Immigration and the Nation-State

The United States, Germany, and Great Britain

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constitution and of judicial review. All effective censoring of Britain’s harsh family immigration rules and asylum practice has originated from the European plane. The question of British exceptionalism is tied up with the question of European exceptionalism. Here a unique polity is in the making where sovereignty is divided and no clear distinction can be drawn between the domestic and non-domestic, ‘international’ spheres. Globalists argue that Europe’s multiple-level polity is a blueprint to be emulated elsewhere (see Soysal, 1994; also Schmitter, 1991). But the evidence for this is thin, and it is more reasonable to assume that a unique historical constellation has given rise to a unique reconfiguration of political space, in which nation-states have abandoned authority on some dimensions only to gain new strength on others (see Milward, 1992). European Union constraints are not truly external, because they are grounded in the voluntary agreements of member states. In this sense, also Britain’s sovereignty constraints are partly self-induced. Europe may well be the trick to provide Britain with what other Western states have long had: effectively divided powers, a bill of rights, and judicial review.

A Nation of Immigrants Again: The United States

In 1958, the young Senator John F. Kennedy published an inconspicuous little book, A Nation of Immigrants. It attacked the National Origins Act of 1924 that had restricted immigration to a few Northern European source countries: ‘Such an idea is at complete variance with the American traditions and principles that the qualifications of an immigrant do not depend on his country of birth, and violates the spirit expressed in the Declaration of Independence that “all men are created equal” ’ (Kennedy, 1964: 75). More than a book, A Nation of Immigrants was a programme for the reopening of America to large-scale immigration. Linking immigration to the American founding myth of an ‘asylum of all nations’ (G. Washington) or ‘nation of nations’ (W. Whitman) has been the enduring motif of this reopening, which was shared across party lines. Two decades after Kennedy’s opening salvo, when the public mood was already turning sour over illegal immigration and mass asylum-seeking, the Republican presidential candidate Ronald Reagan invoked the same liberal founding myth to defend the acceptance of anti-communist ‘freedom-fighters’: ‘Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free?’ (in Cose, 1992: 145).

However, the ‘nation of immigrants’ formula, which framed America’s reopening to mass immigration, is less self-evident and interest-transcendent than it may appear. First, as Rogers Smith (1993) correctly pointed out, there are multiple traditions in America. Next to the liberal tradition of a nation defined by an abstract political creed and immigration, there has been an illiberal tradition of ‘ascriptive Americanism’, which hypostasizes an ethnic core of protestant Anglo-Saxonism that is to be protected from external dilution. A restrictive concept of national community, anti-catholic, anti-radical, and racially nativist, had in fact undergirded the national-origin-based
immigration regime in place until 1965 (see Higham, 1955). The recovery of the 'nation of immigrants' formula therefore has to be placed into a historical context that had delegitimized racial nativism: a war that was won against a country that had carried racism to the murder-ous extreme, Nazi Germany; a new awareness for the interdependence of nations and the international obligations of a superpower, which obviated inward-looking isolationism; and, perhaps most importantly, the domestic civil-rights revolution that outlawed discriminatory racial and national origins distinctions.

Secondly, Kennedy's selective reappraisal of 'American traditions' served a concrete interest: to cover the stigma of Catholicism in this first presidential bid of a non-Protestant, and to build a Catholic-Jewish coalition against the Protestant establishment regarding immigration reform. As John Higham (1984: 6) pointed out, 'immigrants' proper are bearers of a foreign culture, who are to be distinguished from the original 'settlers' who created a new society and laid down the terms of admission for the others. Kennedy's 'nations of immigrants' was a South-Eastern European fighting term, attacking an imbalance within the existing immigration system, which favoured the British and Irish, but locked out the Italians, the Polish, and the Greeks.

However situated in a concrete historical and interest context, the 'nation of immigrants' formula built upon and radicalized the liberal-universalist streak of American nationhood. By the same token, the 'nation of immigrants' formula provides no criteria for the drawing of legitimate boundaries, without which no nation could exist, and whose reinforcement is the very task of immigration policy. Pre-1965 immigration policy could rely on such boundaries, but ones that were no longer legitimate: the boundaries of race, infamously enshrined in the Chinese Exclusion Act of 1882, which barred Chinese labourers from entering the United States and proscribed the naturalization of those Chinese who already legally resided there (see Salyer, 1995: ch. 1). The dilemma of post-1965 immigration policy has been the lack of a legitimate concept of national boundaries, from which clear criteria for entry and stay, membership and non-membership could be derived. As Peter Schuck (1985) realized, liberalism and nationalism are incompatible: the universal thrust of liberalism contradicts the concept of bounded national community. Bereft of legitimate national boundaries, the trend in US immigration law and policy in the liberal civil-rights era has been toward the empowerment of non-members: increase the number of legal immigrants (with no consideration of their national origins), include rather than exclude illegal immigrants, and provide even first-time entrants, such as asylum-seekers, with constitutional due process protection.

The 1965 Immigration Reform and its Unintended Consequences

The Hart-Celler (Immigration Reform) Act of 1965, which abolished the national-origins system of 1924, changed America like few other legislations in this century. By establishing source-country universalism in the admission of immigrants, it opened the door for the large-scale immigration from Asia and Latin America, which is dramatically transforming the texture of American society. As conservative immigration foes correctly point out, this has been a transformation by design, originating in an identifiable political decision (Auster, 1990: 10–26; Brimelow, 1995: ch. 4). But it must be stressed that the opening of America to Third-World immigration was the unintended consequence of moderate, even restrictive legislation, whose purpose was to redress an intra-European imbalance of immigrant stock, and to realign law and actual policies. Regarding the latter, by the early 1960s two-thirds of legal immigration occurred outside the national-origins quota, mostly through special legislation for persons 'displaced' by World War II and Cold War refugees 'paroled in' by the Attorney General (Reimers, 1983: 14). Moreover, American overseas commitments and wartime alliances had put cracks in the racial exclusion of Asians—Chinese exclusion was repealed in 1943, and the War Brides Act of 1945 for the first time made Asian women eligible for admission. Already before the civil-rights revolution would outlaw racial discriminations, the 1952 McCarran–Walter Act's perpetuation of national origins quotas and tacit prolongation of Asian exclusion in the 'Asia-Pacific Triangle' provision had incensed the liberal conscience, and the act was passed by Congress only over President Truman's veto.

When President Kennedy first introduced a bill to abolish the national-origins system in July 1963, intra-European discrimination was key. The old quota system's explicit purpose had been to reproduce the ethnoracial features of the American populace, allotting immigrant visas to nationals proportional to their nationality's representa-tion in the US populace in the 1920 census. This led to gross inequities of national quotas, favouring countries with sizeable
immigrant stock in 1920, and discrepancies between countries with huge backlogs and countries that did not even use up their quotas. In 1963, among the most disadvantaged countries were Greece, with a quota of only 308 and a backlog of 97,577, Italy (quota: 5,666, backlog: 122,706), Portugal (quota: 438, backlog: 46,659), and Poland (quota: 6,488, backlog: 55,429). On the other hand, Britain used only 25,000 of its 65,361 allotted visas, Ireland 5,500 of 17,756. As a result of this imbalance, almost half of the annual total number of 156,700 immigrant slots had remained unfilled in 1962. Much like the Hispanic MALDEF or National Council of La Raza today, Jewish and Italian ethnic organizations sought to reshape immigration policy in their interest. The final act of 1965 thus must be seen as a triumph of the older South-European immigrants, who were well-entrenched as the urban constituents of the Democratic Party and pursued immigration reform as a ‘politics of recognition’ to achieve equal standing in the American nation.

As incontestable as the concept of source-country universalism may appear today, it aroused strong opposition at the time. The American Coalition of Patriotic Societies defended the quota system as a true reflection of the American people: ‘The national-origins system is like a mirror held up before the American people and reflecting the proportions of their various foreign national origins.’ It took two years for the Presidential bill to be signed into law, and the final version included important modifications that were to moderate the new legislation’s impact. Most importantly, the first Presidential bill had advocated a skill-based preference system; this was in line with moving from ascription to achievement in the selection of immigrants. The final bill, however, gave first priority to family members of US citizens and residents. Only a bill that lessened the chance of ethnic change was sellable to Congress, whose legislators could then depict themselves less as revolutionaries than as ‘extended family’. Democrat Edmund Celler, the sponsor of the House bill, was blunt about the purpose of shifting from skills to family reunification: ‘There will not be... many Asians or Africans entering this country... Since the people of Africa and Asia have very few relatives here, comparatively few could immigrate from those countries because they have no family ties in the U.S.’

A second, restrictionist modification of the original bill was the introduction of a cap for Western hemisphere immigrants. Before 1965, immigration from Latin America and Canada was unrestricted; after 1965, it was limited to 120,000 per year. This was also a conces-

sion to labor, which had already pushed hard for the abolition of the Bracero guestworker programme in 1964, which was seen as undercutting domestic wages. Like all major immigration legislation in the last thirty years, the 1965 reform was a ‘package deal’, in which anti-immigrant conservatives had to be appeased—in this case, by excluding Hispanics, especially Mexicans. This most intensely debated aspect of the bill had far-reaching implications: it literally created the phenomenon of illegal immigration over the open Mexican-US land border, which would inflame the heated debate over ‘uncontrolled’ immigration two decades later.

