

Dear Members of the Colloquium:

Thank you very much for taking the time to read my work. I'm circulating excerpts from three draft chapters from a forthcoming book manuscript, written with Adam Cox. It focuses on the executive's power to enforce the law, in immigration specifically and legal theory more generally. To help situate the chapters, I also have included a précis of the book as a whole, which can be skimmed. The chapters are in early draft form, so I eagerly await your insight and guidance.

CMR (11/7/16)

THE PRESIDENT AND IMMIGRATION LAW
(forthcoming Oxford University Press 2017)
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Synopsis

In this book, we will tell the story of how the President became our immigration policymaker in chief. The political and legal consternation over President Barack Obama's current initiatives to halt the deportations of millions of unauthorized immigrants obscures the fact that the centralization and consolidation of the immigration power in the Executive Branch has been underway for decades. Building on two major scholarly articles we have published in the *Yale Law Journal*, we will show how the most ordinary of executive powers—the power to enforce the law—has become a vital engine in the process of deciding who may become a member of our polity. This concentration of power may appear shocking to some, but we will show how policymaking through enforcement, along with political control over law enforcement judgments, can serve values vital to our legal traditions, including by promoting transparency, accountability, and consistency in the application of the law. We will accomplish these objectives through a rich, institutionally grounded account of the history and structure of enforcement in modern immigration law. In a field still dominated by attention to judicial review, we will demonstrate how dynamics between the political branches—between Congress and the Executive, and within the Executive itself—construct regulatory reality. And by comparing immigration enforcement to other regulatory arenas where administrations similarly advance their objectives through under-enforcement, we will illuminate the constitutional virtues and potential dangers of a power that pervades the modern state but that has only just begun to receive scholarly attention.

The Book

On November 20, 2014, President Obama stood before the nation and announced a set of sweeping reforms of American immigration law. Through his signature initiative, he would exercise his discretion to protect more than five million unauthorized immigrants

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² *Id.*, § 1, 18 Stat. 477.

from deportation. If these proposals were to go into effect, nearly fifty percent of the unauthorized population would be shielded from deportation and authorized to work in the United States.

That the President would have such power—to decide which immigrants may stay and which should be forced to leave—has struck many as shocking. Members of Congress quickly charged that Obama had turned the ordinary policymaking process on its head, usurping Congress’s lawmaking functions and marching us further down the road to an imperial presidency. Nearly every Republican governor agreed, and two-dozen states promptly sued the administration in federal court to stop the massive relief programs. The lower courts granted their wish, setting up a Supreme Court showdown for 2016 that ultimately did not come to pass, leaving behind legal uncertainty.

It might be tempting to regard these developments as signs of crisis—in immigration law and in the state of the presidency. But as we will show in this book, and as we have demonstrated in our scholarly collaborations over the last seven years, the President has long been our immigration policy maker in chief. Today, this role is the result of his very ordinary authority to decide whether, when, and how to enforce the law—an understudied source of power that has been brought into sharp relief by the President’s immigration initiatives. This book is about that power—how it has been used, when its uses have been constitutionally and politically justified, when recalibration of the power has become necessary, and why we should embrace rather than cower from policymaking through enforcement.

We have two central aims for this book. First, we will explain how we have arrived at the current state of affairs by charting the ascendance of presidential immigration law. Second, we will use the rich narrative of presidential immigration authority to rethink conventional accounts of the separation of powers. We therefore will offer novel contributions to two substantial and highly salient areas of scholarly inquiry—the political economy of immigration law and structural constitutional theory.

Prior to Obama’s presidency, legal scholars gave little sustained attention to presidential versus congressional decision-making in immigration law, or to the President’s ability to make policy through his use of the enforcement power. It is therefore unsurprising that public and scholarly commentators now treat the current debates over the reach of presidential immigration power as just another manifestation of today’s hyper-polarized politics. On this account, immigration is no different than health care or financial regulation: in each case, polarization in Congress has changed the way policy gets made. Because Congress can’t act, the President must.

But this diagnosis, which implies that President Obama has departed sharply from the separation-of-powers dynamics that would otherwise prevail under a functional government, is mistaken. The book’s central argument will be that the roots of the current contretemps over executive power and immigration enforcement reach much deeper than the politics of the moment. The power the President wields today has emerged from a century-long transformation in the structure of immigration law.

That transformation has bequeathed us modern immigration law’s notoriously complex and detailed statutory structure. Congress’s work product sprawls over hundreds of

pages of the U.S. Code and has spawned frequent criticism for its attention to picayune details and overbreadth. These details tempt observers to think that the prolix Code leaves presidential discretion at its nadir. But far from curtailing discretion, this statutory structure fuels it. And the Code itself is simply a symptom of a larger set of legal, institutional, and political changes that steadily have given rise to our contemporary system of presidential immigration law. To put the point starkly: in today's system, where *nearly half* of the twenty-two million noncitizens living in the United States are formally deportable, the law on the books has become increasingly irrelevant. What matters instead are executive branch decisions about which non-citizens, from among the vast pool of the potentially deportable, will actually be forced to leave the country. We have today a shadow immigration system—a regime in which enforcement discretion far more than congressional action determines the shape of immigration policy. By bringing to light the rise of this shadow regime, we will show that the current, supposedly dysfunctional, relationship between the President and Congress with respect to immigration policy is likely to endure, but that it is a relationship with many virtues.

Scholars writing about immigration largely have missed the rise and significance of this shadow system. Legal scholarship, in particular, has been focused principally on the rights of migrants, as well as the corollary question whether courts will and should enforce those rights against the political branches of government. This focus on rights and courts—a focus shared by public law scholarship more broadly during much of the last several decades—has obscured the inter-branch dynamics central to the meaning and operation of the law concerning migration. But whereas American public law scholarship has turned more recently toward institutional design and away from courts and rights, legal scholarship on immigration has not. An ancillary contribution of our project, therefore, will be to highlight the way scholars' understanding of immigration law and policy formation would benefit from the same institutional turn.

In addition to filling a significant gap in immigration scholarship, this book also provides a novel perspective on longstanding debates concerning the separation of powers. The most significant scholarship of executive power in recent years has focused either on the war powers and foreign affairs settings, or on moments of crisis. This book will show why the most ordinary of executive powers—the enforcement power—may actually be the farthest reaching. But unlike existing camps in constitutional theory, we neither take the position that this power must be feared and kept under control by Congress or the courts, nor subscribe to the view that it operates without the constraint of law.

Immigration law today represents perhaps the starkest illustration of policymaking through enforcement, but enforcement discretion has become increasingly important as a policy-making vehicle in many other regulatory arenas as well. In criminal law, for example, our national policy regarding marijuana possession cannot be understood by reading the U.S. Code. Instead it can be cashed out only by understanding the executive's enforcement choices and the legal policy crafted by the Department of Justice. The prevalence of *nonenforcement* across many regulatory contexts highlights how the Executive can make policy through inaction. Recent administrations have well understood the significance of policymaking through enforcement. The strategies they have used to organize and channel the enforcement power in the immigration setting—efforts that have culminated in President Obama's relief initiatives—provide a perfect case study of the pervasive and

consequential power. Importantly, as the history of immigration enforcement underscores, the Executive can structure discretion in ways that promote, rather than undermine, rule of law values at the core of the American legal tradition. Rather than bemoan policymaking through enforcement as an affront to the constitutional order, then, we demonstrate how it can curb some of the excesses of congressional design and keep the operations of government accountable to the public and attuned to changing circumstances.

The Chapters

The book will begin with an introduction titled *The Stalemate in American Immigration Law*, which will use the debates currently raging over President Obama's announcement of deportation relief for millions of unauthorized immigrants, to introduce the book's key themes. Those themes include the importance of presidential vision and bureaucratic innovation to the construction of substantive immigration policy; the push toward centralization within the immigration bureaucracy in order to facilitate political control of the mechanics of immigration law; and the checking function that assertive executive action in immigration law has played over congressional judgments.

The chapters that follow will then proceed in three parts. Part I of the book will explain how the President became, over the course of the twentieth century, the dominant player in American immigration law, charting the rise of the enforcement power as a primary source of his authority and of substantive immigration policy. Part II will trace the contemporary implications of these historical developments, showing how they help explain and justify the enforcement policies of the last decade. We will argue that President Obama's relief initiatives are but a part of a series of efforts to discipline and oversee bureaucratic actors. While Part I will focus mostly on the relationship between the President and Congress, Part II will delve into the Executive Branch itself, shedding light on its internal power dynamics. Part III then will explore how the rich institutional account of immigration law we have provided helps us to better understand the risks and rewards of the vital source of presidential power to enforce the law. We will evaluate the history we trace through two lenses—first by considering the rule of law implications of policymaking through the discretionary mobilization of the coercive power of the state and then by evaluating how the rise of the enforcement power should affect conceptions of the separation of powers in constitutional theory. We conclude by charting a path for reforming presidential immigration law, and the separation of powers dynamics it embodies, in light of the book's historical and institutional insights.

Part I: The Rise of Presidential Immigration Law

Chapter 1: Immigration Law's Long Founding Moment

The law and politics of immigration during America's first century were fluid and uncertain. State and local governments acted as the primary regulators through the use of their inspection and taxation powers, particularly in important immigrant destinations such as New York and California. Congress created few rules to govern immigration, other than setting a uniform rule for naturalization. In this nineteenth-century world of proto-

immigration policy, Presidents played an important role. They negotiated treaties to facilitate migration and ensure reciprocal protections for Americans abroad—first with nations in Europe, and later with China during the Gold Rush. Only late in the nineteenth century, in response to growing resentment of Chinese migration on the West Coast and pressure from eastern seaboard states struggling to manage migration effectively, did Congress finally become a significant player, passing the Chinese Exclusion Acts and other legislation and beginning the American experiment with immigration restriction.

This chapter will survey this long founding moment of immigration law and chart the gradual decline of the treaty power as a source of presidential authority. We will explain how the Supreme Court stepped in to clarify (somewhat) the distribution of authority between the states and the federal government, while failing to grapple with the balance of immigration power *within* the federal government and beyond the scope of the treaty power. The Court's blind spot intersected with the emergence of a nascent administrative state to create considerable legal and political uncertainty about Presidential power over immigration. This uncertainty persisted well after the turn of the twentieth century—a fact that would be vividly highlighted by certain events of the twentieth century, such as the unilateralism exercised by Presidents Franklin D. Roosevelt and Harry S. Truman to create the Bracero program, the largest guest worker program in the nation's history.

In telling the story of these early presidential actions, we will argue that what was left undecided in this period actually enabled the late twentieth century transformation of immigration law discussed in later chapters. Most scholarly accounts treat the long founding period in a fundamentalist fashion—as the root of immigration law's constitutionally exceptional (and aberrational) insulation from constitutional scrutiny. But this view is overdrawn and distracting. Just as the state of immigration law and policy today is not simply the product of political polarization or post-9/11 security politics, it is also not simply the consequence of a constitutional architecture erected over a century ago.

Chapter 2: Domesticating Emergency Powers

The decline of immigration treaty making and the proliferation of immigration legislation hardly sidelined the President from immigration policy-making. Particularly in response to emergency situations, claims that the President possessed inherent authority over immigration persisted into the twentieth century, consistent with what conventional separation-of-powers accounts would predict. But this theory of presidential power largely fell by the wayside nonetheless, not because presidential administrations stopped shaping immigration policy through unilateral judgments, but because the development and expansion of the immigration code by Congress actually empowered the President to exert substantive influence over immigration law. That influence came through two main sources of power: through express authorities delegated by Congress and through the Executive's power to enforce the law. We turn in the next chapter, and the remainder of the book, to illuminate the metes and bounds of the latter. In this chapter, we consider the myriad roles Congress has assigned the President in the formulation and implementation of immigration law, most of which revolve around managing crises writ large and small.

In exploring how the President has used certain delegated powers, we highlight the autonomy that can emanate from express forms of delegation, particularly when that

delegation involves screening immigrants for entry. Particularly in the case of refugee policy, Presidents have wielded their delegated tools to advance their own substantive policy preferences and drive the immigration agenda, often in opposition to Congress. Congress on occasion has felt the need to rein in presidential decision-making, but it has proven difficult for Congress to stifle the tradition of presidential independence, which has stemmed from certain informational and institutional advantages the President possesses. The instances of immigration policy-making we explore in this chapter, largely through exploration of refugee policy, embody classic separation of powers struggles and help to demonstrate how the scope of the Executive's power, even where expressly enumerated, actually changes over time in light of practice. The unilateralism we describe differs from accounts of inherent authority, primarily in that it emanates from Congress and presupposes Congress's power to intervene. But it arises as a product of the President's institutional position and the particular responsibilities associated with day-to-day governance—a dynamic that will reappear throughout our exploration of the enforcement power, as well.

Chapter 3: The Rise of the Deportation State

In this chapter, we begin to chart the rise of the enforcement power as the source of presidential authority. We highlight the trajectories of various enforcement policies, including the emergence of the bureaucratic machinery of deportation policy and the implementation of the employer sanctions regime adopted by Congress in 1986. We show how the President's enforcement power has grown in relation, in particular, to the rise of illegal immigration in the late twentieth century, transforming the Executive into a lead manager of arguably the central immigration dilemma of our time. In the development of various enforcement regimes over time, we see how interest groups have taken advantage of the separation of powers to advance their political objectives. Whether ethnic lobbies, immigrants' rights groups, or business interests, they have played a vital role in shaping immigration policy by understanding what is at stake in the enforcement domain. The story of executive unilateralism, therefore, reflects how institutional imperatives and politics combine to give content to presidential power and regulatory policy—a key insight not only of this chapter, but also of the project as a whole.

