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# Introduction

## THE TOUGH QUESTION

JUSTICE MARSHALL: *Could Texas deny them [unauthorized immigrants] fire protection?*

JOHN HARDY: Deny them fire protection?

JUSTICE MARSHALL: *Yes, sir. F-I-R-E. Could Texas pass a law and say they cannot be protected?*

JOHN HARDY: If their home is on fire, their home is going to be protected with the local fire services just . . .

JUSTICE MARSHALL: *Could Texas pass a law and say they cannot be protected?*

JOHN HARDY: I don't believe so.

JUSTICE MARSHALL: *If they could do this [deny unauthorized immigrants access to public education], why couldn't they do that?*

JOHN HARDY: Because . . . I am going to take the position that that is an entitlement of the . . . let me think a second . . . You . . . that is . . . I don't know. That is a tough question.

—PLYLER V. DOE, US SUPREME COURT ORAL ARGUMENT,  
DECEMBER 1, 1981

THIS EXCHANGE between the gravelly voice of Justice Thurgood Marshall and the Texas twang of John Hardy lays bare the question: what are the rights of noncitizen immigrants in the United States? The answer to this question shifted dramatically over the last quarter of the twentieth century during debates in courtrooms, in Washington, and in communities and legislative arenas across the country. The impact of these events and battles on evolving alliances cannot be understated. America's transition from a "nation of immigrants" to

a country characterized by a sharpened division between those with citizenship rights and those without didn't simply shape the political landscape of those years but fundamentally shapes American life today.<sup>1</sup>

In recent years, federal policy toward immigrants has become hostile, yet Americans have a surprisingly thin understanding of just how that came to be. This book traces the struggle of politicians, interest groups, courts, activists, and communities to define the rights of immigrants in the United States after the passage of the historic Hart-Celler Act of 1965. A key piece of legislation in Lyndon Johnson's Great Society, Hart-Celler ended the national quota system of the 1920s and launched a new era in immigration, remaking the nation's demographic profile over the next four decades, reshaping American society and culture, and launching deep debates over the place of the immigrant in American life. In particular, political battles erupted over immigrants' access to education, labor, welfare, and civil liberties. Sometimes these battles grew so acrimonious that they dominated American politics.

Historians have not paid much attention to these battles; nor have social scientists who focused more on battles over admissions restrictions than on the rights of immigrants who were admitted.<sup>2</sup> For much of the period under consideration, controlling admission to the United States across its southern border proved too difficult for policymakers. Thus, the battle to control immigrants shifted from external borders to internal ones: to what extent would noncitizen immigrants receive the rights given to US citizens? Those internal borders—which focused on access to schools, to employment, and to welfare—form the subject of this book. So, too, do the various levels of government—the federal, state, and local authorities who tangled with each other over who would have the right to make the critical decisions affecting the lives of immigrants.

While initially seen as a triumph for liberal immigration policy, the Hart-Celler Act proved to be both progressive and deeply conservative at the same time. Scholars have shown how the replacement of the national origins system with equal quotas actually created new obstacles for potential immigrants from the Western Hemisphere as it ignored the particularly compelling reasons residents of some nations had for seeking to emigrate to the United States.<sup>3</sup> But this duality of the Hart-Celler Act becomes even more striking, as this book shows, when we consider how the act that fostered an increase in the numbers and diversity of immigrants also inspired a reactionary movement that has sought to marginalize those same immigrants inside the United States.

