Mobilizing Immigrants

Jayanth K. Krishnan

Indiana University Maurer School of Law, jkrishna@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Civil Rights and Discrimination Commons, and the Immigration Law Commons

Recommended Citation

Krishnan, Jayanth K., "Mobilizing Immigrants" (2003). Articles by Maurer Faculty. 412.
https://www.repository.law.indiana.edu/facpub/412
MOBILIZING IMMIGRANTS

Jayanth K. Krishnan*

INTRODUCTION

Still gripped by emotions of despair, frustration, and loss, many Americans continue to struggle with how best to move on with their lives following the terrorist attacks that left over three thousand people dead on September 11, 2001. The anthrax outburst that ensued after the 9-11 attacks and the 2002 sniper murders in the Washington D.C. area further put on edge a nation racked with fear and angst. Understandably, feelings of anger and pain remain present among those most affected by these tragedies. But sadly some individuals have exploited these events to express their long-held prejudices. Immigrant communities have been primary targets of such hostilities. Overt retributive acts have been committed, most notably in the form of violence against Arabs, Indians, Pakistanis, and other ethnic and religious minorities. The lives of immigrants, however, have changed in the post 9-11 era not just because of violent acts by criminals. In the face of public pressure to resolve the perceived problems of immigration, politicians and members of law enforcement have initiated a wave of “reforms,” resulting in the curtailment of both illegal and legal immigrants’ rights.

Courageously, social activists, scholars, students, and others have protested such mistreatment of immigrants. Given the political climate, this coalition has encountered incredible challenges in the pursuit of their cause, especially when defending illegal immigrants. Partly for this reason perhaps, these advocates mainly have sought to ensure that illegal immigrants

* Assistant Professor of Law, William Mitchell College of Law, St. Paul, MN. J.D. Ohio State University; Ph.D. University of Wisconsin-Madison. For their much needed and much appreciated feedback on earlier versions of this article, the author expresses gratitude to Hiroshi Motomura, Kevin Johnson, and Eric Janus. The author also thanks Austin Sarat, Stuart Scheingold, Raleigh Levine, and Russ Pannier for their insights.

1 Several organizations have set up websites detailing the violence ethnic and religious communities in the U.S. have faced since the 9-11 attacks. For a sample of sites, see the Anti-Defamation League, at http://www.adl.org/terrorism_america/adl_responds.asp (last visited Apr. 18, 2004); Human Rights Watch, at http://www.hrw.org (last visited Apr. 18, 2004); Amnesty International, at http://www.amnestyusa.org (last visited Apr. 18, 2004); Arab-American Institute, at http://www.aaiusa.org (last visited Apr. 18, 2004); and National Network for Immigrant and Refugee Rights, at http://www.nnirr.org (last visited Apr. 18, 2004). This point was also made recently by Thomas Joo, Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002).
are treated humanely and with due process. But the defense of legal immigrants, particularly lawful permanent residents, has been much more vigorous. Social justice advocates express outrage that immigrants who have lawfully entered the United States, paid their taxes, contributed to the economy, and lived in a law-abiding manner, are now being discriminated against just because they are non-citizens. In his 2002 *Stanford Law Review* article, Professor David Cole describes what he calls the "double standard" of treatment between citizens and lawful permanent residents. Cole critiques the various methods that the Bush administration has employed to accentuate this distinction, such as subjecting certain permanent residents to secretive preventive detentions and military tribunals. For Cole, one main reason that legal immigrants have so suffered in the post 9-11 period is because they "have no vote, and thus no direct voice in the democratic process. As such, they are a particularly vulnerable minority."

This argument that lawful permanent residents are politically disadvantaged because they lack the right to vote has a history of support. As I detail in Section II, for years Professors Jamin Raskin, Gerald Neuman, and Gerald Rosberg have each contended that lawful permanent residents should be granted the right to vote. They argue democratic theory mandates that people who live like citizens be granted the same rights as citizens—including the right to vote. For these scholars, the right to vote is an important way to extract accountability from politicians who otherwise have been able to implement detrimental policies affecting immigrant interests.

At the end of Section II I make it clear that I also support extending voting rights to lawful permanent residents. But assuming for a moment that suffrage is granted to this community—which given the current political climate seems rather unlikely—then what? It would be disingenuous to suggest that Professors Cole, Raskin, Neuman, and Rosberg believe that providing voting rights to permanent residents will necessarily lead to these immigrants heading to the ballot box. These scholars, moreover, well know that even if voting rights were to be granted to permanent residents, there are no guarantees that this group's current predicament would change much. Presumably permanent residents, even with the right to vote, would run up against challenges presented by interests that outnumber them;

---

3 Id.
thereby facing the same types of political disadvantages encountered by other minority blocs.

For this reason, Section III builds upon the important contributions made by the immigrant suffrage advocates by asserting that although granting voting rights may be a good starting point, permanent residents would also be greatly benefited by having legally entrepreneurial lawyers involved in their movement. These lawyers, as I shall explain, can be both instrumentally and normatively valuable for permanent resident communities.

No doubt, many who hear this claim will bristle at this suggestion. The criticism from skeptical lawyers has a long history. The common refrain is that when lawyers serve as leaders of emerging movements they too frequently obstruct the issues they set out to champion. These types of social movement lawyers tend to focus their energies on improving the movement's position in society primarily through litigation. Because these lawyers are preoccupied with self-aggrandizement, they construct their strategies to fit with their own expertise. Such elites inevitably take the movement hostage. They frame issues, structure the discourse, and organize campaigns mainly through legal means, and consequently they divert im-

---


portant resources away from tactics that have more significant long-term effects. And perhaps most egregiously, lawyers have the hubris to believe they are critical to a movement's success, as they routinely ignore the role that other political and policy experts can play.

As I will explain, I recognize that lawyers are not the only leaders who can be effective in directing a social movement. A great deal of literature shows this to be the case. But in order to challenge these skeptics' claims, I specifically focus on the important role lawyers can play in immigrant communities. The argument I make seeks to add another layer of evidence to the ever-growing body of scholarship detailing the multi-dimensionality of lawyers. For example, assuming permanent residents became enfranchised, lawyers could make their clients and constituents aware of these new rights as well as use the power of rhetoric and persuasion to demonstrate how and why the right to vote is so important. But even without the right to vote, lawyers can (and do) still empower immigrants by combining legal strategies with mass-based tactics and by developing important coalition partners in order to improve the present political status of immigrants. As I will discuss, lawyers often have been able to create a legal and political consciousness that has lead to immigrants participating in the political process. Lawyers within immigrant communities thus do not have to operate just off of "personal . . . beliefs and abstract programmatic commitments." They can be versatile actors depending upon their professional and political background; their role within the immigrant community; the organizational structure of the immigrant movement; and the overarching political and societal attitudes towards immigrant rights.


10 See, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES AND CULTURAL FRAMINGS (Doug McAdam et al. eds., 1996); SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS (1994); SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY: COLLECTED ESSAYS (Mayer N. Zald & John D. McCarthy eds., 1987); THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY (David Meyer & Sydney Tarrow. eds., 1998).

11 For a general discussion of this idea of legal and political consciousness, see McCann & Silverstein, supra note 6. See also Robert Kidder & Setsuo Miyazawa, Long-Term Strategies in Japanese Environmental Litigation, 18 LAW & SOC. INQUIRY 4 (1993).

12 See McCann & Silverstein, supra note 6, at 262. For commentary on the behavioral nuances that movement leaders should, can, and do display, see Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42, 43-44 (1995) [hereinafter Johnson, Civil Rights].

13 These variables are drawn from McCann & Silverstein, supra note 6.
In other words, lawyers can perform an educative function; they can teach and motivate the rank and file about the importance of voting—something that the right itself of course cannot do. And in the absence of immigrant suffrage, lawyers still can politicize this disenfranchised group, making every effort to ensure that the rights immigrants do possess remain intact. One question that emerges from this discussion is under what conditions will lawyers seeking to assist immigrant communities be encouraged to engage in such activities. In the final section of this article, I offer a preliminary set of suggestions addressing this issue. For those of us interested in protecting the rights of immigrants at this crucial juncture in American history, the hope is that the lessons from this study can move us in this direction.\textsuperscript{14}

I. EMPOWERING PERMANENT RESIDENTS THROUGH SUFFRAGE: A SURVEY OF THE EXISTING LITERATURE

A. The Arguments Against Non-Citizen Suffrage

As stated above, the notion that permanent residents should have the right to vote has been on the agenda of scholars for some time. In a moment, I shall explain the arguments in favor of this position, and then build upon this valuable literature by discussing (a) how with the right to vote, immigrants seeking to mobilize can be greatly assisted by the efforts of lawyers; and (b) how even absent the right to vote, lawyers can remain critical in helping immigrants fight for their rights.

But before proceeding to this discussion, there is the question of whether non-citizens should even be able to vote in the first place. To many, the immediate answer to this question seems straightforward—no. After all, non-citizens are just that; they are not full members of the political community and thus should have no expectation or right to participate in the voting process.\textsuperscript{15} Proponents of this argument point to the Constitu-

\textsuperscript{14} Note, my focus on the ability of lawyers to help both enfranchised and disenfranchised immigrants may lead some to wonder how important suffrage is at all in my analysis. As I shall explain, if permanent residents were granted the right to vote, immigrant-rights lawyers would be armed with one more important option that they could draw on to mobilize their constituents as a means of influencing public policy. Without this right, the lawyer's influence on particularly elected policymakers diminishes some, although as we will see, not completely.

\textsuperscript{15} But there are those who contend that non-citizens should be able to participate in other ways. See Bruce D. Brown, Alien-Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System, 15 Yale L. & Pol'y Rev. 503 (1997) (arguing that aliens should remain disenfranchised,
tion as support for the position that only citizens may vote. One observer interprets the 26th Amendment as providing "that U.S. citizens' right to vote cannot be abridged under specified circumstances, implying that only citizens have the right to vote." Some years back the Supreme Court reiterated this same position. In upholding a New York statute excluding non-citizens from serving on the police force, the Court in Foley v. Connolie went on to say that non-citizens may also be denied suffrage. In Cabell v. Chavez-Salido, the Court noted that distinguishing between people who are non-citizens and who are citizens is vital to the integrity of the democratic process. And in the famous decision of Sugarman v. Dougall, the Court accepted as "clear evidence that [the Fortieth] Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the [Fourteenth] amendment they did not receive a constitutional right of suffrage or a constitutional right to participate in the political process of state government."

There are other reasons why many people oppose non-citizen suffrage. There is the issue of loyalty. How can we permit individuals with presumed allegiances to other countries to participate in our political process—especially if the country from which the individual immigrates is hostile to the United States? Imagine today allowing lawful permanent residents from Afghanistan or Iraq, who may be sympathetic to the former Taliban regime or Saddam Hussein, to vote in American elections. The right to vote is one of the most precious and awesome responsibilities that members within a democratic community possess. Although voter turnout in the United States is criticized for being low, and in most cases an individual's lone vote makes little difference in the ultimate outcome, suffrage has enormous symbolic value and is recognized as the centerpiece for any de-

although they should be allowed to participate, financially, in the political process). See also Jessica S. Horrocks, Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections, 38 B.C. L. REV. 771 (1997).