Chapter 4: De Facto Delegation and the Rise of the Shadow Immigration Regime

The second half of the twentieth century brought the ascendance and entrenchment of a new form of presidential control over immigration law—a form of power we label *de facto delegation*. The expansion in recent decades of deportation rules has created a vast pool of potentially removable non-citizens. Deportation itself dates back to the turn of the twentieth century. But the grounds that make lawful immigrants deportable have ballooned since the 1980s. Coupled with the explosion of illegal immigration in the 1970s, 80s, and 90s, these developments have given rise to a single arresting statistic: roughly *half* of all noncitizens currently living in the United States—approximately 11 million immigrants—are formally deportable under our existing immigration code. The rise of *de facto* delegation thus has dramatically empowered immigration prosecutors and their political overseers. These officials exercise authority to pick and choose among a large pool of potentially deportable migrants, deciding for themselves which ones should be removed from the country. In this world, the intricate, detailed code of formal immigration rules crafted by Congress becomes increasingly irrelevant. Instead, the President, through his control of the

shadow immigration system, does much more to shape the composition and character of our immigrant population. Congress's efforts to exert more control over the immigrant population have meant, counterintuitively, more discretion for executive officials. The promise of emergency powers has thus been eclipsed by a new source of unilateralism. Ultimately, through the power to enforce (or not enforce) immigration law, the Executive Branch regularly re-constructs the substance of our immigration system.

Part II: Executive Power Consolidated

In this part of the book, we will turn from considering the separation of powers dynamics between Congress and the President to analyzing power dynamics within the Executive Branch itself. Over the last several decades, Presidents and political leadership have sought to centralize enforcement discretion—a push that has accelerated dramatically under the Obama administration. This centralization has enabled Presidents to mobilize the enforcement power to serve desired institutional and political ends, including streamlining immigration enforcement while promoting humanitarian goals and the interests of its political supporters who favor particular approaches to immigration law and enforcement. Though such moves could be regarded in the abstract as dangerous forms of concentrating power, we will demonstrate how centralization can promote important rule of law values, making the exercise of power transparent and accountable. Understanding the ways in which the Executive Branch organizes itself and its power is central to understanding—and critiquing—government power in a modern context. This Part will demonstrate, through an analysis of the history of centralization in immigration law, the complexities associated with defining and wielding the enforcement power.

Chapter 5: The Transformation of Immigration Federalism

Perhaps the most conventional of all wisdom in immigration jurisprudence is that the regulation of migration is an exclusive federal domain. But this statement, largely true as a claim about black letter legal doctrine, is deeply misleading as a description of the actual role that states and local governments have played in shaping immigration policy. They have been formal and informal partners, challengers of federal orthodoxies and failures, sources of information, and bureaucratic apparatuses at the federal government's disposal. States and localities also have sought to shape immigration enforcement through assertion of their own regulatory powers, both to go beyond and to temper federal enforcement.

In this chapter, we trace the federal government's historical dependence on state actors to help enforce federal immigration law, in order to show how the rise of presidential power has produced an equally important and perhaps dominant counter narrative—of centralization, or consolidation of power by the Executive at the expense of state and local actors. We will explore the two most salient examples of state and local involvement in recent history: the integration of federal immigration enforcement with local systems of

criminal justice, and the efforts by Arizona and other states to curb unauthorized migration on their own. Both sets of policies point to how the Executive Branch has sought to suppress the pluralism and regulatory diversity that often results from American federalism. In both of these contexts, the federal executive successfully centralized discretionary enforcement authority, taking it out of the hands of state and local officials and lodging it more squarely with officials working within the federal bureaucracy, especially those accountable to the President's political appointees. Even the Supreme Court, which ruled in the high profile lawsuit against Arizona by the United States, accepted and effectively endorsed this consolidation of executive power at the expense of the states.

This chapter will highlight how many modern policy battles putatively about federalism are really as much about separation of powers. From this perspective, these episodes bolster our theory of the President as immigration policymaker in chief. Of course, certain limits to centralization cannot be escaped, some of which stem from the integration of local and national enforcement bureaucracies. It would thus be a mistake to see state and local actors as politically powerless. We will conclude the chapter, therefore, with an exploration of one of the book's major themes—the relationship between law, institutions, and politics in the construction of power.

Chapter 6: Disciplining the Bureaucracy

The central role the Executive Branch has come to play in immigration policy has prompted the White House and senior administration officials to exert increased control over the bureaucracy, disciplining it in order to advance particular institutional and political goals. In this chapter, we discuss these efforts by high-level, mostly political, officials to coordinate, systematize, and rationalize the vast discretion that exists in the shadow system created by de facto delegation. Our account of the centralization initiatives will be buttressed by in-person interviews with former executive branch officials who helped design and shepherd these processes.

To be sure, Congress has created some of the conditions that have precipitated this consolidation. For instance, when it stripped immigration judges of authority to grant relief from deportation in many cases, it shifted more discretionary authority to the immigration prosecutors who make decisions about whom to pursue for removal, which in turn put pressure on political officials to discipline those decisions. But as the chapter will explain, most of the momentum for consolidation has come from within the Executive Branch itself. Some of these efforts have been effective, including the efforts to control states and localities discussed in the previous chapter. But other efforts have been disappointing, at least from the point of view of those who initiated them. Most notably, efforts to use “guidance” documents to shape the behavior of enforcement officers on the ground have proven something of a failure. The guidances did not, as had been hoped, give senior officials significant power to control the types of immigrants being deported. And it was this failure that sparked President Obama's turn to large-scale deferred action programs—institutional innovations that, as we explain in Chapter 6, effectively accomplished what a system of supervisory “guidance” could not.

Chapter 7: United States v. Texas: Enforcement or Dispensation?

Almost immediately upon President Obama’s announcement of his relief initiatives in the fall of 2014, state officials filed suit against the federal government, seeking to prevent the initiatives from coming into force. A federal district court quickly enjoined the programs, and the Fifth Circuit affirmed, teeing up Supreme Court review of monumental administrative law and constitutional questions. Because of Justice Scalia’s sudden death in February 2016, however, these questions remain unresolved. In this chapter, we will tell the story of *Texas v. United States*, highlighting the legal issues that remain live and arguably transcend the case. We offer our own theory for why the President’s actions constituted the permissible exercise of enforcement discretion, rather than the lawless dispensation of the law.

Both the President’s actions and the lawsuit have sparked a debate about a central source of executive power scholars rarely scrutinize—the power to enforce the law. But the terms of the debate, structured around whether the President has violated his constitutional duty to take care that the laws be faithfully executed—have obscured more than clarified what’s at stake. We move beyond this constitutional formalism to demonstrate that the President’s relief initiatives emerged to discipline the enforcement regime described in Chapter 5. Those initiatives were not just the product of partisan politics and position taking on a salient election issue, though politics certainly played a role in President Obama’s announcement, just as it did in the states’ filing of the lawsuit. They also resulted from the inability of the President and senior officials to effectively manage their vast immigration policymaking authority using more limited regulatory tools at their disposal.

In countering the claims of the Texas lawsuit with an institutionally grounded analysis, we will bring to light important relationships between bureaucratic design and crucial values of our legal system, such as non-arbitrariness and accountability. We will show how the apparent concentration or centralization of power is not necessarily dangerous. It can often promote rule of law values and humanitarian goals. Expanded executive power in some circumstances can better protect individual liberties. We simply cannot evaluate the costs or benefits of such expansion, or of so-called presidential unilateralism, without understanding institutional contexts and histories. But even though the states’ claims fail as legal arguments, we will argue that administrative law should develop routes for public participation in the formation of enforcement policy. Such policy traditionally has been treated as a black box of discretionary decision-making. But the story we tell of the President serving as a principal agent of policymaking through the exercise of discretion demands that administrative law and governance devise mechanisms for public input to guide these highly consequential judgments.

Part III: The President’s Enforcement Power—A Way Forward

Parts I and II of the book will provide a rich account of a vital but understudied source of presidential power—the power to enforce the law—grounded in the history of immigration law. In Part III, we will grapple with the implications of this power, for immigration law in particular, and for the American regulatory state and our system of separated powers in general.

Chapter 8: The Promise and Peril of Discretion

The purposes of this chapter will be to highlight three ideas. First, we will discuss the risks typically associated with discretionary decision-making, including that it enables personalized and therefore compromised decision-making by officials. Second, we will highlight the particular ways those risks play out in presidential immigration law, especially in view of the outsized role enforcement discretion plays in the U.S. immigration system. What are the implications of having immigration policy shaped through the selective deployment of the most coercive powers of the state, namely arrest and detention and the threat of each? But we will emphasize overall the need for a theory of discretion in law enforcement that addresses its inevitability and works to harness its considerable benefits, in lieu of the condemnation of pervasive discretion in the immigration system, or wherever else it might exist. Among the purposes of this chapter is to highlight the contributions of our deep analysis of immigration enforcement to legal theory that transcends the particularities of the American system of separated powers and to highlight the blind spots of theories of the rule of law whose animating goal seems to be to eliminate discretion and personality from the application or implementation of the law.

Chapter 9: The Enforcement Power and Theories of the Presidency

Theories of presidential power in American constitutional law typically offer two competing visions of the presidency. The first, which imagines the President as Congress's faithful agent, is assumed to capture most regulatory contexts. In sharp contrast, the second sees the President as possessing unilateral constitutional authority to ignore Congress and take action on his own, even if Congress disagrees. Scholars and jurists generally assume that this second vision operates only in limited domains, such as in emergencies and foreign affairs.

This chapter will employ our rich account of the enforcement power to show that a third model better describes the reality of many regulatory domains—a multiple principals model whereby the President often acts as a second policy-making principal alongside Congress. In sharp contrast to the unilateral powers model, the President's power under our theory is always formally defeasible: Congress retains the authority to limit or define the enforcement power through substantive legislation or appropriations laws. Moreover, the President's sphere of action is itself a function of the regulatory domains Congress has created over time, rather than the exclusive work product of the President acting pursuant to his own powers. Yet while our model preserves legislative supremacy in this ultimate sense, our theory also differs dramatically from the faithful agent framework that dominates modern conceptions of the administrative state. That framework treats departures from Congress's wishes as presumptively bad—as the product of unavoidable, but unfortunate, agency slack. Our model, on the other hand, shows that such “slack” can serve important separation of powers values—that it can be useful for the President and his or her administration to be empowered under our system to establish their own enforcement policies and priorities, even when they might be in tension with Congress's original delegations of power. In this chapter, we will advance these claims by juxtaposing our account of immigration enforcement policy with myriad enforcement contretemps from across the administrative state, from tax policy and criminal law, to environmental and labor law enforcement.

Conclusion: The Future of Immigration Law

Throughout the book, we will have driven home two central ideas. First, immigration law and the imperatives of enforcement today confer tremendous authority on the President. Second, this current concentration of power has resulted from a century-long transformation and is not simply the result of the hyper-polarized political moment in which we find ourselves. In immigration law, in particular, but also in other domains, presidential control is likely to remain for decades to come. Even if Congress tomorrow legalized the vast majority of out-of-status immigrants, presidential immigration law would remain important. As earlier chapters will have explained, deep-seated pressures linked to globalization, technological change, and shifts in the conception of citizenship, make it extremely likely that “transitional” migration will be pervasive, with a large fraction of migrant screening decisions being made not at the border but on the back end of the system—by the enforcement arm of government.

The question then becomes whether the President’s role in the system ought to be reformed in any way. As we will have shown throughout the book, even though the ascendancy of presidential immigration law does not present constitutional concerns and can in fact promote certain constitutional values and bring energy to the policy process, not all uses and arrangements of the enforcement power are desirable. In our conclusion, we will advocate at least two reforms to presidential immigration law.

First, we would do away with some of the pathologies of the asymmetric delegation we describe, whereby the President’s power exists largely on the back end of the system at the deportation stage rather than at the front end, at the admissions stage. To reduce the imperative for the executive branch to manage migration by running a large-scale shadow system, we would encourage Congress to formally delegate more visa-setting power to the President. In a similar vein, we would urge the President to reinvigorate the old (largely forgotten) nineteenth century model of immigration bilateralism, working more directly with sending countries to address migration flows at their origins, but in a way that facilitates rather than stymies migration, particularly when humanitarian imperatives are at stake. We would also expand the regulatory options that might enable the bureaucracy to incorporate new economic, demographic, and social insights to inform the design of immigrant screening systems.

Second, while we will have defended President Obama’s initiatives as better than the status quo, and certainly as constitutional, we will argue that they remain problematic forms of institutionalizing discretion. We will explore ways of making enforcement policy less opaque and more popularly accountable than it tends to be in most domains. We will not call for the sort of notice and comment procedures that drive legislative rulemaking to be brought to bear on enforcement discretion—to do so would impose overly restrictive constraints on the administrative state. But our central conclusion—that significant policy can be made through the enforcement power—demands creative thinking about how to ensure public and institutional accountability. This accountability, however, must come without hamstringing governance, which also must remain nimble, in order to adapt to the changing circumstances the Executive is in the best position of all of the branches to appreciate and manage.

CHAPTER 3

The Rise of the Deportation State

The decline of immigration treaty making and the proliferation of immigration legislation hardly sidelined the President from immigration policymaking. To the contrary, the second half of the twentieth century brought the ascendance and entrenchment of a new form of presidential control over immigration law—a form of power we label *de facto delegation*. The legal stage on which this transformation would play out dates back to the late nineteenth century, when Congress first began to extend the focus of immigration law beyond the border. In that period, Congress first began to enact laws that made noncitizens living in the nation's interior deportable, sometimes long after they had taken up residence in the United States. These deportation rules, and the bureaucratic structures that rose up to accompany them, were a precondition to the emergence of the vast executive branch immigration power we see today. Tracing the rise of the deportation state, therefore, is crucial to our understanding of the entrenchment of the President's power over immigration policy. This chapter tells the story of that rise.