This new anti-immigrant sentiment was notably different from the anti-immigrant sentiment of the late nineteenth and early twentieth centuries, in

large part because the nation itself was notably different.<sup>4</sup> Racism and nativism had become less reputable in American society, while the United States had embraced and expanded a welfare state with a variety of new benefits. As a result of these changes, the new restrictionists rejected overtly racist arguments and instead charged that immigrants unduly burdened the state and its citizens.<sup>5</sup> In this new rendering, immigrants took government benefits and jobs away from working- and middle-class Americans in an era when the new service-oriented, low-wage economy left many citizens economically insecure.<sup>6</sup> Working- and middle-class White *and* Black citizens sometimes viewed the massive growth of Latino and unauthorized populations (all too often seen as one and the same group of people) as the causes of the inequality and displacement associated with the new economy.<sup>7</sup> The movement grew by forging unusual alliances between groups from different sides of the political spectrum. Many unions warned that immigrants would undercut the wages and access to jobs for citizens of the United States. Environmental activists drew upon population control arguments to oppose immigration. More traditional nativists warned of the immigrants' deleterious implications for "American" culture and society. At the same time, the rise of a broad-based conservative movement against "big government" also fueled restrictionist rhetoric that objected to the success of immigrants' rights groups in defending government support for immigrants in the 1970s and early 1980s. For their own reasons, each of these groups sought to restrict the rights of immigrants and together worked to undermine the idealistic vision of the United States as a nation of immigrants that John F. Kennedy had celebrated and that Lyndon Johnson had made part of his Great Society.

These diverse anti-immigrant groups pursued a multifaceted strategy to restrict immigrants' rights, engaging the courts, Congress, state legislatures, ballot initiatives, and other forums to press for political change. Their movement created new cleavages in the electorate and facilitated a redistribution of power within both political parties. The Democrats were divided by a desire to accommodate both anti-immigrant labor unions and members of an emerging centrist faction, Third Way New Democrats, while still appealing to the party's proponents of an expansive and inclusive New Deal welfare state. The party was also split between its pluralist and humanitarian wing that favored opening borders and absorbing immigrants into the mainstream of American society as quickly as possible and those who worried that increases in the labor supply would be so large that the wages of all working-class Americans would suffer. The Republicans were riven by a different divide, one between restrictionists on the one hand and business

conservatives on the other, whose commitment to free enterprise and deregulation (and an ample supply of immigrant workers) caused them to support permeable borders.

This book highlights the constellation of institutions and activists that together thwarted restrictionist efforts through the 1970s and 1980s, providing a perhaps surprising example of liberal persistence during a period generally understood as an era of conservative ascendancy. First, the modern civil rights movement had fostered expansive notions of the Equal Protection and Due Process clauses of the Fourteenth Amendment, which gave immigrant rights advocates access to resources and networks that expanded their claims on the state. Second, in a nation increasingly committed to deregulation and the free movement of capital, goods, and labor across nation-state boundaries, anti-immigration hard-liners struggled to gain power and shape policy within both parties. Third, restrictionists also struggled to navigate the complexity of the United States' fractured legislative process and regulatory structures at the federal, state, and local levels. Altogether, the particular politics of immigration after 1965 divided the parties internally, set potential allies against each other, and created significant difficulties for those seeking to forge the unusual alliances needed to enact policy change. In the end, however, the obstacles to restrictionist reform and repeated failures to pass restrictive immigration policy during the 1970s and 1980s only strengthened the resolve of anti-immigrant activists and helped fuel popular restrictionist sentiment through the decades.

The anti-immigrant movement of the 1970s originated in a rejection of state toleration for *unauthorized* immigrants, but by the 1990s, the increasingly polarized debate, with an emboldened restrictionist movement, had begun to question rights for *all* immigrants, including authorized immigrants and green card holders. The 1990s proved to be a pivotal decade. Citizenship status became the litmus test for basic rights. Anti-immigrant activists successfully limited the access of both authorized and unauthorized immigrants to key welfare programs, including federal welfare benefits, Medicaid, and food stamps. At the same time, they built on the conservative shift in policymaking from the federal to the state level to empower state and local law enforcement officers as the front-line enforcers of immigration policy.

