

## The Message of Proposition 187\*

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The latest earthquake out of California is political, not seismic. The reverberations of Proposition 187,<sup>1</sup> the anti-illegal immigrant initiative on the state's November 1994 ballot, have already registered high on the Richter scales in state capitals and Washington, where politicians see that Pete Wilson's firm identification with Proposition 187 was largely responsible for his sweeping re-election victory. The law's aftershocks are even unsettling Europe, where leaders in almost every country face their own immigration crises, desperately seek solutions, and often look to U.S. experience for guidance.

Is Proposition 187 a fire bell in the night (as was said of the *Dred Scott*<sup>2</sup> decision) warning of imminent civil conflict? Or is it instead just a flash in the pan, one more California exotic that flourishes in this state's unique climate but fails to take firm root elsewhere? Proposition 187, I believe, lies somewhere in between. It is less a spasm of nativist hatred than an expression of public frustration with a government and civil society that seem out of touch and out of control, and with external convulsions that our borders can no longer contain. Although the alarms that motivated Proposition 187 are exaggerated and widely misunderstood, the law is nevertheless a warning—"a primal scream," as one political commentator called it—to all of us who are friends of immigration and have slumbered in the wistful hope that illegal residents and the political problems that they create would, quite literally, go away.

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1. Proposition 187 was approved by California voters at the November 8, 1994 general election, and became effective November 9, 1994. See The Initiative Statute—Illegal Aliens—Public Services, Verification, and Reporting, Prop. 187, § 1 [hereinafter Proposition 187] (defining the purposes of the initiative). See generally Proposition 187, *supra*, §§ 2-9 (enacting CAL. EDUC. CODE §§ 48215 and 66010.8, CAL. GOV'T CODE § 53069.65, CAL. HEALTH & SAFETY CODE § 130, CAL. PENAL CODE §§ 113, 114, and 834b, and CAL. WELF. & INST. CODE § 10001.5).

2. *Dred Scott v. Sandford*, 19 How. 393 (1857).

## I. BRENNAN'S LEGACY

Proposition 187 is a melange of different policies that seeks to stem the flow of illegal aliens into California, encourage the state's roughly 1.4 million illegal residents to go home, and expel the rest. The most controversial provisions would bar anyone who is not a citizen, a legal permanent resident, or a legal temporary visitor from receiving public social services, health care, and education. The provisions differ slightly for each service, but they generally impose three duties on all service providers: to verify the immigration status of all who seek services; to promptly notify state officials and the INS about whoever is "determined or reasonably suspected to be" violating the immigration laws; and to notify the alien (or in the case of children, their parent or guardian) of their apparently illegal status.<sup>3</sup> Proposition 187 is no ordinary law; it provides that the legislature cannot amend it "except to further its purposes" and then only by a recorded supermajority vote in each house of the legislature or by another voter initiative.<sup>4</sup>

As a practical matter, the parts of Proposition 187 that would deny public services may never be implemented. Immediately after voters approved it, immigrant advocate groups and some local officials filed a blizzard of legal challenges to the constitutionality of the heart of the measure's service denial and reporting provisions.<sup>5</sup> A federal judge immediately enjoined it pending trial, and most commentators believe that the courts will ultimately strike down some if not most of the measure.<sup>6</sup>

But the legal challenge to Proposition 187 is not nearly as solid as many say. Indeed, a closer look at the relevant constitutional precedents suggests that the courts could uphold the law if they have a mind to do so.

The courts have long prohibited the states from discriminating against legal immigrants, largely on the grounds that the state's authority in this area is subordinate to the federal government's. But until recently, the courts had never addressed *illegal* immigration. It simply had not been a major issue.

That started changing about thirty years ago. INS arrests—a very crude, unsatisfactory indicator of illegal entries—swelled from 1.6 million during the 1960s to 8.3 million in the 1970s, and then continued to rise in the early 1980s. When states and localities sought to protect their education and health care budgets by imposing restrictions on the newcomers' access to benefits, the courts

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3. CAL. WELF. & INST. CODE § 10001.5(a)-(c) (West Supp. 1995) (social services); CAL. HEALTH & SAFETY CODE § 130(a)-(c) (West Supp. 1995) (health care); CAL. EDUC. CODE §§ 48215(a)-(f), 66010.8(a)-(c) (West Supp. 1995) (secondary education and post-secondary education respectively).

