

THE INTERSECTION OF RACE AND CLASS IN U.S. IMMIGRATION LAW AND ENFORCEMENT

KEVIN R. JOHNSON*

I

INTRODUCTION

Since its emergence in the 1960s and 1970s, ethnic- (including white) studies scholarship has analyzed race and class as intertwined and interrelated.¹ An inherently conservative discipline, law is notoriously resistant to scholarly change. As a result, legal scholarship often lags behind the cutting edge of other disciplines. Not surprisingly, only in relatively recent years has the intersection of race and class become the subject of a growing body of critical *legal* scholarship.²

A bit of intellectual history helps explain the isolation of two bodies of legal scholarship—Critical Legal Studies (CLS) and Critical Race Theory—that would seem to naturally analyze race and class both critically and in tandem. The late 1970s and early 1980s saw the emergence of CLS, which scrutinized the

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* Dean, University of California, Davis, School of Law, and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies. Jennifer M. Chacón, Steve Bender, Bernard Trujillo, and Mary Romero provided helpful comments on a draft of this article, which I presented at the Duke Law School in January 2009 at the “Race and Socio-Economic Class: Unraveling an Increasingly Complex Tapestry” conference. UC Davis law students Maryam Sayyed, Crystal Yu, Anna Kristi Soliman, and Elica Vafaie provided excellent research and editorial assistance. A special thanks to Professor Trina Jones for inviting me to participate in this symposium issue. I have shared some of the thoughts presented in various sections of this article in embryonic form on the ImmigrationProf blog, <http://lawprofessors.typepad.com/immigration>.

1. See generally RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (5th ed. 2004); MARIO BARRERA, *RACE & CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* (1979); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE & THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

2. See, e.g., EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *WHEN MARKETS FAIL: RACE AND ECONOMICS* (2006); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Essay Collection, *Classcritspart: Part I. Thinking Through Law's Questions of Class, Economics, and Inequality*, 56 BUFFALO L. REV. 859 (2008); Margaret E. Montoya, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001); Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629 (1998); Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255 (2005).

law squarely through a class-conscious lens.³ In the wake of considerable conflict and acrimony, Critical Race Theory publicly split off from CLS with the stated aim of more-thoroughly probing the impact of race on the development and maintenance of the law.⁴ Over the years, the two bodies of scholarship, with distinctly different goals, have developed in separate spheres and veered in independent directions.⁵

This issue of *Law and Contemporary Problems* will no doubt contribute to the literature on the intersection of race and class in modern American social life. This symposium is especially timely in light of the recent 2008 Presidential election, which undeniably focused national attention on both race (with the first African American elected President) and class (with the nation reeling from the devastating impacts of the downward spiral of the U.S. economy, the home-mortgage-loan crisis, and the torn and tattered stock market).

There is no better body of law to illustrate the close nexus between race and class than U.S. immigration law and its enforcement.⁶ At bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States.⁷ The laws are nothing less than a “magic mirror” into the nation’s collective consciousness about its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.⁸

But, as in many areas of law, matters of race and class in the U.S. immigration laws are unquestionably more complicated today than in the past. Fortunately, express racial exclusions can no longer be found in the

3. See generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998) (offering chapters with perspectives on Critical Legal Studies from leading scholars). For a recent analysis of issues of race in the law, see LAW & CLASS IN AMERICA: TRENDS SINCE THE COLD WAR (Paul D. Carrington & Trina Jones eds., 2006).

4. See Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1191–96 (2004); see also Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (analyzing the failure of Critical Legal Studies to adequately incorporate race into its analysis).

5. A 2005 symposium analyzed the need to integrate issues of class into Critical Race Theory scholarship. See Symposium, *Going Back to Class? The Reemergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L. 1 (2005); see also Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 122–23, 151 (2003) (calling on critical race scholarship to more thoroughly consider class and material deprivation in the analysis of racial subordination).

6. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 315–16 (2003) (“While race and class have been a constant and recurring theme in U.S. immigration law, it is only recently that legal scholars have begun to give it serious attention.”); see also Ali Noorani, *Race, Class, and the Emergence of an Immigrant Rights Movement*, 31 FLETCHER F. WORLD AFFAIRS 185, 187–89, 192–93 (2007) (analyzing influence of race and class on the possible emergence of an immigrant rights movement).

7. See *infra* II–III.

8. See *Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975) (describing the grounds for exclusion of noncitizens under the U.S. immigration laws as “like a magic mirror, reflecting the fears and concerns of past Congresses”).

immigration laws. A by-product of the 1960s civil-rights movement, the Immigration Act of 1965⁹ abolished the facially discriminatory national-origins quotas system that had remained a bulwark of U.S. immigration law since 1924.¹⁰ As a consequence of this sea change in the law, the nation experienced a dramatic shift in the racial demographics of immigration, with an especially sharp increase in migration to the United States from Asia.¹¹

Importantly, although Congress eliminated the racial exclusions from the immigration laws, provisions of the current U.S. immigration laws regulating entry into the United States, such as economic litmus tests and arbitrary annual limits on the number of immigrants per country,¹² have racially disparate impacts.¹³ Everything else being equal, people from the developing world—predominantly “people of color” as that category is popularly understood in the United States—find it much more difficult under the U.S. immigration laws to migrate to this country than similarly situated noncitizens from the developed (and predominantly white) world.¹⁴ Nonetheless, because of the consistently—and overwhelmingly—high demand among people in the developing world to migrate to the United States, people of color dominate the stream of immigrants to this country.¹⁵

Although racial exclusions are something of the past, the express—and aggressive—exclusion of the poor remains a fundamental function of modern U.S. immigration law, embodied in the provisions of the omnibus Immigration and Nationality Act of 1952.¹⁶ In sharp contrast, domestic laws generally cannot discriminate *de jure* against the poor. This express discrimination against poor and working immigrants by the U.S. immigration laws in operation has disparate national-origin and racial impacts.¹⁷

Part II of this article sketches generally how race and class interact synergistically in the U.S. immigration laws and their enforcement. Part III

9. Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C. (2009)).

10. See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (3d ed. 1994) (analyzing the political history surrounding congressional passage of the national-origins quotas system in 1924).

11. For a careful analysis of whether Congress contemplated the increase in immigration from Asia in enacting the 1965 legislation that repealed the national-origins quota system, see 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 (1996).

12. See *infra* II.A.2. The per-country ceiling generally limits the number of immigrants from any single country that can be admitted to the United States in any one year to 26,000. See Immigration & Nationality Act (INA) § 202(a), 8 U.S.C. § 1152(a).

13. See *infra* II.A.

14. See *infra* II.B.

15. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499–510 (2002).

16. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.) [hereinafter “INA”] (comprehensive federal immigration law passed by Congress in 1952 and amended almost annually since).

17. See *infra* II–III.

offers case studies from recent immigration events in locales across the United States unquestionably demonstrating the centrality of race and class in the modern treatment of noncitizens.

II

THE NEXUS BETWEEN RACE AND CLASS IN U.S. IMMIGRATION LAW AND ENFORCEMENT

Race and class permeate U.S. immigration law and enforcement. This taint stems in large part from the critically important roles of race and class in the formation and maintenance of the American national identity, which ultimately rests at the core of this nation's immigration laws.¹⁸ Immigration law helps determine who is admitted to the United States and, to a certain extent, who, once here, possesses full membership in U.S. society (and thus who is truly American).¹⁹ The exclusion of poor and working people of color from the group of noncitizens eligible for admission into the United States reveals both how we as a nation see ourselves and our aspirations for what we want to be as a collective.²⁰

The concept of “intersectionality,”²¹ one of the rich insights of Critical Race Theory, has proven to be an important tool for understanding how membership in more than one marginalized group can increase the magnitude of the disadvantage facing particular subgroups.²² Women of color, for example, are generally speaking more distinctively disadvantaged in American social life than either white women or men of color—groups whose members generally possess only a single subordinating characteristic.

Intersectionality proves to be especially valuable in fully appreciating the relationship between race and class in the U.S. immigration laws. Many, although not all, immigrants are people subordinated on multiple grounds. A significant component of the immigrant community—especially among the

18. See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003); SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991).

19. See generally LINDA BOSNIAK, *THE CITIZEN & THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006) (analyzing ambivalence in the United States over the proper treatment of immigrants).

20. See *infra* IIA.

21. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 51–56 (2001) (defining the Critical Race Theory concept of “intersectionality”).

22. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991) (discussing structural, political, and representational intersectionality for women of color); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990) (analyzing similar concepts). See generally *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 2d ed. 2003) (collecting foundational readings in the field of Critical Race Feminism, which is premised on the concept of intersectionality); Symposium, *The Future of Critical Race Feminism*, 39 *U.C. DAVIS L. REV.* 729 (2006) (analyzing the evolution of Critical Race Feminism from many perspectives).

undocumented—is comprised of poor and working people.²³ The majority of immigrants in modern times are people of color.²⁴ Immigrants as a group find themselves marginalized in U.S. society by their immigration status, with “undocumented” status more stigmatizing and subordinating than “lawful” status (although lawful immigrants are still afforded fewer legal and social privileges than U.S. citizens).²⁵ As the concept of intersectionality suggests, poor and working immigrants of color are marginalized on multiple grounds. They are generally subordinated in American social life based on characteristics of race, class, and immigration status.

In the first century of this nation’s existence, a number of states sought to exclude the poor, as well as criminals and other “undesirables,” from their territorial jurisdiction.²⁶ In the late 1800s, the federal government began comprehensively regulating immigration to the United States; consistent with the states’ previous forays into immigration regulation, the U.S. immigration laws from their inception were expressly designed to exclude the poor from our shores.²⁷ The United States also has a long history of restricting (if not outright excluding) entry of certain racial minority groups into the country.²⁸ Not

23. Compared to the overall U.S. population, immigrants tend to be overrepresented in the lowest- and highest-skilled jobs. See JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS & CHARACTERISTICS 24 (2005) (“Some have characterized the educational distribution of immigrants as an ‘hourglass’ because immigrants tend to be overrepresented at both extremes relative to natives.”). This article focuses on undocumented noncitizens in the lower-skilled (and more modestly paid) end of the job spectrum.

24. See *supra* note 15 (citing authority on point) and accompanying text.

25. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519–34 (1995); see also Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2508–09 (2007) (analyzing the need for immigration scholars to probe the role of race in U.S. immigration law and its enforcement); Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, DIRECTIONS, & A NEW CRITICAL RACE THEORY 187 (Francisco Valdes et al. eds., 2002) (advocating increased analysis by Critical Race Theorists of the impacts of U.S. immigration law and its enforcement); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 535–46 (2000) (same). Critical inquiry into U.S. immigration law and its enforcement has increased in recent years. See, e.g., Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 266 (2007); Raquel Aldana & Sylvia R. Lazos Vargas, *“Aliens” in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1684 (2005); María Pabón López, *The Phoenix Rises From El Cenizo: A Community Creates and Affirms a Latino/a Border Cultural Citizenship Through Its Language and Safe Haven Ordinances*, 78 DENV. U. L. REV. 1017 (2001); George A. Martínez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335 (2007); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting From INS and Local Police’s Use of Race, Culture, and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

26. Gerald L. Neuman, *A Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993).

27. See KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION & CIVIL RIGHTS 91–108 (2004).

28. See Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1120–36 (1998) (detailing exclusionary policies

coincidentally, the federalization of U.S. immigration law culminated with Congress's decisions to exclude the poor, specifically targeting Chinese laborers, as well as criminals, prostitutes, and other noncitizens deemed to be unworthy of membership in the national community.²⁹

In modern times, popular American culture, taking a hint from the terminology of the immigration laws,³⁰ often demonizes current and prospective immigrants as “aliens” or, even worse, “illegal aliens.”³¹ Class and racial aspects of the stereotypes contribute to the conventional wisdom that immigrants are a pressing social problem necessitating extreme measures. The widespread perception is that all “illegals” are poor and unskilled.³² Most importantly, “[t]he term ‘illegal alien’ now . . . carries undeniable racial overtones and is typically associated with the stereotype of an unskilled Mexican male laborer.”³³ With both racial and class components, the stereotype helps to rationalize the harsh legal treatment of “illegal aliens” and aggressive enforcement of the U.S. immigration laws through, among other things, force, technology, and fences.

