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# Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness

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† The "magic mirror" metaphor is from *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), in which the court stated that the list of grounds for exclusion of noncitizens from admission into the United States "*is like a magic mirror, reflecting the fears and concerns of past Congresses.*" *Id.* at 189 (emphasis added).

* Professor of Law, University of California at Davis. A.B., University of California at Berkeley; J.D., Harvard University. This paper, which is part of a larger project analyzing the implications of the immigration laws for U.S. citizens, was prepared for the Critical Race Theory Conference at Yale Law School in November 1997. I thank the participants at that conference, especially Mary Romero, Margaret Montoya, Leslie Espinoza, Chris Cameron, Deborah Waire Post, Jo Carrillo, John Park, Maria Ontiveros, and Neil Gotanda, for their comments and support. Correspondence with Richard Delgado on preliminary ideas focused my thinking; his encouraging comments on a draft proved valuable. I am indebted to Michael Olivas for his continued encouragement and support as I test new academic waters. Conversations with George A. Martínez, as well as his comments on a draft, assisted greatly in the evolution and development of the arguments in this paper. I also thank John Scanlan, Sylvia Lazos, Stephen Shie-Wei Fan, Guadalupe Luna, Jack Chin, Victor Romero, Jan Ching-An Ting, Gil Gott, and Alex Aleinikoff for helpful, though often critical, comments on a draft. Frank Valdes offered insightful suggestions on an adapted version of this paper. I, of course, am responsible for all errors. Christine Shen, Melissa Corral, and Sushil Narayanan provided first-rate research assistance.

Well Papa go to bed now it's getting late
Nothing we can say can change anything now
Because there's just different people coming down here now
and they see things in different ways
And soon everything we've known will just be swept away.[1]

## INTRODUCTION

In the face of persistent, often virulent attacks in the popular press,[2] as well as academia,[3] the critical study of the impact of race on the social fabric of the United States continues. Despite the rich analysis of race in critical scholarship, a body of law chock full of insights remains largely unexplored.[4] Immigration law traditionally has been considered a specialty area of practitioners spurned by academics. However, the treatment of "aliens," particularly noncitizens of color, under the U.S. immigration laws reveals volumes about domestic race relations in the nation. A deeply complicated, often volatile, relationship exists between racism directed toward citizens and that aimed at noncitizens. Peter Brimelow's anti-immigrant book, *Alien Nation*,[5] exemplifies this relationship; while ostensibly criticizing the state of U.S. immigration law, the book attacks affirmative action, "Hispanics," multiculturalism, bilingual education, and virtually any program designed to remedy discrimination in the United States.

As the legacy of chattel slavery and forced migration from Africa would have it, the United States has a long history of treating racial minorities in the United States harshly, at times savagely. Noncitizen racial minorities, as foreigners not part of the national community, generally have been subject to similar cruelties

1. BRUCE SPRINGSTEEN, *Independence Day*, *on* THE RIVER (Columbia Records 1980).

2. *See, e.g.*, Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997, § 7, at 46 (reviewing *Beyond All Reason* by Daniel A. Farber and Suzanna Sherry); Neil A. Lewis, *For Black Scholars Wedded to Prism of Race, New and Separate Goals*, N.Y. TIMES, May 5, 1997, at B9; Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (reviewing *Beyond All Reason*); Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27.

3. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON (1997); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); *see also* Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1471-72 (1996) (observing that Critical Race Theory has been the subject of "'attack' scholarship" designed "to preempt and shut down debate").

4. There are, of course, some works that consider the relationship between immigration and race relations. *See, e.g.*, Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993).

5. PETER BRIMELOW, ALIEN NATION (1995).

but also have suffered deportation,[6] indefinite detention,[7] and more. The differential treatment is permitted, if not encouraged, by the disparate bundles of legal rights afforded domestic minorities and noncitizen minorities.

In analyzing the treatment of noncitizens in the United States, immigration law offers an invaluable vantage point because of its unique characteristics vis-à-vis traditional constitutional law. The so-called "plenary power" doctrine, which historically has shielded substantive immigration judgments by the political branches of government from meaningful judicial review, bestows great discretion on the U.S. Government to establish rules regulating the admission of noncitizens into the country.[8] Born in an era when Congress acted with a vengeance to exclude Chinese immigrants from this nation's shores,[9] the plenary power doctrine remains the law, though perhaps narrowed somewhat in scope.[10] Moreover, the Supreme Court has invoked the doctrine to permit the federal government, and at times the states, to discriminate against immigrants with the lawful right to remain permanently in this country.[11]

In sharp contrast to the limited constitutional rights of noncitizens, citizens enjoy a full array of protections under the Constitution and a multitude of other laws.[12] Racial minorities, for example, may rely on the Equal Protection Clause of the Fourteenth Amendment to challenge discriminatory governmental action[13] and the Civil Rights Act of 1964 to fight racism in the workplace.[14] Although the

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6. *Cf.* Bridges v. Wixon, 326 U.S. 135, 147 (1945) (emphasizing that deportation of a noncitizen "may result in the loss 'of all that makes life worth living'") (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

7. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (en banc) (holding that the Attorney General had legal authority to indefinitely detain a Cuban noncitizen whom Cuba refused to allow to return).

8. *See infra* text accompanying notes 231-41 (describing doctrine).

9. *See infra* text accompanying notes 52-54 (analyzing genesis of plenary power doctrine in Chinese exclusion cases).

10. *See infra* text accompanying notes 231-41 (discussing modern significance of doctrine); *see, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (upholding gender and legitimacy classifications in immigration laws); Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972) (rejecting constitutional challenge to denial of nonimmigrant visa to Marxist academic on ideological grounds); Boutilier v. INS, 387 U.S. 118, 122-23 (1967) (allowing exclusion of homosexuals).

11. *See* Mathews v. Diaz, 426 U.S. 67, 78-84 (1976) (upholding discrimination against lawful permanent residents in federal medical benefits program); *infra* note 235 (citing decisions permitting states to discriminate between citizens and lawful permanent residents).

12. For a communitarian critique of the proliferation of rights, see MARY ANN GLENDON, RIGHTS TALK (1991).

13. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *cf.* United States v. Virginia, 518 U.S. 515, 531-58 (1996) (holding that Virginia's exclusion of women from Virginia Military Institute violated Equal Protection Clause). The Fourteenth Amendment, however, offers uncertain protections to noncitizens. *See infra* text accompanying notes 41-46 (analyzing law in this regard).

14. *See, e.g.*, Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) (reversing dismissal of Title VII claim alleging racial discrimination by employer). In contrast, the Supreme Court held that Title VII does not bar discrimination on the basis of alienage status. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

close of the twentieth century has been marked by rollbacks in legal protections for minorities,[15] the law, at least in theory, serves to protect discrete and insular minorities from the excesses of the political process.[16]

Rather than just a peculiar feature of U.S. public law, the differential treatment of citizens and noncitizens serves as a "magic mirror" revealing how dominant society might treat domestic minorities if legal constraints were abrogated. Indeed, the harsh treatment of noncitizens of color reveals terrifying lessons about how society views citizens of color. For example, the era of exclusion of Chinese immigrants in the 1800s occurred almost simultaneously with punitive, often violent, action against the Chinese on the West Coast.[17] Efforts to exclude and deport Mexican citizens from the United States, which accelerated over the course of the twentieth century, tell much about how society generally views Mexican American citizens.[18] Similarly, the extraordinarily harsh policies directed toward poor, Black, Haitian persons, seeking refuge from violent political and economic turmoil in Haiti, leave little room for doubt—if there were any—about how this society as a whole views its own poor Black citizens.[19] The out-group homogeneity thesis from psychology, in which in-groups generally view out-groups, such as racial minorities, as homogeneous, lends support to this insight.[20]

Oddly enough, even while the attacks on immigrants of color pervade the national consciousness, some informed observers claim that racism is a historical

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15. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 225 (1995) (holding that all racial classifications, including those in federal program designed to foster minority enterprise, are subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (invalidating city's minority business program as violation of equal protection); Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996) (holding that affirmative action plan was unlawful), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997); *see also infra* note 23 (citing cases upholding end of and invalidating affirmative action programs).

16. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (recognizing that "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"); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 75-77 (1980) (exploring importance of *Carolene Products*'s footnote 4 to constitutional theory of judicial review). This is not to suggest that legal remedies for minorities have proven to be problem-free. Some argue that liberalism's belief that law will promote meaningful social change is misplaced. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992) (contending that racism is endemic to United States); RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS (1994) (analyzing limits of achieving social reform through law); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (analyzing limits of litigation in achieving meaningful social change for Mexican Americans in the United States).

17. *See infra* text accompanying notes 47-54 (analyzing circumstances surrounding Chinese exclusion).

18. *See infra* text accompanying notes 150-78 (scrutinizing U.S. Government's efforts to exclude and deport Mexican immigrants as well as Mexican American citizens).

19. *See infra* text accompanying notes 179-206 (evaluating significance of Haitian interdiction and repatriation for African Americans in the United States).

20. *See infra* text accompanying notes 258-60 (discussing theory).

artifact in the United States,[21] or at least has greatly diminished as a driving force behind policymaking as the twentieth century comes to a close.[22] Based in part on this premise, political forces attack affirmative action,[23] multiculturalism,[24] language minorities,[25] and ameliorative programs created in response to the civil rights struggles of the 1960s. At the same historical moment, Congress, with minimal resistance, has passed increasingly restrictive immigration laws, in the name of fighting a range of social ills from welfare fraud to crime to terrorism to "illegal" immigration.[26] This Article contends that the fact that anti-immigrant sentiment caught fire in tandem with the anti-minority backlash in the United States is no coincidence.

Besides analyzing the history surrounding legal exclusions in the immigration laws, I argue that the exclusionary laws reveal majority sentiment about racial minorities in the United States. Subordination of Asian immigrants and the use of quotas to exclude racialized peoples,[27] among other devices, evolved into more

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21. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM 3, 22-24 (1995).

22. *See, e.g.*, Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1966 (1996) (book review) ("Racism in the United States has declined dramatically in recent decades, despite frequent denials of this fact. *I believe . . . that [though arguable] racism as such no longer plays a crucial role in immigration law; certainly it plays a less significant role than it did before 1965.*") (emphasis added) (footnotes omitted).

23. *See, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir.) (rejecting constitutional challenges to California's Proposition 209, which prohibits consideration of race and gender in any state program), *cert. denied*, 118 S. Ct. 397 (1997); Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir.) (holding that affirmative action by the University of Texas in law school admissions violated Fourteenth Amendment), *cert. denied*, 116 S. Ct. 2580 (1996).

24. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1992) (contending that multiculturalism is destructive force in the United States); *see also* J. HARVIE WILKINSON III, ONE NATION INDIVISIBLE (1997) (contending that ethnic separatism threatens the nation).

25. *See infra* text accompanying notes 226-28 (discussing speak-English-only rules).

26. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 501-553, 110 Stat. 3009, 3670-81 (limiting immigration and facilitating deportation in number of ways); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400-451, 110 Stat. 2105, 2260-77 (limiting the receipt of public benefits by legal immigrants); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 423, 502, 110 Stat. 1214, 1259, 1272 (providing, inter alia, that noncitizens convicted of criminal offenses would receive limited or no judicial review of deportation orders and creating a special tribunal responsible for deporting so-called terrorists).

27. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (analyzing how ideology and history contribute to the construction of races). This contextual definition of "race" is particularly appropriate in analyzing the immigration laws. Restrictionist immigration laws historically sought to limit immigration of groups of persons today thought of as "white ethnics," such as Jewish or Irish immigrants, because they were of a different "race." *See infra* notes 97-120 and accompanying text. Moreover, the international law on which the asylum and refugee provisions of the U.S. immigration laws permitting persons fleeing persecution on account of race are based, *see* Immigration & Nationality Act, ch. 477, 66 Stat. 163 (1952) (as amended), §§ 101(a)(42), 241(b)(3) (codifed at 8 U.S.C.A. §§ 1101(a)(42), 1231(b)(3) (West 1970 & Supp. 1998)), requires a liberal definition of "race." *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 68, at 18 (re-edited ed. 1992) (offering

subtle forms of exclusion with the transformation of racial sensibilities in modern times. Besides analyzing the treatment of minorities under the immigration laws, this Article posits that the harsh treatment of immigrants of color suggests how this nation might treat citizens of color if afforded the opportunity. Absent the Constitution and other legal protections, domestic minorities could expect no better treatment than their foreign brothers and sisters. This is no idle concern. Not all that long ago, the United States Supreme Court declared that African Americans "had no rights which the white man was bound to respect."[28] Though racial sensibilities have changed, this nation at times has denied rights to racial minorities. To avoid the repetition of such events, everyone, not just immigrant rights activists and immigration law scholars, concerned with race relations in the United States should take interest in the exclusionary aspects of our immigration laws.

This Article, however, is more than simply a summary of how racism has infected immigration law and policy in the United States and how citizens as well as noncitizens should be gravely concerned. It instead demonstrates how the harsh treatment of *noncitizens* reveals just how this society views *citizens* of color. As psychological theory suggests, the virulent attacks on noncitizens in effect represent transference and displacement of animosity for racial minorities generally.[29] Because direct attacks on minorities on account of their race is nowadays taboo, frustration with domestic minorities is displaced to foreign minorities. A war on noncitizens of color focusing on their immigration status, not race, as conscious or unconscious cover, serves to vent social frustration and hatred.[30] Hatred for domestic minorities is displaced to an available, more publicly palatable, target for antipathy. These psychological devices help society reconcile the view that "U.S. society is not racist" with the harsh treatment of noncitizens of color. Noncitizens, so the story goes, deserve different treatment because of their immigration status, not race.

Psychological theory also helps explain some historical oddities about U.S. society's seemingly contradictory treatment of different minority groups, particularly African Americans, and groups historically classified as "foreign," such as Asian Americans and Latinos. Congress passed the anti-Chinese exclusionary laws in the 1800s on the heels of the abolition of slavery and the ratification of the Reconstruction Amendments, ostensibly intended to eliminate

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interpretive guidance on relevant international law and stating that "[r]ace . . . has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage").

28. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

29. *See infra* text accompanying notes 261-88 (analyzing psychological theory as tool for understanding relationship between anti-immigrant and anti-minority sentiment).

30. *See, e.g.*, BRIMELOW, *supra* note 5. Though ostensibly complaining about immigrants and immigration, Brimelow expresses deeper frustrations with multiculturalism, affirmative action, and race relations in the United States. *See* Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, STAN. L. & POL'Y REV., Summer 1996, at 111, 113-17 (criticizing Brimelow's analysis of these issues).

all vestiges of this nation's "peculiar institution."[31] What legal rights the country formally extended to Blacks, it ruthlessly denied Chinese immigrants. Similarly, a landmark achievement for African Americans, *Brown v. Board of Education*,[32] and its rejection of the "separate but equal" doctrine, was decided the same year that the U.S. Government commenced "Operation Wetback," a massive campaign resulting in the deportation of tens of thousands of Mexican immigrants, as well as U.S. citizens of Mexican ancestry.[33] Both examples reflect the appearance of generosity toward African Americans, on the one hand, and a crackdown against "foreigners" on the other. When law constrained attacks on the domestic minority, animosity was displaced to foreign minorities in our midst and at our borders. Maintenance of the racial status quo serves as the unifying theme explaining these historical phenomena.[34]

One might wonder why interrelationships such as these have gone unexplored to this point. The subordination of non-Black racial minorities often has remained invisible.[35] Issues of race, being parsed into hues of Black and white,

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31. KENNETH M. STAMPP, THE PECULIAR INSTITUTION at vii (1956); *see infra* text accompanying notes 69-82 (analyzing relationship between these historical developments).

32. 347 U.S. 483, 495 (1954).

33. *See infra* text accompanying notes 150-78 (considering various anti-Mexican campaigns, including infamous "Operation Wetback").

34. *See generally* TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994) (analyzing central organizing principle of white supremacy in race relations in California); REGINALD HORSMAN, RACE AND MANIFEST DESTINY (1981) (analyzing importance of belief of Anglo-Saxon racial superiority to doctrine of Manifest Destiny).

