Tulsa Journal of Comparative and International Law

Volume 15 | Issue 2 Article 2

3-1-2008

Rule of Law in Immigration Law, The

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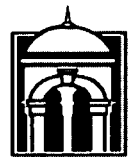

THE RULE OF LAW IN IMMIGRATION LAW

Hiroshi Motomura[*]

It is a great honor to be asked to give this lecture in this august setting, the Sharp Chapel here at the University of Tulsa. This is a fitting venue for addressing the themes of law and justice, especially in the context of my topic for this evening: The Rule of Law in Immigration Law.

There are two ideas that I hope will link my remarks to Professor Hager's life work, and to the Hager Distinguished Lecture and its emphasis on law and justice. The first idea is that immigration law is in many ways the core issue of the twentieth century in America. It is the issue that literally defines who "we" are as a people. Though immigration has traditionally been considered an issue in the border states, or in traditional immigrant communities such as New York or Los Angeles or Miami, right now the border is everywhere. It's in our homes; it's in our restaurants; it's at our construction sites, and in our communities in all sorts of profound ways. And if you think about American history, it becomes plain that it is the history of immigration to this country. This is part of what it means to be a nation of immigrants.

Why is the idea of the "rule of law" so important in immigration law? We often hear that America is a nation of immigrants, but we also hear that America is a nation of laws and a nation where the rule of law matters. How do those two ideas fit together—the idea of a nation of immigrants and the idea of a nation of laws? I hope to suggest answers to these questions this evening.

But first let me say something more general about what I try to do in my teaching and writing. My students often ask me about my work outside the classroom. They ask, "What are you writing about? Why does scholarship matter? How does it relate to teaching? And perhaps most fundamentally, why do you care about teaching and writing?"

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[*] Professor of Law, UCLA School of Law. I would like to thank Interim Dean Janet Levit, Symposium Editor Kimberly Hanlon, and my long-time friend, Professor and former Dean Robert Butkin, for their flattering invitation and gracious hospitality.

My answer, in its most basic terms, is that the law is about ideas. The work we do in teaching is not that different from the work we do in writing about the law and justice. More than anything, I want to offer ways of understanding current debates not only to my students, but also to other teachers and scholars, to policymakers, and to the public in general. I want to suggest frameworks for constructive disagreement. Ideas have a robust power to clarify, and thus to advance the process and substance of decision-making in our society. Moreover, the law is uniquely positioned to perform this function, for the law is one of the most important facets of American public life. Law is a mirror of our values. What we do in the law governing immigration speaks volumes about who we are as a nation, not just as a nation that respects the rule of law, but also as a nation that has at its core a deep and fundamental sense of justice.

The law as a mirror of values in immigration law has become even more important lately, with the temperature of the immigration debate having become so elevated in recent years. This rise in intensity is occurring throughout the country, so it has become very important to better understand why we disagree with each other. It is my job—not just this evening, but in so much of my work—to offer you some thoughts on how to talk to others and say, "I disagree with you, and here's why." Much of this constructive engagement involves understanding that disagreements about immigration often come down to differing views of the rule of law in immigration law. Understanding how these disagreements can arise is often the first step toward overcoming or at least working with them. This is the spirit in which I come to you this evening.

In her generous introduction this evening, Dean Levit mentioned my own personal story. Let me read to you the opening paragraph of the book *Americans in Waiting.*[1] In a moment, I'll explain how this book is part of a two-book series. But first let me read the paragraph that not only begins the book, but also marks the start of my own thinking about immigration law.

My family came to America in 1957, when I was three years old. We lived in an apartment on Bush Street in San Francisco, a ten-minute walk from the traditional Japantown first settled by Japanese immigrants a half-century before us. The 1950s were a time when not many immigrants came to America, at least as compared to today. My family arrived long after the early waves of Asian and European immigrants around the turn of the twentieth century. We arrived before the resurgence of immigration that would start in the late 1960s and still continues, so the America of my childhood wasn't quite the nation of immigrants that preceded or followed it. Even in the rich diversity of a San Francisco childhood, kids with "foreign" names – like Ziad, Juanita, and Hiroshi – found that the early 1960s world of *Ozzie and Harriet*, *Leave It to Beaver*, and

1. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (Oxford University Press 2006).