One peculiar feature of the U.S. immigration laws, which has facilitated the promulgation of harsh and extreme immigration laws and policies over the course of U.S. history, warrants comment: Unlike mainstream constitutional law in which the courts are responsible for vindicating the rights of discrete and insular minorities,³⁴ the courts generally defer to the immigration decisions of

enacted in U.S. immigration laws as well as the national-origins quotas system that “reflects this nation’s preoccupation with its ethnic balance”).

29. See generally BILL ONG HING, *MAKING & REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993) (documenting history of Chinese exclusion and related laws); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS & THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (same); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998) (same).

30. E.g., INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (“Any alien who . . . is likely at any time to become a public charge is inadmissible.”)

31. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS & THE MAKING OF MODERN AMERICA* xix–xx (2004) (analyzing the importance of terminology in the legal and public discussion of immigration); 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, 264 (1996–97) (“Even if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized ‘other,’ different and apart from ‘us.’”).

32. See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 188–91 (2007) (discussing “illegal alien” stereotype).

33. *Id.* at 188–89.

34. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (“[P]rejudice 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 more searching judicial inquiry.”); see also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439–40 (1985) (stating the general rule that courts should apply strict scrutiny review to legislation that includes suspect classifications); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (“[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”). For the contention that immigrants are discrete and insular minorities deserving of judicial protection, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF*

the legislative and executive branches of the U.S. government, which are said to possess “plenary power” over immigration matters, from the criteria for admission to those for deportation.³⁵ Through invocation of this doctrine, the courts routinely permit “aliens” to be expressly disfavored under the immigration laws in ways that U.S. citizens—including the poor and racial minorities—could never be.³⁶

For example, U.S. immigration law on its face discriminates against poor immigrants, with rarely a reservation raised;³⁷ in contrast, ordinary U.S. domestic law cannot infringe upon the right of poor citizens to travel (at least domestically).³⁸ Immigration law has permitted race and class to operate in ways that are truly extraordinary in U.S. law—almost always to the detriment of immigrants.³⁹ The reason is the plenary-power doctrine, which remains the law of the land even though the Supreme Court forged it out of whole cloth initially to shield blatantly discriminatory laws from judicial review.⁴⁰ The doctrine creates a deep and wide gulf between ordinary constitutional law and the constitutional law of immigration.⁴¹ The Court continues to invoke a doctrine⁴²

JUDICIAL REVIEW 161–62 (1980). *See also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002) (“[T]he fact that . . . aliens [cannot] vote makes it that much more essential that the basic rights reflected in the Bill of Rights be extended to aliens in our midst. As a group that is subject to government regulation but denied a vote, aliens are without a meaningful voice in the political bargains struck by our representative system.”); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1383 (2007) (“Political accountability is a crucial component for deference, and when legislation only impacts people without a vote, it cannot be easily justified . . .”). When the states have disadvantaged noncitizens through various alienage classifications in its laws and policies, the Supreme Court at times has treated them as discrete and insular minorities and subjected the classification to strict scrutiny review. *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (applying strict scrutiny to state alienage classification); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular minority’ for whom such heightened judicial solicitude is appropriate.”) (citation omitted).

35. *See* *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (rejecting constitutional challenge to the Chinese Exclusion Act and holding that Congress possesses “plenary power” over immigration matters and that its judgment on such matters is “conclusive” upon the judiciary).

36. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 522–23 (2003) (finding no due process violation for the mandatory detention of a lawful permanent resident who was awaiting a deportation hearing); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (acknowledging the “‘long recognized’” view that the U.S. government may exercise its power to remove or exclude noncitizens as an aspect of national sovereignty) (citations omitted); *Mathews v. Diaz*, 426 U.S. 67, 80–82 (1976) (noting that the powers to exclude and deport noncitizens have “no permissible counterpart” with U.S. citizens); *Ping (The Chinese Exclusion Case)*, 130 U.S. at 609 (holding that Congress’s decisions on immigration admissions criteria was “conclusive” on the judiciary).

37. *See infra* II.A.

38. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 502–05 (1999) (holding that a state cannot provide reduced public benefits to new residents).

39. *See infra* II–III.

40. *See supra* text accompanying notes 35–36.

41. *See* Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77, 77–81 (2008), available at <http://thepocketpart.org/2008/10/28/johnson.html> (arguing that corporate law principles providing various remedies to protect minority rights of shareholders can provide solutions for modern constitutional law of immigration); *see also* Gabriel J. Chin, *Segregation’s Last Stronghold*:

that academics, who contend that ordinary constitutional principles should apply to the review of the U.S. immigration laws as they generally do to other bodies of law, most simply love to hate.⁴³

The bottom line is that the proverbial deck is stacked against potential immigrants from the developing world. U.S. immigration law presumes that “aliens” cannot enter the United States and the burden is on the noncitizen to defeat the presumption and establish that all of the eligibility requirements for a visa have been satisfied.⁴⁴ Available immigrant visas are generally directed toward noncitizens with family members in this country and toward highly skilled workers.⁴⁵ Various exclusions and other features of U.S. immigration law make it difficult for noncitizens of limited education and moderate means from the developing world—even if eligible for a family, employment, or other immigrant visa—to immigrate lawfully to the United States.⁴⁶ Due to the plenary-power doctrine, the courts let all such laws stand.

A. Class

Three features of modern U.S. immigration laws (many more could be added) operate to discriminate—directly or indirectly—on the basis of class: the public-charge exclusion, the per-country caps on immigration, and the limited number of employment visas for low- and moderately-skilled workers.

Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1, 53–58 (1998) (analyzing the continuing vitality and modern significance of plenary power doctrine).

42. See *Demore*, 538 U.S. at 522 (upholding the mandatory detention of an immigrant convicted of an “aggravated felony” pending his deportation and emphasizing that “this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”) (citations omitted); see also Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 344–45 (David A. Martin & Peter H. Schuck eds., 2005) (contending that the decision in *Demore v. Kim* was influenced by fears surrounding the “war on terror” after September 11, 2001).

Emerging scholarship has analyzed the intersection of immigration and criminal law exemplified by *Demore v. Kim*. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

43. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, & AMERICAN CITIZENSHIP* (2002); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, & FUNDAMENTAL LAW* (1996); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993).

44. See INA § 214(b), 8 U.S.C. § 1184(b) (presuming that every noncitizen seeking admission to the United States is an immigrant, i.e., a noncitizen who seeks to remain indefinitely in this country); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 54 (2007) (discussing the practical significance of this presumption in U.S. immigration laws).

45. See *infra* II.A.

46. See *infra* II.A–B.

1. The Public-Charge Exclusion

For much of its history, despite the stated ideal that the nation openly embraces the “huddled masses” from the world over, the U.S. government has not been particularly open to poor and working people seeking to migrate to the United States.

Buried in the American psyche is the deep and enduring fear that, unless strong defensive measures are put into place and aggressively enforced, poor immigrants will come in droves to the United States, overwhelm the poorhouses, and excessively consume scarce public benefits that many believe should be reserved for U.S. citizens.⁴⁷ Responding to that fear, U.S. immigration law has long provided that “[a]ny alien . . . likely at any time to become a public charge”—even one otherwise eligible for an immigrant or nonimmigrant (temporary) visa—cannot be admitted into the United States.⁴⁸ Over time, Congress has significantly tightened the public-charge exclusion and, since major reforms in 1996, it has been most vigorously enforced.

As amended, the Immigration & Nationality Act currently requires the State Department consular officers to consider the following factors in applying the public-charge exclusion to each and every noncitizen seeking entry into the United States: the noncitizen’s age, health, family status, assets, resources and financial status, and education and skills.⁴⁹ Put differently, a prospective entrant must establish that he or she is and will continue to be a member of a particular socioeconomic class—most definitely not poor or likely to ever become poor—to lawfully migrate to the United States. In this way, the U.S. immigration laws enforce a kind of caste system restricting access to the proverbial “land of opportunity,” with certain socioeconomic classes barred from entry.

To this dubious end, the law requires that each prospective immigrant secure a well-heeled sponsor in this country willing to “agree[] to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line”⁵⁰ Sponsors, with the resources necessary to make this substantial income commitment, must submit legally

47. See JOHNSON, *supra* note 27, at 93–96; Neuman, *supra* note 26, at 1847–48. The receipt of public benefits by *U.S. citizens*, as the public discussion of welfare recipients demonstrates, is also deeply controversial and often the subject of heated public debate in the United States; race—and the stereotypical African American “welfare queen”—is central to the discussion. See Catherine R. Albiston & Laura B. Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 476–88 (1995) (analyzing the racialized images of Black women in the debate over welfare and welfare reform in the United States); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1665–73 (2005) (same).

48. See INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (“Any alien who . . . is likely at any time to become a public charge is inadmissible.”). The INA further provides that the receipt of public benefits within five years of admission also may result in the deportation of an immigrant. See INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

49. INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B).

50. INA § 213A(a)(1), 8 U.S.C. § 1183a(a)(1).

enforceable “affidavits of support,” which obligate the sponsor to reimburse the government if an immigrant somehow accesses public benefits.⁵¹

The U.S. government routinely invokes the public-charge exclusion as grounds to deny immigrant and nonimmigrant (temporary) visas to the United States to noncitizens from the developing world.⁵² For well over a century, the exclusion in one form or another has made it especially difficult for poor and working people from Asia, Africa, and Latin America to lawfully enter the United States.

In 1996, Congress toughened the public-charge exclusion by significantly tightening the affidavit-of-support provisions to expressly make the affidavits legally enforceable in courts of law.⁵³ The unmistakable intent was to make it more difficult for noncitizens of modest means to migrate to the United States. The very same year, Congress stripped lawful immigrants, even those who had paid taxes, of eligibility for several major federal public-benefit programs.⁵⁴ Generally speaking, immigrants—both legal and undocumented—remain ineligible for most major federal benefits programs.

As the existence of the public-charge exclusion suggests, the fear that immigrants might overconsume scarce public benefits if the nation is not exceedingly careful remains prevalent.⁵⁵ Consider California’s watershed Proposition 187, a law passed overwhelmingly by the Golden State’s voters in 1994, which would have denied almost all public benefits, including an elementary- and secondary-school education,⁵⁶ to undocumented immigrants.⁵⁷

51. INA § 213A, 8 U.S.C. § 1183a. *See also* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 752–65 (1998) (describing the various income requirements for immigrant sponsors, as well as the legal effect of a sponsor’s affidavit of support); Kevin K. Ban, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Are You Wealthy Enough to Be Reunited with Your Alien Family Members?*, 05-99 IMMIGR. BRIEFINGS 1 (May 1999) (explaining how the affidavit of support is now a statutorily prescribed document rather than one submitted upon the Attorney General’s request).

52. U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2007 (2008) (Table XX), available at <http://www.travel.state.gov/pdf/FY07AnnualReportTableXX.pdf> (listing grounds for refusing visas, including a significant number of public charge exclusions). The U.S. Department of State visa statistics from 2000 to the present that show the invocation of the various exclusion grounds are collected at http://travel.state.gov/visa/frvi/statistics/statistics_1476.html.

53. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4)(ii) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

54. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Two years later, Congress restored certain benefits to lawful immigrants. *See* Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, 112 Stat. 2926. Scholars have analyzed the negative impacts of welfare reform and the 1996 reforms to the public charge exclusions on noncitizens. *See, e.g.*, Aldana, *supra* note 25, at 272–78; Bill Ong Hing, *Don’t Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998); Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L.J. 736 (2007); Lisa Sun-Hee Park, *Perpetuation of Poverty Through “Public Charge,”* 78 DENV. U. L. REV. 1161 (2001).

