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The President and Immigration Law

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THE PRESIDENT AND IMMIGRATION LAW

Adam B. Cox[†] & Cristina M. Rodríguez[‡]

Congress's plenary power to regulate immigration sharply limits the judiciary's involvement in immigration regulation. Since the plenary power doctrine was first formulated, the Supreme Court has emphasized that immigration represents an issue best left to the political branches. The resulting extended focus by scholars on the implications of this distribution of power between courts and the political branches has obscured a second important 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. Surprisingly little scholarly commentary has addressed the inter-relationship between the two branches or attempted to discern whether consistent power-sharing patterns have emerged over time.

In this Article, we explore how the allocation of power between the political branches to screen immigrants has been understood both as a matter of constitutional history and as a matter of actual practice, with a view to better understanding the structure of American immigration law. We present a long-overlooked constitutional history according to which the executive has claimed inherent authority to screen and admit immigrants, but we demonstrate how this use of authority has been slowly domesticated by the rise of the administrative state and its associated jurisprudence, with the consequence that most executive policymaking in the immigration arena proceeds today through delegated authority. But this delegation has not always operated in obvious ways. We show that the explosion of a detailed, rule-bound immigration code has had the counterintuitive consequence of delegating tremendous authority to the President to decide the most basic questions about which types of noncitizens, and how many, should reside in the United States. But this delegation has been asymmetric: the President has considerable authority to screen immigrants at the back end of the system through its enforcement decisions, but little control over screening at the front end, before immigrants enter the United States. We argue that this asymmetric delegation has pathological consequences in certain circumstances, and we suggest two possible solutions: either formally delegating to the President the power to adjust the quotas and admissions criteria at the heart of immigration law, or seriously restricting the prosecutorial discretion of the President in the immigration arena.

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INTRODUCTION

The plenary power doctrine in immigration law is generally thought of as a doctrine that sharply limits the judiciary’s involvement in policing the immigration regulation 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.¹ This 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 inter-relationship 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’ work in this area.

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 understanding the structure of

¹ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *infra* Part I.A.

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 plenary power doctrine was developed by the Court in a series of cases concerning the allocation of regulatory authority between the states and the federal government. These cases, arising in a period during which the national government's authority was much more circumscribed generally than it is today, were understandably less focused on the distribution of authority within the national government.² These early cases relied heavily 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 tremendous 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.³ In other cases, the Court has suggested, to the contrary, that immigration law operates no differently than any other power of Congress,⁴ and that over no other area is the legislative power more "complete" than immigration.⁵ The history of immigration jurisprudence, therefore, contains 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 as defined by Congress's decision to delegate.

These alternative theories—one emphasizing immigration's exceptionalism within the constitutional structure, the other its ordinary place in administrative law—raise the question of which account best fits the historical contours of the relationship between the President and Congress. Outside the courts, the relationship between the President and Congress has been driven by Congress's dramatic expansion of federal immigration law over the course of the twentieth century in the form of a complex, rule-bound legal code, which has given rise to a comprehensive regulatory system. This central development might seem to suggest that the President has little power to

² The Chinese Exclusion Case was decided just three 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.

³ 338 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 executive power to control the foreign affairs of the nation.").

⁴ *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983).

⁵ *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

decide what we will refer to as immigration policy's core questions: what types of noncitizens, and how many, should be admitted to and permitted to reside in the United States—an assumption that amounts to conventional wisdom today. Our major contribution with 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, respectively: 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, 80s, and 90s.⁶ The history of the Bracero program reveals a startling fact: the Roosevelt administration commenced the World War II era guest worker program without any 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 is not limited to a few old and musty Supreme Court opinions. In a similar fashion, the Caribbean refugee crises highlight moments when Congress has explicitly delegated immigrant screening authority to the President through the creation of “emergency” and “parole” powers. These delegated powers were used by several Presidents to manage refugee crises, alongside claims to inherent authority, in ways that sometimes appeared to ignore the limitations Congress placed on the executive through delegation.

While both of these sources of authority play important roles in defining the scope of Executive control over core policy, we argue that a third paradigm of *de facto* delegation drives much of the separation of powers in the immigration context today. During the twentieth century, Congress has developed a detailed, rule-bound immigration code. This code would seem, at first glance, to reflect a world in which Congress sets immigrant screening priorities and in which the President is deprived of discretion—and so go the conventional accounts. In contrast, we show 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 has *de facto* delegated screening authority to the Executive in two ways. First, Congress's radical expansion of the grounds of deportation has rendered a surprisingly

⁶ See *infra* Parts II.A & II.B.

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.

The President thus has far more power than is often recognized to decide what types of people, and in what numbers, should be permitted to live in the United States.⁷ 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. In the past few months, commentators and scholars have talked much about what Barak Obama's election means for the likelihood of Congress finally passing comprehensive immigration reform. But our work underscores that Obama has the power to overhaul the immigration screening system even in the absence of congressional action. While 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 to significantly alter the composition of the immigrant labor force, permit immigrants with minor criminal convictions to stay rather than having to return home, and so on, without resort to the legislative process.

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 re-orient 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 the structure of today's *de facto* delegation may come with considerable costs. Perhaps the most important feature of this modern separation-of-powers structure is that it generates a dangerous asymmetry. The President's power to decide who and how many should live in the United States operates principally at the back end

⁷ In this fashion immigration policymaking shares much in common with Bill Stuntz's account of modern criminal law. As he 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. His account has re-oriented 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 escaped assessment.

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 tools for screening immigrants, the back-end policymaking power operates as substitute for front-end policymaking power: either is a way of achieving a particular size and composition of immigrants.⁸ But screening through deportation can be a very poor substitute for screening at the time of admission, and it can generate all sorts of unnecessary social costs. Unfortunately, a 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.

We outline the costs of asymmetric delegation and begin the conversation about how they might be addressed. There are two obvious routes. First, we could level down, reducing the executive's discretion at the back end of the system by disciplining its exercise of prosecutorial discretion, through the courts or otherwise. Second, we could level up, by expressly delegating to the President more power to set front-end screening policy through admissions rules. We are quite skeptical about the feasibility of the first option. As is well documented in other enforcement arenas like criminal law, disciplining prosecutorial discretion is extremely difficult—especially through the courts. Thus, we contend that it is worth thinking seriously about the second option—about delegating more control over our 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 the social and rule of law costs of overbroad executive discretion, but we believe such delegation could actually improve immigrant screening, lower the collateral social costs associated with deportation, and enhance the oversight and transparency of the President's immigration policy.

Our argument proceeds 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 presidential authority in practice. This story highlights both immigration policymaking's exceptionalism and its simultaneous integration into the mainstream of the administrative state. In Part III, we discuss the normative questions raised by the descriptive account of immigration law's modern delegation regime and present our proposal for institutional re-design.

⁸ For a more extended argument about the way in which ex ante and ex post screening are substitutes, see Adam B. Cox & Eric Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007).

I. THE SEPARATION OF POWERS IN IMMIGRATION JURISPRUDENCE

As a matter of judicial doctrine, the relative powers of the political branches over immigration regulation have never been precisely delineated. 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 lines or conceptions of power-sharing that the Supreme Court has articulated.

Though the plenary power doctrine was forged by the Court in the late 19th Century, this story is largely a 20th century one, not only because complex congressionally-driven immigration regulation did not really begin until the 1890s, but also because the rise of administrative state 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 and even alluded to an inherent Executive power to implement sovereign prerogatives. Over time, as Congress increasingly engaged in immigration regulation, the Court's consideration of immigration cases became rooted in the legitimacy conferred by congressional authorization. Hints of inherent executive authority persisted, nonetheless, in the ways in which the courts conceptualized the deference owed to executive decision-making in the immigration arena. The Court's treatment of the inter-branch relationship in the immigration arena ultimately has been too thin and confused to provide definitive answers to the central separation-of-powers questions in the field. But the doctrine at least suggests that conceptions of inherent and delegated authority have both shaped 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 authority in the canonical case *Chae Chan Ping v. United States*.⁹ 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 restrictionism. In rejecting the petitioner's challenge to the statute, the Court emphatically

⁹ 130 U.S. 581 (1889).

affirmed the power of the federal government to exclude noncitizens from the nation.¹⁰ For our purposes, the decision's most important feature is the way in which it treats the legislative and executive branches of the federal government as unitary. The Court makes no distinction between, referring to Congress and the Executive as simply the "political branches" in which the immigration power is lodged. According to the Court, the decision whether and how to exclude immigrants from the United States is emphatically a political question, not subject to review by the judiciary.¹¹ If the petitioner desired a remedy it, had to lay with China, whose government could lodge a complaint "to the political department" of the United States.¹² 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."¹³

The Court's unitary treatment of the political branches in *Chae Chan Ping* and related cases was likely driven by several features of the early litigation over the scope of Congress's authority.¹⁴ We hint at one such feature above, and it is often noted in the immigration law literature—the Court's strong view that whether to exclude foreigners from the United States was a political rather

¹⁰ *See id.*

¹¹ *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.")

¹² *Id.* at 610.

¹³ *See id.* at 607.

¹⁴ 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. 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. *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* 21 (4th rev. ed. 1957)). Nonetheless, because 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 unlikely that this early tradition explains the Court's approach in the early plenary power cases.

than a judicial question.¹⁵ But other oft-overlooked aspects of these cases also contributed to the Court's incomplete conceptualization of federal power.

First, it is important to recognize that the Court in the late nineteenth century was focused on a *vertical* separation of powers problem—the problem of establishing the contours of federalism, or the relative powers of the state and federal governments to regulate. *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.¹⁶ 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 was not actively regulating migration.¹⁷ In *Chae Chan Ping* itself, the Court confronted for the first time the question of the federal government's authority to regulate immigration directly. Unsurprisingly, therefore, the Court was centrally concerned in that case with articulating an affirmative conception of federal power in relation to the states.

This focus was likely augmented by other developments taking place in American constitutional law around the same time. *Chae Chan Ping* was decided just a few years before *United States v. E.C. Knight Co.*,¹⁸ perhaps the most important late nineteenth century effort by the Court to police Congress's use of its commerce power (to regulate monopolies). During this period, the federal government was growing, but judicial skepticism of whether constitutional authority existed for that expansion had begun to gather. The Court in *Chae Chan Ping* had to overcome skepticism of broad federal power to justify exclusive federal authority over immigration. It thus contrasted a concept of local interests for whose realization the several states of the Union

¹⁵ In discussing the court's lack of authority to pass judgment on the motives of the political branches in reviewing its work, the Court explains that: "[w]e 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 influences. Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses; but the province of the court is to pass on the validity of laws, not to make them." *Chae Chan Ping*, 130 U.S. at 603.

¹⁶ See, e.g., *Chy Lung v. Freeman* [cite]; *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); *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 ground that law interfered with Congress's power to regulate interstate commerce).

¹⁷ See GERRY NEUMAN, *STRANGERS TO THE CONSTITUTION* (2005).

¹⁸ 156 U.S. 1 (1895).

existed, with national purposes, such as the regulation of foreign affairs. With respect to the latter, the Court emphasized, we are “one people, one nation, one power.”¹⁹

Second, the Supreme Court’s unitary conception of immigration authority was likely the product of its reliance on then conventional accounts of sovereignty in international law. In our system of enumerated powers, one would ordinarily expect the Court to specify the textual source of the authority to regulate immigration. But while the Court does present a list of constitutional powers designed to protect the “full and complete power of a nation within its own territories”²⁰—all but one of which, interestingly, are powers of Congress—it implicitly acknowledges that no clear textual source is to be found. Lacking a firm textual footing for the immigration authority in the Constitution, the Court turns to principles of customary international law that held that all sovereigns have inherent authority to exclude strangers from the nation.²¹ But this turn to a sovereignty-based justification for the Chinese Exclusion Acts necessarily results in an opinion that heavily emphasizes 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. It 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 does not conflate the political branches entirely in the early immigration cases. The issue of inter-branch relations was unavoidable, because the Chinese Exclusion Act of 1888 conflicted with an existing treaty with China that had been negotiated by the Executive.²² Indeed, Chae Chan

¹⁹ *Id.* at 606.

²⁰ *Id.* at 603 (listing the power 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). It is important to note that all but one of these is a power of Congress.

