

1998

# Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s

Michael R. Curran

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## Recommended Citation

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# FLICKERING LAMP BESIDE THE GOLDEN DOOR: IMMIGRATION, THE CONSTITUTION, & UNDOCUMENTED ALIENS IN THE 1990S

Michael R. Curran\*

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\* B.B.A. 1991 *magna cum laude*, Baruch College of the City University of New York; J.D., 1996, St. John’s University School of Law; human resources manager for The Mount Sinai Medical Center, The Metropolitan Museum of Art, and other organizations; member of the New York and New Jersey bars; active participant in New York *pro bono* organizations, particularly the SHIELD Project and Robert B. Kay Community Outreach Law Program of the Association of the Bar of the City of New York (the latter dealing with immigrant issues).

I am indebted to the sage counsel and essential support of Professor Philip Weinberg of the St. John’s University School of Law during the ongoing writing and revisions to this article and to the “spirited inspiration” of Professor David Gregory, also of St. John’s. Additionally, I am indebted to the many individuals from all over the globe whom I have met in the United States and elsewhere, who have given me perspective on what America means to the rest of the world and why these folks would leave their homes and come to U.S. shores. I dedicate this Article to my sons - Andrew, Patrick, and Matthew - and my grandmother Marie (Earley) Falconer, and the nineteenth and twentieth century immigrant antecedents of my own family. I wish to express thanks to Ms. Lauren Moran (former Editor in Chief) and Mr. Eric Cheng (former Articles Editor), Case Western Reserve Law School Class of 1997, and most particularly to Ms. Lesli Esposito, Editor in Chief, Case Western Reserve Law School Class of 1998.

This Article was originally written in the Spring of 1996 and was revised in early 1997, prior to the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, most of the provisions of which went into effect on April 1, 1997. At publication, many in the immigrant community are reeling from the pronounced restrictionist and punitive effect of many of the act’s provisions, which were avowedly intended by Congress to “plug the loopholes” in the Immigration and Nationality Act (INA).

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*To the stranger the gates of my house are not closed;  
the rice jar is on the left,  
and the sweetmeats on the right, as you enter.  
Two sayings of the Master:*

*Hospitality is the virtue of the son and the wisdom of the ancestor.  
The superior man is lighthearted after the crogathering;  
he makes a festival.*

*When the stranger is in your melon patch observe him not  
too closely; inattention is often the highest form of civility.  
Happiness, Peace, and Prosperity.*

Hop Sing<sup>1</sup>

#### I. INTRODUCTION: AMERICA APPROACHES THE 21ST CENTURY

Peek into any U.S. hotel or restaurant kitchen, and you are likely to spy foreigners without green cards through the dishwasher steam. These workers are known as "illegal aliens" or more benignly as "undocumented workers," depending on your view of the issue. Foreigners unauthorized to work in the United States can also be found in garment factories, tomato fields, parking garages, taxi cabs, behind a broom, and performing a host of other tasks whose common features are long hours, scut work, and low pay. Millions of such workers continue to flood the

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<sup>1</sup> BRET HARTE, *Wan Lee, The Pagan*, in *THE OUTCASTS OF POKER FLAT AND OTHER TALES* 214 (New Am. Libr. ed. 1961) (from *THE WRITINGS OF BRET HARTE*, Houghton Mifflin & Co. 1896-1904).

labor force, despite a long-fought 1986 immigration-reform law that liberalized legal immigration in exchange for what was supposed to be a crackdown on unlawful entry and employment.<sup>2</sup>

WHAT MAKES CONTEMPORARY AMERICA? Is it the varied and still-vast natural contours of her lands? Does she emanate from new ideas, traditions, and effervescent dreams? Does America present herself to the world as a place of constitutional bounties rich in enumerated rights and privileges derived from the rule of law? Or does Columbia's true glory shine in the polyglot, melting pot of cultures — a rich layering over Anglo-Saxon and Judeo-Christian traditions, nuanced today by nearly every race, creed, and cultural mix on the face of the earth?

In the present-day United States, the people and their representatives talk of the many sources of change quaking American society. Americans, for example, have varying feelings about the downsizing, reorganizing, and reengineering of American businesses and institutions, and the impact on the economy and jobs of the technological revolution.<sup>3</sup> Managed

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<sup>2</sup> See Robert Kuttner, *Illegal Immigration: Would a National ID Card Help?*, in ARGUING IMMIGRATION: ARE NEW IMMIGRANTS A WEALTH OF DIVERSITY . . . OR A CRUSHING BURDEN? 81 (Nicolaus Mills ed., 1994) [hereinafter ARGUING IMMIGRATION]. The terminology is debatable. It makes more sense in many cases to use the term "undocumented" vs. "illegal" alien, because, technically an undocumented alien cannot reasonably be called the latter until a proceeding or administrative determination has ascertained his or her status as "illegal." The reasons for lack of documentation could be valid and widely varied, including loss or theft of documentation, pending status, or valid refugee or asylee status.

<sup>3</sup> At one IBM location a department's productivity was allegedly improved "not 100 percent, but *one hundred times*" (or 100% x 100% = 10,000%) through the reduction of credit checking departmental personnel down to virtually one person. See Simon Head, *The New, Ruthless Economy*, N.Y. REV. BOOKS, Feb. 29, 1996, at 47 (critically reviewing MICHAEL HAMMER & JAMES CHAMPY, REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION 39 (1993)). Many social scientists, sociologists, and pop philosophers have heralded the "information superhighway" and the technological revolution as the end of all political, economic, and social hierarchies everywhere as power "[devolves] downward to the people and [they are liberated] from the constraints of the centralized, tyrannical organizations in which they once worked." FRANCIS FUKUYAMA, TRUST 23-24 and 24 n.1 (1995) (discussing ALVIN TOFFLER & HEIDI TOFFLER, WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY (1993); PETER W. HUBER, ORWELL'S REVENGE: THE 1984 PALIMPSEST (1994)). Others are not so sanguine. Sociologists Stanley Aronowitz and William DeFazio have argued that the rise of computerized technology has created a "technoculture," replacing skill and craft with button-pushing "knowledge workers," resulting in the "proletarianization" of engineers, university professors, doctors, and other professionals. See STANLEY ARONOWITZ & WILLIAM DEFAZIO, THE JOBLESS FUTURE

health care, originating on the west coast, has now swept across the country, and people are becoming accustomed to the presence of managed care organizations in the healthcare relationship between patients and physicians.<sup>4</sup> Impassioned discussions are occurring over crime, family values, the right to die, and many other legal, socio-cultural, and political issues.<sup>5</sup> Not least among questions rolling over the U.S. socio-economic and political fabric are those dealing with the absorption of an increasingly more visible component of American society — the undocumented alien.<sup>6</sup>

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81-138 (1994).

Sophisticated computers, robots, telecommunications, and other Information Age technologies are replacing human beings in nearly every sector. Factory workers, secretaries, receptionists, clerical workers, salesclerks, bank tellers, telephone operators, librarians, wholesalers, and middle managers are just a few of the many occupations destined for virtual extinction. In the United States alone, as many as 90 million jobs in a labor force of 124 million are potentially vulnerable to displacement by automation.

Jeremy Rifkin, *Vanishing Jobs*, MOTHER JONES, Sept-Oct. 1995, at 58, 60.

<sup>4</sup> One of the last entrants in the race to develop managed care organizations (MCOs) was the State of New York, which still prohibits for-profit hospitals and was one of the last states to permit operation of HMOs. Financial writers argue that New York should join the rest of the country in allowing the formation of physician practice management companies (PPMs), more MCOs and HMOs, and for-profit hospitals to streamline taxes and benefit costs. See *Health Reform*, CRAIN'S N.Y. BUS., Apr. 15, 1996, at 8. As part of the national trend, the American Association of Retired Persons (AARP) has decided to license its name to health maintenance organizations that meet "its standards on financial stability, commitment to quality, price and popularity with current members." Milt Freudenheim, *AARP Will License Its Name to Managed Health Care Plans*, N.Y. TIMES, Apr. 29, 1996, at A1. Although the Clinton administration lost its Capitol Hill battle to install governmental oversight into the managed care apparatus, managed care plans increasingly picked up membership via voluntary enrollees who later complained of the limiting controls in HMOs and MCOs. See Robin Toner, *Harry and Louise Were Right, Sort Of*, N.Y. TIMES, Nov. 24, 1996, 4, at 1.

<sup>5</sup> For an excellent discussion of the debate over legalizing physician-assisted suicide, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1 (1996).

<sup>6</sup> In a crescendo of sentiment over the issue of the undocumented alien, on September 30, 1996 major legislation was signed into law amending the Immigration & Nationality Act of 1952 (INA), Act of June 27, 1952, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C.). The new law which wended its way through the House as the Immigration in the National Interest Act, H.R. 2202, 104th Cong. (1996), and the Senate as the Immigration Control and Financial Responsibility Act, S. 1664, 104th Cong. (1996), completed its journey as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 [hereinafter IIRIRA]. The Senate version had passed by a vote of 97-3. See Joe Davidson, *Illegal Immigrants Are Target of Bill Passed by Senate*, WALL ST. J., May 3, 1996, at A14;

This Article presents a discussion of the rights and privileges of aliens in general and undocumented aliens in particular as premised on constitutional and legal bases. It addresses universal historical, economic, and socio-political aspects of the undocumented alien issue, and also discusses future trends and some recent Immigration & Naturalization Service (INS) and court decisions dealing particularly with undocumented aliens, deportation, etc. Finally, the material concludes with suggestions for ways in which the legal system should approach a subject that is as germane to and as much a part of America's heritage as its governmental and political institutions.

## II. THE UNDOCUMENTED ALIEN DEBATE: WHY THEY COME AND "THE BURDEN ON SOCIETY"

"Civilization's going to pieces," broke out Tom violently. "I've gotten to be a terrible pessimist about things. Have you read 'The Rise of the Colored Empires' by this man Goddard?"

"Why, no," I answered, rather surprised by his tone.

"Well, it's a fine book, and everybody ought to read it. The idea is if we don't look out the white race will be — will be utterly submerged. It's all scientific stuff; it's been proved."

...

"The idea is that we're Nordics. I am, and you are, and you are, and —" After an infinitesimal hesitation he included Daisy with a slight nod, and she winked at me again. "— And we've produced all the things that go to make civilization — oh, science and art, and all that. Do you see?"<sup>7</sup>

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Eric Schmitt, *Senate Votes Bill to Reduce Influx of Illegal Aliens*, N.Y. TIMES, May 3, 1996, at A1. The next day the President signed a bill making Mother Teresa an honorary United States citizen. See Joint Resolution to Confer Honorary Citizenship of the United States on Agnes Gonxha Bojaxhiu, also known as Mother Teresa, Pub. L. No. 104-218, 110 Stat. 3021 (1996).

<sup>7</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* 13-14 (Charles Scribners' Sons 1953) (1925). But consider, "Who among us is aboriginal? Indeed those who are aboriginal, the ones we call Native Americans, are the only ones we treat as badly as we treat new immigrants." Kristen M. Schuler, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275 (1996) (citations omitted) (quoting the oral argument of an attorney who represented schoolchildren in the U.S. District Court for the Southern District of California during injunctive proceedings aimed at halting California's anti-undocumented-alien initiative — Proposition 187).

A. *Labels: Aliens, Immigrants, Natives, Nationals, and Citizens*

Discourse over aliens and immigration — much of it inflammatory — has been raging in regard to the controls that should be put in place to channel legal immigration and to curtail the entry and effect removal of undocumented aliens due to the alleged burdens they place on U.S. institutions, social services, and the job market.<sup>8</sup> Aliens who are present

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<sup>8</sup> On an average day in the *New York Times* editorial pages, the day in fact when the U.S. Senate passed the new bill targeting undocumented aliens, an American engineer in California wrote that rather than drive wages down, aliens have helped increase wages in the Silicon Valley, and the President of the National Association of Manufacturers claimed that immigrants with technical skills have helped create jobs. Still another writer, assumedly an immigrant descendant, said that “[I]legal immigration brings skilled workers, artists and professionals to the United States. This is a country founded and built by immigrants, from whose efforts we gain and prosper. Their descendants want illegal immigration curbed and legal immigration left alone.” *Refugees from Mutilation*, N.Y. TIMES, May 2, 1996, at A22.

One prominent journalist warned in 1996 that provisions of recent amendments to the Immigration & Nationality Act would “effectively insulate the [Immigration and Naturalization Service (INS)] from correction of abusive or illegal decisions.” Anthony Lewis, *Mean and Petty*, N.Y. TIMES, Apr. 12, 1996, at A31. Mr. Lewis was apparently referring to H.R. 2202 and its expedited hearing provision for refugees. Although American immigration policies have been insulated from judicial review, federal constitutional review of immigration policies, legislation, and federal administrative decisions has occurred during the 120-plus years of official federal immigration policy, particularly since the 1970s. It is clear, however, that the earliest federal review of government action was heavily flawed by racial and cultural discrimination and other inappropriate considerations, disparately burdening what were later labelled suspect classifications. “Chinese persons, not born in this country, have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.” *Fong Yue Ting v. United States*, 149 U.S. 698, 716 (1893) (upholding § 6 of the Chinese Exclusion Act of May 5, 1892 which extended a ban on immigrant Chinese for 10 years, and required their arrest if they were unable to produce certificates of residence). One Chinese habeas corpus petitioner, who was a long-term U.S. resident, was found excludable because he failed to provide one white witness to testify in his behalf, being able to provide “none but Chinese witnesses.” *Id.* at 731, 732. As another example from the period, about 20 years later, “[one] federal court . . . concluded that the son of a German father and a Japanese mother [could not] acquire citizenship, since ‘it cannot be said that one who is half-white and half brown or yellow is a white person, as commonly understood.’” ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 13 (1985) (quoting *In re Young*, 198 F. 715, 717 (W.D. Wash. 1912)).

Although largely immune from review, current domestic INS determinations may receive review under the Administrative Procedure Act (APA), § 10(e), 5 U.S.C.

in the United States without documentation are usually referred to as “illegal” or “undocumented,” although there are other statuses such as “parolee,” where the pending, undetermined status of the alien is likely to be approved. For purposes of this Article, an unauthorized alien will be categorized as “illegal,” only where that person is either (1) present in the United States against the express wishes of the U.S. government (through fraud, as a criminal fugitive, etc.) or (2) where the alien has violated the terms and conditions of his or her visa, clearly placing the alien in circumstances which may be construed as illegal.<sup>9</sup> “Undocumented alien” — preferred here — is a better term of reference because there are many cases in our Byzantine system of immigration where an alien’s status is ambiguous and remains to be determined.<sup>10</sup> Additionally, it is more use-

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§ 706(2) (1988). “Mandatory agency determinations, those in which the agency has no exercise of discretion if certain eligibility standards are met, must be supported by substantial evidence in the administrative record; discretionary determinations are subject to review under an abuse-of-discretion or arbitrariness standard.” AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS* 1-7 (4th ed. 1996) (citations omitted). “Due process also requires that the executive abide by both the statute and the regulations it has promulgated to effectuate the statute’s terms.” *Id.* (citing *Bridges v. Wixon*, 326 U.S. 135 (1945)). “To prevent the immigration laws from producing excessively harsh effects, Congress included provisions in the Immigration and Nationality Act under which the Attorney General may, at his discretion, suspend an alien’s deportation.” Susan L. Kamlet, *Judicial Review of “Extreme Hardship” in Suspension of Deportation*, 34 AM. U. L. REV. 175 (1984) (citations omitted).

<sup>9</sup> “Illegal alien” does appear as a defined term in both 8 U.S.C. § 1365(b) (1988) and 29 C.F.R. 500.20(n) (1992), but the two definitions are context-driven and inconsistent. The former specifies a category of aliens who were unlawfully in the United States at the time they committed a felony, and the latter refers to aliens without employment authorization.” Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1899 n.413 (1993) [hereinafter Neuman, *Lost Century*]. The recent IIRIRA amendments to the INA more freely use the term “illegal alien.” *See, e.g.*, “Sec. 329 Demonstration Project for Identification of Illegal Aliens in Incarceration Facility of Anaheim California” and “Sec. 502 Pilot Programs on Limiting Issuance of Driver’s Licenses to Illegal Aliens.” Other euphemistic context-driven modifiers include “inadmissible,” “deportable,” and “unlawful.” *See* IIRIRA, *supra* note 6 and accompanying text. “Inadmissible” appears to be the term of art for “excludable” under amendments to Section 212 of the INA. *See id.* § 308(d)(1), 308(d)(2).

<sup>10</sup> Not everyone agrees:

In truth, some immigration advocates haven’t been much more forthright [than Governor Pete Wilson in repatriating imported ‘temporary workers’]. After working tirelessly and effectively to stymie INS enforcement, they now express wonder and dismay when the public demands swift, heavy-handed responses to this complex problem. They insist that aliens who enter surreptitiously should be called ‘undocumented’ rather than ‘illegal’ because their legal status remains uncertain for months or years during which the aliens



ful to call the individuals involved "aliens"<sup>11</sup> rather than "immigrants,"<sup>12</sup> even though many undocumented aliens intend to remain in the United States indefinitely because the Immigration and Nationality Act (INA)<sup>13</sup> obliquely defines immigrant as every alien who does not fit within one of the classes of nonimmigrant aliens.<sup>14</sup>

The INA classifies individuals subject to its jurisdiction, as aliens, citizens, etc. Although "citizen" is not defined, "national of the United States" is: "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States."<sup>15</sup>

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can usually obtain work permits, an uncertainty that is largely the product of the advocates' own skillful manipulations of an increasingly vulnerable administrative system.

Peter H. Schuck, *The Message of 187: Facing Up to Illegal Immigration*, 21 AM. PROSPECT, Spring 1995, at 85, 92. "Wilson surely knows that Proposition 187 could have dire practical consequences for his state, and he may secretly hope that an activist court will rescue him by striking it down." *Id.*

<sup>11</sup> "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1988 & 1997 Supp.). Alien has been defined to be "one born out of the jurisdiction of the United States, and who has not been naturalized under [the U.S.] Constitution and laws." *Low Wah Suey v. Backus*, 225 U.S. 460, 473 (1912).

<sup>12</sup> Some activists espousing rights for the undocumented, however, insist on the label "undocumented immigrant." See Schuler, *supra* note 7.

<sup>13</sup> 8 U.S.C. §§ 1101-1645 (1988 & 1997 Supp.).

<sup>14</sup> "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens" 8 U.S.C. § 1101(a)(15) (1988 & 1997 Supp.). The classes are listed at 8 U.S.C. § 1101(a)(15)(A)-(R) (1988 & 1997 Supp.). The IIRIRA preserves definitions of "alien" and "immigrant" as they are described under "section 101(a) of the Immigration and Nationality Act." IIRIRA, *supra* note 6, § 1(c).

<sup>15</sup> 8 U.S.C. § 1101(a)(22) (1988 & 1997 Supp.). Citizens and nationals (in most aspects) are protected under the U.S. Constitution. Persons born in the United States are citizens at birth, while other citizens are persons who are naturalized or who acquire citizenship under the laws enacted by Congress. "Persons born in Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands (including Saipan and Tinian) . . . are citizens of the United States . . . . Persons born in American Samoa and Swains Island, which are defined under the nationality law as 'outlying possessions,' are nationals but not citizens, of the United States." DAVID CARLINER ET AL., *THE RIGHTS OF ALIENS AND REFUGEES* 2 (2d ed. 1990) (citations omitted). "Persons born in other possessions of the United States [such as Wake and Midway] are treated as persons born outside the United States and are aliens unless . . . they qualify as citizens under other provisions of the nationality laws." *Id.* "A person born in the Panama Canal Zone, over which the United States exercised sovereignty until 1978, is also a citizen of the United States if born prior to 1978, and if at birth, one parent was a citizen." *Id.* (footnote omitted).

Although aliens are subject to the controls of the INA, nationals of the United States are not, with several exceptions: (1) nationals of the United States who are naturalized citizens are subject to denaturalization under circumstances enumerated in the INA; (2) all citizens of the United States may expatriate themselves under provisions set forth in the INA; and (3) all persons, nationals of the United States and aliens alike, are subject to inspection and a determination of admissibility on arrival at a U.S. port of entry. Otherwise, only aliens are within the jurisdiction of the INA and its provisions. United States citizens who lose citizenship because of expatriation or denaturalization become aliens for purposes of the INA's provisions.<sup>16</sup>

The INA distinguishes between its definition of a "national"<sup>17</sup> of a country and "native," which although undefined is important in practice. "[W]hen an alien is allotted an immigrant visa, the allotment is charged against the total available from his or her country of nativity, regardless of the alien's country of present nationality. In contrast, aliens are eligible for nonimmigrant status as investors or traders under treaties between the United States and the country of the alien's nationality; the alien's place of birth is irrelevant to eligibility for treaty status."<sup>18</sup>

Under common parlance, most nonlegal, non-INS materials (such as social science monographs) categorize aliens as immigrant or nonimmigrant, legal or undocumented (or illegal), or refugees,<sup>19</sup> taking various positions on the issue of unauthorized immigration.

The "refugee" category, comprised of aliens considered undocumented until a determination is made of their appropriate status, usually receives a large share of political interest. The Refugee Act of 1980<sup>20</sup>

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<sup>16</sup> FRAGOMEN & BELL, *supra* note 8, at 1-22. The term "national of the United States" embraces diverse subgroups in addition to "citizens," such as residents of territories and possessions, but not does not include "aliens." *Scholz v. Shaughnessy*, 180 F.2d 450 (2d Cir. 1950). The term held more importance during the periods when the United States governed the Philippines as a colony and before Alaska and Hawaii achieved statehood.

<sup>17</sup> "The term 'national' means a person owing permanent allegiance to a state." 8 U.S.C. § 1101(a)(21) (1988 & 1997 Supp.).

<sup>18</sup> FRAGOMEN & BELL, *supra* note 8, at 1-22-1-23.

<sup>19</sup> "Noncitizens consist of 'immigrants,' who have made the United States their home, and 'nonimmigrants,' who may be just passing through; 'undocumented,' or 'illegal' aliens, whose entrance or continued presence in the United States is unauthorized, and 'refugees,' who are fleeing persecution." HULL, *supra* note 8, at 5.

<sup>20</sup> Aliens and Nationality Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1157-59, 1521-1525 and amending various sections of the INA).

was passed to create a "coherent and comprehensive" rather than a "reactive and ad hoc" system for dealing with refugees.<sup>21</sup> The term "refugee" has an expansive definition under the INA, which reads:

The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>22</sup>

Until the present day, the statute did not speak to persecution on the basis of gender, which is currently a topical issue particularly in the realm of female mutilation.<sup>23</sup> Although during the last forty years, the

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<sup>21</sup> HULL, *supra* note 8, at 119, 209 n.29.

The United States pursued a largely ad hoc approach to refugee admissions into the 1970's. Although some refugees were admitted under regular immigration procedures, the bulk of the refugee admissions were authorized by special immigration programs, outside the regular immigration channels. The Attorney General's discretionary authority to parole aliens into the United States temporarily was used as the vehicle for the admission of refugees, and special legislation was then usually enacted to enable them to adjust their status to permanent resident. Refugee groups handled in this manner included the Cubans in the 1960's and the Indochinese in the 1970's.

*History of the Immigration & Naturalization Service*, SENATE COMM. ON JUDICIARY, SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, 96th Cong., 2d Sess. 77 (Comm. Print 1980) (Prepared at the request of Senator Edward M. Kennedy, Chairman).

<sup>22</sup> 8 U.S.C. § 1101(a)(42) (1988 & 1997 Supp.). The 1996 IIRIRA amends refugee status to include "Persecution for Resistance to Coercive Population Control Methods," i.e., forced sterilization or abortion. IIRIRA, *supra* note 6, § 601.

<sup>23</sup> As an example, Fauziya Kasinga fled her native Togo to escape the fate of genital mutilation, but was initially denied asylum. On appeal, "[i]n legal papers filed with the Appeals Board, the Immigration and Naturalization Service says that female

United States has been relatively generous to refugees and asylees — particularly politically favored groups — this was not the case during periods of political isolation, such as the 1920s through the mid-1940s. Additionally, a recurring problem is that individual INS determinations under the refugee statute may not be philosophically consistent since immigration judges may engage in rigid or formalistic analysis. One case exemplifying the proceedings was that of Sofia Campos-Guardado, a Salvadoran refugee, who sought asylum on the basis of her gender: She had been forced to watch male attackers hack flesh from workers on a farm before they were shot, and then she and other female witnesses were raped while male attackers shouted political slogans. The attackers let loose the victims, threatening to kill them unless they fled immediately.

Sofia Campos-Guardado's request for asylum was denied by the 5th Circuit U.S. Court of Appeals in 1987. Despite her brutalization, the court concluded that she "had not shown that the attackers harmed her in order to overcome any of *her own* political opinions." Her rape,

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genital mutilation presents a 'new and difficult' area in law but agrees that it involves an extreme bodily invasion that 'shocks the conscience.' The I.N.S. recommend[ed] that Ms. Kasinga's case be reconsidered by the immigration judge." *Refugees from Mutilation*, *supra* note 8. At the hearing, the INS lawyer argued before the Immigration Board of Appeals that the case should be sent back to the original hearing judge. The Board regarded the appellant, who had been held in a New Jersey detention center and Pennsylvania prisons with sympathy, and appeared to find Ms. Kasinga's story of the barbaric practice credible — the same story that the original judge had found "not only unbelievable but also irrational and unpersuasive." Celia W. Dugger, *Board Hears Asylum Appeal in Genital-Mutilation Case*, N.Y. TIMES, May 3, 1996, at B5.

