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"Hurricane Katrina: Lessons about Immigrants in the Modern Administrative State"  
UC Davis Legal Studies Research Paper No. 115

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ABSTRACT: This paper will be presented as the Twelfth Annual Frankel lecture at the Houston University law center in November 2007 and will be published in the *Houston Law Review*.

In August 2005, Hurricane Katrina crippled the Gulf Coast. National and international television networks televised the widespread destruction virtually non-stop for days. Many observers identified failures by all levels of government, beginning with the failure to take adequate steps to prevent the flooding to the painfully slow reconstruction of the gulf region.

In the aftermath of Hurricane Katrina, race soon emerged at the center of a heated—and often over-heated—controversy. African Americans comprised a substantial number of the flood victims seen on television screens around the world. As the federal government slowly responded and nothing less than anarchy reigned on the streets of New Orleans, critics forcefully contended that the race of many of the victims contributed to the slowness and ineptitude of the response. Rap star Kanye West put it most bluntly: George Bush doesn't care about black people, a position with which nearly three-quarters of African Americans polled in September 2005 agreed. Evidently feeling it necessary to squarely address the charge, President Bush vigorously denied that the race of the victims in any way influenced the federal government's emergency response to the devastation wrought by the hurricane.

Another group—an often invisible group—suffered in the wake of Hurricane Katrina. Immigrants, including many from Latin America, were the silent victims of the deadly hurricane. Thousands of immigrants were displaced by Hurricane Katrina. However, most reports, while critical of the governmental response to the hurricane, failed to even mention, much less criticize, the widespread indifference to the plight of the many noncitizens displaced by the mass disaster.

The general public did not look sympathetically upon immigrants. Government's failure to provide relief failed to generate much of a public response, much less trigger any general expression of outrage. The denial of disaster relief to noncitizens, as well as aggressive enforcement of the immigration laws in the wake of the hurricane, was consistent with the times, which were filled with calls for increased immigration enforcement and the popular perception that immigrants—especially undocumented ones—constituted a serious social problem that must be addressed.

As the rebuilding of the Gulf Coast began, immigrant workers responded. Workers were in short supply; as efforts to return to some semblance of normalcy began, many businesses were hard-pressed to field a workforce. Rather than applaud the assistance of noncitizens in the resettlement and rebuilding efforts, politicians and the public expressed fear and apprehension about the possibility that new immigrants transform the racial identity of New Orleans as well as hurt the job prospects of U.S.—especially African American—citizens. Unlike others willing to help, immigrants were criticized and feared, not welcomed and lauded.

Indeed, local citizens and public officials demanded action to halt immigrants from taking American jobs and changing the racial identity of a major southern city. The African American mayor of New Orleans expressed fear about the city being overrun by Mexican workers. He later stated that it was nothing less than God's will for New Orleans to be a chocolate—not a Mexican

—city, presumably expressing the hope that it would be reconstructed as the African American enclave that it had been. In the public discussion of the impact of Hurricane Katrina on New Orleans, race was considered central to the city's past and future identity.

Although a fascinating story in and of itself, the plight of immigrants in the Hurricane Katrina disaster teaches deeper lessons about society's views of immigration and immigrants in the modern United States. First, despite their many contributions to U.S. society, immigrants generally, as a historical matter, have been deemed unworthy of public benefits whatever their personal circumstances. Welfare assumes an even worse name for immigrants than it does for citizens. The failure of government to provide relief to immigrants after Hurricane Katrina thus fits comfortably into a deep and enduring American tradition.

Second, immigrants—especially undocumented ones—who seek gainful employment in the United States often are characterized as economic parasites who take jobs from U.S. citizens. Throughout its history, this nation at various times has narrowed the immigration laws, ratcheted up border enforcement, and engaged in mass deportation campaigns, based on the unproven claim that immigrants from displacing American workers, which is a special concern in poor economic times. Time and time again, commentators and activists have contended that immigrant labor adversely affects African Americans in the job market.

Public opinion in the United States poses a most unfair Catch 22 to undocumented immigrants, who are characterized as both abusers of public benefit programs and as job takers who hurt U.S. citizens. Put simply, they either do not work and consume welfare or work and steal jobs. Much of this, of course, is old news to the most casual student of this nation's immigration history. However, even though a plethora of scholarship exists on the problems that riddle the immigration bureaucracy, there has been precious little analysis of the theoretical underpinnings of the regulation of immigration by administrative agencies. This is surprising given the great power, including the authority to remove noncitizens from the country, which such agencies possess over the lives and destinies of immigrants. Rather, immigration law, although administered and enforced through a complex and powerful administrative bureaucracy, is considered to be a specialty area outside the mainstream of administrative law.

A problem that has arisen in the U.S. government's response to immigrants in the Hurricane Katrina disaster is symptomatic of a more general failure of American democracy—the lack of political accountability of the immigration bureaucracy to all persons affected by its actions. This Article critically considers the reasons for the lack of responsiveness of that bureaucracy to the needs of immigrant communities and analyzes a glaring political process defect. By so doing, I hope to encourage a sustained examination of the issue, which deeply afflicts the administration and enforcement of the U.S. immigration laws, a complex regulatory body of law filled with vast delegations of discretion to the bureaucracy.