55. JOHNSON, *supra* note 27, at 152–56.

56. This part of Proposition 187 would seem to run afoul of the Supreme Court’s decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which struck down a Texas law that as a practical matter denied most

Concern with the socioeconomic class of today's immigrants bolstered by deep-seated anti-Mexican animus, combined with legitimate concerns about immigration control, contributed to a landslide (2:1) vote in support of the measure.⁵⁸ Proposition 187 served as a model followed by many other states and localities that passed laws directed at regulating immigration and immigrants.⁵⁹

Although judicial intervention prevented the bulk of the initiative from ever going into effect, the passage of Proposition 187 unquestionably signaled to Congress the widespread public discomfort with immigration, specifically with undocumented immigration, and public benefit receipt by immigrants. Not long after, Congress in 1996 passed a welfare-reform bill that achieved the bulk of its fiscal savings by denying *legal* immigrants access to many federal-benefit programs (undocumented immigrants had previously been ineligible for those programs)⁶⁰ and increased funding for greatly heightened enforcement measures along the U.S.–Mexico border.⁶¹

undocumented children, including many of Mexican ancestry, living in Texas access to public elementary and secondary schools. *See also* Michael A. Olivas, Plyler v. Doe, *The Education of Undocumented Children and the Polity*, in IMMIGRATION STORIES, *supra* note 42, at 197 (analyzing the factual and legal background of *Plyler*).

57. A court invalidated most of Proposition 187 as an unconstitutional intrusion on the federal power to regulate immigration. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995). About a decade later, Arizona later adopted a measure similar in many respects to Proposition 187, which the courts refused to disturb. *See* Friendly House v. Napolitano, 419 F.3d 930, 932–33 (9th Cir. 2005); *see also* Aldana, *supra* note 25, at 275–76 (“What is particularly problematic about Proposition 200 [the Arizona counterpart to Proposition 187] . . . is that its intent and effect was to provoke even greater anti-immigrant feelings during an important Arizona election during which the undocumented became the scapegoat for many of the state’s problems. Proposition 200 deceptively included provisions to deny the undocumented benefits for which they were already ineligible under federal law. Indeed, the allegation was one of pernicious fraud, purportedly costing the state of Arizona millions of dollars.”) (footnotes omitted); Hector O. Villagra, *Arizona’s Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. C.R. & C.L. 295, 309–27 (2006) (questioning the lawfulness of the Arizona measure); Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1266–75 (2008) (analyzing how direct democracy disadvantages immigrants and Hispanics).

58. *See* Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 556 (1996) (referring to support for Proposition 187 and similar statutes as “wide and deep”); Johnson, *supra* note 25, at 1568–74 (analyzing Proposition 187 campaign); *see also* Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 129–31 (1995) (discussing Proposition 187 campaign); 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) (documenting the anti-Mexican sentiment at the core of the campaign in support of the initiative); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995) (considering the Equal Protection doctrine applicable to state laws affecting immigrants).

59. Bosniak, *supra* note 58, at 556 n.3.

60. *See supra* note 54 (citing 1996 welfare-reform law).

61. *See infra* text accompanying note 109.

2. Per-Country Ceilings

The U.S. immigration laws include what are known as per-country ceilings that generally limit the number of immigrants from any one country in a year to approximately 26,000.⁶² The limits apply uniformly however great the demand of the citizens of a particular country to come to the United States. Although facially neutral, the ceilings in operation have both class and nationality (and thus racial) impacts.⁶³ This is no surprise. Indeed, Congress extended the per-country ceilings to the Western Hemisphere, with the hope expressed of avoiding a flood of migration from Latin America to the United States.⁶⁴

Under the Immigration & Nationality Act, countries with much less demand among its citizens for immigrating to the United States, such as Iceland, Denmark, and Sweden, enjoy the same annual ceilings as countries like Mexico, the Philippines, India, and China. For the latter, demand to migrate to this country greatly exceeds those countries' maximum annual immigration ceiling. Although there are important exceptions to the ceilings (for example, for immediate relatives),⁶⁵ the per-country limits nonetheless create long lines of prospective immigrants from certain countries, such as Mexico, the Philippines, India, and China, and significantly shorter or nonexistent lines for similarly situated people seeking certain visas from almost all other nations.⁶⁶

For example, in August 2008, the State Department was processing first-preference immigrant visas filed in March 2002 for children of U.S. citizens from all countries except for Mexico (for which the State Department was processing August 1992 applications) and the Philippines (processing March 1992 applications).⁶⁷ Natives of Mexico and the Philippines thus had to wait *a decade longer* to rejoin their parents than similarly situated noncitizens from other nations. Fourth-preference immigrant visas for brothers and sisters of adult U.S. citizens filed in September 1997 were being processed for applicants from all but a few countries, including the Philippines (processing March 1986

62. See INA § 203(a)(3), 8 U.S.C. § 1153(a)(3). Some immigrants, such as noncitizen spouses of U.S. citizens, are not subject to this ceiling. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 201(b)(2)(A)(i) (providing for exemption from per-country ceiling for immediate relatives of U.S. citizens).

63. See Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 359–60 (offering examples of disproportionate impacts of per country ceilings); Stephen H. Legomsky, *Immigration, Equality, and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321 (1993) (commenting on disparate racial impacts of per-country ceilings); 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, 309 (1995) (same); Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 719–22 (2000) (demonstrating how annual ceilings on certain immigrant admissions from a single country have disproportionate impacts on prospective immigrants from Mexico, as well as noncitizens from several other developing nations, because demand for immigration from those nations for reasons of proximity, jobs, and family ties, greatly exceeds the annual ceiling).

64. See Johnson, *supra* note 28, at 1131–33.

65. INA § 201(b)(2)(A)(i), 8 U.S.C. § 201(b)(2)(A)(i).

66. Johnson, *supra* note 28, at 1133.

67. U.S. DEPT OF STATE, 8 VISA BULLETIN 121 (Aug. 2008), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html.

applications), whose nationals had to wait more than ten years longer than all other similarly situated noncitizens.⁶⁸

Notably, as these examples illustrate, some prospective immigrants may be forced to wait more than *twenty years* to immigrate lawfully to the United States and to rejoin close family members. Understandably finding such long waits to be unrealistic as well as onerous, many perspective immigrants are undoubtedly tempted to circumvent the immigration laws.

And, in many respects, these are the fortunate noncitizens. For many noncitizens without family members in this country or high-level employment skills, there is simply *no* line at all in which they can wait to immigrate lawfully to this country.⁶⁹ Absent legal avenues for migrating to the United States, the frequently-voiced objection that undocumented immigrants should “wait in line,” as lawful immigrants must, makes no sense.

Given the lower average annual incomes in the developing world compared to those in this country and the relatively great economic opportunity available in the United States, the per-country ceilings have class and racial impacts, tending to disproportionately affect people of color from developing nations. Many low- and medium-skilled workers of color from those nations seek to immigrate to the United States to pursue superior economic opportunities. Prospective immigrants from nations with demand much greater than the fixed annual ceilings—namely, developing nations populated by people of color—encounter much longer lines for admission in certain visa categories than similarly situated prospective immigrants from other nations.

3. Limited Employment Visas

Scholars, as well as many employers, have long expressed concern with the number and type of employment visas available under the U.S. immigration laws. One common criticism is that the numerical limits and various other requirements for immigrant visas based on employment skills are not adequately calibrated to the nation’s need for labor.⁷⁰

Importantly, the limited employment visas available under the Immigration & Nationality Act are much more plentiful for highly-skilled workers than for moderately-skilled and unskilled ones. Indeed, few legal avenues are open for unskilled workers without relatives in the United States to lawfully immigrate

68. *Id.*

69. *See infra* II.A.3.

70. *See, e.g.*, Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL’Y REV. 349, 356–60 (2007); Jonathan G. Goodrich, Comment, *Help Wanted: Looking for a Visa System That Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975, 985–97 (2008); Susan Martin & B. Lindsay Lowell, *Competing for Skills: U.S. Immigration Policy Since 1990*, 11 LAW & BUS. REV. AM. 387, 390–95, 400–02 (2005); Special Feature, *Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT’L L.J. 691, 703–04 (2005);. *See generally* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006) (analyzing increasing global competition among nations for skilled labor).

to this country.⁷¹ To put it succinctly, “[o]ne critique of the entire [American] immigration system is . . . that *low-skilled workers, as a practical matter, do not have an avenue for lawful immigration to the United States, either temporarily or permanently.*”⁷² Consequently, many low- and moderately skilled workers cannot lawfully migrate to the United States unless they are eligible for family visas (and then still must overcome the public-charge exclusion). As a result, many are tempted and in fact do enter or remain in the country in violation of the U.S. immigration laws. To make matters worse for the undocumented immigrants who circumvent the law, they often find themselves laboring in a secondary labor market—often without legal protections—for low wages and in poor conditions.⁷³

Even skilled workers often find it difficult to secure visas for which they are eligible under the U.S. immigration laws.⁷⁴ The complexities and delays in the process of certification by the U.S. Department of Labor—certification that granting the visa will not adversely affect American workers—necessary for a number of employment visa categories, as well as the potential for abuse, have been the subject of sustained criticism.⁷⁵ Microsoft CEO Bill Gates regularly testifies before Congress about the difficulties experienced by high tech employers seeking to bring skilled immigrant workers to the United States.⁷⁶

71. See INA § 203(b), 8 U.S.C. § 1153(b) (limiting the number of employment-based visas given to immigrants “performing unskilled labor” to 10,000, while immigrants with “extraordinary” or “exceptional” ability are more readily preferred under the statute); see also STEPHEN H. LEGOMSKY, IMMIGRATION & REFUGEE LAW & POLICY 244–45 (4th ed. 2005) (summarizing the employment immigrant visas available for “priority workers,” professionals, skilled workers, investors, and “special immigrants,” such as religious workers). Current temporary-worker programs, see INA § 1101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii), are also plagued by bureaucratic inefficiencies and often fail to ensure the protection of the rights of workers. See Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 45–51 (2006) (describing how guest-worker programs have rarely been temporary or in direct response to a labor need, as well as how such programs have failed to enforce governing labor-law standards); Arthur N. Read, *Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 429–41 (2007) (discussing shortcomings of guest-worker programs); David Bacon, *Be Our Guests*, THE NATION, Sept. 27, 2004, at 22 (same).

72. Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 643 (2006) (emphasis added); see also Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 176–89 (2007) (contending that an immigration regime that permitted more liberal admission of workers would be better for U.S. national security by reducing incentives for undocumented immigration and by better ensuring that as many noncitizens in the United States as possible are subject to ordinary admission procedures that help ensure public safety).

73. See *infra* II.C.

74. See Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post-9/11 World*, 5 GEO. J. L. & PUB. POL’Y 495, 496–98 (2007).

75. See LEGOMSKY, *supra* note 71, at 295–321 (discussing the criticisms).

76. See, e.g., *Competitiveness and Innovation on the Committee’s 50th Anniversary with Bill Gates, Chairman of Microsoft: Hearing Before the H. Comm. on Science and Technology*, 110th Cong. 18–20 (Mar. 12, 2008) (statement of William H. Gates, Chairman of Microsoft); Kim Hart, *Gates Calls on Congress for Science Education, Visas*, WASH. POST, Mar. 13, 2008 at D3; S. Mitra Kalita, *For Green Card Applicants, Waiting Is the Hardest Part*, WASH. POST, July 23, 2005, at D1; Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES, Feb. 8, 2006, at 6; Robert Pear, *High-Tech Titans*

Even so, the bulk of the employment visas under U.S. immigration laws are for highly skilled workers; visas are also available to investors willing to make a substantial financial commitment in the United States. This disproportionately excludes low- and moderately skilled workers from the developing world, who generally are not eligible for employment visas but who nonetheless desire to pursue economic opportunities in the United States. The lack of lawful avenues for workers to migrate helps to explain the continuing flow of undocumented immigrants to this country. It also helps explain the persistent complaints by mainstream business leaders and organizations such as the U.S. Chamber of Commerce, about the difficulties of bringing skilled workers to this country, as well as frequent advocacy for guest-worker programs by employers that would allow unskilled laborers to lawfully enter and temporarily work in the United States.⁷⁷

B. Race

Several salient aspects of immigration law have disparate racial impacts. Express bars on the admission of certain races of noncitizens mar this nation's otherwise-proud immigration history. The Chinese exclusion laws and the national-origins quota system disfavoring immigration from southern and eastern Europe, serve as striking examples that the nation today views as indefensible and embarrassing chapters of U.S. history.