American Bandstand prompted deep and unsettled questions about what it means to come to America, and what it means to say that America is a nation of immigrants.[2]

Some readers say the book goes downhill from there, but that's how it starts. It is a deeply personal book, and yet so much of what it tries to accomplish reflects not only my family history, but rather my sense of duty as a scholar to bring some degree of understanding to current debates.

In exploring the rule of law in immigration law, I need to start one step further back. I trust that it is very much in the spirit of the Hager Lecture to say a few words about how we think about justice in immigration. This is important as a first step in thinking about what the rule of law in immigration law might be. In *Americans in Waiting*, the introduction goes on to explain that very shortly before my family came to America, the U.S. Supreme Court decided *Brown v. Board of Education*.[3] In many ways, *Brown* has become iconic as a symbol of an American commitment to equality, or to put it perhaps more accurately, as a symbol of the American rediscovery of equality after a long and troubled history of inequality and racial segregation.

There is, of course, more than a little bit of tension here between equality and immigration. On the one hand, we speak of equality as a national value, a commitment, and an aspiration. At the same time, the entire field of immigration and citizenship assumes that it is legitimate to divide human beings into two groups: one consists of citizens, and the other group consists of noncitizens. The difference must mean something. We take the existence of that line between citizens and noncitizens as an article of faith, even though we're not always sure what that difference might mean. How, then, can we have a sense of justice in a nation committed to equality, when we start in immigration law with a premise that some people—noncitizens—aren't quite as equal as others?

Much of my purpose in writing *Americans in Waiting* has been to understand how people think and talk about this question. I think there are several different ways of thinking about justice in immigration law, so let me lay them out. These approaches to immigration law are evident if we examine the history of U.S. immigration and citizenship. I believe that these ways of thinking about justice in immigration give us a strong foundation for answering the question: what does it mean to respect the rule of law in immigration law?

As a starting point, we could say that justice in immigration is a matter of human rights. We could say that all persons are created equal and, therefore, there is some baseline of dignity and equal treatment as a consequence. That said, I believe human rights is just a beginning. The next question becomes:

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2. *Id.* at 3.

3. Brown v. Board of Education, 347 U.S. 483 (1954).

what is it about American citizenship in particular that builds upon human rights and possibly confers more rights based on immigration to these United States?

Americans in Waiting explains that the last 200 years of U.S. immigration law and policy has reflected three different ways of answering this question. In other words, if you listen to congressional debates, if you read court decisions, if you look at letters to the editor in the newspaper, you will discern three principal ways in which Americans have discussed what it means to be just and fair in immigration law. These three ways have fluctuated in relative prominence, depending on the era and the issue. As I explain each of them, I think you'll recognize language and reasoning that you've heard many times.

One is that immigration is some kind of contract. Almost no one actually talks this way, but you probably recognize the reasoning. For example, you might read in the newspaper an editorial arguing that immigrants promise not to go on welfare, or immigrants promise not to commit crimes, or Congress shouldn't retroactively change the immigration laws. These sorts of opinions reflect an attempt to achieve justice in immigration law by protecting expectations. In other words, if you lay out the rules in advance, then a failure to follow those rules is troubling.

