A constitutional challenge to immigration quotas

Abstract: Millions of immigrants are never accused of any action which violates any law, yet they are routinely sentenced to worse than jail. Depriving people of liberty without regard to their actions or qualifications violates the 5th and 14th Amendments.

Our laws do not charge immigrant babies with legal responsibility for breaking our laws by letting their parents bring them here. Plyler v. Doe pointed out, "it is a basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." "Dreamers" are only one of seven categories of immigrants who are arrested, prosecuted, and deported who are innocent of any action which violates any of our laws.

Even those who violate our immigration laws can't constitutionally be charged, if the laws they violated are themselves unconstitutional. Depriving innocent people of their liberty, because our laws place a numerical limit on how many of the people living among us may have Freedom, may be justified by a national emergency. But claims that our lottery on liberty serves some "compelling government interest", and does not instead create a dangerous "cost to the nation", has to do more than sound good. It has to survive "strict scrutiny". Qualified evidence and expert witnesses have to identify such an emergency, prove it is "compelling", and prove that immigration quotas restrict liberty by the "least restrictive means" possible.

This claim can't survive such a courtroom examination, because no one who believes it is qualified to testify in court. Those who make this claim in conservative media and in campaign speeches base this claim primarily on their assumptions about the economic impact of immigration on America and on individual Americans, but none of them have a degree in economics. Neither are they qualified in the other areas where they insist immigration harms America. Courts don't allow witnesses to testify beyond what they have personally observed, unless they have university credentials in their subject, qualifying them as "expert witnesses". Undocumented Economists would not be allowed to talk. And credentialed economists are virtually unanimous in a positive, or at worst neutral, view of the benefits of as much more legal immigration as we will allow.

It is no "rule of law" to make laws impossible to obey from which we exempt ourselves, that we apply to only one group of the human beings among us, whose liberties we then justify taking away because they "broke our laws". That is neither "due process", nor "equal protection of the laws", nor just, nor constitutional. And contrary to the conclusion of the king and the crowd in "The Emperor's Clothes" by Hans Christian Andersen, the parade really doesn't have to go on.

Historical perspective: the reason for the 14th Amendment.

The 13th Amendment, ratified in 1866, outlawed slavery, except as punishment for a crime. So Southern states simply passed laws which everyone violates, and wrote them to apply only to blacks. So the 14th Amendment was ratified in 1868 to outlaw unequal laws that put others in jail for doing what we do freely. The 14th Amendment requires "equal protection of the laws". It protects everyone to whom our laws apply – everyone under the "jurisdiction" of our laws – everyone who can be arrested for violating them. Because of the 14th Amendment, it is unconstitutional for Congress to create a lottery that would grant Freedom of Religion to only 10% of the people in our land, and make the other 90% go to the state church. All 100% must be allowed Freedom of Religion. Today, not in 40 years. If freedom for only 10%, after decades of waiting and

"fees", qualified as "equal protection of the laws", we would still have slavery, because even before the Civil War, about 10% of blacks in southern states managed to eventually find or buy a "pathway to freedom". Today, our immigration quotas provide a "pathway" to liberty for about 10% of undocumented immigrants, though it is very rocky, unpredictable, expensive, and decades long. These quotas are no more constitutional than any other lottery our descendants might devise of the fundamental, unalienable, God-given, Constitutional rights of any group of people under the jurisdiction of our laws.

This summary is posted with video at http://www.cafeconlecherepublicans.com/a-constitutional-challenge-to-immigration-quotas

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Syllabus: Only when people commit crimes is it reasonable for our laws to deprive them of liberty, subjecting them to arrest, trial, and detention. Our laws also bar people from various activities which they are not qualified to perform safely.

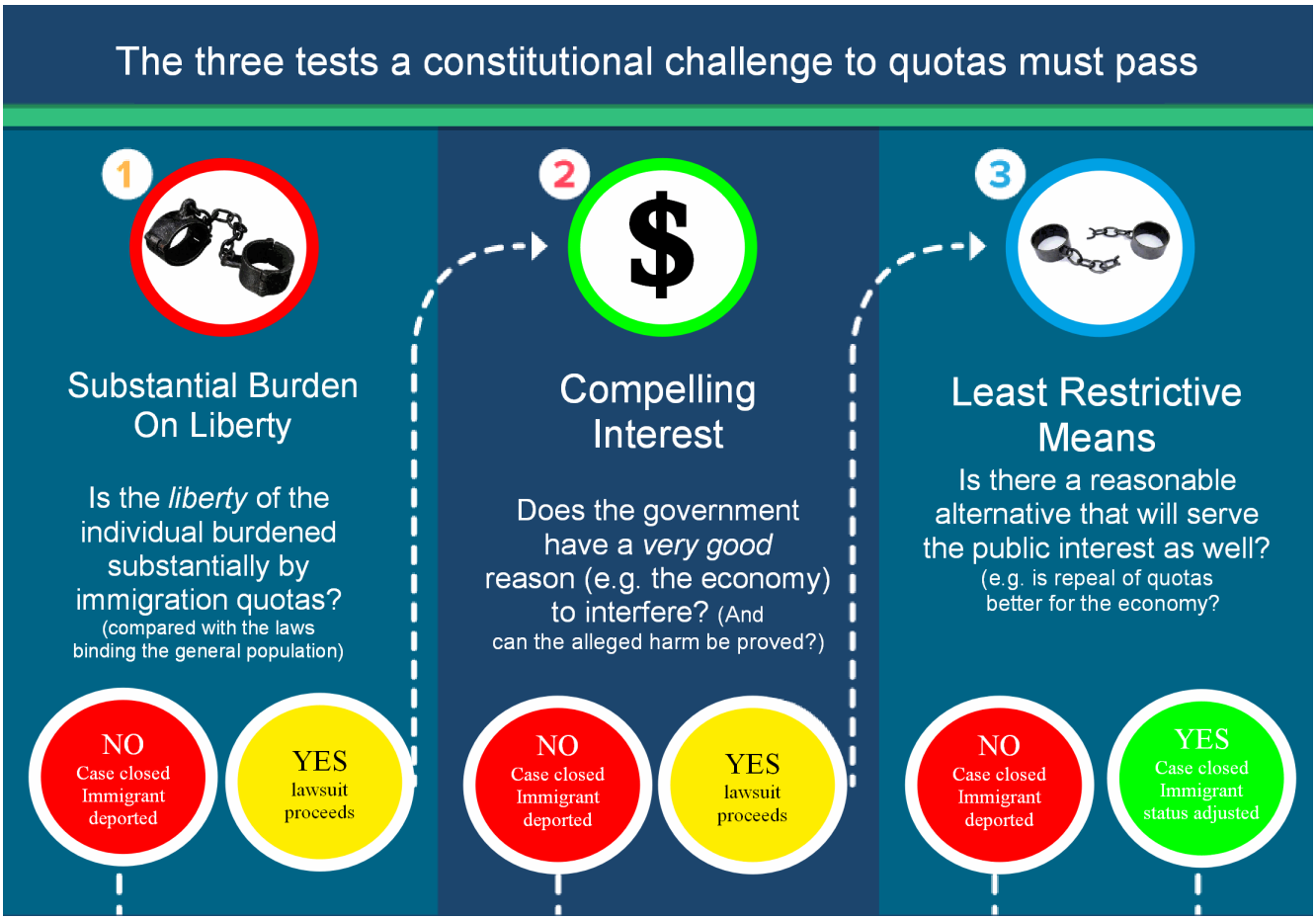
But when our laws deprive a "suspect class"[1] of the fundamental right of liberty without regard to anyone's actions[2] or qualifications, that violates "the *basic concept of our system that legal burdens*

1 When we "relocated" West Coast Japanese Americans during World War II, fearful that they might fight on Japan's side, the Supreme Court allowed it but with this warning which is the origin of the phrase "suspect class": "...all legal restrictions which curtail the Civil Rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194 (1944)

2 "There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation *due to the nature of his conduct.* But unless such condition is shown, I would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees." *Harisiades*

should bear some relationship to individual responsibility or wrongdoing." Plyler v. Doe, 457 U.S. 202, 219 (1982)

When a person has done nothing that violates any law, he is, by definition,[3] "innocent".



Millions of undocumented immigrants have broken no laws, yet are under a cloud through which the rays of liberty can never shine. They violated no laws as they came. They lost their liberty through no fault of their own. Our laws make demands of them which range between unreasonable and impossible, from which citizens exempt themselves. Millions more want to come here but are denied by laws which cannot be Constitutional.

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v. Shaughnessy, 342 U.S. 580, 598 (1952) (Douglas and Black, dissenting) The context of this quote is given in footnotes 11-13.

3 Black's Law Dictionary, 4th edition. Guilt: "That quality which imparts criminality to a motive or act, and renders the person amenable to punishment by the law. 'That disposition to violate the law which has manifested itself by some act already done. The opposite of innocence.' See Ruth. Inst. b. 1, c. 18, § 10." Innocence: "The absence of guilt." Innocent: "Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections."

"Undocumented innocents" are in five categories, examined in Part A: "Dreamers"[4], "Good Samaritans"[5], victims of conflicting authorities,[6] PRUCOL[7], and nonresidents applying for liberty from abroad.[8]

The very essence of "law" is equal "operation upon all members of the community."[9] Laws that treat citizens as "more equal" than immigrants violate the "equal protection" clause of the 14th Amendment, according to SCOTUS.[10] "Illegals" may be "lawbreakers", but when the law which they violate is unconstitutional, a proper court review will set the accused "lawbreaker" free while overturning the law. A proper review would not rule that preserving the "rule of law" requires that it be enforced whether or not it is constitutional, or that an unconstitutional law can't be fixed because that would be "unfair" to millions oppressed by its unconstitutionality in the past.

Therefore the Constitution does not authorize any law which does not apply evenly to everyone under it. Nor can any unevenness of application exist at all except to the extent the freedoms of us all are endangered. The 14th Amendment "equal protection" clause is the only thing in the Constitution that prohibits slavery. (The 13th Amendment tried, but the absence of "equal protection" was a loophole so big the entire South could drive through it.) If it were constitutional to once again build a fence around the liberties of any persons on our shores, slavery would once again be constitutional.

Courts say the more "fundamental" the right, the more "equal protection of the laws" protects

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4 No one alleges that "dreamers" have any legal culpability for being here.

5 "Good Samaritans" are protected by "Necessity Defense" laws which set aside laws whose legalistic enforcement would obstruct saving lives.

6 When legal status is approved by one government agency charged with establishing it, but reversed years or decades later by another agency, the real lawbreaker is the bureaucracy which violates "double jeopardy" and "speedy trial" principles.

7 Dragging out a decision about liberty for years, and then ruling in a way that no one could have predicted, often makes compliance impossible without violating other laws.

8 To the extent our laws reach across our borders to affect people beyond them, are they constitutionally obligated to "equally protect" the rights of all? Do those under the jurisdiction of our laws, and thus entitled to their equal protection, include everyone whose liberties and rights are affected by our laws, whether living here or abroad?

9 "[W]here there is no law, there is no liberty; and nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community." --Benjamin Rush, letter to David Ramsay, 1788

10 ... the Fourteenth Amendment prescribes that **"[n]o State . . . shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."** In Plyler v. Doe, 457 U.S. 202 (1982), we made clear that this principle applies to aliens, for "**[w]hatever his status under the immigration laws,** an alien is surely a 'person' in any ordinary sense of that term." Id., at 210; see also Mathews v. Diaz, 426 U.S. 67, 77 (1976). [Jean v. Nelson, 472 U.S. 846, 874 (1985) dissent by Marshall and Brennan]

it, and courts have protected many rights; so why has no court addressed why the most fundamental right – liberty – shouldn't also be protected? Has the question not been raised? The "equal protection" clause logically applies to everyone *to the extent* our laws affect them. Not just people living here.

Can it be "lawful" for the American majority to subject 10 million U.S. residents to the defacto lottery of liberty that we call "numerical limitations", or immigration quotas, which grants liberty to two percent of them,[11] an arrangement from which the majority exempts itself?

Can it be lawful for Congress to deprive anyone of liberty, (except because of criminal action or deficient qualifications), considering that liberty is an unalienable God-given right according to America's founding document[12] which no human authority can remove from any human?[13] Dissents in 1952 and 1985 question how "the Constitution protects an alien from deprivations of 'property' but not from deprivations of 'life' or 'liberty'".[14] A dissent in 1952 lists several rights won for immigrants in

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11 The 146,406 Mexicans given green cards in Fiscal 2012 are less than 2% of the nearly 10 million already here who are trying to crowd into the same "line". See http://www.usagreencardlottery.org/green-card-statistics.jsp for odds for other immigrants.

12 The U.S. Code at 22 USC § 8201(1) and 22 USC § 7101(22) acknowledges the legal authority of the "unalienable rights" codified in the Declaration of Independence. Black's Law Dictionary, 4th Edition, defines the foundational laws of our government as "organic law": "ORGANIC LAW - The fundamental law, or constitution, of a state or nation, written or unwritten; that law or system of laws or principles which defines and establishes the organization of its government." The U.S. House website posts the Declaration ("decind.pdf") in its directory of "Organic Laws" at http://uscode.house.gov/pdf/Organic%20Laws/current/. This recognition by Congress that the Declaration was "organic law" of the U.S. dates back at least to an 1877 act; see http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=018/llsl018.db&recNum=5. (Following that "preface" are the table of contents, followed by "Organic Laws", beginning with the Declaration, and including the 1787 Northwest Ordinance, the Articles of Confederation, and the Constitution.) The Supreme Court in *Cole v. Richardson,* 405 U.S. 676 at 682, 92 S.Ct. 1332 at 1336, 31 L.Ed.2d 593 (1972) said an oath "to 'uphold' the Constitution...was simply...an affirmation of 'organic law'." The annotation of the Colorado statute at issue, § 22-61-103, summarized the ruling this way: "the phrase to 'uphold the constitution' means an affirmation of belief in organic law". Belief in "organic law" includes "belief" in the other three founding documents besides the Constitution.

13 Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

14 "It simply is irrational to maintain that the Constitution protects an alien from deprivations of 'property' but not from deprivations of 'life' or 'liberty.' Such a distinction is rightfully foreign to the Fifth Amendment." *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Jackson and Frankfurter, dissenting)

"...The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate rests on Fong Yue Ting v. United States, 149 U.S. 698, decided in 1893 by a six-to-three vote. That decision seems to me to be inconsistent with the philosophy of *constitutional law which we have developed for the protection of resident aliens.* We have long held that *a resident alien is a "person" within the meaning of the Fifth and the Fourteenth Amendments.* He therefore may not be deprived either by the National Government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws. *Harisiades v. Shaughnessy***,** 342 U.S. 580, 598 (1952) (Douglas and Black, dissenting)

court which were much less substantial than the right to liberty,[15] and frankly challenges "The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate".[16] The 1952 dissent is validated by the 1982 majority in *Plyler v. Doe.* Had the *Plyler* court been presented with these arguments in a case which asked, not just whether "dreamers" should be educated, but whether they should be free, history might have been different. But no court has been asked that question yet.

Even citizens can be deprived of *ordinary* rights by laws which have some "rational basis" for their restriction. They can be deprived of *fundamental* rights by laws that can pass "strict scrutiny". But as Part B argues, it is not enough to *allege* there is some "compelling government interest" in keeping numerical limitations at their current level, or in even having them at any level. It must be *proved* in court that the restriction of a fundamental right *successfully* serves a "compelling government interest", that there is no "less restrictive means" to do it, and that the solution does not create a greater "cost to the nation" than the problem.

There is no alleged "compelling government interest" for immigration quotas that can survive such a test; rather, serious inquiry will show numerical limitations seriously harm U.S. interests. The

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15 (*Harisiades, continued from footnote 11*) A state was not allowed to exclude an alien from the laundry business because he was a Chinese,[1] nor discharge him from employment because he was not a citizen,[2] nor deprive him of the right to fish because he was a Japanese ineligible to citizenship.[3] An alien's property (provided he is not an enemy alien), may not be taken without just compensation.[4] He is entitled to habeas corpus to test the legality of his restraint,[5] to the protection of the Fifth and Sixth Amendments in criminal trials,[6] and to the right of free speech as guaranteed by the First Amendment.[7] An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands...*Harisiades v. Shaughnessy***,** 342 U.S. 580, 598 (1952) (Douglas and Black, dissenting)

16 (The beginning of the Harisiades argument is quoted in footnote 11. It continues with the list of rights lesser than liberty which courts have affirmed. Here it concludes:) "The right to be immune from arbitrary decrees of banishment certainly may be more important to 'liberty' than the civil rights which all aliens enjoy when they reside here. *Unless they are free from arbitrary banishment, the 'liberty' they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair...*There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation *due to the nature of his conduct.* But unless such condition is shown, I would stay the hand of the Government and let *those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees. Harisiades v. Shaughnessy***,** 342 U.S. 580, 598 (1952) (Douglas and Black, dissenting)

"cost to the nation" of retaining them is high. Dangerously high. Economists virtually all agree that the more immigration we invite, the more robust our economy will be, and the better shape our national deficit will be in. And conversely, that immigration restrictions have not been good for our economy, just as vigorous deportation just before the Great Depression did no favors for our economy.

Can the court count, as a "compelling government interest", any purported legislative goal which is as a practical matter impossible, which has never been remotely met, which Congress refuses to seriously fund, and which would become theoretically possible only at the cost of our freedoms as we know them, through the complete loss of privacy and the absolute power of bureaucracy over citizens in every area of life?

When congressional action has utterly and decisively abandoned a purported goal, can statements about congressional intentions, by a minority, support the finding that the goal is a compelling government interest?

Somehow politicians have managed to evade serious scrutiny of the "rational [sounding] basis" commonly alleged in support of immigration quotas.[17] (For example, more legal immigrants will just take citizens' jobs. They will burst our welfare budgets. They will not "assimilate". Our population would become "unsustainable". More terrorists would come with them. That would be "amnesty", whatever that word has turned into. They will destroy our "rule of law".)