²¹ *Id.* at 608 (quoting Vattel); see also Fong Yue Ting, (same).

²² In 1868, China and the United States signed a treaty that recognized “the inherent an 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, or trade, or as permanent residents. Art. 5, 16 St. 739 (cited in Chae Chan Ping, 130 U.S., at 592). In 1880, this treaty was amended to permit the United States to impose temporary restrictions on the immigration of Chinese laborers. 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 re-entry certificates in order to re-enter after traveling abroad. But in the fall of 1888, Congress passed a statute providing that no Chinese laborer who left the United

Ping's first argument against the Act was that it violated the treaty's prohibition on 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 will controlled, whether it was embodied in acts of Congress or the treaties negotiated by the Executive. Consequently, treaties are of no greater legal obligation than acts of Congress.

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 inter-branch tension,²³ it appeared perfectly happy to allow either branch to respond to what both political departments perceived to be a potential threat to public peace on the West Coast.²⁴ As far as the Court was concerned, it was

States would be permitted to return, regardless of whether he possessed a re-entry certificate. This was the statutory provision at issue in *Chae Chan Ping*.

²³ *Chae Chan Ping*, 130 U.S. at 601 (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 were to threaten the good order of the United States, the U.S. had the authority to “regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it.” *Chae Chan Ping*, 130 U.S., at 596, Congress initially passed a bill that would have stopped Chinese laborers from entering for 20 years. The President vetoed the bill on the ground that the period was too long, and Congress then passed the first Chinese Exclusion Act, which suspended the entry of Chinese laborers for ten years, which the President then signed. 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 20 years and prohibited re-entry by most immigrants who left to visit China (unless the laborers had assets worth at least \$1,000 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. Congress then passed an act in September of 1888, 25 Stat. 476, that would have expanded Chinese exclusion, but it was effective only on ratification of the Bayard-Zhang treaty. This history thus suggests a coordinated effort by the President and Congress to simultaneously secure 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.

²⁴ The Court writes: “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

none of its business whether Congress was justified in ignoring the United States' engagement with another nation, or whether the Executive was itself supportive of the turn of events in Congress.

In this limited fashion, the Court did recognize as early as *Chae Chan Ping* that there were two separate departments constituting the "political branches." There are even hints in the nineteenth century cases that each of the political branches might have different sorts of authority. In *Chae Chan Ping*, for example, the Court references an exchange between the Secretary of State under President Pierce to the U.S. Ambassador to Switzerland, in which the Secretary writes 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.*"²⁵ In *Fong Yue Ting v. United States*,²⁶ the case in which a divided Court held that the power to deport was a corollary to the power to exclude, the Court similarly appears to treat as an open question whether the Executive can act to exclude aliens without authorization from Congress. In its analysis of whether the power to deport or remove is contained within the conception of sovereignty that justifies exclusion, the Court considers the extent to which banishment was permitted at common law. In England, apparently, the only source of controversy over the matter was not whether banishment was appropriate, but whether "the power to expel aliens could be exercised by the king without the consent of Parliament." In practice, the Court noted, the King performed banishment unilaterally.²⁷ But Parliament also passed several acts between 1793 and 1848 wielding the same power.²⁸ In *Fong Yue Ting* the Court neither attempts a resolution 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 594-95.

²⁵ *Chae Chan Ping*, 130 U.S. at 607 (emphasis added). In fleshing out the sovereign right to exclude, the Court refers to a number of such communications between secretaries of state and foreign ambassadors.

²⁶ 149 U.S. 698 (1893).

²⁷ According to Blackstone's commentaries, however, the King had no such power. "No 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 at the . . . express direction of some modern act of parliament." BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. I, s. 190(ee), * 137.

²⁸ *Fong Yue Ting*, 149 U.S. at 709. The Court notes 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." *Id.* at 709. The Court also cites the Ortolan treatise on the law

common law debate nor suggests 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 to allocate immigration authority between the President and Congress,²⁹ they introduce the possibility of two very different conceptions of that power allocation—the two models of inherent authority and delegation that we contend have been present throughout this history of immigration regulation. On one hand is 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 cites approvingly to several legal sources that support such a power. The Court notes, 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.”³⁰ The Court also cites 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.”³¹

On the other hand is the possibility of something akin to modern delegation doctrine, in which Congress has initial authority but can delegate significant authority to executive branch actors. This conception of delegation was 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 notes that the power of Congress to expel, as well as to exclude, “may be exercised entirely through executive officers,” emphasizing that “it is no new thing for the lawmaking power, acting either through treaties made by the president and the 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.”³² Indeed, the Court assumes 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

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.” *Id.* 708. (citing Ortolan, *Diplomatie de la Mer*, (4th Ed.) lib. 2, c. 14, p. 297).

²⁹ *Id.* at 711-13.

³⁰ *Id.* at 709.

³¹ *Id.* 708. (citing Ortolan, *Diplomatie de la Mer*, (4th Ed.) lib. 2, c. 14, p. 297).

³² *Fong Yue Ting*, 149 U.S. at 714.

alien's entrance without review of any kind.³³ Other contemporaneously decided cases are strikingly similar. In *Nishimura Ekiu* and *Yamataya v. Fisher*,³⁴ for example, the Court is quite specific about the extent to which Congress can delegate the supervision of the admission of aliens into the United States, observing that Congress may delegate either to the State Department, or to Treasury officials, including frontline customs officials and inspectors acting under the collectors' authority, the power to decide the facts upon which an alien's right to enter the United States rested.³⁵

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 administrative state and the eventual demise of the nondelegation doctrine domesticated the idea that Congress could give large swaths of policymaking authority to the executive branch. Thus, the twentieth century story of immigration law is in part a story of how the strong conception of delegation in the early immigration cases became normalized in American public law. At the same time, however, it is also a story of how the possibility of inherent executive authority continued to exert surprising influence over immigration jurisprudence.

A good starting place, then, is the confusion that the combination of these alternative conceptions produced—a confusion captured best by the Supreme Court's decision in *Knauff v. Shaughnessy*.³⁶ By the time the Court decides *Knauff* in 1949, the question of delegation's propriety had largely been resolved via the New Deal Revolution. In *Knauff*, the Court rejected petitioner's argument that Congress's Act of 1944, which provided that the President might exclude

³³ *Fong Yue Ting*, 149 U.S. at 762.

³⁴ 189 U.S. 86 (1903).

³⁵ In an Act of October 19, 1888, Congress authorized the Secretary of the Treasury to return an alien to the country from which he came within one year of the alien's entry into the United States. *Yamataya* is generally considered significant because the Court emphasizes that administrative officials are not free to disregard fundamental principles of due process of law, including the opportunity to be heard, when considering the deportation of an alien previously admitted to the United States. See *Yamataya*, 189 U.S., at 101. But nothing in its interpretation of the statute as embodying these due process requirements (an interpretation the Court appears to reach through application of the constitutional avoidance canon) undermines Congress's authority to delegate, and to delegate substantial decision-making power. The Court presumes that Congress, through its delegation, intended the exercise of such power to be governed by due process norms of notice and opportunity to be heard when the alien's liberty is at stake.

³⁶ 338 U.S. 537 (1950). We are not aware of any cases decided between *Yamataya* and *Knauff* that address the question of relative powers.

aliens without a hearing during the national emergency proclaimed just after the attack on Pearl Harbor, and the Act's implementing regulations, were void as unconstitutional delegations of legislative power. But in reaching this conclusion, the Court adverts not to its administrative law jurisprudence on delegation, but to the generalized conception of sovereign power that it had developed in the foundational immigration law cases. The Court emphasizes that there is no issue of unconstitutional delegation, because the exclusion of aliens is a fundamental act of sovereignty. And, for the first time, the Court explicitly suggests that the President possesses an inherent power to regulate. "The right to [exclude aliens]," the Court writes, "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." When Congress regulates with respect to the admissibility of aliens, it not only exercises legislative power, it "is implementing an inherent executive power."³⁷ As a result, though Congress normally specifies the conditions of entry into the United States, Congress may also authorize the executive to exercise that same power if circumstances so require it.

It is far from clear what it would mean for Congress to implement an inherent executive power; nor is it clear from *Knauff* whether Congress can by statute limit the terms by which the President can exercise his inherent authority or delegate that authority to executive officials. At a minimum, however, this statement in *Knauff* is in serious tension with conventional understandings of separation of powers. The Court clearly regards the power to exclude as of a piece with the Executive power justified 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 exercise and act of Congress."³⁸ The meaning of the Court's statement in *Knauff* regarding inherent Executive immigration authority was thus probably wrapped up in the complexities of the scope and source of the foreign affairs power. On the one hand, this statement regarding the independent authority of the President could be characterized as a product of a historically contingent conception of foreign affairs and therefore as an oddity. And yet, it represents perhaps the most direct articulation of a relationship between the political branches that had been implicit since immigration law took its plenary power shape.

³⁷ 338 U.S., at 542.

³⁸ 299 U.S. 304 (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 non-delegation doctrine was inapposite in the foreign affairs context).

As the modern administrative state developed in the latter half of the twentieth century, the relationship between the branches as understood by the Court 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 mainline conceptions of inter-branch relations was undoubtedly related to developments in other areas of American public law. But it was also likely a function of two developments within immigration law: first, the subtle erosion of the plenary power as a statement of uniquely unconstrained congressional authority, marked by the Court's increasing willingness to describe 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 modern cases reflect this conception of immigration authority as an Article I power implemented through delegation to the Executive.³⁹ In *Kleindienst v. Mandel*, the Court observes that “[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens”—a dictum suggesting that decisions about who may enter are legislative in nature.⁴⁰ In *Fiallo v. Bell*, the Court reiterates 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 jumps to a conclusion absent from those earlier cases: that “the formulation of these policies is entrusted exclusively to Congress—a principle as firmly embedded in the legislative and judicial tissue of our body politic as any aspect of government.”⁴¹

The Court re-enforces its picture of the immigration power as a typical congressional power governed by standard conceptions of the separation of powers in *INS v. Chadha*, in which it writes:

It is also argued that these cases present a nonjusticiable political question, because *Chadha* is merely challenging Congress' authority

³⁹ One surface way to distinguish between *Hampton's* reference to both of the political branches and *Fiallo's* focus on Congress would be to point to the distinction between the immigration power and the power to regulate aliens. But, of course, the entire inquiry in *Hampton* revolves around an assessment of the interest in regulating immigration, or immigrant movement, and not just immigrants themselves. For a discussion of why it is conceptually problematic to attempt to draw a line between regulating immigration, or immigrant movement, and regulating immigrants themselves, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 618-620; 638-640 (2008) .

⁴⁰ *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

⁴¹ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Galvan v. Press*, 347 U.S. 522 (1954)).

under the Naturalization Clause, and the Necessary and Proper Clause. It is argued that Congress' 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, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction.'

This passage not only suggests that the immigration power is a function of Congress's authority to set rules for naturalization, but it also suggests that the power to regulate immigration may be subject to constraint, just like any other Article I power. The plenary immigration power is plenary in the same way that the commerce power is plenary under Justice Marshall's formulation in *McCulloch*, not in a way that suggests complete freedom from constitutional restraint, or inherent executive authority to regulate. Moreover, although *Chadha* is explicitly a case about the institutional structure of lawmaking in the immigration arena—perhaps the only Supreme Court case directly concerned with that structure—the Court does not devote any of its opinion to the question of 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 the presidential independence theory still appear in doctrine from the latter part of the century, though the Court never again comes close to making as bold a statement as its undefined elaboration in *Knauff*. In *Hampton v. Mow Sun Wong*,⁴² for example, the Court strikes down a regulation promulgated by the Civil Service Commission (CSC) barring noncitizens, including lawful permanent residents, from employment in the civil service. The Court suggests that the regulations' validity turns on whether the CSC "has direct responsibility for fostering or protecting" the overriding national interest claimed by the government in the case. The Court concludes that the CSC did not have that expertise or status—a conclusion Justice Rehnquist argues in dissent runs counter to the standard operating procedure of the administrative state.