Racial exclusions have evolved into new and different devices that have racially disparate effects on prospective immigrants to the United States. Consequently, race remains central to the operation and enforcement of U.S. immigration law.⁷⁸

Combined with such class-based exclusions as the public-charge exclusion and per-country ceilings, many other devices serve to disproportionately deny people of color from the opportunity of lawful admission into the United States.⁷⁹ The limited opportunities for unskilled noncitizens to secure employment visas tend to disproportionately affect people from the developing world (many of whom are people of color), as well.⁸⁰

Strike Out on Immigration Bill, N.Y. TIMES, Jun. 25, 2007, at A1; David A. Vise, *Gates Cites Hiring Woes, Criticizes Visa Restrictions*, WASH. POST, Apr. 27, 2005, at E5.

77. See Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1106–08 (2005).

78. See, e.g., Boswell, *supra* note 6, at 316–32 (recounting how various exclusionary measures throughout U.S. history have created structural and institutional racial barriers within U.S. immigration law); Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 699 (2005) (“For aliens affected by immigration law, the concept of race is extremely important, and causes many immigrants to be treated as perpetual foreigners.”); see also *supra* note 25 (citing authorities that analyze the role of race in U.S. immigration law and policy).

79. Johnson, *supra* note 28, at 1133.

80. See *supra* II.A.3. In addition, the diversity visa program, which operates to favor immigrants from the developed (and “whiter”) world, operates to decrease the percentage of U.S. immigrants who are people of color. See Johnson, *supra* note 28, at 1135 & n.145 (citing authorities).

Moreover, race-based enforcement historically has been endemic to U.S. immigration law.⁸¹ This continues to be true today. People of color dominate the populations of both legal and undocumented immigrants to the United States.⁸² They are disparately affected by the various exclusion grounds in the U.S. immigration laws and frequently experience roadblocks to their lawful admission to the United States.⁸³ Not coincidentally, people of color in recent years consistently have been disproportionately represented among the hundreds of thousands of noncitizens deported annually from the United States.⁸⁴

1. Exclusions

As the moniker “Chinese exclusion laws” suggests,⁸⁵ racial exclusions were central to the early congressional forays into the realm of national immigration regulation.⁸⁶ The Chinese exclusion laws of the late 1800s were expressly race-based, as well as class-conscious.⁸⁷ Congress later expanded the racial exclusions to apply not just to Chinese, but to all persons of Asian ancestry.⁸⁸ Congress followed the Asian exclusion laws with passage of a national-origins quotas system, which in operation denied admission to many southern and eastern Europeans—including many Jews—who were viewed as racially different from the desired Anglo Saxon norm; the quotas system remained the central organizing tenet of the U.S. immigration laws until 1965.⁸⁹

Changing racial sensibilities—exemplified by the civil-rights movement of the 1960s—resulted in Congress’s removing the racial exclusions in 1965.⁹⁰ However, the U.S. immigration laws continue to operate with starkly different

81. See generally ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1990) (documenting abuses of persons of Mexican ancestry by the Border Patrol).

82. Johnson, *supra* note 15, at 1485.

83. Johnson, *supra* note 28, at 1131–36; Ting, *supra* note 63, at 310–12.

84. See U.S. DEP’T OF HOMELAND SECURITY, *YEARBOOK OF IMMIGRATION STATISTICS* 102–03 (2007) (table 37) (showing that approximately two-thirds of all persons deported in 2007 from the United States were from Mexico). See generally BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, & IMMIGRATION POLICY* (2006) (analyzing critically increasing numbers of deportations pursuant to 1996 immigration reforms); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (documenting the history of deportation under U.S. immigration laws).

85. See *supra* note 29 and accompanying text.

86. See generally Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 *YALE J.L. & HUMAN.* 181 (2005) (analyzing the role of race in the enactment of the first comprehensive federal immigration laws). *But cf.* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 *COLUM. L. REV.* 641, 642–48 (2005) (analyzing the role of the regulation of marriage and morality in foundational U.S. immigration laws).

87. See, e.g., Chae Chan Ping (*The Chinese Exclusion Case*), 130 U.S. at 609 (rejecting a constitutional challenge to racial discrimination in the Chinese Exclusion Act and emphasizing that courts lack power to review exercise of congressional “plenary power” over immigration); *supra* text accompanying notes 34–46 (discussing the impacts of the plenary-power doctrine).

88. See JOHNSON, *supra* note 27, at 17–18.

89. See generally HIGHAM, *supra* note 10 (analyzing the political movement culminating in the congressional passage of Immigration Act of 1924, which created the national-origins quotas system).

90. See *supra* text accompanying notes 9–12.

effects on various national-origin groups. As we have seen,⁹¹ such features of the Immigration & Nationality Act as the public-charge exclusion, for example, preclude many prospective immigrants of color from the developing world from lawfully immigrating to the United States.

2. Immigration Enforcement

Unlike the Chinese exclusion laws of old, modern immigration laws are facially neutral and do not impose express racial bars on prospective immigrants to the United States. Nonetheless, they in operation have racially disparate effects.⁹² Moreover, immigration enforcement disparately affects not just immigrants, but U.S. citizens of particular national-origin ancestries. Today, Hispanic and Asian American communities claim to be the frequent targets of immigration enforcement and regularly complain about what they perceive to be racial profiling,⁹³ a practice generally condemned in ordinary law enforcement.⁹⁴ Mexican American and Asian American citizens, as well as lawful immigrants within these racial communities, often contend that immigration-enforcement officers engage in racial profiling in the enforcement of the U.S. immigration laws. Similarly, they claim that their communities (despite having large U.S.-citizen components) are generally presumed to be “foreigners” subject to immigration-enforcement measures.⁹⁵

The increasingly rigorous enforcement of the nation’s southern border with Mexico, in comparison to the relatively lax enforcement of the northern border

91. See *supra* II.A.1.

92. JOHNSON, *supra* note 27, at 25–46.

93. See, e.g., *United States v. Lara-Garcia*, 478 F.3d 1231, 1233–35 (10th Cir.) (defendant claimed that traffic stop was a pretext for inquiring into his immigration status), *cert. denied*, 550 U.S. 948 (2007); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 539 (6th Cir. 2002) (rejecting officer’s contention that difficulty speaking English constituted a legitimate race-neutral basis for conducting an investigation of the immigration status of the occupants of an automobile following a routine traffic stop); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1039–40 (9th Cir. 1999) (en banc) (reviewing injunctive relief sought against Border Patrol agents in Arizona for a class of persons with a Latin, Hispanic, or Mexican appearance driving their vehicle on highways at night); *Ramirez v. Webb*, 787 F.2d 592, 593 (6th Cir. 1986) (affirming a preliminary injunction that enjoined immigration officers from stopping vehicles on “Hispanic appearance alone”); *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062, 1065–66 (7th Cir. 1976), *modified*, 548 F.2d 715, 715 (7th Cir. 1977) (en banc) (addressing claim of racial profiling in immigration enforcement); *Murillo v. Musegades*, 809 F. Supp. 487, 490–91, 500–02 (W.D. Tex. 1992) (granting preliminary injunction and class certification to a persons of Hispanic descent affiliated with local high school for unconstitutional stops and questioning by Border Patrol). See generally Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (analyzing racial profiling endemic to modern immigration enforcement).

94. See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142 (2002) (stating that racial profiling is the great issue of our time).

95. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117–29 (1997) (discussing impacts of the prevailing stereotype of all Hispanics, including U.S. citizens, as “foreigners”); see also Keith Aoki, “Foreign-ness” & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 ASIAN PAC. AM. L.J. 1, 7–10, 18–23 (1996) (noting the same classification of Asian Americans); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 281 (1997) (same).

with Canada, is often pointed to as nothing less than evidence of racism at work. Immigration raids consistently have disparately racial effects with the arrest of large numbers of undocumented (and many relatively unskilled) immigrants of color.⁹⁶ Tellingly, at times emphasizing enforcement to a fault, immigration authorities have mistakenly—and unlawfully—deported U.S. citizens of minority ancestry.⁹⁷

3. Naturalization and Citizenship

For much of U.S. history, eligibility for citizenship through the naturalization of immigrants had a racial component. From 1790 through 1952, only “white” immigrants were generally eligible for naturalization and thus enjoyed a legal path to U.S. citizenship.⁹⁸ By limiting the number of eligible voters, the racial bar on naturalization of nonwhites had long-term impacts on the political power of certain communities, especially on Asian Americans, and on their full integration into American social life.⁹⁹

Given the demographics of immigration in modern times, and because only U.S. citizens can vote, delays in the processing of naturalization petitions have disparate racial and political effects.¹⁰⁰ In 2007, more than 36% of the

96. See *infra* III.B.

97. See, e.g., Sam Quinones, *Disabled Man Found After 89-Day Ordeal*, L.A. TIMES, Aug. 8, 2007, at B1 (reporting on developmentally disabled U.S. citizen of Mexican ancestry who had been in the custody of the Los Angeles County Sheriff’s Department and had been wrongfully deported to Mexico); Marisa Taylor, *Zeal to Deport Sometimes Catches U.S. Citizens in Its Net*, NEWS & OBSERVER (Raleigh), Jan. 25, 2008, at A3 (reporting a number of cases of wrongful detention and deportation of U.S. citizens).

98. See, e.g., *Ozawa v. United States*, 260 U.S. 178, 196–98 (1922) (holding that immigrant from Japan was not “white” and thus ineligible for naturalization); *United States v. Thind*, 261 U.S. 204, 213–15 (1923) (ruling to the same effect with respect to immigrant from India). See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed. 2006) (analyzing case law interpreting the requirement in place from 1790 to 1952 that an immigrant be “white” to naturalize). Black immigrants technically were eligible to naturalize but, given the stigma attached to African Americans in U.S. social life, it is not surprising that few immigrants were willing to claim a Black identity in an attempt to secure citizenship. Unlike Asian immigrants, immigrants from Mexico were permitted to naturalize because of treaty obligations between the U.S. and Mexican governments. See *In re Rodriguez*, 81 F. 337, 349, 353–54 (W.D. Tex. 1897); see also George A. Martínez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326–27 (1997) (analyzing implications of *Rodriguez* decision).

99. See Leti Volpp, “*Obnoxious To Their Very Nature*”: *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 83 (2001) (“To be Asian American suggests in the American imagination the idea that one acts according to cultural dictates somehow fundamentally different from those known in the United States. One’s Asianness seems to be the difference one must suppress in order to be a full citizen.”). The immigration and nationality laws also historically have had disparate impacts on women. See 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, 145, 160–63 (1996); Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).

