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Juridical Framings of Immigrants in the United States and France: Courts, Social Movements, and Symbolic Politics

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This paper reexamines the engagement of U.S. and French courts with immigration politics, aiming to provide a fuller accounting of how law and immigration politics shape one another. Jurisprudential principles are placed in national and historical context, elucidating the role of rights-oriented legal networks in formulating these arguments during the 1970s and early 1980s. The analysis traces how these judicial constructions of immigrants subsequently contributed to catalyzing a transformation of immigration politics in both countries. Immigrant rights jurisprudence is shown to be produced by, as well as productive of, broader political values, agendas, and identities.

For scholars of immigration politics, the fact that sovereign democratic states do not enact, let alone implement, policies of complete border closure has seemed to fly in the face of public opinion surveys favoring more restrictive policies. Explanations for this puzzle frequently identify the courts as culprits for this overturning of politically popular policies.[i] Although scholars vary in how they use the term "judicialization" to apply to immigration policy (Soennecken, 2008), there is nevertheless a general acknowledgement that courts over the past several decades have made important contributions to the politics of immigration, although the normative sources of this judicial contribution remain the subject of discussion.

Debate has centered on whether domestic or international political dynamics were more important in propelling the judicial expansions of non-citizen rights. Globalization and international human rights theorists assert international politics to be of primary importance (Hollifield, 1992; Jacobson, 1996; Sassen, 1996; Dauvergne, 2008), while comparativists situate the emergence of counter-majoritarian immigration jurisprudence within the domestic political dynamics of each state (Guiraudon, 2000; Joppke, 2001; Togman, 2001). A somewhat overlapping debate has concerned whether judiciaries are characterized by an institutionally-specific liberal logic, the position taken by Guiraudon, or whether the judiciary is best understood as embedded within a broader normative regime of liberalism or neo-liberalism (Hollifield, 2004; Sassen, 2006; Boswell, 2007). Yet, despite their differences, both international convergence scholars and comparative institutionalists cast the "liberal" activism of the courts in opposition to an a priori ideal of "nationhood" whose accomplishment the courts are seen to obstruct. Law and society in these accounts are thus both portrayed as discrete and analytically separate.

A *constitutive* conception of law (Hunt, 1985; Harrington and Yngvesson, 1990; Brigham, 1996) allows us to better appreciate the full scope of judicial engagement with immigration policy, particularly the reciprocal relations between immigrant rights and the politics of immigration. Drawing on post-structuralist theories of the role of language in constituting social relations, this approach conceptualizes observable legal practices – norms, principles, and conventions – as embodying ideology. However, rather than being epiphenomenal to global economic structures or reducible to a timeless institutional feature of the judiciary, legal regimes are understood as produced, reproduced, and

transformed by jurists operating within specific historical contexts. Moreover, insofar as they come to be institutionalized and internalized, legal forms play a constitutive role in politics, defining political identities and crystallizing political agendas. In other words, law - within this framework - holds the potential not simply to block policies from being enacted but to discursively restructure political debate.

Drawing on this interpretive approach, my analysis reexamines the engagement of American and French courts with immigration politics, aiming to provide a fuller accounting of how law and immigration politics shape one another. Part I presents two case studies to illustrate the nationally-distinct formulations of rights-bearing immigrants developed by American and French judges. Part II traces how this immigrant rights jurisprudence was built upon arguments developed by legal networks with close ties to liberal/left political currents. Part III shows how judicial constructions of immigrants as rights-bearing legal subjects have contributed to catalyzing a transformation of immigration politics in both of these countries. Immigrant rights jurisprudence is shown to be produced by, as well as productive of, broader political values, agendas, and identities. The analysis thus elucidates the reciprocal relations between law and society that characterize the contemporary politics of immigration.

THEORIZING THE LEGAL DIMENSION OF IMMIGRATION POLITICS

Empirical investigations into judicial engagement with immigration issues have grappled with two separate but related questions. The first question concerns how best to characterize and explain the normative motivations for judicial enunciations of rights. The second concerns the extent to which these rights-oriented judicial decisions are seen to have an impact on the wider politics of immigration. In what follows, I briefly outline the scope of recent contributions to scholarship in this area.

The emergence of a contemporary immigrant rights jurisprudence is viewed by constructivist international relations scholars as a manifestation of an international regime of "embedded liberalism" (Hollifield, 1992; Gomes, 2000; Hollifield, 2004), formal conventions and informal codes that commit states to upholding liberal values. Liberal hegemonic states find it difficult to derogate from this international order, in part because this would call into question their ability to export their system internationally. States are thus torn between their restrictive proclivities and their normative commitments to liberal values, which include not only free trade but also respect for individual rights. When courts issue decisions that protect the rights of non-citizens, they are simply acting out their part in this post-war system of embedded liberalism.

Critical sociologists and legal scholars have offered an alternate account of the link between judicialization and globalization in the context of immigration. For Saskia Sassen, globalization has loosened the "national grip" on citizens' rights, and in this new global economic structure foreign economic actors are constructed as rights-bearing persons and human rights get incorporated into national law (Sassen, 1996). Similarly, David Jacobson asserts, primarily on the basis of jurisprudence developed by the European Court of Human Rights, that continued high levels of international migration necessitate an accommodating jurisprudential response, which he argues will be

grounded in international human rights principles rather than in domestic constitutional norms (Jacobson, 1996). With relatively greater circumspection, Catherine Dauvergne locates judicial recognition of "a space for marginal migrants within the law" as an emergent phenomenon embedded within rule of law norms (as opposed to human rights norms) that are unhinged from the nation and produced by globalization's "legalization of everything everywhere" (Dauvergne, 2008: 182-183).

These internationalist accounts, although they represent very different disciplinary perspectives, are nevertheless similar in so far as they emphasize structurally-embedded global regimes while discounting the importance of national specificities and distinctions. According to these analyses, judicial decisions articulating rights for immigrants are reflections of economic, political, and ideological structures operating across national borders. Indeed, in Sassen and Hollifield's accounts immigrant rights jurisprudence is almost epiphenomenal to global structures and conditions and its independent contribution to the politics of immigration is minimal.

By contrast, legal scholar Peter Schuck explains the transformation of immigration law as shaped not only by structural changes operating at the international level but also by ideological developments within American law. Schuck describes the U.S. immigration system as operating in a state of crisis, with unprecedented levels of clandestine migration highlighting the contradictions inherent in traditional immigration law principles of absolute sovereign control. In a move that draws intellectual inspiration from the pragmatist tradition of sociological jurisprudence, Schuck suggests that because traditional immigration legal principles are out of sync with contemporary conditions, judges are altering their jurisprudence so as to restore legal coherence and legitimacy. In doing so, they draw upon the universal human rights aspects of liberal constitutionalism, ideas already manifested in other areas of private and public law (Schuck, 1984: 50).

Subsequent legal scholarship has tempered Schuck's early claims, suggesting that immigrant rights have been established in some areas of law but that U.S. courts remain unwilling to question federal authority when border control is implicated (Legomsky, 1987; Motomura, 2008). Commenting on developments within their own legal system, French legal scholars admit that important judicial decisions have expanded rights for immigrants but these scholars have generally viewed the glass more as half empty than half full (Lochak, 1985; Crepeau, 1990). Not surprisingly, when discussing the impact of court decisions, legal scholarship on both sides of the Atlantic has focused almost exclusively on the legal sphere,[ii] viewing the dynamics of judicial and legislative decision making as separate and distinct. A common assumption is that courts can "only marginally" affect broad policy choices, such as the appropriate utilization of border control resources, and that legislatures will independently address these difficult policy tradeoffs (Schuck, 1984: 85).

It is this distinction between courts and legislatures that comparativist political scientists have emphasized. Taking issue with internationalist explanations, these scholars have been keen to demonstrate that it was *domestic institutional changes*, as opposed to changes in the international system, that brought immigration under judicial oversight (Joppke, 1998; Guiraudon, 2000; Togman, 2001; Schain, 2008). They explain the judiciary's intervention in immigration policy matters as a result of both the "maturity" of rule of law principles (Joppke, 1998; Guiraudon, 2000) and changing political party dynamics (Schain, 2008). Driven by a mandate to ensure equal treatment

under the law, autonomous legal institutions have turned to the universalistic principles of constitutional texts and applied them to a range of policymaking domains, including immigration. In these accounts, it was not so much a new ideology that motivated immigrant rights as a shift in domestic institutional configurations that opened the way for courts to assert themselves.

Although some comparativist political scientists view judicial decisions as having minimal impact on immigration politics (Schain, 2008: 67), other comparativist scholars see immigrant rights court decisions as altering the overall dynamics of immigration policy making. Togman points out that court decisions curtailing administrative discretion have had the indirect effect of heightening the public and politicized nature of immigration policy making (Togman, 2001: 113). Similarly, Guiraudon contends that the threat of judicial sanction has ushered in a new policymaking dynamic whereby politicians, who had previously been able to formulate immigration policy without judicial interference, now test the limits of judicial willingness to uphold immigrant rights in a "game of cat-and-mouse" (Guiraudon, 2000: 205). And Joppke suggests that, particularly if they are made by courts with a strong tradition of autonomy,[iii] immigrant rights decisions may push political elites to reformulate their overall approach to immigrant communities (Joppke, 1998: 83-84). In these accounts, the potential power of the legal institutions lies in their institutional autonomy from politics.