Selecting Immigrants: A History

State-based efforts to shape migration flows are nothing new. From the Revolutionary War-era, states and the federal government worked to engineer the future composition of the United States. State governments used poor law and taxation authorities to rid themselves of unwanted residents. And they used inducements, such as the prospect of landowning and voting, to recruit migrants to their territories. In a similar vein, the national government worked to facilitate migration through the use of its treaty making power, as we discussed in Chapter 1. President Lincoln's diplomats, for example, initiated negotiations with China, which eventually culminated in the Burlingame-Seward Treaty of 1868 to promote labor migration to the West Coast. It was no accident that the Treaty was negotiated and ratified during the generation that experienced the California Gold Rush and built the transcontinental railroad.

The rise of federal immigration legislation in the last quarter of the nineteenth century did not, therefore, mark some sharp break with the past—a reversal of some earlier, mythical period in which the United States welcomed all comers. Nonetheless, Congress did create a new regulatory machinery for selecting migrants. That machinery—which began with port-of-entry controls and quickly incorporated the idea of screening new migrants beyond the border—established the legal preconditions, and nurtured a nascent enforcement bureaucracy, that more than a half century later would lead to the rise of America's shadow immigration system.

Exclusion was the innovation that initiated this regulatory transformation. Prior to the 1870s, most (state) efforts to keep out unwanted immigrants focused on changing the incentives of prospective migrants. State officials knew that immigrating to America might look less desirable if one would not be able to purchase real property after arriving. So some

passed laws prohibiting noncitizens from holding property in fee simple. States with large ports also imposed head taxes on every arriving immigrant, or forced ship captains to indemnify the state against the risk that immigrants arriving on their vessels would become paupers. These laws ostensibly served as deterrents to poor migrants by raising cost of passage to the United States, thereby protecting the public fisc. But when the Supreme Court in the early 1870s began blocking nearly all such efforts at the state level, the anti-Chinese sentiment fueling California's restrictionist measures became focused on Congress, and local lobbies began pressuring the national government to do something about the arrival of "undesirable" immigrants.

Congress responded in 1875 by passing the Page Act, the first federal law in the nation's history that made specified types of immigrants "excludable" and formally prohibited their entry into the United States. As a matter of law, the Page Act singled out two types of migrants for exclusion: women "imported for the purposes of prostitution," and any person serving a felony conviction in his home country.¹ As a matter of (not-so-secret) practice, the Act was designed to target Chinese immigrants—particularly Chinese women, who were widely believed to be coming to the United States for "lewd and immoral purposes."²

The Page Act looks like a small-scale experiment when compared to what followed on its heels. Just seven years later, Congress passed the 1882 Chinese Exclusion Act, launching an infamous period of formal racial exclusion in immigration law that would persist for more than half a century. The Act prohibited most migrants of Chinese descent from entering the United States. But it did contain a few exceptions. First, it permitted merchants and others who were not considered "laborers" to land. Second, the Act preserved the right of Chinese migrants already living in the United States to come and go as they pleased.

Enforcing these categories of exclusion required a set of screening rules designed to sift arriving immigrants into two pools—one permitted to enter the United States, the other containing excludable aliens who could be returned to their home countries. It also demanded the creation of a screening bureaucracy to enforce the rules. When a steamer pulled into the port of San Francisco, how was an inspector supposed to determine who was permitted to land? There was no system of passports, stamps, and visas like we have today. There were no records of everyone previously admitted. And prospective migrants obviously had a powerful incentive to not be truthful about their occupations or whether they had previously been living in the United States.³

Congress responded by creating rudimentary documentation requirements for admission to the United States. More significantly, however, Congress began to expand screening and enforcement beyond the border. To do this, Congress formally invested executive branch officials with deportation power—the power to expel noncitizens from the country. The Chinese Exclusion Act authorized the deportation of "any Chinese person found unlawfully within the United States."⁴ No longer would inspection agents be limited

¹ Page Act, § 4, 18 Stat. 477 (1875).

² *Id.*, § 1, 18 Stat. 477.

³ This is what produces the rise of "paper sons," for example.

⁴ 149 U.S. 698

to refusing entry to arriving aliens. Enforcement could now lawfully take place away from the ports and borders, and could occur weeks, months, or even years after an immigrant's arrival in the country.

To be sure, Congress had once before given the Executive the power to deport noncitizens. But that had been nearly one hundred years earlier, when Congress enacted the 1798 Alien Friends Act. That experiment had been short-lived—the Alien Friends Act expired after just two years, having never been used—in part because Madison and other founders had argued that the federal government possessed no power under the Constitution to deport “alien friends.” If any deportation power existed, they argued, it covered only enemy aliens—citizens of a country at war with the United States. Yet despite that fierce debate during the founding period, the Supreme Court hearing challenges to the Chinese Exclusion Acts quickly dispelled any question about the federal government's constitutional authority to use expulsion of a tool to regulate migration. Writing for the Court in *Fong Yue Ting*, Justice Gray treated it as obvious that the government possessed such a power: “The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.”⁵

Like the introduction of exclusion, deportation ultimately transformed immigration law. The power, long contested and never before used by the federal government, was now a core regulatory instrument—viewed by the Supreme Court and Congress as a crucial *complement* to exclusion. Taken together, these mirror-image tools authorized the government to screen immigrants at two points to determine whether they were really the sorts of settlers the government deemed desirable: first, at a port-of-entry upon arrival; and second, at some later date, perhaps years down the road.

Why would the government want two bites at the apple? First, this structure facilitated the gathering of greater amounts of information about the migrant. An immigration inspector might not have known at the time of arrival that the immigrant was a member of class prohibited by statute from entering the United States and taking up residence. Perhaps the immigrant lied to the inspectors, faking a family relationship or misrepresenting her occupation. Or, more straightforwardly, the immigrant might have evaded the inspectors all together. This is what was alleged to have happened in the case of *Yamataya v. Fisher*,⁶ a famous early deportation case to reach the Supreme Court. Koura Yamataya, a sixteen year-old girl who landed in Seattle from Japan, found herself in deportation proceedings just four days after her arrival. The government contended that she was excludable as a pauper and, therefore, deportable as well under the statute. But why then had she been permitted to enter in the first place? According to Thomas Fisher, the duly appointed “immigrant and Chinese inspector,” she had not been: to the contrary, she had “surreptitiously, clandestinely, and without any authority come into the United States of America.”

Screening immigrants after the moment they arrived in the United States served another purpose as well: it empowered the government to change its mind—after the fact—

⁵ 149 U.S. 698 (1893).

⁶ 189 U.S. 86 (1903).

about the immigrants it wanted to let live in the United States. This is exactly what Congress did in the context of Chinese immigration. While the federal government had always been ambivalent about accepting large numbers of immigrants from China, the political climate in the 1860s made possible the completion of a treaty with China that permitted free migration and promised the protection of Chinese immigrants living in the United States. But as the size of the Chinese immigrant community in California grew, so did anti-Chinese sentiment in California and around the United States. By the end of the next decade, many state and national politicians were demanding not just the repeal of the Burlingame Treaty and the end of migration from China. They also wanted to drive out those who had already settled in the United States.⁷

Screening Ex Ante and Ex Post

The problems that confronted the inspectors charged with enforcing the nation's first system of large-scale exclusion were not unique. In fact, they are inherent in any system where a state or anyone else seeks to select a small number of people from a larger pool—here a pool made up of all prospective migrants to the United States. Today American immigration law no longer selects people on the basis of race or ethnicity. But it still restricts immigration to certain *types* of migrants, making migration policy politically and ethically fraught: restrictive immigration policies are, by definition, designed to admit the “right” sort of people while turning away the “wrong” sort. For states committed to exclusion along these lines—more or less all states in today's world—an important question arises: how can immigration law effectively screen out those migrants the state seeks to exclude, while inviting in those it desires?

If states had perfect information about prospective migrants, selecting the right migrants would be straightforward. Like an omniscient employer who sifts through a thick stack of job applicants and invariably identifies the most talented prospective employee, a state with perfect information would quickly single out the migrants it wanted and turn the others away.

But states, like employers, lack perfect information. What to do in such a situation? One thing employers often do is to take a wait-and-see approach, hiring employees on probationary contracts that make it easy for the employer to fire the employee at the end of some initial period of employment, if the employee proves not to be as successful as the employer had hoped. This is precisely how entry-level professors are treated under the system of academic tenure. Predicting the scholarly productivity and teaching acumen of a newly minted academic can be extremely challenging. So universities typically hire junior faculty to probationary contracts lasting a period of several years. During that pre-tenure period, the university can scrutinize the faculty member's performance: do they produce pathbreaking scholarship? Are they valued by their students and colleagues? And at the end of the period, the University can decide whether to offer the employee tenure and the long-term job protection that goes with it.

⁷ We see this in story of Chae Chan Ping. Congress's decision to revoke the re-entry certificates it had earlier authorized may have been motivated in part by concerns about fraud—by the worry that first-time immigrants would present counterfeit certificates in order to gain entry to the country. But almost certainly the principal motivation was a desire to refuse re-entry to resident immigrants who wanted to travel to China, as a way of ridding the country of any who decided to leave briefly.

As the history of Chinese Exclusion shows, the United States began in the late nineteenth century to use a similar strategy to screen migrants. Rather than screening new migrants only at the moment they arrived at a port (*ex ante*), the government chose also to screen migrants at some later date (*ex post*). That decision liberated the state from having to rely solely on information about the migrant available at the moment of entry. If information arose after the migrant entered the United States that led the government to believe the immigrant should not be permitted to remain, it was legally empowered to act on that information. In the context of Chinese exclusion, this wait-and-see approach was initially designed to detect those who had evaded inspection or been untruthful during the initial inspection process. But immigration law quickly broadened the type of post-entry information that the government might use to decide whether the migrant was the type the government wanted.

In addition to providing the state with more information about prospective migrants, *ex post* screening systems come with two additional features that can be attractive to states. First, the wait-and-see approach gives the state more flexibility to deal with changed circumstances. If the state's economy collapses, for example, it can choose not to renew the status of provisional or putatively "temporary" immigrants—something that becomes legally and politically difficult if all migrants are offered permanent residency when they first arrive. Second, *ex post* screening systems also serve to control migrants after they enter. Consider a rule that tells new immigrants they will be deported if they are convicted of dealing drugs. Such a rule operates in part as an *ex post* screening tool, weeding out those migrants who do things the state does not want. But it also shapes the behavior of migrants: knowing that they will be deported if they are caught dealing drugs, they may be less likely to participate in the drug trade.

Three powerful benefits thus cut in favor of a wait-and-see approach: information, flexibility, and control. Yet many states, including the United States, offer migrants permanent residence as they step foot in the United States, and sometimes nations go so far as to offer near immediate access to citizenship itself. The significant costs of *ex post* screening—to both migrants themselves and the state—make it unsurprising that every state places limits on the extent to which it relies on *ex post* screening.

First and foremost, the benefits of information gathering for the state trade off against the costs of insecurity and instability for the migrants. During the probationary period, migrants confront uncertainty about their future: will they be permitted to live their life in the country to which they have migrated and to which they almost immediately begin to develop ties? Or will the state ultimately decide to kick them out of the country? For the migrants themselves, and for their families and the broader communities in which they are embedded, this uncertainty can impose serious economic, psychological, and civic costs. And while the Supreme Court long ago concluded that neither the ties that migrants develop while in the United States, nor the costs of deportation for them or their loved ones, are sufficient to preclude Congress from exercising its deportation power, claims that long-term

residents should be insulated from deportation have at times had political—if not constitutional—power in the United States.⁸

Moreover, Even for a purely selfish state with no concern for the rights and interests of immigrants, this uncertainty can be costly. States frequently benefit when new immigrants put down roots and invest in their new place of residence—by learning the local language, making friends, starting families, and so on. Many of the investments that states would like migrants to make are country-specific in the sense that the migrant will lose all, or most, of the investments they have made if later forced to leave. Deportation can break up families, pull apart social networks, and make the struggle to learn a new language seem like time wasted. Thus, migrants may be much less likely to make these country-specific investments when they feel insecure about their future in a new country. Moreover, the prospect of insecurity can influence migrants even before they arrive in a new state. Some migrants may simply forgo migrating all together if the risk that things won't work out seems particularly high. And where a prospective immigrant has more than one destination state in mind—an increasingly common occurrence in a globalized world, where transportation and communication are ever cheaper and overall rates of migration have been at historic highs for the last three decades—he may choose where to go in part on the basis of which nation offers him greater security.

In exploring the significance of deportation, therefore, it is important to see that the choice between ex ante and ex post screening is both fundamental for any system of immigration regulation and profoundly complex. The United States, like all other nations that receive large numbers of immigrants, relies on an elaborate, complementary mix of ex ante and ex post screening criteria to winnow the large pool of prospective migrants down to those who ultimately will be offered full citizenship in the United States. It should not be surprising that, over time, the system has become excruciatingly intricate, as well as unsatisfying, whether we evaluate it through the lens of ethics, information economics, or some other perspective. The choices required demand a balancing of sometimes incommensurate values, and the system itself reflects a host of political and interest-group compromises bound up with contentious economic and social policy debates and a history of racial exclusion and competition.

Our goal, of course, is not to argue that this or that immigrant screening policy is the most just from the perspective of migrants, or the most beneficial to citizens of the state imposing the policies, or anything like that. Instead, our aim is to show the way in which the explosion of deportation helped propel the rise of presidential power over immigration policy.

The Deportation State

The rise of ex post screening beginning in the late nineteenth century ultimately complimented the long history of executive branch innovation in immigration policy introduced in Chapter 2, facilitating the further transfer of power over immigration policy

⁸ The Supreme Court has repeatedly rejected claims that long-term residence gives rise in immigrants to a vested constitutional right against deportation. See, e.g., *Harisiades v. Shaughnessy* (1952); *Fong Yue Ting* (1894).

from Congress's hands into the Executive's. Initially, however, *ex post* screening grew haltingly. While deportation appeared as a permanent fixture in American immigration law as early as 1882, deportation rules initially applied (as a formal matter) only to those who had evaded point-of-entry screening in some fashion. In other words, deportation was based on pre-entry facts about the person: once lawfully admitted, an immigrant could not be deported under the immigration statute. But this limitation on the scope of deportation rules eroded quickly after its inception. Congress in 1891 added a provision making deportable "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to landing." This provision still focused on pre-entry information, but it also conditioned deportation on an immigrant becoming a public charge *after* arriving in the United States.