Interestingly, the Court's ultimate point is not that *Congress* has to have delegated the authority to the agency to advance those goals, as one might

⁴² 426 U.S. 88 (1976).

expect from a standard administrative law inquiry. Instead, the Court suggests 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.”⁴³ It then conducts an inquiry into whether Congress or the President had ever required the CSC to adopt a citizenship requirement to determine eligibility for employment. Despite finding evidence of congressional and presidential awareness of the restriction under several different administrations, the Court concludes that the CSC’s rule could not be justified by concerns that were properly of the CSC.⁴⁴ Its holding thus simultaneously calls into question the power of Congress to delegate immigration-related matters to agencies with no particular immigration expertise⁴⁵ and suggests that the President and Congress share power to adopt for themselves policies that implicate the interests of aliens and the national interest in structuring the status of aliens in the United States. Indeed, in the aftermath of the case, President Ford issued an Executive Order re-establishing the very same restriction. That regulation survived legal challenge, suggesting that the President had independent authority—absent any congressional delegation—to regulate immigrants’ employment opportunities.

Hints of inherent executive authority also permeate decisions applying administrative law principles to agencies tasked with immigration-related matters. In those cases the Court at times has articulated a variation on typical standards of deference that gives more than the ordinary leeway to the executive. In so doing, the Court cites the “especially sensitive political functions” immigration officials must perform, consistent with the ethos of *Curtiss-Wright*.⁴⁶

⁴³ *Id.* at 103.

⁴⁴ *Id.* at 116.

⁴⁵ As the dissent points out, the Court uses procedural due process as a “scalpel with which one may dissect the administrative organization of the Federal Government,” *id.* at 121 (Rehnquist, J. dissenting). The dissent takes 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 argues 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 emphasizes, the CSC was fully empowered to act as it did in this case. *Id.* at 123.

⁴⁶ *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. The Court’s conclusion that the BIA is entitled to attach significance to the untimeliness of a petition reads like a non-

The most recent example of this heightened deference can be found in the Court's decision in *INS v. Aguirre-Aguirre*.⁴⁷ At issue was a statutory provision establishing that an alien would not be eligible for withholding of removal if the Attorney General determined that the alien had committed a serious non-political crime outside the United States before entering the U.S.⁴⁸ 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 Sindicato* set fire to busses, assaulted passengers who refused to leave those busses, and engaged in the vandalism of stores and police cars.⁴⁹ The BIA determined that these criminal means outweighed the acts' political nature and denied withholding. 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.⁵⁰ The Supreme Court then takes the Ninth Circuit to task for failing to apply *Chevron* to the BIA's decision at all and goes on to emphasize that deference to the Executive Branch is especially important in the immigration context, where officials exercise particularly sensitive foreign policy judgments. The Attorney General's decision to deem violent offenses as political in nature and to allow persons who have committed those offenses to stay in the United States could affect relations with Colombia—a possibility the judiciary is simply not well positioned to assess.⁵¹

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 Eskridge & Lauren E. Baer, *The Continuum of Deference: The Supreme Court's Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L. J. 1083 (2008).

⁴⁷ 526 U.S. 415 (1999).

⁴⁸ 8 U.S.C. §1253(h)(2)(c).

⁴⁹ 526 U.S. at 421-22.

⁵⁰ See *Aguirre-Aguirre v. INS*, 121 F.3d 521, 524 (9th Cir. 1997).

⁵¹ *Id.* at 425. 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 underscores its argument for deference by emphasizing the strong policy reasons that counseled against compelling the AG 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 SG in support of Petr., at 39.

There are ways one could reconcile these different doctrinal strands. It is conceptually possible, for example, that the President has some Article II authority over immigration at the same time that Congress possesses regulatory authority under Article I. This is a common account of the distribution of war-making power under the Constitution, though the question of whether Congress can use its Article I authority to essentially extinguish the President's Article II authority, or whether the President can regulate to some extent without Congressional authorization, remain open. The question, of course, is how much power resides in Article II.

In *Jama v. ICE*,⁵² the disagreement between the majority and the four dissenters capture the two different conceptions of that authority that we have traced through a century of immigration jurisprudence. The case required an inquiry into whether the provision that sets out the procedure by which the Attorney General selects the removal destination for an alien contains a requirement that the alien have accepted the destination country. The dispute arose when an alien ordered removed to Somalia challenged his destination of removal on the grounds 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.”⁵³ The majority thus appears to have suggested that the President possesses independent power, or at least integrity of some kind, in this area. The Executive's independence requires the courts to interpret statutes in a way that defers to executive prerogatives, or is at least conscious of not taking away executive discretion without a clear statement from Congress.

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.”⁵⁴ 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 as a canon of construction to limit Congress's definition of the scope of executive authority and thus to preserve the Executive's independent judgment.

In short, for over a century the Supreme Court has suggested two quite different forms of the congressional-executive relationship in the immigration context. It may or may not be possible to reconcile the lingering vestiges of

⁵² 534 U.S. 335 (2005)

⁵³ *Id.* at 348.

⁵⁴ *Id.* at 368 (Souter, J., dissenting).

inherent executive authority with the more conventional administrative law approach. But the more important point for our purposes is that judicial doctrine ultimately provides little guidance, much less definitive answers, on the scope of the two political branches' authority in immigration decision-making. For a more complete understanding of the political branch dynamics, then, we must turn to constitutional practice, to see if we can discern the contours of the relationship from the ways in which Congress and the Executive have acted over time.⁵⁵

II. THE SEPARATION OF POWERS IN PRACTICE

This Part shifts away from the judiciary and jurisprudence to explore the functional relationship between the President and Congress in the development of immigration policy, as it has played out historically. This relationship has been framed by a singularly important fact: throughout the twentieth century, Congress largely has 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 an important role in the adoption of some of the earliest federal rules regulating immigrant admissions.⁵⁶ But the federal government's reliance on the Treaty power, and Congress's reluctance to engage in immigration policy, was short lived. As early as the first decade of the twentieth century, Congress established itself as a regulatory force, making more and more immigration law through the legislative process.⁵⁷ By the 1920s, when Congress passed the now-infamous admissions quotas in the National Origins Act,⁵⁸ the use of formal international agreements to structure migration policy had moved mostly to the periphery.

⁵⁵ Cf. David Barron & Marty Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Doctrine, Problem, 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).

⁵⁶ See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (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 Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1840 (1993).

⁵⁷ See, e.g., Immigration Act of 1907, ch. 1134, 34 Stat. 898.

⁵⁸ See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1988) (discussing the development of the national origins quota system).

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 immigration policy has disappeared. 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,⁵⁹ until Congress finally over-rode President Wilson's second veto in 1917.⁶⁰

In this Part, however, we put to the side the President's role in the legislative process, in part because the veto power enables the President only to block rather than 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. The two avenues the President has been able to travel are the same as those outlined by the courts in Part I: inherent executive authority on the one hand, and delegated authority on the other.

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 that the executive would claim the constitutional authority to decide directly 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 delegations to the executive branch. The Haitian and Cuban refugee crises of the 1970s, 80s, and

⁵⁹ See ARISTIDE 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 safer to admit hundreds of thousands of illiterate immigrants than "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, 1890-1921*, NBER Working Paper No. 4345 (April 1993).

⁶⁰ See *id.* 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 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).

90s highlight the fact that Congress has formally delegated some power to the President to create screening rules—but only in limited “emergency” contexts. We then shift from the formal delegation model to what we call de facto delegation in immigration law. 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 interesting example of congressional-executive dynamics for a number of reasons. A prominent one, as we will show, is that it appears that Presidents Roosevelt and Truman believed he had inherent authority to establish and maintain a guest worker program. Today, this would come as quite a surprise. In the negotiations over comprehensive immigration reform in 2006 and 2007, President Bush never suggested that he thought he could circumvent Congress and authorize the large-scale temporary admission of workers to the country.⁶¹ 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.⁶² The federal government was initially unresponsive. But in 1942, amidst World War

⁶¹ The policy landscape is slightly more complicated in actual fact. 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 2/3 approval of the Senate as a treaty. In addition, in the final year of the Bush administration, the Executive made rule-making noises, considering whether to expand the reach of temporary agricultural worker programs to cover jobs not explicitly contemplated by the H2-A and H2-B programs.

⁶² During the war, growers wrote Congress requesting that immigration policy be modified to permit “limited migration of American workers.” See WAYNE D. RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM, 1943-1947, Agricultural Monograph No. 13, U.S. Dept. Agriculture: Bureau of Agricultural Economics 26, 200 (1951). The California USDA war board also recommended importing temporary labor from Mexico to the Department of Agriculture. See *id.* For a discussion of the changes to immigration policy that increased this pressure, see MAE NGAI, IMPOSSIBLE SUBJECTS (2004).

II and the so-called “Manpower Crisis of 1942,”⁶³ immigration officials formed a committee to study the possibility of launching a program to import Mexican workers.⁶⁴ Within a month, this interagency committee—which included Roosevelt’s War Manpower Commission,⁶⁵ the Immigration and Naturalization Service,⁶⁶ and the Departments of State, Labor and Agriculture—had drawn up plans for the first installment of Mexican guest laborers.⁶⁷

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 details of the plan.⁶⁸ 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’ Good Neighbor Policy.⁶⁹

Importantly, Roosevelt established the program without consent from Congress (or public debate, for that matter) at the time. The administration cited as authority for this move the Ninth Proviso of the Act of 1917, which gave the Commission of Immigration and Naturalization discretionary power to admit otherwise inadmissible aliens on a temporary basis.⁷⁰ Perhaps doubting that this authority was sufficient to support what the President had negotiated, the administration turned to Congress in short order after initiating

⁶³ ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 41-43 (1964).

⁶⁴ 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: Foreign and Domestic Sources of U.S. Immigration Policy* 46 (2000) (PhD dissertation, University of California, San Diego).

⁶⁵ See DEAN ALBERTSON, *ROOSEVELT’S FARMER: CLAUDE R. WICKARD IN THE NEW DEAL* 287 (1961).

⁶⁶ The INS had been re-located to the Justice Department just a few years earlier by President Roosevelt.

⁶⁷ See KITTY CALAVITA *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (John Brigham & Christine B. Harrington ed. 1992).

⁶⁸ See ALBERTSON, *supra* note 65, at 87; CALAVITA, *supra* note 67, at 2.

⁶⁹ See Rosenblum, *supra* note 63, at 235-36.

⁷⁰ See Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 *CHICANO L. REV.* 66, 77 (1975).

the program to seek specific authorization. From there, the program quickly grew. Less than four months after the program began, the Department of Agriculture requested \$65,075,000 from Congress to expand it. After a few months of legislative wrangling Congress officially approved the Bracero Program on April 29, 1943, through the passage of Public Law 45.

The Bracero program operated for its first seven months without express congressional approval, highlighting that the President has exercised inherent authority to initiate immigration policy. But the legal status of the program toward the end of the decade raised even more starkly the possibility of an inherent authority model in the immigration arena. Under the terms of the Public Law 40, 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, 1947.⁷¹ Additional legislation was introduced 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 this legislation was never enacted into law.

One might suspect that the Bracero program came to an end as 1947 drew to a close, in the face of the program's expiration and Congress's failure to pass legislation either extending the program or delegating to the relevant agencies the power to authorize 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 accord. And unlike the initiation of the program in 1942, Congress did not pass a statute in the following months. The Bracero program continued to operate from 1948 until 1951 without *any* statutory sanction. 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 2000 workers from border towns, and the INS opened the border for a weekend.⁷²

In June 1951, Congress finally passed legislation to authorize and extend the Bracero Program until 1964.⁷³ 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

⁷¹ See Public Law 40.

⁷² See Calavita, *supra* note 67, at 30.

⁷³ See Public Law 78.

documented the high levels of illegal immigration that had accompanied the Bracero program and condemned the depressive effect this immigration had had on the wages of U.S. citizen workers.⁷⁴ Though these concerns eventually 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 PL 78. 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 this episode are particularly interesting. First, this history 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 bi-lateral 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 was much more protective of U.S. interests. Moreover, the breakdown of negotiations themselves, leading to the expiration of statutory authorization in 1948, suggests that the policy position of Congress's median voter was not well-aligned with the position of the executive branch.

