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## Immigration Unilateralism and American Ethnonationalism

Robert L. Tsai

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# Immigration Unilateralism and American Ethnonationalism

Robert L. Tsai\*

*This essay places the Trump administration’s immigration and refugee policy in the context of a resurgent ethnonationalist movement in America as well as the constitutional politics of the past. In particular, it argues that Trumpism’s suspicion of foreigners who are Hispanic or Muslim, its move toward indefinite detention and separation of families, and its disdain for so-called “chain migration” are best understood as part of an assault on the political settlement of the 1960s. These efforts at demographic control are being pursued unilaterally, however, without sufficient evidence there is a broad and lasting desire on the part of the people to alter the fundamental values generated during that period. In order to withstand Trumpism’s challenges, we will have to better understand the Immigration and Naturalization Act’s origins as an integral component of the civil rights revolution. When we revisit this history, we learn that this settlement introduced three principles into the immigration context: equality, a presumption of cultural compatibility, and family integrity. These crucial principles must be made part of any judicial evaluation of a president’s policies—especially those conducted unilaterally.*

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## INTRODUCTION

There is a transformation underway in the United States, but not everyone recognizes the scope of the challenge or understands how we have reached this point. It is an ambitious effort that spans a broad range of policies, institutions, and constitutional doctrines. That plan is to overthrow the political settlement of the 1960s, which brought us the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968—landmark laws that codified the grassroots push for racial equality in the areas of employment, voting, and housing. Collectively, these laws are understood today as the legal achievements of the civil rights revolution.

The reaction against this constitutional settlement began almost immediately. At the time that President Lyndon B. Johnson expended most of his political capital to ensure passage of these laws, he knew there would be backlash, the kind that would damage his own party's electoral fortunes. America would come to support racial equality, but that principle has encountered, and so far survived, episodic resistance. Party realignment followed, as skepticism of equality became channeled through the national Republican Party as six of the next nine administrations following Johnson's have been Republican. While Johnson's ignominious handling of America's involvement in Vietnam cut short the Democratic Party's ability to fulfill the promise of the Great Society, many of the policies inscribed fundamental values and set in motion chains of events that even political resistance could not completely roll back.

Now, the Trump administration has opened a new front in the battle to dislodge the Immigration and Naturalization Act of 1965 (Immigration Act or Hart-Celler Act). This watershed legislation repudiated the national-origin quotas of the Immigration Act of 1924 that had long been considered racist,<sup>1</sup> as well as the long-standing preference for migrants from northern and western Europe, along with the associated logic that immigrants from elsewhere were culturally incompatible and that they and their families could be treated differently. However, this monumental achievement has not been widely appreciated as part of America's civil rights legacy. Most accounts of this period leave out the crucial changes wrought by this law, as well as the criticisms of the older immigration regime. Like its domestic counterparts, the Immigration Act aimed to

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1. As James Whitman has demonstrated, Adolf Hitler admired America's immigration laws for "simply exclud[ing] the immigration of certain races." JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 46 (2017).

create America as “a place where people can live in dignity and without fear.”<sup>2</sup>

As just one example, Bruce Ackerman, who treats the Civil Rights Acts as the equivalent of informal constitutional amendments, never mentions the Immigration Act in his work on this period.<sup>3</sup> The 1964 Civil Rights Act and the Voting Rights Act of 1965, Ackerman writes, revived and codified the “lost logic” of the “anti-humiliation principle” announced in *Brown v. Board of Education*.<sup>4</sup> And yet the Immigration Act, which extends the same principle to cover foreigners—at least those with some contact with the United States because of their families or their opportunities—plays no part in his narrative of this epoch and no role in his theory of constitutional change. It is a glaring omission, for the same architects of the domestic civil rights laws of the 60s also designed the Immigration Act to expand the rights of equality, dignity, and family autonomy. And the same coalition that pressed for legislative action to reduce inequities in so many other areas of American life approved the Immigration Act as part of the same political project.<sup>5</sup>

Our collective failure to appreciate the Immigration Act’s origins as part of the civil rights revolution has left its transformative quality not only poorly understood by many Americans, but also politically and jurisprudentially isolated. It has kept the Immigration Act from fulfilling its intended role in helping to create an egalitarian society, even as

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2. Gabriel J. Chin, *Were the Immigration and Nationality Act Amendments of 1965 Antiracist?*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 11, 54 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) [hereinafter *LEGISLATING A NEW AMERICA*] (quoting 111 CONG. REC. 21,783 (1965) (statement of Rep. Findley)).

3. See generally BRUCE ACKERMAN, 3 *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 40–41 (2014).

4. *Id.* at 137.

5. Ackerman is not alone in this. The Immigration Act of 1965 is also missing from the account of “super-statutes” offered by William Eskridge and John Ferejohn. See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215 (2001). Additionally, many leading biographers of Kennedy and Johnson omit their work on immigration or mention it only in passing. See, e.g., ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917–1963* (2003); RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* (1994); While we wait on Robert Caro’s fifth volume of Johnson’s biography covering 1964–65, it is worth noting that Volume 4 does not mention immigration reform at all. When he writes of Johnson’s “victories in the fight for social justice,” he mentions the 1964 Civil Rights Act and 1965 Voting Rights Act, along with other bills that do not address immigration. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 604 (2013). An exception is Rogers Smith, who briefly observes that the politics of equal respect is “clearly expressed” in these landmark laws, including “the 1965 Immigration Act.” ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 473 (1997). Hugh Graham says more, including immigration reform among the “triumphant reforms of 1964–65” that were all “based on the principle of nondiscrimination by race or national origin.” HUGH DAVIS GRAHAM, *COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA* 7 (2002).

immigration policy has fallen into a confusing state of conflicting interests. It gets worse. Now, with the erosion of institutional protections of basic values surrounding the treatment of migrants once afforded by the Republican Party and Congress, this part of the civil rights legacy has suddenly become vulnerable to unilateral assault by a president who doesn't accept the hard-won principles laid down in that era.

Lawyers and academics certainly share the blame for not doing more to highlight the connections between these titanic laws enacted during the same historical moment. For a long time, this aspect of the 1960s settlement was not actively opposed by leading figures in the Republican party. This fact can be seen not only in the success of occasional bipartisan immigration reform bills throughout the 1980s and 90s, but also in the favorable ways that Republican presidents once talked about immigration.<sup>6</sup> The key point here is that it's not just laissez-faire economics that held together the coalition on immigration—there is also a basic set of deeply-rooted principles concerning an egalitarian polity and the family's role in a democracy that politicians of both parties embraced.

But things began to change when the United States entered the Age of Terror, and the momentum has picked up significantly with the ascendance of Trumpism. While the plan to undermine the 1960s settlement has been decades in the making, the current president—by seeking to restore a set of marginalized values through autocratic methods—has targeted immigration and refugee policy as the new front for eroding foundational principles. The previous two presidents (George W. Bush and Barack Obama) could not achieve bipartisan immigration reform, and the current president has shown no serious interest in meeting the opposition party halfway. To the contrary, President Donald Trump has decided to go it alone on immigration, using the powers of the

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6. For example, in 2006, then-President George W. Bush urged Congress to enact immigration reform and described “the vast majority of illegal immigrants” as “decent people who work hard, support their families, practice their faith, and lead responsible lives.” Instead of painting them as interlopers, he called them “part of American life,” though they may be “beyond the reach and protection of American law.” George W. Bush, *Speech on Immigration* (May 15, 2006) (transcript available at <https://www.nytimes.com/2006/05/15/washington/15text-bush.html> [<https://perma.cc/SZU2-G4Z6>]). Or as Ronald Reagan said in 1980, standing with the Statue of Liberty as a backdrop:

Others came to America in different ways, from other lands, under different, often harrowing conditions, but this place symbolizes what they all managed to build, no matter where they came from or how they came or how much they suffered. . . . They brought with them courage, ambition and the values of family, neighborhood, work, peace and freedom. They came from different lands but they shared the same values, the same dream.

Ronald Reagan, *Labor Day Speech at Liberty State Park, Jersey City, NJ* (Sept. 1, 1980), <https://www.reaganlibrary.gov/9-1-80> [<https://perma.cc/6YXG-38U3>].

presidency to unsettle that aspect of the civil rights legacy, despite widespread support for that political achievement. Similarly, he has put appointees in crucial positions for the purpose of returning to a highly selective “country-of-origin” approach to immigration policy and to treat Hispanic and Muslim migrants differently from other immigrants, often based on vague assertions of group-based threat.

Americans are now reaping the fruits of our own inattention. A first-time presidential candidate, who had never held elected office, rode a wave of grassroots dissatisfaction with demographic changes all the way to the White House, despite losing the popular vote. Trump campaigned on ethno-nationalist themes shared by other right-wing candidates throughout Europe. He promised to force others to bend to his will on matters like immigration and trade, and to act alone if others disagreed. By outflanking his opponents to their right on such issues, he bet his presidency on taking a hardline view on every matter that arguably implicated American demographics and foreign trade: refugee policy that discriminates on the basis of religion and country of origin,<sup>7</sup> expanded use of detention camps for unauthorized migrants, family separation as deterrence, renewed discrimination against the poor, ending automatic citizenship for the children of soldiers and federal workers born in another country,<sup>8</sup> and trying to build a physical wall along the southern border. President Trump has undertaken virtually all of these initiatives on his own, without the express support of Congress.

