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## The President and Immigration Law

**ABSTRACT.** The plenary power doctrine sharply limits the judiciary's power to police immigration regulation – a fact that has preoccupied immigration law scholars for decades. But scholars' persistent focus on the distribution of power between the courts and the political branches has obscured a second important separation-of-powers question: how is immigration authority distributed between the political branches themselves? The Court's jurisprudence has shed little light on this question. In this Article, we explore how the allocation of regulatory power between the President and Congress has evolved as a matter of political and constitutional practice. A long-overlooked history hints that the Executive has at times asserted inherent authority to regulate immigration. At the same time, the expansion of the administrative state has assimilated most executive policymaking into a model of delegated authority. The intricate immigration code associated with this delegation framework may appear at first glance to limit the President's policymaking discretion. In practice, however, the modern structure of immigration law actually has enabled the President to exert considerable control over immigration law's core question: which types of noncitizens, and how many, should be permitted to enter and reside in the United States? Whether Congress intended for the President to have such freedom is less important than understanding that the Executive's power is asymmetric. The President has considerable authority to screen immigrants at the back end of the system through enforcement decisions, but minimal control over screening at the front end, before immigrants enter the United States. We argue that this asymmetry, in certain circumstances, has pathological consequences that Congress could address by formally delegating power to the President to adjust the quotas and admissions criteria at the heart of immigration law.

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**INTRODUCTION**

Scholars and courts generally understand the plenary power doctrine in immigration law to sharply limit judicial scrutiny of the immigration rules adopted by Congress and the President. Since the doctrine was first formulated in the late nineteenth century, the Supreme Court has emphasized that immigration represents an issue best left to the political branches.<sup>1</sup> The jurisprudential and scholarly focus on the distribution of power between courts and the political branches, though important, has obscured a second separation-of-powers issue: the question of how immigration authority is distributed between the political branches themselves. The Court's immigration jurisprudence has shed little light on this question, often treating the political branches as something of a singular entity. Moreover, surprisingly little scholarly commentary has addressed the interrelationship between the two branches or attempted to discern whether consistent patterns of competition, cooperation, or any other dynamic have emerged over time to characterize the political branches' actions in this area.<sup>2</sup>

This Article explores how the allocation of power between the political branches has been understood both as a matter of constitutional history and as a matter of actual practice, with a view to better elucidating the structure of American immigration law. The Supreme Court has long glossed over separation-of-powers questions in immigration law. Early jurisprudential developments set the stage for this inattention. The Court developed the plenary power doctrine in a series of cases concerning the allocation of regulatory authority between the states and the federal government. These cases arose at a time when the national government's authority was much more circumscribed generally than it is today, making the Court understandably less

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1. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889); *infra* Section I.A.
  2. To the extent that scholars have discussed this interbranch dynamic, they have generally assumed that, “[s]ince the passage of the first federal immigration legislation in 1875, it ha[s] been universally understood that Congress—and not the President—possessed the constitutional authority to set conditions for entry and to fix quota numbers.” GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES & AMERICA’S HALF-OPEN DOOR* 56 (1986); cf. Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 676 (1995) (describing a pattern of increased congressional control over immigration and highlighting the “one gaping exception” as the Refugee Act of 1980, in which “Congress virtually wrote the President a blank check to decide how many overseas refugees to admit and which ones”).

focused on the distribution of authority within the national government.<sup>3</sup> The Court relied heavily in its reasoning on the concept of national sovereignty to justify the federal government's power over immigration—a concept that abstracts from the state's institutional details.

Over time, the Court's continued inattention to the scope of the President's power over immigration policy has given rise to doctrinal confusion. In some cases, the Court has gone so far as to suggest that the President has inherent authority to regulate entry into the country.<sup>4</sup> In other cases, the Court has suggested, to the contrary, that immigration law operates no differently than any other power of Congress,<sup>5</sup> and that over no other area is the legislative power more "complete" than immigration.<sup>6</sup> The history of immigration jurisprudence, therefore, contains the seeds of two radically different accounts of the President's power over immigration: one grounded in inherent executive authority under the Constitution, the other rooted in the modern administrative state's conception of executive authority originating exclusively from Congress's decision to delegate.<sup>7</sup>

These alternative theories—one emphasizing immigration's exceptional position within the constitutional structure, the other its ordinary place in administrative law—raise the question of which account better fits the historical contours of the relationship between the President and Congress. Outside the courts, the relationship between the President and Congress has been defined by Congress's dramatic expansion of federal immigration law over the course of the twentieth century through the creation of a complex, rule-bound legal code, which has given rise to a comprehensive regulatory

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3. The *Chinese Exclusion Case* was decided just six years before *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), a widely-known piece of the constitutional law canon in which the Supreme Court limited the federal government's authority to regulate monopolies through a narrow interpretation of the Commerce Clause.
  4. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").
  5. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).
  6. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).
  7. Throughout the Article, we invoke both the "President" and the "Executive," often interchangeably. In so doing, we neither mean to suggest that the executive branch is unitary, nor attempt in any great detail to identify points of conflict or interaction among the various executive branch agencies that perform immigration functions—a set of relationships that ought to be investigated in future work. In this Article, our concern rests primarily with the dynamics between the political branches, not within them.

system. This central development might seem to suggest that the President has little power to decide what we will refer to in this Article as immigration policy's core question: what types of noncitizens, and how many, should be admitted to and permitted to reside in the United States?<sup>8</sup> This assumption amounts to conventional wisdom today. Our major contribution in this Article is to show that, in reality, the President has historically possessed tremendous power over core immigrant screening policy through three channels: through claims of inherent executive authority; through formal mechanisms of congressional delegation; and through what we call *de facto* delegation.

We consider two major events in twentieth-century immigration history as examples of the inherent authority and formal delegation models: the creation and implementation of the temporary worker program of the Bracero era and the response to the Cuban and Haitian refugee crises of the 1970s, 1980s, and 1990s.<sup>9</sup> The history of the Bracero Program reveals two important facts: the Roosevelt Administration commenced the World War II-era guest worker program without first seeking explicit congressional authorization; and when the temporary authorization that Congress eventually provided expired, the Truman Administration ignored that expiration and continued to operate the program. This historical episode thus provides provocative evidence that the possibility of inherent executive authority over migration has existed in practice and is not limited to a few old Supreme Court opinions. The Caribbean refugee crises highlight the President's use of explicitly delegated screening authority in the form of "emergency" and "parole" powers. Though several presidents used these delegated powers to manage the refugee flows, they also made claims to inherent authority, in ways that sometimes appeared to ignore or circumvent the limitations that Congress had placed on the executive through delegation.<sup>10</sup>

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8. We mean for the idea of immigrant types to be understood in the most catholic sense possible. Conventionally, of course, the core question we identify above is implicated by the three main categories into which contemporary immigration law is commonly divided: labor-based immigration, family-based immigration, and refugee admissions. While we focus primarily on family and labor migration, we do explore what the existence of the overseas refugee regime suggests about the separation-of-powers question that motivates this Article. *See infra* notes 161-166 and accompanying text.

9. *See infra* Sections II.A., II.B.

10. The regime for screening refugees and admitting asylum claimants can be conceptualized as distinct from the system according to which immigrants are admitted for permanent residence based on family or labor-related preferences. Indeed, as we discuss in Part III of this Article, the former operates as a kind of parallel admissions track to the latter, and the admission of refugees and asylum claimants is managed primarily by the Executive, to whom the 1980 Refugee Act gives screening authority over refugees. The Executive also

Though both of these sources of authority still play important roles in defining the scope of executive control over core policy, we argue that a third paradigm of *de facto* delegation captures much of the immigration separation of powers today. Over the twentieth century, Congress developed a detailed, rule-bound immigration code.<sup>11</sup> This code would seem, at first glance, to reflect a world in which Congress sets immigrant screening priorities, thus depriving the President of discretion over core policy—and so goes the conventional account. We show, by contrast, that this detailed code has had the counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive. Congress, *de facto*, has delegated screening authority to the Executive in two ways. First, Congress's radical expansion of the grounds of deportation has rendered a large fraction of legal immigrants deportable. Second, the combination of stringent admissions restrictions established by Congress and lax border enforcement policy by the Executive effectively has given the Executive primary control over a large unauthorized population within the United States. In the last two decades that population has grown dramatically, such that today one-third of all resident noncitizens are deportable at the option of the President—a fact that functionally gives the President the power to exert control over the number and types of immigrants inside the United States.

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oversees the Bureau of Immigration Appeals and the immigration judges who adjudicate most asylum claims within the Department of Justice, subject to review by the Courts of Appeals. One of our goals in this Article is to map the ways in which the Executive and Congress share responsibility for screening immigrants for admission generally, and to illuminate both the tensions and advantages of shared authority. As will become clear, the participation of the Executive in the screening of immigrants for admission in the refugee and asylum systems underscores both that *de jure* executive screening is more likely to arise when foreign policy or national security concerns are directly implicated, and that executive screening is not an anomaly in our system.

11. The immigration laws of the United States are principally organized in the Immigration and Nationality Act (INA). The basic organization of the Act was first adopted in the INA of 1952, also known as the McCarran-Walter Act. *See* Pub. L. No. 82-414, 66 Stat. 163. Major amendments followed in 1965, 1986, 1990, and 1996, but the basic organization of the statute has remained largely unchanged. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009; Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359; Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. Today the Act is codified at INA §§ 101-507, 8 U.S.C. §§ 1101-1537 (2006).

The President thus has far more screening power than is often recognized.<sup>12</sup> This conclusion has at least two important implications. First, it shows that the inauguration of a new President can bring with it remarkable changes in immigration policy. Commentators and scholars have speculated a great deal about what Barack Obama's election means for comprehensive immigration reform. Our work underscores that Obama has the power to overhaul the immigration screening system even in the absence of congressional action. Though we doubt very much that he will claim inherent executive authority to restructure our family admissions policy or create a large-scale guest worker program, *de facto* delegation makes it possible for him, without having to resort to the legislative process, to alter significantly the composition of the immigrant labor force, to permit immigrants with minor criminal convictions to stay rather than removing them, and so on.

Second, our richer understanding of the actual relationship between the President and Congress in the immigration arena raises important new normative questions that we begin to address with this Article. Because our central objective in this Article is to reorient the descriptive lens through which scholars and policymakers evaluate immigration law, we cannot hope to offer a complete critique or defense of the President's modern policymaking role. Nonetheless, our descriptive account does suggest that today's *de facto* delegation may be giving rise to considerable costs. Perhaps the most important feature of this modern separation-of-powers structure is that it generates a potentially dangerous asymmetry. The President's power to decide which and how many noncitizens should live in the United States operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit. As a tool for screening immigrants, the back-end prosecutorial power operates as a substitute for front-end policymaking power; both are possible methods of achieving a particular size and composition of immigrants.<sup>13</sup> But screening through

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12. In this fashion, immigration policymaking shares much in common with Bill Stuntz's account of modern criminal law. As Stuntz has argued persuasively, the expansion of criminal codes over the past half-century has dramatically shifted the locus of authority away from legislatures and towards prosecutors. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). His account has reoriented criminal law scholarship and generated a new and powerful critique of the system. Yet our story, which in some ways entails an even starker shift of authority, has gone largely unnoticed and, as a consequence, has escaped assessment.

13. For a more extended argument about the way in which *ex ante* and *ex post* screening are substitutes, see Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007).

deportation is sometimes a poor substitute for screening at the time of admission, and it can generate unnecessary social costs. The President today has little choice about which tool to use, because the regulatory structure channels executive policymaking to the back end of the system. This can lead to perverse consequences, particularly with respect to the management of unauthorized immigration.

After outlining the potential costs of asymmetric delegation, we begin the conversation about how they might be addressed. At least two routes exist to reduce the asymmetry. First, the courts or Congress could level down, reducing the Executive's discretion at the back end of the system—by, for example, disciplining its exercise of prosecutorial discretion. Second, Congress could level up, by expressly delegating the President more power to set front-end screening policy through promulgation of admissions rules. We are quite skeptical about the feasibility of the first option. As is well documented in criminal law and other enforcement arenas, disciplining prosecutorial discretion is extremely difficult, especially through the courts. We, therefore, take seriously the second option—delegating more control over the immigrant admissions system to the Executive. It may seem counterintuitive to argue that the formal delegation of *ex ante* screening authority to the Executive will address abuses associated with the current structure of policymaking, but we believe such delegation actually could improve immigrant screening, lower the collateral costs associated with deportation, and enhance the oversight and transparency of the President's immigration policy.

We develop our argument in three parts. Part I considers the Supreme Court's limited and inconclusive jurisprudence on the separation of powers in immigration. In Part II, we turn to the heart of our descriptive account, exploring the ideas of inherent and delegated executive authority in practice. This story highlights both the exceptional features of immigration policymaking and the simultaneous integration of immigration law into the mainstream of the administrative state. In Part III, we discuss the normative implications of the model of immigration power sharing that dominates today's interbranch relations and begin a conversation about how the institutional structure of immigration law might be redesigned.

## **I. THE SEPARATION OF POWERS IN IMMIGRATION JURISPRUDENCE**

The courts have never precisely delineated the relative powers of the political branches over immigration regulation. To begin to understand how power has been and should be shared, however, we turn first to the jurisprudential treatment of our separation-of-powers question, to bring into

view any discernable conceptions of power sharing articulated by the Supreme Court.

Though the Court forged the plenary power doctrine in the late nineteenth century, the jurisprudential separation-of-powers story is largely a twentieth-century one, not only because complex congressionally driven immigration regulation did not really begin until the 1890s, but also because the expansion of the administrative state in the twentieth century changed the separation-of-powers terrain. In broad outlines, in the formative period of U.S. immigration law in the 1890s, the Court treated the regulatory authority of the political branches as largely interchangeable, eliding important questions about the distribution of authority between the branches, but occasionally alluding to an inherent executive power to implement sovereign prerogatives. Over time, as Congress increasingly engaged in immigration regulation, the Court more frequently emphasized the legitimacy conferred on executive actions by congressional authorization. Nonetheless, hints of inherent executive authority persisted in the Court's reasoning. The Court's treatment of the interbranch relationship ultimately has been too thin and confused to provide definitive answers to the separation-of-powers question we pose. But the jurisprudential history at least suggests that conceptions of inherent and delegated authority have both shaped the way in which the Court has characterized the relationship between the political branches.

#### *A. The Nineteenth-Century Origins of Immigration Law*

The text of the United States Constitution nowhere enumerates a power to regulate immigration. As immigration regulation grew during the nineteenth century, it therefore fell to the Supreme Court to articulate the sources of immigration authority and describe how that authority would be wielded within the parameters of the Constitution.

The Court first described the sources of immigration power in the canonical case *Chae Chan Ping v. United States*.<sup>14</sup> The case concerned the validity of one of the Chinese Exclusion Acts, passed by Congress in response to broad anti-Chinese sentiment and populist calls for immigration restriction. Excluded from the country because of the new Act, Chae Chan Ping argued that the federal government had no authority to regulate immigration.<sup>15</sup>

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14. 130 U.S. 581 (1889).

15. Chae Chan Ping also argued that the statute violated the United States's treaty obligations to China. *See id.* at 589.

Rejecting this challenge, the Supreme Court emphatically affirmed the power of the federal government to exclude noncitizens from the nation.<sup>16</sup>

For our purposes, the decision's most important feature is the way in which the Court treated the legislative and executive branches of the federal government as unitary. According to the Court, the decision whether and how to exclude immigrants from the United States represented a political question, not subject to review by the judiciary.<sup>17</sup> If the petitioner desired a remedy, it lay with China, whose government could lodge a complaint "to the political department" of the United States.<sup>18</sup> The conception of the United States government that emerges from this case thus has a decidedly unitary cast: the legislative and executive branches form a single political department with responsibility for determining "who shall compose [society's] members."<sup>19</sup>

Several features of this early litigation likely drove the Court's unitary treatment of the political branches.<sup>20</sup> We hint at one such feature above, and it is often noted in the immigration law literature—the Court's strong view that the question whether or not to exclude foreigners from the United States was political rather than judicial in nature.<sup>21</sup> But other oft-overlooked aspects of

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16. *See id.*

17. *See id.* at 609 ("Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.").

18. *Id.*

19. *See id.* at 607.

20. To be sure, even outside the immigration context the idea of fusing the executive and legislative functions is not anomalous in U.S. history. As Daryl Levinson and Rick Pildes have observed, for the first forty years of our history, "American government effectively operated . . . with a congressionally dominated fusion of legislative and executive powers." Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2321 (2006). This relationship was a function of the fact that credible presidential candidates came to be identified through party caucuses in Congress, thus giving Congress a major role in selecting the President. *See id.* at 2321. The rise of Andrew Jackson and his populist brand of campaigning and government—a rise enabled by the pressure for popular control of the nominations process and the erosion of the electoral college's power—effectively made the Presidency "one of three *equal* departments of government." *Id.* at 2322 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 21 (4th ed. 1957)). Nonetheless, essentially all of what we recognize as the immigration law canon emerged well after the Jacksonian period; the era of Chinese exclusion followed this period by more than fifty years. It is therefore unlikely that this early tradition explains the Court's approach in the plenary power cases.

21. In discussing the Court's lack of authority to pass judgment on the motives of the political branches, the Court explained,

these cases also contributed to the Court's incomplete conceptualization of federal power.

First, the Court in the late nineteenth century was focused on a *vertical* separation-of-powers problem—the problem of establishing the relative powers of the state and federal governments to regulate immigration. *Chae Chan Ping* was decided on the heels of a series of cases involving state efforts to regulate migration through inspection laws, head taxes, and the like.<sup>22</sup> The state laws arguably interfered with foreign commerce, and they challenged a Court struggling to sort out the role of the states in a world where the federal government did not extensively regulate migration.<sup>23</sup> In *Chae Chan Ping* itself, the Court confronted for the first time the question whether the federal government possessed authority to regulate immigration directly. Unsurprisingly, therefore, the Court was centrally concerned with articulating an affirmative conception of federal power in relation to the states.

Other developments taking place in American constitutional law around the same time likely augmented this focus. *Chae Chan Ping* was decided just a few years before *United States v. E.C. Knight Co.*,<sup>24</sup> perhaps the most important late nineteenth-century effort by the Court to police Congress's use of its commerce power. During this period the federal government was growing, but judicial skepticism of the constitutional authority had begun to gather. The

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We do not mean to intimate that the moral aspects of legislative acts may not be proper subjects of consideration. Undoubtedly they may be, at proper times and places, before the public, in the halls of Congress, and in all the modes by which the public mind can be influenced. Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses; but the province of the courts is to pass upon the validity of laws, not to make them.

*Chae Chan Ping*, 130 U.S. at 603.

22. See, e.g., *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (striking down New York and Louisiana laws that required shipmasters to pay fees or post bonds to indemnify states if immigrants ended up on public assistance, on the ground that the laws interfered with Congress's power to regulate interstate commerce); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down a California law regulating the entry of, among others, "lewd and debauched women," on the ground that the law interfered with Congress's exclusive power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. (7 How.) 283, 447-50, 453 (1849) (striking down New York and Massachusetts laws that levied fees on arriving immigrant passengers but relying on various rationales, including that fees constituted unconstitutional regulations of foreign commerce).
23. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19-49 (1996) (discussing the centrality of state regulation during the first two-thirds of the nineteenth century, as well as the federalism concerns raised by the possibility of federal immigration regulation).
24. 156 U.S. 1 (1895).

Court in *Chae Chan Ping* had to overcome this skepticism to justify exclusive federal authority for this growth over immigration. It thus contrasted a concept of local interests—the realization of which constituted one of the very reasons that the several states of the Union existed—with national interests, such as the regulation of foreign affairs. With respect to the latter, the Court emphasized, we are “one people, one nation, one power.”<sup>25</sup>

Second, the Supreme Court’s unitary conception of immigration authority likely stemmed from its reliance on then-conventional accounts of sovereignty in international law. Given our system of enumerated powers, one would ordinarily expect the Court to specify the textual source of the authority to regulate immigration when reviewing a congressional statute. But though the Court did present a list of constitutional powers designed to protect the “full and complete power of a nation within its own territories”<sup>26</sup> (all but one were powers of Congress) it implicitly acknowledged that no clear textual source could be found. Lacking a firm textual footing for immigration authority in the Constitution, the Court turned to principles of customary international law establishing that all sovereigns have inherent authority to exclude strangers from their territory.<sup>27</sup> This turn to a sovereignty-based justification for the Chinese Exclusion Acts necessarily resulted in an opinion that heavily emphasized the existence of a federal power largely abstracted from the institutional details of its operation. After all, the Westphalian conception of sovereignty common in nineteenth-century international law treated the sovereign as a singular entity, a black box of unitary power. The Court and the concepts it invoked thus had nothing to say about the institutional location of immigration authority.

But despite its focus on the federal government’s power as a general matter, the Court did not conflate the political branches entirely in the early immigration cases. The Court could not completely avoid the issue of interbranch relations, because the Chinese Exclusion Act of 1888 conflicted

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25. *Chae Chan Ping*, 130 U.S. at 606.

26. *Id.* at 604 (listing the powers to “declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship”). The treaty power is the only power listed that is granted to the President. See U.S. CONST. art. II, § 2 (“[The President] shall have [the] Power, by and with the Advice and Consent of the Senate to make Treaties . . .”).

27. See *Chae Chan Ping*, 130 U.S. at 608; see also *Fong Yue Ting v. United States*, 149 U.S. 698, 705-09 (1893) (relying on the same sources of authority to affirm Congress’s power to deport noncitizens).

with an existing treaty with China.<sup>28</sup> Indeed, Chae Chan Ping's first argument against the Act was that it violated the treaty's prohibition against expelling existing Chinese residents. The Court quickly rejected this claim, however, relying again on a unitary conception of sovereignty. The Court held that the last expression of the sovereign controlled, whether it was embodied in acts of Congress or the treaties negotiated by the Executive.

Though this conclusion may seem straightforward, it nonetheless represented a significant separation-of-powers statement when understood in context, because the President, up to that point in time, had driven most immigration policy. But while the Court was clearly cognizant of the possibility of interbranch tension,<sup>29</sup> it appeared perfectly happy to allow either branch to

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28. In 1868, China and the United States signed a treaty that recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." Additional Articles to the Treaty Between the United States and China of June 18, 1858, U.S.-P.R.C., July 28, 1868, 16 Stat. 739, 740, cited in *Chae Chan Ping*, 130 U.S. at 592-93. In 1880, this treaty was amended to permit the United States to impose temporary restrictions on the immigration of Chinese laborers. Treaty Concerning Immigration, U.S.-P.R.C., art. I, Nov. 17, 1880, 22 Stat. 826, 826. But the 1880 amendments preserved the rights of resident Chinese immigrants to come and go from the United States. Congress initially complied with this condition, though it required immigrants to obtain reentry certificates in order to reenter after traveling abroad. *Id.* at art. II, 22 Stat. 827. In the fall of 1888, however, Congress passed a statute providing that no Chinese laborer who left the United States would be permitted to return, regardless of whether he possessed a reentry certificate. This was the statutory provision at issue in *Chae Chan Ping*.
29. *Chae Chan Ping*, 130 U.S. at 600 (noting that "[i]t will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of this country"). In reality, there does not appear to have been much actual tension between the President and Congress over the 1888 Act. After the President negotiated an amendment to the Burlingame Treaty in 1880, providing that if the entrance of Chinese laborers threatened the good order of the United States, then the United States had the authority to "regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it," *id.* at 596, Congress initially passed a bill that would have stopped Chinese laborers from entering for twenty years. The President vetoed the bill on the ground that the period was too long, and Congress then passed the first Chinese Exclusion Act suspending the entry of Chinese laborers for ten years, which the President then signed. See LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 15 (1995). By the fall of 1888, the President began attempting to negotiate further amendments with China. The so-called Bayard-Zhang Treaty would have extended Chinese exclusion for twenty years and prohibited reentry by most immigrants who left to visit China (unless the laborers had assets worth at least \$1000 or immediate family living in America). The treaty also continued the obligation of the U.S. government to protect Chinese people and property in the United States. See *id.* at 21-22. Congress then passed an act in September of 1888, Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476, that would have expanded Chinese exclusion, but it was effective only on ratification of the Bayard-Zhang

respond to what both political departments perceived to be a potential threat to public peace on the West Coast.<sup>30</sup> As far as the Court was concerned, it was none of its business whether Congress was justified in ignoring the United States's engagement with another nation, or whether the Executive was itself supportive of the turn of events in Congress.