20 This position has recently been summarized by Elise Brozovich, Prospects for Democratic Change: Non-Citizen Suffrage in America, 23 HAMLINE J. PUB. L & POL'Y 403 (2002). See also Brown, supra note 15.

The idea that this valuable right could be exercised by "outsiders" is beyond comprehension for those who oppose immigrant suffrage.

One famous observer who agrees that community-membership entitles individuals to certain privileges and rights over non-members is Michael Walzer. Because of the importance Walzer places on the right to self-determination, he believes that communities are justified to exclude outsiders from reaping the benefits enjoyed by members. Communities share a common culture, set of norms, and ideas about justice and legal rights; consequently they should be able to decide who can participate in the political process and who cannot. Citizenship—the one certain way to delineate members from non-members—gives a community its sense of identity as a nation. If non-citizens are permitted to engage in politics in the same way as citizens, then the sovereignty and distinctiveness of that nation are seriously undermined. Thus, the arguments against giving lawful permanent residents the right to vote resonate with many people. But as we shall next see, over the past three decades opponents have countered with their own set of serious rebuttals.

B. Why Immigrant Suffrage is Important—and Constitutional

While a number of observers oppose granting suffrage to immigrants, there are active supporters who favor extending this right. Pro-alien suffrage advocates contend that excluding permanent residents from voting hurts the democratic process and keeps out a significant community whose rights are otherwise ignored. In drawing on the work of Alex Aleinikoff, David Martin, and Hiroshi Motomura, Elise Brozovich contends that two

---


24 It is important to note that Walzer does believe that it is immoral to bring non-members into the community but not provide them with the same rights as those already living there. This point relates to his famous "guest workers" argument; in other words, for Walzer, the options are either to bring outsiders in and treat them equally or not to bring them in at all. See generally id. For one scholar who has evaluated this aspect of Walzer's work, see Jospeh Carens, Aliens and Citizens: The Case for Open Borders, 49 REV. POL. 251 (1987).

25 See, e.g., Brozovich, supra note 20, at 405-406.

alternative arguments have been set forth by scholars who support non-citizen suffrage.\textsuperscript{27} One view is that the Constitution passively permits legislatures to grant permanent residents the right to vote; the other claims that non-citizen voting can be justified under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{28} As support for this constructed dichotomy, Professor Jamin Raskin is viewed as the key representative for the former, while Professor Gerald Rosberg is seen as the proponent of the latter.

First, Raskin, in arguing that the Constitution allows states to extend suffrage to lawful permanent residents, uses a historically-oriented methodology as the basis for his position.\textsuperscript{29} Raskin rejects the notion that providing lawful permanent residents with the right to vote at the national and state levels would serve as a political aberration. He shows that at various periods in American history non-citizens had the right to vote. As he notes: "From the moment the Declaration of Independence was signed (including by several aliens), alien enfranchisement seemed to many states, such as Vermont and Virginia, the logical thing to do . . . The key suffrage qualifications in the states centered on property ownership, race and gender, not on national citizenship."\textsuperscript{30}

In fact, as early as 1809 a Pennsylvania court held that so long as one lived in an American jurisdiction, owned property, and paid taxes, the principles of natural justice mandated that the individual be able to participate in the political process through voting.\textsuperscript{31}

In the period preceding the Civil War, Northern states, such as Michigan, also extended the right to vote to non-citizens. Although Southern states rejected this practice because they feared non-citizens would oppose the institution of slavery, Northern states saw enfranchising non-citizens as a "matter of basic justice."\textsuperscript{32} Following the Civil War, non-citizen suffrage gained momentum in various states, eventually including those in the south and in the west.\textsuperscript{33} Kiyoko Knapp notes that during this time "the laws and constitutions of at least twenty-two states and territories granted aliens the right to vote."\textsuperscript{34} But, according to Raskin, at the dawn of the twentieth cen-

\textsuperscript{27} \textit{Id.}; Brozovich, supra note 20, at 404-05.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{See Raskin, Legal Aliens, supra note 4.}

\textsuperscript{30} Jamin B. Raskin, \textit{Time to Give Aliens the Right to Vote (Again)}, 256 THE NATION, Apr. 1993, at 433 [hereinafter Raskin, \textit{Time to Give}].

\textsuperscript{31} \textit{Id. See also} Brozovich, supra note 20, at 407; Raskin, \textit{Legal Aliens, supra} note 4, at 1403. Both articles also cite the case of Stewart v. Foster, 2 Binn. 110 (Pa. 1809).

\textsuperscript{32} \textit{See Raskin, Time to Give, supra note 30, at 433. See also Raskin, Legal Aliens, supra note 4, at 1408.}

\textsuperscript{33} \textit{See Raskin, Time to Give, supra note 30, at 433.}

tury the movement for non-citizen suffrage waned, as newer, incoming immigrants were racially, linguistically, and ethnically different from their predecessors.\(^3\) Hostility towards immigrants only deepened with the emergence of the First World War, and by 1926 Arkansas became the final state to abandon providing non-citizens with the right to vote.\(^3\) Only a few local jurisdictions, such as Takoma Park, Maryland and Cambridge, Massachusetts, continue to permit non-citizen suffrage.\(^3\)

To some observers, the cessation of immigrant suffrage began the formal exclusion of permanent residents from American politics. Gerald Neuman, one scholar who too believes that the Constitution leaves room for state legislatures to grant non-citizen suffrage, has commented that conceptions of who may vote should not necessarily be fixed to the privileged class of citizens, or what he calls “core electorates.”\(^3\) Is it not strange, Neuman ponders, that American citizens who opt to reside in a foreign country are allowed to continue voting in U.S. elections, while lawful permanent residents who pay taxes, contribute to the local economy, and reside within a U.S. jurisdiction are not? Is it simply because U.S. citizens possess this (faux) construct that we call “citizenship?”\(^3\) For Neuman, there is no strong constitutional justification for marginalizing immigrants who otherwise appear the same as citizens.\(^4\)

This point about permanent residents and citizens sharing many important characteristics prompts Elise Brozovich to assert that “non-citizen suffrage is required by the equal protection clause of the 14th amendment.”\(^3\) Gerald Rosberg similarly for years has argued that any attempt by Congress or a state legislature to curtail the voting rights of permanent resi-

\(^3\) Brozovich, supra note 20, at 410; Raskin, Legal Aliens, supra note 4, at 1397. See also Martha I. Morgan & Neal Hutchens, The Tangled Web of Alabama’s Equality Doctrine After Melof: Historical Reflections on Equal Protection and the Alabama Constitution, 53 ALA. L. REV. 135 (2001) (noting that in Alabama in 1901, voting rights for aliens began to be scaled back as delegates to the state constitutional convention started to require that aliens who wished to vote had to promise to become citizens as soon as they were eligible).

\(^3\) Raskin, Time to Give, supra note 30; Knapp, supra note 34, at 406. See also DAVID WEISS-BRODT, IMMIGRATION LAW AND PROCEDURE 429-30 (4th ed., 1998).


\(^3\) NEUMAN, supra note 4, at 142.

\(^3\) Id. at 143. See also Gerald L. Neuman, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of the Equal Protection Doctrine, 42 UCLA L. REV. 1425 (1995).

\(^4\) Id. For a comparative discussion of this subject, see Gerald L. Neuman, “We Are the People”: Alien Suffrage in German and American Perspective, 13 MICH. J. INT’L L. 259 (1992).

\(^4\) See Brozovich, supra note 20, at 413-14.
udents must be subjected to the strictest scrutiny by the courts. For Rosberg, alienage is almost on par with race as being a suspect classification, and he questions whether there is even a compelling explanation for denying permanent residents suffrage. As he states:

I do not believe that it is possible to articulate an explanation for this assumption without moving the discussion to a level of extremely high abstraction and without putting a great deal of weight on symbolic values. To sustain the disenfranchisement of aliens on the strength of that kind of reasoning would be fundamentally inconsistent, it seems to me, with our ordinary approach in determining which state interests are compelling. But I am confident at least that the validity of laws denying aliens the vote is by no means self-evident. It is surely not enough to tip one's hat at the state interest in having knowledgeable and loyal voters and let it go at that.

Richard Briffault, in a recent article, has echoed many of Rosberg's arguments. Politically, socially, and economically, permanent residents can be and are similar to their citizen counterparts. It, therefore, seems logical that courts should apply the standard of strict scrutiny to restrictions on non-citizen suffrage. But as Briffault points out, different rulings over the past two decades indicate that courts have been unwilling to treat non-citizens in a similar manner to citizens. I mentioned earlier the Sugarman case where the Supreme Court discussed how at the heart of any political community is the presence of members who are defined in terms of their mutual citizenship. For the Sugarman Court, it seemed antithetical to Congress's intent that non-members, such as permanent residents, might be able to participate in the election process. Seeming to follow this lead, in Skafte v. Rorex, the Supreme Court refused to hear an appeal of a Colorado Supreme Court ruling, which held that the legislature is only required to

43 Id. For a presentation of this argument see Brozovich, supra note 20, at 405. See also Valerie L. Barth, Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants, 28 ST. MARY'S L.J. 105 (1997).
44 Rosberg, supra note 4, at 1135. This famous passage has been quoted also in ALEINIKOFF ET. AL., supra note 26, at 583.
45 Richard Briffault, Legal History: The Contested Right to Vote, 100 MICH. L. REV. 1506, 1526 (2002) (noting that “[l]ike other residents, aliens are subject to state and local regulation, taxation, and law enforcement, and depend on states and localities for basic public services, including public safety, sanitation, and education.”). See also Jeffrey A. Roy, Carolene Products: A Game Theoretic Approach, BYU L. REV. 53, 93 (2002) (noting that “alienage has been recognized as a suspect classification, although the Court has applied strict scrutiny more deferentially in cases involving aliens than in those involving race.”).
46 See Briffault, supra note 45.
48 Id. at 649 n.13.
give a rational explanation for why non-citizens cannot vote in school board elections.\(^49\) The Colorado court did not accept the idea that permanent residents—despite their presence and involvement within the local polity—constituted a part of the political community.\(^50\)

But even with these adverse decisions, the call for non-citizen suffrage, at least among academics, has not dissipated. As stated earlier, David Cole’s 2002 article raises great concern over the lack of access non-citizens have to the political process. In a very methodical manner, Cole makes an impassioned plea to both politicians and the public to re-examine the harsh set of conditions non-citizens have endured in the post 9-11 era. For Cole, “the most troubling feature of the government’s response to the attacks of September 11 has been its campaign of mass preventive detention.”\(^51\) That nearly two thousand non-citizens have been held in secret, in the absence of legal representation, and without any official charges leveled against them highlights the government’s lack of respect for individual liberties and civil rights.\(^52\) As important, though, Cole attributes the mistreatment of non-citizens since the 9-11 attacks on the fact that these individuals have no real voice in American politics.\(^53\) Non-citizens lack political muscle, and as a result, few politicians are willing to expend their precious political capital on a community that yields so little back in terms of votes.\(^54\)

But as Cole notes, in addition to the secretive detentions, there have been other examples of non-citizens suffering since 9-11. For example, with Congressional passage of the USA PATRIOT Act,\(^55\) legal non-citizens found to have even the most tangential association with suspicious organizations are now subject to deportation or imprisonment.\(^56\) The Act also

\(^49\) See Skafte v. Rorex, 553 P.2d 830, 832 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). For two astute discussions of this case, see ALIENIKOFF ET AL., supra note 26, at 453-534 (detailing admissions procedures) and Brozovich, supra note 20, at 424-25.