Given these modifications, President Johnson’s understated words during the ceremonial enactment of the bill near the Statue of Liberty seem utterly justified: ‘This... is not a revolutionary bill. It does not affect the lives of millions. It will not reshape the structure of our daily lives, or really add importantly to either our wealth or our power... (Yet) it does repair a very deep and painful flaw in the fabric of American justice... The days of unlimited immigration are past. But those who come will come because of what they are—not because of the land from which they sprung’ (in Reimers, 1983: 17). The new act established an Eastern hemisphere ceiling of 170,000 new immigrant visas per year (complemented by 120,000 visas for the Western hemisphere), distributed according to a seven-category preference system prioritizing family reunification, and stipulating that from no country the total number of new immigrants was to exceed 20,000. By abolishing the Asia-Pacific Triangle provision, the legacy of racial exclusion had been swept away, and each country in the world was put on an equal footing. Testifying before House Immigration subcommittee members, Attorney General Robert Kennedy famously malpredicted the numerical impact of this measure: ‘I would say for the Asia-Pacific Triangle it [immigration] would be approximately 5,000, Mr. Chairman, after which immigration from that source would virtually disappear; 5,000 immigrants would come in the first year, but we do not expect that there would be any great influx after that’ (in Reimers, 1985: 77).

Initially, immigration patterns from Europe changed as intended. For a decade after 1965, Italy became the leading European sending nation with about 20,000 new immigrants per year (Reimers, 1983: 19). Yet by the mid-1970s the Southern European visa backlogs were depleted, and the economic reconstruction of Europe eased the pressure for new-seed immigration. By 1980, only 5 per cent of legal immigration came from Europe. Of the 570,000 legally admitted
newcomers that year, Asians (primarily Filipinos, Koreans, Vietnamese and Indians) accounted for nearly half, while migration from Latin America (mainly Mexico) made up about 40 per cent.8

What had happened? Latin Americans, the truly disadvantaged by the 1965 reform, simply shifted from open to restricted immigration, crowding the relatively small country quotas that were in no correlation with historically high Western hemisphere immigration (especially from Mexico). Asians had arrived either as resettled refugees, as did 500,000 Indo-Chinese after the American withdrawal from Vietnam and Cambodia in 1975, or as ‘third preference’ new-seed immigrants in the skills category, who then multiplied their numbers through resorting to the generous family reunification provisions. This phenomenon became known as ‘chain migration’. It accounts for the self-perpetuation of Third-World immigration once it had been kicked off, and for the relative absence of European immigration once the family backlog had been cleared. The 1965 act reserved 74 per cent of annual new immigrant visas for the reunification of families, limiting skill-based visas to 20 per cent (the remaining 6 per cent were reserved for refugees from communist countries). With 24 per cent of all immigrant visas, the largest (and oddest) preference category is the fifth preference, which allows naturalized immigrants to sponsor their (married) brothers and sisters. Congressman Peter Rodino had pushed for the fifth preference on behalf of the family-oriented Italians—accordingly, the 1965 act has been nicknamed the ‘Brothers and Sisters Act’. But by the late 1980s, the largest demand for fifth-preference admissions originated from Mexicans and Filipinos. There is evidence that Asian countries especially ‘press the illegal immigration system for all it is worth’ (Goering, 1989: 804), for instance, circumventing the crowded fifth preference by sponsoring their (non-quota) parents, who as naturalized immigrants can then petition for other offspring. Of course, the effect of the ‘immigration multiplier’ built into the family preference system is limited by country and preference category limits. As John Goering (ibid. 809) concludes, ‘there is no solid evidence that the multiplier in the first or second decade after an admission ever approaches the theoretical maximums or indeed even a small fraction of that limit.’ But this should not obscure the larger irony: a family-based immigration system that was designed to minimize the possibility of ethnic racial transformation has actually maximized such transformation, stabilizing and perpetuating America’s Third-World immigration of today.

The Problem of Illegal Immigration: The Immigration Reform and Control Act of 1986

Several observers have pointed out that, in contrast to European restrictionism after the first oil crisis, US immigration policies have remained ‘remarkably liberal and expansive’ (Schuck, 1992: 39; see also Tichonor, 1994). There is no better proof of this than the legislation that bore the word ‘control’ in its name and was to resolve the vexing problem of illegal immigration. The Immigration Reform and Control Act (IRCA) of 1986, passed after five years of intense, if not Byzantine, Congressional bickering and deal-making, legalized the status of about three million undocumented immigrants in the country, while failing to stop the inflow of new illegal immigrants. Why have the United States been incapable of controlling illegal immigration? First, like all immigration policies in the USA, policies dealing with illegal immigration are ‘client politics’ (Freeman, 1995a), in which the organized potential recipients of ‘concentrated benefits’ prevail over the non-organized carriers of ‘diffuse costs’. The one restrictionist group, the Federation of Americans for Immigration Reform (FAIR), which was close to the pulse of a public disgruntled about uncontrolled large-scale immigration, had virtually no impact on legislation. On the contrary, Hispanics concerned about the discriminatory impact of employer sanctions and Western growers interested in cheap immigrant labour managed to transform initially restrictive into eventually expansive legislation. Secondly, the range of restrictive immigration policy was severely limited by the civil-rights imperative of non-discrimination. As Alan Simpson, for twenty years the Republican leader of immigration reform in Congress, put it, ‘any reference to immigration reform or control turns out, unfortunately, to be a code word for ethnic discrimination.’9 Because Hispanics (especially Mexicans) have formed the majority of illegal immigrants in the USA, any policy directed against illegal immigration had to appear as ‘anti-Hispanic’.10 To avoid even the slightest connotation of ethnic discrimination, IRCA was softened by an elaborate set of ‘anti-discrimination’ provisions that effectively neutralized it as an instrument of immigration control.

When new immigration reached record levels in the 1980s,11 the parallel surge of illegal immigration came to symbolize a general ‘loss of control’ over the nation’s borders. Even the liberal Select Commission on Immigration and Refugee Policy, which laid the
groundwork for the immigration reforms of the 1980s, presumed that immigration policy was ‘out of control’, targeting the containment of illegal immigration as a first step toward ‘regain[ing] control over U.S. immigration policy’ (Select Commission, 1981). This perspective, stipulating a sequence of loss and recovery, is misleading. There never had been a Golden Age of control. The problem of illegal immigration is a byproduct of the attempt to build a uniform national system of immigration control, which no longer exempted Western hemisphere immigration. When the Eastern hemisphere preference system and country limits were first extended to Western hemisphere countries in 1976, Mexico suddenly faced a severe backlog, with 60,000 applications for 20,000 available visas. Since an elaborate immigration network, with established pathways, settlement, and seasonal employment patterns, already existed, the nationalization and standardization of US immigration policy simply transformed a legal (or at least tolerated) into an illegal immigrant stream.

Immigration control at America’s southern land border has historically been lax, with intermittent shows of toughness, such as Operation Wetback in 1954, in which over a million Mexicans without residence or work permits were rounded up and deported back to Mexico. Mexican sojourners were an indispensable part of agriculture in the American South-West. The notorious expression of this was the so-called Texas Proviso in the 1952 Immigration and Nationality Act. Wanted by Texan growers, it stated that employing illegals did not constitute the criminal act of ‘harbouring’—accordingly, it was legal to employ illegal immigrants, while the latter were still subject to deportation. Only, such deportations were rarely implemented, and the INS Border Patrol would ‘dry out’ illegal ‘wetbacks’ by escorting them back to the Mexican border, having them step to the Mexican side, and bringing them back as legal guestworkers, or even ‘parole’ illegal immigrants directly to prospective employers (Calavita, 1994: 59). ‘The whole process had the appearance more of a sad joke than of serious deterrence policy’, complains Vernon Briggs (1992: 153). Labour unions were the first to find fault with cheap foreign labour. In 1964, they moved Congress to abandon the Bracero guestworker programme with Mexico, which had been originally established in the early 1940s to deal with war-conditioned labour shortages. In conjunction with the 1965 Act, the end of Bracero legalized established immigration flows and networks between Mexico and the American South-West. After 1964, apprehension figures—widely used as indicators for the stock and flow of illegal immigrants—rose steeply, until they passed the one million mark in 1977. This is when the problem of illegal immigration was first framed as a national crisis, and President Carter established the Select Commission on Immigration and Refugee Policy to seek out political remedies. But it is important to see that the problem of illegal immigration is not due to a ‘loss’ of control, but is the product of the opposite attempt to establish first-time control over the southern land border. On this premise, this border may still be inherently difficult to control for a liberal state. As Nathan Glazer (1988: 17) described the uniqueness of the US–Mexico border, ‘nowhere else in the world is there a border between the developed world and the developing world’.

However, domestic politics, not geography, ultimately prevented the United States from controlling illegal immigration. Driven into action by rising numbers of apprehended illegal immigrants and, above all, the pressure of organized labour, Democrat Peter Rodino, chair of the House Judiciary’s subcommittee on immigration, introduced two employer sanctions bills in the early 1970s. While both bills passed the House easily, they died in the Senate—Judiciary Committee boss James Eastland, likewise a Democrat but a cotton planter beholden to Southern agricultural interests, refused to hold hearings on the issue. The lesson was to attach an amnesty provision to the employer sanctions bill, in order to garner support from both liberal immigrant rights advocates and business advocates interested in cheap immigrant labour. President Carter asked Congress in August 1977 to pass a combined sanctions/amnesty bill, but committee leaders Peter Rodino and Edward Kennedy were unenthusiastic to move on legislation that did not bear their signatures. Most importantly, immigration reform proved divisive for the Democratic Party, which became caught in the crossfire between Hispanics and organized labour (Fuchs, 1990). So it was best to remove immigration reform from partisan politics. The vehicle for this was the Select Commission on Immigration and Refugee Policy, established by President Carter in October 1978, which was to study the issue thoroughly and create consensus as a prerequisite of bipartisan reform.

