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THE CIVIL RIGHTS REVOLUTION COMES TO IMMIGRATION LAW: A NEW LOOK AT THE IMMIGRATION AND NATIONALITY ACT OF 1965

GABRIEL J. CHIN*

In this historical analysis of the Immigration and Nationality Act Amendments of 1965, Professor Chin argues that Congress eased restrictions on Asian immigration into the United States in an effort to equalize immigration opportunities for groups who had been the victims of discriminatory immigration laws in the past. In Part I of the Article, he summarizes immigration law before the 1965 Amendments, illustrating the restrictions on non-white immigration which may be found in nearly all immigration

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A number of people and agencies graciously provided first-hand information about the framing and development of the Immigration and Nationality Act Amendments of 1965, including President Gerald R. Ford; Senator Charles Mathias; Governor Arch Moore, Jr.; Representatives James Corman, Don Edwards, Robert Kastenmeier and Peter Rodino, Jr.; former Senate Judiciary Committee staff member Dale DeHaan; David Burke, former Chief of Staff to Senator Edward M. Kennedy; Myer Feldman, Deputy Counsel to President John F. Kennedy and Counsel to President Lyndon B. Johnson; W. Willard Wirtz, Secretary of Labor under Presidents Johnson and Kennedy; the U.S. Department of Justice Office of Legal Counsel; Nicholas deBelleville Katzenbach, President Johnson's Attorney General; Norbert Schlei, Assistant Attorney General under Robert Kennedy; and former Department of Justice attorney Adam Walinsky.

laws before 1965.

In Part II, Professor Chin disputes the prevailing view among scholars that Congress did not intend to ease immigration opportunities for Asians, but passed the law with the expectation that few Asians would immigrate as a result. Relying on congressional documents chronicling the passage of the bill, as well as recent interviews with participants in the 1965 legislative process, Professor Chin rejects the argument that Congress expected little or no change in the demographics of the immigration stream, which was predominantly white during the first half of the twentieth century. Professor Chin claims that this erroneous interpretation of history is based in part on a misunderstanding regarding Attorney General Robert Kennedy's testimony before Congress. Professor Chin further rejects arguments that the bill was designed almost exclusively to remedy injustices to southern and eastern Europeans, that the easing of restrictions on Asian immigration was passed only with the understanding that the Act contained structural protections against increased Asian immigration, or that legislators did not know that Asian families and professionals wanted to immigrate to the United States.

Instead, Professor Chin argues that the 1965 legislation is widely misunderstood. He indicates that history shows that the bill was passed with a racial egalitarian motivation, thus taking a revolutionary step toward non-discriminatory immigration laws.

"The 1965 Immigration Act . . . [has] been a disaster and should be either repealed or reformed so substantially as to imitate repeal."[1]

From the success of California's Proposition 187,[2] which denies most public benefits to undocumented aliens, to proposals in Congress to slash legal immigration, the nature of America's immigration policy is undergoing scrutiny of a scope and intensity not seen in decades. One way of understanding what is at stake in this debate is the continuing vitality of the Immigration and Nationality Act Amendments of 1965 and the principles embodied in it. Although amended several times since 1965, this law established a framework which endures today.[3]

The revolutionary feature of the 1965 Act was its elimination of race and national origin as selection criteria for new Americans. Race neutrality was a significant development for American immigration law, which had been explicitly race conscious from the first

1. *Our Town*, NAT'L REV., Aug. 23, 1993, at 14, 15.

2. Electoral success, at least; many provisions of Proposition 187 have been enjoined as preempted by federal law. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995).

3. For an overview of current immigration law, see 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE pt. 1 (1996) (offering historical synopsis and overview of current law); 2 *id.* pt. 5 (discussing details of eligibility and procedure for obtaining permanent residence status).

substantive federal regulation of immigrants, the Coolie Act of 1862,[4] to the Immigration and Nationality Act of 1952,[5] passed only thirteen years before the 1965 Act.

The 1965 Act represents a high-water mark for opponents of immigration restriction. They celebrate the humane spirit of the 88th and 89th Congresses which, in two remarkable years, passed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the 1965 immigration law. Diversification of the immigrant stream is, from this perspective, no less a civil rights triumph than is equal opportunity under law in the voting booth or in the workplace. The elimination of race as a factor was a practical as well as symbolic change. Since 1965, upwards of seventy-five percent of immigrants have been from Asia, Africa, or Central or South America.[6]

To some immigration restrictionists, the 1965 Act was America's Trojan Horse, perhaps the quintessential example of the rule of unintended consequences.[7] That a majority of the post-1965 immigration has been non-white, restrictionists contend, was as unexpected as it was undesirable. Although the 1965 Act is racially neutral on its face, a phalanx of scholars of otherwise diverse viewpoints agree with restrictionists that the Act was actually designed to increase the number of *white* southern and eastern European immigrants, not people from the third world.[8] Theodore H. White, for instance, wrote that the "new [A]ct ... was noble, revolutionary—and probably the most thoughtless of the many acts of the Great Society."[9] Indeed,

4. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (regulating transportation of "inhabitants or subjects of China, known as 'coolies' "), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387.

5. Immigration and Nationality Act of 1952, ch. 477, § 202(b), 66 Stat. 163, 177 (establishing special quota attribution rule for persons tracing ancestry to races indigenous to "Asia-Pacific triangle" area), *repealed by* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12.

6. *See* INS, U.S. DEPARTMENT OF JUSTICE, STATISTICAL YEARBOOK OF THE INS, 1991, at 29-30 tbl.2 (1992) (showing immigration by decade from 1971-90 and by year for 1991-92) [hereinafter 1991 STATISTICAL YEARBOOK]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 105-09 (1976) (showing immigration by country for 1966-70) [hereinafter BUREAU OF THE CENSUS].

7. Many commentators use the 1965 Act as a prime example of the rule of unintended consequences. *See, e.g.*, S.L. Bachman, *As the Number of People Increases in Poor Nations, the Number of People at the Borders of Rich Countries Does, Too*, SAN JOSE MERCURY NEWS, Mar. 20, 1994, at 7C ("The Law of Unintended Consequences upsets planning."); Donald Devine, *Impending Debate on Immigration*, WASH. TIMES, May 1, 1995, at A16 ("Talk about your unintended consequences from government actions.").

8. *See infra* notes 122-35 and accompanying text.

9. THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE

David Reimers questions what "[Congress] would have done if this issue were clear in 1965,"[10] suggesting the possibility that the bill would not have passed, at least not without measures designed to minimize Asian and other non-white immigration.[11] Roger Daniels has no doubts: "[H]ad the Congress fully understood [the 1965 Act's] consequences, it almost certainly would not have passed."[12]

This argument implies that the Administration and Congress were ignorant, hypocritical, or both. The argument is not simply that Congress was unaware of what seems obvious in retrospect: that poor relations of Americans would want to come here, or that skilled people from relatively impoverished regions of the world would find life in America attractive. Neither is it the claim that officials did not predict precisely how the details of the new law would play out. Instead, the argument is that the Congress which passed the 1965 Act had a conscious belief that white immigrants would continue to dominate the immigrant stream. Congress offered legal equality, these people say, because and only because they firmly believed that non-white immigrants would not take advantage of it.

Commentators such as Peter Brimelow, author of the controversial *Alien Nation*, point to seemingly conclusive evidence of the intent of the law, such as Attorney General Robert Kennedy's prediction that " '5,000 [Asians] would come in the first year [under the 1965 Immigration Act], but we do not expect that there would be any great influx after that.' "[13] To some scholars, Congress's mistake may be of historical interest only, but restrictionists contend that the law's unin-

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PRESIDENT, 1956-1980, at 363 (1982). Similarly, University of North Carolina history professor and immigration critic Otis Graham identifies the 1965 Act as a prime example of the policies that are supposed to have killed liberalism. *See* Otis Graham, Jr., *Tracing Liberal Woes To '65 Immigration Act*, CHRISTIAN SCI. MONITOR, Dec. 28, 1995, at 19.

10. DAVID M. REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 76 (2d ed. 1992).

11. Professor Reimers concluded: "The bill might have passed anyway, in the civil rights and generally liberal climate of 1965, but perhaps not so easily or without other changes." *Id.*

12. ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 338 (1990).

13. PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 78 (1995) (quoting Sen. Robert Kennedy). A number of scholars have trenchantly criticized Brimelow's policy prescriptions. *See, e.g.*, Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 *passim* (1996); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 *passim* (1996); Peter H. Schuck, Book Review, *Alien Rumination*, 105 YALE L.J. 1963 *passim* (1996). For a discussion of Attorney General Robert Kennedy's statement, see *infra* notes 215-45 and accompanying text.

tended consequences make it a monumental blunder that must be corrected.[14] Lawrence Auster, an unsung godfather of the restrictionist movement, insists that introduction of so many immigrants of different cultural backgrounds is leading us down "the path to national suicide." The punch line: Admit mainly whites, urge restrictionists, or slam the door, before it's too late.[15]

This Article examines the conflicting viewpoints concerning the meaning of the 1965 Act. What kind of America did the framers of the law envision? Was it a civil rights milestone, or was it intended to be a gesture of no impact that has gone badly wrong? A close reading of the legislative history of the 1965 Act shows some support for what is clearly the standard view that Congress did not anticipate a change in the racial demographics of the immigration stream. Nevertheless, the more probable conclusion is that Congress intended to create real equal opportunity for groups whose opportunity to immigrate had been restricted in the past. If the magnitude of the change was unexpected, it was also probably not a major issue to a group of legislators who, by passing laws prohibiting discrimination in a variety of contexts, demonstrated the sincerity of their faith in the irrationality of racial distinctions.

Part I of this Article briefly summarizes the racial and quasi-racial restrictions in American immigration law which were swept away by the 1965 Act, focusing on racial treatment of Asians. It points out that as recently as 1952, when Congress passed the McCarran-Walter Act, Congress was willing to pay a substantial price to avoid even trivial non-white representation in the immigration stream.

Drawing upon interviews with members of Congress and the Administration who worked on the bill and on the legislative history of the bill, Part II tests the scholarly consensus that Congress believed there would be no significant change in the racial demographics of the immigrant stream. It concludes that the better view is that Congress knew that more Asians would immigrate as a result of the law. Because the record supports the idea that Congress

14. *See, e.g.*, LAWRENCE AUSTER, THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM 10-26 (1990) (arguing that consequences of 1965 Act were unintended); *id.* at 82-84 (arguing for slashing legal immigration); BRIMELOW, *supra* note 13, at 74-91 (describing "accidental" nature of 1965 Act); *id.* at 258-59 (arguing that 1965 Act should be repealed now that its consequences are known); Linda Seebach, *Let's Vote on a U.S. Immigration Policy*, BALTIMORE EVENING SUN, May 8, 1995, at 9A.

15. *See* AUSTER, *supra* note 14 *passim* (arguing that large-scale immigration of culturally dissimilar people will destroy the American culture).

meant exactly what it said—that race was no longer to be a factor in America's immigration law—the conclusion of some scholars and immigration restrictionists that Congress would not have passed the law had it known what the effects would be is far more doubtful than has been advanced.

I. RACE IN AMERICAN IMMIGRATION LAW BEFORE THE 1965 ACT

A. The National Origins Quota System

Designed to maintain racial homogeneity, the national origins quota system based the number of visas awarded annually to natives of particular nations on the percentage of Americans who traced their ancestry to that country. Although the workings of the quota laws are described in detail elsewhere,[16] they are briefly outlined here. The Immigration Act of 1924,[17] the first permanent quota law,[18] provided for about 150,000 immigrant visas annually. Visas were awarded to a country based on the number of American citizens who traced their ancestry to that nation based on the 1920 census. Each country received a minimum of one hundred visas per year.[19] In 1952, the formula was amended by the Immigration and Nationality Act of 1952, also known as the "McCarran-Walter" Act, so that nations were awarded quotas of one-sixth of one percent of the number of inhabitants of the United States who traced their ancestry to that country in 1920.[20] Because the proportion of eastern and southern Europeans in the population was smaller than that of northern and western Europeans, eastern and southern European nations received low quotas, some receiving only the token one hundred visa minimum. Americans tracing their ancestry to southern and eastern European nations were instrumental in developing support for immi-

16. *See, e.g.*, MARION T. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 47-58 (1963) (describing 1924 quota system); *id.* at 133-52 (describing McCarran-Walter quota system); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 468-74 (1981); *id.* at 187-96 (discussing 1924 quota law); *id.* at 303-11 (discussing McCarran-Walter quota system); PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 83-109 (1953) [hereinafter PRESIDENT'S COMM'N]. *See generally* U.S. DEP'T OF JUSTICE, AN IMMIGRANT NATION: UNITED STATES REGULATION OF IMMIGRATION 1798-1991 (1991) (offering an historical overview of the immigration system).

17. Immigration Act of 1924, ch. 190, 43 Stat. 153 (amended 1952).

18. A temporary quota had been established in 1921. *See* Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5, *amended by* Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

19. *See* Immigration Act of 1924, ch. 190, § 11(b), 43 Stat. 153, 159 (amended 1952).

20. *See* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175 (amended 1965).

gration reform in 1965.

Americans of African descent were not counted for purposes of awarding quotas to foreign nations.[21] The law also provided special restrictions on colonial immigration which disproportionately affected persons of African descent.[22] As a result of these factors and others, "[b]efore 1965, Africans represented less than one percent of the total immigrant population."[23] Pre-1965 immigration policy particularly favored Canadians, Mexicans and Central and South Americans, and other residents of the Western Hemisphere. While England, Germany and Ireland had quotas so large that they were often unfilled, Western Hemisphere residents were subject to no numerical limitations.[24]

B. *Controlling Asian Immigration: Exclusion and Limited Wartime Reform*

Control of the potentially massive numbers of would-be Asian

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21. *See id.*; Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (amended 1952) (stating that "the term 'inhabitants in continental United States in 1920' does not include . . . the descendants of slave immigrants"). *See generally* Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (discussing African immigration to the United States).

22. *See* Immigration and Nationality Act of 1952, ch. 477, § 202(c), 66 Stat. 163, 177-78 (amended 1965). Residents of colonies were denied the unlimited immigration privileges awarded to Western Hemisphere nations or full access to the quotas of their mother countries and instead received the minimum 100-per-year quotas, which effectively limited this form of immigration. The Act provided in pertinent part:

> Any immigrant born in a colony or other component or dependent area of a governing country for which no separate or specific quota has been established . . . shall be chargeable to the quota of the governing country, except that (1) not more than one hundred persons born in any one such colony or other component or dependent area overseas from the governing country shall be chargeable to the quota of its governing country in any one year.

Id.

23. Hing, *supra* note 21, at 240.

24. *See* Immigration and Nationality Act of 1952, ch. 477, § 101(a)(27)(C), 66 Stat. 163, 169 (amended 1965) (stating that the term "nonquota immigrant" includes "an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America"). For a discussion of Latino immigration and demographics, see Berta Esperanza Hernandez Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 383-96 (1994). While a full discussion of Western Hemisphere immigration is beyond the scope of this Article, it should be noted in passing that the argument of some critics that the 1965 Act should be "blamed" for increasing Latino immigration is incorrect. *See* Johnson, *supra* note 13, at 112 (noting that 1965 Act imposed numerical restrictions on Western Hemisphere immigration for the first time); Motomura, *supra* note 13, at 1934 (same).

immigrants was a special focus of American immigration law even up to the 1965 Act. For this reason, the law's treatment of Asian immigration is something of a bellwether. American naturalization law discriminated against non-white immigrants from the first days of the Republic. America's first naturalization act in 1790 offered benefits only to whites;[25] persons of African descent were added in 1870.[26] When persons of "races indigenous to the Western Hemisphere" were added to the statute in 1940,[27] only members of Asian races remained ineligible to naturalize.

Asians were the only group whose immigration was restricted on the basis of race. A consistent feature of anti-Asian immigration laws was categorization by race and ancestry, rather than by place of birth. For example, a person of Asian racial descent born and raised in Brazil was treated as Asian, not Brazilian.[28] By contrast, a Greek family could escape discrimination under the national origins quota system by bearing its children in more favored countries. The Chinese Exclusion Act of 1882[29] was the first express racial restriction; as Japanese and Asian Indians began to immigrate, they too were excluded.[30] This process culminated in the Immigration Act of 1924,[31] which tied immigration to the right to naturalization. "[A]lien[s] ineligible to citizenship" were excluded entirely under the 1924 law.[32]

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25. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (retaining restriction of naturalization to "free white person[s]").

26. *See* Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

27. Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137, 1140. Mexicans in territory ceded to the United States after the Mexican War were offered citizenship under the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, May 30, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930, and Indians were naturalized as a group by statute in 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253.

28. *See* Hitai v. INS, 343 F.2d 466, 468 (2d Cir. 1965) (holding that a Brazilian of Japanese ancestry could not enter as a Brazilian, but only as a Japanese).

29. Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

30. *See* Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876, *repealed by* Act of June 27, 1952, ch. 4, § 403(a)(13), 66 Stat. 163, 279. This legislation created the "Asiatic Barred Zone," prohibiting immigration of natives or descendants of natives of continental Asian countries. China was covered by the preexisting Chinese Exclusion Act, and Japanese immigrants were covered by the "Gentlemen's Agreement," a diplomatic understanding that Japan would not issue travel documents to laborers who wanted to come to the United States. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 207-12 (1993) (reprinting portions of the Gentlemen's Agreement).

31. Immigration Act of 1924, ch. 190, 43 Stat. 153, *repealed by* Act of June 27, 1952, ch. 477, 66 Stat. 163, 279. This law is also known as the Reed-Johnson Act or the National Origins Act.

32. *See id.* § 13(c), 43 Stat. at 162.

This phrase was a euphemism for Asians because the Act defined an alien "ineligible to citizenship" as one covered by the Chinese Exclusion Act or by the Asiatic Barred Zone.[33] Even though some United States citizens traced their ancestry to Asian countries, the quota allotment for Asia was zero.[34] After 1924, virtually no Asians could immigrate,[35] and any who were already here were prohibited from becoming naturalized citizens. Again, all of these laws operated on the basis of race, not nationality.

1. Propaganda Benefits from Limited Reform

The process of eliminating racial restrictions suggests how weighty racial concerns were. Beginning in 1943, the anti-Asian restrictions began to break down when Congress awarded China a minimum quota and allowed Chinese aliens to naturalize.[36] In 1946, Congress extended these privileges to Filipinos and Indians,[37] and finally, in 1952, McCarran-Walter granted these rights to all Asian nationalities.[38] At first glance, these laws appear to represent a cau-

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33. *See id.* § 28(c), 43 Stat. at 168.

34. *See id.* § 11(b), (c), (d), 43 Stat. at 159 (noting that "aliens ineligible to citizenship" were not counted as "inhabitants in the continental United States in 1920").

35. Asians were, however, allowed to enter if they were previously lawfully admitted and were returning from a trip abroad, were a minister of religion or a teacher, or were entering solely for purposes of study in an accredited school. *See id.* §§ 4, 13(c), 43 Stat. at 155, 162.

36. *See* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (amended 1946).

37. *See* Act of July 2, 1946, ch. 534, 60 Stat. 416 (amended 1952).

38. *See* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175 (establishing quotas for Asia); *id.* § 311, 66 Stat. at 239 ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex....").

Practically, these changes may have been as important for Asian Americans as *Brown v. Board of Education*, 347 U.S. 483 (1954), was for African Americans living under Jim Crow. Extending the privilege of naturalization to Asians effectively mooted a system of state prohibitions on various forms of civil rights, including property ownership. *See, e.g.*, Thomas Stuen, *Asian Americans and Their Rights for Land Ownership*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 603 (Hyung-chan Kim ed., 1992) (discussing discrimination against Asians in owning property). Mike Masaoka, the late head of the Japanese American Citizens League, testified that he and his four brothers served in the U.S. Army in France in World War II; when his mother used the insurance proceeds from a son killed in combat to buy a house, the State of California confiscated the property because she was an alien ineligible for citizenship. *See Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 7700 and 55 Identical Bills*, 88th Cong. 901-02 (1964), *reprinted in* 10A OSCAR TRELLES & JAMES BAILEY, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, doc. 69A (1979) [hereinafter *Hearings on H.R. 7700*]. Additionally, as aliens ineligible to citizenship, Asians were precluded from receiving many professional licenses. *See, e.g.*, *In re* Hong Yen Chang, 24 P.

tious but real change in the attitude of the United States towards Asian immigrants. Testifying before Congress in favor of the proposals which became the 1965 Act, Secretary of State Dean Rusk asserted that the 1943 law was a "well-considered and cautious beginning of a revision of our policy of excluding Asian persons [which] has been followed by progressively liberal amendments to our laws."[39] Therefore, in Rusk's view, the 1965 reform proposal was not a "request . . . that the Congress drastically depart from existing policy, but rather that it pursue to a conclusion a development which began more than 20 years [before]."[40]

The prevailing scholarly view is that Rusk put the reforms in an unrealistically flattering light. Rather than representing a decision by Congress about the desirability or acceptability of significant numbers of Asian immigrants, most authorities agree that the reforms were essentially ad hoc responses to particular emergencies or political circumstances. Contemporary scholars correctly observe that World War II motivated Chinese immigration reform.[41] China was

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156, 157 (Cal. 1890) (holding that petitioner could not be admitted as an attorney because he was ineligible for naturalization); *In re* Takuji Yamashita, 70 P. 482, 483 (Wash. 1902) (same). *See generally* Philip Nash, *Asian Americans and their Rights for Employment and Education*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY, *supra,* at 897 (discussing historical discrimination against Asian Americans). In addition, allowing Asians to immigrate on the same basis as all other races allowed Asian Americans, who constituted substantially less than 1% of the population as late as 1965, *see Immigration: Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 89th Cong. 119 (1965) (statements by Sen. Fong and Secretary of Labor Wirtz), *reprinted in* 11 TRELLES & BAILEY, *supra*, doc. 70 [hereinafter *Hearings on S. 500*], to hope that numerical (and hence political) insignificance might not be permanent. Indeed, thanks to immigration permitted pursuant to the 1965 law, as of July 1, 1994 they represented 3.5% of the population. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 22 tbl. 22 (115th ed. 1995).

39. *Hearings on H.R. 7700*, *supra* note 38, at 388 (statement of Secretary of State Dean Rusk). The House Judiciary Committee Report on the 1965 Act made a similar claim in virtually the same language. H.R. REP. NO. 89-745, at 13 (1965), *reprinted in* 11 TRELLES & BAILEY, *supra* note 38, doc. 71.

40. *Hearings on H.R. 7700*, *supra* note 38, at 388.