4. Proposition 187, *supra* note 1, at § 10 (limiting the amendment and severability of the initiative).

5. Since Proposition 187 provides that its sections are severable, some might survive even if others are struck down. See Proposition 187, *supra* note 1, at § 10 (discussing the limits of the initiative's amendment and severability).

6. The federal judge's injunction order was appealed to the Ninth Circuit Court of Appeals, which in affirming held that the district court's application of the abstention law was not an abuse of discretion. *Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995).

could no longer duck the issue. In 1982, the Supreme Court decided *Plyler v. Doe*,<sup>7</sup> a class-action suit brought on behalf of undocumented Mexican children living in Texas. Upholding the ruling of a lower court, a five-to-four majority struck down a statute that withheld from local school districts any state funds for the education of any child who was not legally admitted into the United States.<sup>8</sup>

The constitutional challenge to Proposition 187 rests mainly on this precedent. Writing for the *Plyler* majority, Justice William Brennan had argued that the Texas law would inevitably harm children. These children would eventually obtain legal status in this country, yet would be “permanently locked into the lowest socioeconomic class.”<sup>9</sup> Brennan acknowledged that the state had some leeway in such matters: Under equal-protection principles, illegal alien status is not a “suspect class” like race or religion, and education is not a “fundamental right.”<sup>10</sup> Hence, it did not require heightened judicial scrutiny. Nevertheless, Brennan said, a law that denied children “the ability to live within the structure of our civic institutions . . . can hardly be considered rational unless it furthers some substantial goal of the State.”<sup>11</sup>

Brennan conceded that keeping illegal aliens out of the state might be a legitimate state goal.<sup>12</sup> But the trial court had found that the Texas law had neither the purpose nor the effect of doing that, and Brennan agreed. The Texas law might save some money, according to Brennan, but Texas failed to establish that illegal aliens imposed a significant fiscal burden on state coffers or that their exclusion would improve the quality of education.<sup>13</sup> Besides, Brennan said, federal immigration policy was not concerned with conserving state educational resources, much less with denying an education “to a child enjoying an inchoate federal permission to remain.”<sup>14</sup> All the Texas law would serve to do, Brennan said, was promote “the creation and perpetuation of a subclass of illiterates,” who would be socially dysfunctional and a burden to society.<sup>15</sup> That, he said, clearly was not something the states were allowed to do.

The parallels to Proposition 187 are obvious. Both would, in effect, bar undocumented children from the public schools; if anything, California’s new ban on enrolling such children is even more categorical and rigid than the Texas statute invalidated in *Plyler*, which simply denied state funding for those who were enrolled. Any court that accepted Brennan’s premises in *Plyler* would have a hard time sustaining Proposition 187.

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7. 457 U.S. 202 (1982).

8. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

9. *Id.* at 208.

10. *Id.* at 223.

11. *Id.* at 223-24.

12. *Id.* at 225.

13. *Id.* at 229.

14. *Id.* at 226; *see id.* (referring to the possibility that an illegal alien might obtain discretionary relief from deportation). *See, e.g.*, 8 U.S.C.A. §§ 1252, 1253(h), 1254 (West Supp. 1995).

15. *Plyler*, 457 U.S. at 230.

## II. WHY THE COURT MAY TURN

Brennan's opinion, with its plea for "innocent children" and its recognition that many of them will grow up in the U.S. anyway, has an undeniably powerful resonance. Yet Brennan's argument had its softspots, including an unwarranted emphasis on the uniqueness of education benefits in justifying special constitutional protection for children. It is one thing to say that children should not be penalized for parents' illegal immigrant status, but Brennan never explained how the denial of schooling to a child differs from the denial of other governmental benefits to an undocumented parent, upon whose income and well-being the child's welfare ultimately depends. The Court has always permitted the government to deny illegal immigrant parents access to the private employment and public benefits that provide the children's essential economic support, arguably harming the children, who may actually be U.S. citizens, even more grievously.