The Select Commission, which included members of Cabinet and Congress and representatives of societal groups active on immigration (the Catholic Church, Labor, Hispanics, and Asian-Americans), epitomizes the liberal and expansive cloth out of which immigration reform in the 1980s was made. This is especially clear if one compares the 1978 Select Commission with the 1907 Dillingham Commission, which had laid the groundwork for the restrictive National Origins
Act of 1924 (Fuchs, 1983). Whereas all the members of the Dillingham Commission were descendants of English and Scottish settlers, half of the membership of the Select Commission had ancestors whom the Dillingham Commission had tried to keep out—Italians, Poles, East European Jews. Most importantly, the Dillingham Commission’s obsession with the ethnic and racial features of immigrants was absent in 1978. Father Theodore Hesburgh, a noted civil-rights advocate and chair of the Select Commission, insisted from the start on a ‘policy as free of racial or ethnic bias as we can make it’ (ibid. 63). On the contrary, ethnic diversity, repudiated in 1907, was celebrated in 1978 within the ‘nations of immigrants’ formula: ‘It is a truism to say that the United States is a nation of immigrants . . . New immigrants benefit the United States and reaffirm its deepest values’ (Select Commission, 1981). At the same time, the Select Commission’s final report conceded that the United States could not ‘become a land of unlimited immigration’, and that immigration policy must be guided by ‘the basic national interests of the people of the United States’ (ibid.). Targeting the problem of illegal immigration, the Select Commission gave out the marching order of immigration reform in the 1980s: ‘We recommend closing the back door to undocumented/illegal immigration, [and] opening the front door a little more to accommodate legal migration in the interests of this country’ (ibid.).

With regard to controlling illegal immigration, this proposal included employer sanctions (backed by an effective system to determine employment eligibility), legalization of the undocumented immigrant population, and rejection of any guestworker scheme, with the negative European experience firmly on the Commission’s minds.

The Select Commission’s uncertainty of denominating ‘undocumented/illegal’ immigration reveals a larger ambivalence about immigration control. Illegal aliens were no longer treated as either lawbreakers or growers’ fodder, as in the 1950s, but as discriminated-against and vulnerable people living in the ‘shadows of American life’, deserving equal membership status (Tichnor, 1994: 341). The Select Commission’s exterior ‘control’ rhetoric was thus offset by its redemptive anti-discrimination agenda—the legalization provision, for instance, was partial ‘acknowledgment that . . . our society has participated in the creation of the problem [of illegal immigration]’ (Select Commission, 1981). The same ambivalence is inherent in the notion of national interest, which appears in the title of the Select Commission’s final report, U.S. Immigration Policy and the National Interest. ‘National interest’ conveys that immigration policy should be an expression of sovereignty, and flow from the shared interests of the members of the American nation. However, the national interest so defined has had only a marginal impact on the actual immigration policies that were crafted on the basis of the Select Commission’s recommendations. This is because the national interest, which is inherently status-quo oriented and exclusive, contradicted the reigning view of the United States as a nation of immigrants, which is forever unfinished and inclusive. Tellingly, the one organization that purported to represent the national interest in immigration policy, FAIR, has been restrictionist, and its agenda of ‘maintaining the integrity of our sovereignty’ failed to have an imprint on any legislation in this period. On the opposite side, the component members and profitiers of the nation of immigrants, denounced by FAIR as ‘special interests’, shaped legislation, undermining the control intention that had brought the Select Commission into existence.

The Select Commission’s dual recommendation of imposing employer sanctions and granting an amnesty for illegal immigrants became the key element of a concerted congressional bill named after its sponsors, Senator Alan Simpson (R-Wyoming) and Congressman Roman Mazzeoli (D-Kentucky). Simpson and Mazzeoli were veterans of the Select Commission, and as delegates from low-immigration states sufficiently aloof from pressure groups to produce legislation in the national interest. Crafted in the spirit of bipartisan consensus, the Simpson–Mazzoli bill was on paper an ‘ingenious trade-off between liberals and conservatives’ (Zolberg, 1990: 323), sanctions appealing to organized labour and restrictionists, the amnesty appealing to Hispanics and civil-rights advocates. However, what seemed like a classic package-deal initially left out the agricultural employers, the major users of illegal immigrant workers; and it posed the risk that a group opposing a particular aspect of the bill might try to block the bill altogether. Accordingly, the rocky career of the Simpson–Mazzoli bill, from its first incarnation in 1982 to its passing as IRCA in 1986, may be reconstructed as two separate battles: a first battle over employer sanctions, which were opposed by an odd coalition of Hispanics and civil-rights groups, on the one hand, and the Chamber of Commerce and agricultural growers, on the other; and a second battle over the insertion of a guestworker programme to accommodate the interests of agricultural employers. To secure the passage of the bill, employer sanctions had to be softened to the point of being merely ‘symbolic’ (Calavita, 1994), while the guestworker programme had to be transformed into a second amnesty for temporary workers. What had started as an attempt
to control immigration in the national interest turned out as an effort to further expand immigration, in order to accommodate the group interests that were instrumental for passing any legislation.

In retrospect, the most significant aspect of the battle over employer sanctions is the rise of Hispanics as a political force capable of blocking federal legislation detrimental to their perceived interest. Twice, in 1982 and 1983, the Hispanic lobby succeeded in stalling the House version of the Simpson–Mazzoli bill, after the latter had won comfortable majorities in the Senate. As the Democratic House majority leader Tip O’Neill defended his refusal to hold a vote on the second Simpson–Mazzoli bill in October 1983, “it has to be acceptable to the Hispanic Caucus”. Why wasn’t the bill acceptable to Hispanics? Briefly, Hispanics feared that sanctions on the employers of illegal immigrants would lead to discriminatory hiring practices, in which Hispanic-looking job applicants would be rejected upfront or be subjected to humiliating special identity checks. Interestingly, Hispanic leaders carefully framed their opposition to employer sanctions as being in the interest of ‘Hispanic citizens’ or legal residents, in order to avoid the appearance of disloyalty and pan-national fracturing.

The Hispanics were joined by civil-rights advocates, who feared that the introduction of an employment verification system (dubbed a ‘national ID card’) would be detrimental to civil liberties in general, and lead to a ‘culture of suspicion’. A leading conservative columnist branded the introduction of an ‘ID card’ as ‘this generation’s largest step toward totalitarianism’, concluding that ‘it is better to tolerate the illegal movement of aliens and even criminals than to tolerate the constant surveillance of the free’. In his refusal to have a vote on the second Simpson–Mazzoli bill, Democrat Tip O’Neill struck a similar chord: ‘Hitler did this to the Jews, you know. He made them wear a dog tag’ (in Cose, 1992: 167). Against such wide opposition, which fed upon the traditional American distrust of the state, the plan of a standardized employment verification scheme had to be dropped, inflicting a first severe crack on the control dimension of IRCA.

Eventually, the Hispanic opposition to Simpson–Mazzoli came to be viewed as obstructionist, and its influence waned. A member of the congressional Hispanic Caucus admitted that “we . . . failed to come up with a realistic alternative that could pass”. At the same time, agricultural employers switched their strategy from obstruction to compromise-seeking, thus opening the battle over the adding of a guestworker programme to Simpson–Mazzoli. In a remarkably well-orchestrated campaign, western growers secured the support of liberal

Democratic Congressman Leon Panetta to add an amendment to the House version of Simpson–Mazzoli, which would have authorized the attorney general to admit about 250,000 foreign crop-pickers per year on three-day’s notice, outside the established H–2 temporary visa programme. In June 1984, the House finally passed this version of the bill, with the slenderest of margins (216 to 211). But this was a hollow victory, because intense Hispanic lobbying had moved all three Democratic contenders for the 1984 Presidential elections to come out strongly against Simpson–Mazzoli. Without backing by the Democratic leadership, the final negotiations in the House-Senate conference collapsed, and Simpson–Mazzoli was dead once again.

The mutual charges as to who was responsible for this disappointing outcome, blowing to pieces three years of intense negotiation, show the complexity of an immigration reform that had to reconcile incompatible interests. Because the Panetta amendment was dropped in conference in favour of an expanded H–2 programme, the American Farm Bureau Federation switched from support to opposition; also AFL-CIO opposed the conference compromise, but for the opposite reason that the concessions to agricultural employers were going too far. Conservative Republicans were unhappy about strong civil rights protections for legal aliens, pushed through by House Democrat Barney Frank, and accepted by Simpson only with ‘the gravest reservations’. The final blow came from the Reagan Administration, which disliked the federal reimbursement of states for amnesty-related costs. Epitomizing the divided views about Simpson–Mazzoli, a distinguished immigration historian bemoaned the loss of a ‘more liberal measure than any we’ve had in 90 years’, while a no less distinguished fellow historian found the bill ‘identical with the restrictive legislation of the 1920s, when we were trying to keep certain groups out of the country’.

In April 1985, the indefatigable Simpson tried again, perhaps aware that his imprint on history would depend on successful immigration reform. But the third version of his immigration bill was different. Thriving on a growing public groundswell in favour of clamping down on illegal immigration, which was now increasingly related to crime and drug trafficking, Simpson for the first time laid hands on the amnesty programme, suggesting making it contingent upon the prior improvement of immigration controls. Decoupling the amnesty from employer sanctions was an unconcealed warning to the liberal opponents of Simpson–Mazzoli that continued obstruction might lead to the abandonment of the entire amnesty provision, for which there was
no public support anyway. This moved uncompromising Hispanic groups like MALDEF to opt out altogether, its leader Antonia Hernandez preferring to ‘go down in flames’ than make agreements she presumed disastrous for her constituents (in Cos, 1992: 179). But other immigrant advocacy groups like the National Immigration Forum, the National Council of La Raza, or the League of United Latin American Citizens (LULAC) opted for improving the bill that was now deemed unavoidable. Similarly, Peter Rodino, the grey ‘Mr Immigration’ eminence in the House, abandoned his previous reserve and jumped into the fray, aware that any further delay could only lead to more restrictionist legislation.