Nothing in this Article should be read to suggest that racial discrimination is the exclusive factor shaping the U.S. immigration laws. Rather, as I analyze in other work, *see, e.g.*, Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-51 (1995), other factors not directly linked to race, such as concerns with the perceived costs of immigration and its impact on the labor market, obviously have influenced the development of the immigration laws. Nor does the Article take the extreme position that every immigration law, intentionally or not, discriminates against racial minorities. Rather, I modestly contend that race has influenced—and continues to influence—U.S. immigration law and policy. Consequently, this Article analyzes how race, as one variable in a complex multivariate equation, has affected the policymaking process and studies the relationship between exclusionary immigration laws and the civil rights of domestic racial minorities.

35. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1185 (1997) (book review). "The Black/white framing of race issues must give way to a fuller, more differentiated understanding of a multiracial, multiethnic society divided along the lines of race, class, gender, and other axes in order to . . . contribute to the long-term empowerment of [racial minorities]." Sumi K. Cho, *Korean Americans vs. African Americans: Conflict and Construction*, *in* READING RODNEY KING, READING URBAN UPRISING 196, 196-97 (Robert Gooding-Williams ed., 1993); *see* Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 64 (1995) (noting "tendency . . . to frame civil rights as an almost exclusively black/white issue") (footnote omitted); Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891, 925 (1997) ("Race relations in this country are extremely complex. White supremacy is experienced by non-white

have obscured the relationship between various forms of subordination of different racial minorities.[36] In moving beyond this vision of race relations, we must take care not to "dilute or obscure . . . [the] claims and interests [of African Americans]."[37] This Article contends that it is impossible to fully appreciate the subordination of any particular racial minority group without understanding the oppression of all minority groups.[38] To this end, Part I of the Article analyzes the long history of racial and national origin exclusion in the immigration laws. Part II focuses on the teachings of this exclusionary history for minority citizens as well as noncitizens.

In the end, we peer into a heart of darkness where the deepest fears of racial minorities—that a majority of society desires and has consistently strived for Anglo-Saxon homogeneity and hegemony—are demonstrated to be more than justified. One is left to ponder the frailties of the human condition, what we are as a society, and the possibilities, if any, for racial harmony in the twenty-first

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groups in *different* ways in *different* geographic regions under *different* historical conditions.") (emphasis in original).

36. George A. Martínez has made this point from a philosophical perspective. *See* George A. Martínez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. (forthcoming 1998); *see also* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774-78 (1994) (contending that Critical Race Theory, which has tended to focus on African American subordination, may benefit from the study of subordination of women, lesbians and gay men, Asian Americans, Latinos, indigenous peoples, and the poor); *cf.* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1997) (describing how "systems" analysis in non-legal disciplines applies to study of law).

37. John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free"*, 15 LAW & INEQ. J. 25, 61 (1997); *see* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596-605 (1997) (articulating case for "black exceptionalism," that is, the uniqueness of the African American experience in the United States).

38. I elaborate on this argument in Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997). Two examples help illustrate the central point. The U.S.-Mexican War, which culminated in the Treaty of Guadalupe Hidalgo in 1848, resulted from expansionist desires, including the hope by some to protect the institution of slavery in the United States. *See* 1 RICHARD HOFSTADTER ET AL., THE UNITED STATES 230-31 (4th ed. 1976) (noting that Whigs contended that war was designed to expand slavery to new territories). Thus, an effort to maintain slavery and the subjugation of African Americans, was part of a chain of events culminating in a treaty that many claim resulted in the subordination of Mexican Americans in the Southwest. *See, e.g.*, RODOLFO ACUÑA, OCCUPIED AMERICA 28-39, 105-08 (1972); RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO (1990); Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 13-21 (1996). Similarly, race relations in Texas cannot be fully understood without analyzing the history of the interactions between Anglo, Mexican American, and African American communities; analysis of Mexican American/Anglo or African American/Anglo relations, for example, would offer an incomplete picture. *See generally* NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997) (analyzing history of race relations in central Texas).

century. As Roberto Unger said about the legal academy, "[w]hen we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars and found the mind's opportunity in the heart's revenge."[39]

## I. THE HISTORY OF RACIAL EXCLUSION IN THE U.S. IMMIGRATION LAWS

Racism, along with nativism,[40] economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States. It does not exist in a social and historical vacuum. Foreign and domestic racial subordination instead find themselves inextricably linked.

In untangling this history, keep in mind critical differences between traditional immigration law and ordinary public law. Although the Equal Protection Clause generally requires strict scrutiny of racial classifications in the laws,[41] the Supreme Court long ago—in a decision undisturbed to this day—upheld discrimination on the basis of race and national origin in the admission of noncitizens into the country.[42] Similarly, even though discrimination on the basis of alienage status in modern times may mask an intent to discriminate against racial minorities,[43] the Supreme Court ordinarily defers to alienage classifications made by Congress.[44] Because the substantive provisions of the immigration laws

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39. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 119 (1986).

40. "Nativism" is the "intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections." JOHN HIGHAM, STRANGERS IN THE LAND 4 (2d ed. 1992). The classic historical study of nativism in the United States is *id.* For a summary of nativism's influence on the development of U.S. immigration laws, see Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1083-97 (1996).

41. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-14, at 1466-74 (2d ed. 1988).

42. *See, e.g.*, Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889).

43. Though the Supreme Court has held it impermissible to discriminate against minority immigrants in the country, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886), it must be proven that the state actor *intentionally* used alienage as a proxy for race. *See* Washington v. Davis, 426 U.S. 229 (1976). This formidable burden can rarely be satisfied. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (demonstrating empirically that the discriminatory intent requirement deters the filing of claims and results in a high loss rate for plaintiffs).

44. *See* Mathews v. Diaz, 426 U.S. 67, 84-87 (1976). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (invalidating federal civil service rule barring employment of lawful, permanent residents). State alienage classifications sometimes have been subject to strict scrutiny. *Compare* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to alienage classification in state welfare scheme), *with* Foley v. Connelie, 435 U.S. 291, 294-95 (1978) (declining to apply strict scrutiny in upholding a New York requirement that police officers be U.S. citizens).

historically have been immune from legal constraint,[45] the political process allows the majority to have its way with noncitizens.[46]

### *A. From Chinese Exclusion to General Asian Subordination*

The horrendous treatment of Chinese immigrants in the 1800s by federal, state, and local governments, as well as by the public at large, represents a bitter underside to U.S. history.[47] Culminating the federalization of immigration regulation,[48] Congress passed the infamous Chinese exclusion laws barring virtually all immigration of persons of Chinese ancestry[49] and severely punishing Chinese immigrants who violated the harsh laws.[50] Discrimination and violence, often rooted in class conflict as well as racist sympathies, directed at Chinese immigrants already in the United States, particularly in California, fueled passage of the laws.[51] The efforts to exclude future Chinese immigrants from our shores can be seen as linked to the deeply negative attitude toward Chinese persons already in the country.

The Supreme Court emphasized national sovereignty as the rationale for not disturbing the laws excluding the "obnoxious Chinese"[52] from the United States. In the famous *Chinese Exclusion Case*, the Supreme Court stated that "[t]he

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45. For an analysis of how the plenary power doctrine has caused courts to invoke procedural due process norms and liberally interpret the immigration laws, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990), and Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

46. *See generally* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (analyzing the vulnerability of noncitizens in the political process).

47. *See generally* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 79-130 (1989) (documenting the treatment of Chinese immigrants in nineteenth century America). Not willing to be passive victims, the Chinese community aggressively posed sophisticated legal challenges to the various state and federal barriers placed in their paths. *See generally* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY (1994) (chronicling resistance).

48. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 19-43 (1996) (tracing the shift from state to federal immigration regulation over the course of the 1800s).

49. *See infra* text accompanying notes 52-54 (discussing Chinese exclusion cases).

50. *See* Wong Wing v. United States, 163 U.S. 228, 233 (1896) (invalidating law providing that a Chinese immigrant unlawfully in the country "shall be imprisoned [without a jury trial] at hard labor").

51. *See generally* ROGER DANIELS, ASIAN AMERICA 9-99 (1988); ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (2d ed. 1991). In 1871, for example, mob violence against Chinese persons in Los Angeles resulted in the killing of at least 18 people. *See id.* at 48; *see also* DANIELS, *supra*, at 58-66 (describing anti-Chinese violence on the West Coast during this period).

52. Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting); *see* Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, STAN. L. & POL'Y REV., Summer 1996, at 35, 43-45 (summarizing Supreme Court decisions, denominated as the "anti-Asian cases," which upheld the Chinese exclusion laws).

power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of [its] sovereign powers delegated by the Constitution."[53] Similarly, in *Fong Yue Ting v. United States*, the Court reasoned that "[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[54]

Congress later extended the Chinese exclusion laws to bar immigration from other Asian nations and to prohibit the immigration of persons of Asian ancestry from *any* nation.[55] The so-called Gentleman's Agreement between the U.S. and Japanese Governments in 1907-08 greatly restricted immigration from Japan.[56] The Immigration Act of 1917 expanded Chinese exclusion to prohibit immigration from the "Asiatic barred zone."[57] A 1924 law, best known for creating the discriminatory national origins quota system,[58] allowed for the exclusion of noncitizens "ineligible to citizenship," which affected Asian immigrants who as non-whites were prohibited from naturalizing.[59]

Other aspects of the immigration and nationality laws reinforced the anti-Asian sentiment reflected in the exclusion laws. For example, the Supreme Court interpreted the naturalization law, which allowed "white" immigrants as well as (after the Civil War) persons of African ancestry to naturalize, as barring Asians from naturalizing.[60] In *United States v. Thind*,[61] the Court held that an immigrant from India was not "white" and therefore was ineligible for naturalization. Similarly, in *Ozawa v. United States*,[62] the Court held that a Japanese immigrant, as a non-white, could not naturalize. This manipulation of the citizenship rights of racial minorities harkens back to *Dred Scott v. Sandford*,[63] in which the

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53. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

54. 149 U.S. at 707.

55. For an analysis of the impact of the immigration laws on the evolution of the Asian American community in the United States, see BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993).

56. *See* DANIELS, *supra* note 51, at 123-28.

57. Ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952); *see* HING, *supra* note 55, at 32.

58. *See infra* text accompanying notes 97-120 (analyzing the social forces resulting in the passage of a national origins quota system in 1924).

59. Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (repealed 1952); *see also* TAKAKI, *supra* note 47, at 209-10 (observing the impact of this restrictive exclusion ground on immigration from Japan).

60. *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW (1996) (analyzing cases applying the naturalization prerequisite that a noncitizen be "white"). The impact of the racial prerequisite to the naturalization laws was ameliorated to some extent by the birthright-citizenship rule, which bestows citizenship on virtually all persons born in the United States. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898); *see also* Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 152-53 (1996) (reviewing *White by Law* and commenting on impact of birthright citizenship on children of noncitizens born in United States).

61. 261 U.S. 204 (1923).

62. 260 U.S. 178 (1922).

63. 60 U.S. (19 How.) 393 (1856).

Supreme Court held that a freed Black man was not a citizen for the purpose of invoking the jurisdiction of the federal courts.

Incorporating the racial discrimination encoded in federal naturalization law, state laws buttressed the racial hierarchy. A number of states, most notably California, passed so-called "alien land laws" early in the twentieth century that barred the ownership of certain real property by noncitizens "ineligible to citizenship."[64] The measures were directed at Japanese immigrants, who as non-whites barred from naturalization, were "ineligible to citizenship." The political and social milieu in which these laws were passed demonstrates their racial animus. For example, anti-Japanese venom dominated the campaign culminating in the alien land law by initiative in California.[65] Despite the obvious racial overtones, the Supreme Court rejected the contemporary challenges to the land laws.[66]

Racism unquestionably influenced the anti-Asian exclusion in the immigration laws.[67]

> The national climate of opinion, pervaded by racism and a burgeoning feeling of ethnic superiority or what [has been] called the "Anglo-Saxon complex," certainly contributed not just to the violence but also to the virtual unanimity with which the white majority put its seal of approval on anti-Chinese ends if not means.[68]

### 1. Chinese Exclusion and Reconstruction

Congress passed the first wave of discriminatory immigration laws not long after the Fourteenth Amendment, which bars states from denying any person equal protection of law, and other Reconstruction Amendments went into effect.[69] With the harshest treatment generally reserved for African Americans

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64. *See* Cockrill v. California, 268 U.S. 258 (1925); Terrace v. Thompson, 263 U.S. 197 (1923). For a further discussion of the alien land laws of California and other states, see Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61 (1947), and Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947).

65. *See* Oyama v. California, 332 U.S. 633, 658-59 (1948) (Murphy, J., concurring) (describing a "spirited campaign . . . waged to secure popular approval, a campaign with a bitter anti-Japanese flavor" resulting in the passage of a land law by initiative in California); Ferguson, *supra* note 64, at 62-73 (reviewing the anti-Japanese animus that motivated the initiative's passage). *See generally* DANIELS, *supra* note 51, at 100-282 (analyzing the growth of anti-Japanese sentiment in the United States).

66. *See supra* note 64 (citing cases).

67. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 2 (3d ed. 1995) (observing that the Chinese exclusion laws "like many later immigration laws . . . were the product of economic and political concerns laced with racism and nativism").

68. DANIELS, *supra* note 51, at 65 (citing BARBARA MILLER SOLOMAN, ANCESTORS AND IMMIGRANTS (2d ed. 1972)); *see* MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 227 (2d ed. 1992) (noting that later anti-Japanese hysteria in California resulted in part from a "belief in Anglo-Saxon superiority").

69. *See* TRIBE, *supra* note 41, § 5-12, at 330; *see also* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996)

formally declared unlawful, the nation transferred animosity to another discrete and insular racial minority whose immigration status, combined with race, made such treatment more socially acceptable and legally defensible.[70] This issue arose in the congressional debates over ratification of the Fourteenth Amendment when a member of Congress declared that Chinese persons could be treated less favorably than African Americans because "[the Chinese] are foreigners and the negro is a native."[71]

The relationship between Chinese exclusion and the revolutionary improvements for African Americans during Reconstruction often goes ignored, even though pre-Civil War state laws regulating the migration of slaves served as precursors to the Chinese exclusion laws.[72] Congress enacted the national exclusion laws with the support of southerners interested in rejuvenating a racial caste system as well as self-interested Anglos from California.[73]

It was no coincidence that greater legal freedoms for African Americans were tied to Chinese misfortunes. As one historian observed, "[w]ith Negro slavery a dead issue after 1865, greater attention was focused [on immigration from China]."[74] Political forces quickly reacted to fill the racial void in the political arena. In California, partisan political concerns, along with labor unionism, in the post-Civil War period figured prominently in the anti-Chinese movement.[75]

> In 1867 [the year after the Fourteenth Amendment went into effect] California Democrats launched their offensive against the Chinese. *The result . . . was a bonanza.* The party laid hands on an issue of enormous potential in its own right—a new issue, uncontaminated by the sad history of the civil

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(analyzing how issues surrounding Chinese immigration and immigrants affected the debate over Reconstruction Amendments).

70. *See infra* text accompanying notes 266-83 (analyzing psychological theories of transference and displacement).

71. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (comments of Rep. Higby). In discussing why Blacks should be able to naturalize under the Fourteenth Amendment and Chinese could not, Representative Niblack asked the following:

> If a Chinaman is one of the human race, why should he be degraded below the negro? Why should he not receive the same right as the negro? I should like to understand it. The negro is of pagan race, and is a pagan before he comes here. . . . I want to understand why we should exclude one race and include another, why we should deny to these people the right of naturalization, for instance, and allow it to others.

*Id.* (comments of Rep. Niblack). Congress ultimately extended birthright citizenship under the Fourteenth Amendment to persons of Chinese, as well as African, ancestry born in the United States. *See* Gerald L. Neuman, *Back to* Dred Scott?, 24 SAN DIEGO L. REV. 485, 491-92 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT (1985), and considering congressional debate on this point).

72. *See* NEUMAN, *supra* note 48, at 39-40.

73. *See* MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 10-12 (1946).

74. STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT 151 (1969).

75. *See generally* ALEXANDER SAXTON, THE INDISPENSABLE ENEMY (2d ed. 1995). However, while the exclusion of Asian immigrants resulted in a marked decline in violence directed at Asians in this country, African Americans, who as citizens could not be removed from the country, were subject to horrible violence well into the twentieth century. *See* SUSAN OLZAK, THE DYNAMICS OF ETHNIC COMPETITION AND CONFLICT 219-20 (1992).