If a state may do that, why can't it deny those same children access to the schools? Does *Plyler* mean that a state may not exclude from public housing a family in which an adult has committed a serious crime? Is the Court's rationale consistent with the INS's clear power to deport the undocumented parents of children—children who not only had no role in their parents' wrongdoing but may be U.S. citizens themselves? In each of these cases, the child suffers because of the parent's illegal status, at least as much as under the Texas law.

A second weakness in Brennan's reasoning—his denial that the Texas law corresponded to any identifiable congressional policy or operated harmoniously within the federal program—has grown even more vulnerable in the post-*Plyler* years. Even in 1982, the federal policy against illegal aliens was clear enough: Illegal entry was a federal crime. Congress had spent more and more money to prevent it and had expressly barred illegal aliens from numerous federal benefit programs, and the Court had upheld California's own employer sanctions law on the ground that it was consistent with federal policy.<sup>16</sup> Since then, Congress has implemented a much more comprehensive strategy of immigration enforcement. Post-*Plyler* measures include employer sanctions, severe penalties against smuggling and immigration marriage fraud, expedited deportation procedures for criminal aliens, streamlined asylum procedures, assistance to states in detecting welfare claims by illegal aliens, tighter visa screening, new enforcement technologies, and a huge funding increase for border control at a time when other agency budgets were frozen.

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16. *De Canas v. Bica*, 424 U.S. 351 (1976).

These changes have not been terribly effective. Eight years after Congress imposed employer sanctions, for example, illegal entries are back to the pre-reform level.<sup>17</sup> Other reforms have also yielded disappointing results.

Yet substantial effectiveness cannot be the touchstone of constitutionality; if it were, many public policies would probably be doomed. And what would be the benchmark of effectiveness to which the Court would compare the law being challenged? In effect, Brennan used the inherent difficulty of immigration control as a justification for making it even more intractable. He assumed that exclusion from the schools was a wholly ineffective way to influence migrants' behavior, yet it is surely true that at least some parents are less likely to immigrate if they know their children will be denied schooling. Illegal aliens always have alternatives: They can return home or refrain from coming in the first place. These options may seem harsh but they follow directly from the premise of national territorial sovereignty—a premise that the Court has always affirmed.

Subsequent developments may also invalidate the other cornerstone of Brennan's decision—the fact that Texas was unable to prove financial harm from illegal immigration. In California, 1.4 million illegal residents compose forty-three percent of the national total and account for nearly five percent of the state's own population. An Urban Institute study has provided the first objective assessment of how this concentration affects communities—an assessment that was not available when *Plyler* was decided.<sup>18</sup> The study covered only three cost categories: education, emergency medical services to which illegal aliens are *legally entitled*, and the costs of incarcerating those convicted of crimes.<sup>19</sup> Those costs are substantial—about \$1.75 billion a year in California alone. The study, moreover, did not include either the benefits that illegals fraudulently obtain or the other costs that they impose. Partly offsetting this \$1.75 billion, the study estimated, is \$732 million in revenues generated from sales, property, and income taxes on illegal aliens in California. The fact that many illegal alien workers pay federal payroll taxes but do not claim Social Security benefits does little for California, although it certainly affects the overall calculus of the benefits and costs that they produce for the nation as a whole. These arguments will become even stronger if the devaluation of the peso sends a new stream of Mexicans north.

Of course, the legal challenge to Proposition 187 does not rest entirely on the strength of Brennan's opinion; indeed, a decision to strike down the law could well rely on two other arguments.

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17. Illegal entries would almost certainly have been even higher had employer sanctions not been instituted.

18. CLARK, ET. AL., URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTIVE ESTIMATES FOR SEVEN STATES (Sept. 1994).

19. *Id.*; *see id.* (noting that one in five inmates in California state prisons is a deportable alien).

First, while the federal government has moved to curb illegal migrants, it has never cut off many of their benefits, notably including public education in federally assisted schools and emergency Medicaid services. The courts could take this inaction to mean that Congress remains satisfied with *Plyler* and does not wish to undermine the decision's rationale.