In this final round of the Simpson–Mazzoli saga, the attempt of agricultural growers to install a guestworker programme was again key. In addition to an already granted transitional programme that allowed growers to hire illegal immigrants for three more years, Senator Pete Wilson (R–California) pushed for a guestworker amendment to the Senate bill, which closely resembled the Panetta amendment a year earlier. This would allow for 350,000 workers to harvest perishable fruits and vegetables for up to nine months a year, their movement restricted to a particular region, and 20 per cent of their wages held back until their departure from the United States. In line with the Select Commission’s recommendations, Simpson rejected such a guestworker scheme. ‘The greed of the growers... is insatiable,’ Simpson lashed out in obvious irritation about the growers’ unrelenting campaign, ‘there is no way they can be satisfied. Their entire function in life is that when the figs are ready, the figs should be harvested and they need four thousand human beings to do that’ (in Fuchs, 1990: 123). Naturally, organized labour and Rodino disliked the Wilson amendment, dubbed a ‘de facto slave labor programme’ (in Calavita, 1994: 67). But since the time for a liberal immigration bill was seemingly running out, a compromise had to be found.

The compromise arrived in the form of the Schumer proposal, worked out in eight months of intense negotiation between liberal Congressman Charles Schumer, a Democrat from New York, and representatives of organized labour and the growers. A ‘remarkable feat of congressional horse-trading’ (Zolberg, 1990: 330), the Schumer proposal essentially transformed the guestworker programme into a second amnesty: it provided permanent resident status, and eventually citizenship, for illegal aliens who worked in American agriculture for at least 90 days in the year preceding May 1986; the same possibility was granted to ‘replenishment’ workers in the future. Lawrence Fuchs (1990: 124) called the Schumer proposal revolutionary: ‘For the first time in American history... outsiders brought in to do difficult, temporary jobs would be given the full Constitutional protections and many of the privileges of insiders.’ The proposal broke the last deadlock over Simpson–Mazzoli. Aware that a more liberal law could not be had at the time, even five of the eleven members of the Hispanic Caucus voted in favour of this last version of Simpson–Mazzoli (which by now had become ‘Simpson–Rodino’). Only the restrictionists around FAIR, in whose hope of gaining control over the nation’s borders, legislation on illegal immigration had originally been launched, were dismayed: ‘We wanted a Cadillac, we were promised a Chevy, and we got a wreck’ (in Fuchs, 1990: 124).

Signed into law in early November 1986, the Immigration Reform and Control Act was certainly a ‘left-centre bill’, in which the ‘control’ aspect was barely visible. Putting to an end the Texas proviso, IRCA imposed a sanction scheme on employers who knowingly hired illegal immigrants. But in a concession to Hispanics and employers, sanctions would be abolished if the General Accounting Office were to find discrimination or undue burdens on employers in the future. Most importantly, IRCA included a far-reaching anti-discrimination provision that added the concept of ‘alienage’ to Title VII of the Civil Rights Act, prohibiting employment discrimination on the basis of citizenship. This amounted to the ‘only expansion of civil rights protection in the whole Reagan era’. On the amnesty side, a sequence from temporary resident status to citizenship was provided for illegal immigrants who had resided in the United States continuously since before 1 January 1982. Reflecting the Schumer proposal, the same possibility of citizenship was granted to the participants of a seven-year special agricultural workers (SAW) programme. Finally, IRCA authorized $1 billion annually for four years beginning in 1988 to reimburse state governments for costs of public assistance, health, and educational services for newly legalized immigrants (Bean and Fix, 1992: 44), which amounted to federal support for local immigrant advocacy networks in regions of high immigration density.

No wonder that a representative of La Raza called IRCA ‘probably the best immigration legislation possible under current political conditions’ (in Fuchs, 1990: 126)—perhaps under any conditions, if one considers that the purpose of this legislation had been control, not expansion. Of its dual legalization-sanctions agenda, only the legalization component of IRCA worked as intended. Nearly 1.8 million illegal immigrants applied for legal status under the general legalization
programme, and 1.3 million under the Special Agricultural Worker (SAW) programme. But IRCA failed to reduce the stock and flow of illegal immigrants. After a temporary drop of apprehension figures in 1987 and 1988, attributable less to the effectiveness of sanctions than to a ‘wait and see’ response among potential immigrants, by 1989 the illegal flow was back to pre-IRCA levels. In 1993, the size of the illegal population in the United States was estimated to be as high as ten years before—between three and four million persons (Papademetriou, 1993: 325).24

IRCA’s failure to control illegal immigration is attributable to multiple factors. To begin with, IRCA does not even touch the problem of visa overstayers, which accounts for over 60 per cent of the undocumented population (Martin, 1995: 3). But most importantly, the ‘odd coalition’ pressure of Hispanics and employers has yielded a toothless sanctions scheme. From early on, a ‘good faith’ clause had been inserted into the Simpson–Mazzoli bill, which released employers from any obligation to check the authenticity of shown employees’ documents: a document check conducted in ‘good faith’ constituted an ‘affirmative defense’ that the respective employer had not committed the ‘knowing hire’ misdemeanor (see Calavita, 1994: 71). In effect, employers were immune from punishment if they filled out and filed away routine I–9 forms that attested the document check. Because the introduction of a national ID card had been blocked, some twenty-nine documents, including easily faked US birth certificates (so-called ‘breeders’), served to satisfy the control requirement. The positive ‘affirmative defense’ incentive was complemented by a negative ‘anti-discrimination’ incentive: demanding a specific ID constituted an ‘unfair immigration-related employment practice’, so that employers were better off accepting the document passively offered by the prospective employee. As David Martin (1995: 6 f.) put it, IRCA’s sanctions scheme ‘tells employers that it is more important to avoid even an appearance of discrimination than it is to wind up employing unauthorized workers’. Evidently the civil rights imperative of non-discrimination has stood in the way of effective immigration control.

‘Avoiding Choices by Expanding the Pie’: The Legal Immigration Act of 1990

After the (however incomplete) closing of the illegal back door, legislative attention turned to the opening of the legal front door, as suggested by the Select Commission in 1981. The original impulse behind the reform of legal immigration was twofold: first, to strengthen the component of skills within an immigration system that prioritized family-based immigration, which was increasingly linked to a deterioration of the educational and occupational quality of new immigrants; and, secondly, to redress an imbalance in the national origins of post-1965 immigration, which was skewed toward a few Third-World countries, with European immigration having virtually ceased. Both impulses taken together amounted to a subterraneous, never openly articulated attack on the dominance of Hispanics and Asians in US immigration. Epitomizing the ironically inverted positions in this conflict, advocates of European immigration would rally behind the Third-World notion of ‘diversity’, whereas Hispanic and Asian leaders would brand as ‘racist’ attacks on the existing system of family reunification, which had once been installed to minimize the possibility of ethnoric racial change. Invoking civil-rights language, Senator Edward Kennedy deplored the ‘discrimination . . . against Irish and other European immigrants’ who constituted the “old seed” source of our heritage’ (in Cose, 1992: 198). On the other side, a House member speaking on behalf of Japanese-Americans suspected that the impulse against family reunification ‘really is a bias against the Pacific Rim and Latin America’.25

Eventually, the system of family reunification proved too deeply entrenched to allow restrictions in favour of skill-based immigration, and the initial attempt of reducing one component at the cost of the other gave way to a ‘strategy of conflict-suppressing expansion’ (Schuck, 1992: 88). As a close observer-participant of the 1990 reform characterized the outcome, ‘we avoided choices by expanding the pie’.26 Hurriedly passed during the last hours of the 101st Congress, and almost unnoticed by the public, the Legal Immigration Act of 1990 would increase legal immigration to the United States by almost 40 per cent, and basically reaffirm the priority of family-based immigration as established in 1965.

Even more than IRCA, in which the perceived need to control illegal immigration was at least notionally tied to a group-transcending national interest, the Legal Immigration Act must be seen as the outcome of pure client politics, with very little public involvement. The national-interest dimension was reduced to attempts by Senator Alan Simpson to introduce, for the first time since 1924, an absolute cap on legal immigration, and to his overall objective to tie the admission of immigrants closer to labour-market needs, at the cost of family
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reunification—both of which were eventually defeated. From a national-interest perspective, the system of family reunification appeared as ‘nepotism’, the selection of immigrants according to random family ties, rather than ‘on the basis of the talents and skills needed in this country’. However, even if backed by academic evidence that post-1970 immigrants were characterized by decreased skill levels (Borjas, 1990), a national-interest line on legal immigration was difficult to take. It abstracted from the way immigration had historically occurred and found sediment in the collective experience of Americans. ‘Isn’t that the way people have always come here, that they have left people behind; that they have come and tried to put down roots and become economically viable and then bring their families?’ retorted Bruce Morrison, the House immigration subcommittee leader, to FAIR’s ‘nepotism’ charge. ‘Certainly, members of my family did that.’ The nepotism charge also did not resonate well with the celebration of ‘family values’ during the Republican Bush administration. In their defence of family reunification, ethnic groups shrewdly exploited their discursive advantage: ‘By making the family the focus of our system, the Nation lives up to its highest ideals while providing a strong network that helps immigrants adjust to their new lives in the United States’.