That said, we should be careful not to read too much conflict between Congress and the President into this evidence. There are two ways in which we might interpret the executive branch's 1948 re-authorization of the Bracero program in apparent violation of the existing statutory regime. On the one hand, we might take the action as 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

⁷⁴ See James F. Creagan, *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 market the danger of violations will be much greater than in recent years." Harry S. Truman, 1947 Pub. Papers 229 (May 1, 1947); see also Harry S. Truman, 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.").

commands.⁷⁵ On the other hand, it is possible that many members of Congress were happy to turn a blind eye so that the President could “perpetuate administratively what Congress was for the moment unwilling to legislate.”⁷⁶

But regardless of whether the absence of reauthorization in 1948 is strong evidence of congressional-executive disagreement, there remains the question of 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. In this way, the 1948 reauthorization of the Bracero program resembles recent arguments about the legality of the National Security Administration’s warrantless surveillance program initiated by the Bush Administration. Some aspects of that program may have contravened the requirements of the Foreign Intelligence Surveillance Act. Yet commentators inside and outside the administration have suggested 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 not be circumscribed by Congress.

Such claims have rarely cropped up explicitly in the President’s formulation of his immigration enforcement positions, though we do discuss one instance of such claims in the next section. But it is difficult to defend the Truman Administration’s extension of the Bracero program without reference to an argument about the inherent authority of the President over immigration policy. Though the initiation of the program during World War II could have been justified based on war-related emergency, by 1948, the War had long since ended, and the Truman administration’s exertion of authority to continue the importation of labor reflected the long overhang of a wartime expansion of executive power with policy consequences that reached well beyond wartime concerns.

⁷⁵ See Peter Neil Kirstein, *Anglo Over Bracero: A History of the Mexican Workers in the United States from Roosevelt to Nixon* (1973) (unpublished Ph.D. dissertation, Saint Louis University).

⁷⁶ See CALAVITA, *supra* note 67. 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 of and allocation of resources toward interior enforcement.

B. *Haitian and Cuban Refugees and Express Delegations*

At various points in the 1970s, 80s, and 90s, 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, seeking entry to the United States but without authorization to enter the country. Each of these crises was handled first and foremost by the Executive Branch. The President invoked both delegated and inherent authority to manage the influxes, which ultimately resulted in the resettlement of thousands of Haitians and Cubans in the U.S. These particular episodes in U.S. immigration history thus offer revealing windows into the President's role in immigration law.

1. *Modern Haitian migration*

"Modern migration" from Haiti to the United States began in the 1950s⁷⁷ 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.⁷⁸ 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 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.⁷⁹ 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. An additional 28,000 Haitians were interdicted during that

⁷⁷ See Christopher Mitchell, *U.S. Policy Toward Haitian Boat People, 1972-93*, 534 ANNALS OF THE AM. ACADEMY 69, 70 (July 1994).

⁷⁸ For a detailed account of legal and unauthorized Haitian migration in the 1950s, 60s, and 70s, 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 & CONT. PROBS. 163, 174 (1982). Between 1970 and 1980, 56, 335 Haitian migrated to the United States legally, and between 1981 and 1991, 185,425 legal entrants from Haiti arrived. See Mitchell, *supra* note 77, at 70 (citing INS 1991 Statistical Yearbook, at 29-30).

⁷⁹ See Mitchell, *supra* note 77, 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 pokers into the back passage.") (quoting a 1973 report from Amnesty International). In addition to targeted political repression, "terror and lawlessness" permeated the countryside under Baby Doc's reign, perpetrated by his notoriously brutal security forces, the Tonton Macoutes. Mitchell, *supra* note at 177-78.

same period.⁸⁰ 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, 10,000 Haitians were intercepted by the United States Coast Guard as they attempted to flee lawlessness and violence in Haiti.⁸¹ This pattern of migration has continued into this century. Between fiscal years 1998 and 2003, the Coast Guard has interdicted more than 1000 Haitians each year; in 2003, the interceptions that reached a peak of 3229.⁸²

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 crises⁸³ and by federal courts in South Florida who found the executive's actions inconsistent with the requirements of due process. The Executive continually adjusted its policy with respect to the admission of Haitians in response to these constraints, and a consideration of how the executive deployed the various forms of authority at its disposal throughout these decades should further illuminate the President's role in setting immigration policy.

In the early 1970s, the INS at first adopted a policy of detaining Haitians who arrived on shore for brief periods, for processing and medical examinations. Often the INS subsequently 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.⁸⁴ By 1977, facing a 5000-case backlog and serious overcrowding in the Florida prisons being used to house Haitian migrants,⁸⁵ the INS

⁸⁰Mitchell, *supra* note 77, at 70; *see also* Stepick, *supra* note 78, at 163.

⁸¹ *See* Mitchell, *supra* note 77, at 74.

⁸² *See* Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, CRS Report for Congress 2 (Jan. 21, 2005).

⁸³ In the late 1970s, for example, officials in South Florida feared that the increasing numbers of poor urban Haitians would strain the economy and drain public resources. *See* Stepick, *supra* note 78, at 179.

⁸⁴ *See* Stepick, *supra* note 78, at 182.

⁸⁵ *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 511 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

increased the pace of release, paroling Haitians without bond and issuing work authorization indiscriminately.⁸⁶

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.⁸⁷ This streamlining, in turn, prompted a class action lawsuit in the Southern District of Florida, alleging egregious 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.⁸⁸

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 resident status in the United States.⁸⁹ 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.⁹⁰ Once again, the administration was rebuked by the Southern District of Florida, which permitted exclusion proceedings to go forward where claimants

⁸⁶ As this shift in policy was occurring, the INS also began rewriting asylum regulations that extended the same procedural protections to Haitians in exclusion proceedings as were given to aliens in deportation proceedings.

⁸⁷ The court in *Haitian Refugee Center v. 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 processes between 55 and 100 claims a day. *Id.* at 523. According to the United Nations High Commissioner of Refugees, which sent a representative to Miami during this period, only 45% of asylum claimants were interviewed before their claims were denied. *Id.* at 525.

⁸⁸ See *Civiletti*, 503 F. Supp., at 532 (directing the INS to formulate a plan to adjudicate the cases consistent with due process and equal protection and observing that the INS was “determined to deport [Haitians] irrespective of the merits of their asylum claim” and suggesting that the INS might have been racially motivated in its treatment of the Haitians).

⁸⁹ For a discussion of the Haitian-Cuban Entrant program, see *infra* notes 129-131 and accompanying text.

⁹⁰ See Stepick, *supra* note 78, at 190.

were represented but enjoined final orders of exclusion from being implemented without notice being given to the court.⁹¹

It was at this stage that 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.⁹² 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. territory⁹³—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. Haitians who were discovered as passengers had their asylum claims heard on board by officials from the State Department and the INS, with the assistance of a Creole interpreter, and those who established a well-founded fear of persecution were transported to the United States.⁹⁴ Boats transporting unsuccessful applicants—all but 28 of the 25,000 people who were intercepted over the course of ten years⁹⁵—were returned to Haiti.⁹⁶

The Bush administration altered the interdiction policy somewhat in 1991, in response to the coup that ousted Haiti’s first democratically elected

⁹¹ See *Louis v. Meissner*, No. 81-1260 Civ.-EPS, slip. Op. at 4 (S.D. Fla. Feb. 24, 1982).

⁹² See Mitchell, *supra* note 77, at 73; see also Wasem, *supra* note 82, at 1-2 (noting that between fiscal year 1998 and fiscal year 2005, the Coast Guard has 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* 82, note at 4 (citing 67 Fed. Reg. 219, 68923-68926 (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 23 I&N Dec. 572 (A.G. 2003).

⁹³ See Wasem, *supra* note 82, at 2.

⁹⁴ 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.” See Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT’ J. REFUGEE LAW 677, 679 (2006) (citing United States Immigration and Naturalization Service, *INS Role in and Guidelines for Interdiction at Sea*, Oct. 6, 1981)).

⁹⁵ See Mitchell, *supra* note 77, 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 82, at 3.

⁹⁶ See Stepick, *supra* note at 190.

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.⁹⁷ 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,⁹⁸ and the Bush Administration ultimately set up a camp for 12,000 people at Guantanamo Bay, Cuba to hold intercepted migrants while their claims were processed.⁹⁹

In early 1992, the INS paroled approximately 10,490 Haitians into the United States, after determining that they had credible fear of persecution.¹⁰⁰ 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 Guantanamo and reverted to returning migrants to Haiti without asylum review.¹⁰¹ 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 to a brutal dictatorship without an asylum hearing” as a candidate, President Bill Clinton continued the practice of returning Haitians without review until May 1994.¹⁰² And, in 2005, after another episode of violence erupted in Haiti,

⁹⁷ Haitian migration had slowed substantially after Aristide’s election, only to rise sharply after the coup. *See* Wasem, *supra* note 82, at 1.

⁹⁸ *See* Wasem, *supra* note 82, at 3.

⁹⁹ *See* Mitchell, *supra* note 77, at 74. Apparently this policy shift was met with dissension within the Executive Branch. 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.

¹⁰⁰ *See* Wasem, *supra* note 82, 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.

¹⁰¹ *Id.* at 74.

¹⁰² *Id.* at 75. Stephen Legomsky describes the interdiction policy of the late Bush early Clinton years as “the most extreme brand” of U.S. interdiction, largely because no procedure was established for screening the interdicted Haitians, and all passengers were returned to Haiti without status determinations. *See* Legomsky, *supra* note 94, 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* Legomsky, *supra* note 94, at 681. When Aristide returned to power after the coup leaders stepped aside in response to military pressure from the United States, Haitians then held at Guantanamo were repatriated to Haiti, despite safety concerns expressed by human rights groups. *See* Legomsky, *supra* note 94, at 681.

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.”¹⁰³

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 Executives to set and then drive the agenda with respect to how to handle migration from the Caribbean.

Before considering the Executive’s used of parole authority—the legal mechanism that fits most squarely within the standard administrative law tradition—we consider the sources of authority for the Reagan-era shift to interdiction—probably the most robust example of the Executive exercising his authority aggressively to set policy. On September 29, 1981, President Reagan issued a proclamation declaring that unauthorized migrants from Haiti had “severely strained law enforcement resources” and threatened the “welfare and safety of communities in the region.”¹⁰⁴ 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.

In the memo that advised the President on his authority to issue this proclamation, the Office of Legal Counsel in DOJ cited authority delegated to the President by Congress, as well as the President’s inherent authority to regulate to protect the sovereignty of the country. First and foremost, the memo emphasized that the President’s legal authority in §212(f) of the INA was clear.¹⁰⁵ The provision establishes that “whenever the President finds that

¹⁰³ See Legomsky, *supra* note 94, 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 if any screening. *See id.* at 682 (citing Bill Frelick, *Abundantly Clear: Refoulement*, 19 GEO. IMM. L. J. 245, 245 (2005)).

¹⁰⁴ *High Seas Interdiction of Illegal Aliens*, Proclamation 4865 of Sept. 29, 1981, 46 Fed. Reg. 48107 (Oct. 1, 1981).

¹⁰⁵ *See Proposed Interdiction of Haitian Flag Vessels*, 1981 OLC Lexis 43; 5 O.L.C. 242 (Aug. 11, 1981).

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.”¹⁰⁶ 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.¹⁰⁷ 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 Guantanamo camp, or to operate a facility to house the unauthorized aliens intercepted in the Caribbean region, 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.”¹⁰⁸

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 took an arguably unnecessary step and also invoked the “President’s inherent constitutional power to protect the Nation and to conduct foreign relations,”¹⁰⁹ thus tapping into the ethos of *Curtiss-Wright* and the foreign affairs rationale for inherent authority. 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 long-standing 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 *Knauff v. Shaughnessy*, that sovereignty was lodged in both political branches of government. And thus, because the exclusion of aliens is “a fundamental act of sovereignty”¹¹⁰—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

¹⁰⁶ 8 U.S.C. §1182(f).

¹⁰⁷ *Proposed Interdiction of Haitian Flag Vessels*, *supra* note 105, at 244.

¹⁰⁸ See Executive Order: Delegation of Responsibilities Concerning Undocumented, 2002 WL 31531645 (Nov. 15 2002).

¹⁰⁹ See *Proposed Interdiction of Haitian Flag Vessels*, *supra* note 105, at 242.