> war, yet evocative of that entire syndrome of hatreds and loyalties which still could not quite openly be declared.[76]

The relationship between the treatment of African Americans and other racial minorities can be seen in a constitutional landmark of the nineteenth century. In his dissent in *Plessy v. Ferguson*, often lauded for its grand pronouncement that "[o]ur Constitution is color-blind,"[77] Justice Harlan noted the irony that the "separate but equal" doctrine applied to Blacks, who unquestionably were part of the political community, but not Chinese immigrants, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States" and who generally are excluded from entering the country.[78] Seeking to protect Blacks by denigrating the Chinese, Justice Harlan left no doubt about his sympathies on the question of racial superiority:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[79]

Some might contend that this analysis fails to recognize that the courts at various times invoked the law to protect Chinese immigrants. A most prominent example is *Yick Wo v. Hopkins*, in which the Supreme Court held that discriminatory enforcement of a local laundry ordinance against "aliens and subjects of the Emperor of China" violated the Equal Protection Clause of the Fourteenth Amendment.[80] Though often cited for the proposition that a facially neutral law enforced in a racially discriminatory manner violates the Constitution,[81] the decision, rather than a commitment to racial equality, represented an early foray by the Supreme Court in invalidating economic regulation, which reached its high-water mark during the *Lochner* era.[82] In any event, as the Court's treatment of the exclusion laws reveals, *Yick Wo* is far from representative of the prevailing judicial attitude toward the rights of persons of Chinese ancestry during the late 1800s.

### 2. Japanese Internment and *Brown v. Board of Education*

The historical context of the infamous decision to intern Japanese Americans, as well as Japanese immigrants, during World War II sheds light on the interrelationship between society's treatment of different minority groups. The

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76. SAXTON, *supra* note 75, at 260 (emphasis added).

77. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For a critique of Justice Harlan's so-called color-blindness jurisprudence, see Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

78. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

79. *Id.* at 559 (Harlan, J., dissenting).

80. 118 U.S. 356, 368 (1886).

81. *See, e.g.*, TRIBE, *supra* note 41, § 16-17, at 1483.

82. *See* Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 356 (1995).

Supreme Court ruling in *Korematsu v. United States*[83] shows how, absent the protection of law, disfavored racial minority *citizens* might be treated. In that case, the Supreme Court allowed U.S. citizens of Japanese ancestry, including some born and bred in this country, to be detained in internment camps. This decision reveals the inherent difficulties in drawing fine legal distinctions between noncitizens and citizens who share a common ancestry. In attempting to defuse the Japanese threat to national security, the U.S. Government refused to distinguish between noncitizens who immigrated from Japan and citizens of Japanese ancestry. Lumped together as the monolithic "Japanese" enemy, all were interned. The U.S. Government classified all persons of Japanese ancestry, regardless of their immigration status, as "foreign."

As the Japanese suffered from internment during World War II, African Americans, due in no small part to increased labor demand during the war, experienced improved employment opportunities and less discrimination.[84] As in the nineteenth century, Asian American exclusion from the national community was combined with some improvements for African Americans.

The timing of the Supreme Court's decision in *Korematsu*, one of the most well-known equal protection cases of the twentieth century, should not be ignored. *Korematsu* (1944) is an infamous case, while *Brown v. Board of Education*[85] (1954), which vindicated the rights of African Americans, is much revered. Though close in time, these cases reveal the very best and worst of American constitutional law. While persons of Japanese ancestry were rebuilding the remnants of their lives after the turmoil of legally sanctioned internment,[86] African Americans saw hope in being told that "separate but equal" was no longer the law of the land.

Ultimately, some of the harshest aspects of the anti-Asian laws were relaxed. Pressures to end exclusion of Chinese immigrants to the United States grew during World War II as it became increasingly embarrassing for the nation to prohibit immigration from a valued ally, China, in the war effort. Japanese propaganda efforts during World War II made much of the Chinese exclusion laws.[87] In the end, foreign policy concerns, not humanitarian ones, caused Congress in 1943 to allow China a minimum quota of immigrant visas and to

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83. 323 U.S. 214 (1944).

84. *See* MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982, at 12-15 (1984).

85. 347 U.S. 483 (1954). Even closer in time to *Korematsu*, President Truman in 1948 ordered the desegregation of the armed forces in response to pressures from African American activists. *See generally* RICHARD M. DALFIUME, DESEGREGATION OF THE U.S. ARMED FORCES 148-74 (1969) (analyzing political forces surrounding desegregation order); MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES, 1940-1965, at 291-314 (1981) (same).

86. *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

87. *See* DANIELS, *supra* note 51, at 186-98; *see also* J. Donald Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 LAW & CONTEMP. PROBS. 299, 303-06 (1956) (analyzing U.S. foreign policy problems resulting from the exclusion of Asian immigrants).

allow Chinese immigrants to naturalize.[88] In this way, the United States relaxed the Chinese exclusion laws for foreign policy reasons similar to those that helped bring about *Brown v. Board of Education*.[89]

The Vietnam War also reveals a relationship between Asian subordination and improvements for African Americans. While the civil rights movement of the 1960s achieved improvements for African Americans, the escalation of the war in Vietnam during this time was accompanied by the growth of racism directed at the Vietnamese people, which lingers to this day.[90] Seeing the racial roots of the war, as well as the impact on domestic people of color, two of the most prominent African American leaders of their generation, Martin Luther King, Jr. and Malcolm X, though of different political persuasions, opposed U.S. involvement in Vietnam.[91]

As this sad history demonstrates, Asian Americans—whatever their immigration status and however long they or their ancestors have lived in the United States—historically have been treated as foreigners in this land.[92] Some claim that the immigration laws discriminate against Asians to this day.[93] Besides

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88. *See* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (amended 1946); *see also* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 282-86 (1996) (analyzing foreign policy reasons for the elimination of the ban on Chinese immigration). In 1945, 109 Chinese immigrants came to the United States and 233 in 1946. *See* DANIELS, *supra* note 51, at 199 tbl.6.3. In 1946, Congress extended similar privileges to Filipinos and Indians. *See* Act of July 2, 1946, ch. 534, 60 Stat. 416 (amended 1952). The Immigration & Nationality Act of 1952 (INA) granted these minimum rights to all Asian nationalities. *See* Immigration & Nationality Act, ch. 477, §§ 201(a), 311, 66 Stat. 163, 175, 239 (1952) (codified as amended at 8 U.S.C.A. §§ 1151(a), 1422 (West Supp. 1998)).

89. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (contending that U.S. foreign policy interests spurred desegregation efforts in 1950s); *see also* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) ("[T]he [*Brown*] decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government. And the point was not lost on the news media.") (footnote omitted); Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997) (analyzing relationship between U.S. foreign affairs and civil rights during Eisenhower administration).

90. *See, e.g.*, United States v. Piche, 981 F.2d 706, 710 (4th Cir. 1992) (affirming conviction of the murderer of an Asian American who told victim that he hated the Vietnamese because his brother had been killed in Vietnam and that the Vietnamese should not have come to United States); *see also* Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981) (enjoining Ku Klux Klan and affiliates from harassing and intimidating Vietnamese fishermen).

91. *See* MARABLE, *supra* note 84, at 111-16.

92. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 429-38 (1996); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness" and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

93. *See* Jan C. Ting, *"Other than a Chinaman": How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995); *see also infra* text accompanying notes 121-49 (offering

suffering from efforts to exclude persons who shared their ancestry from the national community,[94] Asian Americans stood accused of the high crime against the American "melting pot" mythology of refusing to assimilate.[95] Ironically, the law prevented full assimilation and equal citizenship. For example, due to the bar to naturalization, immigrants from Asia (as non-whites) were disenfranchised and prohibited from exercising political power as citizens, which in the long run detrimentally affected Asian American political involvement.[96] Barred from the political community, Asian Americans were denied the possibility of more fully assimilating into the mainstream and then suffered criticism for failing to assimilate.

### *B. The National Origins Quota System*

In 1924, Congress established the much-reviled national origins quota system, a formulaic device designed to ensure stability in the ethnic composition of the United States.[97] Specifically, the system served to prefer white immigrants. It initially permitted annual immigration of up to two percent of the number of foreign-born persons of a particular nationality in the United States as set forth in the 1890 census.[98] In operation, the quota system "materially favored

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examples of disparate impact that modern immigration laws have on Asian immigration).

94. *See infra* text accompanying notes 242-60 (explaining stigma attached to citizens as the result of exclusion of certain races and nationalities who share similar characteristics).

95. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 96-97 (1943) (observing in Japanese internment case that many factors "prevented [Japanese] assimilation as an integral part of the white population"); Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 595 (1889) (justifying law excluding Chinese immigration by stating that "[i]t seemed impossible for [the Chinese] to assimilate with our people"). In this vein, the Supreme Court refused to allow an immigrant from India to naturalize and become a citizen, and thus assimilate into the U.S. political community, because he could not assimilate:

> It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. . . . [I]t cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. . . . What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

United States v. Thind, 261 U.S. 204, 215 (1923).

For a historical analysis of how persons advocating immigration restriction have relied on the argument that immigrants fail to assimilate, see Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165 (1997). *See also* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (analyzing barriers to Mexican American assimilation in the United States).

96. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1300-03 (1993).

97. *See* Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952).

98. *See id.* The 1924 Act was a successor to the Immigration Act of 1921, which had a more liberal quota of three percent of the persons from a particular country as determined by the 1910 census. *See* Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5, 5 (repealed 1952). Under

immigrants from Northern and Western Europe because the great waves from Southern and Eastern Europe did not arrive until after 1890."[99] Congress enacted the quota system in the wake of passing the literacy test in 1917; this test excluded "[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish."[100] In operation, the test, as intended, restricted the immigration of non-English speakers, including Italians, Russians, Poles, Hungarians, Greeks, and Asians.[101]

A House report offers a clear articulation of the purposes of the national origins quota system:

> "With full recognition of the material progress which we owe to the races from southern and eastern Europe, *we are conscious that the continued arrival of great numbers tends to upset our balance of population, to depress our standard of living, and to unduly charge our institutions for the care of the socially inadequate.*
>
> If immigration from southern and eastern Europe may enter the United States on a basis of substantial equality with that admitted from the older sources of supply, *it is clear that if any appreciable number of immigrants are to be allowed to land upon our shores the balance of racial preponderance must in time pass to those elements of the population who reproduce more rapidly on a lower standard of living than those possessing other ideals.*"
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> . . . .
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> ". . . *[The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity . . . .*"[102]

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the law, the quota system was based on U.S. population demographics as of 1920 beginning in 1927. *See* Immigration Act of 1924 § 11(b), 43 Stat. at 159.

99. Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1933 (1996) (footnote omitted); *see also* Chin, *supra* note 88, at 279-97 (discussing how quota system limited immigration from Asia). *See generally* HIGHAM, *supra* note 40, at 264-330 (analyzing social forces resulting in passage of restrictionist quota system). Interestingly, the national origins quota system did not impose restrictions on immigration from the Western Hemisphere, *see* Motomura, *supra*, at 1934, which was not expressly restricted until much later, *see infra* text accompanying notes 125-26 (discussing restrictions on Western Hemisphere immigration).

100. Immigration Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952).

101. *See* HIGHAM, *supra* note 40, at 300-30; *see also* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 465-68, 481-83 (1981) (discussing genesis of literacy test).

102. HUTCHINSON, *supra* note 101, at 484-85 (emphasis, omissions, and alterations added) (quoting STAFF OF HOUSE COMM. ON IMMIGRATION AND NATURALIZATION, REPORT ON RESTRICTION OF IMMIGRATION, H.R. REP. NO. 68-350, pt. 1, at 13-14, 16 (1924)); *see also* ROY L. GARIS, IMMIGRATION RESTRICTION at vii (1927) (expressing similar views and emphasizing that "our capacity to maintain our cherished institutions stands diluted by a stream of alien blood, with all its inherited misconceptions respecting the relationships of the governing power to the governed"). Some in the modern immigration debate have made similar calls for greater homogeneity among immigrants. *See, e.g.*, BRIMELOW, *supra* note 5, at 232 ("[B]y introducing diverse populations, [immigration] strikes at the nation-state's Achilles' heel: the need for

As one commentator remarked approvingly in 1924, the national origins quota system was "a scientific plan for keeping America American."[103] Implicit in these rationales, of course, was the view that persons of northern European stock were superior to persons of other groups. In a similar vein, the conventional wisdom was that "[t]he real assimilation of aliens depends to a very large extent upon their associates after entering—'we can easily assimilate' them 'if their origins resemble the origins of the people they find when they get here.'"[104]

The racial hierarchy endorsed by proponents of the national origins quota system was entirely consistent with the academic literature of the day, which viewed the "races" of southern and eastern Europe as inferior to northern European ones.[105] In effect, southern and eastern European immigrants, commonly thought of today as white ethnics, were "racialized" as non-white, and therefore unworthy of joining the national community.[106]

A heavy dose of anti-Semitism fueled the demand for the national origins quota system. Proponents hoped to limit the immigration of Jewish persons to the United States.[107] This anti-Semitism mirrored the discrimination suffered by Jewish Americans in this country.[108] During World War II, anti-Semitism, enforced and reinforced by the quota system, unfortunately influenced the U.S. Government's refusal to accept many Jewish refugees fleeing the Holocaust, one of the tragedies of the twentieth century.[109]

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homogeneity."). *But see* Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1210-19 (1997) (contending that personal preferences for the ethnic status quo are not legitimately considered in immigration law and policymaking).

103. A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 AM. J. INT'L L. 737, 740 (1924).

104. *Id.*

105. *See* HIGHAM, *supra* note 40, at 149-56. An influential book in this regard is MADISON GRANT, THE PASSING OF THE GREAT RACE (4th rev. ed. 1923). *See* HIGHAM, *supra* note 40, at 271 (analyzing nativism's influence on immigration legislation during this period and observing that "[i]ntellectually the resurgent racism of the early twenties drew its central inspiration from [this book]").

106. *See* HIGHAM, *supra* note 40, at 156-57 (analyzing racial hierarchies popular in science during that time with Jews and other "non-Nordics" classified as of inferior racial stock). The racialization of white ethnic immigrants was in no way unprecedented. For example, mainstream U.S. society classified early Irish immigrants as non-white. *See* Ronald Takaki, The Tempest *in the Wilderness: The Racialization of Savagery*, *in* DISCOVERING AMERICA 58 (David Thelen & Frederick E. Hoxie eds., 1994).

107. *See generally* JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA 81-174 (Johns Hopkins Univ. Press, rev. ed. 1984) (1975) (analyzing impact of anti-Semitism on immigration restrictions and discrimination against Jews in the United States).

108. *See* NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 137-85 (1963). *See generally* ROBERT S. WISTRICH, ANTISEMITISM (1991) (analyzing roots of anti-Semitism around the world).

109. *See* RITA J. SIMON & SUSAN H. ALEXANDER, THE AMBIVALENT WELCOME 31 (1993) (summarizing poll data indicating that, in 1939, vast majority of public opposed allowing large number of Jewish refugees from Germany into United States). *See generally* HENRY L. FEINGOLD, THE POLITICS OF RESCUE (1970) (analyzing the Roosevelt administration's response to Jewish refugees); SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED (1973) (studying U.S.

Other "races" also were affected by the quota system. Although Asian Americans were excluded from immigrating to the United States well before 1924,[110] an oft-overlooked impact of the quota system was that it discouraged immigration from Africa, historically the source of precious little immigration to the United States.[111] This is entirely consistent with anti-Black subordination in the country and this nation's later refusal to accept refugees fleeing political turmoil in Haiti, a country populated primarily by persons of African ancestry.[112]

Despite persistent criticisms, including claims that it adversely affected U.S. foreign policy interests,[113] the Anglo-Saxon, northern European preference in the immigration laws remained intact until 1965. Congress, though it tinkered somewhat with the quota system, maintained the quotas in the Immigration & Nationality Act (INA), the comprehensive immigration law that (as frequently amended) remains in place today.[114] President Truman vetoed the INA (a veto that Congress overrode) because it carried forward the discriminatory quota system.[115] In defending the INA's version of the quota system, one commentator of the day claimed that the nation's ethnic composition should not be changed and that, because some known Communists opposed the law, opponents should be circumspect before joining the fray.[116] A Senate report concluded that the national origins quota system "preserve[d] the sociological and cultural balance in the United States," which was justifiable because northern and western Europeans "had made the greatest contribution to the development of [the]

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refugee policy toward Jewish refugees during World War II); GORDON THOMAS & MAX MORGAN WITTS, VOYAGE OF THE DAMNED (1974) (documenting U.S. Government's refusal to accept Jewish refugees on the SS *St. Louis* during World War II and forcing the ship to return to Nazi Germany).