A joint Senate bill, introduced by Alan Simpson and Edward Kennedy in early 1988, set the baseline for the final Legal Immigration Act, both positively and negatively. On the positive side, the Simpson–Kennedy bill was built upon a compromise between Simpson’s agenda of increasing skill-based immigration in the national interest, and Kennedy’s agenda of promoting source-country ‘diversity’, especially in the interest of his Irish constituency. But on the negative side, this compromise was achieved at the cost of reducing family-based immigration, which had to arouse the opposition of Hispanics and Asians. The Simpson–Kennedy bill contained three main provisions: first, it limited the Fifth Preference to unmarried siblings of US citizens, which would cut the annual immigrant intake in this category from almost 65,000 to just 22,000; second, it would increase from 55,000 to 120,000 the number of skill-based immigrants per year, and introduce a new category of ‘independent worker’, selected on a points system that honoured age, education, occupation, and English language competency; and third, it introduced an absolute ceiling of 590,000 legal immigrants per year, which included the previously exempted immediate family members of naturalized US citizens. Each of these provisions had to be an affront to ethnic groups with a stake in family reunification. Slashing the Fifth Preference disadvantaged the Asians, who by 1987 received 56 per cent of all visas in this category (Cose, 1992: 200). Honouring English language competency in the ‘independent worker’ category was a code word for preferring Western European (especially Irish) immigrants, thus indirectly reintroducing the misguided national-origins discrimination. And an absolute cap on legal immigration meant that the immediate family categories would squeeze out the distant family categories, which were heavily used by Hispanics and Asians alike. A leader of the American Jewish Congress criticized the Simpson–Kennedy bill: ‘The bill allows for the admission of skilled newcomers, many of whom are Europeans, at the expense of fifth preference, many of whom are Asian–Hispanic. Applying a preference of skilled immigrants over family reunification could produce unnecessary ethnic strife’. Predictably, the House, more beholden to ethnic constituency pressure than the Senate, refused to consider the bill.

After ethnic group campaigning was on, even the Senate moved into rough water. The second Simpson–Kennedy bill, introduced in July 1989, passed with only three important modifications: first, an amendment proposed by Senators Orrin Hatch (R-Utah) and Dennis DeConcini (D-Arizona) established a floor of 216,000 visas allocated for non-immediate family, which was the level under current law; if the demand for immediate family visas exceeded the total number of 480,000 family visas, the cap would become ‘piercable’—and be no cap at all. Second, at the insistence of Senator Paul Simon (who was known to be friendly with Asian constituencies) the Fifth Preference restrictions were withdrawn. And thirdly, after emotional debate in the Judicial Committee, the ‘English fluency’ criterion in the independent worker category had to be dropped. These were three important victories for the non-European ethnic groups with a stake in the maintenance of the existing family reunification system, and who also took a symbolic interest in an immigration policy based on strict non-discrimination.

But there were omissions in the Senate bill that would have to be addressed head-on in the House, such as the business demand for more temporary visas for skilled workers and professionals (which was opposed by labour unions), or a clearer separation between skill-based and ‘diversity’ immigration. In the House, Bruce Morrison, a young and ambitious Democrat from Connecticut who had taken Mazzoli’s post of immigration subcommittee chair in 1989, opted for an expansive logrolling strategy of satisfying both business and the
and children of permanent residents from numerical restrictions. Similarly, a leader of the American Jewish Congress stipulated that new-seed immigration had to be ‘in addition to, rather than in competition with, family-based immigration’, which in fact describes the essence of the final deal.

Tellingly entitled ‘Family United and Employment Opportunity Immigration Act’, the House bill, sponsored by Bruce Morrison, had little in common with the original Simpson–Kennedy bill, including vastly increased numbers and generous family reunification provisions. In order to get both labour and business aboard, the bill held to a restrictive line on temporary employment visas, but further increased the number of permanent employment visas. Placating the European ethnic groups, a regionally concentrated ‘diversity’ category was now clearly separated from the universal ‘skills’ category. To clear backlogs on family reunification, the Second Preference category was doubled in size (from 70,000 to 140,000 annual visas), three-quarters of which were to be distributed on a first-come first-serve basis, thus waiving the 20,000 country ceiling—this was especially good for Mexican-Americans. Human-rights groups, whose voice was liberal Congressman Barney Frank, achieved a provision that would prohibit the executive from excluding would-be entrants because of their ideological or sexual orientations, which was the dismal legacy of the McCarthy-period McCarran–Walter Act of 1952. A sarcastic observer characterized the ensuing hotchpotch as a ‘Christmas Tree, a tree that everybody puts their own ornaments on’.

Signed into law by President Bush in November 1990, the Immigration Act of 1990 amounted to the most extensive reform of US immigration law since 1924 (Lawson and Grin, 1992: 255). By increasing the intake of legal immigrants to 700,000 during the next three years, and 675,000 thereafter, which was about 40 per cent above the present level, the 1990 Act was indeed, as a New York Times editorial hailed it, ‘a monument . . . to a nation of immigrants’. These large numbers reflected the nature of a positive-sum logroll between business and ethnic groups. In retrospect, it is astonishing to see that the philosophically restrictive Immigration Reform and Control Act (IRCA) was passed during a period of economic expansion and job growth, while the philosophically expansive Immigration Act of 1990 came right at the onset of a serious recession. Obviously, US immigration policy, which is contingent upon a bewildering variety of conflicting client interests, follows its own, inert momentum that is different from the exigencies of the business cycle. ‘Nobody liked the
1990 Act’, says a perplexed US immigration expert in retrospect. While the 1990 Act may be understood as the culmination of a nation rebuilding itself as a ‘nation of immigrants’ after 1965, the obscurity and clientelistic mode of its making cast doubt on its longevity. As one of the 1990 Act’s best chroniclers put it, ‘The public was not exactly clamoring for such a bill. Nor, outside the community of experts, was America even much aware that such legislation was taking shape’ (Cose, 1992: 208). Peter Schuck (1992: 91) is therefore right to conclude that the 1990 Act may simply reflect ‘a particular logroll at a particular point in time’, and be no indication for a ‘broad consensus in favor of an expansionist future’.

Transformation of Immigration Law

Not just the political, but also the legal process has been remarkably expansive towards aliens. Legal expansiveness rests upon a fundamental ‘transformation of immigration law’ (Schuck, 1984) since the 1960s. Classical immigration law, which was formulated in the restrictionist 1880s, fused the principles of consent-based obligation, strong sovereignty, and restrictive national community. Consent-based obligation modelled the relationship between government and alien along the private-law relationship between a landowner and a trespasser, in which the former owed no obligation to the latter except those explicitly consented to. The principle of strong sovereignty was formulated by the Supreme Court in 1892: ‘It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe’ (quoted in Schuck, 1984: 6). Applied to the institutions of government, strong sovereignty meant the unfettered, ‘plenary power’ of the political branches of government over the admission, expulsion, and naturalization of aliens. Finally, strong sovereignty was exerted on behalf of a restrictive national community, in which the main dividing-line was race. The benchmark of classical immigration law is the Chinese Exclusion Case of 1889, in which the Supreme Court refused to overturn legislation that had barred Chinese labourers from entry to the United States. As the Court infamously reasoned, ‘[f] Congress considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, ... its determination is conclusive upon the judiciary’ (ibid. 14).

Since the 1960s, following a larger ‘communitarian’ (Schuck, 1984) or ‘participation’ turn of public law, immigration law has moved away from the classical model. Postclassical immigration law abandons the individualistic principle of consent-based obligation, and ‘grants the alien rights according to an ascending scale as her identification with society deepens’. In the new communitarian model, individuals are seen as invested with inalienable human rights and social ties that must be respected and protected by government. No longer allowed to get tough with aliens as illicit trespassers, government ‘owes legal duties to all individuals who manage to reach America’s shores, even to strangers whom it has never undertaken, and has no wish, to protect’ (ibid. 4). This has entailed a cautious but steadily increasing assertiveness of courts, which refused to defer to the plenary power of Congress and executive branch in immigration affairs, and invoked constitutional and statutory norms to protect the rights of aliens. Motivated by the anti-discriminatory impetus of the civil-rights era, courts have extended constitutional protections beyond the national community, to include legal resident aliens, undocumented immigrants, and even first-time entrants, such as asylum-seekers. However, this extension did not go without strains. As Peter Schuck (1984: 90) has pointed out, the legal empowerment of aliens has undermined the very possibility of national self-definition, which necessarily implies the exclusion of non-members: ‘If the American community’s power to define its common purposes and obligations is no greater than the power of strangers to cross our borders undetected and to acquire interests here, our capacity to pursue liberal values—to decide as individuals and as a society what we wish to be—may be critically impaired.’

The major resource for the legal empowerment of aliens has been a constitution that grants broad equal protection and due process rights to ‘persons’, not just to ‘citizens’ (see Bickel, 1975: ch. 2). Here one must distinguish between three classes of aliens who have successively been brought under constitutional protection: legal permanent residents, illegal immigrants, and first-time entrants. Legal permanent residents (LPRs) now enjoy rights and benefits that are essentially equal to those of US citizens. This has not always been so, as under classical immigration law the states could invoke the legal ‘special public interest’ doctrine to prohibit aliens from owning or acquiring land, working on public laws projects, or receiving welfare benefits. In
subject is the legislative power of Congress more complete,' the Supreme Court argued in 1909. Plenary power over the admission of aliens was reaffirmed as late as 1977 in *Fiallo v. Bell*, where the Supreme Court held that 'policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government'.

However, since the onset of mass asylum-seeking in the early 1980s lower courts have openly challenged the plenary-power doctrine and tried to bring first-time entrants also under the umbrella of the constitution. Discussing the lower court challenge to plenary power, Peter Schuck (1984: 70) appropriately characterizes the 'emergent law of asylum' as an exemplar of communitarian immigration law, '[enabling] any alien to acquire rights against the government to which the latter has not expressly consented'.

The new phenomenon of mass asylum-seeking from Cuba and Haiti caused a serious 'due process crisis' (Martin, 1983: 168) regarding excludable aliens. Facing the arrival of 250,000 Marielito Cubans and of 15,000 Haitian boat people in 1980 alone, the Reagan government ended the previous generous policy of 'paroling' asylum-seekers into the country, and went over to an extremely restrictive mass detention and expulsion policy. This policy was perhaps commanded by the imperative of containing illegal immigration, but it entailed extraordinary hardship for those subjected to it, such as prolonged incarceration under harsh and oppressive conditions, the summary denial of asylum claims, and erratic and discriminatory treatment by the INS. As Peter Schuck (1984: 68) remarked, the denial of elementary due process rights to the innocent victims of economic depriva-

David Martin (1983: 171) has castigated as 'procedural exuberance' the inclination of lower courts to apply constitutional due process and equal protection rules 'to anyone in the world who presents himself at our borders'. The dilemma is clear: continuing to treat excludables as non-persons, as stipulated by the old Knauff-Mezei doctrine, violates the liberal and communitarian values of postclassical immigration law.
law; but granting the constitutional status of ‘person’ to excludables would extend constitutional protection to literally everyone in the world, and stand in the way of effective immigration control.