¹¹⁰ *Id.* at 245 (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)).

interdiction, he would have had the power to act, “even where there is no express statute to execute.”¹¹¹ In other words, the President has Article II power to act in the interstices of legislation promulgated by Congress when the defense of the country’s sovereignty so requires.¹¹² And thus did President Reagan, in his proclamation, invoke the protection of U.S. sovereignty to justify interdiction.

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,”¹¹³ and Article 33 of the 1951 Convention Relating to the Status of Refugees, which prohibits signatories from returning refugees “to the frontiers of territories where his life or freedom would be threatened.”¹¹⁴ In 1992, however, President Bush issued an executive order

¹¹¹ 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)).

¹¹² The OLC memo also points to historical examples of the Executive entering into agreements to operate customs administration in the Dominican Republic and Liberia to justify the executive agreement Reagan signed with Haiti. According to OLC, “many authorities have noted that a President’s exercise of his authority in this area is ‘a problem of practical statesmanship rather than of Constitutional Law.’” See *id.* at 247 (citing E. CORWIN, *THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS* 120-21 (1917)).

¹¹³ 8 U.S.C. § 1253(h)(1).

¹¹⁴ 19 U.S.T. at 6276. 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 Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987). OLC, in assessing the legality of interdiction in light of Article 33 challenges, emphasized that the United States ratified the Refugee Convention in 1968 on the grounds 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 U.S. Op. Off. Leg. Counsel 86, 87 (Dec. 12, 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. See Memorandum from Walter Dellinger, Acting Assistant Attorney General, to the Attorney General, *Immigration Consequences of Undocumented Aliens’ Arrival in the United States Territorial Waters*, Oct. 13, 1993, at 2, 5 available at <http://www.usdodj.gov/olc/nautical.htm>. Dellinger emphasized the broad authority given the Attorney General to promulgate regulations interpreting the

declaring that the United States' obligations under the Convention to not return refugees to persecution did not apply outside United States territory.¹¹⁵

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*,¹¹⁶ the Supreme Court finally upheld the interdiction policy, validating the President's legal claims. The Court 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 an early justification for a unitary conception of the Executive.¹¹⁷ The Court also 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 to prevent mass migration.¹¹⁸ Finally, the Court 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 construing a treaty or statutory provision that may involve foreign and military affairs for which the President has unique responsibility"¹¹⁹;

Justice Blackmun, the lone dissenter, accused the majority of misapplying the presumption against extra-territorial application. In the regulation of foreign affairs and immigration matters, he wrote, "there is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it

INA to protect the Nation's borders and that the courts have accorded substantial deference to the Attorney General in such matters. *See id.* at 15 (citing *Jean v. Nelson*, 727 F.2d 957, 966-67 (11 th Cir., *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* 20 U.S. Op. Off. Legal Counsel 381, *3 (Nov. 21, 1996).

¹¹⁵ 57 Fed. Reg. 23133 (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 94, at 680.

¹¹⁶ 509 U.S. 155 (1993).

¹¹⁷ *Id.* at 172.

¹¹⁸ *Id.* at 187.

¹¹⁹ *Id.* at 174, 187.

was crafting had implications beyond this Nation's borders." The commonsense notion that Congress was looking inward therefore could not be invoked in the case before the Court. What is more, Blackmun emphasize, the Court's reference to *Curtiss-Wright* was inapt, because over no conceivable subject is the *legislative* power more complete than immigration.¹²⁰ 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 maintained the aura of exceptionalism surrounding the scope of the President's power to act, at least on immigration-related matters that clearly involved an external foreign affairs crisis.

But 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 was the parole authority delegated by Congress. This power fits within a more standard administrative law account of delegation. At the same time, however, the President used the power in extraordinary ways.

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 for significant public benefit."¹²¹ 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. Typically, the executive uses parole authority in individual cases that present hardships, *e.g.* 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. The Executive relied heavily on its parole authority, 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. Though the parole authority permits the Executive to admit otherwise inadmissible aliens only on a temporary basis, Congress ultimately enacted legislation permitting many thousands of Haitians and Cubans who had been

¹²⁰ *Id.* at 207 (Blackmun, J., dissenting).

¹²¹ 8 U.S.C. §1182(d)(5). When the purposes of the parole have been served, the alien is required to return to custody. The statute also provides that the Secretary may not parole into the United States a refugee, unless he or she determines that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled . . . rather than admitted as a refugee." *Id.* at § 1182(d)(5)(B).

paroled into the U.S. to adjust their status to permanent. The parole authority thus provided the President with a mechanism to drive and control admissions policy,¹²² 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.¹²³

That the Attorney General, through the INS, 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 had then or has today *de facto* leeway to use the parole mechanism in the same expansive way it has been used in relation to Caribbean migration to circumvent congressionally imposed limits on entry. Indeed, when Congress passed the Refugee Act of 1980, creating a comprehensive regulatory scheme for the admission of refugees, the legislative history that accompanied the Act made clear that Congress was responding in part to the President's wide-ranging use of parole authority. Indeed, as early as the 1965 amendments to the Immigration and Nationality Act it was clear that Congress was displeased with this use of the parole power. The Senate Report for those amendments emphasized that, by making "definite provisions" for the admissions of refugees, 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."¹²⁴

As with the Bracero program, the overhang of emergency appears to 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

¹²² 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. *See* Wasem, *supra* note 82, at 5 (quoting Letter from Daniel J. Bryant, Assistant Attorney General, to Sens. Edward Kennedy and Sam Brownback (Sept. 25, 2002)).

¹²³ 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 U.S. without visas; limitations on the participation of counsel; and the preclusion of judicial review of anything other than a final order of exclusion. *See* Stepick, *supra* note 78, at 193; Ira Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 191 (1981).

¹²⁴ S. Rep. 1965 Amendments to the Immigration and Nationality Act..

highlights that the INS was playing in territory—the management of foreign affairs—in which claims of inherent authority could be made credibly. Particularly after 1980, when the Executive began expressly articulating its authority to manage refugee influxes independent of congressional authorization as an outgrowth of its foreign policy authority, the notion of greater executive freedom to manipulate the INA to suit its own ends gained currency. But Congress eventually pushed back, restricting the Executive's use of parole to admit large numbers of aliens not otherwise determined admissible by Congress.

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. Before 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 set-up to hear claims from potential refugees regardless of their national origin, the Executive essentially managed refugee crises on a case-by-case basis. Refugees were either selected 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 was passed in 1980, the Refugee Act had been a long-time in coming. In addition to reacting to the President's handling of the Caribbean refugee emergencies, that Act depended, in part, on the momentum built up over time by the Executive's various ad hoc programs. The Act represented the culmination of the Executive's efforts to advance an anti-Communist, anti-totalitarian 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 the effect of constraining the Executive's policy-making freedom. Not only did the Act seem to restrict the President's use of the parole authority to admit large groups of migrants, the Act also created an asylum framework based on a principle of non-discrimination, making it more difficult politically for the Executive to pursue its anti-Communist foreign policy agenda through immigration law without also liberalizing its approach to other types of refugees.

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 non-discrimination ethos and the Executive's preference for accommodating refugees fleeing communist governments. What is more, 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 mounted 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.¹²⁵ 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.¹²⁶ This treatment of Cubans reflected the continuation of longstanding U.S. policy, according to which the United States was reluctant to repatriate Cubans, as well as the Castro government's refusal to accept Cubans excludable under the INA.¹²⁷ And yet, public outcry over the inconsistency in treatment of the Haitians and Cubans who arrived in 1980,¹²⁸ in the shadow of the Refugee Act, pressured Carter to adopt temporarily an official policy of equal treatment for all Haitians and Cubans.

¹²⁵ See Wasem, *supra* note 82, at 1.

¹²⁶ See Stepick, *supra* note 78, at 188. 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 94, at 680.

¹²⁷ Since 1966 and the passage of the Cuban Adjustment Act, Cubans present in the United States for at least a year have been permitted to adjust their status to permanent resident—an option given to no other nationality. Act of Nov. 2, 1966; 80 Stat. 1161.

¹²⁸ See Stepick, *supra* note 78, 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).

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, 1980, despite the apparent efforts by Congress, discussed above, to limit the use of this authority.¹²⁹ 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 Cuban-Haitian Entrants to become lawful permanent residents.¹³⁰ Of course, despite pressure to treat Cuban and Haitian migrants equally, the Executive’s policy still reflected its pre-existing 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.¹³¹

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,¹³² 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 policy¹³³ that still treated Cubans as exceptional.¹³⁴

In fact, the Clinton administration negotiated two agreements with the Castro government that substantially recast the United States approach to Cuban migration, but that nonetheless continued the special treatment of Cubans. The agreement established in September 1994 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, *i.e.* Guantanamo. At the same time, the United States agreed to admit no fewer

¹²⁹ See Wasem, *supra* note 82, at 2.

¹³⁰ See Wasem, *supra* note 82, at 2.

¹³¹ See Stepick, *supra* note 78, at 188.

¹³² See Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States’ Policy of Temporary Protection in Offshore Safe Havens*, 15 GEO. IMM. L. J. 319, 333 (2001).

¹³³ 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.

¹³⁴ See Stepick, *supra* note 78, at 187. 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’ border with Mexico. See Legomsky, *supra* note 94, at 683.

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 refugee admissions program, a visa lottery was selected to randomly identify which Cubans, in Cuba, could enter the U.S.¹³⁵ The 1995 agreement addressed the 33,000 Cubans who had come to be encamped at Guantanamo 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 U.S. Second, the U.S. would begin repatriating Cubans interdicted, rather than relocating them to safe havens.¹³⁶

Here again, then, the Executive acted as an agenda setter in this period, in a manner that reflected a substantive point of view, informed by foreign policy judgments with respect to the types of migrants the United States should admit.¹³⁷ And thus, throughout its management of the Haitian and Cuban crises, the Executive has been able to advance an immigration agenda marked by a strong political point of view through a mixture of broad delegated authority and rhetorical claims to foreign policy authority and the overhang of inherent authority. 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 underscoring that immigration policy is at critical moments formulated through a competitive dialogue between the political branches.

¹³⁵ See Ruth Ellen Wasem, *Cuban Migration Policy and Issues*, CRS Report for Congress 2-3 (Jan. 19, 2006).

¹³⁶ See Wasem, *supra* note 135, 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 U.S. 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 2366 Cubans—the highest level of interdiction since the 1994 balsero crisis. See U.S. Coast Guard, Alien Migrant Interdiction, <http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm>.

¹³⁷ 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 “deported 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, 112 Stat. 2681 (Nov. 2, 1998). See Legomsky, *supra* note 94, at 681.

C. *The Rise of De Facto Delegation*

The Bracero program and the later crises concerning Cuban and Haitian migrants point to the existence of two 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 is 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 arena¹³⁸ and consequently made situations like the one that arose during the Bracero period much less likely to recur. 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.

Our basic argument is 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 authority to admit and remove to a world of pervasive delegation and subsequent executive screening. To be clear, we do not mean that

¹³⁸ This 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. 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 lawsuits, therefore, the government appears to be releasing noncitizens while simultaneously contending that Congress prohibits their release under 236(c).

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. In fact, this feature is what makes the Cuban/Haitian crisis so unique: it represents a rare occasion on which the President has been able to invoke § 212(f) to set screening rules. As a general matter, Congress specifies in great detail the criteria for exclusion and deportation. In this sense immigration law is very much like tax law, where Congress retains control over marginal rates, or criminal law, where Congress defines the elements of a crime, and much less like other regulatory arenas in which Congress has delegated broad authority to the executive branch to set standards.