In a limited fashion, then, the Court recognized as early as *Chae Chan Ping* that two separate departments constituted the “political branches.” The nineteenth-century cases even contain hints that each of the political branches might have different sorts of authority. In *Chae Chan Ping*, for example, the Court referenced an exchange between the Secretary of State under President Pierce and the U.S. Ambassador to Switzerland, in which the Secretary wrote that “[i]t may always be questionable whether a resort to this power [to exclude] is warranted by the circumstances, or *what department of the government is empowered to exert it.*”<sup>31</sup> In *Fong Yue Ting v. United States*,<sup>32</sup> in which a divided Court held that the power to deport was a corollary to the power to exclude, the Court similarly treated as an open question whether the Executive can act to exclude or expel aliens without authorization from

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Treaty. This history thus suggests a coordinated effort by the President and Congress to secure simultaneously an international agreement and enabling domestic legislation. It was only after the Chinese government refused to ratify the treaty that Congress passed the Scott Act prohibiting re-entry of Chinese laborers, regardless of whether they possessed a re-entry certificate.

30. The Court wrote:

But notwithstanding these strong expressions of friendship and good will, and the desire they evince for free intercourse, events were transpiring on the Pacific Coast which soon dissipated the anticipations indulged as to the benefits to follow the immigration of Chinese to this country. . . . Whatever modifications have since been made to [the general provisions of the treaties] have been caused by a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there. . . .

. . . .  
. . . As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.

*Chae Chan Ping*, 130 U.S. at 593-95.

31. *Id.* at 607 (emphasis added). In fleshing out the sovereign right to exclude, the Court referred to a number of such communications between secretaries of state and foreign ambassadors.

32. 149 U.S. 698 (1893).

Congress. In its analysis of whether the power to deport or remove is contained within the conception of sovereignty that justifies exclusion, the Court considered the extent to which banishment was permitted at common law. In England, apparently, the only source of controversy was not whether banishment was appropriate, but whether “the power to expel aliens . . . could be exercised by the King without the consent of Parliament.”<sup>33</sup> In practice, the Court noted, the King performed banishment unilaterally.<sup>34</sup> But Parliament also passed several acts between 1793 and 1848 wielding the same power.<sup>35</sup> In *Fong Yue Ting*, the Court neither attempted a resolution of the common law debate nor suggested whether the United States retained or rejected this aspect of the common law relationship between the Executive and the legislature.

But even as these early cases elide the difficult question of how the Constitution allocates immigration authority between the President and Congress,<sup>36</sup> they introduce the possibility of two very different conceptions of that power allocation—the twin models of inherent authority and delegation that have been present throughout the history of immigration regulation. On the one hand exists the possibility that the executive branch has inherent authority to exclude or expel noncitizens. The English common law history raises this possibility, and in *Fong Yue Ting*, the Court cited approvingly to several legal sources that support such a power. The Court noted, for example, that “[e]minent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.”<sup>37</sup> The Court also cited the Ortolan treatise on the law of the sea, noting that in France, no “special form” is prescribed for expulsion and that the right of expulsion is “wholly left to the executive power.”<sup>38</sup>

On the other hand exists the possibility of something akin to modern conceptions of delegation, according to which Congress possesses the power to

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33. *Id.* at 709.

34. According to Blackstone, however, the King had no such power. “[N]o power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will. . . . For exile, or transportation, is a punishment unknown to the common law; and, whenever it is now inflicted, it is . . . by the express direction of some modern act of parliament.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*133.

35. *Fong Yue Ting*, 149 U.S. at 709.

36. *Id.* at 711-13.

37. *Id.* at 709.

38. *Id.* at 708.

regulate but can delegate significant authority to executive branch actors.<sup>39</sup> This conception of delegation may have been in some tension with late nineteenth-century understandings of the relationship between Congress and the President, but it is prominent in the cases nonetheless. In *Fong Yue Ting*, for example, the Court noted that the power of Congress to expel, as well as to exclude, “may be exercised entirely through executive officers,” emphasizing:

It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions . . . to the final determination of executive officers, or to the decision of such officers in the first instance.<sup>40</sup>

Indeed, the Court assumed that Congress has the power to authorize executive officials to summarily deport an alien without trial or judicial examination, just as Congress might authorize executive officials at the ports of entry to prevent an alien’s entrance without review of any kind.<sup>41</sup>

Other contemporaneously decided cases strike similar notes. In *Nishimura Ekiu v. United States*<sup>42</sup> and *Yamataya v. Fisher*,<sup>43</sup> for example, the Court was quite specific about the extent to which Congress can delegate the supervision of the admission of aliens into the United States. The Court observed that Congress may delegate the power to decide the facts upon which an alien’s right to enter the United States rested, either to the State Department or to Treasury officials, including frontline customs officials and inspectors acting under the collectors’ authority.

*Yamataya* and *Nishimura Ekiu* are ultimately part of a long line of very similar cases, which tangle together three different questions.<sup>44</sup> First, the cases raise the question of whether noncitizens must be given due process in

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39. See, e.g., William J. Novak, *The Legal Origins of the Modern American State*, in *LOOKING BACK AT LAW’S CENTURY* 249 (Austin Sarat et al. eds., 2002); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725-29 (2002) (discussing different conceptions of delegation).

40. *Fong Yue Ting*, 149 U.S. at 714.

41. *Fong Yue Ting*, 149 U.S. at 762 (Fuller, C.J., dissenting).

42. 142 U.S. 651 (1892).

43. 189 U.S. 86 (1903).

44. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *United States v. Ju Toy*, 198 U.S. 253 (1905); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895).

deportation or exclusion proceedings.<sup>45</sup> Second, the cases concern the role of Article III courts in these proceedings, a role that might be mandated by either Article III itself, by the Due Process Clause, or by the common law requirements of habeas corpus embodied in the Suspension Clause. (This issue was understood as a question of the separation of powers between the judicial branch and the political branches.) Third, the cases touch on the question of how the immigration power was allocated between the legislative and executive branches. Each of these questions proved thorny at the time, and their simultaneous presence makes it difficult to unpack cleanly the Court's thinking about each one of them. For example, in some cases the Court appears to press a delegation-centered account of immigration authority (that is, a view about the third question), because doing so served to suppress judicial intervention (which suggests a view about the first question).

### *B. Power Sharing in the Modern Administrative State*

The twentieth century brought major changes to the Supreme Court's separation-of-powers jurisprudence. The rise of the modern administrative state and the eventual demise of the nondelegation doctrine domesticated the idea that Congress could give extensive policymaking authority to the executive branch. The twentieth-century story of immigration law thus reflected how the strong conception of delegation present in the early immigration cases came to define both immigration law and American public law generally.<sup>46</sup> At the same time, however, the possibility of inherent executive authority continued to exert surprising influence over immigration jurisprudence.

A good starting place for assessing our central separation-of-powers question in a twentieth-century context, then, is the cases that evince the confusion between the inherent authority and delegation models—a confusion captured best by the Supreme Court's decision in *United States ex rel. Knauff v. Shaughnessy*.<sup>47</sup> Ellen Knauff was a German citizen who had married an

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45. *Yamataya* answers this question in the affirmative for deportation proceedings, overruling contrary suggestions in *Fong Yue Ting*. See *Yamataya*, 189 U.S. at 99-101.

46. This observation means, of course, that separation-of-powers discussions (and assumptions) in early immigration cases were often bound up with larger debates about the scope of the national government's authority and the shape of the administrative state. Several 1920s cases, for example, implicitly assume that the President's immigration authority derives from congressional delegations. See, e.g., *Mahler v. Eby*, 264 U.S. 32 (1924); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). Given the context and timing of these cases, it may be that this assumption was partially motivated by a desire to enforce a more robust conception of the nondelegation doctrine. See, e.g., *Mahler*, 264 U.S. at 43-45.

47. 338 U.S. 537 (1950).

American military officer and sought admission to the United States under the War Brides Act. When she was excluded, without a hearing and on the basis of secret evidence, she filed a lawsuit challenging both the statute that ostensibly authorized the exclusion and the statute's implementing regulations. By the time the Court decided *Knauff* in 1949, the question of delegation's propriety had largely been resolved via the New Deal Revolution. Nonetheless, in rejecting *Knauff's* argument that the statute was void as an unconstitutional delegation of legislative power, the Court did not rely on its growing delegation jurisprudence. Instead, the Court turned to the generalized conception of sovereign power that it had developed in the foundational immigration law cases.

The Court emphasized that no issue of unconstitutional delegation was present, because the exclusion of aliens is a fundamental act of sovereignty. And, for the first time, the Court explicitly suggested that the President possesses inherent power to regulate immigration. "The right to [exclude aliens]," the Court wrote, "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."<sup>48</sup> On the Court's view, when Congress prescribes a procedure concerning the admissibility of aliens, it is not simply exercising a legislative power, it "is implementing an inherent executive power."<sup>49</sup>

It is far from clear what it would mean for Congress to implement an inherent executive power, though perhaps the Court was gesturing toward a conception of concurrent authority. Nor is it clear from *Knauff* whether the Court thought Congress could, by statute, limit the terms by which the President exercised his inherent authority, or whether the President could rely on his inherent authority to reject a congressional attempt to implement that authority. At a minimum, however, this statement suggests that the President possesses some power to act in the immigration arena without congressional authorization, and perhaps even despite congressional action.

*Knauff* thus is in tension with conventional understandings of the separation of powers. The Court linked the power to the capacious and unique conception of executive power defended in *United States v. Curtiss-Wright*, the case famous for articulating "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its

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48. *Id.* at 542.

49. *Id.*

exercise an act of Congress.”<sup>50</sup> Seen in this light, the Court’s statement in *Knauff* regarding inherent executive immigration authority appears related to the complexities of the scope and source of the foreign affairs power. The Court’s statement thus could be dismissed as an oddity, simply the product of a historically contingent conception of foreign affairs. Still, the statement represents perhaps the most explicit articulation of the view of inherent executive authority over immigration that had been implicit since the plenary power took shape. The Court’s rhetoric thus reinforces the fact that the competing models of delegation and inherent authority have long co-existed in the Court’s approach to immigration authority, despite the deep tensions between them.

As the modern administrative state developed in the latter half of the twentieth century, the Court’s understanding of the relationship between the branches took on more of the trappings of typical separation-of-powers jurisprudence, with delegation serving as the primary mechanism for power allocation. This evolution toward more mainstream conceptions of interbranch relations undoubtedly emerged in relation to developments in other areas of American public law. But two developments within immigration law also likely prompted the shift: first, the subtle erosion of the plenary power as a statement of uniquely unconstrained congressional authority, marked by the Court’s increased willingness to treat the immigration power as an ordinary enumerated power of Congress; second, the increasing comprehensiveness of the statutory regime regulating immigration, coupled with Congress’s increased delegation within that regime to executive officials.

Several cases decided during the second half of the twentieth century could be read to endorse implicitly the conception of immigration authority as a typical Article I power implemented through delegation to the Executive.<sup>51</sup> In *Galvan v. Press*,<sup>52</sup> for example, the Court reiterated the basic blueprint outlined in the nineteenth century, noting that the power to exclude is a fundamental sovereign prerogative entrusted to the political branches. But it then jumped to a conclusion absent from those earlier cases:

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50. 299 U.S. 304, 320 (1936) (rejecting a delegation challenge to a congressional resolution authorizing the President to prohibit the sale of arms to Bolivia if he found that such a ban would contribute to peace in the region on the grounds that the nondelegation doctrine was inapposite in the foreign affairs context).

51. Moreover, one can find passing references to the idea of exclusive legislative authority over immigration even earlier. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909).

52. 347 U.S. 522 (1954).

[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissue of our body politic as any aspect of our government.<sup>53</sup>

Many more recent cases, such as *Kleindienst v. Mandel*<sup>54</sup> and *Fiallo v. Bell*,<sup>55</sup> have reiterated this language,<sup>56</sup> which could be read as simply limiting judicial review and recognizing political branch primacy generally.<sup>57</sup> But the reference to “Congress” rather than the political branches as a unit could also be read as recognizing congressional primacy.

For an even more striking example in which the Court appeared to conceptualize immigration authority as a typical congressional power governed by standard conceptions of the separation of powers, consider *INS v. Chadha*:

It is also argued that these cases present a nonjusticiable political question, because *Chadha* is merely challenging Congress’s authority under the Naturalization Clause, and the Necessary and Proper Clause. It is argued that Congress’s Art. I power “To establish an uniform Rule of Naturalization,” combined with the Necessary and Proper Clause, grants it unreviewable authority over the regulation of aliens. The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo*: “Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.”<sup>58</sup>

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53. *Id.* at 531 (citations omitted).

54. 408 U.S. 753, 766-67 (1972).

55. 430 U.S. 787, 792 (1977).

56. *Fiallo*, 430 U.S. at 792-93 & n.4 (quoting *Galvan v. Press* for the proposition that “the formulation of these [immigration] policies is entrusted exclusively to Congress”); *Kleindienst*, 408 U.S. at 767 (same).

57. See also cases cited *supra* note 44.

58. 462 U.S. 919, 940-41 (1983) (citations omitted).

This passage not only suggests that the immigration power is a function of Congress's authority to set rules for naturalization, but also suggests that the power to regulate immigration may be subject to constraint, just like any other Article I power. On this account, the immigration power is plenary in the same way that the commerce power is plenary under Justice Marshall's formulation in *McCulloch v. Maryland*, not in a way that suggests complete freedom from constitutional restraint, or inherent executive authority to regulate. Moreover, although *Chadha* explicitly addresses the institutional structure of national lawmaking in the immigration arena—it is perhaps the only modern Supreme Court case directly concerned with that structure—the *Chadha* Court did not devote any of its opinion to the question whether the policymaking structure might be different in immigration law than in other regulatory arenas.

Despite these developments bringing immigration law into line with standard understandings of separation of powers, traces of inherent executive authority with respect to immigration still appear in doctrine from the latter part of the century—though the Court never again came close to making as bold a statement in support of inherent authority as its undefined elaboration in *Knauff*. In *Hampton v. Mow Sun Wong*,<sup>59</sup> for example, the Court struck down a regulation promulgated by the Civil Service Commission (CSC) barring noncitizens, including lawful permanent residents, from employment in the civil service. The Court suggested that the regulations' validity turned on whether the CSC "has direct responsibility for fostering or protecting" the overriding national interest claimed by the government in the case.<sup>60</sup> The Court concluded that the CSC did not have that expertise or status—a conclusion that then-Justice Rehnquist argued, in dissent, ran counter to the standard operating procedure of the administrative state.<sup>61</sup>

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59. 426 U.S. 88 (1976).

60. *Id.* at 103.

61. *Id.* at 117, 123 ("The Court, while not shaping its argument in these terms seems to hold that the delegation here was faulty. Yet, it seems to me too clear to admit of argument that under the traditional standards governing the delegation of authority the Civil Service Commission was fully empowered to act in the manner in which it did in this case.") (Rehnquist, J., dissenting). It is worth noting that the due process of lawmaking doctrine the Court articulates in *Hampton* has become an administrative law relic and has not been applied or developed in subsequent cases. Indeed, the doctrine seems to have been developed in the case to provide a structural argument for invalidating a federal rule disadvantaging aliens that could not be challenged using equal protection doctrine, given the Court's then-recent decision in *Mathews v. Diaz*, 426 U.S. 67 (1975) (holding that rational basis review applies to distinctions drawn by the federal government with respect to aliens).

Interestingly, the Court did not explicitly state that *Congress* had to have delegated the authority to the agency to advance federal goals. Instead, the Court concluded that, “if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.”<sup>62</sup> The Court then conducted an inquiry into whether Congress or the President had ever required the CSC to adopt a citizenship requirement for employment eligibility, ultimately concluding that neither had.<sup>63</sup>

The Court’s opinion hardly represents a model of clear reasoning. The majority’s language may simply reflect an assumption that Congress’s Civil Service Act delegated power to the President to establish the civil service, thus giving the President the authority to set rules for the service.<sup>64</sup> Yet the majority appears to be extremely careful to mention consistently both the President and Congress each time it discusses the source of the power to require that government employees be citizens – and never in a hierarchical way that would suggest the President’s only power stemmed from congressional delegation. The majority also relies on the idea that the citizenship rule might be justified as a useful bargaining chip for presidents negotiating with foreign countries. Together these features raise the possibility that the Court thought that the President himself had independent authority to establish the citizenship requirement.<sup>65</sup> In this light, it is telling that, in the aftermath of the case, President Ford issued an executive order reestablishing the very same

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62. *Mow Sun Wong*, 426 U.S. at 103 (emphasis added).

63. *Id.* at 116 (finding evidence of congressional and presidential awareness of the restriction under several different administrations, but still concluding that the CSC’s rule could not be justified by concerns that were properly of the CSC).

64. Were this true, however, it is difficult to explain the Court’s holding. As the dissent points out, the Court used procedural due process as a “scalpel with which one may dissect the administrative organization of the Federal Government.” *Mow Sun Wong*, 426 U.S. at 121 (Rehnquist, J., dissenting). The dissent took a much more straightforward administrative law view of the case, discussing the case in terms of the legislature’s delegation of authority to administrative agencies. *Id.* at 122. The dissent argued that the only way to challenge the rule is by arguing that there was an improper delegation of authority. Despite the Court’s suggestion to the contrary, the dissent emphasized that the CSC was fully empowered to act as it did in this case. *Id.* at 123.

65. Another alternative is that the Court was enforcing a sort of nondelegation canon, requiring the President to be more specific on the ground that he cannot delegate the sensitive question of a citizenship requirement to agency officials. For a discussion of this possibility, see Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74. U. CHI. L. REV. 1671, 1674-77 (2007).

employment restriction originally adopted by the Commission.<sup>66</sup> That regulation survived legal challenge.<sup>67</sup>

Even in modern immigration cases that superficially adopt the delegation framework, the idea of executive exceptionalism in the immigration arena persists. In *Jama v. ICE*,<sup>68</sup> for example, the disagreement between the majority and the four dissenters captures the two different conceptions of Article II authority—of congressional control versus shared power—that we have traced through a century of immigration jurisprudence. The case required an inquiry into whether the provision setting out the procedure by which the Attorney General selects the removal destination for an alien requires that the destination country accept the alien. The dispute arose when an alien ordered removed to Somalia challenged his destination of removal on the ground that Somalia had not agreed to take him. The majority declined to infer a rule of acceptance, emphasizing that to do so where Congress has not clearly set it forth “would run counter to our customary policy of deference to the President in matters of foreign affairs.”<sup>69</sup> This language harkens back to *Knauff* and *Curtiss-Wright* and could be seen as an expression of the idea that the President possesses some inherent authority over immigration matters, at least in the absence of congressional action.

The four dissenters, by contrast, rejected the idea that an acceptance requirement would abridge executive judgment, emphasizing that Congress already had interfered with executive judgment by adopting an elaborate removal scheme. In so concluding, the dissenters emphasized that it is “to Congress that the Constitution gives authority over aliens.”<sup>70</sup> In other words, Congress may delegate discretion to the Executive, but it is not appropriate to use a conception of freestanding executive authority over foreign affairs to limit in any way Congress’s definition of the scope of executive authority.

In other recent decisions applying administrative law principles to agencies tasked with immigration-related matters, a conception of enhanced executive authority finds expression within the contemporary *Chevron* framework rather than in the implicit idea of inherent authority. In these cases, the Court has

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66. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 2, 1976) (establishing that “[n]o person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States” and citing as authority “the Constitution and statutes of the United States of America, including Sections 3301 and 3302 of Title 5 of the United States Code”).

67. See *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978).

68. 543 U.S. 335 (2005).

69. *Id.* at 348.

70. *Id.* at 368 (Souter, J., dissenting).

articulated a variation on the typical standards of administrative deference, giving more than the ordinary leeway to the Executive in its interpretation of congressional mandates. In so doing, the Court has relied heavily on the “especially sensitive political functions” immigration officials must perform, consistent with the ethos of *Curtiss-Wright*.<sup>71</sup>

A recent example of this heightened deference to the Executive can be found in the Court’s decision in *INS v. Aguirre-Aguirre*.<sup>72</sup> At issue was a statutory provision establishing that an alien is ineligible for withholding of removal if the Attorney General determines that the alien has committed a serious nonpolitical crime outside the United States before entering the United States.<sup>73</sup> In the course of protesting the high cost of bus fares and the government’s failure to investigate the disappearance and murder of students in his native Colombia, Aguirre-Aguirre and members of the group *Estudiante Sindicado* set fire to busses, assaulted passengers who refused to leave those busses, and vandalized stores and police cars.<sup>74</sup> The BIA determined that these criminal means outweighed the acts’ political nature and denied withholding.<sup>75</sup> The Ninth Circuit reversed on the ground that the BIA had not taken into account all appropriate factors, including whether Aguirre-Aguirre’s violent acts were grossly disproportionate to their political objectives.<sup>76</sup> The Supreme Court then took the Ninth Circuit to task for failing to apply *Chevron* to the BIA’s decision and went on to emphasize that deference to the executive branch

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71. *INS v. Abudu*, 485 U.S. 94, 110 (1988) (“[A]lthough all adjudications by administrative agencies are to some degree judicial and to some degree political . . . INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.”). In *Abudu*, the Court held that the denial of a motion to reopen that was not timely filed was not subject to an abuse of discretion standard on review. *Id.* at 111. The Court’s conclusion that the BIA is entitled to attach significance to the untimeliness of a petition reads like a non sequitur after its observation that immigration officials exercise particularly sensitive political functions, because the former rationale stems from concerns regarding the conservation of judicial and administrative resources, not foreign policy or related judgments. For an account of the variety of standards of deference the Court employs in administrative law, including the heightened deference in immigration cases, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083 (2008).

72. 526 U.S. 415 (1999).

73. 8 U.S.C. § 1253(h)(2)(c) (1996).

74. 526 U.S. at 421-22.

75. *Id.* at 422.

76. See *Aguirre-Aguirre v. INS*, 121 F.3d 521, 524 (9th Cir. 1997).

is especially important in the immigration context, where officials exercise particularly sensitive foreign policy judgments. The Attorney General's decision to deem violent offenses political in nature and to allow persons who had committed those offenses to stay in the United States could affect relations with Colombia—a possibility the Court thought should be left to the control of the Executive.<sup>77</sup>

In short, for over a century the Supreme Court's doctrine has envisioned two quite different congressional-executive relationships in the immigration context. It may or may not be possible to reconcile the lingering vestiges of inherent executive authority with the more conventional administrative law approach that requires congressional authorization for action. But cobbling together a theory from these disparate doctrinal strands might point toward the existence of concurrent authority. Perhaps the President has some Article II authority over immigration at the same time that Congress possesses regulatory authority under Article I, such that the President could act in the immigration arena without statutory authorization.<sup>78</sup> This account is common in discussions of the distribution of war-making powers under the Constitution, and an exploration of the distribution of powers in the foreign affairs context, though beyond the scope of this Article, could shed valuable light on our central questions.

In both the foreign affairs and immigration contexts, however, it seems that the thorniest questions concern what to do about conflict between Congress and the President: can Congress use its Article I authority effectively to extinguish the President's Article II authority? Can the President act to some

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77. 526 U.S. at 424-25. In its brief to the Court, the government emphasized that the traditional reasons for deference are "magnified" in the immigration context. The Ninth Circuit had suggested that factors such as whether violence was necessary to advance an agenda should be taken into consideration in determining whether Aguirre-Aguirre's acts were out of proportion to his political ends. The government underscored its argument for deference by emphasizing the strong policy reasons that counseled against compelling the Attorney General to weigh the perceived necessity and success of violence. The government took the position that to announce that violence was necessary in a certain country to secure change would be to risk inciting further violence, which in turn would have foreign policy implications for the United States. See Brief of Petitioner-Appellant at 19-22, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754).

78. This possibility arises in two of the case studies we explore in Part II of this Article. Presidents Roosevelt and Truman arguably claimed authority to launch and maintain a temporary worker program without explicit authorization by Congress for the particular program they adopted (and perhaps even in the face of an explicit congressional rejection of the program), and President Reagan's Department of Justice cited the President's inherent authority as justification for managing the Haitian refugee crisis, even as the executive branch also claimed statutory authorization for its actions.

extent, even in the face of congressional restrictions? These questions have no agreed-upon answers in the foreign affairs context today, and our survey of immigration jurisprudence highlights the fact that clear answers are even further from possible there.