41. President Roosevelt himself regarded the "legislation as important in the cause of winning the war and of establishing a secure peace." S. REP. NO. 78-535, at 2 (1943). Scholars have not missed the political aim of the law. *See, e.g.*, DANIELS, *supra* note 12, at 328 (describing the repeal of Chinese Exclusion as "a good behavior prize"); ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 152-53 (1957) ("The few who saw repeal as a renunciation of racist concepts and an effort to realize American ideals were very definitely in a minority, and it is most improbable that the liberals could have secured their objective on these moral and idealistic grounds."); WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 395 (1974) ("FDR felt that nations which were largely Caucasian had to be discreet and courteous in their relations with the colored peoples of Asia. Roosevelt took many steps in that direction, including a

the most important allied power on the Asian continent; many other Asian countries were under Japanese domination. It was essential to keep China fighting to keep the Imperial Japanese Army occupied,[42] yet the Allies' global war strategy, according to President Roosevelt, "required the concentration of the greater part of our strength upon the European front."[43] Supporters insisted the bill was necessary to

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request in 1943 that the Chinese Exclusion Laws be repealed."); MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 99 (1987) ("Our alliance with China in the war with Japan was the main factor leading to the repeal of the Chinese Exclusion Act."); REIMERS, *supra* note 10, at 14-15 ("The China bill had been mainly a wartime measure, as a gesture of friendship to an ally."); ABBA P. SCHWARTZ, THE OPEN SOCIETY 107 (1968) (stating that the repeal was "a show of good will toward an ally in war"); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 416-17 (1989) ("World War II had forced the United States to reopen its gates to the Chinese as well as to Filipinos and Asian Indians. Its very claims of democracy required the country to remove the racism contained within immigration policies."); Neil Gotanda, *Towards Repeal of Asian Exclusion, in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 309, 316-18 (Hyung-chan Kim ed., 1995); John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943-65 in* CHINESE AMERICA: HISTORY AND PERSPECTIVES 1995, at 1, 8 (Chinese Historical Society of America ed., 1995); Marius A. Dimmitt, The Enactment of the McCarran-Walter Act of 1952, at 208 (1971) (unpublished Ph.D. dissertation, University of Kansas) (on file with author).

> One commentator has argued:
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> Proclaiming its moral superiority to Hitler and fascist Europe, America was faced with the inconsistency between its claims of equality, freedom and democracy, and its own institutionalized racism, including widespread racial segregation and the exclusion of Asians from citizenship. In short, the United States had to 'make good its claims to democracy.'

Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1068 (1994) (citation omitted).

42. A State Department official, for example, reported that the Chinese Ambassador to the United States raised the issue with the State Department. According to the conversation,

> [t]he Chinese Government is interested in removal of our discriminations against the Chinese as Chinese; they are eager for recognition, technical at least, of China and the Chinese on a basis of "equality." The fact, however, that the Ambassador twice expressed a hope that something might be done without undue delay causes me to speculate as to the possibility that he had the present military and economic situation in unoccupied China—which situation is becoming acute especially from point of view of morale—much in mind. What the Ambassador said, together with other indications, causes me to believe that it is desirable from point of view of the war effort for us to work along as liberal lines as may be possible and as expeditiously as may be possible toward doing something constructive with regard to the solution of this question.

Memorandum of Conversation, by the Advisor on Political Relations, May 29, 1943, *reprinted in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1943, CHINA 772-73 (1957).

43. S. REP. NO. 78-535, at 2. Representative Walter Judd suggested that this policy made this bill important because it provided some tangible evidence of support when the Allies were unable to provide munitions. The goal of winning in Europe first

> could only mean to the Chinese that prolongation of their sufferings was consid-

save American lives.[44]

Immigration reform was particularly important because a central part of the Japanese propaganda campaign involved reminding Asians of the Chinese Exclusion laws.[45] Representative Ed Gossett explained:

> It is a notorious fact that for many years the Japanese have been carrying on a propaganda campaign seeking to aline [sic] the entire oriental world behind Japanese leadership, seeking to set the oriental world against the occidental world. They have called it a campaign of Asia for Asiatics. This propaganda has generally been based upon two propositions insofar as the Chinese are concerned. And mind you just here, there is no propaganda quite so effective as true propaganda. The first leg of Japanese propaganda was that of extraterritoriality. The second leg has been the Chinese exclusion laws.[46]

> ered of no consequence. The Chinese were just so many millions of flies. The thing that was important was that the Allies get agreement in Europe. The white man and his civilization must be saved no matter what happened to anyone else.

89 CONG. REC. 8591 (1943) (statement of Rep. Walter Judd).

44. Representative Judd explained: "No one will dispute that this Nation is in the most critical hour in its whole history.... The question before us, therefore, is not just 105 Chinese immigrants a year.... More important, it is thousands of American boys, perhaps even victory or defeat in Asia." 89 CONG. REC. 8590 (1943). According to Representative Judd:

> We are sacrificing American lives insofar as we fail to mobilize fully the will and the confidence of so indispensable an ally. I do not want on my hands the blood of a single additional American soldier who had to die in China because we failed here to show our purpose to treat the Chinese as equals, and thereby weakened China's morale and will to fight offensively.

Id. at 8592. Representative Thomas Scanlon saw "this bill saving the lives of our fighting men." *Id.* at 8597. Representative Judd suggested that the bill would avoid a future cataclysmic race war. *See id.* at 8633.

45. *See* HING, *supra* note 30, at 36 (noting that the 1943 law was a response to Japanese propaganda); Helen Chen, Chinese Immigration into the United States: An Analysis of Changes in Immigration Policies 111 (1980) (unpublished Ph.D. dissertation, Brandeis University) (on file with author) ("Congress was forced to act when Japan mounted its propaganda campaign to discredit Americans in Asia."). For examples of some of the Japanese propaganda, see *id.* at 112-14 (citing *Hearings on Repeal of the Chinese Exclusion Acts, H.R. 1882 & H.R. 2309, Before the House Comm. on Immigration and Naturalization*, 78th Cong. 40-41 (1943)).

46. 89 CONG. REC. 8581 (1943) (remarks of Rep. Ed Gossett). "Extraterritoriality" was the doctrine invoked by colonial powers to deprive foreign nations of jurisdiction over crimes by Westerners, who would be tried by courts constituted by their home countries. The United States Court for China was an example of this practice. For a discussion of the legal and historical background of the Court for China, see *Mookini v. United States*, 303 U.S. 201 (1938), and David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 460-74 (1988).

Similarly, Representative Thomas Scanlon explained that the problem with this particular propaganda was that it was "based on truth."[47]

The Chinese Repealer was an effort to fight propaganda with propaganda rather than with significant levels of actual immigration.[48] Using techniques replicated in later statutes, the law's structure ensured that Chinese would have only a limited presence. First, the quota assigned was insignificant—105 annually. Second, this quota did not apply simply to citizens of China, or persons in China, but persons of Chinese racial origin, regardless of their citizenship, nationality, or place of birth. This broad application addressed Congress's concern that persons of Chinese ancestry born in countries with larger quotas could enter through the quota of that country, thereby exceeding the 105 annual limitation.[49] Notions of racial equality seem not to have been an important motivating force.[50]

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47. 89 CONG. REC. 8596 (1943). A memorandum by a State Department official confirmed this problem:

> During the past forty years the Japanese, increasingly smarting under the grievance, as they saw it, of our discrimination against them as a race, made of this discrimination a diplomatic issue and used the fact of this discrimination as a springboard and a projectile of propaganda among their own people against the white race in general and the United States in particular.

Memorandum by the Advisor on Political Relations, June 9, 1943, *reprinted in* U.S. DEP'T OF STATE, *supra* note 42, at 777.

48. Representative Earl Michener correctly pointed out that "the enactment of this legislation will have an infinitesimal effect on immigration into this country." 89 CONG. REC. 8603 (1943); *see also id.* at 8628 (remarks of Rep. William Poage) ("[I]t will have no practical effect on the United States .... In China, however, it will have vast practical effects."). The Senate Report noted that "[t]he number of Chinese who will actually be made eligible for naturalization under this section is negligible." S. REP. NO. 78-535, at 6. Representative John Coffee, likewise, assured doubters that the "current proposal is a gesture—a beau geste. This does not open the door. Some people think it is the camel putting its nose under the tent. But this assures the people of China that we recognize them as equals." 89 CONG. REC. 8601 (1943). President Roosevelt himself observed that "[t]here can be no reasonable apprehension that any such number of immigrants will cause unemployment or provide competition in the search for jobs." S. REP. NO. 78-535, at 3. Attorney General Biddle, likewise, wrote that "no useful purpose is being served by keeping the Chinese exclusion laws in effect, since under the quota provisions the Chinese quota would be only 105 persons annually." *Id.* at 2; *see also* U.S. DEP'T OF STATE, *supra* note 42, at 778 (observation of a State Department official that "[t]he immediate problem so far as this country is concerned is that of so revising our laws and procedures as to eliminate discrimination against the Chinese and at the same time safeguard ourselves against a large influx of Chinese immigrants").

49. *See, e.g.*, 89 CONG. REC. 8582 (1943) (remarks of Rep. Fred Busbey). Representative Judd assured his colleagues that "[t]here are no loopholes whereby persons of the Chinese race who were born in Hong Kong, for example, and therefore are British citizens, could come in under the British quota." *Id.* at 8588.

50. While there was an occasional reference to racial equality, *see, e.g., id.* at 8593

In 1952, the McCarran-Walter Act eliminated the remaining bars against Asian naturalization and awarded all Asian countries immigration quotas, most of which were the hundred-per-year minimum.[51] Although the statute has been credited with representing some progress towards racial equality,[52] as with the Chinese Repealer, many scholars have correctly observed that congressional proponents of the bill relied almost exclusively on the foreign policy benefit of reducing racial restrictions against Asians.[53] As the House Judiciary Committee Report explained:

> This bill would make all persons, regardless of race, eligible for naturalization, and would set up minimum quotas for aliens now barred for racial reasons. Thus, persons of Japanese, Korean, Indonesian, etc., ancestry could be admitted and naturalized as any other qualified alien. No doubt this will have a favorable effect on our international relations, particularly in the Far East. American exclusion policy has long been resented there and, in the eyes of qualified observers, was an important factor in the anti-American

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(remarks of Rep. Judd), the circumstances, in addition to the avowed military purposes of the bill, belie any such purpose. Indeed, during the hearings on the bill, when a witness admitted that he supported "social equality among all the races," Representative Leo Allen replied: "I thank you for giving your views. You have done your cause more harm than anybody else." *Hearings on Repeal of the Chinese Exclusion Acts, H.R. 1882 & H.R. 2309, Before the House Comm. on Immigration and Naturalization*, 78th Cong. 40-41 (1943).

51. *See* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175 ("[T]he minimum quota for any quota area shall be one hundred.").

52. *See, e.g.*, ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 284 (1988) ("Even more important than the changes in law were the changes in American ideology.... [S]ometime between June 1941, when Franklin Roosevelt issued Executive Order 8802 establishing a Fair Employment Practices Commission, and June 1952, when Congress dropped the racial and ethnic bars to naturalization, some kind of Rubicon in American policy had been crossed."); MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 10 (1994) ("Although the McCarran-Walter Act was restrictionist in its reaffirmation of the quota system, in order to secure its passage two provisions were included that did involve opening new doors. The Act established very token quotas for those nations—previously excluded—that were defined as the 'Asian-Pacific [sic] Triangle.' It opened up, for the first time since the late 1880s and the 1920s, the possibility of some Asian influx."); REED UEDA, POSTWAR IMMIGRANT AMERICA 43 (1994) ("Despite its basic conservatism, the McCarran-Walter Act did loosen some cornerstones of restrictionist policy.... [T]he 1952 law demolished the long-standing principle of Asian exclusion.").

53. *See, e.g.*, DANIELS, *supra* note 12, at 329 (stating that the 1952 liberalization "should be seen as a fruit of the Cold War"); DIVINE, *supra* note 41, at 173-74; HING, *supra* note 30, at 37-38 ("The ideological Cold War between capitalism and communism made the United States acutely conscious of how its domestic policies, including immigration, were perceived abroad."); Torok, *supra* note 41, at 10-11, Chen, *supra* note 45, at 124; Dimmitt, *supra* note 41, at 209.

feeling in Japan prior to the last World War.[54]

Dean Acheson also recognized the political implications, writing to President Truman that "[o]ur failure to remove racial barriers provides the Kremlin with unlimited political and propaganda capital for use against us in Japan and the entire Far East."[55] Extending immigration and naturalization privileges to natives of all Asian nations surely blunted this propaganda.

2. Propaganda Problems from Limited Reform

If war pressure explains why the laws were liberalized in the ways they were, it fails to explain why the reforms did not go far enough to satisfy the strategic concerns which generated them. With regard to the 1943 law, for example, one commentator persuasively explained that "[t]he ban was lifted because the Chinese were now our allies, and it would be unseemly to deny admission to the nationals of a country with whom we were fighting to rid the world of fascist and racist philosophies."[56] However, if it was unseemly to exclude Chinese, was it not equally unseemly to exclude Indians and citizens of other countries or colonies whose people were fighting on behalf of the Allies?

Scholars have not particularly focused on the double-edged nature of the propaganda effect of the Chinese Repealer and this feature of McCarran-Walter.[57] Members of Congress, however, un-

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54. H.R. REP. NO. 82-1365, at 28-29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1679.

55. Memorandum by Secretary of State to the President, Apr. 14, 1952, *reprinted in* I U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, GENERAL ECONOMIC AND POLITICAL MATTERS 1587 (1983).

56. JETHRO K. LIEBERMAN, ARE AMERICANS EXTINCT? 103 (1968).

57. Some commentators obliquely mention the inconsistency. *See, e.g.*, JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 166 (1986) (noting that "any attempt to redress the insult to China would draw further attention to the larger anti-Oriental context of U.S. immigration policy"). Divine observed that the discriminatory features of the McCarran-Walter Act could have bad side effects in Asia, DIVINE, *supra* note 41, at 173-74, and called the McCarran-Walter Act a "triumph of nationalism over international considerations." *Id.* at 190. Divine explained: "Extremely conscious of a crisis in world affairs, the restrictionists viewed the McCarran bill as a vital measure designed to protect the integrity of the nation." *Id.* at 178. Nevertheless, some understand the McCarran-Walter Act's limited reform of Asian immigration to be a counterexample of Divine's point. *See* UEDA, *supra* note 52, at 43. Reimers appears to be unsure how this aspect of McCarran-Walter helped American security, but he does not go so far as to contend that it had a negative impact. *See* REIMERS, *supra* note 10, at 62 ("While the security provisions of the measure clearly related to the Communist issue, it was not clear that national origins and the racially discriminatory provisions of the Asia-Pacific triangle enhanced American security. But immigration laws were not always logical.").

derstood at the time that retaining discriminatory treatment for Asians would blunt the propaganda benefits of reform.

In 1943, for example, in addition to those who made traditional race-based anti-Chinese arguments,[58] a group of dissenters in the House Immigration and Naturalization Committee[59] and other opponents claimed that the bill created new propaganda problems with other Asian countries while addressing the Chinese morale problem poorly. Representative John Bennett of Michigan, a member of the Immigration and Naturalization Committee and an opponent of the bill, argued that the bill was a transparent gesture because it retained racial treatment for Chinese:

> [T]his bill does not give the Chinese equality on immigration with any European nation.... [Y]ou compel the Chinese to come here by race and permit Europeans to come on the basis of nativity. This result did not come about by accident. It was brought about by a studied and intentional limitation in this particular bill which says in the one breath to China, we are treating you on the basis of equality with Europeans, but in the next breath, it positively limits the number of Chinese by restricting their entry to race regardless of the country of their birth.... Do you think for [one] minute that they are so abstruse that they will not discern the emptiness of this gesture[?] ... Let us not proceed on the assumption that we are fooling anyone about this legislation.[60]

As Representative Bertrand Gearhart suggested, the tiny quota also made the benefit inconsequential as a practical matter.[61]

Bennett also argued that the bill was not an effective counter to Japanese propaganda because it left all other Asians subject to the exclusion.

> While this fails to cure the propaganda situation as it presently exists it creates an additional propaganda weapon with

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58. One group relied on traditional antipathy to the Chinese, *see* 89 CONG. REC. 9989 (1943) (remarks of Sen. Rufus Holman), contending that the bill was an "attempt to put the camel's nose under the tent of our immigration laws." *Id.* at 8602 (remarks of Rep. John Jennings); *accord id.* at 8626 (remarks of Rep. Compton White). One member suggested that allowing Chinese in would give "Japan an argument for breaking down our immigration laws, so that she can flood ... Washington, Oregon, and California with Japanese immigrants." *Id.* at 8631 (remarks of Rep. John Rankin).

59. *See* H.R. REP. NO. 78-732, pt. 2, at 1-2 (1943).

60. 89 CONG. REC. 8584 (1943) (remarks of Rep. Bennett). Representative Thomas Jenkins, likewise, stated that "I do not rate the Chinese as being so ignorant and so easy as not to notice how they are being fooled and discriminated against." *Id.* at 8599.

61. *See id.* at 8589.

> respect to the Asiatics, particularly the Filipinos. By the provisions of this measure we put China in a favored position as against all other Asiatics, including the Filipinos who have been and are at present our own nationals.... Do you see then what further difficulties this legislation creates for us? As far as I can observe, if we are to place China on a quota basis there is no valid reason for refusing to do likewise for other Asiatics and, particularly, the Filipinos.[62]

Representative William Elmer agreed that "[t]o elevate China now above the other Asiatics is a discrimination against them and lays the foundation for future disputes with them."[63]

The fascinating point about these arguments is that they were advanced by legislators who opposed liberalization entirely. Recognizing that it would appear hypocritical to provide a benefit to China but not to other Allied Asian nations such as India, they opposed reform even for the Chinese, rather than extending privileges to other Asian nationalities. All recognized that exclusion from immigration was a fact which was used as propaganda by the Japanese across Asia; indeed, the State Department reported that "this question is of importance from the point of view of the current and the future influence of the United States in our relations not only with China, but with the other countries of Asia and the world in general."[64]

Instead of extending the token benefit of minimum quotas under the 1924 Immigration Act to other Asian nations and thus defusing this propaganda at relatively low cost, opponents thought it was better to continue denying immigration privileges to Chinese. Supporters, too, chose not to try to extend the bill to non-Chinese Asians; this was a special Chinese law for a special Chinese situation. Representative Warren Magnuson explained that "other Asiatic nations are not in the same position as China";[65] that is, they were less strategically important. Congress chose to forego a potential propaganda benefit because it was unwilling to pay the price of, say, five hundred visas annually, a number that in a millennium of immigra-

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62. *Id.* at 8584. Representative Jenkins shared this view. *See id.* at 8598.

63. *Id.* at 8593. Senator Hiram Johnson argued:

> China is not our only Ally subject to our exclusion laws. What about our brave Allies the Filipinos, and what about all the potential Allies in the Orient, the natives of India, Burma, Malaya, the Dutch East Indies, and others? Is not this proposed legislation a deliberate slap in the face for all Asiatic peoples, except only the Chinese?

Id. at 9999 (statement of Sen. Hiram Johnson).

64. U.S. DEP'T OF STATE, *supra* note 42, at 779.

65. 89 CONG. REC. 8587 (1943).

tion would have added less than one percent to the population of the United States.[66]

Again, few academic commentators have focused on the fact that the special, humiliating restrictions on Asian immigration undermined the avowed foreign policy purposes of the McCarran-Walter Act or suggest that reference to the Cold War in and of itself is insufficient to explain the structure of the law.[67] Just as in 1943, for example, the 1952 law provided strict controls on the admission of Asians. While the near-absolute prohibition on Asian immigration was eliminated, Congress replaced it with the Asia Pacific triangle, a geographic area subject to special restrictions. Congress awarded each triangle country a minimum quota of one hundred,[68] but the total immigration from the triangle was limited to two thousand.[69] Thus, if more than twenty countries came into being within the triangle, all triangle countries would have their quotas reduced.

In addition, following the Chinese Repealer model, the McCarran-Walter Act retained a racial test solely for persons tracing more than half of their ancestry to countries in the Asia Pacific triangle. Such persons were charged against the quota of their racial homeland, rather than their country of birth.[70] As one commentator acknowledged, the triangle provision was "an obvious device to prevent such persons, because of their race, from immigrating to the United States under the possibly large quotas of their country of birth, or in the case of Western Hemisphere countries, from coming

66. That is, 500 visas times 1000 years is 500,000; less than one-half of one percent of the American population which, in 1940, was more than 131 million. *See* U.S. BUREAU OF THE CENSUS, *supra* note 38, at 8 tbl.1.

67. *But see* sources cited *supra* note 57 (addressing the inconsistencies caused by restrictions on Asian immigration under the Act).

68. *See* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175. China and Japan received marginally larger quotas. *See* PRESIDENT'S COMM'N, *supra* note 16, at 99-101 tbl.5 (noting that China received a quota of 105 and Japan a quota of 185).

69. *See* Immigration and Nationality Act of 1952, ch. 477, § 202(e), 66 Stat. at 178 (stating that "any increase in the number of minimum quota areas above twenty within the Asia-Pacific triangle shall result in a proportionate decrease in each minimum quota of such area in order that the sum total of all minimum quotas within the Asia-Pacific triangle shall not exceed two thousand"). This feature of the law was removed in 1961. *See* Act Amending the Immigration and Nationality Act and For Other Purposes, Pub. L. No. 87-301, § 9, 75 Stat. 650, 654 (1961); H.R. REP. NO. 87-1086, at 45 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2979. Thus, after 1961, new countries in the triangle could be recognized without diminishing the quotas of preexisting nations.

70. *See* Immigration and Nationality Act of 1952, § 202(b), 66 Stat. at 177, *repealed by* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12.

into the United States on a non-quota basis."[71]

Asian peoples could not have missed the import of these provisions, which presumably gave them little reason to align with the United States rather than the Soviet bloc. The self-defeating effect of the law appears not only in hindsight, but was emphasized by congressional critics who favored greater liberalization. However, the reasoning of this group was not that the bill was insufficiently egalitarian, but that its remaining discriminations against Asians were unwise in light of the Korean War and the global struggle with Communism.[72] The minority Senate Judiciary Committee Report explained that Asian nations would be insulted by these restrictions:

> For the United States to apply the country-of-birth formula uniformly except for persons of Asiatic-Pacific descent would mean discrimination, on our part, between the native citizens of any given country, on grounds of ancestry. This proposed test will certainly be offensive to Indonesia, Burma, Siam, Japan, and other countries whose international cooperation we are seeking and to whom we will be attributing a contaminating ancestry.... Finally, these provisions are insulting to hundreds of thousands of citizens and residents of the United States.
>
> Complete adoption of the principle that an alien be chargeable to the quota of his country of birth, regardless of race, on the other hand, would enhance our Nation's moral leadership in the world and, in particular, would strengthen our prestige in the critical areas of Asia and the lands of the Pacific where the struggle between democracy and communism rages most fiercely in the minds of men. The gain to us may be the lives of millions of our sons.[73]

In a separate statement to the House Judiciary Committee Report, Representative Emanuel Celler also suggested that the restrictions were unwise: "The effect in Asia of such discrimination

71. SCHWARTZ, *supra* note 41, at 109.

72. This point was noted by the Administration as well. *See* Memorandum by the Director of the Bureau of the Budget to the President, May 9, 1952 (noting that Walter bill contained a racial attribution feature, which because it "would apply only in Asia and nowhere else in the world, would call into question the meaning and sincerity of the gestures made by the bill.... The Kremlin is always quick to seize upon any half measure as proof of democratic duplicity."), *reprinted in* I U.S. DEP'T OF STATE, *supra* note 55, at 1591; *see also* I *id.* at 1595 ("These restrictions would announce to the peoples of Asia 'the United States still considers you undesirable. We're going to have one set of rules for everyone else in the world and a special set of rules for you. We want to make sure that too many of you won't come over.' ").