Responding to public outcry, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 addresses feminist issues. IIRIRA, *supra* note 6. Section 652 of the Act regulates the "Mail-Order Bride Business" of approximately 200 "international matchmaking organization[s]" in the United States, and proscribes fraud in these types of dealings, imposing civil penalties of \$20,000 for failing to provide "recruits" for "dating, matrimonial, or social referral services," "information regarding conditional permanent residence status and the battered spouse waiver under such status, permanent residence status, marriage fraud penalties, the unregulated nature of the business engaged in by such organizations," and a mandated study by the Attorney General. IIRIRA, *supra* note 6, § 652. Sections 644 and 645 address concerns over "Female Genital Mutilation," with Section 645 attempting to make the activity a federal crime, stating that "the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the First Amendment to the Constitution or under any other law," and that "Congress has the affirmative power under Section 8 of Article I, the necessary and proper clause, section 5 of the Fourteenth Amendment, as well as under the treaty clause, to the Constitution to enact such legislation." *Id.* §§ 644-45.

which occurred at her uncle's farm, was instead viewed as a consequence of his involvement in a land-reform movement. As Deborah Sontag wrote in the *New York Times*, the fact that an assailant had since threatened to kill Campos-Guardado and her family if she were to reveal him was deemed "entirely personal." The court concluded that Campos-Guardado "failed to show that the harm she fears — no matter how likely — is on account of 'political opinion' or 'membership in a social group,' as those terms are used in the statute."<sup>24</sup>

### B. *Why They Come and the Debate About Burdens*

Promptly at seven . . . Jurgis reported for work. He came to the door that had been pointed out to him, and there he waited for nearly two hours. The boss had meant for him to enter, but had not said this, and so it was only when on his way out to hire another man that he came upon Jurgis. He gave him a good cursing, but as Jurgis did not understand a word of it, he did not object. He followed the boss, who showed him where to put his street clothes . . . then he led him to the 'killing beds' . . . . As Jurgis came in, the first cattle of the morning were just making their appearance; and so, with scarcely time to look about him, and none to speak to anyone, he fell to work. It was a sweltering day in July, and the place ran with steaming hot blood — one waded in it on the floor. The stench was almost overpowering, but to Jurgis it was nothing. His whole soul was dancing with joy — he was at work at last! He was at work and earning money! . . . [H]e went home to the family with the tidings that he had earned more than a dollar and half in a single day!<sup>25</sup>

It is estimated that 800,000 aliens legally immigrated to the United States during 1994,<sup>26</sup> while about 750,000 legal admissions were authorized for 1995. These numbers can be contrasted with the major upswing during 1985-1991 when it was reported that 6,472,087 immigrants were

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<sup>24</sup> Julie Hessler, *Gender-Based Asylum*, in ARGUING IMMIGRATION, *supra* note 2, at 212-13.

<sup>25</sup> UPTON SINCLAIR, *THE JUNGLE* 53 (Penguin Books 1986) (1906).

<sup>26</sup> See Steven A. Holmes, *House Panel Keeps Intact Bill to Restrict Immigration*, N.Y. TIMES, Oct. 12, 1995, at A20; William Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, at \*4 (1995), available in WESTLAW, Immigration Law File. The author states between 800,000 and 850,000 immigrants enter the U.S. legally each year, and that 200,000 to 300,000 undocumented aliens also enter annually. *Id.* at \*11.

legally admitted to the United States or were legalized; among these were 2,920,627 under family reunification programs, including relatives of U.S. citizens; 2,464,347 former illegals grandfathered under the Immigration Reform and Control Act of 1986; about 687,887 refugees and asylees; and only 388,476 employment preference immigrants, including spouses and children.<sup>27</sup> Although many different reasons are given by immigrant aliens for choosing to come to the United States — education, health care, the vision of American opportunity in general — the most popular impetus has been pure economics.<sup>28</sup> “According to the U.S. Census Bureau, of the estimated four million illegal immigrants who have entered the United States since 1970, fifty-two percent live in California.”<sup>29</sup>

Aside from obvious motivations such as flight from persecution or the object of reunifying families, nonimmigrant aliens come to the United States for a wide diversity of reasons — schooling, job training, U.S. postings by a foreign firm or government, or as authorized temporary workers. Undocumented aliens often start out their journey in a nonimmigrant status such as tourist, student, migrant worker — the same as any other nonimmigrant alien — but one day a decision is made to overstay authorized U.S. presence and status eventually transmogrifies into “undocumented.” Many undocumented aliens, too, have dispensed with what they

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<sup>27</sup> See F.H. Buckley, *The Political Economy of Immigration Policies*, 16 INT’L REV. L. & ECON. 81, 92-93 (1996). The author’s article is a statistical study on the “quality” of American vs. Canadian immigrants under the theory that Canadian policies yield “superior” immigrants, using various governmental studies and similar publications as sources for the data cited. The author states that “[s]o strong is the American aversion to screening for immigrant quality that about 35,000 slots for ‘diversity’ migrants are awarded each year by lot,” with 42,000 having been scheduled for 1994. *Id.* at 93, 93 n.47.

<sup>28</sup> See Linda Chavez, *Immigration Politics*, in ARGUING IMMIGRATION, *supra* note 2, at 35. Immigrant economic success has been significant. Chavez cited per capita income for immigrants (assumedly in the early 1990s) at \$15,003 compared to a national average for native-born Americans of \$14,367, while “Africans” were stated as averaging \$20,177. The rate of participation, Chavez says, by some immigrant groups in the labor force such as Haitians, Jamaicans, Salvadorans, Guatemalans, Peruvians, and Filipinos is 10 points higher than participation by the native born. *Id.* Unemployed Irish college graduates came to the New World in the 1980s-early 1990s, prospered in the New York City area, and have since set up a “huge network of support and economic power,” a key element of which is the Irish Business Organization (IBO) comprised of a membership whose average age is 35. David Medina, *Arriving Irish Seeing Green*, CRAIN’S N.Y. BUS., June 10-16, 1996, at 38. In New York City, immigrant entrepreneurship has replaced entry-level work. See Lisa Goff, *New Immigrants Discover How to Create Own Jobs*, CRAIN’S N.Y. BUS., Nov. 25-Dec. 1, 1996, at 17.

<sup>29</sup> Theresa A. Parker, *The California Story: Immigrants Come to California as a Result of Federal — Not State — Policies*, 52 PUB. WELFARE, Spring 1994, at 16.

perceive to be the futility of application for legal entry and instead make furtive border crossings, dodging U.S. border guards, incurring the wrath of government officials, and exciting negative public opinion. The penalties for being caught can be detention and deportation.<sup>30</sup> So what other reasons impel the undocumented to come — and more important — why do they stay?

Across the United States, aliens, many of them undocumented, visibly occupy jobs that Americans either cannot do because they lack the requisite skills or will not do because they perceive the jobs as unworthy.<sup>31</sup> Alien ubiquity is evidenced in numerous tableaux: Colorado ski resorts where aliens have supplanted the classic “ski bum” working as ski

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<sup>30</sup> The chances of being caught, detained, and deported have the aura of a “lottery of fate,” since it has not been possible with the elimination of limited ports of entry such as Ellis Island in New York City in 1954 to contain illegal immigrant influx, due to limited INS resources, flaws in the immigration system, and relatively porous U.S. borders. There are patterns to the policy of detention, however, with certain groups such as Salvadorans and Haitians having been overrepresented in the category of long-term detainees. In the sample year of 1984, prior to the passage of the Immigration Reform and Control Act of 1986 (IRCA), 225 Salvadorans were detained for up to nine months and 97 Nicaraguans for 12-18 months, while 327 Haitians were detained for periods of 12-18 months. See Cushing N. Dolbear, *Detention of Undocumented Aliens: Actions by the INS Prior to Adoption of the Immigration Reform and Control Act of 1986* 12-13 (1990). Only 53 Mexican detainees were kept for periods of three to six months during the same year due to the INS policy of immediately returning Mexicans to Mexico. *Id.* at 6, 13. Detention was reinstated during the 1980s to replace the policy in place for about 25 years of paroling undocumented aliens who were neither a national security threat nor likely to abscond. *Id.* at 1-2. The detention policy was an emergency response by the Carter administration to the *Marielito* exodus of 125,000 Cubans, and was made an official INS policy during the Reagan administration following a flood of Haitian “boat people” into southern Florida. *Id.* Since the government had implemented the detention policy without following the rulemaking process required under the Administrative Procedure Act, 1,800 Haitian detainees were ordered released in 1982. See *Louis v. Nelson*, 544 F.Supp. 973, 1003-04 (S.D. Fla. 1982). The INS published an interim rule thereafter, which was made permanent in October 1982. See Dolbear, *supra*, at 2.

Title III of IIRIRA is entitled “Inspection, Apprehension, Detention, Adjudication, and Removal of Inadmissible and Deportable Aliens,” devoting 88 sections to undocumented and other alien removal. IIRIRA, *supra* note 6, §§ 301-388.

<sup>31</sup>

Entry-level jobs, which are frequently temporary, dirty, and low-paying, are often characterized as jobs that ‘Americans don’t want’ — except perhaps for American teenagers, who expect to move into more attractive jobs when they are older and more experienced.

Frank D. Bean & Teresa A. Sullivan, *Confronting the Problem*, 22 SOC. SCI. 67, 71 (1985).

instructors, chambermaids, janitors, and sales clerks;<sup>32</sup> in the New York area with immigrant talent fueling entrepreneurial ventures,<sup>33</sup> and at Bryn Mawr, near Philadelphia, where a penniless war refugee seeded by physician investors has started her own international trading company.<sup>34</sup>

The flip side to these happy vignettes is the jarring accusation that immigrants are also driving U.S. wages down and are taking jobs away from U.S. workers.

Blacks squeezed out of the local economy in L.A. were likewise being squeezed out nationally. Economic statistics repeatedly illuminated the concurrence of events that have conspired to marginalize struggling blacks. The increasing influx of immigrants exacerbated our crisis. While blacks were being pushed out of the marketplace by recession and widespread apathy, that same American marketplace was accommodating a ground swell of immigrants, privileged and underprivileged, from as far away as the former Soviet Union, the Middle East, Vietnam and Korea. Their presence pushed blacks out of the marketplace altogether.<sup>35</sup>

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<sup>32</sup> See James Brooke, *Foreigners Flock to Slopes to Work, Not Ski*, N.Y. TIMES, Dec. 29, 1995, at A16. West Africans, Mexicans, Russians, and Eastern Europeans are the most common groups to be found, and most of them are not at all interested in skiing. "[T]he Denver office of the Immigration and Naturalization Service estimates that the number of illegal aliens in Colorado has grown to about 22,000 today, from 17,500 three years ago. The Federal agency has 17 field agents to control immigration in this state." *Id.*

<sup>33</sup> Stories reminiscent of the time-worn tradition of immigrant success abound in today's New York which has long been an entryway for immigrants into American society. See Judith Massina, *A Gift of Tongues: New Immigrants Drive High Tech in NY*, CRAIN'S N.Y. BUS., Apr. 8-14, 1996, at 3, 41 (stating that in 1990, immigrants held more than one-third of New York City technical jobs although representing only 25% of the population.); Virginia Citrano, *Skirting Unprofitable Lines Helps to Cut It in Hard Times*, CRAIN'S N.Y. BUS., Apr. 29, 1996, at 14 (describing the story of a Chinese student who graduated from the Fashion Institute of Technology in 1970s, started a fashion business with \$5,000, and whose company expected \$15 million in 1996 sales).

<sup>34</sup> See Thomas Petzinger, Jr., *Though Worlds Apart, Partners Find Success on Common Ground*, WALL ST. J., May 3, 1996, at B1. A former Vietnamese social worker, who started out in the United States as a hospital records clerk, began an international trading business in 1993 with the backing of Pennsylvania doctors. The business now has sales of about \$2,500,000 per year in cameras alone. Her next venture is to open up McDonald's franchises for her contacts in Vietnam. See *id.*

<sup>35</sup> Wanda Coleman, *Blacks, Immigrants and America*, THE NATION, Feb. 15, 1993, at 187, 189 (commenting on the riots following the Rodney King beating verdict in Los Angeles). *But cf.* Bean & Sullivan, *supra* note 31 ("It is not acceptable as a matter of public policy to relegate these jobs to native-born adults from minority groups. If



This viewpoint is not universally held:

Traditionally, the United States has been an economic resource of families in need of work. The fiscal crisis in Mexico has further heightened the flow of immigrants across the U.S. southern border, where even the least desirable jobs in 1 day provide a salary comparable to a week of work in Mexico. Whether these immigrants benefit or burden society is a matter of dispute. At one extreme, people argue that aliens often fill jobs that U.S. citizens do not want, and they pay taxes without receiving benefits. The counterargument is that undocumented aliens increase unemployment for citizens and depress wages . . . . Yet in places like southern California, where more than one-third of the country's immigrants currently reside, the economy depends on aliens. An underground day-labor market flourishes, and service industries increasingly look to new arrivals to fill a shrinking labor pool.<sup>36</sup>

The estimated 300,000 undocumented or illegal aliens entering the United States each year<sup>37</sup> and the 6,000,000-8,000,000 already here<sup>38</sup> are

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legal immigration is impossible, the 'pull' of . . . unattractive jobs will continue to lure illegal migrants into this country"). Some interesting and useful research must apparently be conducted to pinpoint the jobs that American minority groups, specifically American Blacks, claim are being taken away by undocumented aliens, since this writer is unaware of any concrete study. It is more likely that these claims are based on cultural resentment prompted by feelings of alienation which are large, seemingly intractable social problems beyond the scope of the debate on immigration in general and this Article in particular. Black Americans largely descend from "forced immigrants," who suffered severe legal strictures regarding freedom of movement in a form nearly identical to those imposed later in the nineteenth and early twentieth centuries on Chinese, Japanese, and other Asians.

<sup>36</sup> See Wilbur A. Finch, Jr., *The Immigration Reform and Control Act of 1986: A Preliminary Assessment*, 64 SOC. SERV. REV. 244, 245 (1990) (citations omitted).

Legal and illegal aliens were found to play an important role in several industries which were in current or potential financial difficulties, particularly the garment industry. Studies of the garment industry in New York and Los Angeles concluded that undocumented workers did not displace U.S. workers; that the highly flexible 'immigrant sector' of the garment industry had arisen in response to specific conditions in the New York garment industry such as instability, volatility of demand, intense price competition, and the demand for unstandardized goods requiring a skilled labor force; and that without the availability of female undocumented Hispanic sewing machine operators, the Los Angeles garment industry might export jobs to other cheap labor areas.

H.R. COMM. ON JUDICIARY, 99TH CONG., SER. NO. 7, IMPACT OF ILLEGAL IMMIGRATION AND BACKGROUND ON LEGALIZATION 3 (Comm. Print 1985) (prepared by Educ. and Pub. Welfare Div. Cong. Research Serv., Lib. of Congress).

<sup>37</sup> See Michael E. Fix & Jeffrey S. Passel, *Setting the Record Straight: What Are*

particularly blamed for depressing the earnings of U.S. workers, but like Jurgis Rudkus<sup>39</sup> they are glad to be earning their contemporary equivalent of \$1.50 a day.<sup>40</sup> The government, labor unions, and other groups have been actively campaigning against sweatshops in the garment and other industries<sup>41</sup> where it is primarily the undocumented alien who is

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*the Costs to the Public?*, 52 PUB. WELFARE, Spring 1994, at 6, 7.

<sup>38</sup> See *id.* at 12. Fix and Passel point out that INS estimates of the undocumented population are "somewhat over 3 million," which the authors say is grossly inaccurate, supporting illusory ratios of disproportionate usage of public benefit programs by the undocumented, since "there is little evidence that undocumented immigrants come to the United States to use public benefits" and the "undocumented are barred from most programs to begin with." *Id.* at 12-13. One of their major points is that INS-mandated screening systems like the Systematic Alien Verification for Entitlements (SAVE) databases used to check eligibility for certain entitlement programs, such as Aid to Families with Dependent Children (AFDC), have had little impact on saving costs of public benefits because these programs are more highly used by citizens and aliens legally residing in the United States. See *id.* at 13-14.

<sup>39</sup> The Jurgis Rudkus character, a non-English-speaking Lithuanian, would neither have been "illegal" nor undocumented within the same meaning of those terms as used today, because at the turn of the century immigration was strictly controlled through limited ports of entry for ocean-going transport from Europe and the Asia-Pacific region.

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The view of undocumented migration as a "worker" flow finds strong support in the high rates of labor force participation of both men and women, even when a highly restrictive definition of labor force activity is used. Undocumented immigrant men participated in the labor force at rates 4 to 12 percent higher than foreign-born men who presumably entered the United States through authorized means, depending on time of arrival. Among women, the participation differential by legal status was much greater, roughly 14 percentage points for pre-1980 arrivals and 27 percentage points for later arrivals.

George J. Borjas & Marta Tienda, *The Employment and Wages of Legalized Immigrants*, 4 INT'L MIGRATION REV. 712, 724 (1993). Differences were found among ethnic groups. For example, 92% of undocumented women from Africa participated in the U.S. labor force, while 72% of undocumented women from Mexico participated in the labor force at the time they applied for (IRCA) amnesty. See *id.* at 725. Legal immigrant status had a significant effect on U.S. workforce participation with undocumented women from Mexico exceeding legal female immigrants from Mexico by 20% to 35% in active U.S. labor force participation. See *id.*

<sup>41</sup> See Susan Chandler, *Look Who's Sweating Now: How Robert Reich Is Turning Up the Heat on Retailers*, BUS. WK., Oct. 16, 1995, at 96 ("The workforce: mostly female immigrants from Latin America and Asia who earn an average of \$7.34 an hour — just over the federal poverty line"). The hourly wage of these workers might not seem glaringly low, until one factors in the knowledge that the jobs involve dangerous or substandard working conditions, 10 to 12-hour days, 6 to 7 days a week, with no health benefits. One of the motivating factors behind passage of the Immigration

bearing the brunt of illegal conditions — glad (assuredly to a point) to be working and frightened to complain, since she does not want to lose the only job she might get, nor wish to bring alerted INS agents down upon her neck.<sup>42</sup> Ironically, some state governments actually *encouraged* illegal immigration through their labor policies beckoning to temporary or “guest” workers to fill agricultural jobs. Governor (then Senator) Pete Wilson and his backers are faulted for having held up passage of the Immigration Reform and Control Act of 1986 until Congress first modified a provision affecting “guest workers,” allowing 350,000 workers into the United States to harvest crops at cheap rates and then pushed for a measure legalizing more than one million illegal immigrants.<sup>43</sup> “Having put in place a job magnet and having essentially laid out a welcome mat for illegal immigrants in the 1980s, Gov. Wilson should not be surprised that he now has an illegal immigration problem.”<sup>44</sup>

Employment is not the only attraction for undocumented aliens coming to and remaining in the United States. Most aliens who do not have valid documentation upon U.S. entry (though arguably most are savvy enough to procure forged papers either immediately after or prior to entry) are from Mexico — taking advantage of the most vulnerable gateway for simply walking — or running, driving, or flying — across the U.S. border.<sup>45</sup> The “undocumented others” arrive from all parts of

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Reform and Control Act of 1986 was to penalize the use of undocumented labor to push down wages; the AFL/CIO strongly supported employer sanctions in this regard. In New York City, “‘sweatshop’ conditions under which illegal aliens, among others, work in New York’s ‘largest industry,’ the garment business — ‘unseen, unheard of, and virtually unprotected by law,’” were reported by one writer in the late 1970s to “approach the closest thing we have in this country to a slave-labor system,” with as many as 4,500 such workplaces existing citywide, employing 50,000-70,000 workers, and “willfully violating just about every fair-labor standard.” Rinker Buck, *The New Sweatshops: A Penny for Your Collar*, NEW YORK MAG., Jan. 29, 1979, at 40-46. In 1993, California Governor Pete Wilson issued an executive order creating a “Joint Enforcement Strike Force” targeting the California underground economy where employers violate labor laws with impunity, and sweatshops have cheated workers out of billions of dollars in wages and the state of California out of an estimated \$3 billion in uncollected income taxes. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2179-80 (1994).

<sup>42</sup> There is a paradox in the schizophrenic dichotomy of the government as crusader (Department of Labor) and the government as an enforcer and a feared avenger (Department of Justice and the INS).

<sup>43</sup> See William J. Bennett, *Immigration: Making Americans*, WASH. POST, Dec. 4, 1994, at C7.

<sup>44</sup> *Id.*

<sup>45</sup> Title I of IIRIRA is entitled “Improvements to Border Control, Facilitation of

the globe as guest workers who overstay, tourists who do not return, asylees, etc. Aliens stay on in the United States beyond the permitted period to escape destitute conditions at home and circumstances of maltreatment unthinkable to the general U.S. populace.<sup>46</sup>

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Legal Entry, and Interior Enforcement." IIRIRA, *supra* note 6, §§ 101-134. This title provides for annual increases of border patrol agents of "not less than 1,000" for fiscal years 1997-2001; 14 miles of three-tiered fencing, and improved roads for which \$12 million has been budgeted; and authorizes the Attorney General to "acquire and use, for the purpose of detection, interdiction, and reduction of illegal immigration into the United States, any Federal equipment (including fixed-wing aircraft, helicopters, four-wheel drive vehicles, sedans, night vision goggles, night vision scopes, and sensor units) determined available for transfer by any other agency." *Id.* §§ 101(a), 102(b), 102(c), 103. Other features of this Title include waiver of the Endangered Species Act and the National Environmental Policy Act (NEPA) to facilitate construction of the 14-mile fence; machines to read "biometric identifiers"—handprints or fingerprints — of aliens at border crossings; criminal penalties for high-speed flight from immigration checkpoints; and nationwide fingerprinting of "apprehended aliens" (the "IDENT" program). *Id.* §§ 102(c), 104(a), 108, 112. Review of data on "border apprehensions" may justify the brouhaha.

Estimates of the number of undocumented Mexican entrants into the United States are based on the crude measure of "border apprehensions." For the 11-year period 1982-92, apprehensions totalled: "1982, 828,000; 1983, 1,115,400; 1984, 1,149,800; 1985, 1,272,400; 1986, 1,705,300; . . . 1987, 1,168,900; 1988, 980,500; 1989, 906,500; 1990, 1,123,200; 1991, 1,152,700; and 1992 1,227,000 (U.S. Immigration and Naturalization Service, *Statistical Yearbook*, 1991; the figure for 1992 is an estimate extrapolated from actual apprehension data from the first 11 months of the fiscal year)." Demetrios G. Papademetriou, *Illegal Mexican Migration in the United States and U.S. Responses*, 31 INT'L MIGRATION REV. 314, 321 (1993). The writer states that IRCA's legalization of formerly illegal entries may account for the drop in apprehensions during 1987-89, while the increase in the early 1990s might have been attributable to a larger Border Patrol presence during that period. *Id.*

<sup>46</sup> Foreign companies such as Nike and Levi Strauss take advantage of workers earning \$2.00 a day in Southeast Asia. Often foreign ventures are given waivers from officially posted wage rates to attract them to cheap labor forces. When the workers protest or try to form unions in countries such as Indonesia, they are imprisoned and interrogated by the military. See Edward A. Gargan, *Labor Unrest Arises in Developing Asian Nations*, Mar. 16, 1996, HOUS. CHRON., at 1. Worse abuses abound in stories of child laborers and forced and bonded labor. One 12-year-old Pakistani boy acclaimed as an international hero, who had gone to testify at an international labor conference in Sweden, later won the Reebok Youth in Action Award in Boston, and was awarded a standing full scholarship to Brandeis University, was gunned down by an assassin hired by the carpet industry. See *Child Labor Critic Is Slain in Pakistan*, N.Y. TIMES, Apr. 19, 1995, at A16. The boy "was sold by his parents at age 4 and was shackled to a carpet loom for almost six years. When he was freed, he owed his boss 13,000 rupees. He earned one rupee a day." *Id.* Reebok, embarrassed by accusations that its

Although claims are consistently made that most undocumented aliens who enter the United States remain for utilization of social services and public benefits,<sup>47</sup> there has been no clear indication that this is a proven fact.<sup>48</sup> In fact, some studies have shown just the opposite — that

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products were being manufactured in Southeast Asian sweatshops, installed a toll-free "800 hotline" for reporting human rights abuses and sweatshops. *This Morning* (CBS television broadcast, Feb. 14, 1997). Bonded labor, disguised as a method to repay debts incurred by poor rural workers with rich and powerful landlords, despite being statutorily outlawed, continues in Nepal and other Asia-Pacific nations. See Sherab Posel, *Kamaiya: Bonded Labor in Western Nepal*, 27 COLUM. HUM. RTS. L. REV. 123, 127-28 (1995).