Scrutinizing the lower-court challenge to plenary power, one can detect at least three patterns. First, there were variable, often contradictory, lines of court reasoning. These variations partially depended on the national origins of the plaintiffs: regarding Haitians, who were automatically detained and categorized as ‘economic’ refugees ineligible for asylum (while most Cubans were generously paroled into the country), some courts would point at national origin and racial discrimination; regarding detained Mariel Cubans, an alternative line of reasoning was to consider detention not as an immigration measure, but as ‘punishment’ that was subject to constitutional due process control. Secondly, contrary to the impression given by David Jacobson (1996: ch. 5), courts were disinclined to resort to international law as a protection for asylum-seekers; the major thrust has been to bring the latter under the roof of the constitution. Thirdly, the application of constitutional norms to excludable asylum-seekers has remained a lower court phenomenon; the Supreme Court has refused to deliver an equivalent to Plyler v. Doe for excludable aliens.56

Regarding the second pattern, which is relevant for my argument of the primacy of domestic over international human-rights norms, consider the following detention case. In Fernandez v. Wilkinson (1980), a Cuban, who had arrived as part of the Mariel Boat lift in spring 1980 and was deemed non-admissible because of a criminal history, claimed that his prolonged detention was tantamount to cruel and unusual punishment prohibited by the 8th Amendment, and a violation of the due process clause of the 5th Amendment. The district court of Kansas concluded that the plaintiff’s status of excludable alien prohibited recourse to the constitution, thus reaffirming Knauff–Mezei: ‘We have declared that indeterminate detention of petitioner in a maximum security prison pending unforeseeable deportation constitutes arbitrary detention. Due to the unique legal status of excluded aliens in this country, it is an evil from which our Constitution and statutory laws afford no protection’ (quoted in Hassan, 1983: 71). However, the court decided that arbitrary detention was a violation of customary international law, ordering the government to release the Cuban on these grounds within ninety days. Celebrated by international human-rights advocates (Martineau, 1983; Hassan, 1983), this was the only time that a US court based a detention or asylum decision on international law. But, as a legal commentator pointed out (Hahn, 1982: 964 f.), this was also a questionable decision. As the Supreme Court ruled in Paquete Habana (1900), international law is the law of the land only interstitially, ‘in the absence of any treaty or other public act of . . . government in relation to the matter’. Accordingly, the validity of the respective detention depended on whether or not it was undertaken without presidential approval—which was never considered by the court.

Without commenting on the district court’s reasoning, the Tenth Circuit Court of Appeals, in Rodriguez-Fernandez v. Wilkinson (1981), upheld the claimant’s release from detention, but on starkly different grounds. The appeals court argued that indeterminate detention in a federal prison, which resulted from Cuba’s refusal to take the plaintiff back, was no longer part of the process of exclusion under immigration law; rather, it amounted to punishment, for which constitutional protection under the 5th and 8th Amendments applies. Interestingly, the court based its ruling on the sub-constitutional ground that the INS lacked statutory authority for indefinite detention. But, in Motomura’s terms (1990), the court used ‘phantom constitutional norms’ favourable to aliens in its statute interpretation—‘serious constitutional questions [would be] involved if the statute were construed differently’, argued the court (quoted in Hassan, 1983: 75). Overall, the thrust of Rodriguez-Fernandez was to redefine detention as punishment, and thus to bring the respective would-be entrant under the roof of the constitution; the role of international law was diminished from that of a ‘controlling’ to a ‘definitional’ device (Martineau, 1983: 104), as one (among several) guidelines for the definition of what process was due.

Toward Source-Country Universalism in Asylum Policy

Until the late 1980s, US asylum and refugee policy had remained a bastion of state sovereignty within an immigration regime where strong sovereignty had long been in retreat. In summarily granting refugee status to individuals fleeing communist regimes while denying asylum claims of individuals fleeing dictatorial yet ‘friendly’ regimes, asylum and refugee policy represented a curious anomaly within an immigration regime that had abandoned national discriminations in favour of source-country universalism. The trajectory of asylum and refugee policy was thus to a large degree a catching-up with the non-discriminatory principles of immigration law and policy. Rescuing
asylum and refugee policy from foreign policy tutelage, which was not completed before the end of the Cold War and the fall of communism, appeared itself as the curiously anomalous liberalization of a policy area that in Western Europe was then falling to the sway of illiberal restrictionism.

US asylum policy proper is the result of a double differentiation: first, of refugee from immigration policy; and secondly, of asylum from refugee policy. In the 1965 Immigration Act, refugee policy was still an integral part of immigration policy. The Seventh Preference category of the Act reserved 6 per cent of Eastern hemisphere immigrant visas to refugees from ‘communist-dominated countries’ or the Middle East—thus inaugurating the ideological, discriminatory bias of US refugee policy after World War II (see Loescher and Scanlan, 1986: 73). In addition, the Attorney General, acting on behalf of the President, had discretionary ‘parole’ power to admit refugees outside the normal immigration process—a power first used by Eisenhower to ‘parole in’ 40,000 Hungarian refugees after the Soviet crackdown in 1956. Only the Refugee Act of 1980 clearly separated refugee from immigration policy. It first established the regular legal status of refugee and—consonant with the principles of an immigrant nation—the subsequent expectation of refugees to acquire citizenship, along with generous resettlement benefits to ease the transition. In incorporating the 1951 UN refugee definition and non-refoulement obligation, the Act’s purpose was to overcome the ideological bias of US refugee policy, and to achieve more Congressional control over the executive’s erratic parole authority. Finally, in a more subterranean yet momentous change for asylum-seekers, the Refugee Act levelled Knauff–Mezey’s sharp distinction between ‘excludable’ aliens at the borders, with no statutory and constitutional rights, and ‘deportable’ aliens on US territory, endowed with constitutional due process protection (Dinh, 1994). Compliant with the non-refoulement obligation, the exclusion process was henceforth framed by extensive statutory and due process rights for aliens, including access to federal courts.

While the 1980 Refugee Act formally introduced the right to apply for political asylum on US territory or at the borders, this remained essentially ‘an afterthought’ (Meissner, 1988: 60). For the United States, refugees have traditionally been an overseas phenomenon, relevant only if it touched upon foreign policy interests or obligations. As in the Indo-Chinese refugee crisis that followed the American withdrawal from Cambodia and Vietnam in the mid-1970s, refugee policy meant the screening and selection of refugees in camps overseas, with at best loose application of UN convention refugee criteria, and their resettlement in the United States. Such refugee policy was not antithetical to, but a direct outgrowth of state sovereignty, because it reflected enforced, proactive state action toward non-nationals to which the United States, as one of the world’s two superpowers after World War II, felt special obligations and responsibilities.

Mass asylum-seeking, and with it the differentiation of asylum from refugee policy, first became an issue with the Mariel Boat Lift, a few weeks after the passing of the Refugee Act in March 1980. As Doris Meissner (1988: 61) put it, ‘asylum, the sleeper of the new legislation, emerged as the dragon lady, center stage’. In an obvious attempt to embarrass the US government, Castro allowed some 125,000 Cubans to sail freely, on rigged-up rafts and boats, to the shores of Florida, among them a good portion of criminals and mentally disturbed. While met with considerable ambivalence, most Marielitos were allowed to enter without individual screening for refugee status, privileged by the Cuban Adjustment Act of 1966 that allowed Cubans to apply for permanent resident status after a short period on US territory. No such privileged reception was granted to a parallel flotilla of 15,000 Haitian refugees who arrived in Florida at about the same time, but whose departure from the notoriously ruthless yet ‘friendly’ Duvalier regime led the government to label them ‘illegal immigrants’ without legitimate asylum claims. This opened up the debate about a discriminatory ‘double standard’ in US asylum policy, which operated on the simple principle of ‘Cuba, yes. Haiti, no.’

The double standard was further aggravated by the general denial of refugee status to new land-based arrivals from civil-war torn Central America (especially El Salvador), whom the government likewise labelled ‘illegal immigrants’ subject to deportation (see Romig, 1985; Barnett, 1985). In fact, the linkage between asylum-seeking and illegal immigration cannot be dismissed wholesale. The vast majority of asylum applications are not made at the borders and ports of entry, but while already on US territory. This is because applying for asylum is a no-cost game for illegal entrants to avoid deportation. Federal courts have furthered this rational strategy by insisting that the INS must inform detained illegal aliens about their right to apply for asylum. In turn, generous asylum-granting had to have bad precedence effect for historically high illegal immigration from the Western hemisphere. Finally, the Reagan government held ‘friendly’ relationships with right-wing military regimes in Central America, and subsequently denied regime-compromising and destabilizing asylum claims from
the region’s migrants, because it feared to be overwhelmed by refugees in case of Marxist guerilla takeovers. As Reagan outlined, ‘the result [of Marxist dictatorships coming to power in Central America] could be a tidal wave of refugees—and this time they’ll be feet people, not boat people—swarming into our country seeking a safe haven from Communist repression to our south’ (quoted in Romig, 1985: 316).