For our present purposes, however, this confusion is the most important point to appreciate. The Court's reliance on multiple, inconsistent conceptions of the distribution of immigration authority over the years means that the jurisprudential history of immigration law ultimately provides little guidance, much less definitive answers, regarding the political branches' relative authority in immigration decisionmaking. This limitation of the jurisprudence opens up the intellectual terrain and expands the possibilities for institutional design, suggesting a much more fluid and contestable field of play than is traditionally imagined. For a more complete understanding of the political branch dynamics, we must turn to constitutional practice.

## II. THE SEPARATION OF POWERS IN PRACTICE

This Part shifts focus from the judiciary and jurisprudence to the functional relationship between the President and Congress in the development of immigration policy, as it has played out historically.<sup>79</sup> A singular, important fact has framed this relationship: throughout the twentieth century, Congress largely maintained control over the formal legal criteria governing the admission and removal of noncitizens to and from the United States. As discussed in Part I, immigration law did not always take this shape. For much of the nineteenth century, few immigration rules existed, and the treaty power played a central role in the adoption of some of the earliest federal rules regulating immigrant admissions.<sup>80</sup> But the federal government's reliance on the treaty power and Congress's reluctance to engage directly in immigration policymaking were short lived. As early as the turn of the twentieth century, Congress established itself as a regulatory force, making more and more

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79. For a similar approach in another arena, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (studying the history of executive-congressional interaction in the context of war-making and national security-related regulation).

80. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 16-17 (2006) (discussing the treaty arrangements between the United States and China that shaped the development of early admissions policy). For a discussion of the role states played in regulating immigration in the nineteenth century, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841-83 (1993).

immigration law through the legislative process.<sup>81</sup> By the 1920s, when Congress passed the now-infamous admissions quotas in the National Origins Act,<sup>82</sup> the use of formal international agreements to structure migration policy had moved mostly to the periphery.

Congress's increasing exertion of control over the formal legal criteria governing admissions and deportation has not by any means meant that the President's role in setting core immigration policy has disappeared, and we aim in this Part to illuminate that role. The President's veto power certainly has given him some leverage over the shape of immigration law. Perhaps the most well known exercise of this power unfolded at the turn of the twentieth century, when Congress sought over a thirty-year period to impose a literacy requirement on arriving immigrants. Multiple presidents vetoed these efforts,<sup>83</sup> until Congress finally overrode President Wilson's second veto in 1917.<sup>84</sup>

In this Part, however, we put to the side the President's formal role in the legislative process, largely because the veto power enables the President only to block rather than to initiate the setting of admissions and removal standards. Instead, we explore the other paths through which the Executive has wielded affirmative authority over admissions and removals, even as Congress has developed an extremely detailed immigration code covering the substantive criteria for admitting and deporting immigrants. We identify three models of executive power, which map onto those identified by the courts in Part I: (1)

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81. See, e.g., Immigration Act of 1907, ch. 1134, 34 Stat. 898.

82. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (2002) (discussing the development of the national origins quota system).

83. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 216 (2006) (noting President Taft's veto of immigration legislation, including a literacy test); see also *id.* at 227 (noting President Cleveland's veto on March 2, 1897, accompanied by a veto message that acknowledged the necessity of "protecting our population against degeneration" brought on by immigration but declaring the literacy test an unsuitable screening mechanism on the ground that it was "more safe [sic] to admit a hundred thousand immigrants . . . unable to read and write . . . than to admit one of those unruly agitators and enemies of governmental control . . . [who] delights in arousing by inflammatory speech the illiterate . . ."). For an account of the shifting political coalitions in the debate over immigration restriction in the early twentieth century, see Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, in *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* 223 (Claudia Goldin & Gary D. Libecap eds., 1994).

84. See ZOLBERG, *supra* note 83, at 240 (noting that Wilson insisted after both vetoes that "the literacy test in effect penalized a lack of opportunity in the country of origin" and after his second veto argued that allowing immigration officials to pass judgment on the policies of foreign governments would lead them to perform "a most invidious function" that could cause diplomatic problems).

inherent executive authority; (2) formal delegated authority; and (3) de facto delegated authority. Though the inherent authority and formal delegation models have historically supported expansive regulation by the Executive historically and continue to play a role in defining the interbranch relationship, the model of de facto delegation is the most salient and least understood in today's context.

On the subject of inherent authority, we consider the negotiation and maintenance of the Bracero guest worker program in the post-World War II period as an illustration. As we show, as late as the mid-twentieth century, it was still thinkable for the Executive to claim the constitutional authority to decide for himself whom to admit to the country—standard setting ordinarily thought to be the province of Congress. On the subject of delegated authority, we focus first on the model of express congressional delegation to the executive branch. To manage the Haitian and Cuban refugee crises of the 1970s, 1980s, and 1990s, the Executive relied heavily on powers formally delegated to it by Congress, even as lawyers for the administrations invoked the presidents' inherent authority. These episodes illuminate how the Executive has been able to wield delegated authority ostensibly limited to emergency or exceptional contexts to expand its power over core immigration policy.

We then shift from the formal delegation model to explore what we call de facto delegation in immigration law. This model dominates the interbranch relationship today. We show that the intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community. We ultimately argue that this form of authority creates an important regulatory asymmetry. It gives the Executive substantial authority to shape immigrant screening policy at the back end of the system, through decisions about whom to deport, but little power to shape screening policy at the front end of the system, in decisions about whom to admit—an asymmetry whose consequences we discuss in Part III.

#### *A. The Bracero Experiment and Inherent Executive Authority*

The so-called Bracero Program initiated during World War II provides an important example of congressional-executive dynamics. As we will show, Presidents Roosevelt and Truman acted as though they possessed inherent authority to establish and maintain a guest worker program. Today, this assumption would be virtually unthinkable. In the negotiations over comprehensive immigration reform in 2006 and 2007, for instance, President Bush never suggested that he thought he could circumvent Congress and

authorize the large-scale admission of temporary workers.<sup>85</sup> But in the 1940s, such circumvention appears to have occurred.

In the late 1930s, growers in the American South and Southwest began pressuring the government to admit temporary agricultural workers.<sup>86</sup> The federal government was initially unresponsive. But in 1942, amidst World War II and the so-called “Manpower Crisis,”<sup>87</sup> immigration officials formed a committee to study the possibility of launching a program to import Mexican workers.<sup>88</sup> Within a month, this interagency committee—which included

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85. Of course, the fact that President Bush never claimed such authority does not mean that no one has contemplated other strategies to manage the admission of temporary workers. Some participants in the debate have suggested that the United States execute a bilateral labor migration agreement with Mexico, which would not require the same two-thirds approval of the Senate as a treaty. *See, e.g.*, Marc R. Rosenblum, *The United States and Mexico: Prospects for a Bilateral Migration Policy* (Mar. 8, 2007), <http://borderbattles.ssrc.org/Rosenblum/> (detailing the history of U.S.-Mexico bilateral cooperation and addressing obstacles to forging a bilateral agreement in today’s climate). In addition, in the final year of the Bush Administration, the Department of Homeland Security made rulemaking noises, considering whether to expand the reach of temporary worker programs and substantially changing the policy course of the H-2A and H-2B programs. *See* *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 Fed. Reg. 49,109 (Aug. 20, 2008) (“Under the proposed rule, a job would be defined to be temporary where the employer needs a worker to fill the job for a limited period of time. The term ‘limited period of time’ is in turn defined as a period of need that will end in the near, definable future.”); *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 Fed. Reg. 76,891 (Dec. 18, 2008) (lengthening the time a temporary worker may remain in the U.S. after a visa has expired, shortening the time during which a worker with an expired visa must be out of country before becoming eligible for a new visa, adjusting salary formulas, and easing requirements for employers to demonstrate that they have recruited U.S. workers). The Obama Department of Labor proposed to rescind the new H-2A rule for nine months. *See* 74 Fed. Reg. 11,408 (Mar. 17, 2009).
86. During the war, growers wrote Congress requesting that immigration policy be modified to permit “limited migration of Mexican workers.” WAYNE D. RASMUSSEN, U.S. DEP’T OF AGRIC., BUREAU OF AGRIC. ECON., *A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM, 1943-1947*, at 200 (1951). The California USDA war board also recommended to the U.S. Department of Agriculture investigating the possibility of importing temporary labor from Mexico. *Id.* For a discussion of the changes to immigration policy that increased this pressure, see MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).
87. ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 41-45 (1964).
88. Members of Congress also recognized the possibility of addressing wartime labor needs through the importation of guest workers. *See* Marc R. Rosenblum, *At Home and Abroad: The Foreign and Domestic Sources of U.S. Immigration Policy* 50 (2000) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with authors).

Roosevelt's War Manpower Commission,<sup>89</sup> the Immigration and Naturalization Service,<sup>90</sup> and the Departments of State, Labor, and Agriculture—had drawn up plans to admit the first installment of Mexican guest laborers.<sup>91</sup>

In July 1942, the U.S. Secretary of Agriculture, Claude Wickard, presented the labor importation plan to the Mexican government, and the countries signed a bilateral agreement laying out the plan's details.<sup>92</sup> Funded by half a million dollars from the "President's Emergency Fund," the Program's management was immediately turned over to the Farm Security Administration (FSA). On September 29, 1942, the first installment of Bracero workers arrived in the United States. For President Roosevelt, this agreement simultaneously enabled the country to maintain agricultural production levels during the wartime shortage while promoting a bilateral immigration policy that advanced relations with Mexico in the spirit of the United States's Good Neighbor Policy.<sup>93</sup>

Importantly, Roosevelt established the program without first seeking consent from Congress (or initiating public debate, for that matter). The administration might have believed that statutory authority for its program already existed in the Ninth Proviso of the Immigration Act of 1917, which authorized the Commissioner General of Immigration, with the approval of the Secretary of Labor, to "issue rules and prescribe conditions . . . to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission."<sup>94</sup> Nonetheless, the administration turned to Congress

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89. See DEAN ALBERTSON, *ROOSEVELT'S FARMER: CLAUDE R. WICKARD IN THE NEW DEAL* 287 (1961).

90. The INS had been relocated to the Justice Department just a few years earlier by President Roosevelt.

91. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 19 (John Brigham & Christine B. Harrington eds., 1992).

92. See ALBERTSON, *supra* note 89, at 287; CALAVITA, *supra* note 91, at 2.

93. See Rosenblum, *supra* note 88, at 236. For a discussion of Mexico's involvement in the initiation and maintenance of the Bracero Program, see DAVID FITZGERALD, *A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION* 48-55 (2009).

94. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 878. The Ninth Proviso was one of several exceptions appended to the end of Section 3 of the Immigration Act of 1917, which set forth the categories of inadmissible aliens. This exception to the general grounds of inadmissibility created, perhaps for the first time in American immigration history, a formal category of temporary admission for noncitizens. On its face, the Ninth Proviso does not appear to authorize the admission of large numbers of unskilled agricultural workers. Moreover, the Rules adopted by the Department of Labor to implement the Ninth Proviso suggest that it was designed principally for the temporary admission of individual

in short order after initiating the program, seeking specific authorization. Fewer than four months after the program began, the Department of Agriculture requested \$65,075,000 from Congress to expand it. After some brief legislative wrangling, Congress officially approved the Bracero Program on April 29, 1943, through the passage of Public Law 45.<sup>95</sup>

The fact that the Bracero Program operated for its first seven months as a bilateral agreement with no express congressional authorization suggests that President Roosevelt believed he had considerable leeway to craft immigration policy to address wartime labor shortages. More importantly, even if actors at the time would have thought that the Ninth Proviso provided congressionally delegated legal authority to initiate the program, the legal status of the program toward the end of the decade raised even more squarely the possibility that Roosevelt exercised inherent executive authority to regulate immigration. Under the terms of Public Law 45, Congress authorized the admission of temporary workers only for a fixed period of time. The program was initially set to expire in July of 1947. A few months before its expiration, Congress extended the Bracero Program until December 31, 1947.<sup>96</sup> But the statutory

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applicants for whom “urgent necessity or . . . unusual and grave hardship would result from a denial of their request.” U.S. DEP’T OF LABOR, BUREAU OF IMMIG., IMMIGRATION LAWS: RULES OF MAY 1, 1917, at 58 (4th ed. 1920). Nonetheless, it appears that the Proviso was added to the Act in part at the urging of agricultural employers who feared that the Act’s literacy requirements and head tax provisions would render most of their workers inadmissible. See OTEY M. SCRUGGS, BRACEROS, “WETBACKS,” AND THE FARM LABOR PROBLEM: MEXICAN AGRICULTURAL LABOR IN THE UNITED STATES, 1942-1954, at 76 (1988); see also DAVID GRIFFITH, AMERICAN GUESTWORKERS: JAMAICANS AND MEXICANS IN THE U.S. LABOR MARKET 31-32 (2006) (noting that Congress passed the Act of 1917 under pressure from agricultural interests, who feared “labor shortages with men leaving the fields for wartime service and industrial production” as the result of World War I). And during the tail end of World War I, the Department of Labor did adopt orders authorizing the temporary admission of Mexican agricultural workers. See U.S. IMMIG. SERIAL BULL., June 1, 1918, at 1-4 (containing Departmental Order No. 52461/202, authorizing the “temporary admission of certain alien laborers from Mexico”); SCRUGGS, *supra*, at 76-86. Perhaps as a result of this World War I-era activity, some modern scholars have assumed that the Ninth Proviso provided statutory authority for Roosevelt’s program as well. See, e.g., BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 126 (2004) (assuming that the Ninth Proviso provided the authority for the Bracero Program in 1942, as well as for the continuation of the program after 1947 when congressional authorization expired). But we have been unable to find any evidence that the administration actually invoked this provision as a source of authority in 1942. More importantly, the fact that the administration sought authorization from Congress just a few months after initiating the program complicates the assumption scholars have made about statutory authority.

95. Act of Apr. 29, 1943, Pub. L. No. 45, 57 Stat. 70.

96. See Act of Apr. 28, 1947, Pub. L. No. 40, 61 Stat. 1939.

extension required that the program “shall be liquidated within thirty days”<sup>97</sup> thereafter. Program supporters introduced additional legislation in the final months of 1947 to give the Department of Agriculture and the INS authority to admit foreign contract labor administratively, in the absence of a congressionally sanctioned program, but Congress never enacted this legislation.

One might suspect that the Bracero Program came to an end as 1947 drew to a close, given that the original statutory authorization had expired, that Congress had failed to extend the program, and that a congressional statute explicitly required the termination of the program. At this point, even in theory, the Executive could hardly continue to rely on the Ninth Proviso as a source of statutory authority. Congress had created a more specific authorization for the program with a firm expiration date and then, after considerable debate, decided not to extend the program.

In fact, however, the admission of temporary workers stopped for only a short time. On February 21, 1948, the State Department arranged a new accord with Mexico and labor importation resumed. No statute authorized this new agreement, and Congress did not pass a statute in the following months as it had in 1942. Instead, the Bracero Program continued to operate from 1948 until 1951 without *any* statutory sanction – and in apparent direct contravention of a statutory command that the program be “liquidated.” During this period, the Executive managed the movement of labor into the United States administratively, sometimes in controversial ways. In 1948, for example, hundreds of workers clamored for entry at the border after the Mexican government decided to permit U.S. growers to recruit two thousand workers from border towns, and the INS opened the border for a weekend.<sup>98</sup>

In July 1951, Congress finally passed legislation to authorize and extend the Bracero Program through 1953.<sup>99</sup> By that point, a number of concerns regarding the program’s implementation had arisen. In 1950, President Truman had established a Commission on Migratory Labor, whose final report documented the high levels of illegal immigration that had accompanied the Bracero Program and the depressive effect this immigration had had on the wages of U.S. citizen workers.<sup>100</sup> Though these concerns eventually

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97. *Id.*

98. See CALAVITA, *supra* note 91, at 30.

99. See Act of July 12, 1951, Pub. L. No. 78, 65 Stat. 119.

100. See James F. Creagan, *Public Law 78: A Tangle of Domestic and International Relations*, 7 J. OF INTER-AM. STUD. 541, 542 (1965). President Truman also expressed concern about the failure of executive agencies to protect the guaranteed rights of the Mexican workers, observing at the end of the War that because of “the return to a normal peacetime labor

contributed to the program's demise, Congress reauthorized the program nonetheless, with very little discussion and virtually no opposition. Just fifteen minutes after President Truman signed Public Law 78, U.S. negotiators met with Mexican officials to arrange a new bilateral agreement pursuant to the terms of the new statute. Together, the Migrant Labor Agreement of 1951 and Public Law 78 would set the official parameters for the Bracero Program until its termination in 1964.

Two aspects of the congressional-executive dynamics that unfolded during the Bracero experiment merit attention. First, the history of the program suggests that a significant power struggle occurred between the executive branch (mainly the Farm Security Administration) and Congress. While the program's legal requirements were intricate and varied over time, an interesting pattern emerges from them: the bilateral agreements that the executive branch initiated and negotiated directly with Mexico were relatively accommodating of the interests of the Mexican government, while the enabling legislation passed by Congress in 1943 and 1951 emphasized the protection of U.S. interests. Second, the breakdown of negotiations between the President and Congress, which led to the expiration of statutory authorization in 1948, suggests that the policy position of Congress's pivotal members did not align well with the position of the executive branch.

That said, we should be careful not to overemphasize the conflict between Congress and the President. The executive branch's 1948 reauthorization of the Bracero Program in apparent violation of the existing statutory regime can be read in two ways. On the one hand, we might take the action as powerful evidence that the executive branch disagreed with Congress's desire to allow the program to lapse. Because the Executive wielded sufficient power over migration issues, it was able to ignore Congress's commands.<sup>101</sup> On the other hand, it is possible that many members of Congress were happy to turn a blind

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market the danger of violations will be much greater than in recent years." *Message to the Congress Transmitting Reorganization Plan 2 of 1947*, 1947 PUB. PAPERS 229 (May 1, 1947); see also *Special Message to the Congress on the Employment of Agricultural Workers from Mexico*, 1951 PUB. PAPERS 389 (July 13, 1951) ("[B]oth this Government and the Mexican Government have become increasingly concerned about violations of the contract terms under which Mexican citizens are employed in this country. We must make sure that contract wages will in fact be paid, that transportation within this country and adequate reception centers for Mexican workers will in fact be provided.").

101. See PETER NEIL KIRSTEIN, *ANGLO OVER BRACERO: A HISTORY OF THE MEXICAN WORKERS IN THE UNITED STATES FROM ROOSEVELT TO NIXON* (1977).

eye to the Executive's unilateral actions so that the President could "perpetuate administratively what Congress was for the moment unwilling to legislate."<sup>102</sup>

But regardless of whether the history of the program provides strong evidence of congressional-executive disagreement, the question remains: what authority supported the Executive's actions in 1948? Congress specifically provided for the program to terminate on a date certain, but the President acted as though he was not bound by that sunset provision. The President's 1948 re-initiation of the Bracero Program thus resembles executive actions surrounding the National Security Administration's (NSA) warrantless surveillance program initiated by the Bush Administration. Some aspects of that program may have contravened the requirements of the Foreign Intelligence Surveillance Act (FISA). Yet commentators inside and outside the Administration have argued, albeit to much criticism, that any FISA prohibition was irrelevant because the President had inherent authority to engage in the actions undertaken by the NSA—authority that could not be circumscribed by Congress.

The President rarely has made explicit claims of inherent authority in the formulation of his immigration enforcement positions, though we do discuss one instance of such a claim in the next Section. But it is difficult to defend the Truman Administration's extension of the Bracero Program without reference to the assumption that the President possesses inherent authority over immigration policy.<sup>103</sup>

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102. CALAVITA, *supra* note 91, at 25. Indeed, this alternative could explain much of Congress's behavior in the immigration arena historically, such as its failure over the last decade to address the growing phenomenon of illegal immigration. This failure arguably reflects an acceptance of the Executive's underenforcement (of IRCA in particular) as an alternative to addressing the problem legislatively, either through legalization and expanded legal channels of entry, or shifts in the design and allocation of resources toward interior enforcement.

103. The assumption that such power existed may have been bolstered, of course, by the idea that the President was responding to a war-related emergency. Though it is true that the war had long since ended by 1948, the Truman Administration's continuation of the Bracero Program despite Congress's refusal to reauthorize the worker program could have reflected, in part, the overhang of wartime expansion of executive power, with policy consequences that reached well beyond wartime concerns. In the context of World War II-era litigation challenging the President's authority under the Enemy Aliens Act of 1798 to summarily remove enemy aliens after the formal end of the war—an authority the Court confirmed—the Court, in a sense, recognized this sort of overhang. It acknowledged that the tools needed by the Executive to address wartime exigencies may be properly used even after the cessation of hostilities and expressed reluctance to second-guess judgments committed to the political branches. See *Ludecke v. Watkins*, 335 U.S. 160, 166 n.10 (1948) ("The cessation of hostilities does not necessarily end the war power. . . . [T]he war power includes the power to remedy the evils which have arisen from its rise and progress and

*B. Haitian and Cuban Refugees and Express Delegation*

At various points in the 1970s, 1980s, and 1990s, four different presidents confronted refugee crises off the coast of Florida. The combination of tumultuous political events and economic deprivation in Haiti and Cuba led many thousands of would-be immigrants to sail into U.S. waters without authorization to enter the country. The executive branch played the primary leadership role in handling each of these crises, invoking both delegated and inherent authority to manage the influxes, which ultimately resulted in the resettlement of thousands of Haitians and Cubans in the United States. These particular episodes in U.S. immigration history serve as another window into the role the President has played in shaping core immigration policy. The Executive relied primarily on powers formally delegated to it by Congress, making inherent authority claims only as a backstop against potential arguments that it had exceeded its statutory authority. But the Executive ultimately wielded its delegated powers with a breadth that prompted reactions by both Congress and the courts, though the courts, in some instances, relied on the Due Process Clause to restrain the Executive and, in others, blessed the Executive's interpretation of its authority by invoking the President's inherent authority.

*1. Modern Haitian Migration*

"Modern migration" from Haiti to the United States began in the 1950s<sup>104</sup> and accelerated in 1958 with the rise to power of Francois "Papa Doc" Duvalier, whose brutal and repressive rule led to the exodus of Haitians from all socioeconomic walks of life, predominantly to New York City.<sup>105</sup> Though Haitian asylum seekers began arriving by boat in 1963, it was not until the 1970s that the poorest Haitians began large-scale unauthorized travel by sea in

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continues during that emergency. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them.").

104. See Christopher Mitchell, *U.S. Policy Toward Haitian Boat People, 1972-93*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 69, 70 (1994).

105. For a detailed account of legal and unauthorized Haitian migration in the 1950s, 1960s, and 1970s, including analysis of its causes and characteristics and assessment of the legal asylum claims lodged by Haitian migrants, see Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 LAW & CONTEMP. PROBS. 163, 174 (1982). Between 1970 and 1980, 56,335 Haitians migrated to the United States legally, and between 1981 and 1991, 185,425 legal entrants from Haiti arrived. See Mitchell, *supra* note 104, at 70.

dangerously flimsy and overcrowded vessels, fleeing the merciless regime of Jean-Claude “Baby Doc” Duvalier, who became President of Haiti in 1971 after his father’s death.<sup>106</sup> Between 1972 and 1979, 7837 Haitians arrived in the United States by makeshift vessels. In 1980 alone, 24,530 so-called Haitian “boat people” arrived in the United States, coinciding with the Mariel exodus from nearby Cuba.<sup>107</sup> An additional 28,000 Haitians were interdicted during the next decade.<sup>108</sup> The 1991 military coup that ousted democratically elected President Jean Bertrand Aristide set in motion yet another major chain of boat migration. During the single month of May 1992, for example, the United States Coast Guard intercepted 10,000 Haitians as they attempted to flee lawlessness and violence in Haiti.<sup>109</sup> This pattern of migration has continued into this century. Between fiscal years 1998 and 2003, the Coast Guard interdicted more than 1000 Haitians each year; in 2004, interceptions reached a peak of 3229.<sup>110</sup>

Each of the presidents who confronted the influx of unauthorized boat people relied on a combination of tools, including emergency and parole powers delegated by Congress, to manage unfolding events. In addition to the constraints imposed by the scope of delegated authority, the Executive’s ability to deal with these crises as it saw fit was constrained by the politics surrounding the various crises and by federal courts in South Florida.<sup>111</sup> The Executive continually adjusted its policy with respect to the admission of Haitians in response to these constraints. Considering how the Executive deployed the various forms of authority at its disposal throughout these decades should therefore illuminate the President’s role in setting immigration policy.