This view of justice in immigration isn't really a vision of equality in immigration law. Rather, it's a vision of justice that is based on reliance and protection of expectations. It's not a contract in a freely negotiated sense, but I call it immigration as contract because it's the same idea that underlies a sense of fairness when we insist on the enforcement of agreements. You may hear this perspective on immigration when you hear the complaint that some noncitizen workers came to this country to work the harvest and promised to leave after six months. What are they still doing here? The complaint continues that they broke the law, with the letter of the law providing the terms of the immigration contract. This view of immigration as contract is one of three basic ways of thinking about justice in immigration.[4]

There is a second way of thinking about justice in immigration, and this is what I call immigration as affiliation. I'm sure you've heard people saying that immigrants have been in this country for a long time. They may have broken the law by being here without ever having been properly admitted. Nonetheless, they have become part of the community; they've built up ties here; they pay taxes; their kids go to school; and they have served in the military. As some might put it, they've become the kind of people who you want to live next door. In fact, they may actually live next door. This recognition of ties informs a sense of justice in immigration that competes with the core idea of immigration as

4. MOTOMURA, *supra* note 1, at 15-62.

contract—that justice depends on protecting expectations and reliance on promises.[5]

There is a third view of justice in immigration that I talk about much more in *Americans in Waiting* than I will tonight, but let me identify it now. It is immigration as transition, the idea that immigrants should be treated on the assumption that they will become citizens. This would mean treating new immigrants like citizens during the period immediately after their arrival and until they choose not to become citizens. This was a dominant way of thinking about immigration and immigrants in the nineteenth century. Today we have generally forgotten that non-citizen voting was quite common in the nineteenth century, and homesteading was open to immigrants who were not citizens. Much of the reason for this generous treatment of some immigrants was the very strong belief in the nineteenth century that these immigrants should be treated like citizens because that's what they were going to become. They were Americans in waiting.[6]

We've moved from that way of thinking about new immigrants, and about immigration as a transition to citizenship. Much of the message of *Americans in Waiting* is that this view of immigration and immigrants has faded from U.S. immigration law. That is the "lost story" to which the subtitle of the book refers. The lost story is quite complex. It is also the story of race in immigration and citizenship law, a story of both inclusion and exclusion. But I won't get into those aspects of my work this evening. My remarks will focus more on immigration as contract and immigration as affiliation, because they are the ideas that appear more prominently in current debates over immigration.

I should explain that my overall project, in two books starting with *Americans in Waiting*, is to write about lawful immigrants and then about immigrants who are here illegally, unlawfully, or undocumented, whichever word you want to use. I am now at work on the second half of the project, which has the working title, *Immigration Outside the Law*. Some have told me that I should have written first about undocumented immigration, but if you think so, then please consider the sequence to be like that in *Star Wars*, which started with episode four. The reason *Americans in Waiting* came first is that the treatment of lawful immigrants, where the line between immigrants and citizens may be hardest to discern, is the most demanding context for developing the basic concepts and vocabulary for addressing justice in immigration, and in turn, the rule of law. If we disagree fundamentally about how we treat immigrants who are in the United States lawfully, it will be even more difficult to discuss immigrants who are here outside the law, since the range of opinion about undocumented immigrants is likely to be far broader and more polarized.

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5. *Id.* at 80-114.

6. *Id.* at 115-50.

Now on to the rule of law. First, the way we think about the rule of law in immigration law is very much tied up with how we think about justice in immigration. Let me give you an example. A straightforward vision of the rule of law goes something like this: justice in immigration is given content by the immigration contract. The law is itself a contract, and noncitizens can be treated less well than citizens as long as they are given notice that this will be the situation. That notice is embodied in the immigration law itself. Noncitizens who violate immigration law can't complain if the law is enforced against them. If you take this view of justice in immigration, then it follows that the rule of law in immigration law means simply that you enforce the law.

A focus on enforcement alone becomes the natural consequence of this vision of the rule of law. It follows that it is logical to streamline the process of enforcing immigration law, for example by eliminating some of the checks and balances that often appear in our legal system. The reason to streamline enforcement is that if the immigration contract is a set of straightforward expectations that are embodied in the law, then it should be fairly clear who has broken the law by being in the United States illegally. From this perspective, complex procedures are redundant and unnecessary.