Second, a court wishing to invalidate Proposition 187 could cite the many practical problems that implementation would present, in order to show that the law is so irrational as to be unconstitutional. How, for example, will California school officials know whom to exclude? Federal law protects the privacy of any "personally identifiable information" in students' educational records and severely sanctions violations.<sup>20</sup> The Fourth Amendment bars officials from stopping and questioning people without having "a particularized, reasonable suspicion based on specific articulable facts."<sup>21</sup> Neither skin color nor surname alone satisfies that test. So unless an alien volunteers her illegal status, due process principles almost surely require a hearing before the state may withdraw benefits previously granted. Much litigation would ensue.

Meanwhile, many U.S. citizens and legal aliens would get caught up in the dragnet, provoking an even worse political backlash than the kind now produced by clumsy INS enforcement sweeps of shops and factories where many legal employees also work. The dragnet problem would also plague the many families in which some members have legal status and thus qualify for benefits while others are illegal and do not. INS efforts to deport the illegal members would trigger even more legal wrangling because existing immigration law provides several discretionary remedies that are designed to avoid precisely this kind of family-splitting and personal hardship. Many service providers have also said that they will ignore the new law even if the Court upholds it. Hence, it is unlikely to be vigorously implemented.

The challenge to Proposition 187, then, could go either way. A court eager to strike it down could emphasize its resemblance to the law Brennan struck down in *Plyler*. Even a court uneasy with *Plyler*'s rationale could stress Proposition 187's bluntness as a policy instrument for a problem largely outside California's constitutional authority. Only two of the *Plyler* dissenters, Rehnquist and O'Connor, remain on the court; even if Scalia and Thomas joined them they might be unable to pick up a fifth vote.

But a court determined to uphold Proposition 187 by overruling *Plyler* or by distinguishing it away would at least have plausible grounds for doing so. Although justices are usually reluctant to overturn precedents, a standard argu-

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20. Immigration expert Wayne Cornelius predicts that if Proposition 187 is found to violate the privacy law, California could lose up to \$15 billion in federal funds. For examples of federal law protecting the privacy of student records, see 20 U.S.C.A. § 1232g (West 1990 & Supp. 1995), and § 9010(c)(2)(A) (West Special Pamphlet 1995).

21. *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).

ment against doing so—that the precedent has engendered legitimate expectations and stakes in the status quo—seems particularly weak because illegal aliens can have no legitimate expectations of remaining here, much less of receiving public benefits. The court could focus on the analytical soft spots in Brennan’s “innocent children” logic, on the fact that today’s federal policies against illegal aliens are far more comprehensive than they were when *Plyler* was decided, and on California’s high costs of educating illegal alien children—costs that the federal government does little to help defray.

Moreover, this court could simply limit the new decision to its facts, invalidating Proposition 187’s ban on basic schooling—thus preserving *Plyler*—while upholding its ban on social services, non-emergency health care, and higher education, as well as the reporting provisions. A court sympathetic to California’s policy might also allow the state to repair some of the law’s defects through narrowing regulations.

### III. WHAT VOTERS WERE SAYING

If Proposition 187 does survive the legal challenge, many other states—and perhaps the federal government—are likely to consider similarly restrictive measures. Virginia, for instance, recently required its schools to verify the legal status of all students over eighteen years of age enrolled in English as a Second Language programs, and of all students over twenty who entered the U.S. after the age of twelve, or risk losing some state funding.<sup>22</sup>

It is tempting to dismiss this legislative impulse as mere nativism or racism, as so many on the left have done. But the anger behind Proposition 187 focused on illegals, not legal immigrants. Governor Pete Wilson took great pains to underscore that distinction on the campaign trail. In his advertisements and public statements, he praised legal immigrants’ contributions to society while accusing illegals of taking jobs away from Californians and consuming scarce public services.<sup>23</sup> A survey conducted by Ron Unz, Wilson’s opponent in the primaries, found that most supporters of Proposition 187 were primarily motivated by perceived welfare dependency by illegal residents—not by aliens per se. A majority of Asian-Americans and African-Americans, plus nearly a third of Latinos—hardly a nativist coalition—voted for the measure.<sup>24</sup>

Proposition 187, like the “official English” laws approved in California<sup>25</sup> and elsewhere since the mid-1980s, was a symbolic message to policy elites. Both

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22. VA. CODE ANN. § 22.1-5(D) (Michie 1995).