100. See, e.g., Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 51–52 (1995); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 202–03 (1998); Kirk Semple, *Immigrants Eager to Vote Sue to Hasten Citizenship*, N.Y. TIMES, July 16, 2008, at B2.

naturalized citizens were from Asia and 18.5% from Mexico.¹⁰¹ Over the last several decades, partisan debates over naturalization have been hot and heavy. Efforts by the administration of President Bill Clinton in the 1990s to facilitate immigrant naturalization through the Citizenship USA program were subject to harsh criticism from politicians and pundits claiming that the President was in fact attempting to do nothing more than increase the number of Democratic voters.¹⁰²

In 2007, the Bush administration increased the fees charged for naturalization petitions by hundreds of dollars, with a predictably negative impact on immigrants of particular classes and nationalities.¹⁰³ Despite the fee hikes, which the U.S. government promised would provide the funds necessary to speed the processing of naturalization petitions, processing of the petitions remains exceedingly slow with lengthy—and growing—backlogs.¹⁰⁴ Delays in the processing of naturalization petitions are likely to have racial as well as political impacts.

C. Race and Class

Race and class historically have operated in tandem under the U.S. immigration laws and their enforcement. Examples in American history are legion.

101. See NANCY RYTINA & SELENA CALDERA, U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: NATURALIZATIONS IN THE UNITED STATES: 2007, at 2 (July 2008) (Table 1).

102. See Kelly, *supra* note 100, at 204–08 (analyzing naturalization controversy and how congressional reforms significantly delayed the naturalization process); see also Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1, 44–49 (1997) (contending that abuse of naturalization process was one of several charges that justified the impeachment of President Bill Clinton). The Justice Department's Office of the Inspector General found that the Clinton Administration did not act for politically partisan ends in its Citizenship USA program, which sought to facilitate the naturalization process for immigrants, although some naturalization petitions were erroneously approved due to hasty processing. See *IG Report Finds INS's "Citizenship USA" Program Was Flawed, But Not for Political Reasons*, 77 INTERPRETER RELEASES 1198 (Aug. 21, 2000).

103. See Karin Brulliard, *In D.C., Area, Citizenship Test is One of Patience; Local Immigrants Face Longest Wait*, WASH. POST, May 3, 2008, at B1; Julia Preston, *Immigration Fees Rise*, N.Y. TIMES, July 31, 2007, at A15; Editorial, *Citizenship Fees Soar*, WASH. POST, July 31, 2007, at A17. See generally ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, PRICED OUT: U.S. CITIZENSHIP: A PRIVILEGE FOR THE RICH AND WELL EDUCATED? (2008) (analyzing negative impacts of sharp fee increases on immigrants seeking to naturalize and become U.S. citizens).

104. See Julia Preston, *Goal Set for Reducing Backlog on Citizenship Applications*, N.Y. TIMES, Mar. 15, 2008, at A13; Editorial, *High Price, Poor Service: Despite Exorbitant Fees, the Wait to Become a Naturalized Citizen is Three Times As Long As It Was Last Year*, WASH. POST, Jan. 26, 2008, at A16.

The Chinese exclusion laws were directed primarily at Chinese laborers.¹⁰⁵ But immigration enforcement has been no less-overtly focused on people of particular nationalities. Consider some examples. During the Great Depression, state and local authorities, with the assistance of the federal government, arrested hundreds of thousands of persons of Mexican ancestry in parks and other public places often used primarily by people of modest means. These unlucky people, an estimated two-thirds of whom were U.S. citizens, were subsequently “repatriated” to Mexico.¹⁰⁶ The “Bracero program,” which brought temporary or “guest” workers from Mexico to the United States from World War II through the mid-1960s, focused on bringing unskilled workers to this country to work in agriculture—only to be exploited, as wage and labor protections under international agreements for the most part went unenforced.¹⁰⁷

Human trafficking through the smuggling of migrants for profit¹⁰⁸ and deaths of immigrants (almost all Mexicans) in the U.S.–Mexico border region,¹⁰⁹ have increased dramatically since the early 1990s due to heightened border-enforcement operations that have made it more difficult—and dangerous—to journey to the United States. These tend to affect poor and working noncitizens

105. See Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249, 256–60 (2006) (analyzing influence of race and class on congressional enactment of Chinese exclusion laws); see also Henry S. Cohn & Harvey Gee, “No, No, No, No!”: *Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 21–34 (2003) (explaining economic and other pressures for congressional limitations on Chinese immigration).

106. See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* 89–117 (rev. ed. 2006); Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4–13 (2005).

107. See generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, & THE I.N.S.* (1992) (summarizing history of “Bracero Program”). Demonstrating the ambivalence in the United States over immigrant labor, see generally BOSNIAK, *supra* note 19 (analyzing ambiguous status of noncitizens in U.S. society). The U.S. government in 1954 instituted a massive deportation campaign known as “Operation Wetback,” while the nation continued to bring “guest workers” to the United States. See generally JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980) (documenting mass deportation campaign in 1954 known as “Operation Wetback”).

108. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2982 (2006) (noting how each year tens of thousands of women and children are trafficked into the United States); Srikantiah, *supra* note 32, at 184–87 (describing how many victims of human trafficking must endure forced labor); see also Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 260–93 (2007) (comparing trade of African slaves in the history of the Americas with modern human trafficking).

109. See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.–MEXICO BORDER, 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* (1996); KARL ESCHBACH ET AL., *CAUSES & TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985–1998* (2001); JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” & THE MAKING OF THE U.S.–MEXICO BOUNDARY* (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POP. & DEV. REV. 661, 661–62 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 268–72 (2003).

of color, who are forced to take great risks in their efforts to come to the United States because they lack legal avenues for entering the country.

Traditionally, U.S. border-enforcement efforts have focused primarily on undocumented immigrants who enter surreptitiously, without inspection, not on visa overstays—undocumented persons who entered on lawful visas but who have overstayed or otherwise violated the terms of their visas.¹¹⁰ Such uneven enforcement occurs even though approximately forty percent of the undocumented population is composed of visa overstays.¹¹¹

Congress's near-myopic focus on increased border enforcement—and on those undocumented immigrants who enter without inspection—has both class and racial impacts. Such immigrants are more likely to be poor and working people of color from the developing world than immigrants who overstay their visas and who, upon entering, had sufficient financial resources to avoid the public-charge exclusion and to lawfully enter the United States.¹¹² This all-important fact remains all but ignored by policymakers and proponents of ever-escalating border enforcement measures.

In sum, noncitizens excluded and deported from the United States tend to be poor and working people, with U.S. immigration law exuding class-based biases that negatively affect people of color from the developing world.¹¹³ For immigrants able to come to and remain in this country, the exploitation of working-class undocumented immigrants by employers continues virtually unregulated by government.¹¹⁴

110. See James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 419, 443–46 (2002) (recognizing that the U.S. government has concentrated immigration enforcement efforts on “poor immigrants” despite the significant number of higher educated nonimmigrants who have overstayed their visas); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 75–76 (2006) (“[The] enforcement concentration on the border discourages older patterns of seasonal migration and encourages a relatively permanent settlement pattern for undocumented immigrants.”).

111. See JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 2 (Mar. 7, 2006) (estimating that, as of March 2006, the undocumented immigrant population in the United States was between 11.5 and 12 million with about 40% being visa overstays).

112. See *supra* II.A.1.

113. See *supra* II.A.

114. See generally Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004) (citing studies that show significant wage depression and worsening labor conditions in occupations fielded disproportionately by Latinos); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006) (describing how “brown collar workers” often fill increasingly segregated and undesirable jobs because of their partial “subservience”); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008) (suggesting a new Title VII segregation framework founded on the inference of discrimination when all jobs of a particular category are filled by persons from a protected group).

Unfortunately, undocumented workers enjoy precious few protections—and fewer that are effectively enforced—under federal, state, and local law.¹¹⁵ As a result of the operation of the U.S. immigration laws, the undocumented immigrants who successfully make it to this country participate in a labor force that in many respects resembles a racial caste system. Dual labor markets exist, with undocumented workers—predominantly people of color—participating in one market without legal protections, while U.S. citizens and legal immigrants enjoy protections of law in a separate labor market.¹¹⁶ For example, farmworkers, including many from Mexico, often suffer severe exploitation in agriculture, a sector of the U.S. economy in which labor protections are too rarely enforced.¹¹⁷ As has been the case for generations, wage, condition, and other protections are but a faraway dream for many undocumented workers in the United States.

To make matters worse, sporadic workplace enforcement of the immigration laws by the U.S. government has terrified immigrant (and minority citizen) communities and forced them farther underground. In 2007 and 2008, the U.S. government, as Congress contemplated “comprehensive” reform of the immigration laws, ramped up the number of immigration raids of workplaces, which negatively affected many undocumented immigrants from Mexico and Central America as well as their families (including U.S. citizens). This is consistent with past treatment of noncitizens seeking asylum in the United States: In the 1980s and 1990s, the U.S. government routinely classified tens of thousands of Central Americans and Haitians fleeing civil wars as “economic refugees” and thus ineligible for relief from deportation under the asylum provisions of the U.S. immigration laws.¹¹⁸

115. See Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 716–31 (2007) (summarizing legal and other forms of subordination of undocumented immigrant workers in the United States); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002) (holding that undocumented workers were not entitled to backpay for employer’s violation of federal labor law). *But see* Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003) (offering critical analysis of *Hoffman Plastics*); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 104–05 (2003) (“The *Hoffman* decision represents a retrenchment from a trend in which virtually all jurisdictions that had considered the issue found in favor of the workers.”); David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424, 1425, 1434–45 (2008) (positing the need to permit Title VII employment discrimination claims by undocumented citizens in order to conform to international law principles).

116. See JOHNSON, *supra* note 44, at 119–25.

117. See Maria L. Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 169–70 (2003); William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farmworkers*, 33 U.C. DAVIS L. REV. 1075, 1075–76 (2000).

118. See Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459 (1985) (“The government rests its denial of asylum in [Haitian and Salvadoran] cases on the claim that these are ‘economic’ rather than ‘political’ refugees . . .”).

III

MODERN CASE STUDIES OF THE INTERSECTION OF RACE AND CLASS IN THE IMMIGRATION LAWS AND THEIR ENFORCEMENT

This section offers concrete—and recent—examples of the clear intersection of race and class in immigration law and its enforcement in the United States. It demonstrates the artificiality of looking at race and class in isolation when critically analyzing the operation and impacts of the U.S. immigration laws.

Because of their perceived negative impacts on U.S. society, Mexican and other Hispanic immigrants, particularly those who are undocumented, are among the most disfavored immigrants of modern times.¹¹⁹ Their current demonization¹²⁰ fits into a long history of discrimination against immigrants from Mexico and, more generally, all persons of Mexican ancestry in the United States.¹²¹ To be clear, this discrimination has often and unfortunately directly affected U.S. *citizens* of Mexican descent as well as *immigrants* from Mexico.¹²² It is not limited to “aliens” or “illegal aliens.”

119. See Johnson, *supra* note 28, at 1136–40. Arab and Muslim noncitizens constitute another group of immigrants who have been the subject of aggressive immigration enforcement in recent years, especially after the tragic events of September 11, 2001. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–44 (2002); Cole, *supra* note 34, at 981; see also Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 620–44 (2005) (analyzing impact of “war on terror” on Arab and Muslim citizens as well as noncitizens). After September 11, the concern with fighting terrorism came to dominate immigration law and enforcement and the national debate over immigration reform, provoking criticism. See HING, *supra* note 84, at 140–63 (analyzing impact of September 11 on the immigration debate in the United States); Chacón, *supra* note 42, at 1856 (“The removal of any and all immigrants is now seen as an adequate means of addressing terrorism because the rhetoric has evolved to conflate crime, terrorism, and migrant status so completely.”); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1396–1404 (2007) (describing how serious attempts at a U.S.–Mexico migration accord as well as eliminating some of the harshest anti-immigration federal provisions “stopped in their tracks on September 11” and were replaced by an emphasis on “fortifying the borders”); see also Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 398–423 (2007) (analyzing how immigration law can be effectively employed to serve national security ends).