Ominously, the Supreme Court gave Trump a victory on his signature issue when it employed a highly deferential approach to judicial review and upheld the president’s unilateral travel ban against several Muslim-majority countries.<sup>9</sup> That narrow 5-4 victory in *Trump v. Hawaii* has not chastened the president or his allies; to the contrary, it has emboldened hardliners to do more before the clock on Trump’s presidency runs out. Meanwhile, the rest of the federal judiciary has been left to grapple with a wide range of efforts to seize decisive control of immigration policymaking from Congress.

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7. See Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Feb. 1, 2017) (prohibiting immigration from a list of predominantly Muslim countries).

8. See Maria Sacchetti, *Trump Administration Ends Automatic Citizenship for Some Children of Military, Federal Workers Born Abroad*, WASH. POST (Aug. 28, 2019), [https://www.washingtonpost.com/immigration/trump-administration-ends-automatic-citizenship-for-some-children-of-military-federal-workers-born-abroad/2019/08/28/29b811c6-c9d7-11e9-a1fe-ca46e8d573c0\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-ends-automatic-citizenship-for-some-children-of-military-federal-workers-born-abroad/2019/08/28/29b811c6-c9d7-11e9-a1fe-ca46e8d573c0_story.html) [https://perma.cc/K4P6-NHTD] (explaining the impact of President Trump’s Executive Order No. 13,769).

9. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

As we approach the end of Trump's first term in office, the judges he has appointed will have more opportunities to weigh in on his unilateral actions. Culled from among conservative jurists who grew up as part of the reaction to the civil rights movement, they are already steeped in the ideological ferment of post-sixties conservatism.<sup>10</sup> But some could have an even harder edge, believers in the efficacy of the national security state or perhaps even in the virtues of an America where political powers remains decisively in the hands of white voters. These judges may be willing to back the president's play to seize whatever power can still be exerted constitutionally over the country's demographics and ratify further weakening of the anti-discrimination principle.

What accounts for the neglect that has left us so flat-footed? Part of it comes from the proponents of changes to the nation's immigration laws back in the 1960s, who generally played down the significance of those reforms. Some commentators have taken those statements at face value rather than treat them as strategic comments intended to assuage anxieties about the changing makeup of America.<sup>11</sup> Part of this silo-style approach to understanding our political history has to do with a nagging tendency to see civil rights laws as internal matters, and immigration as regulation of external matters. Perhaps some of this mistake is the byproduct of a quite understandable desire to honor the hard work of civil rights protesters who put their lives and bodies on the line for racial equality.

But as some observers have finally started to point out, the massive changes in immigration law during the 1960s had *everything* to do with the civil rights movement.<sup>12</sup> The architects of the Great Society believed that the changes to immigration law flowed naturally from the egalitarian premises that drove the enactment of those other civil rights laws.

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10. On the views and influence of the Federalist Society in shaping the views of conservative jurists, see e.g. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* ); Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 L. & SOC. INQUIRY 1698 (2018).

11. See JUAN WILLIAMS, *WE THE PEOPLE: THE MODERN-DAY FIGURES WHO HAVE RESHAPED AND AFFIRMED THE FOUNDING FATHERS' VISION OF AMERICA* 30–32 (2016).

12. See *LEGISLATING A NEW AMERICA*, *supra* note 2, at 2 (“[T]he 1965 Immigration Act, like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, adopted a norm of nondiscrimination.”); BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990*, at 18 (1993) (contending that the Immigration Act of 1965 aspired to a “new global egalitarianism”); see generally Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (arguing that Congress knowingly eased restrictions on Asian immigration following discriminatory immigration laws of the past). Even those leading the assault on the 1960s settlement ridicule it as “Teddy Kennedy’s 1965 immigration act [that] extended ‘civil rights’ to the entire world.” ANN COULTER, ¡ADIOS, AMERICA!: THE LEFT’S PLAN TO TURN OUR COUNTRY INTO A THIRD WORLD HELLHOLE 70 (2015).

Furthermore, pro-equality activists were a far more interesting bunch than just the famous figures most often written about in the history books. A broader view of the civil rights movement, too, shows that many members of the coalition had a transnational account of equality and justice. For this coalition—which included religious believers, union members, and Cold War warriors—the imperative to do the work of equality did not stop at the border; defeating Jim Crow was just the beginning. As a matter of good history and accurate theory of popular sovereignty, then, the Immigration Act should be understood as part of an intended durable political settlement.

Certainly critics on the right see the far-reaching effects of immigration reform, even if they treat the Hart-Celler Act as nothing more than an ordinary piece of legislation that can be circumvented or cast aside. Many also talk as if the demographic changes ushered by the Immigration Act of 1965 were totally unanticipated.<sup>13</sup> These figures have taken aim squarely at the law, preferring to take us back to the 1924 regime of immigration regulation, where national origin discrimination and racial supremacy was a regular feature of demographic control. Before Trump tapped him for Attorney General, Jeff Sessions spent decades working with anti-immigration groups warning Americans about not only the presence of undocumented aliens, but also the increase of non-white immigration since 1965. He issued reports expressing alarm about the rising ratio of “foreign-born” to “native-born” people in America and arguing that “[the United States] passed a law that went far beyond what anybody realized in 1965, and we’re on the path to surge far past what the situation was in 1924.”<sup>14</sup> His message was unmistakable and established the blueprint for the current administration: roll back immigration to its pre-1965 methods, logic, and results.

This is the political history against which we must understand the Trump administration’s efforts to alter immigration law unilaterally. It is critical background that is almost always left out of today’s reporting and judicial decision making. The current administration’s latest push to expand immigration-related policies to the detriment of “public

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13. See, e.g., PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER*, at xv (1995) (claiming that 1965 Immigration Act “quite accidentally, triggered a renewed mass migration”).

14. Adam Serwer, *Jeff Sessions’s Unqualified Praise for a 1924 Immigration Law*, ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/> [<https://perma.cc/5Z36-ZT9Y>]; see Robert L. Tsai & Calvin TerBeek, *Trumpism Before Trump*, BOS. REV. (June 11, 2018), <http://bostonreview.net/politics/robert-tsai-calvin-terbeek-trumpism-trump> [<https://perma.cc/EX77-DXR6>] (explaining that Trump’s cultural approach to immigration restrictionism is one that grassroots conservatives have espoused for years prior to his presidency).



charges,”<sup>15</sup> or to move to indefinite detention of migrants,<sup>16</sup> or even to end birthright citizenship by executive order,<sup>17</sup> are not random moves, but rather part of this concerted effort to dislodge the political settlement of the 1960s. Ostensibly, administration officials say they are acting within the existing legal framework created by Congress and, taken in isolation, certain actions may seem to be. But in both tenor and substance, key officials and their supporters are committed to wholesale revision of a constitutional settlement through unilateral means. Instead of working with Congress to alter immigration law, President Trump is exploiting the populist model of presidential leadership to build external support for acting alone.

### I. THE IMMIGRATION SETTLEMENT OF 1965

The story of the Immigration and Naturalization Act of 1965 is a long and complicated one, but several aspects of that experience stand out. To begin, the law extended the anti-discrimination principle to regulate the entry of foreigners by eradicating what President Lyndon B. Johnson called “the twin barriers of prejudice and privilege.”<sup>18</sup> The political settlement out of which this egalitarian principle arose was itself an effort to fulfill the promise of an earlier settlement: Reconstruction. The egalitarian project begun by the Reconstruction generation had been cut short by backlash from white Americans who utilized a combination of old and new methods to limit the reach of the principle, and from conservative jurists whose parsimonious interpretations of the Constitution blunted the transformative potential of the Fourteenth and

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15. Michael D. Shear & Emily Baumgaertner, *Trump Administration Aims to Sharply Restrict New Green Cards for Those on Public Aid*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/us/politics/immigrants-green-card-public-aid.html> [<https://perma.cc/N2UV-2BFE>].

16. Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html> [<https://perma.cc/PH9A-2G69>].

17. President Trump has repeatedly parroted the words and goals of immigration restrictionists who believe that birthright citizenship, guaranteed by the Fourteenth Amendment, is a “magnet for illegal immigration.” *Immigration Reform that Will Make America Great Again*, DONALD J. TRUMP FOR PRESIDENT (Aug. 16, 2016), <https://web.archive.org/web/20160930213559/https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf> [<https://perma.cc/7BDY-89FS>]. Trump has even said he feels that he can abolish it by executive order. Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html> [<https://perma.cc/RTU8-7WKF>] (summarizing President Trump’s threat to end by executive order the long-accepted constitutional guarantee of birthright citizenship).

18. President Lyndon B. Johnson, Remarks at Signing of the Immigration Bill, Liberty Island, NY (Oct. 3, 1965) [hereinafter Johnson’s Immigration Bill Remarks] (on file with the Government Printing Office in Washington, D.C.) (transcript available at <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration> [<https://perma.cc/G9CZ-A4KM>]).

Fifteenth Amendments. And so the civil rights generation resumed this unfinished work.