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This book reveals the centrality of debates about the rights of immigrants to the politics of immigration policy in the United States. The focus on border

and admissions policy after 1965 has obscured fights over the rights of immigrants already in the United States. While placing alienage rights in the nation's interior at its core, this project never loses sight of the importance of the external border.<sup>8</sup> The intersection between border enforcement and domestic rights is always dynamic because, as legal scholar Linda Bosniak writes, noncitizens are “deportable by definition.” Regardless of whatever civil, social, or economic rights they enjoy in society, their status as deportable “will always circumscribe their lives, making absolute sphere separation . . . a practical impossibility.”<sup>9</sup> While potential expulsion is always present in noncitizen immigrants' lives, this work focuses on the increasing role that alienage rights played in immigration control and policy at the end of the twentieth century.

As the rights of immigrants in the United States loomed larger and larger, so, too, did the dispersed character of power in the American federal system. This study looks at the entire scale of policymaking that is pertinent to immigrants, showing how local, state, and federal actions shaped policy implementation and politics in distinct ways. From its founding to the late nineteenth century, the federal government played only a limited role in regulating immigration. State and local authorities dominated, creating immigration control regimes with distinctive and uneven patterns in enforcement and influencing popular attitudes toward immigrants well before the era of federal exclusion.<sup>10</sup> In the late nineteenth century, responding initially to the growth of Chinese immigration on the West Coast, federal officials began to control immigration, winning support for their new powers from the US Supreme Court in two cases, *Chy Lung v. Freeman* (1876) and *Henderson v. New York* (1875).<sup>11</sup> For the rest of the nineteenth century and much of the twentieth century, the Supreme Court remained committed to federal preemption in immigration enforcement as largely settled legal doctrine.<sup>12</sup>

However, as federal policy appeared increasingly directionless in the 1970s and 1980s, states and local government began taking more decision making about immigrants into their own hands. In doing so, local and state action in turn pressured federal officials either to delegate authority to the states or to conform federal immigration policy to state preferences. By driving immigration policy during the 1990s, states and localities ushered in a new era of immigration federalism.<sup>13</sup> By 2010, states were shaping immigration policy in numerous ways, with some states pushing increasingly restrictive legislation while others sought to pass laws to increase immigrant integration.<sup>14</sup> The shift to the states that got under way in the 1990s also represents an important step

in the larger trend of devolution of authority to the states seen across many policy arenas during the period.

To understand late-twentieth-century immigration history is to gain a more refined understanding of the end of the twentieth century in the United States. The political debates over immigrants' rights intertwined with debates over large-scale structural changes in the new economy, including those generating unemployment and underemployment, stagnating wages, and deindustrialization. Those who sought to restrict immigration increasingly sought to roll back the expanded notion of social and economic citizenship that had been forged through the Progressive Era, the New Deal, and the Great Society. Immigration history is central to the history of the American state.

The history of immigration restriction in the late twentieth century also brings important new insights to an understanding of the conservative revolution. Many historical works describe a collapse of liberalism in the 1960s and a political shift to the right that took hold in 1970s.<sup>15</sup> In contrast, this book shows how many liberal reforms endured the so-called Reagan Revolution and how the conservative agenda actually achieved more success in the 1990s under the Clinton administration. But liberalism never disappeared. As the evidence here shows, the institutional factors and political activities that thwarted restrictionist efforts kept those liberal visions of social and economic rights alive.

By focusing on the persistence of liberalism even during the supposed triumphant moment of conservatism and the passage of immigration restriction under a Democratic administration, this book is able to join a larger move "Beyond the Red-Blue Divide."<sup>16</sup> Rejecting a narrow focus on partisan politics and election cycles that seem to make the red-blue divide real, the approach to immigration history taken here examines the intersection of political culture, electoral politics, and political economy in ways that allow us to see clearly the divisions that endured within parties and the alliances that formed across party lines during this supposed period of party homogenization and hyper-partisanship.

Finally, in explaining how the rise of restrictionist energy often yielded less than many hoped, or feared, *The Walls Within* puts the Tea Party and Trump-fueled anger that has emerged since 2008 in the context of this three-decades-long history of anti-immigrant activism. Restrictionists have had reason to be unsatisfied, and to become ever more radical, as the policies that have diminished the rights of immigrants have not diminished the growing size of the foreign-born population.