110. *See supra* text accompanying notes 47-82 (analyzing the significance of various laws designed to exclude immigration from China).

111. *See* Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 240 (1994).

112. *See infra* text accompanying notes 179-206 (analyzing U.S. response to Haitian refugees).

113. *See* PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME 52-56 (1953).

114. *See* INA, ch. 477, § 201(a), 66 Stat. 163, 175 (1952) (codified as amended at 8 U.S.C.A. § 1151(a) (West Supp. 1998)) (providing nations with quotas equal to one-sixth of one percent of the number of current U.S. inhabitants who traced their ancestry to that country in 1920).

115. *See* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 441 (1952-53) [hereinafter TRUMAN PAPERS] (explaining veto of INA because it perpetuated discriminatory national origins quota system and emphasizing that "immigration policy is . . . important to the conduct of our foreign relations and to our responsibilities of moral leadership in the struggle for world peace").

116. *See* Robert C. Alexander, *A Defense of the McCarren-Walter Act*, 21 LAW & CONTEMP. PROBS. 382, 385-86 (1956). Some, however, claimed that the public at large opposed the INA, particularly the national origins quota system. *See* Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 LAW & CONTEMP. PROBS. 401, 411 (1956). The passage of the INA in the face of public opposition might be explained by the political strength of an anti-immigrant minority. *See* Johnson, *supra* note 46, at 1158-61 (contending that, due to politics of immigration, vocal anti-immigrant minority may prevail in political process).

country" and the nation should "admit immigrants considered to be more readily assimilable because of the similarity of their cultural background to those of the principal components of our population."[117]

In sum, the national origins quota system reflects this nation's preoccupation with its ethnic balance. The system was based on the desire to limit the immigration of inferior "races" from southern and eastern Europe.[118] Domestic discrimination accompanied the exclusion in the laws. Long-standing anti-Semitism, as well as prejudice against other immigrant groups,[119] existed in the United States.

The life of the national origins quota system spanned a period when domestic racial minorities enjoyed some improvements under the law. While domestic minorities gained formal legal rights, noncitizens at best remained in the same rightless place in American society. Many noncitizens lost rights with the INA, which besides maintaining the quota system, also included some draconian provisions punishing noncitizen political minorities in the name of fighting Communism.[120]

### *C. Modern Racial Exclusion*

In the wake of the Civil Rights Act of 1964,[121] Congress passed the Immigration Act of 1965.[122] This new law abolished the national origins quota system[123] and barred racial considerations from expressly entering into decisions about immigrant visas;[124] it also imposed for the first time a ceiling (120,000) on migration from the Western Hemisphere.[125] Immigration from the Western

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117. STAFF OF SENATE COMM. ON THE JUDICIARY, REPORT ON THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, at 455 (1951).

118. This lends support to the concept that race is a social, not a biological, construction. *See generally* OMI & WINANT, *supra* note 27 (analyzing racial formation in the United States).

119. *See* GLAZER & MOYNIHAN, *supra* note 108, at 181-218 (documenting the Italian-immigrant experience in New York City).

120. *See* John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarren-Walter Act*, 66 TEX. L. REV. 1481, 1489-505 (1988) (analyzing the history of ideological exclusions in U.S. immigration laws with a focus on INA). *See generally* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) (analyzing how noncitizen political minorities historically have been treated in a way that would be patently unconstitutional if they were citizens).

121. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

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

123. *See id.*, sec. 1, 79 Stat. at 911 (codified as amended at INA § 201, 8 U.S.C.A. § 1151 (West Supp. 1998)).

124. *See id.*, sec. 2, 79 Stat. at 911-12 (codified as amended at INA § 202, 8 U.S.C.A. § 1152).

125. *See id.*, sec. 21(e), 79 Stat. at 921 (repealed 1976); *see also* Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 888 (1997) ("Unfortunately, just as the immigration debate in the 1920s had been unduly

Hemisphere previously had been restricted not through quotas but through vigorous enforcement of the exclusion and deportation grounds. The limitation on Western Hemisphere immigration was part of a compromise to those who feared a drastic upswing in Latin American immigration.[126] Consequently, Congress coupled more generous treatment of those outside the Western Hemisphere with less generous treatment of Latin Americans.

With the demise of the quota system, the racial demographics of the immigration stream changed significantly.[127] Increasing numbers of immigrants of color came to the United States.[128] Not coincidentally, concern with

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affected by the rise of nativism, the debate in 1965 was unduly influenced by a very different movement, that to secure civil rights of all Americans."). Interestingly, criticism of the discriminatory nature of the quota system in the House and Senate reports is muted with emphasis placed on the benefits of the new system rather than the deficiencies of the old. *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, REPORT ON AMENDING THE IMMIGRATION AND NATIONALITY ACT, AND FOR OTHER PURPOSES, H.R. REP. NO. 89-745, at 12 (1965) ("In place of the national origins system the bill establishes a new system of selection designed to be fair, rational, humane, and in the national interest."); STAFF OF SENATE COMM. ON THE JUDICIARY, REPORT ON AMENDING THE IMMIGRATION AND NATIONALITY ACT, AND FOR OTHER PURPOSES, S. REP. NO. 89-748, at 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332 (same). Indeed, the House report states that "[t]he national origins system has failed to maintain the ethnic balance of the American population," thereby suggesting that the goal was not necessarily inappropriate. H.R. REP. NO. 89-745, at 11.

126. *See* Motomura, *supra* note 99, at 1934; *see, e.g.*, H.R. REP. NO. 89-745, at 48 (noting that the "most compelling reason" for imposing the Western Hemisphere quota was fear of increased immigration from Latin America resulting from projected population growth); S. REP. NO. 89-748, at 17-18, *reprinted in* 1965 U.S.C.C.A.N. 3328, 3336 (expressing concern with the level of immigration from Western Hemisphere). The blue ribbon Select Commission on Immigration and Refugee Policy summarized the history:

> The United States was . . . far from free of prejudice . . . and one part of the 1965 law reflected change in policy that was in part due to antiforeign sentiments. Prejudice against dark-skinned people . . . remained strong. *In the years after World War II, as the proportion of Spanish-speaking residents increased, much of the lingering nativism in the United States was directed against those from Mexico and Central and South America. . . . Giving in to . . . pressures as a price to be paid for abolishing the national origins system, Congress put into the 1965 amendments a ceiling [on Western Hemisphere immigration] to close the last remaining open door of U.S. policy.*

U.S. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 208 (1981) (emphasis added) (footnote omitted).

127. For essays on this subject, see IMMIGRATION AND ETHNICITY (Barry Edmonston & Jeffrey S. Passel eds., 1994). Whether Congress envisioned the change in the racial demographics of immigration has been a subject of debate. *See* Chin, *supra* note 88 (contending that, contrary to conventional wisdom, Congress understood the implications of the 1965 law).

128. *See* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1995 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 23 tbl.D (1997) [hereinafter 1995 INS STATISTICAL YEARBOOK] (presenting statistical data showing that the top five countries of birth of immigrants in fiscal year 1995 were Mexico, the Philippines, Vietnam, the Dominican Republic, and the People's Republic of China).

immigration, particularly the race of the immigrants, grew over the coming decades.[129]

Importantly, the abolition of the national origins quota system, though removing blatant discrimination from the immigration laws, failed to cleanse all remnants of racism. Various characteristics of the modern immigration laws, though facially neutral, disparately impact noncitizens of color from developing nations. The 1965 Act replaced the national origins quotas with an across-the-board annual numerical limit of 20,000 immigrants from each nation.[130] This ceiling in operation creates lengthy lines for immigrants from developing nations, such as Mexico, the Philippines, and India, and relatively short, or no, lines for people from most other nations. For example, as of March 1998, fourth-preference immigrant visas (brothers and sisters of adult citizens)[131] were being granted to Philippine nationals who applied in April 1978, compared to October 1987 for virtually all other nations.[132] For third-preference immigrant visas (married sons and daughters of citizens),[133] the applications of Mexican citizens filed in May 1989 were being processed in March 1998, compared to September 1994 for applicants from almost every other nation.[134] Thus, similarly situated persons (e.g., siblings and children of U.S. citizens) may face radically different waits for immigration depending on their country of origin, with accompanying racial impacts.[135]

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129. *See, e.g.*, BRIMELOW, *supra* note 5, at 11 (expressing concern with increased immigration of racial minorities because "[r]ace and ethnicity are destiny in American politics") (emphasis omitted); RICHARD D. LAMM & GARY IMHOFF, THE IMMIGRATION TIME BOMB 76-98 (1985) (expressing fear of immigration of non-Anglo-Saxon immigrants who fail to assimilate).

130. *See* Immigration Act of 1965, Pub. L. No. 89-236, sec. 2, 79 Stat. 911, 911-12 (codified as amended at INA § 202(a), 8 U.S.C.A. § 1152(a) (West Supp. 1998)). Congress changed the quota somewhat in 1990. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 123-24 (2d ed. 1997) (explaining changes). The per country quotas were not extended to nations in the Western Hemisphere until 1976. *See* INA Amendments of 1976, Pub. L. No. 94-571, sec. 2, 90 Stat. 2703, 2703 (codified as amended at INA § 201(a), 8 U.S.C.A. § 1151(a)).

131. *See* INA § 203(a)(4), 8 U.S.C.A. § 1153(a)(4).

132. *See Immigrant Numbers for May 1997*, VISA BULL. (Bureau of Consular Affairs, U.S. Dep't of State, Washington, D.C.), May 1997, at 1, 2.

133. *See* INA § 203(a)(3), 8 U.S.C.A. § 1153(a)(3).

134. *See Immigrant Numbers for May 1997*, *supra* note 132, at 2.

135. *See* Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 333 (1993) ("[T]he Mexican individual is treated *less* favorably than his or her Austrian counterpart, because the per-country limit already subjects immigrants from high-demand countries to longer waits.") (emphasis in original); Ting, *supra* note 93, at 308 (contending that per-country caps disparately affect immigrants from Asia, many whom face long waits to immigrate). Some restrictionists recognize, and in fact embrace, the racial impacts. *See* LAMM & IMHOFF, *supra* note 129, at 21-22 (noting that "[c]ountry ceilings on legal immigration exist only to ensure that there is a mixture in our migrant stream, that no one country or group of countries will again dominate the stream to the exclusion of others").

Some might argue that the family reunification policy underlying the INA, *see* LEGOMSKY, *supra* note 130, at 168-70, erroneously favors immigrants from nations with larger families, which is the case in many developing nations populated by people of color. *See* ROY BECK, THE

Other changes to the immigration laws reflect racial concerns. Many have lauded the Refugee Act of 1980,[136] which for the very first time created a general right to apply for asylum in the United States for noncitizens fleeing political and related persecution in their homelands.[137] The Act, however, was motivated in part by a desire to limit the number of Vietnamese refugees accepted by the United States, whom the President had admitted liberally after the fall of Saigon in 1975.[138] The law established numerical limits on refugee admissions and generally restricted the power of the President to admit refugees, with the hope of preventing future mass migrations. Years after Congress passed the law, Vietnamese citizens brought suit charging that the U.S. Government discriminates against them based on nationality in processing visa applications.[139]

Similarly, the immigration laws allow for the exclusion of persons likely to become public charges,[140] an inadmissibility ground given more teeth in 1996 amendments to the immigration laws.[141] The public charge exclusion has a disproportionate effect on noncitizens of color from developing nations.[142]

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CASE AGAINST IMMIGRATION 40-41 (1996); LAMM & IMHOFF, *supra* note 129, at 192-93; *see also* BRIMELOW, *supra* note 5, at 79-81 (advocating change to family reunification policy). They claim that this results in "chain migration." However, "[t]he extent to which . . . 'chain migration' really takes place is hotly disputed." ALEINIKOFF ET AL., *supra* note 67, at 191 (citing authorities).

136. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8, 22, and 42 U.S.C.).

137. *See, e.g.*, 126 CONG. REC. 4501 (1980) (comments of Rep. Rodino) (characterizing this law as "one of the most important pieces of humanitarian legislation ever enacted").

138. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 34 (1981) (reviewing legislative history of Refugee Act and concluding that "commitment [to numerical limits on refugee admissions] reflected a growing antagonism within the United States to increased immigration in general, a feeling crystallized by the very large number of Indochinese admitted into the country since 1975"); *see also* GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS 102-69 (1986) (documenting growing public concern from 1975 to 1980 with the large number of Indochinese refugees resettling in the United States and general fear of mass migration).

139. *See* Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 104 F.3d 1349 (D.C. Cir. 1997) (dismissing claims on jurisdictional grounds).

140. *See* INA § 212(a)(4)(A), 8 U.S.C.A. § 1182(a)(4)(A) (West Supp. 1998) ("Any alien . . . likely at any time to become a public charge is inadmissible.").

141. *See* Juan P. Osuna, *The 1996 Immigration Act: Affidavits of Support and Public Benefits*, 74 INTERPRETER RELEASES 317 (1997) (summarizing changes to the public charge inadmissibility ground in the 1996 amendments to immigration laws).

142. *See* Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 INTERPRETER RELEASES 1581, 1590-91 (1997) (noting that certain nationality groups, particularly Mexicans and Central Americans, will be disparately affected by new income requirements (125% of poverty level) imposed on sponsors of immigrants by Congress in 1996, in INA § 213A(f)(1), 8 U.S.C.A. § 1183a(f)(1)) (citing Michael Fix & Wendy Zimmermann, *Welfare Reform: A New Immigrant Policy for the U.S.* (Apr. 1997) (report commercially available from the Urban Institute, Washington, D.C.)). *See generally* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519-28 (1995) (summarizing the history of the public charge exclusion and deportation grounds and other racial impacts).

For a recent example of alleged discrimination in the granting of visas to noncitizens, see

Passed before the heated immigration debates of the 1990s, the Immigration Act of 1990 reflects congressional concerns with the racial composition of the immigrant stream.[143] The law created a new immigrant visa program that effectively represents affirmative action for white immigrants, a group that benefitted from preferential treatment under the national origins quota system until 1965.[144] Congress, in an ironic twist of political jargon, established the "diversity" visa program, which though facially neutral prefers immigrants from nations populated primarily by white people.[145] As congressional proponents envisioned, many Irish immigrated under the program.[146] Indeed, a transitional diversity program required that forty percent of the visas would be issued to Irish immigrants.[147] In fiscal year 1995, the leading source of immigrants under the permanent diversity visa program was Poland.[148]

In short, the modern immigration laws have disparate racial impacts. As Professor Howard Chang has observed in a related vein, "[n]ativism . . . is not merely a shameful feature of our past . . . . Nativism afflicts our politics *today*,

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*Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997) (granting summary judgment in favor of State Department consular officer, formerly based in Brazil, who claimed he was unlawfully terminated for failing to discriminate on basis of visa applicant's race, ethnicity, national origin, economic class, and physical appearance).

143. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended primarily in scattered sections of 8 U.S.C.).

144. *See id.*, sec. 131, 104 Stat. at 4997-99 (codified as amended at INA § 203(c), 8 U.S.C.A. § 1153(c)); *see also* Legomsky, *supra* note 135, at 321 ("[T]he diversity program is merely the latest in a series of congressional attempts, spanning more than a century, to influence the ethnic composition of the United States immigrant stream.") (footnote omitted).

