BOOK REVIEW

CRYING WOLF OR A DYING CANARY?

CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP. By Peter Schuck. Boulder, Colo.: Westview Press, 1998. Pp. xviii, 475. $26.00.

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To hear some immigration advocates tell it, Americans in the 1990s have slammed the golden door shut in a fit of xenophobic hysteria . . . . Fortunately, this is a false picture . . . .[1]

I.
INTRODUCTION

A. Wolf or Canary?

I recently received a plea for help from a tearful U.S. citizen who is the mother of a twenty-five-year-old lawful permanent resident from Panama. She told me that her son has lived in Boston with his entire family since the age of four. He thought he was a U.S. citizen, too, like all of his relatives here. But, for a variety of complicated reasons, he was mistaken. She said he was now beginning his second tortuous week in solitary confinement twenty-three hours per day in a New Hampshire jail[2]—with no right even

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This review is part of a larger project that critiques the current state of United States deportation law. It is designed to be read in conjunction with two other articles: Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,* 113 HARV. L. REV. 1890 (June 2000) [hereinafter Kanstroom, *Deportation, Social Control*]; and Daniel Kanstroom, *Deportation and Punishment: A Constitutional Dialogue,* B.C. L. REV. (July 2000) [hereinafter Kanstroom, *Dialogue*].

1. PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 139 (1998) [hereinafter SCHUCK, CITIZENS, STRANGERS].

2. The U.S. Immigration and Naturalization Service (INS) now contracts with local jails and prisons to incarcerate immigration detainees. Although INS has promulgated standards for its own facilities, it has not done so for subcontracted facilities such as the one in

to a bail hearing—as he awaited deportation due to an old assault plea for which he had received a suspended sentence. Although it was not a basis for deportation at the time of the plea, assault is now retroactively deemed to be an aggravated felony[3] and, since 1996, a suspended sentence is no different from a year served in prison for purposes of immigration law.[4] Unless the conviction could be somehow "collaterally" attacked (i.e., eliminated, vacated, or materially changed by the state criminal court) the young man would have virtually no chance to avoid deportation and a lifetime ban from this country.

The next morning I read the following from Yale law professor Peter H. Schuck, a pre-eminent scholar of U.S. immigration law: "[W]e should stop crying wolf about nativism . . . [and we should celebrate] America's openness to self-supporting, law-abiding newcomers who don't demand special breaks."[5] A question, long implicit in my own thinking about this subject, became clear to me: does a relatively open and generous admissions policy, such as that of the United States, *necessarily* prove that fears of excessive anti-immigrant government action are not well-founded? If I criticize what seem to be harsh and dangerous recent trends in immigration enforcement, am I "crying wolf"?

Professor Schuck, in his book, *Citizens, Strangers, and In-Betweens*—a collection of mostly previously published work—has crafted an extended argument that such fears are at best marginal and insignificant and at worst dangerous. Essentially and, as noted above, at times quite pointedly, Professor Schuck has developed two related strands of argument. His first concern seems to have been that "the incentive structure of immigration law ha[d] shifted—to the marked advantage of aliens who are undocumented or out of status but also wish to remain."[6] The indicia of this alleged shift were, according to him, a regime of "[e]vasion, delay, surreptitious reentry, and administrative overload."[7] Based upon this view of a system spinning out of control, Professor Schuck's prescription, which appears in different guises throughout his work but which has remained rather consistent over time, has been to regain control by eliminating uncertainty, discretion, delay, disorganization, inefficiency, judicial oversight,[8] and, most controversially, by questioning the validity of 14th Amendment

which our client was detained. There have been substantial allegations of deplorable conditions in many of these facilities throughout the United States. *See generally* HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITES STATES (1998) (detailing problems with living conditions, medical care, legal representation, disciplinary sanctions, physical mistreatment, length of detention, and more) [hereinafter HRW, LOCKED AWAY].

3. 8 U.S.C. § 1101(a)(43) (1999).

4. 8 U.S.C. § 1101(a)(48) (1999).

5. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 148.

6. *Id.* at 69.

7. *Id.* at 70.

8. *See id.* at 69–73.

birthright citizenship.[9] His ultimate goal has apparently been to provide theoretical justification (and some practical suggestions[10]) for fundamental revision of a situation he described in 1984: "'Beating the system' has become a game it seems that almost any resourceful alien equipped with easily obtained fraudulent documents or a competent lawyer can successfully play."[11]

This general theoretical approach is built upon two related premises. The first is an empirical claim about how easy it was to beat the system and how many people actually did so. Suffice to say at this point that this reviewer believes that many attorneys who actually represented noncitizens and particularly asylum-seekers in the 1980s and 1990s might well disagree with Schuck's empirical claim. But more fundamentally, Schuck stakes out a profound legitimacy claim as his second argument. He put it this way in 1984:

> At some point, administrative incapacity prefigures a critical loss of legitimacy . . . [I]t is entirely possible that this point has already been reached . . . . The tidal wave of undocumented aliens who cannot be effectively deterred from crossing into the United States has swept away the credibility of INS enforcement.[12]

Of course Schuck's concern runs much deeper than the reputation of the INS, "because immigration law reflects some of our most deeply held values concerning community, self-definition, national autonomy, and social justice, and diminution of its legitimacy entails a profound, perhaps irretrievable loss."[13]

This review will respond to Schuck's underlying legitimacy claim by suggesting that immigration law implicates at least two quite different aspects of law and society. First, it obviously regulates the demographic composition of the nation-state—undoubtedly a central concern. Second, however, and more subtly, immigration law is a fulcrum upon which government action and majoritarian power are brought to bear against a discrete, marginalized segment of society. This review critiques Schuck's work as tending to blur the line between these two concerns, thereby diminishing public awareness of the importance of the latter. For many years, and especially during the past two decades, this has become a dominant approach to the subject. Substantial changes in the law during the

9. *See generally id.* at 163–216 (arguing that the value of citizenship is eroded by the overextension of constitutional rights to noncitizens).

10. For a more recent example, see Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 371 (1999) (describing current laws as "the harshest, most procrustean immigration control measure in this century" and suggesting more efficient deportation mechanisms involving state and local involvement).

11. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 70.

12. *Id.* at 71–72.

13. *Id.* at 72.

past five years, however, illustrate the dangers of disregarding this aspect of immigration law and demand a vigorous critique of it. Two 1996 laws, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[14] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[15] contained a wide range of exceptionally harsh mechanisms aimed at noncitizens, a very general, partial list of which includes:

- elimination of judicial review of certain types of deportation (removal) orders[16]

14. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C. (1999)). AEDPA is extraordinarily far-ranging and implicates constitutional provisions from Article III to the Suspension Clause and the First and Fifth Amendments. The statute is also notoriously complex and not especially well drafted. As Justice Souter put it in *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." The two most immediately effective features of AEDPA—drastic restriction of federal court habeas corpus review of criminal cases and broad expansion of the power to exclude and deport certain noncitizens—bore virtually no relation to the terrorist act committed by U.S. citizens which had spurred its passage and inspired its name. A more relevant but constitutionally dubious section prohibits the provision of "material support or resources" to groups designated "terrorist organizations." Other sections deal with victim assistance and restitution; jurisdiction for lawsuits against "terrorist states"; prohibitions on "assistance to terrorist states"; nuclear, biological, and chemical weapons restrictions; plastic explosives restrictions; and various criminal law modifications relating to terrorism.

The restrictions on habeas corpus review in AEDPA were, in many respects, a codification of doctrines already created by the Supreme Court. However AEDPA addresses issues such as delay, second and successive petitions, and finality with unprecedented rigidity and force and therefore implicates due process and other constitutional rights in new and often distressing ways. A sketch of AEDPA's main judicial review features includes (1) special court of appeals gate-keeping mechanisms and severe restrictions relating to second or subsequent habeas corpus petitions; (2) unprecedented deference to state court factual and legal findings; (3) strict, new time limitations both on filing deadlines and federal court action on habeas corpus petitions; (4) limitations on evidentiary hearings in habeas corpus cases; and (5) special restrictions on habeas corpus petitions filed by certain state prisoners facing the death penalty, including a filing limitation of 180 days.

15. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C. (1999)).

16. Immigration and Nationality Act [hereinafter INA] § 242, 8 U.S.C. § 1252 (1999). Some courts have recently held that section 242 of the INA does not preclude habeas corpus petitions brought under 28 U.S.C. § 2241 to challenge the legality of removal orders, if those challenges pose substantial constitutional questions (and possibly even beyond such claims). *See, e.g.*, Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999); Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999); Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998); Henderson v. INS, 157 F.3d 106 (2d Cir. 1998); Mansour v. INS, 123 F.3d 423 (6th Cir. 1997); Nguyen v. INS, 117 F.3d 206 (5th Cir. 1997); Ramallo v. Reno, 114 F.3d 1210 (D.C. Cir. 1997). The Seventh Circuit Court of Appeals has held that section 242 prohibits habeas corpus review of removal orders but allows petitions for review, even for crime-related removal orders, when the petitions raise "substantial constitutional issues." *See* Singh v. Reno, 182 F.3d 504 (7th Cir. 1999); LaGuerre v. INS, 164 F.3d 1035 (7th Cir. 1998). *See generally* Kathleen M. Sullivan, *Commentary on Reno v. American-Arab Anti-Discrimination Committee*, 4 BENDER'S IMMIG. BULL. 249 (1999); Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Lenni Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998);

- radical changes to many grounds of inadmissibility and deportation[17]
- elimination and limitation of some discretionary waivers of deportability[18]
- dramatic, often retroactive expansion of criminal grounds of deportation[19]
- mandatory detention for many classes of noncitizens[20]
- expedited deportation procedures for certain types of cases[21]
- creation of a new system, with extremely limited judicial review, for the summary exclusion from the United States of certain noncitizens who lack proper documentation[22]
- authorization for vastly increased state and local law enforcement involvement in immigration matters[23]
- a new type of radically streamlined "removal" proceeding—including the possibility of using secret evidence—for noncitizens accused of "terrorist" activity[24]

It would be absurd to assign responsibility to Schuck for all of these developments, and this review of course does not do so. Nevertheless, reading his work in light of the 1996 laws highlights a troubling convergence between the framework of "credibility" and "control" and the excessive harshness and legal distortions of the current regime. The 1996 laws have been criticized by many commentators, including Schuck, for the devastation they have wrought on families, for their rigidity, for their retroactivity, and for their elimination of judicial review.[25] This review seeks to add a further consideration to this chorus. Put metaphorically, this review approaches these current immigration law trends as a coal miner might view a dying caged canary used to detect the presence of potentially lethal

David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998); Richard H. Fallon, *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068 (1998); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN L. REV. 1525 (1997); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

17. INA § 212, 8 U.S.C. § 1182 (1999); INA § 237, 8 U.S.C. § 1227 (1999).

18. INA § 240(A), 8 U.S.C. § 1229(b) (1999) (replacing § 212(c) and former suspension of deportation with more restricted forms of relief known as "cancellation of removal").

19. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1999) (adding retroactive aggravated felony grounds). *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

20. INA § 236, 8 U.S.C. § 1226 (1999) (listing rules governing apprehension and detention of aliens). *See generally* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997).

21. INA § 238, 8 U.S.C. § 1228 (1999).

22. INA § 235, 8 U.S.C. § 1225 (1999).

23. INA § 103 (a)(8), 8 U.S.C. § 1103 (a)(8) (1999).

24. INA §§ 501–507, 8 U.S.C. §§ 1531–1537 (1999).

25. *See, e.g.*, SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 143–45.

gas further down the mine. The noncitizens and their families who bear the brunt of our current harsh laws are the canaries in the coalmines of our legal system. We do not "cry wolf" when we give voice to their concerns, for their concerns are ultimately ours, as they are ultimately us.

B. A Critical Framework

The view that the rights of citizens and noncitizens are intertwined is not new to U.S. legal and political history. Consider, for example, this statement from a prominent American political commentator: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow . . . ." To many of those immured in the polarized contemporary immigration debate, such a statement likely rings rather pessimistic, conspiratorial, and perhaps too simplistic to be the work of a careful, pragmatic writer. But it was Thomas Jefferson, the year was 1798, and the cause was the so-called Kentucky Resolution,[26] written in opposition to the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act.[27] Jefferson was not alone in his concerns. In that same volatile year, for example, James Madison, in the Virginia Resolution, wrote of a duty to oppose "a deliberate, palpable, and dangerous exercise of other powers" not granted by the Constitution to the Federal government.[28]

Is this argument simply anachronistic cutting and pasting?[29] Perhaps.

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26. *See* DOCUMENTS OF AMERICAN HISTORY 181 (Henry Steele Commager ed., 6th ed. 1958).

27. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)) (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing); Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800) (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801). Note that the Alien Enemies Act is still U.S. law.

28. DOCUMENTS OF AMERICAN HISTORY, *supra* note 26, at 182.

29. For an interesting, recent analysis of the roots of modern U.S. citizenship and deportation laws in the 1790s, see MARILYN C. BASELER, ASYLUM FOR MANKIND: AMERICA 1607–1800 (1999) [hereinafter BASELER, ASYLUM]. Baseler notes that "[t]he final codification of America's alien and naturalization policies was an integral part of the political battle in the 1790s to define the republic itself." *Id.* at 243. Of more particular relevance to current debate is Baseler's conclusion that the Jeffersonians' opposition to the Alien, Sedition, and Naturalization Acts of 1798 was "based not on the desire to augment the republic's population or the need for immigrant votes, but on their fear of Federalist initiatives and their commitment to preserving America as an asylum for both liberty and mankind." *Id.* at 243–44. Baseler's work also demonstrates the difference in focus between laws of naturalization and those of deportation. The former developed throughout the 1790s as a means of limiting the political power through the vote of foreigners. The latter were much wider ranging, as they aimed at both "political rivals and foreign radicals" of the Federalists and implicated much deeper concerns. *See generally id.* at 264–73.