We are thus left with a marked contrast between internationalist and comparative-institutionalist perspectives on how law and courts matter for immigration politics. Comparativist analyses describe an autonomous judiciary, operating independently of other political actors, whose unique institutional qualities allow it to exercise a liberalizing influence on immigration politics. By contrast, internationalist analyses characterize national laws as epiphenomenal to extra-national economic and political structures. Immigrant rights jurisprudence in these models simply manifests and reinforces a broader international regime.

An interpretive socio-legal analysis of immigration politics calls our attention to the discursive and symbolic dimensions of jurisprudential activity, which both comparativist and internationalist studies have tended to overlook. Rather than depicting legal norms and institutions either as operating autonomously from political dynamics or as merely replicating global economic forces and political calculations, an interpretive socio-legal approach conceptualizes law as produced, reproduced, and transformed by social struggles. Social movement conflict is understood to propel new legal claims, which may be transmuted into new forms of law through responsive judicial interpretation (Siegel, 2006). And actors located outside of official legal institutions can be seen to have in important role in shaping the meaning of the law by revising or reinventing forms of legal relationship (Harrington, 1994). Moreover, by formulating and legitimizing a particular vision of society, judicial enunciations of rights also have the potential to act as catalysts for wide-ranging political realignments (Brigham, 2009). Victories in court can be effective for movement building, both by providing norms around which a movement can define itself and organize its struggle, and by supplying a weapon that can push otherwise uncooperative foes into making concessions or compromises (McCann, 1994).

In short, we must look beyond case outcomes to explore the multiple ways in which legal ideas and legal language *constitute* and are *constituted by* broader social

forces. By translating their claims into law, interest groups and social movements seek to mobilize legal symbols of both substantive right and institutional authority. The potential power of judicial decisions enunciating rights for immigrants therefore extends well beyond their ability to constrain politicians with otherwise fixed preferences. Indeed, even in the absence of a definitive court victory enunciating new constitutional rights, legal mobilizations that successfully activate public moral sensibilities hold the potential to shape the type of immigration politics that are possible.

Guided by this framework emphasizing the co-constitutive relationship between law and immigration politics, we see that the extent to which judicial decisions replicate or transform political dynamics will be historically and contextually contingent and can only be assessed through careful empirical examination of specific case studies. The analysis in this paper therefore reexamines the place of legal ideas and institutions in two countries that have featured prominently in previous studies of the immigration politics, the U.S. and France. Both are important migrant destination countries. And, as discussed below, in both countries immigration politics and immigration jurisprudence have been shaped by rights-oriented mobilizations for greater administrative legality.

The analysis starts by providing a close reading of immigrant rights judicial decisions to which particular significance has been attributed, both by scholars and by those involved in the cases. By calling attention to national differences in immigrant rights jurisprudence, the comparison highlights something overlooked in studies generalizing across countries, namely legal professionals in different countries have constructed immigrant rights in substantially different ways. And by historicizing the development of immigrant rights jurisprudence, linking it to the evolving history of public interest reform movements in the U.S. and France, the comparison points to the shortcomings of models of inter-institutional dynamics that collapse this ongoing and reciprocal process of knowledge production.

PART I: COMPARING IMMIGRANT RIGHTS JURISPRUDENCE IN THE UNITED STATES AND FRANCE

This section offers a close reading of American and French immigrant rights juridical decisions in order to explore the ways in which the judges who authored these decisions framed their enunciations of rights. It focuses on the two most widely-discussed instances of the contemporary development of immigrant rights jurisprudence: the 1982 U.S. Supreme Court decision in *Plyler v Doe* and the 1978 *GISTI* decision of France's Conseil d'Etat. Scholars offering divergent theoretical perspectives on the politics of immigration have used these cases to illustrate their accounts of judicialization (Hollifield, 1992; Joppke, 1998; Gomes, 2000; Guiraudon, 2000; Sassen, 2006). In addition, the two cases feature among the list of litigation campaigns to which experts in each country's "immigrant rights community" attach particular significance or importance.[iv]

A discursive analysis of the *Plyler* and *GISTI* decisions suggests that immigrants in the U.S. and France find themselves in quite different places within the law. As discussed below, in both of these cases, rule of law principles take substantive forms that are striking in their contrast, indicating the importance of national variation in the

development of immigrant rights, a dimension of the phenomenon of judicialization that is often occluded in internationalist narratives. National differences in the conjuring of rights-bearing immigrants also call into question the institutionalist emphases of comparative scholars, which emphasize a timeless institutionally-contained logic of legality that is insufficient for explaining jurisprudential variation. Perhaps most importantly, the fact that the judges in these cases address themselves to contemporary immigration debates, going beyond the statutes at issue in each case, indicates the extent to which these courts eschewed purely textualist approaches to legal interpretation and instead considered broad principles when interpreting the law.

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

The U.S. Supreme Court's 1982 *Plyler* decision struck down a Texas statute denying state funding for the public education of undocumented migrant children. In 1975, Texas's State Legislature amended Section 2301 of its educational code so as to cease reimbursing local school districts for the costs of educating undocumented children in free public schools. The provision was challenged by immigrant supporters as a violation of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, and both the majority and dissenting justices grounded their arguments in an interpretation of this clause known as "Footnote Four Jurisprudence."[v] This doctrine, developed during the New Deal era, directs courts to strictly scrutinize legislation that 1) appears on its face violate Constitutional provisions protecting individual rights or 2) is directed against discrete and insular minorities who lack sufficient numbers or power to seek redress through the political process.

It is illuminating to read how Justice Brennan's majority opinion applies this legal test to the facts of the case. His decision begins by drawing upon the findings made in the initial *Plyler* trial by District Court Judge William Wayne Justice that without an education, undocumented children, "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices,…will become permanently locked into the lowest socio-economic class" (1982: 208). Migrants might regularize their immigration status, for example by marrying a legal resident, but they would remain members of Texas's disadvantaged Mexican minority (ibid). This contextualized reading interprets a Texas statute that ostensibly targets only undocumented aliens in light of Texas's longstanding Anglo-Latino caste system in which the educational needs of both legally-resident Mexican-Americans and unauthorized Mexican migrants are not being met.

Unlike the dissenting opinions, which frame the Texas law as a rational legislative response to the perceived costs of immigration, the majority emphasizes the law's discriminatory effects, holding that "depriving the children of any disfavored group of an education, [would] foreclose the means by which that group might raise the level of esteem in which it is held by the majority" (1982: 222). After alluding to the pivotal importance of education in sustaining "our political and cultural heritage" and "our democratic society," Brennan then quotes at length from the 1954 decision in *Brown v. Board of Education* supporting the Warren Court doctrine that "it [is] most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause" (ibid). Aliens, even

those whose presence in the country is unlawful, are people "in any ordinary sense of the term," and their non-citizen children have protection under the 14th Amendment from discriminatory education policies unless the government can show a substantial state interest in discriminating in this manner.[vi]

Moreover, the decision in *Plyler* is not confined to technical legal analysis. Brennan directly addresses the federal government's immigration policies, asserting that the combination of lax federal enforcement and Texas's statutory discrimination created a lethal combination that threatened to create a "permanent caste of undocumented resident aliens…an underclass that presents most difficult problems for a Nation that prides itself on principles of equality under law" (1982: 219). Thus, although the decision overturned a state statutory provision, the majority opinion was clearly directed towards federal policy discussions, citing approvingly a Presidential proposal to legalize a large proportion of undocumented immigrants, "who have become, in effect, members of the community" (1982: 219). Criticized by the dissenting justices for being based on policy outcome rather than on general principles, the opinion endorses a general amnesty for undocumented immigrants who are implicitly framed as a racially-excluded underclass. The *Plyler* decision thus conceptualizes immigrants as the most vulnerable members of a racialized minority, who should be allowed to take part in the American mosaic and who should be given the opportunity to compete on a level playing field with the children of other groups.

GISTI*, Conseil d'Etat, Assemblée, 8 December 1978, RL.1978.458*

The 1978 *GISTI* decision of France's Conseil d'Etat has likewise been offered up by immigration scholars and practitioners alike as an exemplar of immigrant rights jurisprudence. At issue in this case was a November 1977 administrative decree guaranteeing the right of immigrants with at least three years residence in France to bring their immediate family members to join them, but making family migration conditional upon the agreement of those seeking residence permits not to take up any employment. The decree was held to violate a provision in the Preamble to France's 1946 Constitution declaring that, "the nation will assure to each individual and to families the conditions necessary for their development." The justiciability of constitutional rights, including the right to family life, had first been enunciated by France's Constitutional Council in a decision seven years earlier, when the content of the Preamble of the Fifth Republic's 1958 Constitution was held to constitute a "bloc constitutionnel" that judges would henceforth apply (*Liberté d'Association*, Conseil Constitutionnel, 16 July 1971). Adding to the *GISTI* decision's significance is the fact that it was the first to put into practice this newly justiciable constitutional right to family life.

The Conseil d'Etat's official decision in the case is characteristically terse. However, in the published report of the Conseil d'Etat's designated legal advisor for the case, the "Commissaire du Gouvernement," which clarified the Conseil d'Etat's opinion and was widely read by commentators, it is possible to trace the reasoning by which the right to family life is applied to foreigners. The report of Commissaire Dondoux went out of its way to enunciate a substantive principle in the case, drawing upon Republican values to declare: "Our tradition is one of rights of man and not just of citizen and it proclaims principles that surpass our frontiers" (Dondoux, 1979: 17). It declared that

France's administrative policy of allowing immigrant workers to bring their families to join them, a policy that the 1977 decree ostensibly maintained, was not simply a matter of administrative discretion but rather a policy mandated by the Constitutional right to family life.