\(^50\) Skafte, 553 P.2d at 832.

\(^51\) See Cole, supra note 2, at 960.

\(^52\) Id. at 960-66.

\(^53\) Id. at 959 (noting that “the true test of justice in a democratic society is not how it treats those with a political voice, but how it treats those who have no voice in the democratic process.”).

\(^54\) Id. at 981. See also Erwin Chemerinsky, Losing Faith: America Without Judicial Review, 98 Mich. L. Rev. 1416 (2000) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)) (noting “that the political process has no incentive to protect aliens from discrimination, but it has great incentive to impose burdens on aliens who cannot vote and thereby to benefit the citizens who do”); Kevin Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 BYU L. Rev. 1139, 1153 (1993).


\(^56\) See Cole, supra note 2, at 966-69. There is currently an initiative being proposed by Attorney General John Ashcroft that would expand even further the provisions I shall be discussing in the present
permits the INS to exclude those seeking admission into the United States on the basis of the applicant's ideology.\textsuperscript{57} This new legislation also gives law enforcement greater latitude in conducting secret searches without probable cause, including the allowance of more intrusive wiretapping.\textsuperscript{58} In addition, data shows that ethnic profiling by the Justice Department of Arabs and South Asian immigrants has dramatically increased since 9-11.\textsuperscript{59} And military tribunals have been established for the purposes of trying only non-citizens, exemplifying the point that the rights of these individuals have been severely curtailed in this era of heightened security.\textsuperscript{60}

For Cole, because they are a "group that is subject to government regulation but denied a right to vote, aliens are without a meaningful voice in the political bargains struck by our representative system."\textsuperscript{61} This message has resonated with other scholars. Tamra Boyd and Victor Romero each have intimated that one main reason immigrant groups have been unable to mobilize to pursue policy goals is because they have been politically inhibited by their lack of voting power. Romero, in particular, has com-

\textsuperscript{57} As Cole notes, although the Supreme Court has stated that aliens living outside of the U.S. have fewer constitutional protections than those residing within, normatively he believes that the power of the First Amendment is reduced by resorting to such practices. See Cole, supra note 2, at 969-71. For a related discussion, see Kevin R. Johnson, Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

\textsuperscript{58} See Cole, supra note 2, at 972-74. See also Joo, supra note 1, at 37-38.

\textsuperscript{59} See Cole, supra note 2, at 974-77.

\textsuperscript{60} \textit{Id.} at 974-78.

\textsuperscript{61} \textit{Id.} at 981. In this section of his argument, Cole contends that viewing the Bill of Rights as human rights further supports the notion that aliens should not artificially be separated from citizens, simply because of their immigrant status. See also Connie Chang, Immigrants Under the New Welfare Law: A Call for Uniformity, A Call for Justice, 45 UCLA L. REV. 205 (1997).

\textsuperscript{62} Many scholars who support alien suffrage have been either directly or indirectly influenced by the classic works of Jeremy Bentham. For a monumental reading in this area, see THE WORKS OF JEREMY BENTHAM 3 (John Bowring ed., 1962).

\textsuperscript{63} Tamra M. Boyd, Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alien Classification, 54 STAN. L. REV. 319, 343 (2001) (noting that, "since resident aliens cannot vote, they are unlike other minorities, who can theoretically pool their voting strength, build coalitions, and otherwise utilize the political process to protect themselves"). For a related discus-
mented that if non-citizens had the right to vote, deportation hearings might be procedurally fairer and immigration authorities in these settings would likely act in a more tempered manner. April Chung similarly believes that providing immigrants such as Asians and Latinos with the right to vote would result in their interests being better represented. And along these same lines, Kiyoko Knapp states that non-citizen suffrage would result in making legislators more responsive to immigrants. As Knapp and others contend, unless legislators are provided with such electoral incentives, the needs of non-citizens will continue to remain of peripheral concern.

Many legal observers thus believe that non-citizens, particularly permanent residents, deserve the right to vote in American elections. I share this view, and in the next section, Section III, I seek to build upon this literature by advancing the discussion one step further. Specifically, what if tomorrow permanent residents were granted the right to vote—then what? As I explain, a series of organizational hurdles exist that frequently impair members of a group from collectively employing their rights, such as exercising their right to vote. One way to overcome these barriers, as I will discuss, is to have leaders, namely lawyers, present who can help to translate this type of right into an actual political tool. Indeed, I will specifically explain how lawyers can use their skills to get newly enfranchised individuals to the ballot box.

Yet to many observers, the idea that permanent residents might receive suffrage rights anytime soon, especially after 9-11, is so unlikely that focusing on enfranchising immigrants and then mobilizing them to the ballot box amounts to more of a theoretical discussion than practical reality. Furthermore, for many of these “realists,” involving lawyers in a movement where they have no specific charge, such as mobilizing people to vote, will inevitably lead that movement towards adopting tactics that advance the lawyers’ own interests rather than the interests of the majority of community members. As I will show in Section IV, however, this view is off the mark;


For a detailed discussion of this argument, see Victor C. Romero, Expanding the Circle of Membership by Reconstructing the “Alien”: Lessons from Social Psychology and the “Promise Enforcement” Cases, 32 U. MICH. J.L. REFORM 1 (1998).


Id. See also Richard Briffault, Bush v. Gore as an Equal Protection Case, 29 FLA. ST. U. L. REV. 325, 359-60 (2001); Harper-Ho, supra note 37, at 316.
even if permanent residents remain disenfranchised, lawyers can work in diverse ways to ensure that the rights of their constituents are not ignored.

II. **WHAT HAPPENS ONCE PERMANENT RESIDENTS ACQUIRE THE RIGHT TO VOTE?**

A. **Considering the Various Constraints**

As those who write on immigrant suffrage know, a right to vote on paper is not self-enforcing—extending suffrage to a marginalized group without giving members effective means to employ this right is unlikely to yield much in the way of substantive political action.\(^6\) One needs only to examine the era following the Civil War to illustrate this point. Studies have noted that while African Americans gained new constitutional rights after 1865, they were unable to exercise these rights because of various social and political hurdles that existed.\(^6\) Similarly, literature on the American women’s movement shows that the passage of the Nineteenth Amendment in 1920, which enfranchised women, did not automatically result in massive numbers of women heading to the ballot box. As empirical studies indicate, it was not until some four to five decades later that the women’s movement became a widespread, grassroots politicized force within the American electorate.\(^7\)

\(^6\) See Stephen H. Legomsky, *Why Citizenship?,* 35 VA. J. INT’L L. 279 (1994). Legomsky investigates the importance of classifying people on the basis of who is a citizen and who is not. He suggests that the manner in which the U.S. government decides who may become a citizen needs serious reconsideration. *Id.* As he explains, oftentimes one important factor for immigration officials in determining who may naturalize turns on whether the individual is likely to participate in the electoral process. *Id.* at 286. However, similar to my contention that just providing someone with a right does not necessarily mean that it will be used, Legomsky remarks that a positive correlation should not be assumed between granting one citizenship and the level of political participation that that person may exert. *Id.* at 287-88. Moreover, as Peter Spiro has found, in some cases those who lack citizenship may even “enjoy powerful champions [at the governmental level] in the form of public interest lobbies and, more notably, foreign governments, corporations, and consumers.” See Peter Spiro, *Lady Liberty’s Doorstep: Status and Implications of American Immigration Law,* 29 CONN. L. REV. 1627, 1628 (1997).

\(^6\) One of the most glaring examples highlighting this includes the Jim Crow laws that were present during this time. For a selected set of readings, consult: WILLIAM HENRY CHAFEE, *REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH* (2001); EARL CONRAD, *JIM CROW AMERICA* (1947); JESSE W. DEES, *JIM CROW* (1951); PETER IRONS, *JIM CROW’S CHILDREN: THE BROKEN PROMISES OF THE BROWN DECISION* (2002); JAMES PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

\(^7\) For a selected set of important readings on this issue, see: KAREN BECKWITH, *AMERICAN WOMEN AND POLITICAL PARTICIPATION* (1986); SARA EVANS, *BORN FOR LIBERTY* (1997); VIVIAN
If the right to vote on paper does not always translate into immediate political mobilization, this then begs the question, why not? Mancur Olson's landmark study, *The Logic of Collective Action*, helps to shed light on this issue.\(^7\) According to Olson, even when individuals possess rights, there are still hurdles that must be overcome before these rights are enjoyed. The task of organizing and mobilizing large numbers of people who share a common goal but also possess diverse interests can be a great challenge.\(^2\) One reason is that the benefits being sought by such movements are frequently collective in nature. Thus, those who contemplate joining a large movement might think twice about doing so, especially if one believes that he/she may still reap the collective benefit by not acting at all. Such an individual would rather "free-ride" off of the efforts of others, particularly when participation yields no greater payoff.\(^3\) Even if a large community has the right to vote, the argument goes, the fact that rational individuals think in this utility-maximizing manner will result in many people not voting.\(^4\)

So could lawful permanent residents, if given the vote, ever rid themselves of this collective action dilemma? According to Olson, there is hope. Individuals must have a reason, or be offered *incentives*, for why it is in their interest to pursue this particular route.\(^5\) Such incentives may take a variety of forms. In a classic article, Peter Clark and James Q. Wilson noted that incentives can be *material* in nature, whereby members are offered tangible benefits or are permitted to be heavily involved in the group's decision-making strategies.\(^6\) Incentives may also be *solidary*, whereby members are promised that they can develop important "social relationships with other group members and increased status in the eyes of nonmembers."\(^7\)
Or incentives may be *purposive*, whereby members are told that by joining they will be able to quench their ideological ambitions and goals.\(^7\)

Furthermore, since permanent residents are not a homogenous group, more often than not they break down into various communities, typically along the lines of ethnicity, language, race, and/or national origin.\(^7\) Subgroups, under an Olsonian perspective, more easily can overcome collective action problems. Smaller communities often have fewer bureaucratic obstacles in organizing, and their members likely have less divergent interests than those who belong to larger communities.\(^8\) Otherwise put, there is a better chance for harmony among the like-minded members of smaller communities, and because of their "smallness," members are able more fully to share and enjoy accrued benefits. However, smaller communities are not immune from free-riders. Similar to the solution offered for larger groups, Olson suggests that incentives must be provided in order to retain and recruit members to the movement.\(^8\)

Assuming permanent residents were to receive suffrage-rights then, who might provide the necessary incentives to ensure that these individuals would vote? In my view, lawyers are one possible set of leaders who can make such an offer. The idea that leaders in general can be critical incentive-givers for members of emerging social movements was recognized by Olson, who believed such organizational entrepreneurs were essential to the mobilization process.\(^8\) Robert Salisbury, similarly, saw entrepreneurial leaders as creators of organizations and movements who could offer potential members incentives to join the cause.\(^8\) Successful entrepreneurial leaders, in return, gained a legitimate job, a position of relative power, a con-

\(^7\) Id. For an important discussion of incentives in general, see GREEN & SHAPIRO, *supra* note 21. These scholars critique those legal, economics, and political science scholars who believe that incentives can be comprehensively explained by using a materialistic-based, cost-benefit model. Green and Shapiro chide this viewpoint by asking in their study: if this were true, how do we explain why people vote? According to their argument, there are significant costs associated with voting—from the time and effort spent going to the polls, to sometimes waiting in long lines, to going through the hassle of registering and filing the proper forms. Especially given the fact that one's individual vote is unlikely to make a significant difference, why would people act in such an "irrational" manner? For Green and Shapiro, there are obvious non-material incentives for going to the polls, and they deride cost-benefit scholars who originally failed to take this into account. For a countering opinion, see FRIEDMAN, *supra* note 21.