Among the historians that observe the continuities among Johnson's Great Society initiatives extending to immigration, Robert Dallek tells us that Johnson "pressed Congress to make fundamental changes in the National Origins Act of 1924."<sup>19</sup> Dallek thinks that, as a Southerner who felt the sting of regionalist prejudices, Johnson identified with foreigners and minorities who faced analogous mistreatment based on their place of origin.<sup>20</sup> As Johnson explained when he signed it into law, the Hart-Celler Act "is . . . one of the most important acts of this Congress and of this administration."<sup>21</sup> His public declaration was consistent with what he told Speaker of the House John McCormack: "There is no piece of legislation before the Congress that in terms of decency and equity is more demanding of passage than the Immigration bill."<sup>22</sup>

Notice that Johnson elevated the immigration reform law to a special status among the other landmark laws advanced by the administration. He also talked about immigration reform in the parlance of democratic justice. It was intended to "repair a very deep and painful flaw in the fabric of American justice" and "correct[] a cruel and enduring wrong in the conduct of the American Nation."<sup>23</sup> Johnson explained that the immigration law was part of the same "vision" shared by John F. Kennedy and Robert Kennedy, and championed by Attorney General Nicholas Katzenbach, along with Senators Ted Kennedy, Jacob Javits, Mike Mansfield, and Everett Dirksen.<sup>24</sup> As Robert Kennedy himself testified before Congress, considering individuals on "merit . . . is the whole philosophy of the immigration bill, and that that was the whole philosophy of the civil rights bills of 1963 and 1964 and the voting rights bill of 1965."<sup>25</sup>

Johnson characterized the previous approach to immigration policy as "twisted and . . . distorted by the harsh injustice of the national origins quota system."<sup>26</sup> Under the previous system, which was based on country of origin and "grounded in nineteenth century doctrines of scientific

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19. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 1961–1973*, at 227–28 (1998).

20. *Id.*

21. Johnson's Immigration Bill Remarks, *supra* note 18.

22. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 1961–1973*, at 227–28 (1998).

23. Johnson's Immigration Bill Remarks, *supra* note 18.

24. *Id.*

25. 111 CONG. REC. 24,778 (1965) (statement of Sen. Robert Kennedy).

26. Johnson's Immigration Bill Remarks, *supra* note 18.

racism,”<sup>27</sup> he said, “[o]nly 3 countries were allowed to supply 70 percent of all the immigrants.”<sup>28</sup> He made clear that “this system is abolished” the moment he affixed his signature to the bill. Instead, he announced the restoration of the principles of merit and family integrity within the immigration system. No longer would families be “kept apart because a husband or a wife or a child had been born in the wrong place.” Henceforth, “those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship to those already here.” This would finally be consistent with “the basic principle of American democracy . . . that values and rewards each man on the basis of his merit as a man.”<sup>29</sup>

Johnson’s emphasis on the themes of equality, dignity, merit, contribution, and family were all pillars of the Great Society he hoped to build, but they were also consistent with the fallen president’s views on immigration reform. Before his life was cut short by the assassin’s bullet, President Kennedy himself had urged Congress to do away with the quota system in order to “develop[] an immigration law that serves the national interest and reflects in every detail the principles of equality and human dignity to which our nation subscribes.”<sup>30</sup> That meant, he said, admitting individuals “with the greatest ability to add to the national welfare, no matter where they were born . . . The next priority should go to those who seek to be reunited with their relatives.”<sup>31</sup> The norm against national origin discrimination would be confirmed and extended in 1968 when Congress applied it to the private housing market.<sup>32</sup>

On the same day that he signed the law, President Johnson also announced that, consistent with the spirit of this new approach to migration, America would welcome refugees from Cuba. “The dedication of America to our traditions as an asylum for the oppressed is going to be upheld,” he assured.<sup>33</sup> Priority among asylum seekers would be given to “those Cubans who have been separated from their children and their parents and their husbands and their wives and that are now in

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27. GRAHAM, *supra* note 5, at 50.

28. Johnson’s Immigration Bill Remarks, *supra* note 18.

29. *Id.*

30. Letter from President John F. Kennedy to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws (July 23, 1963).

31. *Id.*

32. *See, e.g.*, Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

33. Johnson’s Immigration Bill Remarks, *supra* note 18.

this country.”<sup>34</sup> The second priority would be made for “those who are imprisoned for political reasons.”<sup>35</sup>

Johnson was not alone. During debate over the immigration bill, congressmen repeatedly emphasized that the new legal framework would restore “America’s ideal of equality of all men without regard to race, color, creed, or national origin.”<sup>36</sup> Others put it terms of dignity, so that the law would “judge each individual by his own worth” rather than as a “pawn of society or the State.”<sup>37</sup> Representative Leonard Farbstein put it in the strongest terms possible: “Embodied in this bill is a realization and a recognition which has become widespread in this Nation rather belatedly . . . I am speaking of the recognition of the basic equality of all men.”<sup>38</sup> These comments show that legislators understood exactly what they were doing: embracing a liberal assimilationist approach to immigration and discarding an ascriptive approach that assumed some people—whether according to race or happenstance of birth location—were less worthy than others to become full members of the political community.

There is much more work to be done to fully tell this story, but Jack Chin, who has done yeoman’s work reconstructing the history surrounding the Immigration Act of 1965,<sup>39</sup> points out additional factors that underscore the transformative quality of the legislative changes. First, the basic structure of the changes made it very predictable that the proportion of non-white immigrants would go up dramatically. Increased migration from countries hit hardest by the older caps was expected by nearly all the key players involved.<sup>40</sup> As Chin observes through careful research of the legislative record, legislators repeatedly asked about likely demographic changes and were told explicitly that “[t]here may be people coming in greater numbers from different areas of the world.”<sup>41</sup> Moreover, they realized that lifting “[d]iscriminatory provisions against immigrants from eastern and southern Europe, token quotas for Asian and African countries, and implications of race superiority in the Asia-Pacific

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34. *Id.*

35. *Id.*

36. 111 CONG. REC. 21,786 (1965) (statement of Rep. Helstoski).

37. 111 CONG. REC. 21,778 (statement of Rep. Krebs); 111 CONG. REC. 21,771 (statement of Rep. Gilbert); 111 CONG. REC. 21,807 (statement of Rep. Fino) (noting that the United States has always believed in the “fundamental truth that all men, regardless of race, color or religion, are created equal”).

38. 111 CONG. REC. 21,784 (statement of Rep. Farbstein).

39. Chin, *supra* note 2, at 20 n.67.

40. *Id.* at 26–40.

41. *Id.* at 29.

triangle concept” would surely increase migration from those regions of the world.<sup>42</sup>

Second, the same basic coalition that supported the Civil Rights Act of 1964 and Voting Rights Act of 1965 also voted in favor of the Immigration Act of 1965. Religious and ethnic groups drove the changes, while labor unions and black civil rights leaders “maintained liberal solidarity by supporting immigration reform.”<sup>43</sup> Conversely, the same folks who voted against those laws similarly voted against the Immigration law. As Chin and Douglas Spencer demonstrate:

The percent of overlapping support between the CRA and INA [was] 86.6% in the House and 91.2% in the Senate. . . . Nearly ninety percent of the yea votes for the INA were by members of Congress that had supported the VRA just one month earlier. In all, 196 members of the House and sixty-one senators supported all three bills.<sup>44</sup>

Although Hugh Davis Graham attributes the passage of the Immigration Act more to lobbying and logrolling than lengthy legislative debates, he acknowledges that “every Jewish member of Congress in both chambers voted for it, as did all Catholics in the Senate and all but 3 (of 92) in the House. Most of the opposition came from southern Democrats,” who similarly opposed the Civil Rights Act of 1964.<sup>45</sup>

In fact, polls taken to measure public support for the Civil Rights Act and the Immigration Act in 1965 showed comparable support for both: 58 percent and 51 percent, respectively.<sup>46</sup> Another poll put support for the new immigration law even higher when asked for a thumbs up or down: 70 percent.<sup>47</sup> It’s notable that roughly a third of respondents

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42. *Id.* at 30–31 n.126–28 (citing 111 CONG. REC. 24,238 (statement of Sen. Hart)).

43. GRAHAM, *supra* note 5, at 63.

44. Gabriel J. Chin & Douglas M. Spencer, *Did Multicultural America Result from a Mistake? The 1965 Immigration Act and Evidence from Roll Call Votes*, 2015 U. ILL. L. REV. 1239, 1251–52 (2015); *see also* Chin, *supra* note 2, at 20 n.67.

45. GRAHAM, *supra* note 5, at 64; *see also* KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974*, at 56 (2019).

46. Andrew Kohut, *50 Years Ago: Mixed Views About Civil Rights but Support for Selma Demonstrators*, PEW RES. CTR. FACT TANK (Mar. 5, 2015), <https://www.pewresearch.org/fact-tank/2015/03/05/50-years-ago-mixed-views-about-civil-rights-but-support-for-selma-demonstrators> [<https://perma.cc/M5LB-6XBB>]; Lydia Saad, *In 1965, Americans Favored Immigration Based on Family Ties*, GALLUP (Jan. 12, 2018), <https://news.gallup.com/vault/225401/1965-americans-favored-immigration-family-ties.aspx> [<https://perma.cc/LQ8U-3PS5>].