This focus on the lives and behaviors of immigrants living in the United States was fully realized in the 1907, when Congress for the first time clearly provided for the deportation of an immigrant solely on the basis of her post-entry conduct. An amendment to the immigration code enacted that year made deportable any immigrant who engaged in prostitution, or who was found living in a "house of prostitution," within three years of entering the United States. Over the following decade, Congress quickly added to its growing laundry list of "undesirable" conduct that could result in deportation. Deportable offenses came to include conviction of a felony crime of moral turpitude or two misdemeanor crimes of moral turpitude; advocating anarchy, or the overthrow by force or violence of the government; and working in a dance hall "habitually frequented" by prostitutes. Perhaps unsurprisingly, these grounds were remarkably consistent with an all-too-commonly held stereotype about immigrants (both then and now)—that they have a penchant for crime, vice, and other morally undesirable behavior.

At first, many of these grounds of deportation came with a built-in brake: a statute of limitations. A felony conviction for a crime of moral turpitude could only result in deportation if the crime was committed within five years of arrival in the United States. Working as a prostitute would lead to deportation only for those caught working within four years of entering the country. These temporal limits on the deportation power served to formally protect longer-term residents from the possibility of expulsion. Yet this protection was fleeting. By 1920, Congress had removed the time limits from all but a tiny number of deportation grounds.

Over the balance of the twentieth century, Congress then steadily added to the list of deportable conduct. About once a generation—usually in response to perceived political emergencies having little to do with immigration policy—Congress tacked on a number of new deportation grounds. The 1940s and 1950s brought additional grounds related to the "Communist threat" and the birth of the Cold War. Dissidents, communists, and other political subversives were suddenly subject to removal based on activity that was otherwise mostly protected by the First Amendment. The 1980s and 1990s brought new grounds related to terrorism and the war on drugs. This latter development was perhaps the most significant, given that it coincided with skyrocketing rates of drug prosecution and the rise of mass incarceration. Suddenly, many minor drug offenses made an immigrant deportable. And because Congress at the same time made deportation more categorical—eliminating many avenues of relief from deportation—many immigrants had no opportunity to present the equities of their particular cases, or to argue that their otherwise good behavior or ties to

the country counseled against deportation. By 1996, a lawful permanent resident, even one who had lived in the United States for decades and had a citizen spouse and children, could become categorically deportable under the immigration code if he were convicted in state court of possessing a small quantity of marijuana.

In the end, as we shall see, the effect of more law is paradoxical. Over time the Immigration and Nationality Act became evermore a prolix code, providing in theory an immense set of fine-grained rules that exhaustively defined the circumstances in which an immigrant's conduct would lead to deportation. Yet in practice the proliferation of these rules had the effect of enhancing the discretion of law enforcement officials.

The Bureaucracy of Expulsion

[omitted]

The Probationary Model of Migration

Deportation's rise helped propel a twentieth century transformation of U.S. immigration law. It also had profound consequences for migrants themselves. In making the immigrant's right to reside in the United States contingent, rather than unconditional, policies of ex post screening pushed American immigration law towards a more probationary model of migration. Under that model, large numbers of immigrants may be invited into the country on an expressly contingent basis, and the state defers the ultimate decision about which immigrants can stay on a permanent basis. During the probationary period, an immigrant's right of residence is uncertain, and other rights—like the right to work in a job of one's choosing—may also be limited. Only after the end of the probation are these restrictions lifted, providing the migrant with greater security of residence, access to rights, and perhaps a pathway to citizenship. This probationary model of migration contrasts sharply with what we might call the *permanent residency* model. Under that model, migrants who are lawfully admitted immediately obtain a right to reside permanently in the United States. Their right to remain is not contingent on their refraining from certain behavior after arriving in the country. Nor is it conditioned on their affirmatively demonstrating their "success," in the labor market or elsewhere. And while noncitizens in the permanent residency model do lack some of the rights citizens possess—most prominently the right to vote—the only condition for obtaining access to those rights is naturalization.

No immigration system, of course, conforms perfectly to one model or the other. But U.S. immigration law moved decisively during the twentieth century towards a more probationary system—a move reflected most clearly today in a perusal of the immigration code and its baroque and bloated deportation rules. These rules have been called tools of "social control" by scholar and activist Dan Kanstroom, and for good reason.⁹ The rules do more than simply permit the government to sort immigrants into more and less desirable groupings. They also impose pressure on immigrants to live their lives in certain ways, sometimes even holding immigrants to higher standards of conduct than we impose on

⁹ Dan Kanstroom, *Deportation Nation* (2008).

citizens.¹⁰ Compounding this control, most of the deportation grounds we have described apply right up to the moment that a noncitizen naturalizes. For that reason, even the coveted immigration status of *lawful permanent resident* is, today, not really a guarantee of permanent residence.

In addition to these deportation rules, numerous other elements of immigration law re-enforce and expand the probationary structure of immigration policy. An entire chapter could be devoted to surveying examples, but here we consider two: the rules regulating labor migration and the rules governing immigration through marriage. Labor migration patterns historically have taken many forms, with some migrants moving permanently to the United States, others coming for a time and then leaving, and still others coming on a periodic, cyclical, or seasonal basis. Labor migration *rules*, as such, hardly existed prior to the close of the nineteenth century. While labor migrants today typically must be sponsored by an employer for a specific job to qualify for a visa, in the late nineteenth century, contract labor laws formally prohibited migrants from immigrating on a contract to work for a specific employer.

Beginning with the Chinese Exclusion Acts, however, Congress began to formally regulate access to the domestic labor market. Those initial rules focused on naked prohibitions, but in 1917 Congress created, for the first time in American history, a formal category of temporary admission. The prospect of temporary admission expanded the state's regulatory options, opening the door to a system that distinguished between temporary and permanent labor migrants. That system expanded over the next decades and came to be embodied in the comprehensive 1952 Immigration and Nationality Act, the statute that today remains the blueprint for American immigration law and policy.

The 1952 Act formally divided labor visas into two categories—one permanent, the other temporary. Permanent labor migrants received green cards that provided a right to live indefinitely in the United States and to work in most any occupation. Temporary labor migrants, on the other hand, received visas that gave them a right to live only for a fixed term in the country, usually for just a few years. These visas were also often tied to a particular employer and so prohibited migrants from accessing the larger labor market while in the United States. Importantly, immigration law also erected a barrier between the categories of temporary and permanent migrants: they were seen as parallel, rather than serial, tracks, and those admitted on the temporary track were not expected to ultimately become permanent residents. This expectation was baked into the visa rules. Admission on a temporary visa did not provide a legal pathway to the receipt of a permanent visa at a later date. The temporary visa rules even often required migrants to prove that they had no intent

¹⁰ Contrast, for example, the Department of Justice's current policy not to prosecute minor drug crimes, with the Department of Homeland Security's aggressive policy of deporting noncitizens for minor drug offenses. For a historical example, consider the mid-twentieth century rules providing for the deportation of noncitizen Communists and members of totalitarian parties for engaging in speech and conduct that otherwise would have been protected by the First Amendment. Cf. *Bridges v. Wixon*, 326 U.S. 135 (1945) (overturning deportation order of petitioner for affiliation with Communist party on ground of an unfair hearing but not addressing the constitutionality of deportation rules permitting removal for constitutionally protected activity) (Murphy, J., concurring) ("Seldom in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and is guaranteed to him by the Constitution.").

to permanently abandon their residence abroad, as a way of weeding out migrants whose real desire was to obtain permanent residence.

Over time this barrier has steadily eroded. Today, the overwhelming majority of labor migrants enter the United States initially on temporary visas and then later transition to a permanent status. Moreover, the code has come to embrace this reality, restructuring many labor migration rules around the probationary model. The H-1B program for high-skilled migrants is a striking example of this shift. This visa has been widely used by firms in Silicon Valley and elsewhere to hire software engineers and other technology workers. An H-1B visa formally provides a three-year visa (renewable once) for a noncitizen coming to work in certain “specialty occupations.” In practice, however, the visa rules recognize that many H-1B visa holders will later seek permanent residence. At that later date, their employers hold the power of ex post screening, because most of these migrants can receive green cards only if their employers sponsor it. Given changes like these, it is unsurprising that more than three-quarters of labor green card recipients today are already working in the U.S. on a temporary visa when they receive their green cards.¹¹

Elements of this probationary also have cropped up in the United States’s famously generous rules regulating family-based migration. At first glance, one might suspect that these rules would embody a purely ex ante focus: after all, migrants receive visa on the basis of a family relationship that exist prior to their arrival. Yet even here, the probationary model has made inroads and become embedded in the core family migration rule that permits citizens to sponsor their spouses for green cards. This provision, immensely important for bi-national married couples, has also long been a sore spot for the immigration authorities because of the problem of marriage fraud. To weed out fraudulent marriages entered into for immigration purposes, officials often ask very personal, intrusive questions of newly married couples. As in so many romantic comedies, officials are often not successful at identifying sham marriages; but unlike in the movies, couples in such arrangements rarely fall in love and remain together.

In 1986, Congress responded to this situation by making the marriage migration rules probationary. Now, a newly married couple seeking a green card for one of the spouses can initially receive only a *conditional* green card, which expires after two years. Only at the end of that two-year period can the couple petition (generally jointly) to have the conditional status lifted and the visa converted to a traditional, permanent green card. When the couple does petition at the close of the two-year period, the government uses the petition as an opportunity to screen the couple’s marriage a second time. Couples are required to provide proof about where during the two years they resided and worked, along with any other information they have documenting their life together. This documentation, if it suggests the absence of a joint life, might spark further investigation into whether the couple’s marriage is a sham entered into only for immigration purposes. This gives immigration authorities a second bite at that question, as well as more objective information (like pay slips and rental agreements) on which to base their evaluation. Moreover, because it will be more costly for two people in a sham marriage to keep up the appearance that they are living together, working in the same city, and so forth, the ex post screening rule is what economists call incentive compatible: it promotes self-selection, discouraging those contemplating a sham

¹¹ [cite]

marriage more than couples in a legitimate relationship. Thus, Congress replaced a process that previously focused mostly on ex ante screening with one that added an additional point of screening two years down the road, deliberately building a probationary period into the marriage visa rules.¹²

These labor and marriage examples expand our focus beyond classic deportation rules, but they are still ultimately concerned with the same right—the right to reside in the United States. But we should be clear that the transitional model that has emerged over the last century actually implicates a far broader range of rights. Expanding the lens to encompass the model’s full reach brings it into even sharper focus.

Fights over the rights migrants possess have been with us from the founding. In the post-revolutionary period, for example, there were vigorous debates about whether resident noncitizens should be permitted to own, sell, and devise real property. In Virginia and several other states in the 1780s, for example, resident noncitizens were frequently prohibited by state law from purchasing or devising real property. Today, of course, noncitizens in the United States clearly have the legal right to own and dispose of real property.¹³ The debate has instead shifted to other rights and entitlements, such as access to the domestic labor market, public assistance, and government-subsidized education.

In this way, immigration was always probationary, in the sense that all noncitizens had to wait for some rights until they had lived long enough in the United States to be eligible for naturalization. Prior to the twentieth century, however, most laws restricting the rights or benefits available to immigrants treated all noncitizens identically. There were two categories of legal subjects—citizens and noncitizens—and the question was whether they should be treated the same or differently with respect to some right. But the rise of ex post screening and the institution of deportation facilitated a new way of thinking about immigrants. These changes helped create the legal category of the “illegal immigrant” and the “temporary immigrant,” for example.¹⁴ And over time, immigration law sliced the legal category “noncitizen” into ever-more subcategories—each of which corresponds to a different legal status (or no status at all) and a different set of rights. This has rendered immigration law’s probationary structure much more fine-grained.

¹² [Note that the INS tried during the 1970s to create a sort of probationary period as a matter of administrative practice. But this approach was struck down by the courts as inconsistent with the immigration statute. Dabhagian etc.]

¹³ The Supreme Court has never squarely held as much. But given the demise of the special public interest doctrine, which we trace in Chapter 4, combined with the 1970s cases subjecting state laws restricting immigrants’ access to public benefits to strict scrutiny, such as *Graham v. Richardson*, we think it clear that a state law barring all noncitizens from holding real property would be struck down, probably through a hybrid of preemption and equal protection analysis.

¹⁴ See Mae Ngai, *Impossible Subjects: The Making of the Illegal Immigrant in U.S. History* (2009). Ngai documents how the rise of deportation rules in the twentieth century created this spectre that bedevils immigration debates—the illegal immigrant who is a person physically present in the United States but is prohibited as a matter of law from being there. The change she documents is profound, yet the differentiation we described is even more far reaching than her project imagines. It was not just the category of illegal immigrants that came into being during the early twentieth century. As we explained above, it was also the legal category of temporary immigrants. And over time, the law has sliced the pool of migrants ever more finely into different legal strata, each with a different claim (or no claim at all) to residence in the United States, and with different rights recognized by the state.

With noncitizens separated into so many strata, there are today myriad moments of “transition” for many migrants. Consider a software engineer holding the H-1B visa described above. When that engineer first enters the United States, his right to remain beyond three years is uncertain and his access to the domestic labor market is severely restricted. After several years, he might be sponsored by his employer for a green card. Sponsorship means that his employer has chosen him, rather than some other migrant, for this potential immigration benefit, and a government screening process will ultimately determine whether he receives the green card. If he does, then he will be a lawful permanent resident. He will possess the right to remain indefinitely in the United States (subject of course to the bloated deportation rules we have described), and he will have much broader access to the labor market. But he will still suffer from some disabilities. Some local, state, and federal jobs are reserved to citizens. His right to remain will be unstable, as certain conduct could still make him deportable. And he will be unable to vote. Only naturalization will remove these constraints. And, of course, naturalization involves one final point of screening by the government: our engineer will have to pass an English language test (albeit a very simple one), demonstrate that he is a person of good moral character who is “attached to the principles of the Constitution of the United States” and know some trivia about American history and government. Our temporally layered screening requirements thus result in a system of transitional migration.