A second natural consequence of this simple version of the rule of law is to broaden the cast of characters who are authorized to enforce immigration law. According to this vision of the rule of law, there is a contract, and immigrants who have broken it must leave the United States. Put differently, immigration law is essentially self-executing. We've all heard this type of argument, and no matter if you agree or disagree, it is fair to say that this is an argument based on one vision of the rule of law. But of course, whether you find this type of rule of law argument persuasive depends entirely on your concept of justice in immigration law.

In the spirit of trying to help people understand why they disagree with each other, let me now suggest a more complex view of the rule of law, namely that immigration law is not self-executing. According to this vision of the rule of law, the content of immigration law is ambiguous. The rule of law requires the exercise of discretion in individual cases, and further requires that enforcement be tempered and counterbalanced by due process. The rule of law also means that it is important to minimize the chances of inaccurate or otherwise unfair results in individual cases. The natural consequence of this vision of the rule of law would be to narrow the group of actors who have authority to enforce immigration law. The reason, of course, is to minimize the risk of inaccurate, unfair, or inconsistent outcomes that may result from erroneous enforcement decisions by individuals or agencies that lack the appropriate expertise, or who simply are unaware of decisions by other decision-makers in similar cases. This is the complex view of the rule of law.

In short, both sides can make a rule of law argument. One side would say that if someone is in the United States illegally, the rule of law demands that they leave. The other side could counter that it isn't that straightforward. The law includes many avenues for legalization on an individual basis. Moreover, the rule of law requires a process for guarding against mistakes. This is the tension between the simple view and the complex view of the rule of law.

Now let me go back to my suggestion that one can view immigration as transition, or as contract, or as affiliation. It is illuminating to map the simple and the complex visions of the rule of law back onto these three ways of thinking about justice in immigration. The simple version of the rule of law that results in a single-minded focus on enforcement relies principally on immigration as contract, and further that the terms of that contract are embodied in federal immigration statutes that seem to distinguish sharply between lawful and unlawful presence.

The other vision of the rule of law—the view that immigration law is not self-executing but requires due process and the exercise of discretion—can be based on either of two ways of thinking about justice in immigration that I outlined earlier. If we view immigration as affiliation, justice in immigration must look beyond the fact that an unlawfully present noncitizen has broken the law that reflected the immigration contract. Instead, it becomes important to think about immigration outside the law as a matter of the ties that immigrants have in the United States even if they are undocumented. This is immigration as affiliation, according to which the real rule of law requires some fair way of recognizing these ties.

This is the affiliation-based view of the rule of law that underlies the push for legalization. A large part of the argument for legalization is that immigrants, even if they are here illegally, ought to be granted lawful status in recognition of their past, present, and future contributions to the American economy. Immigration as affiliation gives content to one vision of the rule of law in immigration law that goes far beyond enforcement alone.

Alternatively, this complex view of the rule of law can draw support from a way of viewing immigration as contract that differs from the "contract" that supports the simple enforcement-only view of the rule of law. This requires going back and asking: what are the terms of the immigration contract? Is it just what the statute says, or is it something more?

Here lies another explanation for the polarization in current debates. There are two different understandings of immigration as contract that reflect two very different views of America's past. One view is that the contract isn't a simple reflection of the law as written, but rather something more deeply rooted in American history. Historians have written about these developments in much

greater detail than I will recount here; let me just give you the high points.[7] The history that is relevant here is the emergence of patterns of labor migration from Mexico starting in the early twentieth century as a result of recruitment by U.S. employers with the support of the U.S. government.

Around the beginning of the twentieth century, agriculture came to be established in the American Southwest in the form that we now call agribusiness. Key in this regard were the introduction of irrigation and the invention of the refrigerated boxcar. Soon, growers needed armies of farmworkers to pick crops. With economic and political upheaval in Mexico spurring out-migration, a pattern became established of active recruitment of labor from Mexico by U.S. employers. Moreover, it became de facto U.S. government policy to tolerate and even welcome people coming to this country illegally when the economy needed them and to ratchet up enforcement when the workers weren't needed. This describes much of U.S. immigration policy in the Southwest in the first part of the 20th century.