23. The precise size of the adverse effects and the offsetting benefits generated by illegals remain hotly contested issues that he failed to discuss.

24. In Texas, an even larger fraction of Latino voters indicated that they would have supported such a measure had it been on the ballot there.

25. See CAL. CONST. art. III, § 6 (West Supp. 1995).

measures are grand gestures with few practical consequences other than to convince politicians that many voters now view American society as increasingly alien (literally) and uncontrollable. These voters responded angrily to the vivid television images of Mexican officials denouncing the measure and to the marchers in Los Angeles waving Mexican flags and protesting its limits on welfare benefits. On election day, the voters said that illegal immigrants, industrious as they may be, are part of the problem and that Proposition 187, crude as it is, is part of the solution. It is no solution, of course, but that only underscores the need for a sounder political response in order to forestall future initiatives of this kind.

That response should begin with the candid recognition by leaders that illegal immigration, even at current levels, is not an unmitigated evil and that immigration enforcement competes for resources with other social goals. Although it is hard to admit that we tolerate some lawbreakers as a matter of policy, the fact is that we do—and we always will. This is especially true when the illegal transactions are between consenting adults and arguably make everyone better off on balance. The U.S. is a large country with relatively low population densities even in the cities, and with a vast economy that needs more unskilled labor than domestic workers are willing to supply at current wage levels. It can continue to assimilate a significant number of illegal aliens so long as the costs are not too high or too localized.

Granted, illegal aliens do impose a cost on society. But the cost may be lower than many critics say. Restrictionists stress the recession in California, but then what about the booms in places like Texas or South Florida? Labor economists are divided on many fundamental methodological and empirical questions: Is the low-wage labor market in which most illegals work segmented or unitary? Are citizens and other legal workers displaced by illegal workers, or would they not accept the jobs and wages that illegals take? How many jobs do illegal aliens—who are producers and consumers—create? What are the long-term effects on the economy of retaining low-skill jobs rather than moving to more technologically advanced ones? Can labor market effects be assessed by examining a metropolitan area, or must we also examine illegal aliens' effects on legal workers who are discouraged from migrating to areas where illegal aliens are concentrated? Do illegal immigrants work at lower wages for the same work?<sup>26</sup> Their work and consumption enables all Americans to enjoy lower prices, better services, and a more efficient economy, at least in the short run.<sup>27</sup>

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26. According to labor economist Barry R. Chiswick of the College of Business Administration, University of Illinois at Chicago, evidence suggests otherwise. Personal conversation with the author (June 20, 1995).

27. Of course, the benefit-to-cost ratio favors those who live far from the illegal enclaves—those who need not compete with illegals for public services and entry-level jobs.



It is true that the absolute number of new immigrants, legal and illegal, has never been higher. But it is also true that the proportion of America's foreign-born population is lower than it was at the beginning of the century—8% versus 14%—and only half of what it is in Canada today (about 16%). New immigrants' share of the U.S. population is far below the share in the high-immigration years prior to World War I. The vast majority of aliens who enter illegally are more or less seasonal migrants; (only) 300,000 a year become long-term residents, a number only slightly higher than the 250,000 American citizens and legal resident aliens estimated to leave the U.S. each year to live elsewhere permanently. Many of the illegal aliens who remain will manage to obtain legal status by successfully obtaining asylum or persuading the INS to adjust their status.

Even if the government decided it wanted to eliminate illegal immigration completely, it could not do so. For almost a decade, the INS enforcement budget has grown at a more rapid rate than that of almost any agency in government. It grew by twenty-five percent last year, and will probably increase more this year. Yet illegal immigration has not fallen off, though it surely would have increased were it not for the increased INS funding. Americans could have an expanded border patrol line—the entire southern border shoulder to shoulder—but Congress has concluded, probably wisely, that these funds would be better spent on other things. Effective enforcement requires a secure national identity card, yet this would be costly, bitterly controversial, and perhaps technically unworkable.