120. See *supra* text accompanying notes 31–33 (describing the modern pejorative usage of “illegal alien”).

121. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (holding that Mexican American citizens had unconstitutionally been barred from juries in Jackson County, Texas). See generally ACUÑA, *supra* note 1 (analyzing this history of discrimination); “COLORED MEN” & “HOMBRES AQUI”: *HERNANDEZ V. TEXAS* & THE EMERGENCE OF MEXICAN–AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (analyzing major U.S. Supreme Court decision in 1954 addressing discrimination against Mexican American citizens); RICHARD DELGADO ET AL., *LATINOS & THE LAW: CASES & MATERIALS* (2008) (collecting literature on the law’s negative impact on Hispanics in the United States); NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, & POOR WHITES IN TEXAS COTTON CULTURE* (1997) (studying history of discrimination against persons of Mexican ancestry in Texas); DAVID MONTEJANO, *ANGLOS & MEXICANS IN THE MAKING OF TEXAS, 1836–1986* (1987) (same).

122. See *supra* note 95 (citing authorities).

Anti-Mexican sentiment, often combined with class-based bias, has long been prevalent in American social life. Persons of Mexican ancestry are often stereotyped as nothing other than peasants who undercut the wage scale of “American” workers because of their willingness to work for “inhuman” wages.¹²³ The debates over the ever-expanding fence along the U.S.–Mexico border¹²⁴ and border enforcement generally,¹²⁵ the proliferation of state and local immigration-enforcement measures,¹²⁶ and the fear that some Americans express of the “Hispanization” of the United States,¹²⁷ reveal both anti-Mexican and anti-immigrant sentiment, as well as legitimate concerns with lawful immigration and immigration controls. The difficulty of disentangling lawful from unlawful motivations for supporting such controls does not change the real influence that invidious motives might have in both the substance and enforcement of U.S. immigration law and policy.

An often-expressed public concern is with the magnitude of the flow of immigrants from Mexico. Some contend that the United States is being inundated—“flooded” is the word frequently employed—with poor, racially- and culturally-different Mexican immigrants (often referred to as “illegal aliens”) and that this flood is corrupting the national identity of the United States as well as resulting in economic and other injuries to U.S. society. The alleged failure of immigrants to assimilate into American society also is a related, oft-expressed concern. But several recent developments reveal the

123. See Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles’s Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. 1087, 1087–88 (2000) (relaying a story of one Anglo owner of a landscaping business discussing his Latino workers: “They’re very hard workers, the Mexican fellas, they just need some guidance. I show them how they can make more money working for me.”); Jennifer Gordon & R. A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1163 (2008) (referring to the claim of a U.S. citizen that he would not “be worked like a Mexican”) (footnote omitted). See generally STEVEN W. BENDER, GREASERS & GRINGOS: LATINOS, LAW, & THE AMERICAN IMAGINATION (2003) (analyzing prevailing negative stereotypes about Latinos in American culture); LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, & THE NATION (2008) (studying popular stereotypes of Latino immigrants as a threat to the United States).

124. See M. Isabel Medina, *At the Border: What Tres Mujeres Tells Us About Walls and Fences*, 10 J. GENDER RACE & JUST. 245, 245, 258 (2007) (describing the emphasis of the U.S. government on the “physical” barrier along the international border that is “conceptualized as a dividing line between two culturally and historically separate and distinct nations”); Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.–Mexico Border Security Fence*, 14 HUM. RTS. BR. 33, 33, 37 (2007) (arguing that the 700 miles of border fencing authorized by the Secure Fence Act of 2006 will likely result in the violation of basic human rights of undocumented immigrants crossing the border and those persons living within the border region).

125. See *supra* II.B.2.

126. See *infra* III.A.

127. See HUNTINGTON, *supra* note 18, at 221–56. See generally HANSON, *supra* note 18 (contending that demographic changes in California are transforming the state into “Mexifornia”). But see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1364–68 (2005) (criticizing Huntington’s analysis); George A. Martínez, *Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples*, 61 SMU L. REV. 7, 10–11 (2008) (questioning the claim of Huntington and others that Hispanic immigrants fail to assimilate into American society).

unmistakable influence of race and class on immigration law and its enforcement.

A. The Modern “Sundown” Towns: Prince William County, Virginia, and Escondido, California

The conventional wisdom has been that federal power over immigration is exclusive, with little room for state and local immigration and immigrant regulation.¹²⁸ Nonetheless, in the last few years, a number of state and local governments, frustrated by the failure of Congress to enact comprehensive immigration reform, and uneasy with the real and imagined changes brought by new immigrants—and Hispanics generally—to their communities, have adopted measures that purport to address undocumented immigration and immigrants.¹²⁹ Class and race have unquestionably influenced the passage of these measures.

128. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”) (emphasis added) (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1875); *Passenger Cases*, 7 How. 283 (1849)). Growing numbers of scholars have questioned the conventional wisdom and advocated greater state and local involvement in immigration and immigrant regulation. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121 (1994); see also Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 463–65 (2008) (outlining the kind of immigration legislation states can enact that federal law does not preempt); Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1069–73 (2007) (contending that local governments should be permitted to regulate immigration in a manner consistent with U.S. immigration law and policy); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624–25 (2008) (questioning traditional account that recent efforts of local governments to regulate immigration and immigrants was a response to the failure of Congress to pass comprehensive immigration reform); Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT’L L. 179, 180–91 (2008) (analyzing complex issues raised by local involvement in immigration and immigrant law).

129. *Compare* *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 517–21 (M.D. Pa. 2007) (invalidating city immigration ordinance on federal preemption grounds), *with* *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009) (affirming judgment on procedural grounds that similar city ordinance was not preempted by federal law), *and* *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979–80, 982–86 (9th Cir. 2008) (holding that Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal immigration law).

Many scholars have lodged concerns and raised questions against local attempts to regulate immigration. See, e.g., Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006) (analyzing federalism issues raised in immigration enforcement); Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007) (criticizing Hazleton, Pennsylvania’s immigration ordinance); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007) (arguing that any state, county, or local ordinance directed at immigration regulation generally is unconstitutional under federal preemption doctrine); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217 (1994) (arguing for adherence to the general rule that state regulation of immigration is preempted by federal law); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004)

Consider a piece of commentary describing an anti-immigrant rally in Hazleton, Pennsylvania, home of a much-publicized immigration ordinance that generated national controversy:

I'm not Latino, but the anger displayed at the rally—held in support of Hazleton's anti-immigration mayor, Lou Barletta—was enough to give anyone with a soul a serious case of the chills. . . . About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime, and lowering property values. If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.¹³⁰

Along these lines, some local governments have unsuccessfully attempted to address the efforts of day laborers—relatively unskilled workers, many of whom are undocumented immigrants from Mexico and Central America—to secure work.¹³¹ “Day laborers are short-term workers who assemble in areas where

(contending that local governments cannot constitutionally enforce immigration laws); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) (questioning state and local involvement in matters involving the intersection of criminal law and immigration law); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (contending that exercise of immigration power by states might increase discrimination against all immigrants, including lawful ones, as well as U.S. citizens of particular national origins); cf. Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133 (2008) (analyzing the meaning of “sanctuary” that some cities claim to provide undocumented immigrants). *But see supra* note 128 (citing scholarship contending that state and local governments could legitimately play a role in immigration and immigrant regulation).

130. Mike Seate, *Rage Over Illegals Brings '60s to Mind*, PITT. TRIB. REV., June 7, 2007, available at http://pittsburghlive.com/x/pittsburghtrib/news/rss/s_511404.html; see also Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, RIVERFRONT TIMES (St. Louis), Feb. 28, 2007, available at <http://www.riverfronttimes.com/content/printVersion/204874> (quoting mayor of Valley Park, Missouri, a town that enacted an immigration ordinance similar to the one in Hazleton, “You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in.”); John Keilman, *Hispanics Rue City's New Rules*, CHI. TRIB., Oct. 29, 2006, at C3 (reporting that Hispanics felt under attack by local ordinances like Hazleton's); Ruben Navarrette Jr., *Hate in the Immigration Debate*, SAN DIEGO UNION-TRIB., July 29, 2007, at G3 (observing that the anti-immigrant cause has become distinctly anti-Mexican as shown by the hate mail that he (a prominent national commentator and native-born U.S. citizen educated at Harvard College) regularly receives, including mail calling him a “dirty Latino” who should go “back to Mexico”); Michael Powell & Michelle García, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (same).

131. See, e.g., *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1034 (D. Ariz. 2008) (invalidating an ordinance banning sidewalk solicitation as a violation of the First Amendment); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 955, 961–62, 970 (C.D. Cal. 2006) (striking down a city ordinance that targeted day laborers in practice by prohibiting speech for solicitation of employment); *Coalition for Humane Immigrant Rights v. Burke*, 2000 U.S. Dist. LEXIS 16520, at *43 (C.D. Cal. Sept. 12, 2000) (acknowledging the plight of day laborers who feel “compelled to take to the streets to look for day work,” as well as the need to solve problems “stemming from reckless vehicle-addressed solicitation” but finding an ordinance limiting employment solicitation “is not that solution”). Some cities also have responded to growing Hispanic populations by seeking to regulate—in some cases ban—trucks that sell tacos and other Mexican foods. See *Hispanic Taco Vendors of Wash. v. City of Pasco*, 994 F.2d 676, 677 (9th Cir. 1993) (affirming the denial of injunctive relief seeking to halt enforcement of local law requiring the licensing of taco trucks and other street vendors); Miguel Bustillo, *Hold the Tacos, New Orleans Says*, L.A. TIMES, July 14, 2007, at A1 (reporting on local taco-truck ban in New Orleans area); see also Garrett Therolf, *Taco Trucks Can Stay Parked*, L.A. TIMES, Aug. 28, 2008, at B1 (reporting on court injunction barring enforcement of

they are likely to be visible to potential employers—typically sidewalks, parking lots, and around construction-supply stores.”¹³² These laborers are among the most vulnerable workers in the workforce, often subject to exploitation by employers, including nonpayment of wages and being required to work in substandard working conditions.¹³³

1. Prince William County, Virginia

In 2007, Prince William County, Virginia, responded to an increase of Hispanics settling in the community by adopting a measure that required police officers to check the immigration status of anyone accused of breaking the law, whether for speeding or shoplifting, if the officer believed for some reason that the person was in the country unlawfully.¹³⁴ Affording such broad discretion to law enforcement officers unfortunately creates the serious potential for racial profiling and related abuses.¹³⁵ Fearful of the impacts of the enforcement of the new law, Hispanic immigrants and citizens reportedly have moved out of Prince William County, to the dismay of some businesses and the approval of some white residents.¹³⁶

Los Angeles County taco truck ordinance, which grew out of a complex dispute between owners of Mexican restaurants and taco trucks).

132. Margaret Hobbins, Note & Comment, *The Day Laborer Debate: Small Town, U.S.A. Takes on Federal Immigration Law Regarding Undocumented Workers*, 6 CONN. PUB. INT. L.J. 111, 114 (2007) (footnotes omitted). For studies of day laborers, see ABEL VALENZUELA, JR. & EDWIN MELÉNDEZ, DAY LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY (Apr. 11, 2003), available at http://www.sscnet.ucla.edu/issr/csup/pubs/papers/pdf/csup3_NYDLS.pdf (focusing on day laborers in New York City); ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES (Jan. 2006), available at <http://www.sscnet.ucla.edu/issr/csup/index.php> (discussing the daily lives of day laborers and the conditions they face).

133. See, e.g., Anna Gorman, *A Darker State Economy Sends Day Laborers Packing*, L.A. TIMES, Sept. 1, 2008, at B1 (reporting that economic decline resulted in a decision by some day laborers to return to their native countries). For analysis of the legal issues facing day laborers, see Analiz DeLeon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241 (2008); Hobbins, *supra* note 132, at 113–20; Lisa Zamd, *All in a Day's Work: Advocating the Employment Rights of Day Laborers*, 3 MODERN AM. 56, 56–57 (2007); see also JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 191–92 (2005) (discussing efforts to organize day laborers); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 912–23 (2008) (summarizing how various legal-services programs address legal issues of undocumented immigrants, including day laborers).

