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Impossible Subjects: Illegal Aliens and Alien Citizens

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IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA. By *Mae Ngai*. Princeton: Princeton University Press. 2004. Pp. 377. $35.

INTRODUCTION

America is a nation of immigrants, according to our national narrative. This is the America with its gates open to the world, as well as the America of the melting pot.[1]

Underpinning this national narrative is a very particular story of immigration that foregrounds the inclusion of immigrants, rather than their exclusion. Highlighted in this story is the period before 1924, of relatively unfettered European immigration, and the period after 1965, post the lifting of national origins quotas. Also underlying this national narrative is a particular story about what happens once immigrants enter. In this story the immigrant traverses smoothly from settlement to assimilation and then citizenship. This social experience is accompanied by a teleology of legal categorization, whereby the immigrant is first lawfully admitted as a permanent resident, and then naturalizes to become a citizen.[2]

In a stunning and beautifully written book, historian Mae Ngai[3] directs our attention to a history occluded in our national narrative of

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1. For an example of a description of America as a "nation of immigrants," that also describes "gates [open] to the world" and the "melting pot," see AM. PARK NETWORK, STATUE OF LIBERTY NATIONAL MONUMENT HISTORY (2001), *at* http://www.americanparknetwork.com/parkinfo/sl/history/nation.html.

2. For the argument that this national narrative is waning, see Hiroshi Motomura, Americans-in-Waiting: The Lost Story of Immigration and Citizenship in the United States (2005) (draft manuscript, on file with the author). Motomura asserts that the lifting of national origins quotas in 1965, which broadened who could be admitted as a legal permanent resident, has resulted in permanent residence coming to mean less. The permanent resident is no longer considered an "American-in-waiting." Motomura's argument is that we should restore permanent residence to this historical status. *Id.*

3. Associate Professor of History, University of Chicago.

immigration and citizenship. *Impossible Subjects* examines the woefully understudied period between 1924 and 1965, the tenure of the national origins quota system. This era began with the passage of the Johnson-Reed Immigration Act in 1924 and ended with the lifting of national origins quotas with the passage of the Hart-Celler Act of 1965. This epoch, the most comprehensive immigration restriction in U.S. history, literally "remapped the nation" (p. 3). The period of 1924 through 1965 remapped the nation by developing both a particular racial and ethnic identity and a "new sense of territoriality" (p. 3). Broad-based immigration exclusion created a heightened sense of national borders as well as the state surveillance of those borders, which helped produce what we now know as the "illegal alien."

Ngai's book does not only focus on an understudied historical period of immigration regulation; it also centers immigrants who are marginalized in immigration scholarship. The subject of her book is not the legal permanent resident enjoying an untroubled route to American citizenship. Instead, *Impossible Subjects* primarily concentrates on immigrants variously categorized as illegal aliens, alien citizens, colonial subjects, and contract laborers.[4]

These are immigrants whose experiences we do not center in our national narrative. As a result, the juridical regulation that governed them has been so hidden in both national and community memory that we suffer a collective amnesia. Ngai turns our attention to laws and policies, such as those governing the Chinese Confession Program of the 1950s, Japanese American citizenship renunciation in the 1940s, and Filipino voluntary repatriation in the 1930s, that have largely or completely escaped the purview of legal scholarship.[5] *Impossible Subjects* features meticulous research that fills important gaps in our knowledge of the history of immigration law. But the book does not merely show us a new archive; Ngai turns her research to important analytical use.

Throughout the book, Ngai reminds us that what we experience today as common sense in terms of our immigration law and policy is historically contingent. She describes policies which in the

4. A note on terminology: For stylistic reasons, I use the term "immigrant" in this Review to refer not only to the technically correct sense of the legal permanent resident, but also to refer to categories of noncitizens that under the Immigration and Nationality Act would be referred to instead as nonimmigrants, aliens, or nationals. I also, following Ngai, use the term "illegal alien." As in her book, I use the term not for the purpose of reproducing racist stereotypes, but to locate the historical origins and consequences of the term.

5. Discussion of the Chinese Confession Program is entirely absent in the law reviews. For the only substantive discussion of Japanese American citizenship renunciation in the law reviews, see Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233, 242-47 (1997). The repatriation of Filipinos is mentioned only in passing. *See, e.g.*, Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 823 & n.112 (2000).

contemporary moment seem unthinkable, either in their progressivity (for example, statutes of limitation on the federal power to deport, which prohibited deportation after the immigrant had resided for one year in the United States) or in their regressivity (for example, the policy of "pre-examination," which restricted this form of legalization to European immigrants).[6] The two examples of these policies, both of which magically turned illegal immigrants into lawful ones, also demonstrate a central theme of the book. What we believe to be hardened borders of citizenship and immigrant status have in actuality been enormously malleable. Both citizens and aliens have been "made" and "unmade," through both acts of the state and of the individual. And the border between the "legal" and the "illegal" has been porous. At the heart of the book are the questions of illegality in immigration and how illegal immigration came to be cast as the central problem of U.S. immigration policy in the twentieth century.

Today the conflation of the racial identity "Mexican" with the term "illegal alien" is indisputable. The two terms completely subsume one another in a way that aligns with our everyday understanding of immigration control — even while this does not track empirical fact.[7] *Impossible Subjects* shows us how this conflation was historically created. Ngai demonstrates precisely how the "illegal alien" was produced as a new legal and political subject and how it became synonymous with the racial identity "Mexican."