<sup>47</sup> The allegations concerning alien influx in pursuit of free public education and health services propelled California's passage of the Proposition 187 initiative. See B. Drummond Ayres, Jr., *California Immigration Law Is Ruled to Be Partly Illegal*, N.Y. TIMES, Nov. 21, 1995, at A10. Judge Mariana Pfaelzer ruled that the provisions of Proposition 187 curtailing primary and secondary education and emergency medical benefits to undocumented aliens were unconstitutional and federally preempted, but upheld elements of the law denying post-secondary education and nonemergency medical aid. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). Judge Pfaelzer tested the California law with the holding in *De Canas v. Bica*, 424 U.S. 351 (1976) (stating in part that a "California statute prohibiting an employer from knowingly employing an alien who is not entitled to lawful residence in the United States held not preempted under federal law"), to gauge whether the provisions in Proposition 187 were impermissible mechanisms regulating immigration. See 908 F. Supp. at 768. The judge also held, unsurprisingly, that public education bans in the law were preempted by the holding in *Plyler v. Doe*, 457 U.S. 202, 226-230, *reh'g denied*, 458 U.S. 1131 (1982). 908 F. Supp. at 785. Judge Pfaelzer upheld certain provisions of the law on the bases either that they were severable and a valid exercise of state police power or that they already existed in another form sanctioned by prior INS policies. *Id.* at 765-68, 786-87.

<sup>48</sup> These kinds of claims have frequently been made about undocumented aliens because they are voiceless, easy targets of nativist invective. Professor Gerald Neuman states that aliens are singled out because "several factors combine to expose aliens to governmental neglect or even hostility": (1) aliens are politically silent, since they are not permitted to vote in state elections and the political process ignores the nonvoter; (2) xenophobia (exaggerated fear of foreigners) and its subcategory of nativism, focus on "otherness" which is perceived as unfamiliar and threatening; and (3) an undercurrent of racial, religious, or political discrimination "codes" the rationale of discussions about aliens, giving such discourse an artificial patina of legitimacy. Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of the Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428-29 (1995) [hereinafter Neuman, *Aliens as Outlaws*]. Other commentators point out that denying medical benefits to undocumented aliens is a ridiculous notion because such individuals are high health risks, coming as they do from regions where public health and health systems per se are either limited or nonfunctional. See Edward McGlynn Gaffney, Jr., *Immigrant*

undocumented aliens are less likely to use social and medical services, while bolstering the economy by performing low-level or poorly compensated jobs and by paying taxes into a system from which they may never reap appreciable benefit.<sup>49</sup> California is not the only state prone to the

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*Bashing*, 112 CHRIST. CENTURY 228-29 (1995) ("Bacteria and viruses distribute themselves without regard for national borders or the status of their carriers as citizens or aliens. If an undocumented alien is carrying an infectious or contagious disease, to leave it untreated foolishly risks spreading it to other citizens"). The article quotes Judge Pfaelzer of the Proposition 187 case as saying, "[t]he loss of medical services for illegal aliens could result in greater health risks for the general population." *Id.* at 229. "Germs do not check for green cards. The United States has serious public health problems already in terms of very low immunization rates in many of the urban areas where there are a high number of immigrant children." Susan B. Drake, *America's Newcomers: Health Care Issues for New Americans*, in 17 IN DEFENSE OF THE ALIEN 35, 38 (Lydio F. Tomasi ed., 1995). "HIV does not understand such concepts as citizenship, alienage, national sovereignty, or geographic borders. The infection may be transmitted to anyone, regardless of place of birth." Sana Loue & Steven Oppenheim, *Immigration and HIV Infection: A Pilot Study*, 6(1) AIDS EDUC. & PREVENTION 74, 79 (1994). Much of the developing world, which is the source of the majority of U.S. immigration, is still subject to outbreaks of dangerous diseases, such as the relatively recent epidemic of meningitis in West Africa which infected more than 100,000 people and killed more than 10,000. See Howard W. French, *Wide Epidemic of Meningitis Fatal to 10,000 in West Africa*, N.Y. TIMES, May 8, 1996, at A1.

<sup>49</sup>

In general . . . , Mexican immigrants appear to have rates of health service utilization below those of the general U.S. population. In areas such as preventive care, dental care, and perinatal care, the underutilization of health care may constitute a far more serious problem than overutilization.

Leo R. Chavez et al., *Mexican Immigrants and the Utilization of U.S. Health Services: The Case of San Diego*, 21 SOC. SCI. & MED. 93, 101 (1985).

Except for refugees and elderly immigrants, immigrants are considerably less likely than natives to receive welfare. Among nonrefugees who came in the 1980s, only 2 percent of working-age immigrants report welfare income, versus 3.7 percent for working-age natives. Among longer-term immigrants of working age, 3.2 percent are on welfare — a proportion that is still below the level of natives.

Fix & Passel, *supra* note 37, at 10. Fix and Passel found fault with a study favored by immigration critics, which was prepared by Professor Donald Huddle of Rice University that claimed immigrants cost all levels of government in 1992 a total of \$42.5 billion, while only paying \$20.2 billion in taxes into the social system. *Id.* at 12. Fix and Passel state Huddle made a number of errors in his calculations such as using outdated per capita income estimates for legal immigrants, misspecifying tax rates, omitting taxes paid by immigrants such as FICA, unemployment insurance, and gasoline taxes to reach his total of taxes paid, understating the actual amount by as much as \$50 billion, while also overstating costs by \$9 billion. *Id.* at 12-13. In contrast to Huddle's views, Professor George Borjas estimates that immigrants pay about \$85 billion annually in taxes, while only taking \$24 billion in welfare payments. See

idea that alienage places impossible burdens on its social and public welfare systems, nor is it the only state which has decided to take extraordinary measures dealing with what is labelled by some politicians as an "alien threat."<sup>50</sup>

Part of the enduring American mythos is that the United States is a haven for the dispossessed of the earth: refugees seeking freedom from oppression, religious devotees searching for a place to practice their faiths, ideologues espousing controversial opinions, and persons seeking the freedom to express themselves and associate with the like-minded. The myth also includes the gee-whiz, self-starter of humble means making his/her way up the incline, pulling him or herself up by the veritable Horatio Alger bootstraps of individual initiative to ultimately perch on the pinnacle of financial and social success. There is more than a modicum of truth in all of these images of the country, which claims to be and is for the most part a "country of immigrants." Stories woven into the fibers of the country's essence that provide illustration that immigration revitalizes and strengthens the United States as a nation and economic power stand alongside disheartening historical and contemporary evidence of irrational reaction to noncitizens and tales of execrable depredations

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George J. Borjas, *Tired, Poor, on Welfare*, in ARGUING IMMIGRATION, *supra* note 2, at 76-77. The bad news from Borjas is that if immigrants' taxes are proportionately assessed in accordance with actual government expenditures, i.e., if 21% of American taxes fund defense, 21% of immigrant taxes should fund defense, then immigrant taxation results in an annual shortfall of \$16 billion. *Id.* at 77. William Bennett states that immigrants "are a huge net contributor to Social Security, and annual taxes paid by immigrants more than offset their costs to society, generating a net annual surplus of \$25 billion to \$30 billion." Bennett, *supra* note 43.

<sup>50</sup> Posited on the theory that taxpayers must be protected from "the hidden costs of illegal immigration," New Jersey State Senator Leonard T. Connors introduced a bill denying specific benefits to aliens. "America today is confronted with an invasion of illegal, undocumented aliens," Mr. Connors said. "Illegal, undocumented aliens are driving American workers to the unemployment lines." Iver Peterson, *Senate Votes to Toughen Stance on Illegal Aliens*, N.Y. TIMES, Oct. 20, 1995, at B5. Peterson continues, "Yet the proposal to deny worker's compensation and temporary disability benefits to illegal aliens was opposed by legislators who said that such a law might actually encourage companies to hire aliens in the hope of avoiding having to pay such benefits." *Id.* Other states have taken a path of least resistance approach to saving money in connection with alien expenditures. Governor Pataki of New York began a program in the summer of 1995 which makes use of a new state law deporting "criminal aliens" under an INS-sanctioned expedited procedure. The measure, lauded by the INS and replacing an old policy which allowed deportation only after illegal aliens had served a minimum sentence, is supposed to save the State of New York \$2 million over the next 5 years. See Ian Fisher, *Pataki Announces Aliens' Expulsion*, N.Y. TIMES, Aug. 29, 1995, at A1.

visited upon them. Placed together, these elements form the panorama that is the backdrop to America's formulation of immigration law and the kindred "constellation" of alien constitutional rights. Still evolving are firm principles governing the rights of the undocumented alien, perhaps the most "discrete and insular [of] minorities."<sup>51</sup>

### III. HISTORICAL AND LEGAL SKETCH OF THE RIGHTS OF AUTHORIZED AND UNDOCUMENTED ALIENS

There were two days of that eventful year which will long be remembered in San Francisco — two days when a mob of her citizens set upon and killed unarmed, defenseless foreigners, because they were foreigners and of another race, religion, and color, and worked for what wages they could get. There were some public men so timid that, seeing this, they thought that the end of the world had come; there were some eminent statesmen, whose names I am ashamed to write here, who began to think that the passage in the Constitution which guarantees civil and religious liberty to every citizen or foreigner was a mistake. But there were also some men who were not so easily frightened, and in twenty-four hours we had things so arranged that the timid men could wring their hands in safety, and the eminent statesmen utter their doubts without hurting anybody or anything.<sup>52</sup>

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<sup>51</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (offering Justice Stone's famous suggestion in "footnote 4" that there would be occasions for Supreme Court review to determine "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

Immigrants, of course, are an easy mark. Arguably, aliens fit the paradigm of a suspect classification more than any other group. They are politically powerless *de jure*. Because aliens have no right to vote, politicians suffer no consequences from immigrants at election time. Historically, immigrants have suffered persistent mistreatment and injustice. Many aliens' immigration status is immutable, at least in the immediate sense, and in that respect their condition is beyond their own control.

These factors have led to the recognition that aliens — at least lawful permanent resident aliens — constitute a suspect classification under the Equal Protection Clause of the Fourteenth Amendment, deserving of protection against discrimination by the states. Such discrimination will warrant strict judicial scrutiny and can only be justified by a policy narrowly tailored to a state's compelling interest. Aliens' 'personhood' is thus fully vindicated, as the very language of the Fourteenth Amendment contemplates.

Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 639 (1994).

<sup>52</sup> HARTE, *supra* note 1, at 228.



The rights and privileges of immigrants and aliens under American law have been a source of debate since the founding of the United States, when the unpopular Alien and Sedition Acts of 1798 were passed.<sup>53</sup> The Alien Act and the Sedition Act were passed partly in response to fears that Frenchmen entering America would infect the people with radical revolutionary ideas; the Acts were passionately condemned by Thomas Jefferson and others.<sup>54</sup> The 1798 Naturalization Act, which extended residence for naturalization purposes from five to fourteen years and required alien registration within forty-eight hours of arrival in the United States, was intensely unpopular and was repealed in 1802, while the Alien Enemies Act, the last of the set, remains on the books today as 50 U.S.C. § 2124 (1988).<sup>55</sup>

Except for this federal flirtation, states reigned for ninety years as the primary immigration authorities, although federal and state officials occasionally scuffled over aliens, and particularly slaves, as contentious jurisdictional issues.<sup>56</sup> State laws asserted prerogatives to exclude crimi-

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<sup>53</sup> See The Naturalization Act of 1798, Act of June 18, 1798, ch. 54, 1 Stat. 566; Alien Enemies Act, Act of July 6, 1798, ch. 66, 1 Stat. 577; Alien Act, Act of June 25, 1798, ch. 58, 1 Stat. 570; see also Neuman, *Lost Century*, *supra* note 9, at 1881 n.309 ("The Sedition Act, ch. 74, 1 Stat. 596, was a criminal statute equally regulating the speech of citizens and aliens, and not a regulation of migration").

<sup>54</sup> Part of the furor was caused by states complaining that Congress had no power to control the flow of aliens into the states. See Neuman, *Lost Century*, *supra* note 9, at 1881.

<sup>55</sup> See *id.* at 1881 n.315, 1881-82.

<sup>56</sup> The states regulated "movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination." *Id.* at 1841. Federal and state disputes over the regulation of slavery and racial regulation produced particularly rancorous exchanges, which culminated in — through these disagreements and other causes — the American Civil War. *Id.* at 1865-80. Laws regulating slavery and race migration were not limited to southern states. See *id.* at 1867 n.221. For laws regulating slavery and race migration to western and midwestern states, see Ill. Const. of 1848, art. XIV ("The general assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in this State; and to effectually prevent the owners of slaves from bringing them into this State, for the purpose of setting them free."); Ind. Const. of 1851, art. XIII, § 1 ("No negro or mulatto shall come into, or settle in, the State, after the adoption of this Constitution"); Or. Const. of 1857, art. I, § 36 ("No free negro or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State . . . and the Legislative Assembly shall provide by penal laws for the removal by public officers of all such negroes and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ or

nals and paupers dumped by European nations; ban entry of "lunatics"; impose quarantine on ships and others entering the state; and bar free Blacks and slaves — powers which were upheld by the U.S. Supreme Court in mid-1800 opinions.<sup>57</sup> Because each state had a separate scheme for regulating immigrant flow, state regulations were ineffective, allowing aliens to merely shop for the most hospitable port of entry to enter the United States unchallenged.<sup>58</sup> Although the Supreme Court invalidated state head taxes on passengers in the *Passenger Cases*<sup>59</sup> as an unconstitutional interference with foreign commerce, the Court waited until the mid-1870s to settle the question of immigration regulation, holding that immigration affected the comity of nations and inherent national sovereignty, and thus extended the federal government's preeminence over the area.<sup>60</sup>

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harbor them"). "Immigration lawyers will have noticed that the Oregon constitution expressly required employer sanctions. Indiana went further and wrote the employer sanctions right into the constitution. See Ind. Const. of 1851, art. XIII, 2." See Neuman, *Lost Century*, *supra* note 9, at 1867 n.221.

<sup>57</sup> See *id.* at 1879-80.

<sup>58</sup> See *id.* at 1883-85. Handbooks were published in Europe advising "emigrants" where they could land and thereby avoid exclusion. See *id.* at 1885.

<sup>59</sup> See *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849).

<sup>60</sup> See *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876). The states did not give up easily. During the 1940s, the war climate resulted in some states attempting to institute state identification cards to keep tabs on foreigners or aliens within the state. Pennsylvania's law in this regard was ruled as preempted by federal law. See *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941).

[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization, and deportation, is made clear by the Constitution [and] was pointed out by authors of *The Federalist* in 1787 . . . and has been given continuous recognition by this Court . . . . When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.

*Id.* at 62-63.

For many years Congress has provided a broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported. Numerous treaties, in return for reciprocal promises from other governments, have pledged the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for the imposition of discriminatory burdens.

*Id.* at 69. Soon after this opinion was written, Japanese residents in the western United States were interned, suffering a "discriminatory burden" far more onerous than the requirement of carrying a \$1.00 state identification card. See *Korematsu v. U.S.* 323 U.S. 214 (1944).

### A. *Early Days: The Development of Federal Immigration Law*

The outlaw's life is insecure. In Bracton's day he ought not to be slain unless he is resisting capture or fleeing from it; but it is everyone's duty to capture him. And out in Gloucestershire and Herefordshire on the Welsh march custom allows that he may be killed at any time. If knowing his condition we harbour him, this is a capital crime. He is a 'lawless man' and a 'friendless man.' Of every proprietary, possessory, contractual right he is deprived . . . .<sup>61</sup>

The U.S. Constitution does not speak to immigration per se, but gives Congress the right to regulate naturalization of citizenship.<sup>62</sup> The constitutional rights of aliens have been said to flow from the Fourteenth Amendment,<sup>63</sup> in regard to state regulation of alienage, and from the

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<sup>61</sup> See FREDERICK POLLOCK & FREDRIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 476 (2d ed. 1959).

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 4. ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."). Insofar as constitutional protection applies to aliens, they "do not receive the protection of constitutional guarantees that by their terms apply only to 'citizens.' However, aliens are protected by those provisions which refer to 'persons.' Thus, they receive the protection of the Bill of Rights, including the fifth amendment due process clause, and the fourteenth amendment due process and equal protection clauses." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.11 (4th ed. 1991).

<sup>63</sup>

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The issue has been whether or not aliens are persons in regard to the due process and equal protection provisions of the Fourteenth Amendment. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the equal protection clause is applicable to aliens). At the beginning of federal immigration law, the main question involved the preeminence of the federal government over the states in an area uniquely affecting U.S. sovereignty and its conduct of foreign affairs. Professor Gerald Neuman states that federal regulation of certain aspects of immigration was initially advanced as a legal fiction.

[T]he issues of crime, poverty and disease among immigrants were treated as matters of legitimate local concern. It was not until 1876, in *Chy Lung v. Freeman*, that the Supreme Court puffed them up into foreign policy questions. To the extent that immigration regulation today turns on these issues (which is substantial), the equation of immigration with foreign policy is a fiction. That does not mean that the states should resume their earlier responsibilities for regulating migration. There are practical reasons

Fifth Amendment,<sup>64</sup> in regard to federal regulation, while other sections

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why immigration can be more effectively regulated by the federal government, with its overseas diplomatic establishment and its near-exclusive authority to enter into agreements with foreign governments. There are also reasons why the unit of government that includes the diplomatic establishment would often be more sensitive to the rights of aliens than would the average state. But that does not mean that an alien's deportation for crime is more a foreign policy question than is his execution.

Neuman, *Lost Century*, *supra* note 9, at 1897 (citations omitted). Professor Neuman criticizes the *Chy Lung* opinion as "not terribly persuasive as written," posited as it was on the assumption that federal regulation would curb abuse by state officials. "The regulation of aliens' entry is a power subject to abuse by individual state officials. So is every other power over aliens." *Id.* at 1897 n.403 (citing 92 U.S. 275, 278 (1876)).

<sup>64</sup>

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The due process aspect of the Fifth Amendment is applicable to aliens under federal laws. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896). However, because the congressional immigration mandate does not arise from a specific constitutional grant, but is inherent in the power of "sovereignty," Congress has tremendous latitude to enact immigration laws which the judiciary are reluctant to overturn. *See Chinese Exclusion Case*, 130 U.S. 581 (1889). "The original immigration laws did not provide relief from deportation for an alien illegally present in the United States." Kamlet, *supra* note 8, at 177-78 (citations omitted). Decisional law eventually mitigated the fiction that deportation was non-punitive in character. *See id.* at 175 n.3 (citing *Tan v. Phelan*, 333 U.S. 6, 10 (1948) as arguing that "deportation is a severe penalty for alien's misconduct" in the United States); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that deportation may result in the loss "of all that makes life worth living").

Today there are elaborate provisions whereby the Attorney General is empowered to suspend deportation upon a requisite showing of "extreme hardship." *See* 8 U.S.C. § 1254(a)(1) (1988 & 1997 Supp.). There are also limited provisions for judicial review of deportation and exclusion orders. *See* 8 U.S.C. § 1105a (1988 & 1997 Supp.). The 1996 IIRIRA revises terminology in these sections replacing the term "deportation" and its variants with the term "removal" and variants. IIRIRA, *supra* note 6, § 308. Additionally, the Act limits the Attorney General's power to suspend deportation under section 244 of the INA to 4,000 suspensions annually. *See id.* § 309(c)(7).

Remaining on the books as evidence of the continuing sweeping federal power in this area are provisions for indefinite detention of aliens "afflicted with . . . diseases or mental or physical defects or disabilities" and for removal of "any alien who falls into distress or who needs public aid from causes arising subsequent to his entry." 8 U.S.C. §§ 1222, 1260 (1988 & 1997 Supp.) The provisions were enacted as part of the

of the Constitution have been applied to aliens with limited success. The rights and privileges of aliens have been almost exclusively governed and limited by the Immigration and Nationality Act (INA).<sup>65</sup> These rights and privileges have been analyzed within the framework of rights accorded *authorized* aliens, i.e., resident or nonimmigrant aliens and refugees, as opposed to undocumented aliens who, by definition, have no apparent legally permissible basis for their presence within the borders of the United States.

The first immigration laws unfolded during a period when America was growing into a formidable industrial power. The young country, like Paul Bunyan of folklore, was a mighty, strapping giant, but also possessed an oafishness and nativist xenophobia which found its way into the country's laws and into early Supreme Court opinions dealing with aliens. America had begun to show an intolerant streak by the middle of the nineteenth century in the Know-Nothing and Anti-Catholic movements, largely in response to the large influx of Irish immigrants fleeing the poverty of a country racked by the Great Famine and other social ills.<sup>66</sup> Following the American Civil War, the importation of foreign nationals such as Chinese "coolies" as temporary laborers was eventually met in

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original Immigration and Nationality Act of June 27, 1952, c. 477, Title II.

<sup>65</sup> 8 U.S.C. §§ 1101-1645 (1988 & 1997 Supp.).

<sup>66</sup>

Between 1815 and 1844, an estimated 800,000 to 1,000,000 Irish responded to British legislation and economic hardships in Ireland by sailing to North America . . . . In 1845, the Great Famine prompted the Irish to immigrate to the United States in historic numbers . . . . The failure of the potato harvests resulted in approximately one million deaths and the exodus of approximately 1.8 million Irish to North America.

Patricia I. Folan Sebben, *U.S. Immigration Law, Irish Immigration and Diversity: Cead Mile Failte (a Thousand Times Welcome)?*, 6 GEO. IMMIGR. L.J. 745, 749 (1992) (citations omitted). Although Irish labor was welcomed with open arms earlier in the century, the growing mass of immigrants resulted in nativist reaction. "In the 1840s, these nativists began one of the earliest movements to restrict immigration, forming associations such as the Know-Nothing Party which advocated a twenty-one year residence for citizenship and which opposed German and Irish Catholic immigrants." *Id.* at 749-51 (citations omitted). Anti-Irish Catholic ferment had begun earlier than 1845, as Irish populations soared in Philadelphia and Boston.

On 6 May 1844, a Protestant meeting in Kensington [in Philadelphia] provoked a riot and bloodshed that lasted for three days and only terminated after the militia had been mobilized. These disorders resulted in the burning of two Catholic churches, . . . the destruction of dozens of Catholic homes; and sixteen deaths.

DENNIS CLARK, *THE IRISH IN PHILADELPHIA* 21 (1973). There is evidence that the clashes were provoked by animosity between Irish Protestants and Catholics vying for primacy on the city's political scene, since the Protestant power base was threatened with replacement by the fecund Catholics. *See id.* at 21-23.

California and in western mining towns with resentment and violence as the late nineteenth century brought economic downturns.<sup>67</sup> The Chinese Exclusion Acts, such as the one shown below, codified the xenophobia of the period:

Act of May 6, 1882  
(22 Stat. 58; 8 U.S.C.)  
To Execute Certain Treaty Stipulations  
Relating to Chinese

Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States.

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<sup>67</sup> Initially the Chinese were favorably compared with the Irish and other immigrant groups.

*The New York Times* argued that "John Chinaman" was a better addition to [American] society than was "Paddy." It 'complained' that the Chinese men did not drink whiskey, stab one another, or beat their wives. As a leading historian of the subject has observed, "[n]eedless to say, such sarcasm was not lost on the Irish." Numerous "defensive articles on behalf of the Chinese were thinly disguised attacks on the Irish."

Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 231 (1995) (citations omitted). The tolerance did not last. With the completion of the Central Pacific Railway in 1869, 12,000 Chinese laborers were turned out in Utah, most of them finding their way back to San Francisco and to farms in the West. *See id.* at 232.

The *New York Times* recognized that "the hapless Mongolian . . . that presumptuous individual, having faithfully served out the period for which he contracted, now wishes to turn his skill to account by engaging in the manufacturing of goods for his own benefit," and underselling his former bosses.

*Id.* at 233 (citations omitted). The marketplace turned very ugly.

In 1871, a lynch mob killed nineteen of the 172 Chinese living in "Negro Alley" in Los Angeles . . . . In 1877, the Order of Caucasians attempted to burn down Chinatown in San Francisco and successfully burnt down a ranch in Chico, California, also shooting to death four Chinese farmhands . . . . After passage of the Chinese Exclusion Act, white miners attacked their Chinese co-workers and killed twenty-eight in Rock Springs, Wyoming . . . .

*Id.* at 232 n.28.

Sec. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may be also imprisoned for a term not exceeding one year.

...

#### VIOLETION OF PROVISIONS

...

Sec. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.

#### CHINESE GOVERNMENT OFFICIALS EXEMPT

...

#### ADMISSION OF CHINESE TO CITIZENSHIP PROHIBITED

Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

Sec. 15. That the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.<sup>68</sup>

Far from being uninvolved during this period, the U.S. Supreme Court was an active participant in the formulation of legal principles undergirding the first comprehensive system of federal immigration laws. In the *Chinese Exclusion Case*,<sup>69</sup> the Supreme Court suggested that the federal power to exclude aliens was inherent in the "external sovereignty of the nation,"<sup>70</sup> upholding the constitutionality of laws like the one above. Prior to that decision, Congress had passed what is considered the

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<sup>68</sup> 22 Stat. 58, 8 U.S.C. (1882); amended by 23 Stat. 115, 8 U.S.C. (1884); supplemented by 25 Stat. 504, 8 U.S.C. 270 (1888); repealed by 57 Stat. 600, 8 U.S.C. 212a (1943), reprinted in LAWS APPLICABLE TO IMMIGRATION AND NATIONALITY 211-15, 218, 236, 524 (Edwina Austin Avery ed., 1953).