Certainly the political and legal climate of 1798[30] was fundamentally different from that which we encounter 200 years later.[31] The invocation of Jefferson and Madison thus fairly raises the question of why we should care today about what they thought about a particular set of deportation laws long ago.[32] The best answer must be derived from the substance of their positions. As Kwame Anthony Appiah recently put it, "If they were right, then we can agree with them; if they are wrong, we must reject them. What matters, surely, is what is right."[33]

But how do we decide what is right in so complex and contentious an arena? One way is to consider how certain aspects of the relationship between the debate over immigration, citizenship, and noncitizens' rights and the ideals of American constitutional democracy have remained surprisingly constant over time. The issues are invariably historically contingent, to be sure, but very few are completely so.[34] My initial broad question may

30. As Gerald Neuman has rightly pointed out, the Alien and Sedition Acts of 1798 posed the question of whether aliens had constitutional rights in "stark form" because it "subjected them to expulsion on mere suspicion through orders issued ex parte by the president." GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 53 (1996). However, as Neuman also notes, the importance of this controversy as "a test of principle" was much magnified by its incorporation into Jefferson's political strategy and by "the subsequent prestige of the Jeffersonian defense of individual and states' rights." *Id.*

31. For a comprehensive account of the political history of this period, see JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956) [hereinafter SMITH, FREEDOM'S FETTERS].

32. There are more parallels between the contentious debates of 1798 and today than one might think. Opponents of the Federalists' proposed Alien Friends Act argued, among other things, that it violated the constitutional guarantees of habeas corpus. Representative Sewall, for example, though supporting the proposition that "[g]overnment has a right to suspend the liberty of persons in cases where they suppose there would be danger in their being at large" seems nevertheless to assume as noncontroversial the fact that "the persons thus imprisoned would also have the power of demanding a trial." ANNALS OF CONGRESS, 5TH CONG. (Joseph Gales ed., 1834–1856), *quoted in* BASELER, ASYLUM, *supra* note 29, at 27.

33. Kwame Anthony Appiah, *Citizenship in Theory and Practice: A Response to Charles Kesler, in* IMMIGRATION & CITIZENSHIP IN THE 21ST CENTURY 41–42 (Noah Pickus ed., 1998).

34. Consider the 1798 Naturalization Act. Apart from its extension of the required residence period preceding naturalization, the Act also subjected aliens to a system of national surveillance. "Newcomers were to register with a clerk of the district court, or with an authorized registrar of aliens, within forty-eight hours of their entry, and resident aliens were to report within six months after the bill became law." SMITH, FREEDOM'S FETTERS, *supra* note 31, at 34. These requirements provoked little outcry until their real significance became clear upon passage of two other laws in 1798. The 1798 Aliens Friends Act authorized the President, without a hearing, to order any alien whom he judges "dangerous to the peace and safety of the United States" to be forcibly deported and banished from the United States." Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 571 (1798) (expired June 25, 1800). Shortly thereafter the Alien Enemies Act further provided that, if there were a declared war between the United States and any foreign nation, "all natives, citizens, denizens, or subjects of the hostile nation . . . shall be liable to be apprehended, restrained, secured and removed, as alien enemies." Alien Enemies Act, ch. 66, § 1, 1 Stat. 577, 577 (1798) (permitting the President during war to apprehend, restrain, secure, and remove all enemy

therefore be refined further. Does one "cry wolf" in the United States by asserting that extreme governmental control of any person or discrete and insular class of persons, without the restraint of legitimate[35] law, is an experiment with—if not potentially a precursor to—tyranny?

Some aspects of the debates over the 1798 laws provide a useful backdrop for such questions, notwithstanding the many obvious historical differences. For instance, among the more powerful objections to these eighteenth century laws were the two related contentions that they violated basic principles of separation of powers, constituting "a refinement upon despotism,"[36] and that the arguments used by the Federalists to support the bills could equally support similar measures against citizens.[37] These arguments may respectively be termed *structural* and *prophylactic*.[38] That is, they are based upon an idealized conception of constitutional legal structures[39] and upon fear of excessive government power.[40] As such, they are

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aliens without a hearing) (current version at 50 U.S.C. §§ 21–23 (1999)). Registration, then as now, was the prerequisite to control. Jefferson and others saw such control as the leading edge of tyranny.

35. By "legitimate" I mean defensible on principled grounds generally recognized as valid, even if contestable. As discussed below, much of the current U.S. regime of immigration law does not meet even this minimal test.

36. Statement of Edward Livingston, *quoted in* SMITH, FREEDOM'S FETTERS, *supra* note 31, at 85 [internal citations omitted].

37. *See* SMITH, FREEDOM'S FETTERS, *supra* note 31, at 88.

38. At a deeper level, they are both actually prophylactic in that their normative force derives from a fear of further consequences. They can, however, be distinguished in that the first is more abstract while the second is more obviously predictive in the common "slippery slope" sense.

39. The particular concern has been with the discretionary power of the Executive Branch—a central feature of the 1996 laws. For a fuller treatment of the structural and legitimacy problems raised by the highly discretionary nature of much of U.S. immigration law, see generally Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

40. It is important to distinguish constitutional structural arguments from the related historical debate over the propriety and scope of judicial review. One surely can, as Thomas Jefferson did in the context of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), assert that there are constitutional limits to the legitimate exercise of executive discretionary, or even legislative law-making power without necessarily accepting the full judicial review implications of *Marbury*. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS 1–30 (1958) (asserting that there was "nothing in the United States Constitution that gave courts any authority to review the decisions of Congress"). As Jefferson himself put it in an 1804 letter to Abigail Adams,

> You seem to think it devolved on the judges to decide the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. . . . [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.

Letter to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, at 310 (Paul Leicester Ford ed. 1897). *See also* Letter to William C. Jarvis (Sept. 28, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, at 160 (Paul Leicester Ford ed. 1899) ("You seem [to] consider the judges as the ultimate arbiters of all constitutional questions; a very

as relevant today,[41] at least in theory, as they were two hundred years ago.[42]

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dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.").

41. The long history of law-based debate over immigration and noncitizens' rights in the United States—like the still famous quotes from George Washington about the new nation being an "asylum for mankind," or, conversely, from Benjamin Franklin about the ideal qualities of immigrants—reveals an American aspiration both to situate the debate historically and to derive some basic principles from which to develop constitutionally sound policy. *See* Benjamin Franklin, *Information to Those Who Would Remove to America, in* BENJAMIN FRANKLIN: WRITINGS 975 (J.A. Leo Lemay ed., 1987); BASELER, ASYLUM, *supra* note 29, at 195. However, amid the most recent flurry of books on the subject it is difficult to discern any agreement—methodological, stylistic or substantive—beyond the obvious facts that the subject is complex, highly charged, easily amenable to rhetorical excess, and historically, politically, and philosophically resonant. Consider some representative excerpts from the opening pages of a few recent books on the subject:

> Immigration is such an emotionally charged issue that it is difficult to tackle it publicly without subjecting oneself to speculation about motives. . . . [T]here are racists whose prime aim of restricting immigration is to keep out foreigners because they are not white, and there are racists who support high immigration because it provides them with a way to keep from having to hire native-born black Americans.

ROY HOWARD BECK, THE CASE AGAINST IMMIGRATION: THE MORAL ECONOMIC SOCIAL AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS 12 (1996); "The debate about immigration is important and interesting because it is first and foremost a debate about national identity. It is, as well, a debate among conflicting philosophical political visions. Lastly, it is a debate that challenges political stereotypes." NICHOLAS CAPALDI, IMMIGRATION: DEBATING THE ISSUES 9 (1997);

> As immigration has grown, opposition to it has grown as well. The country is flooded with proposals to reduce the flow of immigrants, to change the priority categories, to tighten controls at the border and to penalize immigrants, both legal and illegal. . . . Little about the debate is new; most of the arguments, both pro and con, have surfaced many times in the past . . . .

JOHN ISBISTER, THE IMMIGRATION DEBATE: REMAKING AMERICA 6 (1996);

> I am convinced that we must free ourselves of the emotional and severely limited ideological terms that so often attend any discussion of citizenship, immigration, or nationhood—unhelpful delineations . . . such as "liberal" or "conservative," "immigrant" or "alien," "patriot" or "nativist." We desperately need a new terminology to fit the mind-set that the times demand.

GEORGIE ANNE GEYER, AMERICANS NO MORE xiii (1996).

42. These arguments are meant as supplements to, and not as substitutes for, arguments based upon the basic human rights of the people who are subjected to these laws. This distinction, embodied in the debate over Proposition 187, has been well-described by Linda Bosniak: "In a hostile political climate, emphasizing the initiative's negative consequences for Americans' own self-interest is more effective and less risky than representing undocumented immigrants (who are, after all, the apparent source of the public's anxiety) as legitimate subjects of concern and interest." Linda S. Bosniak, *Opposing Proposition 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 558 (1996) [hereinafter Bosniak, *Opposing Proposition 187*]. Bosniak noted, however, that:

> for many progressives, including progressive scholars, who instinctively oppose Proposition 187, the matter of the measures' injustice in principle is far more troubling [because] most progressives tend to think about justice in distinctly national terms; they tend to collectively possess what I call a 'national political imagination,' one which regards the national community as the predominant community of normative concern and presumes the legitimacy, and perhaps the necessity, of maintaining boundaries around it.

Many aspects of the current immigration law regime are portrayed by Schuck (and others) as a moderate, practical, and pragmatic position. In some respects, this is undoubtedly a fair characterization. After all, this strategy allows for the continuation of much that is most important to our "nation of immigrants" myth.[43] It also has strong rule of law underpinnings that resonate powerfully.[44] This review shall argue, however, that, taken together, this has not been so moderate a strategy as it may appear. It has already caused immense suffering and hardship to thousands of noncitizens and their families.[45] More generally, though, if this pattern continues, the incremental erosion of fundamental legal protections and traditions as a trade for short-term and easily reversible entry decisions may well be a dangerous formula, even if we maintain high numbers of admissions. What is needed is a change of focus and a dramatic change of tone.

II.
THE ELUSIVE PRAGMATIC MIDDLE

A. Introduction

In the introduction to *Citizens, Strangers, and In-Betweens*, Schuck begins with an invocation of the law of unanticipated consequences. He suggests that it is striking that the four leading sources of immigrants to the United States today—Mexico, The Philippines, Vietnam, and The Dominican Republic—are countries that America once invaded and occupied.[46] He considers this fact to be part of "one of history's great and momentous ironies"[47] because people have moved in the opposite direction of that which America intended upon determining to be "an imperial nation."[48]

Although it may be unseemly to quibble about so general a point, this rather subjective approach to historical irony is not dissimilar to much that

Id. at 558–59. I am not convinced that progressives as a group are necessarily so limited, but it is surely more difficult to make the case for "criminal" or "illegal" aliens than it is to approach the subject as this review suggests.

43. I do not mean to imply anything pejorative by my use of the word "myth." As I have discussed at length elsewhere, every nation-state has a distinctive mythology that seeks to define its character. *See* Daniel Kanstroom, *Wer Sind Wir Wieder: Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 YALE J. INT'L L. 155 (1993); *see also* Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the "Euro-solution" to the German Immigration Dilemma*, 41 B.C. INT'L & COMP. L. REV. 201 (1993).

44. As Barbara Jordan once put it, "We are a nation of immigrants, dedicated to the rule of law" (quoted in the 1997 REPORT TO CONGRESS OF THE U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY [hereinafter 1997 COMMISSION REPORT]).

45. *See generally* Donald S. Kerwin, *How Our Immigration Laws Divide, Impoverish, and Undermine American Families*, 76 INTERPRETER RELEASES 31, 1213 (Aug. 16, 1999) [hereinafter Kerwin, *How Laws Divide*].

46. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at xi.

47. *Id.*

48. *Id.*

follows.[49] *Citizens, Strangers, and In-Betweens* offers, in general, a top-down view; a perspective that rather uncritically accepts certain power relationships as given, while essentially postulating their legitimacy. The voice is generally that of the government or, sometimes, the majority. The dominant concerns are those of order, control and efficiency.

Schuck's general goal, as he puts it, was to elucidate some of the "more complex, particular modes of reciprocal influence" of the approximately sixty-five million legal and—according to his figures—more than five million "illegal" immigrants who "have helped to shape American life and law—and *vice versa*."[50] To that end, this book consists of fourteen essays that were written between 1984 and 1997 and two chapters (5 and 10) published in this work for the first time.[51]

Part 1 of the book seeks to provide a context for what follows by recounting the history of the immigration control system of the United States and analyzing the role the courts have followed in checking that system.[52] Part 2 continues this method of analysis up to approximately 1990.[53] In Part 3, Schuck seeks to "broaden the focus well beyond the courts to encompass the more volatile political forces that drive and shape immigration law and policy."[54] It is in Part 4 that Schuck reprints some of what has been his most influential and controversial work: his writings on the "devaluation" and "reevaluation" of citizenship in the United States.[55] Finally in Part 5, Schuck enters a number of current policy debates including the relationship between immigration and civil rights, some more general aspects of immigration and refugee issues throughout the world, and the general nature of discourse over immigration policy.[56]

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49. The supposed irony of the fact that people from invaded countries have tended to migrate, if possible, to the territory of their invaders evaporates rather quickly if one considers, even superficially, some of the economic reasons why these countries were invaded in the first place. Is it really so "ironic" that people who are controlled and economically exploited from afar would migrate to improve their economic or political situation? It is only ironic from the hypothetical perspective of the United States "imperialists." The colonized and conquered would likely choose a much stronger concept than irony to describe the historical relationship between imperialism and migration. Indeed, when one considers the general relationship between imperialism and the quest for both markets and labor, the possibility of labor migration over time to the territory of the imperialist power seems, at least in hindsight, easily explicable if not predictable. France, for example, like all other European former colonial powers, finds itself grappling with the demographic consequences of its colonial history in Africa. *See, e.g.*, GERARD NOIRIEL, THE FRENCH MELTING POT (1996). I do not, of course, mean to brand Peter Schuck an imperialist. But this top-down tendency is noteworthy nevertheless.

50. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at xi.

51. *See id.* at xii.

52. *See id.* at xii, 1–16.

53. *See id.* at xii, 17–88.

54. *Id.* at xiii.

55. *See id.* at xiii, 160–248.

56. *See id.* at xii–xiii.

B. *The Transformation Revisited*

The book is dominated to a large degree by the framework of Chapter 2, Schuck's 1984 article, *The Transformation of Immigration Law*. There Schuck wrote what to my mind was one of the most important sentences in the literature of U.S. immigration law. I have quoted it often: "Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of Constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[57]

As befits an article in the "transformation" genre, the story told in Chapter 2 seeks to describe a profound change in deep cultural values as reflected in legal structures. Schuck begins with the uncontroversial idea that immigration law is "epiphenomenal"; he links its history to the development of American liberalism, which he defines as embodying a vision of the good society—one in which "each individual enjoyed maximum liberty to pursue his or her own conception of the good by deciding whether and on what terms to enter into contractual relationships with other equally free individuals."[58] By the 1880s, according to Schuck, the social milieu in which liberalism had flourished receded to be replaced by "a set of new conditions and attitudes far less congenial to it."[59] He suggests that liberal values were challenged by other impulses, some of which were racist and class-based, some xenophobic and bigoted. In Schuck's view these changes created a different ideology, which he terms "restrictive nationalism," and a legal order to justify it, which he calls "classical immigration law."[60]

Let us consider a very basic concern about this view of history at the outset. One could describe the pre-1880s period quite differently, by highlighting both the centrality and the persistence of deeply illiberal principles such as slavery, the exclusion of women from the right to vote, the treatment of indigenous people, etc. This focus calls into question many of the ostensibly halcyon aspects of the early liberal period. Such an approach diminishes the significance of the transformation of the late 1880s and views U.S. immigration history more continuously. By doing so, it may more accurately capture the relationship between, on the one hand, race and majoritarian power, and, on the other, immigration and deportation laws. Such concerns are far from irrelevant to early U.S. immigration history. Indeed, even the famous desires of many of the colonists for open immigration clearly often had a racial subtext and a strongly instrumentalist cast when seen in light of concerns over slave revolts and the often violent confrontations with indigenous peoples.[61] Schuck, to be sure, is aware

57. *Id.* at 19.
58. *Id.* at 20.
59. *Id.*
60. *Id.*
61. *See, e.g.*, LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE 7–34 (1990) (chronicling the various attitudes of colonists

of this problem with taking too benign an overview of early American liberal theory, but he relegates his concern to a breezy footnote in which he concedes that "In practice, of course, a considerable portion even of American society—most notably slaves and, to some degree, females—were denied this liberty."[62] This issue barely interrupts the flow of his narrative, however, as the most important point of this chapter is Schuck's view of "classical immigration law." And, indeed, it was in the post-1880s period that the most obviously illiberal aspects of U.S. immigration law became dominant.

"Classical immigration law" was the legal order of what Schuck aptly termed "restrictive nationalism."[63] Its practices were "decidedly, sometimes, grotesquely illiberal"[64] and included a denigration of such ideals as natural rights and consent, while elevating the concepts of sovereignty, national interest, and extensive, often arbitrary government power.[65]

Schuck disaggregates and effectively describes the elements of classical immigration law, though he rarely critiques them fully.[66] The thrust of Chapter 2, however, limns the decline of this *ancien regime* and seeks to characterize its emerging successor.

Schuck wrote in 1984 that the "chorus of criticism" of classical immigration law was beginning to find expression in the discourse and doctrines of immigration law.[67] This can best be called anachronistic and at worst must seem painfully ironic to many who now read it now. He suggested that new principles based upon "fundamentally different values are beginning to undermine the classical regime."[68] He called these principles "communitarian" (as did many others) for their suggestion that the government owes legal duties to all individuals who come to this country, "even to strangers whom it has never undertaken and has no wish to protect."[69] It is not at all clear from this work whether Schuck actually endorsed any of

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toward immigration and assimilation); SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, STAFF REPORT 161–66 (1981) (asserting that the need for labor and for assistance in defending against American Indians prompted many early settlers to welcome newcomers, but that there was still an uneasiness about foreigners) [hereinafter SELECT COMM'N, STAFF REPORT]. *See also* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1–58 (1980).

62. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 20 n.7.

63. *Id.* at 20.

64. *Id.*

65. *See id.* at 20–21, 22–39.

66. One exception is his discussion of the case the mid-twentieth century case of *Marcello v. Bonds,* 349 U.S. 302 (1955), in which the Supreme Court declined to hold that the Constitution required an impartial tribunal to adjudicate deportation cases. Schuck pointedly notes that the Court's reasoning "defies comprehension even today." SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 38 n.185.

67. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 21.

68. *Id.*

69. *Id.*

these "communitarian" ideas. Indeed, Schuck's commendation of the consent principle later in the book indicates his profound misgivings over some fundamental communitarian principles.[70] But let us move forward in time, as Schuck does, to see how his evolutionary approach fared.

Schuck clearly recognizes that the harsh 1996 amendments to U.S. immigration law seriously call into question his predictive hypothesis. However, in a new brief introduction to Chapter 2, he predicts that the courts will strain to interpret the new law in ways that "will preserve many of the procedural protections, especially judicial review, that they fashioned to assimilate strangers and in-betweens to a legal order developed largely for citizens."[71] It should be obvious that I hope he is correct but the evidence to date is quite mixed. Indeed, the recent decision of the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* seems very much to the contrary.[72] There has certainly been some recognition by district and circuit courts of the potentially serious constitutional problems raised by a regime that seeks to insulate administrative decisions from any meaningful judicial review.[73] Similarly, some courts have expressed concern and even outrage over the retroactivity of certain parts of the 1996 laws.[74] But the history of immigration litigation is replete with similar episodic judicial attempts at holding the line, of preserving some vestige of judicial control in the face of broad pronouncements by the Supreme Court to the contrary. If there has been any sort of communitarian transformation of immigration law since 1984, then it seems to have been more backward than forward. But why?

C. *Legitimacy and Moral Force*

Schuck's analysis of the problem of legitimacy in 1984 was both prescient and, I believe, influential to some degree on legal events that have transpired since. He suggested in 1984 that "the incentive structure of immigration law" had shifted to the marked advantage of undocumented or

70. *See id.* at 168–71.

71. *Id.* at 17.

72. 525 U.S. 471 (1999). As a general matter, an alien unlawfully in the United States has no right under the federal Constitution to assert selective enforcement of federal immigration laws as a defense against deportation. *Id.* at 488. Additionally, aliens who are alleged by the federal government to be members of an organization that supports terrorist activity—and who claim to have been targeted for deportation by federal officials in alleged violation of the aliens' rights under the federal Constitution's First and Fifth Amendments—have no right under the Constitution to assert selective enforcement as a defense against deportation. *Id.* at 491–92.

73. *See, e.g.,* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) (holding that aliens convicted of certain offenses and who are precluded by AEDPA and IIRIRA from seeking direct review of their deportation orders in appellate court may file habeas petitions in district court), *cert. denied sub nom.*, Navas v. Reno, 526 U.S. 1104 (1999).

74. *See, e.g.*, Henderson, 157 F.3d at 128–30; Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd sub nom.*, Henderson v. Reno, 157 F.3d 106 (2d Cir. 1998).

out-of-status noncitizens who wished to remain in the United States.[75] He noted that evasion, delay, surreptitious re-entry, and administrative overload in the immigration system were precious resources for such people and that a more communitarian legal environment was making such resources abundantly available to them.[76] He also noted that noncitizens could utilize numerous avenues of discretionary administrative relief that existed at that time and invoke administrative and judicial review mechanisms to stay and to reopen proceedings, all while steadily accumulating new relationships and equities that enabled them to delay deportation, obtain work authorization, and perhaps ultimately achieve legal permanent resident status or citizenship.[77] He therefore felt, as noted above, that "beating the system" had become a game that "almost any resourceful alien equipped with easily obtained fraudulent documents or a competent lawyer could successfully play."[78]

As one who perhaps flatters himself as a competent lawyer, I must admit to a visceral objection to Schuck's facile comparison of the effectiveness of an attorney to that of fraudulent documents. To say the least, I think he vastly undervalues the seriousness with which competent immigration attorneys grapple with moral and ethical obligations as they struggle with what are not infrequently life and death issues for clients. Moreover, such comparisons have an implicit quality of pandering to radical anti-lawyer sentiments. While Schuck, a law professor, probably did not intend to evoke general lawyer-bashing, his language is troubling nevertheless. In effect, his concern about "beating the system" denigrates the legitimate efforts of attorneys to achieve just results through determined and skillful use of flexibility within the legal system.[79] Even more importantly, it almost entirely overlooks the poignancy of many individuals' and families' struggles to build and maintain a normal life in the face of devastating economic and political hardships.

His main focus, however, was elsewhere. Schuck eloquently noted and was deeply concerned about the loss of credibility and deterrence suffered by a legal system that cannot effectively execute its own rules and intentions, and the impotence of which was, according to him, widespread and apparent. Similarly, Schuck noted the ineffectiveness of the Border Patrol at that time and the very low proportion of persons (fewer than two percent) deported after having been ordered by the INS to leave the country in 1982.[80]

These points became increasingly important throughout the late 1980s and ultimately were major factors in the 1996 changes enacted by Congress.

75. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 69.
76. *See id.*
77. *See id.* at 69–70.
78. *Id.*
79. *See id.* at 70.
80. *See id.*

Schuck specifically noted that the collapse of what he termed a "credible enforcement posture"[81] could result from legal developments that enhanced the strategic position of undocumented aliens—for example, the application of the exclusionary rule,[82] and what he perceived as the right "in effect to have free appointed counsel."[83] Schuck cited an article written by then-Professor David Martin (later to become INS General Counsel) which suggested that lower courts had in effect, if not in law, created a right to free appointed counsel by requiring expeditious hearings while also enjoining deportation hearings in which the alien lacks counsel.[84] This, to paraphrase Yul Brynner, is (and was) a puzzlement. If it was ever true on a wide scale, I am unaware of it. I do not think it was true in the 1970s or 1980s. It is certainly not true today. As early as 1981 the Select Commission on Immigration and Refugee Policy (SCIRP) had actually recommended that Congress provide counsel at government expense to lawful permanent residents in deportation or exclusion procedures who could not otherwise obtain representation.[85] To this day, the problem of lack of counsel is one of the most pressing issues faced by indigent noncitizens facing increasingly harsh, intransigent, complex, and unforgiving legal proceedings. In New England, for example, where the Boston College Immigration and Asylum Project operates, we routinely encounter hundreds of noncitizens in INS detention facilities. Although we have not compiled specific statistical data, I can confidently report that many of these people appear in immigration proceedings *pro se* and that competent, energetic counsel can completely change the outcome of many cases. Indeed, the vignette with which this review began had a happy ending only because of the extraordinary efforts of three attorneys and two law students who put in dozens of hours of complex and difficult work in a very short time frame.

But Schuck's arguments have clearly carried the day. And, although it surely overstates his influence and ignores the subtlety of his thought to place responsibility for the 1996 debacle on his shoulders, one sometimes feels impelled to ask of him the Dr. Frankenstein question: Granted, you didn't intend the monster; but what did you actually think you were going to create with this method?

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81. *See id.* at 71.

82. *But see* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (eliminating the exclusionary rule for deportation cases unless a widespread or egregious violation is proven).

83. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 71 n.434.

84. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173–80 (1983).

85. *See* SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT AND RECOMMENDATIONS 274–75 (1981); *see also* Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1574 (1986). *See generally* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation on Administrative Reform*, 29 CONN. L. REV. 1647 (1987).

The essence of Schuck's general approach to immigration law is revealed by his eloquent concern about its alleged loss of "moral force."[86] He obliquely quotes Mao for the proposition that law without legitimacy "is little more than naked force, the power, as it has been said, that comes out of the barrel of a gun."[87] What is intriguing about this comment, though, is that Schuck seemed to presume in 1984 that immigration law *had* "moral force" prior to the alleged decline in effective policing action by the INS.[88] But was this ever really true? Was it true in the era of *Chae Chan Ping v. United States*[89] and *Fong Yue Ting v. United States*[90] which upheld the racist Chinese Exclusion Acts and applied them internally to deport Chinese immigrants? During the "classical period," with its racist quotas,[91] ideological deportations,[92] and wide-ranging exclusion policies?[93] When the post-war Supreme Court affirmed the use of secret evidence and held that whatever process given to an alien denied entry is due process?[94] If not during those periods, then when? Perhaps it is the post-Quota Laws period from 1965 to 1984 to which Schuck refers. But this interpretation is also complicated by the fact that the transformation he describes had nothing to do with reversing the most important "moral" aspect of that period—the elimination of the Quota Laws. In general, Schuck seems to equate moral force with efficiency and control, even at the occasional expense of individual rights. This is, to say the least, a rather parsimonious view of moral force in the law.[95]

The nostalgic invocation of a past moral force in immigration law thus remains oblique for this reader, though the principle of legitimacy is rightly seen as central. I would suggest that law derives its true moral force from the quality of justice it dispenses; from its humanity, not from its efficiency. Efficiency is a contingent value; it possesses no inherently just attribute. And yet much of the current rhetoric over immigration law seems to equate efficiency with credibility and both with justice. This is a dangerous inversion.