According to Dondoux, family regroupment – and the right to family life upon which it is grounded – implies "at the least a right to residence for all migrant families, whether or not they plan to enter the labor force" (Dondoux, 1979: 24). In other words, according to this Constitutional interpretation, if migrant families are not allowed to enter the labor force fulfill their material needs, their ability to enjoy their formal right to family life is compromised. The administration's formalistic argument that the 1977 decree preventing family members from working did not altogether prohibit family regroupment was judged to be "too general and too absolute" (Dondoux, 1979: 24) to pass constitutional muster. According to the Conseil d'Etat's jurisprudence, the government may have good reasons for denying one or another individual migrant a work permit, but these national interests must be weighed against the rights of migrant families, meaning immigration administration is bound by standards of substantive and procedural legality, including the requirement of individual examination.

Moreover, in overturning the decree, French judges appear to have been seeking to intervene in a broader debate over immigration politics. The conclusions of the commissaire's report state that, "One of the main interests of this case is to allow the addressing of the question – subject to much controversy – of the rights of foreigners to residence and work" (Dondoux, 1979: 25). Commissaire Dondoux goes on to state that, although it is not required by the case, it is important to articulate the following principle:

> Once authorized to reside and work, foreigners have a minimum of rights…to stability in their situation and to a progressive consolidation of these situations…. Moreover, foreigners have a right – unless legislation exists to the contrary – to not be expelled from our territory except for reasons of public order, and public order must be interpreted restrictively (Dondoux, 1979: 26).

By stating that immigrants, as workers, had accumulated rights that the State could not take away, the Conseil d'Etat transformed the State's instrumental guest worker program into a source of rights for immigrant workers. Rather than existing as a resource for France's economic development, the individual immigrant shared, at least partially, in the rights of French citizens. The *GISTI* jurisprudence creates the immigrant worker as a figure who has been incorporated into the nation as an authorized resident and as a worker, and whose rights cannot be violated without diminishing the Republic's overall commitment to legality.

PART II: A LEGAL MOBILIZATION HISTORY OF IMMIGRANT RIGHTS IN THE UNITED STATES AND FRANCE

How can we explain the substantively distinct and politically-engaged articulations of rights that are visible in the *Plyler* and *GISTI* decisions? By way of explanation, this section situates immigrant right jurisprudence nationally and historically, tracing its

origins to the politics of American and French liberal/leftist movements active during the 1970s. The *Plyler* and *GISTI* decisions, as well as other less well-known immigrant rights decisions of this period, are grounded in legal arguments generated by rights-oriented attorneys who developed innovative formulations of immigrants and their place in the law.

The protagonists in this narrative are part of a generation of legally trained young professionals in the U.S. and France who started their careers at a time when rights-oriented politics was ascendant. In both countries, reform-oriented legal networks aimed to expand individual liberties and rule of law within the welfare state, working in tandem with liberal/left political currents shaped by the anti-authoritarian spirit of the post-1968 period (Ross, 2002). Social issues, including immigration, which had previously been conceptualized primarily in materialist terms were reframed at this time as questions implicating individual liberties (Sunstein, 2004).

The comparative lens points to the ways in which American and French versions of this 1970s politics of rights were oriented in strikingly different directions. The policies and principles developed by rights-oriented reform movements drew selectively from national political traditions and reformulated them in new ways. Taking each country in turn, I show how the contemporaneous rights-based frames colored the way in which immigrants and immigration questions came to be formulated first by legal networks outside the courts and then in authoritative judicial enunciations.

U.S. Juridical Framing: Immigrants and Civil Rights Pluralism

The U.S. politics of rights that developed in the 1960s and reached full blossom in the 1970s has been the subject of numerous scholarly and popular commentaries. A number of recent studies have attempted to place this movement in historical context (Kalman, 1996; Dudziak, 2000; Skrentny, 2002; Hilbink, 2006; Teles, 2008). These historical analyses paint a picture of a powerful "liberal legal network" that had become firmly institutionalized by the early 1970s, having emerged from diverse intellectual and organizational sources during the preceding decades.

A significant factor in the development of the U.S. politics of rights of the 1960s and 1970s was the assertive rights-oriented jurisprudence of the U.S. Supreme Court. Following its landmark 1954 decision in *Brown v Board of Education* ending de jure segregation in public schools, the Warren Court issued decisions expanding the constitutional rights of a range of other disadvantaged groups, including criminal defendants, recipients of government social services, and minority voters. In doing so, the Supreme Court discarded the posture of legislative deference endorsed by judges during the New Deal era and instead adopted the mantle of preeminent guardian of constitutional rights.

The liberal legal network that emerged in the 1960s aimed to implement and further develop the principle of equal protection of the laws enunciated so famously in *Brown*. Urban elites actively supported the social movement to advance black civil rights. Alabama Governor George Wallace's defiance in the face of a federal district court's desegregation order, was an important moment in motivating President Kennedy to embrace civil rights as a central policy commitment of the federal government (2000:

178). During the summer of 1964, task forces of Ivy League experts and scholars undertook the work of outlining an ambitious civil rights agenda of congressional action, executive branch enforcement efforts, and court orders that would eventually be put into effect by the Johnson administration (Skrentny, 2002). Based on these recommendations, federal programs were designed to remove racial and ethnic discrimination in a wide range of areas, including immigration law, election law, and employment law.

The liberal elites who designed the Great Society's civil rights programs embraced the principle of equal rights within the framework of liberal pluralism. Pluralist political ideology developed in the 1950s as a Cold War defense of American democracy from the charge that political power under the capitalist system had come to be held by a narrow class of elites.[vii] Deemphasizing class divisions, pluralism recognized, and even celebrated, the existence of multiple sub-national identities – including ethnic, cultural, and racial identities.[viii] When U.S. liberals called for greater legality in government, they implicitly embraced a pluralist framework. The welfare state's shortcomings were seen not as structural bias but rather as problems that could be corrected by giving representatives of minority groups a voice in the decision-making process.

In the early 1970s, the Ford Foundation's grant programs exemplified and actively promoted this vision of civil rights multiculturalism. Beginning in 1966 under the direction of McGeorge Bundy, formerly one of President Kennedy's "wise men," the Foundation embarked on a strategy to build up the resources of minority group organizations in order to ensure that ethnic and racial discrimination would receive sustained political attention.[ix] Bundy was guided by the belief that "to get past our terrible inheritance of racism" it was of vital importance to continue to affirmatively promote the access of ethnic minorities to voting, education, employment, housing, and the administrative and civil court systems (McClymont and Golub, 2000). By giving minority groups the resources to engage in shaping public policy, the Foundation aimed to create a new equilibrium in which minority constituencies would be made competitive within the pluralist political process.

This liberal politics of rights is manifested in Supreme Court decisions that expanded "Footnote Four" equal protection scrutiny to include groups who could draw convincing parallels between their own experience of disadvantage and the signature historical experience of U.S. blacks with discrimination (*Craig v. Boren*, 1976). The Court's jurisprudence also expanded beyond legal neutrality towards a concept of affirmative action to redress historical discrimination, holding that federal judges were justified in requiring aggressive remedial measures so long as minorities were being given an inadequate share of educational resources (*Swann v. Charlotte-Mecklenberg Board of Education*, 1971). Under this substantive approach to equal protection, apparently neutral policies needed to be assessed based on an empirical record that was "long and wide," meaning that judges would assess equal rights by looking at both evidence of historical racism and statistical analyses of racially disproportionate outcomes. The emphasis on proportional outcomes for racial minorities places this jurisprudence squarely within the program advanced by the U.S. liberal legal network.

This was the milieu in which graduates of American law schools in the 1970s came of age professionally. Unlike the previous generation of liberal lawyers who had sought out government legal work, the ambition of these young lawyers was to organize

high-profile litigation for a civil rights law firm. What in the early 1960s had been called the "professionalization of reform" had become by the end of that decade the "legalization of reform" (Teles, 2008: 52). Public interest law firms operating with Ford Foundation funding were already organizing litigation campaigns on behalf of inner-city recipients of government services, rural farm workers, and minority public employees. Ambitious law school graduates, steeped in the values of civil rights multiculturalism, sought out an area in which they too could make their mark.

Immigration questions had not yet fallen under the purview of any existing law reform organization. In part, this was because transient and vulnerable immigrant communities had until recently had difficulty finding political supporters. U.S. Latino groups were still in the process of embracing their multicultural identity and abandoning their prior political strategy of identifying themselves as "other whites" (San Miguel, 1987). Moreover, the majority of liberal elites were wary of defending undocumented migrants at a time when Cesar Chavez was still advocating stricter immigration controls (Tichenor, 2002: 226). Although civil rights multiculturalism supplied reform-minded lawyers with a template of broad principles and approaches, the extent to which constitutional rights could be extended to non-citizens remained an open legal question. In order to frame immigrants as rights-bearing formal legal subjects, both legal and political ingenuity would be required. In what follows, I briefly describe two of the early immigrant rights litigation campaigns in order to highlight some of the juridical innovations produced by the young lawyers who pioneered the field of "immigrant rights lawyering."