In other words, Americans have become content with explanations for our immigration policy that *sound* plausible, there being little interest in *evidence* that it does anything we want.

That would be enough, if we were talking about a right to free phones or something, but we are talking about liberty. And we are not just talking about the liberty of 11 million U.S. residents. The monitoring measures invoked to deprive these millions of liberty threaten the liberty of us all.

It is time for strict scrutiny of the claims that ending our lottery on liberty will destroy America.

17 For example, more legal immigrants will just take citizens' jobs. They will burst our welfare budgets. They will not "assimilate". Our population would become "unsustainable". More terrorists would come with them. That would be "amnesty", whatever that word has turned into. They will destroy our "rule of law".

When this scrutiny finally happens, it may show us that ending that cruel lottery is the only thing that can save America.

Questions Presented (or, Questions I would love to see restrictionists try to answer!)

1. Can Liberty be rationed? *(In other words, can our laws deprive human beings of Liberty, not on the basis of their actions or of their qualifications, but on the basis of any type of lottery? Is the rationing of Liberty to anyone, anywhere, by our laws, permissible under the 14th Amendment "equal Protection" and 5th Amendment "due process" clauses?)*

2. Can immigrants be prosecuted for violating laws which the prosecutors themselves, and the citizens who authorized them, would be guilty of violating, had they not exempted themselves? *(In other words, can laws which target significant discrete population groups for disruption of fundamental human relationships, and liberty itself – laws from which population majorities are exempt, survive "due process" and "equal protection" scrutiny?)*

3. Should deprivation of the fundamental right to Liberty, of persons innocent of violating any law, be reviewed by Strict Scrutiny?

4. Even under the Rational Basis test, can liberty-rationing numerical limitations pass the "cost to the nation" test of Plyler v. Doe, while they perpetuate economic and security problems identified by a consensus of economists and disputed only by undocumented economists (with no university credentials in the field) who are thereby unqualified to testify as expert witnesses?

5. Can there be any other justification for retaining liberty-rationing immigration quotas, after the consensus of qualified expert witnesses fails to identify any "compelling government interest" for them, much less any evidence that quotas are the "least restrictive means" of achieving it?

6. Can the court count, as a "compelling government interest", any purported legislative goal which is as a practical matter impossible, which has never been remotely met, which Congress refuses to seriously fund, and which would become theoretically possible only at the cost of our freedoms as

we know them, through the complete loss of privacy and the absolute power of bureaucracy over citizens in every area of life? When congressional action has utterly and decisively abandoned a purported goal, can statements about congressional intentions, by a minority, support the finding that the goal is a compelling government interest?

A. Five categories of unauthorized immigrants unconstitutionally deprived of liberty.

1. "Dreamers." (Defendants brought here as children.)

Prosecutors don't even allege that "dreamers" are guilty of any action which constitutes a violation of any law. They are in a "suspect class" of about 2.7 million undocumented immigrants similarly situated who were brought here as babies or as children with no voice in their coming here. As *Plyler v. Doe* (1982) observed,[18] our laws do not regard infants and small children as lawbreakers for actions over which they have no control. They have no "culpability" (legal responsibility), or "mens rea" ("criminal intent"). Depending on their age, children have diminished capacity to "intend" to live on one or the other side of the border. They go where they are taken. Without "criminal intent", our criminal laws do not openly find anyone guilty of any crime. That is why we judge juvenile offenders by different standards than we judge adults.

Nor do our civil laws proceed against defendants not guilty of any "negligence", and who have exercised "due diligence" within their power to avoid harm and violation of law.

One might object, "Whoa. If someone is kidnapped and taken to a restricted military installation, and discovered, he isn't just given the run of the place just because it wasn't his fault he got there! He is not prosecuted, but he is respectfully escorted off the base!"

To make that analogy appropriate the person would have been brought to the base as a young

18 "...those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. ... the children... 'can affect neither their parents' conduct nor their own status.' ....legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." Plyler v. Doe, 457 U.S. 202, 220 (1982)

child, grown up there, blended in with the base population for 20 years without being discovered as unauthorized, and the base is in a foreign country with language and laws unknown to the youth (in many cases) which no longer recognizes the youth as its citizen. Even then the inhumane cruelty to the youth might be justified if somehow his continued presence put the base at serious risk, just as any officer might be expelled who becomes a serious threat to the base. But what can justify such an expulsion if the youth has become a functioning, contributing worker on the base? Or even a vital member of the team, whose expulsion would put the base at risk? Forget lawful. How can it be smart? (See the Part 2 discussion of "strict scrutiny" and "cost to the nation".)

If our analogy is of a baby left on our doorstep, then for it to be relevant it would be 20 years before we notice the child is not a family member, and by that time the child's family would have passed away.

Liberty limited to only two percent of 10 million U.S. residents cannot withstand rational or strict scrutiny. Two percent "quotas" on the liberties of resident unauthorized alien *children* cannot withstand any scrutiny of any kind. They are without even the pretense of justification.

Not only are virtually all "dreamers" legally innocent of any actions that should cost them liberty, but for a number of them, bringing themselves into compliance with our laws, by leaving the U.S., is as impossible, even after they become adults, as it would be for most native born citizens.

Many "dreamers" are not fluent in another country's language. They have no savings to start a business or even rent a home abroad. No foreign city is familiar. The ways of another land are unfamiliar.

Such a person does not know how to conduct himself in a land ruled not by law but by bribes. He doesn't know who to bribe, how much is necessary, and who not to bribe. He has no money to pay a bribe. He is unfamiliar with a government bureaucracy where bureaucrats obtain jobs paying ten times the wage of laborers, not by qualifying on a civil service test or by any other measure of competence, but by purchasing the job from the outgoing worker for perhaps twice the annual wage.

He doesn't know which bureaucrats to most avoid, who might otherwise threaten him with those nine terrifying words: "I'm from the government, and I'm here to help." (In the words of President Reagan.) He does not know the laws of the land under which he may be legitimately prosecuted, much less the labyrinthian *ad hoc* customs guiding individual bureaucrats in shaking down their victims. He does not know the ways of the drug cartel: which areas to avoid, when to avoid them, and what words invite danger. He will be the perpetual target of thieves who assume that because he came from America he is rich. He will be the perpetual target of prejudice and resentment because he is an outsider. (At least that last problem will not be new to him.)

The absence of any government "safety net" is not new to him. But here he has survived with the help of a network of friends and family. Here he knows the laws, which he fears, not because he is guilty of violating them but because they criminalize his very existence; but at least he knows our laws, and can *minimize* his liability by remaining innocent of violating them, without fear of some bureaucrat's shakedown for bribes.

Some "dreamers" are citizens of no other country either. It is impossible for them to bring themselves into compliance with our laws if they stay, and they cannot leave because there is nowhere they can go. ICE cannot deport them because no other country will receive them. Our laws make them "lawbreakers" for the crime of existing. The only legal recourse which our laws leave them, if they want to obey our laws, is suicide. And some states even have laws against that.

That solution deprives them of the fundamental right not only of liberty, but of life.

It seems likely that had the Plyler court been asked whether "dreamers" should not only have a public education, but the more fundamental right of liberty, the court would have obliged.[19]

19 *Plyler v. Doe,* 457 U.S. 202, 219 (1982) "The children who are plaintiffs in these cases are special members of this underclass. *Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply [p220] with the same force to classifications imposing disabilities on the minor children of such illegal entrants.* At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. *But the children of those illegal entrants are not comparably situated. Their 'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'" Trimble v. Gordon,* 430 U.S. 762, 770 (1977). Even if the State found it expedient to control the

The probability that "dreamers" will eventually become legal, and will become voters, is a factor to weigh in deciding how we should treat them.[20] If this factor is strong enough to merit providing them a public education during their childhood, how much stronger a factor this should be in providing them liberty for the remainder of their natural lives?

This consideration is expressed in the version of the 14th Amendment Equal Protection Clause[21] which is found in the Iowa Constitution.[22]

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conduct of adults by acting against their children, *legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.* "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the *basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent.* [P. 202] "Although undocumented resident aliens cannot be treated as a 'suspect class,' and although education is not a 'fundamental right,' so as to require the State to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless the Texas statute imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. These children can neither affect their parents' conduct nor their own undocumented status. [P. 207] "Finally, the court noted that, under current laws and practices, *'the illegal alien of today may well be the legal alien of tomorrow,'* [n4] and that, without an education, these undocumented children, [a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class." [P. 220] *"Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic, since it is the product of conscious, indeed unlawful, action. But §21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of §21.031."*

20 [Plyler, p. 207] ...*under current laws and practices, "the illegal alien of today may well be the legal alien of tomorrow,"* [p. 230] Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. *Whatever the current status of these children, the courts below concluded that many will remain here permanently, and that some indeterminate number will eventually become citizens*.

21 The relevance of the 14th amendment to federal immigration policy should be clarified, since the 14th Amendment restricts states, not the federal government. Plyler made much of the 14th Amendment because a state, Texas, wanted to bar undocumented children from its public schools, so SCOTUS invoked the 14th Amendment for its authority over Texas.

But the 14th Amendment has power over federal policy in two ways. First, if a federal immigration policy unconstitutionally deprives residents of a state, under the jurisdiction of the state, of "equal protection of the laws", it forces the state to violate the 14th Amendment by conforming its laws to federal policy. Second, SCOTUS often cites the 5th Amendment (which has jurisdiction over Congress) in the same phrase with the 14th, without treating them as distinct.

For example, notice in this cite that SCOTUS applies both 5th Amendment and 14th Amendment restrictions to both states and the federal government: *Harisiades v. Shaughnessy*, 342 U.S. 580, 598 (1952) (Douglas and Black, dissenting) "We have long held that a resident alien is a 'person' *within the meaning of the Fifth and the Fourteenth Amendments. He therefore may not be deprived either by the National Government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws."*

Although their phrases are not identical, the amendments are treated as if they both describe the same reality but just emphasize different aspects of it. So that the 5th Amendment, although it doesn't say it, of course applies to anyone under the jurisdiction of U.S. laws, and of course requires "equal protection of the laws" for them.

22 "Foreigners who are, *or may hereafter become residents* of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens." - Iowa Const. art. I, § 22.

When the case for the legal innocence of "dreamers" is so compelling, especially for those with no citizenship elsewhere and who do not know another language, that even if ICE is too ashamed to prosecute, a class action lawsuit would seem reasonable over denied opportunities (ie. college, work, or a driver's license) by laws that criminalize their very existence.

2. Good Samaritans. When an unadmitted immigrant comes here to save lives, and actually saves lives, and there was no other way to do so, (and if the proper defenses are properly raised), U.S. laws do not normally enforce whatever laws it was "necessary" to break.

For cases in federal court, federal law's Model Penal Code, which suggests Necessity Defense verbiage to states, should carry weight. The principle is a "comparison of harms". Violating a law is legally justified if "the harm...sought to be avoided...is greater than that sought to be prevented by the law...."

"(1) *Conduct that the actor believes to be necessary* to avoid a harm or evil to himself or to another *is justifiable*, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;..." [Model Penal Code § 3.02 (1962), 10 U.L.A. 477 (1962).]

When unauthorized immigrants are prosecuted for state crimes caused by their immigration status, such as driving without a license because that state doesn't allow licenses for unauthorized immigrants, that state's necessity defenses could prove fruitful. Every state has "self defense" and "defense of others" laws, which not only *justify* violating relatively minor laws when that is the only way to save human life, but in many states like Iowa's 704.10, even clarify that such an action is "not a public offense". Such defenses are endorsed by *U.S. v. Bailey* 444 U.S. 394 (1980), even for states who do not spell them out in their laws.

The principle is packaged for popular consumption in the "old saying", "necessity knows no law."

Here is a typical case of a Good Samaritan: a man came here as a young teen when his father

died, leaving six younger siblings and a struggling mother. Their fate, if our Samaritan did nothing, was certain: several of them would be forced to the streets to beg, and some would die there. The father could barely feed his family on the $3 a day of hard labor that he found; a woman gets paid less, and can't pay babysitters. Our hero would likewise have earned less than his father, had he stayed in Mexico. Our Samaritan risked his life to come here, to lie about not only his status but his age, and to earn money to send back home so his family could live.

It is now 20 years later. His family is safe. He helped with not only their food but their shelter, their medical needs, and a move to a safer area when drug gangs moved in. He has many nieces and nephews whom he will never see because he can't safely return home and then return here to be with his new family.

And now our government has found our hero and rewarded him with a Medal of Honor: an orange prison jumpsuit.

The "comparison of harms" will weigh almost infinitely in our hero's favor, if it is raised, since the court will search in vain for *any* "harm or evil sought to be...prevented by the law" in the case of most immigration law. Where are any "findings of fact" or case law that explain how Numerical Limitations benefit America in any way, or that explain what harm is prevented by them? In contrast to harms which no case law or law identifies, stands the certain harm of lost human lives in the absence of defendant's action.

A second and third element of the federal Necessity Defense is that "(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear." [Model Penal Code § 3.02 (1962), 10 U.L.A. 477 (1962)].

Certainly there is no law either authorizing unauthorized immigrants to come here to work to save lives, or specifying that saving lives does not justify them coming.

This is just as true for refugees. Immigration laws provide for refugees to come here to escape

grave danger to themselves,[23] but danger to others, whom a refugee might save by coming here and sending money back home, is not addressed by any law.

Because laws provide for a few refugees to come here but put a number on how many, clause (b) of the Model Penal Code prevents the Necessity Defense from justifying refugees coming in excess of that number, regardless of the human tragedy that results. But coming here to save others is unprovided for, and thus not barred as a justification.

Clause (b) also allows the Necessity Defense to justify refugees coming here to flee dangers to themselves like famine, since only danger from deliberate human violence is provided in law as a ground for coming here as a refugee. "The specific situation involved" remains unprovided for and "a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

Where is there any "legislative purpose" at all for Numerical Limitations?

Where does any law or case law "plainly" or positively state that saving a family from starvation is *not* and *should not be* grounds for refugee status? Any lawmaker would be ashamed to even introduce such a bill. It would never pass. Even if it passed, to be enforceable it would have to spell out what kinds of human beings would be left to die, which would be a public scandal.

Refugee laws correctly express our compassion. (Not adequately, but correctly.) Our laws should have greater respect, instead of no respect, for immigrants who save the lives of others at risk to

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23 Ge v. Holder, 588 F.3d 90, 95 (2009): [Ge applied] "for asylum, for withholding of removal, and for relief under the United Nations Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment ("CAT"). 1465 U.N.T.S. 85.... To demonstrate that "[his] fear of [future] persecution is well-founded," [] an applicant must establish that his putative "persecutor is, or could become, aware of the applicant's possession of the disfavored belief or characteristic." [Tun, 445 F.3d at 565] As we have explained, an applicant can make this showing in one of two ways: first, by offering evidence that "he or she would be singled out individually for persecution"; and second, by 'prov[ing] the existence of `a pattern or practice in his or her country of nationality ... of persecution of a group of persons similarly situated to the applicant' ... and ... establish[ing] his or her own inclusion in, and identification with, such [a] group.'" Id. at 564 (quoting 8 C.F.R. § 208.13(b)(2)(iii)).

"Put simply, to establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities....

"In order to be considered a refugee and therefore eligible for asylum, the INA provides that Ge must show that he has suffered past persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion," or that he has a "well-founded fear of persecution" on such grounds should he be ordered to return to his native country. 8 U.S.C. § 1101(a)(42). A well-founded fear is "a subjective fear that is objectively reasonable. A fear is objectively reasonable even if there is only a slight, though discernible, chance of persecution." Tambadou v. Gonzales, 446 F.3d 298, 302 (2d Cir.2006)

their own. Congress gives its Medal of Honor, not to soldiers who save themselves, but who, at the risk of their own interests, face those who would destroy others.[24]

We define "hero" as someone who saves others, at cost or risk to himself.[25]

Therefore by every spiritual, moral and legal principle, our laws sheltering refugees trying to save themselves ought the more to shelter heroes trying to save others. Fortunately a rich body of Good Samaritan law and case law stand ready to help.

Our Necessity laws, which can never be repealed without strangling everyday life with mindless, lethal legalism, set aside the ordinary operation even of immigration law when necessary to save lives.

This is the same principle that has been codified as accommodation of "refugees". But refugee laws have also become strangled with regulations and quotas that leave millions in terror. It is time to visit the constitutionality of laws which put quotas on how many may escape certain death, whether violent or peaceful, and which only shelter those facing death from human-administered torture and not those facing death from human-caused but not personally administered starvation, nor those intervening to save others from death.

3. **Conflicting Authorities.** An immigrant ruled "legal" by one of the branches charged with determining his status – the courts, state department, USCIS, and county recorders – but later ruled "illegal" by another branch, has become an "illegal" without regard to his actions or qualifications, by which criteria he is legally innocent. The case is more egregious, the more delayed and unpredictable the second ruling was, and the more "roots" the defendant laid down, during good faith compliance with the first ruling, between the two rulings. Such a case may invoke "speedy trial" and "double jeopardy" principles.

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24 [The medal goes] to a person who while a member of the Army, distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty. 10 U.S.C. § 3741

25 Webster's 1828 Dictionary includes these words for "hero" and "heroic": valor, intrepidity or enterprise in danger;...bold; daring;...brave;...magnanimous...." These are all words that describe a subjugation of self interest to a cause greater. Jesus put it this way: "Greater love hath no man than this, that a man lay down his life for his friends." John 15:13.

The most egregious example must be the 500-1,000 cases of citizens in several South Texas counties forced to bring legal action against the Bush and Obama administrations to defend their citizenship, half a century after a few isolated cases of fraud by midwives (filling out certificates saying the child was born in the U.S. when the child was not) cast doubt on birth certificates in those counties. Those counties are 90 percent Latino.[26]

The number of cases brought to trial does not count the number of people deported to a strange land because they could not defend themselves – too elderly, mentally disabled, or poor to pay the $5,000 to $15,000 cost, and denied court-appointed attorneys because they were alleged to be non-citizens. It doesn't count those detained for days and pressured to sign false statements that they were born in Mexico, to which they were then deported.