47. *Huddled Masses: Public Opinion & the 1965 U.S. Immigration Act Blog*, ROPER CTR. (July 10, 2015), <https://ropercenter.cornell.edu/blog/huddled-masses-public-opinion-1965-us-immigration-act-blog> [<https://perma.cc/8P53-RNP7>].

thought country of origin should matter,<sup>48</sup> while 55 percent supported family ties.<sup>49</sup>

Third, part of the way the notion of equality worked in the immigration domain (as opposed to work, voting, or housing) is that, beyond putting overt racial animus off limits, it overturned a long-held skepticism of cultural incompatibility. Such suspicion of foreign peoples and their cultures of origin was a lasting scar from earlier approaches in dealing with poor Irish and Chinese migrants and stretching all the way back to the country's reservation of naturalization only for "free white person[s]."<sup>50</sup> Rather than treating immigrants as "incorrigible vassals of a racial, ethnic, or national strain," the new approach would evaluate foreigners as prospective "future Americans."<sup>51</sup>

Senator Ted Kennedy's remarks are also instructive in this regard. The position that prevailed presumed that individuals who come to America seeking a better life could be assimilated. Experience had disproved the "fear" that immigrants "will not assimilate into our society," he reported.<sup>52</sup> To the contrary, "their adjustment has been notable."<sup>53</sup> Kennedy added: "In an age of global television and the universality of American culture, their assimilation, in a real sense, begins before they come here."<sup>54</sup> By contrast, the presumptions of cultural incompatibility associated with the losing position were now "out of line with the obligations of responsible citizenship. They breed hate of our heritage."<sup>55</sup>

Fourth, "family reunification" emerged as a Cold War imperative—a dynamic that had similarly driven equality gains for black Americans after emancipation, largely through the work of the Freedmen's Bureau operated by the War Department. Graham points out that "lobbying by ethnic and religious groups with strong ties to eastern and southern Europe" produced a wave of sympathy for families split from some relatives fleeing from totalitarian governments or Communist revolutions in places like Cuba.<sup>56</sup> In this environment, Graham and others say, "supporting liberalized family reunification policies offered members of

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48. *Id.*

49. Saad, *supra* note 46.

50. An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790), *repealed* by Act of Jan. 29, 1795, ch. 20.

51. 111 CONG. REC. 21,818 (1965) (statement of Rep. Conte).

52. 111 CONG. REC. 24,228 (1965) (statement of Sen. Robert Kennedy).

53. *Id.*

54. *Id.*

55. *Id.*

56. GRAHAM, *supra* note 5, at 58.

Congress,” especially from diverse metropolitan areas, “great political payoff with virtually no negatives.”<sup>57</sup>

To say that the Immigration Act is an indispensable facet of the 1960s settlement is not to say that the law fulfilled all of these objectives perfectly. Legislators understood that the egalitarian norm would operate slightly differently in each domain. When it came to admission to the country, national security could still come into play in certain situations. Even on family reunification, the reality is that many families have remained separated due to long waiting periods and other legal and practical obstacles.<sup>58</sup> Moreover, country of origin remained essential to how refugee matters were handled.<sup>59</sup> But that only means that the equality principle is more nuanced rather than inoperable. There was now a new constitutional norm regarding how potential immigrants would be treated: with equal respect and a presumption that they, and close family members, would have a fair shot at the American Dream, regardless of the happenstance of birthplace.

## II. TRUMPISM’S ASSAULT ON THE CIVIL RIGHTS SETTLEMENT

Trumpism has attempted to harness a wide range of cultural and demographic concerns and direct that dissatisfaction to de-legitimize and undermine the 1960s settlement. What we are seeing is an ethno-nationalist movement that has been fused with a more traditional conservative movement that is skeptical of social progress, focused on continuing economic prosperity, and committed to reducing the size of the administrative state.<sup>60</sup> Thus, Trumpism contains remnants of earlier conservative movements, including the Moral Majority, the Tea Party,

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57. *Id.*; see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999).

58. Rose Cuison Villazor, *The 1965 Immigration Act: Family Unification and Nondiscrimination Fifty Years Later*, in *LEGISLATING A NEW AMERICA*, *supra* note 2, at 197, 221.

59. Brian Soucek, *The Last Preference: Refugees and the 1965 Immigration Act*, in *LEGISLATING A NEW AMERICA*, *supra* note 2, at 171, 171. It must be pointed out that the 1965 Immigration Act’s new approach did away with unlimited Western Hemisphere migration. See Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, in *LEGISLATING A NEW AMERICA*, *supra* note 2, at 116, 116–19 (arguing that the 1965 immigration law discriminated against Latinos by imposing a ceiling of 120,000 immigrants from the Western Hemisphere).

60. See generally Sidney M. Milkis & Nicholas Jacobs, *‘I Alone Can Fix It’ Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship*, 15 *FORUM* 583, 609 (2017) (observing the Trump administration’s use of executive orders as well as “a slew of less visible strategies” to push deregulation of corporations and open protected lands to energy exploration).

militia, and white nationalist movements that have occupied the far-right over the last several decades.<sup>61</sup>

As a political and social movement, Trumpism possesses several defining features. First, it is primarily a grassroots movement fueled by popular grievances over demographic and cultural changes in American society as well as the social and economic dislocations created by the global economy—what Steve Bannon, Donald Trump’s former campaign chairman, called “a populist nationalist conservative revolt . . . against the elites in this country,” especially “the globalists among those elites.”<sup>62</sup> This can be seen in the major themes of Trump’s candidacy about “American carnage” wrought by foreign powers and strange cultures. In addition, these themes can be observed in his insistence that black athletes stop taking a knee to protest police brutality and the administration’s opposition to the Black Lives Matter movement.

Second, in tone and symbolism, Trumpism presents itself as a restoration movement, an effort to turn the clock back to simpler times when social roles seemed more predictable when it comes to race, sex, and religion. Bannon and his acolytes call their project protecting “the Judeo-Christian West.”<sup>63</sup> Whether or not such an age of perfect political-religious governance ever really existed, this nostalgia-fueled vision harkens back to Nixon’s “law and order” discourse repurposed against undocumented migrants, Muslims, and “Leftists.” An enhanced concern with demographic control to ensure the political power of white, Christian voters, the economic prospects of corporations and dislocated white workers, and conservatives’ concerns of cultural degradation fits comfortably within this movement. As Hofstadter might have put it, adherents of Trumpism are grateful that their leader-spokesman is “always manning the barricades of civilization.”<sup>64</sup>

Originally, Bannon’s vision involved a worker-led takeover of the Republican Party and the formation of a center-right coalition to both defeat the progressive left and destroy the neo-liberal economic establishment within both parties.<sup>65</sup> The goal was to achieve an

61. See KRUSE & ZELIZER, *supra* note 45, at 88–112 (discussing the rise of the conservative reaction to the 1960s); see generally JOSEPH LOWNDES, FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM (2008).

62. Robert Kuttner, *Steve Bannon, Unleashed*, PROSPECT (Oct. 6, 2017), <https://prospect.org/power/steve-bannon-unleashed/> [https://perma.cc/3RRV-MV7Y].

63. J. Lester Feder, *This Is How Steve Bannon Sees the Entire World*, BUZZFEED NEWS (Nov. 15, 2016), <https://www.buzzfeednews.com/article/lesterfeder/this-is-how-steve-bannon-sees-the-entire-world> [https://perma.cc/NKZ5-9LFA].

64. Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER’S MAG., Nov. 1964, at 77–86.

65. Feder, *supra* note 63. Bannon’s ouster has left the bulk of economic policy in the hands of



“enlightened” form of capitalism as well as remake American citizenship in a way that transcended individualistic and tribal identities.<sup>66</sup> Bannon always understood that the grassroots efforts on the right would include white nationalists but believed that that element would eventually burn itself out after its utility dried up—along with other forms of social group identification.<sup>67</sup> Yet white nationalists such as Peter Brimelow, David Duke, and Richard Spencer all looked to Bannon and his allies within the administration to keep Trump’s promises to restrict immigration and thereby protect white culture and political power by any means possible.<sup>68</sup>

Third, immigration has been the main issue binding a fractious set of communities to Trump’s banner. Trump’s lock on the party’s base comes from his repeated return to the rhetoric and dark view of ethnic and racial pluralism shared by the base of the modern Republican Party and his muscular use of the presidency’s powers to take consistent action in this area. By harnessing the anti-immigration work and strategies of such figures as Bannon, Jeff Sessions, Stephen Miller, and Kris Kobach, Trumpism relies heavily upon demographic control as the means to restore a sense of cultural integrity and prevent the loss of political power for a white majority.

Part of the fury surrounding immigration and refugee policy stems from a sense of desperation among restrictionists. Older modes of demographic control now lie beyond the constitutional pale: interracial marriage and overt regimes of racial separation are no longer countenanced. Progressive reformers have also in recent years stepped up challenges to racial and partisan gerrymandering, strategies that have long been used to preserve the political dominance of white populations in America. The narrowing range of options for Americans concerned about cultural change and the dilution of white power has merely intensified border control and immigration policy as the sites for contesting the future of American culture and the nature of political community.

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corporate interests.

66. *Id.*

67. Eric Bradner, *Bannon Rejects White Nationalism: “I’m an Economic Nationalist”*, CNN (Nov. 21, 2016, 6:39 PM), <https://www.cnn.com/2016/11/21/politics/steve-bannon-donald-trump-nationalist/index.html> [<https://perma.cc/4DM7-VWAS>] (quoting Bannon: “I have admired nationalist movements throughout the world, have said repeatedly strong nations make great neighbors. I’ve also said repeatedly that the ethno-nationalist movement, prominent in Europe, will change over time.”).