\(^7\) For studies that have examined this point in detail, see: R. BOOTH FOWLER, RELIGION AND POLITICS IN AMERICA (1985); MICHAEL OMI & HAROLD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960'S TO THE 1990'S (1994); and M. CRAWFORD YOUNG, THE POLITICS OF CULTURAL PLURALISM (1976).

\(^8\) See id.

\(^8\) See generally OLSON, *supra* note 71.

\(^8\) Id.

\(^8\) See Salisbury, *supra* note 76.
stituency, and administration over a diverse, potent set of resources. As Frank Baumgartner and Beth Leech have noted, entrepreneurial leaders have "been recognized by virtually every researcher of group origins and maintenance since Salisbury [and Olson] introduced the concept."

Building on this literature, I suggest that if permanent residents are to be a force within the American polity, it is necessary that they be led by strong leaders who possess the ability to articulate why becoming involved in electoral politics is so important. I focus on the role that lawyers can play, although I recognize that non-lawyers too often perform critical functions on behalf of their constituents. In fact, as I will discuss, my description of what lawyers could do to mobilize permanent residents will not seem "lawyerly" at all to many, in that litigation is not central to their tactical arsenal. But that is exactly the point. Contrary to the common perception, the activities of such lawyers do not necessarily have to involve using the formal judicial process. Let us now turn to examining some of the ways in which these lawyers might be useful in helping enfranchised permanent residents exercise their rights.

B. From Individuals with the Right to Vote, to Politicized Individuals

As I have suggested, permanent resident communities are best served by not just having the franchise but also by having leaders who can transform this right into a vehicle for accomplishing social change. Lawyers who work within such an immigrant movement are one set of leaders who can enable this to occur. I mentioned above how voting rights granted to African Americans after the Civil War and to women in 1920 did not automatically result in these groups rushing to the ballot boxes. Rather, it took the efforts of leaders within these communities, many of whom were lawyers, to help articulate for these constituencies why they needed to vote. For immigrant communities, what might lawyers, in particular, do to help make the right to vote a meaningful political tool, and are there historical lessons these lawyers might draw on to assist in their efforts?

Perhaps most obviously, one contribution lawyers might make to immigrant communities just receiving the right to vote would be to represent

84 Id. See also BAUMGARTNER & LEECH, supra note 77, at 69-70.
85 See BAUMGARTNER & LEECH, supra note 77, at 70. For scholarship that deals with issues of group origins and movement maintenance, see: MOE, supra note 76; Rothenberg, supra note 9; and Jack L. Walker, The Origins and Maintenance of Interest Groups, 77 AM. POL. SCI. REV. 390 (1983).
87 See sources cited supra notes 69-70.
these individuals in court, in the event that the state or private citizens would attempt to impair them from exercising this right. Of course, voting rights litigation initiated by civil rights attorneys representing African Americans, Latinos, and other minorities has historical precedent in the United States. Numerous scholars have written about the various ways civil rights lawyers have used the courts as a means of ensuring that these communities enjoy their constitutional right of suffrage. And despite the fact that certain civil rights activists have at times questioned the usefulness of engaging in the legal and electoral processes, generally accepted sentiment is that lawyers in many cases, through litigation, have helped minorities better exercise their voting rights.

But as discussed above litigation can be both a time-consuming and resource-heavy endeavor. For this reason, using the courts, contrary to popular belief, is not the only way lawyers can serve their clients or constituents. For example, lawyers working on behalf of immigrant communities might engage in seemingly more basic, albeit still important, services. As lawyers and policy leaders from the National Association for the Advancement of Colored People’s Legal Defense Fund (NAACP LDF) did during the 1960s and 1970s, immigrant-rights lawyers similarly could be useful in organizing transportation of enfranchised permanent residents to polling stations. While the NAACP LDF of course played an active role

88 For a sample of voting rights cases that bear this point out, consult the Department of Justice’s webpages that detail the work done on the Voting Rights Act (1965) and its subsequent amendments. See, e.g., Major Section 2 Cases, Dept. of Justice Civil Rights Division, at http://www.usdoj.gov/crt/voting/sec_2/major.htm (last visited Apr. 18, 2004); About Section 5 of the Voting Rights Act, Dept. of Justice Civil Rights Division, at http://www.usdoj.gov/crt/voting/sec_5/case_activ.htm (last visited Apr. 18, 2004).


90 For works discussing this point, see: MICHAEL McCANN, TAKING REFORM SERIOUSLY (1986); ADOLPH REED, THE JESSE JACKSON PHENOMENON: THE CRISIS OF PURPOSES IN AFRO-AMERICAN POLITICS (1986); and Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976).

91 The NAACP website provides a rich history of the types of tactics organizational policy-makers have used to realize their rights, including tactics that involve get-out-the-vote strategies. See Our Past and Your Future, NAACP Timeline, at http://www.naacp.org/past_future/naacptimeline.shtml (last visited Apr. 18, 2004) [hereinafter, NAACP Timeline]. For an even more recent article showing how NAACP officials continue to engage in this activity, see Jenel Few, NAACP Urges Georgians to Stand up and be Counted, SAVANNAH MORNING NEWS ON THE WEB, Nov. 19, 1999, available at http://www.savannahnow.com/stories/111999/LOCIacpaction.shtml (last visited Apr. 18, 2004).
"in crafting and enacting the Voting Rights Act of 1965," lawyers from this group also recognized that it was a struggle for many African Americans even to get to the voting booth in the first place. Thus, they organized free buses and other means of transportation to ensure that their constituents had not just the right but also the access and ability to vote. Similarly, one can imagine that many newly enfranchised permanent residents too may have difficulty reaching the appropriate polling stations; lawyers who are familiar with such a population might well fill the role of a transportation organizer.

There are other ways immigrant-rights lawyers could be of service as well. They could monitor relevant statutory proceedings occurring in the state legislatures and in Congress in order to ensure that the acquired voting rights of permanent residents are not somehow being curtailed. Several scholars who have tracked various other interest groups and social movements have noted that lawyers working for these constituencies often view legislative monitoring as a key aspect of their professional duties. On a related note, one can imagine immigrant-rights lawyers acting as useful advocates in governmental hearings conducted by bureaucratic agencies or legislative committees, if the subject of immigrant suffrage ever was to arise. Here too, scholars who have studied the behavior of other types of organizational and social movement lawyers find that testifying in such settings is not an uncommon practice.

Furthermore, lawyers representing immigrant communities could serve as coalition builders with other potential policy partners to promote greater voting access. While alone, a minority group with the right to vote may have difficulty effectuating significant political and social change, if that group can partner up with other similarly situated groups in the classic Madisonian sense, then achieving such change may be more successful.


93 See sources cited supra note 91.


95 The findings in each of the studies in footnote 94 note this point.

96 See JAMES MADISON, FEDERALIST PAPERS, No. 10 & No. 51. For a classic rebuttal of the Madisonian argument, see ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).
Surely lawyers can play a critical role in facilitating this type of coalition building. Consider the events leading up to the 1982 amendments to the Voting Rights Act of 1965.97 Among the major elements of the 1982 amendments included an extension of Section 5, a provision within the original 1965 Voting Rights Act that barred a jurisdiction from altering its voting structure without first gaining pre-clearance from a U.S. federal district court or from the U.S. Attorney General.98

Section 5 of the 1965 Voting Rights Act was set to expire five years after being passed.99 But in 1970 Congress extended this provision an additional five years, and in 1975 Congress extended it again, this time for an additional seven years.100 Beginning in the late 1970s, leaders from the NAACP, including lawyers working for the group’s Legal Defense Fund, began considering ways to extend Section 5 for a much longer period of time.101 These leaders started reaching out to policy partners with whom they had worked before, such as the American Civil Liberties Union, the Southern Christian Leadership Council, the Congress of Racial Equality, the National Urban League, and various other groups in order to garner support for their proposal.102 Soon a number of organizations were clamoring for a long-term extension of Section 5, and by 1982 Congress responded by setting 2007 as the year when Section 5 would need to be renewed.103 In turn, lawyers and other policy leaders from the NAACP invoked this victory during their voter registration drive that same year—

99 See sources cited supra note 98.
101 See NAACP Timeline, supra note 91 (noting that during the period discussed in the text, “the NAACP leads the effort to extend The Voting Rights Act for another [twenty-five] years”).
102 Id. The NAACP maintains a list of its numerous coalition partners. See Associations, NAACP, at http://www.naacp.org/connections/assoc.shtml (last visited Apr. 18, 2004).
103 The U.S. Department of Justice has a full discussion regarding the extension of Section 5 on its website. See Introduction to Section 5 Preclearance, Department of Justice Civil Rights Division, at http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Apr. 18, 2004).
which resulted in registering 850,000 new voters.\textsuperscript{104} That civil rights lawyers played an important role building coalitions for the purposes of pushing through enhanced voting rights legislation (and registering more voters) could serve as another type of educative cue for immigrant-rights lawyers contemplating how they too might assist newly enfranchised permanent residents.\textsuperscript{105}

In addition to all of these activities, lawyers may play a significant discursive role when serving as leaders of an immigrant community. Through the power of rhetoric and persuasion, lawyers may be able to explain to their constituents why voting is so important. We see that lawyers from both the women’s suffrage movement and the civil rights movement engaged in this activity during each of these respective eras.\textsuperscript{106} As these leaders recognized, having the right to vote was one thing, but seeing to it that enfranchised citizens exercised this right was quite another. For example, lawyers for the Southern Poverty Law Center (SPLC), a well-known civil rights organization founded in Alabama in 1971,\textsuperscript{107} for decades have championed the right to vote by publishing books, papers, and other documents as part of a wider informational campaign on the normative value of voting.\textsuperscript{108} SPLC lawyers have focused, in particular, on the issue of redistricting, advocating that by voting, “everyday citizens—those who are most harmed by poorly created voting districts—can become the driving force behind the redistricting process.”\textsuperscript{109} In fact, in an impassioned plea to their constituents, the SPLC in its most recent publication entitled \textit{Drawing the Line}, states:

\begin{quote}
The future of your right to vote is at stake. Your community, your state and the country are now drawing election lines that will determine how your vote is counted for the next ten
\end{quote}

\textsuperscript{104} See NAACP Timeline, \textit{supra} note 91 (commenting on its voter registration initiative following its efforts to get Section 5 extended).