134. See Nick Mirotff & Kristen Mack, *After Vote, Pr. William Immigrant Plan Faces Hurdles*, WASH. POST, Oct. 18, 2007, at A1. The Prince William County measure implicates a larger—and much-contested—question about the role of state and local police agencies in the enforcement of the U.S. immigration laws. Compare Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (advocating such cooperation), with Kittrie, *supra* note 129, at 1466–74, 1487–92 (analyzing federalism issues raised in local police involvement in immigration enforcement), and Huyen Pham, *supra* note 129, at 998–1003 (contending that local police cannot constitutionally cooperate in the enforcement of the federal immigration laws).

135. See *supra* II.B.2.

136. Nick Mirotff, *A Hispanic Population in Decline; Illegal Immigrant Policy Alters Pr. William on Many Levels*, WASH. POST, July 10, 2008, at A1.

Supporters of the local immigration measures have contended that the law will promote “self-deportation” of undocumented immigrants.¹³⁷ However, the Hispanics moving out of Prince William County appear to be moving to neighboring localities and states rather than leaving the country.¹³⁸

2. Escondido, California

Another local government that has sought to deter Hispanic immigrants (and perhaps U.S. citizens) from remaining in its jurisdiction is the city of Escondido, California, which is located north of San Diego not far from the U.S.–Mexico border. In the last few years, Escondido has tried to discourage undocumented immigrants from being visible in the city limits through a number of aggressive means, including passing an ordinance—which the city later rescinded in the face of a formidable legal challenge¹³⁹—barring landlords from renting to undocumented immigrants, implementing immigration sweeps, and pursuing aggressive enforcement of other laws.¹⁴⁰

Escondido has attacked undocumented immigration indirectly by, among other things, increasingly citing residents for code violations such as garage conversions, graffiti, and junk cars.¹⁴¹ Like other municipalities, Escondido city officials considered a policy restricting drivers from picking up day laborers.¹⁴² One of the local police department’s most controversial moves was to target unlicensed drivers through the use of traffic checkpoints, which disparately affected undocumented immigrants who are ineligible in California (and many other states) for driver’s licenses.¹⁴³ Claiming in effect that the city’s motives are

137. *E.g.*, Thomas G. Tancredo, U.S. Representative (Colo.), A New Strategy for Control of Illegal Immigration, Remarks at the Heritage Foundation (Sept. 21, 2006), in *HERITAGE LECTURES*, Oct. 26, 2006, at 5; Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 *TULSA J. COMP. & INT’L L.* 155, 160–61 (2008). The U.S. government offered a short-lived—because it was unsuccessful—campaign encouraging undocumented immigrants to turn themselves in and effectively self-deport. See Amy Taxin, *Federal “Self-Deportation” Pilot Program Ends Today a Flop*, *SAN GABRIEL VALLEY TRIB.*, Aug. 22, 2008.

138. See Miroff, *supra* note 136.

139. See Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 *DENV. U. L. REV.* 1041, 1056–57 (2007) (analyzing litigation resulting in settlement of a legal challenge to the Escondido ordinance barring landlords from renting to undocumented immigrants).

140. See Anna Gorman, *Undocumented? Unwelcome; Escondido is Using a Wave of Policies to Try to Drive Away Illegal Immigrants*, *L.A. TIMES*, July 13, 2008, at B1; see also Catherine Slack, *Municipal Targeting of Undocumented Immigrants’ Travel in the Post 9/11 Suburbs: Waukegan, Illinois Case Study*, 22 *GEO. IMMIGR. L.J.* 485 (2008) (analyzing effects of efforts of Illinois city to regulate travel of undocumented immigrants).

141. *Id.* Such methods reflect a practice that has been described as discrimination by proxy, namely reliance on a race-neutral proxy correlated with Hispanic identity to discriminate against Hispanic citizens and immigrants. See Kevin R. Johnson & George Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 *U.C. DAVIS L. REV.* 1227, 1274–76 (2000).

142. See Steve Lopez, *Migrant Has Tough Message to Others*, *L.A. TIMES*, July 20, 2008, at B1; see also *supra* text accompanying notes 131–33 (discussing localities that have sought to regulate day laborers).

143. In 2007, “the department set up 18 license checkpoints, resulting in 293 impounded cars, 14 arrests, and 296 citations.” Gorman, *supra* note 140.

nothing less than invidious, a retired sheriff observed that the city is in fact “looking for a way to reduce the number of brown people” in Escondido.¹⁴⁴

Like Prince William County’s, Escondido’s approach has been described as a method encouraging “attrition: making life as difficult as possible for undocumented immigrants in the hope that they’ll self-deport back home.”¹⁴⁵ Fulfillment of this hope seems unlikely, given that residence is possible in other nearby jurisdictions in the United States.

3. The New “Sundown Towns”

The end result of local immigration measures like those in Prince William County and Escondido may well be modern-day variants of the old “sundown towns” in the United States. Emerging in the North after the Civil War when many freed slaves migrated from the South in search of employment, sundown towns systematically excluded African Americans after sunset.¹⁴⁶ Sundown laws, often enforced through threats of violence, allowed workers of color to provide labor needed in town but without the perceived burden on townspeople of Blacks living among the city’s white residents.

Along these lines, Hazleton, Pennsylvania, Valley Park, Missouri, and Farmer’s Branch, Texas have adopted ordinances that bar landlords from renting to undocumented immigrants; these laws have been characterized as a new Jim Crow, harkening back to the days of legally-enforced segregation of African Americans.¹⁴⁷ Besides affecting undocumented immigrants, the enforcement of these laws may result in discrimination against national-origin minorities, including U.S. citizens and lawful permanent residents in addition to undocumented immigrants.¹⁴⁸

There is little indication that the labor provided by immigrants in cities with ordinances and policies like Escondido and Prince William County will not be in demand to maintain the homes and yards of city residents, to provide child care services, and to sustain restaurants, hotels, construction, and service industries in those municipalities. The elimination of day-laborer pick-up points, for example, would likely drive the employment of these workers deeper

144. *Id.* (quoting Bill Flores, retired sheriff).

145. *Id.*

146. See Tom I. Romero, *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER, RACE, & JUST. 14 (2008) (contending that state and local immigration laws are in fact about race, not simply undocumented immigration). See generally JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005) (offering a comprehensive history of sundown towns throughout the United States).

147. See Marisa Bono, *Don’t You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow*, 3 MODERN AM. 29, 29–34 (2007).

148. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 72–81 (2008) (identifying how many persons are perceived as unlawfully being in the United States because of “group-based stereotypes” tied to ethnicity rather than national origin); see also Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEG. F. 93, 101–04 (2007) (analyzing immigration controls as a form of residential segregation).

underground. But this would not likely reduce, much less eliminate, the informal labor market that exists to satisfy the economy's thirst for inexpensive labor. The new incarnation of the sundown town, it appears, will thus have unskilled Hispanic immigrant workers by day but will be white-dominated by night.

B. Immigration Raids: Postville, Iowa, 2008—A Case Study

As Congress debated comprehensive immigration reform beginning in late 2006,¹⁴⁹ the Bush administration increasingly employed immigration raids in the interior of the United States in an effort to demonstrate the federal government's commitment to immigration enforcement.¹⁵⁰ These raids have had racial and class impacts on particular subgroups of immigrant workers, namely low-skilled Hispanic immigrants.

Immigration raids are not an entirely new immigration-enforcement strategy. Nor are their racial and class impacts. At various times in U.S. history, the U.S. government has employed raids as a device for enforcement of the

149. For different perspectives on comprehensive immigration reform of U.S. immigration law like that debated in Congress during 2006–07, see, for example, Muzaffar Chishti, Comment, *A Redesigned Immigration Selection System*, 41 CORNELL INT'L L.J. 115 (2008) (offering an immigration-reform proposal); Hugh Hewitt, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS 1 (2008) (offering a variety of perspectives on immigration reform); Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533 (2007) (discussing practicalities of immigration reform); Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267 (2006) (discussing politics of immigration reform); Doris Meissner, *Keynote Address*, 16 TEMP. POL. & CIV. RTS. L. REV. 309 (2007) (offering opinions on immigration reform); Marc R. Rosenblum, Independent Task Force on Immigration and America's Future, "*Comprehensive*" Legislation vs. Fundamental Reform: The Limits of Current Immigration Proposals, MIGRATION POLICY BRIEF 13 (Jan. 2006) (analyzing comprehensive immigration-reform proposals); Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE REL. GENDER & CLASS 151 (2005) (same); Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007) (explaining link of failure of immigration reform and rise of vigilantism); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446 (2008) (describing needed changes to federal labor law after legalization of undocumented immigrants). *But see generally* JOHNSON, *supra* note 44 (proposing a more far-reaching reform of the immigration laws than that envisioned by the proponents of the various forms of "comprehensive" reform considered by Congress).

150. *See, e.g.*, Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092–96 (2008) (discussing U.S. government's raids of Swift Company meatpacking plants in December 2006); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1157–68 (2008) (analyzing legal impacts of raids and other forms of interior immigration enforcement); Sandra Guerra Thompson, Comment, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 654–58 (2008) (same); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 403–06 (2008) (identifying negative impacts of immigration raids on families, including U.S. citizen children of immigrants); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862–88 (2008) (analyzing legal impacts of raids and other forms of interior immigration enforcement); *see also* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782–800 (2008) (studying various modes of private enforcement of the immigration laws).

immigration laws.¹⁵¹ But in the last few years, the U.S. government has conducted immigration raids in increasing numbers—and with greater aggressiveness—at worksites across the United States.¹⁵²

The May 2008 raid of a meatpacking plant in Postville, Iowa, constituted one of the largest raids on undocumented workers at a single site in American history. In the raid's aftermath, the U.S. government did not simply seek to deport the undocumented, but pursued criminal prosecutions of the workers for immigration and related crimes, such as for identity fraud.¹⁵³ The new strategy, which devastated the economic and social fabric of a rural community in America's heartland, proved to be especially controversial.

With a massive show of force that included helicopters, buses, and vans, federal agents surrounded the Agriprocessors plant in Postville, the nation's largest kosher slaughterhouse.¹⁵⁴ The officers arrested hundreds of suspected undocumented workers and detained them at the National Cattle Congress grounds, a cattle fairground seventy-five miles from Postville.¹⁵⁵

According to news reports, immigration authorities arrested 290 Guatemalan, 93 Mexican, 4 Ukrainian, and 2 Israeli workers.¹⁵⁶ Shackled and

151. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1035–38 (1984) (addressing legal challenges to raids at a car-repair shop and a potato-processing plant); *INS v. Delgado*, 466 U.S. 210, 211–14 (1984) (same with respect to a factory search); *Int'l Molders & Allied Workers' Union Local No. 164 v. Nelson*, 799 F.2d 547, 550 (9th Cir. 1986) (same); see also David K. Chan, Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767, 769 (1986) (arguing that U.S. citizens and lawful immigrants are “seized” under the Fourth Amendment when government interrogates the person regarding their citizenship status during a workplace raid).

152. See, e.g., Pam Belluck, *Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts*, N.Y. TIMES, Mar. 22, 2007, at A22; Robbie Brown, *300 Detained in Immigration Raid at Plant*, N.Y. TIMES, Oct. 8, 2008, at A19 (South Carolina); Anna Gorman, *U.S.-Born Children Feel Effect of Raids*, L.A. TIMES, June 8, 2008, at B1 (California); Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16 (Mississippi); Julia Preston, *Immigration Raid Draws Protest From Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A17 (North Carolina); Libby Sander, *Immigration Raid Yields 62 Arrests in Illinois*, N.Y. TIMES, Apr. 5, 2007, at A12; William Wan, *Authorities Detain 45 in Immigration Raid of Painting Company*, WASH. POST, July 1, 2008, at B2 (Maryland);

153. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A1. For criticism of the criminal prosecutions in Postville, see Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009). U.S. immigration authorities employed similar strategies in much-publicized raids at meatpacking plants in 2007. See Aldana, *supra* note 150, at 1092–94; Thronson, *supra* note 150, at 400–01.