73. S. REP. NO. 82-1137, pt. 2, at 5 (1952).

will have far-reaching effect and will supply ammunition for Communist propaganda in that troubled area of the world.... Tragic consequences are foreseeable, as a result of such legislation, in the development of our foreign policy vis-à-vis Asia."[74]

These themes were repeated in the House floor debates. Liberalization was favored as a means of improving "our relations with the people of the Far East,"[75] but the special treatment of Asians, it was argued, was antagonistic to this goal.[76] In the Senate, as well, there was vigorous debate about whether the bill went far enough to satisfy foreign policy needs. Hubert Humphrey, a leading critic of the discriminatory aspects of the bill, observed:

> [T]he future of the world may well depend on what happens in Asia, Africa, the Near East, and in the underdeveloped and underprivileged areas of the world.
>
> ....
>
> I submit that the passage of the pending bill would announce by public policy and by public act of the Congress of the United States that we do not consider them to be free and equal citizens; that we consider them to be unwanted, unequal, and undesirable.
>
> That would bring about the worst kind of international relations....[77]

Later that day, he stated that "[t]he philosophy which is embodied in this legislation may have a profound effect upon American policies and American relationships in areas of the world where today we stand very, very weak."[78] Senators Herbert Lehman,[79] John Pastore[80] and Brien McMahon[81] made similar arguments. The reality of the

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74. H.R. REP. NO. 82-1365, at 327-28 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1752 (additional views of Mr. Celler).

75. 98 CONG. REC. 4304 (1952) (remarks of Rep. Farrington).

76. *See id.* at 4311 (remarks of Rep. Louis Heller).

77. *Id.* at 5315.

78. *Id.* at 5432.

79. Senator Lehman argued:

> We cannot fool the world. Let us not fool ourselves. If we wish to show our good faith to all of Asia, if we wish to rob the Communists of one of their strongest propaganda weapons in the Far East and wherever in the world there are people with colored skins, if we wish to discard outmoded racist doctrines, if we are not scared of bogeys dreamed up by our opponents, then let us wipe out discriminations in our immigration law based on race.

Id. at 5612.

80. *See id.* at 5162.

81. Senator McMahon insisted that "[n]o propaganda, no assertion of pious intentions and principles, can drown out the plain speaking of our own action here. The free

negative foreign policy implications was emphasized by Senator Lehman, who noted that even before the bill became law, the Philippines was planning a protest to the United States government.[82]

In 1952, as in 1943, members of Congress invoked the Asian war as a justification for liberalization. Senator William Benton suggested that the bill was "potentially more costly, more damaging to the national interest, than any major bill which has come to the floor with so little understanding about it on the part of the Senate as a whole."[83] Benton explained:

> What folly it is for us, Mr. President, to spend hundreds of billions of dollars on defense and to incur more than 100,000 casualties in Korea, and then to undercut this great investment of our boys' blood and their parents' money by passing a bill which turns the world against us . . . .
>
> [W]e can totally destroy that investment, and can ruthlessly and stupidly destroy faith and respect in our great principles, by enacting laws that, in effect, say to the peoples of the world:
>
> "We love you, but we love you from afar. We want you but, for God's sake, stay where you are."[84]

Benton went so far as to argue that the earlier Asian Exclusion laws contributed directly to Japan's attack on Pearl Harbor.[85]

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world which we seek to unite against the threat of encroaching totalitarianism will not be deceived." *Id.* at 5216-17.

82. *See id.* at 5332.

83. 98 CONG. REC. 5149 (1952). Benton was in an excellent position to evaluate the effects of propaganda on foreign policy; he had been both an assistant secretary of state involved in the founding of the United Nations, and the founder of a major Madison Avenue advertising agency, Benton & Bowles. For a discussion of his activities, see generally SIDNEY HYMAN, THE LIVES OF WILLIAM BENTON (1969).

84. 98 CONG. REC. 5150 (1952).

85. Senator Benton reported that he:

> happened to be in Japan in 1937 on the anniversary of the day when the United States enacted its Oriental Exclusion Act. [sic] To my astonishment, I saw black flags break out all over Tokyo, even draped on buildings. It was a national day of mourning in Japan, a day of humiliation. No man knows the extent to which the Oriental Exclusion Act, by which we insulted the proud peoples of Asia, was responsible for the temper of the Japanese people which lead to the attack upon the United States at Pearl Harbor.

Id. at 5157; *see also id.* at 5616 (making similar comment).

A 1943 memorandum by a State Department official offers some support for this view:

> The burning hostility of such men as the late Admiral Yamamoto toward the United States, and the desire and intention and plans and efforts of such men to make war upon and defeat the United States were animated in no small part by their view of and emotions regarding this matter of discrimination on our part against the race of which they were and are members.

War concerns were not enough to move restrictionists. Senator McCarran opposed a substitute bill proposed by Senators Humphrey and Lehman which would have retained the essentials of the national origins system, but would have treated Asians the same as members of other races. McCarran's response was that any foreign policy benefits would be outweighed by the cultural harms of increased Asian immigration:

> [T]he cold, hard truth is that in the United States today there are hard-core, indigestible blocs who have not became [sic] integrated into the American way of life, but who, on the contrary, are its deadly enemy. The cold, hard truth, Mr. President, is that today, as never before, untold millions are storming our gates for admission; and those gates are cracking under the strain. The cold, hard fact is, too, Mr. President, that this Nation is the last hope of western civilization; and if this oasis of the world shall be overrun, perverted, contaminated, or destroyed, then the last flickering light of humanity will be extinguished. A solution of the problems of Europe and Asia, Mr. President, will not come as we transplant these problems en masse to the United States of America.[86]

McCarran further explained that the results of the Humphrey-Lehman bill would be so drastic that Asian American groups themselves opposed them. He argued that the "provisions of the substitute bill are so fantastic, so drastic, and so unrealistic that the major oriental groups in the United States are unalterably opposed to the amendment, because they know it would give them the kiss of death,"[87] apparently implying that any effort at broader liberalization would be fatal to the bill. Senator McCarran pointed out that many Asian-American organizations supported his bill rather than the more liberal substitute.[88]

Memorandum by the Advisor on Political Relations, June 9, 1943, *reprinted in* U.S. DEP'T OF STATE, *supra* note 42, at 777.

86. 98 CONG. REC. 5330 (1952).

87. *Id.* at 5624; *see also id.* at 5329 (referring to "kiss of death").

88. *See id.* at 5092. Perhaps these Asian American groups supported Senator McCarran's bill because they thought it was the best they could get. *Cf.* HING, *supra* note 30, at 55 (noting that the Japanese American Citizens League supported the McCarran-Walter bill, because it would allow the first-generation Japanese immigrants ("Issei") to naturalize). Some Asian American groups withdrew their support for McCarran-Walter once the more liberal Humphrey-Lehman substitute was introduced. *See* 98 CONG. REC. at 5791, 5795.

Senator Francis Case attempted to respond to the foreign policy argument, first contending that the claim was unworthy of an American: "Mr. President, if that argument were true, it should not be advanced by an American." *Id.* at 5764. He also noted that

The Humphrey-Lehman substitute was defeated, and the McCarran-Walter bill was passed by both houses. However, President Truman vetoed it, urging the Congress "to enact legislation removing racial barriers against Asians from our laws. Failure to take this step profits us nothing and can only have serious consequences for our relations with the peoples of the Far East."[89] Congress overrode the veto.

Immediately after the bill was passed, Radio Moscow broadcasted the news to the Korean battlefront,[90] suggesting that propaganda concerns were not groundless.[91] Thirteen years later, many witnesses testifying about the 1965 immigration bill contended that McCarran-Walter created significant foreign policy difficulties,[92] notably Secretary of State Dean Rusk,[93] and James Sheldon, a Vietnam War "hawk" from the United Church of Christ who reported that McCarran-Walter "provided [Communists in Vietnam] a weapon worth more than a whole fleet of helicopters."[94]

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the Soviet Union also did not have a very good immigration policy:

> Russia has no policy for inviting the immigration of peoples from other parts of the world. If she maintains an iron border against outside nationalities ... it is ridiculous to say that because we have a policy of maintaining the historic proportions in this country, we are playing into the hands of the Kremlin.

Id. This overlooked the central message of American Cold War policy that the Soviet Union was an inappropriate role model.

89. H.R. DOC. NO. 520, *reprinted in* 98 CONG. REC. 8082, 8085 (1952).

90. *See* PRESIDENT'S COMM'N, *supra* note 16, at 52-53 (discussing Radio Moscow's broadcast to Korea).

91. Another commentator reported in 1956 that the Soviets were exploiting discriminatory provisions of McCarran-Walter as part of their "New Look" policy. *See* J. Donald Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 LAW & CONTEMP. PROBS. 299, 306 (1956).

92. *See, e.g.*, *Hearings on S. 500, supra* note 38, at 623 (remarks of Mike Masaoka of the Japanese American Citizens League); *id.* at 144 (remarks of Sen. Hugh Scott, reporting complaints about McCarran-Walter from officials in Hong Kong, Japan, Malaysia, Singapore, New Zealand, Fiji, Tahiti and elsewhere); *Hearings on H.R. 7700, supra* note 38, at 390 (remarks of Secretary of State Dean Rusk); *id.* at 257 (remarks of Rep. Spark Matsunaga). Representative Matsunaga stated:

> We are expending more than a million dollars a day together with the valuable lives of Americans in Vietnam. We are still facing the Communist Chinese across the truce lines in Korea. We stand prepared to aid India to resist further Communist Chinese aggression along its Himalayan frontiers. However, military victory over communism is only a phase; it must be accompanied by victory in the battle for men's minds.

Id.

93. *See Hearings on S. 500, supra* note 38, at 51 (statement of Secretary of State Dean Rusk); *Immigration: Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 89th Cong. 91-95 (1965) (same), *reprinted in* 10 TRELLES & BAILEY, *supra* note 38, doc. 69 [hereinafter *Hearings on H.R. 2580*].

94. *Hearings on S. 500, supra* note 38, at 878 (testimony of James Sheldon, represen-

In retrospect, the risk of increased Asian immigration seems fairly low. If immigration privileges had been extended to all Allied Asians in 1943, an absolute cap could have been imposed as it was in 1952. If McCarran-Walter had applied the place-of-birth principle to Asians as it did to members of all other races, it may well be that few additional Asians would have entered. A contemporary critic insisted that "[t]he numbers involved in a nondiscriminatory approach would be so small as to be insignificant."[95]

In 1943 and 1952, then, measures which could have offered aid in what were alleged to be struggles for national survival failed in the face of the historic policy of racial regulation of the immigrant stream. Congressional willingness to pay that price at those times for racial purity suggests a deep attachment to the idea.

II. REAL REFORM: THE 1965 IMMIGRATION ACT

"I think Christ would be excluded under present law."[96]

The year 1965 brought an abrupt change to American immigration law. The Immigration and Nationality Act Amendments of 1965,[97] sometimes known as "Hart-Celler," was structurally familiar

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tative of the United Church of Christ); *see also Hearings on H.R. 2580, supra* note 93, at 369 (offering similar opinion).

95. Kingsley, *supra* note 91, at 306. This claim is supported by projections made in hearings on the bill which became the 1965 Act. Secretary of State Dean Rusk anticipated that approximately 5,000 Western Hemisphere residents of Asian racial ancestry, then ineligible to immigrate because the Asia-Pacific triangle quotas were filled, would come to the United States; Assistant Attorney General Norbert Schlei predicted that the same number of Asians would come the first year they were eligible to enter from the non-quota areas of the Western Hemisphere and from areas with undersubscribed quotas such as England, but he contended that the number would decrease thereafter. *See infra* notes 243-44 and accompanying text.

96. *Hearings on S. 500, supra* note 38, at 342 (remarks of Anthony Celebrezze, Secretary of Health, Education and Welfare).

97. Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

On July 23, 1963, President Kennedy sent his immigration reform proposal to Congress, where it was introduced as H.R. 7700 in the House and S. 1932 in the Senate. Congress held hearings on both bills. *See* HUTCHINSON, *supra* note 16, at 359-60. On January 13, 1965, President Johnson sent a similar immigration proposal to Congress which was introduced as H.R. 2580 in the House and S. 500 in the Senate. Hearings began in February of 1965 in the Senate and in March of 1965 in the House. *See id.* at 367-68. Less than one year passed between the last hearings on the Kennedy proposal and the first hearings on the Johnson proposal, and, as Senator Edward Kennedy explained, Johnson's "recommendations ... with very minor exceptions, paralleled those of President Kennedy." Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 142 (1966). Similarly, James J. Hines of the Office of the Legal Adviser, U.S. Department of State, did a section-by-section comparison of the Admini-

in certain ways.[98] The new law provided for restricted immigration; a limit of 170,000 visas per year was imposed on the citizens of the countries in the Eastern Hemisphere.[99] Furthermore, no more than 20,000 visas per year could go to natives of any one nation.[100] McCarran-Walter's system of awarding visas according to preference categories based on skills or family relationships was repeated in the new law; the new preference categories were based on employment skills or family connections to citizens or permanent resident aliens.[101] In addition, immediate relatives of citizens—spouses, parents and unmarried children—could enter without numerical limitation, that is, regardless of whether one of the 170,000 Eastern Hemisphere (or 20,000 per country) visas were available, and without being charged against those limits.[102]

Western Hemisphere immigration was limited for the first time to 120,000, but without preferences or per-country limitations.[103] As in the Eastern Hemisphere, immediate relatives of citizens could enter without regard to the 120,000 annual limitation.[104] The law's revolutionary feature was its race-neutrality: For the first time since the United States started regulating immigration, race was not a factor.

A. Foreign Policy and War Policy

As in 1943 and 1952, foreign policy concerns surely helped pass the 1965 Act.[105] Representative Michael Feighan, Chairman of the

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stration proposal and the bill which became law and found them substantially similar. *See* James J. Hines, *The Immigration Act of 1965*, 43 INTERPRETER RELEASES 59, 59-61 (1966). Accordingly, the hearings on H.R. 7700 and S. 1932 are treated as relevant to the meaning of the final law.

98. For additional discussions of the Act's workings, see H.R. REP. NO. 89-745, at 8-23 (1965); S. REP. NO. 89-748, at 10-26 (1965), *reprinted in* 11 TRELLES & BAILEY, *supra* note 38, doc. 73, *and in* 1965 U.S.C.C.A.N. 3328, 3328-45 (1965).

99. *See* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (codified as amended in scattered sections of 8 U.S.C.).

100. *See id.* § 2, 79 Stat. at 911-12.

101. *See id.* § 3, 79 Stat. at 912-13 (establishing preference system).

102. *See id.* § 1, 79 Stat. at 911.

103. *See id.* § 8, 79 Stat. at 916 (defining "special immigrant" to mean native of an independent foreign country of the Western Hemisphere or Canal Zone, and the spouse and children of such person, as well as other certain other categories of person, such as permanent resident aliens returning from a temporary trip abroad, and certain active or retired employees of the United States government); *id.* § 21, 79 Stat. at 920-21 (providing that, effective July 1, 1968, immigration of "special immigrants" based on their Western Hemisphere nativity may not exceed 120,000 per year).

104. *See id.* § 21(e), 79 Stat. at 921.

105. *See, e.g.*, TAKAKI, *supra* note 41, at 418 ("Seeking to promote anti-Communism abroad and to present itself as a democracy to peoples engaged in anticolonialist struggles

House Judiciary Subcommittee responsible for immigration, noted that "[o]ur Secretary of State and two Attorneys General have testified that the quota system has made problems in the conduct of our relations with certain foreign countries."[106] Senator Hiram Fong expressed the views of many in Congress when he argued that the quota limitations "hurt America's image as the leader of the free world."[107]

The importance of the foreign policy was highlighted by arguments that Americans were once again engaged in an Asian ground war. Representative John Lindsay noted:

> [T]his nation has committed itself to the defense of the independence of South Vietnam. Yet the quota for that country of 15 million is exactly 100. Apparently we are willing to risk a major war for the right of the Vietnamese people to live in freedom at the same time our quota system makes it clear that we do not want very great numbers of them to live with us.[108]

Tip O'Neill observed that the "current policy ... presents the ironic situation in which we are willing to send our American youth to aid these people in their struggle against Communist aggression

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in Latin America, Africa, and Asia, the United States felt compelled to abandon the national-origins quota."); *id* (noting the important role of the Civil Rights Movement in awakening "the moral conscience of America"); Abba P. Schwartz, *Foreign and Domestic Implications of U.S. Immigration Laws*, 50 DEP'T ST. BULL. 675 *passim* (1964) (discussing foreign policy difficulties caused by McCarran-Walter); Torok, *supra* note 41, at 11-12; Chen, *supra* note 45, at 132-33.

106. 111 CONG. REC. 21,585 (1965); *see also id.* at 21,590 (remarks of Rep. Arch Moore, Jr.). For the State Department's views on the 1965 law, see Dean Rusk, *Foreign Policy Aspects of Proposals to Revise Immigration Law*, 52 DEP'T ST. BULL. 384 *passim* (1965) and Dean Rusk, *The Reform of our Basic Immigration Law*, 52 DEP'T ST. BULL. 806 *passim* (1965).

107. 111 CONG. REC. 24,447 (1965). Senator Fong continued:

> Many countries of Asia and the Pacific have traditionally sought more than a token of immigration to the United States. These are the countries that will play a large and vital role in determining the future course of world events. Their friendship is crucial to all those who are fighting to preserve freedom.

Id. at 24,467.

Representative Joseph Addabbo noted that "[t]he national origins system is discriminatory, and it gives a bad image to our friends overseas." *Id.* at 21,768. Other members of the House made similar remarks. *See id.* at 21,777 (remarks of Rep. John Dent); *id.* at 21,781 (remarks of Rep. William Ryan); *id.* at 21,783-84 (remarks of Rep. Lester Wolff); *id.* at 21,784 (remarks of Rep. Leonard Farbstein); *id.* at 21,787 (remarks of Rep. Jeffery Cohelan); *id.* at 21,787 (remarks of Rep. Joseph Huot). Representative Jonathan Bingham informed his colleagues that from his "experience as an Ambassador to the United Nations, and from discussions with diplomats from the Far East, ... Asians feel very strongly about this discrimination." *Id.* at 21,793. Senator Philip Hart pointed out that "[t]o State Department officials, the bill represents a public relations coup ...." *Id.* at 24,240.

108. *Id.* at 21,769.

while at the same time, we are indicating that they are not good enough to be Americans."[109] Jacob Javits[110] and Edward Kennedy made the same point.[111]

B. *Racial Egalitarian Motivation*

Although foreign policy was a major motivation for the change in immigration policy towards Asians, it was not the sole motivation. Many commentators understand the 1965 Act as principled anti-racist legislation, at least to some degree.[112] Congressional discussion

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109. *Id.* at 21,790.

110. *See id.* at 24,470.

111. *See id.* at 24,777. Senator Kennedy remarked:

> We have sent tens of thousands of American soldiers to Vietnam to defend the people of that country because we believe that as free people they are worthy of our support. But if the finest citizen of Vietnam wanted to come and live in America today, he would have to wait for many years.

Id.

112. *See, e.g.*, VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 62 (1984) ("Just as overt racism could no longer be tolerated in the way citizens treated their fellow citizens, neither could it be sanctioned in the laws that governed the way in which noncitizens were considered for immigrant status."); DANIELS, *supra* note 12, at 338 (noting that the Civil Rights Act, Voting Rights Act and Immigration Act "represent a kind of high-water mark in a national consensus of egalitarianism"); MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 266 (2d ed. 1992). Jones wrote:

> By the early 1960's, however, anti-Communist paranoia had waned, racial and ethnic stereotypes had lost some of their force, and Americans had become more tolerant of diversity. There was also growing awareness that the country was chronically short of skilled labor. Even so, it was not until Johnson's landslide victory in the 1964 presidential election had given Congress a more liberal complexion that reform at last reached its goal.

Id.; see also RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 400-01 (1993) ("Moral consistency compelled lawmakers to remove the barriers to Asian immigration, and in 1965, Congress enacted a new immigration law.... By abolishing discrimination against Asian immigrants, this new law represented a sharp ideological departure from the traditional view of America as a homogeneous white society...."); Nathan Glazer, *Introduction* to CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION 3, 7 (Nathan Glazer ed., 1985) (referring to the "liberal and open spirit of 1965" and the "moral satisfaction of passing a nondiscriminatory immigration act"); Garnet K. Emery, Comment, *The American Dream—For the Lucky Ones: The United States' Confused Immigration Policy*, 12 U. ARK. LITTLE ROCK L.J. 755, 762 (1989) ("The 1965 Amendments were most likely motivated by the civil rights movement...."); Elliot Fertik, Comment, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, 15 U. PA. J. INT'L BUS. L. 649, 651 (1995) ("The 1965 reforms rejected the national quota system established in 1924 and the discriminatory principles upon which it was based." (citations omitted)); Mary Jane Lapointe, Note, *Discrimination in Asylum Law: The Implications of* Jean v. Nelson, 62 IND. L.J. 127, 132-33 (1986) (comparing 1965 law to other contemporaneous civil rights legislation); Katherine Terrell, Note, *The Simpson-Mazzoli Bill: Employer Sanctions and Immigration Reform*, 17 N.Y.U. J. INT'L L. & POL. 987, 992 (1985) ("In 1965 Congress abolished the national origins quotas. This immigration reform was made in response to the dawning

of the 1965 amendments supports this conclusion. Many legislators contended that the laws should be changed because racial and national distinctions were bad in principle, not because of some particular exigency. Senator Edward M. Kennedy argued that the national origins quota system was "contrary to our basic principles as a nation."[113] Senator Joseph Clark insisted that "[t]he national origins quotas and the Asian-Pacific [sic] triangle provisions are irrational, arrogantly intolerant, and immoral."[114] Representative Paul Krebs argued that the national origins system was "repugnant to our national traditions," and that "[w]e must learn to judge each individual by his own worth and by the value he can bring to our Nation."[115] Representative Dominick Daniels argued that "[r]acism simply has no place in America in this day and age."[116] These kinds of arguments had been largely absent from debates in 1943 and 1952.[117]

This change in attitude apparently extended to Asians. Representative Leonard Farbstein stated to his colleagues that he could not "believe that there is any Member of this House who would say a word in defense" of the Asia-Pacific triangle provision.[118] Senator Kennedy announced that he was "especially gratified that we are wiping out the Asia-Pacific triangle.... [A]fter almost 100 years, Asian peoples are no longer discriminated against in the immigration laws of our country."[119]

Others compared the bill to measures designed to eliminate do-

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social consciousness of racial discrimination within the United States, as reflected in the Civil Rights Act of 1964.") (citing Charles B. Keely, *Immigration Policy and the New Immigration, 1965-76, in* SOURCEBOOK ON THE NEW IMMIGRATION: IMPLICATIONS FOR THE UNITED STATES AND THE INTERNATIONAL COMMUNITY 15, 24 (Roy S. Bryce-Laporte ed., 1980)) [hereinafter SOURCEBOOK ON THE NEW IMMIGRATION]; *see also* Daniel H. Foote, *Japan's "Foreign Workers" Policy: A View from the United States*, 7 GEO. IMMIGR. L.J. 707, 711 (1993) ("[S]ince ... 1965, the United States has taken great strides toward achieving an immigration system based on universal standards; and the commitment today to a system free from racial bias appears to be supported by broad national consensus....").