Presumptive illegality has not only shaped the experiences of those branded as "illegal aliens." Ngai traces how the presence of large illegal populations in certain communities has contributed to the construction of Asian and Latino communities in general as illegitimate, criminal, and unassimilable. These communities are peopled by what Ngai calls "alien citizens" (p. 2), persons who enjoy the formal status of citizenship as an immigration matter, but lack citizenship as a matter of identity. An important section of *Impossible Subjects* is devoted to the notion of alien citizenship.

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6. *See* discussion, *infra* pp. 108-09.

7. The Department of Homeland Security's statistics report that one-third of all undocumented persons in the United States are not in unlawful status because they crossed the border without lawful admission, but because they were originally lawfully admitted (from all over the world), but then overstayed their visa. *See Homeland Security: Overstay Tracking Is a Key Component of a Layered Defense: Testimony Before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *Homeland Security Overstay*] (statement of Nancy R. Kingsbury, Managing Director, Applied Research and Methods), *at* http://www.gao.gov/new.items/d04170t.pdf. In this testimony before the Subcommittee on Immigration, Border Security and Claims, Committee on the Judiciary, House of Representatives, Nancy Kingsbury of the General Accounting Office asserts that the one-third figure probably underestimates the extent of overstaying. *Id.* at 6.

Impossible Subjects is incredibly rich in its archival detail, powerful in its argument, and broad in its scope. I will first focus on Ngai's analysis of the historical construction of the illegal alien through what may seem, at first blush, paradoxical: the regulation of legal immigration, first, in the form of national origins quotas from the Eastern Hemisphere, second, in the form of the *bracero* program made up of workers from Mexico, and, third, through the retention of numerical per-country quotas in 1965. I will discuss this history in light of President George W. Bush's proposal to create a new guest-worker program, as well as Samuel Huntington's controversial new book, *Who Are We*,[8] which calls for curbing immigration from Mexico in light of its threat to "American national identity."

I will then turn to Ngai's discussion of "alien citizens." Ngai analyzes a relationship between migrancy, nationalism, and war that is made visible in the renunciation by 5,500 Japanese Americans in internment camps of their U.S. citizenship during World War II, as well as the legalization of 30,000 Chinese Americans who "confessed" their illegal immigration status during the Cold War period. I will consider these questions in light of the present "war on terror."

I. ILLEGAL ALIENS

Ngai begins *Impossible Subjects* by explaining how the Johnson-Reed Immigration Act of 1924 was simultaneously the end of one era and the beginning of another. The Act ended unlimited immigration from Europe and for the first time imposed numerical limits on immigration through a quota system that ranked the world's population in terms of nationality and race.

Many scholars have made reference to the fact that the Act aimed to curtail immigration from Southern and Eastern Europe, which soared after World War I.[9] The Act accomplished this through basing the quotas, first, on figures from 1890, and later, on the census of 1920. Ngai explains, in compelling and disturbing detail, why there was such a shift. The temporary quota of two percent of the foreign born population in 1890, as explicitly discriminatory, was recognized by the nativists who led the drive for restriction to be potentially controversial.[10] Shifting to a quota based on the 1920 census allowed

8. SAMUEL P. HUNTINGTON, WHO ARE WE: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004).

9. *See, e.g.*, Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625, 636-37 (2001).

10. On the debate as to whether to use the benchmark of the 1890 Census, *see also* DESMOND KING, MARKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY 203-04 (2000); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 83-84 (1998).

similar numerical results, inflating the number of Northern European slots, now with the appearance of nondiscrimination (p. 22). Apportioning slots on the basis of the 1920 census could reach the same results, even after mass immigration from Southern and Eastern Europe, through switching the statistical pool. The 1920 figures apportioned slots not solely based upon the foreign-born population, but upon the entire population of the United States, immigrant and otherwise, thus maintaining the statistical advantage of Northern Europeans. Doing otherwise would, in the words of the immigration restrictionist whose concept grounded the 1924 Act, discriminate against "those who have arrived at an earlier date and thereby contributed more to the advancement of the nation" (p. 22). Basing quotas on these 1920 figures enabled Great Britain and Northern Ireland in 1929 to receive an annual quota of 65,721 persons a year, in contrast to 2,784 for Russia, and 5,802 for Italy (pp. 28-29 table 1.1).

But the 1924 Act did not actually consider the entire population of the United States. Rather, whites were the only population counted for purposes of developing national quotas. The law stipulated that "'inhabitants in the continental United States in 1920' does not include (1) immigrants from the [Western Hemisphere] or their descendants, (2) aliens ineligible for citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of the American aborigines" (p. 26). Thus, the "colored races" were erased from the history of national origins of America (p. 27).[11]

This is how the United States largely closed its doors to the undesirable races of Southern and Eastern Europe, while simultaneously drawing a color line *around* Europe, not through it (p. 17). Thus while erecting a hierarchy of difference within Europe, the Johnson-Reed Immigration Act also asserted an American race entirely made up of European descendants.