68. Andrew Kaczynski & Chris Massie, *White Nationalists See Advocate in Steve Bannon Who Will Hold Trump to His Campaign Promises*, CNN (Nov. 15, 2016), <https://www.cnn.com/2016/11/14/politics/white-nationalists-on-bannon/index.html> [<https://perma.cc/8FD6-TWJC>].

As Miller—the overseer of White House immigration policies after Bannon’s departure from the administration—explained, the goal is to return to a period like “from 1920 to 1970,” where “the foreign-born population shrank.”<sup>69</sup> Here, “foreign-born” has become the preferred lingua franca for immigration restrictionists who wish to signal concern about migrants from Central and South America, Africa, and Asia, while avoiding charges of racism.

Thus, the issue of undocumented migrants has always been a stalking horse. The real “beating heart of the problem,” as the architects of Trump’s immigration policy acknowledged in quieter moments, has always been legal immigration.<sup>70</sup> The assault on the civil rights settlement of the 1960s encompasses cultural conservatives who are queasy about the lack of a thick set of beliefs that bind a polity, as well as white nationalists who are more powerfully committed to preserving governance in the hands of white voters in the face of demographic changes.

Consider the best-selling book *Alien Nation* by Peter Brimelow, a figure whose work has been influential in anti-immigration circles. Unlike many commentators, Brimelow acknowledges that “antidiscrimination legislators . . . framed the 1965 Immigration Act.”<sup>71</sup> But he worries that “[t]o the extent that the 1965 Immigration Act is seen as part of the Civil Rights triumph, it is above criticism—let alone reform.”<sup>72</sup> So he makes the strategic choice to try to undermine the entire civil rights legacy, saying that “The Civil Rights battle has left deep and permanent scars on America” and fostered a reflexive tendency to describe “a wide range of social questions . . . as problems of ‘discrimination.’”<sup>73</sup> To Brimelow, the Immigration Act was a product of “Civil Rights reflex.”<sup>74</sup> He contends that egalitarianism has no proper role in immigration policy because “immigration policy is *inherently discriminatory*.”<sup>75</sup> He then goes on to doubt that any multicultural society can survive and argues that immigration “threaten[s] a country’s political balance.”<sup>76</sup>

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69. Tara Golshan, *Steve Bannon in 2016: Legal Immigration Is the Real “Problem”*, VOX (Feb. 2, 2017), <https://www.vox.com/policy-and-politics/2017/2/2/14472404/steve-bannon-legal-immigration-problem> [<https://perma.cc/WN6S-KEUX>] (quoting Stephen Miller).

70. *Id.* (quoting Steve Bannon).

71. BRIMELOW, *supra* note 13, at 104.

72. *Id.*

73. *Id.* at 103.

74. *Id.*

75. *Id.* at 104.

76. *Id.* at 123–29, 193.

Sessions, who once mentored Miller and was given a bigger media platform by Bannon while toiling at the fringes of the Republican Party, repeatedly emphasized these same themes. In a 2015 memo he circulated to colleagues, he complained, “[t]he last four decades have witnessed the following: a period of record, uncontrolled immigration to the United States.”<sup>77</sup> It was clear even then that he wanted a return to the discriminatory regime that had been repudiated in 1965. “Since end of the 1960s,” he wrote, “the share of the U.S. population that is foreign-born has increased from less than 5 percent to more than 13 percent. As a total number, the size of the foreign-born population has quadrupled over the last four decades.”<sup>78</sup> Elsewhere, he has explicitly criticized the Immigration Act and advocated a return to the 1924 law.<sup>79</sup>

Fifth, as a candidate, Trump was able to graft this grassroots movement onto an existing politico-economic structure that has for decades advanced the economic priorities of the merchant class regardless of party. This has not led to a wholesale repudiation of the neoliberal order, but instead to a selective and awkward merging of elite and populist philosophies. That, plus his willingness to turn over the repopulation of the federal judiciary to organizations dedicated to “originalist” methods and traditionalist ideologies, helped Trump secure a certain degree of loyalty and expertise from party elites, as well as the conservative legal bar.<sup>80</sup> To the extent the goals of conservative elites align with those of Trumpism, philosophical disagreements have been subordinated to partisan advancement or economic gain. Those with a darker view of the liberal tradition have mostly welcomed the degradation of liberal norms and institutions, even if they do not share Trumpism’s ideological commitments, believing that liberal democracy’s decline might pave a return to traditional forms of governance or perhaps something entirely new.

Since Trump assumed office, the tensions between the goals of his most enthusiastic supporters—which include a mix of street brawling groups like the Proud Boys, fringe law men like Joe Arpaio and Darren Clarke,<sup>81</sup> and avowed white nationalists and identitarians—and the goals

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77. JEFF SESSIONS, IMMIGRATION HANDBOOK FOR THE NEW REPUBLICAN MAJORITY 1 (2015).

78. *Id.* at 10.

79. Serwer, *supra* note 14.

80. For excellent work on the conservative legal movement, see TELES, *supra* note 10 (examining efforts to make the legal system more conservative); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008) (outlining types of lawyers that have united behind the Republican Party).

81. Robert L. Tsai, *The Troubling Sheriffs’ Movement That Joe Arpaio Supports*, POLITICO (Sept. 1, 2017), <https://www.politico.com/magazine/story/2017/09/01/joe-arpaio-pardon-sheriffs-movement-215566> [<https://perma.cc/25BH-AVR8>].

of conservative members of the merchant class have largely been managed through gestures and policies. His bombastic leadership style has kept the culture warriors in his fold, while creating headaches for his elite supporters. But many of those elites have been pacified that the merchant class has so far won nearly all of the fights on taxes, the economy, and social welfare policies.

Civil rights and immigration are two areas where grassroots activists have enjoyed the greatest impact on the substance of administration policies. Trump officials have taken traditionalist positions on transgender rights across the board, in the military, in public schools, and in the workplace—despite contrary positions taken by the EEOC and some mild opposition by the Education Department.<sup>82</sup> On the Civil Rights Act of 1964, the Trump administration’s Department of Justice argued that the proper interpretation of the word “sex” is biological, and therefore excludes, through statutory silence, discrimination against sexual minorities.<sup>83</sup> In another attack on civil rights, Trump’s DOJ has also moved across the board to release police departments from consent decrees arising from police brutality and misconduct allegations.<sup>84</sup>

On immigration, Trump’s strategy resembles the executive-led transformation of the law after the 9/11 attacks: built on broad claims of national security, increased reliance on emergency governance, little to no consultation with or approval from Congress on his most controversial moves, and reliance upon government lawyers to help justify executive actions that push the boundaries of existing law.

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82. Kristin Lam, *Homeless Shelters Could Deny Transgender People Under Proposed Trump Administration Rule*, USA TODAY (May 23, 2019), <https://www.usatoday.com/story/news/nation/2019/05/22/transgender-homeless-protections-discrimination-hud-proposal/1199509001/> [https://perma.cc/4X9E-S94R]; Paul Sonne & Ann E. Marimow, *Military to Begin Enforcing Trump’s Restrictions on Transgender Troops*, WASH. POST (Mar. 13, 2019), [https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9\\_story.html](https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html) [https://perma.cc/C39V-ZBP3].

83. Brief for the Federal Respondent Supporting Reversal at 16, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (mem.) (No. 18-107), 2019 WL 3942898 at \*16 (arguing that Title VII’s prohibition of employment discrimination “because of sex” does not extend to “transgender status” and “does not constitute sex stereotyping prohibited by Title VII”).

84. Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [https://perma.cc/6GYC-N3BL]; see also Memorandum from Attorney General Jeff Sessions to Heads of Litigating Components and United States Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (Nov. 7, 2018) (on file with the United States Justice Department in Washington, D.C.) (available at <https://www.justice.gov/opa/press-release/file/1109681/download> [https://perma.cc/R3EY-CZB4]).

The model of strong presidential leadership advanced by past presidents such as Franklin D. Roosevelt, Ronald Reagan, and George W. Bush has now paved the way for more unilateral action rather than bipartisan legislation. The principal difference is that the model of executive action is now being exploited by someone who does not feel constrained by a broad range of governing norms, such as convincing a majority of voters of the wisdom of his ideas, horse trading with legislators from the opposing party to achieve legislation, or worrying about his party's future electoral success beyond his own tenure. This is almost certainly Trump's one and only run in electoral politics, so future elective ambition is missing as a curb on this president's words and deeds.

A continuing decline in the general norm of bipartisanship, coupled with the erosion of consensus over who should be primarily responsible for immigration policy is a recipe fit for exploitation by a populist-autocrat. For all practical purposes, all a president's legislative allies have to do is hold off one house in Congress.<sup>85</sup> So far, assertive presidential leadership plus partisan obstruction has worked, allowing Trump to read existing law in a fashion that favors singular action and to overwhelm the judiciary through a series of aggressive enforcement actions, new regulations, and defensive skirmishes once lawsuits are inevitably filed. The administration's lawyers believe this approach will buy time to build political support for his bold actions and ultimately yield wins before the Supreme Court. To that end, they have sought to expedite as many cases as possible to that more favorable venue while Trump appointees continue to fill the lower federal courts.<sup>86</sup>

So far, the administration's policies in the immigration domain have exhibited the following characteristics. First, the administration has taken a number of steps to centralize decision-making authority over immigration and refugee policy. Power has been kept closely guarded in the hands of a few White House aides, with allies outside the White

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85. It should be pointed out that President Obama himself exploited the populist model of presidential leadership to establish the Deferred Action for Childhood Arrivals (DACA) program, contributing to the erosion of these norms of bipartisan control over immigration policy, even though he was doing so in the service of other principles: fairness, family integrity, and so on.

86. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125, 134 (2019) (observing that between January 2017 and October 2019, "the Solicitor General has sought stays from the Supreme Court on at least twenty-one different occasions"); Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html) [<https://perma.cc/AUF4-CJZV>] ("Federal judges have ruled against the Trump administration at least 63 times over the past two years, an extraordinary record of legal defeat that has stymied large parts of the president's agenda on the environment, immigration and other matters.").

House rarely consulted on the most controversial policies. Notably, certain agencies, such as the State Department, have been consistently sidelined, whereas other agencies such as Homeland Security have been given primary responsibility for carrying out new policies, but not necessarily equivalent policymaking clout.

A second pattern, related to the first, has been the reorganization of executive branch bureaucracies that oversee immigration and refugee policies. Sessions initiated efforts during his tenure to assert the Attorney General's prerogative over the work of immigration law judges (ILJ), whose existence can be traced to Article I of the Constitution rather than Article III. Sessions took away powers from ILJs that they used to delay deportation proceedings or administratively close them in order to keep families together.<sup>87</sup> Using the same authority, Sessions's successor William Barr later determined that any alien transferred from an expedited removal proceeding after establishing a credible fear of prosecution or torture "is ineligible for [release on] bond," so must be held indefinitely.<sup>88</sup> In the past, these tools were used by ILJs to keep families intact and reduce suffering by deportable aliens while proceedings continued.

An office that has helped pair immigrants with pro bono counsel in the past has also been reshuffled, with the potential effect of limiting access to legal information and assistance on the part of migrants facing deportation.<sup>89</sup> According to a new interim rule, an office of policy will have authority to make precedent for ILJs, and the Director of the Executive Office for Immigration Review will have authority to render an appellate decision when cases are not decided within a certain period of time.<sup>90</sup> Most recently, Attorney General Barr has moved to decertify the immigration law judges' union.<sup>91</sup> Thus, in all of these ways, the

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87. Castro-Tum, 27 I&N Dec. 271, 272 (A.G. 2018) (emphasis added) (holding that "immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure.").

88. Matter of M-S-, 27 I&N Dec. 509, 510 (A.G. 2019).

89. Alan Pyke, *Shakeup of Immigration Court System Threatens Migrants' Due Process*, THINKPROGRESS (Aug. 23, 2019), <https://thinkprogress.org/shakeup-of-immigration-court-system-threatens-migrants-due-process-7ffae9cab289/> [<https://perma.cc/4FGB-FZGR>] ("The regulations concern the Executive Office of Immigration Review (EOIR), where the work of applying immigration laws to individual human cases gets done. In addition to burying the legal-assistance work in a team Trump created, the rule endows EOIR's director with vast new power to change how the immigration laws are applied.").

90. Colleen Long & Amy Taxin, *DOJ Making Changes to Agency that Runs Immigration Courts*, ASSOCIATED PRESS (Aug. 23, 2019), <https://www.apnews.com/1e2188552a724b14b23739f1a8595fc3> [<https://perma.cc/Y78W-R788>].

91. Richard Gonzalez, *Trump Administration Seeks Decertification of Immigration Judges' Union*, NPR (Aug. 12, 2019), <https://www.npr.org/2019/08/12/750656176/trump-administration->

administration has harnessed the powers of the Attorney General to reorganize existing bureaucracies with the goal of reducing their ability to impede the president's new immigration policies.

Third, there is a broadening of law enforcement as a tool for social policy across key domains such as immigration and refugee policy. Both in rhetoric and practice, Trumpism returns to a Nixonian law-enforcement tilt, which reflects a greater comfort with using force to solve a wider array of social problems—from race relations to the cultural and demographic makeup of this country. Barr has largely been a force for continuity given his strong commitment to an expansive theory of executive authority,<sup>92</sup> even if Sessions had been more openly committed to an ethno-nationalist vision of America. But whereas in other areas the primary goal has been “deconstruction of the administrative state,” especially in terms of the nominees chosen to lead a department, the attorneys general have been notable outliers by possessing an expansive view of federal authority to deal with migration.

While he served as AG, Sessions routinely gave speeches to law enforcement castigating past immigration policy as “lawlessness” and seeking to inculcate sheriffs, state troopers, district attorneys, and attorneys general with a nationalist vision where demographic control is the responsibility of every law enforcement officer on the ground. As Sessions told a gathering of law enforcement officers in California, America admits “the highest numbers [of legal immigrants] in the world.”<sup>93</sup> This was an “unprecedented rate” he warned, and asked law enforcement to buy into the white anxiety driving a central tenet of Trumpism: “we will soon have the largest percentage of non-native born in our nation's history.”<sup>94</sup> During this gathering, he asked police to presume unauthorized migrants to be a danger to officers themselves: “Think about the officers knocking on a door to execute a warrant. They

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seeks-decertification-of-immigration-judges-union [<https://perma.cc/XL6W-KG9X>].

92. Barr has staked out a particularly strong version of the “unitary executive” theory, where a president cannot corruptly abuse a power given to him by the Constitution. This view was outlined in an unsolicited letter to Deputy AG Rod Rosenstein in which Barr complained about Mueller's special counsel investigation, and this view formed the basis for his decision as AG that the president could not be prosecuted for obstruction of justice. Eli Watkins, *Barr Authored Memo Last Year Ruling Out Obstruction of Justice*, CNN (Mar. 26, 2019, 6:31 PM), <https://www.cnn.com/2019/03/24/politics/barr-memo-mueller/index.html> [<https://perma.cc/4YGL-FTT8>].

93. Jeff Sessions, Remarks at 26th Annual Law Enforcement Legislative Day Hosted by Cal. Peace Officers' Ass'n, Sacramento, C.A. (Mar. 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-26th-annual-law-enforcement-legislative-day> [<https://perma.cc/SG4Q-E6R7>].

94. *Id.*

don't know what's on the other side.”<sup>95</sup> In Las Cruces, New Mexico, he announced the president's “zero tolerance policy toward illegal entry.”<sup>96</sup> He explained the ideological basis for this shift in policy: “The United States of America is not an idea . . . [it's] a nation.”<sup>97</sup>

The Trumpian vision of immigration regulation demands lock-step participation by state and local authorities, even though the principle of federalism limits how much the administration can strong arm jurisdictions that refuse to cooperate. Even the mostly symbolic declarations by certain jurisdictions they are “sanctuary cities” for undocumented immigrants is a threat to this vision of total mobilization against migration. To this administration, any disagreement with its immigration policy violates federal law. Sessions put his point in alarming terms: “Cities, states, and counties that knowingly, willfully, and purposefully release criminal aliens back into their communities are sacrificing the lives and safety of American citizens in the pursuit of an extreme open borders policy.”<sup>98</sup>

A fourth strategy entails ratcheting up criminal sanctions and other repercussions. The “rule of law” approach to immigration builds on earlier efforts to criminalize the mere existence of undocumented migrants in the United States and magnifying the consequences of unlawful entry. As it has been widely reported, the Trump administration is consciously redesigning American immigration policy purely through executive action to maximize whatever deterrence value it can wring from enforcement policy and rule changes to alter the rates and patterns of migration.

Most experts who study migration say that a complex array of factors affect when people decide to leave their home countries in search of a better life, from economic and political stability to natural disasters.<sup>99</sup> Trumpism's “zero tolerance” strategy is focused entirely on the alleged “pull factors,” trying to not just dry up economic opportunities for

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95. *Id.*

96. Jeff Sessions, Remarks on Immigration Enforcement, Las Cruces, N.M. (Apr. 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> [https://perma.cc/25FQ-HMEQ].

97. *Id.*

98. *Id.*

99. See JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601, 602 (2002) (“The primary ‘push’ factors are poor living conditions, high levels of unemployment, poverty, political unrest, overcrowding, and government oppression in the alien’s home country.”); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 623–26 (1981) (outlining key factors that influence an undocumented worker’s decision to come into the United States illegally).



migrants but also to increase the pain associated with efforts to cross the southern border—even when such efforts are entirely legal, say, to seek asylum under federal and international law. Separating children from parents and other family members at the border, denying education and benefits to undocumented children, and even a reported effort to withdraw from the Flores Settlement Agreement so the administration can return to indefinite detention of families, are all part of the same tapestry.<sup>100</sup>

Fifth, a new problem now emerges from assertive presidential action and modest institutional blowback, which is substantive spillover: an expansion of emergency-based governance and unilateral action across a host of areas. This includes the travel ban, foreign trade, the border wall, and other areas involving immigration and refugee policy. For the most part, the Trump administration's lawyers have deftly exploited limitations in the ways courts function to advance their objectives. They have come to expect unfavorable rulings from lower courts. While the president rails against those judges to rally his supporters and try to influence judges, his lawyers have at times strategically withdrawn appeals and rewritten policies to increase the odds of a victory before higher courts. This approach led the third version of Trump's promised Muslim travel ban to be upheld narrowly by the Supreme Court even though crucial changes had been made (i.e. excluding permanent residents, deleting the so-called "Christian preference" desired by evangelicals, and dropping a few countries from the list).<sup>101</sup>

At a key moment in *Trump v. Hawaii*, the majority of justices refused to read the Immigration Act's nondiscrimination principle to apply to national security decisions suspending entry for a class of nonimmigrants, even when those classes are defined by country of origin.<sup>102</sup> The majority's reading of the law is inconsistent with the 1960s settlement insofar as the reading treats the non-discrimination provision added in 1965 as regulating a wholly "different sphere"—visas as opposed to admission. But this reading of immigration law reduces the egalitarian principle to nothing more than the decisions made by low-level bureaucrats charged with visa determinations. At the same time, it presumes that Congress wanted a president to have otherwise broad power to bar the entry of immigrants, even for discriminatory reasons.