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86. *See* SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 72.

87. *Id.* I have been unable to retrieve the exact source from which this reference is drawn, but my recollection is that Mao was concerned with political, not legal power and was himself echoing Von Klausewitz to the effect that war is the continuation of politics by other means.

88. *Id.*

89. 130 U.S. 581 (1889).

90. 149 U.S. 698 (1893).

91. *See generally* SELECT COMM'N, STAFF REPORT, *supra* note 61, at 193–97.

92. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding deportation of former members of Communist Party).

93. SELECT COMM'N, STAFF REPORT, *supra* note 61.

94. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

95. For a classic statement to the contrary, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

Schuck, however, is undoubtedly right when he summarizes this section by noting that "communitarian values are themselves antithetical to vigorous immigration enforcement, especially when reinforced by traditional liberalism's human rights dimension, which Americans continue to cherish."[96] But the conclusions he drew from this premise are remarkable: "[C]ommunitarian values deprive administrative deportation efforts of the moral legitimacy that the classical order managed to sustain for so long."[97] It thus appears that Schuck's argument may itself be a sort of *prophylactic* one: "[T]he collapse of immigration enforcement may actually generate a profound public reaction against aliens and the communitarian values that increasingly protect them, reviving the nativist impulses that have always been an important, albeit often deplorable, element of our national character."[98]

The implicit theory seems to be that it is legitimate to crack-down on immigrants severely in order to avoid a nativist backlash. The hard question that must be put to all such theories, however, is how to determine when those aspects of vigorous enforcement that cause great hardship and trample on some of our most fundamental and best values are not a solution but a deeply worrisome problem. The approach favored by Schuck is not well designed to answer this question because of another latent tendency that is well exhibited in *Citizens, Strangers, and In-Betweens*—the desire to steer a middle course between a relatively open admissions policy and noncitizens' rights.

D. The Problem of Seeking the "Pragmatic" Middle

Citizens, Strangers, and In-Betweens is an impressive, wide-ranging undertaking written by a careful scholar whose work has structured much of the discourse in the field for more than a decade. It is virtually impossible to evaluate such a work fairly in a review that is by necessity only a fraction of its length. One searches for a unifying idea, a theme, the proverbial "red thread." Aspects of such unity may be discerned, but not easily. The elegance of Schuck's prose, the breadth of the subject matter,[99] the impressive thoroughness with which he attacks his subjects, and the expanse of time covered render this work difficult to digest or summarize.

One key theme, however, emerges very early in the book. Schuck notes in the preface that in 1996 Congress "acted abruptly but decisively to abort and reverse major elements of this communitarian order."[100] He views the 1996 law (although with qualifications) as "a repudiation of the emergent communitarian order" that he thought he had discerned in

96. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 73.
97. *Id.*
98. *Id.*
99. Schuck examines not only immigration, but also race relations and affirmative action, while making a welter of general observations on the state of American society.
100. *Id.* at xiv.

1984.[101] Rather than simply opposing that trend (and despite his recognition that certain aspects of it may be held unconstitutional by federal courts), however, Schuck suggests that the changes brought about by Congress in 1996 "bespeak a political impulse that immigration advocates [of which Schuck considers himself to be one] ignore at their peril."[102] Here, perhaps, is a key to understanding much of what follows in the book.

The theoretical essence of this work, taken as a whole, seems to consist of two parts: first, a search for a pragmatic, moderate, and philosophically consistent position; and second, as Schuck puts it in Chapter 4, a tendency, surely appropriate if not inevitable in a legal scholar, to focus on the way in which "[i]deas can precede interests as well as advance them . . . [and can] affect how [political] actors construct their agendas in the first place."[103]

As to the quest for the middle ground, this book has a lot of company. Schuck, like so many others from Aristotle through Bill Clinton, is on a rhetorical pursuit of the middle, the modern golden mean. Even his title reflects this, as it is based on a continuum view of the citizenship question—with his unnamed "in-betweens" occupying the position between the two extremes: citizens and strangers. This is such an intuitively reasonable position that one has to work to remember that it is not the only, or even necessarily the correct one.

A moderate solution is not appropriate for every situation, even in theory. It is not, for example, satisfactory to split the difference between the freezing and boiling point of water when seeking to brew tea. Nor, for that matter, would this be an effective method of either preservation or disinfection. Given the shrillness of so much immigration debate, however, a search for middle ground certainly seems appropriate, for the general reason that democratic legitimacy favors compromise and for the prophylactic reason that sometimes the best way to avoid majoritarian tyranny or

101. *Id.*

102. *Id.*

103. *Id.* at 95. Schuck's particular candidates for the important ideas that motivated the immigration politics of the 1980s are: a desire to foster linkage between global competition strategy and immigration policy; a confirmation and expansion of ethnic diversity; and continuation of family unification as a paramount value. Human rights should constitute a major, permanent component of United States immigration policy, and immigration policy should cure the mismatch between job skills needed by the economy and those supplied by domestic workers. On the other side, illegal migration "poses a serious threat to social stability and equity. This threat must be reduced before legal immigration is expanded." But "[c]ivil liberties, civil rights and due process norms should govern the law's treatment of aliens even illegal ones." *Id.* at 95–96. Schuck, of course, is aware of the much-discussed dangers of overemphasizing ideas' "causal role in politics." First is the danger of reductionism. Second is the problem that "ideas are elusive and their effects on outcomes are harder to gauge" than more measurable phenomena like votes, institutions, interests, events, etc. *Id.* at 96.

widespread violations of individual rights in the aftermath of chaotic periods may be tactical, presumably temporary, capitulation to legitimate concerns about efficiency and control, even if the mechanics deployed are excessive.

The hard question is how to decide when the values one is being asked to sacrifice are too fundamental. This, in brief, is the basic question raised for me by *Citizens, Strangers, and In-Betweens.* Schuck has determined that immigrants' rights advocates ignore or struggle against certain concepts, "at their peril."[104] This may of course be correct. But there are perils on both sides that need to be confronted directly. One cannot define the middle without first defining the outer boundaries of a position. This means, first, that one must define carefully the particular Scylla and Chyribdis between which one intends to steer. Do we face, for example, a choice between the dangers of racist nationalism on the one hand and Balkanized anarchy on the other? Or is the problem more bounded in this historical era, compelling us merely to choose between economically efficient admission policies and those which foster humanitarian, culturally pluralistic, or constitutionally embedded values? Perhaps there is a basic problem, as Schuck seems to suggest, between government control and law-breaking chaos. Or is it a more idealistic problem of liberalism vs. communitarianism, as Schuck also argues?[105]

I believe that it is all of the above and more. And the implication of this is that a search for a workable middle is fundamentally hindered by the fact that the problem we confront is not binary. Its multivalence and complexity renders the very idea of a middle path problematic. The middle is contingent, not fixed; it is a point of contention, not one of repose. It is, in sum, an ambiguous metaphor at best and misleading at worst.

Viewed in this way, we can perhaps analyze Schuck's middle more acutely by considering those points on which he focuses his sharpest critique. In general, they seem to be, on the one hand, xenophobic, nativist restrictionists, and, on the other, immigrants' rights advocates who do not respect the importance of border control and the legitimacy of deporting "illegal" aliens. Thus, in his introduction to Part I, entitled "Contexts," he states his antipathy for what he perceives to be the simplistic and polarized approaches of the American left and right, noting that since 1986, "public feelings about immigration run strong and politicians run scared."[106]

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104. *Id.* at xiv.

105. *See id.* at 54–81.

106. He further recognizes, however, that the 1996 immigration and welfare reform laws are the most far-reaching changes in immigration law to date and that "it is difficult to exaggerate how radical these reforms are compared to prior law." *Id.* at 1. Schuck is nevertheless unwilling—even tactically or provisionally, I assume—to simply view immigrants as "a discrete and insular minority" under which they would enjoy heightened constitutional protection. *Id.*

A disinclination to adopt a simple polarized position is perhaps the most important attribute of a scholar. But in legal scholarship in general, and scholarship in highly controversial, politically active arenas in particular, this ostensibly cautious approach contains a hidden risk beyond the theoretical difficulty of defining the middle discussed above. It may facilitate the misunderstanding of complex ideas and may allow one's positions to be cited favorably and even used by those with whom one may have little in common. The clamor for the middle in the immigration debate seems now to include a wide array of very different ideas. Georgie Geyer, for example, in her much less cautious work, *Americans No More*,[107] purports to offer "the voice of the rational, compassionate, tough-minded middle."[108] Then, using very brief excerpts from his work, she lists Schuck as a supporter of a very generalized, conservative proposition with which I am not at all sure Schuck would completely agree—that the "norm" for American society has moved from the autonomous, self-determining citizen to the state-encouraged dependent.[109]

Of course, it would be unfair and wrong to blame a writer for the occasional misunderstanding of his thought by others. And yet, since Schuck appreciates irony and the law of unintended consequences, it does seem fair to query whether such misunderstanding is simply ironic or whether there is something in the way he approaches the subject that contributes to it.

Here is a more specifically relevant example. Schuck, like others including myself,[110] seeks to develop a more nuanced understanding of those who favor restrictions on immigration,[111] suggesting that, although such people are commonly seen as monolithic in their views, they are actually a diverse group motivated by different emotions, principles, and interests, "some of which are misrepresented in public debate."[112] He seeks to distinguish four positions which he terms "ideological"[113]: xenophobia, nativism, principled restrictionism, and pragmatic restrictionism.[114] Schuck

107. GEYER, *supra* note 41.

108. *Id.* at 318.

109. *Id.* at 127.

110. *See, e.g.*, Daniel Kanstroom, *Dark Undertones of the New Nativism: Peter Brimelow and the Decline of the West*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 300–17 (Juan F. Perea ed., 1997) [hereinafter Kanstroom, *Dark Undertones*]; Schuck, CITIZENS, STRANGERS, *supra* note 1, at 57.

111. *See* SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 4.

112. *Id.*

113. Based upon my understanding of the modern etymology of the term "ideology," I am not convinced that xenophobia fits within the category. This is a quibble, however, that is probably not worth much ink.

114. *See* SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 4–9. It should be noted that Schuck is not entirely clear at this point whether these positions apply only to the question of immigrant admissions, or to the question of alien's rights as well, since he characterizes his own position as favoring "moderate increases in legal immigration but tighter controls on illegal aliens." *Id.* at 4. One tends to think that his focus is the former. His analysis of the four positions tends to confirm this hypothesis, although, as he of course knows and

defines xenophobia in a very general way: "an undifferentiated fear of foreigners or strangers as such."[115] Schuck's definition of nativism is more focused—a philosophy that idealizes and supports the moral or racial superiority of the "indigenous stock" (in this case, of course, not Native Americans but Anglo-Saxon Protestants) who came to dominate this country. Schuck views nativism as a species of racism in that it maintains that cultural values "inhere in particular racial, ethnic or national groups and cannot be learned."[116] Although Schuck recognizes that this question is more contested than his view of xenophobia, he believes that nativism, as distinguished from his other categories of restrictionist thought, is "probably not a significant force [in U.S. politics] today."[117] He believes that support for Proposition 187 in California in 1994, for example, is best understood as "an expression of widespread public frustrations with the failures of federal immigration enforcement and the perceived erosion of U.S. sovereignty and control over its borders and demographic destiny, not as a spasm of nativist hatred."[118] He cites the openly nativist failed candidacy of Patrick Buchanan as supporting this assessment.[119] The answer for Schuck lies in so-called "principled restrictionism," the position that he asserts is most commonly held in the United States today.[120] This is a view that is ostensibly driven neither by xenophobic fear nor by racist or culturally chauvinistic views that only certain types of people are capable of civic virtue.[121] He suggests that the leading principled restrictionists in the United States include environmental advocates, demographic control advocates, and others who "in other areas subscribe to liberal public policy positions."[122]

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even discusses later in the book, control of illegal immigration is not nor can it be solely a border question.

115. *Id.* at 5. This is of course psychologically correct but the effect of such a general definition is that it virtually compels the conclusion that Schuck draws: that "the level of xenophobia in the United States has steadily declined and is probably not a significant force today." *Id.* Put at such a level of generality, this conclusion is impossible to evaluate. One would have to undertake broad-based psychological studies of the population to determine both what people's positions are on immigration and what the motivations for those positions are, which, if motivated by xenophobia, by definition would be deeply personal and quite complex. I am not convinced that xenophobia of this type has ever been a major factor in anti-immigrant sentiment or policy in this country. Rather, history seems to demonstrate, as does the recent experience with Proposition 187 in California, that anti-immigrant movements tend to be local and highly contextual responses to specific problems, such as crowded schools, high taxes, crime, etc.

116. *Id.* at 5. The precise relationship between biological, racist nativism, and cultural nativism in United States history is extraordinarily complex, as John Higham has noted in his classic work on the subject, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (1955). *See also* Kanstroom, *Dark Undertones*, *supra* note 110.

117. *See* SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 5.

118. *Id.* at 6.

119. *See id.*

120. *See id.* at 6–7.

121. *Id.*

122. *Id.* at 7.

Schuck's leading example of this cohort gives pause, however. He cites the Federation for American Immigration Reform (FAIR).[123] FAIR, to be sure, is a large organization and I am confident that many of its board members differ on many details. However, since so much of the immigration debate involves coded discourse and concerns about implicit racist underpinnings it seems reasonable to analyze the discourse of this so-called principled restrictionist organization for clues to motivations that may not be so thoroughly or justifiably principled.