Formally, the quota system encompassed all countries in the world, except for the Western Hemisphere, which was exempted due to American diplomatic and trade interests with Canada and Mexico and the need for agricultural labor from Mexico (p. 50). All countries in the Eastern Hemisphere received the minimum quota of one hundred persons. At the same time, the 1924 Act excluded from immigration those deemed to be "aliens ineligible for citizenship."[12] Even though

11. *See also* Roger Daniels, *Two Cheers for Immigration*, *in* ROGER DANIELS & OTIS GRAHAM, DEBATING AMERICAN IMMIGRATION: 1882-PRESENT 22 (2001) (noting these omissions in the 1924 Act in defining American national identity).

12. The first federal citizenship statute, passed by Congress in 1790, limited naturalization to "free white" aliens. Act of March 26, 1790, ch. 3, 1 Stat. 103. This was amended to permit naturalization of "aliens of African nativity" or "African descent" in 1870. Act of July 14, 1870, ch. 254, sec. 7, 16 Stat. 254. From 1870 until 1952, when the racial bar on naturalization was entirely lifted, there was considerable litigation. Most persons

China, for example, received a quota of one hundred, the only persons eligible to emigrate from China were non-Chinese persons (p. 27). We can see here the mechanisms that shaped U.S. demographics so that pundits like Peter Brimelow, author of the best-selling book, *Alien Nation*, allege that the "ethnic core" of the United States — to which he argues that we must return — has been white.[13] It bears mention that if the United States had enjoyed immigration unfettered by racial exclusion, presuming that immigrants entered in proportion to their world populations, we would experience a very different national identity, given that over one-half of the world's population is Asian.

What Ngai also carefully shows is something that seems quite paradoxical: how these numerical restrictions, which did not apply to the Western Hemisphere, nonetheless created illegal immigration from Mexico. She argues that numerical restriction created a new class of persons in the national body, in the form of illegal aliens (p. 57). Before the 1920s, few immigrants were deported.[14] Deportation functioned as a corrective to exclusion; in other words, if a person should not have lawfully entered, and was caught in an asylum or hospital or prison, they might be deported.[15] Thus, in 1891, Congress authorized the deportation of aliens who within one year of arrival became public charges from causes existing prior to landing, in other words, causes that would have kept them from entry in the first place. Deportation did not have its own substantive grounds. And note that the federal government did not have an unlimited time within which to act. It was, in fact, considered unconscionable to deport an immigrant

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denied naturalization as racially ineligible were Asian. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

13. PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 10 (1995). For critical reviews of *Alien Nation*, see Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996); Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963 (1996).

14. I am referring here to deportation by the federal government. For discussions of the history of expulsion by state and local authorities of individuals for reasons of crime, poverty, and disease, see generally Kunal Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75, and Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

15. P. 59. Historically, a noncitizen denied admission at a port of entry was said to be "excluded"; those expelled from the interior, whether lawfully present or not, were "deported." Entry into the United States is no longer the dividing line. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 replaced both exclusion and deportation with the word "removal," made the dividing line as to whether one was subject to grounds of deportability or excludability the question not of entry but of lawful admission, and thus specified that persons present in the interior without lawful admission were to be treated like those denied admission at a port of entry. For a discussion of this shift, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 3, 380-81 (3d ed. 2002).

after he had settled and begun to assimilate. The Immigration Act of 1917 extended the statute of limitation on deportation from one year to five years from arrival (p. 59).

The Johnson-Reed Immigration Act of 1924 both eliminated the statute of limitation on deportation and created separate grounds for deportation (p. 60). Significantly, the Immigration Service was now authorized to deport at any time any person who entered without a valid visa or without valid inspection (p. 60). The 1924 Act also established, for the first time, a land border patrol. In addition, unauthorized entry became a criminal, as well as a deportable, offense (p. 60). Thus, the new numerical restrictions on legal immigration required a concomitant enforcement apparatus, which led to new surveillance and new ways of thinking about immigration and unlawful entry. This enforcement apparatus coincided with the creation of the illegal alien; they were mutually produced.

By the late 1920s, deportation was becoming an expensive proposition. To make expulsion more efficient, the Immigration Service allowed illegal aliens without criminal records to depart voluntarily (p. 60). Aliens without a proper visa became the largest single class of deportees and accounted for over half of formal deportations and the overwhelming majority of such voluntary departures by the late 1920s (p. 60).

And here we see the seeds of the fusion of the illegal alien with the criminal alien, which continues to this day. Entry without a visa meant, in the words of the Immigration Service, that the "*first act* upon reaching our shores [is] to break our laws by entering in a clandestine manner" (p. 61). The illegal alien was presumed to have general criminal tendencies, because he had broken the law through illegally entering. In the words of one INS official, "[b]ecause the 'wetback' starts out by violating a law, . . . it is easier and sometimes appears even more necessary for him to break other laws since he considers himself to be an outcast, even an outlaw" (p. 149). This equating of "illegal" in the immigration sense with "criminal" coincided with the racialization of the illegal alien as Mexican and with the concomitant construction of all Mexicans as both illegal and criminal. Thus, we can see how processes of territorial and administrative enforcement that were not, in the first instance, motivated by or defined by race produced presumptions about race (p. 63).

The perception of the "illegal alien" as Mexican was born at a time when there were no numerical limits on immigration from Mexico. Until 1919, Mexicans were allowed to enter freely; after that time they were required to apply for admission at ports of entry and subjected to entry requirements such as a head tax and visa fee (p. 64). Those who sought to avoid the requirements, or feared denial of admission, entered without inspection and became illegal immigrants. The

enforcement of immigration restrictions — through inspection procedures, deportation, the Border Patrol, and criminal prosecution — created many thousands of illegal Mexican immigrants (p. 71).