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106. See Stepick, *supra* note 105, at 176 (“Haiti’s prisons are still filled with people who have spent years in detention without ever being charged or brought to trial. . . . The variety of torture is incredible: clubbing to death, maiming the genitals, food deprivation to the point of starvation, and insertion of red-hot poker into the back passage.”). In addition to targeted political repression, “pervasive lawlessness” permeated the countryside under Baby Doc’s reign, perpetrated by his notoriously brutal security forces, the Tonton Macoutes. Mitchell, *supra* note 104, at 74.

107. Mitchell, *supra* note 104, at 70.

108. *Id.*

109. See *id.* at 74.

110. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 2 (2005), available at <https://www.policyarchive.org/handle/10207/3662>.

111. In the late 1970s, for example, officials in South Florida feared that the increasing numbers of poor Haitians in urban areas would strain the economy and drain public resources. See Stepick, *supra* note 105, at 179.

In the early 1970s, the INS initially adopted a policy of detaining Haitians who arrived on shore for brief periods, for processing and medical examinations. Often the INS paroled these migrants into the United States while their asylum claims were pending, though the agency simultaneously made it difficult for Haitians released on bond to obtain work authorization.<sup>112</sup> By 1977, facing a 6000-case backlog and serious overcrowding in the Florida prisons being used to house Haitian migrants,<sup>113</sup> the INS increased the pace of release, paroling Haitians without bond and issuing work authorization indiscriminately.<sup>114</sup>

In response to these policy changes, local Miami INS officials and the public balked. The INS quickly rescinded the work authorization program, the source of the public concern, and developed the "Haitian Program" in cooperation with the Department of Justice to accelerate dramatically the processing of cases. The Haitian Program amounted to an aggressive streamlining of the procedures governing the exclusion proceedings involving Haitians.<sup>115</sup> This streamlining, in turn, prompted a class action lawsuit in the Southern District of Florida, alleging violations of due process and challenging, under the APA, the Executive's handling of the rulemaking process with respect to the procedures governing exclusion hearings.<sup>116</sup>

In 1980, the Executive's treatment of Haitian migrants changed course again and became more permissive, as the Carter Administration also confronted the Mariel boatlift from Cuba. This temporary shift in policy ultimately resulted in thousands of Haitians being granted legal permanent

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112. See *id.* at 182.

113. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 511 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).

114. As this shift in policy occurred, the INS also began rewriting asylum regulations that extended the same procedural protections given to aliens in deportation proceedings to Haitians in exclusion proceedings.

115. The court in *Civiletti*, 503 F. Supp. at 511, documented many of the steps taken by the INS, including scheduling a dozen or more interviews and hearings per hour, scheduling the hearings of multiple applicants who shared the same lawyer at the same time, *id.* at 523-34, and shortening ninety minute proceedings to less than thirty minutes, *id.* at 527. Before the Haitian program, the INS processed no more than half a dozen claims a day, whereas in 1978, the Agency processed between fifty-five and one hundred claims a day. *Id.* at 523. According to the United Nations High Commissioner of Refugees, which sent a representative to Miami during this period, many asylum applications were incomplete or contained no information that could be used to establish an asylum claim. *Id.* at 526.

116. See *id.* at 451-52 (directing the INS to formulate a plan to adjudicate the cases consistent with due process and equal protection and observing that the INS policy was "designed to deport [Haitians] irrespective of the merits of their asylum claims" and suggesting that the INS might have been racially motivated in its treatment of the Haitians).

resident status in the United States.<sup>117</sup> But, by 1981, the Reagan INS resumed processing Haitian cases by relying on methods such as mass exclusion hearings and detention without parole, except in urgent humanitarian cases.<sup>118</sup> Once again, the Southern District of Florida rebuked the Administration by permitting exclusion proceedings to go forward where claimants were represented but enjoining final orders of exclusion from being implemented without notice being given to the court.<sup>119</sup>

At this stage, the Reagan Administration commenced its policy of interdiction—a shift that shaped the Bush and early Clinton Administrations’ approaches to Haitian migration and remains in effect in some form today.<sup>120</sup> In 1981, pursuant to an agreement negotiated by President Reagan and Jean-Claude Duvalier, the U.S. Coast Guard began patrolling near Haiti. The agreement authorized the Coast Guard to stop, board, and inspect private Haitian vessels, thus intercepting migrants before they could reach U.S. territory<sup>121</sup>—a move likely designed to avoid the jurisdiction of the courts and thus escape the constraints the courts had imposed on the INS’s management of refugee flows. State Department and INS officials, with the assistance of a Creole interpreter, heard the asylum claims of Haitians discovered as passengers. Those who established a well-founded fear of persecution were transported to the United States.<sup>122</sup> Boats transporting unsuccessful

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117. For a discussion of the Haitian-Cuban Entrant program, see *infra* notes 172-174 and accompanying text.

118. See Stepick, *supra* note 105, at 189-90.

119. See *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982).

120. See Mitchell, *supra* note 104, at 73; see also WASEM, *supra* note 110, at 1-2 (noting that between fiscal year 1998 and fiscal year 2004, the Coast Guard interdicted over 1000 Haitians each year). In 2002, the INS published a notice to clarify that migrants arriving by sea who had not been admitted or paroled would be placed in expedited removal proceedings, concluding that “illegal mass migration by sea threatened national security because it diverts the Coast Guard and other resources from their homeland security duties.” WASEM, *supra* note 110, at 4 (citing 67 Fed. Reg. 68,923-68,926 (Nov. 13, 2002)). In 2003, the Attorney General instructed immigration judges to consider the national security implications of creating incentives for further unlawful migration when making bond determinations, suggesting that granting bond in too many cases might fuel more unlawful migration. See *In re D-J-*, 23 I. & N. Dec. 572 (A.6. 2003).

121. See WASEM, *supra* note 110, at 2.

122. INS guidelines provided that: “If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.” Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT’L J. REFUGEE L. 677, 679 (2006) (citing U.S. IMMIGR. AND NATURALIZATION SERV., INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA, 1981, reprinted in LAWYERS COMM. FOR HUMAN RIGHTS, REFOULEMENT: THE FORCED

applicants—all but 28 of the 25,000 people who the Coast Guard intercepted over the course of 10 years<sup>123</sup>—were returned to Haiti.<sup>124</sup>

The Bush Administration altered the interdiction policy somewhat in 1991, in response to the coup that ousted Haiti's first democratically elected President, Jean Bertrand Aristide. Though the election itself coincided with a downturn in out-migration from Haiti, the coup created a new and substantial outflow of at least 1800 refugees in October and November of 1991 alone.<sup>125</sup> Sensitive to the danger of returning migrants to a highly volatile political situation, the Executive modified the interdiction policy. Though it began by holding some Haitians on Coast Guard cutters and seeking safe haven in nearby countries for many others, the number of migrants overwhelmed both of these capacities,<sup>126</sup> and the Bush Administration ultimately set up a camp for 12,000 people at Guantánamo Bay, Cuba, to hold intercepted migrants while their claims were processed.<sup>127</sup>

In early 1992, the INS paroled approximately 10,490 Haitians into the United States, after determining that they had credible fear of persecution.<sup>128</sup> But when the number of Haitian migrants at sea grew to 10,000 during the month of May 1992, the Administration closed the camp at Guantánamo and reverted to returning migrants to Haiti without asylum review.<sup>129</sup> This policy became a flashpoint of controversy during the 1992 election. Despite having excoriated George H.W. Bush for a “cruel policy of returning Haitian refugees

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RETURN OF HAITIANS UNDER THE U.S.-HAITIAN INTERDICTION AGREEMENT, exh. B, item H (1990)).

123. See Mitchell, *supra* note 104, at 73. In 1981, the Duvalier regime negotiated an agreement with the United States to permit these patrols and to prosecute smugglers. *Id.* According to the Congressional Research Service, between 1981 and 1990, 22,940 Haitians were interdicted at sea, and only 11 were determined by the INS to be entitled to asylum. See WASEM, *supra* note 110, at 3.
124. See Stepick, *supra* note 105, at 190.
125. Haitian migration had slowed substantially after Aristide's election, only to rise sharply after the coup. See Mitchell, *supra* note 104, at 74.
126. See WASEM, *supra* note 110, at 3.
127. See Mitchell, *supra* note 104, at 74. Apparently disagreement with the executive branch emerged over this policy shift. The Department of Defense was concerned about provoking the Cuban government; the State Department worried that too many Haitians were being permitted to claim asylum; and State and INS criticized the Coast Guard for encouraging Haitians to flee by patrolling too close to Haitian territory. See *id.* at 75.
128. See WASEM, *supra* note 110, at 3. In 1998, Congress passed the Haitian Refugee Immigration Fairness Act, which allowed Haitians who had filed asylum claims or had been paroled into the United States before December 31, 1995, to adjust to legal permanent resident status.
129. See Mitchell, *supra* note 104, at 74.

to a brutal dictatorship without an asylum hearing” as a candidate, President Bill Clinton continued the practice of returning Haitians without review until May 1994.<sup>130</sup> And, in 2005, after another episode of violence erupted in Haiti, prompting yet another out-migration, President George W. Bush announced that the Coast Guard would turn back “any refugee that attempts to reach our shores.”<sup>131</sup>

## 2. Sources of Legal Authority

To manage these various policy shifts over the three decades, the Executive invoked three primary sources of legal authority: the parole power and the power to exclude aliens to prevent harm to the United States, both delegated by the INA, and inherent executive authority over foreign affairs. These tools, used in combination, enabled at least three different administrations to set and then drive the agenda with respect to how to handle migration from the Caribbean.

### a. Interdiction, Statutory Exclusions, and Inherent Power

Before considering the Executive’s use of parole authority, we consider the sources of authority for the Reagan-era shift to interdiction—probably the most robust example of the President exercising his authority aggressively to set screening policy. On September 29, 1981, President Reagan issued a proclamation declaring that unauthorized migrants from Haiti had “severely

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130. *Id.* at 75. Stephen Legomsky describes the interdiction policy of the late Bush and early Clinton years as “the most extreme brand” of U.S. interdiction, largely because no procedure existed for screening the interdicted Haitians, and all passengers were returned to Haiti without status determinations. *See* Legomsky, *supra* note 122, at 686. In May of 1994, President Clinton entered into agreements with Jamaica and the Turks and Caicos whereby Haitian migrants would be given refugee status determinations on those countries’ territories, supervised by the UNHCR. *See id.* at 681. When Aristide returned to power after the coup leaders stepped aside in response to military pressure from the United States, the U.S. repatriated Haitians then held at Guantánamo, despite safety concerns expressed by human rights groups. *See id.* at 681.

131. Legomsky, *supra* note 122, at 682 (emphasizing that this announcement represented the first time a U.S. President explicitly referred to Haitians as refugees but yet maintained that they could nonetheless be returned to their countries of origin, but also distinguishing the policy from the one in place in 1992 on the ground that the 2004 policy allowed the possibility of refugee status determinations in some cases). After this announcement, nearly 1000 Haitians fled by sea, only to be intercepted by the Coast Guard and returned to Port-au-Prince with minimal to no screening. *See id.* at 682 (citing Bill Frelick, “Abundantly Clear”: *Refolement*, 19 GEO. IMMIGR. L. J. 245, 245 (2004)).

strained the law enforcement resources” of the United States and “threatened the welfare and safety of communities in [South Florida].”<sup>132</sup> Pursuant to his authority under § 212(f) of the INA, and “to protect the sovereignty of the United States,” the President declared that the parole of unauthorized Haitians would cease and would be prevented by interdiction of vessels carrying such aliens.<sup>133</sup>

In the memo that advised the President on his authority to issue this proclamation, the Office of Legal Counsel (OLC) in the Department of Justice cited authority delegated to the President by Congress, as well as the President’s inherent authority to protect the sovereignty of the country. First, the memo emphasized that the President’s legal authority in § 212(f) of the INA was clear.<sup>134</sup> The provision establishes that

whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>135</sup>

OLC advised the President that, under § 212(f), he could make a finding that the entry of unauthorized Haitians presented a security risk, or that their entry already had been “suspended,” because it was illegal for them to enter.<sup>136</sup> Subsequent presidents have invoked this authority when seeking to refashion the interdiction policy. In 2002, for example, President Bush issued an executive order, pursuant to § 212(f), giving the Attorney General the authority to set up the Guantánamo camp, as well as to screen such aliens in any manner he deemed appropriate. The Order further enlisted the Department of State to assist in the resettling of aliens deemed in need of protection, and the Department of Defense to provide support to the Attorney General in the event of “mass migration.”<sup>137</sup>

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132. High Seas Interdiction of Illegal Aliens, Proclamation No. 4865, 3 C.F.R. 50 (1982), *reprinted in* 8 U.S.C. § 1182 (2006).

133. *Id.*

134. *See* Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242 (1981).

135. 8 U.S.C. § 1182(f).

136. Proposed Interdiction of Haitian Flag Vessels, *supra* note 134, at 244.

137. *See* Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region, Exec. Order No. 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002).

But significantly, though the Reagan OLC emphasized that § 212(f) gave the President all the authority he needed to establish the interdiction program, the opinion also invoked the “President’s inherent constitutional power to protect the Nation and to conduct foreign relations,”<sup>138</sup> thus tapping into the ethos of *Curtiss-Wright* and the foreign affairs rationale for inherent authority over immigration. According to OLC, the scope of this authority under Article II was less clear than the delegated statutory power under § 212(f). In fact, the OLC acknowledged the longstanding principle that, where Congress has acted in the immigration arena, its authority is plenary. At the same time, the memo pointed to the Supreme Court’s recognition, in *Ekiu v. United States* and *United States ex rel. Knauff v. Shaughnessy*, that sovereignty rested in both political branches of government. And thus, because the exclusion of aliens is “a fundamental act of sovereignty”<sup>139</sup>—a conclusion that dated back to the *Chinese Exclusion Cases*—the memo concluded that the Executive possessed inherent authority to make exclusion decisions. OLC thus advised that because the President would be acting to protect the United States from massive illegal immigration through interdiction, he had the power to act, “even where there is no express statute for him to execute.”<sup>140</sup> In other words, OLC concluded that the President has Article II power to act in the absence of congressional authorization to regulate immigration.

By the late 1980s, cases concerning the legality of interdiction began reaching the federal courts. Parties challenging the interdiction policy relied primarily on the withholding provision of the INA, which prohibits the Attorney General from returning any alien to a country if that alien’s “life or freedom would be threatened,”<sup>141</sup> and Article 33 of the 1951 Convention Relating to the Status of Refugees, which prohibits signatories from returning a refugee “to the frontiers of territories where his life or freedom would be threatened.”<sup>142</sup> In 1992, however, President Bush issued an executive order

138. See Proposed Interdiction of Haitian Flag Vessels, *supra* note 134, at 242.

139. *Id.* at 245 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)).

140. See *id.* at 245 (citing *Haig v. Agee*, 453 U.S. 281, 292-94 (1981) (holding that in the absence of legislation the President could control the issuance of passports to citizens, pursuant to the foreign relations power)).

141. 8 U.S.C. § 1253(h)(1) (1994).

142. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150. In an opinion concurring in part and dissenting in part from the D.C. Circuit’s decision to dismiss one of these cases for lack of standing, Judge Harry T. Edwards concluded that Article 33 in and of itself provided no rights to aliens outside a host country’s borders. See *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 839-41 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part). OLC, in assessing the legality of interdiction in light of Article 33 challenges, emphasized that the United States ratified the

declaring that the United States's obligations under the Convention not to return refugees to persecution did not apply outside United States territory.<sup>143</sup>

Though resolution of the cases challenging the interdiction policy turned on the scope of the President's delegated authority, the courts also averred to the special foreign affairs-related deference to which the President was entitled, thus keeping alive the ethos of the inherent authority claim, if only in the form of a presumption in favor of broad executive authority to interpret the scope of the powers delegated by statute to the Executive. In *Sale v. Haitian Centers Council, Inc.*,<sup>144</sup> the Supreme Court finally upheld the interdiction policy, validating the President's legal claims.<sup>145</sup> The Court found that § 212(f) provided ample power to the President to establish a naval blockade denying Haitians entry, and by extension authorized the means chosen by the Executive

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Refugee Convention in 1968 on the ground that its obligations could be met through the already existing § 243(h) withholding provision, which applied only to the removal of refugees already in the United States, see *INS v. Stevic*, 467 U.S. 407, 415 (1984). The OLC memo also emphasized that the United States acceded to the convention through the 1967 Protocol, which is not self-executing and therefore does not create rights or duties that can be enforced by a court. See *Legal Obligations of the United States Under Article 33 of the Refugee Convention*, 15 Op. Off. Legal Counsel 86, 87 (1991). As Acting Assistant Attorney General, Walter Dellinger, in reviewing the interdiction policy, considered the question of whether aliens who were interdicted *within* U.S. territorial waters were entitled to a hearing. He concluded that undocumented aliens intercepted within U.S. territorial waters are "not entitled to an exclusion hearing under the INA," reaffirming that it is the alien's arrival at a port of the United States that triggers significant legal effects. Memorandum from Walter Dellinger, Acting Assistant Attorney Gen., to the Attorney Gen., *Immigration Consequences of Undocumented Aliens' Arrival in the United States Territorial Waters*, Oct. 13, 1993, <http://www.usdoj.gov/olc/nautical.htm>. Dellinger emphasized the broad authority given the Attorney General to promulgate regulations interpreting the INA to protect the nation's borders and the substantial deference accorded by the courts to the Attorney General in such matters. See *id.* (citing *Jean v. Nelson*, 727 F.2d 957, 966-67 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1984) (noting that the INA "permits wide flexibility in decision-making on the part of executive officials involved, and the courts are generally reluctant to interfere")). The Clinton OLC affirmed this conclusion after Congress reformed the immigration system in 1996, combining exclusion and deportation proceedings into a single removal procedure, concluding that because "unlanded" aliens interdicted on internal waters do not constitute applicants for admission, such aliens are not entitled to removal proceedings. See *Procedural Rights of Undocumented Aliens Interdicted in U.S. Internal Waters*, 20 Op. Off. Legal Counsel 381 (1996).

143. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992). As Stephen Legomsky has observed, the effect of this order was to eliminate all screening of Haitian migrants and to ensure that no refugee status determinations were made before migrants were repatriated. See Legomsky, *supra* note 122, at 680.

144. 509 U.S. 155 (1993).

145. *Id.* at 172.

to prevent mass migration.<sup>146</sup> Most important for present purposes, the Court also concluded that the withholding provision of the INA did not apply outside U.S. territory, particularly given the presumption against extraterritorial application of statutes, which has “special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”<sup>147</sup>

Justice Blackmun, the lone dissenter, accused the majority of misapplying the presumption against extraterritorial application. In the regulation of foreign affairs and immigration matters, he wrote, “[t]here is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond this Nation’s borders.”<sup>148</sup> The commonsense notion that Congress was looking inward therefore could not be invoked in the case before the Court. What is more, Blackmun emphasized, the Court’s reference to *Curtiss-Wright* was inapt, because over no conceivable subject is the *legislative* power more complete than immigration.<sup>149</sup> In other words, the presumptions on which the Court relied to find authorization for the President’s actions displaced *Congress* from its central role. *Sale* thus captures an implicit but sharp disagreement among the Justices about the immigration lawmaking separation of powers. And the majority maintained the aura of exceptionalism surrounding the scope of the President’s immigration power, at least on matters that clearly involve an external foreign affairs crisis.

*b. The Parole Power*

Despite the persistence of the inherent authority possibility in both the Executive’s own legal analysis and in the Court’s evaluation of the President’s power to act, the most important tool used by the Executive to manage unauthorized Caribbean migration proved to be the parole authority delegated by Congress. At first glance, this power appears to fit within a more standard administrative law account of delegation. Historically, however, the President has used the power in extraordinary ways that call into question this surface understanding.

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146. *Id.* at 187. The Court also concluded that the interdiction program created by the President had not usurped the power delegated to the Attorney General by Congress to adjudicate asylum claims, thus providing justification for a unitary conception of the Executive.

147. *Id.* at 188.

148. *Id.* at 206 (Blackmun, J., dissenting).

149. *Id.* at 207.

Section 212(d)(5) of the INA gives the Executive a legal mechanism to allow otherwise unauthorized or inadmissible aliens into the country, but only on a temporary and case-by-case basis and “for urgent humanitarian reasons or significant public benefit.”<sup>150</sup> On the face of the statute, this authority appears to be limited. Indeed, the INA explicitly establishes that the authority cannot be used to parole refugees into the United States unless compelling reasons in the public interest require it.<sup>151</sup> Typically, the Executive uses parole authority in individual cases that present hardships—for example, to allow otherwise detainable or removable aliens into the country to deal with health emergencies or to care for children. But throughout its management of the Caribbean refugee crises, the Executive employed parole for more large-scale migration management.

Notably, this use of parole long predates the Caribbean refugee crises. In 1956, President Eisenhower seized on the then-obscurer parole provision in the 1952 INA to argue that he had authority to admit temporarily 15,000 Hungarians fleeing communist repression, despite the absence of congressional authorization.<sup>152</sup> From that point forward, the parole provision became the central tool of American refugee policy—a tool that for over twenty years permitted the President to dominate refugee admissions policy.<sup>153</sup>

Congress did not acquiesce quietly to this policymaking structure. At various points in history, members of Congress have declared that the Executive has stretched the parole power far beyond its intended meaning, and Congress has attempted several times to rein in this executive discretion.<sup>154</sup> As

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150. 8 U.S.C. § 1182(d)(5) (2000). When the purposes of the parole have been served, the alien is required to return to custody.

151. *Id.* § 1182(d)(5)(B).

152. In a message to the House of Representatives related to the Hungarian refugee crisis, President Eisenhower observed that “[t]heir admission to the United States as parolees . . . does not permit permanent residence or the acquisition of citizenship. I believe they should be given that opportunity . . . .” Message from the President of the United States to the House of Representatives, 85th Cong., 103 CONG. REC. 1355 (1957). He thus recommended that Congress enact legislation giving the Attorney General the authority to permit paroled aliens to remain as permanent residents. *Id.*

153. See GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT* 55-56, 68-69, 85 (1986).

154. An important early example of this was the Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965), which for the first time established a visa preference category for the admission of overseas refugees. *Id.* § 3. The committee reports accompanying the Act make clear that the new preference category was designed to curtail the President’s use of parole power:

Inasmuch as definite provision has now been made for refugees, it is the express intent of the committee that the parole provisions of the Immigration and

early as the 1965 amendments to the Immigration and Nationality Act, it was clear that Congress was displeased with the Executive's use of the parole power. The Senate Report for those amendments emphasized that, by making "definite provisions" for the admissions of refugees in the statute, Congress expressly intended to establish that the Executive use its parole authority only in "emergent, individual, and isolated situations," and not for "classes or groups outside the limit of the law."<sup>155</sup>

Despite these efforts, the Executive continued its large-scale use of the parole power to respond to the Cuban refugee crisis that arose in the 1960s, and later to respond to the large refugee populations that came from Vietnam, as well as Haiti and Cuba, in the 1970s. Congress's dissatisfaction with this use of parole and its desire to exert more control over refugee policy helped prompt the passage of the Refugee Act of 1980.<sup>156</sup> Indeed, the language requiring "compelling reasons in the public interest" for the parole power to be invoked did not exist when the parole provision was first adopted as part of the McCarran-Walter Act of 1952. Congress added the language to the INA in 1980 in large part to restrict the use of parole in refugee contexts,<sup>157</sup> including with respect to the Executive's heavy reliance on the power to manage the Haitian exoduses.<sup>158</sup>

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Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.

S. REP. NO. 89-748, at 17 (1965); accord H.R. REP. No. 89-745, at 15-16 (1965).

155. S. REP. NO. 89-748, at 17 (1965).

156. DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 75-78 (2007); Arnold H. Leibowitz, *The Refugee Act of 1980: Problems and Congressional Concerns*, 1983 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 164-65 (1983).

157. See H.R. REP. NO. 96-781 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. 160, 161-62; S. REP. NO. 96-256 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 141-42.