Forcing people to hire attorneys to defend themselves before two or more of these immigration status authorities violates 5th Amendment "double jeopardy". It violates 6th Amendment "speedy trial" by making people wait upon more than one of the authorities to make a decision, two of whom have wait times that exceed any reasonable construction of "speedy". These requirements are relative, but at some point a line is crossed and they should be raised, and the lawbreaker should be acknowledged as not the resident, but the bureaucrat or the laws enabling him.

Although the long awaited USCIS ruling is not a courtroom trial, its impact on adjustment of status applicants is more cruel than the impact of most courtroom trials on citizens, since the USCIS ruling has the potential to deprive defendant of liberty forever, while citizens may return to their family, business, and community relationships after their ordeal is over.[27] Therefore it cannot be that defendant's right to a "speedy trial", which everyone acknowledges applies to a court trial, does not

26 Many news stories covered this incident. These figures are taken mostly from "Obama DHS Stripping Citizenship from Hundreds of Latinos" by Bob Quasius, posted at http://cafeconlecherepublicans.com/obama-dhs-stripping-citizenship-from-hundreds-of-latinos.

27 "The right to be immune from arbitrary decrees of banishment certainly may be more important to 'liberty' than the civil rights which all aliens enjoy when they reside here. *Unless they are free from arbitrary banishment, the 'liberty' they enjoy while they live here is indeed illusory.* Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. *Harisiades v. Shaughnessy***,** 342 U.S. 580, 600 (1952) (Douglas and Black, dissenting)

also apply to a more serious ruling against people whose 5th and 14th Amendment rights are equally protected. It cannot be that the authors of the "speedy trial" requirement did not mean to put a stop to waiting times several times longer than for a trial, to determine penalties rivaling every courtroom penalty short of execution.

The usual relief for defendants from unconstitutionally conducted legal proceedings is liberty through dismissal of the charges or vacation of the conviction.

There is no statute of limitations on murder. If new evidence is discovered that a senior citizen committed murder 50 years ago, a new trial can be ordered.

But being born with the help of a record-fudging midwife is not murder. In fact, the person accused of being born with the help of a record-fudging midwife is not even accused of any action that violates any law. To deprive a U.S. resident (under U.S. "jurisdiction")[28] of liberty without regard to his actions or qualifications violates both "equal protection of the laws" and "due process".

Traditional reasons for statutes of limitations are deterioration of memory and evidence over time, including progressive depletion of witnesses. In Texas, the USCIS asks for records of prenatal care fifty years ago. Not only can defendants not remember the name of their deceased mothers' deceased doctors before they were born, or ask their deceased mothers for their deceased doctors' names, or subpoena their deceased doctors for their records, but fifty years ago prenatal care was not that fashionable. ICE, upon hearing of the uncertainty over birth certificates, wouldn't let at least two citizens return to the United States from their vacations abroad.

All U.S. residents have a responsibility to exercise "due diligence" to obey our laws insofar as compliance is humanly possible and insofar as laws can be known. But bureaucrats and law enforcement also have a responsibility to rule with enough predictability, clarity, and finality that plans

28 *Plyler v. Doe,* 457 U.S. 202, 219 (1982): "....The *Equal Protection Clause [of the 14th Amendment] was intended to work nothing less than the abolition of all caste-based* and invidious [offensive, prejudicial, causing hatred] class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection. ....*Indeed, it appears from those debates [during its passage of the 14th Amendment] that Congress, by using the phrase 'person within its jurisdiction,' sought expressly to ensure that the equal protection of the laws was provided to the alien population."*

made in good faith compliance with those rulings will not make residents unable to obey the law. The conformity of one's plans with good faith reliance upon rulings is a measure of one's "due diligence". The impossibility of complying with later unexpected rulings is a measure of the unconstitutionality of the bureaucracy or of the laws that created it.

For example, when there is every indication from every legal authority that your liberty is established, so you get married, bear citizen children, start a company that employs hundreds of citizens, and get elected to Congress, a ruling that suddenly you are no longer a citizen and you have six months to leave the country is made impossible to obey by all these commitments which you have made in good faith compliance with all previous rulings.

To the extent life plans cannot be laid with confidence in their legality, because of uncertainty stretched out over a generation about how bureaucrats will rule, bureaucratic indecisiveness is unconstitutional by a principle similar to that explained in an Iowa federal district court.[29]

To paraphrase the Court's logic and apply it to immigration, "immigrants should be given guidelines that will enable them to predict how the USCIS will rule. They should be provided a factual basis from which to predict how they should modify their applications or their lives to avoid deportation. When immigrants are not given reliable guidance, their 14th Amendment 'equal protection of the laws' rights and 5th Amendment 'due process' rights are violated. Wary of what applications, actions or life arrangements are required and what must be avoided to prevent deportation, immigrants might fail to exercise their rights freely and fully. The risk that immigrants will be forced to 'steer far wider of the unlawful zone' than is constitutionally necessary is not justified when the Congress is

29 Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10(1975). The Court said when parents are accused of child abuse under a vague law whose scope is anyone's guess, they are "faced with establishing that their conduct fell outside the potentially boundless scope of" the law. "[Parents should receive] notice of what they were doing wrong. They [should be] given a factual basis from which to predict how they should modify their past conduct, their 'parenting', to avoid termination." The decision explained that when parents are not given explicit notice, their constitutional rights are violated, which brings child abuse cases under the jurisdiction of federal courts. The way parents' constitutional rights are violated is that, "Wary of what conduct is required and what conduct must be avoided to prevent termination, parents might fail to exercise their rights freely and fully. The risk that parents will be forced to 'steer far wider of the unlawful zone' than is constitutionally necessary is not justified when the state is capable of enacting less ambiguous termination standards. The Court finds the aforementioned standards unconstitutionally vague in that they deter parents from conduct which is constitutionally protected."

capable of enacting less ambiguous deportation standards. The Court finds the aforementioned standards unconstitutionally vague in that they deter immigrants from conduct which is constitutionally protected."

4. PRUCOL. A ruling can't be constitutional that requires someone to violate a law.

Our example is the bride of a citizen. She has a six month visa, and has promptly applied for adjustment of status. She has every reason to expect approval. So she begins laying down her life plans in good faith compliance with that expectation.

The provision in law of a fixed time to allow for bureaucrats to process forms reasonably implies that the forms will be processed within that time. Sometimes they are. The fixed times known to the couple are the 6 month visa, and the additional 8 months' grace period before deportation proceedings may begin. If the couple had had enough money for a more detailed education from their lawyer, they might have known the USCIS often takes three years.

So during their first 14 months, the bride has a child, enrolls in English classes, cosigns on a mortgage, advises her husband in marketing his business to Latinos, and the increased business allows her to begin sending money to her family abroad without which her family was at grave risk of serious injury or death due to starvation, lack of medical care, and having to live and work in a violent area. (See section A.2 for the relevance of this last item.)

Finally the ruling comes, but inexplicably, it is a denial. But the years of waiting for it have reduced the couple's ability to comply with it. The couple lost income during the many days spent waiting in the offices of attorneys, U.S. Senators, and ICE, trying to get them to rule. They have bills from a psychiatrist from their fourth year of waiting.

PRUCOL status has protected her from deportation until now, but now she has six months to leave the country. If she doesn't meet the deadline, she won't be able to return for three years even if the other problems are ironed out.

The biggest problem is the three citizen babies. To comply with the ruling, she must violate

state laws against child neglect. She must move them with her and her husband to the middle of a poverty stricken drug war zone. That is, if it is humanly possible to sell the business and home in six months.

Or she must separate from her husband and leave the children in the U.S. Our child abuse laws are as vague in their definitions of abuse as immigration guidelines, so it can never be taken for granted that parental separation will never wind up on some social worker's grounds for termination. But all studies indicate children of broken homes grow up with disadvantages.

Long-delayed adverse rulings often require immigrants to violate child neglect laws, as well as real estate contracts and business agreements.

Our second PRUCOL example is defendants who hurried to meet the April 30, 2001 deadline of the Life Act (under 245(i)), which promised that they could live legally in the U.S. if they had been in the U.S. since before 1998.[30] They had to file through an employer or a family member, and pay a fine. They thought their adjustment of status would be quick. But there were no visas available then.

12 years later, many are still waiting hopefully for their visas to become available. Those from Mexico and the Philippines must wait longer than most. Visas applied for in 1992 are being processed now, 20 years later.

These defendants have obeyed all our laws, but ICE bureaucrats have not obeyed our laws. Or it is our laws which have not obeyed themselves, one law promising liberty and another ensuring that liberty is impossible. Defendants' right to live here while they wait is acknowledged by our laws, and yet they are subject to deportation.

They are not guilty of any act which violates any law. No one has accused them of so acting. They are innocent before the law. To prosecute innocent people is legally and morally repugnant.

5. Nonresidents Suing to Repeal Numerical Limitations – Exploring the Boundaries of "Jurisdiction".

30 Information is taken from "11 Million chances for the GOP to help itself" by Linda Vega, Vega Law Firm, posted at http://cafeconlecherepublicans.com/11-million-chances-for-the-gop-to-help-itself-with-latinos

Even though U.S. laws don't generally have jurisdiction over people beyond U.S. borders, and therefore can't protect their constitutional rights, to the extent they do affect the liberties of human beings beyond our borders, do the 5th and 14th Amendments[31] require our state and federal lawmakers to protect all their rights equally?[32] That is, with exceptions narrowly tailored to serve compelling government interests? (See Part B.)

Does the responsibility of our lawmakers and courts to apply our laws fairly, equally, to everybody, indeed end at our borders, when their reach extends beyond them? When our laws determine the liberty of others, no matter where they are, shouldn't they be fair and consistent, without arbitrarily denying to one what it gives the next, without regard to anyone's actions or qualifications?

That is certainly what the Amendments say on their face.[33] They would appear to actually give standing to sue to a nonresident noncitizen, against laws which deprive him of any opportunity for liberty in the foreseeable future, not because of his action, nonaction, or qualifications, but only because of the arbitrary rationing of liberty imposed by numerical limitations. Co-plaintiff citizen cousins, siblings, nephews and nieces could help establish standing to sue, but theoretically that should not even be necessary.

U.S. entrance requirements must be the same for all. The U.S. constitution requires Equal

31 "[n]o State . . . shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." - U.S. Const. Amend. XIV, § 1, cl. 3 and 4. "*No person shall...be deprived of...liberty...without due process of law....* U.S. Const. Amend. V, cl. 3"

32 *Jean v. Nelson, 472 U.S. 846, 873 (1985) (Marshall and Brennan, dissenting)*: "…. in Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), the Court held that a corporation "duly organized under, and by virtue of, the Laws of Russia," id., at 487, could invoke the Fifth Amendment to challenge an unlawful taking by the Federal Government. The corporation in that case certainly had no more claim to being "within the United States" than do the aliens detained at Ellis Island. Nonetheless, the Court broadly stated that "[a]s alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country." Id., at 491-492"

33 This expansive understanding of "jurisdiction" flatly rejects the competing definition, that "jurisdiction" means some kind of "loyalty" or "allegiance owed", where citizenship in another nation is counted as evidence that you are not under the "jurisdiction" of this. This is the new alternative definition of the immigrant-restriction movement, upon the basis of which they expect courts to end Birthright Citizenship. They say undocumented immigrants, who remain citizens of other countries, thereby "owe allegiance" to other countries so that any "allegiance" left over for the U.S. is diluted at best. Therefore, somehow, their children born here, who often are *not* citizens of any other country, cannot be citizens here either. However, when police are determining whether they have jurisdiction to arrest and deport undocumented immigrants, immigration restrictionists would expect undocumented immigrants to jump back to being under U.S. jurisdiction. This chameleon definition of "jurisdiction" has not been accepted by any court to the extent of accepting a challenge to Birthright Citizenship, but it appears to be in the background of judicial reasoning for according immigrants fewer constitutional rights than citizens.

Opportunity Immigration. No citizen would tolerate a lottery on Freedom of Speech. Not even for immigrants. We do not imagine that there are only a fixed number of words so that if we allowed immigrants to speak freely they would take words away from citizens. No citizen or immigrant should tolerate a lottery on liberty.

Most Constitutional rights are not extended beyond our borders because of practical impossibility. But it is a Constitutional mistake to confuse the necessary for the ideal – to imagine that lawmakers have no responsibility to be fair to foreigners when they could easily be, just because their ancestors were not fair when they could not be.

The only Constitutionally acceptable limitation on constitutional rights should be where reality makes it impossible to protect the same rights given U.S. residents. For example, It is not possible to grant "entrant aliens", or applicants residing abroad, the same 5th and 6th Amendment courtroom rights when we prosecute them abroad, such as for terrorism or as prisoners of war, that we give citizens and other U.S. residents. Our subpoenas have no jurisdiction, abroad, to compel witnesses and accusers to appear. Without that, we can't provide the defendant the right to face his accusers.

Another example: because of our self defense laws, we can't legally require witnesses to testify when it will mean their certain death. In the U.S. we have "witness protection programs". But they can't reach out and protect witnesses living abroad. So whether it is jailed terrorists or immigrants with failed background checks, witnesses and accusers can't have their identities known to the accused without serious danger to themselves. So we give the accused hearings, but only lawyers with top secret clearances may see the evidence; not any ordinary defense lawyer or even judge, and certainly not the accused. "Defense of Others" laws likewise consider the thousands of lives at risk relevant, when the identity of an embedded agent would be compromised for the sake of testifying in a trial.

Therefore, not alone for concerns of national security but also because of physical impossibility, we can't give litigants living abroad the same 5th and 6th Amendment rights that we give litigants living here.

But the fact that 5th and 6th Amendment rights in court are sometimes impossible does not change the fact that they are always ideal. The fact remains that "equal protection of the laws" is our ideal, and should always be pursued to the extent possible; and to the extent it is not so pursued, that failure is an unconstitutional violation of the 14th Amendment.

The practical is the compromise with the possible. The practical should not be mistaken for the ideal, so that Congress' accommodation of reality is mistaken for what we must insist upon even in those situations where more rights are possible. To the extent "equal protection of the laws" is possible, that is our duty. To fail, and especially to not even try, is to undermine our "rule of law".

Therefore, when national security or the safety of witnesses is not an issue, and where witnesses are willing to appear voluntarily, there is no reason to deny court hearings to immigration applicants living abroad. Especially if they are paying for their own attorneys, as resident noncitizens do now. If Congress impedes this right in this situation, it does so by violating the 5th Amendment.

If only a few of our laws apply to someone, do we not understand that those few must still be fair and treat all equally? Is not this required by "due process" and "equal protection of the laws"?

Or are constitutional rights available only in proportion to the number of laws over us? If so then do lawyers have more constitutional rights than dishwashers? Do employers have more constitutional rights than employees? Do doctors have more constitutional rights than patients?

If some human beings have more constitutional rights than others, has anyone attempted a comprehensive list of precisely what degree of each Constitutional Right may be denied to each respective population class?

The right concerning us is the Fundamental Right of Liberty. Does any statute or precedent justify depriving anyone anywhere of a Fundamental Right through the operation of any U.S. law, without regard to anyone's actions or qualifications?

Should it be found lawful to deprive certain human adults of their Fundamental Right to Liberty without regard to anyone's actions or qualifications, what will make it unlawful to also deprive them of

their Fundamental Right to Life without regard to anyone's actions or qualifications?[34]

If Congress has authority to deliberately make laws that are unfair and unequal, what limits their power to do so? If Congress is excused from enacting "equal protection of the laws" [the phrase which ended slavery] towards any group of human beings, what other constitutional restraint prevents them from letting states bring in immigrants as slaves? Can we exclude people "by any means which happen to seem appropriate to the authorities?"[35] Is "due process" no more than whatever burden some bureaucrat feels like loading on some minority?[36] Are alien rights zero?

If a noncitizen commits murder here and escapes our manhunt across the border, we will seek extradition so we can give him a constitutional right to a criminal trial. Is it logical to give an alien the constitutional right to a trial if he is accused of a crime, but not the constitutional right to liberty if he is not accused of a crime?[37]

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34 (Not even Roe v. Wade supports killing humans. Roe acknowledged that should it ever be "established" that the unborn are "persons", that is, "recognizably human", then abortion's legality would "of course, collapse".)

35 *Jean v. Nelson,* 472 U.S. 846, 854 (1985) (Marshall and Brennan, dissenting) "It simply is irrational to maintain that the Constitution protects an alien from deprivations of "property" but not from deprivations of "life" or "liberty." Such a distinction is rightfully foreign to the Fifth Amendment. ...even in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees. Surely we would not condone mass starvation. As Justice Jackson stated in his dissent in Mezei: "Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate [an alien's] exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?" 345 U.S., at 226-227. Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement. *Fiallo v. Bell,* 430 U.S. 787, 793, n. 5 (1977)

36 *Jean v. Nelson*, 472 U.S. 846, 870 (1985) (Marshall and Brennan, dissenting): "The statement in Knauff and Mezei that *"[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," lies at the heart of the Government's argument in this case. This language suggests that aliens detained at the border can claim no rights under the Constitution. ....Justices Black, Frankfurter, Douglas, and Jackson dissented in Mezei. Focusing on Mezei's detention on Ellis Island, Justice Jackson asked: "Because the respondent has no right of entry, does it follow that he has no rights at all?" 345 U.S., at 226 (Jackson, J., joined by Frankfurter, J., dissenting)."*

37 Jean v. Nelson, Page 472 U.S. 846, 873 *"Our case law makes clear that excludable aliens do, in fact, enjoy Fifth Amendment protections.* First, *when an alien detained at the border is criminally prosecuted in this country, he must enjoy at trial all of the protections that the Constitution provides to criminal defendants.* As early as Wong Wing v. United States, 163 U.S. 228 (1896), the Court stated, albeit in dictum, that *while Congress can "forbid aliens or classes of aliens from coming within [our] borders," it cannot punish such aliens without "a judicial trial to establish the guilt of the accused."* Id., at 237. The right of an unadmitted alien to Fifth Amendment due process protections at trial is universally respected by the lower federal courts and is acknowledged by the Government. See, e. g., United States v. Henry, 604 F.2d 908, 912-913 (CA5 1979); United States v. Casimiro-Benitez, 533 F.2d 1121 (CA9), cert. denied, 429 U.S. 926 (1976); Brief in Opposition 20-21. *Surely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime. There is no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms."* (See also footnote 30)

If jail is so serious a penalty that we will not give it even to an immigrant unless we have first given him a constitutional right to a trial by jury, how can we, without a trial at all, hand out sentences of deportation, which is worse than jail?[38]

As with citizens, it makes sense to withhold liberty because of criminal actions or omissions, or lack of qualifications. But it is not justice by any definition to deprive millions of people of liberty on the basis of a roll of the quota dice, without any regard or consideration of their actions or qualifications.[39]

In fact liberty is such a fundamental, unalienable right, that it is more "clear than...Congress' power to deport",[40] a power which Congress, before 1882, never exercised except on the basis of criminal actions or unmet financial or health qualifications.