As I began writing this review, I sought to investigate this question by logging on to the FAIR website.[124] The very first thing I encountered as an index entry in the December/January newsletter was the following title: *INS Greases Foreign Labor Pipeline for Meat Packer/What Can You Do?*[125] Perhaps I am over-reading this, but the word and metaphor choice in this headline struck me as having a racist edge. Similar scanning of earlier indexed entries uncovered articles with the following titles: *Clouds on the Horizon; The Northern Border: Backdoor for Terrorists; The Southern Border: A Surge in Violence; A Surge in Violence; Students of Terror; Terrorists Welcomed to U.S. as Foreign Students;* and *Women Stabbed by Would Be Citizen.*[126] Such articles may of course be merely the sensationalist excesses of various staffers but consider this 1998 year-end statement from Dan Stein, the head of FAIR:

> But make no mistake. The forces of immigration anarchy are gaining strength. The corrupt Mexican Government and its drug cartel allies now actively interfere with U.S. border operation; they seek to influence U.S. Domestic Affairs and U.S. Elections. Immigration lawyers are multiplying faster than the numbers of illegal aliens in federal prisons. Huge industries are recruiting foreign and illegal workers in greater numbers than ever. And big corporations that use illegal and foreign labor are making lavish political contributions and hiring influential Washington lobbyists.
>
> . . . .
>
> . . . [W]e need to realize how serious our situation is. The ethnic lobbies, foreign governments, cheap labor industries and misguided fat cat foundations and philanthropists won't go away, in fact they're getting stronger.[127]

123. *See id.* at 7.

124. *See* FAIR (visited March 26, 1999) <http://www.fairus.org>.

125. FAIR, *INS Greases Foreign Labor Pipeline for Meat Packer/What Can You Do?*, (last modified Dec. 1998) <http://www.fairus.org/html/12-1.htm>.

126. *Id.*

127. Dan Stein, *Clouds on the Horizon* (last modified Dec. 1998) <http://www.fairus.org/html/12-2.htm>.

I would hope that Schuck would definitively distance himself from such inflammatory rhetoric. However, one also finds on the FAIR website the following quotation:

> The present guarantee under American law of automatic birthright citizenship to the children of illegal aliens can operate . . . as one more incentive to illegal migration and violation by non-immigrant aliens already here. When this attraction is combined with the powerful lure of the expanded entitlements conferred upon citizen children and their families by the modern welfare state, the total incentive effect of birth right citizenship may well become significant.
>
> Professors Peter Schuck and Rogers Smith, "Consensual Citizenship," *Chronicles*, July, 1992.[128]

FAIR then deduces that congressional action is warranted because the Fourteenth Amendment stipulates that Congress has the power to enforce its provisions by enactment of legislation, and the power to enforce a law is necessarily accompanied by the authority to interpret that law. Therefore, an act of Congress stating its interpretation of the Fourteenth Amendment as not to include the offspring of illegal aliens would fall within Congress's prerogative in FAIR's view.[129] Interestingly, Peter Schuck and Rogers Smith opposed this viewpoint in a 1996 letter to the *New York Times*.[130] But their earlier work seems to have had much greater staying power in certain circles than their recent attempts to back away from their prior positions.

Leaving aside the substantial reservations that I and others have about the correctness of this position on birthright citizenship,[131] should we not consider what its advocacy has meant in the current climate? Schuck notes that although principled restrictionism is in his view often motivated by values such as "national solidarity, linguistic unity, religious tolerance, or cultural coherence," many nativists are forced underground because the "etiquette of acceptable public discourse" forces them there.[132] "Such persons may seek political legitimacy and influence by publicly couching their racist views in the less objectionable rhetoric of principled restrictionism."[133] True enough, but some positions are clearly more amenable to

128. FAIR, *Anchor Babies: Is Citizenship an Entitled Birth Right* (last modified Aug. 1997) <http://www.fairus.org/html/04139708.htm>.

129. *Id.*

130. "In fact our book does not justify the proposal. We strongly disagree with it." Peter Schuck & Rogers Smith, Editorial, *G.O.P. Plank Errs on Immigrant Citizenship*, N.Y. TIMES, Aug. 12, 1996, at A14.

131. *See, e.g.*, David Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987).

132. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 7.

133. *Id.*

such couching than others. Perhaps a burden of prudence and clarification arises in proportion to that possibility?

Schuck argues that in an ideal world only the merits of a speaker's position would be relevant, not the speaker's motives. I am not so certain, however, that merits can ever be completely disaggregated from motives, even in idealized theory. If I give a compliment to a friend, for example, surely it matters why I have done so. Similarly, if I assert that it is time that "we" take back control of the country from "illegal aliens," my motives are hardly irrelevant. It is clear in any event that in the recent immigration debate motives often matter a great deal. Schuck is concerned that many "immigration advocates" (an undefined term) seek to stigmatize their restrictionist opponents by "tarring them with the nativist brush."[134] He offers no cites for this proposition so it is difficult to know of whom he is thinking. He does note in passing that the reverse is also true, although here the epithets used against those "favoring more liberal immigration policies" are that they are "unpatriotic 'one-worlders' and 'open borders' advocates"—arguably much less odious charges.[135] Schuck, in any case, seems mostly concerned with the "principled restrictionists" who are "especially vulnerable to this [false labeling] tactic."[136] According to Schuck "they cannot easily refute such charges even when they are false."

It is undoubtedly true that little in life is more disturbing than being falsely labeled. The more interesting question that occurs to me, however, is not whether it is in fact difficult for "principled restrictionists" to refute such charges, but whether the *position itself* is fairly analyzed from the perspective of race and the historical perspective of racism. Put another way, surely one may fairly argue that a position has racist implications even if its proponent is not necessarily consciously so.

Interestingly, Schuck's former co-author, Rogers Smith, in a recent book entitled *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*,[137] tends towards this view. Smith suggests that immigration policies and indeed every major public policy should be evaluated in light of the answer it provides to a single question: "If adopted, is it likely to perpetuate or even exacerbate America's traditional, politically crafted racial inequalities and hierarchies, or is it likely to reduce them?"[138] If we take this or an analogous antinativist approach to principled restrictionism, perhaps it would provide some insight both into why principled restrictionists are especially vulnerable to the charge of implicit or perhaps hidden racism or

134. *Id.* at 8.

135. *See id.*

136. *See id.*

137. ROGERS SMITH, CIVIL IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

138. *See* Rogers Smith, *The Policy Challenges of American Illiberalism*, *in* INTERNATIONAL MIGRATION POLICY PROGRAM, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, OCCASIONAL PAPER NO. 2, at 3 (1998).

nativism and also why such charges are difficult to refute. The important question is whether the *policies* advocated by principled restrictionists perpetuate or work to eradicate racism in America. This leads us into a much more difficult arena of politico-legal analysis: the search for an elusive tipping point at which policies that encourage cultural pluralism may become untenable because they incite forces of racist reaction. Conversely, we must question whether ostensibly neutral "control" strategies are in the real world often so imbued with racial content that they are fairly criticized on that ground. Thus, one's support for an increased police presence on the New Jersey Turnpike should, I think, wane as one realizes the extent of the racial profiling that has taken place there over the years. Unfortunately, though, Schuck never grapples with this problem in this way.[139]

It is in the book's last essay, *Alien Rumination*, a review of Peter Brimelow's atrocious 1995 book *Alien Nation*,[140] that Schuck, ironically perhaps, presents his affirmative views in what he terms a "quite negative" book review.[141] Schuck artfully and thoroughly deconstructs this work, which he charitably refers to as "uncharming."[142] He identifies five distinct but related empirical claims that make up Brimelow's argument, and he analyzes and effectively critiques them all. Particularly useful is his brief but efficient analysis of Brimelow's misleading use of demographic and economic statistics and his reading of the delicious irony that the 1965 Amendments which form the basis for Brimelow's argument actually contained the first sustained restriction on Mexican immigration which today forms by far the largest component of the non-European immigrant flow that Brimelow so strongly deplores.[143]

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139. Schuck's category of "pragmatic" restrictionism purports to address this problem to a degree, however, and has an immediate appeal. He says that this position resembles principled restrictionism in policy positions but differs in that pragmatic restrictionists view the conflict between immigration and certain other preferred goals or values as contingent, not inevitable. For example, Schuck suggests that "pragmatists believe that immigration's effects on population, the environment, national unity, cultural consensus, and so forth are essentially empirical questions." SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 8. As these effects may be assessed through empirical research, "the pragmatic restrictionist remains open to persuasion by contrary evidence." *Id.* Schuck suspects that most Americans are pragmatic restrictionists although he knows that one cannot be certain. But I would suggest this lack of certainty is due to both the vagueness with which the category is defined and the lack of empirical research on the question itself. The difficulty, it seems to me, is that it is hard to understand on what the pragmatism of a "pragmatic restrictionist" is based if not some sort of philosophical, political, legal, economic or social principle. Again, how exactly does one decide how much immigration is "enough" or what sorts of deportation measures are fair and sufficient? Absent much more elaboration, the category of "pragmatic" restrictionism seems to be more a rhetorical device than a category meaningfully different from that of "principled" restrictionism.

140. PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995). Others have also critiqued Brimelow's book. *See generally* Kanstroom, *Dark Undertones*, *supra* note 110.

141. *See* SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 326–58.

142. *Id.* at 326.

143. *See id.* at 336–41.

In the area of criminal aliens and more particularly deportation, however, Schuck seems much more willing to adopt, without questioning, certain of Brimelow's most controversial assumptions. To be sure, he questions some of the book's statistics but notes without critique that "media reports about criminal activity by Asian street gangs, Latin American drug lords, Islamic terrorists and Russian Mafiosi are profoundly disturbing to the American public and surely fuel restrictionist sentiment."[144] However, the most salient point he can make about this trend is that, in its concern about immigrant crime, "the public often fails to differentiate between legal and illegal aliens."[145] Schuck's main concern is with the "abysmal policy lapses of the federal government" that he argues have aggravated this political response.[146] But this argument is puzzling in light of his recognition that similar claims of the past—as reflected in the report of the Dillingham Commission that immigrants of that time were "congenitally vicious and unusually crime prone"—have now been demonstrated to have been false in many respects and that "similar claims appear to be false now."[147] Nevertheless, his solution to this problem lies in increased deportation and detention efficiency and more expeditious removal of criminal aliens.[148]

Given the care with which Schuck approaches all of the other aspects of the immigration question, this lapse is particularly noteworthy. As one who has in the past few years represented many of the individuals and families affected by these policies, often in the most poignant circumstances, I can only suggest that Schuck consider the question more closely and devote more attention to these aspects of it. Our current widespread detention policies and the retroactive development of deportation laws have wrought exceptional hardship for many long-term legal permanent residents and their families. The public failure to differentiate between legal and illegal aliens that Schuck bemoans before he extols the virtues of the more efficient policy is largely unrelated to the question of immigrant crime policy. One might suggest that "illegal" aliens who commit crimes be expeditiously deported while lawful permanent residents should benefit from greater constitutional protections, both procedurally and substantively. This would be a more measured, though not unproblematic, position. But Schuck does not develop the point. As a result, we are left with a rather undifferentiated approach to "illegal" and "criminal" aliens that blurs important distinctions.

Schuck's review of *Alien Nation* also contains yet another attempt at distinguishing his own position from that advocated by Brimelow on the regulation or elimination of birthright citizenship by Congress. He argues

144. *Id.* at 342.
145. *Id.*
146. *Id.*
147. *Id.*
148. *See id.*

again that he and Rogers Smith had noted that consideration by Congress of the elimination of birthright citizenship would entail "genuinely difficult normative, empirical, and policy questions."[149] He notes with a certain resentment that Brimelow did not appear even to have considered the extremely difficult problems created by this situation—that such a policy change might well create a destitute, vulnerable and more or less permanent caste of "pariah children" who might well remain in that condition for the rest of their lives in the United States.[150] On this point, it clearly seems that Schuck has embraced a valid prophylactic principle with which I heartily agree—the danger of a pariah caste far outweighs the benefit, if there ever was any, of a citizenship system more completely based upon the consent principle.[151]

However, Schuck's willingness to trade admissions numbers for rights is clear in his eloquent statement of the virtues of maintaining the current immigrant flow. He says that immigrants have contributed to our continued economic growth and extols, "the dramatic rise in the public's tolerance for minorities (including dark-skinned aliens) and its support for racial integration and quality, the renaissance in many previously declining urban neighborhoods and the diversification and enrichment of many aspects of American culture."[152] He also articulates a list of what he terms social improvements that he suggests "bespeak a robust quality" that contradicts Brimelow's dark vision.[153] In his conclusion, he states that "it will take much, much more" than Brimelow's book to convince him that we should stop or radically reduce that flow.[154] Schuck believes that immigration, including the post-1965 wave, has served America well and, if "properly regulated," there is every reason to expect that it will continue to do so.[155]

The basic question that still remains after reading this chapter, though, is what we are to make of the phrase "properly regulated." In this regard I

149. *Id.* at 352.

150. *Id.* at 352.

151. Certain aspects of the more recent work in CITIZENS, STRANGERS, AND IN-BETWEENS cause one to suspect that Schuck has begun to reconsider some of the underlying assumptions of his earlier citizenship work. In Chapter 10, *Plural Citizenships*, for example, Schuck, rather than developing abstract normative models, considers the question of dual citizenship by "the less systematic but perhaps more effective approach of canvassing the advantages and disadvantages for the American polity." *Id.* at 230. Leaving aside the problem of determining who is included in the polity, Schuck, in what might well be viewed as a surprising conclusion in light of the emphasis placed on the importance of citizenship to U.S. civic culture in *Citizenship Without Consent* and in Chapter 9, concludes that the growth of dual citizenship is "on balance a good thing." *Id.*

152. *Id.* at 355.

153. *Id.*

154. *Id.* at 358.