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100. Shear & Kanno-Youngs, *supra* note 16.

101. See generally ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 1–6, 74–80 (2019); see also Peter Spiro, *How the Courts Could See Their Way to Striking Down the Trump Travel Ban*, LAWFARE (Feb. 2, 2017), <https://www.lawfareblog.com/how-courts-could-see-their-way-striking-down-trump-travel-ban> [<https://perma.cc/3Q2F-FFVE>] (stating that "the order serves no counterterrorism purpose" and "[r]efugees are the most vetted of immigrants").

102. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10 (2018).

That seems inconsistent with the broader goals of the Immigration Act, which broadly attacked assumptions of cultural incompatibility and animus against foreigners. It is also obvious from legislative debates that using country of origin could, in some instances, violate the precepts animating the Immigration Act. Contrary to the Court's approach, it simply isn't possible to do justice to that law without meaningful consideration of a president's motive and some empirical inquiry of a presidential policy.

A great deal also seemingly hinges on whether the president's action to suspend entry from certain Muslim-majority countries is truly temporary. If that's a sham and it is actually an indefinite ban, the policy's subversion of the 1960s settlement is even more striking.<sup>103</sup>

Apart from the doctrinal aspects of the case, the president and his supporters have tried to build on this victory in two ways: rhetorically, by claiming broadly that his unilateral actions have now been endorsed by the Court; and substantively, by giving often weak empirical justifications on behalf of other unilateral moves, such as his decision to reallocate military funds to build a border wall that Congress refuses to fund. For a populist-autocrat, the absence of significant resistance to unilateral action is treated as a license to keep going and expand the areas for emergency governance and/or solo action.<sup>104</sup>

Some of the administration's policies entail treating migrants from certain parts of the world—i.e. Central and South America and the Middle East—differently from migrants that come from other parts of the world. The question is whether this differential treatment is justified by something legitimate that distinguishes these regions or countries, or whether they are instead founded on bigotry or otherwise unsupported assumptions.

On October 4, 2019, President Trump signed a proclamation invoking the identical INA provision § 212(f) used to keep out Muslim travelers to do something new unilaterally: keep out immigrants who can't demonstrate in advance they are "covered by approved health

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103. *Id.* Chief Justice Roberts's opinion for the 5-4 majority went on to decide the constitutional issues. After confining the principle of nondiscrimination to visas only, he then took an exceedingly deferential approach to the Equal Protection Clause due to the assertion of national security. On that score, the majority found a way to brush aside all evidence of anti-Muslim motivation, from repeated sentiments expressed by President Trump and his policy makers, as well as the fact that upwards of 97 percent of the populations of the affected Middle Eastern countries were Muslim. See TSAI, *supra* note 101, 74-75 (suggesting that it was not coincidental that the president's ban singled out populations from countries with 97 percent of the population belonging to the Muslim faith).

104. See generally Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590 (2020).

insurance.”<sup>105</sup> This is a major departure from past usages of a president’s emergency power to suspend the entry of foreigners. It doesn’t seem to be geared toward a problem limited in scale but rather entails policymaking of significant scope. This single act of presidential adventurism is projected to slash legal immigration by a whopping 65 percent if it goes into effect.<sup>106</sup>

In a sense, we might be witnessing a mutation of Franklin D. Roosevelt’s one hundred-day strategy of swamping the field of action and daring opponents to respond, while expecting a number of losses but “winning” with the public by creating the overall impression of furious activity on behalf of “the people.” One difference is that the ratio of executive actions to legislative successes has seemingly become lopsided. Another apparent difference has been the sustained length of time that a president has tried to go alone on any particular issue without significant institutional pushback. Further study of this phenomenon is warranted to assess whether the current norms-breaking style of throwing up far-reaching policies against the wall and seeing what sticks is an aberration or a sign of things to come.

To be sure, the structural incentives in favor of unilateral action have never been stronger for a populist-autocrat, given the lack of repercussions so far from either Congress or the Supreme Court. Unlike during the early part of the New Deal, there has been no shot across the bow from the high court, other than the notable decision in the surprising census case that suggests that, at least in certain contexts, manufacturing rationales could be a problem in the future.<sup>107</sup> Perhaps most troubling of all, the Court’s decision to insulate partisan gerrymandering from judicial review on political question grounds sends the signal to a populist-autocrat that deeply anti-democratic measures are simply matters to be fought out through ordinary politics.<sup>108</sup> The Court will soon have more opportunities to weigh in on other matters of democratic decline, such as the anti-corruption features of the Constitution. Whether the Judiciary will rise to the occasion or remain on the sidelines have an impact on democracy’s continuing fortunes in America.

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105. Proclamation No. 9945 on the Suspension of Entry of Immigrants Who Will Financially Burden the U.S. Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans, 84 Fed. Reg. 53,991, 53,992 (Oct. 4, 2019).

106. Nicole Narea, *Trump Just Quietly Cut Legal Immigration by Up to 65%*, VOX (Oct. 9, 2019), <https://www.vox.com/2019/10/9/20903541/trump-proclamation-legal-immigration-health-insurance> [<https://perma.cc/7W3P-5SPN>].

107. *Dep’t. of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (ruling that the justification that the government offered for including the citizenship question on the 2020 census was just a pretext).

108. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2018) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

One bright spot is the level of unintended transparency about legal changes: there seems to be more governmental actors willing to leak details about troubling initiatives, and among some public servants to draw a line in the sand and speak up even if they resign. This dynamic of internal bureaucratic testing and conscience-based decision making has enhanced the ability of people outside of government to expose the ideologies and plans behind unilateral actions. It's too sporadic to call it a true resistance. Yet thus far, we have seen more of the actual rationales that underlie major executive branch shifts in thinking, which helps observers to be able to connect the dots between seemingly disparate executive initiatives. That is different from many of the key transformations that took place within the Bush administration, which were conducted with far more secrecy.<sup>109</sup>

To say that these various aspects of unilateral immigration policy are troubling from the standpoint of the 1960s settlement is not to say that every single change would be deemed unconstitutional. It is, however, to recognize that many of the moves are part of the same concerted effort to gain control over the demographics and culture of this country.

Make no mistake: the grassroots effort to undermine the Immigration Act's legitimacy continues. Among the president's most enthusiastic early supporters on this issue was Ann Coulter. Her best-selling book, *¡Adios, America!*, derides the civil rights era as "the most destructive period in American history."<sup>110</sup> She singles out the Immigration Act's "premise" for special scorn and likens it to a bizarre belief of a weird hippy cult: "The poor of the world have the right to come to America, and we have to take care of them!"<sup>111</sup> It will take some effort to ensure that such attitudes, which informs the administration's approach, do not skew immigration policy in a lasting fashion.

### III. PRESUMPTION OF EQUALITY, CULTURAL COMPATIBILITY AND FAMILY UNITY

There are flaws with Trumpism's claim to popular sentiment for undermining the 1960s settlement. First, Trump did not win the popular vote in 2016, and Hillary Clinton's nearly three million-vote margin makes that deficit the largest for an Electoral College winner in

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109. For an excellent account of the 9/11 transformations, see JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2009). See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

110. COULTER, *supra* note 12, at 17.

111. *Id.*

history.<sup>112</sup> Accordingly, it is difficult for Trump to claim either a mandate or institutional consensus for the most radical features of his agenda. This does not by itself make any particular policy illegitimate, but it does warrant skepticism about majoritarian support for his initiatives when he acts alone. He may be acting within a reasonable scope on questions that are not well settled, but by expressing animus against refugees or Muslims or presuming that immigrants represent group threats, he is taking direct aim at deeply held principles without sufficiently broad and deep support.

Second, since many of his immigration measures emerge from the playbook of anti-immigration activists, the policies and objectives themselves come from the margins of the president's own party. These organizations have tried to take those policies mainstream through their expanded access to the White House, but it remains uncertain how popular those policies truly are if the president is unwilling to test them by doing the hard work of legislative governance. Indeed, his plan to reallocate military funds to build a border wall and his plan to separate minor children crossing the border from parents are disfavored by a majority of Americans.<sup>113</sup> Even members of his own party have denounced some of the policies.<sup>114</sup>

Third, while past presidents who won a close race tried to govern by moving towards the center, Trump has bucked that received wisdom by constantly tending to his base rather than seeking common ground with the opposing party, and then hoping that he will be rewarded electorally for maintaining the impression of tireless battle against the status quo. His anti-consensus leadership style certainly exploits the eroding democratic conditions that he found, but acting alone raises concerns that

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112. Benjamin Kentish, *Donald Trump Has Lost Popular Vote by Greater Margin Than Any US President*, INDEPENDENT (Dec. 12, 2016), <https://independent.co.uk/news/world/americas/us-elections/donald-trump-lost-popular-vote-hillary-clinton-us-election-president-history-a7470116.html> [https://perma.cc/6SCS-6BAE].