It fails the "absurd result" test[41] to religiously protect a lesser right, like the right to a trial by

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38 *Boutilier v. Immigration Service,* 387 U.S. 118, 132 (1967) (Dissent by Douglas, concurrence by Fortas): "*Deportation is the equivalent to banishment or exile. ... Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process".*

39 *Harisiades v. Shaughnessy*, 342 U.S. 580, 601 (1952) (Douglas and Black, dissenting): "There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation *due to the nature of his conduct. But unless such condition is shown, I would stay the hand of the Government* and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and *liberty which the Constitution guarantees"*

40 *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas and Black, dissenting) "*If those rights, great as they are, have constitutional protection, I think the more important one - the right to remain here - has a like dignity.* The power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power "To establish an uniform Rule of Naturalization." U.S. Const., Art. I, 8, cl. 4. *The power of deportation is therefore an implied one. The right to life and liberty is an express one. Why this implied power should be given priority over the express guarantee of the Fifth Amendment has never been satisfactorily answered."*

41 *State v. Kirkpatrick,* 286 Kan. 329, 184 P.3d 247 (2008) (Nuss, dissenting): "I acknowledge that where the language of a statute is clear, our normal rule is that we are bound by it. A legitimate exception exists, however, when that language leads to absurd results. The United States Supreme Court agrees. See *Public Citizen v. Department of Justice,* 491 U.S. 440, 453, 454 n.9, 455, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989) (despite a "straightforward reading" of statutory language, absurd "that Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion and public oversight when a President or Cabinet officer consults with party committees concerning political appointments . . ."); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510-11, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989) (no matter how plain the text of Federal Rule of Evidence 609[a][1] may be, it "can't mean what it says"); *United States v. Brown,* 333 U.S. 18, 27, 92 L. Ed. 442, 68 S. Ct. 376 (1948) ("No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences."). Nor is the "absurd result" rule applied by only a few justices belonging to a particular school of thought. Even a "textualist" jurist like Justice Scalia has done so. See *Green v. Bock Laundry Machine Co.*, 490 U.S. at 527 ("statute, if interpreted literally, produced an absurd result," thus justifying departure from the "ordinary meaning" of word "defendant" in Federal Rule of Evidence 609[a][1]) (Scalia, J., concurring). Justice Kennedy has addressed potential critics who might argue that this exception could constitute inappropriate judicial activity: "[T]his narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of the Congress, but rather demonstrates a respect for the coequal Legislative Branch, *which we assume would not act in an absurd way.*" (Emphasis added.) *Public Citizen v. Department of Justice,* 491 U.S. at 470 (Kennedy, J., concurring).

jury if you are accused of a crime, and fail to notice violations of the greater right to Liberty if you are *not* accused of a crime. It is like "straining a gnat" out of your soup and "swallowing a camel".[42]

Liberty is the second most fundamental right, after life, according to its order in the Declaration of Independence, according to Samuel Adams speaking in 1772,[43] and according to logic: life is most fundamental since no right exists without it; liberty is second because no other right besides life can be enjoyed without it. Indeed for SCOTUS to protect property rights but not the liberty to live in the same country where your property is, is illogical, and can only be explained by the theory that litigants have asked for property protection, but have not thought to bring cases asking for liberty.

"Liberty" was the original purpose, in 1620, for starting our nation, and a synonym of Liberty became the title of the document officially establishing us as a distinct nation: "The Declaration of Independence". The document that provoked war with Britain was not titled "The Declaration of Rules of Civil Procedure." To scrupulously guarantee the relatively unimportant right to a trial when accused of a crime, while ignoring the fundamental right to walk free when not accused of any crime, is to "strain out a gnat and swallow a camel".

Especially when no compelling reason, or even any reason at all that can survive scrutiny, can be given for our lottery on liberty.

6. Violators of non-laws. This will be our most philosophical section. Sometimes it helps to look again at the meanings of words we have used all our lives. "Law" is such a word. This will seem philosophical and abstract only because it has been two centuries since the very meaning of this word was a topic of intense national discussion.

Black's Law Dictionary, 4th Edition, defines "law" in terms of what authorities pass and enforce, and how it affects people, but not in terms of its legitimacy. The closest it comes to acknowledging when a "law" is not legitimately "a law" is when a legislature's statute violates the Constitution.[44]

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42 Matthew 23:24

43 "Among the natural rights [of the people] are these: first, a right to life; secondly, to liberty; thirdly to property; together with the right to support and defend them in the best manner they can." --Samuel Adams (1772)

44 Black's Law Dictionary, 4th Edition: "When a statute is passed in violation of law, that is, of the fundamental law or

Of course "law" always has coercive power which Black's notes. But so does a murderer. Why do we say a policeman's orders enforce "law", (ideally), but an armed robber's orders do not? A connotation of "law" is "legitimate". What makes the laws openly debated and passed by a representative legislative assembly more "legitimate" to American minds than the orders of a brutal dictator?

Reflection on these questions will reveal what is profoundly illegitimate, unconstitutional, and illegal about most of our current immigration law, which is built upon a lottery of liberty from which citizens have exempted themselves.

"Rule of law" is a phrase originally coined to explain the difference between American law and almost every previous legal system. Samuel Rutherford coined it in 1644 to distinguish between "Rex Lex", the then ubiquitous system in which the King is the Law, and "Lex Rex", the then theoretical system, not counting the system Rutherford found in the Bible, in which the Law is the King. His question 26 was "Whether the King be above the Law or no". But the theme of his book was "no": even the king is subject to the "rule of law". The real "sovereign" is the people, who have a duty to resist any lawmaker, including any king, who defies the law.

Today immigration restrictionist Republicans keep the phrase "rule of law" in the news with no memory of its original distinction between legal systems. They use it to distinguish between a legal system and no legal system; that is, anarchy. It does not occur to them that not all movement from disorder to order is a step up from anarchy, or even a step away from anarchy. For example, the movement to the orders of a murderer. Or the constructive anarchy of mindless legalism, also called mind numbing bureaucracy, or endless red tape, where restrictions have no correlation to the any discernible requirements of reality, or serve any purpose that anyone can remember or defend. Which of course describes most immigration law.

To this day the idea of a "king" is somewhat romanticized, even though the phrase which means

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constitution of a state, it is the prerogative of courts to declare it void, or, in other words, to declare it not to be law. Burrill. An unconstitutional statute is not a "law", John F. Jelke Co. v. Hill, 208 Wis 650, 242 N.W. 576, 581; Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d. 244, 248."

the same thing, "absolute dictator", is not. When another absolute dictator rises on the world stage, we look for ways, nonviolent if possible, to help the people regain their freedom from him. We as Americans recognize two essential differences between our system and his, which makes our laws "legitimate" and in that profound sense "lawful" while his are not: the laws operate equally upon everyone – not even the lawmakers are exempt, and majorities can't exempt themselves from burdens they impose in minorities; and they are approved by a process we call "due process", in which all who are subject to them have a voice in them through a vote for our representatives that has equal weight with the vote of every other citizen.

As Benjamin Rush wrote in a 1788 letter to David Ramsey, "[W]here there is no law, there is no liberty; and nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community."

The very word "justice" requires equality of all before the law, or "impartiality". Or as the Bible puts it, "no respect of persons". Thus Judge Joseph Story said in his 1833 "Commentaries on the Constitution", "Without justice being freely, fully, and *impartially* administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value; and men may as well return to a state of savage and barbarous independence."

The fact that our government is the result of out votes makes its laws legitimate. In a profound sense ours is by definition the best government possible, because it is the government that results from our votes. There are many excellent ideas for improving our government. Hopefully this article is one of them. But before our votes approve such an improvement, such a government, however much more beneficial to us and friendly to all our desires, would be one imposed on us against our will, and in that important sense inferior.[45]

45 Even God declined to claim jurisdiction of His laws over Israel until after He had secured the unanimous consent of the people, not once but five times. Exodus 19:8 And all the people answered together, and said, All that the LORD hath

However dumb many of our choices are, they are our choices, and our weakest complaint against the legitimacy of any law is against laws which we have chosen.

That is why it so strongly undermines America's "rule of law", as America's Founders understood the phrase, and by any possible way to justify the existence of any government, to have immigration laws which grant liberty by lottery to only a small fraction of the U.S. residents waiting for decades for a place "in line" for it,[46] and grant no voice to the millions ordered to bear that burden, while the citizens whose votes sustain that bureaucratic monster would never, neither they nor their pre-1900 ancestors, touch any of those burdens with even one of their little fingers.[47]

7. General arguments against against Fundamental Rights Restrictions from which Majorities are Exempt.

Yes, an "illegal" "breaks the law" by coming among us to seek the same opportunities we enjoy, without our permission. But the "law" he "breaks" would have been broken by most citizens, including many lawyers and judges, had not citizens exempted themselves from it. The only reason he is "illegal", and we are not, is that we exempt ourselves from the laws which we enact against him.

Therefore there is an important difference between "illegals" and "criminals". Criminals break laws which citizens do not break. "Illegals" obey the laws citizens obey, generally as well as citizens do – in fact statistically, a little better – and disobey only those laws from which citizens have exempted themselves. (That is, if they disobey any law at all; but as sections 1-5 explain, millions of those called "illegals" are never accused of any action which violates any law.)

We voters choose lawmakers who first create a lottery to determine which of our neighbors not to allow the same opportunities the rest of us have, and then we preach against our unlucky neighbors for reaching for the same opportunities we enjoy in spite of our laws designed to discriminate against

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spoken we will do.... Also Exodus 19:8, 24:3, 7, Deut 5:27-28, Jos 24:22. This vote was no rubber stamp but a real vote, because God had expressed genuine reluctance to assume jurisdiction over the people until they voted.

46 In the case of Mexicans, those allowed to come legally each year are something like two percent of those already living here and looking for a spot in that "line".

47 Luke 11:46 "And he said, Woe unto you also, *ye* lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."

them – to deprive them of the rights we demand for ourselves.

We impose arbitrary, irrational quotas which limit legal residence to a lucky few. To call this "fair" or "impartial" or "equal protection of the laws" just because we let *some* come would be like calling slavery "freedom" because, after all, slave owners let *some* of them buy their freedom, so everyone has a chance (however remote) to be free!

To call our immigration numerical limits "equal protection of the laws" because they permit two percent of applicants to come legally is like saying a full return to slavery would not violate the14th Amendment because slave masters allowed about two percent of blacks to be free.

That's why the 5th and 14th Amendments make no distinction between persons born here or elsewhere; between citizens and noncitizens; between people here legally or illegally. All "persons" are equally protected by all laws which are Constitutional. If we want it to be otherwise, we should, deciding together as a nation, repeal the 14th Amendment, and live under tyranny, but at least legally. Until that happens, we should not tolerate a few officials, much less an entire federal agency, simply *ignoring* it. To let our laws ignore our very Constitution is the ultimate challenge to the Rule of Law, dwarfing anything "illegals" do.

Can we limit rights for some without limiting our own?

A young man picked up his sweetheart at her parent's home. As they left, her father said something innocently, at which the young woman screamed in rage, before turning back with a sweet smile to her young man. The young man married the woman, confident that she was incapable of the same rage towards himself which he had seen towards her father. How did the story end? Was he right? Was her father surprised?

Is it possible to thoroughly hate an enemy, and thoroughly love a friend? It is no more possible to preserve the "equal protection of the laws" clause exclusively for "us" while we deny it to "them". That is, of course we extend the "equal protection" of quite a number of laws to the undocumented; it is mostly only Liberty, that Fundamental Right without which all other rights are of limited value, that

we ration.

But if our laws were equal, then when an immigrant satisfies the qualifications of a citizen, he would be given the rights of a citizen.

As soon as citizens meet our criteria to drive, or practice licensed trades, and go through a reasonable certification process, we give them their freedom. But it would not be "due process" to randomly pick 10 million children and tell them that no matter how old they become, or how many driving tests they pass, they will never be allowed to drive. We make immigrants hire lawyers, pay $20,000 in USCIS and lawyer's fees, and wait 30 years for their applications to be processed. That is not a reasonable certification process. That is not "equal protection of the laws". That is not "due process". There is no predictability, to how a "roll of the dice" process like that will be applied to the next person in line. Which deprives not just immigrants of liberty, but our whole society, according to a SCOTUS judge.[48]

One example of a right legitimately denied immigrants temporarily, which citizens enjoy, is the right to vote. It is reasonable to make an immigrant wait a few years before receiving this right. When America was young, the wait varied between 2 and 5 years. It takes a few years of living here to understand not only the choices on the ballot, but for many, the concept of a ballot. The wait time represents the time needed to become qualified to vote with understanding.

It would honor this basic principle to, for example, offer automatic citizenship to any immigrant who graduates from a U.S. university, having been here 4 years and having obviously met the qualifications to understand the ballot that citizens have.

What is unreasonable is USCIS processing times that require applicants in many cases to wait

48 *Shaughnessy v. Mezei,* 345 U.S. 206, 217 (1953) (Black, dissenting): "*No society is free where government makes one person's liberty depend upon the arbitrary will of another.* Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous."* Hitler's secret police were (start page 218) given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was – our constitutional principles are – that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken "without due process of law."

as long as 40 years before they can vote, for no reason related to anyone's actions or qualifications. Or Numerical Limitations that prohibit 98% of applicants from ever voting during this human lifetime, regardless of qualifications.

Not only is today's rationing of liberty unconstitutional, but it is legally and logically impossible to amend the Constitution so that we can still keep our freedoms, while constitutionally denying them to immigrants. It is impossible to dumb down the 14th Amendment so it only applies to "me" and not "the other guy". It is not possible to deny freedom to a few, without threatening the freedom of all.

Laws depriving minorities of freedom may not immediately deprive majorities of freedom. But they are precedents chipping away at everyone's freedom to the extent vigilance relaxes. Vigilance relaxes as we deaden conscience to encroachments upon others until we become so used to them that we tolerate them upon ourselves. We justify them upon others by attributing negative attributes to an entire suspect class without the necessity of evidence that even a single member of the class has them. We commission bureaucrats to chase those we have accused, and never imagine that the bureaucracy could grow beyond the authority we gave it to ever so accuse us, having been relieved by us of the necessity of evidence. We seal our servitude when others similarly situated with ourselves are falsely prosecuted under cover of bureaucratic obscurity, and our response is "they must have been guilty of something or they wouldn't be in jail."

Prejudice having replaced the evidence necessary before law can make sense with regard to the individuals before it, law becomes legalism, and our minds confuse Legalism for the Rule of Law. The problem is that when we start a list of unwelcome groups, others will finish it, who may not like us any more than we like them.

God has drawn a line of protection around the rights of every person equally, in the words of the founding document of our nation: "We hold these truths to be self evident, that ALL men are created equal, and endowed by their Creator with certain inalienable rights..." If we say "but that

doesn't mean men not born here, whom we have decided not to like", we try to move lines which God has drawn, to a place where God has decreed they most not be moved. We cannot push against God without injury to logic, and we cannot injure logic without injuring ourselves.

When we ourselves draw a line around others which God does not permit, just because we are the Majority, what answer will we have when a future majority wants to move God's line around ourselves? For example, what if the future majority is Hispanic? Our own logic will condemn us! We will have no spirit then to defend our own rights. We will have no moral authority to challenge the legitimacy of their oppression of us.

If we deprive any group of persons of the equal protection of just "some" laws, what will prevent depriving that group of the equal protection of *any* laws? If we may withhold the protection of *this* law, why not the protection of *that* law?

If we depart just a little bit from God's commandment to "have one manner of law, as well for the stranger [immigrant], as for one of your own country", Leviticus 24:22, we undermine the laws which protect ourselves.

They are called "hypocrites", who accuse others of doing what they do themselves. Voters and lawmakers make it "illegal" for 12 million U.S. residents to do the same hard work the rest of us do. Then, because they persist in living the way we do, we call them "criminals" and claim the moral high ground over them. And again, for what? For being like us?

In other words, we classify our unwelcome neighbors as "illegal" on the basis of "laws" which violate the "Rule of Law", as our Founders defined the phrase. We have forgotten its meaning.

Quotas on rights are unacceptable to the Constitution, and would be unacceptable to any citizen upon whom they were imposed. If only two percent[49] of Americans had the right to speak freely, the right to drive to work, (before 1882 it was never illegal to get a job or ride a horse), or the right to trial by jury, no one would say Americans still had "equal protection of the laws". Every tyranny has

49 (2% is about the percentage of Mexicans applying to get in our "line" whom we allow in, counting those already living here who are trying to crowd in the same line, but not counting those from abroad whom we reject.)

allowed freedom for at least two percent. Where freedom is not *for all,* Americans don't even call it "freedom".

Plyler v. Doe was so inspired in its polemic against discrimination,[50] citing the 14th Amendment, that it is inconceivable that SCOTUS meant only to bar states from such discrimination by authority of the 14th Amendment, but not to invoke the almost identical 5th Amendment "due process" clause[51] to bar Congress from the same discrimination.