145. *See* LEGOMSKY, *supra* note 130, at 204-10 (explaining the genesis and operation of diversity visa program). "Since many more Americans already trace their ancestry to Europe than to Asia or Latin America, the statutory 'diversity' program is in truth an '*anti-diversity*' program; it causes the resulting population mix to be *less* diverse than it would otherwise be." *Id.* at 210 (emphasis in original); *see also* Ting, *supra* note 93, at 309 ("The expansion of diversity visas as part of the Immigration Act of 1990 reflects continuing Congressional unhappiness with the predominantly Asian and Latin American character of immigration and corresponding satisfaction with the success of diversity visa programs in leavening the immigration mix with more Europeans and other Caucasians."). Before passage of the 1990 Act, Congress tinkered with a pilot "diversity" program. *See* ALEINIKOFF ET AL., *supra* note 67, at 130 (noting that the Immigration Reform & Control Act of 1986, Pub. L. No. 96-603, 100 Stat. 3359 (codified as amended primarily in 8 and 42 U.S.C.), created pilot diversity visa program "to ameliorate the steep reduction in European migration that [was a] byproduct of the 1965 amendments"); Legomsky, *supra* note 135, at 329-30 (explaining temporary predecessors to diversity visa program of Immigration Act of 1990 and explaining how diversity visas are allocated).

146. *Compare* Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigrants and Diversity: Céad Míle Fáilte (A Thousand Times Welcome?)*, 6 GEO. IMMIGR. L.J. 745 (1992) (recognizing and defending the diversity immigrant program's benefits to Irish), *with* Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297 (1992) (reviewing the legislative history of 1990 Act, demonstrating how diversity visas were designed to benefit Irish, and criticizing the program).

147. *See* 1995 INS STATISTICAL YEARBOOK, *supra* note 128, at 21.

148. *See id.*

posing a clear and present danger of new anti-immigrant legislation."[149] The same is true for racial discrimination in the immigration laws. Other examples bring this point home.

### 1. The War on "Illegal Aliens" a/k/a Mexican Immigrants

One cannot fully appreciate the current debate over undocumented immigration in the United States without understanding how it fits into a long history. Especially in the Southwest,[150] the immigration laws have helped ensure a disposable labor force.[151] For example, during the Great Depression when the supply of unskilled labor dwarfed demand, Mexican immigrants as well as citizens of Mexican ancestry were "repatriated" to Mexico at the behest of governmental authorities.[152] Later, under the Bracero Program in the 1940s and 1950s, an estimated one million Mexican workers were temporarily admitted into the country to work in agriculture.[153]

At times, the call for immigration restrictions has been expressly anti-Mexican. For example, in 1956, the Duke Law School's *Law & Contemporary Problems* published an article ironically entitled "A Critical Analysis of the Wetback Problem,"[154] which referred to the 1950s as the "wetback decade" and blamed undocumented immigration from Mexico with "displacement of American workers, depressed wages, increased racial discrimination toward Americans of Mexican ancestry, illiteracy, disease, and lawlessness."[155] Though the term "wetbacks" has been replaced in today's parlance with "illegal aliens," the

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149. Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2115 (1997) (emphasis in original).

150. *See generally* ACUÑA, *supra* note 38; CAREY MCWILLIAMS, NORTH FROM MEXICO (rev. ed. 1990).

151. *See generally* MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST (1979) (analyzing history of labor control devices used in Southwest). For a summary of the history of Mexican immigration to the United States and an argument that the United States owes moral obligations to undocumented Mexican immigrants living in the country, see Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

152. *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 98-99 (1995) (analyzing deportation of persons of Mexican ancestry during Great Depression).

153. *See* KITTY CALAVITA, INSIDE THE STATE 218 (1992) (analyzing and criticizing U.S. Government's role in the program of ensuring control over Mexican labor). For a summary of the anti-Mexican policies during this period, see Michael A. Olivas, *The Chronicle, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicles as Racial History*, 34 ST. LOUIS U. L.J. 425, 435-39 (1990).

154. Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334 (1956). The pejorative term "wetback" was commonplace vernacular at the time and present in legal as well as popular discourse. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1395 (1953) (lamenting dicta in Supreme Court decision "say[ing], in effect, that a *Mexican wetback* who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation") (emphasis added).

155. Hadley, *supra* note 154, at 344.

modern restrictionist movement plays on remarkably similar—though often sanitized—themes.[156]

Despite the fact that undocumented persons come from nations all over the world, the near exclusive focus of governmental and public attention at the tail end of the twentieth century has been on undocumented immigration from Mexico.[157] The racial impact of the recent push to crack down on "illegal aliens" is unmistakable.[158] Well-publicized border enforcement operations, little different from military operations, in El Paso, Texas (Operation Blockade, later renamed Operation Hold the Line due to protests from the Mexican Government)[159] and San Diego, California (Operation Gatekeeper)[160] have been aimed at sealing the U.S.-Mexico border and keeping undocumented Mexican citizens from entering the United States.[161] Indeed, U.S. military forces assisted the Immigration & Naturalization Service (INS) in policing the border.[162] At the same time, reported abuses against Mexican nationals along the border continue unabated.[163] For example, in 1997, a U.S. Marine on patrol shot and killed a teenager, Esequiel Hernandez, Jr. (a U.S. citizen who had no criminal record) while he was herding his family's goats near the border.[164] The U.S. General

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156. *See, e.g.*, BRIMELOW, *supra* note 5, at 262-63 (expressing similar concerns in arguing for dramatic reductions in levels of immigration).

157. *See* 1995 INS STATISTICAL YEARBOOK, *supra* note 128, at 185-86 (estimating that, as of October 1996, about 54% of the undocumented population was of Mexican origin and that 15 countries contributed 50,000 or more persons to undocumented population in the United States).

158. For analysis of the importance of language as a tool for rationalizing limitations on the rights of noncitizens under the immigration laws, see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

159. *See* U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 10-19 (1994) (lauding Operation Hold the Line in El Paso and advocating expansion of this enforcement strategy).

160. *See President's Report Reviews Initiatives, "Accepts Immigration Challenge"*, 71 INTERPRETER RELEASES 1469 (1994) (describing operation).

161. *See generally* TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992 (1996) (documenting increased militarization of border enforcement).

162. *See* H.G. Reza, *Military Silently Patrols U.S. Border*, L.A. TIMES, June 29, 1997, at A3 (reporting on National Guard unit patrolling U.S.-Mexico border).

163. *See* U.S. COMM'N ON CIVIL RIGHTS, FEDERAL IMMIGRATION LAW ENFORCEMENT IN THE SOUTHWEST 80 (1997) (reporting on evidence of pattern of violence by Border Patrol); Amnesty Int'l, *United States of America: Human Rights Concerns in the Border Region with Mexico* (visited May 26, 1998) <http://www.amnesty.org/ailib/aipub/1998/AMR/25100398.htm> (documenting human rights abuses by INS); *see also* ALFREDO MIRANDÉ, GRINGO JUSTICE 100-45 (1987) (analyzing abuses of Chicanos in name of border enforcement); Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757 (1995) (analyzing need for improved complaint procedure for Border Patrol abuses).

164. *See* Sam Howe Verhovek, *After Marine on Patrol Kills a Teen-Ager, a Texas Border Village Wonders Why*, N.Y. TIMES, June 29, 1997, § 1, at 16. An archeologist who knew Hernandez his entire life commented that "'I'm telling you, the only way they could have botched this up more was if they shot Mother Teresa. If there was one truly innocent man on the border, it was this young man. And he's the one who got killed.'" *Id.*; *see also* Elvia R.

Accounting Office found that, despite the border enforcement build-up, the evidence was inconclusive about whether the strategy had proven effective.[165]

Public concern with undocumented Mexican immigration heightened at the same time that the population of persons of Mexican ancestry grew in the United States.[166] In return, the resistance of Mexican Americans to anti-immigrant sentiment represents a fight for status. Similar to the often-heated debate over bilingual education[167] and crime,[168] restrictionist proposals are but another battlefield for Anglos and Mexican Americans to fight for status in the U.S. social hierarchy.[169]

Besides conflict over social status, Mexican Americans, and Latinos more generally, have a self-interest in fighting overzealous border enforcement. In the fervor to locate and deport undocumented Mexican citizens, Mexican Americans, often stereotyped as "foreigners" by the national community, may fall within the enforcement net.[170] In the infamous deportation campaign known as "Operation Wetback" in 1954, for example, "[t]he Mexican American community was affected because the campaign was aimed at only one racial group, which meant that the burden of proving one's citizenship fell totally upon people of Mexican descent. Those unable to present such proof were arrested and returned to Mexico."[171] Similarly, evidence suggests that provisions of the immigration laws

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Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245, 256-62 (1996-97) (relaying human stories of undocumented Mexican immigrants in INS workplace raids).

165. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-21, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED (1997).

166. *See* FREDRIC C. GEY ET AL., CALIFORNIA LATINA/LATINO DEMOGRAPHIC DATA BOOK 8-9 tbls.1-2 to 1-3 (1993) (examining data showing that the population of California was 19% Latino in 1980 and 25% in 1990, with 80% of the Latinos in 1990 identifying themselves as of Mexican ancestry). The Bureau of the Census has projected that "Hispanics" will be the largest minority group in the United States by 2005. *See* Katharine Q. Seelye, *U.S. of Future: Grayer and More Hispanic*, N.Y. TIMES, Mar. 27, 1997, at B16.

167. *See generally* Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987) (analyzing controversy over bilingual education as conflict over status between Anglos and Latinos).

168. *See, e.g.*, People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090 (1997) (upholding broad injunction limiting conduct of Latino "gang" members not convicted of any crime).

169. *Cf.* John Cassidy, *The Melting-Pot Myth*, NEW YORKER, July 14, 1997, at 40, 40 ("The immigration debate has become a surrogate for arguments about everything from eugenics to welfare reform to economic growth."). For analysis of the conflict over status and its relevance to constitutional interpretation, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

170. *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997) (analyzing significance of classification of Latinos as "foreigners"); *see also* Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1245-51 (1995) (summarizing history of racialization of Chicanos in United States).

171. JUAN RAMON GARCÍA, OPERATION WETBACK 230-31 (1980); *see* JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971) (noting that in "Operation Wetback," "the Border Patrol launched the greatest maximum peacetime offensive against a highly exploited, unorganized and unstructured 'invading force' of Mexican migrants").

that allow for the imposition of sanctions on those who employ undocumented persons,[172] have resulted in "'a serious pattern of discrimination'" by employers against persons of Latin American, as well as Asian, ancestry.[173]

The historical relationship between subordination of Mexican Americans, a "foreign" minority, and African Americans, viewed as a domestic minority, is telling. During the New Deal, while the government scrambled to help citizens and provided public benefits to citizens who satisfied eligibility requirements,[174] Mexican American citizens as well as Mexican immigrants were effectively deported to Mexico.[175] In 1954, the same year that the Supreme Court handed down the much-lauded *Brown v. Board of Education*[176] decision, the U.S. Government commenced "Operation Wetback," the mass-deportation campaign directed at undocumented Mexicans.[177] Ironically, the war on Mexican immigrants, as well as Mexican American citizens, began at the same time that the formal legal rights of African Americans were finally being recognized. At that time, it was far from clear that the Equal Protection Clause of the Fourteenth Amendment on which *Brown* rested even protected Mexican Americans.[178]

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172. *See* U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 159, at 50-88 (finding current enforcement of employer sanctions to be ineffective); *see also* Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994) (arguing for elimination of sanctions because of their ineffectiveness and because they have increased discrimination against persons of Mexican ancestry).

173. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 5-6 (1990) (quoting a nationwide GAO survey); *see* U.S. COMM'N ON CIVIL RIGHTS, THE IMMIGRATION REFORM AND CONTROL ACT at iv (1989) (finding "no doubt that the employer sanctions have caused many employers to implement discriminatory hiring practices"). Such discrimination occurs despite the existence of provisions prohibiting it. *See* INA § 274B, 8 U.S.C.A. § 1324b (West Supp. 1998).

174. *See* WILLIAM C. BERMAN, THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION 4 (1970) ("Negroes voted for Roosevelt in 1936 and 1940 largely because their economic deprivation, stemming from unemployment and discrimination, had been lessened through the work of [the] . . . New Deal agencies . . . ."); *see also* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 249-75 (4th ed. 1989) (summarizing various social welfare programs developed for citizens during New Deal). Indeed, "in spite of the large number of white women on [welfare], 'welfare' . . . has become a '. . . code word' for race. And the 'typical' [welfare] mother is widely—though erroneously—believed to be an unmarried, unemployed urban woman of color with many children." Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1966 (1993) (omission added) (quoting Marian Wright Edelman, head of the Washington-based Children's Defense Fund). This is not to suggest that the administration of welfare during the New Deal was racially neutral. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 133-35 (2d ed. 1993) (discussing racial discrimination by southern states administering the federal welfare program).

175. *See supra* text accompanying note 152.

176. 347 U.S. 483 (1954).

177. *See supra* text accompanying note 171.

178. *See* Hernandez v. Texas, 347 U.S. 475 (1954) (reversing finding that Mexican Americans failed to constitute a cognizable class for equal protection purposes); *see also* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) (analyzing *Hernandez* in terms of racialization of Mexican Americans in Texas); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and*

During a period when the law promised (though perhaps failed to deliver) new legal protections to African Americans, a legally sanctioned deportation campaign struck with a vengeance at persons of Mexican ancestry.

### 2. Asylum, Haitian Interdiction, and the Politics of Race

U.S. law and policy toward noncitizens who have fled civil war, political and other persecution, and genocide in their native lands historically have been influenced by nativism and racism. Domestic anti-Semitism, for example, unfortunately contributed to the Roosevelt administration's decision to turn its back on Jewish refugees fleeing the horrors of Nazi Germany.[179] Congress passed the Refugee Act of 1980, among more humanitarian purposes, with the hope of reducing the number of refugees that the President admitted from Vietnam.[180]

It has not only been race, however, that has influenced U.S. refugee and asylum policy. Persons from China and Cuba, for example, in the latter half of the twentieth century received generous treatment from the U.S. Government in no small part due to foreign policy concerns, namely that the U.S. Government was at odds with the government of their homelands; admitting refugees from China and Cuba implicitly condemned their governments.[181] The United States generally denied asylum to Central Americans fleeing regimes with abominable human rights records that were U.S. allies, while granting relief to Poles fleeing a harsh communist government at odds with our own.[182]

Policy conflicts occasionally resulted in confused and inconsistent U.S. policies. For example, the treatment of Chinese refugees, including many who claimed persecution because of resistance to China's one-child rule, was erratic at best.[183] This results from the fact that, while foreign policy interests favored

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*Whiteness*, 2 HARV. LATINO L. REV. 321, 328 (1997) (analyzing lower court decision in *Hernandez* and treatment of Mexican Americans under law as "white" to their disadvantage).

179. *See supra* text accompanying notes 108-09.

180. *See supra* text accompanying notes 136-38.

181. *See generally* LOESCHER & SCANLAN, *supra* note 138, at 6-84 (documenting how various presidents employed asylum and refugee decisions to further U.S. foreign policy goals).

182. *See* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 343-48 (presenting statistical data reflecting phenomenon); *see also* Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751 (1992) (analyzing impact of foreign policy on asylum and refugee decisions); Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 28 (1993) (noting that, although Refugee Act "was hailed as a significant milestone in human rights, . . . the widely held view [is] that the present system is politically biased, compromising the intended goal of neutrality").

183. *See* Di v. Carroll, 842 F. Supp. 858, 866-67 (E.D. Va. 1994) (tracing inconsistency in treatment by U.S. Government of Chinese persons fleeing one-child rule), *rev'd without opinion*, 66 F.3d 315 (4th Cir. 1995). Congress in 1996 changed the law to expressly make persons fleeing such policies eligible for relief. *See* INA § 101(a)(42), 8 U.S.C.A. § 1101(a)(42) (West Supp. 1998) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 601(a)(1), 110 Stat. 3009, 3689, which provides that a person who has been subject to, or fears being subject to, forced abortion or involuntary sterilization, is deemed to have been persecuted on account of political opinion and therefore is eligible for asylum).

liberal admissions (and thus implicitly condemned China's communist government), domestic fears militated in favor of numerical limits. The U.S. Government initially showed sympathy for Chinese refugees.[184] However, fearing a mass migration from China in the 1990s, the executive branch began to detain all Chinese migrants who came to the United States on ships, including the much-publicized Golden Venture in 1993, and to interdict Chinese ships outside U.S. territorial waters before they reached the mainland.[185]

Despite the fluctuations on policy, the U.S. Government not infrequently went to extraordinary lengths to halt feared mass migrations of people of color. It implemented special detention policies directed at Central Americans and made concerted efforts to encourage potential asylum applicants to forego their claims and "voluntarily" depart.[186] No U.S. policy approached, however, the government's extraordinary treatment of Black persons fleeing the political violence in Haiti. An oft-ignored fact is that, by stigmatizing African American citizens, "U.S. immigration policy toward Haiti may *harm* a historically disadvantaged group—namely, black Americans."[187]

For much of recent history, the U.S. Government generally has supported the Haitian Government, in large part because the various regimes were stridently anticommunist.[188] In stark contrast, both Democratic and Republican administrations have had notoriously poor relations with Haiti's neighbor, Cuba, since Fidel Castro came to power in 1959. The different relationships visibly influenced asylum and refugee policy toward persons fleeing the two nations: Cubans received much more favorable treatment than Haitians.[189]

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184. *See, e.g., In re* Chen, 20 I. & N. Dec. (BIA) 16 (1989) (granting asylum to Chinese refugee based on past persecution during Cultural Revolution despite minimal threat of future persecution).