<sup>69</sup> Chae Chan Ping, 130 U.S. 581 (1889).

<sup>70</sup> See *id.*; see also Neuman, *Lost Century*, *supra* note 9, at 1886 n.338.

first federal immigration statute in 1875, excluding "convicts and prostitutes, as well as increasing the stringency of the 'coolie trade' statutes."<sup>71</sup> Shortly thereafter, *Henderson v. Mayor of New York*<sup>72</sup> and *Chy Lung v. Freeman*<sup>73</sup> were decided, invalidating respective head taxes on passengers in New York and California which the Court regarded as excuses for state officials to improperly extort fees in return for allowing undesirable aliens to land, and which the Court held were impermissible disruptions of the federal regulation of commerce.<sup>74</sup>

The 1893 opinion in the case of *Fong Yue Ting v. United States*<sup>75</sup> is typical, not only of the analysis applied to contemporary alienage cases of the period, but also the general approach the Supreme Court took during the first ninety years of immigration law. When reviewing the power of the executive and legislative branches to regulate the entry and movement, and status of aliens, the Court applied an analysis which took much the same form as that used by federal courts today. The Court was considering the effect of a new law passed in response to a wave of 1890s migration by Chinese entrants who were circumventing the Exclusion Acts passed in the 1880s, attempting to join the 100,000 or more of their countrymen<sup>76</sup> already in the United States:

Chinese laborers came into the country by water and by land; they came through the open ports, and by rivers reaching the seas, and they came by the way of the Canadas and Mexico. New means of ingress were discovered, and, in spite of the vigilance of the police and customs officers, great numbers clandestinely found their way into the country. Their resemblance to each other rendered it difficult, and often impossible to prevent this evasion of the laws.<sup>77</sup>

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<sup>71</sup> See *id. supra* note 9, at 1887 n.347 (citing the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477).

<sup>72</sup> 92 U.S. 259 (1876).

<sup>73</sup> 92 U.S. 275, 277 (1876).

<sup>74</sup> See Neuman, *Lost Century, supra* note 9, at 1892-93.

We are of the opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.

*Henderson*, 92 U.S. at 274. "In any view which we can take of this statute, it is in conflict with the Constitution of the United States, and therefore void." *Chy Lung v. Freeman*, 92 U.S. at 281.

<sup>75</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>76</sup> *Id.* at 734 (Brewer, J., dissenting).

<sup>77</sup> *Id.* at 751 (Field, J., dissenting). The Court was facing the beginning of the



The question before the Court in *Fong Yue Ting* was not whether the United States had the power to exclude aliens, but whether Chinese, who had apparently been residing lawfully in the United States, could be arrested and deported without a trial if found without certificates of residence authorizing their presence within U.S. borders. The case involved three habeas corpus petitions brought by Chinese facing deportation: the first was by a non-English speaking Chinese who had lived in the United States more than thirteen years before the new law was passed, failed to get a certificate, and who was then arrested without a warrant; the second involved a similar case where the person was arrested, brought before a district judge, and without a hearing, was ordered by the judge to be deported "forthwith"; and in the third, the Chinese had applied to the "collector of internal revenue" for a certificate, but was refused because he could not produce a witness "other than a Chinaman" to prove he was entitled to a certificate.<sup>78</sup> The six to three majority opinion by Justice Gray reviewed the "accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see it fit to prescribe."<sup>79</sup> Justice Gray distinguished "deportation" as the "removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare" from measures deemed as "punishment[s]" such as "transportation" and "extradition."<sup>80</sup> He stated:

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far [as] the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.<sup>81</sup>

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erosion of the myth of America as an ethnically homogeneous nation.

<sup>78</sup> *Id.* at 703. The statute required at least "one credible white witness" to testify on the Chinese alien's behalf. *Id.* at 699 (section 6 of the Act of May 5, 1892, c. 60).

<sup>79</sup> *Id.* at 705 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

<sup>80</sup> *Id.* at 709 citing *BAR, INT. LAW* (Gillespie's Ed., 1883), 708 n.711. Transportation is "[a] species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." *BLACK'S LAW DICTIONARY* 1499 (6th ed. 1990).

<sup>81</sup> *Fong Yue Ting*, 149 U.S. at 713.

Justice Gray noted that there had been a prior treaty with China affecting the status of at least one of the aliens in the case which had recognized "the mutual advantage of the free migration and emigration of . . . citizens and subjects . . . from one country to the other"<sup>82</sup> and which stated "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may . . . be enjoyed by the citizens and subjects of the most favored nation."<sup>83</sup> However, Justice Gray stated that because "Chinese laborers, of a distinct race and religion, remain[ed] strangers in the land, resid[ed] apart by themselves, tenaciously adher[ed] to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests,"<sup>84</sup> the United States was constrained to amend the treaty due to "embarrassments consequent upon such immigration"<sup>85</sup> to first limit or suspend admission of Chinese to the United States<sup>86</sup> and then to altogether ban them.<sup>87</sup> Justice Gray upheld the arrests and deportations on the grounds that the proceeding before a U.S. district judge was "in no proper sense a trial and sentence for a crime or offense," but simply an "ascertainment."<sup>88</sup> Gray also found that deportation was not a punishment per se:

It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and

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<sup>82</sup> *Id.* at 716 (citing Art. 5 of treaty between the United States and China of July 28, 1868). Justice Gray apparently took little notice of the treaty's applicability to the alien residing in the United States prior to the act requiring the certificates of residence.

<sup>83</sup> *Id.* (citing Art. 6 of the treaty).

<sup>84</sup> *Id.* at 717.

<sup>85</sup> *Id.* (quoting the preamble of a supplemental treaty of November 17, 1880 concluded between the United States and China).

<sup>86</sup> *Id.* (citing Art. 1 of the 1880 treaty).

<sup>87</sup> *Id.* at 718-30.

<sup>88</sup> *Id.* at 730.

prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.<sup>89</sup>

Whether the statute was penal in nature, since it included in addition to its other stringent provisions a directive to imprison Chinese at "hard labor at a period of not exceeding one year,"<sup>90</sup> was an aspect of the case Justice Gray apparently chose not to address.

Three of the other justices looked closely at the statute and found it to be punitive, dissenting from the majority — two of them vigorously — on the grounds that the statute denied both equal protection and due process to the affected aliens. Chief Justice Fuller "entertain[ed] no doubt that the provisions of the Fifth and Fourteenth Amendments, which forbid that any person shall be deprived of life, liberty, or property without due process of law"<sup>91</sup> were "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality."<sup>92</sup> He stated that the act imposed "a legislative sentence of banishment, and, as such, [was] absolutely void."<sup>93</sup>

Justice Brewer noted that the Court in *Yick Wo v. Hopkins*<sup>94</sup> had held that the use of the word "person" in the Fourteenth Amendment applied equally to "all individuals lawfully within the State"<sup>95</sup> and that the Fifth Amendment "must be equally comprehensive."<sup>96</sup> He compared the Chinese laborers affected to "ticket-of-leave men," referring to the fact that the laborers had to carry a certificate of residence at all times or risk arrest in a fashion similar to that of Australian convicts.<sup>97</sup> Justice Brewer expressed discomfort over using sovereignty as a justification for imposing the hardship of deportation on Chinese laborers, who were "denizens," invited to work in the United States on railroads and public works:

They have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guaranty from the government, and who has come not in response to any invitation, but

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 726 (describing section 4 of the Act of May 5, 1892, c. 60).

<sup>91</sup> *Id.* at 761 (Fuller, Ch. J., dissenting).

<sup>92</sup> *Id.* at 761-62 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>93</sup> *Id.* at 763.

<sup>94</sup> 118 U.S. 356, 369-71 (invalidating a California municipal ordinance discriminating against Chinese laundry owners).

<sup>95</sup> *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 743.

has simply drifted here because there is no prohibition to keep him out.<sup>98</sup>

. . .

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers — ours are fixed and bounded by a written constitution.<sup>99</sup>

Justice Field distinguished the *Chinese Exclusion Case*, which excluded foreigners from the United States, from the case under review, in which an ex post facto burden was being imposed on previously legal aliens.<sup>100</sup> He stated, comparing the two circumstances: “[B]etween legislation for the exclusion of Chinese persons, that is to prevent them from entering the country, and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference.”<sup>101</sup> Justice Field stated that the government’s “power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments, except for a crime, or as an act of war.”<sup>102</sup> Distinguishing between “alien enemies and alien friends,”<sup>103</sup> Justice Field declared that to hold the Chinese laborers to a different set of laws or to categorize them as less protected than other persons was to “ignore the teachings of our history, the practice of our government, and the language of our Constitution.”<sup>104</sup> Calling the conception that the power to summarily arrest and deport aliens was coterminous with the power to exclude them “shocking brutality”<sup>105</sup> and comparing the government policy to the expulsion of

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<sup>98</sup> *Id.* at 736-37.

<sup>99</sup> *Id.* at 737.

<sup>100</sup> *Id.* at 749-51 (Field, J., dissenting).

<sup>101</sup> *Id.* at 746.

<sup>102</sup> *Id.* at 746-47 (referring to the Alien Act of 1789 as being an exception, Justice Field argues that the act was “severely denounced by many of [the country’s] ablest statesmen and jurists as unconstitutional and barbarous”).

<sup>103</sup> *Id.* at 749.

<sup>104</sup> *Id.* at 754.

<sup>105</sup> *Id.* at 756.

Moors from Spain, Jews from England and Russia, and Huguenots from France,<sup>106</sup> Justice Field opined:

The punishment is beyond all reason in its severity. It is out of proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business, and taken before the judge for his condemnation, without permission to his home, see his family, or complete any unfinished business. Mr. Madison well pictures its character in his powerful denunciation of the alien law of 1798 . . . and concludes . . . that if a banishment of the sort described is not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.<sup>107</sup>

The protestations of the dissent in the *Fong Yue Ting* case to the contrary, the immigration policy of the United States during the last part of the nineteenth and the first third of the twentieth centuries continued to be racially exclusionary:

Americans' antipathy toward the Chinese ultimately extended to almost everyone indigenous to the Asian continent. In 1907, the United States and Japan negotiated a "Gentlemen's Agreement" that limited the right of Japanese nationals to settle in this country. By 1917, Congress had excluded virtually every resident of the so-called "Asiatic barred zone," a vast territory that extended from the Kirghiz (Russian) Steppes and Arabian Peninsula to what is now Indonesia.<sup>108</sup>

Supreme Court decisions such as the *Japanese Immigrant Case*, "which held that any procedure to deport aliens who are in the United States must conform to the requirements of due process,"<sup>109</sup> gave aliens the

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<sup>106</sup> *Id.* at 757.

<sup>107</sup> *Id.* at 759-60 (explaining that the law was a punishment, Justice Field also considered it an unconstitutional infringement of rights under the Fourth Amendment).

<sup>108</sup> HULL, *supra* note 8, at 11 (citations omitted).

During this time members of Congress also attempted to prevent blacks from immigrating to the United States. In 1915 an amendment was introduced in the Senate to exclude "all members of the African or black race." The amendment was approved, but subsequently defeated in the House of Representatives after an intense campaign by the NAACP.

*Id.* at 11 n.25. "The only territory excluded from the [Asiatic] barred zone included parts of Afghanistan and Russia, and what was then Persia." U.S. COMM. ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *in* IMMIGRATION, 9 (1980) [hereinafter GOLDEN DOOR].

<sup>109</sup> CARLINER ET AL., *supra* note 15, at xiii n.13 (citing *Yamataya v. Fisher*, 189

occasional victory, but overall federal government policy on immigration remained highly restrictive.

Immigration law continued to evolve during the first quarter of the twentieth century. By that time, waves of immigrants were coming to America from Italy, Poland, Greece, and many other countries, particularly from the Mediterranean region. Mechanisms of paranoia began clanking again as xenophobes warned of a rising tide of foreigners who would engulf native-born Americans. Nostalgia for a bygone era and an ugly anti-foreigner movement swept the country, stimulating isolationism and politics of ethnic exclusion excited by the alarms of pseudo-scientists who warned of a threat from Jews, Italians, and other "'beaten men from beaten races, representing the worst failures in the struggle for existence'."<sup>110</sup> Respected social and literary figures joined in the nativist sentiment. In 1907, Henry James wrote in *The American Scene* of the new immigrant: "He resembles for the time the dog who sniffs around the freshly acquired bone, giving it a push and a lick. Let not the unwary, therefore, visit Ellis Island."<sup>111</sup> The 1911 Dillingham Commission, commissioned by Congress, released a forty-two volume study on the impact of immigration in U.S. society, which provided "irrefutable proof that the new immigrants were of inferior stock. The Commission, therefore, concluded that American society would be inexorably debased unless migration from Southern and Eastern Europe was substantially curtailed."<sup>112</sup> As a result, Congress enacted the Immigration Act of 1917,<sup>113</sup> which remained in effect until 1952 and "banned not only

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U.S. 86, 100-01 (1903)).

<sup>110</sup> HULL, *supra* note 8, at 14, 14 n.50 (citing Jenna Weissman Joselit, *Perceptions and Reality of Immigrant Health Care, 1840-1920*, 178 (1980) (paper prepared for SCIRP Staff Report) (quoting respected early twentieth-century academician Edward Ross)). The theories were the American brand of a worldwide phenomenon which later gave rise to Nazi ideas about genetic purity. *See id.*

<sup>111</sup> *See* Nicolaus Mills, *Introduction: The Era of the Golden Venture*, in ARGUING IMMIGRATION, *supra* note 2, at 25.

<sup>112</sup> *See* HULL, *supra* note 8, at 15 (citations omitted). Fueled by the saber-rattling of Imperial Germany, a rash of anti-German sentiment began to sweep the country.

[M]any flourishing newspapers, social clubs, and other enterprises serving the German-American community were forced to close. The Governor of Iowa prohibited the use of any language other than English in public places and over the telephone, sauerkraut was renamed "liberty cabbage," and the demand for dachshund pups fell in one year by 60 percent.

*Id.* at 15-16 (citations omitted). As America was drawn into the maelstrom of the First World War, the movement reached a fever pitch — a phenomenon holding some irony, since 20 years later Germans under Nazi rule proved themselves paradigmatic ethnic purists.

<sup>113</sup> Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 374-375.

illiterates and virtually every inhabitant of Asia, but also several other categories of aliens as well," such as persons attempting to enter the United States for immoral purposes, persons of "constitutional psychopathic inferiority," and vagrants.<sup>114</sup> Meanwhile, during this period, the Supreme Court issued a decision invalidating an Arizona statute that required eighty percent of employees in businesses having more than five employees to be "qualified electors or native-born citizens of the United States,"<sup>115</sup> but upheld a statute which limited public works employment to U.S. citizens, giving a preference to state citizens,<sup>116</sup> and upheld a later law which denied licenses to operate pool and billiard rooms on the ground that it was not irrational to bar aliens from the "conduct of a dubious business."<sup>117</sup>

"The flood of immigrants after World War I, sixty-five percent of whom were from eastern and southern Europe, heightened the tensions between old and new immigrants."<sup>118</sup> The evolving national policy on immigration, influenced by the larger social movement, ultimately resulted in the push for construction of an immigration framework based on preferential quotas. In response, in 1921 Congress passed and President Harding signed into law a bill designed to reclaim "America for Americans."<sup>119</sup>

This measure, the First National Origins Act, . . . established a ceiling on European immigration and limited the number of annual visas allocated to any one country to 3 percent of its foreign-born population in the United States at the time of the 1910 census. This formula still allowed more southern and eastern Europeans to enter than its framers had intended, however. To rectify the situation Congress subsequently passed an amended version known as the Johnson-Reed, or second "National Origins," Act, which went into effect in 1929 and remained the gravamen of United States immigration law until 1965.<sup>120</sup>

. . .

The second National Origins Act . . . was a finely tuned contrivance designed to restore an "optimal" ethnic mix: Under its terms, Great Britain, with 2 percent of the world's population, received 43 percent of

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<sup>114</sup> See HULL, *supra* note 8, at 16, 163 n.57.

<sup>115</sup> See *Truax v. Raich*, 239 U.S. 33, 34 (1915).

<sup>116</sup> See *Heim v. McCall*, 239 U.S. 175, 195 (1915).

<sup>117</sup> See *Clarke v. Deckebach*, 274 U.S. 392 (1927).

<sup>118</sup> See *Bean & Sullivan*, *supra* note 31, at 68.

<sup>119</sup> See HULL, *supra* note 8, at 17-18.

<sup>120</sup> See *id.* at 18, 163 n.65 (citations omitted) (citing Act of May 26, 1924, ch. 190, 43 Stat. 153).

the quota; most Asians continued to be barred altogether, and the allotment for southern and eastern Europeans was significantly slashed.<sup>121</sup>

“In establishing immigration restrictions in 1924, Congress rejected a proposal to set quotas on the basis of the number of foreign-born persons of various nationalities residing in the United States in 1910 in favor of quotas based on the national origins of the entire population in 1920.”<sup>122</sup> The result was that the former plan would have allocated forty-four percent of total immigration to southern and eastern Europeans, while the use of the 1920 census gave only fifteen percent of the allocation to those groups.<sup>123</sup>

These policies gave rise to one of the most horrific results in American legal history. The National Origins Act, which never performed with “fool-proof efficiency,” was sufficiently effective to exclude hundreds of thousands of people attempting to escape Hitler’s SS exterminators.<sup>124</sup> “In what a congressional staff report referred to as perhaps the cruelest action in United States history, in 1939 Congress also defeated a proposal to rescue some 20,000 children from Nazi persecution, despite the eagerness of American families to sponsor them. The reason: the children would have exceeded the annual quota allotted to Germany.”<sup>125</sup>

After the Second World War, thoughtful people, appalled by the consequences of their country’s immigration policies, began agitating for their revision. The quota system nevertheless basically remained intact for another twenty years, although Congress frequently circumvented it by passing special legislation that resulted in the admission of hundreds of thousands of mainly “new” immigrants — war brides, displaced persons who had escaped Hitler’s death camps, and later, refugees fleeing communism. To secure the integrity of the national origin system, however, Congress charged these special interests against their countries’ future quotas.<sup>126</sup>

During the 1920s-1940s, the Supreme Court was relatively silent on the question of alien constitutional rights with two notable exceptions — both dealing with Japanese — which set the tone for a more progressive approach to constitutional analysis of the rights of aliens. The first case

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<sup>121</sup> See *id.* at 18 (citation omitted).

<sup>122</sup> See Bean & Sullivan, *supra* note 31, at 68.

<sup>123</sup> See *id.*

<sup>124</sup> See HULL, *supra* note 8, at 18-19 (citations omitted).

<sup>125</sup> See *id.* at 19 (citations omitted).

<sup>126</sup> See *id.* (citations omitted).



was *Korematsu v. United States*,<sup>127</sup> where the Supreme Court upheld an executive military exclusion order<sup>128</sup> forbidding persons of Japanese ancestry from the West Coast war area, "selected as suspect because of their race, and deprived of any due process despite the lack of even a single case of disloyal conduct."<sup>129</sup> Although the Court upheld the temporary exclusion and detention of persons of Japanese ancestry, giving great deference to the war powers of President Roosevelt and Congress, the six to three majority opinion by Justice Black established a new standard of review for race classifications, which would have a significant effect on the development of the rights of aliens:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>130</sup>

The second case, *Takahashi v. Fish & Game Commission*,<sup>131</sup> involved a Japanese resident alien who was ineligible under the laws of the time for citizenship and who, following World War II, found that he was unable to renew the fishing license he had possessed for twenty-five years. Takahashi was denied the license because of a new provision in California law which forbid the licensing of persons ineligible for citizenship, which the Supreme Court of California upheld on the basis of the state's proprietary right in the fish.<sup>132</sup> The U.S. Supreme Court, on the basis of Fourteenth Amendment analysis, struck down the statute stating "[t]o whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful

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<sup>127</sup> 323 U.S. 214 (1944).

<sup>128</sup> Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 17, 1942). Congress then enacted a law which it made it a federal crime to violate military orders pursuant to this authority. See NOWAK & ROTUNDA, *supra* note 62, § 14.8(d)(1), at 621.

<sup>129</sup> See Wu, *supra* note 67, at 233 (citations omitted). Justice Murphy, in his dissent, stated that the detentions and internments of Japanese-Americans represented "the ugly abyss of racism" and that the measure was "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation." *Korematsu*, 323 U.S. at 233, 235 (Murphy, J., dissenting).

<sup>130</sup> 323 U.S. at 216.

<sup>131</sup> *Takahashi v. Fish & Game Commission*, 185 P.2d 805 (1947), *rev'd and rem'd*, 334 U.S. 410 (1948).

<sup>132</sup> *Id.*

residents of the State from making a living by fishing in the ocean off its shore while permitting all others to do so."<sup>133</sup>

In the meantime, as small victories for aliens in the constitutional arena mounted, the early 1950s Congress, in an atmosphere of concern over potential entry into the United States of "fifth columnists" and communist provocateurs, contemplated a major immigration law effort, which resulted in passage of the statute that remains the basic framework of the Immigration and Nationality Act (INA). "The McCarran-Walter Act of 1952, the basic law in effect today, codified the immigration law under a single statute."<sup>134</sup> The Act established three principles for immigration policy: "(1) the reunification of families, (2) the protection of the domestic labor force, and (3) the immigration of persons with needed skills."<sup>135</sup> The concepts of the national origins system and unrestricted immigration from European and Western Hemisphere countries was retained, but bars were removed to immigration and citizenship for races which had been denied status prior to that time. "Asian countries, nevertheless, were still discriminated against, for prospective immigrants whose ancestry was one-half of any Far Eastern race were chargeable to minimal quotas for that nation, regardless of the birthplace of the immigrant."<sup>136</sup> The McCarran-Walter Act "ranks among the country's most controversial policies, and with the exception of the Internal Revenue Code represents the longest, most complicated, and certainly the most arcane piece of legislation in modern United States history."<sup>137</sup>

The Supreme Court, often a weathervane of the social climate, issued several opinions during the period which echoed the decade of the Korean War and McCarthyism. In one case, *Marcello v. Bonds*,<sup>138</sup> an alien, Marcello, had come to the United States as an infant in 1908, married a U.S. citizen, and was jailed for one year for violation of the Marijuana Tax Act.<sup>139</sup> Following the 1952 amendment of the INA, which ex post facto made a marijuana conviction grounds for expulsion, the Immigration Service initiated deportation proceedings against Marcello and ordered him to leave the country in sixty days, a determination upheld by the Supreme Court.<sup>140</sup>

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<sup>133</sup> *Id.* at 421.

<sup>134</sup> GOLDEN DOOR, *supra* note 108, at 7-12.

<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See* HULL, *supra* note 8, at 20 (citation omitted).

<sup>138</sup> 349 U.S. 302 (1955).

<sup>139</sup> *See* HULL, *supra* note 8, at 33.

<sup>140</sup> *See id.* Marcello, however, never left the United States because no country would take him. *See id.* at 34 n.29.

In another decision, *Shaughnessy v. United States ex rel. Mezei*, termed by Professor Gerald Neuman as indicative of the "anomalies, and even barbarities, that would be tolerated in no other field of regulation,"<sup>141</sup> the Supreme Court held that a returning resident alien could be excluded and incarcerated forever on Ellis Island without notice or hearing if no other country would take him.<sup>142</sup> Mezei, who had lived in the United States lawfully for twenty-five years, had attempted to return to Hungary to visit his dying mother.<sup>143</sup> On his return, armed with a visa from the American consulate, Mezei was denied entry by the Attorney General on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."<sup>144</sup> The Supreme Court, in an opinion by Justice Clark, reversed the courts below and upheld Mezei's exclusion without a hearing as constitutional: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"<sup>145</sup>

A third case from the period exemplifying the limited due process protection for aliens was that of *Galvan v. Press*.<sup>146</sup> Galvan had lived in the United States since 1918, joining the Communist party in 1944 for a two-year period, an act which was legal at the time, since the party had

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<sup>141</sup> See Neuman, *Lost Century*, *supra* note 9, at 1839 (citations omitted).

<sup>142</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-216 (1953). The District Court had admitted Mezei as a parolee temporarily on a \$5,000 bond; the Court of Appeals affirmed. *Id.* at 207-08.

<sup>143</sup> *Id.* at 208.

<sup>144</sup> *Id.* at 208. Justice Clark described Mezei's plight:

That determination rested on a finding that respondent's entry would be prejudicial to the public interest for security reasons. But thus far all attempts to effect respondent's departure have failed: Twice he shipped out to return whence he came; France and Great Britain refused him permission to land. The State Department has unsuccessfully negotiated with Hungary for his readmission. Respondent personally applied for entry to about a dozen Latin American countries but all turned him down. So in June 1951 respondent advised the Immigration and Naturalization Service that he would exert no further efforts to depart. In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in.

*Id.* at 208-09.

<sup>145</sup> *Id.* at 212 (citations omitted) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), upholding the exclusion of a war bride).