154. Hsu, *supra* note 153.

155. Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in U.S. History: A Personal Account 1*, (June 13, 2008) (unpublished essay, on file with The New York Times), available at <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>.

156. Hsu, *supra* note 153. It has been observed that only five of the persons originally arrested by the authorities in the Postville raid had criminal records. See Camayd-Freixas, *supra* note 155, at 3. As the Postville raid suggests, recent immigration raids have had particularly negative impacts on Guatemalan immigrants. One of the largest workplace raids before Postville occurred in March 2007 in New Bedford, Massachusetts, with more than 360 workers arrested, the majority of who were natives of Guatemala. Jack Spillane, *Immigrants Feel Singled Out for Labor Abuse*, STANDARD-TIMES (New Bedford), June 30, 2008, available at <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20080630/NEWS/806300303/-1/SPECIAL62>; Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid: New Bedford Factory*

chained, the workers appeared in court and listened to interpreted court proceedings through headsets.¹⁵⁷ An observer of the mass legal proceedings lamented that those arrested

appeared to be uniformly no more than 5 ft. tall, mostly illiterate Guatemalan peasants with Mayan last names, some being relatives . . . , some in tears; others with faces of worry, fear, and embarrassment. They all spoke Spanish, a few rather laboriously [They presumably were native speakers of indigenous languages.] . . . [A]side from their Guatemalan or Mexican nationality . . . they too were Native Americans, in shackles. They stood out in stark racial contrast with the rest of us as they started their slow penguin march across the makeshift court.¹⁵⁸

The raid and criminal prosecutions, however, did not end the immigration-enforcement activities in Postville. A local teacher reported that U.S. Immigration & Customs Enforcement officers followed up by going to schools seeking student and employee files of any person with a “name that sounded Hispanic”; the day after the raid, immigration authorities searched “every home and apartment that ha[d] a Hispanic name attached it.”¹⁵⁹ This is nothing less than a crude form of impermissible racial profiling.¹⁶⁰

More than three hundred of those arrested in the Postville raid faced criminal charges for identity theft and related crimes.¹⁶¹ Most of the Guatemalans could not read or write and many reportedly failed to understand that they were charged with *criminal* offenses rather than mere *civil* violations of the immigration laws.¹⁶² Rather than facing simple deportation, these immigrants stood accused of serious criminal charges that would subject them to imprisonment and make it difficult, if not impossible, for them to ever immigrate lawfully to the United States.¹⁶³

The rapid pace of the proceedings and the aggressive prosecution of criminal charges represented the federal government’s new strategies in enforcing the U.S. immigration laws.¹⁶⁴ Previously, the U.S. government generally had sought to swiftly deport noncitizens arrested after workplace raids and had not pursued immigration-related criminal prosecutions.¹⁶⁵ Many of the undocumented workers apprehended in the Postville raid quickly accepted plea bargains on the criminal charges, with hopes of faster release and immediate deportation.¹⁶⁶

Employed Illegals US Says, BOSTON GLOBE, Mar. 7, 2007, at A1; Maria Sacchetti, *Commission Hears Testimony on US Immigration Raids*, BOSTON GLOBE, Apr. 8, 2008, at B1.

157. Editorial, *The Shame of Postville*, N.Y. TIMES, July 13, 2008, at WK11.

158. Camayd-Freixas, *supra* note 155, at 2.

159. Elise Martins, *Postville, Iowa, Immigration Raids Tear Apart Families, Destroy Local Economy*, Sisters of Mercy, available at http://www.sistersofmercy.org/index.php?option=com_content&task=view&id=1373&Itemid=193.

160. *See supra* II.B.2.

161. Camayd-Freixas, *supra* note 155, at 2–3.

162. *See id.*

163. Julia Preston, *An Interpreter Speaking up for Migrants*, N.Y. TIMES, July 11, 2008, at A1.

164. *Id.*

165. Editorial, *The Shame of Postville*, *supra* note 157.

166. Editorial, *‘The Jungle,’ Again*, N.Y. TIMES, Aug. 1, 2008, at A18.

In its zealous pursuit of immigration enforcement, U.S. officials did not appear particularly concerned with the exploitation of the undocumented workers by the employer, although there were criminal immigration indictments of the employer. Indeed, the Postville raid may have interfered with an ongoing Department of Labor investigation looking into various labor-law violations, including the use of child labor.¹⁶⁷ One observer critically characterized the Postville raid as part of an effort to disrupt union-organizing activities among the Agriprocessors workers.¹⁶⁸

Moreover, the human damage of the immigration raid on a small rural town was devastating:

Postville . . . where nearly half the people worked at Agriprocessors, had lost 1/3 of its population Besides those arrested, many had fled the town in fear. Several families had taken refuge at St. Bridget's Catholic Church, terrified, sleeping on pews and refusing to leave for days. Volunteers from the community served food and organized activities for the children. At the local high school, only three of the 15 Latino students came back on [the day after the raid], while at the elementary and middle school, 120 of the 363 children were absent. . . . Some American parents complained that their children were traumatized by the sudden disappearance of so many of their school friends. . . . Some of the children were born in the U.S. and are American citizens. Sometimes one parent was a deportable alien while the other was not. "Hundreds of families were torn apart by this raid," said a Catholic nun.¹⁶⁹

Months after the raids, the furor over the U.S. government's Postville strategy and the treatment of the immigrant workers continued.¹⁷⁰ The title of one *New York Times* editorial—*The Shame of Postville*¹⁷¹—pretty much said it all. Congressman Bruce Braley (D-Iowa) observed that “[u]ntil we enforce our immigration laws equally against both employers and employees who break the law, we will continue to have a problem.”¹⁷² A union official opined that the

167. See Hsu, *supra* note 153.

168. David L. Wilson, *Union-Busting by Any Other Name*, MR ZINE, July 20, 2008, available at <http://mrzine.monthlyreview.org/wilson200708.html>.

169. Camayd-Freixas, *supra* note 155. Many families in the United States are composed of parents and children of different immigration statuses. See Campbell, *supra* note 139, at 1052; see also MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INSTITUTE, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 1 (Oct. 6, 1999) (estimating that ten percent of all families in United States had mixed immigration statuses). The recent raids resulting in the arrests of undocumented immigrant parents have left some U.S.-citizen children without parental supervision. See Sherryl Zounes, Current Development, *Children Without Parents: An Unintended Consequence of ICE's Worksite Enforcement Operations*, 21 GEO. IMMIGR. L.J. 511, 512–14 (2007). Removal of noncitizens that effectively results in the deportation of U.S. citizen children (who accompany the deported parent) has long been a problem with the enforcement of the U.S. immigration laws. See Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 525–35 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 46–50 (1988).

170. See, e.g., Press Release, Ali Noorani, Department of Homeland Security or Department of Economic Ruin? (July 24, 2008) available at <http://www.immigrationforum.org/press/release-display/departement-of-homeland-security-or-department-of-economic-ruin/>; Preston, *supra* note 163.

171. *The Shame of Postville*, *supra* note 157; see also *'The Jungle,' Again*, *supra* note 166.

172. Hsu, *supra* note 153.

Bush administration “seem[ed] to place a larger value on big, splashy shows in this immigration raid than in vigorously enforcing . . . labor laws.”¹⁷³

The Postville immigration raids unquestionably were directed at and affected unskilled Hispanic immigrant workers, who are among the most vulnerable laborers in U.S. society. Even if one defends the immigration-control goals of the U.S. government, it is difficult to persuasively contend that the Agriprocessors raid did not have distinctively racial and class impacts. To this point, the United States unfortunately has not addressed the root cause of undocumented immigration: the more general problem with the U.S. immigration laws being out of synch with the nation’s labor needs and the lack of legal ways for many low- and moderately-skilled workers of color from the developing world to lawfully come to the United States.¹⁷⁴

IV

CONCLUSION

In operation, and to a certain extent in design, the U.S. immigration laws aim to keep poor and working people of color out of the United States. Those who suffer the brunt of immigration enforcement are most often poor and working noncitizens of color. Almost all of those who die on a daily basis in the desert and mountains—a nightmare that continues daily along the U.S.–Mexico border—on the arduous journey through the desert to the United States are poor and working people of color. Local immigration-enforcement measures, such as those adopted by Prince William County, Virginia, and Escondido, California, target poor and working immigrants of color, as did the federal government’s spring 2008 immigration raid in Postville, Iowa.

The experiences of Hispanic immigrants provide a stark example of the intersection of race and class in the operation of U.S. immigration law and its enforcement, which is best understood through the Critical Race Theory concept of intersectionality.¹⁷⁵ One could look at noncitizens of many different nationalities who suffer as a result at the intersection of race and class in the operation of U.S. immigration law. Africans¹⁷⁶ and Haitians¹⁷⁷ seeking to come to

173. *Id.* (quoting Mark Lauritsen, the international vice president of the United Food and Commercial Workers union).

174. *See supra* II.A.3.

175. *See supra* text accompanying notes 21–25 (explaining intersectionality).

176. *See* Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 *HOW. L.J.* 237, 244–47 (1994) (describing the historic role of chattel slavery and immigration and nationality laws in severely limiting the number of African immigrants to the United States).

177. *See* Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 *U. MIAMI L. REV.* 717 (1999); *see also* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158 (1993) (upholding U.S. government’s policy of the interdiction on the high seas and repatriation of Haitians fleeing political violence and their return to Haiti). *But see* Harold H. Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 *YALE L.J.* 2391 (1994) (criticizing the Haitian interdiction case); *see generally* Harold H. Koh, *Reflections on Refoulment and Haitian Centers Council*, 35 *HARV. INT’L L.J.* 1 (1994) (same). Many factors contributed to the extraordinary treatment of

the United States, for example, historically have been subject to particularly harsh treatment by the U.S. government.

In some ways, this racial and class dynamic is not exceptional to U.S. immigration law and enforcement. As other contributions to this issue of *Law and Contemporary Problems* amply demonstrate, many other bodies of American law operate in a remarkably similar fashion. However, because the plenary-power doctrine bestows constitutional immunity on the immigration laws, the laws have been more extreme with class and racial impacts far clearer and more direct in immigration law than in other bodies of U.S. law. Immigration law expressly defines who can and cannot enter the United States and, not surprisingly, mirrors the class and racial hierarchies that exist in American society. Immigration law and its enforcement make class, nationality, and other distinctions not permitted in other bodies of law, which results in disparate class and racial impacts.

For better or worse, the United States, despite frequent claims that it is a “nation of immigrants,” is not exceptional in the racial and class impacts of its immigration laws and their enforcement. The nations that comprise the European Union, to offer one prominent set of examples, have experienced similar negative public reactions to immigrants from North Africa, with the difference of race and class to native populations contributing to sporadic nativist backlashes.¹⁷⁸ Yet the United States has always held itself as committed to more laudable immigration ideals and often purports to embrace the “huddled masses” of the world. It is about time that the U.S. immigration laws better live up to the nation’s lofty ideals.

noncitizens fleeing Haiti, including the difference of race and class. See generally 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 (1993); see also Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000). Despite the long history of political violence in Haiti, U.S. officials historically have generally classified people fleeing that country as “economic migrants,” not “political refugees” eligible for relief under the U.S. immigrations laws. See Johnson, *supra*, at 12–14; Note, *Political Legitimacy in the Law of Political Asylum*, *supra* note 118 at 459; see also *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1030 (5th Cir. 1982) (noting that the Immigration & Naturalization Service characterized most of those who fled Haiti as “economic” refugees). Haitian immigrants created a popular fear among the U.S. public of a flood of poor and Black people of a very different culture coming to the United States. See Johnson, *supra*, at 5, 11, 15; Johnson, *supra* note 28, at 1140–44.

178. See Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 123–30 (2007–08).