The first significant legal mobilization to test the civil rights approach to immigration issues, would end in the Supreme Court's *Plyler* decision, took place in Texas starting in the mid-1970s. The litigation campaign challenging Texas's restriction on the public education for undocumented migrants was from the beginning inseparable from the legacy of affirmative action and multiculturalism. The attorneys steering the class action lawsuits[x] combined in *Plyler* were deeply embedded in the U.S. liberal legal network: Peter Schey had recently created a Legal Services Corporation "immigration law back-up center" in Los Angeles Peter, while Peter Roos was the legal director for the Mexican American Legal Defense and Education Fund (MALDEF), a Ford Foundation grant recipient. Given the organizational and ideological commitments of the litigators, it is not surprising that the primary thrust of their arguments was that the purportedly racially-neutral legislation was in fact saturated with invidious racism. By arguing that Texas's undocumented immigrants are a "minority within a minority" (Schey Brief, 1981: 24) and that "the public schools provide virtually the only opportunity that many of these children will have to interact with the majority society" (MALDEF Brief, 1980: 17), advocates effectively cast their clients within a race-based mold, softening the distinction between "alienage" and "lineage."

In addition to eliding differences between Mexican-Americans, Mexican legal immigrants, and undocumented Mexican immigrants, litigators' arguments were predicated in other ways upon a civil rights multiculturalist approach. For example, the interpretation of the equal protection clause presented in the case was a distinctly pluralist one. The plaintiff children were a prime example of "a discrete and insular minority requiring heightened judicial solicitude because they have been subjected to a history of purposeful unequal treatment" (MALDEF Brief 1980: 8) This statement applies to

undocumented immigrants the approach, developed in Footnote Four and applied in the civil rights cases of the 1950s and 1960s, that implicitly assumes not only that racial inequalities originate in purposeful racism but also that they are ultimately fixable. According to the plaintiffs' arguments in *Plyler*, Mexican undocumented school children are no different than "children of other immigrant groups" in their knowledge of their ancestry. In sum, *Plyler* was built as a defense of Hispanics, and immigrants were understood to represent the most vulnerable segment of this group.

A second illustration of how the civil rights multiculturalist framework was juridically adapted to immigration issues is provided by a litigation campaign, organized at the same time as the *Plyler* litigation, which sought to overturn the interdiction and detention policies directed against Haitian migrants arriving by sea on the coast of South Florida. While the arguments about access to public education had addressed border control only indirectly, the litigation challenging the interdiction policies of the Immigration and Nationalization Service (INS) posed a much more direct challenge to national immigration policy.

Under the administration of President Jimmy Carter, INS officials set in place a program in July and August 1978 to accelerate the immigration and asylum processing of undocumented Haitian "boat-people." The District Director was told to cease requiring immigration judges within his district to suspend deportation proceedings upon the filing of an asylum claim, and also to cease the practice of allowing aliens 10 days for the preparation of applications to withhold deportation. Starting in late 1978, a legal challenge to the "Haitian Program" was organized on behalf of the Haitian Refugee Center, a non-profit organization directed by charismatic exiled Haitian priest Gerard Jean-Juste. The case was first conceived by Ira Kurzban, a recent law school graduate who had come to Miami only a few months earlier, and who had contacts with the Haitian Refugee Center through his law school professor, NY-based radical labor defender Leonard Boudin. Within a short period of time, Kurzban was joined by Peter Schey, fresh from the litigation in the Texas school cases, and by Rick Swartz, another young lawyer who had participated in some of his DC firm's *pro bono* work for the NAACP and who had been hired by the Washington Lawyers Committee to organize an immigrant rights project.

The attorneys representing the Haitian migrants argued that the District Director of the INS Miami office had denied the 5th Amendment due process rights of the class members by refusing to give them a meaningful hearing and that he had likewise violated their 5th Amendment equal protection rights by removing the right to petition for asylum on the basis of national origin (HRC Plaintiff Briefs, 1980). They emphasized the racialized identity of Haitian asylum seekers, arguing that the underlying reason why their clients had been subjected to intentional "national origin" discrimination was that the plaintiffs were part of the first substantial flight of black refugees from a repressive regime to the United States. Taking a page from civil rights jurisprudence that relied on statistical differences to demonstrate discrimination, they presented evidence that other asylum seekers, such as Nicaraguans, were permitted to work while their asylum claims are pending and that Cuban asylum seekers uniformly received asylum. The advocates were successful in communicating to the court that invidious racial prejudice lay behind this evidence, to the extent that the first sentence of Judge King's decision stated, "This

case involves thousands of black Haitian nationals" (*Haitian Refugee Center v. Civiletti*, 1980: 451).[xi]

Even before the 5th Circuit affirmed the immigrant rights victory against the 1978 "Haitian program," the newly elected Reagan Administration enacted a new and aggressively control-oriented set of immigration policies. In response, immigrant rights attorneys argued that these practices were merely a continuation of the pattern of racial discrimination against black refugees. In the class action brought in July 1981, they reapplied legal arguments from in their previous case, suggested that, "black Haitian asylum seekers are the first substantial flight of black refugees who have come to our shores seeking political asylum," and that "the INS had never before treated any other race or nationality in this manner" (HRC Brief, 1985: 4, 18). Attorneys introduced statistical analysis to show that INS detention policies had had a disproportionate impact on Haitians as compared with other similarly situated excludable aliens such as Cubans and Nicaraguans. For the plaintiffs, this evidence pointed to "a pattern of discrimination as stark as *Gomillion v. Lightfoot*" (1985: 12), the famous voting rights case in which the Supreme Court had found that it was not necessary to prove discriminatory intent where disproportionate racial impact was evidence of discriminatory purpose. The case went through several appeals, all of which focused on the equal protection issue.

When the case was appealed to the Supreme Court, immigrant rights attorneys presented their arguments in even more explicitly racial terms. Referring to the 11th Circuit's deleterious reading of the equal protection rights of excludable aliens, advocates for the Haitians told the Supreme Court:

> Not since the *Dred Scott* decision has this or any other court ever held that a class of persons is wholly immune from constitutional protection…. The discriminatory application of prolonged incarceration to Haitians occurred in the context of a lengthy historical pattern of discrimination by INS officials against black Haitian refugees…INS officials have denied Haitians their rights and have shipped them, like cattle, to remote areas of America. (HRC Brief, 1985: 4-14)

Citing the Supreme Court's decision in *Swann*, the attorneys suggested that an explicit extension of equal protection rights in this case would be a logical progression from Congress's 1965 immigration reforms that had "eliminated the vestiges of invidious racial or nationality based discrimination in the immigration statutes" (1985: 44) by eliminating the national-origins system. Just as in the Texas school litigation, the rights of Haitian migrants were constructed by racializing immigrant identity and racial discrimination was framed as the primary obstacle to the realization of immigrant rights.

French Juridical Framing: Immigrants and Republican Social Rights

The roots of the politics of rights that emerged in France in the 1970s lie in opposition during the 1960s to the authoritarian tendencies that characterized the Fifth Republic under President de Gaulle. Republican political clubs, with opposition politician François Mitterrand a prominent figure, began to focus on the themes of decentralization and of subjecting government to legality. Although Mitterrand had been an insider within the Fourth Republic, he vocally opposed the newly centralized power of the Fifth Republic presidency on the grounds that it threatened individual liberties. For most of the decade,

however, these discussions were confined to a small circle of elites estranged from the established political parties and they failed to gain popular currency.

The events of 1968 transformed French politics with an infusion of energy embodying a "cultural leftism" detached from institutional channels. This efflorescence of criticism strongly rejected organizational dogma and espoused a greater diversity of causes than traditional syndicalism. Its vocabulary was strongly influenced by France's political tradition of solidarism, kept alive by the French Communist Party and its electorate, even as the new non-Communist left sought to criticize hierarchy and materialism (Touchard, 1977). Represented most visibly by Michel Foucault, leftist intellectuals provided high-profile support to the Maoist and Trotskyist groups that proliferated in the years immediately after 1968. These groups aimed to foment a "war of liberation" against the capitalist system by implanting activists among the in both urban factories and rural communities to reeducate the masses. The government's repression of both student protesters and radical activist groups served to further concentrate previously diffuse currents of dissent.

Within the legal profession, the apparent excesses of police power in the aftermath of May 1968 served to galvanize previously politically unengaged jurists. Venerable liberal associations such as the Ligue des Droits de l'Homme were revitalized by the arrival of new members (Agrikoliansky, 2002), and so were the republican political clubs, particularly Robert Badinter's *Droit et Démocratie*. New organizations such as the Mouvement d'Action Judiciaire placed their focus of defending the rights of those within the criminal justice system. Eventually, even traditional unions were infused by the spirit of the times. The *Confédération Française Démocratique du Travail* (CFDT) labor union created a legal department dedicated to developing a strong "revindicative" activism in the courts on behalf of workers (Willemez, 2003: 27).

This leftist legal network, the *gauche juridique*, initially remained a loose assemblage of individuals and associations. Legal activism reflected the left's new diversity of causes, ranging from traditional syndicalism to newer movements for legal access to abortion, anti-nuclear environmentalism, and the rights of prisoners. Participants shared a common assumption that law could be used to make existing structures of power, whether of the police or official profession organizations, more participative. However, the traditional language of the left remained an integral vocabulary for this new legal activism. Existing power structures would be made more transparent and participative and lacunae in the *Etat de Droit* would be filled. But the presumption was that the resulting more coherent legal system would uphold the principles of a state with responsibility for ensuring the social and economic welfare of its citizens.