Any study of immigration at the end of the twentieth century requires that one grasp how fundamentally the Hart-Celler Act changed the demographic profile of the United States. Passed in 1965, Congress established a preference system that first favored family reunification and then gave preference to employment-based migration. The 1924 Immigration and Nationality Act, also known as the Johnson-Reed Act, had previously defined immigration for a half century. Wartime hysteria, fears of working-class radicalism, the rise of the eugenics movement, as well as the maturing of the industrial infrastructure which reduced the need for unskilled labor led to the passage of the Act in the early 1920s. Its chief aim was to drastically reduce immigration, and with its passage, Congress sought to use “immigration law as an instrument of mass racial engineering” in order to produce a nation that was heavily white and of northern and western European descent.<sup>17</sup> The 1924 Act set immigration at no more than 2 percent of what the US total for each nationality had been in 1890, when immigrants arriving were predominantly from Western and Northern Europe, drastically cutting immigration from Southern and Eastern Europe. Additionally, the Act banned immigration by people “ineligible to citizenship,” which, when paired with a series of court decisions in the early part of the twentieth century that had ruled Asians were ineligible to become citizens based on their race, largely ended legal immigration from Asia, and especially from South and East Asia. But the 1924 Act made much less of an attempt to stem immigration from Mexico. Agricultural labor needs in the Southwest and American foreign policy concerns blocked the restriction of Mexican immigration. As a result, Mexico and other countries of the Western Hemisphere were not subject to either the numerical quotas or the “ineligible to citizenship” ban that targeted Asians, as under naturalization law at the time, Mexicans were deemed to be White.<sup>18</sup> Nonetheless, while not formally excluded through quota by the 1924 Act, Mexicans were considered readily deportable and faced deportation, administrative exclusion, and repatriation campaigns throughout the 1924–1965 period of restriction.<sup>19</sup>

Following this period of severe restriction, the passage of the Hart-Celler Act in 1965 drastically remade the nation’s immigration patterns and its racial composition more broadly. Approved by Congress under an ethos of civil rights and fairness and as part of the Great Society, the Act set a uniform cap on all nations at 7 percent of the annual total. In its rejection of national origins, and its replacement with a system that on its face was race neutral and



based on egalitarianism, the 1965 immigration act can be seen as part of the larger civil rights movement, passed the same year as the Voting Rights Act, and just a year after the Civil Rights Act of 1964. “We have removed all elements of second-class citizenship from our laws by the [1964] Civil Rights Act,” Vice President Hubert Humphrey noted. “We must in 1965 remove all elements in our immigration law which suggest there are second-class people. . . . We want to bring our immigration law into line with the spirit of the Civil Rights Act of 1964.”<sup>20</sup> At the time, few of the bill’s supporters or opponents anticipated that the legislation would result in a demographic transformation of the United States, with a transformed population of unprecedented diversity emerging.

In an effort to promote uniformity, the Hart-Celler Act also introduced for the first time a cap on immigration from the Western Hemisphere. Thus, while the overall cap rose, the volume of legal immigration from Mexico actually fell, leading to a sharp increase in deportations, as Mexican migrants increasingly became recast as “illegals.”<sup>21</sup> As a result, there has been a rising perception of immigration as an “invasion” by a lawbreaking population seen as non-assimilating in a threatening way. In addition, the 1965 immigration law required tracking of previously largely informal migration by Central and South Americans, creating a significant increase in immigration regulation and bureaucracies that have continued expanding ever since, with immigration status serving as a proxy for certain kinds of racial discrimination. While there have been incremental changes to the numbers allotted to the preferences established in 1965, the general structure of immigration regulation created by the Hart-Celler Act still governs admission today.