113. 111 CONG. REC. 24,225 (1965).

114. *Id.* at 24,501. It was unjust, Senator Clark continued, that "[a] brilliant Korean or Indian scientist is turned away, while the northern European is accepted almost without question." *Id.*

115. *Id.* at 21,778.

116. *Id.* at 21,787.

117. Surely some members of Congress held racially egalitarian views in those years, but they may have concluded that such an argument would be unpersuasive to the majority.

118. 111 CONG. REC. 21,785 (1965); *see also id.* at 21,792 (remarks of Rep. Brademas) (noting that the bill "will repeal the Asia-Pacific triangle which has too long been an insult to those of oriental ancestry").

119. *Id.* at 24,227.

mestic discrimination, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Reflecting the views of many, Representative Laurence Burton argued: "Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this Nation composed of the descendants of immigrants."[120]

Whether or not aliens had a right to immigrate on a race-neutral basis, officials recognized that racism in immigration was a civil rights issue because of its effect on Americans. Dean Rusk, for example, observed that immigration policy had significant domestic, as well as foreign, effects:

> [G]iven the fact that we are a country of many races and national origins, that those who built this country and developed it made decisions about opening our doors to the rest of the world; that anything which makes it appear that we, ourselves, are discriminating in principle about particular national origins, suggests that we think ... less well of our own citizens of those national origins, than of other citizens ....[121]

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120. *Id.* at 21,783; *see also id.* at 21,765 (remarks of Rep. Sweeney) (making similar observation); *id.* at 21,768 (remarks of Rep. Giaimo); *id.* at 21,783 (remarks of Rep. Wolff); *id.* at 21,784 (remarks of Rep. Farbstein); *id.* at 21,796 (remarks of Rep. Gallagher) (mentioning Voting Rights Act); *id.* at 24,446 (remarks of Sen. Fong) ("Elimination of racial barriers against citizens of other lands is a logical extension of eliminating discrimination against American citizens."); *id.* at 24,563 (remarks of Sen. Edward Kennedy).

121. *Hearings on H.R. 7700*, *supra* note 38, at 390; *see also id.* at 410 (remarks of Attorney General Robert Kennedy) (noting that the bill "would remove from our law a discriminatory system of selecting immigrants that is a standing affront to millions of our citizens"); *Hearings on S. 500*, *supra* note 38, at 9 (remarks of Attorney General Katzenbach) ("I do not know how any American could fail to be offended by a system which presumes that some people are inferior to others solely because of their birthplace.... The harm it does to the United States and to its citizens is incalculable."); *Hearings Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary on S. 1932 and other Legislation Relating to the Immigration Quota System*, 88th Cong. 31 (1964) (unpublished) [hereinafter *Hearings on S. 1932*] (remarks of Sen. Robert Keating). Keating stated:

> Moreover, by eliminating from the law the pernicious implications of racial inferiority contained in the Asia-Pacific Triangle provisions, the United States would no longer be in the position of having on its books a legal slap in the face of our ... own citizens of Asian background who can be justly proud of their record of attainments as Americans.

Id.

Even opponents of reform, such as W.B. Hicks, Jr., Executive Director of the Liberty Lobby, understood this point. Hicks acknowledged the insult to Americans when the law discriminated against those of similar ethnic or national backgrounds:

C. *The Unintended Reform?*

The evidence to this point suggests that the 1965 bill was a genuine repudiation of the discriminatory laws of the past, for Asians as well as for the African and southern and eastern European nationals whose opportunities to immigrate were limited by the national origins quota system. Yet, in spite of the racially egalitarian tenor of congressional and administration statements, a number of immigration scholars and historians,[122] as well as leading anti-immigration

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> I would like to say that the people I have seen, the witnesses, coming before this committee to object to the quota system have made a very deep impression on me. Apparently the quota system is not an insult to foreigners so much as it is to Americans of foreign parentage of identifiable racial strains such as the Italian-Americans and Chinese-Americans, who feel that the quotas make them less valuable or that Congress feels they are less valuable as American citizens than others, and I can well understand their feelings. I think the people who subscribe to Liberty Lobby would agree with me on this, that we do not like the idea of discrimination based on race resulting in a feeling of being insulted on the part of our American citizens.

Hearings on H.R. 7700, *supra* note 38, at 852.

122. *See* IRVING BERNSTEIN, GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON 259 (1996) ("No one anticipated the dramatic changes that would soon take place."); BRIGGS, *supra* note 112, at 79; DANIELS, *supra* note 12, at 341, 344 ("Clearly, the 1965 law has not worked out as its proponents expected. The experts simply did not know what they were talking about . . ."); JONES, *supra* note 112, at 267 (claiming that the massive increase in Asian immigration "was entirely unexpected"); REIMERS, *supra* note 10, at 73-76 (noting that many thought Asian immigration would not increase; citing, inter alia, Rep. Celler); ELIZABETH ROLPH, IMMIGRATION POLICIES: LEGACY FROM THE 1980S AND ISSUES FOR THE 1990S, at 10 (1992) (noting that Congressional interest in change in immigration law was spurred by "certain unanticipated consequences of the 1965 immigration reforms" including increase in Asian immigration); STEPHEN STEINBERG, THE ETHNIC MYTH 268 (1989) (noting that the dramatic increase in Asian immigration was "not fully anticipated at the time of its enactment"); TAKAKI, *supra* note 41, at 419; UEDA, *supra* note 52, at 45; PHILIP Q. YANG, POST-1965 IMMIGRATION TO THE UNITED STATES 18, 21 (1995) (noting that "both Congress and the Johnson Administration expected only a slight increase in Asian immigration" as a result of the 1965 Amendment); Franklin Abrams, *Immigration Law and its Enforcement: Reflections on American Immigration*, *in* SOURCEBOOK ON THE NEW IMMIGRATION, *supra* note 112, at 27 (stating that immigration of Asian professionals was unexpected); Edna Bonacich et al., *Korean Immigrant: Small Business in Los Angeles*, *in* SOURCEBOOK ON THE NEW IMMIGRATION 167, *supra* note 112, at 167 ("An unanticipated consequence of the new law has been a sharp rise in immigration from Asia."); Glazer, *supra* note 112, at 7; Nathan Glazer, *The Closing Door*, *in* ARGUING IMMIGRATION 37, 39 (Nicolaus Mills ed., 1994); Elizabeth Midgely, *Comings and Goings in U.S. Immigration Policy*, *in* THE UNAVOIDABLE ISSUE: U.S. IMMIGRATION POLICY IN THE 1980s, at 52 (Demetrios Papademetriou & Mark Miller eds., 1983) (stating that "not all of the effects of the new system in practice were anticipated" including the increase in Asian immigration); *The New Immigrants*, 5 CQ RESEARCHER 108, 108 (1995) (noting that one of the "effects of the new law [was] a largely unanticipated rise in immigration from . . . Asia"); David M. Reimers, *An Unintended Reform: The 1965 Immigration Act and Third World Immigration to the United States*, 3 J. AM. ETHNIC HIST. 9, 25 (1983); Peter Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIG. L.J. 1, 7 (1991) ("Kennedy ad-

activists,[123] argue that there was no thought that the Asian proportion of the immigration stream would change as a result of the 1965 law.[124] More specifically, Robert Tucker is one of the few who suggest that some increase was expected: "Asian immigration was expected to rise only very modestly as a result of the new legislation."[125] By contrast, Professor Vernon Briggs of Cornell writes that "it was anticipated that passage of the Immigration Act of 1965 would lead to a decline in Asian immigration."[126]

Perhaps George Borjas captures the consensus view when he writes that "[i]t is conceivable that some of the framers of the 1965 amendments saw the family-reunification provisions as a way of preserving the status quo in the national-origin mix of the U.S. population, without having to resort to explicit racial or national-origin restrictions."[127] Similarly, Bill Ong Hing explains that the 1965 law was "driven by [America's] desire to be seen as the egalitarian champion of the 'free world' " but that "Asian immigration after 1965 took the United States by surprise"[128] because "little attention was paid to what, if any, impact the reforms might have on Asian

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ministration officials predicted that only 5,000 Asians would migrate in the first year and virtually none thereafter...."); David Stewart, *Immigration Laws Are Education Laws Too*, 75 PHI DELTA KAPPAN 556, 556-57 (1994); Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 307 (1995); Roger Waldinger, *US Immigration Policy in the 1980s*, 10 ETHNIC & RACIAL STUD. 370, 372 (1987) (reviewing REIMERS, *supra* note 10); Miguel Lawson & Marianne Grin, Note, *The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978*, 33 HARV. INT'L L.J. 255, 256 (1992) ("[T]he 1965 Act had the unintended effect of drastically limiting European immigration to the United States and increasing Hispanic and Asian immigration."); Stephen Wagner, The Lingering Death of the National Origins Quota System: A Political History of United States Immigration Policy, 1952-1965, at 470 (1986) (unpublished Ph.D. dissertation, Harvard University) (copy on file with author).

123. *See* AUSTER, *supra* note 14, at 21-22; BRIMELOW, *supra* note 13, at 76-78.

124. This idea has also been embraced by the popular press. *See, e.g.*, Steve Johnson, *Asians Mindful of U.S. History of Prejudice*, SAN JOSE MERCURY NEWS, June 1, 1993, at 6A ("[W]hen a 1965 law finally let them come in significant numbers, it was largely unintended.... Congress assumed few Asians would actually come.").

125. Robert Tucker, *Immigration and Foreign Policy: General Considerations*, *in* IMMIGRATION AND UNITED STATES FOREIGN POLICY 9 (Robert Tucker et al. eds., 1990).

126. VERNON M. BRIGGS, JR. & STEPHEN MOORE, STILL AN OPEN DOOR? U.S. IMMIGRATION POLICY AND THE AMERICAN ECONOMY 19 (1994). Professor Briggs also stated that "some interest groups saw family reunification as a way to perpetuate the old national origins systems under a guise that was more politically acceptable." *Id.* at 17.

127. GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 32 (1990).

128. HING, *supra* note 30, at 79.

American communities."[129] Many scholars cite Robert Kennedy's prediction that 5,000 Asian immigrants would come in the year after the act became law.[130] Given that 5,000 was a fraction of the annual Asian immigration under the McCarran-Walter Act, reliance on this figure suggests that many scholars really believe that Asian immigration was not expected to increase at all.

The claim that post-1965 Asian immigration was unexpected seems to be not merely that no one considered the issue one way or the other, but that policymakers had a conscious belief that Asian immigration would not increase significantly or would actually decline. The literature's repeated assertion of this point is significant because it implies that knowledge would have been material—that the law might have been structured differently—had the risk of increased Asian immigration been perceived. Not only do professors Reimers[131] and Daniels[132] suggest that the bill may have been conditioned on an assumption of no significant change in the makeup of the immigrant stream, but this "unintended consequence" is cited by restrictionists as a reason to scrap the law.[133] If it is true that a determinative assumption underlying the law was that few Asians would immigrate, it necessarily means that the law was not really intended to eliminate race as a factor from America's immigration laws.[134]

The prevailing scholarly view does not give Congress enough credit. Close examination of the legislative history and interviews with people involved in the bill suggest that Congress knew more Asians would immigrate. The most probable view is that legislators and administration officials knew that Asian immigration would increase substantially, even if no one predicted the actual magnitude,

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129. *Id.* at 39.

130. *See infra* notes 215-35 and accompanying text.

131. *See* REIMERS, *supra* note 10, at 76 ("What [Congress] would have done if this issue were clear in 1965 is, of course, unknown.").

132. *See* DANIELS, *supra* note 12, at 338 ("[H]ad the Congress fully understood its consequences, [the 1965 Act] almost certainly would not have passed.").

133. *See supra* note 14.

134. It would be perfectly consistent for a member of Congress to conclude as an empirical matter that more, fewer, or the same number of non-whites would immigrate under a racially neutral system, or not to think about the consequences at all, and still be an anti-racist. But if a member of Congress voted for the 1965 Act *on the condition* that there would be no change, that person could not fairly claim to be opposed to race as a factor in immigration, any more than could a legislator who voted for the 1964 Civil Rights Act only on the condition that African-Americans remain in segregated and inferior jobs. Someone willing to change racially discriminatory laws only if there is no change in substance is not an anti-racist.

which was probably greater than expected.[135] In this context, it would be easy to confuse an outcome that seems inevitable in retrospect and one that was actually known at the time. Nevertheless, a number of factors suggest that congressional and Administration officials knew that the likely outcome of liberalization would be an increase in Asian immigration. If Congress knew, then the question of what Congress would have done had they known becomes nonsensical—Congress knew and the 1965 Act is what they did in the face of that knowledge.

1. Contemporary Recollections of Participants

A number of participants shared their recollections—some faded—of the drafting and adoption of the 1965 legislation. When trying to determine what people meant by particular actions, what they say has some bearing.[136] The responses were remarkably uniform. President Gerald R. Ford, for example, was the House minority leader in 1965, and a supporter of the bill. He remembers that Asian immigration was expected to increase substantially. "As I recall, it was anticipated that the 1965 Amendments would substantially increase the number of Asian immigrants. As the Republican Leader in the House of Representatives at the time, I favored that result."[137]

The bill came out of the Democratic-controlled House Judiciary Committee, and its Subcommittee Number One, which was responsible for immigration.[138] Peter Rodino, Jr., later Chairman of the

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135. The absolute numbers of immigrants of all nationalities exceeded, in some years, the numbers predicted by Congress in 1965. *See, e.g.*, DANIELS, *supra* note 12, at 340-44.

136. I do not mean to weigh in on the controversy over using legislative history to construe statutes. *See* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 425-31 (1993) (discussing debate and collecting authorities). First, no one questions that the 1965 Act eliminated the national origins quota system and formal consideration of race from the immigration laws. Moreover, this Article examines what Congress and the Administration thought they were doing when they changed the law. In answering this question, legislative history and other evidence is surely relevant. At the same time, the " 'plain meaning' " rule—that the best evidence of congressional purpose is the "plain meaning of the text"—renders doubtful the claim that the racial diversification of the immigration stream was accidental. *See id.* at 426. It is implausible that Congress did not know that ending discrimination would create opportunities for previously excluded groups.

137. Letter from President Gerald R. Ford to Gabriel J. Chin, Assistant Professor of Law, Western New England College School of Law 1 (Jan. 29, 1996) (on file with author).

138. *See* CONGRESSIONAL STAFF DIRECTORY 1966, at 217 (Charles Brownson ed., 1966) (noting that Subcommittee No. 1 had "[s]pecial jurisdiction over immigration and nationality").

House Judiciary Committee itself, recognized that there was enormous unsatisfied immigration demand in Asia.[139] Representative Rodino recognized at the time that the increase in Asian immigration "could be substantial."[140] Judiciary Committee member Robert Kastenmeier also expected that "many more Asians would be coming to the United States."[141] Subcommittee member Don Edwards recalled that he knew "there would be more" Asian immigrants.[142] Jack Brooks,[143] Charles Mathias,[144] and Arch Moore,[145] all members of the Immigration Subcommittee, also anticipated increased Asian immigration, although not at the level that actually occurred.

According to Dale DeHaan, then advisor to Senator Edward Kennedy, supporters of the bill in the Senate recognized that more Asians would be coming.[146] Aware of some scholarly opinions to the contrary, DeHaan disagrees with them.[147]

Kennedy and Johnson Administration officials who worked on the bill had no doubt about its effects. Washington attorney Myer Feldman was Deputy White House Counsel to President Kennedy and White House Counsel to President Johnson.[148] Feldman states

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139. *See* Telephone Interview with Peter Rodino, Jr., Retired Member of Congress (Mar. 8, 1996) (transcript on file with author).

140. *Id.* at 9.

141. Telephone Interview with Robert Kastenmeier, Retired Member of Congress (Jan. 12, 1996) (transcript on file with author).

142. Telephone Interview with Don Edwards, Retired Member of Congress (Jan. 16, 1996) (transcript on file with author).

143. *See* Letter from Jack Brooks, Retired Member of Congress, to Gabriel J. Chin, Assistant Professor of Law, Western New England College School of Law 1 (Jan. 17, 1996) (on file with author) ("As I recall the thought was that a few more Asians would enter and that it would modify the national origin system which had limited the number of Asian immigrants for a few years.").

144. *See* Telephone Interview with Charles Mathias, Retired United States Senator (Feb. 9, 1996) (transcript on file with author).

145. *See* Telephone Interview with Arch Moore, Jr., Retired Governor of West Virginia and Member of Congress (Jan. 18, 1996) (transcript on file with author).

146. *See* Letter from Gabriel J. Chin, Assistant Professor of Law, Western New England College School of Law, to Dale DeHaan, Former Staff Member for Senator Edward M. Kennedy 1 (Dec. 16, 1995) (on file with author) (containing transcribed notes of interview). After leaving Senate service, Mr. DeHaan remained active in refugee and immigration matters. He was director of immigration and refugee services for the National Council of Churches and the Church World Service, and later U.N. Deputy High Commissioner for Refugees. In 1990, he was named to the U.S. Commission for the Study of International Migration and Cooperative Economic Development. *See* Robert Pear, *Centralized Immigration Control Urged*, N.Y. TIMES, June 3, 1990, at A22 (announcing Commissioner DeHaan's appointment).

147. *See* Letter from Gabriel J. Chin to Dale DeHaan, *supra* note 146, at 1.

148. *See* 1 WHO'S WHO IN AMERICA 1274 (50th ed. 1996).

that both Kennedy and Johnson believed that "[w]hether the immigrant was from Asia, Africa, Italy or eastern Europe, or whether the immigrant was from England, France or Belgium, was not an acceptable basis for discrimination between them."[149] Speaking of Asian immigration, Feldman writes: "[W]e did expect there would be an increase and we welcomed it."[150]

Nicholas deBelleville Katzenbach was Deputy Attorney General under Kennedy before becoming Attorney General under Johnson.[151] Katzenbach said recently that he was "surprised [but] not astounded" at the percentage of non-white immigration under the 1965 Act, but that he would not have been surprised at the time the bill was passed if fifty percent turned out to be non-white.[152] Although the details, such as Southeast Asian immigration following the Vietnam War, could not have been anticipated, "the general phenomenon" of increased Asian immigration "should have been predictable, [and he] think[s] was" predictable when the bill was passed.[153] W. Willard Wirtz, then Secretary of Labor, generally shares Attorney General Katzenbach's views.[154]

Norbert A. Schlei,[155] Assistant Attorney General in the Justice Department's Office of Legal Counsel under Robert Kennedy, worked on the original draft of the bill with Adam Walinsky.[156] Both

149. Letter from Myer Feldeman, Former White House Counsel, to Gabriel J. Chin, Assistant Professor of Law, Western New England College School of Law 1-2 (Feb. 2, 1996) (on file with author).

150. *Id.* at 2.

151. During his remarks on the floor of the Senate, Robert Kennedy thanked 10 people for their work on the bill including Adam Walinsky; the first two names mentioned were Attorney General Katzenbach and Assistant Attorney General Schlei. *See* 111 CONG. REC. 24,498 (1965).

152. *See* Telephone Interview with Nicholas deBelleville Katzenbach, Former Attorney General (May 20, 1996) (transcript on file with author).

153. *Id.*

154. *See* Telephone Interview with W. Willard Wirtz, Former Secretary of Labor (Aug. 7, 1996) (transcript on file with author).

155. Schlei's background is remarkable; editor-in-chief of the Yale Law Journal and first in his graduating class, he clerked for Justice Harlan on the Supreme Court and co-authored a prize-winning book with Yale Professor Myers McDougall. *See* 2 WHO'S WHO IN AMERICA, *supra* note 148, at 3705. Six years out of law school, he was an Assistant Attorney General under Robert Kennedy, where he advised the White House on such matters as the Cuban Missile Crisis and integration of the University of Mississippi. *See id.*

156. Since leaving the Justice Department, in addition to practicing law in New York, Walinsky has been one of the most provocative and interesting critics of the criminal justice system. *See* Adam Walinsky, *The Crisis of Public Order*, ATLANTIC MONTHLY, July 1995, at 39, 39; 140 CONG. REC. S124965-01 (daily ed. Aug. 25, 1994) (noting Walinsky's ultimately successful efforts to establish a Police Corps, which occurred in 1994 by virtue

recall that Asian immigration was expected to increase; Walinsky points out that "you'd have to be a real dope not to know that the number would go up."[157] Thomas Ehrlich, President Emeritus of Indiana University and now a Stanford professor, worked on the original draft of the bill when he was on the legal staff of the State Department.[158] He says that he and Assistant Secretary of State Abba Schwartz intended to "open up the gates, and ... it happened just [that] way[]."[159]

In sum, even filtered through thirty years of memory, the consistency of Republican and Democrat, House and Senate, Congress and Administration, suggest that these recollections are worth considering. It is, of course, conceivable that these recollections are self-serving, that the sincere anti-racism which the substance of the remarks suggest has been tailored to fit some notion of political prudence.[160] For two reasons, this seems implausible. First, save only perhaps the Reconstruction Congresses, many of these men come from Congresses and Administrations more sympathetic to civil rights than any in American history. If some of these men were not sincerely in favor of civil rights, then we have never had elected officials who were. Second, their recollections are supported by the contemporaneous record of consideration of the bill.

People thinking about immigration, years before the results of the 1965 Act were known, predicted that ending discrimination against Asians would result in more of them coming over. For example, in his 1963 book *American Immigration Policies*, former Congressman Marion T. Bennett criticized Senator Philip Hart's 1962 proposal to end quota preferences for Northern European nations. Bennett wrote:

China and India ... would ... ultimately be the European-

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of Pub. L. No. 103-322, tit. XX, § 200104, 108 Stat. 2049, 2050 (1994) (codified at 42 U.S.C. § 14093 (1993))).

157. Telephone Interview with Adam Walinsky, Former Attorney, Office of Legal Counsel, U.S. Dep't of Justice (May 31, 1995) (transcript on file with author); *see also id.* (noting that the Chinese quota was around 100, he asks, rhetorically, "How could anybody think when we were repealing the Asia-Pacific Triangle that you wouldn't get a significant increase in immigration from China? That just doesn't make any sense. It's just stupid."); Telephone Interview with Norbert Schlei, Former Assistant Attorney General (Dec. 18, 1995) (transcript on file with author).