The Border Patrol was originally formed to deter Chinese, who were generally barred from entry,[16] and Europeans of excludable classes who sought entry through Canada (p. 64). But the Border Patrol gained its identity along the U.S.-Mexico border, assuming the character of criminal pursuit, although charged with civil law enforcement. In Ngai's words, the Border Patrol "raised the border" (p. 68). Through their acts, the border was rearticulated as a cultural and racial boundary and as a creator of illegal immigration.

Ngai shows how Europeans were unmade as illegal, even while walking or wading across the U.S.-Mexico border became the quintessential act of illegal immigration. Increasing enforcement against Europeans created a groundswell for some immigration reform after European immigrants began to experience the legal machinery of very limited or nonexistent due process or judicial review that was developed for Chinese immigrants.[17] In 1933 and 1934, legislation was introduced to grant waivers to deportation in cases where immigrants were considered deserving (p. 81). As Ngai points out, the prototypical story told by reformers to exemplify the need for such reform involved the "poor man's theft" of bread or a sack of coal, where the immigrant committed the original crime for a family who now would suffer because of his looming deportation (p. 80). Not surprisingly, those considered deserving were primarily Europeans with criminal records (p. 82). Mexicans apprehended without proper documents were not (p. 82). And the administrative policies allowing illegal immigrants to evade deportation were either exclusively restricted to Europeans or implemented for their primary benefit.[18]

Europeans caught illegally in the United States could follow a procedure known as pre-examination. The program allowed Europeans to take voluntary departure to Canada, obtain a visa for permanent residence from the U.S. consul there, and then reenter as legal immigrants. Asians did not qualify for the program, as they were categorically excluded from immigration on grounds of racial

16. Excepted from Chinese exclusion were merchants, students, teachers, tourists, treaty traders, and diplomats. Ngai, p. 204. For a discussion of Chinese immigration during the period of exclusion, *see* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA: 1882-1943, at 45 (2003).

17. As Ngai mentions, Justice Brewer's dissent in *Fong Yue Ting v. United States*, 149 U.S. 693 (1893), was prescient. He noted that while today the absolute power of the state to expel unwanted aliens was "directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?" P. 76 (quoting *Fong Yue Ting*, 149 U.S. at 743).

18. *See* discussion, *infra* pp. 108-09. Ngai writes: "Legislative and administrative reforms operated in a way that fueled racial disparity in deportation practices." P. 82.

ineligibility; while one district director tried to grant pre-examination to Mexicans, he was stopped after 1938 (pp. 86-87). Between 1935 and 1959, the INS processed nearly 58,000 cases and granted approval in the vast majority of them (p. 87). Thus, Europeans could convert their status from illegal aliens to lawful immigrants through pre-examination. In addition, unlawful immigrants could become lawful through suspension of deportation. Suspension of deportation was discretionary relief which could be granted to aliens of "good moral character" if deportation would result in "serious economic detriment" to the alien's immediate family. The INS suspended the deportations of several thousand aliens a year from 1941 to the late 1950s (p. 88). While there was no bar to suspending the deportation of Mexicans, Ngai notes an internal Justice Department study that indicated that European immigrants constituted the majority of those whose deportation was suspended.[19] Lastly, the Registry Act, which legalized the status of "honest law-abiding alien[s] who may be in the country under some merely technical irregularity" upon the payment of a twenty dollar fee if they could show continuous residence since 1921 and "good moral character," primarily benefited Europeans and Canadians.[20] Ngai estimates that between 1925 and 1965 some 200,000 illegal European immigrants successfully legalized their status through these three mechanisms (p. 89).

This selective forgiving of the illegal status of European immigrants is hidden in our history. Its absence from the history books coincides with the presumption of legal European and illegal Mexican that is absolutely foundational to our national identity. The illegal immigrant, presumptively Mexican, functions as the opposite to the European immigrant, presumed to be legal and on the path towards citizenship. Europeans have, through the processes Ngai describes, become entirely legitimated as the center of American citizenship, while Mexicans have been cast over the borders, as having no rightful claim of belonging.[21]

Mexican Americans were literally cast over the borders in the form of "repatriation" programs of the Great Depression, whereby authorities removed over 400,000 Mexicans from the Southwest and

19. Seventy-three percent of 389 randomly selected suspension cases in a study conducted by the Justice Department in 1943 involved Europeans; eight percent involved Mexicans. P. 88. This is an admittedly small sample.

20. The Registry Act "did not formally favor Europeans over Mexicans," p. 82, but of the 115,000 immigrants who registered between 1930 and 1940, 80 percent were European or Canadian. P. 82. Many Mexicans qualified but "few knew about it, understood it, or could afford the fee." P. 82.

21. Arguably, Mexicans are considered to "belong" in the United States, but as cheap and flexible labor rather than as citizens.