155. *Id.*

find Schuck's deconstruction of Brimelow difficult to reconcile with statements such as one finds earlier in his book that "control of illegal migration . . . is not merely a pragmatic policy goal; it assumes the character of a legal duty and a moral crusade."[156] Similarly troubling are Schuck's statements that "the massive breaching of American borders by illegal aliens evidences the nation's vulnerability" and his uncritical acceptance of terms such as "invasion" and "flood" to describe that situation.[157]

This point is where the book's approach to citizenship merges with that taken to border control, deportation, and detention. One of the main underpinnings of Schuck's consideration of citizenship (pre-1996) was his contention that, "As a practical and legal matter, the right of [a lawful permanent resident] alien to remain in the United States is almost as secure as a citizen's."[158] Although Schuck excepted from this generalization lawful permanent residents convicted of a serious crime, we must now ask how much it matters that Congress has progressively redefined the criminal deportation grounds to the point where a legal permanent resident may be deported for a twenty- or thirty-year-old conviction for assault or even shoplifting.[159]

Schuck considered four dangers inherent in the "devaluation" of citizenship, which he termed political, cultural, spiritual, and emotional.[160] In opposition to these dangers, he eloquently extolled the value of the "equality and due process principles" which he argued had contributed to the devaluation, noting that "[b]y maximizing individual opportunity and preventing the formation of a legally disabled underclass [the principles] have fostered the social mobility and optimism that seem essential to the success of American democracy."[161]

Recent events, however, have called the due process principle into substantial question for aliens, thereby significantly raising the protective value of citizenship. It is thus not correct to say now that "the courts, by interpreting the equality and due process principles more expansively, have substantially reduced the value of citizenship to legal resident aliens. Today the marginal benefits to most aliens of moving from legal resident status to full membership are slight. Indeed they have never been smaller."[162]

Unfortunately, probably because so much of *Citizens, Strangers, and In-Betweens* was written well before 1996, it never struggles with this problem. This is much more than a detail in my view, because the events of 1996—like the proverbial thirteenth ring of the clock that calls into question all that came before it—illustrate quite persuasively the importance of

156. *Id.* at 182.
157. *Id.* at 183.
158. *Id.* at 168.
159. *See id.*
160. *See id.* at 171–72.
161. *Id.* at 173–74.
162. *Id.* at 169.

a type of prophylactic concern for lawful permanent residents that was missing from Schuck's analysis.

It is largely because I find myself so inspired by Schuck's rhetorical talents regarding due process and equality that I feel such disappointment in the general omission of substantial consideration of the dangers and cruelty of the 1996 retroactive deportation laws. Indeed, one sees, on page 189, the almost verbatim repetition of a phrase from page 168, though the latter had been written almost a decade earlier: "The actual risk of removal for non-criminal LPRs [legal permanent residents] living in the United States has been vanishingly small."

Statistically, perhaps; but the *perception* of risk for noncitizens has surely changed dramatically as ever more minor contacts with the criminal justice system—itself hardly a model of equal protection or due process for minority group members and the poor—result in even harsher and more certain sanctions including not just removal but immediate incarceration with no right to a bond hearing,[163] let alone release *pendente litem* for example. Thus more and more we must consider the meaning of the term "non-criminal" in this context. Dispositions such as the Massachusetts "continuance without a finding of guilt" or other state law diversion-type programs for minor offenders now constitute criminal convictions for immigration purposes, even if they were not considered to be such at the time they were rendered.[164] Suspended sentences, in the view of the criminal justice system a form of leniency, are now deemed to be exactly the same as a sentence to be served in prison.[165] And the Board of Immigration Appeals has recently held that state rehabilitative statutes that vacate minor convictions for first offenders are no longer effective to defeat deportation.[166] With these severities in mind, we may consider some broader concerns raised by insufficient recent attention to the structural and prophylactic aspects of immigration law.

III.
DYING CANARIES: WHY SHOULD WE CARE?

A. Eight Basic Structural and Prophylactic Concerns

What, if anything, can *structural* and *prophylactic* considerations add to our understanding of the dangers inherent in the general approach to immigration law taken by *Citizens, Strangers, and In-Betweens*?[167] To be

163. *See* INA § 236(c), 8 U.S.C. § 1226(c) (1999) (mandating incarceration for certain classes of aliens in removal proceedings).

164. INA § 101(a)(8), 8 U.S.C. § 1101 (a)(8) (1999).

165. *Id.*

166. *See* Matter of Roldan, Int. Dec. 3377 (B.I.A. Mar. 3, 1999).

167. Underlying the position taken in this review is an aspiration to unify what some scholars refer to as "immigrant's law" or "alien's law" with immigration law. *See, e.g.*, Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L.

REV. 1047 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1938 (1996) [hereinafter Motomura, *Whose Nation*]. This is a complex task, however, due to certain distinct aspects of U.S. immigration law history. Since the late nineteenth century, one difficulty with U.S. immigration debate has been that of trying to work on two different issues—immigration admissions policy and noncitizens' rights—with one tool, the so-called plenary power doctrine, hanging sword-like over various aspects of both questions. The hammer of plenary power has been fully used at the border, partially used internally in the deportation context, and for the most part avoided in other domestic settings involving noncitizens' rights. In general, the questions of who we should admit and on what terms have been seen as different from the questions of how we should enforce laws pertaining to noncitizens and what should be the constitutional limits on government action against noncitizens, at least within the territorial limits of the United States. This distinction may be traced at least as far back as the period between *Yick Wo v. Hopkins*, in which the Supreme Court held that "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens," 118 U.S. 356, 369 (1886), and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), which first announced the plenary power doctrine that insulated admission and exclusion decisions from constitutional scrutiny. The related question of whether deportation was governed by *Yick Wo* or by plenary power was answered by the Court, albeit contentiously and, in the view of many scholars, badly, in a line of cases rooted in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). There, the Court denied the procedural protections of the criminal process to aliens facing deportation and stated that "the power to exclude aliens and the power to expel . . . are in truth but parts of one and the same power." *Id.* at 713. The constitutional limits on this power have been a subject of great controversy ever since. *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86 (1903) (deportation procedures must conform to due process norms); Wong Wing v. United States, 163 U.S. 228 (1896) (striking down part of deportation law that provided for imprisonment without judicial trial of aliens found deportable). More generally, the disaggregation of "immigrants' law" from "immigration law" has been the basis of our jurisprudential understanding of a wide range of legal questions involving noncitizens.

This is not an inevitable way to think about the subject. In 1798, for example, there was no general federal deportation statute. Jefferson and Madison therefore did not have much reason to disaggregate noncitizens' general rights from their rights in deportation proceedings. In one sense, this renders their opinions less relevant to our current debate. Viewed in another way, however, they provide a valuable example of pre-plenary power analysis. Such a window into a world without the *Chae Chan Ping* doctrine might well appeal to the many scholars who have sought to overturn the plenary power model by suggesting that our approach to aliens' rights questions should inform (or at least be theoretically consistent with) our approach to admissions and related immigration law questions. *See, e.g.*, NEUMAN, *supra* note 30, at vii (seeking "to explore the constitutional foundations of immigration law and aliens' rights in the United States"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); *see also* Linda S. Bosniak, *supra;* Hiroshi Motomura, *Whose Immigration Law?: Citizens, Strangers, and the Constitution*, 97 COLUM. L. REV. 1567, 1572 (1997) (noting how Neuman's analysis is shaped by focus on the rights of aliens and suggesting benefits of focus on citizens). This reparation of the *Yick Wo–Chae Chan Ping–Fong Yue Ting* tear in our constitutional fabric is clearly a worthwhile scholarly pursuit. But the project tends to be tinged with an optimism unwarranted in light of recent events. *See, e.g.*, Motomura, *Whose Nation, supra,* at 1943–44 ("As plenary power erodes, it is logical to assume that the recognition of aliens' constitutional rights in alienage law fosters the recognition of 'immigrants' rights' in immigration law."). Put another way, the risks of this approach should also not be ignored. Consistency, after all, does not necessarily mandate the decline of plenary-power type reasoning. Indeed, the most recent Supreme Court decision in the immigration law field seems to evidence a contrary move, one towards the strict limitation of noncitizens' rights, even in the postentry deportation context. *See* Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). It is not a large step—and smaller still if we

sure, the primary targets of government action are not, as in 1798, suspected French revolutionary agents, or their equivalent.[168] Instead, they are "illegal" and "criminal" aliens. So, on first blush, the Jeffersonian concern that a law against aliens might later be aimed at citizens may seem farfetched. Why should those of us who are citizens and who have never been convicted of a crime care about a crackdown on this group? All we need to do is refrain from committing crime—hardly an unreasonable criterion for avoiding adverse government action and surely one with which the majority of the U.S. population would have little problem. After all, as Schuck puts it, "Targeting them is the moral, political, and policy equivalent of motherhood and apple pie. Illegal aliens are, well, illegal."[169]

Let me, however, suggest a few points of concern, some very specific, some more general, with this view:[170]

1. In the pursuit of a "credible" or "workable" policy, INS has now by some accounts become the largest federal enforcement agency with the largest number of armed officers,[171] a mandate to get tough, and thousands

eradicate the line between immigration and immigrants' law—from this decision to the application of such reasoning to non-immigration law questions of noncitizens' rights. Moreover, notwithstanding all of its well-analyzed flaws, the disaggregation of immigration and immigrants' rights questions may have an obscured virtue: it helps to support the argument that noncitizens' rights—grounded as they have been in constitutional principle—should neither be exchanged nor depreciated in exchange for admissions numbers. It is deeply, perhaps tragically, shortsighted to barter a greater number of immigrant admissions for restrictions on procedural rights in deportation hearings, incremental acceptance of retroactive deportation laws, unreviewable executive detention practices, or the general elimination of judicial review of agency enforcement actions. As noted above, the worst offenders in this regard were the Congress and President of the United States when they sought to achieve the otherwise defensible goal of expeditious and fair postentry internal immigration control (i.e., deportation or "removal" policy) through the highly dubious (and probably unconstitutional) methods of retroactive lawmaking, executive detention, and elimination of judicial review. *See supra* notes 14–15 and accompanying text (discussing 1996 laws).

A somewhat similar point was recently made by Roberto Suro, who writes that the "danger of mixing together policies for illegal and legal immigration is that neither will be addressed effectively. The two areas involve contradictory goals and conflicting methodologies. One is meant to punish and deter illegal activities. The other is meant to regulate and encourage a legal, even desirable human ambition . . . ." ROBERTO SURO, WATCHING AMERICA'S DOOR 45 (1996). In the current postideological climate, the unified rights approach seems at least as likely to result in a deterioration of the rights of noncitizens (and even perhaps new citizens) as it does to achieve any positive gains.

168. The focus on terrorists, however, could easily devolve into an ideological government program given the current laws' lack of judicial oversight and other procedural protections.

169. SCHUCK, CITIZENS, STRANGERS, *supra* note 1, at 145.

170. This list is intended as an introduction to future work. I have not undertaken the task of fully analyzing each of these concerns due to limitations of space and time. There is, however, an emerging body of excellent theoretical and empirical work on these topics, some of which I have cited where appropriate.

171. Anthony Lewis, Editorial, *Mean and Petty*, N.Y. TIMES, Apr. 12, 1996, at A31.

of people incarcerated under its power.[172] Its budget exceeds $4.0 billion.[173] Its staffing has nearly doubled in the past four years.[174] It has tens of thousands of people under its control, many of whom are incarcerated with little prospect of release and many of whom are asylum-seekers.[175] IIRIRA mandates detention, without possibility of release, of virtually all noncitizens whom INS seeks to remove from the U.S. due to alleged criminal conduct.[176] Since the passage of IIRIRA, INS has nearly doubled its detention capacity, from 8,592 beds in fiscal year 1996 to 17,400 beds in 1998.[177] It estimates a need for as many as 18,000 additional beds to comply with the mandates of IIRIRA.[178] In fiscal year 1998 alone, INS detained more than 153,000 people.[179] Also, many immigration detainees are now held in local jails, often under deplorable conditions. A 1998 Human Rights Watch study noted that, "Faced with an overwhelming, immediate demand for detention space, the agency has handed over control of its detainees to local sheriffs and other jail officials without ensuring that basic international and national standards requiring humane treatment and adequate conditions are met."[180]

172. *See* Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 40, 1433 (Oct. 19, 1998).

173. *See generally President Clinton Proposes INS Budget Increase, Restoration of Certain Public Benefits*, 76 INTERPRETER RELEASES 229, 240 (Feb. 8, 1999) (reporting announcement by INS of eight percent increase over the Fiscal Year 1999 funding level, creating a total of 306 new staff positions).

174. The INS recently announced (i) a renewed focus on border management, interior enforcement and institutional infrastructure; (ii) that by the year 2001, the number of Border Patrol agents will have doubled in the short span of only six years; and (iii) $20 million in new spending to create 185 new positions to address immigration enforcement in the U.S. interior. *See id.* In a separate release, the INS heralded the success of recent allocation of additional resources: it was able to remove 171,154 criminal and undocumented aliens in fiscal year 1998, breaking 1997's record of 114,386 removals. Of the 1998 figures, criminal alien removals reached 56,011, 15% of which were for violations of immigration law. These numbers do not include the additional 78,928 aliens who were allowed to depart "voluntarily" after having been charged with a violation of immigration law, nor do they the account for the approximately 1.5 million apprehensions and "voluntary" returns at U.S. borders during fiscal year 1998. *See generally INS Removals Reach All-Time High*, 76 INTERPRETER RELEASES 193, 198 (Feb. 1, 1999). The numbers for fiscal year 1999 were similar. INS removed 179,181 noncitizens, of which 63,033 removals were due to criminal convictions. *See* OFFICE OF POLICY & PLANNING, IMMIGRATION AND NATURALIZATION SERV., JANUARY 2000 MONTHLY STATISTICAL REPORT: REMOVALS <http://www.ins.usdoj.gov/graphics/aboutins/ statistics/msrjan00/REMOVAL.HTM> (last modified Mar. 3, 2000).