How should we interpret this history? We might dismiss it as unimportant if we believe that immigration as contract is the source of justice in immigration, and that the letter of the law provides the contract terms, and illegal immigrants are breaking the contract. We might then conclude that the rule of law requires enforcement of the law. But the other way that we might interpret this history is to say that the real immigration contract has been an invitation to come to the United States outside the law. According to this view, the immigration contract consists of de facto U.S. immigration policy, which allows undocumented immigrants to come here, giving up many rights and protections in the workplace, and otherwise living a very precarious life, but with some reasonable expectation that their presence will be tolerated and their work welcomed. This, of course, is a different notion of the immigration contract, though it stays with a contract-based view of justice in immigration.

In short, there are two ways to reach the conclusion that the rule of law in immigration law is more than just enforcement, and that instead it is tempered by discretion and due process, and by the legalization of immigrants in light of their role in American society. One is based on immigration as affiliation, and the other is based on a complex view of immigration as a contract. Both are complex views of the rule of law. Both contrast with the view that regards the

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7. *See* Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, *in* MEXICAN MIGRATION TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 151 (Wayne Cornelius & Jorge Bustamante eds., 1989); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981). *See generally* MOTOMURA, *supra* note 1, at 48-49, 128-30 (discussing the impact of a need for Mexican labor in American history of immigration); T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY 1302-11 (6th ed. 2007).

statute as the immigration contract and argues that any violation of that law should lead to enforcement without delay or procedural complexities. Put differently, many of the things that fall in the categories of due process and discretion in immigration law decision-making matter to those who adopt a complex view of the rule of law because they believe either that ties in the United States ought to be recognized, or that history has created ambiguous obligations.

This struggle between competing visions of the rule of law in immigration law is a key feature of current debates about immigration law and policy. Although the rule of law idea appears often, there is very little agreement about what the rule of law in immigration law means. To put it somewhat cynically, the idea of the rule of law is very malleable and often means what the speaker wants it to mean.

Let me provide some examples to show how the rule of law in immigration law can be a very malleable rhetorical device. Here I draw on what has happened in the past twelve years in federal immigration law. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[8] was largely driven by the idea that anyone who is illegally in the United States undermines the rule of law simply by being here. Accordingly, the 1996 Act limited availability of discretionary relief.[9] It introduced a system of mandatory detention for noncitizens in removal proceedings, so that they have no opportunity to apply for release on bond while their cases are pending.[10] Of course, noncitizens in removal proceedings may be denied release on bond even if they are allowed to apply, but under the 1996 Act many noncitizens have no chance to apply at all. As a third example, the 1996 Act also severely curtailed judicial review.

The 1996 Act did much more; for example, it also made deportability grounds much more severe.[11] But key to this part of my analysis are limits on discretionary relief, mandatory detention, and limits on judicial review. These three sets of amendments to the federal immigration statutes show that the predominant view of the rule of law over the past twelve years in federal immigration law has been the simple view—that the rule of law is nothing more or less than the enforcement of immigration statutes.

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8. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

9. *See* Immigration and Nationality Act (INA) of 1952, 8 U.S.C. § 1229(b) (2006); *see generally* MOTOMURA, *supra* note 1, at 54-57, 98-99 (explaining that illegal immigrants arrested before 1996 would have had the chance to apply for discretionary relief if the government tried to deport them); ALEINIKOFF, ET AL., *supra* note 7, at 789-812.

10. *See* Immigration and Nationality Act (INA) of 1952 § 236(c), 8 U.S.C. § 1226(c) (2006); *see generally* ALEINIKOFF, ET AL., *supra* note 7, at 1116-30.

11. *See* MOTOMURA, *supra* note 1, at 55-56.