158. *See* 1 WHO'S WHO IN AMERICA, *supra* note 148, at 1173.

159. Telephone Interview with Thomas Ehrlich, President Emeritus, Indiana University and Former Attorney, State Department (Feb. 9, 1996) (transcript on file with author).

160. I did not see any particular evidence of this. Indeed, many of these men are now retired from public life.

> *successor to our immigration largesse.* The 1961 Indian census reported 438 million people in that country. The 1953 Chinese census reported 583 million Chinese and in 1962 President Kennedy said there were 650 million in Communist China alone. *The possibility that they might not take advantage of relaxed immigration restrictions is remote.* Their quotas have been oversubscribed for years. One of the arguments advanced for greater Chinese immigration is that the Chinese quota is only 205 annually. It is pertinent to note, however . . . that nonquota Chinese immigration is much greater than the world average of two and one-half times quota immigration.[161]

What is obvious in retrospect was also observed at the time: Liberalization would mean benefits for countries with large populations and high immigration demand.

2. Legislative History: Asian Immigration Will Increase

In 1964 and 1965, there seems to have been no serious question that the racial demographics of the immigration stream would change. In what might have been the first use of the term "the new immigration" in the context of the 1965 Act, Senator Edward Kennedy explained that Americans need not fear the people who would be brought in under the bill: "[T]he people who comprise the new immigration—the type which this bill would give preference to—are relatively well educated and well to do. They are familiar with American ways."[162] Kennedy argued only that the change would not be traumatic, not that there would be no change.

If only southern and eastern European immigration would be increased, then the following exchange about security measures between Representative Michael Feighan and State Department official Abba Schwartz makes little sense:

> MR. FEIGHAN. The reason I ask [about changes in security procedures] is that the existing patterns of immigration to the United States have been in force for some time, thus permitting the development of security techniques and procedures which fit those patterns. *The administration proposal could very well change those patterns to such an extent that you would be required to operate in new and un-*

161. BENNETT, *supra* note 16, at 274 (emphasis added) (footnote omitted). Hart later introduced the bill which became the 1965 Act. *See also Editorial, New Quota for Old*, BOSTON REC. AM., Jan. 16, 1965 (noting irony that "those nations with large numbers of people who would like to emigrate to the U.S. are generally allotted the smallest quota").

162. 111 CONG. REC. 24,228 (1965).

> *charted waters. Is that a realistic possibility?*
>
> MR. SCHWARTZ. We certainly believe you are correct, Mr. Chairman. *There may be people coming in greater numbers from different areas of the world.* That certainly would be taken into account. I can imagine that if numbers were to increase of persons coming from areas where we do not have extensive personnel, or experienced people, that certainly would have an effect and we would have to take care of that.[163]

Senator Paul Douglas made no bones about the effect of the bill: "I would say the fundamental question is simply this. Should we not admit more of the hundreds of thousands of people in eastern Europe, southern Europe, southeastern Europe and Asia who want to come here . . . [?]"[164]

If Asian immigration volume was expected to rise insignificantly, that fact was kept secret from the many witnesses who predicted a substantial increase in Asian immigration. If few subscribed to witness Rosalind Frame's prediction that after forty years of immigration under the new law, there could be more than 114 million Chinese living in the United States,[165] a number of groups, including The Citizens for a Sensible, Security-Minded Immigration Law,[166] and The Daughters of the American Revolution,[167] among several oth-

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163. *Hearings on H.R. 7700, supra* note 38, at 511-12 (emphasis added). The Administration draft of the bill gave the President discretion to give Ireland, Germany and England extra visas over and above the ordinary per-country limitation. Dean Rusk explained:

> This is partly because we do not wish to interrupt *too precipitantly* longstanding patterns of movement of peoples from those countries who have long sent us substantial numbers of emigrants [sic]. I think it would work a hardship if we were to apply this 10-percent rule right away to some of the countries who have been sending us large numbers every year.

Id. at 403 (emphasis added). President Johnson's message to Congress proposed a five-year phase-in of the new law, so that the "possibility of *abrupt* changes in the pattern of immigration from any nation [could be] eliminated." H.R. EXEC. DOC. 89-52, at 2 (1965), *reprinted in* 10 TRELLES & BAILEY, *supra* note 38, doc. 68 (emphasis added). In fact, Congress adopted a three year phase-in period. *See infra* note 207 (discussing this provision). The Senate Judiciary Committee report explained that "*[d]uring the interim*, this procedure will not affect the flow of immigration from large quota countries." S. REP. No. 89-748, at 14 (1965), *reprinted in* 11 TRELLES & BAILEY, *supra* note 38, doc. 73 (emphasis added).

164. *Hearings on S. 500, supra* note 38, at 167.

165. *See id.* at 821.

166. *See Hearings on H.R. 7700, supra* note 38, at 1012 ("Asia and Africa . . . [will] receive the largest quotas.").

167. *See id.* at 736 ("[S]uch a change in our existing laws would appear to be an outright accommodation to the heaviest population explosions throughout the world—India,

ers,[168] agreed that the bill would offer advantages to "immigrants from the overpopulated, socially, and economically deprived countries, such as China, India, and Africa [sic]."[169]

Many witnesses and legislators also recognized that existing law was unfair to would-be Asian immigrants;[170] and that there was un-

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Asia, and Africa. Certainly these countries could naturally be expected to take full advantage of such an increased quota opportunity.").

168. Mrs. Myra C. Hacker testified that the Hart bill "would realine [sic] quotas to countries and be based on the relation of their populations to world population." *Id.* at 764. Representatives of the Greenwich Women's Republican Club explained that immigrants "will begin to come more and more from Asia where the pressures of the population explosion are felt most heavily." *Id.* at 819. Another commentator explained:

> In the preamble to the Constitution, the founders of this great Republic made it abundantly clear that they were leaving the fruits of their struggle as a legacy to us, their "posterity." We, their posterity, are either emigrants, or descendants of emigrants, from the white nations of northern Europe in the majority. . . .We are neither Asiatic nor African.

Id. at 1017 (statement of Matthew McKeon); *see also id.* at 1014 (statement of Fla. State Rep. George B. Stallings, Jr.) ("The enemies of [McCarran-Walter] do not like America as it is, its institutions and its culture. They want to make America over in the image of Asia, Africa, or eastern and southern Europe."); *Hearings on H.R. 2580, supra* note 93, at 443-44 (comments of Tyre Taylor of the Southern States Industrial Council) (noting that immigrants are typically the poorest people from "overpopulated, hunger-racked" nations).

169. *Hearings on H.R. 7700, supra* note 38, at 664.

170. Senator Edward Kennedy said that elimination of the Asia-Pacific triangle concept was "one of the most laudable aspects of the entire bill." 111 CONG. REC. 24,776 (1965). Senator Hart stated that "[d]iscriminatory provisions against immigrants from eastern and southern Europe, token quotas for Asian and African countries, and implications of race superiority in the Asia-Pacific triangle concept, have no place in the public policy of the United States." *Id.* at 24,238. Senator William Proxmire stated that the bill "would break the pattern of inconsistency that has discriminated against immigration from southern and eastern Europe and Asia." *Hearings on S. 500, supra* note 38, at 857-58. Representative William Ryan was one of many who recognized unfairness in the fact that "[t]he quota for Ireland is larger than that for all of Asia." *Hearings on H.R. 2580, supra* note 93, at 165; *see also id.* at 194 (remarks of Rep. Paul Fino) (making similar observation); *Hearings on H.R. 7700, supra* note 38, at 234 (remarks of Rep. Edward Patten) ("[T]he countries of India, China, Israel, Australia, New Zealand, and many others are allowed only 100 people per year."); *id.* at 240 (remarks of Rep. Seymour Halpern) (mentioning discrimination against Asia, among other areas); *id.* at 278 (remarks of Rep. Harold Donohue); *id.* at 317 (remarks of Rep. John J. Rooney); 111 CONG. REC. 21,769 (1965) (remarks of Rep. John Lindsay); *id.* at 24,781 (remarks of Sen. Abraham Ribicoff) (mentioning discrimination against southern and eastern Europe and Asia).

Oregon's Senator Neuberger quarreled on this point with Senator Ervin, who was hesitant about reform. Ervin asked whether, given that one in four people in the world was Chinese, Neuberger advocated admitting 65 million Chinese to the U.S. so they would have the same representation here. Without quite agreeing, Neuberger did insist that there had been unfairness: "I am even more concerned if there [sic] are one out of four that they are not truly represented in our society. It shows we have been excluding them for one reason alone and that is their ancestry." *Hearings on S. 500, supra* note 38, at 551.

satisfied immigration demand in Asia.[171] Many officials recognized that Asian immigration would increase. Edward Kennedy[172] and Attorney General Katzenbach[173] predicted that would-be Asian immigrants would benefit from the reforms.

Senator Ervin, ambivalent but ultimately a supporter of the bill, seemed to assume that China[174] and India[175] would take the maximum quota, and noted that the bill "would provide for at least possible, substantial increases in immigration from" a list of countries with small quotas, including Bhutan, Burma, Cambodia, China, Mongolia, India, Indonesia, Korea, Laos, Pakistan, Thailand, Western Samoa, and Vietnam.[176] Representative George Miller of California, after speaking of a U.S. Air Force Academy graduate of Japanese American ancestry, said "I feel that we can accept more people here or we can perhaps better arrange the quotas to take in people from places and areas that are now given an insufficient quota."[177]

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171. Mrs. Ray Erb mentioned the long waiting lists in some Asian countries, *see Hearings on S. 500, supra* note 38, at 703-04, as did Senator Fong, *see* 111 CONG. REC. 24,447, 24,448 (1965), and Representatives Ryan, *see id.* at 21,781, and Yates, *see id.* at 21,793 (discussing "heavily mortgaged Eastern quotas").

David Carliner, testifying in support of the bill on behalf of the ACLU, pointed out that in addition to unsatisfied immigration demand in Italy and Greece, there was also unsatisfied demand

> to some extent from Eastern Europe and from Asia. I think that under this bill we redress the balance by letting those people come in, and in a historical sense, to give the Chinese a preference today would perhaps be a discrimination in their favor. But if someone has been getting a discrimination for 100 years, he cannot complain if somebody else gets a discrimination for the next 100 years.

Hearings on S. 500, supra note 38, at 448. According to Carliner, "[t]he critical problem is that the people in Greece, in China, to some extent in India, are seeking to come here in large numbers." *Id.* at 455.

Senator Leverett Saltonstall, after mentioning discriminatory effects against southern and eastern Europe and Asia, explained: "Today there are many quota numbers available in some countries where there is little pressure for immigration, while in other areas, where there are many persons who wish to immigrate to the United States, few quota numbers are available and the quotas are heavily oversubscribed." 111 CONG. REC. 24,441 (1965). He mentioned five countries: China, Italy, Greece, Poland and Portugal. *See id.*

172. According to Senator Kennedy, "[t]he principal beneficiaries of the new system are those countries which have large backlogs of applicants for immigration, but have relatively small quotas." *Hearings on S. 500, supra* note 38, at 2. Kennedy named China and Japan, and seven other countries. *See id.*

173. Katzenbach said southern and eastern Europe would benefit and "the Asian countries would get some benefit." *Hearings on H.R. 2580, supra* note 93, at 23.

174. *See Hearings on S. 500, supra* note 38, at 64, 359, 571.

175. *See id.* at 66, 196, 280, 530.

176. *Id.* at 210-11.

177. *Hearings on H.R. 7700, supra* note 38, at 189.

Representative Arch Moore, in explaining what the status of Japan, China and the Philippines would be after the bill was passed, told Congress precisely how the system would work—20,000 per year would be the upper limitation for them just as for every other country.[178] As a result, the United States could "look forward to an increased number of each of the groups . . . referred to."[179] Similarly, Senator Fong stated that there was no need to fear that an increase of Asian immigration would "upset the historical and cultural pattern of American life. An objective examination of the facts dispels this fear as groundless"[180] because of historical patterns of Asian assimilation. The argument that Americans should not fear more Asians surely suggests that more would come.

Opponents of reform recognized that Asia would benefit. Representative O.C. Fisher, an opponent, stated that "[t]here is simply no way of estimating the number of refugees, Asiatics, Africans, and others, who would be admissible . . . . The big increase under the Celler proposal would come primarily from Africa, Asia, and some from southern Europe."[181] Even Representative Frank Chelf, a subcommittee member who supported the national origins quota system, said that the bill should be rejected, but Asian immigration should increase:

> As I recall . . . in 1952 we . . . recognized the Japanese, Koreans, Chinese, and the others. In other words, the Asian countries and this so-called affront of exclusion was removed.
>
> While I agree . . . that this is only a token recognition—and I also agree . . . that there ought to be an additional recognition—how much, at this juncture, I am unable to say, but in all good conscience and sincerity, I do agree . . . we should eventually recognize them by a larger number.[182]

Senators Spessard Holland,[183] John McClellan[184] and Robert

178. *See* 111 CONG. REC. 21,590 (1965).

179. *Id.* at 21,591. Representative Pelly stated that "[i]t is not that I register fear that they might come in because they make wonderful citizens." *Id.* Moore added that "[p]eople who attack what we are doing here today say that it will let millions of orientals come into the United States," and found that result unlikely. *Id.*

180. *Id.* at 24,467.

181. *Hearings on H.R. 2580, supra* note 93, at 157-58.

182. *Hearings on H.R. 7700, supra* note 38, at 393; *see also id.* at 847 (statement by Rep. Chelf) (stating to Chinese-American witness: "I favor an increased quota for your people.").

183. Senator Spessard Holland of Florida, a supporter of McCarran-Walter, noted:

> [T]he bill, as it is now disclosed on the floor, assumes to open the door to immi-

Byrd[185] also recognized that Asian immigration would increase.

In April of 1966, before the full effects of the new law could be known, an Immigration and Naturalization Service employee writing about the law was certain that Asian immigration would increase.[186] After discussing the elimination of the Asia-Pacific triangle provisions, he wrote:

> This amendment will have the effect of making immigrant visas available to aliens who were previously chargeable to quotas so greatly oversubscribed that visas could not be issued to them for many years to come. *The amendment will lead to an increase in the number of visa petitions filed with the Service.* The fact that even the preference portions of some quotas were heavily oversubscribed had discouraged many relatives and prospective employers from filing petitions to accord aliens a preference classification.[187]

He also recognized that the overall pattern of immigration would change in favor of relatives and skilled immigrants, and nonpreference immigration would be virtually unavailable.[188]

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gration to this country equally wide to people from all the countries of the world, making no distinction between them .... [T]he Oriental, the African, the Malayan, and various other people from all parts of the earth are to be equally accepted for immigration into this country and for admission to citizenship.

All I am calling attention to is that many people in my State of Florida do not agree with that principle, and they have objected to it.

....

I merely state that when we open our doors wide to all the oriental nations of this earth, with some 700 to 800 million in 1 country alone, and with countless other millions in other nations, and when we offer to admit them on terms of exact equality with people from our own forefather nations, we are making a radical departure of which I cannot, and do not approve.

111 CONG. REC. 24,778-79 (1965). Senator Robert Kennedy did not deny Holland's claim: "The Senator talks about opening the doors wide. The doors are open only to those who can make a contribution." *Id.* at 24,779.

184. Senator McClellan asked, "Will the addition of still more minority groups from all parts of the world lessen or contribute to the increasing racial tensions and violence we are currently witnessing on the streets of our major cities?" *Id.* at 24,556. "Remember that under this bill, immigration will shift from those European countries that contributed most to the formation of this Nation to the countries of Asia and Africa." *Id.* at 24,557.

185. *See id.* at 23,794 ("[R]evising our immigration laws by removing the Asia-Pacific triangle provisions will add to the many social problems that now confront us across the Nation."). A West Virginia newspaper placed in the record claimed that Senator Robert Byrd was concerned that elimination of the quota system "would swell the flow of immigrants from Asia and the newly emerging countries." *Id.* at 24,542.

186. *See* Robert Lindsey, *The Act of October 3, 1965*, 14 I & N REP. 103, 103 (1966).

187. *Id.* at 104 (emphasis added).

188. He explained:

There was no need for an alien who was a native of England, Ireland or Germany, for example, to seek a preference classification, when nonpreference visas

The news media did not overlook the likely effects of the 1965 law on Asian immigration. *U.S. News & World Report* was unambiguous: "Under rules just approved by Congress, officials forecast these changes in the flow of immigrants to [the] U.S.... FROM ASIA: Many more immigrants expected, since racial restrictions on Indians and Orientals are wiped out."[189] "Nobody has estimated the number of Chinese who will apply to enter the U.S.," the magazine reported, but "[t]he potential is large."[190] Days after President Johnson signed the bill, the *Christian Science Monitor* reported that it would contribute to a "multinational and multiracial United States."[191] In November 1965, *Scientific American*, reporting on the new law, noted that Asians, as well as Southern Europeans, would have increased opportunities to immigrate.[192] Other newspapers agreed that the demographics of the immigration stream would change.[193] Indeed, the argument that an increase in Asian immigration is surprising is the revisionist view of the history of this law. A 1966 article in *American Legion Magazine* insisted that the multiplicity of newspaper reports predicting an increase in Asian immigration

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were readily available. However, on and after July 1, 1968, such aliens will be competing for immigrant visas on equal terms with natives of countries which heretofore have had heavily oversubscribed quotas, such as Greece, Italy and China. It is highly probable that af[t]er July 1, 1968, the pattern of recent years will be greatly changed, with all or nearly all of the immigrant visas subject to the numerical limitation... being issued to preference immigrants.

Id. at 111-12.

189. *A New Mix for America's Melting Pot*, U.S. NEWS & WORLD REP., Oct. 11, 1965, at 55, 55.

190. *Id.* at 57.

191. Saville Davis, *Immigration Change, Papal Visit Mesh*, CHRISTIAN SCI. MONITOR, Oct. 5, 1965, at 1.

192. *See Equitable Immigration*, SCI. AM., Nov. 1965, at 48.

193. *See, e.g.*, *Alien Bill Warning Is Issued*, CHI. TRIB., July 30, 1965, § 1A, at 12 (noting prediction by a witness that the Chinese-American population of the United States would skyrocket if the bill passed); Willard Edwards, *Alien Bill Called Democratic Bid for Votes*, CHI. TRIB., Sept. 22, 1965, § 1A, at 4 (noting that bill will have the effect of "increasing the flow from southern Europe and other areas whose flow is restricted under the present system"); *Immigration Law May Be Revised*, BOSTON SUN. HERALD, Jan. 3, 1965, § 1, at 80 (noting that "[i]t is more difficult for [Southern and Eastern Europeans, Africans and Asians] to immigrate to the U.S. Most attempts at revising the law would alter this balance."); William Moore, *Senators Cite Heritage, Plea for Alien Bill*, CHI. TRIB., Sept. 21, 1965, § 1B, at 8 ("Supporters of repeal say that African and Asian countries need more immigration permits."); Cabell Phillips, *Congress Seen Approving New Immigration Law*, BOSTON HERALD, May 23, 1965, § 1, at 25 ("Critics have long argued that [the National Origins Quota System] tended to favor the Western European countries at the expense of other regions, particularly the Far East."); Irene Saint, *How Immigration Bill Would Affect Boston Area*, BOSTON HERALD, Jan. 17, 1965, § 4, at 1 (noting that Asian countries, among others, would benefit from reform).

were foolish.[194]

3. Sources of the New Immigration: Families and Professionals

The few estimates which were offered support the idea that an increase in Asian immigration was expected. Administration officials predicted that Asian immigrants would account for 94,972 of the 820,910 immigrants expected during the five-year phase-out of the quota system that was proposed by President Kennedy;[195] this was an increase over the 15,000 or so who came in each year during the 1950s, but, because of increasing numbers in the late 1950s and 1961-65, about the same proportion as had come in under McCarran-Walter.[196]

Senator Fong predicted that about twenty percent of quota spots would go to the Asia-Pacific triangle once the new law was in full effect[197]—more than a 300% increase over their share in the 1950s, and over 1300% more than their official quota of 2,000 (1.53% of all visas) under McCarran-Walter. Concretely, twenty percent of the 170,000 per year Eastern Hemisphere quota under the new law would be 34,000 for Asia (not counting non-quota immigration).

If hard estimates are scarce, impressionistic information is more plentiful. The 1965 law offered preferences to skilled immigrants and to family members of United States citizens or permanent resident aliens. The legislative record indicates that Congress understood that Asians would take advantage of both aspects of the new law.

a. Asian Family Reunification

Congress perceived clearly the problem of divided families—Americans separated from family members eligible to immigrate except for their race. Many immigrants, Massachusetts Senator Saltonstall explained, "have spouses, children, parents, brothers or sisters still abroad whom they wish to bring to this country to join them."[198] Legislators recognized that this problem applied with spe-

194. *See* Deane Heller & David Heller, *Our New Immigration Law*, AM. LEGION MAG., Feb. 1966, at 6, 9. This and other misinterpretations of the law, according to the authors, were "a bit of faking" on the part of the press. *Id.* at 41.

195. *See Hearings on H.R. 7700*, *supra* note 38, at 589.

196. *See* 1991 STATISTICAL YEARBOOK, *supra* note 6, at 29. Although Asian countries had no quotas or small quotas during this period, many Asians immigrated nevertheless, through special bills for refugees, relatives, scientists and the like. *See infra* notes 288-96 and accompanying text.

197. *See Hearings on S. 500*, *supra* note 38, at 118, 147.

198. 111 CONG. REC. 24,441 (1965). Although there were family reunification preferences under McCarran-Walter for low-quota countries, they were rapidly exhausted.

cial force to Asians. The experience of passing many private bills,[199] necessary to reunite families or alleviate other severe hardships, was not forgotten in the debate on the 1965 law. Robert Kennedy, for example, testified as Attorney General about the problems Americans had bringing in an immediate relative who was "Italian or Australian, Spanish or Portuguese, Japanese or Korean, Indian or Filipino."[200] Senator Neuberger explained that

> we on the west coast have a large number of citizens who are second, third, and fourth generation Americans, but whose ancestors were born in China, Japan, Korea, other Asiatic countries—the Philippines—in order to reunite some of these families requires my putting in a number of private bills every year.[201]

Congress recognized that the volume of Asian family reunification immigration would be significant. For example, Representative John Lindsay noted that in 1964, "[t]he great majority of the immigrants who entered the country over and above their national quotas were admitted because they were the wives, husbands, or children of U.S. citizens. Persons in any one of these three categories last year alone accounted for . . . almost 8,000 from Asia."[202] As a result, nonquota family reunification immigration from Asia was nearly four times quota immigration.[203] That these facts were before Congress when it passed the bill suggests that when they continued to be true, it was no surprise.