Midwest in the early 1930s. An estimated sixty percent of the "repatriates" were children or American citizens by birth (p. 72). The repatriations were a mix of voluntary departures, deportations by the INS, and organized removals by local welfare bureaus seeking to expel unwanted Mexicans from their jurisdictions (p. 73). The identity of Mexicans in the United States has been so fused with foreignness, illegality, and nonbelonging that U.S. citizens of Mexican ancestry could be evicted in a racial expulsion program, exceeded in scale only by the American Indian removals of the nineteenth century (p. 75), under the rubric of "repatriation" — as if Mexican Americans were Mexican nationals.[22]

The nineteenth-century conquest of Mexico's Northern Territories by the United States, leading to the assertion "[W]e didn't cross the border, the border crossed us,"[23] highlights the strangeness of the presumptive illegality of Mexicans in the United States. As Ngai explains, the casting of Mexicans as foreign was accomplished not only by the immigration enforcement described above, but also by the context of the political economy of the U.S. Southwest. Conquest of a population considered subordinate and inassimilable, and desirable primarily as imported and cheap labor, led to Mexicans being racialized as foreign in a land now considered to belong to white Americans.

The Southwest was dominated by agricultural growers who desired large numbers of Mexican laborers, considered more malleable and vulnerable than the settled resident workforce. Even though most Anglos to the region were migrants, Mexicans, whether born in the United States or not, were considered foreign (p. 132). Foreignness stripped Mexicans of the claim of belonging as natives; instead, they were cast as illegitimate and inferior. Mexicans were racialized as disposable, as a one-dimensional "commodity function" (p. 132).

Growers argued that they were suffering from a severe labor shortage as of the late 1930s and lobbied for the importation of Mexican nationals as contract laborers.[24] Their success represented a

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22. For further discussion of the "repatriations" and of Mexican American and Mexican immigrant identity, see generally DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY (1995); for further discussion of the "repatriation" program and of contemporary efforts to seek redress, see Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 659-70 (2004).

23. *See* Interview by Nic Paget-Clarke with Roberto Martinez, Director of the U.S. / Mexico Border Program in San Diego, Cal. (1997), *in Immigration and Human Rights on the U.S./Mexico Border* (pt. 4), IN MOTION MAG., Sept. 14, 1997, *at* http://www.inmotionmagazine.com/border4.html. *See* Kim David Chanbonpin, *How the Border Crossed Us: Filling the Gap Between* Plume v. Seward *and the Dispossession of Mexican Landowners in California After 1848*, 52 CLEV. ST. L. REV. 297 (2005).

24. Contract labor stands "outside the free labor market." KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 21 (1992). The

sharp break with past policy and practice, which had prohibited foreign contract labor. As Ngai indicates, since the Civil War, contract labor was likened to slavery and portrayed as the antithesis of the free labor on which democracy depended (p. 137). Like the enslaved person, the contract laborer was not free to bargain over wages and working conditions, and he had no ability to either choose his employment or to quit (p. 137-38). In 1885, Congress had passed the Foran Act, prohibiting the immigration of aliens into the United States under labor contracts made before their arrival.[25]

Contract labor was considered so antithetical to the founding principles of American democracy that the practice was stopped in Hawai'i after its acquisition by the United States as a territory, and was never instituted in the Philippines or Puerto Rico under American colonial rule (p. 138). Yet within the mainland, the United States turned to a labor practice rejected in its own colonies in the form of the *bracero* program. The program required Congress to repeal the Foran Act.[26]

Between 1942 and 1964, some 4.6 million Mexicans entered the United States and worked in twenty-six states. Lobbyists for the *bracero* program claimed it would provide farm laborers desperately needed for the war effort, with the side benefit of eliminating illegal immigration, all the while protecting foreign nationals from abuse (p. 139). But the Mexican laborers who came in under the *bracero* program were largely unsuccessful in keeping wages or working or housing conditions at the contracted level (pp. 143-46). This is not surprising given that these workers had limited legal standing in the society in which they worked. Upwards of several thousand formal complaints were filed per year. Some voted with their feet. Desertion from the *bracero* program occurred at the rate of ten percent per year; by leaving the program, legal workers were transformed into illegal aliens. The program generated illegal immigration in another,

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contract laborer is not a waged employee. For a definition of the term "contract labor," see Leah F. Vosko, *Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective*, 19 COMP. LAB. L. & POL'Y J. 43, 70 n.99 (1997). Vosko defines the term as "work performed for a natural or legal person . . . under actual conditions of dependency on or subordination to [that person]." *Id.* (quoting International Labour Office, Eighty-Fifth Session of the International Labour Conference Provisional Record, Sixth Item on the Agenda: Contract Labour, para. 191.1 (1997)).

25. Precursors to this Act were the 1862 Act to Prohibit the Coolie Trade by American Citizens in American Vessels and the 1875 Page Act that targeted "coolies" as well. For a discussion of the 1862 Act, see Moon-Ho Jung, Outlawing 'Coolies': Race, Nation, and Empire in the Age of Emancipation 57 AMERICAN QUARTERLY (forthcoming 2005).

26. P. 139. Smaller programs involved Puerto Ricans who, as "statutory citizens" would not be considered foreign labor, at least in theory, and workers from the British West Indies. P. 138.

unexpected way. Mexico had insisted on the exclusion of states that explicitly racially discriminated against Mexicans from the *bracero* program, namely Texas, Arkansas, and Missouri. Because growers in these states sought labor from Mexico as well, creating a powerful pull, recruitment of undocumented labor into these states soared (pp. 147-48). These undocumented workers were labeled "wetbacks."[27]

The simultaneous existence of *bracero* and illegal labor seemed to call for cracking down. Illegal immigration seemed more illegal when there was a legal method of procuring farm labor. As a result, the INS stepped up enforcement in the early 1950s with the infamous Operation Wetback that cleared hundreds of thousands of "wetbacks" from the United States by dumping them over the border. But Ngai's statistics make clear that this massive deportation did not forestall illegal immigration — at best it was a "short-term success" (p. 156). For the duration of the *bracero* program, both *bracero* and illegal labor continued to coexist, and the existence of the *bracero* program seems to have generated illegal immigration, both through defections from the program and through recruitment by growers of undocumented labor.