Critics of the 1996 Act generally adopt a very different view of the rule of law. They argue that a system that respects the rule of law must include three other essentials of the American legal system. One is a system of legal rules and standards that can grant case-by-case immigration relief to noncitizens if they meet certain standards, such as hardship to a U.S. citizen child, spouse, or parent.[12] Another essential feature is a system that carefully allocates decision-making so that complex decisions are made by the right people. Another essential is due process. Critics of the 1996 Act argue that discretion, decision-making, and due process are all essential to the rule of law in immigration law.

To say just a bit more about discretion, there was a time when discretion in immigration law was exercised in an arbitrary way, at the whim of a border inspector or other government official. But over a period of about fifty years in the middle of the twentieth century, legal standards emerged to rein in this authority. Today, this discretion is guided by hardship standards that applicants must meet, and by threshold eligibility requirements that applicants have certain qualifying relatives who are citizens or permanent residents of the United States. This emergence of legal rules to guide discretion was a very important phase in the evolution of U.S. immigration law. It's also worth noting that race has played a major role in this history, with some of the discretionary relief mechanisms having once been available only to Europeans and Canadians. For this reason, the emergence of legal standards governing this exercise of discretion reflected the emergence of nondiscrimination principles as well.[13]

Against this background, the 1996 Act reduced the opportunities for discretionary relief by tightening the threshold eligibility criteria and by requiring detention for many noncitizens who might be eligible for relief from removal. Is this a problem? It depends on your point of view, and in particular, on whether you believe discretionary relief is extraordinary or normal.

If the rule of law calls simply for enforcement because immigrants came in illegally and are breaking the immigration contract, then cutting back on discretion is only appropriate, because discretionary relief is extraordinary and it should remain so. But if immigration law is complex and not just a matter of enforcing the terms of the statute—either because noncitizen's ties should be recognized as a matter of immigration as affiliation, or because the de facto U.S. immigration policy of letting in and tolerating undocumented immigrants reflects the true immigration contract—then these new limits on discretionary relief may be quite troubling. It would also be quite troubling that mandatory detention

12. *See, e.g.*, Immigration and Nationality Act (INA) of 1952 § 240A(b), 8 U.S.C. § 1229(b) (2006).

13. *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (Princeton University Press 2004) (providing a historical analysis of discretionary relief as linked to race).

during removal proceedings would severely limit access to legal counsel, which the noncitizen may need to make the case for relief, not to mention the hardship imposed by the fact of detention itself, often in locations remote from family and friends.

Let me give you one other example. The 1996 Act shifted decision-making authority away from some government officials and gave it to other officials. Thus, it curtailed or eliminated judicial review in key categories of cases.[14] With these new limits on judicial review, federal judges are much less involved in deciding immigration cases than they used to be. These decisions often go no higher than the agency level and thus don't reach the courts at all. And at the agency level, the 1996 Act took decision-making authority in a significant group of cases away from immigration judges, who are Department of Justice employees and at least administratively independent of the immigration enforcement agencies that are generally part of the Department of Homeland Security. Now, a significant number of decisions are made by immigration inspectors in a process called expedited removal, which generally provides no opportunity for review in immigration court.[15]

Should we be troubled by these changes in the decision-making structure? Perhaps not, if we start with a simple view of the rule of law in immigration law that posits an immigration contract that an immigrant breaks by being in the United States illegally. From this perspective, anyone who wants access to a lawyer, asks to go to court, or wants multiple layers of review is just creating undue delay and inefficiency in a system that should operate more quickly from apprehension to removal.

If, however, we start with a more complex view of the rule of law, then the changes in the 1996 Act are disturbing indeed. This view of the rule of law is based on a view of justice in immigration that either calls for recognition of a noncitizen's ties to this country or sees the real immigration contract as the de facto policy of tolerating immigration outside the law. From this perspective, it is deeply problematic to have airport inspectors making decisions on deportability, especially when one penalty for removal in these cases is a bar on returning for five years.[16] Likewise, it is troubling that federal judges have a much more limited role in correcting errors that might be made below them at

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14. *See* Immigration and Nationality Act (INA) of 1952, § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (2006); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 469-88 (2006); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 GEO. IMMIGR. L. J. 385, 405-11 (2000). *See generally* ALEINIKOFF, ET AL., supra note 7, at 1148-90.