* * *

The re-orientation of American immigration law towards a probationary model, along with the development of the enforcement bureaucracy necessary to implement such a large-scale ex post screening system, created the preconditions for our modern immigration system. But creating these formal screening rules, and erecting these bureaucratic structures, did not alone produce the structure of immigration lawmaking we witness today. While interior removals grew into a more important social and political phenomenon, in the 1960s the INS still deported fewer than 10,000 immigrants in most years.

But patterns of immigration and enforcement were changing rapidly as the 1960s drew to a close. Rates of unauthorized migration rose dramatically in the late 1960s and early 1970s. And that rise prefigured even higher levels of unlawful immigration during the final three decades of the twentieth century. In the next Chapter, we explain how those high levels interacted with the formal structure of immigration law to produce our shadow migration system and solidify the Executive Branch’s central role in the making of migration policy.

CHAPTER 4

De Facto Delegation and the Shadow Immigration System

Today, our shadow system is characterized by a single arresting statistic: roughly *half* of all noncitizens currently living in the United States—approximately 11 million immigrants—are formally deportable under our existing immigration code. The staggering size of the deportable population is the product of a historical collision between two forces. One was bureaucratic: it was the explosive growth of the deportation state and the turn toward a probationary model of migration, which the last chapter documented. The other was sociological: it was the acceleration, during the final third of the twentieth century, of illegal immigration. The collision of these legal and demographic phenomena generated a massive shadow immigration system that today operates alongside our regular immigration regime.

In this shadow system, Congress’s intricate, detailed code of immigration rules becomes increasingly irrelevant. Instead, immigration policy is shaped largely by the Executive’s enforcement judgments. The choice about whom to pluck from the pool of deportable immigrants becomes a central driver of the composition and character of our immigrant population. As we will demonstrate in this chapter, the rise of the shadow system thus delegated a vast amount of immigration screening authority to the President and other executive branch officials.

This delegation of power differs dramatically from the sorts of congressional delegations that are typically the subject of debates about our modern administrative state. No Act of Congress formally delegates this authority to the President. Nor did some particular Congress, operating at some specific point in time, implicitly endorse or acquiesce in the Executive’s exercise of such power over migration policy. As we will see, the patterns of power we identify were the product of complex political forces that played out over several generations, molding our modern regime in a common law like fashion. Moreover, this new form of unilateralism has in many ways eclipsed the significance of the explicit delegations—often of emergency powers—analyzed in Chapter 2.

To highlight this contrast with the usual way of thinking about delegation and unilateralism in administrative law and separation of powers writing, we name this central feature of modern immigration lawmaking “de facto delegation.” Operating in utterly ordinary times, the pervasive practices of enforcement discretion, exercised within a world of de facto delegation, are today the more significant, persistent source of presidential control over immigration policy. Through the power to enforce, or not enforce, the law, the Executive Branch regularly re-constructs the substance of our immigration system.

The Rise of Undocumented Migration

[omitted]

The Shadow System

The [rise of illegal immigration charted above] has left us with a profound mismatch between the law on the books and reality on the ground. Nearly half of resident noncitizens are unlawfully present. Moreover, the number of noncitizens in violation of immigration law is far from limited to those who are out-of-status. Lawfully resident immigrants swell the numbers further, largely as a result of the growth of deportation grounds that we documented in the last chapter. By rendering more and more conduct a basis for expulsion from the country, the proliferation of ex post screening rules has drawn ever increasing numbers of lawful immigrants into deportation's orbit.

These developments have been highly consequential for the separation of powers in immigration law. The creation of a huge pool of deportable noncitizens has handed the keys to immigration policy to the executive branch, giving the President and the enforcement bureaucracy the power to shape the screening system by making day-to-day judgments about enforcement policy.

To see why this mismatch delegates so much regulatory authority to the Executive, imagine a criminal statute that rendered half of all the people living in the country subject to criminal conviction. In this world, prosecutors could not possibly initiate proceedings against all persons in violation of the law. They would, therefore, would have tremendous authority to make regulatory policy by deciding whom to prosecute. In other words, extremely broad criminal liability, coupled with the existence of prosecutorial discretion and inevitable under-enforcement of the law, results in the delegation of considerable authority to the officials who decide whether to initiate a criminal prosecution.

Scholars of American criminal law – most notably Bill Stuntz – have long argued that the criminal justice system is structured in just this way.¹⁵ State legislatures have criminalized wide swaths of conduct, with the expectation that many violations of their statutes will go unpunished. Those legislatures count on prosecutors to wield the broad criminal prohibitions only where appropriate. Stuntz and others have criticized this structural feature of criminal law. Surprisingly, it has gone unnoticed that immigration law has a very similar structure. In fact, while Richard McAdams and others have questioned whether criminal laws are really as overbroad as Stuntz argued, there can be no doubt that immigration law has this structure. First, a huge fraction of the noncitizen population is deportable as a technical legal matter. Second, while vast numbers of noncitizens are deportable, only a tiny fraction will ever be placed in removal proceedings. Third, the immigration agencies wield the same power as criminal prosecutors to make selective charging decisions.

¹⁵ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

Moreover, the enforcement power is arguably more concentrated in prosecutors' hands in immigration than in criminal justice. In both systems, prosecutors are largely free to decide when *not* to proceed—when to ignore clear violations of the laws on the books. But in the criminal justice system, other actors can often temper the power of prosecutors when they do charge and prosecute an alleged offense. Juries can refuse to convict. Judges can reject draconian sentencing recommendations. Immigration law is largely innocent of these restraints. Today, the decision to charge a noncitizen and initiate deportation proceedings is often tantamount to a decision to order the person removed.

It was not always this way. For many years, federal judges, as well as the administrative law judges who decide immigration cases, had broad authority to prevent the removal of otherwise deportable noncitizens. Federal trial court judges could make a “Judicial Recommendation Against Deportation” (known to litigants as a JRAD) in the course of disposing of a federal criminal case brought against an immigrant. Once the recommendation was made, it precluded the immigration authorities from removing the noncitizen, even if the crime of conviction was a ground of deportation under the immigration code. Immigration judges presiding over deportation proceedings possessed similar powers. Conferred by the immigration code itself, this power authorized immigration judges to grant deportation relief to otherwise deportable immigrants, so long as the immigrant could show that the equities of her individual case augured against removal. Those equities included having lived for a long time in the United States, or facing extreme hardship if deported. In recent decades, however, Congress has made the system of deportation more categorical. It eliminated the JRAD entirely, stripping federal court judges of the power to prevent deportation. Congress also deleted many statutory forms of deportation relief, drastically constricting the set of cases in which immigration judges have the power to grant relief at the conclusion of removal proceedings.

It might seem that making deportation rules more categorical would sharply limit the role that discretion plays in immigration law. But far from eliminating discretion, these provisions have simply shifted discretion from judges to immigration prosecutors and police. The power to provide relief to otherwise deportable immigrants is, as we will see, increasingly central to the construction of coherent immigration policy. That power is simply wielded today at the arrest and charging phase—either in ad hoc decisions not to charge, or in programs like the ones created by the Obama administration to provide relief to millions of unauthorized immigrants. Thus, Congress's actions to close off avenues of relief did not eliminate executive discretion. Rather, Congress ended up consolidating it in the executive's enforcement power, liberating discretionary decision-making from the statutory framework that previously had guided and constrained it.

This does not mean, of course, that executive branch judgments about the screening system are somehow magically insulated from congressional influence. Enforcement policy, in immigration as in other arenas, is the result of a complex political process in which Congress plays a meaningful role. Congress sometimes signals priorities in the code itself; other times it uses the appropriations and oversight process for this purpose. But only in limited circumstances does Congress bind the executive as a matter of law to a particular course of enforcement. Thus, the Executive is left with primary authority to set these priorities—authority that has been wielded by successive administrations in quite different ways to shape and reshape the deportation pipeline over the last several decades.

Border and Interior Enforcement

Over the last four decades, successive administrations have used this power to shape and reshape immigration policy on the ground—often with the acquiescence of Congress, and sometimes with its open support.

Consider, for example, one of the most basic choices that must be made in any system of immigration enforcement: should the system focus on border or interior enforcement? It might seem at first glance that this choice is not particularly consequential—that the border and interior represent nothing more than two different locations where the government might look for immigration violators. Yet this choice is closely linked to a core debate about the structure of the immigration system: should that system operate largely as an *ex ante* screening system, or instead as an *ex post* one?

This choice has profound consequences for the composition of the immigrant pool subject to enforcement, as well as for the population that ultimately ends up living in the United States. Intercepting migrants crossing into the country—by building up the border patrol's resources along the long land border with Mexico, for example, or by intensifying airport screening efforts—will increase the fraction of new arrivals swept into the deportation system. It may also raise the fraction of immigrants engaged in seasonal migration who are drawn into the system (and, as a corollary, suppress cyclical migration by making it much riskier). In contrast, focusing on interior enforcement is likely to result in the deportation of greater numbers of immigrants with longstanding connections to the United States, including citizen family members. These are not hard and fast rules, of course: border enforcement can easily ensnare a long-term resident returning from a trip to visit family abroad; and interior enforcement can target new arrivals who have been shuttled by smugglers from the border to an immigration destination like Chicago or New York. Nonetheless, these programmatic choices about where to concentrate enforcement resources can have significant systematic consequences for what sorts of immigrants the deportation system is removing from the country.

Presidential administrations have struck this balance very differently over time, even as the formal structure of Congress's screening system has remained essentially the same. To be sure, the politics of immigration enforcement have demanded that all Presidents in the modern era talk tough about border enforcement. But as the evidence from the post-Bracero period suggests, that tough talk was often not matched by a similar commitment of resources and personnel. The commitment to interior enforcement has similarly waxed and waned across administrations—and sometimes even within a single one. Nowhere has this been more apparent than during Obama's presidency, a period for which we have the best data regarding enforcement. With respect to immigration policy, his tenure in office is really a tale of two terms.

During Obama's first term, interior removals continue along the same vigorous lines as under the George W. Bush administration—a trend that many have interpreted as reflecting a political bet (since proven wrong) that ramped up interior enforcement would facilitate a bi-partisan compromise on immigration reform legislation. Yet during Obama's second term—as the an immigration deal with Congress began to appear increasingly out of reach and as the Administration was attacked by immigrants' rights organizations furious at

the growing numbers of long-term residents with no criminal convictions being deported—the pattern began to shift significantly. Interior removals began to fall precipitously. In 2011 there were nearly 200,000. By 2014 there were only one-half that number: roughly 100,000 immigrants were removed from the interior of the country.¹⁶ The total number of deportations, which had peaked at more than 400,000 in 2012, would have plummeted dramatically had it not been for a corresponding increase in the number of removals at the border. Border removals increased by nearly 100,000—from 200,000 to 300,000, during the same three-year-period over which interior removals fell by an equivalent amount.

In other words, the administration appears to have adopted a deliberate strategy of shifting away from its interior enforcement strategy and toward one focused on the border. Undoubtedly the choices reflected in these trends are linked to the deliberate decision in 2012 to ask enforcement agents to ignore many unauthorized immigrants living in the nation's interior, so long as those immigrants were long-term residents who were not convicted of crimes.

Workers or Criminals?

Focusing on interior enforcement choices reveals the same pattern of Presidential control over immigration policy—this time over the deportation rules that shape the probationary nature of modern American immigration law. The political forces and policy determinations that have driven executive branch decisions about whom to target for deportation, whom to ignore, and whom to affirmatively protect, defy any simple story. But those patterns of enforcement clearly belie any notion that the Executive has behaved as though it has a legal obligation to pursue an enforcement strategy that maximizes enforcement (given its budget constraint). Instead, the vast gap between the law on the books and the reality on the ground has been treated by successive administrations as an opportunity to decide *which types* of immigrants should be subjects of immigration enforcement. Congress sometimes sets the stage for (and constrains) these choices through authorization and appropriations laws. By-and-large, however, Congress has done little to curb this de facto delegation of ex post screening authority to the President.

Presidents have used this authority to give quite different answers over time to one of migration policy's predominant debates: should immigration policy's primary goal be to protect domestic workers from labor market competition? Or should it be to protect citizens from immigrants who are seen as dangerous? These divergent goals point toward radically different enforcement strategies. If the aim is to protect domestic workers, then immigration law might focus on deporting immigrants working without permission in the United States—or, as we will see, on punishing the employers who hire them. But if the aim is to weed out immigrants who commit crimes that threaten community safety, then immigration law will focus on deporting a very different set of migrants.

[Discussion omitted of historical waxing and waning of focus on immigrant workers versus immigrants with criminal convictions.]

¹⁶ See Rosenblum, *supra* note 3, at 6.

The Politics of Protection

Executive priority setting is, it should now be apparent, central to the structure of modern immigration law. At one level this observation borders on the banal. No one believes that, each year, the Executive deports a random sample of the existing pool of unauthorized immigrants. Nor does anyone think that it would be sensible—much less legally required—for the Executive to deliberately pursue such a thoughtless strategy. Perhaps more strikingly, however, it should now also be clear that the politics of priority setting over the last several decades have often led to quite deliberate decisions to dramatically under-enforce the immigration laws on the books. There is no other plausible way to understand many historical episodes, such as the near-complete abandonment of Congress’s employer sanctions regime during the administrations of Presidents Bill Clinton and George W. Bush.