As a result of these new admissions allocations, the demographic composition of the United States has shifted significantly over the last fifty years. Of the approximately 59 million immigrants that arrived in the United States between 1965 and 2015, approximately half came from Latin America and one-quarter from Asia.<sup>22</sup> Whereas in 1965, 84% of Americans were classified as non-Hispanic Whites, by 2015 that share had declined to 62%. The Hispanic share of the population grew from 4% in 1965 to 18% in 2015. Asians also saw their share rise, from less than 1% in 1965 to 6% in 2015. New immigrants, their children, and grandchildren have driven much of the population growth in the United States since 1965, adding 72 million people to the nation’s population, accounting for 55% of the population growth.<sup>23</sup>

This work focuses on the changes in immigrants’ rights during and in the wake of these demographic changes and in particular looks at education, labor,

and welfare rights and civil liberties protections, four key arenas where the state touches individuals' lives. The first half of the book covers roughly 1965–1990, the period when new arguments over immigrants' rights emerged and efforts at restriction were met with mixed success. The second half addresses 1990–2000, a time when anti-immigrant activism began to make consequential gains and states began to play a significant role in immigration policymaking. The debates over the rights of noncitizen immigrants in the United States in the 1970s were undoubtedly shaped by the perception of many native-born Americans that they faced increasingly limited opportunities for economic mobility and that the political and social means to achieve their own aims and aspirations had narrowed.

The debate over opportunity and access was inherently linked with arguments over what acceptable “entitlements” were and to what extent the government had to “promote the general welfare, and secure the blessings of liberty.”<sup>24</sup> During the 1970s, twenty years after the famous *Brown v. Board of Education* desegregation decision, school segregation and inferior educational opportunities remained at the forefront of public discourse. As seen in the *Swann* and *Milliken* Supreme Court decisions over busing policy, as well as the violent anti-busing protests in Boston, arguments over integration raged across the country. Educational equity and school financing disparities were contested in local communities and came before the Supreme Court in the 1973 case *San Antonio Independent School District v. Rodriguez*.

Part of this larger national dialogue over access to quality public education included a fight over immigrants’—particularly unauthorized immigrants’—access to public education. Chapter 1 explores how during the 1970s, several local school districts in Texas, with the backing of the Texas state legislature, began to charge tuition to unauthorized students. A group of unauthorized students and their parents sued the school board, and a team of activist lawyers took the case to the Supreme Court in *Plyler v. Doe* (1982). Chapter 2 traces the federal government’s role in the case, under both the Carter and the Reagan administrations, and addresses how the federal government’s arguments were deeply influenced by political and policy concerns. In the end, the Supreme Court’s 1982 landmark decision extended the school rights of the Equal Protection Clause of the Fourteenth Amendment to unauthorized children, expanding the rights afforded to those with anything less than citizenship status to new bounds.

While education was one key component of the social contract, so too was access to fair labor and employment. In what some social scientists have

dubbed “the fading American dream,” 92 percent of Americans born in the 1940s earned a higher salary than their parents by the time they turned thirty, but only about half of those born in the 1980s could say the same.<sup>25</sup> This regression of Americans’ ability to do better than their parents was tied to significant changes in the economy with the rise of post-industrial labor, including the impact of stagflation, the oil crisis, and changes in the labor force. Chapters 3 and 4 explore the debate over immigrants’ access to employment during this period of tumultuous change in the American economy.

Studying the passage of employer sanctions for hiring unauthorized immigrants under the 1986 Immigration Reform and Control Act shows how cracks began to emerge within the liberal coalition as the new economy created active rifts in the pro-immigration alliance. But they also show how the strength of neoliberalism and a commitment to free movement of capital, goods, and people reigned in Washington and across the nation. As a result, even as the architects of the 1986 bill set out to punish employers who gave unauthorized immigrants jobs, all enforcement mechanisms were successfully removed from the bill before passage. The measures to deny jobs to unauthorized immigrants were thus rendered toothless; in addition, the bill granted a road to citizenship for three million unauthorized immigrants. Though framed as an act of immigration control, the 1986 Act actually did little either to seal the border or to punish unauthorized immigrants themselves or employers who gave them jobs. These chapters also help us to reconsider the labor history of this period. A declension narrative focused on outsourcing dominates labor history of the end of the twentieth century.<sup>26</sup> By turning away from that narrative, this project shines a light on those who came to the United States for work, as well as the economic stagnation and part-time service economy that they encountered. Noncitizen immigrants’ success in gaining access to education and labor rights was matched by success in other policy areas, the gains driven in part by the growth of Latino and Mexican American activism. While these efforts were not uniformly successful, there was a notable expansion of immigrants’ rights during this period.<sup>27</sup> This expansion would not remain true for following decades, as seen in the second half of this book.