To tighten the borders effectively, better consular and asylum screening would also be critical; half the illegal aliens enter on visas issued by our foreign service officers abroad and many others successfully exploit the procedurally complex asylum system. Low-level visa decisions, however, are notoriously difficult to make and hard to control, and the INS's brand-new asylum procedures remain untested, both in the field and in the courts. At Congress's insistence, deporting the 90,000 criminal aliens now in federal and state prisons has become a top INS priority, but this too will require increased resources and sustained management attention, from an agency historically renowned for its incompetence.

Proposition 187 will probably reduce some migration, especially by women and their small children, who constitute a growing fraction of the illegal flow. But the enormous legal and practical obstacles to implementing laws like Proposition 187 will always limit their effectiveness. A vast, prosperous nation with strong due process and equal protection values and a 2,000-mile border with the Third World cannot eliminate illegal migration; it can only hope to manage it. Our leaders must tread this thin line.

#### IV. DO OUTSIDERS HAVE CLAIMS ON US?

Even so, Proposition 187 insists that government need not provide public services for those illegal immigrants. While the Constitution protects illegals as

“persons,” Congress can exclude them from public education if it wishes, even though the states cannot unless Congress permits them to do so.

Such a move would be perverse. If our enforcement policy “allows” illegal aliens to enter and remain long-term (but illegal) residents, then Brennan was surely right: There is little point, and even less justice, in consigning them to lives of ignorance, dependency, and discrimination by denying them education, a denial that would injure not only them but the American communities in which they will live and work. For much the same reason, they should also receive emergency medical care.

Beyond that, however, there is room to dispute the moral claims of illegal aliens. Most of us doubt that illegal aliens have legitimate claims to public benefits such as AFDC, food stamps, housing subsidies, and higher education. We also should distribute more fairly whatever net financial burden illegal residents impose upon state and local governments. Although Washington has exclusive power to control the border and deport illegals, the costs of federal enforcement failures fall on the states. The federal Constitution now requires the states to provide illegal immigrants with public education, the most costly service, yet Congress pays only a tiny fraction of the bill. Federal law mandates that legal and in some cases illegal aliens receive a host of other public benefits and services. But while states bear about two-thirds of the costs for such services, two-thirds of taxes legal and illegal aliens pay go straight to Washington. This fiscal mismatch is even greater in the case of illegal aliens, who pay federal payroll taxes but claim relatively fewer benefits than legal aliens and citizens.

Calculating this imbalance will not be easy. Marginal benefits and costs are hard to measure and set off against one another. Remedying the imbalance may be even harder, given the experience with the old “impacted aid” program for communities with military installations and the more recent program to defray the state costs of the amnesty program for illegal aliens. Congress’s new interest in unfunded mandates reflects less a desire to rectify intergovernmental inequities than a desperate search for budget savings; if the savings do not materialize, congressional enthusiasm in this area will quickly evaporate, leaving the states no better off. Still, even crude justice is better than none.

Congress is now considering proposals to reduce benefits for legal immigrants as well. In 1993 Congress limited Supplemental Security Income (SSI) benefits for low-income elderly legal aliens in response to a dramatic increase in claims.<sup>28</sup> This affected almost 700,000 immigrants, ten percent of the SSI caseload. Now, with the victory of Proposition 187, members of both parties have proposed even broader restrictions on benefits for legal aliens. Speaker Newt Gingrich calls himself “very pro-legal immigration” and has criticized such proposals, as have GOP stalwarts Alan Simpson, Jack Kemp and Bill Bennett. Legal

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28. Unemployment Compensation Amendments of 1993, Pub. L. No. 103-152, 107 Stat. 1516, 1519 (codified as amended at 42 U.S.C.A. § 1382j (1995)).

aliens are, however, a weak political constituency. Their benefits will be especially vulnerable in the headlong rush to cut government spending.

Proposals to deny legal aliens federal benefits raise a fundamental issue that we have avoided since the McCarthy era—the nature of membership in a liberal polity. Are legal permanent residents like tax-paying citizens who lack only the franchise? Or are they on probation, obliged to demonstrate good behavior and financial independence unless and until they naturalize? In its 1976 *Diaz* decision, the Supreme Court seemed to endorse the “probation” model, broadly upholding Congress’s power to discriminate between citizens and all (or only some) aliens in distributing public benefits.<sup>29</sup> In general, however, Congress has tended to treat all legal resident aliens like full members in most important respects, including benefits.