Strictly speaking, the anomaly of US asylum policy was not the generally restrictive response to mass asylum-seeking at the country’s land and sea borders, which was in line with the practice of other Western states, and intricately linked to the parallel fight against illegal immigration. Instead, it was the preferential treatment for Cubans and other refugees from communist regimes that was anomalous. In rejecting pleas to grant ‘extended voluntary departure’ (temporary safe haven) status to illegal Salvadorians in the US, a government official could credibly point at the bad precedence effect of such a measure for ‘all other migrants from poor, violent societies to our south’. But why had this status been granted to 5,000 Poles during martial law? This imbalance created a double dynamic of asylum advocates trying to lift up the general asylum practice to the generosity displayed to refugees from communism, and of a government cautiously but steadily abandoning its preferential treatment for some categories of asylum-seekers. Already the Marielitos were not unequivocally welcome, and one of the uglier asylum battles of the early 1980s was to detain and deport thousands of them whose criminal or medical records did not make them eligible for entry in the first place, or whose ‘parole’ status had been forfeited by crimes committed while in the United States. Curiously, a Cuban advocate wondered aloud whether it was ‘just’ if Cuban hijackers were no longer welcomed as heroes but sent back to Havana, complaining that ‘today’s Cubans must file their requests for asylum with the rest of the world’. In fact, the Marielitos’ privileged transition from temporary parole (‘Cuban-Haitian entrant’) status to permanent residence, by means of the Cuban Adjustment Act, which so blatantly left out the Haitians, was forced by a federal court rule upon a government that would have preferred to settle jointly the legal status of both groups within the Simpson-Mazzoli bill.

Throughout the 1980s, hard-nosed government measures of mass detention, deportation, and high-sea interception were undercut by increasingly activist courts which no longer deferred to the traditional ‘plenary power’ of Congress and the President over immigration, and brought to bear the communitarian impetus of immigration law on the new field of asylum. In this respect, the decade is marked by a string of legal victories for asylum-seekers. Next to limiting the detention and deportation power of the executive, courts have eased the burden of proof for asylum applicants, for instance, in no longer using false documentation or witness as automatic grounds for dismissal of a case (see Anker and Blum, 1989). More importantly still, in INS v. Cardoza-Fonseca (1987), the Supreme Court ruled that the Reagan Administration’s demanding ‘clear probability’ of persecution standards for deciding asylum claims had to be replaced by the looser ‘reasonable possibility’ of persecution standards, pointing out that a one-in-ten chance of persecution would qualify as a legitimate asylum claim (Porter, 1992: 234 f.). Finally, there has been a tendency toward broadening the grounds on which individuals can raise asylum-claims. For instance, in Bolanos-Hernandez v. INS (1984), a court stipulated that ‘political neutrality’ also constituted a ‘political opinion’ subject to persecution. A ‘gender-conscious’ judiciary has even been willing to grant asylum to homosexuals who claim to be persecuted for their sexual orientation.

The court-driven liberalization of asylum culminated in new asylum rules given out by the Justice Department in 1990. They replaced the uneven, politically driven ‘interim rules’ that had guided the administrative asylum process since 1980. In addition, a corps of professional asylum officers trained in international relations and human-rights law was established, with the mandate to make politically neutral asylum decisions, unimpaired by State Department prerogatives. According to the new rules, work permits and the help of lawyers were to be granted routinely to asylum-seekers. Most importantly, the new rules gave asylum-seekers the benefit of the doubt. Claimants no longer needed to prove that they were individually singled out for persecution; it was enough to show ‘a pattern or practice of persecuting the groups of persons similarly situated’—a refugee definition considerably looser than the UN convention refugee definition. Moreover, aliens now qualified for asylum on the basis of their own statements, without objective corroboration, if the testimony was ‘credible in light of general conditions’ in the home country (to be ascertained by means of a newly established documentation centre). In David Martin’s (1988) terms, this new policy moved from ‘deterrence’ to ‘fair adjudication’, and as such it stood out in the Western world.

The double standard was officially put to rest in a subsequent court settlement, in which the government agreed to stop detaining and deporting illegal aliens from El Salvador and Guatemala, granting new
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asylum hearings for all 150,000 applicants denied since 1980 and for 350,000 illegal aliens who had never applied previously. The settlement averted a trial of the government’s ‘discriminatory’ denial of asylum to Salvadorans and Guatemalans, who claimed violation of their constitutional rights to free speech, equal protection, and due process. The government now explicitly obliged itself to rule out foreign policy, border control, and the applicant’s country of origin as criteria of asylum determination. This was a major victory for the ‘sanctuary movement’ of church leaders, social workers, and human-rights lawyers, who had filed the suit in May 1985. This movement, which included not just 200 churches and synagogues but entire cities like Los Angeles and Sacramento declaring themselves ‘sanctuaries’ for Central American refugees, epitomizes the normative cloth out of which US asylum liberalization was made: not abstract human-rights principles hovering above nation-states, but—as a church leader put it—‘the deepest values of our United States traditions of being a place of refuge, a place to where persecuted people can come.”

Closing the Golden Door? Proposition 187 and After

Since 1965, US immigration policy has followed a path of ‘relentless liberalization’ (Freeman, 1996: 1). The 1980 Refugee Act applied the principle of source-country universalism to refugee and asylum policy; the notionally restrictionist Immigration Reform and Control Act of 1986 turned 3 million illegal into legal immigrants; and the 1990 Immigration Act increased legal-quota immigration by one-third. An expansive political process under the sway of client politics was undergirded by the communitarian turn in immigration law, which inflicted cracks on traditional state sovereignty (‘plebiscite power’) and amounted to the legal empowerment of aliens. In a counterpoint to this liberalization, which spurred the biggest wave of mass immigration since the turn of the century, American public opinion turned increasingly restrictionist. According to annually held Gallup polls, the proportion of Americans who opted for ‘decreasing’ the current immigration levels has grown steadily, from 33 percent in 1965 to 42 percent in 1977, 49 percent in 1986, and 65 percent in 1993. A Newsweek poll of August 1993 found a majority of 59 percent of the belief that immigration had been a good thing in the past, but only a minority of 29 percent who thought it was still a good thing today. No wonder, when provided with the vote, the public came out strongly against the expansive immigration policies of the elites.

In November 1994, Californian voters overwhelmingly passed Proposition 187, dubbed as the ‘Save Our State’ (SOS) initiative, which would bar illegal aliens from most state-provided services, including non-emergency health care and school education. This was nothing less than a political earthquake. Transmitted by the most conservative Congress in half a century, with both houses falling to Republican control in the same November 1994 elections, the after-shock was immediately felt in Washington. A sweeping overhaul not only of illegal, but also of legal immigration seemed to be in the making. Two years later, the earthquake has been reduced to a ripple, unable to overturn the ‘incremental expansionism’ (Freeman, 1996: 5) that had characterized US immigration policy since the mid-1960s. The planned restriction of legal immigration was shelved, perhaps indefinitely. Until it was signed into law as the Immigration Control and Financial Responsibility Act of 1996, an initially drastic proposal to combat illegal immigration was watered down significantly. Once again, client politics came in the way of ‘put[ting] the interests of America first’.

This outcome is doubly astonishing, given that the popular challenge was accompanied by a formidable academic challenge to the expansionist orthodoxy. Certainly outside the realm of ‘respectable’ academic discourse but with tremendous public impact, the Republican-leaning financial journalist Peter Brimelow (1995: p. xvi) dared question the changing ‘racial and ethnic balance’ due to Third-World immigration, which would turn the white majority into a near-minority by the year 2050. Michael Lind (1995) sought to reclaim a restrictionist stance toward immigration from a liberal perspective, advocating ‘zero-net immigration’ (p. 321 f.) as in the interest of American workers and the black underclass. Nathan Glazer (1995) summarized the joint liberal-conservative anti-immigration chorus, giving five reasons why the United States in the 1990s differed from the United States in the 1920s (the end of the previous wave of mass immigration): first, in a more densely populated country there was no demographic need for a further population increase; secondly, regionally concentrated immigration raised environmental concerns; thirdly, immigration became decoupled from the business cycle, whose lulls had dampened immigration in the past; fourthly, the United States was now a mature welfare state, whose benefits were contingent upon limiting their claimants; and fifthly, multicultural identity politics...
overcharged the assimilatory force of American nationhood. "These changes", Glazer cautiously concludes, "do nothing to support an argument for more immigration" (p. 55). The new scepticism of intellectuals was bolstered by economist George Borjas's disturbing finding that immigrant households were more likely to be in the welfare system than native households, and that the case for immigration had to be made on political rather than economic grounds. Even the popular argument that immigrants displace native workers is no longer routinely rejected (as in Muller, 1993: ch. 5). Sociologist Roger Waldinger, no immigrant foe he, argued in prominent place that low-skilled blacks do suffer from immigration, because immigrant groups create their own job niches and networks that exclude blacks, and because employers prefer immigrants over blacks as more docile and productive workers.