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199. A look though the private bills section of a volume of *Statutes at Large* suggests the magnitude of the private bill solution. *See, e.g.*, An Act for the Relief of Thelma Margaret Hwang, Priv. L. No. 85-94, 71 Stat. A39 (1957); An Act for the Relief of Kuo York Chynn, Priv. L. No. 85-96, 71 Stat. A39 (1957); An Act for the Relief of Yun Wha Yoon Holsman, Priv. L. No. 85-97, 71 Stat. A39 (1957); An Act for the Relief of Chong You How, Priv. L. No. 85-102, 71 Stat. A41 (1957).

200. *Hearings on S. 500*, *supra* note 38, at 216. He repeated this comment as New York's junior senator. *See* 111 CONG. REC. 24,482 (1965).

201. *Hearings on S. 500*, *supra* note 38, at 548.

202. *Hearings on H.R. 2580*, *supra* note 93, at 413. Many other members of Congress made the same point. Representative James Roosevelt wrote that an American citizen of Indian ancestry would have difficulty bringing in a brother or sister, while a British neighbor would find it easy. *See Hearings on H.R. 7700*, *supra* note 38, at 320. Representative Thomas Gill of Hawaii, stated: "Reuniting families, particularly when you deal with the various Chinese quotas and the Asian [sic] Pacific triangle quota, is very important to Hawaii." *Id.* at 179; *see also id.* at 305 (statement of Rep. Joseph Minish) (noting that a Chinese constituent was unable to bring in her sister from Hong Kong); *cf. id.* at 697 (statement by a member of a social welfare agency that the wife and child of an American physician could not enter).

203. Representative Byron Rogers also spoke about family immigration pulling in large groups, *see Hearings on H.R. 7700*, *supra* note 38, at 78, and he later mentioned Indian or Italian family members. *See id.* at 83.

b. Asian Professionals

The record also shows that Congress was well aware that significant numbers of Asian professionals would immigrate once they had a chance. One after another, legislators regaled each other with stories about real or hypothetical Asian professionals who could not be admitted because of their racial ancestry.[204] These stories were only anecdotes, but it was clear that the number of Asian professionals who would immigrate was thought to be significant. Indeed, Representative Arch Moore, a supporter of the bill, was concerned about the brain drain from Asia:

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204. Senator Allott spoke of a Chinese nurse who faced deportation. *See* 111 CONG. REC. 24,473 (1965). Senator Clark noted that a "brilliant Korean or Indian scientist is turned away, while the northern European is accepted almost without question.... While Plato and Dante would have a hard time getting into the United States ... Confucius or Lao-tze could not get in at all." *Id.* at 24,501. Senator Robert Kennedy mentioned three professionals who could not get in because of the quota system: a Greek chemist, a Korean radiation specialist and a Japanese microbiologist. *See id.* at 24,482. Representative Thomas Gill spoke of a doctor of Chinese descent, who, he thought, was a native to the Philippines, who could not get into Hawaii. *See Hearings on H.R. 7700, supra* note 38, at 180. Senator Paul Douglas explained that a Chinese engineer in Evanston, Illinois, was unable to obtain permanent residency for his Chinese wife, a nurse, who had entered on a student visa. *See Hearings on S. 500, supra* note 38, at 153. According to Senator Neuberger, a cancer expert sought by a medical school was kept out because of the Asia Pacific triangle rule. *See id.* at 550-51. A representative of the ACLU stated that a hypothetical "brilliant physicist living in Hong Kong who is Chinese," *id.* at 450, would not be able to come in. Attorney General Katzenbach testified that there were "innumerable" cases in which the quota system damaged the United States by keeping out professionals, including a "brilliant" Indian cardiac surgeon. *See id.* at 10. He also observed that an Indian brain surgeon would likely be excluded or subjected to a very long wait, but a common laborer from Ireland could easily enter. *See Hearings on H.R. 2580, supra* note 93, at 17. Attorney General Robert Kennedy said skilled workers from the United States would go to "Italy, Germany, England, and Japan," just as we took their skilled workers. *Hearings on H.R. 7700, supra* note 38, at 427. Similarly, after Senator Kennedy noted that the Asia Pacific triangle restrictions would be eliminated by the bill, Maryland Senator Tydings noted that his family doctor was Chinese, that his son had a close Korean friend, and exclaimed with apparent passion:

> Why if a man can make a great contribution—a doctor, a writer, a scientist, or a scholar—the fact ... that he should be kept out, when we arbitrarily bring anybody in from northern Europe whether they can make a contribution or not, merely because the quota of northern Europe is not filled, just does not make sense.

Hearings on S. 500, supra note 38, at 657. John Lindsay explained: "A high proportion of those who most want to come to America and who would be of most benefit to us are ineligible. A very few countries are given high quotas which they don't use. Other countries with vastly larger populations ... are given tiny quotas." *Hearings on H.R. 7700, supra* note 38, at 115. Senator Fong also advised the Senate Judiciary Committee of Nobel prize winning scientists who had managed to make it in, including a number of Asians. *See Hearings on S. 1932, supra* note 121, at 98 (listing immigrants from Europe and Asia who have won Nobel prizes).

> In the Asia-Pacific triangle countries, there isn't a very wholesome attitude about us from the standpoint of our immigration policies; and yet, here we become a scavenger for brain power in the same part of the world. It just seems to me that while we may in a very logical way, by removing the national origins system, remove the stigma of placing a greater value on one citizen over another, we jump right back into the fire in another respect when we set up these magnets to pull out their choicest citizens.[205]

Similarly, Labor Secretary Wirtz suggested that the quality of skilled immigration would increase because Asian immigration would open up. After discussing the small quotas available to the Asia-Pacific triangle countries, Wirtz said, "under the new bill there will be situations in which a more skilled person will come in where under the old bill a less skilled person from a country whose quota was not filled would have come in."[206]

There was also evidence that once opportunities to immigrate were made available, Asians would take full advantage of them. In September of 1966, before the law was fully implemented,[207] and therefore before its consequences could be fully known, British economist Brinley Thomas predicted that Asian immigration would increase.[208] His argument was based not only on logic, but on the results of 1962 legislation,[209] which made it easier for professionals to

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205. *Hearings on H.R. 2580*, *supra* note 93, at 223. A critic writing in *The New Republic* argued that the law would "suck in the doctors and engineers that underdeveloped countries need at home." T.R.B. from Washington, *Who Should Enter?*, THE NEW REPUBLIC, Feb. 20, 1965, at 4, 4. Clearly, this was a reference to underdeveloped third world nations, not Germany or England. *See also Hearings on H.R. 2580*, *supra* note 93, at 374 (statement of W.B. Hicks, of the Liberty Lobby) ("Should we deprive the underdeveloped nations of the world of the cream of their limited supply of doctors, engineers, and teachers by making these skills the No. 1 preference in our immigration law, and at the same time, spend millions on programs designed to develop such skills in those nations?"); 111 CONG. REC. 21,775 (1965) (remarks of Rep. Durward Hall).

206. *Hearings on S. 500*, *supra* note 38, at 114.

207. Under the law, the national origins quota system was not fully abolished until 1968. *See* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (providing that each country would have at least the same quota as it had under McCarran-Walter until June 30, 1968, but unused quota slots would be used for oversubscribed countries).

208. *See* Brinley Thomas, *From the Other Side: A European View*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 68 (1966).

209. Act of Oct. 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247. Technically, the bill allowed entry over and above the quota of certain immigrants who, by virtue of their skills, were entitled to first preference entry under McCarran-Walter, but whose countries' quotas were exhausted. *See* S. REP. NO. 87-2276, *reprinted in* 1962 U.S.C.C.A.N. 4204 (reporting favorably on S. 336, describing in particular its effect on worthy Chinese who wished to immigrate).

enter the United States.

The 1962 statute allowed "large numbers of alien scientists and engineers to achieve immigrant status within a relatively short period of time."[210] As a result, immigration of European scientists and engineers increased twenty-three percent, but "that of Asians increased by no less than 182 per cent. This indicates that skilled Asian immigration has a remarkably high elasticity with respect to a moderate liberalizing of the restrictions."[211] The author concluded:

> If the relatively minor supplement to the law in October 1962 led to an almost threefold increase in the influx of highly qualified Asians, one wonders what the basic alteration in the principles of selection enacted in 1965 is likely to do. *One can only surmise that the process of creaming off skills from the poorest areas of the world will be intensified.*[212]

Members of Congress working on the 1965 bill were aware of the prior law and its effects.[213] In short, rather than concluding that immigration of Asian professionals *should have been* no surprise; it seems more probable that it *was* no surprise to any member of Congress who listened to the testimony and debates on the bill.

D. The Evidence Supporting a Prediction of No Asian Influx

There is some evidence that members of Congress and other informed sources doubted that Asian immigration would increase as a result of the bill. Some of it is ambiguous.[214] Even the most compelling, however, does not outweigh the evidence to the contrary.

1. Attorney General Robert Kennedy's Prediction

The 1964 prediction by then-Attorney General Robert Kennedy, cited at the beginning of this Article, is the centerpiece of the widespread belief that no one expected an Asian influx as a result of

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210. Thomas, *supra* note 208, at 67.

211. *Id.* at 67-68.

212. *Id.* at 68 (emphasis added).

213. *See, e.g., Hearings on S. 1932*, *supra* note 121, at 13 (testimony of Senator Philip Hart) (noting the immigration "has not, in fact, flowed in the national origins channels set forth in the 1952 Act"); 111 CONG. REC. 24,226 (1965) (chart including all admissions under special legislation, including this act, described as the "act of Oct. 24, 1962").

214. *See, e.g., Hearings on S. 500*, *supra* note 38, at 563 (testimony of Sen. Claiborne Pell) ("Maybe there will be a huge surge from India or a huge surge from Africa, but I would tend to doubt it."). Senator Strom Thurmond, who voted against the bill, stated that he did not "believe that the immigration formula in the proposal now before the Senate, if properly administered, will result in drastic or undesirable changes in the patterns of immigration into the United States." 111 CONG. REC. 24,237 (1965).

immigration reform. According to *Fortune*, for example, "Attorney General Robert Kennedy told the Senate that 5,000 Asian immigrants might come the first year, 'after which immigration from that source would virtually disappear.' "[215] The interpretation that Robert Kennedy's words constituted a projection that Asian immigration would quickly become a thing of the past has been cited in the halls of Congress,[216] by academics including Bill Ong Hing,[217] David Reimers,[218] Roger Daniels,[219] Peter Schuck,[220] Nathan Glazer,[221] Vernon Briggs,[222] Nicolaus Mills,[223] and Michael Teitelbaum;[224] published in respected news outlets like the *Economist*,[225] *The San Francisco Chronicle*,[226] *The Los Angeles Times*,[227] *The Christian Science Moni-*

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215. Scott McConnell, *The New Battle Over Immigration*, FORTUNE, May 9, 1988, at 89, 94.

216. *See, e.g.*, *Legal Immigration Reform Proposals: Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 104th Cong. 134 (1995), *available in* 1995 WL 306792 (testimony of Mark Krikorian, of the Center for Immigration Studies) (citing Robert Kennedy's testimony); 132 CONG. REC. 27,397 (1986) (statement of Rep. Donnelley, quoting Robert Kennedy's prediction).

217. *See* HING, *supra* note 30, at 39-40.

218. *See* DAVID M. REIMERS, STILL THE GOLDEN DOOR 77 (1st ed. 1985); Reimers, *supra* note 122, at 9, 16. *But see infra* note 245 and accompanying text (discussing Professor Reimers's current view about the meaning of Robert Kennedy's comment).

219. *See* DANIELS, *supra* note 12, at 341 ("Members of [Johnson's] administration, almost certainly in good faith, had testified before Congress that few Asians would come in under the new law . . . .").

220. *See* Schuck, *supra* note 122, at 7.

221. *See* Glazer, *supra* note 112, at 7.

222. *See* BRIGGS & MOORE, *supra* note 126, at 19 ("[I]t was anticipated that passage of the Immigration Act of 1965 would lead to a decline in Asian immigration." (citing Attorney General Robert Kennedy's testimony)).

223. *See* Nicolaus Mills, *Introduction: The Era of the* Golden Venture, *in* ARGUING IMMIGRATION 1, 17 (Nicolaus Mills ed., 1994).

224. *See* Michael S. Teitelbaum, *Skeptical Noises About the Immigration Multiplier*, 23 INT'L MIGRATION REV. 893, 895 (1989).

225. *See Yes, They'll Fit In Too*, THE ECONOMIST, May 11, 1991, at 17 (The 1965 reform "has had large, and largely unintended, consequences. Robert Kennedy, the then attorney-general, was wildly wrong when he told a congressional committee that 5,000 immigrants might come from Asia in the first year 'but we do not expect that there would be any great influx after that.' ").

226. *See* Ramon G. McLeod, *A Call for an Immigration Policy*, S.F. CHRON., July 4, 1991, at A1, A6:

> In 1964, the late Robert Kennedy told a congressional hearing that an immigration law ending quota systems would result in at most about 5,000 people immigrating from Asia. Almost 4 million Asians immigrated after the law went into effect in 1965. Such unanticipated results . . . have been the hallmark of recent immigration debate.

Id.; *see* Ramon G. McLeod, *1965 Immigration Reform Law Opened Door for Asians*, S.F. CHRON., July 4, 1988, at A5 (describing the contrast between the prediction and the large increase in immigration in the Bay Area).

tor,[228] *The Baltimore Evening Sun*,[229] *The Phoenix Gazette*,[230] and *Financial World*,[231] and used as ammunition by anti-immigration activists like Lawrence Auster,[232] Leon Bouvier,[233] Peter Brimelow[234] and Otis Graham.[235] The perceived meaning is completely wrong, making it possibly the most pervasive legend in immigration history.

Even under McCarran-Walter, Asian immigration in 1964 was 21,279,[236] and had averaged 15,000 per year in the 1950s.[237] Is it possible that Robert Kennedy thought that Asian immigration would "virtually disappear" after 1966; that he believed *eliminating* restrictions would *diminish* immigration?[238] This interpretation makes no sense. Close examination of the hearing record where the statement was made shows why his testimony was misunderstood.

Attorney General Kennedy was testifying about the administration version of the bill, which continued the historical practice of imposing no numerical limitation on Western Hemisphere immigration. The bill, however, would, for the first time, extend the privilege of unlimited Western Hemisphere immigration to persons of Asian

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227. *See* Douglas Massey, *Immigration Adjustments Ignore the Chain Effect of Family Eligibility*, L.A. TIMES, Apr. 6, 1988, pt. 2, at 7 (Op-Ed column by a sociology professor at the University of Chicago) (citing Kennedy quote as example of unpredictability of immigration law changes).

228. *See* John Dillin, *Asian Americans: Soaring Minority*, CHRISTIAN SCI. MONITOR, Oct. 10, 1985, at 3 ("Seldom has any public official been so wrong.").

229. *See* Seebach, *supra* note 14, at 9A (editorial commentary by a California newspaper editor).

230. John Kolbe, *"Alien Nation:" Immigration Alters Face of America Against its Will*, PHOENIX GAZETTE, Oct. 13, 1995, at B5.

231. *See* Kermit Lansner, *Who Will Be an American?*, FINANCIAL WORLD, Apr. 17, 1990, at 100.

232. *See* AUSTER, *supra* note 14, at 20-23 (describing Kennedy's approach as "divorce[d] from reality").

233. *See* LEON F. BOUVIER & LINDSEY GRANT, HOW MANY AMERICANS? 79 (1994) (dealing with the environmental impact of immigration). Mr. Bouvier is also concerned about the racial makeup of the nation. *See* LEON F. BOUVIER & CAREY B. DAVIS, IMMIGRATION AND THE FUTURE RACIAL COMPOSITION OF THE UNITED STATES 7-19 (1982). For a critique of the environmental argument against immigration, see Peter L. Reich, *Environmental Metaphor in the Alien Benefits Debate*, 42 UCLA L. REV. 1577 *passim* (1995).

234. *See, e.g.*, BRIMELOW, *supra* note 13, at 78 (quoting and mocking Kennedy's purported prediction).

235. *See* Graham, *supra* note 9, at 19 ("Attorney General Robert Kennedy predicted 5,000 immigrants from the entire Asia-Pacific Triangle, 'after which immigration from that source would virtually disappear.' ").

236. *See* BUREAU OF THE CENSUS, *supra* note 6, at 109.

237. *See* 1991 STATISTICAL YEARBOOK, *supra* note 6, at 49.

238. Query what bizarre phenomenon would make 5,000 Asians want to immigrate in 1965, but none thereafter?

ancestry who lived in the region.[239] The question was:

> Mr. FEIGHAN. Mr. Attorney General, what influx or increase in nonquota immigrants would you consider likely by the abolition of the Asia-Pacific triangle and the relationship of the same upon the nonquota immigration from the Western Hemisphere?
>
> Attorney General KENNEDY. I would say for the Asia-Pacific triangle it would be approximately 5,000, Mr. Chairman, after which immigration from that source would virtually disappear; 5,000 immigrants could come in the first year, but we do not expect that there would be any great influx after that.[240]

Kennedy was asked to comment on the increase in Asian immigration from the Western Hemisphere which would result from extending nonquota immigration privileges to them. Kennedy replied that 5,000 Asians would immigrate from the Western Hemisphere as a result of the change, not that 5,000 Asians would immigrate from all the countries of the world. To the contrary, during the same hearing,[241] Robert Kennedy filed written projections estimating that 94,972 Asians—not 5,000—would immigrate in the first five years of the proposed law.[242] Testimony by Secretary of State Dean Rusk[243] and Justice Department officials makes clear that Kennedy was predicting that 5,000 Asians living in the Western Hemisphere would immigrate when they were eligible to do so, not that 5,000 Asians worldwide would come to the United States.[244] A

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239. Recall that under McCarran-Walter, in effect when Kennedy was testifying, persons of Asian descent, wherever born, were relegated to the tiny quotas of their countries of racial ancestry. *See supra* notes 70-71.

240. *Hearings on H.R. 7700, supra* note 38, at 418.

241. *See id.* at 431 (statement of Rep. Poff) (referring to "[t]he document which the Attorney General presented for inclusion in the record").

242. *See id.* at 589.

243. *See id.* at 406 (testimony of Dean Rusk) ("The elimination of the Asia-Pacific triangle would result in an estimated 5,000 or 6,000 persons annually entering the United States *from nonquota areas*, who are now chargeable to highly oversubscribed quota areas within the Asia-Pacific triangle." (emphasis added)).

244. Assistant Attorney General Schlei, for example, was asked about the repeal of the Asia-Pacific triangle quota and its effects on non-quota immigration. He replied:

> I understand it is estimated, about 5,000 people who would like to come to the United States and are in either nonquota areas [i.e., the Western Hemisphere], or in areas where there are no waiting lists, such as England, Ireland, and Germany, but are now unable to come because they had Asiatic ancestors. *We would, therefore, get 5,000 immigrants within the first year from that source, but from then on it would disappear.*

Id. at 482 (emphasis added); *see also id.* (testimony of Office of Legal Counsel attorney

few people got it right, including David Reimers in his more recent work,[245] but the myth persists. The best evidence that the framers of the 1965 Act believed it would not increase Asian immigration turns out to be a misunderstanding.

2. Focus on Southern and Eastern Europe and Backlogs on Wait-Lists

When it considered the law, Congress may well have been focusing on remedying injustices to southern and eastern Europeans.[246] Several commentators have relied on this point as partial support for the idea that the increase in Asian immigration was unforeseen.[247] Perhaps the possibility of significant Asian immigration was just overlooked, but this is implausible. Leaving aside the many affirmative statements that Asian immigration would increase, remarks by members of Congress noting the injustices to would-be Asian immigrants seem to suggest that Asians were not ignored by the people who were considering the law.[248]

Under McCarran-Walter, when a visa was not available, an alien could be placed on a waiting list and thus become part of a country's "backlog." Some have pointed to the fact that the largest waiting lists for visas were in Italy and Greece at the time the bill was passed.[249] The relatively smaller backlogs in China, say, might have indicated a lower demand for immigration, and hence supported the conclusion that not many Asians would want to immigrate after the reforms. But this analysis ignores the issue of relative quotas; a backlog of 50,000 is not daunting if a nation's quota is 25,000 per year; a backlog of 5,000 might be insuperable for a would-be immigrant from a nation with a quota of one hundred. The real question

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Adam Walinsky) (noting that 5,000 Asians would come as a result of the change).

245. *See* REIMERS, *supra* note 10, at 74-76. Credit goes to Dr. Stephen Wagner for being the first scholar to identify this misunderstanding in his dissertation. *See* Wagner, *supra* note 122, at 470-71 n.21.

246. *See Hearings on H.R. 7700*, *supra* note 38, at 215 (remarks of Rep. John Murphy) (focusing on Italian, Greek and Polish immigrants); *id.* at 219 (remarks of Rep. William Ryan); *id.* at 274 (remarks of Rep. James J. Delaney); *id.* at 300 (remarks of Rep. Roland Libonati).

247. *See* DANIELS, *supra* note 12, at 341; HING, *supra* note 30, at 39-40; YANG, *supra* note 122, at 21.

248. *See, e.g.*, *Hearings on S. 1932*, *supra* note 121, at 10-11 (testimony of Sen. Philip Hart) ("Let us restore equality and fair play in our selecting immigrants. Discriminatory provisions against immigrants from eastern and southern Europe, token quotas for Asian and African countries, and implications of race superiority in the Asia-Pacific Triangle concept have no place in the public policy of the United States.").

249. *See, e.g.*, REIMERS, *supra* note 10, at 76, 92-93; Reimers, *supra* note 122, at 16.

is not the backlog in absolute terms, but the length of the wait for a visa. This point did not escape members of Congress; among many others,[250] Senator Saltonstall pointed out that over 40,000 people were on the wait list for the Chinese quota,[251] which made the wait over 380 years for a visa, given China's annual quota of 105. That Chinese would put their names on a list, even though, as Senator Fong noted, the quota was "for all practical purposes exhausted in perpetuity,"[252] indicates a desire to immigrate to the United States of almost religious intensity.

3. Structural Protections Against Asian Immigration

Arguably, supporters of the bill might have expected little increase in Asian immigration because, as in 1943 and 1952, protections against unlimited immigration were built into the statute.[253] To the extent that this argument suggests that there would be some upper limit on immigration, it is, of course, correct. If it suggests that the limits would ensure low proportions of Asian immigration, it is implausible because the structure of the 1965 law was so different from previous statutes that there was no reasonable basis for predicting that it would prevent "overrepresentation" from particular regions of the world.

One important restriction in the 1965 law was the 20,000 per country annual limitation, which was designed to avoid "opening up the gates to a vast flood from some particular country."[254] There are hints in the legislative history that the "particular countries" Congress was concerned with were Asian. Representative Feighan, for example, Chairman of the House Judiciary Committee's subcommittee with jurisdiction over immigration, stated that repeal of the Asia-Pacific triangle concept "has met with strong reactions from our allies and friends in Asia who have come to regard it as the same kind of personal affront as the old Chinese Exclusion Act."[255] In the next breath, he added that "the proposed selective system of immigrant admissions included in the bill guarantees that no country can receive a disproportionate number of the total visas authorized."[256] The fact

250. *See supra* note 171 (listing several other people who were concerned about the substantial backlogs in visa waiting lists).