\textsuperscript{105} Another aspect to the 1982 amendments to the Voting Rights Act of 1965 involved Section 2. Section 2 of the Act prohibited state and local governments from disadvantaging or diluting the impact of minority voters’ votes in an election. (Jurisdictions might do this by, for example, dividing minorities along district lines in order to prevent them from building coalitions to have their preferred candidate elected, or by mandating an at-large voting process, where it is known that the result will have a discriminatory impact on minority voters.) In 1982, Congress reaffirmed the principle that Section 2 had to be preserved, and moreover, went on to state that so long as a discriminatory impact was present on minority voters, no discriminatory intent on the part of the jurisdiction was necessary. \textit{Cf.} \textit{White v. Regester}, 412 U.S. 755 (1973).

\textsuperscript{106} I shall explain how in the subsequent paragraphs.

\textsuperscript{107} See Southern Poverty Law Center, \textit{at} http://www.splcenter.org (last visited Apr. 18, 2004).

\textsuperscript{108} \textit{Id.}

years. The Florida vote count during the last Presidential election taught us that it's essential for everyone to vote—and for those votes to be counted. If you care about fair elections—if you want to make sure your voice is heard—get involved in the redistricting process . . . .

With the information in this manual, you can take action to make sure that your voice—your vote—is heard and counted throughout the next decade.\textsuperscript{110}

There is no reason to believe that immigrant-rights lawyers could not engage in disseminating information in a similar manner, as a means of advocating to permanent residents why exercising the right to vote is so important.

Immigrant-rights lawyers might also look to how suffragette lawyers used discourse at the grassroots level to educate women about the significance of voting.\textsuperscript{111} Virginia Drachman’s historical account details how after 1920 these activists sought to teach women about issues of political engagement, equal rights, and the ability to influence legislation and public policy through the power of voting.\textsuperscript{112} During this time, women’s rights lawyers also worked with the League of Women Voters, which was arguably the most prominent organization that grew out of the suffragist movement.\textsuperscript{113} The goal that the League and the lawyers had was simple: to articulate to the newly enfranchised woman how, through voting, she might be able to affect broad social policy issues such as preventing child labor, increasing the minimum wage, mandating compulsory education, and furthering access to employment.\textsuperscript{114} As the then President of the League, Carrie Chapman Catt, noted: “The politicians used to ask us why we wanted the vote. They seemed to think that we want to do something particular with it, something we were not telling about. They did not understand that women wanted to help make the general welfare.”\textsuperscript{115}

Thus, whether it is through publications, grassroots educational efforts, or oration, lawyers can use a variety of discursive techniques to show to their constituents how voting can connect to other types of political rights and values.\textsuperscript{116} Ideas and proposals on voting indeed can serve as a

\textsuperscript{110} Id.

\textsuperscript{111} See generally VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998).

\textsuperscript{112} Id. See generally EDWARD T. JAMES ET AL., NOTABLE AMERICAN WOMEN (1971).

\textsuperscript{113} See League of Women Voters, at http://www.lwv.org/about/past.html (last visited Apr. 18, 2004).

\textsuperscript{114} Id.


\textsuperscript{116} Reva Siegel, in a recent article, discusses how leaders of women’s movements, both during the early 1900s as well as during the debate over the Equal Rights Amendment in the 1970s, invoked the rhetoric of the Constitution in order to advance the progressive idea that through participating in politics, women could raise their overall status within society. See Siegel, supra note 70. As she notes, Both the ERA and the Nineteenth Amendment demonstrate how the text of the Constitution makes the
springboard for encouraging greater political involvement and civic participation.\textsuperscript{117} That immigrant-rights lawyers might be capable of employing such a course of action on behalf of newly enfranchised permanent residents seems clearly within the realm of possibility as well.

But as Barbara Babcock reminds us, voting does not necessarily have to be an instrumental tool for achieving some other type of objective.\textsuperscript{118} For example, there were women lawyers during the early 1900s who believed that the right to vote, on its own, had immense intrinsic value for all women.\textsuperscript{119} The hugely symbolic importance of this precious right was not lost on these advocates championing for suffrage.\textsuperscript{120} Women lawyers such
as Margaret Anderson, Olga Bennett, Lela Robinson, and Clara Folz would often stress the inherent significance of suffrage when seeking to mobilize their constituents. For lawyers working with immigrant movements today, this historical lesson is useful because it shows that when engaging in discourse as a means of highlighting the significance of voting, other “larger” issues need not necessarily be included in the dialogue.

Yet while this right to vote may indeed have inherent significance, even if suffrage were to be granted to permanent residents, existing political obstacles may be such that this once disenfranchised group still may feel excluded from the democratic process. Babcock and others have noted that because of the entrenched political inequality that continued to persist in

She goes on to say: “voting . . . involved an unambiguous passage into the public sphere . . . . That is why . . . all women lawyers wanted suffrage, and why many actively campaigned for it.” Id. at 1696. And as she notes, almost ninety percent of a sample of women lawyers surveyed in 1920 believed the Nineteenth Amendment would be critical in altering their status in society. Id. at 1702.

121 See Pioneers in the Law, Margaret Reinardy Anderson, at http://www.wisbar.org/bar/pioneers/bios/anderson.html (last visited Apr. 18, 2004). Anderson tried to energize women to vote by actively engaging in party politics. See id. She campaigned actively on behalf of her husband who first ran for District Attorney in Stevens Point, Wisconsin and then for a seat in the House of Representatives in Wisconsin’s Seventh Congressional District. Id. Her husband lost the D.A.’s race and five days before the election for Congress he died. Id. Margaret Anderson then ran in his place, but she lost to Melvin Laird in the 1954 election.

122 See Pioneers in the Law, Olga Bennett, at http://www.wisbar.org/bar/pioneers/bios/bennett.html (last visited Apr. 18, 2004). Bennett, like Anderson, was involved in electoral politics. Id. She was one of the Wisconsin’s first elected judges, and she sought to mobilize women to the ballot box by showing how they could indeed be successful not just as practicing lawyers but also as elected officials. See id.


125 Why people actually believe that their individual vote matters has been discussed and debated, particularly in the political science literature, for years. It may be that individuals honestly perceive that by voting, social change affecting their lives can be made. Or there may be some heightened sense of civic duty; or a commitment to being a participant within the democratic process; or a combination of these and other factors. For a very select sample of readings, see: ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1976); FRIEDMAN, supra note 21; GREEN & SHAPIRO, supra note 21; NORMAN H. NIE ET AL., THE CHANGING AMERICAN VOTER (1976); FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990); KEITH REEVES, VOTING HOPES OR FEARS? WHITE VOTERS, BLACK CANDIDATES, AND RACIAL POLITICS IN AMERICA (1997); A. Blais & R. Young, Why Do People Vote? An Experiment in Rationality, 99 PUB. CHOICE 39 (1999); Arthur Schram & Joep Sonnemans, Why People Vote: Experimental Evidence, 17 J. ECON. PSYCHOL., 417-42 (1996).
the years following the passage of the 1920 amendment, many women, including many women lawyers, became disillusioned with the idea that voting could make any real difference. For this reason, those few women who were practicing law opted to focus on their careers, hoping to make their mark in their profession—where it was perceived that they would be more fairly judged—rather than in the biased world of politics. One can imagine that in today's political climate, with the presence of the Patriot Act and other measures scaling back the rights of immigrants, enfranchised permanent residents might similarly perceive participating in electoral politics as futile—or even dangerous. Arguably in this scenario then, having the right to vote may not matter much for permanent residents, and this in turn would naturally reduce the lawyer's ability to move people to the ballot box. After all, if enfranchised permanent residents are determined not to vote, even the most impassioned lawyer will have difficulty convincing constituents to exercise this right.

In this situation then, what is the lawyer to do? There will be those who claim that without having any specific goal on which to channel their energies, such as mobilizing their constituents to vote, lawyers who are working with a community of people like permanent residents will inevitably revert to promoting policy tactics with which these lawyers are most familiar—litigating and directing the group towards the judicial process. In fact, as the argument goes, this is all but certain to occur given that in this post 9-11 era the chances of permanent residents receiving the right to vote in national and state elections are slim to none. In the next section, Section IV, I will explain in detail why many observers worry about the general presence of lawyers within a political group or social movement. Following this discussion, I then will suggest that even if lawyers are not working on a particular goal, such as mobilizing voters, their general or overall presence can still be valuable for protecting the political interests of the constituents they represent.


III. LAWYERS AND THEIR GENERAL IMPACT ON IMMIGRANT COMMUNITIES

A. The Skeptics' Point of View

Indeed, since the events of 9-11, it is difficult to imagine that permanent residents will be receiving the right to vote anytime soon. I described above that were these immigrants granted full voting rights, lawyers—drawing on the experiences of their predecessors who worked with the women's suffrage movement and the civil rights movement—likely could contribute in many different ways to getting permanent residents to the ballot box. But even without hope of receiving full suffrage rights, lawyers still may be highly useful in politically mobilizing immigrants. No doubt this assertion will make some observers cringe. Over the past thirty years, there has been a wave of scholarship critical of the role lawyers play within emerging social organizations. In the mid-1970s, Derrick Bell published his famous article, entitled “Serving Two Masters,” where he evaluated the impact that lawyers had on the fight for educational desegregation. According to Bell, because the desegregation movement relied on lawyers to guide its strategies, too often litigation was used as the main means for implementing social change. Lawyers, so preoccupied with devising strategies to win doctrinal arguments in court, lost touch with the real life concerns of their constituents. Instead of thinking about creating policies to ensure that minority children had better educational opportunities, the lawyers involved were obsessed with convincing judges that they were right on the merits of their case. As a result, important “political, economic, and social” concerns were ignored much to the detriment of the African American community at large.

Those who oppose having lawyers serve as leaders within permanent resident communities also might point to other empirical works for support. For example, two years before the publication of Bell’s article, Stuart Scheingold released his landmark book, *The Politics of Rights.* In this study, Scheingold observed that lawyers who headed social activist move-

129 The literature that is cited, referenced, and reviewed here comes from the comprehensive bibliography provided by McCann & Silverstein, *supra* note 6, at 288-92.
130 *See* Bell, Jr., *supra* note 90.
132 *See* Bell, Jr., *supra* note 90, at 516.
133 *Id.* at 475-516.
ments frequently lacked the skills as well as the desire to employ litigation in conjunction with other political tactics. Given the scarce space within the American political arena, Scheingold found that such movements had trouble competing with those organizations that structured their strategies using both legal and political action. In 1978, Joel Handler came out with his study on lawyer-led social movements. Handler discovered that these leaders tended to be driven more by an ambition to enhance their personal reputations than by a desire to meet the needs of their constituents.

Empirical studies published during the 1980s offered further ammunition to those who might question the wisdom of having lawyers lead permanent resident communities. Jack Katz’s study of lawyers who work on behalf of the poor illustrates that while these lawyers believed that victories through litigation positively affected their clients’ lives, the perceptions and realities of the clients themselves were far different. Other works followed showing disparities between the lawyers’ visions of the transformative power of the law, and the true impact that these legal changes had on client communities. For example, Gerald Lopez’s 1992 study contended that poor and minority communities are routinely disempowered by lawyers seeking to control their clients’ agenda. Lawyers, according to Lopez, tend to reify the formal distinctions between themselves and their clients, thereby creating a mystification of what legal practice entails. Lopez argues that lawyers maintain this reification by focusing on litigation as a means to satisfy their personal ambitions. All the while, the lawyer remains either unaware or unconcerned that the amount of time and money that this tactic consumes works to the ultimate detriment of the clients’ interest. Too often, then, clients are left confused and frustrated, believing that their substantive concerns have been relegated to the backburner.