To be sure, circumstances have changed since *Diaz*; immigration (legal and illegal) and public benefits (especially education, health care, and SSI) have grown enormously. Welfare receipt by some legal immigrant groups, including refugees from Indochina and immigrants from the Dominican Republic, is very high and often long term. To produce a hoped-for \$22 billion in savings over five years, Congress would not even have to pass a new law; the federal government could enforce an existing but rarely used law that requires the U.S. relatives of family-based immigrants to make good on pledges of financial support for the immigrants.<sup>30</sup>

But as with Proposition 187, the savings from excluding legal aliens may prove illusory. Many Indochinese refugees, for example, combine low education and few skills with strong political claims to at least temporary assistance. Even if cutting off federal benefits would save Washington some money, the states will have to fill much of the gap; the Supreme Court has ruled that they cannot discriminate against legal residents without congressional approval. State general assistance programs constitute the final safety nets for indigents who are ineligible for federal benefits, and cuts in federal benefits will drop some legal permanent immigrants into those nets. These federal cuts could also have the unintended effect of encouraging legal permanent residents to naturalize quickly to protect their access to benefits. Although increased naturalization is highly desirable, it will dissipate the savings that Congress seeks.

## V. ELUSIVE CANDOR

Proposition 187, in its most important provisions, constitutes perverse public policy that has come at a politically propitious moment. Responsible leadership

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29. *Mathews v. Diaz*, 426 U.S. 67, 77-82 (1976).

30. 42 U.S.C.A. 1382j(a) (1993); *see id.* (requiring a lawfully admitted alien’s sponsor’s income to be considered in determining eligibility and payment amount for Supplemental Social Security Income Programs).

should recognize the practical and moral arguments against these provisions and should concentrate on setting immigration limits that we are prepared to enforce.

But from where will such candor come? Certainly not from the likes of California Governor Wilson. During the debate over the Immigration Reform and Control Act of 1986 (IRCA),<sup>31</sup> which enacted employer sanctions and legalized over 2 million undocumented workers, then-Senator Wilson held the fragile legislative compromise hostage until he won approval of programs increasing the number of “temporary” farmworkers available to California’s growers. By ensuring that the agricultural amnesty and guest worker programs were so open ended that the INS could not prevent widespread fraud, Wilson enabled hundreds of thousands of undocumented workers to enter and work in the state. Although most of them are now legalized, they were subsequently joined by their spouses and children who are and will presumably remain illegal for some time and who are major consumers of the public services that Wilson sought to limit under Proposition 187.

Only ten days after Proposition 187 was approved, Wilson reverted to his 1986 ways by proposing to the Heritage Foundation that still more “temporary” workers be imported to harvest California’s crops. Wilson surely knows that Proposition 187 could have dire practical consequences for his state, and he may secretly hope that an activist court will rescue him by striking it down. Reliance on such a judicial *deus ex machina* exposes the ideological expectancy of many court-bashing conservatives of Wilson’s stripe.

In truth, some immigration advocates have not been much more forthright. After working tirelessly and effectively to stymie INS enforcement, they now express wonder and dismay when the public demands swift, heavy-handed responses to this complex problem. They insist that aliens who enter surreptitiously should be called “undocumented” rather than “illegal” because their legal status remains uncertain for months or years during which the aliens can usually obtain work permits—an uncertainty that is largely the product of the advocates’ own skillful manipulations of an increasingly vulnerable administrative system.

As long as policy elites continue to evade realities and responsibilities, restrictive measures such as Proposition 187 will flourish. But misguided though such measures are, they do have at least one salutary effect: forcing us to consider anew what it means for the U.S. to be a nation of immigrants at a time when the core values of legality, national sovereignty, and self-reliance are under extraordinary pressures from within and without.

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31. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of Titles 7, 8, 12, 18, 20, 29, and 42 of the United States Code).