The dramatic under-enforcement of the employer sanctions regime was always somewhat implicit. Neither the Bush nor the Clinton-era INS announced publicly that it would no longer investigate employers to see if they were illegally hiring workers without papers. Relatedly, when enforcement resources were shifted from farms and factories to jails and prisons, those who ended up protected from deportation were, in some sense, protected because they belonged to an “omitted” category. The political rhetoric focused more on making criminals a high priority of enforcement than it did on making others a low priority.

In many cases, however, the choice to protect otherwise-deportable immigrants from removal has been made both explicit and public. These decisions to forgive violations of immigration law reflect an understanding that not everyone who has broken immigration law should be sanctioned. In some cases this is because a person is seen as particularly deserving of relief, and as undeserving of deportation—an approach parallels the classic use of prosecutorial discretion to insulate criminal defendants from a punishment that would not fit the crime. In other cases, however, it is because of an understanding that the deportability rules themselves are over-broad.

In fact, federal immigration law itself has long codified the understanding that the formal rules defining deportable conduct are overbroad. As early as 1917, Congress wrote into the code official grounds of relief from removal. A person found deportable could petition for such relief and, if granted, they would be returned to their prior immigration status. The grounds for relief cut back on the deportability grounds in a myriad ways.

How should we understand the purpose of these forms of relief? Some grounds seem driven by goal of excusing a legal violation in order to protect those for whom deportation would be a hardship. Other grounds appear to be designed to protect insiders rather than the migrants themselves: they cut back on the scope of deportation in instances where American citizens, or other lawful residents, would be harmed by the deportation of a loved one. Still others seem to be designed to make an affirmative judgment that deportation does not make sense because the migrant has proven his “desirability” by living in the United States successfully—with success defined by long residence, steady employment, and the like. These different goals encompass both of the above ideas about discretionary under-enforcement: that it is sometimes about excusing violations we wish had not occurred, but at

other times is about moderating a regulatory regime whose primary rules of deportation have been drawn in an overbroad fashion.

This sort of explicit acknowledgment of the overbreadth of immigration law's formal grounds of deportability is remarkable. Yet it has never been the only way, or even the principal way, that deportable immigrants have been singled out for protection from deportation. This codified system, which in many cases restores (or provides for the first time) immigrants to green card holding status, has always been paralleled by an informal system of prosecutorial discretion. Just as we see in criminal law, immigration prosecutors and police have long chosen to forgo removal efforts against plenty of obviously deportable immigrants. Thus, the shadow immigration system has been sustained not simply as a result of sheer incapacity of enforcement; it is equally the product of deliberate discretionary decisions by executive branch officials that not all formally deportable noncitizens should be deported.

Sometimes these prosecutorial priorities are formally outlined in memoranda issued by high-level executive branch officials to the line-level personnel who enforce immigration law on a day-to-day basis. Those memos were directed to individual charging decisions. But there is also a long history of policies identifying large groups of people and inviting members of those groups to apply affirmatively for protection from deportation. If the idea of executive branch decisions to forebear enforcement against particular types of immigrants sounds familiar, it should. We saw just this sort of policy in Chapter 2, where we traced the history of Presidents using enforcement discretion to protect large groups of otherwise excludable immigrants.

[Discussion of administrative mechanisms used to facilitate these forms of protection omitted.]

Conclusion

Under our system of separated powers, it is the Executive that is formally vested with authority to enforce the law. Because enforcement necessarily entails discretion—a point well understood by James Madison and the other architects who drew up our constitutional blueprint—executive branch decisions about how to enforce laws passed by Congress have always been a source of Presidential power. In American immigration law today, however, the scope of that power has been dramatically magnified by the rise of *de facto* delegation. *De facto* delegation has heightened the significance of the priority setting that enforcement invariably entails, creating the possibility that a President might profoundly shift immigration policy simply by adopting different priorities than his predecessor. Congress, perhaps unwittingly, has born considerable responsibility for expanding the domain of enforcement in a way that has magnified executive policymaking power, by making the INA more and more complicated and rule-bound since its adoption in 1952.

This executive power is undeniable. Less obvious is how the Executive should be obliged to wield it. Consider two diametrically opposed understandings of immigration law's modern structure. On the one hand, the existence of an enormous shadow population might be understood to reflect an unfortunately policy failure, the product of state incapacity. On this account, Congress made immigration policy over the course of the twentieth century hoping for perfect compliance. Unauthorized immigration was the last thing Congress would have wanted. But immigration policy was overwhelmed by the challenge of restraining migration in the face of the strong desires of many to migrate, as well as of significant domestic demand by employers for labor migrants.

Or maybe the rise of the shadow system of immigration was no mistake at all. Perhaps significant levels of immigration by lower-skilled workers were exactly what Congress always wanted. But the politics of openly supporting visas for these workers may have militated in favor of an approach that tacitly accepted this immigration without formally endorsing it in the immigration code. Moreover, Congress and others may have even preferred a shadow system to one that was above board, because migrants who lack the security of legal status are easier for the government to deal with as it wants. With fewer legal rights, unauthorized migrants make fewer fiscal demands on the state. They also cannot complain—as a matter of law at least—if the government decides suddenly to change its policies and begin deporting larger numbers of migrants. A shadow population thus gives the government more political cover for its policy and greater flexibility in that policy's implementation.

These two understandings of immigration law's structure point in very different directions for the Executive Branch. If the former reading is the right one, then we might think that the Executive's obligation is to do its best to get us closer to full compliance—to close, as much as is feasible, the gap between the rules of immigration law on the books and the reality of immigration policy on the ground. If the latter reading is the right one, however, then a perfect world from Congress's perspective is not a world of perfect compliance. Instead, Congress has always understood that immigration law on the books was largely a tool designed to delegate discretion to the Executive to set immigration policy: by adopting rules that would render many migrants formally deportable, Congress delegated to the Executive the authority to use enforcement policy to manage migration levels and shape the immigrant screening system. On this account, it would be a mistake to think that the Executive would be obliged to strive always for an enforcement policy that maximized legal compliance. And while the immigrant screening system would still be a selective one, there would be no reason to think that the criteria for screening immigrants would track closely the formal statutory grounds of deportability. The *de facto* screening would instead be established largely through the decisions of executive branch actors.

These accounts are ideal types, of course. Neither is likely fully correct. Moreover, both are obviously incorrect (or even incoherent) to the extent they suggest that modern immigration law is the product of some well-defined congressional "intent" that remained consistent over many decades. The politics of immigration law have been far too complicated over the last century to be distilled neatly down to the product of singular intelligent designer. That said, we believe that the history of the system's rise that we have traced suggests that the political economy of immigration law looks a lot more like the latter view than the former. Furthermore, the congressional-executive dynamics surrounding illegal

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immigration in the intervening decades bolster the claim that the best understanding of modern immigration law is that it delegates, at least as a de facto matter, tremendous policy-making power to the Executive.

CHAPTER 8

The Promise and Perils of Enforcement Discretion

In Parts I and II, we traced the evolution of the Executive’s authority over immigration law and policymaking and ultimately highlighted the centrality of a source of power that has received limited scholarly attention—the power to enforce the law. In administrative law, courts and scholars have focused on regulations and their variants, in debates about the nature and scope of executive authority. And in constitutional theory, the authority to make war and conduct foreign affairs attracts the lion’s share of attention from scholars preoccupied with understanding the modern presidency. Our account of the rise and consolidation of presidential immigration law highlights how a central, repeated, and very ordinary responsibility of the executive arm of government—to decide when and how to enforce the law—can actually confer a kind of substantive power that serves as a functional equivalent of certain aspects of lawmaking. Our claim throughout has been that the structure of immigration law has transformed enforcement priority setting into policymaking, enabling the President to act as an agenda setter in a context where we might otherwise expect him to be hewing to the commands of Congress.

In this chapter, we grapple with the significance of this power from what we might call a “rule of law” perspective, saving for Chapter 9 an exploration of what our account suggests about constitutional theories of the separation of powers and the elaboration of our argument that the *raison d’être* of the administrative state belies the claim that executive policymaking through enforcement is constitutionally worrisome. Here we ask: what does it mean to make policy—to reflect value judgments—through the exercise of the coercive power of the state, or the decision whether to bring sanctions against those who may have violated the law, thus implicating liberty interests?

The enforcement power is ultimately driven by the exercise of discretion—a form of decision-making regarded as the antithesis of law by many theorists. Our account of enforcement up to this point highlights what might seem like a lamentable conclusion: that the presence of discretion in a legal system is inevitable. But it also demonstrates why, under certain circumstances, we might embrace discretion as central to the realization of the aims of a well-functioning legal system. Even more important, we show that it is far more productive to consider and debate how best to structure and channel discretion than to focus our energies on figuring out how to eliminate it altogether.

To develop these conclusions, we begin by spelling out the conception of the enforcement power that emerges from our account of immigration law. What, exactly, can government do with the power, and what are the power’s limits? We then explore what our history of immigration enforcement tells us about how to structure the power to enforce the law. When should discretion be decentralized or committed to civil servants and when should it be in the hands of high-level or politically appointed officials? Can transparency sometimes be the enemy of accountability? And in a federal system, such as our own, how

do we manage the intersection of a variety of enforcement powers operating in the same domain?

Defining the Enforcement Power

The picture of the Executive that emerges from the modern history of immigration law is defined by the use of the enforcement power to drive a substantive policy agenda. The responsibility to enforce the law may on the surface seem like a poor source for creative decision-making. Enforcement entails making effective the specific enactments of Congress. And in immigration law, in particular, those enactments have become increasingly detailed and reticulated over time. But in choosing when and against whom to enforce the law, the modern immigration bureaucracy has played a central role in determining the shape of the polity. Enforcement entails exercising discretion, which empowers the Executive to use its judgment in applying and therefore giving meaning to the law. In a world in which the state has the capacity to sanction only a small fraction of those who have violated the law, the choice about which subset of people to proceed against carries the potential for significant policy-making.

The force of large-scale enforcement judgments, in particular, stems to a significant degree from their entrenchment effects. This dynamic has arisen on numerous occasions in immigration policy; temporary and discretionary decisions to forebear removal have ripened into expectations of continued solicitude, which in turn result in pressure on lawmakers to transform discretionary relief into legal presence. In Chapter 2, we recount how the Executive's use of the discretionary parole power, to allow otherwise ineligible immigrants to enter and remain in the United States, has forced the congressional hand by giving rise to equities lawmakers have not been able to ignore. The decision not to enforce the law, or to forebear enforcement for certain categories of offenders or for certain periods of time (the focus of chapters 5 and 6) also might tie the hands of lawmakers and other political actors, particularly if non-enforcement judgments are announced openly and made on a large scale, thus raising public expectations about how the government will act in the future.

The possibility of entrenchment contributed in large measure to leading critiques of the Obama administration's decision, discussed in chapter 5, to defer removal of unauthorized immigrants who met certain criteria (DACA and DAPA).¹⁷ By moving from a posture of recommending that enforcement officials consider relief in individual, sympathetic cases to one that openly appeared to promise relief and work authorization to large categories of otherwise removable non-citizens, the administration raised public expectations of relief, arguably triggering a sense of de facto if not de jure entitlement. On one account, these expectations would make unraveling the relief policies politically costly (were a court eventually to allow the policies to go into effect). That the President himself promised the relief in a national press conference only heightened the nature of the promise

¹⁷ Deferred Action for Childhood Arrivals (DACA) was initiated in 2012 and has deferred the removal of unauthorized immigrants brought to the United States as children and enabled them to apply for work authorization. Challenges to its legality have not succeeded. The Obama administration announced Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) in 2014 and intended to allow the parents of U.S. citizens and lawful permanent residents to apply for deferral of removal and work authorization. This program, however, remains enjoined after an evenly divided Supreme Court was unable to come to a precedential decision about its legality in 2016—litigation that is the subject of chapter 6.

and the expectation of durability, even though the administration's formal explanations of its policies disclaim any entitlement to the relief provided.¹⁸

But though the enforcement power enables the Executive to give shape and meaning to the law, and even to render the law more or less potent, it is not itself a lawmaking power in certain crucial regards. Enforcement judgments still take place within the domain of regulation the legislature has created. The enforcement power is thus a creature of delegation, albeit an implicit and less clearly articulated or circumscribed delegation than we see in rulemaking regimes. And as the Obama administration's own characterization of its relief initiatives underscores, through enforcement judgments the government cannot create new rights or entitlements to which constitutional constraints of due process would apply. The enforcement power does not enable the Executive to act prospectively in the sense of changing the conditions (the laws) that give rise to the population of law violators. In these important senses, then, the executive and legislature are not substitutes for one another, even though the former's capacity to influence the meaning of existing law may eclipse the latter's. This understanding of the limits of the enforcement power will be most relevant to our separation of powers analysis in chapter 9. Here, it serves to temper somewhat the picture of law enforcement officials as potentially faithless agents.

Our claims that the Executive generally and the President in particular have considerable policymaking power that may or may not be adequately constrained are certainly familiar ones about the administrative state generally. But we do not believe our account of the enforcement power is simply a retelling of familiar problems in legal interpretation and administrative law. We believe the enforcement power and the discretionary decision-making it entails differ in kind and in important respects from other forms of discretionary judgments produced by the legal uncertainty and agency slack that pervade the administrative state. Discretion can and is exercised by numerous types of officials, and discretion is easy to conflate with interpretive autonomy or the freedom that even rule-bound legal interpretation gives to an adjudicator. How we name and then respond to the pathologies of discretion therefore will depend to a large extent on the types of officials and powers at issue.