"It is said that the power" of Congress to deport immigrants it chooses not to welcome "is inherent in sovereignty. This doctrine...is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?....The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, *they gave to this government no general power to banish. Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas and Black, dissenting)[52]

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50 *Plyler v. Doe,* 457 U.S. 202, 219 (1982):

> ....The *Equal Protection Clause [of the 14th Amendment] was intended to work nothing less than the abolition of all caste-based* and invidious [offensive, prejudicial, causing hatred] class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.
>
> ....Indeed, it appears from those debates [during its passage of the 14th Amendment] that Congress, by using the phrase *"person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population.* Representative Bingham reported to the House [from committee] the draft resolution of the ...Fourteenth Amendment. [and argued in support]:
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> "Is it not essential to the unity of the Government and the unity of the people that *all persons, whether citizens or strangers,* ["stranger" is the Biblical term for "immigrant"] *within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?"...*
>
> Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who 'may happen to be' within the jurisdiction of a State:...
>
> *"The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty,* or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the *injustice of subjecting one caste of persons to a code not applicable to another.* . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon *those fundamental rights and privileges which pertain to citizens of the United States, and to all person who may happen to be within their jurisdiction."*

51 See also footnote 16.

52 "Mr. Justice Brewer's dissent in Fong Yue Ting v. United States, supra, pp. 737-738, grows in power with the passing years: "It is said that the power here asserted is inherent in sovereignty. *This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?* Is it within legislative capacity to declare the limits? *If so, then the mere assertion of an inherent power creates it, and despotism exists.*

"May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the

This is an attack on the constitutionality of the central premise of our immigration policy beginning with the Chinese Exclusion Act of 1882. This 1952 dissent, which resonates with the *Plyler* majority in 1982, stated the unstatable. It is so unacceptable that it becomes irrelevant whether it is true. But is it? *Harisiades* concludes by saying it is simply unconstitutional to prosecute innocent people who have not even been accused of any act which violates any law: "*Banishment may be resorted to as punishment for crime;* but among the powers...not delegated to the [federal] government is that of determining whether whole classes in our midst shall, *for no crime but that of their race and birthplace*, be driven from our territory."

Unrestrained "sovereignty" sounds a lot like monarchy, which is absolute dictatorship. Especially since the claim seems to be made to distract attention away from any limits to such power over others. It is when equality of all men is slighted, and the slight justified, that restraint of government falters, government becomes tyranny step by step, and the inequality intended for only a few becomes the fate of all.

"Without liberty, law loses its nature and its name, and becomes oppression." --James Wilson

B. "Strict Scrutiny" v. "rational basis"

Plyler v. Doe 457 U.S. 202, 215 (1982) examined whether undocumented children could be barred from public schools by a state. The Court agreed that the children and their undocumented parents had "constitutional rights". The Court said the fact that a person's presence here is unlawful "cannot negate the simple fact of his presence" here, and his presence gives him rights.[53]

practices of other nations to ascertain the limits? The governments of other nations have elastic powers – ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, *they gave to this government no general power to banish.*

"*Banishment may be resorted to as punishment for crime;* but among the powers...not delegated to the [federal] government is that of determining whether whole classes in our midst shall, *for no crime but that of their race and birthplace*, be driven from our territory." *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas and Black, dissenting)

53 "Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and

The Court explained that all persons "similarly situated" should be treated equally by law, but different circumstances can justify different treatment. States should have "substantial latitude" to make those judgments, and as long as their solutions seem reasonable states should be left alone.[54] But some rights should be watched more closely: fundamental rights, and the rights of any population group where discrimination is suspected.[55] Any denial of such fundamental rights by any state demand an accounting whether there is some "substantial interest" of the state which "may be fairly viewed as [being] further[ed]" by limiting the right.[56]

Because liberty is an even more "fundamental right" than a public school education, no mere "substantive right" but a full fledged "enumerated right", not merely implicit but explicit in the Preamble to the Constitution, where it is given as the purpose of the Constitution, Court review of the lottery on liberty called "Numerical Limitations" merits "strict scrutiny". Numerical Limitations must end if they are not "precisely tailored to serve a compelling governmental interest", and especially if they "give rise to recurring constitutional difficulties".

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reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction -- either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States -- he is entitled to the equal protection of the laws that a State may choose to establish." Plyler v. Doe 457 U.S. 202, 216 (1982)

54 (Plyler, continued from footnote 51:) III The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. Plyler v. Doe 457 U.S. 202, 215 (1982)

55 (Plyler, continued from footnote 52:) But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus, we have treated as presumptively invidious those classifications that disadvantage a "suspect class," [n14] or that impinge upon [p217] the exercise of a "fundamental right." [n15] Plyler v. Doe 457 U.S. 202, 216 (1982)

56 (Plyler, continued from footnote 53:) "With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a [p218] substantial interest of the State." [n16] Plyler v. Doe 457 U.S. 202, 217 (1982)

Plyler applied another test: the "cost to the nation", of a large population of uneducated residents, so great that the law "can hardly be considered rational unless it furthers some substantial goal of the state."[57] The innocence of the children was noted as if it were a significant burden for the law's claim of rationality to overcome.[58] Plyler's "cost to the nation" test shows that even for a "rational basis" review, it is simplistic to consider only whether a law appears directed towards an apparently legitimate state purpose, with no cost/benefit analysis. Hopefully this will involve a review of evidence, even though that is more expected in a "strict scrutiny" review.

Plyler says being here illegally "is not a constitutional irrelevancy", which keeps the children from being counted as a "suspect class", but their innocence keeps the law depriving them of education from counting as "rational."[59] The overlooked question raised by Plyler's logic is "how can children be here illegally, and be innocent, at the same time?" The fact that the children are innocent certainly can't be a "constitutional irrelevancy" either! Do the two "constitutional irrelevancies" cancel each other?

We have a new kind of "racial discrimination" that is not based on race, but on being foreign. Rationing liberty makes all foreigners a "suspect class". We are like the stingy, selfish headmaster who throws a fit of rage, shouting "More? You want more?!" when trembling, frail, hungry Oliver meekly carries his empty liberty bowl up to us, made the more hungry by the chatter of the orphanage staff feasting on stuffed turkey and all the trimmings, and asks "Sir, may I please have more?"

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57 "These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class, because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. *See San Antonio Independent School Dist. v. Rodriguez, supra,* at 28-39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining [p224] the rationality of § 21. 031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State." Plyler v. Doe 457 U.S. 202, 223 (1982)

58 "In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered." *Plyler v. Doe*, 457 U.S. 202, 203 (1982)

59 See note 55.

Like the indignant headmaster who threw Oliver out of the orphanage onto the street to survive by depending on lawbreakers, some would banish all who have grasped more Liberty than we have rationed, and would never, ever, for any reason, under any circumstances, allow them to return for the rest of their lives.

What "pressing public necessity" requires this?

The Iowa Supreme Court[60] quoted Plyler's holding that immigrants are not a "suspect class", but omitted Plyler's consideration of the human cost to the targets of the restriction, or the "cost to the state" of not letting undocumented immigrants get drivers' licenses. The Court said driving is not a "fundamental right", like abortion.[61] Not raised was whether driving is an essential function of liberty, which is a fundamental right.

Another SCOTUS test of the constitutionality of a state's or Congress' restraint of liberty is "power unreasonably or harshly exercised".[62] Congress may have the *power* to enact numerical limitations. But are they "reasonable"? Is their impact on millions of people "harsh"?

Patently obvious prejudice might qualify as "power unreasonably or harshly exercised". Congressional prejudice might become obvious to the Court if it is shown that tyrannically oppressive

60 "The classes argued in their brief that we should apply strict scrutiny in this case. However, at oral arguments, counsel correctly conceded that no suspect class or fundamental right was at issue in this case and that rational basis was the appropriate level of scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 223, 102 S. Ct. 2382, 2398, 72 L. Ed. 2d 786, 803 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"); *id.* at 218 n.15, 102 S. Ct. at 2395 n.15, 72 L. Ed. 2d at 799 n.15 (stating that fundamental rights are those explicitly or implicitly contained in the Constitution).

"Under rational-basis review, the statute need only be rationally related to a legitimate state interest. *Cleburne*, 473 U.S. at 440, 105 S. Ct. at 3254, 87 L. Ed. 2d at 320. As the Supreme Court has explained:

"Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has the authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation.

"Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative (sic) "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'

"….Fundamental liberty interests ... 'deeply rooted in this Nation's history and tradition,' ... include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Sanchez v. State, 692 N.W.2d 812, 817, 819 (Iowa 2005)*

61 Attorney for the plaintiffs Curt Daniels presented the wrong arguments to the Iowa Supreme Court. He should have found a woman who was forced to drive to the abortion clinic without auto insurance.

62 The Court might step in if Congressional "power has been so unreasonably or harshly exercised by Congress in this Act as to warrant judicial interference." *Harisiades v. Shaughnessy,* 342 U.S. 580, 580 (1952) "This brings us to the alternative defense under the Due Process Clause - that, granting the power, it is so unreasonably and harshly exercised by this enactment that it should be held unconstitutional." *Harisiades v. Shaughnessy,* 342 U.S. 580, 588 (1952)

restrictions of a group could have been avoided with much simpler restrictions which would have served the purposes of Congress much better, and which Congress knew about. In the current heated immigration debate, it is not hard to find examples of patently obvious prejudice. Nor is it hard to find examples of immigration debate so clouded with emotion that reason is attacked as unrealistic or worse, leading to legislative agendas which hurt the purposes they are believed to help. This kind of test, where the gravity of the oppression is compared with the availability of relief, is also suggested with the language "The penalty [of deportation] is so severe that we have extended to the resident alien the protection of due process. Wong Yang Sung v. McGrath." BOUTILIER v. IMMIGRATION SERVICE, 387 U.S. 118, 132 (1967)

These tests ("power unreasonably or harshly exercised", "patently obvious prejudice", "severity of the defacto penalty", and "tyrannically oppressive restrictions which could have been avoided with simpler, friendlier, more effective restrictions") may be offered to help the Court weigh quotas.

"Power unreasonably or harshly exercised." Is a 1% quota on liberty – allowing liberty to only 1% of unauthorized resident aliens on a roll of the quota dice – "reasonable"? Is its impact on 12+ million people "harsh"?

"Patently obvious prejudice." Is this a possibility when Congress prefers a bureaucratic and security hell for itself, and a generation-long nightmare for 12+ million undocumented immigrants, to a criteria system that would solve all problems quickly, effectively, and inexpensively?

"Severity of the defacto penalty of deportation." The contrast is between liberty as citizens experience it, and deportation. Banishment. There is no middle ground, unless you count the waiting for the banishment. Or the bad working conditions because you are afraid to complain.

"Whether tyrannically oppressive restrictions could have been avoided through simpler, friendlier, more effective restrictions"; and

"whether the contrast between the oppressiveness of the restriction, and the simplicity of an effective alternative, is great".

(For a series of articles about immigration facts, making the case that criteria will solve the national problems which quotas cause, see www.Saltshaker.US, click on "immigration".)

1. Numerical Limitations: the "cost to the nation" in National Security.

One "cost to the nation" of Numerical Limitations is our national security. Border agents could easily catch our few thousand violent threats, if they weren't overwhelmed by having to hunt down millions guilty of hard work. We would no longer have a huge illegal "haystack" in which violent criminals hide, if our "line" welcomed all who obey the same laws which citizens obey. 99% of our present illegal caseload would sign up to "be in the system".

Can we agree that border security is a "compelling government interest"? Can we agree that 12 million U.S. residents hiding in our legal shadows is a serious security problem? Can we agree that without a 12+ million haystack to hide in, criminals and terrorists would be much easier to catch? These serious national problems are directly, logically, and inescapably caused by numerical limitations on liberty set at 1%.

Plyler v. Doe made a strong case for the value of education, and the high "cost to our nation" of withholding it. Can't an even stronger case be made for the value of national security, especially during a time of war whose enemies come, not in waves of tens of thousands, but a few at a time? What good is the best education in the world, if the students protected by *Plyler v. Doe* are slain by Islamic terrorists slipping in through borders made porous by a million nonviolent immigrants who just want to work?

Replace Numerical Limitations with criteria, and our 12 million illegal guests will pour out of the shadows to sign up with the USCIS for "line" credit.

If Numerical Limitations on the opportunities of legal applicants abroad are also replaced with criteria, the flow over the border would also joyfully redirect itself into a legal line.

Freed from that impossible caseload, USCIS agents will have time to focus on the real criminals and terrorists who won't sign up. Without millions of others in hiding with them, they will be

much easier to spot. They will stand out like ants on a white board. That will also make it harder for our citizen criminals to hide. (The number of unserved warrants on U.S. Citizens is roughly the same number as that of unadmitted residents.) In fact, 12 million who used to help each other hide will become more willing to cooperate with the law, turning in real criminals and terrorists.

2. Numerical Limitations: the "cost to the nation" in Unity.

The "cost to the nation" identified by the authors of the 14th Amendment was national unity.

> "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property? *Plyler v. Doe,* 457 U.S. 202 (1982), quoting Congressman Bingham.

This may be argued as true on many levels.

At the time of its passage, the goal was reuniting the Southern previously slave states with the North.

It is also essential to national unity that our nation not be blighted with a large sub-population of disenfranchised residents whose peacefulness towards the nation, as measured by their lower crime rate than for citizens, cannot safely be taken for granted forever.

It is also essential to national unity that we maximize all the brainpower available to us, which is not done by depriving millions of freedom without regard to their actions or qualifications. The larger the "brain pool" of human beings living in freedom, peace and security, where rewards for personal industry by our system of Free Enterprise motivate men to creativity and service to others, the greater the technology they can support. The better our technology, the greater our national wealth. As Hamilton put it,

> "To cherish and stimulate the activity of the human mind, by multiplying the objects of enterprise, is not among the least considerable of the expedients, by which the wealth of a nation may be promoted." --Alexander Hamilton

Freedom also gives men the motivation to defend their nation with greater heroism than slaves render tyrants:

> "There is a certain enthusiasm in liberty, that makes human nature rise above itself, in acts of bravery and heroism." --Alexander Hamilton

Without access to the same rights enjoyed by others, people not only lose respect for, but cannot comprehend, the law as an instrument of justice. A significant population of people in this condition requires a significant force of police, moving our nation from a "free nation" to a "police state". As Thomas Jefferson explained the principle:

> "He who is permitted by law to have no property of his own, can with difficulty conceive that property is founded in anything but force." --Thomas Jefferson, to Bancroft, 1788

3. Numerical Limitations: the "Cost to the Nation" in accomplishing any goal at all!

Can the Government show numerical limitations are "precisely tailored to serve" ANY government interest? Wouldn't repeal of Numerical Limitations solve *every* immigration problems thoroughly and quickly?

If we think their work for low wages drives our wages down, all we have to do is make getting a good job the condition for the short line. They will produce so many $500/hour doctors, lawyers, and psychiatrists that they will drive everybody's wages *up.*

(That's how the logic goes, isn't it? If their hard work for us while we pay them little drives our wages down, making us poor, then the high prices charged by doctors and lawyers must make us rich, right? Or could it be we have tolerated moronic economics? Could it be that the more immigration we have, the stronger our economy, and the less reason factories have to relocate overseas in search of lower cost labor?)

If our concern is immigrant use of emergency hospital rooms without paying for them, all we have to do is make not taking advantage of them a ticket to the short line, they would pay back every nickel of every visit, and turn their receipts in to the USCIS for credit. Immigrants might even help

each other bear these costs. It would be unacceptable to repeal laws providing for life-saving care, but there is no legal or humanitarian reason immigration law can't offer a positive incentive for repaying these bills, and that solution to hospital budget woes would be a far more compassionate solution, a far more effective solution, and a solution far less restrictive of fundamental rights, than numerical limitations.

Congress, if it wants, can even get around Plyler v. Doe's requirement that our pricey public schools educate illegal children: there is no *legal* reason Congress can't offer immigrants positive incentives, like points on their LPR applications, for home schooling instead!

Children born here, whether or not their parents are legally here, are U.S. citizens according to the 14th Amendment. And as citizens, they (not illegal parents, but citizen children) are eligible for **welfare such as food stamps**. These laws are virtually unchangeable, but nothing prevents our moving LPR applicants ahead in the "line" for repaying these costs when they can. If that is what we want to do. If that is what we want to call a "compelling government interest". The children will find that more compassionate, and the Court will find that less restrictive of fundamental rights, than deporting their parents.

If we let immigrants in the legal line who learn what keeps us free, and why free populations are prosperous, dreams of Mexico annexing our Southwestern states would become the target of jokes rather than donations. How can any Mexican want to make part of the US subject to the same government that drove him from his homeland? Who could, who understands the relationship between Communism and poverty, and between political apathy and government corruption? Criteria can give them a reason to learn.

Every alleged "compelling governmental interest" which numerical limitations pretends to serve will be served with less restriction of fundamental liberties, more effectively, and more compassionately, by eliminating numerical limitations altogether and allowing all to come who meet reasonable criteria which natural born citizens already meet naturally, and who do not commit what

would be crimes if citizens did them.

Criteria similar to these were proposed in S1387, which was introduced 7/10/3 during the 108th Congress. Less detailed criteria were offered in S1348, the "Immigration Compromise" bill, in 2007, where they were applied to applicants for LPR (Legal Permanent Residents), not just to citizens. Criteria are already a part of a U.S. citizenship application, but a very small part. Those who go through it find the hard part is the mind-numbing bureaucracy, not the tests.

Criteria do not violate "equal protection of the laws" for all. We don't let children drive. Yet every child has the opportunity of every adult: to drive *after* growing old enough to do it without killing everyone on the road. We don't let just anyone do brain surgery. But anyone can operate *after* learning how without killing everyone in the hospital. Criteria are acknowledgments in law of *natural incapacity* to perform restricted tasks. Once this *natural incapacity* is remedied, Constitutional laws step out of the way of full enjoyment of the rights of U.S. citizens.

C. Candidates for a sufficiently "Compelling Government Interest" to justify rationing Liberty

1. "Sustainable Population"

Can the Court document a "compelling governmental interest" served by Numerical Limitations? How about the "valid immigration goal of reducing the number of undocumented aliens arriving at our borders" which the dissent in JEAN v. NELSON, 472 U.S. 846, 880 (1985) speculated (without elaboration or documentation) may have motivated immigration officials?