Illegal immigration has not ended, as we know. Ngai argues that illegal immigration has persisted due to the continued and extended reach of numerical restriction on legal immigration. Again, this is a claim that on first blush may seem counterfactual, but Ngai's analysis is entirely persuasive. The 1965 Hart-Celler Immigration Act, lauded as overturning racial discrimination, did not repeal the idea of quotas in immigration. Rather, immigration reform was narrowed to the question of formal equality, in terms of apportioning the same number of slots for each country. On some level, formal equality — given the history of explicit racial preferences — is understandably appealing. Ngai suggests that formal equality was desirable as well in terms of the American image abroad during the Cold War era; formal equality between countries sent a very visible signal that the United States did not discriminate between sending states nor among the national origins of its population. But, as she asserts, substantive equality — which would have suggested different-sized quotas for countries with different needs or sizes, or with specific historical relations with the

27. The term "wetback" referred to Mexicans who had illegally crossed the Rio Grande into the United States. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 283 n.92 (1996-97).

United States — was not mandated by Cold War civil rights[28] and was not a subject of reform.[29]

Remember that the Western Hemisphere, including Mexico, had been subject to no national origin quotas under the 1924 Immigration Act.[30] A quota of 120,000 for the entire Western Hemisphere went into effect in 1968. In 1976, an annual country quota of 20,000 on Mexico was implemented. We can track the relation between this numerical restriction of legal immigration from Mexico and illegal immigration. In the early 1960s, the annual legal migration of Mexicans to the United States approximated 200,000 *braceros* and 35,000 admissions for permanent residence. The number of deportations of undocumented Mexicans increased by forty percent in 1968 (the year the 120,000 quota for the Western Hemisphere was implemented) to 151,000. In 1976 (the year the 20,000 country quota for Mexico was implemented), the INS expelled 781,000 Mexicans from the United States. Meanwhile, the total number of apprehensions for all other nationals in the world, combined, remained below 100,000 a year (p. 261).

Thus, Ngai shows how illegal immigration from Mexico was produced. The uniformity of our national origins quota system, providing the same per-country quota regardless of nonuniform national populations, needs, and histories, is responsible for the existence of "illegal aliens," along with administrative enforcement produced through national immigration restriction and policies that selectively turned illegal immigrants into lawful ones. Ngai thus issues a sharp critique to the conventional understanding of the lifting of national origins quotas. The end to the national origins quotas is generally lauded as a civil rights victory,[31] as the closure to an ugly history of race-based immigration exclusion.[32] But Ngai challenges us to consider what it has meant to lift national origins quotas while

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28. P. 245. Ngai refers here to MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 11-17 (2000). Dudziak's research demonstrates that Cold War liberals believed that granting African Americans formal equality was important to America's image abroad, but that substantive equality was not required. P. 245.

29. On formal versus substantive equality in the context of civil rights, see Kimberlé Crenshaw et al., *Introduction*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995).

30. *See supra* p. 105. Of course, administrative means — for example, barring Mexicans from entry when they were considered likely to become a public charge — were used during that period to cut down on the number of lawful entries.

31. *See, e.g.*, 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).

32. *See* Schuck, *supra* note 13, at 1966 (stating that "racism as such no longer plays a crucial role in immigration law; certainly it plays a less significant role than it did before 1965").

simultaneously maintaining numerical restrictions. Given the history of conquest of Mexico by the United States, the contiguous border between Mexico and the United States, and the disparate economic conditions between the two countries, it is no wonder that more Mexicans seek to enter than are lawfully admitted. A true civil rights victory might have recognized that substantive equality, in the form of a larger per-country quota, would have been necessary to permit more legal immigration from Mexico.[33]

Ngai's historical analysis proves helpful to recent discussions about implementing a guest-worker program. In January 2004, President George W. Bush unveiled an immigration reform proposal under the title "Fair and Secure Immigration Reform." In his announcement he stated, "[a]s a Texan, I have known many immigrant families, mainly from Mexico, and I have seen what they add to our country."[34] He described lives risked in "dangerous desert border crossings" and lives entrusted to "the brutal rings of heartless human smugglers."[35] This, he said is "wrong" and "not the American way."[36] Explicitly wrapping the proposal in the language of family values, he referred to families being separated by immigration law and stated that "family values do not end at the Rio Grande border."[37] Common sense and fairness, he asserted, demand that we allow workers to fill jobs Americans are not filling.

The proposal consisted of a temporary-worker program that would match "willing foreign workers" with "willing U.S. employers" when "no Americans can be found to fill the jobs."[38] As proposed by Bush, jobs would be open to both workers overseas and undocumented individuals within the United States. Workers would receive a three-

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33. The impact of uniform per-country quotas has also led to long waits for potential immigrants from certain countries, especially Mexico, India and the Philippines, given the larger number of persons seeking family-sponsored immigration visas from those countries. *See Immigrant Numbers for January 2005*, VISA BULL., (U.S. Dep't of State, Wash., D.C.), Dec. 8, 2004, *at* http://travel.state.gov/visa/frvi/bulletin/bulletin_2007.html. According to the Bulletin, the current wait for a U.S. citizen seeking to sponsor a brother or sister from most countries is about twelve years. *Id.* For India, the wait is twelve and a half years; for the Philippines, the wait is more than twenty-two years.