251. *See* 111 CONG. REC. 24,441 (1965).

252. *Id.* at 24,447.

253. *See, e.g.*, REIMERS, *supra* note 10, at 74-75.

254. 111 CONG. REC. 24,763 (1965) (remarks of Sen. Dirksen).

255. *Id.* at 21,585.

256. *Id.*

that he thought of the per-country limitation might be read to suggest some connection between disproportionate immigration, on the one hand, and Asians on the other. Similarly, Representative Giaimo noted that the bill would repeal the Asia-Pacific triangle provisions, but added in the next sentence that "[i]t is important to note that this new law will not open the floodgates of immigration as charged by opponents of the bill."[257]

There is countervailing evidence suggesting that the 20,000 cap was not created with Asians in mind.[258] However, even if the 20,000 per country annual limitation was intended to restrict Asian immigration, compared to prior restrictive laws—limiting Chinese immigration to 105, as the 1943 act had done, or all Asian immigration to 2,000—a maximum of 20,000 per country could be called an open door policy as easily as a restriction. Representative Moore, explaining that Asians would be treated the same as persons from other parts of the world, showed the arithmetic:

> It does not mean that that number, 20,000, of Chinese, Japanese, or Filipinos are immediately going to come into this country, but the upper limitation [of the number] to which they would be entitled would be that number .... People who attack what we are doing here today say that it will let millions of orientals come into the United States. I wanted to place in the RECORD the observation that there is no one in this House who need fear such an event occurring.[259]

Moore was right; millions of Asians would not enter each year. But Moore recognized the possibility that just three Asian countries could send 60,000 per year, thirty times as many as all Asians worldwide had been officially allowed under McCarran-Walter. This was a revolutionary increase compared to past treatment of Asian immigration.

Another potential safeguard was a Western Hemisphere quota limitation.[260] Representative Fisher, echoing arguments from the

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257. *Id.* at 21,767.

258. *See* Telephone Interview with Norbert Schlei, *supra* note 157 (explaining that the per-country limit was imposed because of southern and eastern European nations).

259. 111 CONG. REC. 21,590-91 (1965). Representative Thomas Pelly, who asked the question which engendered that response, stated that

> I would like to say to the gentleman that I would not fear that amount of those persons coming in. I have a great amount of Japanese, Chinese, and Filipinos in my district. It is not that I register fear that they might come in because they make wonderful citizens. I want to make that clear.

Id. at 21,591.

260. The restriction was not in the House bill reported by the Judiciary Committee

1943 and 1952 debates, argued that "there are about half a million Chinese living in the Western Hemisphere, many of whom would like to come into this country if they could, but who are prohibited now from doing so because of the triangle provision."[261] The law protected against this eventuality by imposing, for the first time, a 120,000 annual limit on Western Hemisphere immigration. But this restriction also was insignificant compared to those which were eliminated.

4. Did a Mistake Regarding Non-Quota Immigration Contribute to the Passage of the Bill?

There was a very odd episode on the floor of the Senate immediately before the bill was passed. In an exchange on the floor of the Senate, in the presence of floor manager Edward Kennedy, the meaning of the bill was spectacularly misinterpreted in a way that suggested there was an additional protection against changes in the immigration stream.

Some senators may have voted for the 1965 law believing that a provision allowing unlimited immigration of immediate family members of citizens applied only to people who were citizens when the law was passed, and not to persons who became citizens through birth or naturalization after 1965. This was an important issue. If people born or naturalized after 1965 were required to unify their families through numerically limited quota immigration, then (leaving aside emergency situations) the 1965 law would have been extremely predictable—only 290,000 visas would be available each year, and every alien who wanted to come in would have to get one of them, or wait until next year. If this interpretation had been correct, the chain migration phenomenon would have been significantly dampened.[262] This feature actually was not part of the law; even people who became citizens after 1965 could bring in their immediate relatives free of the quota.

However, on the floor of the Senate, proponents did not explain that non-quota, immediate relative immigration was a permanent

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and was, in fact, narrowly rejected as a floor amendment. However, it was in the version approved by the Senate, and was accepted by the Conference, thus becoming part of the law. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, §§ 8(a), 21(e), 79 Stat. 911, 916, 921 (defining Western Hemisphere natives as "special immigrants" and limiting their numbers to 120,000 per year).

261. 111 CONG. REC. 21,774 (1965).

262. "Chain migration" or the "multiplier effect" is the phenomenon by which one immigrant brings over other relatives, who, in turn, can sponsor their relatives. *See* DANIELS, *supra* note 12, at 19.

feature of the law which would permit anyone who became a citizen in the future to bring their relatives to the United States. Instead, non-quota immigration was characterized as a transitional "clean-up" program, allowing people who were citizens *on the date of the Act* to reunify their families by bringing in immediate relatives.

The issue was raised when Senator Holland, an opponent of the bill, asked: "Is any distinction made between the members of families of immigrants already in the United States and those who would come in as new immigrants?"[263] Edward Kennedy, misunderstanding this somewhat ambiguous question, simply described the preference system again, and Holland repeated the question: "Is there any difference between relatives of migrants who are already here, whether citizens or not, and relatives of migrants who will be coming in under the bill, as to their being charged or not charged to the quota?"[264] Senator Ervin answered: "As I understand the bill, every person who comes as an immigrant is charged to the limitation, except certain relatives of one who is *already here* as an American citizen."[265] Senator Kennedy added: "That is exactly correct."[266] The ambiguity, of course, was whether "already here" meant as of the effective date of the bill, or at the time in the future when an alien relative sought to immigrate.

Senator Holland apparently understood that the answer was that only people who were already citizens in 1965 could bring in their relatives free of quota limitations: "Then there is a difference in the charging to the quota or not charging to the quota as between immigrants already in the United States seeking to bring their relatives in, and those who seek to bring them in with them after the passage of the law."[267] Senator Pastore, a supporter of the bill, agreed that people who became citizens after 1965 could bring their relatives in only subject to quota limitations:

> [Senator Holland] is making a good point. His question may be misunderstood. His question is this, as I understand: If a person who comes to the United States let us say, in 1970, has relatives abroad, under what conditions may he bring his relatives in? It is my understanding that under the bill, *whoever comes in 1970 will have to come in under the overall number....* In other words, the exception is being

263. 111 CONG. REC. 24,775 (1965).
264. *Id.*
265. *Id.* (emphasis added).
266. *Id.*
267. *Id.*

> made as to the people already in the United States; and at the time of the signing of the bill there will be the authority, the exemption, in order to provide for family unification. But beyond that point, any relatives who come in new, so to speak, will come in as immigrants and must be counted among the number.[268]

Again, it was not true that "whoever comes in 1970 will have to come in under the overall number." A person born in the United States in 1966 who wanted to bring in her alien spouse in 1986 could do so without respect to the 290,000 numerical limitation. Yet, no member of the Senate contradicted Senator Pastore's interpretation of the new law.[269] While the Senate Judiciary Committee Report itself was fairly clear on the effect of the law,[270] there is no guarantee that the majority of the senators were aware of it.

The apparent misunderstanding is important, because Senator Pastore, who offered the misinterpretation, voted for the bill. It is conceivable that other supporters shared that mistaken view. Accordingly, it may be that, had an opponent understood the actual workings of the provision sufficiently to chime in, even supporters of the general concept of scrapping national origins might have voted to change this provision.

If some version of the interpretation expressed on the Senate floor actually had been in the law, then the Asian-American situation would have been quite different. A significant share of their post-1965 immigration has been pursuant to non-quota family reunification.[271] Nevertheless, like the 20,000 annual limitation, and the

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268. *Id.* (emphasis added).

269. Apparently, virtually the entire Senate was present for this exchange, because Senator Holland was the third-to-last person to speak before Senator Edward Kennedy called for a vote. *See* 111 CONG. REC. 24,779 (1965) (concluding remarks of Sen. Holland); *id.* at 24,780 (Sen. Edward Kennedy calling for the vote).

270. *See* S. REP. NO. 89-748, at 13 (1965), *reprinted in* TRELLES & BAILEY, *supra* note 38, doc. 73 ("In order that the family unit may be preserved as much as possible, parents of adult U.S. citizens, as well as spouses and children, may enter the United States without numerical limitation."). It would not make sense for the non-quota admission of "immediate relatives" of citizens to have been a transitional program because there was no preference category for such persons. Thus, if they did not continue to be non-quota on an ongoing basis, then they could have entered only as non-preference immigrants. In that event, for example, spouses of citizens would have a far worse immigration situation than spouses of resident aliens.

271. Statistics from a few randomly chosen years illustrate the point. In 1975, 386,194 immigrants were admitted, including 132,469 Asians; 33,539 Asians were immediate relatives of citizens, and 94,032 entered subject to numerical restrictions. *See* INS, U.S. DEP'T OF JUSTICE, 1975 ANNUAL REPORT 36 tbl.6 (1976). In 1980, of 530,639 immigrants, 236,097 were from Asia; 112,552 Asians entered subject to numerical limitations,

establishment of a Western Hemisphere quota, if this non-existent feature had been thought of as a protection against Asian immigration, it would have been so loose that it must be regarded as a break from the policies of prior statutes.

E. Celler, Masaoka, Rusk

The best evidence that members of the administration or Congress thought there would be little Asian immigration are the public statements of three knowledgeable participants, House Judiciary Committee Chairman Emanuel Celler, Japanese American Citizens League officer Mike Masaoka, and Secretary of State Dean Rusk.[272]

Celler's oft-cited remarks suggest that he believed non-white immigration would be limited:

> Mr. Chairman, claim has been made that the bill would bring in hordes of Africans and Asians. This is the answer to that false charge: Persons from African and Asian countries would continue to come in as heretofore, but would be treated like everyone else. *With the end of discrimination due to place of birth, there will be shifts to countries other than those of northern and western Europe.* Immigrants from Asia and Africa will have to compete and qualify in order to get in, quantitatively and qualitatively, which, itself, will hold the numbers down. *There will not be, comparatively, many Asians or Africans entering this country.*
>
> . . . .
>
> Mr. Chairman, since the peoples of Africa and Asia have very few relatives here, comparatively few could immigrate

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and 59,029 entered as immediate relatives of U.S. citizens. *See* INS, U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS, 1980, at 18 tbl.7 (1981). In fiscal year 1986, of 601,708 immigrants, 258,546 were from Asia; 114,202 Asians entered subject to numerical limitations, and 85,292 were immediate relatives of United States citizens. *See* INS, U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS, 1986, at 18 tbl.8 (1987). In fiscal year 1990, 1,536,483 immigrants were admitted, including 338,581 Asians, of which 96,810 were immediate relatives of citizens. *See* 1991 STATISTICAL YEARBOOK, *supra* note 6, at 62 tbl.7.

These numbers almost certainly understate to some degree the total effect of non-quota admission of immediate relatives. Even leaving aside the attraction effects of larger Asian populations, some persons who enter the United States as immediate relatives later bring in their relatives under a preference.

272. A number of commentators rely on Representative Celler's statements. *See, e.g.*, BRIGGS & MOORE, *supra* note 126, at 17; TAKAKI, *supra* note 41, at 419; Reimers, *supra* note 122, at 16. Professors Briggs and Reimers also rely on Mike Masaoka's statements, as does Professor Daniels. *See* DANIELS, supra note 12, at 341; TAKAKI, *supra* note 41, at 419; Reimers, *supra* note 122, at 16. Lawrence Auster and Professor Reimers also rely on Dean Rusk's testimony. *See* AUSTER, *supra* note 14, at 21; REIMERS, *supra* note 10, at 75-76.

> from those countries, because they have no family ties in the United States.... *There is no danger whatsoever of an influx from the countries of Asia and Africa.*[273]

Although Celler acknowledged that there would be shifts in the immigration stream, he also seemed to say that there would not be "comparatively" many Asian or African immigrants; that is, that there would be no huge influxes.

Mike Masaoka, longtime JACL officer and advocate of immigration reform, insisted that fears of a " 'flood' of immigration from the Orient" were "groundless."[274] Because seventy-four percent of the visas were designated for family reunification, the small numbers of Asians here would not be able to take advantage of them, with the result that "the general pattern of immigration which exists today will continue for many years yet to come."[275] Dean Rusk, likewise, commented that "[a]ny increase in the volume of immigration resulting from the proposed amendments would be rather limited against the actual volume of Asian immigration into the United States between 1953 and 1963."[276]

One possible explanation for the remarks is that people were simply stretching the truth to get a bill passed.[277] If so, it does not necessarily mean that others shared a concern that a truthful prediction about an increase would be fatal to the bill. Celler and Masaoka had been defeated in 1952—McCarran-Walter had been passed despite racial restrictions they deeply opposed. Indeed, forty-one years later, when Celler's views finally prevailed, he reminded his colleagues that he "inveighed against this national origins theory a way back in 1924,"[278] when Congress passed the first permanent quota law. Even if the traditional fear of Asian immigration had diminished in the minds of other legislators by 1965, it would be understandable if Celler and Masaoka were still concerned with the "kiss of death" that Senator McCarran had predicted would destroy any bill eliminating

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273. 111 CONG. REC. 21,757-58 (1965) (emphasis added).

274. *Id.* at 24,503.

275. *Id.*

276. *Hearings on S. 500*, *supra* note 38, at 48-49; *accord Hearings on H.R. 2580*, *supra* note 93, at 90; *Hearings on H.R. 7700*, *supra* note 38, at 389. Similarly, although he believed that Asians would account for approximately 20% of Western Hemisphere immigration, Senator Fong suggested the possibility that the Asian American population might never exceed one percent of the total. *See Hearings on S. 500*, *supra* note 38, at 119.

277. As Adam Walinsky observed in this context, "people in debate say all kinds of things." *See* Telephone Interview with Adam Walinsky, *supra* note 157.

278. 111 CONG. REC. 21,579 (1965).

special restrictions on Asian immigration.[279] When Masaoka observed that "the slant of my eyes . . . ha[s] nothing to do with the slant of my heart,"[280] he might have suspected that others would not agree.[281]

Equally plausible is that these comments, taken in the context of the entire history of the bill, were sincere, *and have proved to be accurate.* What would constitute an "influx" or a "flood"? When attempting to alleviate fears of Asian immigration from the Western Hemisphere, Mike Masaoka argued that "[e]ven if all the million [persons of Asian descent] from Latin America . . . came in at one

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279. *See supra* note 87 and accompanying text (discussing Senator McCarran's prediction). Former Assistant Attorney General Schlei believes this may be the explanation for Celler's comments:

> [T]he standard lore was that it was utterly impossible to change the national origins quota system because there was such an entrenched feeling in Congress and in the country that everyone wanted the same racial, national make-up of the immigrant stream, but when I began to promote that Bill and to talk to people about it in the Congress, I found that it was not anywhere near as totally accepted a proposition as everybody had thought. . . . [A]lmost everybody felt bad about our immigration laws and felt that something needed to be done about it. . . . But Celler was a fellow who had struggled with immigration for a generation, and he I think, feared that if the word was around that this was going to totally change the stream of immigration, the Bill might lose, so I think he tried to develop arguments (and we probably helped him) to reassure those people that if there was a change it certainly wouldn't be sudden . . . . I think Celler was trying to think of every argument he could to reassure the conservative people that what we were doing was not going to blow everything up like a bomb; it was going to be a gradual change and not all that great.

Telephone Interview with Norbert Schlei, *supra* note 157.

280. *Hearings on S. 500*, *supra* note 38, at 626.

281. Perhaps it was no coincidence that Masaoka's comment came from a Japanese-American, rather than an American of other Asian descent, because by 1965, the major Japanese immigration to the United States was over. Compared to other Asian groups, the influx of Japanese immigrants was small. *See* J. Wareing, *The Changing Pattern of Immigration into the United States, 1956-75*, 63 GEOGRAPHY 220, 221 (1978) ("In Asia, despite the spectacular rise in numbers, the trend was not universal and immigration from Japan actually declined after 1965 because of the continuing buoyancy of the Japanese economy and the competition for visas."). By the end of the 1970s, the first full decade of the law's operation, Japanese-Americans fell from being the largest Asian subgroup to the third largest, behind Chinese-Americans and Filipino-Americans. *See* DANIELS, *supra* note 52, at 321-22; *see also* HING, *supra* note 30, at 106 ("A variety of factors have combined to limit the impact of the 1965 Amendments on Japanese America."). This phenomenon was predicted before the 1965 bill became law. *See Hearings on H.R. 7700*, *supra* note 38, at 725 (statement of James Carey, President of the International Brotherhood of Electrical Workers) (noting the economic boom in Japan and predicting that "very few Japanese would become emigrants [sic] to the United States today even if all bars were down"). *But cf. Hearings on S. 500*, *supra* note 38, at 727 (testimony of Chinese-American leader Jack Wong Sing) (stating, much more ambiguously, "[l]et it not be said that Chinese immigration would be opened"); *see also Hearings on H.R. 7700*, *supra* note 38, at 846 (asserting that any increase would be limited).

time . . . they still would not equal the number of Asiatics in this country. And the total number of Asiatics in this country is less than one-half of one percent."[282] A million in one day from one region of the world would not be a huge influx. Similarly, Robert Kennedy argued that an increase of two percent in the Italian-American proportion of the total United States population over a course of years would not constitute an alteration of the ethnic makeup of the country.[283] What seem to be very large shifts in absolute terms, we are told, are *de minimis*; what to one person might seem like a flood, to another is merely diversity.

Edward Kennedy explained that the bill "will not inundate America with immigrants from any one country or area, or the most populated and economically deprived nations of Africa and Asia. . . . *[N]o country can be given more than 10 percent of the total annual quota* . . . ."[284] The protection was that no country could have more than ten percent, but that did not preclude, say, China, Korea, India and the Philippines, from having forty percent. Thus, when he advised that "[t]he principal beneficiaries of the new system are those countries which have large backlogs of applicants for immigration, but have relatively small quotas," that is, countries with high immigration demand, he named China and Japan as two of the nine countries which had the most to gain.[285] The result was not that there would be no change in the immigration stream, but that "the ethnic pattern of immigration under the proposed measure is not expected to change *as sharply as the critics seem to think.*"[286] Indeed, the bill provided for a phasing out of the National Origins Quota System, designed to make sure that the traditional sources of immigration were protected *for three years.*[287] The clear implication of this provision is that after 1968, sources of immigration could change more rapidly.

In these terms—a million in a day is not a huge influx, a two percent increase over a period of decades is not a huge influx, acceptance of a sharp (if not too sharp) change in the immigrant stream—there still has not been an influx of Asian immigrants.

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282. *Hearings on S. 500*, *supra* note 38, at 627; *accord Hearings on H.R. 7700*, *supra* note 38, at 890-91.

283. *See Hearings on S. 500*, *supra* note 38, at 217.

284. *Id.* at 2 (emphasis added).

285. *Id.*

286. *Id.* (emphasis added).

287. *See* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911; *see also supra* note 207 (discussing this provision).

Compared to the population of Asia as a proportion of the world population, the percentage of Asians in the immigrant stream does not represent a huge influx. Compared to the population of the United States, the percentage of Asians in the immigrant stream does not represent a huge influx. In absolute terms, the United States is a long way from becoming a distinctly Asian country.

In addition, Celler, Masaoka and Rusk knew what is sometimes obscured today: By 1965, McCarran-Walter had failed to maintain an immigrant stream which reflected America's racial makeup as of 1952 or 1924; in particular, it had failed to limit the number of Asian immigrants. A series of special laws admitted refugees,[288] relatives,[289] and others,[290] in response to particular political and economic exigencies, even though no quota numbers were available for them.[291] As Richard Poff, a member of the House Judiciary Committee Subcommittee Number One in 1964, explained:

> [McCarran-Walter's] purpose has been called worthy and unworthy. Whether the concept is sound or unsound, the purpose worthy or unworthy, debate is no longer relevant. The question is moot. The purpose has not been achieved. The national origins system has not maintained the ethnic ratios of the American population which prevailed in 1920.... For the last 3 years, for every immigrant entering under the quota system, there were two entering by other means, entirely within the law as amended by Congress from time to time.[292]

Thus, under McCarran-Walter, that is, from 1953-1965, there were roughly 28,000 quota numbers allotted to Asia,[293] but 238,507

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288. *See, e.g.,* Refugee Relief Act of 1953, ch. 336, 67 Stat. 400 (codified at 50 U.S.C. app. § 1971 (a)-(q)) (omitted in current 50 U.S.C. app. due to provision that statute would lapse on Dec. 31, 1956).

289. *See, e.g.,* Act of Sept. 22, 1959, Pub. L. No. 86-363, §4, 73 Stat. 644, 644 (providing for relief of backlog by admitting, as non-quota immigrants, certain relatives on waiting lists) (current version at 8 U.S.C. § 1153 (1994)).

290. *See* Act of Oct. 24, 1962, Pub. L. No. 87-885, § 2, 76 Stat. 1247, 1247 (admitting certain skilled immigrants from waiting lists as non-quota immigrants).

291. *See generally* Helen F. Eckerson, *Immigration and National Origins*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 10-14 (1966) (discussing laws providing for admissions outside the quota system established by McCarran-Walter).

292. 111 CONG. REC. 21,772 (1965); *see also* H.R. REP. NO. 89-745, at 11 (1965) (making similar observation). As one member of Congress put it, "[t]he basic inequities in the existing quota system have impelled Congress to enact numerous laws during the past dozen years to meet emergency conditions." 111 CONG. REC. 23,677 (1965) (remarks of Rep. Cunningham).

293. *See Hearings on S. 500, supra* note 38, at 308-25 (listing quotas for all nations).

Asian immigrants.[294] Representative Moore noted that between 1953 and 1963, 119,677 immigrants came to the United States from China, Japan and the Philippines, and 109,000 were non-quota immigrants.[295] Senator Hart informed the Senate Judiciary Committee that while China had a quota of 1000 for the period 1953-1962, actual entrants were 3,600 more; in spite of Japan's annual quota of 185, 48,169 immigrants arrived.[296] A "limited" increase over a quota of 2000 is one thing; a "limited" increase from a situation where Asians are already coming in at a rate geometrically in excess of their quota, the situation Celler, Masaoka and Rusk were discussing, is another.

F. Was the Issue Left Vague Because Congressional Anti-Racism Was Sincere?

Perhaps the best evidence of the attitude of Congress in 1965 is what they did *not* say or do. In the committees and on the floor of Congress, some people said Asian immigration would increase a little or a lot, and others suggested those concerns were overblown. The only formal estimates covered the transition period, not the much more important time during which the law would be in full effect. If ethnic changes in the immigrant stream were an important consideration to the members of Congress who were neither extreme anti-racists nor racists,[297] why did they not insist on some kind of projections, or structural protections in the law against that eventuality?[298]

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294. *See* BUREAU OF THE CENSUS, *supra* note 6, at 108 (giving annual admissions statistics).