Is the theory that population growth will harm our nation a "compelling governmental interest"? Is population density undesirable? If that's it, explain why people, to this day, migrate from rural land to cities! People talk about leaving the city for the suburbs, but most do not move to larger tracts of land. Even the few who do try to stay within commuting distance of cities. And when they leave, others replace them in the middle of the city; some from farms! And those who move farthest away from population centers remain in touch with them, valuing the fruits of large, free populations:

technology such as cell phones, GPS devices, TV, internet.

People *say* population growth is terrible, but who lives as if they actually believe it? In free America, population density is linked to jobs, opportunity, and prosperity, and even to minimal pollution compared with our more rural, more polluted, less technologically efficient past! Federal courts are situated in the centers of the largest cities. Can any federal court document any "compelling governmental interest" in restraining population growth?

How about the theory that the "compelling governmental interest" is "assimilation" of people with other cultures and languages, not population growth of citizens? OK, but what if evidence shows Numerical Limitations *cause* the assimilation problem? If 12 million people weren't afraid to make friends with fluent English speakers, because of Numerical Limitations which allow only 1% of them to live here legally, they could learn English better!

How about population reduction? Can such a government interest be asserted, as long as populations still shift from farms to cities, people regard as "luxuries" the technologies only possible through large, free, peaceful populations, and federal courthouses are placed in the largest cities?

Republican prolifers reject population density as a negative thing, when it justifies abortions or other methods of population control. Their response is to show how easily the entire world population could fit into a small fraction of the U.S. land area. But some of the same prolifers accept population density as a negative during discussions of immigration. They then join pro-abortionists in worrying that allowing more immigration will make us crowded and poor like Bangladesh.

Anti-immigrant rhetoric is based on one of the paranoid excuses of abortionists for killing unborn babies: the Population Control myth that we don't have room for all the hard working, non-criminal immigrants who love freedom and opportunity, so we have to drive them out. That is not prolife. That is the ideology of Margaret Sanger, Planned Parenthood, and Hitler, not the Republican Party, at least not before Pat Buchanan poisoned it while he was a presidential candidate.

It is said that if Numerical Limitations are repealed, "the whole world will come! We won't

have room!"

The U.S. already being an economic and military powerhouse, and the world's tyrannies retaining somewhat fragile control mostly with the indulgence and some support from the U.S., not very much more of the world's population could come here without the U.S. becoming so overwhelmingly influential that tyrannies would finally topple, overtaken by governments which no longer drive out their own citizens.

Many others say another legitimate government interest is in limiting population growth to what is "sustainable".

But how many is that? Has any actual scientific research established such a figure? Doesn't most of the discussion about it avoid definite figures? Don't fears of such a limit appeal, not to clear research, but to the limits of how crowded most of us can imagine being without sacrificing "quality of life"?

Today's population density was unsustainable by 17th century standards, but that was before Freedom. Our experience as the first free nation in 3,000 years has taught us that the larger a brain pool of free men and women living in peace and safety, the greater the technology. That explains why population growth is so attractive to this day that people leave rural areas for the most densely populated cities to enjoy greater cultural and employment opportunities. By contrast, very few leave population centers for rural areas, beyond their ability to commute to population centers, or to interact by other means.

A big problem with counting population levels as a legitimate government interest in restricting immigration, is that it entrusts government bureaucrats with deciding what national discussion and scientific inquiry appear incapable of establishing.

Before we entrust bureaucrats with such power to deprive millions of the liberties we take for granted, on a premise that no man can prove, shouldn't we be consider whether such population limits might actually hurt ourselves as much as they hurt immigrants? For more details, see #10, "Doesn't

generate unsustainable population growth."

We will address the scenario of the whole world coming here. But first, some reasons that won't happen:

(1) If we process citizenship applications in 2-5 years as America's Founders did, immigrants sending money to starving families back home will export political experience with the money – a combination that will enable families back home to transform their governments so they no longer drive out their own citizens. Under today's system, by the time people who send money back home acquire political experience, their families back home have all died of old age.

(2) As the Declaration of Independence touches on, when enough of a population are disturbed enough with their government to endure the upheaval and risk of leaving for a better land, it becomes easier to reform their government so it no longer drives out its own citizens.

(3) The U.S. already being an economic and military powerhouse, and the world's tyrannies retaining somewhat fragile control mostly with the indulgence and some support from the U.S., not very much more of the world's population could come here without the U.S. becoming so overwhelmingly influential that tyrannies would finally topple, overtaken by governments which no longer drive out their own citizens.

(4) There are a lot of violent, lawless people in the world who prefer living where they can resolve disputes with bullets rather than ideas, where they can own slaves, hack Christians to death, rape children, and where they can get a good job as a government torturer. They hate freedom, especially of speech and religion, and they consciously war against prosperity. For example, a well publicized Moslem demonstration photo shows a sign reading "Freedom go to Hell." They don't want to live like us. They want to conquer us and make us live like them. There must always be land set aside for hearts hardened against all things good and beautiful. In Eternity, that land is called Hell.

(5) At some point along the immigration of the whole world into the United States, the United States would annex the whole world.

I have in mind a number of immigrants I want welcomed to the United States: the same number as our own babies whom we have mercilessly slain. God's substitute workforce offers us these advantages:

(1) We attract the best quality immigrants who want to acquire wealth by honest hard work that benefits others, rather than by oppressing others. Our immigrants are like the Levites and other righteous citizens in 2 Chronicles 11:13-17 who left Israel with its two golden calves to live in the more righteous Judah.

(2) National security. We need as many freedom-loving, nonviolent immigrants as we can get to help defend our nation against increasingly hostile enemies. Judah's immigrants "strengthened the kingdom of Judah", just as ours strengthen our God-blessed (so far) land. Many immigrants serve proudly in our armed forces, and as war spreads, we will need more. In an increasingly armed world, a significant increase in our population of citizens committed to our defense may be our only salvation.

While people born here tend to take Freedom for granted and see little urgency about understanding it, much less fighting for it, while even ignorantly voting against it, America is rejuvenated by refugees from freedom's absence. We are a magnet to the best quality Freedom Fighters any free nation could ask.

(3) Technology requires for its invention, and then for its maintenance, a brain pool of free citizens. The larger the brain pool, without diminishing freedom, the greater the technology, and thus the greater our technological edge over our military enemies and economic competitors. Legalizing our 11 million undocumented residents will free their "brains" to join us in our "pool". The more mature our technology, the better jobs will become for everybody.

(4) Elevation of America as the lightouse of the world.

Freedom is a Judeo-Christian value, not a Muslim or Hindu value. That is one of the things that makes America profoundly a "Christian nation", to this day. A Republic in which leaders are elected by popular vote after political campaigns goes back to Moses' institution of "judges". According to

Calvin's Institutes, this system was applied to the selection of pastors of Christian churches for their first several centuries. It was resurrected by the Pilgrims, who for the first time in a thousand years gave the vote to everybody; not just free men but servants, not just church members but atheists, and not just men, but when my ancestor Richard Warren died in 1607, his wife Elizabeth, as head of household of 7 children, was allowed to vote. (For documentation, see www.Saltshaker.US, click on "1620: When Freedom was Reborn".)

It is this sense that atheists, Moslems, Hindus, and pagans who live here under our freedom and enjoy it, live more like Christians than like the brutal societies in which those professions dominate.

Even citizens who profess Atheism's Communism-supporting evolution-justifying "survival of the fittest" live here under our laws. Honest, not violent, not criminal, their temperament self-controlled, serving others with quality, integrity, wisdom, and a commitment that goes beyond mere concern for future business, treating wives well, treating others as they want to be treated, not necessarily given to drink or drugs.

Even relativists, who live here, live by some kind of "moral code" with principles so important to them that violating them is unthinkable, and which, when violated by others, seems to them "wrong". And sometimes even "abominable".

Non-Christians who live in America, while hardly professing Christianity, live much more by Christian principles than by the principles of other world religions. The religions they profess do not fully articulate the moral codes by which they live, when they live in America.

"But what if half the world comes?"

Although this will be impossible for the above reasons, let's fully dispose of the Population Control Myth by demonstrating the potential good of even that much population density.

If ½ the world came, the U.S. would be only a little more densely populated than Polk County, Iowa.

I live in Polk County. Polk County is the heart of Iowa, host to the starting gate for Presidents.

Polk County does not have an unsustainable population! We don't have very many people crammed in high rises; mostly homes. And about half our land is farm land. We could grow all our own food if we had a reason. Fewer are leaving Polk County for farms, than are coming to Des Moines from farms.

Quality of life is proportional, not to population density, but to freedom of religion, speech, and opportunity protected for all. Here is the proof. The first figure is population density per square mile. The second figure is average annual income.

U.S. 71/$22,212.
Mexico 115/$2,936.
China 315/$370.
U.K. 611/$15,000.
Israel 658/$10,500.
Polk County 756/$23,654.
Japan 865/$27,321.
U.S. if ½ the world came 912/$___
Bermuda 1,088/$36,845.
Taiwan 1,669/$8,083.
Manhattan 66,940/$100,000+.

Even if the whole world came here, leaving the rest of the world for farms and hunting, the U.S. would still have only 3% of the population density of Manhattan, where many prefer to live by their free choice. To this day people flock from rural areas to densely populated cities to take advantage of the opportunities, jobs, culture, and technology which is always increased, the more condensed the pool of free, secure brain power.

The threat to America is not numbers, but declining understanding of how our freedoms work, and/or declining interest in freedom.

The source of the application of Population Control ideology to immigration in today's political discussion is primarily one man, John Tanton, who has no credentials in economics or demographics. He is an eye doctor. The Wikipedia article about him says "Tanton has also held national positions in environmental organizations such as the Sierra Club and Zero Population Growth, and local leadership positions in the Audubon Society and Planned Parenthood." Here is a list of restrictionist groups Tanton started according to Wikipedia:

American Immigration Control Foundation - AICF, 1983, funded

- American Patrol/Voice of Citizens Together - 1992, funded
- California Coalition for Immigration Reform - CCIR, 1994, funded
- Californians for Population Stabilization - 1996, funded (founded separately in 1986)
- Center for Immigration Studies - CIS, 1985, founded and funded
- Federation for American Immigration Reform - FAIR, 1979, founded and funded
- NumbersUSA - 1996, founded and funded
- Population-Environment Balance - 1973, joined board in 1980
- ProEnglish - 1994, founded and funded
- ProjectUSA - 1999, funded
- The Social Contract Press - 1990, founded and funded
- U.S. Inc. - 1982, founded and funded

Source: "John Tanton's Network." *Intelligence Report*. Summer 2002.

2. Preserving Good Jobs for Citizens.

Can a court count it a "compelling government interest" to keep so many immigrants from taking U.S. jobs that there aren't enough jobs left for citizens? Or to keep immigrants from working for us for such low pay that they "drive down wages" for citizens?

These are the kinds of myths which survive on the campaign trail only through the ability of citizens to listen to the voices that please them, while turning off the voices able to correct them. It is unlikely they could survive in a court room where all sides must be heard. As amazing as the power of a judge is to censor testimony he arbitrarily decides is irrelevant, it is unlikely he would so censor myth busters on these subjects, since even the "rational basis" test offers the burden of proving that the purported "government interest" is irrational. A test which should be easily met.

Factories leave our shores in search of cheap labor (regulations and taxes are another subject). Duh! We wouldn't have to move our factories overseas to find cheap labor, if we would allow cheap labor to come to our factories! Millions of low cost workers are clamoring to come!

Immigrating workers don't have to be as low cost as workers abroad, to bring our factories back, because labor abroad isn't worth as much. Workers abroad lack a work ethic of honesty, integrity, and quality. Communication with workers is limited. Experienced workers are harder to keep because of terrorism and government tyranny. Foreign governments have fewer written regulations but more

unwritten bribe shakedowns. Shipping contributes not only to costs, but to a lag of months between discovery of a problem and its correction; or between an innovation and its implementation.

When our factories return, the good jobs with them return. Rent and property taxes are paid to Americans instead of foreigners.

Immigrants don't take jobs away from citizens! The reason we don't have 250 million unemployed since U.S. population grew from 100 million to 350 million, is that there are not a fixed number of jobs. The number of jobs available is always proportional to the population, and to the degree of freedom from taxes, regulations, and corruption which allows citizens to serve one another. This is because every new worker taking a job, whether born here or abroad, also creates a job because he requires the services of citizens to live here – and he has to pay citizen wages!

We don't thank our lawyers and doctors for driving UP our wages by charging so high. It makes no sense to accuse immigrants of driving down our wages by working cheap. When we pay them low, and charge them high, it is not them cheating us. Citizens should shut up and be grateful.

Technology requires for its invention, and then for its maintenance, a brain pool of free citizens living in peace. The larger the brain pool, without diminishing freedom, the greater the technology, and thus the greater our technological edge over our enemies and economic competitors. Legalizing our 11 million undocumented residents will free their "brains" to join us in our "pool". The more mature our technology, the better quality jobs will become for everybody.

If the government has any serious interest in creating good jobs for citizens, then the sooner the Court can help the government divest itself of its own policies, which are precisely the greatest obstacle to good jobs.

3. Regulating the pace of assimilation.

Can a court count it a "compelling government interest" to not allow immigrants to flood in so fast that they create ghettos of unassimilated English-free poor people uninterested in the rest of our nation?

If we make English mastery the door to LPR (Legal Permanent Residence), they will study English with all the vigor it takes to swim the Rio Grande.

We blame immigrants for not “assimilating”, and yet our immigration policy gives strong disincentives to assimilate. Overturning Numerical Limitations, so that all nonviolent, qualified immigrants can come legally, will reverse our current disincentives and highly motivate immigrants to learn fluent English.

Numerical Limitations are the primary reason it takes a couple of generations rather than a couple of years for bureaucrats to process the paper trail between a work visa and citizenship. Without Numerical Limitations, immigrants will become proud citizens with little stimulus to look back with longing to the country that drove them out.

Undocumented immigrants fear mixing with fluent English speakers for fear of detection, and documented immigrants are not endeared to fluent English speakers because of the racial profiling that spills over from hating “illegals”.

We can reverse our disincentives with a new immigration policy that rewards applicants for Legal Permanent Residence for high scores in history, government, and English tests, as well as a documented work history which gives extra credit for work which requires English fluency.

The promise of timely legalization is so appealing that we could institute serious English and government tests not only to be a citizen but to gain Legal Permanent Residence, and immigrants would gladly master them.

Overturning Numerical Limitations would create such enthusiasm for meeting citizenship requirements, that if for the test we required a GED diploma, with which an immigrant might graduate directly from a work visa to citizenship, only a minority would go through the lengthier intermediary step of Legal Permanent Residence.

If the government has any serious interest in assimilation, then the sooner the Court can help the government divest itself of its own policies, which are precisely the greatest obstacle to

assimilation.

D. The Government's Solution must be "Effective"

It is not enough for the government to allege some noble purpose for Numerical Limitations, if the facts are that Numerical Limitations are the primary obstacle in the way of that purpose.

> *Central Hudson Gas & Elec. v. Public Serv. Comm'n,* 447 U.S. 557 (1980) The State must assert a substantial interest to be achieved by restrictions.... Moreover, the regulatory technique must be in proportion to that interest. The limitation...must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction..., the excessive restrictions cannot survive. Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. ...
>
> ....we ask whether the asserted governmental interest is substantial..., we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. The regulatory technique may extend only as far as the interest it serves. The State cannot regulate [anything] that poses no danger to the asserted state interest....

Central Hudson says the 3rd prong of Strict Scrutiny is that the government's solution for its compelling problem must be effective. It can easily be shown Numerical Limitations are a pretty ineffective way to achieve border security! They cause it! The government must actually present evidence that the solution is effective! There must be an evidentiary record, and it must be convincing! Mere theory or conjecture is insufficient. Liberty certainly merits as much protection as free speech, since it is a more fundamental right. The First Amendment was an Amendment to the Constitution, but Liberty was an enumerated right in the Preamble to the Constitution, and in the Declaration of Independence, which is the cornerstone of the Constitution. It lists Life, Liberty and the Pursuit of Happiness, and simple reason dictates that life is the most fundamental right, without which no other right can exist; and liberty is next, without which no other right other than life can exist.

E. An Impossible, Impractical, Abandoned Goal isn't much of a "Compelling Government Interest"

Can the court count, as a "compelling government interest", the legislative goal of deporting millions of U.S. residents – or any other goal which is as a practical matter impossible, which has never been remotely met, which Congress refuses to seriously fund, which divides citizens and lawmakers as to whether it is a great good or a great evil, and which would become theoretically possible only at the cost of our freedoms as we know them, through the complete loss of privacy and the absolute power of Big Brother's national tracking bureaucracy *over citizens* in every area of life?

When congressional action has utterly and decisively abandoned a goal, can statements about congressional intentions, by a congressional minority, support the finding that the goal is a compelling government interest?

a. Impossible. Deportation of any significant portion of our 12+ million unauthorized residents is as a practical matter impossible.

The U.S. Senate rejected enough Big Brother to achieve even a 13% reduction in their numbers. (Senator Jeff Sessions gave this figure, summarizing the June 4, 2007 Congressional Budget Office report that analyzed SA 1150.)

It voted to not require a Real ID card to get a job. The card combines Social Security, FBI, and state driver's license databases, and collects digital photos which can be processed by facial recognition software, creating potential for hidden cameras across America tracking everyone going by. Even with that much Mark of the Beast prep, the CBO estimated that would only reduce the illegal population by 1.3 million, characterized as a 13% reduction by Senator Jeff Sessions in June 27, 2007 floor debate.