15. Immigration and Nationality Act (INA) of 1952, § 235(c), 8 U.S.C. § 1225(c) (2006).

16. Immigration and Nationality Act (INA) of 1952, § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006).

the agency level by immigration judges or even by front-line immigration inspectors.

This sort of quality control is also important because it produces some semblance of uniformity. Treating like cases alike is essential for public confidence in the administration and enforcement of immigration law. Of course, any such need for uniformity presupposes that some mistakes might be made and require correction. Here, too, one's view of the rule of law makes a difference. If justice in immigration simply requires the enforcement of the immigration contract, and that contract consists of a straightforward decision about a noncitizen's lawful or unlawful presence, then the need for quality control and uniformity assumes a much lower priority. A more complex view of the rule of law suggests that mistakes and inconsistency are likely without mechanisms to foster uniformity.

These examples from the 1996 Act show how the view of the rule of law that has been dominant in federal immigration law over the last twelve years has been the simple view that the rule of law is a matter of enforcement. The complex view of the rule of law—that it not only includes enforcement, but also requires a balance among enforcement, due process, discretionary relief, and the proper allocation of decision-making authority—has generally been on the defensive during this same period. This is a way of understanding how and why people disagree about the legislative changes adopted in 1996 and about many of the enforcement initiatives adopted by the executive branch in both the Clinton and Bush administrations. Today, if we consider any kind of immigration policy debate in Congress, whether it concerns guest-workers,[17] legalization of unauthorized workers[18] or students,[19] or any other immigration-related topic for that matter, the disagreement can be understood and analyzed as a matter of these conflicting visions of the rule of law in immigration law.

Now I reach this question: what does the rule of law in immigration law have to do with the topic of this Symposium, which is the role of states and cities in immigration law? I think the rule of law is strongly tied to the state and local

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17. *See, e.g.*, Agricultural Job Opportunities, Benefits, and Security Act of 2007, S. 237, 110th Cong. (1st Sess. 2007); *see generally* ALEINIKOFF, ET AL., *supra* note 7, at 459-60.

18. *See, e.g.*, ALEINIKOFF, ET AL., *supra* note 7, at 1349-53.

19. *See id.* at 1383. *See generally* Development, Relief, and Education for Alien Minors Act (DREAM) of 2005, S. 2075, 109th Cong. (2005). This bill was introduced in previous sessions of Congress, but has failed each time at various levels; *see* Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004); Andorra Bruno, Unauthorized Alien Students: Issues and "DREAM Act" Legislation 1-5 (Congressional Research Service, RL33863, 2007), http://www.ilw.com/immigdaily/news/2007,0508-crs.pdf. *See also* JEANNE BATALOVA & MICHAEL FIX, MIGRATION POLICY INSTITUTE, NEW ESTIMATES OF UNAUTHORIZED YOUTH ELIGIBLE FOR LEGAL STATUS UNDER THE DREAM ACT (2006), http://www.migrationpolicy.org/pubs/Backgrounder1_Dream_Act.pdf.

role. If we believe that the rule of law amounts to the enforcement of a clear line between the lawful and the unlawful, then we would naturally conclude that states, cities, and maybe even private actors have an important and unobjectionable role in immigration law enforcement. The idea would be that the law is self-executing, enforcement is straightforward, and the risks of error and inconsistent enforcement are minimal or nonexistent.[20]

Suppose, however, we take the view that the rule of law in immigration law is based on the rational weighing of many different sorts of circumstances that may bear on justice in immigration. These would include not only what the Immigration and Nationality Act says initially about lawful status, but also some recognition of the ties in this country through discretionary relief avenues that are sometimes in the INA and sometimes a matter of administrative discretion or de facto policy. From this perspective, it seems misguided and even foolhardy to expand an enforcement system by delegating immigration law enforcement to an expanding group of state and local officials who may lack adequate training, who may have law enforcement priorities that conflict and compete for resources with the enforcement of federal immigration law, and who may not be part of a structure that fosters uniformity and nondiscrimination in enforcement practices.[21]