Our claim, instead, is that the President’s inability set formal admissions and deportation 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 gives rise to a system of *de facto* delegation to the Executive of power that serves as the functional equivalent of 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 policy-making power to the President, and we discuss each in turn:

1. *Deportation for unauthorized presence*

First, and perhaps most important, 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 an immigrant deportable. The first federal immigration controls contained no deportation provisions.¹³⁹ Even after deportation for unlawful entrance

¹³⁹ These first controls were contained in the Page Act, which was enacted in 1875. Act of Mar. 3, 1875 (Page Act), ch. 141, § 1, 18 Stat. 477. The only minor exception was the anomalous, controversial, and short-lived Alien Enemies Act of 1798, which authorized the President to deport noncitizens who 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

became a formal possibility, several features of the immigration system prevented those provisions from being particularly significant. The initial deportation rules contained statutes of limitation that limited their reach,¹⁴⁰ and the elaborate documentation requirements associated with modern immigration law simply did not exist.¹⁴¹ As a result, it was quite difficult for the government in most situations to identify unlawful entrants.¹⁴² 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.¹⁴³

Today, however, the Immigration and Nationality Act makes deportable any noncitizen who enters the U.S. without authorization or overstays her visa.¹⁴⁴ While these provisions lay out clear rules that do not confer any *de jure* discretion on the executive to determine who has lawful status and may therefore remain in the U.S., in practice they delegate tremendous authority to the executive branch. The principal reason is that over *one-third* of all noncitizens living in the United States are deportable under this provision because they have either entered illegally or overstayed their visas.¹⁴⁵

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.

¹⁴⁰ 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.

¹⁴¹ *See* LUCY SALYER, *LAW AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (discussing the development of documentation requirements).

¹⁴² 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 (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 141 (describing mass refusal to apply for certificates of residence and the government’s eventual capitulation that led the documentation requirement never to be enforced).

¹⁴³ *See* NGAI, *supra* note 62.

¹⁴⁴ *See* INA § 212(a)(6) (“An alien present in the United States without being admitted or paroled . . . is inadmissible.”); § 237(a)(1)(A) (“Any alien who at the time of entry [was] . . . inadmissible by the law existing at such time is deportable.”); § 237(a)(1)(B) (“Any alien who is present in the United States in violation of this Act [which includes those who have overstayed their visas] . . . is deportable.”).

¹⁴⁵ *See, e.g.*, Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the United States* (Pew Hispanic Center Mar. 7, 2006), available at <<http://www.migrationinformation.org>>; *see also* David Martin, Migration Policy Institute,

To see why this effectively delegates so much regulatory authority to the President, imagine a criminal statute that rendered half of all the people living in the country subject to criminal conviction. In this world, prosecutors could not possibly initiate proceedings against all persons in violation of the law 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 under-enforcement of the law, results in the delegation of overwhelming authority to the officials who decide whether to initiate a criminal prosecution. In a series of important articles about the structure of modern criminal law, Bill Stuntz has made precisely this point.¹⁴⁶ Surprisingly, it has gone unnoticed that immigration law has a startlingly similar structure.¹⁴⁷ First, a huge fraction of the noncitizen population is deportable as a technical legal matter. Second, while vast numbers of noncitizens are deportable, only a tiny fraction will ever be placed in removal proceedings. Third, the immigration agencies wield the same power as criminal prosecutors to make selective charging decisions.¹⁴⁸ In this way, the structure of immigration system delegates tremendous power to the executive branch.

Twilight Statuses: A Closer Look At The Unauthorized Population (June 2005), available at http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf.

¹⁴⁶ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

¹⁴⁷ 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 whether this account is really accurate or 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 A. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists' View*, in [collected volume] (forthcoming 2009). But while it seems somewhat implausible that 30% of Americans are formally "felons," more than this fraction of noncitizens are formally deportable.

¹⁴⁸ See *Exercising Prosecutorial Discretion*, Memo from Doris Meissner, INS Commissioner, to District Directors of INS, Nov. 17, 2000 (outlining factors to be considered when deciding whether to exercise discretion to pursue removal). While this memo documents the immigration agencies' authority to decline to prosecute, it is important to note that this memo reveals only a small aspect of the agencies' 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 described in footnote 186 than to ours.)

2. *Deportable post-entry conduct*

A second feature of immigration law magnifies this delegation of authority. The Act does not limit deportation to those who have entered unlawfully; it also makes *lawful* entrants deportable for a wide variety of post-entry conduct. Over the last century, Congress has dramatically expanded these deportation grounds and thereby multiplied the number of noncitizens subject to removal.¹⁴⁹

When the federal government first began to restrict immigration in the 1870s and 1880s, provisions making immigrants deportable for post-entry conduct were nonexistent. There were few deportation provisions of any kind in the earliest immigration statutes. Moreover, the tiny number that did exist all made removal turn on information about the immigrant available at the time she entered, rather than on post-entry conduct. For example, the 1882 Chinese Exclusion Act authorized deportation only for “any Chinese person found unlawfully within the United States”¹⁵⁰—meaning those persons who entered unlawfully after the adoption of the Act.¹⁵¹ 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.¹⁵² That same statute made deportable “any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing,”¹⁵³ similarly reaffirming a focus on pre-entry information.

It was not until 1907 that Congress first added deportation grounds that clearly targeted post-entry conduct, making deportable any immigrant who engaged in prostitution within four years of entering the country.¹⁵⁴ Over the last century, Congress has steadily expanded the ex post screening system by augmenting the list of post-entry conduct that makes a noncitizen deportable. Congress began in 1917 by adding criminal convictions and advocacy of anarchy to grounds for deportation.¹⁵⁵ In 1922, Congress added certain drug

¹⁴⁹ The following discussion draws on Cox & Posner, *supra* note 8.

¹⁵⁰ Chinese Exclusion Act § 12, 22 Stat. at 61.

¹⁵¹ *Id.*

¹⁵² See Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

¹⁵³ *Id.*

¹⁵⁴ See Immigration Act of 1907 § 3, 34 Stat. at 900.

¹⁵⁵ 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,

convictions to the statute.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ While nearly all grounds of deportability were time-limited in the first three decades of federal immigration law, today such statutes of limitation remain for only a few grounds.¹⁵⁹

During the last two decades, the expansion of deportation provisions targeting post-entry conduct has accelerated dramatically—due mostly to the way modern immigration law treats criminal behavior classified as an “aggravated felony.”¹⁶⁰ 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.¹⁶¹ Since then the definition has been repeatedly expanded by Congress.¹⁶² Today it sweeps in a broad swath of

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”).

¹⁵⁶ See Act of May 26, 1922, ch. 202, 42 Stat. 596 (making deportable any noncitizen convicted of violating the statute’s prohibition on the importation of or dealing in opium).

¹⁵⁷ See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952); see also E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 307-13 (1981).

¹⁵⁸ See, e.g., 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); Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (eliminating the 1917 Immigration Act’s statute of limitations on the deportability of anarchists); cf. Immigration Act of Feb. 5, 1917 § 19 (extending to five years the statute of limitations for deporting public charges).

¹⁵⁹ See, e.g., INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (making deportable noncitizens convicted of a single “crime involving moral turpitude committed within five years . . . after the date of admission”).

¹⁶⁰ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305; 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.

¹⁶¹ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470-71.

¹⁶² See Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-

criminal conduct, including minor convictions—even some misdemeanors—that make the statutory label something of a misnomer and the statute’s scope breathtaking.¹⁶³

The principal consequence of this dramatic expansion has been to further enlarge the number of immigrants technically subject to removal, and thus the size immigrant population over which the Executive exercises its discretion. 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 policy-making power with respect to an ever-increasing cohort of immigrants.

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.¹⁶⁴ 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 persuasively that the elimination of various forms of relief under the INA and the increasingly categorical nature of the code have caused the demise of

132, § 440, 110 Stat. 1214, 1276; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546, 3009-627.

¹⁶³ See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); IMMIGRATION LAW AND PROCEDURE, *supra* note __, § 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).

¹⁶⁴ 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. 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).

discretion in immigration law.¹⁶⁵ 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. This shift is unlikely to assuage the critics who have called attention to the constriction of immigration judges' discretion to provide relief, but for our structural purposes, it is important to see 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 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, namely because such an option opens up an avenue for judicial review by Article III courts of the application of relief provisions—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, the relief-from-removal provisions are typically applied in the first instance by an immigration judge.¹⁶⁶ These judges are located in the Executive Office of Immigration Review (EOIR), a division of the Justice Department (DOJ), rather than in the Department of Homeland Security with the rest of the immigration administrative structure. Initially a part of 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 decision-making by those judges. These same objectives justified keeping the immigration judges within DOJ when the

¹⁶⁵ See, eg., Stephen Legomsky, *Fear and Loathing in the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000).

¹⁶⁶ See INA §§ 240A, 240B.

Department of Homeland Security, which houses ICE, or today's version of the INS, was created in 2002.¹⁶⁷

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. Those changes have had the effect of shifting more aspects of the deportation decision back to ICE. Thus, far from eliminating discretion, the statutory restrictions on discretionary relief have simply consolidated this discretion in the agency officials responsible for charging decisions.¹⁶⁸ Prosecutorial discretion, rather than the exercise of discretion by immigration judges, has become the norm.

* * *

Together, the three changes to the structure of immigration law we outline that 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 about the changes over time and how both the courts and the political branches have conceptualized the constitutional distribution of authority between the President and Congress.

¹⁶⁷ See, e.g., Stephen Legomsky, *Deportation and the War on Independence*, 91 CORN. L. REV. 365 (2006).

¹⁶⁸ 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 determine how to utilize enforcement resources, and how quickly to remove certain types of non-citizens. 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 that they had been inside the country for more than 14 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.

D. *Ex Post Screening and Asymmetric Delegation*

Implicit in our regulatory account of pervasive de facto delegation and executive discretion is a crucial observation about the nature of executive power in the immigration context: the structure of modern immigration law has come to delegate screening authority to the President in an asymmetric fashion—the authority operates almost entirely on 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 immigrants 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 the basis of information that the state acquires about the immigrant after she enters the country.¹⁶⁹ These mechanisms of ex ante and ex post screening are substitutes. Just like a university selecting permanent faculty members might pick 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 post-entry conduct—the standards we discussed in the previous section.¹⁷⁰ Why a state might pick a particular combination of ex ante and ex post-screening depends on the state's objectives with its immigration policy and with its institutional capacity to gather information through the two channels.

The three aspects of modern immigration law discussed above all augment the Executive's power to set ex post screening policy. 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.

¹⁶⁹ See Cox & Posner, *supra* note 8.

¹⁷⁰ 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.

Consider perhaps the most important feature we 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, the provisions are used by immigration officials to shape immigration policy through ex post decision-making. Executive officials do not initiate removal proceedings against anything like a random sample of immigrants who are deportable under this provision. Instead, for many years the INS and ICE initiated proceedings mostly against those 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 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 raids had in recent years declined to insignificance, and their resurgence represents a de facto shift in ex post screening policy. Rather than targeting almost exclusively those deportable immigrants who become entangled in the criminal justice system, the Executive is beginning to screen out those unauthorized immigrants found working in particular labor sectors. This reflects a re-ordering of priorities to place greater emphasis on unlawful workers rather than simply on noncitizens who have had run-ins with the criminal justice system. 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 new 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 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 being removed without Congress making any changes to the formal structure of immigration law.

But while the President 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. 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 are formally embedded in the INA's complex visa allocation system. That system makes certain numbers of visas

available for different classes of noncitizens.¹⁷¹ 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.¹⁷²

There are a few exceptions—areas in which Congress has expressly delegated some such authority to the President. The INA, for example, gives the executive some 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 make an annual determination of how many refugees may be admitted in the next fiscal year,¹⁷³ in consultation with Congress.¹⁷⁴ 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 they are motivated by foreign policy or domestic political concerns.¹⁷⁵ More significantly, § 212(f) gives the President personally the power to suspend the entry of “any class of aliens” whose admission “would be detrimental to the interests of the United States.”¹⁷⁶ But

¹⁷¹ See, e.g., 8 U.S.C. § 1153(a) (allocating family visas); *id.* at § 1153(b) (allocating visas on employment grounds).

¹⁷² See Memorandum from Bo Cooper to Deputy Commissioner of the INS, 1 INS and DOJ Legal Opinions § 99-5 (“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 decisions. By contrast, a grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not 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 the alien is not eligible, so the alien remains in a continuing difficult state of limbo and illegality.” *Id.* at 7. There are a few areas in which Congress has delegated some such authority to the Executive, namely in the setting of annual refugee quotas.

¹⁷³ 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.* at § 1157(b).

¹⁷⁴ 8 U.S.C. § 1157(a)(1)(2) & (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

¹⁷⁵ 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 United States. See STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 932 (2005) (citing statistics from 55 FED. REG. 41979-80 (Oct. 17, 1991)).