See generally HANDLER, supra note 7. See generally KATZ, supra note 7. See, e.g., AREYH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE (1982). See, e.g., O’NEILL, supra note 8; Neal Milner, The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation, 8 LAW & POL’Y 105 (1986); Nikolas Rose, Unreasonable Rights: Mental Illness and the Limits of Law, 12 J. LAW & SOC’Y 199 (1985). For a summary of these points, see McCann & Silverstein, supra note 6, at 262-63. See GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE (1992). Id. Id. Id.

Ann Southworth, Taking the Lawyer out of Progressive Lawyering, 46 STAN. L. REV. 214, 215
All of these studies reveal that lawyers distort the importance of pursuing causes through litigation and underestimate the significance of considering alternative approaches. Yet, there is no better support for the position that communities ought to contemplate seriously the value of relying on lawyers than Gerald Rosenberg’s book, *The Hollow Hope*. In this rich study, Rosenberg tackles the question of whether pursuing litigation is the best method for bringing about social change. Rosenberg argues that because courts are constrained by several factors—including their lack of enforcement power, their heavy reliance on other institutions to produce reform, and their constitutional obligation to hear only cases in controversy—they are precluded from making substantive social changes.

Many lawyer-led movements, however, fail to acknowledge these obstacles and too often follow a (judicial) path that rarely results in achieving desired outcomes. Moreover, since the pursuit of litigation is expensive and time-consuming, resources that otherwise could have been devoted to developing sustained political action and grassroots awareness are needlessly expended on a costly and ineffective tactic. Kevin Johnson, in his work on Latino communities in the U.S., has also recognized that this “need for an emphasis on political mobilization results in large part from deficiencies of traditional legal strategies.” And in summarizing this argument, Michael McCann and Helen Silverstein state:

> [T]he inclination of lawyers to frame movement goals in terms of disputes among discrete parties can narrow the range of movement demands as well as undermine broad-based movement organization and alliance building. The result is a tendency to atomize struggles, dividing and separating rather than uniting those who desire social change.

Thus, there are numerous concerns in having lawyers serve as leaders within emerging social movements. Perhaps for good reason then, much

---


146 See generally ROSENBERG, supra note 9.

147 Id.

148 Id. at 13-21.

149 Id.

150 Johnson, *Civil Rights*, supra note 12, at 43. Note, however, that Johnson’s perspective is important because he is very sensitive in recognizing that movement-leaders in various situations have been able to incorporate both legal and political strategies effectively. This point is what I seek to emphasize in the next section.

151 McCann & Silverstein, *supra* note 6, at 263. Note, as we will see, this is not the position held by McCann and Silverstein; this is again only their summary of this argument.
skepticism might exist towards my assertion that lawyers could be a valuable resource for permanent resident communities seeking to participate in the political process. But while the empirical evidence just provided questions whether lawyers are the appropriate people to assume this responsibility, there is another side to this debate. As I shall next argue, even if permanent residents lack the right to vote, lawyers can do much more for an immigrant movement than solely focusing on which cases to take to court and when.

B. The Contribution of Lawyers, Even Absent Suffrage Rights for Immigrants

Lawyers may employ their talents in a variety of ways to help non-enfranchised permanent residents politically mobilize. Pursuing litigation surely is one option. Consider some of the rights currently possessed by permanent residents in this country. Permanent residents have the right to social welfare benefits, the right to work in state civil service jobs, the right to state education, and even the right to practice law. Permanent residents gained these entitlements in large part because of the successful efforts of hard-working and intelligent lawyers.

But in general, most social movement lawyers know that relying on litigation as the sole or even a primary tactic has its drawbacks. For one thing, there can be a huge lag between the time a lawsuit is initiated and the time it is resolved. Lawyers also know that favorable decisions from courts may not always translate into beneficial results. And the fact is that litigation at times simply may not work. Thus, when social movement lawyers use the courts, most do so in a sophisticated manner.

---

156 For an eloquent study highlighting the ability of legal elites to mobilize constituents in this manner, see John Kilwein, Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181-200 (Austin Sarat & Stuart Scheingold eds., 1998).
158 See Gregg Ivers, Please God, Save this Honorable Court, in THE INTEREST GROUP CONNECTION: ELEETIONEERING, LOBBYING AND POLICYMAKING IN WASHINGTON (Paul Herron ed., 1998).
159 See Carrie Menkel-Meadow, The Causes of Cause Lawyering: Toward an Understanding of the
ple, litigation is frequently seen as having not only direct but also "indirect benefits." In her valuable study of immigrants in Britain, Susan Sterett discusses how lawyers working with the South Asian community often know that winning immigration cases in court is rare. Yet, these lawyers have not abandoned this tactic, namely because "litigation can be a way of gaining public time. Cases can be part of an effort to elevate an issue to the political agenda, occupying time in Parliament and the newspapers."

Perhaps put more generally, lawyers can use litigation to serve an educative function. Recall Gerald Neuman's argument, which focuses on how lawyers for permanent residents should be able to win the right to vote for their clients on equal protection grounds. To a certain degree, though, focusing on the outcome of such litigation detracts from the fact that just taking such a case to court allows a lawyer to raise the public's consciousness towards the range of issues facing permanent resident communities, including their lack of suffrage. Moreover, skillful lawyers coordinate litigation with other strategies, such as those that are more grassroots in nature.

Susan Coutin amplifies this point in her study of immigration lawyers in Los Angeles. Coutin's description centers on how this group of lawyers used charlas, or public talks at town hall meetings, to publicize, in this case to Salvadoran and Guatemalan non-citizens, the intricacies and flaws of


See McCann & Silverstein, supra note 6, at 267.

Susan Sterrett, Caring about Individual Cases: Immigration Lawyering in Britain, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 293-316 (Austin Sarat & Stuart Scheingold eds., 1998).

Id. at 310.

See McCann & Silverstein, supra note 6, at 267; MCCANN, RIGHTS, supra note 6.

See McCann & Silverstein, supra note 6, at 268. For one thing, there is research documenting how lawyers constantly consider costs before making even the slightest tactical decision. In fact, as Stephen Wasby has noted, most legal elites resignedly accept that the availability of resources "both force choices and limits them." WASBY, supra note 157. Understanding the different constraints that face them, apt legal entrepreneurs thus recognize that they must consider other, more politically-based tactics, if they wish to see their agendas realized. See, e.g., BAUMGARTNER & LEECH, supra note 77; CHARLES EPP, RIGHTS REVOLUTION: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 58-61, 69-70 (1998); HANDLER, supra note 7, 25-35; FRANK SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 42 (1976). WASBY, supra note 157, at 81; Milner, supra note 140.

U.S. immigration law.\textsuperscript{166} In addition to offering legal advice and representing clients in court, these lawyers would use charlas "[t]o educate immigrants about their rights, enable immigrants to devise viable legalizations strategies, dispel popular misconceptions about immigration law, and help immigrants to recast their own experiences in legal terms."\textsuperscript{167} As Coutin explains, the lawyers contemplated advancing the rights of immigrants in terms of litigation and in terms of political education, publicity, and overall movement building.\textsuperscript{168}

Lawyers also can use their knowledge of, and experience with, litigation as a leveraging tool. Where immigrant communities face neglect or discrimination—whether it is from private citizens, businesses, or government entities—lawyers can wield the threat of litigation as a powerful tool to extract concessions.\textsuperscript{169} Some of the most impressive evidence highlighting this point comes from the work done by the late Cesar Chavez. Chavez, a Mexican-American migrant farmer activist who eventually became the president of the United Farm Workers of America, spent his life advocating on behalf immigrant laborers.\textsuperscript{170} Through his tireless efforts, Chavez achieved several accomplishments, including providing migrant workers with the right to bargain with their employers, better health care, higher wages, and an overall recognition of their worth in the workplace.\textsuperscript{171} As observers have noted, although Chavez was not a lawyer, lawyers who represented him and his movement played a role in obtaining these benefits on behalf of this community.\textsuperscript{172} These lawyers worked closely with Chavez skillfully to coordinate grassroots strategies, such as boycotts, pickets, and marches with more formal tactics—like that of litigation. And it was not as though these lawyers would run to court the moment they believed that their cause was suffering a setback. Rather, when less costly (more grassroots-based) strategies would fail to yield concessions from those in power, they, along with Chavez, recognized that one tactic that would often garner attention was the threat of placing this dispute in court. Having the ability

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id. at 128.}

\textsuperscript{168} \textit{Id. See also} McCann & Silverstein, \textit{supra} note 6, at 269.

\textsuperscript{169} This point has been made by several scholars who have studied lawyer-led interest groups and social movements. For a selected sample of readings, see generally EPP, \textit{supra} note 164; HANDLER, \textit{supra} note 7; MCCANN, \textit{RIGHTS, supra} note 6; O'CONNOR, \textit{supra} note 72; SORAUF \textit{supra} note 164, at 42; Jayanth K. Krishnan & Kevin den Dulk, \textit{So Help Me God}, 30 GA. J. INT'L & COMP. L. 233 (2002); and Kim Lane Scheppel & Jack L. Walker, \textit{The Litigation Strategies of Interest Groups, in MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS} (Jack L. Walker ed., 1991).

\textsuperscript{170} \textit{See CONSUELO RODRIGUEZ, CESAR CHAVEZ} (1991); \textit{WINTHROP YINGER, CESAR CHAVEZ: THE RHETORIC OF NONVIOLENCE} (1975).

\textsuperscript{171} \textit{See id.; RICHARD GRISWOLD DEL CASTILLO, CESAR CHAVEZ: A TRIUMPH OF SPIRIT} (1995).

\textsuperscript{172} \textit{Id. See also} JACQUES E. LEVY, CESAR CHAVEZ: AN AUTOBIOGRAPHY OF LA CAUSA (1975).
to "leverage" the law in favor of the immigrant community proved an extremely important skill that these leaders possessed.

But it is important to remember that there are other ways that lawyers can serve the needs of their constituents. For those permanent resident communities interested in seeing institutional changes made from the top-down, legislative lobbying may be an effective technique that lawyers can employ. Given their legal education and presumed familiarity with the legislative process, many lawyers will know what it takes to pass effective legislation. Helping to draft laws, testifying in front of legislative committees, and promoting the adoption of preferred statutory language within bills are just some of the functions that lawyers can and do perform. Also, because they understand the legalese that often lace entire pieces of legislation, lawyers are in a good position to read and translate to their constituents what certain bills mean. The general literature on organizational interests in American politics highlights this point, showing that group-leaders routinely focus their efforts on monitoring legislative activity. John Heinz and his colleagues, in particular, document how almost every interest organization that they studied had leaders (many of whom were lawyers) who scrutinized for their constituents the daily actions in which members of Congress engaged. Since these leaders possess the skills to comprehend the machinations of what appears to most people as governmental morass, they are able to serve as an important asset to a community on the brink of being affected by a legislative decision.