Discussions of public administration typically focus on two types of discretion: explicit delegation of policymaking authority and interpretive discretion. Pursuant to the former, for example, Congress delegates to the EPA the power to decide what limits shall be placed on carbon dioxide emissions. Delegations of this sort often arise because Congress lacks perfect information about the future or lacks the capacity to resolve all future contingencies. Interpretive discretion, by contrast, arises when Congress attempts to define the parameters of an agency's task but in terms that require further definition: to decide what it means to "protect public health," for example. Interpretive discretion can arise for the same reasons that drive express delegations. But even when Congress has perfect information and sufficient capacity, there are still limits to its ability to communicate its

¹⁸ Of course, as a theoretical matter, it seems just as plausible that the institutionalization of relief in high-level agency decisions will ultimately undermine the durability of relief over time. A single decision of a future administration could reverse the nonenforcement decisions with respect to millions of noncitizens all at once. Arguably, agencies become more responsive and policies less entrenched as decision-making becomes centralized in high-level officials who are less subject to inertia within institutions. Cox & Rodriguez, *Redux* at 207-208.

preferences. For that reason, discretion is inevitable even in the absence of imperfect information or limited capacity.

The discretion that concerns us here differs in important respects from these standard accounts. The pure case of enforcement arises in situations in which there is consensus about the formal legal rule enacted into law by the legislature. A statute on the books prohibits a person from doing X, and the question is when, if ever, it is permissible for an enforcement agent to decline to bring an enforcement action against a person who does X. The question at the heart of the enforcement power becomes whether to bring to bear the coercive power of the state on an actor who may have violated the law. The specific tools of enforcement—from investigation and the threat of prosecution, to arrest, prosecution itself, detention, and punishment (and in the case of immigration law, deportation)—mean that the state’s potential impact on liberty interests is visceral and direct, rather than at least one step removed and debatable, as is the case with the promulgation of a rule or the resolution of a legal question by an executive branch actor. The tools of the enforcement power are thus far more menacing than the mechanics of regulation and adjudication. Defining and then thinking about how to constrain the enforcement power thus requires consideration of different sets of competing priorities.

The extent of the legal uncertainty associated with enforcement discretion also differs in kind from the other types of discretion present throughout administration. With respect to interpretive discretion, all legal criteria leave some room for interpretation and therefore give rise to uncertainty as to their meaning. This uncertainty, in turn, can have the effect of delegating to the Executive Branch (as well as the judiciary) the authority to give content to substantive standards set by Congress. The problem is familiar in immigration law. Asylum and withholding law illustrate this point particularly well. Congress has set broad parameters for who qualifies for withholding or asylum, including by enacting a definition of refugee as someone who has experienced persecution or has a “well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁹ The Board of Immigration Appeals, which is part of the Department of Justice, and the Courts of Appeals, to which BIA decisions can be appealed directly, have given this definition its actual content, through the adjudication of asylum claims. In this sense, through case-by-case adjudication, the Executive Branch has played a major role in setting the ex ante standards for admission by determining which sorts of claims fall within the definition of refugee adopted by Congress, determining what it means to have a “well founded fear” or to be a member of a “particular social group.” The exclusion provisions of the INA similarly empower executive adjudicators. The Code, for example, makes inadmissible a non-citizen who has committed a “crime involving moral turpitude”²⁰—a vague phrase undefined in the INA that immigration judges must give meaning in individual cases.

But with respect to many of these sorts of criteria throughout the Code, the accumulation of agency and judicial interpretation over time has significantly reduced the interpretive uncertainty surrounding them. And unlike the decision whether to enforce the law in a discrete case, or the consideration of how to prioritize enforcement resources across

¹⁹ INA §101(a)(42).

²⁰ 8 U.S.C. 1182 (a)(2).

cases, interpretations of Code language are performed in a judicialized and openly deliberative fashion. While we could say that the same ought to be true of enforcement judgments (though we would not), it simply is not, given the particular nature of deciding whether to pursue a particular case (as opposed to actually prosecuting the case, which will require reason-giving in the form of evidence that conforms to statutory requirements defining offenses). And so, while interpretive uncertainty remains an important source of executive power, it does not amount to a large-scale delegation of authority akin to the power we have described as emanating from enforcement.²¹

But perhaps the more important distinction to defend is between the enforcement power and agency action through rulemaking. Policymaking through enforcement judgments presents concerns that policymaking through delegation does not: the source of delegated authority is less clear, and it can be difficult to externally police the executive decision-making process.²² Whereas agency rulemaking and formulation of guidance documents amount to rationalized bureaucratic processes²³ marked frequently by broad-ranging deliberation and public and interest group input, the exercise of the enforcement power historically has been opaque and rarely subject to public contestation. It operates at the back end of the system, after laws and regulations have been debated and enacted, often through ad hoc decision-making.

The opacity of enforcement judgments is not inherently problematic; the guarding of law enforcement judgments from public view is in fact typically considered a virtue. Secrecy not only serves the government's interest in motivating compliance with the law by not revealing the circumstances that might lead to non-enforcement, but it also protects the liberty and reputational interests of those who might become targets of investigation. But to the extent the ex post decision-making of the enforcement power transcends the weighing of individual equities and constitutes instead a kind of substitute immigration law, as we argued in Part II has become the case, the opacity becomes far more concerning from a democratic principles point of view. What is more, even when secrecy is arguably necessary, it can compound the unique threat of the enforcement power, which again operates through the coercive power of the state.

²¹ One could argue that the state of asylum adjudication may be the exception that proves the rule. It is by now a well-known feature of the system that immigration judges within DOJ and asylum officers within DHS diverge dramatically in how they apply the refugee definition, as well as the law's other features, as evidenced by asylum grant rates that differ dramatically depending on the adjudicator. See Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 296 (2007) ("the chance of winning asylum was strongly affected not only by the random assignment of a case to a particular immigration judge, but also in very large measure by the quality of an applicant's legal representation, by the gender of the immigration judge, and by the immigration judge's work experience prior to appointment."). Though the factors that drive these discrepancies may be myriad, they almost certainly include legal uncertainty, as well as the individual characteristics and ideological orientations of adjudicators that inform their resolution of that uncertainty. The fact that two distinct bureaucracies manage asylum claims—DHS handles affirmative applications and DOJ adjudicates asylum claims raised in removal proceedings—only compounds the diffusion of control over the meaning of the law.

²² Cox & Rodriguez, *Redux*, at 105.

²³ Cf. James Q. Wilson, *The Bureaucracy* xvii ("describing the bureaucracy as a "distinctive form of social organization which exists to increase the predictability of government action by applying general rules to specific cases" but observing as well that many agencies fail to observe these norms).

The Inevitability of Enforcement Discretion

One of the central contributions of Parts I and II was to highlight the inevitability of enforcement discretion. The scope of discretion may have become outsized or unusually large in immigration law, but the immigration story underscores the centrality of the phenomenon to any legal regime. Discretion cannot be eliminated but instead must be managed, and as we argue below, it is a vital component of a well-functioning legal regime. Relatedly, we have demonstrated how difficult it can be to calibrate the extent of enforcement “just right,” showing that regimes tend to toggle between forms of over and under-enforcement, each of which presents its own perils.

The costs of over-enforcement seem plain—the psychic oppression of living in a carceral state, police abuse, the indignities and inconveniences associated with zealous enforcement, and the erosion of trust in officialdom. The costs of under-enforcement can lead to a deprivation of justice, as with the absence of law enforcement in poor communities, or the failure to protect, which can create public safety risks. It can also produce principal-agent problems—a particular concern in US constitutional theory.²⁴ And under-enforcement can provoke a crisis of legitimacy. If the law does not appear to be enforced, or if there is disagreement about who deserves enforcement and who does not, public confidence in officialdom and even the law may suffer, and we risk favoring those interests closest to the enforcer’s.

The inescapable nature of the balancing act between these two sets of problems stems from various sources. The most commonly discussed and accepted source of this enforcement discretion is the inevitability of resource constraints. From this perspective, our goal may well be that the populace perfectly comply with the law, and we might assume that it would be possible to perfectly enforce the law if only enforcement were free. But because enforcement is costly, and governments must make trade-offs when allocating resources, not only across enforcement regimes, but also across the administrative state as a whole, enforcement agents must make choices about when and how to enforce. From this perspective, it is best if they make those choices in a way that maximizes voluntary compliance given their budget constraints. Or, if we think about the budget constraint as endogenous, it is best if they spend enforcement resources up to the point at which the marginal cost of additional enforcement equals the marginal cost of additional law breaking. In other words, because enforcement is costly, agents have to make choices about when to enforce and at the same time create incentives for voluntary compliance. These constraints may result in under-enforcement in some domains and over-enforcement in others.

More profoundly, because of our legal culture’s commitment to judging people as individuals and recognition of the possibility that the law may be overbroad, we value the power of prosecutors to exercise discretion in individual and categorical cases to reflect some form of collective judgment that it would be counterproductive or cruel to enforce the letter of the law—against the low-level marijuana user, or the unauthorized immigrant

²⁴ The legitimacy of the exercise of power depends on adhering to the separation of powers, and the failure of the executive to enforce might mean not fulfilling its responsibilities (though we explore these questions more fully in chapter 9).

brought to the United States as children, for example. From this perspective, perfect compliance may still be the system's goal, but under-enforcement is not only permissible, but also desirable. Even if we preferred, *ex ante*, that everyone follow the law, there are situations where, *ex post*, we may be reluctant to punish a person for failing to comply. This is the classic frame through which many view the exercise of "prosecutorial discretion." As Meir Dan-Cohen and others have recognized, it would be best in this world if legal subjects observed only the *ex ante* legal command, and not the *ex post* judgments excusing violations. But this sort of "acoustic separation" is nearly impossible to institutionalize in the real world.

Through our analysis of the structure of modern immigration law, we offer a third frame for understanding enforcement discretion—one that has enforcement discretion baked into it and significantly opens up the possibility of policymaking through enforcement. Understanding the institutional history of immigration enforcement helps us to see that the rules written into a statutory scheme may not be designed with a goal of perfect compliance at all. *Ex ante*, the system's objective is not to have everyone follow the law perfectly. Instead, the law is drawn in an overly broad fashion and therefore delegates to actors other than lawmakers themselves the responsibility for determining the scope of desired compliance. Regimes of this sort may be rare. Some scholars have argued that American criminal law ought to be understood in this way,²⁵ and we show how immigration law should be understood similarly. Within this frame, enforcement discretion is organized around *ex ante* enforcement judgments that themselves (alongside statutes) establish the first-order behavioral norms of the system, rather than around *ex post* judgments about how to allocate scarce resources or account for particularly sympathetic defendants.²⁶ This feature of *ex ante* policymaking renders this form of discretion conceptually unlike the other frameworks for making sense of the enforcement power. Instead, this conception resembles the explicit delegation of policymaking discretion, or the existence of interpretive discretion. For this reason, in earlier chapters, we labeled the phenomenon "de facto delegation."

As we have defined it, the concept of de facto delegation is conceptually challenging, in large part because our claim is not that lawmakers ever have the specific intent to create a regime of this sort, but rather that the regime emerges over time as the legislature's work interacts with and shapes the facts on the ground. In the case of immigration law, the accretion of the grounds of removal, coupled with demographic and economic trends, have made an astoundingly high number of non-citizens removable, often for reasons and in circumstances that reasonable people would descry. The Code itself builds in a series of discretionary mechanisms to provide immigration judges with the power to counteract the law's overbreadth, at the end of the adjudication of a case of removal. But none of these tools is arguably as significant as the power of the prosecutor to decline to bring charges at all.²⁷ The question then becomes: what follows from this descriptive observation? The

²⁵ See, e.g., William J. Stuntz, *The Collapse of American Criminal Justice* (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 506-509 (2001).

²⁶ This understanding of enforcement discretion has some foundation in existing constitutional theory. As Justice Kennedy's opinion in *Arizona v. United States* suggests, Congress legislates knowing that the Executive ultimately must exercise judgment when enforcing the law.

²⁷ By this we do not mean that the enforcement agent's decision not to proceed with an action has a greater impact on the individual than the grant of cancellation of removal by an immigration judge, which results in

management of discretion of this kind requires a well-constituted officialdom—an objective we explore in more detail below. But first, we must understand what is both dangerous and virtuous about executive discretion.

Evaluating Discretion

Generally speaking, we worry about officials exercising discretion because the power to pick and choose when to enforce or apply the law seems tantamount to decision-making divorced from generally applicable rules. The judgment unleashed by discretion is informed heavily by the internal characteristics of the decision-maker, even when legal rules cabin his authority to use his coercive or administrative power. Personality drives the judgment whether the law applies. Compounding these problems is the fact that discretionary enforcement is usually opaque, often deliberately so, making it all the more difficult to hold the decision maker to account. This opacity can be for good reasons, including protecting the targets of investigations before adjudication can occur, guarding national security and other sensitive government information, and promoting voluntary compliance with the law by keeping the public in the dark about any criteria for non-enforcement that might exist. But it is hidden from public scrutiny nonetheless.

These characteristics pose myriad risks. Perhaps the most commonly invoked danger is that bias and personal preference can easily cloud discretionary judgment. Indeed, lawmakers might even prefer to delegate discretion to permit various sorts of biases to operate hidden from view, especially to the extent that the Constitution or statutes otherwise prohibit them from writing those biases into law. At the level of the individual enforcement official, the specter of racial profiling or bias looms particularly large, whether overt or the consequence of implicit bias, and it can be abetted by systemic policies that encourage aggressive policing, such as New York City's discredited stop and frisk strategy. Ideological or vendetta-driven motives could also plague the individual prosecutor. And at the systemic level, the risk that ideology or the quest for partisan advantage will skew the setting of enforcement priorities elevates the concern by amplifying its reach. The Bush administration's attempt to dismiss U.S. Attorneys who would not adhere to a Department enforcement agenda motivated by partisan political interests (focused on questionable instances of voter fraud) reflects how executive discretion can result in the abuse of conventions intended to insulate the power of law enforcement from the political scrum.