¹⁷⁶ 8 U.S.C. § 1182(f).

as we explained in Part II, the restriction of this power to emergency situations makes its practical utility as a thoroughgoing *ex ante* screening mechanism limited. Indeed, it is rarely invoked and 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 existing law permits him to do *vis-à-vis* entry is to parole into the United States non-citizens who must nonetheless meet the criteria set by Congress to remain permanently.¹⁷⁷

Of course, the President can change *ex ante* screening policy at the margins by changing enforcement policy. But prosecutorial discretion and selective enforcement play a much smaller 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 exceptions, the agencies are not authorized 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

¹⁷⁷ 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 is an illustrative example. *See* Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (Sept. 23, 1950) (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, it has been the Bureau of Immigration Appeals and the Courts of Appeals, through the adjudication of asylum claims, that have given the standards their actual content. In this sense, through *ex post* 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 that is 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.

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 themselves 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 are an important reminder that it is not meaningless). For the most part, therefore, the President has little ability to use selective enforcement to reshape the pool of immigrants who are lawfully admitted to the country.

That leaves enforcement at the border as the principal tool available to an executive who wants to alter the formal policy concerning which immigrants are or are not screened out of the country on the front end of the system—a tool that, we contend, is coarse and limited, whether 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. Take, for example, the debates over construction of a fence along our southern border. With the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress authorized the construction of barriers along U.S. land borders to prevent unauthorized crossings and explicitly directed that a 14-mile fence be built along the U.S.-Mexico border near San Diego.¹⁷⁸ In so doing, Congress authorized 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.¹⁷⁹

And yet, by 2005, as the result of protracted litigation under California state law, almost none of the San Diego fence had been built. With the REAL ID Act of 2005, Congress broke through this impasse. 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. But the Act also set forth a host of other immigration measures, including 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.¹⁸⁰

¹⁷⁸ See Michael John Garcia, Margaret Mikyung Lee, & Todd Tatelman, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005* 15 (Congressional Research Service, May 2005).

¹⁷⁹ §102 IIRIRA.

¹⁸⁰ H. Rept. 109-72, at 171 (2005).

The power to suspend all laws necessary for the construction of a border fence is startlingly broad, and vigorous debate about this capacious delegation ensued in the Senate, though it 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. And 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.¹⁸¹ After the fact, numerous members of the Senate expressed that opposition by articulating great concern over the extent of delegation to DHS authorized by Congress. 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.¹⁸² And 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.¹⁸³

Though we recognize how extraordinary this delegation of power to construct the border fence free of other legal constraints might be, the more salient point for our purposes is that 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.

¹⁸¹ 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. S 4816 (May 10, 2005); *see also* Statement of Senator Barack Obama (D.-IL), 151 Cong. Rec. S 4816, 4831 (May 10, 2005) ("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.").

¹⁸² 151 Cong. Rec. S 4806, 4807 (June 27, 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 non-delegation doctrine. *See Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, ___ U.S. ___ (June 2008).

¹⁸³ 151 Cong. Rec. S 4816, 4831.

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; again, it is difficult to use border enforcement as a fine-grained screening mechanism—that is, to ease border policing for some types of migrants but not others and thereby control the types of immigrants that are exempt from the ordinary ex ante screening criteria. Again, there are exceptions around the margins.¹⁸⁴ It is true, of course, that border enforcement by its nature comes with some selection effects. The more difficult and dangerous it becomes 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 who are willing to take the risk (a risk that today includes death).¹⁸⁵ Under-enforcement at the border thus can change the distribution of immigrants who enter the country. Nonetheless, these changes in the distribution are not really within the control of the executive branch. Thus, the fundamental ex ante standard-setting questions remain in the hands of Congress.

Though modern immigration law delegates tremendous screening authority to the President, there is an important asymmetry in the delegation of policy-making power. The Executive has considerably more flexibility to make fine-grained adjustments to ex post screening policy than to ex ante screening policy.¹⁸⁶ This asymmetry will be important to our critical evaluation

¹⁸⁴ 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, who may represent a different type or class of person.

¹⁸⁵ 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.

¹⁸⁶ Recently, Gerry Neuman has made a somewhat different argument about the location of discretion in the immigration system. In *Discretionary Deportation*, 20 GEO. IMM. L. J. 611 (2006), 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

in the next Part of the way that the relationship between the Executive and Congress has been structured in immigration law. Before proceeding, however, we should emphasize that recognizing asymmetric delegation also puts us in a better position to understand the historical examples we discussed in Parts 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. This fact is in part why those examples stand out in the historical record as “exceptional” (and explains our choice to focus on them). It also helps explain why the examples are likely to arise during “emergencies” such as wartime labor shortages or a refugee crisis—emergencies are 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.¹⁸⁷ Moreover, history has shown that the President is much more likely during emergencies to act aggressively on the basis of claimed inherent authority.¹⁸⁸ Thus we are much less likely outside the emergency context to observe the Executive acting as though it has inherent authority over immigration policy—whatever the merits of the position as a matter of constitutional law. This reality serves to further reinforce the conclusion that *ex post* flexibility is much more pervasive and that there is, consequently, an asymmetry in the flexibility accorded the Executive.

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.¹⁸⁹ We show that immigration law has over a century

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 creates vastly more executive discretion than is created by any of the *de jure* discretion rules in the code.

¹⁸⁷ See *supra* notes 104-111 and accompanying text.

¹⁸⁸ See *supra* Parts II.A & II.B.

¹⁸⁹ 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 relating 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;

shifted (as a matter of both formal constitutional doctrine and functional structure) from a world in which questions of inherent executive screening authority were both legally and practically plausible to a world in 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 of which are 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 much less central questions about the formal allocation of authority under the Constitution.

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 generality, it is easy to identify some potential causes of these historical trends. Larger legal changes like the rise of the administrative state may be partly responsible. So might be the growing migratory and demographic pressure that the United States has experienced over the past four decades. 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 that may be but are not necessarily unique to immigration law. It could well be, much as Bill Stuntz has suggested of the growth in criminal law, that Congress has intentionally delegated increasing amounts of immigration authority to executive officials because Congress accrues political benefits from making immigration law on the books ever harsher and bears few of the political costs associated with immigration enforcement efforts that segments 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 a story true, immigration law would involve a sort of one-way ratchet of ever-widening deportability for noncitizens.¹⁹⁰

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 also supra* note 37 and accompanying text.

¹⁹⁰ One could also tell a different sort of political economy story about the path delegation has taken. It might have been influenced by the extent to which Congress anticipates that the

While the past three decades of immigration legislation are largely consistent with this account of the political economy of immigration law, they are not entirely so: while deportation policy has steadily expanded, that expansion was punctuated by a large-scale legalization program in 1986. And even if the theory does fit our reality fairly well, it is still quite difficult to substantiate this sort of account. The political economy of immigration law is very poorly understood, and causal stories that are grounded in political economic logic are often exceedingly difficult to falsify. Moreover, it is far too easy to underestimate the role that happenstance and path dependency play in such transformations.

Our ambition, therefore, is not to provide a causal account of how the current structure of immigration law came to be. Instead, we conclude by introducing the central normative questions our descriptive account prompts: Is the modern allocation of powers desirable or undesirable? While we cannot hope to provide anything like a complete answer here, we begin the conversation by reflecting on some of the potential costs of the current structure.

A. De facto Delegation and Screening Costs

There are several ways we could put our descriptive account into perspective. 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 that, while not unique to immigration law, have never been clearly identified in the immigration scholarship.

First, 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 decision, undermines their incentive to properly sort immigrants according to existing criteria governing the right to presence

executive will share 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 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); Levinson & Pildes, *supra* note 14, at 2361 (observing that “branch 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 reinterpretation of statutes.”).

in the United States. This possibility would be particularly salient in contexts where it is difficult for the public to monitor the job that the Executive is doing, namely when the Executive is exercising its discretion whether to prosecute removal or not.

Second, even if the Executive is well intentioned in its enforcement, the nature of today's ex post screening, which revolves considerably around the policing of an undocumented population, raises evidentiary (and potentially rule-of-law) 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.¹⁹¹ Using a proxy can be beneficial in situations where we believe that the proxy is correlated with the conduct we wish to target and where that conduct itself is difficult to prove. But the use of proxies raises concern about the confidence level of our screening decisions. 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.¹⁹² The criminal grounds of deportability generally require a conviction.¹⁹³ Part of the reason for this, presumably, is to ensure that we have a certain amount of confidence that those who are deported for criminal conduct actually did engage in the criminal conduct of concern—that we are deporting the right sort of immigrant. When an immigrant's undocumented status is used to remove a putative gang member, however, the allegations about illegal criminal conduct have not been tested through the criminal process. This undermines the evidentiary standard that Congress embodied in the criminal deportation provisions.¹⁹⁴ And rule-of-law concerns aside, the risk of error seems high

¹⁹¹ 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 is clearly a proxy for the crime of burglary itself.

¹⁹² See, e.g., Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (discussing the use of immigration law as an anti-gang enforcement strategy).

¹⁹³ See 8 U.S.C. §1227 (a)(2).

¹⁹⁴ There is a closely related point 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. § 1229a (describing the ordinary removal process) with 8 U.S.C. § 1225 (b) (describing the expedited removal process for illegal entrants) and INA 8 U.S.C. § 1231(a)(5) (describing the process for reinstating removal orders for those who re-enter unlawfully after being deported). More

because undocumented status is extremely poorly correlated with gang membership, criminality, and most of the other objects of concern for which undocumented status is used as a proxy offense.

The failure of 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 be connected to the attacks.¹⁹⁵ Many of these noncitizens were eventually released (after months of detention) without ever being charged. And while many were removed for their visa violations, not a single one was ever found to be connected to terrorism or the 9/11 plot. Moreover, the proxy enforcement strategy fueled the impression that the government was simply targeting Muslims.

We ultimately do not intend to suggest that these agency problems mean that the Executive should never wield this sort of policy-making 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.¹⁹⁶ Immigration policy debates, when held at the Congressional or national level, can be protracted, heated, and divisive. Plenty of evidence exists to support the conclusion that change in immigration policy at the

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 process are becoming the norm despite the attachment of 5th and 6th 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 US History: A Personal Account*, *Monthly Review*, July 8, 2008, available at <http://www.monthlyreview.org/mrzine/camayd-freixas120708.html>.

¹⁹⁵ *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).

¹⁹⁶ Here the classic example is the Base Closure and Realignment Commission, which Congress created in 1988 after it became clear that the politics of base closure made it nearly impossible for Congress to itself pick the bases to be closed. *See* COLTON C. CAMPBELL, *DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION* (2001).

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.¹⁹⁷

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 they have arisen as a result of the dramatic increases 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, there is an additional question: what should be made of the asymmetrical structure of that delegation? As we explained above, the modern immigration separation-of-powers provides the Executive considerably more flexibility to make to 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.¹⁹⁸

¹⁹⁷ 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, instead of regarding Executive decision-making as a form of democracy accommodation, we would look at separation of powers questions with a view to establishing norms that would force Congress to act. *See, e.g.*, DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

¹⁹⁸ 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, both in order to avoid the costlier project of developing clear ex post screening rules, and because administrative agencies will be 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 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

To be clear, we should emphasize that, at a high level of generality, this sort of asymmetric delegation is pervasive in 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 where the Executive would prefer to admit immigrants with *lawful* status, it is largely powerless to do so because their lawful admission is inconsistent with the admissions established by Congress. One instance where the executive might prefer access to the lawful path is where potential immigrants are unwilling to bear the risks associated with unlawful entry. While many low-skilled migrants with few other options are willing to bear these risks, high-skilled immigrants are often much less willing or able to bear them. Migration to the U.S. may be less valuable to them, because they are likely to have more migration options, or because their economic prospects at home are 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 is an extremely poor regulatory substitute for ex ante authority.

One prominent example of the Executive adopting a second-best regulatory strategy is the large “illegal immigration system” that operates in the shadow of the legal system.¹⁹⁹ In a world where the executive has little authority to expand the lawful admission of low-skilled workers (on either a

the form of grounds of removal. But there is little evidence that Congress has done so because legal rules are easier to generate for ex ante than ex post screening. Nothing in our descriptive account in Parts I and II, for example, would suggest that the asymmetry that has arisen has much to do with optimal precision of legal rules.