295. *See* 111 CONG. REC. 21,590 (1965). In 1931-40, 3.1% of the 528,000 immigrants were from Asia; 3.5% of the approximately 1,000,000 immigrants admitted between 1941-50 were from Asia; in 1951-60, of 2,515,000 immigrants, 6% were from Asia. *See* 1991 STATISTICAL YEARBOOK, *supra* note 6, at 29. Thus, in absolute and proportionate terms, Asian immigration had been increasing substantially for decades.

296. *See Hearings on S. 1932*, *supra* note 121, at 13.

297. Sitting in the first session of the 89th Congress were many who had opposed the Civil Rights Act of 1964 because of its fundamental principle, and signed the Southern Manifesto. For example, Senators James O. Eastland, Allen Ellender, Sam Ervin, Spessard Holland, John McClellan and Strom Thurmond voted against both the Civil Rights Act of 1964, *see* 110 CONG. REC. 14,511 (1964), and the Voting Rights Act of 1965, *see* 111 CONG. REC. 11,751-52 (1965); only Ervin switched sides and voted for the Immigration and Nationality Act Amendments of 1965. *See id.* at 24,783. Each of these men—and ninety or so other members of Congress—signed a statement entitled "Deviations from the Fundamentals of the Constitution," subsequently known as the Southern Manifesto, the 1956 pledge of resistance to *Brown v. Board of Education* endorsed by almost every member of the Southern contingent in both houses of Congress. *See* 102 CONG. REC. 4515-16 (1956). Of the Southern senators, only Lyndon Johnson, Estes Kefauver, and Albert Gore declined to sign. *See* RICHARD KLUGER, SIMPLE JUSTICE 752 (1976).

298. Senator Eastland argued that "it would be a grave mistake if we proceeded with haste to adopt new concepts unsupported by detailed factual surveys and studies," 111

It may be that race really was not a major issue to a majority in Congress. McCarran-Walter's supporters could not make political hay out of it, moderates were unconcerned about the race of new immigrants, and liberals thought it was fair for previously excluded groups to have a chance to enter in greater numbers. That is, perhaps Congress as a whole truly meant to eliminate the race factor from immigration policy.

Statements of David Burke, then Senator Edward Kennedy's Chief of Staff, suggests that this motive might have existed: "If you can ever find some nobility in public policy, elimination of the Triangle was one of [those] instances, I think, because it certainly wasn't going to bring any acclamation to Ted Kennedy or his brother Bobby."[299] "Scare" argumentation invoking a renewed threat of the yellow peril would have been ineffective: "[I]n those days ... if the guys from Alabama, or Mississippi, or Georgia, if that was the best they could come up with, it was not a concern. The Asian immigration was not a concern. It was not a threat...."[300] According to Congressman Peter Rodino, Jr., given the tenor of the times, no legislator who wanted to avoid being tagged a racist would have insisted on racial estimates.[301]

Senator Charles Mathias, who was in the House in 1965, said it was fair to assume that the bill would have passed even had its effects been known at the time. "After all, the bill was fairly dramatic in abandoning the original quota system, and it was opening the gates wider than they had been opened ...."[302] In Robert Kastenmeier's view, the bill would have passed even if its effects had been known at the time: "I don't know that somebody around here would quibble about whether it is one-half or one-third, or one-quarter, but I guess most of us who supported the bill would have said, 'well, ... that's not an unreasonable figure.' "[303] Immigration Subcommittee member Don Edwards also believes the bill would have passed even if its ef-

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CONG. REC. 24,545 (1965), but his view did not prevail. Many commentators observe that increasing racial toleration domestically was a factor in passing the bill. *See, e.g.*, *supra* note 112 (listing sources discussing increased racial toleration). But why was this important, if the 1965 Act was McCarran-Walter with a fresh coat of paint? A change in racial attitudes signaled that a substantive, not merely formal, change in immigration policy was possible.

299. Telephone Interview with David Burke, Former Chief of Staff to Senator Edward M. Kennedy (June 29, 1995) (transcript on file with author).

300. *Id.*

301. *See* Telephone Interview with Peter Rodino, Jr., *supra* note 139.

302. Telephone Interview with Charles Mathias, *supra* note 144. Senator Mathias did note that he was speculating. *See id.*

303. Telephone Interview with Robert Kastenmeier, *supra* note 141.

fects had been known at the time.[304] Arch Moore, Jr., also a member of the House Judiciary Committee subcommittee responsible for immigration, believes that awareness of the full consequences of the bill with regard to Asian immigration "probably would have caused some difficulty with the bill. Whether or not it would have been sufficient to have defeated the bill, which had widespread administration support, I doubt it."[305] Similarly, James Corman, then a member of the House Judiciary Committee, "would have supported the bill" even if its effects in increasing Asian immigration had been known.[306] President Ford's opinion that "[t]he existing laws were clearly out of date with unrealistic quotas and racial bars" is also consistent with an intent to create real change.[307] Dale DeHaan explained that the race of new immigrants was simply not a serious issue for most supporters of the legislation, especially given the context of other civil rights legislation which was being passed at the time.[308]

Participants from the administration echo these views. President Johnson's counsel Myer Feldman agrees that arguments about changes in the immigrant stream would have been unavailing: "Certainly, the argument against 'more blacks,' 'more Asians,' or 'more Poles' was unpersuasive."[309] "I have no reason to believe," Feldman says now, "that the commitment to ending discrimination would have been less if its effects in increasing the percentage of Asians had been perceived at the time of passage."[310] Katzenbach also believes the bill would have passed even if its effects were known at the time,[311] as do Schlei[312] and Walinsky.[313] While Thomas Ehrlich does not know how others would have reacted to advance knowledge of the bill's effects, it would not have made a difference to him or, he believes, to State Department official Abba Schwartz.[314] If these

304. *See* Telephone Interview with Don Edwards, *supra* note 142.

305. Telephone Interview with Arch Moore, Jr., *supra* note 145; *see also id.* (making similar comment).

306. Telephone Interview with James Corman, Former Member of Congress (Jan. 18, 1996) (transcript on file with author).

307. Letter from President Gerald R. Ford to Gabriel J. Chin, *supra* note 137, at 1.

308. *See* Letter from Gabriel J. Chin to Dale DeHaan, *supra* note 146, at 1.

309. Letter from Myer Feldman to Gabriel J. Chin, *supra* note 149, at 2.

310. *Id.* Referring to the absolute numbers of immigrants admitted, he explains that "we did not anticipate the high level of immigration that followed the enactment of the law. However, I doubt that if we had . . . , that [it] would have changed our policy." *Id.*

311. *See* Telephone Interview with Nicholas deBelleville Katzenbach, *supra* note 152.

312. *See* Telephone Interview with Norbert Schlei, *supra* note 157.

313. *See* Telephone Interview with Adam Walinsky, *supra* note 157.

314. *See* Telephone Interview with Thomas Ehrlich, *supra* note 159.

views are representative, and if indeed some did not forecast a significant increase in non-white immigration in 1965, perhaps the reason was that the question was not decisive.

This is not to say that full disclosure of the racial consequences would not have caused a ripple in Congress or the administration. Some officials said that if the full consequences had been known that would have given some supporters pause.[315] However, not being entirely free of anxiety is not inconsistent with real change. It would not be surprising, for example, if even a sincere supporter of civil rights legislation felt a twinge when confronting the concrete effects of ending favoritism for whites. The reality that a white member of Congress could lose his seat might make him look at the Voting Rights Act from a different perspective.

G. The Assimilation Assumption

Members of Congress may have felt comfortable admitting a greater proportion of non-whites because they assumed immigrants would assimilate. Representative John Tunney, for example, assured his colleagues that "[t]here is no hidden nefarious motive behind the bill to undermine our American way of life."[316] Congress assumed that immigrants wanted to come to the United States to share this way of life.[317] Representative Paul Findley explained: "[T]he Statue of Liberty ... still stands as an inspiration and a hope to those millions beyond our borders who long for an opportunity to share in the American heritage. To them, America is a promised land, a place of refuge, a place where people can live in dignity and without fear."[318]

Congress agreed with Presidents Kennedy[319] and Johnson[320] that

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315. *See, e.g.*, Telephone Interview with Peter Rodino, Jr., *supra* note 139; Telephone Interview with David Burke, *supra* note 299; Telephone Interview with Thomas Ehrlich, *supra* note 159.

316. 111 CONG. REC. 21,791 (1965).

317. *See, e.g., id.* at 21,597 (remarks of Rep. Donald Irwin) ("[T]here is still room for those in need of shelter and those in search of freedom."); *id.* at 21,787 (remarks of Rep. Jeffery Cohelan) ("[T]oday we find countless thousands who look to this great melting pot as a land of freedom and opportunity....").

318. *Id.* at 21,783.

319. In a letter to Congress, President Kennedy argued that his reforms would
> provide a sound basis upon which we can build in developing an immigration law that serves the national interest and reflects in every detail the principles of equality and human dignity to which our nation subscribes.... [The national origins quota system] should be modified so that those with the greatest ability to add to the national welfare, no matter where they were born, are granted the highest priority. The next priority should go to those who seek to be reunited with their relatives.

foreigners were allowed to immigrate to the extent that it was perceived to be a benefit to America. Thus, Representative Feighan insisted that "the interests of the United States were at all times first and foremost" when Congress drafted and passed the bill.[321] Accordingly, the law "carefully establishes conditions which guarantee against any influx of refugees who might be openly or covertly hostile to American principles."[322]

If America was looking out for itself, not the huddled masses, why could it so blithely eliminate racial and national tests? The answer was that individuals were nothing less than individuals, and factors like race, religion, color or place of birth were irrelevant—they said nothing about a particular person.[323] This focus on individu-

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Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, *in* PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 1963, at 594, 595 (July 23, 1963).

320. *See* Remarks at the Signing of the Immigration Bill, Liberty Island, New York, *in* 2 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1965, at 1037, 1038 (Oct. 3, 1965) (stating that "[t]hose who can contribute most to this country—to its growth, to its strength, to its spirit—will be the first that are admitted to this land"); Remarks to Representatives of Organizations Interested in Immigration and the Problems of Refugees, *in* 1 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1963-64, at 123, 123 (Jan. 13, 1964) ("What is the training and qualification of the immigrant who seeks admission? What kind of citizen would he make, if he were admitted?"); *see also* Annual Message to the Congress on the State of the Union, *in* 1 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1963-64, at 112, 116 (Jan. 8, 1964) ("[A] nation that was built by immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?' ").

321. 111 CONG. REC. 21,585 (1965) (remarks of Rep. Feighan). Senator Pastore also noted:

> John Kennedy's immortal test—Ask not what America can do for you—ask only what you can do for America—would still be his test.... [I]t makes no difference what the race is, it makes no difference what the nationality is, it makes no difference what the place of birth is. What counts is the contribution that a person can make to this great America of ours.

Id. at 24,562-63.

322. *Id.* at 21,770 (remarks of Rep. Jacob Gilbert).

323. President Johnson made this point in his signing message, saying that the national origins quota system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." Remarks at the Signing of the Immigration Bill, Liberty Island, New York, *supra* note 320, at 1038; *see also* 111 CONG. REC. 21,594 (1965) (remarks of Rep. Peter Rodino) ("This long overdue change recognizes the dignity of the individual and is predicated on the principle that one person is no less desirable than any other person regardless of his race or place of birth."); *id.* at 21,759 (remarks of Rep. Clark MacGregor) (noting that the "fundamental American attitude [is] to ask not where a person comes from, or to prejudge a person on the basis of his place of birth, but to evaluate his personal qualities"). Representative Bernard Grabowski stated that immigration should be:

> based on the worth and integrity of each individual without regard to his country or religion.... [Admission] will be based on what skills a person has to offer and

ality was not just an acknowledgment of the idea that all people are morally equivalent despite deep differences; it was also a claim that they actually bear fundamental similarities.[324] Representative Silvio Conte noted the achievements of Italian Americans but then suggested that this kind of background was irrelevant: "The single overriding point is that aliens should and must be evaluated as individuals, not as incorrigible vassals of a racial, ethnic, or national strain. They must be evaluated as future Americans, not as former Italians, or Greeks, or Congolese, or Ethiopians, or anything else."[325] "We have learned," said Edward Kennedy, "that there is no difference between people who participate in the life of our Nation."[326] Furthermore, Robert Kennedy explained that evaluating individuals on "their merit . . . is the whole philosophy of the immigration bill, and that that was the whole philosophy of the civil rights bills of 1963 and 1964 and the voting rights bill of 1965."[327]

On the other hand, even if "in the United States we judge a man by what he is and not by where his ancestors came from, what his religion is or what color his skin is,"[328] we still judge him. As Edward

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whether he already has close relatives in this country. . . . It is time that we start to consider what an individual has to contribute, not whether those of his same nationality are preponderate in this country.

Id. at 21,764; *see also id.* at 21,771 (remarks of Rep. Jacob Gilbert) ("It is our birthright that we are a nation of men, women and children, each an individual, and not a pawn of society or the State. This measure is testimony of America's regard for the worth of the individual."); *id.* at 21,778 (remarks of Rep. Paul Krebs) ("We must learn to judge each individual by his own worth and by the value he can bring to our Nation."); *id.* (remarks of Rep. Seymour Halpern) ("Americans are concerned with a man's merit and personal integrity, and not with his ethnic background or racial stock."); *id.* at 21,784 (remarks of Rep. Frank Annunzio) ("We have always measured a man's worth by his capacity to contribute and not by his religious beliefs or nation of origin."); *id.* at 21,786 (remarks of Rep. Henry Helstocki) ("[W]e are seeking an immigration policy which will reflect America's ideal of equality of all men without regard to race, color, creed, or national origin . . . .").

324. *See id.* at 21,784 (remarks of Rep. Leonard Farbstein) ("Embodied in this bill is a realization and a recognition which has become widespread in this Nation rather belatedly. Indeed, even now it is not yet accepted in all quarters. I am speaking of the recognition of the basic equality of all men."); *id.* at 21,787 (remarks of Rep. Dominick Daniels) ("The very basic contention that 'all men are created equal' is negated by our immigration policy. A policy which flies in the face of our national ideals by holding that some races and some ethnic groups make better Americans than others."); *id.* at 21,807 (remarks of Rep. Paul Fino) (noting "fundamental truth that all men, regardless of race, color or religion, are created equal").

325. *Id.* at 21,818.

326. *Id.* at 24,777.

327. *Id.* at 24,778.

328. *Id.* at 21,787 (remarks of Rep. Dominick Daniels); *see also* Special Message to Congress on Immigration, *in* 1 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1965, at 37, 39 (Jan. 13, 1965) ("No move could more effectively reaffirm our fundamental belief that a man is to be judged—and judged exclu-

Kennedy put it, "[f]avoritism based on nationality will disappear. Favoritism based on individual worth and qualifications will take its place."[329]

One component of individual worth and qualification was that the new immigrant assimilate and become a good citizen.[330] Representative Moore explained:

> In addition to the existing numerical quota limitations, intending immigrants must satisfy strict moral, mental, health, economic, and national security requirements. The law is long and detailed on the specific criteria to be applied in testing the qualifications of applicants. The objective of these tests is obvious: To insure that those aliens admitted are of good character, healthy, will not be a burden on our economy, and will not endanger our form of government and way of life.[331]

The United States could welcome new immigrants without fear of damaging its special history and tradition, because the new immigration would assimilate to the United States just as had the old.[332]

But the form of assimilation suggested by the legislative history was cosmopolitan and fluid; it did not demand that immigrants' history would be wiped clean as they arrived at LaGuardia Airport, or

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sively—on his worth as a human being.").

329. 111 CONG. REC. 24,226 (1965); *see also id.* at 24,238 (remarks of Sen. Philip Hart) (making similar point); *id.* at 24,564 (remarks of Sen. Thomas Dodd) (describing the provisions of the bill).

330. *See id.* at 21,765 (remarks of Rep. Brock Adams). He stated:

> I am very proud of the people who live in [my] District who have been patient for many years in the face of America's inadequate immigration policies. They number among our finest citizens, and a look at the people this bill will help the most shows they are among the best people of our community. This is shown by the warm affection they enjoy in the community and by such statistical factors as the low school dropout rate, low crime rate, low incidence of welfare, and a high degree of participation in all civic endeavors.

Id.; see also id. at 21,796 (remarks of Rep. Roman Pucinski) ("We need good citizens, good Americans from all the four corners of the world."); *id.* at 21,799 (remarks of Rep. Edward Roybal) ("[W]e have always been an outward-looking people, coming as we do from many ethnic and cultural backgrounds—a true melting pot of the strength and diversity that has made America great.").

331. *Id.* at 21,780.

332. *See, e.g., id.* at 21,769 (remarks of Rep. John Lindsay) ("The law, obviously, must be geared to this country's absorptive capacity."); *id.* at 21,779 (remarks of Rep. Seymour Halpern) ("We are not a stagnant people, nor a nation stuck in its ways. Ours is a dynamic and ever-progressing society, always receptive to fresh insights and new ideas, while at the same time, preserving those principles which have made our Nation great."); *id.* at 21,783 (remarks of Rep. Lester Wolff) (arguing that the claim that many immigrants would be "hard to assimilate . . . [has] no foundation and crumble[s] when exposed to the facts of immigration reform").

that the United States would be denied the cultural contributions of people from foreign lands. The words of Senator Saltonstall capture both the respect for immigrant contributions to a dynamic and evolving culture and the assumption of assimilation that the bill embodied: "The homogeneity of American life has been enhanced by the efforts of many groups of heterogeneous people."[333]

President Johnson[334] and members of Congress asserted that new immigrants would weave themselves into the fabric of a unitary America without eradicating cultural distinctiveness. Representative Rodino, for example, stated:

> Surely one of the greatest sources of the strength of America is to be found in the diversity of the groups making up our Nation. Each group has brought its traditions, its culture, its individual genius, and these in turn have become part of the American heritage. Diversity marks the various contributions to this heritage; unity has been the outgrowth of a shared experience, of shared values. The American Nation today stands as eloquent proof that there is no inherent contradiction between unity and diversity.[335]

Senator Edward Kennedy also made clear that new immigrants would assimilate:

> Another fear is that immigrants from nations other than those in northern Europe will not assimilate into our society. The difficulty with this argument is that it comes 40 years too late. Hundreds of thousands of such immigrants have come here in recent years, and their adjustment has been notable. . . . The fact is, Mr. President, that the people who comprise the new immigration—the type which this bill would give preference to—are relatively well educated and well to do. . . . They share our ideals. Our merchandise, our styles, our patterns of living are an integral part of their own countries. Many of them learn English as a second language in their schools. In an age of global television and the universality of American culture, their assimilation, in a real sense, begins before they come here.[336]

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333. *Id.* at 24,441; *see also id.* at 24,501 (remarks of Sen. Joseph Tydings, citing an INS official) ("Their gradual fusion with the multinational immigrants who came to this land before and after them has helped to produce an amalgamated society which has no parellel [sic] in the world.").

334. *See* Remarks at the Signing of the Immigration Bill, Liberty Island, New York, *supra* note 320, at 1039 ("From a hundred different places or more they have poured forth into an empty land, joining and blending in one mighty and irresistible tide.").

335. 111 CONG. REC. 21,594 (1965).

336. *Id.* at 24,228. Senator Kennedy continued:

Emanuel Celler more than once told a story which palpably communicates its message of pluralistic harmony:

> If you go to my district [in Brooklyn, New York] you will find people of all nationalities. And to give you an idea of the pluralistic character of my district, which is symptomatic [sic] of many, many districts in the Nation, I would like to tell you a story.
>
> A man goes into a Chinese restaurant, and there, to his amazement, he sees a Negro waiter—a Negro waiter in a Chinese restaurant. And he says to the waiter, "What is the specialty of the house?" And the Negro waiter says, "Pizza pie."
>
> "Pizza pie in a Chinese restaurant?"
>
> And he said, "Yes, this is the Yiddish neighborhood."
>
> That gives you some idea of what is happening in this country and what is happening is good for the land because all those races are amalgamated and they are here for a good, common purpose, the weal and the welfare of our Nation, to which all these diverse races make contribution.[337]

In short, the law would not assume that a person could not be a good American because of race, color or place of birth, but it did assume that people would come here because they wanted to assimilate into this society. Even a legislator who recognized that it might not

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> Let us erase forever today the stereotype of the immigrant in our history. The cities of America no longer have the foreign neighborhoods, the cultural islands, separate, unassimilated, a drag on the Nation. They are gone and policies based on them should be gone.... The people who will be admitted under [the bill] will continue to adjust to our country with the speed and dispatch of past immigrants.

Id. at 24,777.

337. *Id.* at 21,757. Representative Durward Hall, likewise, explained:

> Mr. Chairman, from the "melting pot" which certainly we were, and had to be, has come an American culture, a culture no less unique than that of any other established nation in the world.... Persons from many nations and many nationalities and many ethnic groups all contribute to this culture. But it is also important to recognize that as they have changed America, so has America changed them. The result is a nation which in combining the best of each ethnic group has, in effect, like a great, fine hybrid, surpassed each predecessor, and has provided a standard of living that surpasses that of any country from which all our forebears once immigrated.

Id. at 21,775; *see also id.* at 24,467 (remarks of Sen. Hiram Fong) ("As a nation of immigrants, we have developed a racially heterogeneous society in which citizens of many cultures and ethnic origins live and work side by side to make the American dream a reality."); *id.* at 24,781 (remarks of Sen. Joseph Tydings) ("In his book, 'A Nation of Immigrants,' President Kennedy reminded us that the three ships that discovered America flew the Spanish flag, sailed under an Italian captain, and included as members of their crew an Irishman, a Negro, an Englishman, and a Jew.").

be easy for white Americans to get used to unfamiliar languages and colors could insist that anyone, in time, could become a part of "the adventure and opportunity that America means,"[338] and share in the "dream of America."[339]

CONCLUSION

The 1965 Act is widely misunderstood. In conjunction with other landmark civil rights bills of the time, it probably intended to take race out of America's immigration policy. Although there is sometimes good reason to question the true motives behind particular laws, the Congress of Camelot and the Great Society was perhaps the most racially progressive America has ever seen. If these legislators were racial hypocrites, the Voting Rights Act of 1965 and the Civil Rights Act of 1964 become very problematic—were they spurious, also?

Fortunately, the evidence in support of the argument that Congress passed the 1965 Act only because it believed there would be little change in the racial demographics of the immigrant stream is limited. The evidence, in fact, actually shows the opposite. This change is revolutionary, given how recently American interests in winning World War II, the Korean War and Cold War were subordinated to the more important policy of racial restrictions on immigration. Knowing that non-whites would be likely to take advantage of the equalized opportunities, Congress passed the law anyway. When Robert Kennedy announced that "[i]t will not matter whether they come from Italy or Germany or whether they come from some countries in the Far East,"[340] he seems to have been telling the truth.

338. *Id.* at 24,562 (remarks of Sen. Pastore).
339. *Id.* at 21,783 (remarks of Rep. Philip Burton).
340. *Hearings on H.R. 7700*, *supra* note 38, at 421.