175. *See* Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197 (1999).

176. INA § 236 (c)(1), 8 U.S.C. § 1226(c) (1999).

177. Kerwin, *How Laws Divide*, *supra* note 45, at 1218.

178. *Id.*

179. IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, INS FACT SHEET (1999).

180. HRW, LOCKED AWAY, *supra* note 2.

And still no one suggests that INS is even close to doing the job envisioned by the 1996 Congress.[181]

2. Because of the maintenance of high admissions numbers, combined with increasingly strict postentry laws, we are witnessing the creation of a large, internal population with profoundly depreciated due process rights, subject to increasingly capricious and often retroactive laws.[182]

3. The principle of proportionality[183] that implicitly guides much of our normative legal reasoning appears to have lost its place in the current immigration debate, as it also has in much of our debate over criminal laws. Yes, "illegal aliens are, well, illegal." But even if we ignore the profound differences among segments of this large population,[184] this reasoning hardly proves that it is "moral" or wise policy to incarcerate them, deprive them of access to judicial review, or summarily deport them without an opportunity to appeal for mercy.

4. There is clearly at least an implicit racial edge to much of the current "crackdown." In 1996, the *New York Times* reported data showing that the percentage of the population that white Americans thought was Hispanic, Asian, and black was, respectively, 14.7%, 10.8%, and 23.8%; the actual figures were 9.5%, 3.1%, and 11.8%.[185] There can be little doubt that attitudes about "illegal" and "criminal aliens" have similar built-in biases. More importantly, we might also consider the racialized nature of the criminal justice system which now determines to a large degree which noncitizens are to be subject to the harsh new laws.[186] If current patterns

181. Furthermore, federal prosecutions of immigration crimes resulting from INS investigations nearly doubled from 7680 in 1996 to 14,616 in 1998. INS reports that 172,312 persons were deported (removed) from the United States in 1998 and 118,430 in the first eight months of 1999. Kerwin, *How Laws Divide, supra* note 45, at 1215 (citing TRAC-INS, *National Profile and Enforcement Trends Over Time*, tbl.3 (July 26, 1999)).

182. The danger of such a situation has manifest itself earlier in U.S. history, most notably in the institution of slavery, the treatment of indigenous peoples, and the internment of Japanese and Japanese Americans. As to the third of these, which is perhaps the most analogous and portentous, we should recall that—however dubiously—the Supreme Court at least felt compelled to invoke the exigencies of war as a justification for these otherwise clearly illegal measures. *See* Korematsu v. United States, 323 U.S. 214 (1944).

183. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (applying proportional analysis to recidivist laws); Rummel v. Estelle, 445 U.S. 263 (1980) (same); Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty impermissible for rapist who took no life); J. KLEINIG, PUNISHMENT AND DESERT (1973); RICHARD G. SINGER, JUST DESERTS SENTENCING BASED ON EQUALITY DESERT (1979).

184. For example, the category includes asylum-seekers, students who have not maintained a full course load, tourist "overstays," relatives of citizens and lawful residents awaiting processing, etc.

185. Priscilla Labovitz, *Immigration—Just the Facts*, N.Y. TIMES, Mar. 23, 1996, at A15.

186. *See generally* MARGARET WERNER CALAHAN, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES: 1850–1984, at 65, 91 (Bureau of Justice Statistics ed., 1986); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 58–66, 105–16 (1995). The disproportion between white and black inmates began to rise in the early 1980s, accelerating later in the decade as the number of crack prosecutions grew. By 1995, the black proportion of the inmate population had risen to 49.4%. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL

hold, white noncitizens will be much less likely to be arrested, incarcerated, or deported under the new laws.[187] Regardless of whether such patterns could be justified on nonracist grounds—a dubious possibility in my view—appearances matter, too. And the appearance in this setting is of great racial disparity.[188]

5. The effects of harsh immigration laws are not limited to noncitizens. The Urban Institute has recently determined that nine percent of *all* American families may be defined as "mixed status." That is, they have at least one noncitizen parent and at least one U.S. citizen child. The rate increases to fourteen percent among low income families, and is as high as twenty-seven percent in California.[189] In New York City, seventy percent of the households with children that are headed by undocumented noncitizens have U.S. citizen children.[190] As Donald Kerwin has well noted,

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POPULATIONS IN THE UNITED STATES: 1995, at 7 tbl.1.6 (1996). The percentage has by all accounts continued to rise since then. As of June 1997, the number of inmates in America's prisons and jails was estimated at 1,725,842. *See* Darrell K. Gilliard & Allen J. Beck, *Prison and Jailed Inmates at Midyear 1997, in* BUREAU OF JUSTICE STATISTICS, BULL. NCJ-167247, at 1 (Jan. 1998). A study conducted in early 1997 found that, nationwide, 51% of prisoners were black. *See* Fox Butterfield, *Many Black Men Barred From Voting*, N.Y. TIMES, Jan. 30, 1997, at A12.

These statistics are due both to differential enforcement and to differential sentencing. *See* United States v. Armstrong, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 145 (1995)). I should note, however, that for purposes of this review it is not necessary to enter the debate over whether these statistics indicate racist policy or a proper reaction to a serious social problem. *See* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261–70 (1994); Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?, in* PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 153 (Stephen E. Gottlieb ed., 1993). My point is simply that the system is not racially neutral in its focus. *See generally* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795–1842 (1998) (citing the above statistics but also arguing that class plays a significant role in crack cocaine cases) [hereinafter Stuntz, *Race, Class, Drugs*].

187. *See generally* Louis Palmer, *Number of Blacks in Prison Soars*, BOSTON GLOBE, Feb. 28, 1999, at A14 (quoting statistics from National Center on Institutionalization and Alternatives, U.S. Department of Justice). *See also* DAVID COLE, NO EQUAL JUSTICE (1999).

188. As Professor Stuntz has put it in a slightly different context:

> Contemporary drug policy is not fundamentally racist, at least not in the usual sense of the word 'racist.' The system's treatment of crack relative to other drugs is a kind of paternalism that purports to favor rather than harms black neighborhoods. But this paternalism is double-edged; it sends the message that some neighborhoods (and some groups) are subject to different standards than others. Whether that message is racist or not, it looks racist. And in this setting, appearances matter: apparently racist enforcement patterns tend to undermine the normative force of the drug laws among targeted groups, to delegitimize the system in the eyes of those whose behavior the system seeks to influence.

Stuntz, *Race, Class, Drugs, supra* note 187, at 1798 (footnote omitted).

189. ALL UNDER ONE ROOF: MIXED STATUS FAMILIES IN AN ERA OF REFORM (Urban Inst., June 1999) *cited in* Kerwin, *How Laws Divide, supra* note 45.

190. *Id.*

"[T]hese numbers show that it is simplistic to divide the immigrant population into 'legal' and 'illegal'. . . . Measures designed to impact the undocumented can and do have an impact on LPRs and U.S. citizens, and those individuals are often children."[191]

6. It is not at all clear that citizenship is a true safe harbor. Calls have been heard for vigorous re-examination of allegedly improper naturalizations on the West Coast while the fifteen-year-old debate over whether birthright citizenship should accrue to the children of the undocumented continues.[192] Indeed, in a ruling that could have affected thousands of naturalized individuals,[193] a panel of the Ninth Circuit Court of Appeals recently supported the Attorney General's assertion of administrative authority to reopen and to revoke orders of naturalization.[194] Although this ruling was ultimately reversed by the Ninth Circuit *en banc*,[195] the episode calls into question whether U.S. citizenship is as impervious to easy reversal as many had thought.

History is far from devoid of examples in which the structures of citizenship have been changed to accommodate government or majoritarian oppression of particular social groups.[196] As one prominent opponent of the 1798 laws put it, "the citizen has no other security for his personal safety than is extended to the stranger who is within his gates."[197]

7. The general elimination of judicial review of administrative action that was so central to the 1996 changes to immigration law has not only facilitated harsh and expeditious detention and deportation; it is part of a trend that includes important aspects of federal court review in the criminal justice system as well.[198]

8. Since 1996 the Attorney General, upon a determination of an "actual or imminent mass influx of aliens," may warrant any state or local law

191. Kerwin, *How Laws Divide, supra* note 45, at 1215.

192. *See* Bosniak, *Opposing Proposition 187, supra* note 42 (noting that some of the original promoters of Proposition 187 drafted an advisory ballot measure for the 1996 elections in California calling for an amendment to the U.S. Constitution to eliminate automatic birthright-citizenship for the U.S.-born children of undocumented immigrants); *see also* Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994).

193. 76 INTERPRETER RELEASES 28 (July 26, 1999). The *Los Angeles Times* estimated that the ruling could affect 4500 cases. Henry Weinstein, *INS Can Void Citizenship, Court Says Ruling: Panel Backs Agency's Process of Revoking Naturalization Through Hearings Outside the Judicial System,* L.A. TIMES, June 5, 1999, at A1.

194. Gorbach v. Reno, 179 F.3d 1111 (9th Cir. 1999).

195. Gorbach v. Reno, 219 F.3d 1087 (9th Cir. 2000) (en banc) (finding that the Attorney General's statutory power to naturalize does not imply the power to de-naturalize).

196. *See, e.g.,* Kanstroom, *Dark Undertones, supra* note 110, at 305 (describing changes to German citizenship laws under National Socialism).

197. Statement of Edward Livingston, *quoted in* BASELER, ASYLUM, *supra* note 29, at 282 (internal citations omitted).

198. *See e.g.,* 28 U.S.C. § 2244(d)(1)(A) (1999) (one-year limitation on habeas corpus review of state court convictions).

enforcement officer to perform the functions of an INS agent.[199] This is a dramatic expansion of previous, court-sanctioned authorizations of state and local involvement with immigration law enforcement. The generality of section 103(a)(8) has impelled the INS to propose a new rule providing for "a cooperative process by which state or local governments can agree to place authorized state or local law enforcement officer(s) under the direction of the INS in enforcing immigration laws, whenever the Attorney General determines that such assistance is necessary during a mass influx of aliens."[200] The rule incorporates two principal safeguards, absent from section 103(a)(8) of the INA, that seem designed to prevent abuses of power by state and local law enforcement agents in enforcing immigration laws: a requirement of an advance written agreement between the INS Commissioner and relevant state and local officials, and an INS training program for individual state or local officers authorized to enforce immigration laws. Nevertheless, the lack of a definition of "mass influx" and the lack of clear safeguards against state and local excesses are real concerns. The delegation of authority to the states bypasses certain safeguards inherent in federal preemption.[201] Abuses are foreseeable when the power to control immigration is placed in the hands of local police who may well be insensitive to the intricacies of immigration law and may fail to protect the rights of noncitizens.[202] Decentralization of the enforcement of federal immigration law also carries with it the potential for independent civil rights violations.[203] As two commentators have put it:

The danger reaches a worrisome level if one considers that the potential for civil rights violations lurks not only over undocumented aliens but over legally admitted aliens and U.S. citizens as well. Immigration law calls

199. INA § 103(a)(8), 8 U.S.C. § 1103(a)(8), *as amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 372, 110 Stat. 3009-546 (1996). Specifically, section 1103(a)(8) provides:

> In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

8 U.S.C. § 1103(a)(8) (1999).

200. Powers of the Attorney General to Authorize State or Local Law Enforcement Officers to Enforce Immigration Law During a Mass Influx of Aliens, 64 Fed. Reg. 17,128 (1999) (to be codified at 28 C.F.R. pt. 65) (proposed Apr. 8, 1999).

201. *See, e.g.*, Rebecca Chiao, *American Dream–Immigrant Reality: Two Sides to Preemption Comments on Bau*, 7 LA RAZA L.J. 72, 80 (1994).

202. *Id.*

203. Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISPANIC L.J. 9, 12 (1994).

for specialized training to achieve effective enforcement within constitutional guidelines. The lack of knowledge, training and experience in dealing with immigration issues heightens the potential for civil rights violations when immigration enforcement is placed in the hands of local police.[204]

Taken together, these eight points of concern highlight the potential and actual dangers inherent in the recent expansion of the "credibility and control" model of immigration law. When our attention is focused on them, rather than on the ease with which aliens and their lawyers can "beat the system" or on the inefficiencies of INS enforcement, we can see how far the current regime has tilted. We can also develop a clearer sense of where this trend may lead us if it is not countered by a more assertive concern for individual rights, proportionality, legal legitimacy, and basic fairness.

B. The Pervasiveness of the Control Model of Immigration Law

An insufficient concern for the structural and prophylactic perspective on immigration law is hardly confined to Schuck's work. Indeed, his approach, as he notes throughout *Citizens, Strangers, and In-Betweens*, is probably the dominant one today. One way to see the truth of this is to consider briefly one of the most systematic recent attempts to develop a comprehensive approach to the subject.

A great deal of immigration law and policy over the past twenty years has been derived from recommendations made by special commissions.[205] The most recent Commission's first mission was to review specific topics such as family-based and employment-based visas; the impact of immigration reform on social, demographic and natural resources; foreign policy and national security; per country levels of family-sponsored immigration;

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204. *Id.* at 12–13.