The synthesis of solidarism and Republican legality is epitomized by Badinter's *Liberté, Libertés*, written at the request of François Mitterrand and extending beyond political tract to develop a comprehensive statement of program of this emergent *gauche juridique* (Badinter, 1976). The book is an edited collection comprised of contributions from forty intellectuals and public figures. Badinter's leftist "charter of liberties" endorses a society that assures the liberties of all of its component groups, not just those whose favored socio-economic background allows them to maintain their rights. It argues against a system based on pure liberalism, which has no guarantee of social inclusion for disadvantaged groups (be they those who cannot find work, women, the

handicapped, the elderly, foreigners, or the imprisoned). When government is left to the discretion of state managers and there is an absence of "common will" or "community," liberty is imperiled (Badinter, 1976: 267). The text identifies the basis of legal rights with the revolutionary vocabulary of France's left: only when the "real needs of the majority" are met will social relations be transformed so as to ensure individual liberty (Badinter, 1976: 269). At the same time, it infuses the solidaristic leftist program with principles of legality that were newly ascendant in the post-1968 period: anti-authoritarian struggles for the rights of women and minorities, defense of regional autonomy, and environmentalism are recognized not as secondary but rather as "inseparable from industrial struggle" (Badinter, 1976: 269). This discursive synthesis traces a new vision of the State as a socially-supportive vessel from which none should be excluded and whose operation relies that it adhere to legal procedures rather than the cut-throat logic of the free market.

A generation of young French legal professionals - including both those trained for private practice and those trained for service within the state administration - came of age within this ideological context and were moved towards political engagement. Some had participated in the events of May-June 1968, while others simply witnessed the post-1968 political aftermath. Like their classmates trained for careers in medicine, social work, architecture, and psychiatry, they felt alienated from the traditional institutions of the state and sought to reexamine their expert training through a lens freed from traditional hierarchical structures (Artières, 2008). Michel Foucault's model of the *intellectuel-specifique* was particularly attractive, and based on Foucault's example of gathering a group to rethink France's penal regime, other groups of young professionals searched for social issues in which they could self-reflectively apply their training and thus practically advance a program of reform.

Immigrant activists had themselves recently begun to mobilize on behalf of better working conditions and against racism, building on informal circles linked to anti-colonial organizations in their countries of origin and supported by a loose network of grassroots Catholic social justice associations (Escafré-Dublet, 2008). The leadership of the two main French labor unions did not support these movements, favoring policies of immigration restriction (Haus, 2002). Moreover, migrant sending countries actively lobbied to maintain their position as sole representative of immigrants' political interests in a bid to maintain their attachment to the homeland.

By the early 1970s, the cause of immigrant workers had been adopted by reform-minded legal networks amenable to embracing new causes whose members sought to use their legal training to protect the disadvantaged. When, in 1972, the government's immigration policies shifted towards restrictionism, the mobilizations of immigrants and their supporters achieved a higher profile. The Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), which had strong institutional and ideological ties to France's nascent *gauche juridique*, supplied the anchor for a new constellation of young attorneys, judges, and legally-trained public administrators with an interest in mobilizing law in support of immigrant causes.

Unlike their U.S. counterparts, French legal professionals did not have an extensive body of recent rights-oriented jurisprudence on which to build their claims. The Constitutional Council had recently rendered justiciable the rights-based provisions of previous constitutional texts (See Stone, 1992). But it was not obvious that this "bloc

constitutionnel" could be applied against administrative action, since the Constitutional Council only had the power to review the text of statutes before they were enacted into law and had no power of judicial review over either laws already in application or administrative policies. In order to challenge government immigration policies, French litigators would need to bring their cases before the Conseil d'Etat, France's highest administrative court, and would need to convince France's elite administrative adjudicators that they should apply constitutional principles. Finally, the Conseil d'Etat would need to be convinced through skilled legal argumentation that immigrant workers were legal subjects whose rights were guaranteed under French principles of law.

The first significant test of whether courts would be receptive to rights-based claims on behalf of immigrants was a challenge to the controversial Marcellin-Fontanet circulars restricting the granting of residency and work permits to non-citizens.[xii] Challenges were brought against the Marcellin-Fontanet circulars almost as soon as they had been issued. Members of GISTI's "commission on housing" drafted a response focusing on the argument that the state had not met its responsibility to provide decent housing to immigrant workers, while another GISTI working group calling itself the "commission on labor rights" argued that the regulation would have the effect of giving the employer control over the labor contract (Israel, 2003). The legal department of the CFDT was approached and convinced to bring a case against the circulars in its own name.[xiii]

The legal case against the 1972 circulars illustrates the way in which the discourse of France's *gauche juridique* was at this time beginning to fuse leftist and republican values. The arguments raised before the Conseil d'Etat in the plaintiffs' briefs centered on the constitutional principle of the right to work and asserted that the essence of this right was the freedom of workers to seek employment wherever they wished rather than being tied to a particular employer (Waquet Note, 1973). The circular's provision removing the temporary residence card was argued to effectively bind immigrant workers to their employers because if they sought employment elsewhere they would lose their residence permit. Similarly, the provision conditioning residence and work authorizations on the employer's commitment to supply adequate housing were seen by advocates for immigrants as an instance of employers and the state jointly exercising greater social control over foreign workers. Pluralist theories had no place in these legal arguments since jurists assumed that, because of the way the system was structured, workers as a group could never expect to achieve a proportionate share of the nation's wealth.

The *gauche juridique* synthesis of solidarism and legalism is clearly visible in the arguments against the provisions in the circulars linking the validity of work and residency permits. Immigrant rights advocates argued that resident immigrants such as Da Silva should not be placed in a precarious position every time they went to renew their work permits. They suggested that the circulars illegally changed a well-defined existing regime in which labor contracts, once signed by the employer and employee were not assumed to have any fixed expiration. Immigrant workers who had been given an employment contract should be considered to be part of the national community, they argued. They need not continuously ask for permission to stay. French republicanism had long held that Frenchmen were created through the socializing processes of schools, the military, and public employment. The arguments made against the circulars gave

these liberal ideas a leftist flavor by suggesting that, just as work was used to create the nation, those who were working should have the same rights as citizens. Immigrant workers were citizens in spirit.

Finally, the case is illustrative of the reluctance of France's political left to define immigrants in racial-ethnic terms. Administrators were well aware at this time that decisions on work and residence permits issued at the level of the prefectoral *guichet* were likely to discriminate against Algerians, and this was one motivation behind the circulars' provisions enhancing prefectoral discretion (Weil, 1991). Despite indications that the government's restrictionist policies were directed particularly against Algerian Muslim migrants, the representative plaintiff for the suit against the Marcellin-Fontanet circulars was a Portuguese immigrant. The racial identity of the plaintiff was not important since he was a representative of the class of immigrant workers that GISTI and the CFDT were dedicated to representing.

The Conseil d'Etat decided against the government and nullified the Marcellin-Fontanet circulars. The judges justified their decision primarily on technical grounds and brought no explicit evolution in jurisprudential principles. Nevertheless, the decision was seen by some as a sign that the Conseil d'Etat was willing to scrutinize government policy making in the area of immigration, itself a new development since until this point immigration policy allowed complete administrative discretion.

Between 1974 and 1977 the government gave immigrant rights advocates a number of additional opportunities to go to court, issuing a stream of restrictive immigration policies.[xiv] In December 1978, the Conseil d'Etat declared a number of these regulations and programs illegal. Some of the policies in question had been aborted by the government even before their legality could be reviewed by the Conseil d'Etat, and so these decisions were over-shadowed by the last decision that the Section des Contentieux issued in this avalanche of reversals of government policy: the *GISTI* decision which created a right for immigrants to family regroupment.

At issue was a November 1977 decree guaranteeing the right of immigrants with at least three years residence in France to bring their immediate family members to join them, but making family migration conditional upon the agreement of those seeking residence permits not to take up any employment. The decree's legality was attacked by GISTI and the CFDT, as well as by another trade union, the Confédération Générale du Travail (CGT). The advocates began by making right to work arguments similar to those used against the Marcellin-Fontanet circulars, claiming that the decree amounted to a fundamental change in the right to work, something which, according to Article 34 of the Constitution, only the legislature could enact. The CFDT also argued that the decree violated the text of the Preamble of the Constitution of 1946, which created an aspirational right to work by saying that "everyone has the obligation to work and the right to obtain employment" (cited in Dondoux, 1979: 11).

The decree was also challenged for violating a right to family regroupment. The European Social Charter, ratified by France in October 1974, contained a provision that required contracting states to facilitate migrant family regroupment. The language of the Preamble to France's 1946 Constitution, saying, "the nation will assure to each individual and to families the conditions necessary for their development," seemed to suggest something similar. The 1977 decree prohibited regroupment only for those who wished to enter the labor force, but GISTI attorneys argued that by curtailing the right to obtain

employment the decree impinged on the social protections that were central to their interpretation of the right to family life (cited in Dondoux, 1979: 12). The decree was yet another example of the administration regulating the situation of immigrants through a process of "infra-droit," or non-law, that created a "Kafka-esque universe" where law could change from one day to the next, thereby depriving immigrants of social rights and "exacerbating their already precarious material situation" (GISTI Note, 1978).