158. As Senator Edward Kennedy put it:

Another concern in Congress was the use of the Attorney General's "parole authority". I felt that Congress had provided ample approval and constitutional justification for the authority. However, many disagreed, and the issue was of deep concern to many in Congress, especially in the House of Representatives. One of the principal arguments for the Act was that it would bring the admission of refugees under greater Congressional and statutory control and eliminate the need to use the parole authority.

Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 146 (1981).

At first glance, the Executive during those episodes used its parole authority to address transitory problems, both to compensate for the government's limited capacity to detain the large number of arriving aliens, and to secure entry for aliens thought to present colorable claims for asylum. But though the parole authority permits the Executive to admit otherwise inadmissible aliens only on a temporary basis, political pressures and the presence of thousands of refugees inside the United States pushed Congress to enact legislation permitting many thousands of paroled Haitians and Cubans to adjust their status to permanent. The parole authority thus provided the President with a mechanism to drive and control admissions policy,<sup>159</sup> enabling the Executive in times of great political pressure bordering on emergency to alleviate some of the strain of processing large numbers of cases in a way that ultimately pushed Congress to act to make permanent the status of many aliens initially admitted by the Executive.<sup>160</sup>

That the Attorney General, through the INS, has used his parole authority extensively in response to large-scale refugee influxes is not a surprise. But it is far from clear that the Executive would have de facto leeway today to use the parole mechanism in the same expansive manner it did in relation to Caribbean migration, to circumvent congressionally imposed limits on entry. Again, when

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And yet, as Kennedy also pointed out, "the ink was hardly dry on this historic reform when the new law faced its first test: the massive influx of Cuban refugees to the United States, which began a few weeks after the Act became effective on April 1, 1980." *Id.* at 141. According to Kennedy, the Carter Administration resorted once again to ad hoc use of the parole power—a discouraging refusal of the Executive to use the new tools of the Refugee Act over which Congress had labored intensively. *Id.* at 141-42, 152-55. Among the reasons given by the Carter Administration was that it did not want to set a precedent for future admissions by labeling as refugees the many thousands of Cubans who were admitted during the Mariel event. *Id.*

159. In 2001, in another example of the Executive's use of the parole authority to set a quasi-admissions agenda, DOJ instructed its field offices "to adjust parole criteria with respect to all inadmissible Haitians arriving in South Florida after December 3, 2001, and that none of them should be paroled without the approval of INS headquarters." The apparent rationale for using parole authority more sparingly was to avoid triggering further mass migration from Haiti, which could result from migrants' expectations that they would be paroled. WASEM, *supra* note 110, at 5 (quoting Letter from Daniel J. Bryant, Assistant Att'y Gen., to Senators Edward Kennedy and Sam Brownback (Sept. 25, 2002)).
160. In 1981, the Reagan Administration proposed a series of reforms that would have widened its latitude to deal with crises similar to the Haitian experience, contending that the courts, if not Congress, were constricting the Administration's ability to operate. The proposed legislation included bars on asylum applications by persons who arrived in the United States without visas, limitations on the participation of counsel, and the preclusion of judicial review of anything other than a final order of exclusion. See Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 94-98 (1981); Stepick, *supra* note 105, at 192-93.

Congress passed the Refugee Act of 1980, creating a comprehensive regulatory scheme for the admission of refugees,<sup>161</sup> the legislative history that accompanied the Act made clear that Congress sought to constrain the President's use of parole authority.

As with the Bracero Program, a perceived emergency may have helped legitimate the Executive's actions in the Caribbean refugee crises at the time they were taken. The fact that the federal government's approach to these various refugee crises was driven by executive initiative and priority setting highlights that the INS was playing in the territory—the management of foreign affairs—in which claims of inherent authority could be most easily made. Particularly after 1980, when the Executive initiated the interdiction policy and began expressly articulating its authority to manage refugee influxes independent of congressional authorization, the notion of greater executive freedom to manipulate the INA to suit its own ends gained currency. But Congress did push back, restricting the Executive's use of parole to admit large numbers of aliens not otherwise determined admissible by Congress.<sup>162</sup>

### 3. *Haitians, Cubans, and Executive Agenda Setting*

The President's reliance on the parole authority and the creation of the Haitian Program in the 1970s, in particular, fit within the ad hoc, executive-driven approach taken to refugee policy at the time. Prior to 1980, the Executive essentially set the federal government's priorities with respect to refugee admissions. Before Congress passed the Refugee Act of 1980, which incorporated the definition of refugee in international law into domestic law and created a full-blown asylum system to hear claims from potential refugees regardless of their national origin, the Executive mostly managed refugee crises

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161. The Refugee Act delegates power to the President to set the maximum number of refugees who may be admitted in the upcoming fiscal year and allows the President to decide how that total will be allocated among the countries of the world—numbers that are set in family and labor immigration systems by Congress in statute. See INA §§ 207(a)(2)-(3), 8 U.S.C. §§ 1157(a)(2)-(3) (2000). The Act sets no limits on how many (or how few) refugees the President may admit; the statute requires that he engage in “appropriate consultation” with Cabinet members and members of congressional committees. *Id.* §§ 207(a)(3)-(e), 8 U.S.C. §§ 1157(a)(3)-(e). For a fuller account of this system, see Legomsky, *supra* note 2, at 696-706.

162. The Reagan-era shift to interdiction could have been partially responsive to this limitation imposed on the Executive by Congress in 1980, though political pressure from southern Florida to prevent refugees from entering, as well as the Reagan Administration's more muscular approach to foreign policy, probably provide better explanations for the shift in policy.

on a case-by-case basis. The Administration selected refugees either through the overseas refugee program, through the exercise of the parole authority, or via § 243(h) withholding claims. Through the decades of the Cold War, the Executive used these tools to admit large numbers of refugees fleeing communist persecution, as well as the governments of the Middle East, thus advancing through delegated power a particular vision of what constituted a worthy refugee in line with the President's prevailing foreign policy concerns.

As suggested above, when it passed in 1980 the Refugee Act had been a long time coming. In addition to responding to the President's handling of the Caribbean refugee emergencies, the Act depended on the momentum built up over time by the Executive's various ad hoc programs. It represented the culmination of the Executive's efforts to advance an anticommunist, antitotalitarian agenda that involved the United States assuming responsibility for the protection of individuals' human rights.

At the same time, the passage of the Refugee Act had both the goal and the effect of constraining the Executive's policymaking freedom. The Act restricted the President's use of the parole authority to admit large groups of migrants<sup>163</sup> and created a structured refugee selection program that delegated power to the President to select overseas refugees, but required that he consult with Congress in the process<sup>164</sup> and ensure a more equitable treatment of refugees.<sup>165</sup> The Act also created an asylum framework based on a principle of nondiscrimination, making it more difficult politically for the Executive to pursue its anticommunist foreign policy agenda through immigration law without also liberalizing its approach to other types of refugees.<sup>166</sup>

This tension was apparent during the Mariel boatlift of 1980, as well as in the mid-1990s. At these two crucial junctures, spikes in migration from Cuba coincided with the ongoing outflow of migrants from Haiti, forcing to the surface the tension between the new Refugee Act's nondiscrimination ethos and the Executive's preference for accommodating refugees fleeing communist

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163. See INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B) (2006) (prohibiting the Attorney General from paroling refugees without "compelling reasons in the public interest with respect to that particular alien"); *supra* notes 156-160 and accompanying text.

164. INA § 207(e), 8 U.S.C. § 1157(e) (2006); see also Legomsky, *supra* note 2, at 681, 696-97 (noting that consultation is "defined to include personal discussion between Cabinet-level representatives of the President and members of the pertinent congressional committees").

165. See Kennedy, *supra* note 158, at 143 (noting that the Act ensured that "refugee" applied not only to refugees from communism or certain areas of the Middle East, but also to all who met the standard for refugee under the Refugee Convention and Protocol).

166. At least until the mid-1990s, however, the President continued to use the authority delegated to him by the Act to select overseas refugees to give preferences to refugees from communist and formerly communist countries. See Legomsky, *supra* note 2, at 698-99.

governments.<sup>167</sup> These moments highlighted the uneasy line between political refugees, entitled by U.S. and international law to make the case for asylum, and economic migrants, entitled only to exclusion. The political imperatives felt by the Executive to accommodate refugees fleeing the communist regime in Cuba, combined with the shift in policy embodied by the Refugee Act, significantly shaped how the Administration responded to the Haitian migration.

In April 1980, over 150,000 people boarded boats in Mariel Harbor, Cuba, and sought refuge in the United States. During this period, approximately 25,000 Haitians headed toward South Florida as well.<sup>168</sup> By the summer of 1981, that number had increased to 35,000. Initially, President Carter and the INS treated Cubans fleeing the communist Castro dictatorship as refugees and the many thousands of Haitians who arrived simultaneously as economic migrants, despite the fact that many of the Mariel Cubans initially explained their departure as the result of food scarcity, or the desire to earn more money in the United States.<sup>169</sup> This treatment of Cubans reflected the continuation of long-standing U.S. policy, according to which the United States was reluctant to repatriate Cubans; moreover, the Castro government generally refused to accept Cubans excludable under the INA.<sup>170</sup> Still, public outcry over the inconsistency in treatment of the Haitians and Cubans who arrived in 1980,<sup>171</sup> in the shadow of the Refugee Act, pressured Carter to adopt temporarily an official policy of equal treatment for all Haitians and Cubans.

The policy called on Congress to create a new status for Haitians and Cubans, called “Haitian-Cuban Entrant.” In the meantime, the Executive extended renewable parole to those migrants who arrived before October 10,

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167. See *supra* note 158 and accompanying text.

168. See WASEM, *supra* note 110, at 1.

169. See Stepick, *supra* note 105, at 187-88. Whether Haitian migration was motivated by economic or political factors also has been a source of debate. During the Aristide years, the fact that the election of Aristide coincided with a major decline in out-migration, and that the subsequent coup overthrowing him produced a dramatic spike in refugee flows, underscores that at crucial moments, Haitian migration has been motivated substantially by political violence. See Legomsky, *supra* note 122, at 680.

170. Since 1966 and the passage of the Cuban Adjustment Act, Cubans present in the United States for at least two years have been permitted to adjust their status to permanent resident—an option given to no other nationality. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended in scattered sections of 8 U.S.C.).

171. See Stepick, *supra* note 105, at 187-88 (noting that “Haitian advocates were quick to advance charges of discriminatory treatment,” staging hunger strikes and marches in Miami, New York, Washington, and elsewhere, and that the Congressional Black Caucus put pressure on the Administration to change its policies).

1980, despite the apparent efforts by Congress, discussed above, to limit the use of this authority.<sup>172</sup> In most cases, the Executive continued to renew this temporary legal status until 1986, when Congress added an adjustment of status provision to the INA, enabling Haitian-Cuban Entrants to become lawful permanent residents.<sup>173</sup> Of course, despite pressure to treat Haitian and Cuban migrants equally, the Executive's policy still reflected its preexisting preferences; October 10, 1980, after all, marked the end of the Mariel boatlift, but Haitians continued to arrive after that date had passed. With no political pressure to treat Haitians as presumptive refugees, then, space was left open for the Administration to return to the practices of the Haitian program of the late 1970s, and to begin the policy of interdiction.<sup>174</sup>

During the next period of simultaneous Haitian and Cuban influxes in the mid-1990s, the political winds had shifted, and the Executive's approach to admissions shifted in response. By 1994, public support in South Florida for the incorporation of large numbers of Cuban refugees had waned considerably,<sup>175</sup> and the Executive extended the interdiction policy it had adopted in 1981 to manage Haitian refugees to Cubans, albeit against the backdrop of the new "wet foot-dry foot" policy<sup>176</sup> that still treated Cubans as exceptional.<sup>177</sup>

In fact, the Clinton Administration negotiated two agreements with the Castro government that substantially recast the U.S. approach to Cuban migration, but that nonetheless continued the special treatment of Cubans. The September 1994 agreement provided, among other things, that the United States would no longer permit migrants intercepted at sea to enter the United States, placing them instead in a safe camp—that is, Guantánamo Bay. At the same time, the United States agreed to admit no fewer than 20,000 immigrants from Cuba annually, not including the immediate relatives of U.S. citizens. Because this floor could not be met through the operation of the already extant

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172. See Stepick, *supra* note 105, at 188.

173. See WASEM, *supra* note 110, at 2.

174. See Stepick, *supra* note 105, at 188-89.

175. See Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens*, 15 GEO. IMMIGR. L.J. 319, 333 (2001).

176. Under this policy, Cubans interdicted at sea are returned to Cuba, but Cubans who step foot on U.S. soil are paroled into the United States, after which they usually can adjust status under the Cuban Adjustment Act within a year, at the discretion of the Attorney General.

177. See Stepick, *supra* note 105, at 187-88. Among the effects of this policy shift, along with the maintenance of the "wet foot-dry foot" policy, has been the rise of Cubans traveling to Honduras (the only country in the Americas that does not repatriate interdicted Cubans) and crossing the United States's border with Mexico. See Legomsky, *supra* note 122, at 683.

refugee admissions program, a visa lottery was selected to randomly identify which Cubans, in Cuba, could enter the United States.<sup>178</sup> The 1995 agreement addressed the 33,000 Cubans who had come to be encamped at Guantánamo as the result of the shift to interdiction in 1994. First, using its parole authority, the INS would admit most of the detained Cubans into the United States. Second, the United States would begin repatriating Cubans interdicted, rather than relocating them to safe havens.<sup>179</sup>

Here again, then, the Executive acted as an agenda setter implementing its preferences with respect to the types of migrants the United States should admit.<sup>180</sup> Thus, throughout its management of the Haitian and Cuban crises, the Executive has dominated the policymaking process, through a complicated mixture of claims to delegated authority, foreign policy authority, and inherent authority over migration. And as during the Bracero Program, the Executive's actions in managing unauthorized Caribbean migration set the table for Congress's response, which simultaneously attempted to constrain the Executive and created new channels for entry prompted by the Executive's policy choices. The history of Caribbean migration thus underscores that at critical moments immigration policy has been formulated through a competitive dialogue between the political branches.

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178. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., CUBAN MIGRATION POLICY AND ISSUES 2-3 (2006), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9147:1>.

179. See *id.* at 3. As part of this arrangement, Cuba agreed to count the migrants admitted under the 1995 parole agreement toward the 20,000 annual minimum of the 1994 agreement. In addition, the United States agreed to provide those interdicted at sea with the opportunity to express fear of persecution—an opportunity not given to Haitian migrants. Those who met the definition of refugee would be resettled in third countries. Approximately 170 Cubans were resettled between 1995 and 2003. See *id.* In fiscal year 2005 alone, the Coast Guard interdicted 2712 Cubans—the highest level of interdiction since the 1994 balsero crisis. See U.S. Coast Guard, Alien Migrant Interdiction, <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (last visited Sept. 6, 2009).

180. In another policy shift that reflects the mutual influence of the two branches on one another, in 1998, President Clinton directed that a form of temporary relief known as “deferred enforced departure” be given to Haitians who had been paroled into the United States or had applied for asylum before December 1, 1995. This order came on the heels of Congress's decision to extend special relief to persons from Guatemala, Nicaragua, Cuba, the Soviet Union, and Eastern Europe in the Nicaraguan Adjustment and Central American Relief Act of 1997. Congress subsequently codified the President's order in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. See Legomsky, *supra* note 122, at 681.

*C. The Rise of De Facto Delegation*

The Bracero Program and the later crises concerning Cuban and Haitian migrants reinforce the existence of two quite different models for the allocation of constitutional authority to engage in immigration lawmaking. One model recognizes inherent executive authority, while the other revolves around authority expressly delegated to the Executive by Congress. In immigration law, there exists a broader basis than in many other areas of law for defending inherent authority as a matter of constitutional design. This possibility stems from many sources: from the immigration power's ephemeral origins; from the nexus between immigration law and foreign affairs; from the uneasy relationship between the immigration power and administrative law over the last century; and from the ambiguity regarding legal authority that often arises during times of perceived crisis.

Whichever of the two models better describes the constitutional structure of immigration policymaking, the constitutional separation-of-powers question has taken on a crucial but underexplored third dimension over the last several decades. Important regulatory changes over the past century have made less significant the question of the Executive's inherent authority in the immigration arena and consequently made situations like the one that arose during the Bracero period much less likely to recur.<sup>181</sup> Indeed, once we understand these changes, it will become much clearer why modern courts and commentators have largely ignored the question of power allocation between the President and Congress.

We contend that there has been a relatively secular trend toward the enlargement of the President's power over core immigration policy through ever-expanding congressional delegation of what amounts to screening authority. We have moved from a world of plausible independent executive

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181. This development does not mean, of course, that such conflicts cannot occur today. In fact, the executive branch does sometimes act today in ways that appear to disregard its own understanding of existing statutory requirements. Immigration detention provides but one example. Section 236(c) of the INA provides that "[t]he Attorney General *shall* take into custody" certain classes of inadmissible and deportable noncitizens. 8 U.S.C. § 1226(c) (2006) (emphasis added). The immigration agencies have interpreted this provision to deny them the authority to release noncitizens covered by the provision. Nonetheless, in several instances, the government has chosen to release noncitizens who have been detained for prolonged periods of time pursuant to § 236(c) – often in order to moot lawsuits challenging the Attorney General's interpretation of the statute (and the constitutionality of prolonged detention). In these situations, therefore, the government appears to be releasing noncitizens while simultaneously contending that Congress prohibits their release under § 236(c).

authority to admit and remove to a world of pervasive delegation and subsequent executive screening. To be clear, we do not mean that Congress has *formally* delegated to the President the power to set the legal criteria governing the admission and deportation of noncitizens. To the contrary—as we noted at the outset of this Part, one of the signal features of immigration law is that Congress has largely retained a monopoly over these formal legal criteria.<sup>182</sup> In general, Congress specifies in great detail the criteria for admission and removal, particularly when it comes to the major categories of family and labor migration that make up the bulk of admissions. In this sense, immigration law resembles tax law, where Congress retains control over marginal rates, or criminal law, where Congress defines the elements of a crime, rather than other regulatory arenas in which Congress has delegated broad authority to the executive branch to set standards.<sup>183</sup>

We claim, instead, that the President's inability to set formal admissions and removal criteria has not precluded him from playing a major role in shaping screening policy. The modern structure of immigration law that gives the President little standard-setting authority as a formal matter actually has given rise to a system of *de facto* delegation of power that serves as the functional equivalent to standard-setting authority. This *de facto* delegation is driven by legal rules that make a huge fraction of resident noncitizens deportable at the option of the Executive. This significant population of formally deportable people gives the President vast discretion to shape immigration policy by deciding how (and over which types of immigrants) to exercise the option to deport.

Three principal aspects of immigration law have the effect of delegating tremendous policymaking power to the President, and we discuss each in turn.

### *1. Deportation for Unauthorized Presence*

First, and perhaps most importantly, Congress has delegated substantial authority to the President by making deportable all persons who have entered without authorization. Historically, unauthorized entry did not always render

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182. See Legomsky, *supra* note 2, at 680-86 (describing a history of transfer of policymaking authority from the Executive to Congress as embodied in the detail with which the INA lays out grounds of admission and removal, as well as elements of the Refugee Act of 1980, IRCA, and the Immigration Act of 1990).

183. To be sure, there are some exceptions to this trend. As our discussion above demonstrates, the parole power prior to the passage of the 1980 Refugee Act, and the power conferred by § 212(f), do not fit as cleanly into this model of intricately identified formal screening criteria. But this mismatch is part of what makes the Haitian/Cuban crisis so unique.

an immigrant deportable. The first federal immigration controls contained no deportation provisions.<sup>184</sup> Even after deportation for unlawful entrance became a formal possibility, several features of the immigration system prevented those provisions from being particularly significant. Early deportation rules contained statutes of limitation that restricted their reach,<sup>185</sup> and the elaborate documentation requirements associated with modern immigration law simply did not exist.<sup>186</sup> As a result, the government faced significant difficulties in most situations in identifying unlawful entrants.<sup>187</sup> As Mae Ngai has documented, it was not until the 1920s that the deportation of those who entered the country unlawfully really became a meaningful possibility.<sup>188</sup>

Today, however, the Immigration and Nationality Act makes deportable any noncitizen who enters the United States without authorization or who overstays her visa.<sup>189</sup> Though these provisions lay out clear rules that do not

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184. These first controls were contained in the Page Act, which was enacted in 1875. Act of Mar. 3, 1875, ch. 141, § 1, 18 Stat. 477, 477. The only minor exception was the anomalous, controversial, and short-lived Alien Enemies Act of 1798, which authorized the President to deport noncitizens he deemed dangerous to the United States. See Act of June 25, 1798, ch. 58, 1 Stat. 570, 570-71 (“[I]t shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . .”). By its terms, the Act expired two years after its passage. See *id.* § 6.

185. In 1891, for example, Congress made noncitizens deportable for one year following entry if they were found to have entered in violation of law. See Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

186. See SALYER, *supra* note 29, at 43-68 (discussing the development of documentation requirements).

187. When the government attempted to implement more stringent documentation requirements, the Chinese immigrant community (which was the principal target of the legislation) engaged in coordinated civil disobedience that successfully prevented the government from enforcing its new documentation requirements. See Act of May 5, 1892 (Geary Act), ch. 60, § 3, 27 Stat. 25, 25 (creating a presumption that any Chinese resident was deportable “unless such person shall establish, by affirmative proof, . . . his lawful right to remain in the United States,” a statutory requirement backed by regulations requiring all Chinese immigrants to obtain a certificate of residence as proof of their lawful right to remain); SALYER, *supra* note 29, at 46-58 (describing mass refusal to apply for certificates of residence and the government’s eventual capitulation, which meant that the documentation requirement was never enforced).

188. See NGAI, *supra* note 86, at 55-56, 64-68.

189. See INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2006) (“An alien present in the United States without being admitted or paroled . . . is inadmissible.”); INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2006) (“Any alien who at the time of entry [was] . . . inadmissible by the law existing at such time is deportable.”); INA § 237(a)(1)(B), 8 U.S.C.

confer any de jure discretion on the Executive to determine who has lawful status and may therefore remain in the United States, in practice they delegate tremendous authority to the executive branch. The principal reason is that over *thirty percent* of all noncitizens living in the United States are deportable under this provision because they have either entered illegally or overstayed their visas.<sup>190</sup>

To see why this fact effectively delegates so much regulatory authority to the President, imagine a criminal statute that rendered thirty percent of all the people living in the country subject to criminal conviction. In this world, prosecutors could not possibly initiate proceedings against all persons violating the law and 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 underenforcement of the law, results in the delegation of great authority to the officials who decide whether to initiate a criminal prosecution. In his important work concerning the structure of modern criminal law, William Stuntz has made precisely this point.<sup>191</sup> Surprisingly, it has gone unnoticed that immigration law has a startlingly similar structure.<sup>192</sup> First, a significant fraction of the noncitizen population is deportable as a technical legal matter. Second, though 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

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§ 1227(a)(1)(B) (2006) (“Any alien who is present in the United States in violation of this Act [which includes those who have overstayed their visas] . . . is deportable.”).

190. See, e.g., JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (2006), <http://pewhispanic.org/files/reports/61.pdf>; see also DAVID A. MARTIN, MIGRATION POLICY INST., *TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION* (2005), [http://www.migrationpolicy.org/pubs/MPI\\_PB\\_6.05.pdf](http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf) (categorizing the varied statuses of the undocumented population).

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

192. In fact, immigration law may comport even more closely with Stuntz’s claims than does criminal law. Stuntz’s theory about criminal law turns centrally on his claim that modern criminal law renders wide swaths of the American public subject to criminal prosecution. Richard McAdams has recently questioned the accuracy of this account and wondered whether Stuntz is “exaggerating when he says that the current [criminal justice] system is ‘lawless,’ that criminal statutes are a ‘side-show,’ that we are coming ‘ever closer to a world in which the law on the books makes everyone a felon.” Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists’ View*, in CRIMINAL LAW CONVERSATIONS 517, 523 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009). But while it seems somewhat implausible that thirty percent of Americans are formally “felons,” more than this fraction of noncitizens are formally deportable.

selective charging decisions.<sup>193</sup> In this way, the structure of the immigration system delegates tremendous power to the executive branch.