113. Steven Shepard, *Poll: Majority Still Opposes Trump Emergency Declaration*, POLITICO (Mar. 13, 2019), <https://www.politico.com/story/2019/03/13/trump-national-emergency-poll-1218483> [https://perma.cc/9SRN-HFXG]; *Stop Taking the Kids, 66 Percent of U.S. Voters Say, Quinnipiac University National Polls Finds; Support for Dreamers Is 79 Percent*, QUINNIPIAC POLL (June 18, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=255> [https://perma.cc/8X23-DR9Q].

114. Jeff Cirillo, *Here Are the Republicans Opposing Migrant Family Separation*, ROLL CALL (June 19, 2018), <https://www.rollcall.com/news/politics/republicans-opposing-migrant-family-separation> [https://perma.cc/3QVH-HNSA] (“Sen. Bob Corker . . . of Tennessee joined 11 senators in urging Attorney General Sessions to ‘halt’ the administration’s policies leading to family separation while Congress works to deliver a lasting immigration fix.”); Laura Bush, *Separating Children from Their Parents at the Border ‘Breaks My Heart’*, WASH. POST (June 17, 2018), [https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549\\_story.html](https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html) [https://perma.cc/WFP2-9YMN] (“[T]his zero-tolerance policy is cruel . . .”).

even when the president gets his way, his action may be an anti-democratic outcome or else violate deeply-held notions of how the constitutional order should operate.

So, what, if anything, should we take to be the normative consequences of acknowledging the Immigration Act of 1965 as an achievement every bit as important to the constitutional order as the traditional civil rights laws? While it's certainly no panacea, recovery of the statute's extraordinary status could help deepen and diversify efforts to protect the crucial values associated with its enactment. Legislation, judicial rulings, and popular rhetoric from a multiplicity of sources could deepen that historical insight and prevent further erosion of fundamental principles by populist-autocrats. Recovering the Immigration Act's history as part of the civil rights revolution also presents lawyers and judges with the material they need to convince others of the need to construe statutes so as to facilitate legislative goals and the empirical evidence so as to deter pernicious motives.

First, the principles of antidiscrimination and family integrity ought to be broadly presumed to run through the entirety of the Immigration Act. These principles should not be cabined to purely ministerial acts by bureaucrats but should instead have some broader constraining effect upon enforcement and policy decisions. The principles might act slightly differently depending on a particular dispute, and depending on the statute invoked, but wholesale disregard of them would seemingly violate the terms of the 1960s settlement. In areas like derivative citizenship, too, the equality norm should be more robust than it is at the moment. For now, the Court has been willing to afford more protection to visa determinations than invocations of national security-based exclusions, leaving only deferential constitutional protections. But where the Court has currently drawn even that line, and how judges evaluate the evidence of animus or cultural incompatibility, could be adjusted based on this historical knowledge.

Closely related to the non-discrimination norm in the immigration domain is a strong presumption of cultural compatibility. Its antithesis—the older assumption that people from certain countries were categorically incapable of assimilation and political loyalty—has been explicitly repudiated as part of this political settlement as racist and contrary to empirical practice. This should mean that enforcement actions or policies that are based on such broad assumptions, rather than other, legitimate grounds, should not be permitted to stand.

Not every usage of country-of-origin as a criterion will transgress these precepts. That category is still used in per-country limitations as well as for imposing application procedures on countries believed to be problematic. Where there is a sound empirical basis for using the criteria,

government officials should have no trouble doing so. But where country-of-origin serves merely as a proxy for racial animus or false cultural stereotypes, usage of that criteria to the detriment of newcomers offends the notion of equality or cultural compatibility.<sup>115</sup>

Second, although I have focused on the 1960s, these principles are not an entirely new product of that decade of political mobilization. Rather, they consisted of efforts to revive older notions of equality, freedom, and family reunification that emerged during the Reconstruction period. Kerry Abrams, for instance, detects language about a “natural right” to family unity in some cases that allowed family members to join existing relatives in America even without the proper papers.<sup>116</sup> More work can be done to underscore those linkages across political settlements, but the fact that these principles have a stronger historical pedigree and jurisprudential grounding should be part of the equation. They are fundamental values and should not be brushed aside as the musings of left-wing globalists.

Third, and this has the most impact for a populist-autocrat: any actions taken by later presidents, when they are done without the explicit approval of Congress, would be presumptively illegitimate insofar as they are inegalitarian or disregard the norm of family integrity. This point could have profound consequences for the current administration’s “zero tolerance” approach, which (1) may be characterized as broadly treating certain migrants differently based on hatred or disgust for them, or grounded in sweeping racial or cultural stereotypes and (2) has not been explicitly authorized by Congress. The president and his foot soldiers in the anti-immigration movement have repeatedly praised people and cultures from Nordic countries, while assuming the worst about the inhabitants and cultures of those from other parts of the world, such as Haiti, Africa, and El Salvador.<sup>117</sup> Such sentiments may serve as evidence of animus, but they may also reflect a categorical rejection of the presumption of cultural compatibility embodied in the Immigration Act.

It may be possible to urge even stronger legal protections to defend the law from unauthorized repeal or piecemeal adjustment, though doing so would take more space than I have here. For instance, one might claim

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115. For a deep dive into how some states use sweeping nationality in ways that offend equality, see Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563.

116. Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 255–58 (2017) (discussing *In re Chung Toy Ho*, 42 F. 398 (C.C.D. Or. May 23, 1890) and *United States v. Gue Lim*, 176 U.S. 459, 466–68 (1900)).

117. Jen Kirby, *Trump Wants Fewer Immigrants from “Shithole Countries” and More from Places Like Norway*, VOX (Jan. 11, 2018), <https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway> [<https://perma.cc/5NH5-QXUS>].

that the Immigration Act deserves to be accorded status as a “super-statute.” Bill Eskridge and John Ferejohn have argued that such a law is an ambitious one that:

- (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that
- (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.<sup>118</sup>

A law that qualifies as a super-statute should be construed “liberally and purposively,” the two contend.<sup>119</sup>

For Eskridge and Ferejohn, the Civil Rights Act of 1964 is the quintessential super-statute because it “embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law.”<sup>120</sup> They make no mention of the Immigration Act of 1965. The first two conditions seem to be satisfied, though more work would have to be done to establish that the Immigration Act has to a similar degree influenced governance in the institutional and normative sense that they describe. If so, the idea is that normatively, other doctrines should bend to facilitate the faithful application of a law rendered during a moment of intense popular mobilization.

To say that the Immigration Act of 1965 is part of the civil rights revolution is not to say that changes to immigration law can never be made. That would be absurd. Instead, it is simply to point out that the Immigration Act shares certain core principles embodied in other landmark laws. It also underscores that any changes to the essential character of immigration law and enforcement policy should come from Congress, while claims of populist presidents to embody the wishes of the people when acting alone should be treated with skepticism.

How far this legal transformation goes will depend upon what upcoming national elections bring, how federal judges react to the raft of lawsuits against the administration, and how firmly and cleverly the Democratic Party defends the precepts of the 1965 Immigration Act against the challenge of Trumpism. Trump’s almost certain impeachment in the wake of explosive revelations that his allies sought foreign assistance to harm a political rival will weaken him, while emboldening

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118. Eskridge & Ferejohn, *supra* note 5, at 1216.

119. *Id.* at 1249.

120. *Id.* at 1237 (footnotes omitted).



institutions willing to resist his efforts, but not necessarily put an end to executive-based innovation in policymaking.<sup>121</sup>

In broad strokes, as Tom Ginsburg and Aziz Huq point out, democracy in America remains at risk of “constitutional retrogression” given Trump’s “hostility to the institutional predicates of democracy.”<sup>122</sup> Trump’s removal from office would not be sufficient to repair the damage done; nor will it fix overnight the way institutions like the Department of Justice and the State Department have been disfigured by partisan and personal interests. What happens from here on out will tell us how durable our existing political settlements are. History tells us that there is always a period of institutional and popular resistance, as there should be, when a social movement or figure comes to power with visionary objectives. But that period of resistance varies, and when reformers push far enough for long enough, institutional resistance will end and become adaptation, as courts and other legal actors come to accept the terms of a new constitutional baseline.

We should assume that the same dynamic that weakens institutional resistance over time to populist leaders will respond in largely the same way by eventually accommodating populist-autocrats. On the other hand, democratic backsliding can still be reversed—or at least norms of governance can theoretically be returned to a pre-crisis state if intervention through election or some other change of power occurs. The Democrats’ flipping the Senate would ordinarily be a crucial change if it were to occur, but even if that institutional shift were to occur, Congress as a whole would still have to be able to overcome the vetoes of a populist-autocrat.

The basic point, however, remains: How we see the civil rights revolution, and what we do to keep it intact, is entirely up to us.

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121. See Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. REG.: NOTICE & COMMENT (Nov. 16, 2016), <https://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/> [<https://perma.cc/YHY3-LF48>] (cataloguing covert and overt tactics used by civil servants to defy their superiors).

122. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 163–64 (2018).