In emphasizing the identity of immigrants as workers, members of France's *gauche juridique* avoided any mention of migrants' racial-ethnic identities. Rather than focusing on representing Algerians, who would be most immediately impacted by the decision, immigrant rights advocacy encompassed all immigrant workers without distinction. France's Constitution commits "the nation" to assuring certain basic rights without mention of citizenship, and bilateral guest worker agreements that protect immigrant workers' social rights similarly "assimilate" the nationals of one contracting party with the nationals of the other contracting party (Lyon-Caen Note, 1974). According to the framework developed by left legal networks during the 1970s, immigrant workers contributing their labor to the nation become a part of the nation and acquire legal rights.

PART III: LAW'S SYMBOLIC CONSTRUCTION OF IMMIGRATION POLITICS

Litigation campaigns organized by liberal/left legal networks not only resulted in important judicial victories that articulated new jurisprudential principles of immigrant rights but also supplied the discursive frameworks on which these decisions were based. Beyond shaping the way in which courts adjudicate cases, have these decisions and the principles they enunciate contributed to any broader shift in the politics of migration? The period of the late 1970s and early 1980s has been identified as a critical juncture for what has variously been termed the "judicialization of immigration" (Gomes, 2000; Soennecken, 2008) and the "transformation of immigration law" (Schuck, 1984). What is the lasting legacy of liberal/left juridical framings of rights-bearing immigrants?

Just as the previous section examined the interplay between law and society through a discursive lens, showing how legal mobilizations by actors outside the courts laid the groundwork on which courts constructed immigrants as rights-bearing subjects, this section will explore some of the ways in which a discursive analysis allows us to better understand the contribution of judicial enunciations of rights to the broader politics of immigration. I argue that in both the U.S. and France, the long-term impact of these cases extended beyond their direct policy outcomes or the legal precedents they created for subsequent litigation. Once endowed with the judiciary's political legitimacy, the "pluralist civil rights" and "republican social rights" framings of immigrants can be understood as constituting significant symbolic *actants* (Latour, 2005) in their own right, leaving their mark on immigration reform programs in the 1980s and beyond.

Constructing U.S. Immigration Politics through Immigrant Civil Rights

In order to understand the way in which legal mobilization contributed to symbolically reshaping immigration politics, we need to first examine the political discourse around

immigration that prevailed among American liberals during the preceding decade. For most of the 1970s, migrant communities found it difficult to locate political support for their cause. Eventually, prodded by a new generation of Chicano activists, Mexican-American professionals and business leaders overcame their reluctance to associate themselves with impoverished Mexican migrants (Chavez, 2002). But the United Farm Workers, and the labor movement more generally, saw migrants as a threat to organizing efforts, and this significantly impacted the immigration policy positions of Democratic Party politicians with strong labor constituencies (Haus, 2002). Moreover, throughout the 1970s, black legislators continued to see employer sanctions as way to curb undocumented migration and job displacement (Tichenor, 2002: 235). Thus, immigration was framed in primarily materialist terms during this period. Immigrants were seen as threats to the economic balance of the welfare state, something that most liberals wanted to preserve.

It was thus not at all obvious that the civil rights framing of immigrants would acquire political currency. While some politicians strongly wanted to increase immigration quotas, the Democratic Party as a whole was divided on immigration issues. Congress's decision in the fall of 1978 to create a Select Commission on Immigration and Refugee Policy ("The Hesburgh Commission") was in large part an attempt to find a way to bridge these seemingly intractable differences (Tichenor, 2002: 233). The hope was that the commission would broker a compromise.

It was at this formative moment that legal mobilizations against the Carter Administration's Haitian refugee policy burst onto the political scene. The lawyers representing the Haitian migrants consciously understood themselves as molding immigration into a new civil rights movement. The exhaustive trial between the fall of 1979 and the spring of 1980, in which the plaintiffs placed particular rhetorical emphasis on the racial identity of Haitian asylum seekers, provided an opportunity to build a political coalition between civil rights groups and immigrant supporters. In the spring of 1980, advocates for the Haitian plaintiffs succeeded in convincing members of the Hesburgh Commission to travel to Miami, where they heard the testimony of 500 Haitian refugees. Later that year, again as part of a political strategy to garner support for the litigation, advocates organized meetings on Capitol Hill for Haitians to personally describe their experiences, energizing the Congressional Black Caucus Haitian Taskforce. With the ground thus prepared, the decision in September 1981 by a Nixon-appointed federal judge to issue a temporary restraining order against the INS garnered legitimacy for a civil rights framing of immigrants.

The *Haitian Refugee Center v. Civiletti* trial illustrates the potential of litigation to mobilize legal symbols to gain leverage and catalyze support. It reaped some important early results, with the Carter Administration agreeing to negotiate and eventually announcing in June 1980 that it would parole into the U.S. all of the Haitian plaintiffs. More importantly in the long-run, the framing of refugees as a racially disadvantaged minority was influential in convincing leading black legislators who had previously opposed refugee legislation to vote for the 1980 Refugee Act (Gimpel and Edwards, 1999: 131). Finally, the Haitian litigation further enhanced the credibility of immigrant rights advocates, the most immediate effect of which was that litigator Peter Schey was hired into a legal research position with the Hesburgh Commission.

The Hesburgh Commission's report, released in March 1981, which advocated controlling unauthorized migration but doing so in a way that protects alien rights, set the political context for Congressional immigration debates over the next five years. With immigration reform beginning to gain momentum, litigator Rick Swartz left his position at the Washington Lawyers Committee for Civil Rights in the summer of 1981 and sought funding from the Ford Foundation for a new lobbying organization – the National Immigration Forum - that would bring the civil rights approach to immigration directly into the political sphere.

In June 1982, two important court decisions solidified the framing of immigration as a civil rights issue. The Supreme Court decision in *Plyler* was read as a stinging indictment of federal inaction on immigration reform. Justice Brennan's decision presented amnesty as the only feasible policy alternative, since massive deportation would potentially expose undocumented migrants to civil rights abuses. The same month that the Supreme Court issued its decision, a District Court in South Florida handed litigators another victory in their campaign for Haitian asylum seekers. Judge Spellman held that the Reagan Administration's detention practices violated standards of legality and ordering that Haitians be released from detention so long as they had an individual sponsor while pursuing their asylum claims (*Louis v. Nelson* 1982). The decision was widely reported in legal circles. Both the American Bar Association and the American Immigration Lawyers Association issued press statements supporting the goals of immigrant civil rights advocacy (AILA, 1996).[xv]

These decisions contributed to the nascent National Immigration Forum "getting a seat at the table" in Congressional immigration debates (Swartz, 2006). The new non-partisan immigration lobby, consisting of ethnic and religious groups and immigration lawyers, forged a civil rights-themed immigration coalition with the potential to exerted significant influence. As a participant in this political coalition, the Congressional Black Caucus, which had previously strongly supported employer sanctions, worked to defeat the inclusion of employer sanctions in the 1982 version of the immigration reform bill (Gimpel and Edwards, 1999: 140). Although the civil rights-immigration coalition was not ultimately able to prevent employer sanctions provisions from being included in the Immigration Reform and Control Act that was passed in October 1986, they succeeded in ensuring that procedures would be set up to periodically evaluate the impact of sanctions on job discrimination and that the Justice Department would pursue discrimination claims (Gimpel and Edwards, 1999: 168).

In the 1990s, the fully-flowered civil rights immigration lobby exerted a strong influence over debates. The "groups," as the lobby came to be known, successfully blocked proposals in 1990 for more exacting employer sanctions and employment verification technology (Gimpel and Edwards, 1999: 193). This coalition, whose existence was made possible by the civil rights framing of immigration, deepened at the end of the decade to include the AFL-CIO, which for pragmatic reasons switched its position on immigration and adopted a strategy that focused on organizing immigrant workers, becoming an active supporter of the National Immigration Forum (Haus, 2002: 73). AFL-CIO President Lane Kirkland joined members of the Leadership Conference on Civil Rights in lobbying for more vigorous enforcement of job anti-discrimination protections for Latinos and Asians (Tichenor, 2002: 263). And black legislators, such as Representative Mel Watt, continued to be active on immigration issues, bringing an

overriding concern with procedural justice and civil rights to this policy area (Gimpel and Edwards, 1999: 231).

The civil rights-immigration lobby continues to make its presence felt in immigration policymaking circles (DeParle, 2011). Recent work on U.S. immigration politics suggests that this civil rights framing, while not hegemonic, has lost none of its potency (Newton, 2008).

U.S. legal liberalism framed the struggles of immigrants against restrictionist policies as a new form of civil rights. The civil rights components of IRCA, and the ongoing civil rights framing of immigration issues more generally, were made possible by political coalitions which were catalyzed by judicially-enunciated framings of immigrant rights during the 1970s and early 1980s. While courts were not willing to wholly subsume immigration under the protections of strict scrutiny, they were unwilling to dismiss immigrant rights claims entirely. The civil rights approach to immigration, which exerted substantial power over the U.S. politics of immigration, changing the way that key players understood the issues, was formulated and legitimized through legal mobilizations for immigrant rights.