## 2. *Deportable Postentry Conduct*

A second feature of immigration law magnifies this delegation of authority. The Immigration and Nationality Act does not limit deportation to those who have entered unlawfully; it also makes *lawful* entrants deportable for a wide variety of postentry conduct. Over the last century, Congress has dramatically expanded these deportation grounds and thereby multiplied the number of noncitizens subject to removal.<sup>194</sup>

When the federal government first began to restrict immigration in the 1870s and 1880s, provisions making immigrants deportable for postentry conduct did not exist. The tiny number of deportation provisions that did exist all made removal turn on information about the immigrant available at the time she entered, rather than on postentry conduct. For example, the 1882 Chinese Exclusion Act authorized deportation only for “any Chinese person found unlawfully within the United States”<sup>195</sup>—meaning those persons who entered unlawfully after the adoption of the Act.<sup>196</sup> In 1891, Congress generalized this provision by making noncitizens deportable for one year following entry if they were found to have entered in violation of the law.<sup>197</sup> That same statute made deportable “any alien who becomes a public charge

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193. See *Exercising Prosecutorial Discretion*, Memorandum from Doris Meissner, INS Comm’r, to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg’l & Dist. Counsel of INS (Nov. 17, 2000) (on file with authors) (outlining factors to be considered when deciding whether to exercise discretion to pursue removal). Though this memo documents the immigration agency’s authority to decline to prosecute, it is important to note that the memo reveals only a small aspect of the agency’s exercise of prosecutorial discretion. It focuses very much on individual case equities—on the question of whether a deportable noncitizen who is apprehended or otherwise comes to the attention of the agency should be placed in proceedings. Unsurprisingly, it does not discuss or document the larger system-wide decisions about enforcement priorities that dramatically affect the types of noncitizens who are likely to be placed in removal proceedings. (In this way, this memo is more closely related to Gerry Neuman’s project, see *infra* note 209, than it is to ours.)

194. The following discussion draws on Cox & Posner, *supra* note 13.

195. Act of May 6, 1882 (The Chinese Exclusion Act), ch. 126, § 12, 22 Stat. 58, 61, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

196. *Id.*

197. See Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

within one year after his arrival in the United States from causes existing prior to his landing,”<sup>198</sup> similarly reaffirming a focus on preentry information.

It was not until 1907 that Congress added deportation grounds that clearly targeted postentry conduct, making deportable any immigrant who engaged in prostitution within three years of entering the country.<sup>199</sup> Over the last century, Congress has steadily expanded the ex post screening system by augmenting the list of postentry conduct that makes a noncitizen deportable. Congress began in 1917 by adding criminal convictions and advocacy of anarchy to grounds for deportation.<sup>200</sup> In 1922, Congress added certain drug convictions to the statute.<sup>201</sup> The enactment of the Immigration and Nationality Act in 1952 broadened the definition of subversives subject to deportation and enlarged a number of other deportability grounds as well.<sup>202</sup> This growth in the number and breadth of deportation grounds was augmented by changes in the temporal scope of deportation: Congress over time has extended the screening period for noncitizens, eliminating the statutes of limitation for most grounds of deportability.<sup>203</sup> Though Congress time-limited nearly all grounds of deportability in the first three decades of federal immigration law, today such statutes of limitation remain for only a few grounds.<sup>204</sup>

198. *Id.*

199. See Immigration Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899-900.

200. See Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889 (making deportable “at any time within five years after entry . . . any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States”); *id.* (making deportable “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry”).

201. See Act of May 26, 1922, ch. 202, § 2(e), 42 Stat. 596, 597 (making deportable any noncitizen convicted of violating the statute’s prohibition on the importation of or dealing in opium).

202. See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

203. See, e.g., Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012, 1012 (eliminating the 1917 Immigration Act’s statute of limitations on the deportability of anarchists); Act of Mar. 26, 1910, ch. 128, § 3, 36 Stat. 263, 264-65 (eliminating the statute of limitations from the 1907 Act’s ground of deportability for noncitizens who, after entry, practiced prostitution or were associated with a house of prostitution); *cf.* Immigration Act of 1917, § 19 (extending to five years the statute of limitations for deporting public charges).

204. See, e.g., INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2006) (making deportable noncitizens convicted of a single “crime involving moral turpitude committed within five years . . . after the date of admission”).

During the last two decades, the expansion of deportation provisions targeting postentry conduct has accelerated dramatically—due mostly to the way modern immigration law treats criminal behavior classified as an “aggravated felony.”<sup>205</sup> Congress in 1988 made deportable any noncitizen with a conviction for an “aggravated felony”—a term that the INA initially defined to cover serious drug trafficking offenses.<sup>206</sup> Since then Congress has expanded the definition repeatedly.<sup>207</sup> Today the definition encompasses a broad swath of criminal conduct, including minor convictions—even some misdemeanors—that make the statutory label something of a misnomer and the statute’s scope breathtaking.<sup>208</sup>

The principal consequence of this dramatic expansion has been to further enlarge the number of immigrants technically subject to removal, and thus the size of the immigrant population over which the Executive exercises its discretion.<sup>209</sup> Moreover, the expansion has altered the *types* of immigrants subject to deportation by making many long-term permanent residents deportable—often for very minor crimes. This gives the Executive policymaking power with respect to an ever-increasing cohort of immigrants.

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205. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; National Narcotics Leadership Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

206. See National Narcotics Leadership Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470-71.

207. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-79; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546, 3009-627 to 3009-628; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22; Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048.

208. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001) (holding that the Illinois Class A misdemeanor of criminal sexual abuse constitutes an aggravated felony); IMMIGRATION LAW AND PROCEDURE, § 71.05(2)(d) (examining case law interpreting the breadth of “aggravated felony”); Dawn Marie Johnson, Note, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001).

209. See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006) (noting that deportation rules can set a “very high standard of conduct that does not express the country’s deportation policy, but rather creates a large *pool* of legally deportable aliens among whom the minister selects on some other basis . . . as a matter of enforcement discretion”).

### 3. *Relief from Removal*

A third feature of modern immigration law helps consolidate screening power in the immigration officials responsible for setting enforcement priorities and making charging decisions. In recent years, Congress has made the system of deportation more categorical, eliminating many avenues of relief from removal that in earlier periods were available to noncitizens who engaged in deportable conduct.<sup>210</sup> At first it might seem that this change would decrease the authority of the Executive by eliminating de jure discretion and making more rule-oriented many deportation provisions. So goes the conventional account of this change. Many scholars have written that the elimination of various forms of relief under the INA and the increasingly categorical nature of the code have spelled the demise of discretion in immigration law.<sup>211</sup> Immigrants' rights advocates have widely condemned the changes on these grounds, concluding that the loss of discretion has increased the injustice of the system.

The limitation of this account as a description of the role of discretion in immigration law is that it focuses on the scope of the formal statutory provisions that make migrants eligible or ineligible for relief from removal in a hearing before an immigration judge. If we broaden our focus to encompass the entire removal process, it becomes clear that the statutory changes did not so much limit discretion as shift it to the charging stage of the deportation process. Shedding light on this shift will most likely fail to assuage the critics who have called attention to the constriction of immigration judges' discretion to provide relief. But for our structural purposes, it has significance because it underscores that the Executive still has de facto delegated authority to grant relief from removal on a case-by-case basis. The Executive simply exercises this

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210. Prior to 1996, statutory relief from deportation was available under a variety of circumstances. All deportable noncitizens who could otherwise qualify for an immigrant visa—even those without lawful status—were eligible for suspension of deportation if they had lived for a sufficient period in the United States, were of good moral character, and could make a showing of extreme hardship. See INA § 242, 8 U.S.C. § 1254 (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 308(b)(7), 110 Stat. 3009-546, 3009-615. For lawful permanent residents, somewhat more generous relief was also available under INA § 212(c). Congress significantly restricted the availability of relief from removal in 1996 when it consolidated the various relief provisions. See INA § 240A, 8 U.S.C. § 1229b (2006). After 1996, for example, noncitizens convicted of “aggravated felonies” are categorically ineligible for relief from removal. See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).

211. See, e.g., Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000).

authority through its prosecutorial discretion, rather than by evaluating eligibility pursuant to a statutory framework at the end of removal proceedings. In fact, because these decisions are no longer guided by the INA's statutory framework for discretionary relief, the changes may actually have increased the Executive's authority.

Again, there may be very good reasons to prefer that discretion rest with the Executive at the end of the removal process. For one thing, such an option opens up an avenue for judicial review by Article III courts of the application of relief—a form of review unavailable with respect to prosecutorial discretion. But the important structural point is that, rather than reducing discretion, the principal effect of changes to the relief provisions has been to reallocate discretion to a different set of institutional actors within the executive branch. Under the INA, an immigration judge typically applies the relief-from-removal provisions in the first instance.<sup>212</sup> These judges sit within the Executive Office of Immigration Review (EOIR), a division of the Justice Department (DOJ), rather than in the Department of Homeland Security (DHS) with the rest of the immigration administrative structure. Initially located within the INS (which before 2002 was itself a part of DOJ), the immigration judges were moved to EOIR in 1983 as part of an explicit effort to separate them from the enforcement arm of the immigration bureaucracy and thereby ensure a higher degree of independent decisionmaking by those judges. These same objectives justified keeping the immigration judges within DOJ when Congress created DHS, which today houses the immigration enforcement bureaucracy.<sup>213</sup>

But this effort to insulate decisions regarding relief from the prosecutorial arm of the immigration agencies has been undermined by the recent changes to the relief provisions. These changes have had the effect of shifting more aspects of the deportation decision back to Immigration and Customs Enforcement (ICE). Far from eliminating discretion, then, the statutory restrictions on discretionary relief have simply consolidated this discretion in the agency officials responsible for charging decisions.<sup>214</sup> Prosecutorial discretion has thus

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212. See INA §§ 240A, 240B, 8 U.S.C. §§ 1229(b), 1229(c) (2006).

213. See, e.g., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 280-81 (Thomas Alexander Aleinikoff, et al., eds., 6th ed. 2008) (describing the creation of EOIR in 1983 as well as Congress's decision to keep EOIR in DOJ rather than to transfer it to DHS); see also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006) (discussing the erosion of independence in the context of immigration adjudication).

214. Note the way in which other summary removal mechanisms accomplish this consolidation, as well. Existing literature focuses principally on the way in which the summary mechanisms alter the amount of process that an immigrant receives; but it is also important to be attentive to the way in which these provisions change the distribution of decision-making authority within the executive branch by giving the Executive broader authority to

overtaken the exercise of discretion by immigration judges when it comes to questions of relief.

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Together, these three changes to the structure of immigration law, which began nearly a century ago and have accelerated in the last few decades, have given broad authority to the Executive to set immigration screening policy. The trends have made the administration of immigration law look more and more like the administration of criminal law, where charging decisions—rather than either the formal legal rules or the exercise of judicial discretion—determine who is deported and what collateral consequences attach to deportation. In this fashion, the development of the statutory structure of immigration law tracks our accounts above concerning the changes over time in the way the courts and the political branches have conceptualized the constitutional distribution of authority between the President and Congress.

*D. Ex Post Screening and Asymmetric Delegation*

Implicit in our account of pervasive de facto delegation and executive discretion rests a crucial observation about the nature of executive power in the immigration context: modern immigration delegates screening authority, or authority over what we have been calling core immigration policy, to the President in an asymmetric fashion. The President has authority almost entirely at the back end of the system, as opposed to the front end. Such asymmetry is not inherently problematic or dysfunctional. But once we see the asymmetry, it becomes important to explore its consequences and consider whether recalibration might be required.

At a very basic level, immigration law involves picking a small number of entrants from a large pool of potential immigrants. As one of us has argued elsewhere, states can screen immigrants in two different ways: on the basis of information about the immigrant that the state has when she seeks entry; or on

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determine how to utilize enforcement resources, and how quickly to remove certain types of noncitizens. Until recently, the Executive used expedited removal only at ports of entry to screen for arriving immigrants with fraudulent documents, permitting those who could demonstrate credible fear of persecution to go through the asylum process. But in 2005, Secretary Chertoff announced that expedited removal would be used for non-Mexicans apprehended within 100 miles of the border who could not demonstrate lawful entry or presence inside the country for more than fourteen days. This expansion of the policy clearly reflected the Executive's decision to place greater emphasis on removing immigrants who crossed the U.S.-Mexico border without inspection.

the basis of information that the state acquires about the immigrant after she enters the country.<sup>215</sup> These mechanisms of *ex ante* and *ex post* screening are substitutes. Just like a university selecting permanent faculty members might choose them entirely on the basis of credentials, or might instead use the tenure system to weed out some faculty on the basis of their performance after they arrive, a state can use either type of screening mechanism, or both, to choose immigrants.

In practice, of course, our immigration system relies on a complex combination of both mechanisms. The INA embodies a commitment to *ex ante* screening in provisions that select immigrants for entry on the basis of their prior professional achievements, their family connections in the country, their lack of certain criminal convictions, and so forth. The Act also embodies a commitment to *ex post* screening in provisions that make noncitizens deportable for engaging in a variety of postentry conduct—the standards we discussed in the previous section.<sup>216</sup> Why a state might pick a particular combination of *ex ante* and *ex post* screening depends on the objectives of the state's immigration policy, its institutional capacity to gather information through the two channels, and moral judgments concerning the consequences of the different mechanisms.

The three aspects of modern immigration law discussed above all give the Executive dramatic power to set screening policy *ex post*. Together, these features create a large class of resident noncitizens who are technically deportable. By deciding which members of this class to remove, immigration officials can dramatically reshape *ex post* screening policy.

Consider what we regard as the most consequential feature discussed above: the INA provisions that make illegal entrants deportable. In theory, these provisions represent an *ex ante* screening standard adopted by Congress. In practice, however, immigration officials use the provisions to shape core immigration policy through *ex post* decisionmaking. Executive officials do not initiate removal proceedings against a random sample of immigrants deportable under this provision. Instead, the Executive makes substantive judgments as to whom to pursue. For many years, for example, the INS and ICE initiated proceedings mostly against immigrants who had had a run-in with the criminal justice system. Unlawful entrants who managed to avoid criminal arrest or conviction were extremely unlikely to be deported. In this

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215. See Cox & Posner, *supra* note 13.

216. Our reliance on *ex post* screening is also reflected in the increasingly common process that permits growing numbers of immigrants initially admitted on a temporary basis to adjust their status to permanent resident.

way, the Executive used selective enforcement to convert § 237(a)(1) into an ex post screening mechanism that targeted a subset of unlawful entrants, prioritizing their removal above others.

Recently, the immigration agencies have begun to change this selective enforcement strategy. For the first time in nearly two decades, the agencies have begun conducting workplace and even home raids on a relatively widespread scale. These developments represent a de facto shift in ex post screening policy. Rather than targeting almost exclusively those deportable immigrants who have become entangled in the criminal justice system, the Executive is beginning to screen out those unauthorized immigrants found working in particular labor sectors. The Executive appears to have reordered priorities to place greater emphasis on unlawful workers rather than on noncitizens with criminal convictions.

It is still too early to know, of course, how significant or lasting this shift will be. The number of raids may still be too small to amount to a dramatic reshaping of screening policy in practice, and the newest Secretary of DHS, Janet Napolitano, has vowed to shift the focus of enforcement policy from targeting unlawful workers to unscrupulous employers (query what difference this shift will make in practice). Still, these recent changes show how the President, in an ex post manner, can substantially change policy with respect to which immigrants are permitted to remain, without Congress having made any changes to the formal structure of immigration law.

But though the President effectively has been delegated tremendous authority to shape ex post screening through the setting of enforcement priorities, he has much less authority to reshape ex ante screening policy. As noted above, archetypical ex ante screening rules are those that make some immigrants but not others admissible because of their educational and professional achievements, their family connections, and so forth. These rules appear in the INA's complex visa allocation system. That system makes certain numbers of visas available for different classes of noncitizens.<sup>217</sup> Congress has kept for itself nearly all the power to enact these ex ante screening criteria. The President has almost no formal authority to adjust the quotas or change the criteria by altering the information about each immigrant that can be factored into the screening decision made by administrative officials.<sup>218</sup>

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217. See, e.g., 8 U.S.C. § 1153(a) (allocating family visas); *id.* § 1153(b) (allocating visas on employment grounds).

218. See Memorandum from Bo Cooper to Gen. Counsel, INS, and Deputy Comm'r, INS, 1 INS and DOJ Legal Opinions § 99-5, at 3 (2006) ("The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement

A few exceptions to this general rule exist. The INA, for example, gives the Executive considerable authority to manage refugee crises and address overseas refugee problems, as elucidated by our discussion in Part II. In the Refugee Act of 1980, Congress delegated to the President the power to determine annually how many refugees may be admitted in the next fiscal year,<sup>219</sup> in consultation with Congress.<sup>220</sup> Under this provision of the INA, the President also has the authority to determine how that total should be allocated among the various refugees fleeing conflicts and disasters around the world, thus giving the President important authority to express his preferences regarding who should enter, whether those preferences are motivated by foreign policy or domestic political concerns.<sup>221</sup> More broadly, § 212(f) gives the President personally the

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decision. By contrast, a grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.”). It is also important to note that, though ICE has the authority not to commence a removal proceeding against an alien, it does not have the authority to “grant a status for which an alien is not eligible, so the alien remains in a continuing, difficult state of limbo and illegality.” *Id.* at 7.

219. 8 U.S.C. § 1157(a). Congress also gave the President the power to add refugee slots in the event of emergency—a power President Clinton exercised after events in Kosovo in 1999. *See id.* § 1157(b).
220. 8 U.S.C. §§ 1157(a)(1)-(a)(3), 1157(b). Through this process, the President can express normative views and advance his foreign policy agenda by determining from what part of the world to accept refugees. Since 1990, pursuant to § 244 of the INA, the President also has possessed the power to grant Temporary Protected Status (TPS) to aliens who are fleeing violent situations, natural disasters, or other calamities but do not necessarily qualify under the legal definition of refugee. *See* 8 U.S.C. § 1254a. TPS may be granted for six to eighteen months and may be extended if the conditions that precipitated it have not improved. Aliens with TPS status are not on the path to lawful permanent resident status. The numbers of aliens with TPS status are significant, to be sure. In 2008, for example, aliens of seven nationalities residing in the United States had TPS status, including 229,000 individuals from El Salvador and 70,000 from Honduras. *See* RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 5 (2008), [http://pards.org/crs/CRS\\_Report\\_Temporary\\_Protected\\_Status\\_Current\\_Immigration\\_Policy\\_and\\_Issues\\_\(September\\_30,\\_2008\)\\_Updated.pdf](http://pards.org/crs/CRS_Report_Temporary_Protected_Status_Current_Immigration_Policy_and_Issues_(September_30,_2008)_Updated.pdf). It is important to note, however, that these numbers do not reflect annual grants of TPS, but rather the number of persons who have TPS in 2008, many of whom were granted the status years ago. *See id.* at 5, tbl.1 (demonstrating that the Salvadorans with TPS in 2008 have had that status since 2001, and that the Somalis with TPS in 2008 were granted that status as early as 1991). In addition, these numbers of admissions are far less substantial than those in the pool of aliens over which the President exercises ex post screening authority, or the number of immigrants admitted on an annual basis through the labor and family channels established by Congress.
221. From 1980 until the end of the Cold War, for example, the Executive allocated almost all of the refugee quotas to persons fleeing communist countries or other adversaries of the

power to suspend the entry of “any class of aliens” whose admission “would be detrimental to the interests of the United States.”<sup>222</sup> But, as we explained above, the restriction of this power to emergency situations makes its practical utility as a thoroughgoing ex ante screening mechanism limited. Indeed, the Executive rarely invokes it, and it seems suited to address isolated instances of sudden and mass influx. What is more, though the power clearly allows the President to exclude immigrants, it seems that the most that existing law permits him to do vis-à-vis entry is to parole into the United States noncitizens who must nonetheless meet the criteria set by Congress to remain permanently—a power the Refugee Act actually sought to limit to discrete humanitarian cases.<sup>223</sup>

Of course, the President can change ex ante screening policy at the margins by changing ex ante enforcement policy. But prosecutorial discretion and selective enforcement play a much smaller and less fine-grained role at the admissions stage than the deportation stage. When an immigrant applies for a visa and presents herself for admission, prosecutorial discretion is largely inapplicable. As a matter of law, the immigration agencies are not authorized to grant a visa to a person who does not satisfy the admissions criteria or who is subject to one of the grounds of inadmissibility. Conversely, with a few

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United States. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 932 (4th ed. 2005) (citing statistics from 55 Fed. Reg. 41,979-80 (Oct. 17, 1991)).

222. 8 U.S.C. § 1182(f). See *supra* Subsection II.B.2.a. for a detailed discussion of these developments.

223. We should note one other source of delegated authority: legal uncertainty. The INA’s admission and exclusion criteria are for the most part relatively rule-like, but all legal criteria leave some interpretive uncertainty. This uncertainty often has the effect of delegating to the executive branch the authority to give content to substantive standards set by Congress. Asylum and withholding law illustrate this point. See Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (codified as amended in scattered sections of 50 U.S.C.) (setting out the first withholding provision: withholding does not entitle an alien to permanent resettlement, and the standards for establishing eligibility for withholding are distinct from the standards required for establishing persecution). Though Congress has set the broad parameters for who qualifies for withholding or asylum, the Board of Immigration Appeals and the Courts of Appeals, through the adjudication of asylum claims, have given the standards their actual content. In this sense, through case-by-case adjudication, the executive branch has essentially set ex ante standards 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.” A similar example comes from the exclusion provisions, which make inadmissible a noncitizen who has committed a “crime involving moral turpitude”—a vague phrase undefined in the INA. See 8 U.S.C. § 1182(a)(2). While the discretion conferred by these provisions is important, the accumulation of agency and judicial interpretation has significantly reduced the interpretive uncertainty surrounding these provisions and prevented them from amounting to large-scale delegations of authority akin to the ones we describe in the main text.

exceptions, the statute does not authorize the agencies to deny a visa to a person who satisfies the admissions criteria and does not fall within one of the grounds of inadmissibility. To be sure, at the margins, the Executive has some power to influence who can enter. The Executive could in theory choose to invest more or less in testing the veracity of some immigrants' visa applications—with the effect of changing the visa grant rates or the speed of the approval process for that group. Officials at consulates around the world could adopt, formally or informally, presumptions of suspicion of visa applicants, and different consulates might, for example, develop reputations for being more or less exacting in the proof and credibility they require of a visa applicant's ability to support himself financially. In practice, however, this possibility probably amounts to a fairly minor delegation (though the substantial visa delays for those immigrating from predominantly Muslim countries in the wake of 9/11 represent an important reminder that it is not meaningless).

That leaves enforcement at the border as the principal tool available to an Executive who wants to alter the formal policy concerning the screening of immigrants at the front end of the system—a tool that, we contend, is a coarse and limited tool, whether it is the result of *de jure* or *de facto* delegation.

As a *de jure* matter, Congress certainly has given the Executive considerable power with respect to border enforcement. Over the past fifteen years, Congress has delegated to the Executive more and more power to build a border fence without requiring that Congress comply with pre-existing legal constraints. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which authorized the construction of barriers along U.S. land borders to prevent unauthorized crossings and explicitly directed that a fourteen-mile fence be built along the U.S.-Mexico border near San Diego,<sup>224</sup> began this trend by authorizing the Attorney General to waive the Endangered Species Act and the National Environmental Policy Act of 1969 when necessary for the construction of barriers and roads.<sup>225</sup> After protracted litigation prevented nearly all construction, Congress further augmented the President's fence-building power in the REAL ID Act of 2005.<sup>226</sup> Among a number of

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224. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF H.R. 418, THE REAL ID ACT OF 2005 (2005), <https://w2.eff.org/Activism/realid/analysis.pdf>.

225. Illegal Immigration Reform and Immigration Responsibility Act of 1996, § 103, 8 U.S.C. § 1103 add. (2006).

226. The central purpose of the REAL ID Act was to set out a new set of security-conscious criteria to which government-issued identification, including state identification, had to adhere.

immigration-related provisions, that Act included a provision authorizing the Secretary of Homeland Security to waive not just environmental laws, but *all* legal requirements, defined as any local, state, or federal statute, regulation, or administrative order, as he determines is necessary, in his sole discretion, to advance the expeditious construction of border barriers and related roads.<sup>227</sup>

The power to suspend all laws necessary for the construction of a border fence is startlingly broad, and a number of senators called attention to this capacious delegation.<sup>228</sup> Senator Hillary Clinton (D-NY) for example, emphasized the threat the waiver authority posed to the system of checks and balances, describing the measure as a “tremendous grant of authority to one person in our Government” and a slide toward “absolute power” in the Executive.<sup>229</sup> Senator Patrick Leahy (D-VT) described the delegation as “breathtaking” and the legislation as demonstrating a lack of concern for the environment, not to mention the rule of law.<sup>230</sup>

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227. H.R. REP. NO. 109-72, at 171 (2005).