34. Press Release, White House, President Bush Proposes New Temporary Worker Program: Remarks by the President on Immigration Policy (Jan. 7, 2004), *at* http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html.

35. *Id.*

36. *Id.*

37. *See, e.g.*, David D. Kirkpatrick, *Republicans Squaring Off Over Bush Plan on Immigration*, N.Y. TIMES, Jan. 27, 2005, at A19.

38. *See* Fact Sheet, White House, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), *at* http://www.whitehouse.gov/news/releases/2004/01/print/20040107-1.html [hereinafter Fact Sheet]; *see also* Anne Heavey Scheinfeldt, *President Bush Proposes New Temporary Worker Program*, 18 GEO. IMMIGR. L.J. 429 (2004).

year, temporary legal status that was renewable, and that would not automatically lead to legal permanent residence.[39] At the same time, Bush noted that some workers might "pursue American citizenship," which they would need to apply for "in the normal way," and without gaining "unfair advantage over people who have followed legal procedures from the start."[40]

Reaction was swift, and criticism fell across a broad spectrum,[41] ranging from the claim that the program launched a "new era of indentured servants" to condemnation of the program as a "reward" to "illegal aliens."[42] Despite Bush's explicit statements, some saw the guest-worker program as an amnesty program that could benefit as many as eight million illegal immigrants.[43] Some critics expressed concern that "illegal aliens" were going "unpunished";[44] others decried the likelihood that this "temporary" program could become "permanent."[45] One way the program was thought to be non-temporary was through the possibility of children of the temporary workers enjoying birthright citizenship.[46] In one gruesome response, a columnist and talk show host called for sterilization of temporary workers to ensure the program remained temporary.[47]

Critics who feared the program would not accrue to the benefit of vulnerable immigrants pointed out that this was a classic guest-worker program that instead of giving workers "hope," merely gave workers a

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39. *See* Fact Sheet, *supra* note 38.

40. *See* Scheinfeldt, *supra* note 38, at 429-30.

41. For the rare laudatory view, see Regina Germain, *Perspectives on the Bush Administration's Immigrant Guestworker Proposal: The Time For Immigration Reform Is Now*, 32 DENV. J. INT'L L. & POL'Y 747 (2004).

42. *See* Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y 735, 737 (2004).

43. *See* Joseph Curl, *Bush's "Guest-Worker" Proposal on a Back Burner*, WASH. TIMES, Sept. 1, 2004, at A10.

44. In the words of one commentator, "millions of illegal aliens who are using fake or stolen Social Security numbers would face no penalty and could remain in the country for an unspecified number of years." *Id.*

45. Editorial, *Flaws in Bush's Immigration Plan*, S.F. CHRON., Nov. 24, 2004, at B8.

46. *See Bush "Guest Worker" Program to Be "Open to Any Type of Employee,"* LONEWACKO, Jan. 28, 2004, *at* http://www.tolstoy.com/lonewacko/blog/archives/000943.html (describing the statement of Margaret Spellings at a Cato Institute panel that children of "guest workers" would automatically become citizens if born in the United States).

47. Jane Chastain, a columnist and talk show host stated:

> [T]he only way to assure the American people that this "temporary" status truly is temporary is to seal up the wombs — sterilize — those who apply for guest-worker status. Or else change the law that grants citizenship to anyone who is born here regardless of the status of his or her parents.

http://www.pfaw.org/pfaw/general/default.aspx?oid=13565.

job,[48] at the end of which they faced removal. Others called the program an "immigration trap."[49] For undocumented workers within the United States, identifying oneself to the Department of Homeland Security in order to secure a temporary-worker visa would mean providing sufficient information to facilitate deportation if that worker remained beyond the end of the program and did not qualify to stay under another immigration category.[50] The program, open not just to agricultural employers but to any employer seeking low-wage overseas labor, was decried as importing into the United States "Wal-Mart *bracero*[*s*],"[51] and raised concerns about the effect of a massive influx of temporary workers on the wages and working conditions of American workers.[52]

Others evaluated the program based upon their assessment of its relationship to the problem of illegal immigration. Some asserted that the first order of business was to secure the borders, and then to develop a guest-worker plan.[53] Others claimed that a guest-worker plan would in fact help reduce illegal immigration. The Cato Institute claimed that a look at history would indicate that the *bracero* program and illegal immigration were inversely correlated during the time of the program's existence.[54] But the history noted in Ngai's book indicates that the *bracero* program and illegal immigration were not inversely correlated, but bore a tautological relationship to one another.[55] Illegal immigration only exists in relationship to legal

48. *See* David Abraham, *American Jobs but Not the American Dream*, N.Y. TIMES, Jan. 9, 2004, at A19 (also pointing out the possible effects on wages and working conditions).

49. *See* Bill Ong Hing, *Legal Status: Amnesty or Deportation Trap?*, CHI. TRIB., Jan. 9, 2004, at 17.