185. *See* Ting, *supra* note 93, at 310-11 (contending that treatment of Chinese immigrants on Golden Venture and interdiction of Chinese ships represent selective enforcement of immigration laws to limit Asian immigration); *see, e.g.*, Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) (affirming denial of asylum claim of Chinese national apprehended on Golden Venture); Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995) (same).

186. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (affirming permanent injunction barring INS from engaging in a pattern and practice of coercing Salvadoran noncitizens into signing voluntary departure forms and interfering with right to counsel); *see also* ROBERT S. KAHN, OTHER PEOPLE'S BLOOD 209-19 (1996) (documenting increased use of detention by INS in the 1980s, particularly detention of Central Americans).

187. Motomura, *supra* note 99, at 1950 (emphasis in original); *see infra* text accompanying notes 242-60 (analyzing stigma attached to domestic minorities when immigration law excludes immigrants sharing similar ancestry).

188. *See* THOMAS CAROTHERS, IN THE NAME OF DEMOCRACY 183 (1991); *see also* Jorge I. Domínguez, *Immigration as Foreign Policy in U.S.-Latin American Relations, in* IMMIGRATION AND U.S. FOREIGN POLICY 150, 157-58 (Robert W. Tucker et al. eds., 1990) (discussing the U.S. Government's relationship with Haiti).

189. *See* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 12-14 (1993) (analyzing significance of double standard). This has not always been the case. For example, refugees who came over in large numbers on the Mariel boatlift were detained with some even facing indefinite detention because the United States would not admit them, and the Cuban Government would not allow

In the late 1970s, an increasing number of Haitians in makeshift boats sailed to south Florida. In 1981, the Reagan administration, to diminish the flow of refugees and to deter others from following, initiated a program in which the U.S. Coast Guard interdicted Haitian boats and allowed INS officers to screen applicants to determine whether they had plausible claims for asylum and withholding of deportation.[190] Between 1981 and 1991, the Coast Guard interdicted about 25,000 Haitians.[191]

After the military coup toppled the democratically elected government in September 1991, the Bush administration imposed economic sanctions on Haiti and suspended interdiction; in November 1991, interdiction recommenced.[192] As a result of the coup, "'hundreds of Haitians [were] killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands [were] forced into hiding.'"[193] In the six months after October 1991, the Coast Guard halted over 34,000 Haitians on

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them to return. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (en banc) (upholding indefinite detention of Cuban national who came to the United States in Mariel boatlift). *See generally* Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925 (1984) (discussing the detention of Cubans arriving since 1980); Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans*, 62 S. CAL. L. REV. 1733 (1989) (summarizing the intolerable conditions Cuban detainees must endure during confinement). One salient difference between the Mariel Cubans and previous Cuban immigrants was that many more of the Mariel Cubans were Black. *See* MARÍA CRISTINA GARCÍA, HAVANA USA 68 (1996) (observing that 15-40% of Mariel Cubans were Black compared to 3% of the 1959-1973 stream of Cuban immigrants). Race thus helps explain the differential treatment of distinct waves of Cuban immigrants.

In 1994, the U.S. and Cuban Governments agreed to take steps to limit migration from Cuba to the United States. *See* LEGOMSKY, *supra* note 130, at 58-62 (summarizing evolution of U.S. policy toward persons fleeing Cuba). The United States' willingness to enter the agreement was influenced by concerns of a mass migration. *See id.* at 61-62 (observing that nations agreed to treaty after "new exodus" of "[t]housands of rafters" embarked for the United States).

190. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 160-62 (1993) (describing evolution in U.S. Government's treatment of Haitians during the 1980s and early 1990s). Under U.S. law, Haitians, once in the country, could have applied for asylum and withholding of deportation (now known as nonreturn). *See* INA § 208(a)(1), 8 U.S.C.A. § 1158(a)(1) (West Supp. 1998) (asylum); *id.* § 241(b)(3)(A), 8 U.S.C.A. § 1231(b)(3)(A) (nonreturn). Claims were made that screening on Coast Guard cutters was insufficient to satisfy obligations under international law to protect Haitians fleeing persecution. *See* Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2341 (1991).

For challenges to other policies directed specifically at Haitian asylum-seekers, see *Jean v. Nelson*, 472 U.S. 846 (1985) (reviewing claims of racial and national origin discrimination and finding that applicable regulation did not permit such discrimination), *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (finding discrimination by INS in processing asylum claims of Haitians), and *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981) (finding to the same effect as *Haitian Refugee Center*).

191. *See Sale*, 509 U.S. at 161.

192. *See id.* at 162.

193. *Id.* (alterations added) (quoting district court's "uncontested finding of fact").

the high seas,[194] which exceeded the number interdicted during the previous ten years.[195]

To stop the flow of refugees, President Bush in May 1992 began immediately repatriating all Haitians without screening to determine whether they might be eligible to remain in the United States.[196] Despite campaign promises to the contrary, President Clinton continued Haitian interdiction and repatriation and forcefully defended the policy against legal challenge.[197]

The Supreme Court ultimately upheld the executive branch's unprecedented Haitian repatriation policy.[198] The Court did so without squarely addressing the claim made in an amicus curiae brief of the NAACP, TransAfrica, and the Congressional Black Caucus that the policy was discriminatory and that the Haitians were subject to "separate and unequal" treatment.[199]

Besides African American activist groups, others condemned the executive branch's harsh policies toward the Haitians as race-based.[200] True enough, people of color from Haiti apparently were the first group of refugees ever singled out for interdiction on the high seas by U.S. armed forces, as well as for a series of extraordinary policies.[201] The issue is complex, however. Cubans, who have received much more favorable treatment, also are people of color. The executive branch's foreign policy goals, in addition to race and concerns of a mass migration, may explain the disparate treatment between Haitians and Cubans.[202]

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194. *See id.* at 163.

195. *See id.* at 161 (stating that, in decade after commencement of interdiction in 1981, "the Coast Guard interdicted approximately 25,000 Haitian migrants") (footnote omitted).

196. *See* Exec. Order No. 12,807, 3 C.F.R. 303 (1993), *reprinted in* 8 U.S.C. § 1182 (1994).

197. *See* Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES, Jan. 15, 1993, at A1.

198. *See Sale*, 509 U.S. at 188. In so doing, the Court relied on a version of the plenary power doctrine. *See id.* (emphasizing need for deference to President when "construing treaty and statutory provisions that may involve foreign and military affairs") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

199. *See* Brief of the National Association for the Advancement of Colored People, TransAfrica, and the Congressional Black Caucus as Amici Curiae in Support of Respondents, *Sale*, 509 U.S. 155 (No. 92-344).

200. *See* Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747, 749 & n.12 (1993); Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 688 (1993); *see also* Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 451 (S.D. Fla. 1980) (stating that a "possible underlying reason" why Haitians were treated differently than any other refugees fleeing repressive regimes was that they are Black), *aff'd as modified sub nom.* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

201. *See* SARAH IGNATIUS, NATIONAL ASYLUM STUDY PROJECT, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 141-66 (1993) (documenting special policies geared only toward Haitian asylum applicants by INS asylum officers).

202. *See supra* text accompanying notes 181-82. This suggests a hierarchy of racial discrimination in the United States, with the strongest racist sentiment directed at persons of African ancestry. *See* Saito, *supra* note 92 (analyzing racial hierarchy in the United States); *see also* Linda Kelly, Defying Membership: The Evolving Role of Immigration Jurisprudence 53-58 (unpublished manuscript on file with author) (analyzing Nicaraguan Adjustment and Central

Nonetheless, subtle racism inevitably reduced the potential for significant resistance to an interdiction program directed exclusively at Haitian refugees. As law professor Steve Legomsky declared, "'[t]he public would never [have stood] for this if the boat people were Europeans.'"[203] The race, class, language, and culture of the Haitians, as well as the popular belief that many had the HIV virus, unquestionably contributed to the domestic resistance to their admission.[204]

In the end, asylum-seekers from Haiti, one of the few nations near the United States with a large Black population, suffered some of the harshest treatment imaginable from the U.S. Government. The Supreme Court's sanctioning of that treatment occurred in the aftermath of the violence in Los Angeles after the Rodney King verdict,[205] a time when the nation's focus was on building racial harmony to avoid a repeat of violence in the future.[206] At the same historic moment, the nation was striving to improve the place of African Americans at home while it was excluding Blacks from abroad.

### 3. Proposition 187 and Race

Race played a prominent role in the passage of California's Proposition 187, one of the racial milestones of the 1990s.[207] To bolster his sagging re-election campaign, California Governor Pete Wilson capitalized on public dissatisfaction with immigration by staunchly supporting the initiative. Television advertisements emphasizing Wilson's unqualified support for Proposition 187 showed shadowy Mexicans crossing the border in large numbers.[208] Supporters blamed undocumented Mexicans for California's economic woes that were more

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American Relief Act, Pub. L. No. 105-100, §§ 201-204, 111 Stat. 2160, 2193-201 (1997) (codified in 8 U.S.C.A. §§ 1101, 1153, 1229b, and 1255 (West Supp. 1998)), which afforded lawful permanent residency to certain Nicaraguans, Cubans, and others but not to similarly situated Haitians).

203. James Harney, *Critics of U.S. Policy See Racist Overtones*, USA TODAY, Feb. 3, 1992, at 2A (alterations added) (quoting Professor Legomsky).

204. *See* Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841, 904-15 (1994); *see also* Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993) (analyzing difficulties faced by Haitian refugees and comparing their plight to that of Jews who fled Nazi Germany).

205. *See generally* READING RODNEY KING, READING URBAN UPRISING, *supra* note 35 (compiling essays analyzing issues surrounding the Los Angeles rebellion).

206. *See* James H. Johnson, Jr. & Walter C. Farrell, Jr., *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 N.C. L. REV. 1403, 1418-20 (1993) (summarizing various initiatives to foster economic development and ease social tensions in south central Los Angeles).

207. For analysis of the campaign culminating in the passage of Proposition 187, see Johnson, *supra* note 34, at 650-72, and for analysis of its impacts, see Johnson, *supra* note 142, at 1568-75. *See also* Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996) (analyzing complexity of nonracial fairness arguments in opposition to Proposition 187).

208. *See* John Marelius, *Wilson Ad Out to Ease Prop. 187 Drumbeat*, SAN DIEGO UNION-TRIB., Oct. 25, 1994, at A3.

likely attributable to drastic reductions in federal defense spending required by the end of the Cold War and the demise of the Soviet Union.[209]

Nativist and racist themes inflamed the bitter Proposition 187 campaign. One initiative sponsor, in a textbook example of nativist sentiment, boldly asserted that "'[i]llegal aliens are killing us in California. . . . Those who support illegal immigration are, in effect, anti-American.'"[210] An argument favoring the measure in a pamphlet distributed to registered voters proclaimed that "Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion."[211] One leader in the pro-187 campaign even played on fears that, unless citizens took steps like the initiative, Mexico might ultimately annex California.[212]

The public statements of the drafters of Proposition 187 left the unmistakable imprint of racial animus. One initiative leader conjured up disturbing imagery of lynching, a device historically used to terrorize African Americans in the United States: "'[y]ou are the posse . . . and [Proposition 187] is the rope.'"[213] Harold Ezell, a high-ranking INS official during the Reagan presidency who was loathed by Latino activists because of his derogatory comments about illegal aliens,[214] attributed Proposition 187's widespread support to the fact that "'[t]he people are tired of watching their state run wild and become *a third world country*.'"[215] Barbara Kiley, mayor of an Orange County town, reportedly described the children of undocumented immigrants as "'those little f--kers.'"[216] Her husband

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209. *See, e.g.*, TONY MILLER, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 8, 1994, at 54 (1994) [hereinafter CALIFORNIA BALLOT PAMPHLET] ("It has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year. While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer. IT IS TIME THIS STOPS!") (capitals in original) (Argument in Favor of Proposition 187). The fact that Proposition 187 placed in jeopardy federal funding of $15 billion, which greatly outweighed any cost savings, was virtually ignored in the campaign, *see id.* at 53, a fact suggesting that other factors besides fiscal ones were at work.

210. Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. TIMES, Aug. 10, 1994, at A1 (alteration and omission added) (quoting Ronald Prince, head of the Proposition 187 campaign).

211. CALIFORNIA BALLOT PAMPHLET, *supra* note 209, at 54 (capitals in original).

212. *See* Linda R. Hayes, *Letter to the Editor*, N.Y. TIMES, Oct. 15, 1994, § 1, at 18 (expressing concern that "a Mexico-controlled California could vote to establish Spanish as the sole language of California, 10 million more English-speaking Californians could flee, and there could be a statewide vote to leave the Union and annex California to Mexico"). Hayes was the Proposition 187 media director for southern California. *See id.*

213. McDonnell, *supra* note 210, at A1 (alteration and omission added) (quoting "initiative co-founder").

214. *See* Olga Briseno, *Mister Migra Harold Ezell*, SAN DIEGO UNION-TRIB., Aug. 23, 1989, at F1 (recounting Ezell's "most famous quote" in which "he said illegal aliens should be 'caught, skinned and fried'").

215. Daniel B. Wood, *Ballot Vote on Illegal Immigrants Set for Fall in California*, CHRISTIAN SCI. MONITOR, June 1, 1994, at 1, 18 (alteration and emphasis added) (quoting Harold Ezell).

216. Elizabeth Kadetsky, *"Save Our State" Initiative: Bashing Illegals in California*, 259 NATION 416, 418 (1994) (quoting Barbara Kiley).

and the initiative campaign's political consultant, Richard Kiley, observed that the public protests of Proposition 187 were counterproductive because "'[o]n TV there was nothing but Mexican flags and brown faces.'"[217] Barbara Coe, a Proposition 187 supporter, expressed fear of the "'militant arm of the pro-illegal activists, who have vowed to take over first California, then the Western states and then the rest of the nation.'"[218]

Election results were polarized along racial lines. White voters supported Proposition 187 by two-to-one and Latinos opposed it by a three-to-one margin.[219] As the racially tinged campaign and racially polarized vote suggest, Proposition 187, though facially neutral, at its core focused on race. Although undocumented persons in the United States come from many nations other than Mexico,[220] this never figured prominently in the debate over the initiative. Moreover, the measure, if implemented, will disparately impact certain minority communities. Undocumented Mexicans, Mexican American citizens, and citizens of other minority groups viewed as foreign, including Asian Americans, are the groups most likely to feel the enforcement sting of Proposition 187.[221]

To this point, the courts have enjoined the implementation of most of Proposition 187, with the final disposition of the legal challenges unknown.[222] Nonetheless, the law triggered national action. In 1996, Congress enacted welfare reform restricting benefits to lawful, as well as unlawful, immigrants.[223] As with the Chinese exclusion laws,[224] California blazed a trail for the nation.

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217. Margot Hornblower Lamont, *Making and Breaking Law*, TIME, Nov. 21, 1994, at 68, 73 (alteration added) (quoting Richard Kiley).

218. Carol Byrne, *Proposition 187's Uproar*, STAR TRIB. (Minneapolis), Oct. 20, 1994, at 7A (quoting Barbara Coe).

219. *See Times Poll: A Look at the Electorate*, L.A. TIMES, Nov. 10, 1994, at B2 (describing exit poll results). Polls taken immediately before the election suggested that the vote would be much closer than the results proved to be (59% to 41%). The inaccuracy may have resulted from the fear of some white supporters of being classified as "racists" if truthful to the pollsters. *See, e.g.*, Ed Mendel, *'The Door Is Open' if Voters Kill 187, Co-Author Warns*, SAN DIEGO UNION-TRIB., Nov. 4, 1994, at A1 (reporting that polls showed that Proposition 187 vote was dead heat). Racially polarized elections commonly produce a disjunction between polls and election results. *See* Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 734 & n.98 (1991).