Constructing French Immigration Politics through Immigrant Social Rights

The political discourse around immigration that prevailed in France during the early 1970s was resolutely materialist. French administrative elites in the decades after WWII made no serious efforts to promote the social insertion of immigrant workers, assuming that they would return to their countries of origin when their labor was no longer needed (Lochak, 1985: 157). This was the dominant view among politicians on the political right, who saw immigrant workers as dispensable sources of labor (Viet, 1998: 385). Anchoring the political left in the early 1970s, François Mitterrand spoke about immigrant workers as one of the many groups exploited by the capitalist class (Viet, 1998: 397) and his 1972 "Common Program" made no mention of immigrants requiring any special protection. In general, France's political class was loath to admit that colonial groups, against whom it had recently suffered humiliating defeats, were owed any kind of right to residency (Weil, 1991: 111). Thus, while they differed in their assessments of immigrants' working conditions, French politicians and policymakers did not envision post-war immigrants as potential members of the Republic's political community.

The publication of the Conseil d'Etat's 1975 *Da Silva* decision, overturning the Marcellin-Fontanet circulars, provided an important impetus for France's various immigrant communities and their small but growing group of supporters to band together under the cause of immigrant social rights. The 1972 circulars, which made it harder to obtain a residence permit, elicited hunger strikes by migrants. Grassroots support groups initially eschewed juridical tactics, taking the principled position that all papers should be done away with since there should be no divisions within the working-class (Ginesy-Galano, 1984). The Conseil d'Etat's willingness to scrutinize government policymaking, even though it was based primarily on technical grounds, prompted the movement for defense of immigrants to focus their efforts on the more pragmatic goal of defending the right to have papers (Marek, 2002). The judicial decision was seen as a vindication for the diverse grassroots coalition comprised of Portuguese, Maghrebin, and African migrants which had organized protests in the name of all immigrant workers against the

circulars (Bouziri, 1990). A political identity was thereby cemented, with migrants of multiple nationalities increasingly identifying themselves as "immigrant workers with rights."

This movement-building gained further momentum in response to the much more draconian policies adopted, starting in 1977, by the Giscard government. The economic crisis that ended France's period of post-war economic growth was now seen as durable, and the government experimented with a number of administrative initiatives aimed at ensuring the return of immigrant workers to their countries of origin. In response, immigrants and their supporters mobilized to claim their place within French society, proposing to accord foreigners the right to vote in local elections and thus crystallizing an agenda for a formerly diffuse movement (Blanc-Chaléard, 2001). Associative leaders who had previously spoken in Marxist terms of promoting the interests and needs of the immigrant proletariat now increasingly adopted the language of rights to frame their claims (Viet, 1998: 404).

The Conseil d'Etat's 1978 *GISTI* decision responded to this debate, intervening against the Giscard government. According to the court, migrants who have been authorized to reside in France have the right to live as a family and to enjoy basic legal protections. They cannot have their applications for work or residence treated en masse and they cannot be summarily expelled. The decision was read by doctrinal commentators as extending full social rights to foreigners in France. The right to family life was interpreted as implying the right for migrant families to have the possibility of work, i.e. the right to look for work, to obtain professional training, and to be provided with unemployment insurance (Hamon, 1979: 664). Moreover, it was suggested that the principle of guaranteeing a right to family life to all those who are resident under the state's authority might easily be extended to provide immigrants with other rights, such as bodily integrity and protection against attacks on human dignity (Hamon, 1979: 664).

The decision had an important impact on French politics, setting the context for legislative debates leading up to the 1981 election. The Conseil d'Etat's authoritative criticism, particularly since it was based on constitutional guarantees, was useful to those wishing to stigmatize the government. Opposition politicians calculated that taking up the cause of immigrant rights was an effective political strategy. Labor union leaders, including the CFDT's Hubert Lésire-Ogrel, spoke explicitly in rights-based terms when challenging the government's immigration proposals, saying that "fundamental liberties are in jeopardy, the right of immigrants to live and to have a family life and a future…the forced departure of immigrants touches too many essential things for us not to struggle against it" (Weil, 1991: 177). Hunger strikes against the expulsion of young migrants that took place during the 1981 presidential campaign were supported by the Ligue des Droits de l'Homme, which embraced the immigrant cause. François Mitterrand likewise positioning himself as a defender of immigrant rights, finding in a rights-based immigration framework, which demonstrated his currency with the new post-1968 social movements, a valuable weapon to use not only against the government but also against his communist competitors within the left (Viet, 1998). Three of the proposals in Mitterrand's *110 Propositions*, which were both a personal manifesto and a summation of left's political program in 1981, concerned immigrants. Mitterrand proposed giving non-citizens voting rights in local elections as well as full associational rights. He wrote that

these rights were necessary so that immigrants, who as a group were particularly disfavored, might have the opportunity to fully participate in society.

This *prise de position* had lasting effects following the left's 1981 presidential victory, not least because during the campaign Mitterrand had presented himself as offering voters a clear electoral program, a contract to break with the past and usher in a new political regime. During the new government's first year in office, fidelity to its electoral program guided its actions "to the point of fetishism" (Weil, 1991: 196). The creation of a "Secretary of State for Immigrants" within the new Ministry of National Solidarity, which took over the immigration portfolio from the Ministry of Labor, was aimed to demonstrate symbolically that the nation's solidarity was extended to all. No longer would immigrants be seen simply as workers, meaning that education and social insertion programs were required to address their needs. Minister Nicole Questiaux declared that her ministry's actions would be guided by "solidarity with all, French and immigrants alike, without discrimination," and she urged legislators to quickly reverse the previous policies made of "often illegal circulars, often hastily prepared, sometimes brutal declarations, and unpublished instructions," and replace them with a politics founded on respect for immigrant human rights (Weil, 1991: 199). The immigration law of 1981, granting foreigners associative rights as well as social security and unemployment benefits was a dramatic instantiation of this approach.

The impact of the Conseil d'Etat's intervention was also felt among the political and intellectual classes who see themselves as representing France's republican tradition. The idea that social and economic rights must be given as part of incorporation into the Republic had the effect of incorporating immigrant rights into the republican tradition. This principled line of reasoning was confirmed when, two months after its decision in the *GISTI* case, the Conseil d'Etat issued a scathing advisory opinion that characterized the Giscard government's proposed immigration legislation as

> …contrary to republican traditions, to that which has constituted, since the Second World War, the spirit of France and the tradition of his politics of immigration… immigrant labor was sought out when it was needed; now that this need no longer exists, these workers are taken and sent back to their country (*Advisory Opinion on the Proposed Stoléru Law*, 1979).

The Conseil d'Etat's clearly enunciated position confirmed the intuitions of technocratic elites within the administration that the Giscard government's aggressively restrictionist immigration program went a step too far (Weil, 1991: 186). Moreover, Gaullist legislators could not accept a law that the Conseil d'Etat, the guardian of France's republican tradition, had characterized as an attack on certain essential values of the republic. Important figures such as André Postel-Vinay, Stanislas Mangin, and Georges Gorse drew on the Conseil d'Etat's arguments to criticize the government during legislative debates (Weil, 1991: 186).[xvi]

We can see the durable effect of the rights-based framework for immigration when the political winds in France changed due to the rising electoral popularity of far-right politicians promoting a discourse that equated immigration and insecurity. The Socialist Party's unfavorable electoral showing in spring 1982 cantonal elections, and the sense that the 1981 regularization had produced negative political effects, prompted some ministers within the Mitterrand government to advocate a change in its position on immigration. Nevertheless, during governmental debates, ministers such as Laurent

Fabius vocally insisted that a distinction be made between unlawful immigrants on the one hand, and on the other hand, lawful immigrants "who can and must stay" (Favier and Martin-Roland, 1997: 173). Technocrats within the administration likewise took as given the legal principle that immigrants have human rights. The legal advisor to the Ministry of Solidarity, Jean Massot, instructed his minister that his sense of the Conseil d'Etat's jurisprudence was that immigrants and their families who had been in France for a long time deserved a guarantee of security (Viet, 1998: 414). Mitterrand eventually pursued a compromise: regular migrants would be included and definitely given residence rights and irregular migrants would face a politics of exclusions.

Although, at this time, neither France's Conseil d'Etat nor its Constitutional Council had retrospective powers of judicial review to use as a stick against restrictionist statutes, legally authoritative pronouncements contributed to constructing a vision of immigrants that by the early 1980s was firmly institutionalized. A public report assessing expert opinion on France's politics of immigration identifies the 1982-1984 period as "completing the definition" and confirming the "new rules of the game" for immigration politics (Gaxie, 1995: 35). The immigration law passed by the Mitterrand government in July 1984 brought about a "stabilization" in the terms of partisan debates (Viet, 1998: 415). Although the 1984 law contained a number of provisions to finance voluntary repatriation of immigrants, a signal of the influence of the far-right on both political parties, it nevertheless introduced the ten-year residence card. This replaced a regime in which mandatory annual or tri-annual application for renewal of residence authorization had kept immigrants in France in a state of permanent instability and represents a realization by the government and the parliament of the impossibility of sending post-war immigrants back to their countries of origin. According to legal scholar and immigrant rights activist Danielle Lochak, the statute "concretized in law the recognition of a durable installation in France of immigrant populations and the dissociation of the right to residence from economic activity" (Lochak, 1985: 168). This outline for the politics of immigration "traced a line for all governments to come" (Blanc-Chaléard, 2010: 492). French governments in subsequent years would reinforce the rigor of border controls but would simultaneously express their commitment to integrating those already present. The discourse on immigration had changed and immigrant guestworkers who reconstructed France would no longer be seen as a temporary presence but would be incorporated into the republic.