<sup>146</sup> 347 U.S. 522 (1954) (holding substantive immigration policy is not constrained by due process).

legalized status and had even sponsored candidates for state elections.<sup>147</sup> Galvan was a member of the Communist party during the effective period of the Alien Registration Act of 1940, which provided "that no alien could be deported for subversion without proof that he or she actually advocated the overthrow of the government."<sup>148</sup> This provision was nullified by passage of the Internal Security Act of 1950<sup>149</sup> which made it a deportable offense to have been a member of the Communist party at any time.<sup>150</sup> A majority on the Supreme Court concluded that membership for two years in the Communist party was adequate grounds under the INA for deportation. The Court issued its opinion regretfully, but followed a doctrine it still has not abandoned today that "since deportation proceedings are civil in nature the government can accordingly penalize aliens for activity that was not unlawful when committed."<sup>151</sup> As Justice Frankfurter stated for the majority in *Galvan v. Press*:

[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a "page of history," but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors . . . .<sup>152</sup>

<sup>147</sup> See HULL, *supra* note 8, at 34.

<sup>148</sup> *Id.* (citations omitted).

<sup>149</sup> Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 1006.

<sup>150</sup> See HULL, *supra* note 8, at 34.

<sup>151</sup> See *id.*

<sup>152</sup> 347 U.S. at 530-32 (citations omitted). Today, however, "federal judges often

Perturbed by the unfairness and arbitrariness of the immigration quota system, President John Kennedy and others vowed to abolish it. "On the domestic level, members of the emergent civil rights movement became particularly active in this endeavor, as did affiliates of church, ethnic, and civic organizations, whose postwar efforts on behalf of refugees had sensitized them to the inequities inherent in the country's immigration scheme."<sup>153</sup> Thus, twenty-three months after President Kennedy's assassination, in a fitting eulogy, President Lyndon Johnson signed the Immigration and Nationality Act Amendments of 1965 into law at the foot of the Statue of Liberty, ending a system, he said, which "ha[d] been un-American in the highest sense."<sup>154</sup>

The new legislation significantly reduced the flagrant racial and ethnic discrimination that had characterized earlier acts, but some aspiring immigrants were still treated inequitably: Colonies and dependencies were allocated only 200 visas a year — to be counted against both the mother country and its hemispheric ceiling . . . . The result has been to restrict dramatically immigration from certain colonial areas, where demand for entrance is high and where the population is mainly Black and Asian . . . . Under the 1965 act many western hemisphere countries also fared badly because their residents, accustomed to unlimited migration, were now restricted to an annual ceiling of 120,000. Within this ceiling, applicants were granted visas on a "first come-first serve" basis — a system that soon provoked criticism from many members of Congress, either because entrants from certain countries, particularly Mexico, could immigrate to the United States in what they considered inordinate numbers, or because the new policy extended no favoritism to those with needed skills or family ties to United States residents . . . .<sup>155</sup>

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labor creatively to mute [the] harsh impact" of deportation laws. HULL, *supra* note 8, at 35.

On occasion they will even stretch facts, contort phraseology, or impute intentions to Congress that belie common sense. In 1957, for instance, the Court asserted in *Rowoldt v. Perfetto* [355 U.S. 115 (1957)] that Congress intended only to deport those aliens whose membership in the Communist party had been "meaningful," and six years later it concluded in *Gastelum-Quinones v. Kennedy* [374 U.S. 469 (1963)] that the government bears the burden of proving its "meaningfulness."

*Id.* at 35 (citations omitted).

<sup>153</sup> See HULL, *supra* note 8, at 22.

<sup>154</sup> *Id.* (citations omitted) (citing Weekly Compendium of Presidential Documents, no. 11, Monday, Oct. 11, 1965, at 365).

<sup>155</sup> See *id.* at 23, 25 (citations omitted). Congress passed several amendments in the 1970s providing for a worldwide ceiling on immigrant admissions, finally settling on a ceiling of 270,000 nonrefugee immigrants in 1980. See *id.* at 25.

*B. Modern Constitutional Rights of Legal and Undocumented Aliens*

“Illegal alien” gestures toward a legal concept of noncompliance with law, but the law is more complex than most politicians and voters realize. There are different manners in which an alien’s presence could be said to violate the law, . . . and there are different forms of curative government action that may impart degrees of legality to the alien’s presence . . . . Many aliens enter or overstay for the purpose of working in the United States, but others act from a variety of motives: some seek asylum from persecution; some flee threats of death or injury that do not count as persecution under the asylum laws; some enter unlawfully while awaiting lawful admittance as a family member or a citizen or permanent resident. Some alien women are kept in unlawful status by husbands who could confer lawful status upon them but refuse for the purpose of maintaining control . . . . Some “illegal” aliens entered the United States as young children without exercising any choice . . . .<sup>156</sup>

The 1970s might be called the “golden age” of alien constitutional rights — especially when one looks back at the period with present-day awareness that contemporary public attitude is shifting away from tolerance to the old notions of restrictionism. During the early 1970s to early 1980s — a little more than a decade in time — alien rights which had slowly inched forward over a period of almost one hundred years bounded ahead in a great leap, particularly expanding alien franchise in the area of equal protection, while to a very limited extent providing protection to the undocumented. A number of important decisions were handed down by the Supreme Court during this period — some of which perpetuated the restrictive interpretations found in earlier cases — but there were two decisions which stand out as pertinent to the protection of the rights of undocumented aliens: *Graham v. Richardson*<sup>157</sup> and *Plyler v. Doe*.<sup>158</sup>

The *Graham* case was a watershed victory in the realm of general constitutional rights of aliens. In that case, the Court held that the equal protection clause prevented a state from conditioning welfare benefits either upon the possession of United States citizenship or residence in the United States for a specified number of years.<sup>159</sup> The Court, although noting its prior decisions had accepted the justification of a “special

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<sup>156</sup> See Neuman, *Aliens as Outlaws*, *supra* note 48, at 1440-41 (citations omitted).

<sup>157</sup> 403 U.S. 365 (1971).

<sup>158</sup> 457 U.S. 202 (1982).

<sup>159</sup> 403 U.S. at 382-83.

public interest" in allowing a state to favor its own citizens over aliens in distributing public benefits, stated that the decision in *Takahashi v. Fish & Game Commission*<sup>160</sup> had "cast doubt on the continuing validity of the special public-interest doctrine in all contexts."<sup>161</sup> The Court continued: "Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi*, we conclude that a state's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and long time resident aliens."<sup>162</sup>

The Court in *Graham* pointed out "that prior decisions had equated classifications based on alienage with those based on race or national origin and declared that such classifications are inherently suspect and subject to close judicial scrutiny. The classification would only be valid if it was necessary to promote a compelling state interest."<sup>163</sup> The Court also held that because only Congress has the power to set policies barring indigent aliens from the United States, state action in this area is superseded by the federal power to regulate immigration, finding "state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government."<sup>164</sup> Two Supreme Court opinions following *Graham*, *Application of Griffiths*<sup>165</sup> and *Sugarman v. Dougall*,<sup>166</sup> used the suspect classification argument and compelling state interest language to invalidate respectively a state citizenship requirement for admission to the bar and a citizenship requirement for eligibility for any position in the competitive class of a state's civil service system. These cases were later narrowed by decisions holding that there was a "self-governance" or "political function" justification which operated as an exception to strict scrutiny in laws excluding aliens as members of a state police force,<sup>167</sup> as public school teachers,<sup>168</sup> or as state "peace officers."<sup>169</sup>

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<sup>160</sup> *Takahashi*, 334 U.S. at 410.

<sup>161</sup> See NOWAK & ROTUNDA, *supra* note 62, § 14.12(c), at 707.

<sup>162</sup> 403 U.S. at 374.

<sup>163</sup> See NOWAK & ROTUNDA, *supra* note 62, § 14.12(c), at 707.

<sup>164</sup> 403 U.S. at 378.

A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported programs would appear to contravene [the] explicit constitutional requirement of uniformity.

*Id.* at 382.

<sup>165</sup> 413 U.S. 717 (1973).

<sup>166</sup> 413 U.S. 634 (1973).

<sup>167</sup> *Foley v. Connelie*, 435 U.S. 291 (1978).

<sup>168</sup> *Ambach v. Norwick*, 441 U.S. 68 (1979).

*Plyler v. Doe*<sup>170</sup> marked a beachhead for the rights of the undocumented alien. The Court opinion of Justice Brennan in *Plyler* was — and remains — controversial<sup>171</sup> since it extended the right to a public education to the children of individuals who might have little or no legal basis for presence in the United States. The *Plyler* ruling itself was a very limited one. Justice Brennan used the literal language in the Fourteenth Amendment, providing protection to “any person within [state] jurisdiction the equal protection of the laws,” to analyze the plight of children under a Texas statute which denied state funds for educating children not “legally admitted” to the United States and denied the enrollment of children not “legally admitted” in Texas public schools. The Court refused to recognize undocumented aliens as a suspect class, which would have required laws burdening the class to be subjected to strict judicial scrutiny,<sup>172</sup> stating that all laws burdening illegal aliens did not require judicial review, because the status of being an undocumented alien was not “an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.”<sup>173</sup>

The Court’s review specifically focused on the hardship that would be endured by the children of undocumented aliens, finding that the state was not entitled to a strong presumption of constitutionality for a law which would impose “a lifetime hardship on a discrete class of children not accountable for their disabling status.”<sup>174</sup> In finding that education is not a right granted specifically by the U.S. Constitution, nor held to be a fundamental right under Supreme Court decisional law,<sup>175</sup> the Court avoided use of strict scrutiny analysis and the requirement that the law be necessary to a compelling state interest, instead using a kind of heightened rational review, undergirded by normative notions of justice.<sup>176</sup> The result: “[e]ven if the state found it expedient to control the

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<sup>169</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

<sup>170</sup> 457 U.S. 202, *reh’g denied*, 458 U.S. 1131 (1982).

<sup>171</sup>

Brennan never explained how the denial of schooling to a child differs from the denial of other governmental benefits to an undocumented parent, upon whose income and well-being the child’s welfare ultimately depends. The Court has always permitted the government to deny illegal parents access to the private employment and public benefits that provide the children’s essential economic support, arguably harming the children (who may actually be U.S. citizens) even more grievously.

Schuck, *supra* note 10, at 87.

<sup>172</sup> 457 U.S. at 219 n.19.

<sup>173</sup> *Id.* at 218-22.

<sup>174</sup> *Id.* at 223.

<sup>175</sup> *Id.* at 218-22.

<sup>176</sup> *Id.* at 222-24.



conduct of adults by action against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."<sup>177</sup> "[T]he importance of education to a person's ability to function in society, and the fact that denial of all educational benefits to these children would result in their being deprived of any opportunity to advance their personal or economic interests on the basis of individual merit, led the majority to the conclusion that the Court should not simply defer to the state decision to deny an education to these children."<sup>178</sup>

*Plyler* was a close five-to-four decision. Chief Justice Burger authored a dissent joined by Justices White, Rehnquist, and O'Connor: "Once it is conceded — as the court does — that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate purpose."<sup>179</sup>

In the view of the dissent it was not unconstitutional to deny any opportunity for an education to these children because it was not irrational for a state to conclude that it did not have the responsibility to provide benefits for persons whose presence in the country was illegal.

The closeness of the vote in *Plyler* and the narrowness of the ruling, striking down only a law which denied an education to the children of illegal aliens, make it difficult to predict the nature of the equal protection guarantee that will be defined in future cases involving the rights of illegal aliens.<sup>180</sup>

As the 1980s continued, drawing toward the 1990s, the debate about undocumented aliens became a centerpiece political exchange, providing a political litmus test for both the left and right, particularly in the southwestern United States as undocumented alien entry rose at a rapid rate. Although accumulating sparse legal victories in federal courts, such as the right to coverage by the National Labor Relations Act,<sup>181</sup> the

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<sup>177</sup> *Id.* at 219, 220.

<sup>178</sup> See NOWAK & ROTUNDA, *supra* note 62, § 14.13, at 717.

<sup>179</sup> 475 U.S. at 248 (Burger, C.J., dissenting).

<sup>180</sup> See NOWAK & ROTUNDA, *supra* note 62, § 14.13, at 718 (citations omitted).

<sup>181</sup> *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (holding that an employer committed an unfair labor practice when it reported undocumented alien employees to the INS in retaliation for their participation in union activities). For a similar development in this area, see also *Saipan Hotel Corp. v. National Labor Relations Board*, 114 F.3d (9th Cir. 1997) (holding that NLRB has jurisdiction over both resident and

general legal trend remained against the undocumented alien, particularly where attempts were made to expand his/her rights under federal laws. These rights were limited by earlier decisions, such as the 1976 *Matthews v. Diaz*<sup>182</sup> case affecting all aliens, where the Supreme Court held that Congress could condition participation in a program for federal medical benefits on continuous five-year residence in the United States; the Court claimed that the provision was being upheld for, among other reasons, its effect on the conduct of foreign relations, since aliens are noncitizens, still retaining benefits of citizenship from some other country. In representative mid-1980s cases following *Plyler*, the Supreme Court, in one instance, refused to review the constitutionality of INS procedures affecting Haitian parole applicants, remanding the case to the district court to determine whether the INS properly exercised its discretion without regard to race or national origin,<sup>183</sup> and in another case held that the Fourth Amendment prohibition on unreasonable searches and seizures had no extraterritorial effect for a Mexican alien apprehended in the United States, whose Mexican domiciles were searched by Mexican authorities at the request of U.S. law enforcement officials.<sup>184</sup>

#### IV. THE RECENT LEGAL DEBATE ON UNDOCUMENTED ALIENS

Although the legal immigrants who entered in recent years constituted only 3.1% of the total U.S. population during the 1980s (the comparable shares for the first three decades of this century were 10.4%, 5.7%, and 3.5% respectively), the steady accumulation of immigrants over time has produced a growing cohort of foreign-born in the United States. In 1994, over 22 million people, 8.7% of the total U.S. population, were foreign-born. Although the percentage of the foreign-born remains far below the 13.2% share it comprised in 1920, it is the highest percentage since then, and the foreign-born share has almost doubled since 1970, when it was 4.8%. The fact that one out of every eleven persons in the United States is a first-generation immigrant gives immigration a much higher political and media profile today than it possessed only a quarter-century ago, when fewer than one in twenty were foreign-born.<sup>185</sup>

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nonresident workers in the U.S. Commonwealth of the Northern Mariana Islands).

<sup>182</sup> 426 U.S. 67 (1976).

<sup>183</sup> *Jean v. Nelson*, 472 U.S. 846, 857 (1985).

<sup>184</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, *reh'g denied*, 494 U.S. 1092 (1990).

<sup>185</sup> See Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J., 1963, 1973-74 (1996) (reviewing PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995)).

Sec. 330. PRISONER TRANSFER TREATIES.

(a) *NEGOTIATIONS WITH OTHER COUNTRIES.* — (1) Congress advises the President to begin to negotiate and renegotiate, not later than 90 days after the date of enactment of this Act, bilateral prisoner transfer treaties, providing for the incarceration, in the country of the alien's nationality, of any alien who —

(A) is a national of a country that is party to such a treaty; and (B) has been convicted of a criminal offense under Federal or State law and who — (i) is not in lawful immigration status in the United States, or (ii) on the basis of conviction for a criminal offense under Federal or State law, or on any other basis, is subject to deportation or removal under the Immigration and Nationality Act, for the duration of the prison term to which the alien was sentenced for the offense referred to in subparagraph (B) . . . .

. . . .

(c) *PRISONER CONSENT.* — Notwithstanding any other provision of law, except as required by treaty, the transfer of an alien from a Federal, State, or local incarceration facility under an agreement of the type referred to in subsection (a) shall not require consent of the alien

. . . .<sup>186</sup>

The Irish began to go to America the moment the door was opened . . . . So that America has always been a friend to the Irish people. And when I went over there — I never felt as if I were a foreigner at all.

Sean O'Casey, *Wisdom*<sup>187</sup>

If Sean O'Casey were to come to the America of 1997, he might find that the door is rapidly closing for all immigrants, especially those deriving from some of the more economically disadvantaged regions of the world community. There is a markedly different attitude building toward immigrants, particularly the underskilled or uneducated, or those who may — in certain areas of the United States — tend to exhibit distinctively "foreign" characteristics.<sup>188</sup> Public pressure has resulted in

<sup>186</sup> IIRIRA, *supra* note 6, § 330.

<sup>187</sup> EDWARD F. MURPHY, *THE CROWN TREASURY OF RELEVANT QUOTATIONS* 383 (1978).

<sup>188</sup>

Immigration is most plausibly restricted when the immigrant is attracted by higher welfare benefits in the immigration state. Such immigration can be expected to impose costs on natives without generating an efficiency gain. An efficient immigration policy will therefore seek to exclude such value-decreasing immigrants and to attract value in-

government action such as the steps that have been taken to reduce or eliminate Supplemental Security Income (SSI) benefits for “noncitizens,” including lawful permanent resident aliens.<sup>189</sup>

Despite massive financial, logistic, and — now — legislative obstacles, the United States remains a powerful magnet for all types of immigrants, while the undocumented use newer, more aggressive and, sometimes, quite ingenious methods to make an entry into the United States. Once the undocumented alien has made an entry — and if he or she has neither a criminal past nor engages in criminal activity — the entrant is accorded some protective due process.

### A. *Making an Entrance*

[The] most extreme [American] fears are epitomized by a highway sign in Southern California. Caution, the sign warns: in black silhouette against a yellow background it shows a family running. It is the West Coast equivalent of a New England deer-crossing sign, but posted, as it is, along a highway where illegals enter the country from Mexico, the sign carries a very different message. Here, it says, are people so intent on flight that they are vulnerable to traffic. Here is a problem so beyond control that all the government can do is issue warnings.<sup>190</sup>

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creasing ones. One method of doing so is to curtail welfare payouts to recent immigrants, as is now proposed by welfare reform legislation.

Buckley, *supra* note 27, at 99. During 1993, the U.S. Equal Employment Opportunity Commission (EEOC) accumulated 7,393 cases involving charges of discrimination on the basis of national origin. See Samuel R. Cacas, *The Language of Hate*, 22 WTR. HUM. RTS. 30 (1995).

Most common problems are employers who impose English-only requirements and accent-based employment practices . . . . Today, it is more acceptable to focus on language characteristics as a racial expression rather than race itself. We are going through bad economic times so language issues are a convenient way to keep a person who is foreign looking out of the workplace. And as the workplace becomes more diverse, language restriction is used more often for screening out job applicants.

*Id.*

<sup>189</sup>

Fifty-one percent of noncitizens on SSI come from six countries — Mexico, the former Soviet Union, Cuba, Vietnam, the Philippines, and China . . . . About two-thirds of noncitizen SSI recipients live in three states — California, New York, and Florida.

*Supplemental Security Income Noncitizen Caseload Continues to Grow: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong. (1996), available in WESTLAW, 1996 WL 276554 (prepared statement of Jane L. Ross, Director Income Security Issues, Health, Education and Human Services Division, United States General Accounting Office, Fed. News Serv. Cong. Hearing Testimonies).

<sup>190</sup> Mills, *supra* note 111, at 20.

On May 24, 1993, the *Pai Sheng*, a Honduran-flagged cargo ship with about 200 passengers from the People's Republic of China, slipped beneath the Golden Gate Bridge in San Francisco and moored at an abandoned dock in the Golden Gate National Recreational Area.<sup>191</sup> The passengers disembarked at the dock unwitnessed by INS or any other law enforcement officers and quickly dispersed throughout the area into waiting vehicles.<sup>192</sup> Officers from the United States Park Service Police, the Golden Gate Bridge Police, Military Police from the Presidio military base, and security officers from a local Veterans Administration Hospital, acting on information from the Coast Guard, fanned out through the Golden Gate area, collaring about 182 of the debarkees.<sup>193</sup> The passengers from the *Pai Sheng* were then taken to a building beneath the Golden Gate Bridge to be detained prior to their exclusion processing. The *Pai Sheng* was later apprehended by the U. S. Coast Guard and the ship's crew admitted that they were involved in an organized smuggling operation.<sup>194</sup>

One of the Chinese undocumented aliens applied for review of the exclusion proceedings against him to the Board of Immigration Appeals. The alien "applicant" argued he had made an "entry" into the United States, since effective entry would require the more elaborate deportation proceedings rather than expedited exclusion favored by the INS. The Board stated: "Under our precedent decisions, an "entry" requires: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2) (a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint."<sup>195</sup> The Board, rejecting the INS's argument that the applicant was under "constructive" restraint found that, because the applicant was free from "anywhere from a half hour to 9 hours afterward" to leave the area and to mingle with the population of San Francisco, "the applicant . . . made an entry into the United States when he debarked from his vessel at a place other than a port of entry and fled into the interior undetected, with every apparent intention of evading immigration inspection. The mere fact that he entered an area which was under federal jurisdiction for reasons unrelated to immigration processing does not render his movement something less than an entry."<sup>196</sup>

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<sup>191</sup> *Matter of Z*, 20 IMMIGR. & NATURALIZATION 707, 707-09 (B.I.A. 1993).

<sup>192</sup> *Id.* at 709-10.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 710.

<sup>195</sup> *Id.* at 708.

<sup>196</sup> *Id.* at 713-14. The INS had argued that the alien's presence in the area of a

Undocumented aliens have come a long way from the days of the summary arrest and deportation of Fong Yue Ting and the potentially eternal imprisonment on Ellis Island of the luckless Mr. Mezei,<sup>197</sup> enjoying a right of due process that was not so certain even thirty-five years ago. The key factor for aliens, giving rise to the right to due process, is the ability to make an effective entry:

“Entry” is an important concept in immigration law, because an alien who has made an entry is a “person” within the jurisdiction of the United States, whether or not that entry was legal. As a person protected by the U.S. Constitution, the alien who has made an entry is entitled to deportation proceedings rather than exclusion proceedings as a forum for adjudicating his or her right to be or remain in the United States. The distinction between these two types of proceedings is significant, because in deportation proceedings the government carries the burden of proof, the alien has greater procedural rights, and an automatic stay of deportation is granted pending a direct petition for review in federal court (except for a narrowly drawn class of “aggravated felons”).<sup>198</sup>

Once the alien has entered, the story has just begun, since thereafter follows a period where the alien’s status must receive a label and be accorded rights concomitant with the label so conferred — legal immigrant, asylee, refugee, nonimmigrant, undocumented alien or, maybe, deportee or detainee. Even under circumstances where it may appear that aliens should receive special review, the INS and the federal government, under very considerable powers of discretion, are virtually free to revoke or adversely alter alien status.

In a case marked by a tortuous procedural history, *Legal Assistance for Vietnamese Asylum Seekers v. U.S. Dept. of State*,<sup>199</sup> the Supreme Court ordered that the U.S. Court of Appeals for the District of Columbia reconsider its appellate decision favoring Vietnamese asylee appellees, in

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federal park was analogous to hiding in an airport lavatory, which was determined under precedential case law as not tantamount to an entry and this would have allowed the INS to use the exclusion procedure to remove the alien. *Id.*

<sup>197</sup> The point is all the more compelling when one considers that undocumented aliens have no legal basis for entry, while Fong Yue Ting and his brethren and Mezei *had* legal status that was revoked by governmental action lacking due process. The government has the power to do almost the same thing to a Mezei today, but not to Fong Yue Ting.

<sup>198</sup> See FRAGOMEN & BELL, *supra* note 8, at 1-23.

<sup>199</sup> See *Legal Assistance for Vietnamese Asylum Seekers v. U.S. Dept. of State*, 45 F.3d 469 (D.C. Cir. 1996), *cert. granted*, 116 S.Ct. 2521 (U.S. June 17, 1997) (No. 95-1521).

light of Section 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>200</sup> The case involved the petitions of Vietnamese immigrants claiming discrimination since they were being forced by the United States consulate to return from Hong Kong to Vietnam to apply for asylum. The Court of Appeals had found that the Department of State's action was reviewable on the basis of 8 U.S.C. Section 1152(a),<sup>201</sup> which states in part: "[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality . . . or place of residence." However, the Supreme Court, in a *per curiam* opinion, required the Court of Appeals to reconsider its decision under the language of Section 633, which states that nothing in Section 1152(a)(1) "shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed."<sup>202</sup>

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<sup>200</sup> Enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>201</sup> 8 U.S.C. § 1152(a) (1988 & 1997 Supp.) The asylees had appealed the INS's decision under the Administrative Procedure Act as "aggrieved parties." 45 F.3d 469, 471 (D.C. Cir. 1995) (citing 5 U.S.C. § 702 (1988)). The Court of Appeals held that the INS's interpretation of where the asylees should be processed for their visas could not be upheld under 5 U.S.C. § 706(2)(A) (1988), since "[t]he interpretation and application of the regulation so as to discriminate against the Vietnamese on the basis of their nationality is in violation of the Act, and therefore not in accordance with law." 45 F.3d at 473-74.

<sup>202</sup> IIRIRA, *supra* note 6, § 633, amending Sec. 202(a)(1) of the INA. Under the facts in the first Court of Appeals decision, the State Department in 1993 had instructed an unwilling consulate in Hong Kong to require Vietnamese applicants to return to Vietnam for visa processing. *See* 45 F.3d at 471. This position was consistent with the INS's claim at the time that there was an ongoing abuse of the asylee status by visa petitioners.