In addition, the more dispersed the discretion given executive officials, the greater the risk that discretionary decision-making will result in or be perceived to result in arbitrary decision-making. When officials fail to treat like cases alike at any stage of the enforcement pipeline, from investigation, to arrest, to prosecution, the principle of equal treatment under the law suffers, as does public confidence in the law. Because enforcement officials exercise the coercive power of the state, the indignity of unequal treatment may be particularly acute or demoralizing.

permanent status. Instead, the power not to bring a case at all is the power to keep someone out of the system altogether, where the vagaries of interpretation may or may not result in a relief determination down the line.

Given its inevitability, the challenge becomes to properly cabin and channel the myriad forms of enforcement discretion that exist within any given legal regime. But to shift to this sort of institutional design approach to the problem of executive discretion, we must also understand the virtues of this form of decision-making. We identify the classic one above—taking into account individual equities that might lessen the justification for the application of the law to someone who has violated it. More important for our purposes, however, our account of the evolution of immigration enforcement policy powerfully underscores that a regulatory system requires policy flexibility to respond to the unanticipated effects of the law. At a most basic level, we cannot know in advance what all of the law’s effects will be. It is vital that a legal system contain institutions or mechanisms for taking into account the unanticipated effects of a law, whether they are humanitarian concerns or simply pragmatic concerns about workability and the like. Commentators sometimes defend flexibility of this kind (whether as a matter of administrative design or judicial interpretation) as necessary to respond to changes in the world. But our key observation is distinct: we should not underestimate the importance of unanticipated consequences of laws and legal policies themselves.

A key insight of our account of immigration enforcement is that independent priority setting by the Executive can facilitate the constrained use of power, particularly in a world of overbroad legislation. For instance, the enforcement priorities articulated across administrations to emphasize the removal of security and safety risks constitute executive efforts to construct a more rational screening system within the overinclusive sweep of today’s immigration code. Moreover, the act of actually enforcing the law—of confronting its real-world effects—can point to limits or unintended consequences of the law as drafted. Enforcement brings to life the consequences of legislation—a concrete manifestation of the informational advantages of the presidency. We should want the Executive Branch to have the power to grapple with those consequences based on judgments forged through its own experience. Indeed, these informational benefits can often only be acquired in a dynamic context, in which executive branch officials have authority to make decisions *subsequent* to congressional policymaking. For the Executive to respond to the lived experience of the law by shifting priorities can help hold the legislature accountable, but also advance a policy debate by pointing a regulatory regime in better directions.²⁸

Discretion in Immigration Law

The rise of presidential immigration law implicates all of these concerns in some way. To the extent that power over the substance of immigration law has become concentrated in executive hands, it has become concentrated in discretionary decision-making tools that are especially susceptible to the dangers described above—tools that operate mostly through ex post judgments about whom to prosecute and remove. As Chapters 5 and 6 reveal, much of the political oversight of the immigration enforcement bureaucracy, as well as much of the fight over the Obama initiatives, has been about addressing some of the problems with discretion, including the threat of arbitrariness and a lack of transparency.

We can look at the developments we recount in chapter 5 from two vantage points, and the political and legal fights of the second Obama administration reflect a struggle

²⁸ Cox & Rodriguez, *Redux*, at 167-69.

between them. On the one hand, we can tell a largely critical story by highlighting how the structure of immigration law has meant that official power has been wielded through amorphous guidelines with limited effect on line-level agents—that concentrating power within an enforcement arm of the administrative state is in and of itself the problem.²⁹ By contrast, we could emphasize how efforts to centralize control over enforcement with political leadership through ever more refined guidelines, and finally DACA and DAPA, demonstrate a gradualist but salutary approach to taming the principal-agent problem. In other words, we can look at the developments of chapter 5 as a story about how making substantive choices through discretionary decision-making will consistently thwart our larger rule of law goals, or as a story about the possibility of perfecting discretion.

As pragmatists, we do not necessarily have to choose between these two evaluations. We can prefer the Obama path to the status quo it replaced while still recognizing the need to shrink the realm of discretion and appreciating the potential dangers of DAPA-style policy-making. Indeed, DACA and DAPA can make little progress in addressing a concerning feature of presidential power in immigration law revealed in chapters 2 and 3: the asymmetry of the power and the corresponding lack of transparency. The President has far greater authority to make judgments at the back end of the system—picking and choosing ex post whom to remove and to whom to extend “grace,” using coercive tools like arrest, prosecution, and detention—than at the front end. Outside of discrete and mostly historical emergency contexts, the President has no comparable power on the front-end of the system. But whereas decision-making through enforcement has not traditionally been subject to public deliberation, we have many more tools for judging what government is up to when its decision-making is ex ante (through legislation or rule-making, for example). In other words, the turn toward policy-making through enforcement in immigration law has re-enforced the opacity of the system, even as the current administration has made public its criteria for enforcement.

The turn toward executive action in immigration also gives rise to what we call the problem of the discretionary nation. We can quite properly understand the Obama initiatives as efforts to construct the polity—as substantive judgments about who should be here and who should not. The President himself made claims of this sort: DREAMERS deserve to be part of the polity (or, more accurately, they already are, such that law must catch up with sociology).³⁰ On the one hand, these judgments reflect the core benefit we claim for discretion—enabling the law to catch up with reality on the ground and to reflect changed views about who ought to be deported. But these are judgments that have been made without much more than interest group pressure, and they are largely the result of bureaucratic inertia. These are the deep concerns behind the otherwise legally dubious claims in the *United States v. Texas* litigation we discuss in chapter 6, framed as arguments about the

²⁹ We shouldn’t underestimate the constraints that exist on line-level and discretionary judgment, of course, both from the law (due process, non-refoulement obligations, etc.), but even assuming these norms penetrate officialdom, they are not ways of ensuring that all like cases be treated alike.

³⁰ This observation echoes a central line in *Plyler v. Doe*, though in that case the structural question was whether Congress or the Court had the authority to determine who constituted the polity.

Administrative Procedure Act and whether work authorization and other “benefits” have valid legal authorization.³¹

Structuring Discretion

Despite the clear perils of discretion, it would be a mistake to think we can and ought to squeeze as much of it out of the system as possible, not least because of the humanitarian and pragmatic functions it performs. More important, once we move past the assumption that we seek perfect compliance with the law, other virtues of under-enforcement become easier to see, as does the necessity of discretion. The right question to ask about discretion thus becomes: how do we structure it? Our overarching goal should be to reduce arbitrariness and biased judgment and to ensure that “personalized” judgment is grounded in a set of professional and legal norms. But maintaining the legitimacy of an enforcement regime might also require ensuring some sort of congruence between enforcement outcomes and public expectations. At least two of the central debates of public law bear on these goals, and our study helps to advance our understanding of those debates.

First, the question of *who* exercises discretion becomes fundamental in a world in which we recognize its inevitability.³² The primary way into this problem arises from a classic and overly dichotomized debate in administrative law between the political appointee and the civil servant. At the heart of this debate is the question of how granular state decision-making should be. Should officials closest to the discrete cases of enforcement (more often than not civil servants) make the ultimate “on the ground” judgments? Or should decision-making be made in a more centralized fashion, where the influence of political appointees will be greater?

The case for line-level agents and civil servants as the repositories of discretion (drawing on theories of the bureaucracy) includes that they are more likely to be disinterested and understand the details of the law, as well as how it operates on the ground. The case for lodging discretion in political officials is that they are accountable to both the law and the public. They might have perverse incentives to prosecute or not based on public whim, but it can be difficult to distinguish between whim and deeply democratic preferences.

In general, every system balances these roles in some way. The preference for granularity arguably functions better when the enforcement pool is small and involves fewer trade-offs among competing regulatory objectives. In these circumstances, because there is less opportunity for significant policy-making, it is easier to imagine discretion organized according to the classic image of individualized prosecutorial discretion. But as the enforcement pool grows larger, the “situation sense” of line agents or civil servants may become less valuable, or at least might be offset by the need to manage an increasingly

³¹ Finally, and relatedly, to borrow a phrase from David Sklansky, there is the problem of ad hoc instrumentalism. The combination of the President’s asymmetrical power, plus his power over the construction of the polity, produces an additional worry—that he has the power to use unauthorized status as an easy way to target people whom the government would like to punish for other reasons, such as gang members and security threats after 9/11.

³² This may be a uniquely American question—in Canada and the UK, for example, the idea of political officials exercising the sort of discretion we’re assessing makes little sense, though within a civil service there are, of course, hierarchies and mechanisms of supervision.

complex regulatory task through the articulation of general principles. The demands on the system begin to look legislative in character, necessitating the involvement of higher-level officials who both have a broader institutional purview than the line agent and also can be held accountable politically. As has been the case in immigration law, as the law on the books becomes detached from how it plays out on the ground, the pressure for a politically legitimated form of decision-making increases.

For the most part, we do not think it possible to determine in a generalized fashion what the right distribution of discretion might be.³³ In the context of immigration law, we can say that line-level agents are incredibly diffuse and in fact ideologically motivated. They are also dominated by a culture of enforcement that we would argue ought to be disrupted by a more generalist mindset. While still recognizing the importance of a well-trained bureaucracy capable of acting semi-autonomously, we would defend the claim that political officials ought to have considerable discretion in the immigration domain as currently constituted.³⁴

The evolution of enforcement policy over the last decade underscores, however, that transforming this potential into actual influence requires systematizing the enforcement power, typically by centralizing it. The tools of the modern presidency have been central to the management of the enforcement power, as it has grown in scope and influence. Presidents and their political appointees, along with high-level career officials, have turned to various mechanisms of supervision to shape the multiple and quotidian judgments that law enforcement officials must make, relying primarily on guidance documents made more specific and directive over time. They have done so in response to institutional needs, namely to ensure consistency across cases. And they have responded as well to partisan and ideological pressures, seeking to generate public support and political capital among particular constituencies by under-enforcing the law against sympathetic cases (in the case of immigration law, business interests and advocates for civil and immigrants' rights). Whatever the motive, however, transforming the multitude of enforcement judgments required of the various arms of the Executive into a coherent policy agenda has necessitated high-level awareness of the bureaucracy's inner-workings and high-level involvement in organizing those choices.

The second core question illuminated by our account of the enforcement power revolves around the proper scope of transparency in government action. Again, law enforcement judgments are conventionally and typically opaque. But our account of immigration law and recent developments in other regulatory domains suggest they need not be, at least not entirely. The strong norms supporting opacity generally—against disclosing the details of an ongoing investigation or prosecution—would not be inconsistent with

³³ Cf. James Q. Wilson, *The Bureaucracy* 25 (1990) (emphasizing that there's no one best way of organizing the bureaucracy and that the decision whether to centralized will depend on defining the agency's critical task, ensuring freedom of action, and facilitating political support for the agency's authority to redefine its tasks as needed).

³⁴ Our confidence in this form of centralization is abetted by the fact that certain legal restraints and conventions governing the behavior of political appointees both prevent them from engaging in politicized, individualized targeting and ensure that their judgments will be vetted with input from across the relevant agencies and their career officials. But these conventions may be fragile, and their break down would warrant a significant re-consideration of the role of politics in enforcement.

openness about the general criteria used to guide enforcement actions. Such criteria are generally framed as guidelines, as in the case of the memoranda disclosing that the federal government will not prioritize prosecutions of low-level marijuana offenses in states that have legalized the use of possession of the drug (or at all). DACA and DAPA take a more decisive step by creating a set of eligibility criteria and inviting those who have violated the law to affirmatively apply for relief from removal, providing a de facto kind of repose.

These forms of transparency provide notice to the regulated public and communicate a changed understanding of the meaning and reach of the law. In addition to enabling those affected by the law to better conform their behavior to how that law will be implemented, such guidance also creates opportunities for deliberation about the criteria that govern discretion.³⁵ To be sure, that debate is largely ex post. In the case of the Obama initiatives, at best, the public participated in the formulation of the guidelines through interest groups meetings and informal contacts with the White House. But the subsequent swirl of commentary, and even the Texas lawsuit against the initiatives, has helped pull back the curtain on how the Executive wields its enforcement power and prompted a wide-ranging debate about the propriety of its priorities. The political benefits and costs of this openness are clear, even if it remains difficult to weigh them against each other. The administration can communicate a view of the law that matches the preferences of important constituencies, even as it risks public backlash. But the institutional benefit also should be clear, in that the transparency reveals an administrative apparatus taking seriously and organizing carefully its awesome power.

Transparency is by no means an unalloyed virtue. We have emphasized throughout that secrecy about the criteria of enforcement serves a core rule of law value, namely ensuring compliance with the law in a world of scarce resources. If everyone knew the algorithm the IRS used for determining whom to audit, tax compliance would drop, and a government that depends on voluntary compliance with tax law for its very existence would suffer. But as our analysis of immigration enforcement suggests, the costs of transparency lessen the more the legal regime resembles one in which total compliance is either not expected or not desired.

[Federalism discussion omitted.]

Conclusion

With respect to any of the design choices we canvass, the objective is not simply to move the locus of discretion around to more or less reliable actors. Our goals might very well include actually shrinking the domain of discretion—not squeezing discretion out of the regime but limiting it nonetheless. Indeed, even if we accept the inevitability of discretion and have learned how to cabin it, the realm of discretion may still be large enough that it continues to present many of the risks that attend discretionary decision-making by government officials and may even thwart efforts to systematize or discipline official decision-making altogether. It can be hard to identify the point at which the realm of discretion has become too vast, but we are arguably at that point in immigration law given

³⁵ In our proposals for reform detailed in the conclusion, we consider the relative merits of notice and comment procedures, versus other vehicles for deliberation.

the scope of de facto delegation. Even the Obama initiatives reflect only a small recalibration since they reach no more than half of the unauthorized population and have no affect on border enforcement—an increasingly crucial site of discretionary judgment. In our final chapter we thus explore ways of diminishing the role of discretion in immigration law. For now, we emphasize that we should not be afraid of either executive discretion or policymaking through enforcement, even as we must remain attentive to how discretion is organized, in the interest of public accountability and deliberation.