In addition, because permanent residents cannot vote, lawyers could engage in campaigns that encourage greater naturalization among immigrants. As Kevin Johnson states:

173 McCann & Silverstein, supra note 6, at 268-69. For a full discussion of this point, see McCANN, RIGHTS, supra note 6, at 168-170.
175 Id. See also SCHEINGOLD, supra note 9; AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001); AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998).
178 See Johnson, Civil Rights, supra note 12, at 51-54.
A large population of potential Latino voters are left outside of the political process.... This has a significant impact on Latino political participation because the lawful permanent resident population from Mexico is substantial in size but has a relatively low naturalization rate. New immigrants from Latin America, at least those who immigrate in compliance with the immigration laws, are potential voters if they become citizens and thus are a potential source of strength to the Latino community.... The fact that so many Mexican lawful permanent residents are in the United States suggests great potential benefits of a drive to convince lawful permanent residents eligible for naturalization to become citizens and participate in the political process.\footnote{179}{Id. at 52-53.}

Thus, attempting to increase naturalization rates is just one other way lawyers can help promote the immigrant communities’ cause.\footnote{180}{Id. at 54-55.} Along these lines, one could imagine too that once these immigrants have naturalized, lawyers might press for multi-lingual ballots and push for voting to take place on multiple days or on weekends to allow for greater immigrant turnout, to name a couple other options.\footnote{181}{For a discussion of alternative proposals such as the ones mentioned here, see generally: RAYMOND TATALOVICH, NATIVISM REBORN? (1995); Yxta Maya Murray, The Latino American Crisis of Citizenship, 31 U.C. DAVIS L. REV. 503 (1998); Christine M. Rodriguez, Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States, 36 HARV. C.R.-C.L. L. REV. 133 (2001). Also consider the Voting Rights Act of 1975, 42 U.S.C. § 1973(b) (2004) (requiring that bi- or multi-lingual ballots be provided in areas where there is a large population of foreign language speakers).}

Lawyers can engage in a significant amount of non-litigation work that still is very much legal in nature. The “transactional” services that lawyers can perform may be vital for an immigrant movement’s continued existence. Ann Southworth has discussed how lawyers can be involved in “implement[ing] plans by identifying sources of capital, analyzing regulatory schemes, negotiating on the client’s behalf, structuring relationships, drafting agreements, and navigating procedural and political obstacles.”\footnote{182}{See Southworth, supra note 144, at 223.} Lawyers also can help constituents file what are often confusing immigration forms and translate into plain English the many detailed-ridden immigration statutes affecting non-citizens.

Effective transactional legal entrepreneurship can be useful in other settings. Take, for example, a group of permanent residents interested in establishing a non-profit business in order to assist arriving non-citizens to this country. The group could well need lawyers who, among other things, can write-up the necessary contracts, file for tax-exempt status, obtain the proper liability insurance, and provide advice on how to run the business efficiently.\footnote{183}{See id. at 225-30.} These legal experts can also be helpful in dealing with local citizen groups, government officials, and other business associations in the
Moreover, one can envision situations arising where members of the immigrant community may not want to involve themselves directly in a potential conflict that may harm their image or reputation among the general population. In these situations, their preference might be to have someone represent their interests and negotiate on their behalf. Here, the lawyer can step into the role of a loyal advocate, sensitive to the pressures that her clients face. By serving as a transactional representative, the lawyer can fulfill a social and political function within the wider community.

And it is this last point that needs reiteration. As we have discussed, the fact is many lawyers are successful in championing a movement’s cause, because they coordinate traditional legal strategies with other political and social tactics. Recent reports on the wave of Haitian demonstrations in Miami over perceived biases in U.S. immigration policies suggest that the leaders from this community—again many of whom are lawyers—have sought to augment their pursuit of litigation with more grassroots tactics. Although they have been doing so for a much longer period of time, Cuban-Americans in Miami also have been employing legal and non-legal strategies together in a systematic manner in order to raise their political, economic, and legal status. Because effective legal mobilization relies on a combination of legal and political strategies, lawyers can speak to a wider audience when representing an emerging immigrant community that may be seeking to build coalition partners in the future.

The multi-faceted work lawyers perform also can be contagious. Other, not yet well-organized communities may draw inspiration from activities they see being conducted. Historical accounts of the 1960’s civil rights movement show how the work of legal advocates in the south partly helped to spawn political action in northern cities, such as in Detroit, Milwaukee, and Cleveland. More recently, consider the tactics used by

---

184 Id.
185 Id. at 224.
188 See McCann & Silverstein, supra note 6, at 272.
legal advocates of the Caribbean community in New York City. As a way of protesting the City Police Department’s shooting of immigrant Amadou Diallo and torturing of immigrant Abner Louima, lawyers employed both grassroots demonstrations and litigation that resulted in spurring political action not just in New York but also in cities throughout the country.\textsuperscript{190} Although assessing the precise impact of this influence needs empirical verification, it appears that the actions of these activists in Manhattan emboldened leaders in other communities to speak out. Because the New York entrepreneurs operationalized their tactical portfolio in a multi-dimensional manner, they seem to have served as inspiration for movements that had not yet materialized. To quote Michael McCann and Helen Silverstein:

When legal action is combined with other strategies, there is little reason to believe that . . . lawyers contribute to the fragmentation of social movements. [Those] who approach legal action in a strategic and politically savvy fashion often can significantly reduce the atomizing character of formal legal action . . . [When these individuals] come to view themselves more broadly as movement activists, this too can diminish the tendencies towards particularistic, internally divisive or disaggregating action.\textsuperscript{191}

Finally, lawyers can be useful to permanent resident communities because they know how to challenge the existing legal system, discursively.\textsuperscript{192} Those who criticize the idea of having lawyers as leaders of social movements tend to believe that such elites are too susceptible of falling under the spell of the current legal order.\textsuperscript{193} These critics worry that legal advocates become caught up in the discourse and ideology of the prevailing legal system and thereby have no ability or desire to contest the governing norms.\textsuperscript{194} As a result, an emerging social movement, such as one that is immigrant-based, may be unable to make substantive legal and political changes if their leaders lack the wherewithal to stand up against those rules with which they are most familiar and comfortable.

Yet, it is exactly because lawyers are familiar with the prevailing order that they are best able to challenge the status quo. Because lawyers know how the system operates, they also know how to speak the language of those working within the system. They thus can identify both the strengths


\textsuperscript{191} McCann & Silverstein, supra note 6, at 272.

\textsuperscript{192} \textit{Id.} at 273. \textit{See also Patricia Ewick & Susan Silbey, The Commonplace of Law} (1998).

\textsuperscript{193} For a discussion of scholars who make these critiques, see supra Section IV.A.

\textsuperscript{194} \textit{Id.}
and weaknesses within the judicial process. Lawyers can have the benefit of being "insiders," and consequently they can (and do) effectively challenge the present legal order from within the system. They can craft creative legal arguments and manipulate the existing legal framework to promote the causes that they represent.

Highlighting this point is the work, once again, of Susan Coutin. Coutin describes how immigration lawyers, in their meetings with non-citizen communities, would chastise the U.S. legal system and the immigration judges as "biased" and lacking "impartiality." These immigration lawyers characterized the INS as being primarily concerned with disposing of cases in as quick a fashion as possible. The lawyers would repeatedly claim that it is easier for the government to presume that the non-citizen should be deported, than to find exceptions within the law that might allow him or her to stay. Because of who they were and the credentials they held, these immigration lawyers had a presumed air of legitimacy. When they would cast the immigrants' battle with the legal system in terms of a "war" that would require the immigrant to do whatever it took to win, the advice from these advocates would be taken as gospel. The immigrants keenly listened as their lawyers recommended that during any INS proceeding, applicants would be best served if they could convince the government that they spoke English, dressed "American," celebrated U.S. holidays, valued American education, participated in traditional "American" social organizations, and overall, belonged within mainstream American culture. Thus, rather than reifying the status quo, these immigration lawyers used their expertise and intimate knowledge of the system to articulate to their constituents how best to help their own cause.

198 Coutin, supra note 165, at 129.
199 Id. at 131.
200 Id.
201 Id. at 130. For a classic account that made a similar point many years back, see Stephen Wexler, Practicing Law for Poor People, 79 Yale L.J. 1049 (1970).
202 Id. For a different, albeit related, account, see Paul R. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 Hastings L.J. 947 (1992).
203 Id. at 131. See also McCann, Rights, supra note 6; McCann & Silverstein, supra note 6, at 274; Martha Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 Univ. Pitts. L. Rev. 723 (1991); Stephen Wizner, Homelessness: Advocacy and Social Policy, 45 Univ. of Miami L. Rev. 387 (1990-91).
Of course, the use of discourse for the limited, instrumental purposes described by Coutin may not seem all that surprising; lawyers regularly advise clients how to behave depending upon the given context. But as she and different scholars contend, employing discourse can be done for other reasons as well. For example, Michael McCann describes how lawyers often through the use of legal discourse and rights-talk help crystallize a group of people’s aspirations. Whether they draw on precise rights-based language located in statutes or in court decisions, or whether they point to the more abstract notions of justice itself, lawyers can espouse important virtues that in turn motivate people to pursue particular political goals or legal ideals. The language used by lawyers can guide the trajectory of a people’s ambitions and affect how, and to what degree, political mobilization occurs. Stuart Scheingold has written as well that lawyers have the ability to use the law to help redistribute power in society. According to Scheingold, the most effective movement lawyers are those who do not become caught up in the “myth of rights.” These individuals realize that a right provided by the legislature or judiciary does not automatically result in the realization of that right. Needed as well are leaders skilled in the politicization of rights. “Have-nots,” under the proper leadership, may be motivated to seize upon a right and employ strategies to ensure that it becomes a reality. The movement lawyer is thus important because she can galvanize constituents to participate in politics, and because she can rec-

204 MCCANN, RIGHTS, supra note 6; McCann & Silverstein, supra note 6. Also, Bert Kritzer’s work on the different types of activities in which lawyers engage is especially relevant. See, e.g., HERBERT M. KRITZER, THE JUSTICE BROKER (1991); Herbert M. Kritzer & Jayanth K. Krishnan, Lawyers Seeking Clients: Clients Seeking Lawyers, 21 J.L. & POL’Y 347-75 (1999); Herbert M. Kritzer, Propensity to Sue in England and the United States: Blaming and Claiming in Tort Cases, 18 J.L. SOC’Y 400 (1991); Herbert M. Kritzer, Fee Arrangements and Fee Shifting, 47 LAW & CONTEMP. PROBS. 125 (1984); Herbert M. Kritzer, The Fracturing Legal Profession: The Case of Plaintiffs’ Personal Injury Lawyers INT’L. J. LEGAL PROF. (forthcoming 2004).


206 For an overview and subsequent critique of this point, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991), who, in fact, has chided those movements that have leaders that focus on “rights-talk.” In her view, such language limits (rather than expands) the possibilities for members within these groups. Id. Unfortunately, Glendon’s evidence for this assertion is weak. As the literature I draw on in this section and the next will illustrate, she glosses over the fact that legal entrepreneurs can be multi-dimensional.