[The asylum] process has on occasion been misinterpreted by ineligible aliens as a due process for obtaining work authorization or for avoiding deportation. As you know, the criteria for granting asylum are the same as for granting refugee status. But many illegal aliens in the United States file frivolous asylum claims as a way to gain work authorization or to delay deportation. Often, they use standardized documentation packages which satisfy the basic application requirements but fail to make a legitimate case for a well-founded fear of persecution. They simply want to take advantage of the lengthy process of administrative and judicial review which allows them to remain here until their cases are decided.

The INS must respond to this abuse of asylum regulations as it responds to all efforts to circumvent U.S. immigration laws — with tougher enforcement and better application of those laws . . . .

In another case, *INS v. Elramly*,<sup>203</sup> the Supreme Court — although first granting certiorari — refused to return to the days of *Marcello v. Bonds* to review a resident alien's request to waive deportation on the basis of a 1982 conviction for the sale of \$100 of hashish. The U.S. Court of Appeals for the Ninth Circuit had identified the question in the case as being whether the Board of Immigration Appeals (BIA) had properly considered "unusual or outstanding" countervailing equities in order for it to exercise its statutory discretion to waive deportation.<sup>204</sup> "However, before its official term even started, the Court vacated and remanded the case back to the Ninth U.S. Circuit Court of Appeals to reconsider the case in light of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996," which provides for deportation without an immigration court hearing for certain aliens convicted of aggravated felonies.<sup>205</sup>

In *United States v. Ogbomon*,<sup>206</sup> the Supreme Court was presented the question of whether or not sentencing judges can directly order defendants to be deported. The Court, however, dismissed the case's writ of certiorari as improvidently granted, thereby passing up the opportunity to resolve a conflict among the circuits over whether or not judges should be strictly limited to referring defendants to the INS for deportation proceedings.<sup>207</sup>

The only immigration case that was fully decided by the Supreme Court during the 1996-97 term was *INS v. Yang*.<sup>208</sup> In *Yang*, the Supreme Court held that the U.S. Attorney General is entitled to ignore the

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Gene McNary, *INS Response to Immigration Reform*, xiv IN DEFENSE OF THE ALIEN 6-7 (Lydio F. Tomasi ed., 1992).

<sup>203</sup> 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (Mar. 18, 1996), *vacated and rem'd*, *INS v. Elramly*, 117 S. Ct. 31 (Sept. 16, 1996).

<sup>204</sup> 73 F.3d at 223-24.

<sup>205</sup> See Stephanie Hinz, *Court Acts Upon Last Immigration Case on Its Schedule by Removing It from the Calendar*, WEST'S LEGAL NEWS, Jan. 14, 1997, available in 1997 WL 9349 (referring to the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No 104-132, 110 Stat. 1214 (1996)). Courts of Appeal have likewise held that the AEDPA, as amended by the IIRIRA of 1996, divests the courts of jurisdiction "if an alien was found deportable for two or more crimes of moral turpitude not arising from a single scheme of criminal conduct and has served or been sentenced to a prison or correctional institution for one year or more." *Arevalo-Lopez v. INS*, 104 F.3d 100, 101 (7th Cir. 1997) (citing Section 306(d) of the IIRIRA, amending Section 440(a) of the AEDPA).

<sup>206</sup> 55 F.3d 638 (11th cir. 1995), *cert. granted*, 117 S. Ct. 37 (Oct. 1, 1996), *dismissed*, 117 S.Ct. 725, 1997 WL 8529 (Jan. 10, 1997).

<sup>207</sup> See Hinz, *supra* note 205.

<sup>208</sup> 117 S. Ct. 350 (1996).



“entry fraud” exception (INS may disregard fraud, no matter how egregious, when considering a waiver of deportation) and may consider acts of fraud committed by an alien at the time of his/her U.S. entry when deciding whether to grant a discretionary waiver of deportation.<sup>209</sup> The fact that this “generous disposition” exists neither compels nor requires the INS to exercise it; because as long as the agency does not engage in an “irrational departure,”<sup>210</sup> it is entitled to nearly unfettered discretion.<sup>211</sup> The Court noted in this Fall 1996 decision that jurisdiction to review the Attorney General’s discretion was not confined by Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>212</sup> since that provision would not become effective until April 1, 1997. Section 306(a) provides in part: “[N]otwithstanding any other provision of law, no court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General the authority for which is specified under [Title 8 U.S.C.] to be in the discretion of the Attorney General . . . .”<sup>213</sup>

Among numerous lower court decisions involving alien immigration issues during 1995-97, limitations on alien due process stand starkly illustrated. In one case from the Southern District of New York, an alien’s denial of adjustment of status by the INS was upheld on a summary judgment motion, although questions of fact were raised by (1) the INS’s assertion that the alien’s documents were forgeries and (2) the INS, while refusing to inform the alien of the basis for its conclusion, precluded him from rebutting the allegations.<sup>214</sup> In separate cases from the Ninth Circuit, two Filipino appellants were denied asylum since they were lacking in “well-founded fear[s] of persecution” upon their potential return to their country.<sup>215</sup> In one case, the Court of Appeals, though noting that the appellant had met most of the prima facie test required to qualify for suspension of deportation,<sup>216</sup> held the BIA was within its discretion

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<sup>209</sup> 117 S. Ct. at 352-54.

<sup>210</sup> Behavior that is “arbitrary, capricious, [or] an abuse of discretion” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988 & Supp. 1994).

<sup>211</sup> 117 S.Ct. at 353-54.

<sup>212</sup> IIRIRA, *supra* note 6, § 306(a).

<sup>213</sup> 117 S. Ct. at 352 n.1.

<sup>214</sup> Kodza v. McElroy, 1996 WL 737201 (S.D.N.Y. 1996).

<sup>215</sup> *Astrero v. INS*, 104 F.3d 264, 265 (9th Cir. 1996); *Chanco v. INS*, 82 F.3d 298, 300 (9th Cir. 1996).

<sup>216</sup> An alien must establish:

(1) he has been physically present in the United States for a continuous period of at least 7 years; (2) he is a person of good moral character; [and] (3) his deportation would result in “extreme hardship” to himself or his immediate family member who is

when it found that there would be no "extreme hardship" to the alien if he were deported.<sup>217</sup> In a case with similar themes, the Ninth Circuit denied asylum to a Filipino army officer who was wanted for prosecution by the Philippines government for complicity in the 1987 coup attempt against President Corazon Aquino.<sup>218</sup> Distinguishing a coup from a common crime, the court crafted a rule:

These cases recognize that the fear of prosecution must be evaluated in the context of the legitimacy of the law being enforced. When a government does not respect the internationally recognized human right to peacefully protest, punishment by such a government for a politically motivated act may arguably not constitute a legitimate exercise of sovereign authority and may amount to persecution.

Here, the record shows that diverse political views are tolerated in the Philippines, and [the alien] could have expressed his political opinion without resort to a violent attempt to overthrow the democratically elected government. Because lawful means, as an alternative to coup d'état, were available, the BIA reasoned that the prosecution he faces is not on account of his political opinion but on account of his illegal action. We agree.<sup>219</sup>

Another decision of interest affecting alien due process was an Eleventh Circuit case where the INS was not bound to waive deportation for an alien who, as part of a plea bargain, was told by U.S. attorneys who entered into the written plea agreement that the government would not institute deportation proceedings.<sup>220</sup> The court, responding to the ap-

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a United States citizen or legal alien.

104 F.3d at 266-67 (citing Immigration & Naturalization Act § 244(a)(1), 8 U.S.C. § 1254(a)(1)). Effective April 1, 1997, the physical presence requirement was increased by § 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, Department of Defense Appropriations Act, 1997, which amends the INA to create § 240A, providing a new "cancellation of removal" procedure which is only available if an alien can prove continuous physical presence in the United States for 10 years.

<sup>217</sup>

In determining whether to suspend deportation on grounds of extreme hardship, the Board construes extreme hardship narrowly, and this Court may not substitute its sense of what constitutes hardship in a given case unless the Board abused its discretion, by failing to consider all relevant facts bearing upon extreme hardship or to articulate reasons supported by the record for denying suspension of deportation.

Astrero, 104 F.3d at 267 (citations omitted).<sup>217</sup>

<sup>218</sup> 82 F.3d at 300.

<sup>219</sup> *Id.* at 302.

<sup>220</sup> *San Pedro v. United States*, 79 F.3d 1065, 1067 (11th Cir. 1996).

parent reliance of the U.S. attorneys on the United States Attorney's Manual as the source of their authority, stated that the manual was for guidance only and did "not have the force of law."<sup>221</sup> The court upheld the district court which had affirmed the INS's deportation proceedings, reasoning under agency analysis that, since the Attorney General had not delegated her power, a U.S. Attorney or could not even *negotiate* regarding deportation without obtaining *specific approval* from the Assistant Attorney General of the Criminal Division.<sup>222</sup>

In a Seventh Circuit decision, the court considered the community service of a Filipino family who had come to the United States in 1982 on student and student dependent visas and who, when they had attempted to renew the visas after one year, had deportation proceedings initiated against them.<sup>223</sup> In an opinion by Chief Judge Posner, on reviewing the BIA denial of the application for suspension of deportation, the court evaluated the "extreme hardship" of the family's being returned to the Philippines, noting the great deal of community service the husband and wife had rendered since being in the United States, but especially took note of the plight of their child, Lancelot, who "ha[d] no competence in any language other than English,"<sup>224</sup> and who would have a hard time adjusting to Filipino society. The court found that the BIA had failed to properly weigh the family's "community service," which was a "factor to be considered in deciding whether the statutory criterion of extreme hardship ha[d] been satisfied, so the Board [could not] disregard it" when deciding if extreme hardship were shown to exercise discretion to suspend deportation.<sup>225</sup>

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<sup>221</sup> *Id.* at 1070.

<sup>222</sup> *Id.* at 1070 n.4 (emphasis added). However, consider the following:

I respectfully dissent. The principal issue in this case is not the authority of the United States Attorney's Office with respect to deportation. Rather, the critical issue is whether there has been a violation of San Pedro's fundamental right to due process if, in fact, the government reneged on a prosecutorial promise made as part of San Pedro's plea agreement.

*Id.* at 1072 (Goettel, J., dissenting) (citations omitted).

<sup>223</sup> *Salameda v. INS*, 70 F.3d 447, 448 (7th Cir. 1995).

<sup>224</sup> *Id.* at 451.

<sup>225</sup> *Id.* at 452. But consider:

No administrative opinion has held that an end of service to the community can produce extreme hardship to the alien. The BIA did not have to explain a change of position, for it has not changed positions. I therefore do not understand what the majority can mean in saying that "it is the law of this case that community assistance must be considered."

70 F.3d at 456 (Easterbrook, J., dissenting). Judge Easterbrook argued that, since the INA commits definition of "extreme hardship" to "the Attorney General and his delegates" and that "reasonable men could easily differ" as to the construction of these

In another case involving a Filipino petitioner, an illegitimate child born in the Philippines in 1946 to a U.S. citizen and Filipino mother was unable to prove paternity until 1990 and was denied citizenship on the basis of the lapse of time.<sup>226</sup> The appellee was unsuccessful in asserting that the 1940 Nationality Act, which required proof of paternity as a prerequisite to naturalization, created unequal treatment since the Act required an illegitimate child born out of the country to an alien mother and U.S. citizen father be legitimated or prove his/her paternity before reaching majority, but which did not impose a similar requirement on an illegitimate child born abroad to an alien father and U.S. citizen mother nor on legitimate children born out of the country to a parent who was a U.S. citizen.<sup>227</sup> Although noting a blood test which had proven Ablang's father to be a U.S. citizen with 95.77% probability,<sup>228</sup> the Ninth Circuit applied the "facially legitimate and bona fide reason test" enunciated in *Fiallo v. Bell*,<sup>229</sup> and held that the statute involved was not lacking in a rational basis and was, therefore, not unconstitutional.<sup>230</sup> The Supreme Court denied certiorari of this case.

In a decision from the District Court in New Jersey, a deportation statute was held unconstitutional, which rendered an alien deportable whenever the Secretary of State finds the alien's presence "would have potentially serious adverse foreign policy consequences."<sup>231</sup> The Secretary of State had sent a letter to the Attorney General requesting that the alien, who was a member of one of Mexico's most influential and politically active families and whose brother was murdered during an election campaign, be deported to avoid a chilling effect on mutual law enforcement issues between the United States and Mexico. The court held that the statute, Section 242(a)(4)(C)(i) of the Immigration and Nationality Act violated Fifth Amendment due process, since it did not provide the alien sufficient notice of its consequences and was void for vagueness.<sup>232</sup> However, the Third Circuit reversed and remanded the case with directions to dismiss since the district court lacked jurisdiction to entertain

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words, the court should have deferred to the BIA's "narrow interpretation" of the Salameda's circumstances. *Id.* at 453, 457-58 (citing *Immigration & Naturalization Service v. Jong Ha Wang*, 450 U.S. 139, 145 (1981)).

<sup>226</sup> *Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

<sup>227</sup> *Id.* at 803-04.

<sup>228</sup> *Id.* at 802, 805-06.

<sup>229</sup> 430 U.S. 787, 799 (1977).

<sup>230</sup> 52 F.3d at 805-06.

<sup>231</sup> *Massieu v. Reno*, 915 F.Supp. 681, (D. N.J. 1996), *reh'g denied*, 91 F.3d 416, (3d Cir. 1996).

<sup>232</sup> 915 F.Supp. at 681.

plaintiff's claim under Section 106 of the INA, 8 U.S.C. Section 1105(a), where, if a petitioner wishes to challenge deportation, he/she must first "exhaust available administrative remedies and then petition for review" in the courts.<sup>233</sup>

### B. *Aliens and Public Benefits: Proposition 187 and Progeny*

Without a constant and sincere pursuit of the shining but never completely attainable ideal of the rule of law above men, of "reason" above "personal preference," we would not have a civilized government. If that ideal be an illusion, to dispel it would cause men to lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised. Unattainable ideals have far more influence in molding human institutions toward what we want them to be than any practical plan for the distribution of goods and services by executive [or judicial] fiat.<sup>234</sup>

On November 16, 1994, District Judge Mariana Pfaelzer for the Central District of California entered a temporary restraining order enjoining sections 4, 5, 6, 7 and 9 of Proposition 187, a California voter initiative, eight days after it was voted into law.<sup>235</sup> On December 14, 1994, the court granted a preliminary injunction, enjoining "implementation and enforcement of those sections."<sup>236</sup> In response to a motion for summary judgment by the plaintiffs, the court granted the motion in part and denied it in part, stating that the preliminary injunction would remain in place until the case was resolved in its entirety.<sup>237</sup>

"Proposition 187 consists of ten sections: a preamble (section 1), a section pertaining to the amendment and severability of the initiative (section 10) and eight substantive sections (sections 2-9)."<sup>238</sup> The eight substantive sections consist of five types of provisions. The first type consist of "provisions which require state officials to verify or determine the immigration status of arrestees, applicants for social services and health care, and public school students and their parents, by either

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<sup>233</sup> 91 F.3d at 417, 426.

<sup>234</sup> Thurman Arnold, *Professor Harts' Theology*, 73 HARV. L. REV. 1298, 1311 (1960).

<sup>235</sup> *League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755, 763-64 (C.D. Cal. 1995). The measure was passed by a vote of 59% to 41% on November 8, 1994 and was effective the next day. *Id.* at 763.

<sup>236</sup> *Id.* at 764. The injunction was affirmed by the Ninth Circuit on July 14, 1995. *Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995).

<sup>237</sup> *Id.* at 764, 787.

<sup>238</sup> *Id.* at 764.

classifying persons based on state-created categories of immigration status . . . or verifying immigration status by reference to federal immigration laws."<sup>239</sup> The second group of provisions "require state officials to notify individuals that they are apparently present in the United States unlawfully and that they must 'either obtain legal status or leave the United States.'"<sup>240</sup> The third group of provisions "require state agencies to report immigration status information to state and federal authorities, and to cooperate with the INS regarding persons whose immigration status is suspect."<sup>241</sup> Next, the fourth group, are provisions "which require facilities to deny social services, health care services and public education to individuals based on immigration status."<sup>242</sup> The fifth and last group contain criminal penalties for falsifying immigration documents.<sup>243</sup>

The initiative has a dual purpose and effect. The classification, notification and cooperation/reporting provisions taken together constitute a regulatory scheme designed to deter illegal aliens from entering or remaining in the United States by (1) detecting those persons present in the United States in violation of either state-created criteria for lawful immigration status or federal immigration laws; (2) notifying those persons of their purported unlawful status and ordering them to obtain legal status or leave the country; and (3) maintaining a system of reporting and cooperation between state and federal agencies to effect the removal of those persons. These provisions cannot be read as except a regulatory scheme; and indeed, defendants have not seriously urged any other reading. While the benefits denial provisions also have the purpose of deterring illegal aliens from entering or remaining in the United States, and arguably may be viewed as part of the same regulatory scheme, they have the additional purpose of forbidding the use of public funds to provide social services, health care and education to persons deemed to be present in the United States illegally.<sup>244</sup>

Judge Pfaelzer noted California law holds that "all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient," and that provisions which may be federally preempted, if they can stand alone, may be severed from the rest of an initiative "so

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<sup>239</sup> *Id.* at 764-65.

<sup>240</sup> *Id.* at 765.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

that the remainder may take effect."<sup>245</sup> In California, for a provision to be severable, it must be "grammatically, functionally, and volitionally separable" and can be removed without "affecting the wording of any other provision."<sup>246</sup> Judge Pfaelzer found that the sections and subsections of Proposition 187 were each "a distinct grammatical unit and thus . . . capable of being severed from the other sections and subsections without affecting the wording of any other section or rendering what remains unintelligible."<sup>247</sup> Based on that observation and the principle that "if the voters had known that some of the initiative's provisions would be held invalid, they would have preferred the implementation of the remaining portions, rather than the invalidation of the entire initiative,"<sup>248</sup> Judge Pfaelzer held that the invalid or preempted portions could be severed from the sections that could be preserved.

Judge Pfaelzer used the three tests in *De Canas v. Bica*<sup>249</sup> to determine if the initiative were preempted: (1) whether the state statute is a regulation of immigration, an exclusive federal power; (2) whether the statute is in conflict with federal law in an area where Congress intended to "occupy the field"; and (3) whether the state statute conflicts with federal law making compliance with state and federal law impossible.<sup>250</sup> Stating that Proposition 187 had a "direct and substantial impact on immigration"<sup>251</sup> and that state agents are "unqualified — and also unauthorized — to make determinations of immigration status," since their function in administering state-federal cooperative programs is "ministerial rather than . . . discretionary,"<sup>252</sup> Judge Pfaelzer held:

[T]he classification, notification and cooperation/reporting provisions of the initiative, contained in sections 4 through 9 and in the preamble, which are aimed solely at regulating immigration, are preempted. The provisions which have the permissible purpose and effect of denying state-funded benefits to persons who are unlawfully present in the United States are not a regulation of immigration and therefore survive the first *De Canas* test.<sup>253</sup>

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<sup>245</sup> *Id.* at 765-66 (quoting *Legislature v. Eu*, 816 P.2d 1309, 1313 (Cal. 1991)).

<sup>246</sup> *Id.* at 766.

<sup>247</sup> *Id.* at 767.

<sup>248</sup> *Id.*

<sup>249</sup> 424 U.S. 351 (1976) (holding a California statute prohibiting an employer from knowingly employing an alien who is not entitled to lawful residence in the United States is not preempted by federal law).

<sup>250</sup> *League of United Latin Am. Citizens*, 908 F.Supp. at 768.

<sup>251</sup> *Id.* at 769.

<sup>252</sup> *Id.* at 770.

<sup>253</sup> *Id.* at 771.

Next, under the second *De Canas* test, the Judge found that, while Section 1 and Sections 4-9 dealing with classification, notification, and cooperation/reporting requirements were preempted, the benefits denial provisions of sections 5-8 were not, nor were sections 2 and 3 criminalizing the production and use of false documentation.<sup>254</sup>

Finally, under the third test, Judge Pfaelzer considered whether Proposition 187's classification, notification, and reporting; benefits denial; and criminalization provisions were preempted on the basis of direct conflict with federal law. First Judge Pfaelzer found that, as under the first and second *De Canas* tests,

The classification, notification and cooperation/reporting provisions directly contradict the INA's mandate that the procedure outlined in the INA 'shall be the sole and exclusive procedure for determining the deportability of an alien.' These provisions create a *new, wholly independent procedure*, pursuant to which state law enforcement, welfare, health care, and [state] education officials — rather than federal officials and immigration judges — are required to determine the deportability of aliens and effect their deportation . . . .<sup>255</sup>

As a result, these provisions, therefore, were preempted.

The benefits denial provisions were given an in-depth, complex analysis by Judge Pfaelzer under the third test. First, the classification of eligible beneficiaries for public benefits was found by Judge Pfaelzer as being underinclusive, missing such categories as asylees and parolees, and in conflict with federal systems such as the SAVE system.<sup>256</sup> However, Judge Pfaelzer found these provisions to be severable from the remainder of the initiative and, while certain other language was in conflict with federal law and required severance, the balance of the benefits verification provisions were upheld.<sup>257</sup> Next, under the benefits denial provisions, the Judge noted conflicts in sections 5 and 6 with provisions for federal programs, such as the Women, Infants, and Children (WIC) program and federally funded health care facilities, but reserved future judgment on certain aspects of these sections.<sup>258</sup> Judge Pfaelzer found section 7 of the initiative, denying education to undocumented children and to child citizens of undocumented alien parents, to be entirely preempted by *Plyler*

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<sup>254</sup> *Id.* at 775-76.

<sup>255</sup> *Id.* at 777.

<sup>256</sup> *Id.* at 777-78; for a discussion of the application of the SAVE database system, see also *supra* note 38.

<sup>257</sup> *Id.* at 779-80.

<sup>258</sup> *Id.* at 780-85.



*v. Doe* and federal law in general.<sup>259</sup> However, Judge Pfaelzer did not find section 8 of the initiative, prohibiting public postsecondary schools from admitting, enrolling, or permitting the attendance of persons who are not "authorized under federal law to be present in the United States," to be preempted by the third *De Canas* test, nor did she find preempted sections 2 and 3 of the initiative punishing document fraud by fines and imprisonment.<sup>260</sup>

In summary, in her opinion decided November 20, 1995, Judge Pfaelzer left in place the preliminary injunction issued nearly a year before, holding that the state scheme aping INS enforcement was preempted; that certain aspects of the state benefits denial provisions where these did not conflict with federal law were not preempted; that the denial of primary and secondary education was preempted by *Plyler*, but that the denial of postsecondary enrollment was not preempted; and that the initiative's criminalization of document forgery did not conflict with federal law.<sup>261</sup>

The debate over Proposition 187 and the Pfaelzer decision heralded Congressional action which resulted in the passage of Chapter 14 of Title 8 of the United States Code — "Restricting Welfare and Public Benefits for Aliens."<sup>262</sup> Section 1601(5) sums up the general purpose of the act: "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."<sup>263</sup> Additionally, the act includes this provision:

With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classifications in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.<sup>264</sup>

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<sup>259</sup> *Id.* at 785-86.

<sup>260</sup> *Id.* at 786.

<sup>261</sup> *Id.* at 786-87.

<sup>262</sup> 8 U.S.C. §§ 1601-1645 (1997 Supp.), Title IV, Pub.L. No. 104-193, 110 Stat. 2260 (Aug. 22, 1996).

<sup>263</sup> 8 U.S.C. § 1601(5) (1997 Supp.), Title IV, § 400, Pub.L. No. 104-193, 110 Stat. 2260 (Aug. 22, 1996). The title of Section 1601 is "Statements of National Policy Concerning Welfare and Immigration."

<sup>264</sup> 8 U.S.C. § 1601(7) (1997 Supp.), Title IV, § 400, Pub.L. No. 104-193, 110 Stat. 2260 (Aug. 22, 1996).

In addition to such major provisions under Chapter 14, such as Subchapter I, "Eligibility for Federal Benefits"<sup>265</sup> and Subchapter III, "Attribution of Income and Affidavits of Support,"<sup>266</sup> Subchapter II is titled "Eligibility for State and Local Public Benefits Programs."<sup>267</sup> Section 1621, subsection a, states:

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits.

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not —

- (1) a qualified alien (as defined in section 1641 of this title),
- (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], or
- (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).<sup>268</sup>

<sup>265</sup> The Subchapter limits federal benefits to "qualified alien[s]" as defined in 8 U.S.C. § 1641, with certain eligibility exceptions allowed for specific federal benefits under 8 U.S.C. § 1611(b). 8 U.S.C. §§ 1611(b), 1641 (1997 Supp.).

<sup>266</sup> This Subchapter imposes a continuing requirement of fiscal responsibility for sponsors of aliens, particularly those who might avail themselves of public benefits; the states are also given the right to attribute "sponsors income and resources to the alien with respect to State programs." 8 U.S.C. §§ 1631-1632 (1997 Supp.).

<sup>267</sup> 8 U.S.C. §§ 1621-1622 (1997 Supp.), Title IV, §§ 411-412, Pub.L. 104-193, 110 Stat. 2268-2269 (Aug. 22, 1996). This passage appears to find philosophical support in *De Canas v. Bica*, 424 U.S. 351 (1976).