CONCLUSION

In both the United States and France, the formal legal subject of the immigrant emerged in conjunction with an ascendant liberal/left political vision, with the effect that immigrant rights were articulated in terms of nationally-specific discursive frames. Just as U.S. immigrant rights advocates sought to frame the rights of non-citizens within the ideology of pluralism and racial proportionality, French immigrant rights advocates cast the rights of immigrants within the frame of the state's commitment to social rights. In both instances, immigrants came under the legal protection of frameworks that had been developed in the context of struggles on behalf of African-Americans, on the one hand, and on behalf of the French working class on the other.

It is important to bear in mind that the construction of immigrants as bearers of rights, a process in which French and American legal networks played central roles, involved some significant flattening and distortion. To be sure, as Sassen points out, the thin formal subject of "the alien" is always in tension with a rich reality (Sassen, 2006: 293).[xvii] However, the paradigmatic "foreigner" or "alien" that appeared in precedent-setting cases during the first wave of contemporary immigrant rights litigation was particularly one-dimensional, and often unrepresentative of the more complex self-portrayals put forth by contemporaneous immigrant movements. For example, in the U.S., Haitian immigrants certainly labeled INS policies as motivated by racism, but the often-tense relations between newly arrived Haitian migrants and Miami's working-class African-American neighborhoods did not necessarily reflect the civil rights politics of liberal elites (Schiller and Fouron, 2005). Moreover, leaders of the Haitian immigrant community's mobilization against refugee expulsions cast their actions as part of a larger protest against U.S. complicity in the abuses of the Aristide regime. Similarly, immigrant groups in France were far more likely to draw on a vocabulary of colonial racism than were many of their French leftist elite supporters (Simeant, 1998). And relations on the factory floor between native French workers and immigrant workers did not always demonstrate industrial solidarity. In both countries, as advocates working at the grassroots were well aware, immigrant political identities were dynamic and complex rather than ideologically fixed.

While juridical translations of immigrant struggles into the language of each country's dominant liberal/left legal discourse may have significantly altered the ways that immigrants portrayed themselves, in both the United States and France, these formal juridical representations came to have a significant long-term impact on the politics of immigration. In France, advocacy before the Conseil d'Etat not only placed limits on administrative discretion but also strengthened an emerging leftist program to reinforce the rights of resident immigrants, elements of which were codified in the July 1984 Immigration Law. In the United States, immigrant rights litigation likewise contributed to legitimating the reformist components of the 1986 Immigration Reform and Control Act, such as the general amnesty and the anti-discrimination safeguards on employer sanctions, and the civil rights framing of immigration politics continues to make itself felt. By authoritatively sanctioning the figure of the immigrant as a minority within a minority or as the proletariat of the proletariat, juridically based advocacy on behalf of immigrants substantially defined the politics of immigration and set a formative baseline against which subsequent policymakers would respond.

By creating our taken-for-granted assumptions about the relationship between non-citizens and the national community, law constitutes the discursive frames within which legal mobilization and judicial action can take place. Legal categories are not often debated in day-to-day politics, and perhaps for this reason they are often overlooked in studies of the politics of immigration. As the foregoing discussion has demonstrated, knowledge production in the juridical field is strongly dependent upon context. In the judicialization of immigration politics, the identities of immigrant legal subjects and the frontiers of citizenship are themselves fluid and contested.

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Notes

[i] Not all explanations of the "liberal constraint" on democratic preferences focus on the role of the courts. For scholars of legislative politics, the judiciary's role has been trivial or ancillary to the play of interest groups and political parties. According to Freeman, liberal immigration policies persist because their costs are diffuse and their benefits are concentrated, implying that those who benefit will be incented to lobby more actively than the majority who are disadvantaged by these policies. Freeman, G. P.1995 "Modes of Immigration Politics in Liberal Democratic States." *International Migration Review,* **29** (**4**): 881-902. Schain is similarly focused on legislative politics, suggesting that relatively liberal immigration policies are an indicator that political parties see future gain from naturalizing immigrant voters, but that not all states are characterized by this party-driven domestic political dynamic. Schain, M. A. (2008), *The Politics of Immigration in France, Britain, and the United States.* Palgrave MacMillan: New York.

[ii] For example, one such analysis points to the way in which the reasoning in *Plyler* provides support for theorizing Footnote Four equal protection doctrine as analytically separate from the principle of federal preemption Rubio Marin, R. (2000), *Immigration as a Democratic Challenge.* Princeton University Press: Princeton..

[iii] Thus, while he agrees with Schuck that U.S. courts have had a limited impact on immigration legislation, largely due to the persistence of the 19th century doctrine that the legislature has plenary power over immigration, Joppke nevertheless sees a relatively more extensive role for Germany's "autonomous legal system" in shaping the politics of immigration Joppke, C. (1998), *Immigration and the Nation-State: The United States, Germany, and Great Britain.* Oxford University Press: New York..

[iv] The empirical research for this project included 86 in-depth personal interviews, 46 in the United States and 40 in France, with legal professionals who have made their career in the field of immigrant rights.

[v] At that time, the U.S. Supreme Court was moving away from its previous obstructionism towards economic legislation. The Court revised its standards for judicial review of constitutionality, declaring that the judiciary would defer to the legislature in matters of economic regulation and would require only that legislation be related to a legitimate state interest. See Tushnet, M. 2008 "The Rights Revolution in the Twentieth Century" In Cambridge History of Law in America. ed. M. Grossberg and C. Tomlins. New York: Cambridge University Press.

[vi] The Court did not go as far in granting equal protection rights as some has urged it to do. In opting for intermediate scrutiny, Justice Brennan's majority rejected a more rigorous "strict scrutiny" analysis. Moreover, the Court made it clear that its extension of equal protection rights to undocumented migrant children should not necessarily be read as precedent to support the extension of these rights to undocumented migrant adults.

[vii] Pluralist theorists, such as Robert Dahl and David Truman, asserted that a monopolistic elite would be prevented from imposing its narrow class interests on society so long as political structures gave equal recognition to all competing groups and thereby forced them to compromise with one another Truman, D. (1951), *The Governmental Process: Political Interests and Public Opinion.* Alfred A. Knopf: New York, Dahl, R. A.1957 "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law,* **6**..

[viii] In this respect, the theory fit well with the professional arrival in the 1960s of the third generation descendants of the wave of U.S. immigration that had peaked in 1910 Noiriel, G. (1996), *The French Melting Pot.* University of Minnesota Press: Minneapolis..

[ix] Substantial grants went to the NAACP-LDF and the Mississippi office of the Lawyers' Committee for Civil Rights Under Law. The Foundation also provided start-up funds to establish the Mexican American Legal Defense and Education Fund, the Southwest Council of La Raza, the Native American Rights Fund, and the Puerto Rican Legal Defense and Education Fund.

[x] The litigation in *Doe v Plyler* was organized in 1978 by MALDEF as a test case in Federal District Court against the Texas law. In 1979, while the *Plyler* case was being heard by the judges of the 5th Circuit on appeal by the state, a consolidated statewide class action was approved in the Houston Federal District Court that aimed to address statewide issues so as to accelerate the process of allowing all undocumented children to return to school. Peter Schey was recruited by local attorneys to organize this consolidated case, *In re Alien Children Ed. Litigation*. In 1981, arguments in the *Plyler* case and in the consolidated Houston case were jointly heard by the U.S. Supreme Court.

[xi] It did not hurt that Judge King was himself African-American.

[xii] Under the new regulations, prefects were instructed to veto requests for regularization if the immigrant's employer could not show that after advertising the position for three weeks through the National Employment Agency (ANE) the agency had failed to find a worker to fill the position.[xii] Prefects were also instructed to veto requests for regularization if the immigrant's employer failed to provide adequate housing for the worker. A denied request for regularization would result in an expulsion order. The circulars also changed the rules for issuing residency and work cards for all immigrants, not just those making the initial attempt to regularize their status. Prefects were instructed to replace the temporary work authorization card, previously issued during the first year of employment, with a one-year visa pasted onto the immigrant's employment contract. They were also instructed to ensure that the residence cards they issued to non-citizens would last no longer than the duration of the work permits.

[xiii] Since GISTI was not yet registered as an official association, another case was brought by GISTI's members in the name of a Portuguese immigrant and CFDT unionist, Antonio Da Silva, who held work and residency permits, but for whom it was argued the circulars would impose multiple obstacles when it came time to renew these permits. The two cases were consolidated when they were finally heard by the Conseil d'Etat in January 1975.

[xiv] Litigation was brought against three November 1974 circulars that suspended all new labor immigration and all family immigration. Cases were also organized against another circular passed the same month that placed conditions on the issuance of residence permits, and two others that attempted to restrict migration to France by citizens of France's former black African colonies. The government's "return assistance program," promulgated by memorandum in June 1977, was also the object of litigation before the Conseil d'Etat.

[xv] Over the ensuing months, the American Bar Association and the American Immigration Lawyers Association combined efforts to provide two thousand geographically diverse pro bono lawyers to represent Haitians making asylum claims. Thus, an unexpected consequence of the decision was that it prompted the private bar to become active in immigration politics.

[xvi] Weil suggests that this indicates that discrete contacts existed between the Conseil d'Etat and like-minded Gaullist politicians

[xvii] Sassen writes that it is this tension that gives to immigration its heuristic capacity to illuminate tensions at the heart of the historically constructed nation-state.