228. For procedural reasons, this debate was largely incidental to the Act’s passage. As a stand-alone measure, the REAL ID Act passed the House but did not make it through the Senate. In March of 2005, however, it was appended to an emergency appropriations bill that included funds for U.S. troops and victims of the tsunami in Southeast Asia, ultimately making opposition to the Act politically unpalatable. Because the Act had been attached in committee, no debate or amendment process was possible in the Senate, and the REAL ID Act thus made its way through the chamber, despite opposition. Members of the Senate lamented the way in which the Act was passed. Senator Russell Feingold (D-WI) asked: “What happened to the legislative process? I know that some in the other body, and some in the Senate as well, have very strong feelings about these immigration provisions. But strong feelings do not justify abusing the power of the majority and the legislative process in this way.” 151 CONG. REC. S4816, 4823-24 (daily ed. May 10, 2005); *see also* 151 CONG. REC. S4816, 4831 (daily ed. May 10, 2005) (statement of Sen. Obama) (“Despite the fact that almost all of these immigration provisions are controversial, the Senate did not conduct a full hearing or debate on any one of them. While they may do very little to increase homeland security, they come at a heavy price for struggling State budgets and our values as a compassionate country.”).

229. 151 CONG. REC. S4814, 4815 (daily ed. May 10, 2005). The Supreme Court denied certiorari in June 2008 on a case challenging the waiver provision of the REAL ID Act as a violation of the nondelegation doctrine. *See* *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

230. 151 CONG. REC. S4816, 4841 (daily ed. May 10, 2005). Similar concerns were expressed during the debates over the McCarran-Walter Act in 1952 and the inclusion of what is now Section 212(f). Several witnesses before the House Judiciary Committee emphasized that the power was not necessary outside of emergencies because “Congress was certainly available,” *Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong. 448 (1951) (statement of Stanley H. Lowell, Americans for Democratic Action, D.C.); that the “lawmaking power is entrusted to Congress,” making the provision an improper delegation of power, *Hearings Before the President’s Commission on Immigration*

Nonetheless, even with this extraordinary delegation of power to construct the border fence free of other legal constraints,<sup>231</sup> the “border fence” tool in the hands of the Executive remains very coarse as an actual screening mechanism. Building the fence raises the screening bar fairly uniformly. It gives the President no authority to augment the screening criteria *selectively* by, say, adding a requirement that an applicant for admission speak English or have a particular amount of savings before being permitted to enter.

As a de facto matter, the Executive retains more policy options than the law suggests on its face, if only because he can choose not to build the border fence Congress has authorized, thus deciding to permit the flows of unauthorized immigrants across the border to continue undeterred by the fence. But not building the fence (or otherwise relaxing border enforcement) simply lowers the screening threshold a bit across the board. It is difficult to use border enforcement as a fine-grained screening tool—that is, to ease border policing for some types of migrants, but not others, and thereby control the types of immigrants exempt from the ordinary *ex ante* screening criteria.

Again, exceptions exist at the margins.<sup>232</sup> And it is true that border enforcement by its nature has selection effects. The more difficult and dangerous the government makes it to cross the border, the more likely it is that the system will select for those who are physically able to make the crossing and temperamentally willing to take the risk (a risk that today

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*& Naturalization*, 83d Cong. 1787 (1952) (statement of Ben Touster, President, Hebrew Sheltering and Immigrant Aid Society); and that the “blanket authority” the provision delegated gave the President power to “wipe out immigration altogether,” a “tremendous and wide power in the hands of any one individual” that could lead to events such as the Palmer Raids, *Hearings Before the President’s Commission on Immigration and Naturalization*, 83d Cong. 375 (1952) (statement of Samuel Abrams, Attorney & President, Hebrew Sheltering and Immigrant Aid Society).

231. In 2005, Secretary of DHS Michael Chertoff waived “in their entirety, with respect to the construction of the barriers and roads” prescribed in Congress’s 1996 legislation, “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to” the National Environmental Policy Act, the Endangered Species Act, the Coastal Zone Management Act, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty, the Clean Air Act, the Administrative Procedure Act, and the Religious Freedom Restoration Act, among other statutes, and reserved the authority to make additional waivers. *See* 70 Fed. Reg. 55,623 (Sept. 22, 2005). For an argument that this delegation of authority violates the nondelegation doctrine because it affects private rights but does not provide for the crucial safeguard of judicial review, see *Petition for Writ of Certiorari, El Paso v. Chertoff*, 129 S. Ct. 2789 (No. 08-751).
232. For example, the Executive might be able to screen at the border for particular types of migrants by using its expedited removal authority to return unlawful border crossers, rather than seek out unauthorized aliens who have overstayed their visas and who may represent a different type or class of person.

includes death).<sup>233</sup> Underenforcement at the border thus can change the distribution of immigrants who enter the country. Nonetheless, these changes in distribution are not really within the control of the executive branch.

In short, while the Executive possesses some ex ante screening authority, the Executive has much more flexibility to make fine-grained adjustments to ex post screening policy.<sup>234</sup> This asymmetry will be important to our critical evaluation in the next Part of the current relationship between the Executive and Congress in immigration law. But before launching that critique, we should emphasize that recognizing asymmetric delegation also puts us in a better position to understand the historical examples we discussed in Sections II.A. and II.B. Both the Bracero and Haitian/Cuban examples involved screening immigrants at the point of arrival, rather than on the back end of the system. In those episodes, the Executive played the lead role in determining what types and how many noncitizens should be allowed to enter. This fact explains why those examples stand out in the historical record as important but exceptional moments in immigration history (and explains our choice to focus on them). It ultimately should not come as a surprise that instances of extended executive ex ante screening tend to arise during “emergencies” such

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233. In particular, we might expect underenforcement to prefer those immigrants who have the most to gain from migrating, those who have the fewest other migration options, and those who are more risk-seeking.

234. Recently, Gerry Neuman has made a somewhat different argument about the location of discretion in the immigration system. In *Discretionary Deportation*, *supra* note 209, he argues that

U.S. deportation policy is primarily rule-governed, with enforcement discretion. U.S. admission policies differ, and even those that are rule-governed in theory may become discretionary in practice. In rough terms, this contrast reflects a greater emphasis on the rule of law in dealing with foreign nationals who have already developed connections with the United States . . . .

*Id.* at 618. Neuman’s conclusion initially appears to be the opposite of ours: he seems to be saying that there is more executive discretion at the ex ante stage than the ex post screening stage. But this tension dissolves when one realizes that Neuman’s research interest and methodological focus is quite different from ours. He focuses principally on the extent to which formal legal rules confer de jure discretion on the Executive—as when the INA formally grants immigration judges discretion to decide whether some noncitizens should be granted relief from deportation. In contrast, we focus centrally on the way the INA confers de facto discretion by expanding the grounds of categorical deportability. Relatedly, Neuman focuses somewhat more on individual determinations rather than the way that the formal rules interact with the overall structure of the immigration laws. This makes much less important for him something that is perhaps *the* central feature of our account—the fact that the huge undocumented population sits alongside the deportation rules in a way that gives the Executive considerably more discretion than the de jure discretion rules in the code.

as wartime labor shortages or refugee crises. Emergencies represent one of the limited contexts in which the statutory structure of the INA actually delegates to the President the power to set *ex ante* screening rules.<sup>235</sup> Moreover, history has shown that the President is much more likely during emergencies to act aggressively on the basis of claimed inherent authority.<sup>236</sup>

### III. THE PATHOLOGY OF ASYMMETRIC DELEGATION

Our central ambition in this Article has been to understand the doctrinal and practical distribution of immigration authority between the President and Congress, in order to shed some much-needed light on the nature of immigration policymaking.<sup>237</sup> We show that immigration law, over the last century or so, has shifted (as a matter of both formal constitutional doctrine and functional structure) from a model according to which questions of inherent executive screening authority were both legally and practically plausible to a model in which the Executive's screening authority has become a function of Congress's pervasive delegation of policymaking authority to the President, primarily through the creation of a code that requires the Executive to exercise extensive *ex post* discretion in enforcement. As Congress has come to rely more and more on *ex post* screening, the mechanisms of prosecutorial discretion and enforcement priority setting, both executive in nature, have come to take on greater significance. Thus do the outlines of an institutional accommodation between the two political branches begin to appear. This institutional accommodation makes questions about the formal allocation of authority under the Constitution much less important

Our descriptive thesis raises several questions. Perhaps most obvious is the question of how the current state of affairs came to be. At the highest level of

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235. See *supra* notes 132-140 and accompanying text.

236. See *supra* Sections II.A.-B.

237. Although it is not our central focus here, our descriptive project also is important for ongoing debates about the connections between immigration law and modern administrative law doctrines. Federal courts have been confused for years about the extent to which their review of immigration courts should be governed by *Chevron* and a variety of other rules related to judicial deference, *res judicata*, and so on. Some courts have interpreted the history of plenary power jurisprudence to require exceptional deference to the immigration agencies; others have treated those agencies as subject to conventional doctrines of administrative law; and still others have treated those agencies with considerably more skepticism than modern administrative law would allow. See, e.g., Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007) (discussing this confusion). At a very basic level, these questions cannot be resolved without a theory of the immigration separation of powers. See *supra* note 49 and accompanying text.

generality, we can easily identify some potential causes of these historical trends. Larger legal changes such as the rise of the administrative state may be partly responsible. So might be the growing migratory and demographic pressures that the United States has experienced over the past four decades—pressures that have proven difficult to manage *ex ante* and that probably help explain the rise of the unauthorized population. These changes together likely have contributed to the growth in *ex post* screening during the second half of the twentieth century.

At the same time, it is also possible that the changes over time in the relationship between Congress and the Executive have been the product of political dynamics not unique to immigration law. It could be, much as William Stuntz has suggested of the growth in criminal law, that Congress has intentionally delegated increasing amounts of immigration authority to executive officials for political reasons. Congress might accrue political benefits from making immigration law on the books ever harsher and bear few of the political costs associated with immigration enforcement efforts that portions of the public might see as excessive (perhaps, as in Stuntz's story, because the public blames the Executive for these enforcement efforts). Were such an account true, immigration law would involve a sort of one-way ratchet of ever-widening deportability for noncitizens.<sup>238</sup>

While the past three decades of immigration legislation cohere with this account of the political economy of immigration law, some dissonance exists: while deportation policy has steadily expanded, Congress punctuated that expansion by adopting a large-scale, generally applicable legalization program in 1986, and a smaller scale program focused on nationals from particular

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238. One could also describe the path of delegation in a different way: it might have been influenced by the extent to which Congress has been able to anticipate that the Executive shares its political goals. (The presence or absence of aggressive assertions of executive authority might be similarly driven by partisan dynamics.) In this story, important variables would include the existence of divided government, or of the rise of an Executive with clearly different policy priorities, if not from a different party, than from the Congress that enacted the legislation being enforced. *Cf.* DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999) (analyzing conditions under which Congress does or does not delegate and observing, among other things, that Congress is more likely to delegate in the face of unified as opposed to divided government or with respect to technically complex issues); Levinson & Pildes, *supra* note 20, at 2361 (“[B]ranch interests are not intrinsic and stable but rather contingent upon shifting patterns of party control. . . . Commentators have suggested, for example, that future Congresses will now think twice before delegating regulatory authority to an executive branch that could change partisan hands—and policy outlook—and legally be able to implement its new policies through agency reinterpretations of statutes.”).

countries in 1997.<sup>239</sup> And even if the theory does fit our reality fairly well, it can be quite difficult to substantiate this sort of account. The political economy of immigration law is not well understood, and causal stories grounded in political economic logic are often exceedingly difficult to falsify. Moreover, we should not underestimate the role that happenstance and path dependency play in such transformations.

We do not aim, therefore, to provide a causal account of how the current structure of immigration law came to be. Instead, we conclude by introducing the central normative question our descriptive account prompts: is the modern allocation of powers desirable? While we cannot hope to provide a complete answer here, we begin the conversation by reflecting on some of the potential costs of the current structure and suggesting institutional reform that might address those costs.

#### *A. De facto Delegation and Screening Costs*

We might put our descriptive account into perspective in several ways. First, we might focus on the sheer magnitude of the delegation to the President, rather than its asymmetrical character. This large delegation raises a set of agency problems not often discussed in immigration scholarship, though they are not unique to immigration law.

For instance, delegating so much screening authority to the Executive arguably gives rise to bad incentives and poor sorting. At some point, providing too much power to immigration officials, particularly lower level officers who make the day-to-day charging decisions, undermines their incentive to properly sort immigrants according to existing criteria governing the right to presence in the United States. This possibility would be particularly salient in contexts in which it is difficult for the public to monitor the work of the Executive, namely when the Executive exercises its unreviewable discretion whether to prosecute removal or not.

Second, even with a well-intentioned Executive, the nature of today's ex post screening, which revolves in large part around the policing of an unauthorized population, raises evidentiary (and potentially rule-of-law)

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239. In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA), which provided amnesty to nationals of Nicaragua and Cuba. Nationals of Guatemala, El Salvador, the former Soviet Union and its successor republics, and most Eastern European nations were given the right to apply for cancellation of removal under pre-1996 standards, which were less onerous than the then-applicable provisions. See Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (codified as amended in scattered sections of 8 U.S.C.).

concerns. As we explained above, the illegal immigration system enables the Executive to use unauthorized status as a proxy for identifying those aliens who might or might not reflect far more “undesirable” qualities, such as criminality or connection to terrorism.<sup>240</sup> Using a proxy can be beneficial in situations where we believe that the proxy correlates with the conduct we wish to target and where that conduct itself is difficult to prove. But the use of proxies may make us less confident that officials’ screening decisions are consistent with articulated enforcement priorities.

Take, for example, the federal government’s recent practice of using technical visa violations or undocumented status as a legal basis for removing putative gang members.<sup>241</sup> The criminal grounds of deportability generally require a conviction.<sup>242</sup> This requirement presumably exists to ensure that those who are deported for criminal conduct actually engaged in the conduct of concern—that the government deports the right sort of immigrant. When a prosecutor relies on an immigrant’s undocumented status as the basis for removing a putative gang member, however, the allegations that he engaged in criminal conduct have not been tested through the criminal process. This bypassing of the criminal process undermines the evidentiary requirements that Congress implicitly built into the criminal deportation provisions.<sup>243</sup> And

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240. In this way, immigration law operates much like criminal law, where the use of proxies is widespread. The classic example is the crime of possessing burglar’s tools, which clearly serves as a proxy for the crime of burglary itself.

241. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (discussing the use of immigration law as a criminal enforcement strategy).

242. See 8 U.S.C. § 1227(a)(2) (2000).

243. A closely related point can be made about the process due to immigrants in deportation proceedings. One of the consequences of the changes in the structure of immigration law has been to deflate the importance of the procedural protections that have developed over the last century. Some of the reductions have been driven by Congress: the immigration code today often accords less process to those being removed on the ground that they entered without authorization than to those being removed on other grounds. Compare 8 U.S.C. § 1229(a) (2000) (describing the ordinary removal process) with 8 U.S.C. § 1225(b) (2000) (describing the expedited removal process for illegal entrants) and 8 U.S.C. § 1231(a)(5) (2000) (describing the process for reinstating removal orders for those who re-enter unlawfully after being deported). More important for present purposes, however, is that even when the code does not formally strip process protections, those protections become much less relevant when the only question before the adjudicator is the often-conceded question of whether the noncitizen entered the country without authorization. In fact, recent events have highlighted the fact that the modern system’s deflation of due process extends even to instances where immigrants are accorded full criminal procedural protections because they have been charged with criminal immigration violations. Along the Texas border, enforcement policy has shifted and mass plea agreements with no meaningful

rule-of-law concerns aside, the risk of error seems high, because undocumented status does not correlate strongly with gang membership, criminality, and most of the other objects of concern for which undocumented status is used as a proxy.<sup>244</sup>

The limitations of using undocumented status as a proxy was perhaps most strikingly illustrated in the immediate wake of 9/11. In the days following the attacks, the federal government detained more than 1000 noncitizens for technical visa violations in an effort to track down terrorists or others who might have been connected to the attacks.<sup>245</sup> The government eventually released many of these noncitizens after they spent months in detention without ever being charged. And while many were removed for their visa violations, the government could not connect a single person detained to terrorism or to the 9/11 plot. Moreover, the proxy enforcement strategy fueled the impression that the government sought to target Muslims.

We ultimately do not intend to suggest that these agency problems mean that the Executive should never wield this sort of policymaking power. Such power always will be inherent in the authority to enforce the law, and broad de facto delegation might be good for a number of reasons. As the large literature on delegation shows, shifting power to the executive branch can enable government to respond more quickly to changing needs and public opinion. It can also sometimes help overcome counterproductive legislative deadlock.<sup>246</sup> Immigration policy debates, when held at the congressional or national level, can be protracted, heated, and divisive. Plenty of evidence exists to support the

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process are becoming the norm despite the attachment of Fifth and Sixth Amendment guarantees. Similar mass plea arrangements have become a central aspect of the recent worksite raids in Iowa and elsewhere. See Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in U.S. History: A Personal Account*, MONTHLY REV., Dec. 7, 2008, <http://www.monthlyreview.org/mrzine/camayd-freixas120708.html>.

244. See, e.g., Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, <http://www.migrationinformation.org/Feature/display.cfm?ID=403> (last visited Oct. 31, 2009) (documenting that the incarceration rate for the native born is substantially higher than for the foreign born).
245. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 22-35 (2003); see also Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373 (2004) (discussing other post-9/11 policies that used immigration status proxies to pursue national security concerns).
246. Here, the Base Closure and Realignment Commission presents the classic example; Congress created the Commission in 1988 after it became clear that the politics of base closure made it nearly impossible for Congress itself to select the bases to be closed. See COLTON C. CAMPBELL, *DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION* 113-28 (2002).

conclusion that change in immigration policy at the congressional level comes only after long periods of legislative stasis. In the face of congressional inaction, then, discretion on the part of the Executive to balance public concern over immigrant influxes with pressure from consumers, employers, and the labor market through its enforcement policies may make good policy sense.<sup>247</sup>

Whatever the optimal balance of all these concerns, the important point to note at this stage is that the immigration literature has been inattentive to these agency costs, because it has overlooked the fact that the costs have arisen as a result of the dramatic increase in de facto delegated authority over the course of the twentieth century.

### *B. The Costs of Asymmetric Delegation*

Even if we think the broad delegation of immigration authority to the President is appropriate, we must ask an additional question: what should be made of the asymmetrical structure of that delegation? As we explained above, the separation of powers in the context of modern immigration law provides the Executive considerably more flexibility to make ex post screening policy than ex ante screening policy. In other words, it splits control over the field's two core policy instruments—admissions policy and deportation policy—giving Congress control over the former and the President control over the latter. In this Section, we tentatively suggest that dividing authority in this way may come with significant costs.<sup>248</sup>

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247. Of course, the opposite might also be true. The large-scale delegation of immigration authority may make it easier for Congress to avoid tackling big immigration reform questions. If we wanted Congress to act more often, we would look at separation-of-powers questions with a view to establishing norms that would force Congress to act, instead of regarding executive decisionmaking as a form of democracy accommodation. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

248. To be sure, defending the asymmetry is not impossible. There might be reasons why such asymmetry is desirable from the perspective of optimal institutional design. Asymmetric delegation arguably tells us something important about rules, standards, and the relationship between ex ante and ex post screening. Imagine that it is relatively easy to specify clear rules for screening immigrants on the basis of pre-entry information, but comparatively more difficult to specify clear rules for screening immigrants on the basis of post-entry information. Were this the case, it might make sense for Congress to specify the ex ante screening rules (because doing so would not be particularly costly) while delegating to the immigration agencies the power to make ex post screening decisions on the basis of looser standards. This structure would allow Congress to avoid the costlier project of developing clear ex post screening rules and allow administrative agencies to act when they are institutionally better positioned to respond flexibly on a case-by-case basis in the ex post context, where more contextual information gathering will be necessary. In reality, this

To be clear, we should emphasize that, at a high level of generality, this sort of asymmetric delegation characterizes every regulatory regime. In part, this asymmetry arises from the simple fact that the rules Congress establishes are without effect until they are enforced—a process that gives the enforcement arm of government a kind of policymaking power. Asymmetry also arises whenever Congress decides to formally restrict the set of tools the President may use to tackle a particular problem—by, for example, permitting the President to attack global warming using fuel efficiency standards but not a carbon tax. In any arena these limitations can come with both costs and benefits. But in the immigration arena, we believe that the likelihood of distortion is particularly high because of the way in which admissions rules and deportation rules function as policy complements.

For example, in situations in which the Executive would prefer to admit immigrants with *lawful* status, it is largely powerless to do so. Their lawful admission would be inconsistent with the admissions criteria established by Congress. One instance in which the Executive might prefer access to the lawful path is when potential immigrants are unable or unwilling to bear the risks associated with unlawful entry. Whereas many low-skilled migrants with few other options bear these risks, high-skilled immigrants often will not. Migration to the United States may be less valuable to the latter, because they have more migration options, or because they have economic prospects at home sufficient to support a family and live a good life. What is more, employers of high-skilled immigrants may be much less likely to take the risk of flouting the immigration laws than employers of lower skilled labor. For high-skilled migrants, then, the delegation of *ex post* screening authority substitutes poorly for *ex ante* authority.

The large “illegal immigration system” that operates in the shadow of the legal system offers a prominent example of the Executive adopting a potentially second-best regulatory strategy.<sup>249</sup> In today’s world, in which the Executive has

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defense of immigration law’s asymmetric delegation seems a bit far-fetched. Particularly since 1996, Congress has adopted a long list of *ex post* screening rules in the form of grounds for removal. This evidence is in tension with the claim that Congress finds legal rules easier to generate for *ex ante* than *ex post* screening. More generally, nothing in our descriptive account in Parts I and II would suggest that the asymmetry that has arisen has much to do with optimal precision of legal rules.

249. We note that we are less certain that the asymmetry stemming from Congress’s expansion of the post-entry grounds for removal is “pathological” or undermines the rule-of-law values that the separation of powers ought to advance. It is arguably preferable, both from an information gathering perspective and a normative fairness perspective, for the government to admit immigrants without attempting to predict the likelihood that they will commit certain crimes, leaving the sorting of “desirable” from “undesirable” immigrants to

little authority to expand the lawful admission of low-skilled workers (on either a permanent or temporary basis), we have seen the rise of an executive branch enforcement strategy that enables immigrants' entrance in large numbers without legal status.

The Executive might, of course, prefer this system. The government might sometimes be pleased that unauthorized immigrants lack lawful status, and so an illegal immigration system might emerge even if the Executive had authority to engage in *ex ante* admissions. Unauthorized immigrants' lack of status gives the Executive more policy flexibility in determining their future inside the United States. To put it crudely, the Executive can more easily remove illegal immigrants than legal immigrants once those immigrants have served the labor purpose for which they were permitted to enter.<sup>250</sup> Similarly, the immigrants' lack of status may improve labor market efficiency and circumvent public resistance to expanding legal migration.<sup>251</sup>

Still, some evidence exists that the Executive would prefer to change the admissions rules rather than rely on the shadow system of illegal immigration. Throughout most of his presidency, for example, President George W. Bush strongly supported the creation of a large-scale temporary worker program—a program that would have changed significantly admissions policy and decreased reliance on the President's discretionary control over deportation policy. But President Bush could not have implemented this system unilaterally—at least not without claiming inherent executive authority. The asymmetry of delegation prevented him from adjusting admissions policy rather than deportation policy.

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be done based on immigrants' behavior once they have arrived. Independent arguments could be made, however, against the normative desirability of the profusion of grounds of removability since 1996.

250. See Cox & Posner, *supra* note 13 (discussing the possibility that a purely self-interested state might prefer the illegal system).
251. See JORGE G. CASTAÑEDA, *EX MEX: FROM MIGRANTS TO IMMIGRANTS* 174-75 (2007) (observing that the status quo allows the United States to avoid difficult choices, placates the left and the right by pretending to go after unscrupulous employers and building a "make-believe" fence, keeps labor cheap with minimal risk to security, and keeps remittances and safety valves open for developing countries such as Mexico); GORDON H. HANSON, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 28-29 (2007), available at <https://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf> (noting that illegal immigrants, because of their relative absence of ties, respond most quickly to changes in the labor market); Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111 (2008) (book review).