<sup>268</sup> 8 U.S.C. § 1621(a) (1997 Supp.). Subsection (b) lists exceptions to this preclusion from benefits such as emergency medical treatment, short-term disaster relief, public health immunizations and:

- (4) Programs, services or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

8 U.S.C. § 1621(b)(1)-(4) (1997 Supp.). Subsection (d) allows states to make otherwise ineligible aliens under Section 1621(a) eligible through provisions in state laws. 8 U.S.C. § 1621(d) (1997 Supp.).

Section 1622 authorizes states to determine eligibility for any state public benefits for "qualified alien[s]," nonimmigrant aliens and aliens paroled for less than one year.<sup>269</sup> The Section also provides exceptions for refugees and asylees based on time limitations, certain permanent resident aliens, veterans and aliens and dependents based on active U.S. military service and a grandfathering for aliens "lawfully residing in any State" until January 1, 1997.<sup>270</sup>

Although Proposition 187's attack on undocumented aliens was blunted by Judge Pfaelzer's analysis and the severing of provisions directly assaulting constitutionally accorded alien protections, the essence of the initiative lingered because the court permitted benefits denial provisions that did not conflict with federal law to remain. The recently enacted Chapter 14, Title 8, United States Code in effect sanctions California, New York, Texas and more hesitant states to move forward in their goals to restrict or reduce alleged costs resulting from the infusion of undocumented aliens into American society. The new amendments to the INA will require re-examination of holdings such as *Lewis v. Grinker*,<sup>271</sup> where the Second Circuit affirmed the district court in enjoining the Secretary of Health and Human Services from denying Medicaid coverage for prenatal care to otherwise eligible women who were not permanently residing under color of law (PRUCOL).<sup>272</sup>

Denial of public benefits for "citizen children" of undocumented aliens has been central to the debate over the legal and ethical permissibility of foreclosing benefits to undocumented aliens.<sup>273</sup> Although citizen

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<sup>269</sup> 8 U.S.C. § 1622(a) (1997 Supp.).

<sup>270</sup> 8 U.S.C. § 1622 (b)(1)-(4) (1997 Supp.).

<sup>271</sup> 965 F.2d 1206, 1221 (2d Cir. 1992).

<sup>272</sup> The court's reasoning was posited primarily on the U.S. citizen status of the children:

Newborn children are automatically eligible for Medicaid in their own name if their mothers were eligible for Medicaid-sponsored prenatal care. If non-PRUCOL pregnant women are ineligible for Medicaid, then the child of an alien would not automatically be eligible for Medicaid while the child of a citizen would. Yet both children are United States citizens. Such discrimination against the citizen child on the basis of the alien status of the parent would raise serious equal protection questions.

*Id.* at 1217 (citations omitted).

<sup>273</sup> See Larry M. Leaman, *The Citizen Child and Undocumented Parents*, 52 PUB. WELFARE, Spring 1994, at 21.

We must realize that while we have a good count on the IRCA amnesty population in this country, we can only guess at the number of undocumented parents of citizen children, much less the total undocumented population. I will venture that most public agency officials with AFDC, food stamp, child welfare, Medicaid, and housing assistance caseloads under their jurisdictions do not know how many such citizen-child cases they actually have in these programs. We do not know because we do not ask, and we do

children have a clear claim to public benefits inherent in their native-born citizenship status, their parents or foreign-born siblings may not. The state of affairs may not only cause a schism in the health of immigrant family members, but the bar to benefits may also cause deleterious effects to the general public health.<sup>274</sup> The controversy has also brought into focus race, class, and gender issues inherent in denial of public benefits to discrete groups of potential beneficiaries.<sup>275</sup>

Equal protection analysis does not go far in assessing the position of the undocumented alien in regard to public benefits, since undocumented alien rights have largely been viewed through the *ad hoc* prism of scattered lower court decisions, and *Plyler* did not reach equal protection as a broad-focus issue. Perhaps the most telling component of the public benefits debate is the aura or implication of exploitation inherent in the fact that industries, such as agriculture in California, benefitted incalculably from the cheap, unorganized labor that the undocumented provided.

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not ask because federal law and regulations preclude us from asking. In other programs, we may ask in order to determine family composition and eligibility; but such data are not tracked in the aggregate, as they are not statistics we are mandated to generate.

All states with large immigrant and alien populations are wrestling with this issue. See, e.g., Carolyn S. Salisbury, Comment, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 U. MIAMI L. REV. 633, 634 (1996) (presenting one Floridian's view of *Plyler* means to its minor population of the undocumented).

<sup>274</sup> Schuler, *supra* note 7, at 280.

Negative repercussions of Proposition 187 are already being felt. The portion of the act purporting to deny medical care to undocumented persons has been particularly harmful. Even before the election, while proponents harangued about the money denial of medical care would save, opponents were countering that disease could spread more easily without medical care, even to the documented and citizen population. Within the two weeks after the measure passed, hospital outpatient clinics and community facilities reported a ten to twenty percent decline in patient visits, since undocumented patients feared deportation if they kept their appointments. One death has already been blamed on the measure; a 12-year-old boy died of leukemia complications when his parents, hearing of the passage of the proposition, were afraid to take him to his clinic appointments . . . .

*Id.* (citations omitted).

Undocumented immigrants fare much worse [in not seeking preventive care]. Practically two-thirds (65.2%) of the immigrants [in a particular sample] never had a general check-up when not ill. Preventive care is least common among recent undocumented migrants, and most common among long-term legal immigrants. However, recent legal migrants are more likely to have had a check-up when not ill than undocumented immigrants who have been in the U.S. more than 3 years, indicating the importance of immigration status, and its socioeconomic characteristics, for understanding patterns of preventive care usage.

Chavez et al., *supra* note 49, at 99 (citations omitted).

<sup>275</sup> See, e.g., Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995).

Once the workers had finished their tasks, leaders, such as Governor Wilson, swiftly switched positions and advocated their removal:

California's Proposition 187, adopted in conscious violation of the holding in *Plyler*, may offer a broader context in which to understand the inadequacy of hornbook equal protection doctrine to address the problem of state discrimination against "illegal" aliens. *Plyler's* analysis was predicated on the likely permanence of the children's presence in Texas and the life-long infliction of harm and exploitation that keeping them illiterate would entail. The Court decided *Plyler* during the period when the so-called "Texas proviso" left most employers immune from sanctions for availing themselves of "illegal" aliens' labor . . . . Thus, the aspect of illegal migration addressed in *Plyler* involves collective hypocrisy, permitting the "illegal" label to reinforce the vulnerability of migrants to exploitation.

. . .

But Proposition 187 adds a further dimension not present in *Plyler* that should also be addressed. Unlike the Texas law in *Plyler*, Proposition 187 imposes a systematic program for driving "illegal" aliens out of California. In Governor Pete Wilson's vivid terminology, it aims to induce aliens to "self-deport". . . . It therefore provokes us to inquire whether any limits exist on a state's creation of disincentives for unlawful residents to enter or remain in the state. The problem is framed by the peculiar circumstance that the state has legitimate interest in deterring "illegal" aliens from residence but no power to remove them directly . . . .<sup>276</sup>

The trend to curtail the benefits of aliens is a direct result of the backlash against the undocumented and a response to fiscal crises, which, as in prior times, have been blamed by the nativist element on immigrant aliens in general and the undocumented in particular. Congress, for example, in 1993 and more recently, limited Social Security benefits by increasing residence requirements so that many aliens became ineligible.<sup>277</sup> Other states can be expected to take steps imitative of California, as Wisconsin and New York did in the 1980s following the enactment of IRCA, curtailing medical and other benefits used by aliens.<sup>278</sup>

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<sup>276</sup> See Neuman, *Aliens as Outlaws*, *supra* note 48, at 1444-45 (citations omitted).

<sup>277</sup> See Schuck, *supra* note 10, at 91.

<sup>278</sup> Carrasco, *supra* note 51, at 591, 596 n.23 (1994) (stating that after the enactment of the Immigration Reform and Control Act of 1986, Wisconsin legislatively banned medical assistance benefits to certain aliens and New York used an administrative directive to disqualify newly legalized aliens from public assistance).

Several New York counties and state senators filed suit claiming that, in carrying out its immigration policy, the federal government violated various statutory and constitutional provisions, including the Naturalization Clause, the Guarantee Clause, the Invasion Clause, the Tenth Amendment, and the Administrative Procedure Act.<sup>279</sup> The plaintiffs sought monetary support from the federal government to compensate New York and its subdivisions for the expenditures it has been constrained to make as a result of the federal government's immigration policy.<sup>280</sup> Using such cases as *McCulloch v. Maryland*,<sup>281</sup> *Baker v. Carr*,<sup>282</sup> and *Fiallo v. Bell*,<sup>283</sup> the court held that the claims brought under the Naturalization and Guarantee Clauses were nonjusticiable political questions, and that to be afforded the protection of the Invasion Clause the state must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government.<sup>284</sup> In regard to the Tenth Amendment claim that New York was "coerced" into providing health and other services, the court rejected the argument that the state's legislative processes had been "commandeered" by the federal government, stating: "[The state] must provide emergency medical services to illegal immigrants, this is only true because New York State participates in the federal Medicaid program, . . . a voluntary program in which states are free to choose whether to participate. If New York chose not to participate, there would be no federal regulation requiring the state to provide medical services to illegal aliens."<sup>285</sup> The court pointed out that aliens had been incarcerated under the state's laws, not in response to a federal obligation, and rebuffed the claim that the court should review the manner in which the INS used its resources, as an interference with an internal discretionary matter of a government agency.<sup>286</sup>

Other states using similar arguments — meeting with similar success — were California,<sup>287</sup> New Jersey,<sup>288</sup> and Texas.<sup>289</sup> Following the

<sup>279</sup> *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996).

<sup>280</sup> *Id.* at 23.

<sup>281</sup> 17 U.S. 316 (1819). The U.S. Supreme Court has held that the federal government may exercise its plenary powers even though the effects of such exercises of power may be onerous to the states. *See* 82 F.3d at 26.

<sup>282</sup> 369 U.S. 186 (1962). There is "a textually demonstrable constitutional commitment" of naturalization and immigration to Congress. *See* 82 F.3d at 27.

<sup>283</sup> 430 U.S. 787, 792 (1977). "[T]he power over aliens is of a political character and therefore subject only to narrow judicial review." 82 F.3d at 27.

<sup>284</sup> 82 F.3d at 28.

<sup>285</sup> *Id.* at 29 (citations omitted).

<sup>286</sup> *Id.*

<sup>287</sup> *California v. United States*, 104 F.3d 1086 (9th Cir. 1997).

<sup>288</sup> *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996).

passage of the plethora of major immigration bills during 1996-97, litigious states may become energized by what they perceive as a fiscally restrictionist trend running against undocumented aliens.

*C. Culture Clash: The Newly Arrived Encounter Those Who Came Before*

[W]hen immigrants arrive, some kind of magic happens: they do extraordinary things, things they couldn't do at home. In Indochina the Asians fight, rent by factionalism; here they build and get dressed up and go to the Westinghouse Awards and Ivy League commencements. In Greece the young are sunk in a funk, with widespread joblessness; here they become entrepreneurs. In Jamaica, people find that just living day to day can be a struggle; here they've raised Colin Powell to become a hero, general, and chairman of the Joint Chiefs of Staff.

. . .

[W]e must not permit school texts to imply, as some do, that "America was founded by white male Euros who broke from Britain over taxes but retained slaves, and two centuries later the liberation is not complete because racism is still rampant." Such sour revision is not helpful. And it omits a salient truth: those seeking justice over the years were lucky enough to be operating in a country that had not only a Constitution, but a conscience, to which an appeal could be made. This is a triumph of idealism that is forever a tribute to the human spirit.<sup>290</sup>

Evidence abounds in U.S. daily life of both the presence and impact of immigrants in American society. Immigrants deposit their wealth and savings in U.S. banks,<sup>291</sup> publicly exercise a variety of religions and folk customs,<sup>292</sup> fall prey to victimization and crime often perpetuated

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<sup>289</sup> Texas v. United States, No. B-94-228 (S.D. Tex. 1995).

<sup>290</sup> Peggy Noonan, *Why the World Comes Here*, in ARGUING IMMIGRATION, *supra* note 2, at 178-79.

<sup>291</sup> See Lore Croghan, *Melting Pot's a Pot of Gold*, CRAIN'S N.Y. BUS., Mar. 3-9, 1997, at 3, 44. Greater New York Savings Bank, operating in immigrant neighborhoods in boroughs such as Brooklyn, has employees who speak 35 languages and ATM machines offering six language options in a move to serve the surge of 536,000 legal immigrants who arrived in the New York City area between 1990 and 1994. See *id.* at 44.

<sup>292</sup> See Somini Sengupta, *Ramadan Enters New York City School Life*, N.Y. TIMES, Feb. 6, 1997, at A1 (commenting that New York City schoolchildren observe "Islam's holiest period," having an effect on fellow students and school life).

by other immigrants,<sup>293</sup> and struggle to bring their families from far-off homelands to join them in the betterment of their lives.<sup>294</sup>

Although there was some perception of improvement in the 1980s, analysts have asserted that many recent immigrants are inferior by historical standards, possessed of few skills and less education, coupled with the claim that "there are strong links between the shifts in national origins and declining immigrant skills."<sup>295</sup> Claims that recent immigrants lack skills are puzzling, especially in light of the fact that during the late 1970s and the 1980s, employers were forced to go abroad to recruit temporary workers for certain professional and semi-professional occupations, due to a dearth of such persons in the United States. These "so-journers" were invited under programs which required special immigration legislation to admit sufficient quantities of skilled workers. The continuing need for these workers becomes apparent when one stops to note the difficulty Congress has in abolishing temporary worker legislation that perpetuates visas for skilled workers such as registered nurses.<sup>296</sup>

Rationalizing more stringent immigration controls posited on a negative skills assessment seems all the more disingenuous — and downright

<sup>293</sup> See Michael Cooper, *Evidence in Queens for a Trial in China*, N.Y. TIMES, Mar. 15, 1997, at 27 (discussing an outbreak of kidnappings and torture against Fujianese immigrants by other Chinese and how an internationally cooperative police effort by the NYPD and the PRC police cracked the case).

<sup>294</sup> See Celia W. Dugger, *Immigrant Study Finds Many Below New Income Limit*, N.Y. TIMES, Mar. 16, 1997, at A1. A Federal study found that the new INA amendments would make it very difficult for poor and working-class immigrants to bring family members to the United States legally, especially for Mexicans and Salvadorans, since it will require those sponsoring family members to earn at least \$19,500 for a family of four. See *id.*

<sup>295</sup> See Edward Funkhouser & Stephen J. Trejo, *The Labor Market Skills of Recent Male Immigrants: Evidence from the Current Population Survey*, 48 INDUS. & LAB. REL. REV. 792 (1995).

<sup>296</sup> See Extension of Stay in United States for Nurses, extending the authorized period of stay for nurses to September 30, 1997, whose "period of authorized stay has expired or would expire before September 30, 1997 . . ." § 1(a)(1)-(2), Pub.L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

Again, I will be withdrawing my reservation, but with the understanding that we are not going to just do this every year, and their employers and the nurses are on notice that they should use this time to start preparing themselves, No. 1, to go back to their home country, and, No. 2, to find Americans who can work as nurses in these areas in rural North Carolina, as well as in Chicago and elsewhere where there are, as I say, spot shortages of nurses.

EXTENDING PERIOD OF STAY IN UNITED STATES FOR CERTAIN NURSES, PROCEEDINGS & DEBATES, H.R. DOC. H12293-01, 104th Cong., 2d Sess. (Oct. 4, 1996), available at 1996 WL 56773.



unfair — when one perceives the volume of immigrant labor — particularly undocumented — that the United States utilizes to serve its retail customers, work in its factories, or till its soil and raise its crops.<sup>297</sup>

In a similar vein, although there are some tensions over immigrants in the workforce and the effect of the global economy on jobs,<sup>298</sup> labor unions and other groups have sought to reach out to immigrant workers who are often unfamiliar with U.S. laws<sup>299</sup> — while U.S. law has on occasion been extended to offer aliens and immigrants some form of worker protections.<sup>300</sup> Though laws confuse the immigrant, culture arguably is the issue that causes alarm and conflict for immigrants.<sup>301</sup> As an example, consider the situation when Indochinese refugees landed in San Francisco during the 1970s following the Vietnam War.<sup>302</sup>

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<sup>297</sup> See *Illegal Aliens Make Up 57% of Migrant Farm Work Force, Study Shows*, WEST'S LEGAL NEWS, Aug. 1, 1996, available at 1996 WL 427620.

The study's results are more than double the estimates made by the U.S. Department of Labor. The study also found that none of the undocumented workers was denied a job because of lack of legal identification, two out of 10 illegal alien workers refused to complain about poor working conditions or wages for fear of deportation, and a majority of illegal workers favored some kind of unionization. The farmer employers responded to the study by saying that spotting illegal aliens is an impossible task.

*Id.*

<sup>298</sup> See Keith Bradsher, *Skilled Workers Watch Their Jobs Migrate Overseas*, N.Y. TIMES, Aug. 28, 1995, at A1. While jobs for the skilled migrate, U.S. employers are also hiring skilled foreigners who will often work more cheaply. See Bob Davis et al., *Unions Threatened by Global Economy*, WALL ST. J., Mar. 25, 1996, at A11.

<sup>299</sup> See David Gonzalez, *Unions Open Drive to Recruit Immigrants*, N.Y. TIMES, Sept. 5, 1995, at B4; Pamela G. Rubin, *Immigrants as Grievants: Protecting the Rights of Non-English Speaking Union Members in Labor Arbitration*, 8 GEO. IMMIGR. L.J. 557 (1994). On the problem of immigrant comprehension of U.S. law, see James W. Meeker & John Dombrink, *The Undocumented and Their Legal Needs*, 15 HUMBOLDT J. SOC. REL. 105 (1988); Chad Richardson & Joe Feagin, *The Dynamics of Legalization: Undocumented Mexican Immigrants in the United States*, 3 RESEARCH IN POL. SOC. 179 (1987).

<sup>300</sup> See Foo, *supra* note 41, *passim* (arguing for such protective legislation); see also *Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883 (1984) (extending protection of the National Labor Relations Act to the undocumented alien). *But cf.* *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218 (3d Cir. 1991) (holding that vessels engaged in foreign operations did not become subject to the Fair Labor Standards Act when their vessels transitorily reflagged under the U.S. flag, were transferred to an American corporation, and were leased back to a foreign company).

<sup>301</sup> See *Hampton v. Mow Sung Wong*, 426 U.S. 88, 92 (1976) ("The complaint alleged that there are about four million aliens living in the United States; they face special problems in seeking employment because our culture, language, and system of government are foreign to them . . ."). *Id.*

<sup>302</sup> See *The New Arrivals: Indochinese Face Culture Shock*, 5 PRACTICE DIGEST 6

News reports out of San Francisco may have brought home to Americans how different these refugees were from others. The reports noted that animals were being trapped in the city's Golden Gate Park. The park's ponds were being used for fishing. The fishermen and trappers, it turned out, were Hmong refugees from Laos, hill people who were trying to carry on their rural way of life in the most rustic part of San Francisco they could find.<sup>303</sup>

Sometimes cultural confusion manifests itself in legal issues. Vietnamese immigrants, for example, have experienced violations of civil rights and harassment by U.S.-born citizens and prevailed in resulting civil rights actions<sup>304</sup> litigated against the State of California over whether they could use traditional "gill nets" to fish,<sup>305</sup> and found that they could not void a waiver of *Miranda* and other rights by asserting that the waiver was not "knowing and voluntary," since there had been an interpreter present fluent in Vietnamese and English.<sup>306</sup>

American political and legal analysts have assessed culture as a necessary factor one must consider. David Ziskind, legal comparativist, has identified awareness of "cultural bias" as a necessary component of legal analysis.<sup>307</sup> Though Ziskind's ideas are targeted toward comparing laws of different countries and societies, particularly labor laws, the idea

(1983) (published by Nat'l Assn. of Social Workers).

<sup>303</sup> *Id.*

An initial topic was the distinction between mental health and mental illness. Dinh Nguyen, a social worker with the project, explain[ed] that to the Vietnamese, a mental illness may have to do with evil spirits, whereas conflicts with a spouse or employer are usually dealt with by conversation with a friend or a monk. "The idea of being crazy is understood," he sa[id], "but the notion of what craziness entails varies from culture to culture."

*Id.* at 8.

<sup>304</sup> *See, e.g., Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan*, 543 F.Supp. 198 (S.D. Tex. 1982).

<sup>305</sup> *Vietnamese Fishermen's Assn. of America v. California Dept. of Fish & Game*, 816 F.Supp. 1468, 1469 (N.D. Cal. 1993) (holding state law preempted by federal law).

<sup>306</sup> *United States v. Pham*, 815 F.Supp. 1325, 1328 (N.D. Cal. 1993).

<sup>307</sup> *See* David Ziskind, *Cultural Bias in Labor Law Comparison*, 6 COMP. LAB. L. 275 (1984).

Bias is inherent in all thought. Thinking is a process of cumulative experience. It is embedded in neural patterns that may be modified from time to time but that remain in the cortex of the brain; and ideas and actions that emerge when those past patterns are activated . . . . That body of prior knowledge has a built-in cultural bias. The conditioning of individual experiences by social interaction tends to form similarities in bias, or many cultural biases, characteristic of different groups in societies. These take expression, as patterns, themes, or styles.

*Id.* at 276.

of cultural bias, especially emanating from socio-cultural, religious, linguistic, and ideational factors is appropriate when one considers the immigrant debate. A component of the furor being spouted over legal, as well as illegal, aliens arises from perception by Americans of various levels of sophistication who feel the character of U.S. society may be forever altered by exposure to the multitude of cultures descending on U.S. shores, resulting in espousal of an old-style nativist sentiment.<sup>308</sup> A primary reason for this type of attitude originates in unfamiliarity with the cultures of other groups and a bias by the perceiving group — whether biased in favor of U.S. norms or those of another culture — that one's own preferred norms are superior.

Leading social scientists and legal theorists see some of these differences as illusory. Francis Fukuyama, in an essay critiquing Peter Brimelow's book, *Alien Nation: Common Sense About America's Immigration Disaster*, explodes the notion that there is a "white" American cultural group.<sup>309</sup> Fukuyama believes there was every bit as much distance among Catholic Irish, Jewish descendants from Russia and the Austro-Hungarian Empire, Italians from southern Italy, and other Caucasian groups at the time of their first encounter as there is today when so-called "white Americans" meet Mexicans and other immigrants: "Though this is not always apparent today, the degree of cultural and *perceived* racial distance between these groups was *every bit as great* at the time they arrived here as the distance between the "median" Anglo of today (named Pezzuli or Steinberg) and a recent Mexican immigrant."<sup>310</sup> Fukuyama pointedly assails the inherent "cultural bias" (innate stereotypical perceptions) that appear in Brimelow's book:

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[P]roposition [187] states that those "suspected" of not being legally documented will be questioned. That means anyone who looks foreign, speaks with an accent or doesn't fit into the stereotype of a blond, blue-eyed, red-blooded American. This would create conflict, paranoia and controversy. Already, United States citizens who appear Hispanic are asked to show their documentation on a regular basis. These citizens fear Proposition 187 will legitimize these harassing inquiries.

Schuler, *supra* note 7, at 280 (citations omitted). Fifty-six percent of African-Americans voted against the Proposition 187 initiative, possibly under influence of groups such as the National Urban League, whose spokesperson said "[I]f you're Black and you vote for 187, you're not just voting against Hispanics, but you're also voting for the kind of thing that has been used against Blacks since time began." Tamayo, *supra* note 26, at 31-32.

<sup>309</sup> Francis Fukuyama, *Culture Vulture*, NAT'L REV., May 1, 1995, at 77 (book review).

<sup>310</sup> *Id.* (emphasis added).

The fact is that there is a mountain of empirical evidence indicating not just that Asians *may* have the right “Puritan, Anglo-Saxon” virtues, but that they have them to a significantly *higher* degree than people actually of Protestant Anglo-Saxon descent (many of whom are today either ultra-liberals pushing the multiculturalist agenda, or else poorly educated, low-income workers in the rural South, whose families are fraying and whose politics are increasingly up for grabs as a result of their downward social mobility).<sup>311</sup>

Culture is perhaps more essential to the immigrant debate than any other element in the diatribe. William Bennett affirms this assessment:

The immigration issue evokes the strongest passions in the cultural, and not the economic, arena. Indeed, immigration cannot be fully understood outside a larger cultural context. There is an alarming reluctance in our schools and universities to affirm, advance and transmit our common American culture. And while it has profound implications for immigration, I believe contemporary American society’s most serious problems are more fundamental than, and different from, immigration. Our problem does not have to do with legal immigration but with assimilation — and assimilation not just for people born in foreign lands but for the people born in this nation.<sup>312</sup>

Bennett notes that cultural anthropologist David Murray has referred to new-born children as the “ultimate undocumented aliens,” since they are not born with culture or society and “they must be helped to become citizens every bit as urgently as, say, refugees from Southeast Asia. If we fail the American-born children, they will be the aliens who overwhelm us.”<sup>313</sup>

“Our common American culture” is familiar to most people on earth through transmission via various forms of media — television, computer technology, and even books. Perhaps among the other magnets drawing immigrants — economics, rights under the rule of law, refuge from persecution — U.S. culture is one of the most powerful forces drawing in immigrants legal and undocumented alike.