It is no accident that the popular anti-immigrant earthquake had its epicentre in California. Not only does this state, initially rural and settled by white farmers' flight from the 'dust-bowl' misery of the 1930s Mid-West, lack the 'nation of immigrants' insignia of the East Coast cities, with the Statue of Liberty and the like. More importantly, the problem of illegal immigration, the root cause of America's immigration debate, is more ardently felt in California than elsewhere: almost half of the estimated national total of four million illegal immigrants resides here. The Urban Institute calculated that they cost the state almost $2 billion per year in education, emergency medical services, and incarceration. Against this, the $732 million in state revenues from sales, property, and income taxes on illegal aliens appear paltry (Schuck, 1995: 88). California epitomizes three problems of contemporary immigration to the United States. First, this immigration is extremely regionally concentrated, with three-quarters of immigrants ending up in just six states (40 per cent of them in California). Secondly, disproportionate costs are incurred by some state governments and municipalities, while the main benefits in terms of federal taxes and social security payments are reaped by the federal government. 'The smaller the jurisdiction, the larger the burden', concluded the California Senate Office of Research (1993: 6). Sixty per cent of immigrants' taxes land in federal coffers, while counties receive just 3 per cent. Accordingly, a 1992 Los Angeles County study showed that despite a total tax income of $4.3 billion from (legal and illegal) immigrants, the county still suffered a net loss of $808 million in public services (ibid.). Eric Rothman and Thomas Espenshade (1992: 410) characterized the federal-local imbalance as a result of 'bumping rights', in which higher levels of government deflect costs to the next lower one: 'Because local governments have nowhere else to turn, they end up paying most of the costs of immigration.' Moreover, because the costs of federal immigration are not fully internalized, 'the immigration door is open wider than it would otherwise be' (ibid.). In response, since 1994 a bipartisan movement of state governors has sued the federal government for carrying the costs of its expansionist policies. Thirdly, and related to this, in the wake of Proposition 187 the economic focus of the US immigration debate has shifted from the labour market to the negative fiscal implications. As Governor Pete Wilson maliciously calculated, the $1.8 billion that California spent each year on educating the 355,000 children of its illegal immigrants could be used for hiring 51,000 new teachers, building 2,340 new classrooms, or installing 1 million new computers in the state's battered and under-equipped schools. While the draconian core of Proposition 187 was rejected even by many Republicans, a bipartisan consensus emerged that immigrants, illegal or legal, should be excluded from most welfare state services, such as Aid for Families with Dependent Children (AFDC) or Medicaid. The one novelty of post-1994 restrictionism is to use the field of immigrant integration, so far one of 'benign neglect' in the United States, for purposes of 'exclusion' (Fix and Zimmermann, 1995: 36).

It was clear upfront that Proposition 187, which openly defied the Supreme Court rule in Plyler v. Doe, would be blocked by the courts. Within hours after the polls had closed, a flurry of court-suits were filed, and instant restraining orders blocked the controversial education provision. In November 1995, the US District Court of Los Angeles found the measure in breach of the Constitution, and in violation of the federal prerogative to control immigration. However, supported even by one-third of Latino and the majority of Asian and black voters, Proposition 187 was essentially a 'symbolic message' (Schuck 1995: 92) to the political élites who had so recklessly evaded realities and responsibilities for years. And if Congress picked up the ball at the national level—this was the more-than-symbolic reasoning of the initiative leaders—the Supreme Court might be led to a reconsideration of Plyler v. Doe and eventually uphold the restrictionist state law.

Congress picked up the ball indeed, without delay. The federal Commission on Immigration Reform, originally established to review the impact of the 1990 Immigration Act, immediately proposed drastic changes of existing immigration law and policy. The full weight of
the restrictionist challenge is indicated in the fact that the Commission was headed by Barbara Jordan, the former black Congresswoman from Texas with impeccable liberal credentials, and spiked with some of the very same liberal pro-immigrant politicians and academics who had been responsible for the expansionist immigration policies of the 1980s. In its March 1995 report, the Commission recommended cutting legal immigration by one-third. This included the scrapping of most extended family categories, including the old Fifth Preference prioritizing the married brothers and sisters of naturalized citizens, which had already been under serious attack in 1990. In addition, and supported by the labour-friendly forces in the Clinton administration, it should become more difficult and costly for employers to hire foreign professionals. In contrast to Brimelow (1995) and Lind (1995), the Commission did not touch the ‘nation of immigrants’ myth: “The U.S. has been and should continue to be a nation of immigrants.” But this proposal went even further than Proposition 187 and California’s Governor Pete Wilson, who had targeted only illegal immigration. Regarding illegal immigration, the Commission had advocated already in late 1994 a national employment verification system, which would compile the names and social security numbers of all citizens and legal aliens authorized to work in the United States, and make it mandatory for employers to call it up before hiring new workers. This stopped short of introducing a national ID card, which continues to be anathema in the United States. But it became opposed, predictably, by a plethora of ethnic, civil-rights, and business organizations as being just that: a national ID card in disguise.

The Commission’s recommendations became incorporated in similar House and Senate bills, introduced by Lamar Smith, a Republican Congressman from Texas, and Senator Alan Simpson, the Republican immigration veteran from Wyoming. Both bills centred around three measures: cutting legal immigration by slashing the non-nuclear family categories and reducing skilled immigration; combating illegal immigration by screening the workplace more tightly and fortifying the borders; and, in a windfall from the parallel Congressional effort to reform the welfare system, making even legal aliens ineligible for most public services. Hardly was the ink dry, when the machine of client politics was set in motion. An unusually broad ‘Left–Right Coalition on Immigration’ included not just the usually odd immigration bedfellows of employers and ethnic and civil-rights groups, but also the Home School Network, a Christian fundamentalist group rallying against the ‘anti-family’ measures to curtail legal immigration;

Americans for Tax Reform, who disliked—along with Microsoft, Intel, and the National Association of Manufacturers—having employers pay a heavy tax on each foreign worker they sponsored; and the National Rifle Association, upset by the employment verification system—“If you’re going to register people, why not guns?” Richard Day, the chief counsel to the Senate Judiciary Subcommittee, characterized this unusual line-up as ‘Washington groups’ against ‘the American people’, who had asked for ‘some breathing space’ from immigration. Such is the logic of immigration policy as client politics.

The first success of the client machine was to split the omnibus bill into two. The client machine was helped in this by divisions within the Republican Party. A large section of free-market and family-value Republicans (such as Jack Kemp, William Bennett, and Dick Armey) favoured legal immigration. In addition, Republicans from California, where the problem of illegal immigration was most pressing, feared that shifts over legal immigration would improperly delay the eagerly awaited crackdown on illegal immigration. In March 1996, the Senate Judiciary Committee, with the parallel House committee following suit, decided to postpone legislation on legal immigration, and to concentrate on illegal immigration first. The Big One had suddenly shrunk to a rather smallish immigration earthquake. Only a few months earlier, Republican Lamar Smith had boasted that ‘the question is no longer whether legal immigration should be reformed, but how it should be reformed’. Now he lay flattened by the client machine. ‘Congress has listened to lobbyists more than public opinion,’ wrote an angry immigration foe.

After cracking the omnibus bill, the effort of the pro-immigration lobby concentrated on smoothing out some drastic features of the remaining bill on illegal immigration. One target was the employment verification system, denounced by a libertarian critic as ‘dialing “1-800 Big Brother”’. An amendment by Senator Edward Kennedy softened the proposed verification system from being nationwide and mandatorily in place within eight years to a variety of voluntary pilot programmes in high-immigration states, to be reviewed by Congress after three years. This meant, without new legislation, no nationwide employment verification system. This was an important step back from the recommendation of the Commission on Immigration Reform, which had called for a mandatory national verification system ‘the linchpin’ of combating illegal immigration. In addition, an amendment by Senator Orrin Hatch, the pro-immigration Republican
from Utah, eliminated a hefty increase of fines against employers who knowingly hired illegal aliens—this was a victory for small business owners.94

When signed into law by President Clinton in early October 1996, the ‘Maginot line against illegal immigration’ (D. Papademetriou)95 looked more like a Swiss cheese, with big holes eaten into it by America’s clients of immigration policy. The drastic Gallegly amendment in the House (named after its sponsor, California Republican Elton Gallegly), which would allow states to bar the children of illegal immigrants from public schools and thus turn into national law California’s Proposition 187, was dropped from the final bill, also because of a safe Presidential veto. A watered-down employment verification system is unlikely to fix the biggest deficit of illegal immigration control, ineffective workplace screening and employer sanctions. The control impetus in the new law thus boils down to stricter border enforcement, doubling the number of border patrol agents to 10,000 by the year 2000, requiring the INS to build a 14-mile-long, 10-foot high, triple steel fence south of San Diego, and imposing stiff penalties on the flourishing business of smuggling aliens into the United States. This only reinforces existing policy. As in its various border operations ‘Gatekeeper’ or ‘Hold the Line’, the Democratic Clinton administration had cleverly pre-empted Republicans from occupying the immigration control discourse during the 1996 Presidential election campaign.

The one novelty of the 1996 Immigration Control and Financial Responsibility Act is to adjust unabated mass immigration to a welfare state under siege. Already a new welfare law, passed three months earlier, had made most legal immigrants ineligible for federally funded, means-tested welfare benefits, such as Supplemental Security Income (SSI) and food stamps.96 The new immigration law added to this the concept of ‘deeming’, which requires the sponsors of family immigrants to have an income 125 per cent above the poverty line, and holding the sponsor legally responsible for supporting the immigrant in the case of neediness. This could significantly diminish the size of legal immigration in the future. However, a much more drastic proposal to deport legal immigrants who had become ‘public charges’ was dropped from the final bill. The Golden Door has certainly narrowed a bit, but the attempt to have it slammed shut has been averted.

This chapter described America’s reopening to large-scale immigration after World War II, in the spirit of the civil rights revolution. The focus was on why the United States, in contrast to Europe’s excluding new immigration after the first oil crisis, continued expansive open-door policies, which manifested themselves in the double legislative reforms on illegal and legal immigration in 1986 and 1990. I adduced two factors to explain this outcome: first, the civil-rights imperative of non-discrimination seized the immigration field, which prohibited effective controls of illegal immigration and (necessarily) Third-World targeted cuts of legal immigration. Secondly, immigration policy maintained low visibility throughout the 1980s, which helped a strange coalition of ethnic groups, agricultural producers, and free marketeers to shape legislation—a classic case of small but well-organized interests prevailing over the large but diffuse interests of the public. Even in asylum policy, the thrust has been liberalizing rather than restrictive, driven by the principle of source-country universalism and aggressive courts invoking constitutional norms to challenge harsh detention and expulsion measures of the federal government. The slim successes of the current movement for restricting legal and illegal immigration suggest that America will not stop being a nation of immigrants any time soon.