[Page 8 of the CBO report: "Information from the Pew Hispanic Center indicates that as many as 12 million unauthorized immigrants were in the United States in March 2006. CBO anticipates that one million of them would not be affected by the legislation because they will eventually become legal permanent residents under current law. We also anticipate that about 2.0 million of the unauthorized immigrants (workers and dependents) would attain legal status under the legislation through the

program for agricultural workers. Of the remaining unauthorized immigrants, CBO estimates that about 60 percent would gain legal status under the legislation. The number of individuals with legal status would decline in later years due to death, emigration, and the loss of legal status for individuals who do not complete the process of becoming legal permanent residents. The largest factor contributing to the population increase in the first 10 years would be changes in family-sponsored admissions, which would add an estimated 1.6 million legal immigrants (or children of those immigrants) to the population by 2017. That increase would occur because the amendment would raise the cap on family-sponsored visas from 226,000 (not including parents of citizens) to 567,000 for several years. Because those limits would drop to 127,000 in 2017, the population increase relative to current law would start to decline after that. CBO estimates that another 1.1 million people would be added by 2017 as a result of the guest-worker program—about half of them authorized workers and dependents, the remainder the result of unauthorized overstays. That figure would grow to 2.0 million by 2027. In contrast, the enforcement and verification requirements of the legislation would act to reduce the size of the U.S. population. CBO estimates that implementing those requirements would reduce the net annual flow of illegal immigrants by one-quarter, reducing the projected population by 1.5 million people in 2017 and by 3.6 million people in 2027 (including the effects on citizen children). Other aspects of the legislation are likely to increase the number of illegal immigrants—in particular, through people overstaying their visas from the guest-worker and H-1B programs. CBO expects that the enforcement measures and the higher number of overstayers would, on net, diminish the number of unauthorized immigrants by about 500,000 in 2017 and about 1.3 million in 2027."

From p. 26-27: "Effects of Enforcement and Verification on Net Flow of Unauthorized Migrants. The potential impact of the border security, employment verification, and other enforcement measures on the flow of unauthorized migrants is uncertain but could be large. While efforts to restrain the influx of unauthorized workers and their families have historically been relatively ineffective, this legislation would authorize significant additional resources as well as a comprehensive employment

verification system to deter the hiring of unauthorized workers. Moreover, the implementation of the new guest worker program and the provision of visas to the currently unauthorized population could occur only if the Secretary of DHS certifies that the enforcement measures are in place. CBO estimates that those measures would reduce the net annual flow of unauthorized immigrants by one-quarter. A reduction of that order of magnitude would reduce the unauthorized population in the United States by about 1.3 million in 2017."]

On June 27, through an amendment to the Immigration Compromise offered by Grassley from Iowa, the Senate refused citizen monitoring designed to detect illegals. (Vote #234. Called Division VII of SA 1934. When it was voted upon, it was called the Baucus-Domenici-Grassley amendment; however, a week prior, a series of letters was exchanged about the amendment between USCIS director Chertoff and Baucus, Grassley, and Obama, and when the vote was counted Domenici had voted against it! So the bill's only consistent cosponsors were Grassley and Baucus. In floor debate it was called the Baucus amendment, and Baucus is its sponsor in news articles, but Grassley was the one who stood and spoke for it in floor debate.)

Why did the CBO estimate only 25% fewer illegals flowing in? Past experience: "efforts to restrain the influx of unauthorized workers and their families have historically been relatively ineffective". (Page 8 of the CBO report.) Why wouldn't fences, agents, and overwhelming monitoring completely stop the flow? Even with a secure border, the CBO estimated the source of new illegals would be overstays of the increased temporary work programs. But how could these millions continue to work, with so effective an EEVS (Electronic Employment Verification System)? The CBO didn't say. But Senator Sessions explained, June 27, how many will still get phony ID's. And of course many are self employed.

b. This goal has never been met, or even approximated. To the contrary, the unauthorized population has grown five times in the past 20 years, and continues to grow at its present rate with no realistic strategy on any political table. Instead of rational discussion of what it would actually take to

achieve the deportation goals of some, there is highly charged blame of agents for not trying hard enough, and of politicians and Christian missions for frustrating deportation goals by sheltering undocumented immigrants in a variety of ways.

Anti-immigrants say the legislative goal of deporting millions of U.S. residents was successfully met by "Operation Wetback" in 1954, but the facts are very much in dispute. The INS said "as many as" 1,300,000 undocumented immigrants left, but apparently several million did not leave, because over a million a year were crossing. And the 1,300,000 figure may be wishful thinking. The INS apprehended only 80,000! The INS opined that the rest left out of fear of those apprehensions. During the operation, the INS exaggerated the size of its operation far beyond its 700 men, in order to scare "wetbacks" into leaving. Newspapers exaggerated the size of the operation for its own reasons: to accuse the INS of overreaching. [Source: http://www.tshaonline.org/handbook/online/articles/pqo01] According to Wikipedia, "According to the opinion of Mary Bosworth, there were widespread allegations of abuse against Mexicans and US citizens of Mexican descent, including harassment and beatings. Lawsuits were filed and settled in favor of victims." The operation began July 15, 1954 and ran out of funding around September. One can only guess how much of a factor the lawsuits were, in Congress' decision to drop the project.

(No attempt at a careful analysis of Operation Wetback is attempted here; if this issue is ever of interest to a court no doubt we will see great research then. I estimate that it will support my characterization of the legislative goal of deporting millions of U.S. residents, as a goal which has never remotely been met.)

c. Citizens divided whether the government's interest is "compelling" or "cruel". Much of the reason deportation goals are never met is that the nation is split down the middle whether they are good or bad. Non-citizens have no right to trial by jury for immigration offenses, but if they did, it would be difficult to voir dire juries sufficiently to assure convictions.

d. No Congressional funding. Jailing, processing, and deporting unauthorized immigrants is

estimated by ICE at $94 billion. (ICE chief Julie Myers, answering Senator Susan Collins. http://thelede.blogs.nytimes.com/author/mnizza/ 9/13/7)

That doesn't count the cost of finding them. Over $20 billion just for Real ID, and $11.7 billion per year to expand Real ID into the EEVS, as envisioned in the Immigration Compromise bills, counting the cost to business. [$17 billion was DHS' estimate March 9. (Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Proposed Rule 72 Fed. Reg. at 10,845.) $23 billion was Senator Leahy's estimate June 27, (Congressional Record, page S8599) which apparently included the cost of expanding Real ID into the EEVS, since the Congressional Budget Office estimated the EEVS would cost $3 billion over the first five years. (June 4, analysis of S.A. 1150) But this counts only the cost to federal and state government. $11.7 billion a year was the cost, when the cost to businesses was counted, according to the GAO in 2006. (http://www.reason.com/news/show/117343.html "Worse Than a Wall" <> "The immigration solution everyone agrees on may end up hurting the most" <> Kerry Howley | May 2, 2006 "...Every employee must be entered and tracked individually, which may prove impossible for employers who hire large numbers of workers on a seasonal or day-by-day basis and businesses that depend on labor flexibility to stay competitive. It's a 21st century system built for a lost world of 9-to-5 employment, a retro-futuristic vision of time cards, assembly lines, and electronic surveillance. How does the government that brought you the prescription drug benefit debacle plan to manage an electronic system involving every employed person in these United States? The GAO needs a color-coded map to explain, but here is the basic summary: Employers send data for every new hire to DHS, which then sends information to SSA, which then sends information back to DHS, which sends info back to the employer, who can either contest any rejected applicants and begin the process anew, risk fines for not complying, or accept the findings. The burden of contesting mistakes and keeping records lies with employers. The cost, says the GAO, will be about $11.7 billion—annually—'with employers bearing much of the cost.'"]

But congress rebelled against even enough Big Brother to reduce the unauthorized population by 13%, and now is starving to death even the Real ID Act. [Senate Amendment 2406, 8/26/07, by Baucus, was passed by unanimous consent. The amendment was one sentence long: "None of the funds made available in this Act may be used for planning, testing, piloting, or developing a national identification card."] Meanwhile 11 states have enacted laws prohibiting implementation, 9 have passed resolutions denouncing it, 6 have passed anti-Real ID legislation in one chamber, and 11 have had such legislation introduced. In only 13 states, including Iowa, has there been no outcry. [As of Thanksgiving Day, 2008, according to www.realnightmare.org, a website of the ACLU.] Although May 11, 2008, was supposedly the deadline for states to either comply or request a waiver from the DHS, not one state complied. A few asked for waivers. Those who refused waivers, and by law should have seen their driver's licenses not accepted at airports or federal buildings, were given waivers anyway by the DHS, which was the DHS' white surrender flag.

e. Cost of success: our freedoms. The Real ID and EEVS would have only reduced the unauthorized population by 13%, so what would it take to reduce it significantly? What is the next step, beyond Real ID and EEVS?

[For those not familiar with these technologies, the Real ID card, which states were supposed to obey by May 11, 2008, combines state driver's license databases, and collects digital image files (as opposed to the old laminated polaroid phots on driver's licenses of which no record remains with the state) which can be processed by facial recognition software, creating potential for hidden cameras across America tracking everyone going by. The Real ID Act requires this card for any federal purpose, including boarding a plane, opening a bank account, and entering a federal building. The EEVS (Electronic Employment Verification System), as proposed by the Immigration Compromise which failed 6/28/07, combines the national driver's license database with those of the SSA, FBI Ident, with "information sharing" with the IRS, and requires the Real ID card to get or keep a job.]

The next logical step: linking the EEVS to hidden cameras all across once-free America,

fulfilling the dreadful warning of "1984" by George Orwell.

What is wrong with national tracking?

We don't want a thief to know our social security number, credit card numbers, or bank account code, because he can use it to drain our bank account and charge our credit card.

We don't want a thief to be able to track our location through our cell phones because then he will be able to find us if he wants to rob or kill us, and ransack our home when we are away.

We don't want a thief to have a record of what guns we have; if we have none, we want him to worry that we might, and if we have some, we don't want him to be thinking how to steal them.

We don't want a thief to know exactly how much money we make, and from what sources, or where we spend it, because that will equip him to intercept our income and deceive us in our purchasing in a thousand different ways.

We don't even want our friends and relatives to know this information, even though we trust them and they love us, because that much opportunity to take advantage of us will lay before them too great a temptation. Sin begins small: they might want to just "borrow" a little with the full intention of repaying it in a couple of days, just like the government just "borrowed" our social security trust funds with every intention of repaying them in a couple of generations.

We don't even give our very own parents or children this information about us, except for a very good reason, and limited only to enough information to serve that limited purpose.

And yet we provide government, whom no one trusts, all this information about us, every hour of every day!

Government knows our social security, credit card, and bank account numbers, and uses them to extract money from us at every step along our transactions. The temptation of government to take more and more and more is so strong that American voters trying to stop the spiral are like a cowboy trying to lasso a train. As Chief Justice of the U.S. Supreme Court John Marshall (from 1801-1835) said "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit

beyond which no institution and no property can bear taxation."

Government can track us at will through our cell phones. We are glad when they track criminals, but the DHS list of who is a "terrorist" includes home schoolers, gun owners, conservative Christians, etc, illustrating the temptation we have placed before our government to expand its tracking activities beyond mere lawbreakers. When we see full fledged armed raids on raw milk producers, we doubt government's commitment to respecting the difference.

Government would dearly love to know what guns we own. It already knows what handguns we own, except for those purchased years ago, and is so anxious to list the rest, that we should be as wary as we would of any other stranger asking us for a list of the guns we own.

E-Verify greatly increases the temptation we offer government to rob us of Freedom. Over the years it will purge its already existing national database of errors, giving government ruthlessly accurate data on every U.S. citizen. Its "Photo Tool", a photo of every citizen processed by Facial Recognition Software, can interface with surveillance cameras to log every human being walking or driving by.

Without E-verify, no man will be able to work. Without a job, no man will be able to buy. It is a small step to require every new bank account applicant to be checked by the system; that requirement is part of the enacted by ever-delayed Real ID Act. Without a bank account, it is pretty hard to sell anything. Without the ability to either buy or sell, the system satisfies most of the description of the Mark of the Beast of Revelation 13, the Bible's prophecy of the ultimate tyranny of all human history.

Universal Unacceptability of *The Other Guy's* National Tracking.

The financial cost of this step has not been estimated. The cost in our freedoms is universally unacceptable. Unthinkable. At least if it is *the other guy* that is proposing it.

For example, Hillary Clinton's health care initiative floundered in 1994 largely because it included a national health ID card. This was unacceptable to conservatives who compared it with George Orwell's "Big Brother" and the "Mark of the Beast" of the Book of Revelation in the Bible.

Liberals enthusiastically supported it, though. But even though liberals controlled the Executive, Legislative, and Judicial branches, conservative resistance was passionate enough to kill it.

But now that unauthorized-resident-detecting National Tracking is proposed, like the Real ID Act, the Electronic Employment Verification System, E-verify, etc., conservatives see no problem because they are urged by moral conservative leaders like Congressmen Tom Tancredo and Steve King, or Senators Jeff Sessions or Kay Hutchison Bailey.

Meanwhile the leading congressional opponent of this national tracking movement is Democrat Senator Sam Baucus, supported by ultra-liberal organizations like the ACLU and the AFL-CIO. The ACLU cites the cost in individual liberty. The AFL-CIO, in a successful lawsuit to stop the DHS from implementing a system like the E-Verify, successfully argued that it would cause huge numbers of citizens to lose their jobs because of errors in national databases that would impede citizens trying to prove their citizenship. (AFL-CIO v. Chertoff, N.D. Cal. No. 07-4472-CRB)

> 8/29/8 Press Release, AFL-CIO: "...a new Department of Homeland Security (DHS) rule will threaten jobs of U.S. citizens and other legally authorized workers simply because of errors in the government's inaccurate social security earnings databases. ...According to the Office of the Inspector General in SSA, 12.7 million of the 17.8 million discrepancies in SSA's database - more than 70% - belong to native-born U.S. Citizens....The new rule turns the law on its head by using the notoriously incomplete and inaccurate social security databases to decide who is authorized to work. This will wreak havoc with workers and businesses and will cause massive discrimination against anyone who looks or sounds 'foreign'".

The DHS rule would have given citizens 90 days to straighten out SSA errors, but the current wait for a SSA hearing for benefits is 499 days. The similar "Save America Act", H 4088, would give a citizen only 10 days!

12.7 million discrepancies belong to natural born U.S. Citizens! Try to imagine all the confusion, the media apathy, the obstruction of justice, about whether Barack Obama is a citizen, multiplied by 12.7 million!

The DHS asked the court for time to revise its rules in order to not jeopardize citizens. Five long months later, on 3/21/08, the DHS finally released its revised rule, and I can't tell the difference

from the contested rule! Apparently neither can the court, because I haven't heard of any further action in the case.

The Save America Act

As a measure of the willful ignorance of "enforcement only" politicians, the "Save America Act", H 4088 (see also H 5515) was introduced with great expectations 12/6/07 by 112 co-sponsors even though it threatens citizen's jobs as much as the DHS rule. It calls its National Tracking system "E-Verify", to which a "photo tool" had been added 9/25/07, a technology which enables hidden cameras with access to the national database to monitor who is walking or driving by.

> ...because facial images can be captured from video cameras, facial recognition is the only biometric that can be used for surveillance purposes. (9/9/03 General Accounting Office)

Meanwhile, it seems likely 2013 would give us Comprehensive Immigration Reform.

> An analysis by America's Voice of 21 "battleground" races for House and Senate seats found that pro-immigration-reform candidates beat enforcement-only "hardliners" in 19 of the races. " Senate Majority Leader Harry Reid reassured the public that Congress will "move forward" and pass immigration reform legislation.... Meanwhile, the renowned Republican strategist Karl Rove included immigration reform as part of a roadmap for the future survival of the GOP. "Republicans must find a way to support secure borders, a guest-worker program and comprehensive immigration reform that strengthens citizenship, grows our economy and keeps America a welcoming nation," said Rove.
> http://immigrationimpact.com/

However, every expensive and impractical solution BUT repeal of Numerical Limitations will be our fate, from the looks of current proposals. We should expect to see:

* Numerical Limitations increased by perhaps 50%, so that instead of meeting 1% of the need they will accommodate 1.5% of the need. Whoopee!

* More pressure on business owners to solve the problem politicians can't: how to tell Legal Citizens from Unauthorized Residents. Businesses will not be "forced" to participate in E-Verify, but only participation will relieve them of liability for accidentally hiring an Unauthorized Immigrant. And once they participate, hundreds of thousands of citizens should expect to spend months in court after losing their jobs.

* The exponential growth of National Tracking, using facial recognition software (a component of E-Verify since 9/25/7) processing citizens passing by, first at border checkpoints and job sites, second in airports and federal buildings, and finally, since all of that is projected by the CBO to only reduce our unauthorized population 13%, everywhere.

* Economic catastrophe from hundreds of thousands of citizens out of work and tied up in court, businesses unable to replace citizens with immigrants, and new pressure on entire factories to relocate overseas in search of low cost labor, since accessible low cost labor here will be slashed.

* Worsening security nightmares, as millions *guilty of hard work* are pushed farther into hiding, giving terrorists, criminals, and drug lords even deeper shadows with which to blend. Many Unauthorized Residents would stay, supporting themselves by going into business for themselves, or working "under the table".

* "Guest Worker" schemes that will make a tiny number of workers available only to businesses who can afford to wait for months while they advertise first for citizens; who don't need to interview their workers before hiring them; and who won't want them longer than 3 years, since the workers will have no path to staying here legally any longer than that. This will lead to a new flood of visa overstays.

* A "path to citizenship" for a fraction of the 12+ million Unauthorized Residents, with so much bureaucracy, fines, and conditions that millions will prefer the shadows, thank you.

* Further release of violent criminals to free precious cell space for criminals guilty of Hard Work. The new jail space, provided by the 2007 Immigration Compromise to hold immigration offenders for the sentences created by the bill, would have required 300 years to process all the current immigration offenders.

* Bureaucratic meltdown as the appropriations, bureaucracies, enforcement, and prison space provided by the new Compromise utterly fail to achieve any of the bill's intended purposes, having been conceived amidst profound willful ignorance of reality.

The Disaster of E-Verify

Conservatives are supposed to want to kick "Mark of the Beast" national tracking schemes like E-Verify back to Hell to join Hillary's 1993 National Health Card.

Conservatives are not supposed to want to increase national tracking of any kind: whether a national ID card like the "Real ID", the combining of national databases, the addition of biometric information to national databases, or the building blocks of future national tracking.