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<sup>311</sup> *Id.* at 78 (emphasis added).

<sup>312</sup> Bennett, *supra* note 43.

<sup>313</sup> *Id.*

## V. NORMATIVE VERSUS CONSTITUTIONAL CONCERNS: A WORD ABOUT PLENARY POWER AND NATURAL LAW

Whatsoever thou wouldst that men should not do to thee, do not do that to them. This is the whole Law. The rest is explanation.

Ha-Babli (c. 30 B.C.)<sup>314</sup>

Deciding 14,000 cases a year, the Board is bound to commit some howlers.

Circuit Judge Easterbrook (1995)

(referring to Board of Immigration Appeals)<sup>315</sup>

Federal immigration power is said to be a “plenary” power of the federal government: It is a power “[f]ull, entire, complete, absolute, perfect, unqualified.”<sup>316</sup> Insofar as these words affect immigration, what can they mean? Apparently, as we have seen above, the words connote a power that springs from itself, spun from the whole cloth of its own self-creation and self-perpetuation. In a sense the plenary immigration power is legal fiction — created by necessity via whirring mechanisms of sovereignty, the necessity for nations to deal transnationally with other sovereign nations, and the necessary ability of the national power to regulate the several states when their dealings go beyond their borders or mere internal affairs. States once held an original sovereign power to regulate immigration, as Professor Neuman has illustrated,<sup>317</sup> but the federal government removed the power from the sphere of individual state governance as a power not only in conflict with federal supremacy but also a power the states did not wield wisely. There is a question that flows from this observation: if the states did not, could not wield the power well, then has the federal government done so?

The federal government essentially created the immigration power from sparse provisions in the Constitution<sup>318</sup> and waited about 100 years until the post-Civil War Reconstruction to enact equally sparse supplemental legislation — primarily based on racial characteristics of the

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<sup>314</sup> THE GREAT QUOTATIONS 292 (George Seldes ed., 1960).

<sup>315</sup> *Salameda v. INS*, 70 F.3d 447, 458 (7th Cir. 1995) (Easterbrook, J., dissenting).

<sup>316</sup> BLACK'S LAW DICTIONARY, *supra* note 80, at 1154.

<sup>317</sup> See Neuman, *Lost Century*, *supra* note 9, *passim*.

<sup>318</sup> U.S. CONST. art. I, § 8, cl. 4.

subject groups.<sup>319</sup> This sparsity was supplemented by judicial decisions, which were hardly categorizable as the hallmark of jurisprudence:

The applicant has fully met every requirement of the naturalization statutes except [those provisions] relating to racial limitation. Applicant's grandfather was a full-blooded Portuguese, and his grandmother was a native Chinese living on the Island of Macao, a Portuguese possession near Hong Kong, China. His father married a Chinese native of Macao. Applicant claims to be a "free white person" through Portuguese strain on the paternal side.

"Free white persons" includes members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races . . . .

Applicant comes within the class of persons of mixed blood. *In re Camille* (C.C.) 6 F.256, it was held that a person of half Indian blood, whose father was a white Canadian and his mother an Indian woman, is not a "white person," within the meaning of [the statute] . . . .

It seems clear to this court that applicant Fisher is barred by [the statute] and his petition is therefore denied.<sup>320</sup>

The *Fisher* case above is a good example of the flawed reasoning that served as the foundation for the evolution of U.S. immigration policy. In the simple passage above, the judge engages in an analysis of genetics — or more aptly a crankish form of eugenics — to reach a legal conclusion based on a federal statute which speaks of "free white person[s]" fifty-two years *after* the Civil War had ended.<sup>321</sup> Is it so certain that, even today, lawful and unlawful immigrants alike are insulated from being abused by such bogus, quasi-legal methodology?<sup>322</sup>

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<sup>319</sup> A naturalization law was passed in 1870 which declared that "[t]he naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent." Act of July 14, 1870, 16 Stat. 256. For a recent evaluation of United States naturalization policies, categorized as "backward-looking," see Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237 (1994).

<sup>320</sup> *In re Fisher*, 21 F.2d 1007 (N.D. Cal. 1927).

<sup>321</sup> Perhaps such considerations are not entirely absent today even at sophisticated levels of U.S. society. For instance, the cover of the March 24, 1997 issue of the *National Review* ("Manchurian Candidate") shows President Clinton, Mrs. Clinton, and Vice President Gore dressed in Chinese regalia, but also possessing exaggerated and stereotypical Asian racial characteristics, in regard to a story relating to PRC contributions to the Clinton campaign war chest. See Rich Lowry, *China Syndrome*, NAT'L REV., Mar. 24, 1997, at 38.

<sup>322</sup> Consider, for example, the process by which an alien obtains a visa in a foreign

As demonstrated above, aliens who are present within the borders of the United States do receive some constitutional protections since they are "persons" within the meaning of the U.S. Constitution. "Thus, they receive the protection of the Bill of Rights, including the Fifth Amendment due process clause, and the Fourteenth Amendment due process and equal protection clauses."<sup>323</sup> The irony and paradox is that, although aliens are entitled to powerful guarantees of constitutional protection from action by the individual states, their legal status and the true source of their alien rights flow from the much more limited, judicially and administratively driven federal plenary power. In effect, this limitation had, until recently, made aggressive actions against aliens by individual states largely irrelevant and legally ineffectual. However, with passage of such measures as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states have been given much more leeway to bring alien rights into the cross-hairs of restrictionism, particularly in their onslaught on the pale reasoning in the *Plyler* holding and its thin patina of protection for the constitutionally vulnerable undocumented alien.

Core to the exchange over the rights of lawful resident and nonresident aliens, and the rights of undocumented aliens are economic issues,<sup>324</sup> since categorizing the rights of aliens as economic in character accords them far less protection under equal protection doctrine than rights that are fundamental or which involve suspect classifications.<sup>325</sup> In

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country from the United States consulate:

The negative decisions of consular officers are theoretically subject to review by a supervisory consul. These supervisors, however, frequently serve more than one consulate, or are themselves overburdened with casework. In either case, they lack the time necessary to subject these decisions to more than perfunctory review . . . .

The State Department may also review consular decisions, but only with regard to questions of law. Factual determinations remain within the absolute discretion of the consular officer . . . . Moreover, parties adversely affected by a consul's action cannot seek redress in federal courts, since the judiciary has repeatedly held that administrative determinations in this area are final unless judicial review is authorized by explicit statutory language . . . .

HULL, *supra* note 8, at 168 n.12. Of course, foreign aliens have little or no claim under our federal laws to typical U.S. "due process" or "equal protection," since both of these protections ordinarily flow from an alien's status as a U.S. "entrant." *See supra* note 198 and accompanying text.

<sup>323</sup> *See* NOWAK & ROTUNDA, *supra* note 62, § 14.11 at 698.

<sup>324</sup> *See, e.g.,* Elizabeth Kay Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U.J. INT'L L. & POL'Y 269 (1993); Robert W. McGee, *Some Thoughts on the Relationship Between Property Rights and Immigration Policy*, 42 CLEV. ST. L. REV. 495 (1994).

<sup>325</sup> For a discussion of this general philosophy in other equal protection arenas such

response to economics, U.S. borders have had a fluctuating porosity in their accommodation of alien labor, which has increased or decreased in relationship to economic need, an issue that has remained a source of conflict with regional powers, particularly neighboring Mexico.<sup>325</sup> Reliance on alien labor has engendered an international debate with moral and ethical overtones,<sup>327</sup> clarifying in North America as a discussion over the quality of alien entrants<sup>328</sup> with legislators in the United States taking the position that employers should be penalized for taking advantage of unskilled, undocumented alien labor<sup>329</sup> and should even be made to pay in the event foreign workers are utilized before domestic workers.<sup>330</sup> By giving the alien controversy the appearance of a debate purely posited on economics, those particularly in an adversary position have achieved a

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as wealth-based classifications, welfare rights, and rights to government employment, see NOWAK & ROTUNDA, *supra* note 62, §§ 14.25, 14.42-14.46.

<sup>326</sup>

The NAFTA agreement does not include migration issues. The Mexicans at first wanted migration to be one of the themes of the agreement. The argument made by them was that there are flows of two factors, capital and labor, both of which are important in the structure of U.S.-Mexican relations. From the viewpoint of economic analysis, the Mexicans argued that labor flows deserved an equal place with capital flows. However, the United States was not prepared to talk about the movement of Mexican labor. Nor was it clear precisely what aspect of the issue the Mexicans wanted to talk about. Except for the chapter that permits temporary migration of business people and technicians, there are no immigration provisions in the NAFTA itself.

Sidney Weintraub, *Free Trade and Migration: The Long-Term Impact*, xvii IN DEFENSE OF THE ALIEN 8 (Lydio F. Tomasi, ed., 1995).

<sup>327</sup> See Jonas Widgren, *Global Arrangements to Combat Trafficking in Migrants*, MIGRATION WORLD MAG., May 1, 1995, at 19 (describing an arrangement to combat trafficking among governments for a "new and sustainable order which would diminish the role of irregular movements of people between nations").

<sup>328</sup> See Trien T. Nguyen, *The Parallel Market of Illegal Aliens: A Computational Approach*, 17 WORLD DEV. 1965 (1989) (one of a number of articles on alien quality authored by Canadians, deriving from the Canadian national philosophy and policy to encourage skilled aliens and discourage unskilled aliens).

<sup>329</sup>

Isolated labor shortages arose soon after employer penalties went into effect. The INS made no effort to reach out and "educate" small business owners, despite evidence suggesting that they often rely on undocumented workers, and some legal undocumented workers lost their jobs due to employer fears of being cited by the [INS]. In other situations, aliens fled the country because of deportation fears . . . . However, fears that perishable fruits and vegetables would be left rotting in the fields failed to materialize . . . . Few employers appeared willing to increase wages as a means of overcoming labor shortages.

Finch, *supra* note 36, at 251.

<sup>330</sup> See Steven A. Holmes, *Immigration Panel Proposes Fee for Bringing in Foreign Workers*, N.Y. TIMES, Sept. 13, 1995, at A20.



kind of constitutional high ground, while such reductionism also aids the economic elite in exploiting the tenuous legal status of the undocumented alien.

The current Supreme Court, led by Chief Justice William Rehnquist, may well be returning to the days of the Chinese Exclusion Acts, essentially deferring immigration to Congress. Also demonstratively deferential to federal "plenary power" to enact, interpret, and administer immigration laws, prior Courts for 100 years have had some impact in defining the laws' scope. In contrast, the present Court has responded by taking up four immigration cases — but deciding only one. Called upon to make determinations, the Rehnquist Court may follow reasoning by the dissent in cases like *Nyquist v. Mauclet*<sup>331</sup> and *Plyler v. Doe*.<sup>332</sup> The reasoning of the dissent in these cases — essentially that the Supreme Court should not intervene in processes entrusted to enactment by the legislative and enforcement by the administrative branches of government — are at variance with the historic function of the Court to interpret the "phantom norms" of the federal plenary immigration power.<sup>333</sup> Although the Su-

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<sup>331</sup> 432 U.S. 1 (1977).

Since the New York statute under challenge i[n] this case does not create a discrete and insular minority by placing an inevitable disability based on status, the Court's heightened judicial scrutiny is unwarranted. The reason for the more rigorous constitutional test having ceased, the applicability of the test should likewise cease.

Applying the rational-basis test, it is obvious that the statutory scheme in question should be sustained. The funds that New York wishes to spend on its higher education assistance programs are, of course, limited. New York's choice to distribute these limited funds to resident citizens and to resident aliens who intend to become citizens, while denying them to aliens who have no intention of becoming citizens, is a natural legislative judgment.

*Id.* at 21 (Rehnquist, J., dissenting). The alien, a Canadian, had resided in the United States for nine years, had registered with the Selective Service on his eighteenth birthday, and had become eligible for a New York State Regents Scholarship. *Id.* at 5.

<sup>332</sup> 457 U.S. 202 (1982).

The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.

*Id.* at 253 (Burger, C.J., dissenting) (citations omitted). Historically, during the twentieth century, the Supreme Court has not been loathe at certain junctures to take "unwarranted judicial action" in cases where aliens, immigrants, or the immigration power were involved.

<sup>333</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power*:

preme Court is the “ultimate interpreter”<sup>334</sup> of the Constitution, when called upon, the current bench may give inordinate weight to the principle that:

“Ultimate interpreter” does not mean exclusive interpreter. The courts expect other branches of government to interpret the Constitution in their initial deliberations. “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.” . . . Congressional interpretations are given substantial weight in some circumstances, even to the point of becoming the controlling factor . . . .<sup>335</sup>

Normative considerations need also be given weight as a factor in the debate. Sidestepping issues by brandishing classic separation of powers doctrine will not satisfy the duty of the Supreme Court to “say what the law is,” at those moments when it is required — not to reign in — but prudently guide our legislative and executive branches in holding true to U.S. constitutional traditions. At these junctures it may be necessary to apply other standards supporting review of legislative and executive action, such as found in the philosophical tenets of natural law. Natural law or *jus naturale*, though not necessarily normative, is “intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitu-

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*Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990).

[T]he plenary power cases provide, as a matter of explicit constitutional theory, that the immigration context is different, and that therefore we cannot directly apply mainstream constitutional norms in immigration cases. But “phantom constitutional norms” are “constitutional” in the sense that they, having been at least seriously entertained as a constitutional argument and in many cases actually adopted as an expressly constitutional decision in other areas of law, then carry over to immigration cases, where they are substantial enough to serve the limited function of informing interpretation of immigration statutes and other subconstitutional texts.

*Id.* at 564.

<sup>334</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

<sup>335</sup> LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 243 (1988) (citations omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)).

tion.<sup>336</sup> Limitations inherent in this doctrine were made clear by Lewis Carroll:

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."<sup>337</sup>

Though of seemingly mystical and amorphous character, natural law has precedent in its application by the Supreme Court during at least two periods of legal history: evolution of constitutionally mandated due process safeguards for the trying of criminal defendants and elementally in the development of "fundamental rights" involving procreation, birth control, and abortion.<sup>338</sup> Natural law, phantom constitutional norms, or whatever label one prefers to use has not been withheld from analysis in the context of alien rights and immigration. In the case of *Bridges v. Wixon*,<sup>339</sup> the Supreme Court said:

Our concern in this case does not halt with the fate of Harry Bridges, an alien whose constitutional rights have been grossly violated. The significance of this case is far reaching. The liberties of 3,500,000 other aliens in this nation are also at stake. Many of these aliens, like many of our forbears, were driven from their original homelands by bigoted authorities who denied the existence of freedom and tolerance. It would be a dismal prospect for them to discover that their freedom in the United States is dependent upon their conformity to the popular notions of the moment. But they need not make that discovery. The Bill of Rights belongs to them as well as to all citizens. It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy. Neither injunction, fine, imprisonment nor deportation can be utilized or prevent the exercise of intellectual freedom. Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land.<sup>340</sup>

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<sup>336</sup> BLACK'S LAW DICTIONARY, *supra* note 80, at 1026.

<sup>337</sup> EUGENE C. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" 140 (1953).

<sup>338</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>339</sup> 326 U.S. 135 (1945).

<sup>340</sup> *Id.* at 165-66.

These fine words were written at the close of the worst war the world had ever seen, after world humanity had been sorely tested by the abuses of National Socialism and other forms of totalitarianism. The philosophy inhering in *Bridges v. Wixon* foretold the future humanistic trend of Supreme Court decisions such as *Takahashi* and *Graham v. Richardson*, which — except for the chilling period of the McCarthy era — remained the general direction of development for individual rights, such as those of the Texas schoolchildren in *Plyler*. In the late 1990s, the U.S. Supreme Court may be poised to drift in a contrary direction, particularly in the realm of alien rights. The potential for this change is all the more possible in a Court that may see its role in interpreting the federal plenary power as subordinated to the domain of the legislative and executive branches

#### VI. CONCLUSION: WHEN THEY KNOCK, WHO WILL ANSWER?

And if a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.<sup>341</sup>

As of 1990, an immigration specialist estimated that about fifty-five million immigrants had come to the United States during its history from every part of the globe.<sup>342</sup> However, in 1995, legal immigration only amounted to 720,000 individuals — a decline of about ten percent from the 1994 total of more than 804,000, which in turn was a decline of about eleven percent from the 1993 total of 904,000.<sup>343</sup> The decline in legal immigration may partly frame the issues, because it can be argued that hostility to undocumented aliens may be spilling over to legal immigrants.<sup>344</sup> The presence of the foreign-born in our society remains significant. To gain comparative perspective, today the foreign-born represent about twenty-two million out of a total population of 260

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<sup>341</sup> *Leviticus* 19:33-34.

<sup>342</sup> See CARLINER ET AL., *supra* note 15, at xi.

<sup>343</sup> See Schuck, *supra* note 185, at 1970.

<sup>344</sup>

Is Proposition 187 a firebell in the night (as was said of the Dred Scott decision), warning of imminent civil conflict? Or is it instead just a flash in the pan, one more California exotic that flourishes in that state's unique climate but fails to take root elsewhere? Proposition 187, I believe, lies somewhere in between. It is less spasm of nativist hatred than an expression of public frustration with a government and civil society that seem out of touch and out of control, and with external convulsions that our borders can no longer contain.

Schuck, *supra* note 10, at 85.

million (nine percent),<sup>345</sup> while about ninety years ago, immigrants represented about ten million out of a total population of seventy-six million (13.15%).<sup>346</sup> Many of the legal decisions that cabined the "immigrant question" of those less sophisticated times were formulated by a judiciary concerned by the rapid swelling of U.S. cities by an immigrant underclass in a society less prepared, organized, or even willing to deal with socially responsive issues. It can be convincingly shown that decisions by immigration authorities today often echo an earlier period,<sup>347</sup> since many of the early immigration-related judicial decisions remain in full force, undisturbed by time.<sup>348</sup>

On today's law school campuses and in the courtroom, debate is incessant on almost any and all aspects of the legal rights and status of undocumented aliens.<sup>349</sup> Some of the debate's participants have even argued for elimination of automatic citizenship for children of undocu-

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<sup>345</sup> See Schuck, *supra* note 185, at 1970.

<sup>346</sup> *Keller v. Ullman*, 213 U.S. 138, 148 (1909).

<sup>347</sup> See, e.g., *Larklam v. INS*, 99 F.3d 1146 (9th Cir. 1996) (in a nonprecedential opinion, the Ninth Circuit remanded case back to Board of Immigration Appeals, where there was ample evidence that Burmese refugee should be deported to Thailand, his previous domicile, not Burma, because of his well-founded fear of persecution by the Burmese government, and neither Immigration Judge nor BIA made any findings as to the facts); *In re Pilch*, File A29-603-413, 1996 WL 706595 (BIA 1996) (Polish aliens denied extreme hardship exception as to deportability, despite fact petitioner had three citizen children, for whom he was their sole support, was a partner in a construction company employing 13 people full-time, and would forfeit \$117,000 home, the BIA not finding extreme hardship on the facts). *But cf.* *In re X-P-T*, File A73-134-418, 1996 WL 727127 (BIA 1996) (Chinese female granted asylum, since she had been forced to undergo forced sterilization and was therefore protected by Section 601(a)(1) of the IIRIRA of 1996).

<sup>348</sup> Classic among these cases, of course, was *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (known as "The Chinese Exclusion Case").

<sup>349</sup> See Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation* 41 CASE L. REV. 969 (1991) (arguing that inclusion of aliens in the 1990 census violates the principle of one person one vote); Robert Alan Culp, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800 (1986) (providing evidence of INS officers questioning individuals merely on the basis of racial and ethnic characteristics); Paula Sue Smith, *An Argument Against Mandatory Reporting of Undocumented Immigrants by State Officials*, 29 COLUM. J.L. & SOC. PROBS. 147 (1995) (arguing against Proposition 187 and similar movements in the southwestern U.S.); Mitchell Kurfis, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129 (1995) (arguing in favor of Proposition 187).

mented aliens, reaching back into the days of Lord Coke to find support for their position.<sup>350</sup>

Economic issues remain at the forefront of discussion, particularly in regard to the cost of public benefits, while the exploitation of alien laborers continues a negative tradition of American history going back to the mid- through late-nineteenth century. Mexican farmworkers, for example, are caught up in this dynamic, between the push from a country glad to see them leave and the pull of a country that wants their strong backs, busy hands, and low expectation of earnings.<sup>351</sup> Aliens have, on occasion, found America to be a land where they were required to dwell unseen in the shadows, where they have experienced a cultural dichotomy and duality, perceiving themselves constrained to conceal their cultural antecedents,<sup>352</sup> sometimes discovering that the land where they dwell did not even want them counted as constitutionally recognized "persons."<sup>353</sup> And yet, New Yorkers and other Americans avidly witnessed the televised spectacle of 296 alien Chinese who had been so eager to get to America, that when their ship, the *Golden Venture*, ran aground near New York City, they jumped overboard into the pounding surf to swim to shore, with ten of their number being drowned.<sup>354</sup>

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<sup>350</sup> See Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL'Y REV. 127 (1996).

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Cesar Chavez [in the 1980s], President of the United Farmworkers of America, had criticized severely the failure of the Immigration and Naturalization Service to prevent California employers from using illegal aliens to break strikes of the United Farmworkers. Chavez had said that for thirty years, the Service had maintained a policy of neutrality in strikes, although the neutrality gave growers a free hand in using illegal aliens as strikebreakers.

Douglas McCabe, *Business and Labor: A Monolithic View Toward Immigration*, in GEO. IMMIGR. L. REP. 100 (Virginia A. Lazala ed., 1985).

<sup>352</sup> See generally PANG-MEI NATASHA CHANG, *BOUND FEET & WESTERN DRESS* (1996) (providing a biographical account of a Chinese-American woman's great aunt, who had lived in China during the first half of the eventful twentieth century, contrasted with the author's reluctance to recognize and appreciate her own cultural identity).

<sup>353</sup> *Ridge v. Verity*, 715 F.Supp. 1308, 1310 (W.D. Pa. 1989) (suit to block inclusion of aliens in upcoming census for purposes of congressional apportionment).

<sup>354</sup> See Mills, *supra* note 111, at 11. Unlike the Chinese in the contemporaneous case of the *Pai Sheng*, the Chinese aboard the *Golden Venture* did not achieve an "entry," since they were spotted in U.S. waters off the coast by U.S. officials, making them qualified for exclusion (little or no due process) rather than deportation proceedings (due process). *Xin Chang Zhang v. Slattery*, 55 F.3d 732, 752-56 (2d Cir. 1995); *Yang v. Maugans*, 64 U.S.L.W. 2302 (3d Cir. 1995), No. 95-7316. As of February 1997, about fifty-five of the debarkees from the *Golden Venture* remained behind bars as detainees in York, Pennsylvania. See Celia W. Dugger, *Dozens of Chinese From*

America has prided herself on being more than the sum of her parts, currying the myth about her big heart, even in these economically trying times. Accusations of xenophobia and nativism may be just that, or may be reflexive behavior originating in public nostalgia for a bygone America,<sup>355</sup> general distrust of politicians,<sup>356</sup> and a trend to engage in faddish philosophizing, resembling the artifice of Victorian and late nineteenth century proponents of the Poor Law and other legislation which had the effect of punishing the poor for their oppression.<sup>357</sup>

The undocumented alien problem is a rapidly growing and swiftly evolving social phenomenon — and the law hangs several years behind the trend. Our statesmen and jurists have yet to conjure a proper solution for the dilemma. Exclusion acts — racially, ethnically, or nationally based — are not the answer. Options must be viewed in a larger world context.

One hundred years ago verse was penned in response to a gift the United States received from a foreign government. The verse has taken on a life of its own as a cultural artifact representing the American ideal. Today, Americans must consider the now-familiar words and ponder America's place in the world. As we revisit these famous lines we must determine whether the words are charming relics of a bygone age, or they shall serve us in our entrée into the global century.

*Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore,  
Send these, the homeless, tempest-tossed to me,  
I lift my lamp beside the golden door!*

*Here at our sea-washed, sunset gates shall stand  
A mighty woman with a torch, whose flame  
Is the imprisoned lightning, and her name  
Mother of exiles.*

*The New Colossus*<sup>358</sup>

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1993 *Voyage Still in Jail*, N.Y. TIMES, Feb. 3, 1997, at A1.

<sup>355</sup> See Andrew Peyton Thomas, *Can We Ever Go Back?*, WALL ST. J., Aug. 9, 1996, at A8.

<sup>356</sup> See Daniel Yankelovich, *Restoring Public Trust*, MOTHER JONES, Nov.-Dec. 1995, at 28.

<sup>357</sup> Richard Currie, *Judging the Present by the Worst of the Past: Victorian Virtue as Vice*, Remarks at Luncheon in Celebration of 184th Anniversary of the Birth of Charles John Huffam Dickens, hosted by the Friends of Dickens (Feb. 10, 1996), New York City.

<sup>358</sup> THE QUOTABLE WOMAN: 1800-1975 86 (Elaine Partnow, ed., 1977) (quoting Emma Lazarus, *The New Colossus*, 1886).