220. *See supra* note 157 (citing statistical data on undocumented population in United States).

221. *See* Johnson, *supra* note 142, at 1571-72.

222. *See* League of United Latin Am. Citizens v. Wilson, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal. Mar. 13, 1998); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

223. *See supra* note 26 (citing welfare reform bill). For a sketch of possible constitutional infirmities with the elimination of benefits to lawful immigrants, see Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1612-25 (1997). *See also* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547 (1998) (analyzing how immigration and welfare restrictions violate various international human rights norms).

224. *See supra* text accompanying notes 47-82.

Proposition 187 was about much more than immigration. The initiative represented the electorate's general frustration with changing racial demographics. While an effort to attack domestic racial minorities with full force is unsavory politically,[225] an all-out war against noncitizens, with the attack being focused on their immigration status rather than their race, could be pursued. Proposition 187 thus reflects racial tensions in a way similar to the ever-popular English-only laws,[226] which have racial impacts because of the link between language and national origin. Designation of English as the official language, though facially neutral, directly affects the Latino community.[227] It therefore should not be surprising that the national origins quota system of 1924 came on the heels of the addition of the English literacy requirement to the immigration laws in 1917.[228] Both constituted parts of an overall package to limit the immigration of minorities.

Two years after the voters passed Proposition 187, the electorate approved the California Civil Rights Initiative, which was designed to eliminate affirmative action by the State of California.[229] This followed a University of California Board of Regents' decision to eliminate affirmative action in student admissions.[230] Consequently, attacks on racial minorities followed attacks on immigrants of color.

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225. *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION 194-228 (1991) (contending that vocal minority on university campuses frequently charge "racism" against professors and pressure campus administrators to side against professors).

226. *See generally* RAYMOND TATALOVICH, NATIVISM REBORN? THE OFFICIAL ENGLISH LANGUAGE MOVEMENT AND THE AMERICAN STATES (1995) (analyzing English-only movement in United States).

227. *See, e.g.*, Hernandez v. New York, 500 U.S. 352 (1991) (holding that prosecutors may lawfully base peremptory challenges against Latinos on ground that they speak Spanish); Yniguez v. Arizonans for Official English, 69 F.3d 920, 947 (9th Cir. 1995) (en banc) ("[T]he adverse impact of . . . the overbreadth [of Arizona's English-only law] is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities.") (citation omitted), *vacated as moot*, 117 S. Ct. 1055 (1997); *see also* Stephen W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 149-53 (1997) (analyzing instances of "language vigilantism" directed at Spanish-speaking Latinos). *See generally* BILL PIATT, ¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990) (advocating language rights). For analysis of the law analyzing the speak-English-only rules in the workplace, showing how they reveal Latino invisibility, legal indeterminacy, and racial dualism, see Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving Speak-English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997).

228. *See supra* text accompanying notes 97-101.

229. *See generally* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir.) (holding that the California Civil Rights Initiative did not violate the Equal Protection Clause), *cert. denied*, 118 S. Ct. 397 (1997).

230. *See* Jeffrey B. Wolff, Comment, *Affirmative Action in College and Graduate School Admissions—The Effects of* Hopwood *and the Actions of the U.C. Board of Regents on Its Continued Existence*, 50 SMU L. REV. 627, 654-57 (1997) (summarizing events surrounding the University of California Board of Regents' abolition of affirmative action).

## II. LESSONS FROM THE IMMIGRATION LAWS FOR DOMESTIC MINORITIES

Immigration law offers a helpful gauge for measuring this nation's racial sensibilities. Long a fixture of immigration law, the plenary power doctrine, a judicially created immunity for substantive immigration decisions, emphasizes that the legislative and executive branches of the U.S. Government enjoy "plenary power" over immigration matters and that little, if any, room exists for judicial review. Though consistently criticized, and arguably narrowed by the Supreme Court, the doctrine continues to represent the law of the land.[231] In this important way, immigration law has been, and remains to some extent, estranged from traditional public law, where the Constitution operates in full force.[232]

At the tail end of the twentieth century, immigration law and policy have increasingly become a visible hotbed of racial conflict. This section analyzes the teachings of the plenary power doctrine for domestic race relations.

### *A. Racial Exclusions in the Immigration Laws Reinforce the Subordinated Status of Minority Citizens in the United States*

Academic attacks on the plenary power doctrine are legion, coming from many different angles.[233] Some, for example, challenge the fundamental idea

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231. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (upholding gender and legitimacy classifications in immigration laws and recognizing the "limited scope of judicial inquiry into immigration legislation"); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding "that when Executive exercises . . . power . . . on the basis of a facially neutral and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant").

232. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984):

> Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. . . . [I]mmigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.

233. *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987) (challenging the *Chinese Exclusion Case* from an international law perspective); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 771-82 (1996) (advocating that all persons subject to U.S. laws should have constitutional rights and applying theory to family reunification under immigration laws); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (criticizing various theories for judicial deference); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) (analyzing recent plenary power case law and predicting future inroads in doctrine); Victor C.

underlying the doctrine—that nations have unfettered sovereign power to seal their borders.[234] Few, if any, modern defenders of the plenary power doctrine can be found in the legal academy.

*Federal* plenary power over immigration contrasts sharply with the Supreme Court's occasional strict scrutiny of *state* alienage classifications. In *Graham v. Richardson*, which invalidated a state welfare regulation, the Court recognized that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom heightened judicial solicitude is appropriate."[235] This reasoning would seem to apply with full force to federal regulation.[236] However, the Supreme Court consistently has been deferential to federal alienage

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Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997) (arguing for more scrutinizing judicial review of federal alienage classifications and immigration law classifications that affect fundamental rights); Michael Scaperlanda, *Partial Membership and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (rejecting ideas of inherent and unlimited sovereign power over immigration and calling for constitutional dialogue on place of noncitizens in national community); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1155-56 (1995) (examining case law involving detention of aliens and observing that the "focus on an eroding plenary power doctrine, which until recently has dominated immigration law scholarship, overlooks the polluting effect of the plenary power doctrine *outside* the immigration law realm") (emphasis added) (footnote omitted); Wu, *supra* note 52, at 43-50 (arguing for abrogation of plenary power doctrine); Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration (unpublished manuscript, on file with author) (contending that racial classifications in immigration laws should be subject to judicial scrutiny).

234. For a sampling of this sort of challenge, see NEUMAN, *supra* note 48, at 119-22, James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983), and Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965. *See also* Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 59-89 (1989) (analyzing the importance, and weaknesses, of sovereignty fiction in immigration law).

235. 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)); *see* Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating prohibition of noncitizens from state civil service system); *see also* ELY, *supra* note 16, at 161-62 (suggesting that, because aliens are a discrete and insular minority, alienage classifications deserve strict scrutiny). In contrast to *Graham*, the Court at times has declined to opt for strict scrutiny review of state alienage classifications. *See* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding state law barring aliens from jobs as public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (refusing to apply strict scrutiny and upholding state law requiring police officer to be a U.S. citizen). Nonetheless, courts occasionally have been willing to find that state laws in effect regulate immigration and usurp national power in the field and therefore are preempted by federal law. *See, e.g.*, Toll v. Moreno, 458 U.S. 1 (1982) (holding that federal law preempted state policy discriminating against lawful permanent residents); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that federal law preempted core provisions of Proposition 187 because they attempted to regulate immigration).

236. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 294 ("[I]f alienage is a suspect classification when made the basis of state regulation, should it not remain suspect when it is used by the federal government?").

classifications, just like it has been with respect to Congress's judgments about substantive immigration admissions criteria. For example, in *Mathews v. Diaz*,[237] the Court invoked the plenary power doctrine and upheld limits on lawful immigrants' eligibility for a federal benefits program.

The plenary power doctrine fortunately has not been invoked in recent years to shield any laws as contrary to this nation's modern constitutional sensibilities as the infamous Chinese exclusion laws.[238] Express racial and national origin exclusions, which would squarely contradict such icons of the law as *Brown v. Board of Education*,[239] rarely arise in modern immigration law and policy.[240] As we have seen, however, the facially neutral immigration laws of the modern era have distinctively racial impacts.[241]

Assuming that under the plenary power doctrine *noncitizens* possess few, if any, constitutional protections with respect to entering the country, the implications of racial and national origin exclusions on *citizens* must be considered. Because the Constitution unquestionably protects the rights of citizens, citizens claiming injury have a better chance at successfully challenging the immigration laws than noncitizens directly affected by their operation. Courts have recognized that citizens in certain circumstances may challenge the lawfulness of immigration laws because of the impact on their rights.[242]

Gerald Rosberg focuses on the damage to U.S. citizens sharing the race or national origin of groups barred from joining the national community:

> *[A racial or national origin] classification would . . . require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification.* When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry

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237. 426 U.S. 67 (1976).

238. *See supra* text accompanying notes 47-54.

239. 347 U.S. 483 (1954).

240. However, such situations arise occasionally. *See, e.g.*, Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (holding that national origin discrimination against noncitizens from Iran did not violate the Constitution); *supra* text accompanying notes 179-206 (analyzing Haitian interdiction and repatriation). In addition, one could envision a scenario in which Congress might pass an immigration law that expressly discriminates on the basis of race. *See* LEGOMSKY, *supra* note 130, at 94-96 (setting out hypothetical exercise in which Congress enacts law limiting immigration from Latin America into the United States because of domestic racial tensions attributed to growing Latino population).

241. *See supra* text accompanying notes 121-49.

242. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (refusing, because Attorney General offered legitimate and bona fide reason not to waive exclusion grounds, to consider First Amendment interests of those citizens who would have communicated with noncitizen in United States); Adams v. Baker, 909 F.2d 643, 647 n.1 (1st Cir. 1990) ("[I]t is important to recognize that the only issue that may be addressed by this court is the possibility of *impairment of United States citizens' First Amendment rights* through the exclusion of the alien.") (emphasis added) (citing *Mandel*, 408 U.S. at 762); Allende v. Schultz, 605 F. Supp. 1220, 1224 (D. Mass. 1985) ("The lower federal courts have interpreted *Mandel* to require the Government to provide a justification for an alien's exclusion when that exclusion is challenged *by United States citizens asserting constitutional claims*.") (emphasis added), *aff'd*, 845 F.2d 1111 (1st Cir. 1988).

> alone, it fixes a badge of opprobrium on citizens of the same ancestry. . . . *Except when necessary to protect a compelling interest, Congress cannot implement a policy that has the effect of labeling some group of citizens as inferior to others because of their race or national origin.*[243]

Others also have observed the impacts of racial and national origin exclusions on citizens. In vetoing the INA,[244] President Truman observed that the national origins quota system was founded on the idea

> that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept . . . violates the great political doctrine of the Declaration of Independence that "all men are created equal."[245]

Similarly, in arguing for the abolition of the quota system, Secretary of State Dean Rusk recognized that excluding certain noncitizens suggested that "'we think . . . less well of our own citizens of those national origins, than of other citizens.'"[246]

*Brown v. Board of Education*[247] suggests that racial and national origin exclusions in the immigration laws adversely affect domestic minorities. In that case, the Supreme Court relied on social science studies documenting the fact that segregation of African Americans "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."[248] Similarly, exclusion from the country of immigrants

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243. Rosberg, *supra* note 236, at 327 (emphasis added); *see also* Chang, *supra* note 102, at 1213 ("[X]enophobia . . . is inconsistent with equal concern and respect for citizens who may share the cultural traits that the xenophobe finds disagreeable.") (footnote omitted); Motomura, *supra* note 99, at 1947 ("[I]mmigration law that excludes members of a particular race or ethnicity may cast stigma on that group. Unless the government can show a compelling interest, any such provable stigma violates the bedrock equal protection prohibition against treating any person as inferior to another by virtue of race or ethnicity.") (footnotes omitted). Such an approach is consistent with theories of equal protection law that link the level of judicial review to the stigma created by the challenged legislative classification. *See* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 271-75 (1996) (comparing stigma approach to equal protection to other theories).

244. *See supra* text accompanying notes 114-15 (noting that Congress overrode presidential veto).

245. TRUMAN PAPERS, *supra* note 115, at 443.

246. Chin, *supra* note 88, at 302 (omission added) (quoting *Immigration: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary on H.R. 7700 and 55 Identical Bills*, 88th Cong. 390 (1964)); *see also* Louis L. Jaffe, *The Philosophy of Our Immigration Law*, 21 LAW & CONTEMP. PROBS. 358, 358 (1956) ("[National origin] quota provisions were born in racial prejudice. They give needless offense to many of our citizens and to the people of other countries; they bedevil the conduct of our foreign relations and add nothing to our public welfare.").

247. 347 U.S. 483 (1954).

248. *Id.* at 494. The Court cited various social science sources for this proposition. *See id.* at 494 n.11. Though the use of social science in constitutional interpretation, and particularly in *Brown*, has been much discussed, often critically, social science influenced the Court's decisions long before *Brown*. *See* Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 664 n.226.

of color may well "generate[] a feeling of inferiority as to the[] status in the community"[249] of domestic minorities who share a similar racial and national origin background.

Racial exclusion of noncitizens under the immigration laws, be they express or covert, reveals to domestic minorities how they are viewed by society. The unprecedented efforts to seal the U.S.-Mexico border combined with the increased efforts to deport undocumented Mexicans, for example, tell much about how a majority of society views Mexican Americans and suggests to what lengths society might go, if permitted under color of law, to rid itself of domestic Mexican Americans.[250] In fact, during the New Deal, Mexican American *citizens*, as well as Mexican *immigrants*, were "repatriated" to Mexico.[251] It therefore is no surprise that the organized Mexican American community consistently resists the harsh attacks on immigration and immigrants.[252] This is true despite sentiment among some Mexican Americans to restrict immigration because of perceived competition with immigrants in the job market.[253]

For similar reasons, African American activist organizations protested when the U.S. Government acted ruthlessly toward poor Haitian refugees facing death from the political violence gripping Haiti.[254] Asian activist groups criticized the treatment of Chinese immigrants in the 1990s,[255] as well as anti-immigrant sentiment and welfare reforms that adversely affected the Asian immigrant community.[256] These minority groups implicitly understand the link between racial exclusions and their place in the racial hierarchy in the United States. It is not just that they share a common ancestry, though that no doubt plays some role in the formulation of political support. These communities instead understand that animosity toward members of immigrant minority communities is not just

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249. *Brown*, 347 U.S. at 494.

250. *See supra* text accompanying notes 150-78.

251. *See supra* text accompanying note 152. Today, the "deportation" of citizens occurs most frequently when Mexican citizens with U.S.-citizen children (due to their birth in this country) are deported; the citizen children, especially younger ones, almost inevitably accompany their deported parents. *See* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40-41 (1988).

252. *See* PETER SKERRY, MEXICAN AMERICANS 304-08 (1993) (criticizing Mexican American leaders' liberal stance on immigration as out of step with rank-and-file).

253. *See generally* DAVID G. GUTIÉRREZ, WALLS AND MIRRORS (1995) (analyzing restrictionist sentiment in Mexican American community because of, among other things, fear of job loss to low wage labor provided by Mexican immigrants).

254. *See supra* text accompanying note 199 (discussing amicus brief filed with the Supreme Court by NAACP and other African American groups in Haitian interdiction case); *see also* Hing, *supra* note 111 (contending that U.S. immigration law's exclusion of immigrants from Africa sent "messages of exclusion" to African American community).

255. *See, e.g.*, Pamela Burdman, *Human-Smuggling Crackdown Reported in Chinese Press*, S.F. CHRON., Aug. 20, 1993, at A2 (reporting that Asian Law Caucus attorney questioned U.S. Government's treatment of Chinese asylum-seekers); Gregory Gross & Angela Lau, *Mexico Refuses to Let Chinese Land*, SAN DIEGO UNION-TRIB., July 10, 1993, at A1 (same).