205. *See generally* Carlos Ortiz Miranda, *United States Commission on Immigration Reform: The Interim and Final Reports*, 38 SANTA CLARA L. REV. 645 (1998). The Select Commission on Immigration and Refugee Policy, created in 1978, for example, played a significant role in the development of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.) and the Immigration Act of 1990 (1990 Act), Law of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.). *See* SELECT COMM'N, STAFF REPORT, *supra* note 61. IRCA established a legalization program through which more than two million aliens were granted legal residence. IRCA also enacted the "employer sanctions" program that makes it unlawful for employers to knowingly hire undocumented workers. *See generally* Daniel Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?*, 25 HARV. C.R.-C.L. L. REV. 53 (1990). The 1990 Act also established a successor to the Select Commission, the so-called Commission on Legal Immigration Reform (hereinafter Commission). 104 Stat. at 5001. This Commission was designed to review and reform the system of legal immigration. 104 Stat. at 5002, 5003. In 1991, Congress expanded the authority of the Commission so that it could address a variety of other immigration issues. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991) (codified as amended in scattered sections of 8 U.S.C.).

adjustment of status and asylees; numerical limitations on certain nonimmigrants; and diversity immigration. In addition to these particular topics, in its final report the Commission was free to include "such recommendations for additional changes . . . as the Commission deems appropriate."[206]

At least one prominent member of Congress had exceedingly high aspirations for the process to be developed out of the Commission's work, suggesting that "never again will we have to wait twenty-five years to reform our immigration laws."[207] Though this has clearly not been the case, the reports are an ideal place to look if one wishes to understand immigration law discourse in the U.S. today. A critical reading analyzing not simply policy suggestions, but also structure and tone, yields valuable insights into the background understanding of Commission members and many others into immigration law and noncitizens' rights.

One of the first things one notices in the 1997 Commission Report is the use of language in the transmittal letter to Congress written by the Chair of the Commission, Shirley M. Hufstedler. The word "credible" appears twice in the first substantive paragraph. It first appears to describe the need for a "credible and coherent" immigrant and immigration policy; and then reappears to describe the need for a "credible, efficient" naturalization process. Two paragraphs later, in support of a proposal to restructure aspects of the immigration service, the word "credibility" defines the need for such restructuring as part of the goal of restoring the "credibility" of our immigration system.

Clearly the Commission, like Schuck, believed that the lack of "credibility" of the current system was a primary concern to the country, or at least to Congress. But what does "credible" actually mean? It must mean

206. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5002 (1990). *See generally* Carlos Ortiz Miranda, *An Agenda for the Commission on Immigration Reform*, 29 SAN DIEGO L. REV. 701 (1992).

207. Statement of Senator Alan Simpson, *quoted in Congress Approves Major Immigration Reform*, 67 INTERPRETER RELEASES 1209, 1214 (1990). However, although the work of the Commission has led to some statutory changes, Congress has also rejected a number of major recommendations made in the Interim Reports. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 220 (1997). The first interim report, RESTORING CREDIBILITY, issued in September 1994, dealt generally with the subjects of enforcement and control both at the border and within U.S. territory. It focused mostly on deterrence, i.e., prevention of illegal entries and unauthorized work. The second interim report, SETTING PRIORITIES, issued in June 1995, primarily considered legal (family and skill-based) admission policies, with less attention paid to nonimmigrant admissions, refugee admissions and the idea of Americanization. The third and final interim report, TAKING LEADERSHIP, issued in July 1997, analyzed refugee policy much more fully. The Commission recommended maintaining the current distinction between refugee admissions and "regular" immigration admissions. It also recognized that "[s]ince its very beginnings, America has been a refuge for the persecuted" and supported continued admission of refugees to sustain "our humanitarian commitment to . . . the persecuted," including those "refugees whose admission is of special humanitarian interest to the United States but who are not in imminent danger where they currently reside." 1997 REPORT TO CONGRESS OF THE U.S. COMM'N ON IMMIGRATION REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP 1, 37, 41.

more than its usual synonym, "believable." In this context, it seems to have the implicit meaning of reliable, well-organized, or perhaps, justifiable. Thus it seems to echo Schuck's concern that legitimacy is lost when enforcement appears weak. Support for this reading might be found by looking at the adjectives with which "credibility" is accompanied in the letter. They are "coherent," "efficient," and "effectively."

As linguistic analysis may aid the search for implicit underlying attitudes, we might also consider certain types of words that do not appear in this transmittal letter. For example, one will search in vain for "fairness" and "justice" or cognates. Indeed, there is virtually no normative language in the letter apart from that of credibility and efficiency. To be sure, the report itself does contain some references to concepts of fairness, especially in its treatment of Congress' use of retroactive laws in 1996.[208] The tone of the transmittal letter, however, is definitely one of control, practicality, and efficiency.[209]

Apart from its language and tone, the focus of the transmittal also indicates that its target audience was, to say the least, not primarily the pro-immigrant community. Indeed, even when the Commission adopts the recommendation "to reconsider the welfare reform legislation adopted in 1996 that makes legal immigrants ineligible for basic safety net programs," the reasoning that supports this proposal is surprisingly abstract and instrumentalist. The Commission suggests that requiring immigrants to become citizens in order to receive the protections afforded by these programs "debases citizenship."[210] Further, the Commission argues that if citizenship, rather than legal status, becomes the determinant of eligibility, this "blurs the distinction between legal immigrants, whom we welcome, and illegal aliens."[211] The poignant and widespread injustice and pain caused by the 1996 legislation, with which many immigrants' rights advocates are familiar,

208. "Although retroactive application of new statutory requirements by Congress is legally permissible . . . it does not constitute sound public policy. . . . [It] not only is manifestly unfair, but also invites confusion, adds uncertainty, and fosters a lack of trust and confidence in the rule of law." 1997 COMMISSION REPORT, *supra* note 44, at 144. The Commission continued by underlining that

> [while] the retroactive application of the 1996 legislation will both significantly increase the number of removable aliens and decrease [those] who might otherwise have qualified for existing relief, the system does not have the capacity actually to remove these added numbers of individuals. The resulting situation serves only to further erode the effectiveness and credibility of the immigration system as a whole.

Id. at 145.

209. The transmittal letter is also noteworthy for other word choices. We see border "control" referred to in the third paragraph as border "management." Deportations are now referred to as "removals." This terminology was mandated by Congress in its 1996 revisions of the Immigration and Nationality Act. This, in general, is the language of management efficiency, not that of justice.

210. 1997 COMMISSION REPORT, *supra* note 44, at 73.

211. Shirley M. Hufstedler, *Letter from Chair of 1997 Commission on Immigration Reform*, in 1997 COMMISSION REPORT, *supra* note 44.

are not mentioned at all. Nor is the harshness of the 1996 law itself viewed as having affected negatively the "credibility" of the system.[212]

The Commission Report does contain some rather specific and important recommendations to enhance procedural and substantive fairness in enforcement. Though perhaps not as prominently as this reviewer would have liked, these suggestions do mitigate somewhat the dominant "credibility and control" tone of the report. Thus the report suggests: the development of programs to guarantee that aliens be educated about their legal rights in deportation proceedings,[213] the encouragement and facilitation of legal representation,[214] the exercise of prosecutorial discretion,[215] the strategic use of detention and release decisions,[216] and improved detention conditions and monitoring.[217]

Much of the normative force of *Citizens, Strangers, and In-Betweens* seems to derive from an implicitly contractarian view both of citizenship and of the legitimacy of deportation as an appropriate sanction for border violation and post-entry criminal conduct. The Commission similarly adopts a rather traditionally contractarian model of what it terms "Americanization"[218] and suggests that the principles be made more explicit through the "covenant between immigrant and nation."[219] The three stated aspects of the covenant are intriguing. The first is that the covenant is "voluntary."[220] Indeed, the report specifically makes the point that it is "not an entitlement."[221] One wonders why the commissioners thought that this needed to be said. Surely, only a very small number of people hold the position that immigration to the United States generally is an "entitlement." Analogously complicated is the Commission's general assertion

212. This tendency is evident in other parts of the report. In its discussion of prosecutorial discretion, for example, the Commission merely suggests that "discretion should be exercised with the goal of establishing a more efficient and rational hearing system." 1997 COMMISSION REPORT, *supra* note 44, at 137. Detention, it is said, should be used "strategically" and "efficiently." *Id.* at 138–39.

213. *Id.* at 135.

214. *Id.* at 135–37.

215. *Id.* at 137–38.

216. *Id.* at 138–39.

217. *Id.* at 141–42.

218. This was defined as "the cultivation of a shared commitment to the American values of liberty, democracy and equal opportunity." *Id.* at 26. It is in this section that aspirational values other than efficiency, control, and credibility appear. But the subject is one of great complexity. In a speech given in 1995, Barbara Jordan, the late chair of the Commission, had said that the word Americanization "earned a bad reputation when it was stolen by racists and xenophobes in the 1920's. But it is our word, and we are taking it back." *Id.* at vi (quoted in *Executive Summary*). Given the dominant credibility and control orientation of the report, it is apparent that Jordan's desire to disaggregate racism and xenophobia from border control and deportation practices was, at its root, essentially similar to that of Schuck.

219. *Id.* at 27.

220. *Id.*

221. *Id.*

that immigration presents mutual obligation.[222] Again, this fits logically within the contractarian model but the obligations cited in the Commission's *Executive Summary* are peculiarly asymmetrical. Immigrants, it is said, must accept the obligations we impose—to obey our laws, to pay taxes, to respect other cultural and ethnic groups.[223] The penalty for failure to do so would presumably be deportation. At the same time, the Commission asserts that citizens incur obligations to provide an environment in which "newcomers" can become fully participating members of our society.[224] A worthy aspiration, to be sure. But the difficulty with this mutuality model, as stated in the report's summary, is that these ostensibly reciprocal obligations have little to do with each other. On the one hand, the Commission has stated two obligations on the part of immigrants that are legal obligations—to obey laws and to pay taxes—punishable by the harsh sanctions of deportation and prosecution. But the obligation stated for citizens is purely aspirational and obviously not the sort of thing that could be enforced in any way. In the final report, this point is reiterated in the suggestion that "there is a federal role in promoting and funding English language acquisition and other academic programs for both immigrant children and adults."[225] Indeed, the Commission even suggests that new legal immigrants receive a "welcoming statement," that state governments be encouraged to establish information clearinghouses in major immigrant-receiving communities with "modest [federal] incentive grants," and that the federal government facilitate the development of "public/private partnerships to orient and assist [legal] immigrants in adapting to life in the United States."[226] Nevertheless, what this structure implies is a system whereby the "obligations" of immigrants are enforced vigorously through harsh laws with solid funding, whereas the obligations of citizens and the government are much vaguer, less likely to be funded during hard economic times, and more likely to be criticized as "welfare" or "entitlements."[227]

222. The mutuality component of Americanization holds some promise of counteracting recent anti-immigrant attitudes. *See* Juan F. Perea, *Am I an American or Not?, in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 63 (Noah M.J. Pickus ed., 1998). "Existing Americans therefore are truly in need of Americanization." *Id.* at 65.

223. 1997 COMMISSION REPORT, *supra* note 44, at 28.

224. *Id.*

225. *Id.* at 36.

226. *Id.* at 35–36.

227. The Commission, somewhat strangely in my view, takes the opportunity to assert that "the United States admits immigrants as individuals" and that "as long as the United States continues to emphasize the rights of individuals over those of groups, we need not fear that the diversity brought by immigration will lead to ethnic division or disunity." *Id.* at 28–29. This is a remarkably broad and attenuated philosophical statement to include in a report on immigration policy. It also seems to contradict many aspects of current policy including, for example, refugee admissions, temporary protected status, etc.

IV.
CONCLUSION

Thomas Jefferson presented, in at least one way, a mirror image of the views of Professor Schuck. Jefferson was not nearly so strong a supporter of open immigration admission policies as he was an opponent of excessive government action against aliens. In the mid-1780s, for example, he worried about how emigrants from absolute monarchies might not be able to understand or accept the specific principles of the new U.S. government: "They will bring with them the principles of the governments they leave . . . or, if able to throw them off, it will be in exchange for an unbounded licentiousness, passing, as is usual, from one extreme to another."[228] In this light, his eloquent concerns about the excesses of the Alien and Sedition Acts resonate even more strongly today, for he was not motivated by support for immigrants so much as he was by a deep concern for the essential nature of our constitutional democracy.[229] This is a basic history lesson to which one wishes the 1996 Congress and the recent proponents of immigration crack-downs had paid greater heed.

The ideals of open immigration and maintenance of a rule of law are not necessarily contradictory. Like *Citizens, Strangers, and In-Betweens*, the *Executive Summary* to the *1997 Commission Report* was especially concerned about the problem of illegal migration. It is significant, however, that the Commission clearly stated that it "continues to believe that unlawful immigration can be curtailed consistent with our traditions, civil rights, and civil liberties," and that, as a nation committed to the rule of law, "our immigration policies must conform to the highest standards of integrity and efficiency in the enforcement of the law . . . [and] we must also respect due process."[230]

It is surely possible to maintain a relatively open admissions policy with a credible enforcement and control mechanism which avoids public cynicism and backlash without sacrificing the ideals of individual rights, proportionality, non-retroactivity, and judicial review. To do so, however, we must maintain those ideals in the forefront of our public discourse. They cannot be marginalized or relegated to footnotes or retrospective hand-wringing. They may be, after all, our best protection against the arrival of the real wolf.

228. THOMAS JEFFERSON, NOTES ON VIRGINIA, Q.VIII, 1782, Memorial Edition 2:118.

229. Jefferson's support for immigration increased substantially over the course of the next decade, however, due both to his general sympathy for the French Revolution and the support for the Democratic Party by recent immigrants in the 1800 elections. *See, e.g.*, Thomas Jefferson, Notes on Virginia, Q.VIII, *in* THOMAS JEFFERSON: WRITINGS 211 (Merrill D. Peterson ed., 1984). *See generally,* SMITH, FREEDOM'S FETTERS, *supra* note 31.

230. 1997 COMMISSION REPORT, *supra* note 44, at 104.