Today's allegedly "conservative" immigration policy relies on Big Brother (or Mark of the Beast) government tracking databases and technology – the E-Verify system, with its Facial Recognition software which, once nationally mandated and filled with images and data on everyone who works, will have the potential capacity to chart the movements of every American through surveillance cameras across America.

I am a very conservative Republican who ran last year against Iowa's openly gay state senator, but forcing employers to sic Big Brother on every employee, so that a man can literally not work, without which most cannot buy or sell, without this metaphorical "mark", is not the "conservatism" that I signed on for! When Hillary tried to do a fraction of that with an ID card pegged to her national health plan in 1993, conservatives shut down the switchboards and made Newt majority leader. That national ID card was the primary catalyst for Newt's rise, as I recall. That's my memory of the meaning of "conservative".

What makes E-Verify so different from the Real ID and BELIEVE Acts that the former is praised and the latter vilified even by some "end times" radio preachers? The clearest difference is that with the former you don't have to carry a card. Your face is the card, through E-Verify's "photo tool" which uses Facial Recognition software. That makes it better? The databases are about the same; under any plan, there is pressure to merge state and national databases. The "Immigration Compromise" of 2007 would have combined Social Security, IRS, and state DOT (drivers' license) records. The ironically named "Save America Act" would have instead combined Social Security records with state

birth and marriage certificate records.

E-Verify database errors force at least 0.3% percent of citizens to wrestle with database bureaucrats to keep their jobs. No one knows how many of the remaining 2.3% percent not allowed to work are citizens who never figured out how to appeal, or didn't want to bother, or are still waiting for a hearing. Three years ago, the wait time for a hearing was 499 days.

If E-verify were mandatory across America, that would add up to between 800,000 and 7 million citizens not allowed to work. That is probably more than the number of undocumented immigrants that would not be allowed to work; especially since there is no clear evidence that E-Verify has reduced the undocumented population at all.

But far more frightening than a government database whose errors would put 7 million citizens out of work, would be a government database with zero errors!

E-Verify relies on the Social Security database, which has about 18 million mismatches between names and numbers, over 12 million of which are for citizens.

At least those figures are the main reason a California court stopped the USCIS from mandating E-verify nationally by administrative rule.

("Order Granting Motion for Preliminary Injunction" of the U.S. District Court for the Northern District of California, No. C, 07-04472 CRB, 10/10/2007. After a similar scheme was rejected by the U.S. Senate - "The Immigration Compromise" - the USCIS attempted to accomplish the same thing through an administrative rule. 72 Federal Register 45611 August 15, 2007. A coalition led by the AFL-CIO filed a Complaint August 28: AFLCIO v. Chertoff, Northern District of California.)

What will happen to you if you are one of those 12 million? What if a previous employer, or the SSA, misspelled your name or number on a W2 form? What if you got married and didn't tell both the IRS and SSA? What if a W2 form was turned in for you that wasn't completely filled out? What if your number is used by someone else?

Those were four main reasons given by the Court why the SSA has so many errors.

The SSA Inspector General testified February 28, 2008, that there are 751,767 cases waiting for a hearing decision, causing an average wait time of 499 days. That is how long you might be out of work if you can't quickly resolve a mismatch about you in SSA records and have to go before an SSA administrative law judge, where, by the way, even citizens don't have a right to a court appointed attorney.

The SSA already sends out eight million letters every year to employers about their employees whose names and numbers don't match. But the letter honestly says that is not evidence that a worker is not a citizen. The USCIS wanted to change that disclaimer, and give employers 90 days to resolve that no-match, fire their employees, or face huge fines. The Court said "If allowed to proceed, the mailing of nomatch letters, accompanied by DHS's guidance letter, would result in irreparable harm to innocent workers and employers....Kenneth Apfel, ex-Commissioner of the SSA, believes – based on his prior experience at the agency – that "there will be many legally authorized workers who cannot resolve a mismatched earnings report" by the deadline imposed by the new rule. See Apfel Decl. ¶ 17. Because empirical research suggests that mass layoffs often follow receipt of a no-match letter, see Theodore Decl. ¶ 11, there is a strong likelihood that employers may simply fire employees who are unable to resolve the discrepancy within 90 days, even if the employees are actually authorized to work."

But now the GAO says the error rate is much lower.

"USCIS has reduced TNCs [Temporary NonConfirmations] from 8 percent for the period June 2004 through March 2007 to almost 2.6 percent in fiscal year 2009."

Let's translate.

In 2007 the Court said the SSA database had 12.7 million no-match errors involving citizens. Now the GAO says 4 years later there is an error rate of 2.6%.

U.S. population according to the 2010 census is 308,745,538.

[en.wikipedia.org/wiki/Demographics_of_the_United_States]

That's how many SSN's there should be, of living Americans, as opposed to Chicago voters.

2.6% of that many, minus 11 million estimated undocumented residents, comes out to 7,720,000 citizens with no-matches.

But are the no-matches errors? Perhaps not! only 0.3% were *proved* to be eligible for work after they contested their TNC. At that rate, a scant 800,000 U.S. Citizens would be at risk of having to wrestle with bureaucrats in order to keep working, were E-Verify made mandatory for all U.S. employment! (Not reported is how much work it was to wrestle with the database bureaucrats, how much time it took, and if anyone is still wrestling.)

Except that there is no way to be sure about that other 2.3%, according to the February 2011 government Accounting Office report. Maybe some were citizens who were never told they could appeal their TNC, suggested the GAO. Maybe they were citizens who just didn't want to fight it; there is no way to even find out what is in USCIS records that led to the TNC. Without knowing that, how can you correct it? If those 2.3% who lost their jobs were also citizens, then at that rate, if E-verify is mandated across America, then we should expect 7 million American citizens to lose their jobs!

Here are excerpts from the GAO report posted at http://www.gao.gov/new.items/d11330t.pdf

> USCIS has reduced TNCs from 8 percent for the period June 2004 through March 2007 to almost 2.6 percent in fiscal year 2009. As shown in figure 1, in fiscal year 2009, about 2.6 percent or over 211,000 of newly hired employees received either a SSA or USCIS TNC, including about 0.3 percent who were determined to be work eligible after they contested a TNC and resolved errors or inaccuracies in their records, and about 2.3 percent, or about 189,000, who received a final nonconfirmation because their employment eligibility status remained unresolved. For the approximately 2.3 percent who received a final nonconfirmation, USCIS was unable to determine how many of these employees (1) were authorized employees who did not take action to resolve a TNC because they were not informed by their employers of their right to contest the TNC, (2) independently decided not to contest the TNC, or (3) were not eligible to work.
>
> USCIS has reduced TNCs and increased E-Verify accuracy by, among other things, expanding the number of databases that E-Verify can query and instituting quality control procedures to screen for data entry errors. However, erroneous TNCs continue to occur, in part, because of inaccuracies and inconsistencies in how personal information is recorded on employee documents, in government databases, or both.

….In addition, identity fraud remains a challenge because employers may not be able to determine if employees are presenting genuine identity and employment eligibility documents that are borrowed or stolen.[5] E-Verify also cannot detect cases in which an unscrupulous employer assists unauthorized employees. USCIS has taken actions to address fraud, most notably with the fiscal year 2007 implementation of the photo matching tool for permanent residency cards and employment authorization documents and the September 2010 addition to the matching tool of passport photographs. Although the photo tool has some limitations, it can help reduce some fraud associated with the use of genuine documents in which the original photograph is substituted for another.6 To help combat identity fraud, USCIS is also seeking to obtain driver's license data from states and planning to develop a program that would allow victims of identity theft to "lock" their Social Security numbers within E-Verify until they need them to obtain employment authorization.[7] Combating identity fraud through the use of biometrics, such as through fingerprint or facial recognition, has been included in proposed legislation before Congress implementing a biometric system has its own set of challenges, including those associated with cost and civil liberties.

….USCIS is challenged in ensuring employer compliance with E-Verify requirements for several reasons. For example, USCIS cannot monitor the extent to which employers follow program rules because USCIS does not have a presence in employers' workplaces.8 USCIS is further limited by its existing technology infrastructure, which provides limited ability to analyze patterns and trends in the data that could be indicative of employer misuse of E-Verify. USCIS has minimal avenue for recourse if employers do not respond or remedy noncompliant behavior after a contact from USCIS compliance staff because it has limited authority to investigate employer misuse and no authority to impose penalties against such employers, other than terminating those who knowingly use the system for an unauthorized purpose. For enforcement action for violations of immigration laws, USCIS relies on Immigration and Customs Enforcement (ICE) to investigate, sanction, and prosecute employers. However, ICE has reported that it has limited resources to investigate and sanction employers that knowingly hire unauthorized workers or those that knowingly violate E-Verify program rules.[9] Instead, according to senior ICE officials, ICE agents seek to maximize limited resources by applying risk assessment principles to worksite enforcement cases and focusing on detecting and removing unauthorized workers from critical infrastructure sites.

Senior E-Verify program officials said they expect improved technology enabling automated analysis of E-Verify data to be implemented by fiscal year 2012.

….USCIS does not have operating procedures in place for USCIS staff to explain to employees what personal information produced the TNC or what specific steps they should take to correct the information.

….USCIS and SSA face challenges in accurately estimating E-Verify costs. Our analysis showed that USCIS's E-Verify estimates partially met three of four characteristics of a reliable cost estimate and minimally met one characteristic.[12] As a result, we found that USCIS is at increased risk of not making informed investment decisions, understanding system affordability, and developing justifiable budget requests for future E-Verify use and potential mandatory implementation if it.

F. The Court's Readiness to Overrule Congress

It seems clear that if the Court accepts a case challenging numerical limitations, and if it rules

consistently with its own case law and dicta, it will overturn Numerical Limitations. But would the Court ever accept such a case, or rule on such an issue? Court dicta often expresses greater reluctance to review Congress' work in the area of immigration than in any other area. But the very cases that express such reluctance are cases where the Court was actually ready and willing to constitutionally test Congress' work, and to overturn it if there was an adequate case.

The strongest support for the theory that Congress has dictatorial power to do anything it pleases to immigrants without fussing over the Constitution comes from a concurrence in a ruling almost as nationally embarrassing as Mezei.

Justice Frankfurter lists policies which he believes Congress can enact which Courts lack jurisdiction to review. But no cites are given, and this is the only justice whose signature is on this list.

The majority had concluded there was no 1st Amendment problem, even had the deported communist been a citizen; but Justice Frankfurter, concurring with the majority, seems to be implying that even if the legitimate free speech rights of the communists had been violated, the Court should have deferred to Congress and deported them anyway. If this is his meaning, he stands against all other court decisions, which show willingness to intervene (on behalf of aliens, whether legal or illegal, who are living here) if there are constitutional violations.

But see how much contempt even this extreme Congress-tolerant justice shows for Congress' quota system! Even he would joyfully overturn it, should he see his way to jurisdiction over it. He says "what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine".

This is generally but not absolutely true. It is probably no more true of immigration law than it is of civil rights, 1st Amendment, abortion, or any other area of law where the Court has impacted Congress' decisions: the Court doesn't start out writing laws, but when it decides a law violates the Constitution, the law is defacto rewritten.

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) MR. JUSTICE FRANKFURTER, concurring.

It is not for this Court to reshape a world order based on politically sovereign States. In such an international ordering of the world a national State implies a special relationship of one body of people, i. e., citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State. (I put to one side the oddities of dual citizenship.)

Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary.

Accordingly, when this policy changed and the political and law-making branch of this Government, the Congress, decided to restrict the right of immigration about seventy years ago, this Court thereupon and ever since has recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the Judiciary.

The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

The Court's acknowledgment of the sole responsibility of Congress for these matters has been made possible by Justices whose cultural outlook, whose breadth of view and robust tolerance were not exceeded by those of Jefferson. In their personal views, libertarians like Mr. Justice Holmes and Mr. Justice Brandeis doubtless disapproved of some of these policies, departures as they were from the best traditions of this country and based as they have been in part on discredited racial theories or manipulation of figures in formulating what is known as the quota system.

But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, e. g., Kwock Jan Fat v. White, 253 U.S. 454, and the requirement of Due Process may entail certain procedural observances. E. g., Ng Fung Ho v. White, 259 U.S. 276. But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace. In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.

The following selection articulates fairly clear criteria for what Congress can and cannot do in immigration policy if it wants to avoid being overturned. It takes a more restrictive view of what

Congress can get away with than Frankfurter's List. Actually the case directly reviews a decision by the Attorney General, from the Executive Branch. But it was resolved when the INS hurriedly rewrote regulations previously approved by Congress. Marshall writes that immigration officials become targets of the Court when their decisions seem more attributable to racial or nationality prejudice than to legitimate immigration goals. Otherwise, nationalities cannot be treated differently. Not addressed is how it is possible to treat immigrants of all nationalities to 1% of the liberty of citizens, while saying they are entitled to 100% of the liberty of citizens.

> *Jean v. Nelson,* 472 U.S. 846 (1985)
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> This dissent is not the place to determine the precise contours of petitioners' equal protection rights, but a brief discussion might clarify what is at stake. It is clear that, consistent with our constitutional scheme, the Executive enjoys wide discretion over immigration decisions. Here, the Government would have a strong case if it showed that (1) refusing to parole Haitians would slow down the flow onto United States shores of undocumented Haitians, and that (2) refusing to parole other groups would not have a similar deterrent effect. Then, its policy of detaining Haitians but paroling other groups might be sufficiently related to the valid immigration goal of reducing the number of undocumented aliens arriving at our borders to withstand constitutional scrutiny. Another legitimate governmental goal in this area might be to reduce the time it takes to process applications for asylum. If the challenged policy serves that goal, then arguably it should be upheld, provided of course that it is not too underinclusive. It is also true that national origin can sometimes be a permissible consideration in immigration policy. But even if entry quotas may be set by reference to nationality, national origin (let alone race) cannot control every decision in any way related to immigration. For example, that the Executive might properly admit into this country many Cubans but relatively few Haitians does not imply that, when dealing with aliens in detention, it can feed Cubans but not feed Haitians. In general, national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) ("[D]ue process requires that [an agency's] decision to impose [a] deprivation of an important liberty . . . be justified by reasons which are properly the concern of that agency").
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> When central immigration concerns are not at stake, however, the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders. If in this case the Government acted out of a belief that Haitians (or Negroes for that matter) are more likely than others to commit crimes or be disruptive of the community into which they are paroled, its detention policy certainly would not pass constitutional muster.

In the following case, the majority says "It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." And "the constitutional requirement of 'fair warning' has no

applicability [to immigration law].” This sounds stern, but these statements came only after showing that “fair warning” didn’t apply to the situation anyway, since the behavior targeted by immigration law couldn’t have been helped by the hapless immigrant even if God had given him “fair warning” by writing it in the sky with red-outlined clouds. The “fair warning” requirement doesn’t apply to a regulation about health characteristics which the immigrant is powerless to change regardless of how much warning he has.

In other words, the “Congress has plenary power” argument was kind of a redundant clincher like adding an extra layer of frosting. Or perhaps it was that after making its strong argument, the Court didn’t want to seem homophobic for making it, so the Court added, “besides, don’t blame us. It’s Congress’ fault.”

But the fact that the Court went to the trouble of showing that “fair warning” didn’t even apply to the situation suggests that had that constitutional requirement applied, the Court would have stepped in to stop Congress.

The humorous background issue is that the sodomite immigrant says he didn’t receive “fair warning” that if the INS found out he was a sodomite they wouldn’t admit him. Why did he want “fair warning”, if he “couldn’t help” what he was anyway? Obviously, because he could help it, and could control it long enough to lie to the INS about it. The Court surely figured that out, but threw it back in the immigrant’s face, agreeing it was an “affliction” which he “couldn’t help”, in which case what good would “fair warning” have done you?

> *Boutilier v. Immigration Service,* 387 U.S. 118, 123 (1967) Petitioner says, even so, the [law barring immigrants with a “psychopathic personality”] is constitutionally defective because it did not adequately warn him that his sexual affliction at the time of entry could lead to his deportation. It is true that this Court has held the “void for vagueness” doctrine applicable to civil as well as criminal actions. See Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925). However, this is where “the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all. . . .” In short, the exaction must strip a participant of his rights to come within the principle of the cases. But the “exaction” of 212 (a) (4) never applied to petitioner’s conduct after entry. The section imposes neither regulation of nor sanction for conduct. In this situation, therefore, no

> necessity exists for guidance so that one may avoid the applicability of the law. The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry. Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible. The constitutional requirement of fair warning has no applicability to standards such as are laid down in 212 (a) (4) for admission of aliens to the United States. It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. See The Chinese Exclusion Case, [Page 387 U.S. 118, 124] (1889)."

Notice that the Court remains willing to safeguard the Constitutional rights, even of an alien. Notice also that the Court says "Congress [can] make rules ...to exclude those" [it doesn't want] but that doesn't mean that after Congress makes its rules the Court can't review their constitutionality! Because that is exactly what the Court did in this case! Although the Court found no Constitutional violation, it was willing to look for one.

In the following selection, Congress' authority is affirmed, but no power to trample on rights for no good reason and expect to be immune from judicial scrutiny is conceded. The reason the Court leaves Congress alone here in its limitation on rights is because of the practical near impossibility in a foreign country of the fact finding necessary to enable those rights.

This is not precedent for any congressional power to restrict rights without practical necessity.

> 1977, FIALLO v. BELL, 430 U.S. 787, 796 "...This is not to say, as we make clear in n. 5, supra, that the the Government's power in this area is never subject to judicial review. But our cases....are subject only to limited judicial review. [Footnote 8] The inherent difficulty of determining the paternity of an illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier. Congress may well have given substantial weight, in adopting the classification here challenged, to these problems of proof and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line. Moreover, our cases clearly indicate that legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations,' Trimble v. Gordon, ante, at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)), as those in the domestic area.
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> FROM THE DISSENT: (P. 805) I also have no quarrel with the principle that the essentially political judgments by Congress as to which foreigners may enter and which may not deserve deference from the judiciary. ....The simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens' fundamental interests.