¹⁹⁹ We note that we are less certain that the asymmetry that exists as the result of Congress’s expansion of the post-entry grounds for removal is “pathological” or undermines the rule of law values 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 be determined based on immigrants’ behavior once they have arrived.

permanent or temporary basis) we have instead seen an executive branch enforcement strategy that enables immigrants' entrance in large numbers without legal status.

It is, of course, possible that this system is desirable from the Executive's perspective: the government may sometimes be pleased that unauthorized immigrants lack lawful status, such that this illegal immigration system would 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, it is easier for the Executive to remove illegal immigrants than legal immigrants once they have served the purpose for which they were permitted to enter.²⁰⁰ Relatedly, the immigrants' lack of status may improve labor market efficiency circumvent public resistance to expanding legal migration.²⁰¹

Still, there is some evidence that the Executive would often 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 significantly changed admissions policy and decreased reliance on the President's discretionary control over deportation policy. But this is a system that President Bush could not implement unilaterally—at least not without claiming inherent executive authority; the asymmetry of delegation prevented him from adjusting admissions policy rather than deportation policy.

C. *The Status and Symbolism of "Illegal Aliens"*

In short, if admissions and deportation policy were not split awkwardly between Congress and the President, there is some reason to think that immigration law would look significantly different. But even if Congress and the President are perfectly pleased with the existing institutional arrangement—an arrangement that channels policymaking into the back end of the system—it is important to recognize the system's attendant costs.

²⁰⁰ See Cox & Posner, *supra* note 8 (discussing the possibility that a purely self-interested state might prefer the illegal system).

²⁰¹ See Gordon Hanson, Report for the Council on Foreign Relations (noting that illegal immigrants, because of their relative absence of ties, respond most quickly to changes in the labor market); JORGE CASTAÑEDA, *EX MEX: FROM MIGRANTS TO IMMIGRANTS* 174-75 (2007) (observing that the status quo allows the U.S. 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); Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111 (2008).

Large-scale de facto delegation depends in significant part on the creation and maintenance of a huge population of people who are unauthorized. 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.²⁰² This problem is related to the absence of transparency that is a function of prosecutorial discretion. It is hard for the public to 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 makes the violation of employment laws and health and safety standards easier. The existence of a large unauthorized population also sows social unrest by negatively affecting race relations and heightening the culture of surveillance. Not only can the premium on enforcement lead to racial profiling in hiring by employers reluctant to run afoul of the immigration laws,²⁰³ but the profusion of an unauthorized population 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 great numbers of low-skilled workers.²⁰⁴ Our account shows that these normative concerns about human rights are actually linked to the separation-of-powers structure in immigration law. This suggests that the reforms these critics seek may be difficult to achieve without a shift in the policymaking relationship between the President and Congress. Conversely, it highlights overlooked

²⁰² The formally illegal status of these migrants can also distort the policy making 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.

²⁰³ Among the most significant risks that can accompany the asymmetry we are describing is the risk of racial profiling by police, as well. 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 Rodríguez, *supra* note 39, at 635.

²⁰⁴ See Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. L. FORUM 219; Cristina M. Rodríguez, *Reciprocity in an Age of Migration* (working paper on file with author) (2009).

reform possibilities: working to reform the immigration separation of powers may be an important way of advancing the rights of migrants.

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. The obvious solution would be to vertically integrate authority over both admissions and deportation policy—that is, to ensure that the same institutional actor made basic policy choices in each domain.

There are two paths to vertical integration. First, we could level down, reducing the executive’s discretion at the back end of the system by disciplining, through courts or otherwise, its exercise of prosecutorial discretion. Second, we could level up, by expressly delegating to the President more power to set front-end screening policy through admissions rules. We are quite skeptical about the near-term feasibility of the first option. As is well documented in other enforcement arenas like criminal law, disciplining prosecutorial discretion is extremely difficult—especially through the courts.²⁰⁵ Thus, we suggest that it is worth thinking seriously about the second option, that of delegating more control over our immigrant admissions system.

In a sense, this possibility would simply bring to immigration policy a practice of delegation that is 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

²⁰⁵ Courts could in theory place substantive limits on the grounds of deportability. Such restrictions would limit the use of prosecutorial discretion and force more regulatory work to be done at the front end of the immigrant-screening system. *See* Stuntz, *supra* note 146 (discussing a similar mechanism for reducing prosecutorial discretion in criminal law). But we are pessimistic that courts would actually take this step. It is not that it is impossible to imagine a constitutional toehold for such a jurisprudential shift: 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 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. But given the plenary power tradition and the courts’ general reluctance to step into anything even vaguely connected to foreign affairs, this sort of correction seems even less likely than the possibility of Congress delegating quota-setting power to the executive.

circumstances.²⁰⁶ The failure to delegate similar authority in the immigration context has meant that immigration policy has exhibited the pathological features we laid out above.

We recognize, of course, that immigration law is sometimes seen as fundamentally different than other regulatory arenas. Perhaps congressional control of immigrant admissions policy is a way of creating 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 centrally manage.²⁰⁷ Admissions standards can be analogized to marginal tax rates, or to the elements of a crime—rules or standards that our intuitions tell us should be kept in the hands of the legislature. But that sense of control is largely an illusion, as Congress has found a back door way of giving the Executive wide authority to decide these basic membership questions; they are just made through a system of ex post screening that obscures the extent to which Congress is not in charge.

To be sure, leveling down also raises questions about feasibility. One route to Presidential power over ex ante screening—claims of inherent executive authority—seems unlikely to be invoked in the contemporary political environment. In 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. But though the question of inherent authority has never been definitely resolved, we are confident that it would be too politically risky for the Executive, and too disruptive to the conventions that have evolved over time regarding Congress’s leadership in this arena (and in administrative law generally), for the President today to rely on a reinvigorated inherent authority claim. Indeed, even when he was riding high politically between 2002 and

²⁰⁶ 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.” SPENCER ABRAHAM & LEE H. HAMILTON, *IMMIGRATION AND AMERICA’S FUTURE: A NEW CHAPTER*, REPORT OF THE INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE 41-42 (2006).

²⁰⁷ See Cox, *supra* note 189 (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, *supra* note 39 (discussing the legitimacy of delegating membership decisions).

2004, it did not occur to President Bush to propose publically a large-scale guest worker program without congressional authorization.²⁰⁸

Still, we do think that Congress might be persuaded to delegate greater authority over admissions policy to the Executive. The first step in creating greater symmetry would be for Congress to delegate *ex ante* screening authority to the immigration agencies through 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. The questions to be answered in implementing this sort of agenda are multiple. They include whether the Executive should be empowered to set annual limits distributed according to the various visa categories as he sees fit, or whether formulae should be developed to keep family, labor, and other immigration in rough proportion to one another. 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? In addition, it would be important to consider whether this approach would require the formation of a new agency or independent commission,²⁰⁹ or whether the Department of Labor and Homeland Security could work together to set the limits. However this delegation is to be structured, it 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, which is also part of the refugee allocation system, would permit the Executive to change the content of the *ex ante* screening criteria—to determine which family relationships, employment status, or other qualities, such as language ability, should be taken into account in determining eligibility for admissions. This sort of move would be of a piece with the turn to a points system contemplated in late 2007, though under the reform envisioned then, Congress would have retained control over the parameters of the point allocation. This step would be more radical, because it would give the Executive the power to make first-order judgments about the purpose of immigration. But whether the delegation is limited to number

²⁰⁸ 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.

²⁰⁹ 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. *See id.* at 42.

setting or includes the definition of substantive criteria for admissions, our purpose in this preliminary discussion of power reallocation is to emphasize the value of vertical integration. An agency that has front-end screening authority and ex post enforcement authority will be better able to manage the regulatory problems it faces.

Of course, as we intimate in previous sections, it is possible that the asymmetry we are targeting is the product of deliberate design, or at least it may serve the interests of both of the political branches well. Thus, even if the Executive is delegated ex ante screening authority, there is no guarantee that an administration will alter the mix of ex ante and ex post screening rather than continuing to rely on the large scale illegal system.²¹⁰ Indeed, agency inaction is a problem across the administrative state, and the mechanisms for inducing agency action are limited.²¹¹

In the context of immigration, asymmetry may ultimately be to the benefit of both of the political branches, precisely *because* it obscures lines of accountability. Congress can rely on the Executive to use its enforcement tools to overcome the limitations of the immigration rules Congress sets without having to expand formal immigration channels, and the Executive can use its enforcement discretion to adjust immigration levels to suit its low-cost labor agenda while shifting the major part of the blame for illegal immigration to Congress's inability to legislate. Alternatively, even if an evident means of reducing illegal immigration and thus reducing enforcement costs would be for the Executive to expand opportunities for legal entry, the political and economic costs of admitting a greater number of lawful immigrants may be too high for the Executive, who is also politically accountable and subject to the same public pressures to keep immigration rates stable as Congress. Indeed, the viability of ex ante delegation as a mechanism for addressing the pathologies of illegal immigration hinges on our assumption that Congress has not changed the numbers and types of immigrants admitted since 1990

²¹⁰ As a historical matter, there is some reason to expect different behavior. The President has often been more likely to be open to higher levels of immigration, as both the Bracero experiment and the saga of the literacy test vetoes underscore. This greater receptivity suggests that the Executive will, in fact, behave differently than Congress if given control over admissions policy. Of course, this might also appear to reintroduce the democracy concern alluded to above. 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.

²¹¹ See, e.g., Richard C. Revesz & Nicholas Bagley, *Centralized Oversight of the Regulatory States*, 106 COLUM. L. REV. (2006) (discussing the limited utility of OIRA letters in prompting agency action).

because it has been institutionally too difficult to do so, not because doing so would be irrational or undesirable from a political or policy perspective. It might therefore be difficult to secure a change in executive policy simply through delegation, absent an external push of some kind.

The most likely candidate to exert external pressure would be the courts. 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.²¹² 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 was of course able to do 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 extra-territorial solution, because by definition we are dealing with persons in the territory of the United States.

In addition to the challenges of agency inaction, we recognize that there may be democracy costs to moving standard setting authority into the Executive. Assuming that the Executive would be less politically accountable than Congress—an assumption that should not be taken for granted—these costs are not likely to be greater in the immigration context than in other regulatory contexts. But if the reason Congress rarely adjusts visa levels is that the public does not want Congress to do so, then delegating the authority to the Executive to set visa levels through a policy process less likely to be subject to widespread public scrutiny may be inappropriate. Indeed, as a historical matter, the President has been more likely to be open to higher levels of immigration, as both the Bracero experiment and the saga of the literacy test veto underscore.²¹³ This greater receptivity suggests that the Executive will, in fact, admit more immigrants than Congress, in part addressing the inaction concern above. But such agency action may be inconsistent with the will of the people.

²¹² 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.

But while we acknowledge this possibility, we also emphasize that the asymmetry that has resulted from the lack of vertical integration in current institutional arrangements is highly problematic, from both a rule of law and a human rights perspective. Holding constant the Executive's current capacities for enforcement, as well as Congress's willingness to adjust ex ante standards itself, we think that expanded legal admission by the Executive in the face of popular preferences is far preferable to the current illegal immigration system. At the very least, through the delegation we propose, we would be setting up a system that is more likely than the status quo to take account of the multitude of factors relevant to admissions decisions, including popular preferences, both because what we propose is administrative and not legislative in nature, and because the costs of assimilating all the relevant information are lower for the Executive than for Congress.

Though this preliminary discussion obviously leaves a great many questions open—both with respect to design and feasibility—our primary goal in this Section has been to initiate an inquiry into the institutional distribution of decision-making authority. We have sought to underscore traditions of power sharing between the executive and legislative branches, and 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 we can do better, 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 of 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, it is the de facto delegation model that 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 when the question is who to deport, but not at the

front end, when the question is who to admit. Because this asymmetry is arguably pathological in certain circumstances—it undermines accountability, due process, and rule of law values—its existence should occasion re-evaluation of the relationship between the political branches in immigration law. We suggest that greater formal delegation of ex ante screening authority to the President is one way to re-integrate 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.