207 SCHEINGOLD, supra note 9, at 151-203.

208 Id. at 13-82.

209 Id.


211 SCHEINGOLD, supra note 9, at 83-150.

212 See, e.g., Richard Abel, Speaking Law to Power: Occasions for Cause Lawyering, in CAUSE
ognize that rights on paper, at best, serve only as a catalyst for mobilizing communities that need to have their voices heard.

In sum, it is probably true that permanent residents will not be receiving the right to vote anytime soon. Obviously if this remains the case, there will be little opportunity for lawyers to work on bringing permanent residents to the ballot box. But even if permanent residents never gain the right to vote, the fact is that lawyers can still play a vital role in mobilizing these immigrants. Through their use and knowledge of rights discourse, lawyers can inspire, educate, and publicize the causes of permanent residents to society at large. And lawyers can also be involved in various non-litigation oriented strategies, including formal political lobbying, coalition-building, transactional work, and grassroots tactics. Therefore, contrary to how detractors often characterize them, lawyers can be very useful in whether permanent resident communities are politicized.

IV. PUBLIC POLICIES IMPACTING LAWYERS WORKING ON BEHALF IMMIGRANTS—CONCLUDING REMARKS

The above discussion on the role of lawyers working with permanent resident communities has been two-fold. I first presented the many ways in which lawyers might be able to assist permanent residents, were these immigrants given the right to vote. Assuming, however, full suffrage rights—equivalent to those held by citizens—were not granted, I then suggested that lawyers could still have an important impact on politically mobilizing these non-enfranchised individuals. Yet, the one question that remains is, under what conditions would lawyers even be inclined to engage in such public interest service on behalf of immigrant communities? What role, if any, has the government played in encouraging lawyers to devote their time and energy to helping these non-citizens?

In his passionate essay describing the recent "assault on progressive public interest lawyers," Professor David Luban argues that the federal government and the courts have engaged in "a disturbing pattern of legal attacks on public-interest lawyers . . . , targeting every one of the principal sources of support for progressive public-interest law: the Legal Services Corporation ("LSC"), state Interest on Lawyers Trust Account ("IOLTA")

---

programs, law school clinics, and civil rights attorneys' fees."

In terms of the LSC, this entity emerged in 1974 after Congress passed the Legal Services Corporations Act. The mission of the LSC has been "to promote equal access to the system of justice and improve opportunities for low-income people throughout the United States by making grants for the provision of high-quality civil legal assistance to those who would be otherwise unable to afford legal counsel."

In order to accomplish this goal, the LSC-grants are awarded "to independent local programs selected through a system of competition. In 2002, LSC funded 179 local programs," totaling $310,000,000.

Yet, for lawyers who have wanted to use their diverse skills to assist immigrants, the LSC has restricted much of what they can do. For example, because LSC guidelines prohibit class action lawsuits, an LSC-funded lawyer cannot represent immigrants who might wish jointly to bring a cause of action in court. Moreover, since LSC-funded lawyers are barred from representing individuals in criminal matters, this precludes them from defending immigrants who, in this post 9-11 era, are more open than ever to arbitrary prosecution. Furthermore, in 1996, Congress added a new set of amendments to the Act which now prohibits LSC recipients from engaging in "rulemaking, lobbying... and [even specifically the] representation of certain categories of aliens" (itals added). Professor Luban notes:

---

214 Id. at 209-10.
217 What is LSC?, Legal Services Corporation website, at http://www.lsc.gov/welcome/wel_who.htm (last visited Apr. 18, 2004) [hereinafter What is LSC?].
218 LSC BUDGET: FY02 APPROPRIATION, at http://www.lsc.gov/pressr/pr_02a.htm (last visited Apr. 18, 2004). Although encouraging lawyers to provide legal services to the needy has been long promoted in the United States, the immediate federal predecessor to the LSC was the Legal Services Program, created within the Office of Economic Opportunity in 1966 as part of President Lyndon Johnson's War on Poverty. Members of Congress who opposed the Legal Services Program sought its elimination almost immediately, but supporters, with the help of President Nixon, staved off these efforts in a compromise that established the politically independent LSC in 1974. For a brief history of legal services in the U.S., see MidPenn Legal Services, at http://midpenn.org/aboutus.html (last visited Apr. 18, 2004). See also SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES (1999).
220 § 2996e(d)(5); also see Luban, supra note 213, at 221 (noting that under the Legal Services Corporations Act, recipients of LSC money also may not litigate cases involving abortion, secondary school desegregation, and most military matters). For an important discussion on the potential pitfalls of class action suits, see Deborah Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982).
221 See What is LSC?, supra note 217. See also Luban, supra note 213, at 221.
222 The primary category of aliens referred to here is undocumented workers. See What is LSC?, supra note 217. See also Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996...
Perhaps the most devastating regulation, however, is Congress's prohibition on LSC recipients using their nonfederal funds for these prohibited activities. This requirement had a drastic effect. A legal-aid office could no longer accept an LSC grant if it did any prohibited legal work. This provision forced legal-services providers to split into separate organizations with separate offices, one receiving federal funds and abiding by the restrictions, the other maintaining its freedom of action at the cost of its LSC grant. LSC enacted "program integrity" regulations to implement this restriction by ensuring that the two offspring organizations maintained physical and financial separation. The result was bifurcated organizations substantially weaker than the initial organization. Some organizations had to purchase duplicate computer systems and hire duplicate staff. Some locales could afford only a restricted office, so that clients with the "wrong" cases were forced to travel hundreds of miles to find counsel or, more realistically, do without.\footnote{Luban, supra note 213, at 221.}

In my home state of Minnesota, one needs only to examine the two main legal aid offices to see how immigrant representation has been affected by the bifurcation to which Luban refers. The Central Minnesota Legal Services ("CMLS") office receives all of its funding from the LSC.\footnote{See Funding Sources, Central Minnesota Legal Services (CMLS), at http://www.centralmnlegal.org (last visited Apr. 18, 2004).} Its work is restricted to legal initiatives involving family law, housing, government services, and consumer law.\footnote{Id.} As its website indicates, CMLS' tactics are narrowly tailored to assist "eligible clients through direct repre-

sentation, brief advice, and through participating in community legal education programs."\textsuperscript{226}

In contrast, the Mid-Minnesota Legal Assistance ("MMLA") office does not receive any money from LSC. MMLA's resources, which are considered more extensive than other non-LSC offices, come from different local, state, and federal agencies, private donors, and independent foundations.\textsuperscript{227} MMLA is not restricted by LSC guidelines in how it seeks to accomplish its mission. In addition to legal representation, the group engages in a range of community building activities and educational awareness programs.\textsuperscript{228} MMLA also has occasionally assisted immigrants; for example a few years back the group brokered an agreement with the state Department of Human Services that guaranteed better access to social welfare programs for individuals with limited English skills.\textsuperscript{229} But while the MMLA lawyers have worked on immigration cases, they devote particular attention to what are called "special projects" (e.g., projects involving disability law, elder law, housing law, and agricultural law); immigration law does not fall under this category.\textsuperscript{230} There are no doubt valid reasons for this exclusion; donor wishes, lawyer expertise, client demand, and the like may explain why immigration law is not as emphasized as much as other areas of the law. Yet one does wonder whether this bifurcated LSC-system invariably strips certain people (such as non-citizens) of the opportunity to have their important needs met.

Professor Luban identifies other political and legal factors impeding the development of public interest lawyering. For example, interest on lawyers trust account programs (IOLTA), which are state plans that were set up after 1980 to help fund low-income legal services, have recently come under attack.\textsuperscript{231} Although by a 5-4 vote the Supreme Court recently in Brown

\textsuperscript{226} Id.

\textsuperscript{227} See Mid-Minnesota Legal Assistance (MMLA), at http://www.midmnlegal.org (last visited Apr. 18, 2004).

\textsuperscript{228} Id.


\textsuperscript{230} For a list and discussion of these special projects, see MMLA's website at http://www.midmnlegal.org.

\textsuperscript{231} As Luban explains, under the Restatement as well as under the Model Code of Professional Responsibility, lawyers are ordered to keep funds that they hold for clients in a separate trust account. Luban, \textit{supra} note 213, at 226-27. Significant amounts of money held for a longer duration are placed in interest-bearing accounts; smaller amounts of money or those held for shorter periods are placed in demand accounts. \textit{Id.} Clients are entitled to the interest earned on these funds (particularly with respect to the interest-bearing accounts), but in certain cases, the administrative costs associated with transferring the interest back to the client are more than the interest itself (as in with demand accounts). \textit{Id.} at 227. Recognizing this, states enacted programs after 1980, when the federal banking laws changed, that
v. Legal Foundation of Washington upheld the constitutionality of IOLTA programs, given the closeness of the vote and a 1998 Court ruling that put the IOLTA scheme in jeopardy, some observers still remain cautious about how long the program will remain intact. Also, clinical legal programs at several state law schools throughout the country, which often represent immigrants, have unfortunately been the victims of budget cuts and recent regulations limiting who can work within these centers. And, over the past two decades the Supreme Court has reduced the opportunities for public interest lawyers to collect attorneys’ fees in cases where federal statutes would seem to authorize such payments from defeated parties. All of these institutional obstacles have impaired lawyers from emerging as effective leaders within various needing communities. Of course, not all immigrants are incapable of affording legal services—but there are those who do struggle economically. If financially disadvantaged immigrants, in particular, wish to reap the benefits of having lawyers assist them with their causes, strategies must be developed to overturn these institutional roadblocks.

would use the interest from demand accounts (interest that would not anyway go back to the client) to fund legal services for the poor. Id. Luban reports that in 2001, these IOLTA programs generated $125 million dollars. Id. But opponents to IOLTA charge that this is an unconstitutional taking on the part of the state, and that because nearly half of the states in the country require lawyers to participate in an IOLTA program, the states are forcing lawyers to engage in coercive speech. Id. at 234.

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). The 1998 ruling by the Court held that clients who have funds in these demand accounts (see previous footnote) are entitled to this interest. See Phillips v. Wash. Legal Found., 524 U.S. 156 (1998). For a discussion of this point, see Luban, supra note 213, at 228.

See Luban, supra note 213, at 236-40. For another interesting account of the role social action litigation can play within the law school environment, see ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (1989).


For an important work discussing possible ways to maintain public interest lawyering on behalf
In the post 9-11 era, immigrant rights have taken a serious hit from politicians, judges, and law enforcement officials. Given that the political climate is unlikely to change anytime in the near future, the proposal made years ago that lawful permanent residents should have a voice in the electoral process has regained momentum among many immigrant-rights activists. I, too, believe that enfranchising this group is long overdue. However, as part of a community that is striving to protect the interests of what John Hart Ely has called one of our nation's most disempowered class of individuals, I have also suggested that it is equally important for lawyers to work at the grassroots level on behalf of immigrants to ensure that true political, legal, and socio-economic change is made. Until such bottom-up mobilization emerges on a wider scale, those of us interested in this issue should hold our breath hoping that more abuses against immigrants do not materialize.


236 See JOHN HART ELY, DEMOCRACY AND DISTRUST 149-62 (1980).