The long simmering ambivalence toward social welfare in the United States entered a new era during the 1990s, and its confluence with the changing immigrant population had dramatic constricting effects on immigrants’ rights as well as on the broader social contract. During the 1960s and early 1970s, the War on Poverty and the welfare rights movement made gains in expanding

social welfare and opportunity for minorities and the poor in the United States.<sup>28</sup> As a result, the meaning of citizenship and the social contract had expanded, fueling the growth of the conservative right. Chapter 5 explores how by first mobilizing at the state and local levels, these conservative anti-welfare forces were successful in slashing some services during the 1970s, including notably in California under then-Governor Ronald Reagan. Unauthorized immigrants were made ineligible for many welfare programs as a result of these efforts. These anti-welfare campaigns, combining with the rising tide of conservatism and changing party politics, achieved even greater success and remade the American welfare state during the 1990s.<sup>29</sup> Immigrants in particular saw dramatic shrinkage in their access to benefits. California voters overwhelmingly supported a ballot initiative, Proposition 187, which sought to prohibit unauthorized immigrants from accessing public benefits including health care, education, and other social services. While federal courts invalidated many of the Proposition's provisions, the measure's popularity drove national policy. Following California's anti-immigrant lead, the 1996 Welfare Reform Act disallowed access for millions of authorized immigrants to Supplemental Security Income (SSI), along with food stamps and other means-tested programs. As a result, in the realm of federal welfare, the rights of immigrants in the United States largely depended on citizenship status instead of whether such immigration was legally authorized.

While border state California led the way in blocking immigrants' access to the welfare state, it was in the nation's landlocked core that immigrants' civil liberties began to be challenged in dynamic ways during the 1990s. In Iowa, a murder in a small town and the broader region's changing immigration patterns spurred the creation of the 287(g) program by Congress as part of the 1996 Immigration Reform and Immigrant Responsibility Act. This program allowed the federal government to deputize state and local law enforcement to assist in federal immigration enforcement. Chapter 6 explores the roots of this program and the shifting role of state and local law enforcement in immigration enforcement, beginning in the mid-1970s and culminating in the implementation of 287(g). This program effectively ended a century of exclusive legal federal control over immigration enforcement, and it created a new set of civil liberties concerns. While this was a major government policy shift, the program's implementation was highly contested at the local level, demonstrating again the dynamic role that local governments played in implementation as well as the limits of restrictionist pressure.

Taken together, these chapters show that the politics of immigration reform and immigration restriction were powerful not only at the country's edges, but at its core. Debates over education, labor, and welfare rights and civil liberties for noncitizen immigrants revealed the growing strength of the restrictionist movement in the United States. In the aftermath of the civil rights movement, anti-immigration activists forged a new restrictionist movement with rhetoric drawn from the language of rights, benefits, and burdening the state. Pivoting its tactical approach during the 1990s, this modern anti-immigrant movement made inroads, coming to dominate national politics and ushering in a new era of immigration federalism.

Immigrants in the United States entered the twenty-first century with few of the governmental benefits that they had enjoyed thirty years earlier. Locally, they continued to carve spaces to live, work, and thrive in the face of shifting political winds. At the beginning of the twenty-first century, while many in the United States still referred to the country as a "nation of immigrants," it was more accurately a nation of citizens and noncitizens, in which the benefits of citizenship had been both narrowed and denied to a very significant population living permanently in the United States.

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