Although immigration law is ultimately about individuals and families whose lives are governed by the administration and enforcement of immigration law, it is essential to recognize that achieving justice in immigration law requires the design of sound decision-making systems. I am willing to assume that the individuals who administer and enforce immigration law are well-meaning. But even if everyone involved in this process has the best intentions, any system will produce highly problematic outcomes if it asks individual government officials to make decisions for which they lack expertise, or for which there are no mechanism to correct errors and foster uniformity.

Let me close by anticipating and answering two questions. The first question: what is at stake? If the rule of law in immigration law affected only noncitizens, then we might justifiably fall back on one of my opening observations, that the entire field of immigration law begins with the idea that there is an inherent, inevitable, and justified line between citizens and noncitizens. That line might suggest that any misguided understanding of the rule of law will adversely affect only noncitizens, and that limiting injury in this

20. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

21. *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (discussing how the Constitution is violated when inherent authority is granted to local authorities to enforce federal laws).

way should diminish our degree of concern. Thus, the simple view of the rule of law that focuses only on enforcement might be more tolerable because immigration law enforcement targets only noncitizens.

The difficulty, of course, is that the real world doesn't divide neatly into citizens and non-citizens. Dean Levit mentioned in her introduction that immigration law enforcement splits up families. As she suggested, reality introduces the complication that there are over three million U.S. citizen children living in households in which one other member of the household is here unlawfully, typically their parents and perhaps their siblings.[22] This means that the choice among views of the rule of law in immigration law has profound impact on citizens as well as noncitizens.[23] Also profoundly affected are businesses in the United States, and in turn the U.S. citizen employees of American businesses that are doing what they can to stay in the United States and save American jobs by not relocating. This is an important aspect of what is at stake when we talk about the rule of law in immigration law.

Another question to address in closing is: what happens as we look ahead? This question prompts two answers. First, I believe that the problems that we regard as issues of immigration law and policy are actually much deeper and more pervasive than they seem. What has emerged in this phase of U.S. history is a serious gap between the needs of the U.S. economy and what U.S. immigration law provides. Clearly, Congress needs to address this gap. But as someone who has worked on immigration issues for some twenty years, I also believe that the real issues run even deeper. Much of immigration is a reflection of international economic development in general, particularly in the Western Hemisphere and Mexico.[24] The real immigration issues aren't even immigration issues. Rather, they concern, among other things, developments in economies of the countries that migrants leave in order to come to the United States.

There is a second part to my answer to the question about what lies ahead. We are in a moment of great urgency in our national history for the formulation of sound immigration policy that can command a national consensus. As we move ahead, we need to remember, as I've just observed, that the current policy is broken in large part because the economy and law are out of sync. But it is even more important to remember that justice in immigration requires not just a sound view of the rule of law, and not just an immigration law that reflects

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22. JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 8 (2006), http://pewhispanic.org/files/reports/61.pdf.

23. *See* Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 420-29 (2003); *see also* Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567 (1997) (review essay).

24. *See* DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 118–23 (Russell Sage Foundation 2003).

economic conditions in the United States and in the countries that send us migrants. Sound policy must also embrace the question of how we integrate immigrants into American society. That is the ultimate test for whether immigration law works or not.

In turn, the fundamental prerequisite for integration is that citizens and newcomers alike have confidence in U.S. immigration law and policy. And that confidence needs to begin with a coherent view of the rule of law in immigration law. I've tried to show this evening that competing views of the rule of law can differ profoundly. My hope as a scholar is that if we can understand how and why these differences exist, we will have a vocabulary for constructive disagreement, and in turn a framework for a national conversation.