Most generally, the frequent failure of the agencies that administer the immigration laws to fully consider the impacts of laws and regulations on noncitizens suggests a fundamental flaw in the conventional rationale for deference to administrative agencies. The Supreme Court, in perhaps the leading administrative law decision of the post-World War II period, *Chevron USA v. Natural Resources Defense Council, Inc.*, has emphasized that reviewing courts ordinarily should

defer to the interpretations of statutes by administrative agencies because the Executive Branch, through election of the President, is politically accountable to the voters and that decisions properly delegated to agencies are necessarily political ones. The administration of the immigration laws thus poses a fundamental problem for the democratic rationale for deference: if we entrust agencies with making and enforcing the laws because of their political accountability, what should we do if a specific agency is only accountable to part of the people affected, directly or indirectly, by its decisions?

Both lawful and undocumented immigrants, barred from having any formal political input — namely, the vote — into the administrative state, are frequently injured by decisions of the bureaucracy. Citizens, whose interests often diverge from those of noncitizens, are indirectly affected by the decisions of the immigration bureaucracy but, whatever its limitations, have a full voice in the national political system through election of the President. Some citizens, of course, have family members and friends affected by immigration law and its enforcement and may advocate politically for pro-immigrant laws and policies. Still, immigrants lack the political capital of the ordinary citizen constituency of an administrative agency.

The lack of balance in political input between the affected communities can be expected to result in agency rulings and decisions on immigration matters that fail to fully consider the interests of immigrants. This fact helps explain why, especially in times of social stress, the rights of immigrants have been marginalized by the immigration agencies, as well as by Congress, throughout U.S. history. The politically powerful dominate, while the weak—noncitizens—have their interests under-valued and often suffer punishment.

Part I of this Article summarizes the context surrounding the Hurricane Katrina disaster and how the stage was set for a racially-charged debate over the government's actions in response to the disaster as well as the mistreatment of immigrants. Part II critically analyzes how government harshly treated immigrants in the aftermath of Hurricane Katrina and how political failure within administrative agencies contributed to this treatment, just as it has throughout U.S. history. This structural flaw further helps explain why we know so little about the silent suffering of immigrants in the wake of Hurricane Katrina and, more generally, in American social life. It also suggests deep problems with the lack of political accountability of the immigration bureaucracy to noncitizens.

As it turns out, Hurricane Katrina is symptomatic of a more general problem in the governance of the United States. A shadow population of millions of undocumented immigrants who are abused and exploited, live in the United States and lack any formal input into the political process. They, along with many lawful immigrants, hold second class status in U.S. social life and, more specifically, are part of a low wage caste of color. Although more diluted than the old racial caste in place in the days of Jim Crow, it is a racial caste no less, marked by a subordinated status and subject to exploitation. To make matters worse, the democratic problem identified in this article is not limited to the immigration bureaucracy, but is a more general problem of U.S. government.

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"California Tax Collection: Time for Reform"  
*Santa Clara Law Review*, Vol. 48, 2007  
UC Davis Legal Studies Research Paper No. 116

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ABSTRACT: California's tax collection system has been characterized in at least one legislative study as duplicative, a financial waste, a diffusion of activities and responsibilities, and as a hodgepodge of boards, and elective and appointed officials not truly responsive to the Governor. The current structure evolved from mechanisms created in the State Constitution of 1879 in order to equalize property taxes among competing mining and grazing counties in the state. While both the California economy and the sophistication of its revenue laws has grown, the state remains saddled with an antiquated tax collection system supervised in large part by an elected board with no particular experience with tax matters. The problem of fair taxation is exacerbated by the tax adjudication system through the elected Board of Equalization which seldom publishes its opinions, which can be influenced by ex-parte communication with potential political supporters appearing before it in tax disputes, and which is susceptible to changing its holdings as a result of periodic changes in membership. The absence of reliable interpretative guidance to the application of California's tax law is disruptive to business investment in the State.

This article explores the historic evolution of the California tax collection system. The article examines numerous legislative studies and governmental commission reports recommending restructuring the California tax administration. The article also explores in depth the California tax adjudication process to recommend creation of a California Tax Court under the model of the United States Tax Court.

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"Cultural Dissent"  
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UC Davis Legal Studies Research Paper No. 113

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ABSTRACT: Gay Scoutmasters contest what it means to be a Boy Scout. Female Pueblo Indians denounce tribal rules as sexist. Muslim women reinterpret the Koran and emphasize women's right to religion and equality. In the twenty-first century, exposure to modernity and globalization has created a society that now more than ever is characterized by cultural dissent: challenges by individuals within a culture to modernize, or broaden, the traditional terms of cultural membership. Cultural dissent symbolizes a movement away from imposed cultural identities to a new age of autonomy, choice and reason within culture. But current law, stuck in a nineteenth-century view of culture as imposed, distinct, and homogeneous elides cultural dissent. Under current law, cultural dissenters have either a right to culture (with no right to contest cultural meaning) or to equality (with no right to cultural membership), but not to both. Through a close reading of *Boy Scouts of America v. Dale*, Professor Sunder illustrates how, in the name of preserving cultural distinctiveness, freedom of association law authorizes the exclusion of those whose speech challenges cultural norms. Law's conception of culture matters. As cultures become more internally diverse and members appeal to courts to determine a culture's meaning, increasingly, it will be law, not culture, that regulates cultural borders. Law's outmoded view of culture leads it to reestablish traditional cultural boundaries, in some cases making them stronger than ever. This need not be the case.

Professor Sunder describes how a cultural dissent approach to cultural conflict - which recognizes dissent within culture - would prevent law from becoming complicit in the backlash project of suppressing internal cultural reform.

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