256. *See* Steve A. Holmes, *Anti-Immigrant Mood Moves Asians to Organize*, N.Y. TIMES, Jan. 3, 1996, at A1; Lena Sun, *Ethnic Groups Unite Against Benefit Cuts*, WASH. POST, July 10, 1995, at C1.

limited to immigrants. In this way, immigration has proven to be a battlefield for status among Anglos and people of color in the United States.[257]

The concerns of minority activists find support in psychological theory, which suggests that people generally view persons of national origin ancestries other than their own as fungible. Put differently, in-groups tend to define out-groups as homogeneous.[258] The out-group homogeneity theory helps explain the persistence of racial stereotypes.[259] Many have experienced the homogenizing of racial minorities in crude and obviously false statements about how all certain racial minorities "look alike."[260] The theory supports the idea that society generally classifies all persons of Mexican ancestry, for example, as the same and fails to make fine legal distinctions between them based on such things as immigration status.

In the end, we must understand that the impact of racially exclusionary immigration laws does more than just stigmatize domestic minorities. Such laws reinforce domestic subordination of the same racial minority groups who are excluded. By barring admission of the outsider group that is subordinated domestically, society rationalizes the disparate treatment of the domestic racial minority group in question and reinforces that group's inferiority. Exclusion in the immigration laws must be viewed as an integral part of a larger mosaic of racial discrimination in American society.

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257. *See supra* text accompanying notes 167-69 (citing authority analyzing status conflict).

258. *See* Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception, in* PREJUDICE, DISCRIMINATION, AND RACISM 165 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (summarizing studies on cultural homogeneity theory and elaborating on them in empirical study); *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1192 (1995) ("While ingroup members perceive similarities between themselves and others in their group, they perceive outgroup members as being even more homogeneous. In other words, subjects tend to perceive outgroup members as an undifferentiated mass, while ingroup members are more highly differentiated."); *id.* at 1192 n.133 (citing studies). Krieger offers as an example a reference by a white supervisor to her Salvadoran client in an employment dispute as "Mexican," which "tended to show that he perceived Latinos as an undifferentiated outgroup." *Id.* at 1192.

259. *See* Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 82 (1969).

260. *See* Harry H.L. Kitano, *Asian-Americans: The Chinese, Japanese, Koreans, Pilipinos, and Southeast Asians*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 126 (1981) (stating that people "presume[] homogeneity among Asian groups, not only on the physiological level, as typified by the phrase, 'They all look alike,' but on a cultural level"); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341 n.100 (1987) (discussing common experience of African or Asian American "being mistaken for another black or Asian who looks nothing like you (the 'they all look alike' syndrome)") (citation omitted).

### *B. Lessons from Psychological Theory: Why Immigrants of Color Are Society's Scapegoats*

The historical dynamic identified here cannot be marginalized as simply an "immigration" issue, which is how legal academia often has treated immigration law. Indeed, immigration law sounds the alarm for racial minorities in the United States. Efforts to exclude noncitizen minorities from the country under the immigration laws threaten citizen minorities. An obvious threat is that, if for whatever reason—narrow interpretation by the Supreme Court, for example—the protections of the Constitution are limited or eviscerated, domestic minorities have much to fear.[261] The punishment of noncitizens of color suggests just how society might zealously attack domestic minorities of color absent legal protections. *Korematsu*, in which the Supreme Court sanctioned the internment of citizens as well as noncitizens of Japanese ancestry in the name of national security, is a stark example.[262]

Moreover, a relationship exists between society's treatment of domestic minorities and noncitizens of color. Congress passed the Chinese exclusion laws not long after ratification of the revolutionary Reconstruction Amendments designed to protect the rights of African Americans.[263] *Korematsu* and "Operation Wetback" came close in time to *Brown v. Board of Education*.[264] Haitian repatriation continued at roughly the same time as the "Rebuild L.A." campaign in the wake of the Rodney King violence.[265] Because of the recurring nature of such events, it cannot be viewed as a coincidence that they occurred at the same time but should be considered to be part and parcel of a complex pattern of racial subordination in the United States.

Psychological theory at times has served as a tool for analyzing the legal implications of racial discrimination.[266] In some ways, the reaction to immigrants

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261. Indeed, they have much to fear even with legal protections. Legal constraints can only do so much to constrain anti-minority sentiment. *See supra* note 16 (noting limits on legal remedies in facilitating meaningful social change).

262. Korematsu v. United States, 323 U.S. 214 (1944); *see supra* text accompanying notes 83-89.

263. *See supra* text accompanying notes 47-96.

264. 347 U.S. 483 (1954); *see supra* text accompanying notes 174-78.

265. *See supra* text accompanying notes 205-06.

266. *See, e.g.*, Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 811-14 (1994) (analyzing psychological theory on unconscious nature of racism in rejecting claim that assailant's race should be considered in evaluating self-defense claim); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (analyzing psychological impacts of microaggressions, subtle put-downs, and slights of minorities); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982) (analyzing psychological harms of racial insults to racial minorities); Lawrence, *supra* note 260 (analyzing how unconscious racism undermines effectiveness of modern equal protection law, which requires proof of discriminatory intent). For examination of social psychology literature on anti-immigrant sentiment, see Victor C. Romero, Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and

of color can be explained by the psychological construct known as transference "in which feelings toward one person are refocused on another."[267] Transference ordinarily occurs unconsciously in the individual.[268] The general public, in light of modern sensibilities, often is foreclosed from directly attacking minority citizens, at least publicly. Society can, however, lash out with full force at noncitizens of color. In so doing, they contend that the attacks are not racially motivated but that other facially neutral factors animate restrictionist goals.[269] Such attacks amount to transference of frustration from domestic minorities to immigrants of color.

The related psychological construct of displacement also helps understand the phenomenon.[270] "Displacement" is "[a] defense mechanism in which a drive or feeling is shifted upon a substitute object, one that is psychologically more available. For example, aggressive impulses may be displaced, as in 'scapegoating,' upon people (or even inanimate objects) *who are not sources of frustration but are safer to attack.*"[271]

Psychological studies show how displaced frustration may unconsciously result in the development of racial prejudice.[272] For example, one famous study of displaced aggression found that negative attitudes toward persons of Japanese and Mexican ancestry increased after a tedious testing session that caused children to miss a trip to the movies. Animosity was displaced from the test-givers, immune from attack because of their positions of authority, to defenseless racial minorities.[273]

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the "Promise Enforcement" Cases 49-59 (Mar. 3, 1998) (unpublished manuscript, on file with author).

267. Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197, 205 (1970). In psychoanalytic theory, transference refers to the patient's transference of feelings toward a particular individual to the therapist. *See generally* C.G. JUNG, THE PSYCHOLOGY OF THE TRANSFERENCE (R.F.C. Hull trans., 2d ed. 1966).

268. *See* Elizabeth F. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 L. & PSYCHOL. REV. 93 (1976); *see also* Francis A. Gilligan et al., *The Theory of "Unconscious Transference": The Latest Threat to the Shield Laws Protecting the Privacy of Sex Offenses*, 38 B.C. L. REV. 107, 111-17 (1996) (discussing psychological theory of unconscious transference in witness identification and distinguishing it from psychological use of the term "transference").

269. *See, e.g.*, *supra* text accompanying notes 207-30 (discussing how supporters of Proposition 187 claimed that the measure was not racist or anti-immigrant).

270. I readily concede, as Gordon Allport observed in a different context, that "[n]o single theory of prejudice is adequate." GORDON W. ALLPORT, THE NATURE OF PREJUDICE 352 (1954). The psychological literature makes clear that a complex interplay of factors contributes to the development of anti-immigrant sentiment. *See, e.g.*, Gregory R. Maio et al., *Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 513 (1996); Gregory R. Maio et al., *The Formation of Attitudes Toward New Immigrant Groups*, 24 J. APPLIED SOC. PSYCHOL. 1762 (1994).

271. DAVID KRECH ET AL., ELEMENTS OF PSYCHOLOGY 768 (2d ed. 1969) (emphasis added).

272. *See* ALLPORT, *supra* note 270, at 343-53.

273. *See* Neal E. Miller & Richard Bugelski, *Minor Studies of Aggression: II. The Influence of Frustrations Imposed by the In-Group on Attitudes Expressed Toward Out-Groups*, 25 J. PSYCHOL. 437 (1948).

Such examples square with the history of scapegoating immigrants for the social problems of the day.[274] For example, the U.S. economy went south in the late 1800s and the frustration was displaced from diffuse economic causes to Chinese immigrants.[275] Gordon Allport offered a most apt example: "Most Germans did not see the connection between their humiliating defeat in World War I and their subsequent anti-Semitism."[276] Frustration was displaced from complex real-world causes to a simple—and defenseless—solution.

Transference and displacement serve to hide racial animosity toward all people of color, not just immigrants of color. Unfortunately, however, an unsatisfied appetite for homogeneity knows no border between immigrants and citizens.[277] Minority citizens as well as minority noncitizens remain a distinct racial minority whatever the fine legal distinctions made with respect to immigration status. The popular perception that Latinos[278] and Asian Americans[279] are "foreigners" in the United States, supports this idea.

Transference and displacement also help us better understand interethnic conflict in the United States.[280] Racial minorities all too often fight each other because their frustration is displaced from white society, too powerful to attack successfully. Latinos and African Americans, for example, have blamed each other for their social and economic woes.[281] African Americans and Asian Americans have done the same.[282] Though understandable, this displaced animosity obscures the fact that dominant society, which is fighting to maintain

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274. *See* ALLPORT, *supra* note 270, at 243-59; *see also id.* at 346-47 ("[I]t is not economic advice that rules immigration policy, but rather the *felt frustrations* of citizens who rightly or wrongly think an immigration iron curtain will protect them in their search for status.") (emphasis in original) (footnote omitted).

275. *See supra* text accompanying notes 69-82.

276. ALLPORT, *supra* note 270, at 352.

277. *See supra* text accompanying notes 258-60 (discussing out-group homogeneity thesis). Along similar lines, Alex Aleinikoff has expressed fear about the difficulties of ensuring that the United States include lawful immigrants in the national community when efforts are made to exclude undocumented immigrants. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915 (1995). The difficulty of cabining such sentiment is demonstrated by the fact that, not long after the California voters passed Proposition 187 to limit the availability of public benefits to undocumented persons, *see supra* text accompanying notes 207-30 (discussing Proposition 187), Congress enacted welfare "reform" denying public benefits to lawful immigrants, *see supra* note 26 (citing legislation).

278. *See supra* text accompanying note 170.

279. *See supra* text accompanying note 92.

280. *See* Johnson, *supra* note 35, at 57-63 (analyzing how interethnic conflict is symptomatic of larger racial and social problems).

281. *See generally* BILL PIATT, BLACK AND BROWN IN AMERICA (1997) (analyzing African American/Latino conflict and advocating cooperation).

282. *See* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1584-85 (1993) (analyzing how media and other portrayals of African American and Korean American conflict in Los Angeles reflected dominant society's racial views); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the* Violent Discourse *Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993) (analyzing conflict along class as well as racial lines).

the racial status quo, is the true culprit. This insight suggests the importance of efforts to resolve interethnic conflict and build constructive coalitions between communities of color to challenge discrimination.[283]

Cognitive dissonance theory, under which the human mind attempts to reconcile conflicting ideas,[284] also helps explain how dominant society pits subordinated peoples against one another. Being generous to one racial minority allows one to rationalize the harsh treatment of other minorities and offer a facially neutral explanation, such as the group's failure to assimilate, its deficient work ethic, that its members speak a foreign language, or that members of the group entered the country in violation of the immigration laws. As Cass Sunstein observed,

> [t]he beneficiaries of the status quo tend to . . . conclud[e] that the victims deserve their fate, that they are responsible for it, or that the current situation is part of the intractable, given, or natural order. . . . [P]eople who behave cruelly change their attitudes toward the objects of their cruelty and thus devalue them. Observers of cruelty and violence tend to do the same. The phenomenon of blaming the victim has clear cognitive and motivational foundations. The notion that the world is just, and that existing inequalities are deserved or desired, plays a large role in forming preferences and beliefs. All these phenomena played an enormous part in the history of racial and sexual discrimination.[285]

A number of other psychological and sociological theories offer some explanatory role for the relationship between domestic and foreign subordination.[286] The theory of status conflict focuses on conflicting groups fighting for status in the country.[287] Competition theory sees various ethnic groups, including whites, Asian Americans, and African Americans, competing for scarce economic and social resources.[288] Though these and many other theories of race relations differ in important ways, each considers the whole of social relations as opposed to focusing on the particular misfortune of one

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283. *See* Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 828-47 (1995) (analyzing benefits and impediments to multiracial coalition building); Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 30 n.118 (1996) (advocating "sophisticated approach to coalitional efforts").

284. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (hypothesizing that when confronted with internally inconsistent ideas, a person will try to reduce cognitive dissonance by avoiding situations and information that would likely increase the inconsistency).

285. Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 759-60 (1991) (footnote omitted).

286. For a discussion of various psychological theories that help explain racial conflict, see Sylvia R. Lazos, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. (forthcoming May 1998).

287. *See supra* text accompanying notes 167-69 (explaining concept of status conflict in connection with the English-only movement in the United States).

288. *See generally* OLZAK, *supra* note 75 (applying theory to explain an empirical study considering conflict between various groups and noting rise in conflict and violence with increases in immigration).

minority group at a time. This lesson should not be lost on those analyzing anti-immigrant sentiment and domestic race relations.

## CONCLUSION

This Article traces the historical relationship between subordination of domestic minorities and noncitizen minorities. Those serious about social change must engage and contend with these complex interrelationships for a better understanding of the operation of subordination in the United States. Because racial subordination is part of a cohesive whole, it cannot be fully appreciated by focusing on one aspect as separate and apart from the dynamic social context.

As seen in the instance of interethnic conflict, the complex interrelationship suggests the need to build coalitions between subordinated communities seeking to end subordination.[289] In the past, conflict between different minority groups—be it between Black and Latino, Black and Asian, or some other—has contributed to the maintenance of the status quo. Conflict has hindered the building of coalitions necessary to dismantle the entrenched racial hierarchy.

But, if change is not forthcoming, what is one to extrapolate from the past in predicting the future? We can expect crackdowns on immigrant minorities at times when minimal improvements are seen by domestic racial minorities. Foreigners, like sacrifices to the gods, are the price for domestic minorities to achieve marginal improvements in their plight. The psychological dynamics work together to buttress the status quo and ensure maintenance of the racial hierarchy in the United States.

For better or worse, the history of national origin and racial exclusion in U.S. immigration laws serves as a lens into this nation's soul. By considering the nationalities and racial minorities that a society seeks to exclude from the national community, we better understand how that society views citizens who share common characteristics with the excluded group. This phenomenon is not limited to racial minorities, but applies with equal force to other groups who have been excluded from our shores under the immigration laws, including political minorities, the poor, women, lesbians, and gay men.[290] Disadvantaged in the United States means multiply disadvantaged under the immigration laws.[291]

Transference of hate and displacement of frustration from one racial minority to another explain much in the heated racial dynamics of the twentieth century. Cognitive dissonance theory also teaches us how the nation can be so harsh to noncitizens of color while claiming that racism is dead in America. As immigration continues to change the complexion of U.S. society, we unfortunately can expect more of the same. One can only wonder what the

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289. *See supra* text accompanying note 283 (discussing building of multiracial coalitions).

290. For analysis of different subordinated groups' attempts to achieve full citizenship rights in this country, see KENNETH L. KARST, BELONGING TO AMERICA (1989).

291. *Cf.* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (analyzing intersection of race and gender in subordination of women of color).

constant striving for homogeneity[292] means for the future, as racial diversity in the United States increases and the Anglo-Saxon ideal becomes less a possibility and more a distant, perhaps nostalgic, memory. Indeed, we are left with a terrifying vision into the heart of darkness. Are we robots? Insects?[293] In pondering the future, the question posed by Richard Delgado—"The Coming Race War?"—becomes all the more ominous.[294]

292. For critique of the Anglo-Saxon homogeneity assumption underlying U.S. law generally, see Lazos, *supra* note 286. *See also* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. J. 323 (1997) (analyzing Eurocentric nature of law and its use as instrument of cultural domination in the United States).

293. *See* George A. Martínez, Latinos, Assimilation, and the Law: A Philosophical Perspective (unpublished manuscript, on file with author).

294. RICHARD DELGADO, THE COMING RACE WAR? (1996).