C. *The Status and Symbolism of “Illegal Aliens”*

If admissions and deportation policy were not split awkwardly between Congress and the President, immigration law might well look significantly different, for the reasons discussed above. But even if the current institutional arrangement that channels policymaking into the back end of the system satisfies Congress and the President, the system gives rise to costs.

Large-scale de facto delegation, as an actual strategy for admitting immigrants, revolves around the creation and maintenance of a huge population of unauthorized people. This system has potentially worrisome expressive effects. It heightens the association of illegality with immigration and contributes to the public perception of the erosion of the rule of law. In this way, the legal structure of immigration delegation exacerbates the deep public disagreement about the significance of what it means for a person to be undocumented or illegally present.<sup>252</sup> This problem relates to the absence of transparency—a function of prosecutorial discretion. The public cannot clearly grasp what the Executive is doing when it appears to be tolerating unauthorized immigration and engaging in seemingly haphazard enforcement of the immigration laws.

Moreover, the reliance on a large unauthorized population introduces policy externalities in other regulatory arenas. Not only does unauthorized status put families and communities under great economic and social stress, it also makes the violation of employment laws and health and safety standards easier; unauthorized workers are less likely to know how to bring complaints against employers, and they lack the security that would enable them to do so. The existence of a large unauthorized population also sows social unrest by negatively affecting race relations and heightening the culture of surveillance in the workplace and other public spaces, as well as in the home, as the turn to home raids by the Bush Administration underscores.<sup>253</sup> Not only can the

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252. The formally illegal status of these migrants can also distort the policymaking process. The rise of an unauthorized population shifts the focus away from other immigration policy matters that may be just as pressing, such as high-skilled immigration or reforming the system of immigration adjudication, but that cannot be broached as long as the unauthorized problem remains.

253. Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2009) (chronicling alleged abuses committed by ICE agents during home raids, including entering homes without true consent, mistaking citizens for deportable immigrants, and humiliating arrestees, such as taking them into custody in night clothes and releasing them after processing far from home and without means of return); see also Stella Burch Elias, “Good Reason to Believe”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting*

premium on enforcement lead to racial profiling in hiring by employers reluctant to run afoul of the immigration laws,<sup>254</sup> but the profusion of an unauthorized population also exacerbates the immigration-related anxieties felt by the public and fuels suspicions of Latinos and Latino culture.

Many commentators, including one of us, have criticized the existing state of affairs as inferior to a more formalized (*ex ante*) system for admitting large numbers of low-skilled workers,<sup>255</sup> largely because of these human and social costs generated by the former. Our account shows that these normative human rights concerns relate to the separation-of-powers structure in immigration law. This connection suggests that the reforms sought by critics of our current labor policy may be difficult to achieve without a shift in the policymaking relationship between the President and Congress. Conversely, it highlights overlooked reform possibilities: working to reform the immigration separation of powers may be an important way of advancing the rights of immigrants.

#### *D. Integrating Authority over Admissions and Deportation Policy*

If asymmetric delegation of immigration policymaking power is pathological for any of the reasons we discuss above, the question becomes what might be done about it. Perhaps counterintuitively, the most direct solution would be to vertically integrate authority over both admissions and deportation policy—that is, to ensure that the same institutional actor makes basic policy choices in each domain.

At least two paths to vertical integration exist. First, we could level the Executive's discretion down, reducing it at the back end of the system by disciplining its exercise of prosecutorial discretion, through courts or otherwise. Second, we could level the Executive's discretion up, by expressly delegating to the President more power to set front-end screening policy through admissions rules.

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Lopez-Mendoza, 2008 WIS. L. REV. 1109 (noting increased Fourth Amendment violations in immigration raids, including during recent home raids).

254. Among the most significant risks that can accompany the asymmetry we describe is the risk of racial profiling by police. Particularly in an era when state and local governments are responding to the high levels of unauthorized immigration by calling for more of their own participation in the enforcement of federal immigration law, the likelihood of profiling would seem to rise. For a discussion of this phenomenon, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 635 (2008).
255. See Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219; Cristina M. Rodríguez, *Reciprocity in an Age of Migration* (2009) (manuscript on file with author).

We are quite skeptical about the near-term feasibility of the first option. While courts could in theory place substantive limits on the grounds of deportability, limiting the use of prosecutorial discretion and forcing more regulatory work to be done at the front end of the immigrant-screening system, we are pessimistic that courts would actually take this step.<sup>256</sup> We can imagine a constitutional toehold for such a jurisprudential shift.<sup>257</sup> But as is well documented in other enforcement arenas such as criminal law, disciplining prosecutorial discretion through the courts is extremely difficult.<sup>258</sup> Add to this general difficulty the plenary power tradition and courts' general reluctance to step into anything connected to foreign affairs, and this sort of correction seems even less likely.

To be sure, courts are not the only institution with power to limit prosecutorial discretion. Congress could also do so by repealing some of the laws that give the President *ex post* screening authority. Again, this possibility seems remote, in part because the political obstacles to reversing the trend of expanding grounds of criminal deportability seem quite high. But even were Congress willing to contract the grounds so that long-term permanent residents could no longer be deported for minor criminal conduct, Congress is highly unlikely to repeal the most powerful instrument of delegation: the immigration provisions that make removable all noncitizens who enter the country without inspection or who overstay their visas.<sup>259</sup> These provisions rest at the core of the modern immigration code.

If we cannot count on the courts to participate in leveling down, we ought to think seriously about leveling executive discretion up by delegating the President more control over our immigrant admissions system. Such an idea has recently emerged in the policy debate. A 2006 task force made up of former government officials and immigration policy experts has recommended establishing a Standing Commission, similar to the Federal Reserve, to allocate

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256. See Stuntz, *supra* note 191, at 579-82 (discussing a similar mechanism for reducing prosecutorial discretion in criminal law).

257. The limits might come from a substantive theory of due process that incorporates conceptions of proportionality, as in the Court's punitive damages jurisprudence—an approach that would avoid the long-standing holding that deportation is not punishment and therefore not subject to the constitutional constraints that govern the criminal justice system.

258. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

259. See INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (2006).

labor visas,<sup>260</sup> and two major labor unions recently have come out in favor of delegation, as well.<sup>261</sup> Moreover, such formal delegation already exists in one limited area: the refugee allocation system established by the Refugee Act of 1980.<sup>262</sup> To be sure, this delegation may itself have been motivated by the desire to *limit* executive discretion. The Refugee Act of 1980 created a formal system that demanded the President consult with his Cabinet and members of Congress in the allocation of refugee slots, which had the effect of curtailing the then-existing executive discretion to admit as many refugees as desired through the use of the parole power. Still, Congress chose to formally delegate considerable ex ante screening power to the President rather than to set the refugee quota itself. Perhaps Congress concluded that presidential control, made transparent and consultative, remained necessary to address with flexibility the worldwide refugee situation, which could change dramatically from year to year depending on human-initiated and natural disasters and shifting foreign policy concerns.

Delegating to the President more general ex ante screening power would capture this very flexibility for the immigration system as a whole. Leveling up would simply involve expanding the logic of the refugee regime to the other domains of immigration. In a sense, doing so would bring to immigration policy a practice of delegation commonplace in other regulatory arenas. Throughout the administrative state, Congress has delegated ex ante standard setting authority to administrative and independent agencies, taking advantage of the greater ease with which agencies can collect and synthesize information presented by experts, interest groups, and the public alike, to produce regulatory policies or standards that reflect facts on the ground and changed circumstances.<sup>263</sup> The failure to delegate similar authority in the immigration context has contributed to the pathological features of immigration policy laid out above.

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260. SPENCER ABRAHAM & LEE H. HAMILTON, MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, REPORT OF THE INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 41-42 (2006).

261. See Julia Preston & Steven Greenhouse, *Immigration Accord by Labor Boosts Obama Effort*, N.Y. TIMES, Apr. 14, 2009, at A1 (discussing advocacy by AFL-CIO and Change to Win for the establishment of an independent commission to monitor and control entry of immigrant workers).

262. Refugee Act of 1980, INA §§ 411-414, 8 U.S.C. §§ 1521-1524.

263. The calculation of immigration rates has been likened to the setting of monetary policy. But, "in contrast to setting interest rates, which are formally reviewed eight times a year on the basis of calculations by over 400 professional economists working for the Federal Reserve Board, immigration limits are locked into statutes that have been revisited, on average, less than once per decade." ABRAHAM & HAMILTON, *supra* note 260, at 41-42.

We recognize, of course, that lawmakers and the public regard immigration law as different from other regulatory arenas in fundamental ways. Perhaps leaving immigrant admissions policy in the control of Congress helps maintain the illusion of democratic control over membership decisions—the process of self-definition of the polity that the people’s institution of the legislature must manage.<sup>264</sup> On this theory, admissions standards can be analogized to marginal tax rates, or to the elements of a crime—rules that our intuitions tell us should be kept in the hands of the most deliberative and popularly accountable body, the legislature. As we have emphasized throughout, however, the idea that Congress remains in control of immigrant screening more generally is illusory. Congress has, as a *de facto* matter, given the Executive wide authority to decide these basic membership questions. The *ex post* screening system obscures the extent to which Congress does not actually control membership decisions.

Two routes to more formalized Presidential power over *ex ante* screening could be pursued: a claim of inherent executive authority on the one hand, and direct congressional delegation on the other. With respect to the first theory, one could imagine that a proactive Executive with an interest in reducing its enforcement costs, as well as in shifting the illegal population into legal status, might seek recourse in its inherent executive authority over immigration, much as Presidents Roosevelt and Truman seized the initiative in addressing farm worker shortages during and immediately after World War II. Though the question of inherent authority has never been definitely resolved, we are fairly confident that this option would not be viable in the contemporary political environment. The assertion of inherent authority would be too disruptive to the conventions that have evolved over time regarding Congress’s leadership in this arena (and in administrative law generally). Indeed, even when he was riding high politically between 2002 and 2004, it did not occur to President Bush to propose publicly a large-scale guest worker program without congressional authorization.<sup>265</sup>

And so the answer may well be leveling up through delegation, if we believe (as we do) that Congress might be persuaded to give greater authority

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264. See Cox, *supra* note 237, at 1676–79 (discussing the possible appeal to courts of a nondelegation norm that prevents Congress from delegating basic questions about membership in the polity); see also Rodríguez, *Reciprocity in an Age of Migration*, *supra* note 255 (discussing and critiquing the conception of the distribution of membership as a centralized process).

265. In the final years of the Bush Administration, several attempts were made to expand existing guest worker programs to enable the admission of greater numbers of workers, primarily through broadening the definition of the types of workers eligible for the temporary visas. This suggests that even a President with an expansive vision of inherent executive authority felt constrained to act within the delegation framework.

over admissions policy to the Executive.<sup>266</sup> Congress could take a modest step by delegating some power to the Executive over the *numbers* of immigrants admitted. The immigration agencies could be given the power to adjust all the quota levels on an annual basis, in a manner similar to the process for setting and adjusting refugee quotas discussed in Part II. Multiple questions must be answered in implementing this sort of agenda. If the power extends to all major visa categories, should the Executive be empowered to set annual limits distributed according to the various visa categories as he sees fit, or should the President's power be limited to setting quotas for labor visas, as the task force cited above has recommended? What factors should the Executive take into consideration when setting levels, or how should the agency balance the interest in promoting economic growth with protecting the interests of U.S. workers? How much of this balancing can be specified in statute and how much should be committed to agency discretion?

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266. To be sure, Congress has been resistant in the past to delegations of this sort. During the drafting of the 1965 immigration reforms, the Kennedy Administration initially recommended the creation of an executive commission that would have had the authority to distribute unused visas during the period of transition between the national origin quotas system and the new regime established by the Act (the visas allocated to countries such as Great Britain, Ireland, and Germany, were underutilized, and the Administration sought to reallocate them, though not to increase the numbers of visas available). During his testimony before the House Judiciary Committee in 1964, Robert F. Kennedy was pressed on whether the President should be given such power. He invoked the already existing power of the President to exclude aliens in the nation's interest—today's § 212(f)—to support his claim that the creation of the Commission would not be out of the ordinary. In response, Representative Feighan emphasized that the existing power was only to “keep immigrants out,” suggesting an intuition that there was an important difference between the power to admit and the power to exclude. See *Immigration Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong. 424 (1964) (statement of Robert F. Kennedy, Att’y Gen. of the United States). In a retrospective on the 1965 Act, Senator Edward Kennedy describes as a “unique and creative” feature of the bill the “highly controversial” idea of an Immigration Board composed of members appointed by the President, as well as Congress, that would advise and assist the President, including on matters such as “the reservation and allocation of quota numbers and the admission of professional or skilled persons whose services would be needed by reason of labor shortages.” Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS OF AM. ACAD. POL. & SOC. SCI. 137, 140 (1966). The intense congressional opposition to the Commission eventually led to its removal from the legislation. See *id.* at 143, 144 (noting the feeling in Congress that “the bill afforded too much authority to the President and his advisers at the expense of Congress” and that the House version of the bill stripped “any semblance” of the Commission from the legislation).

In addition, it would be important to consider whether this approach would require the formation of a new agency or independent commission,<sup>267</sup> or whether the Departments of Labor and Homeland Security could work together to set the limits. Addressing this question requires deciding the relative insulation the ex ante screening process should have from politics and populist pressures.<sup>268</sup> Is the better option a more technocratic one that permits an independent agency to bring to bear its expertise with respect to labor markets, or should we seek maximum responsiveness to presidential priority setting? Is there an optimal combination of insulation from politics and populist pressures and accountability to directly elected public officials (and therefore to the broader public, however it is defined)? We doubt that this question can be answered in the abstract, but however it is to be approached, the delegation we envision should be designed to leverage the comparative advantage of administrative bodies to gather data on the costs and benefits of immigration, as well as on the structure and movement of hemispheric labor markets.

A second and more radical step would permit the Executive to change the rules regarding the *types* of immigrants admitted. Congress could delegate to the immigration agencies the power to determine which family relationships, employment statuses, or other qualities, such as language ability, should be taken into account in determining eligibility for admissions.<sup>269</sup> Again, this power exists implicitly as part of the refugee allocation system; the President has the power in that system to select the countries from which refugees should be chosen, and the country of origin historically has been used as a proxy for immigrant types. But this step would represent a larger departure from the

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267. As noted above, one prominent proposal along these lines recommends creating an independent executive agency called “The Standing Commission on Immigration and Labor Markets,” which would be tasked with making recommendations to the President and Congress for adjusting the levels and categories of immigration. ABRAHAM & HAMILTON, *supra* note 260, at 42.

268. Cf. Legomsky, *supra* note 2, at 708-13 (calling for the creation of an independent board to determine refugee admissions under the Refugee Act of 1980 in order to remove the influence foreign policy has had on presidents’ judgments under the current system, as a way of promoting more equitable treatment in refugee admissions).

269. The power to select types could be delegated within the current statutory framework or by moving toward the sort of points system contemplated in late 2007 and used by other countries such as Canada. Under the point system debated in 2007, Congress would have expanded the criteria relevant for obtaining a visa but retained control over the parameters of the point allocation. In Canada, however, administrative agencies have some authority to raise or to lower the number of points associated with a particular criterion.

status quo, as it would transparently give the Executive the power to make first-order judgments about the types of people who should be admitted.<sup>270</sup>

Regardless of whether Congress were to decide to limit delegation to number setting or include the definition of substantive criteria for admissions, in this preliminary discussion of power reallocation, we seek primarily to emphasize the value of vertical integration. An agency that has front-end screening authority and ex post enforcement authority will be better equipped to manage the regulatory problems it faces.

Of course, it may well be that, even with vertically integrated authority, the shift in screening policy we anticipate might not occur. First, as we intimate in previous sections, the asymmetry we target could in theory be the product of deliberate design—a system that creates a mix of ex ante and ex post screening that the government believes is optimal. If so, then consolidating authority may not alter the mix of ex ante and ex post screening that occurs; the Executive may opt to continue to rely on the large-scale illegal system.<sup>271</sup>

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270. We say “transparently” because history has shown clearly that power over *numbers* inevitably provides at least some power over *types*. See Emergency Quota Act of 1921, 42 Stat. 5, *repealed by* Immigration Act of 1924, 43 Stat. 153 (purporting to restrict the numbers of immigrants from the Eastern Hemisphere for the clear purpose of restricting migrants of a particular type—those from southern and eastern Europe).

271. As a historical matter, there is some reason to expect different behavior. The President has often been more open to higher levels of immigration, as both the Bracero experiment and the saga of the literacy test vetoes underscore. Similarly, when he vetoed the McCarran-Walter Act in 1952, President Truman emphasized not only his opposition to the continuation of the national origin quota system, but also his view of the need to admit more immigrants to contribute to the development of the United States. See Message from the President of the United States to the House of Representatives, 82d Cong., 98 CONG. REC. 8082 (1952) (“The overall quota limitation, under the law of 1924, restricted annual immigration to approximately 150,000. This was about one-seventh of one percent of our total population in 1920. Taking into account the growth in population since 1920, the law now allows us but one-tenth of one percent of our total population. And since the largest national quotas are only partly used, the number actually coming in has been in the neighborhood of one-fifteenth of one percent. This is far less than we must have in the years ahead to keep up with the growing needs of our Nation for manpower to maintain the strength and vigor of our economy.”). This greater receptivity suggests that the Executive will, in fact, behave differently than Congress if given control over admissions policy. Of course, this dynamic arguably reintroduces the democracy concern alluded to above—that putting admissions policy in the hands of the President removes these decisions from the preferences of the public. We do not mean to minimize this concern, but it is important to emphasize that *both* Congress and the President are democratically accountable—they are simply accountable to different constituencies. Thus, the bare fact that the President has different policy preferences than Congress is not itself a reason to prefer congressional control over an issue.

Second, even if the regulatory asymmetry was not deliberately created, it may today obscure lines of accountability in ways that benefit political actors. This possibility would make the idea of leveling up self-defeating.<sup>272</sup> And even if Congress could be persuaded to delegate, the President might still pursue policies that reduce transparency. In other words, if the front-end screening by the Executive is designed to be transparent, the same political forces that operate now on Congress might push the Executive into a similarly parsimonious posture when it comes to setting legal admissions levels.

Third, delegating *ex ante* screening authority to the President could introduce new obstacles associated with the administrative state. If agency inaction is a pervasive problem across the administrative state, for example, then it might be difficult to secure a change in executive policy simply through delegation, absent an external push of some kind.<sup>273</sup> The courts present the most likely candidate to exert external pressure. If, for example, courts were to apply robust conceptions of due process to the Executive's enforcement policies, thereby substantially raising the costs of enforcement raids, detention pending removal, and other aspects of the current asymmetric regime, an Executive under pressure to address illegal immigration would be more likely to utilize his delegated authority to address the problem on the front end.<sup>274</sup> This dynamic was clearly apparent in the 1970s, when the lower courts during the Haitian refugee crises applied due process norms to force the Executive to change its policies with respect to the removal of unauthorized immigrants. The Reagan Administration, of course, ran an end-run around the courts by adopting an interdiction policy subject to even fewer due process and oversight constraints than the policy it replaced. But today's dilemma of unauthorized immigration would not obviously lend itself to this kind of extraterritorial solution, because by definition the problem involves persons in the territory of the United States.

In addition to these challenges, we recognize that delegating formal screening authority to the President presents legitimacy concerns. As we

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272. See, e.g., Nicholas Bagley & Richard C. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277-80 (2006) (discussing the limited utility of OIRA letters in prompting agency action).

273. *Id.*

274. Other forms of court review, through basic administrative law doctrines, might also prompt action. For instance, if the Executive were given the responsibility of setting visa limits on an annual basis, and also had the judicially policed responsibility of responding to the variety of interest group and public comments generated during the notice and comment period, some external pressure to regulate in a way commensurate with facts on the ground as opposed to ideological preferences might exist.

explain above, much of this concern is misguided, given that the President already exercises screening authority through de facto delegation. Moreover, if a concern for accountability drives the worry over delegation, the history laid out in Part II highlights the error of making simple-minded statements about superior congressional accountability in the immigration arena. The Executive's unitary cast might well mean that its decision-making processes are less deliberative than Congress's (though notice and comment procedures can recreate some public deliberation). Part II also provides some suggestive evidence that the President has been more open to higher levels of immigration, as the Bracero experiment and the saga of the literacy test vetoes underscore.<sup>275</sup> But this evidence cannot tell us in the abstract whether the President or Congress is more likely to be responsive to voters. To be sure, the President is likely to be responsive to a *different set* of voters. According to a standard trope, the President lacks the regional bias of Congress and is therefore more likely to approximate the views of the median voter, or to overcome obstacles erected by regional minorities in the Senate.<sup>276</sup> Whereas the intensity of regional preferences can allow a minority coalition to block reform in Congress, the President through the administrative process is arguably better positioned to effectively balance competing interests, such as the interests of employers, labor, and immigrants themselves. Of course, whether we can conclude that the President is more accountable to the people than Congress depends on to whom accountability should run—a question beyond the scope of this Article. For our purposes, we simply underscore that Congress

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275. See *supra* note 271. The President also appears more likely to factor foreign policy concerns into his decisions about immigrant admissions. The history of the Bracero Program, the refugee crises of the 1970s and 1980s, and the debate over the Refugee Act all point in this direction. Stephen Legomsky also has argued that foreign policy concerns have significantly influenced the way in which the President has used his powers under the overseas refugee selection system. See Legomsky, *supra* note 2. Though between 1980 and 1995, the Cold War and its aftermath appeared to have influenced the President's decisions to admit mostly refugees from communist or formerly communist countries, refugees in recent years have come primarily from places such as Burma and Somalia, and applicants from China top the list of asylum grantees, along with citizens from certain South American countries. See KELLY J. JEFFERYS & DANIEL C. MARTIN, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2007 (2008). A foreign policy story can probably be told for each of these developments.

276. For one classic statement, see Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1 (1994). For a helpful qualification, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

does not have a monopoly on the virtue of accountability.<sup>277</sup> Most importantly, we are writing in a context in which Congress does not appear capable of or willing to act to address the pathologies we have outlined.

This preliminary discussion obviously leaves a great many questions open, both with respect to design and feasibility. What groups are more likely to influence an administrative process than a legislative process? What can be done to prevent a new agency or commission from being captured by business or other interests? In this Part, our goal has not been to tackle these questions. Instead, we have sought to initiate an inquiry into the institutional distribution of decision-making authority. We have traced a long, evolving tradition of power sharing between the executive and legislative branches in order to highlight how each branch has come to perform important screening functions that could be better coordinated. As a matter of institutional design, we think the United States can do better than the status quo, and so we have offered one alternative for consideration.

## CONCLUSION

Almost all separation-of-powers jurisprudence and scholarship in immigration law focuses on judicial review—an understandable tendency given how the die was cast in the *Chinese Exclusion Cases*. But this extraordinary attention to the relationship between the judiciary and the political branches has obscured an even more important separation-of-powers question—how power is allocated between the two political branches. The Court's jurisprudence on this question provides few answers, and conventional wisdom assumes that Congress retains responsibility for making the decisions at the heart of immigration law: how many and which types of noncitizens should be allowed to enter and reside in the United States. But as the historical practice we unearth reveals, the Executive has exercised considerable screening authority through three basic sources of power: inherent authority, formal delegation, and de facto delegation.

Though the first two forms of authority have been significant historically, and the formal delegation model remains important, it is the de facto delegation model that principally drives the relationship between Congress and the President today. This form of delegation, however, is asymmetric, in that it gives the President power to screen immigrants at the back end of the system

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277. For literature on this subject generally, see Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 742-52 (1997); and Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 761-88 (1999).

when the question is whom to deport, but not at the front end, when the question is whom to admit. Because this asymmetry has pathological consequences in certain circumstances, its existence should occasion reevaluation of the relationship between the political branches in immigration law. We suggest that greater formal delegation of ex ante screening authority to the President offers one way to reintegrate control over the two central policymaking instruments in immigration law. But even if less drastic institutional design strategies might be preferable, the separation-of-powers inquiry in immigration law must be broadened to consider the political branches as they relate to one another.