50. *Id.*; *see also* Christina B. LaBrie, *President Bush Proposes a New Temporary Worker Program* (Cyrus D. Mehta & Assoc., New York, N.Y.), Jan. 9, 2004, *at* http://www.cyrusmehta.com/print_news_articles.asp?news_id=937.

51. Medige, *supra* note 42, at 735.

52. For earlier scholarship on this point, see Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 42 BRANDEIS L.J. 967 (2002).

53. In the words of Representative Tom Tancredo: "The president must understand that without first securing our borders from the mass flow of illegal immigration, any guest-worker plan is totally unworkable." Sergio Bustos, *Bush to Seek Guest Worker Law*, TUCSON CITIZEN, Nov. 10, 2004, *at* http://www.tucsoncitizen.com.

54. The Cato Institute's Daniel Griswold recently asserted that the "response" to rising illegal immigration from Mexico was to dramatically increase temporary worker visas under the *bracero* program; the result was an equally dramatic decline in illegal immigration. Daniel Griswold, *Immigration: Beyond the Barbed Wire* (Cato Inst., Wash., D.C.), Dec. 7, 2004, *at* http://www.cato.org/dailys/12-07-04.html.

55. For the argument that Bush's proposal would likely lead to an increase in unauthorized workers, see Philip Martin, *Does the U.S. Need a New Bracero Program?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 127 (2003). *See also* Philip Martin, AgJOBS: New Solution or New Problem? (2005) (unpublished manuscript, on file with the author).

immigration. In contrast to the vision of illegal immigrants waiting outside U.S. borders to enter, illegal immigration is produced through government regulation demarcating who is legal and who is not. The border between illegal and legal is mutable, depending upon where the state decides to draw the line between the two categories, and depending upon who the state allows to shift from one category to another. Thus, the idea that there are fixed and identifiable populations of legal and illegal immigrants who will choose to enter or not enter the United States in response to a particular policy does not make sense.

The outcry over a temporary-worker program highlights the contradictions between U.S. capital's need for cheap labor and the political imperative of the nation-state.[56] The desire for cheap labor in the form of temporary overseas workers stands in opposition to a liberal democratic state identified as the guarantor of rights.[57] Mexican immigration has been seen as a "uniquely elastic supply of labor"[58] in the structural contradictions that exist between the economic utility of immigrants as cheap labor and the political and fiscal costs imposed by nurturing a surplus labor supply.[59] The historical *bracero* program was an attempt to institutionalize and routinize this flexible labor;[60] the Bush proposal attempts the same.

Some critics would charge that we must acknowledge that we already have an informal "guest-worker program" made up of disposable workers in the form of undocumented immigrants.[61] At the same time, we already have a legally authorized "guest-worker program" in the form of temporary-worker programs that have gone largely ignored in the public debate about Bush's proposal.[62] These are

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56. *See* LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 15 (1996) (describing the contradiction of the capital imperative and the political imperative of the U.S. nation-state).

57. *Id.*

58. CALAVITA, *supra* note 24, at 180.

59. *Id.* at 179.

60. *Id.* at 180.

61. This was a comment made repeatedly at the Association of American Law Schools Annual Meeting program organized by the Section on Immigration and Section on Labor and Employment Law, titled Guest Worker Programs: Proposals and Perspectives, Golden Gate Law School, Jan. 5, 2005.

62. Pending now in Congress is the Agricultural Job Opportunity, Benefits, and Security Act of 2005, S. 359, H.R. 884, 109th Cong. (2005) [hereinafter AgJobs], sponsored by Senators Larry Craig and Edward Kennedy and Representatives Howard Berman and Chris Cannon. AgJobs contains an explicit legalization provision for agricultural workers, through a new concept called "earned legalization." For a discussion of AgJobs, including a description of its provisions and an analysis of why it was not passed in the past, see Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. (forthcoming Summer 2005). Under earned

the H-2A program for agricultural workers and the H-2B program for non-agricultural and low-skilled workers.[63] Both programs proffer nonimmigrant visas that bear no relationship to permanent residence or citizenship.[64] In the fiscal year 2002, a total of 102,615 workers were admitted into the United States for temporary work under these programs, primarily under the H-2B program.[65] The H-2A program has historically been very small, issuing less than 40,000 visas per year in an industry that is estimated to employ up to four million workers annually.[66]

One question that must be asked is whether it would be accurate to raise the specter of a new *bracero* program in the form of Bush's temporary-worker proposal, when the H-2A program is a temporary agricultural worker program that is generally acknowledged as the legacy of the *bracero* program.[67] In fact, the H-2A program has been called the "New Bracero Program."[68] Certainly, the failure of Bush to numerically limit the program in his announcement fueled reaction by critics seeking to curb illegal immigration or to stop immigration altogether. Similarly, these critics were motivated by the presumption that the program would lead to legalization. But for those who charged that Bush's proposal must be condemned as a guest-worker program, why has the H-2A program escaped the onslaught of recent criticism?[69]

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legalization, applicants must prove a past history of agricultural work in the United States (at least 200 days in the previous year), then register and continue to work in agriculture during a subsequent period (at least 360 more days in the next six years). If AgJobs were ever enacted, the law would provide the opportunity for up to 500,000 agricultural workers to legalize. *See* Fact Sheet, Nat'l Council of La Raza, Fact Sheet: Agricultural Jobs Opportunity, Benefits, and Security Act of 2003 (AgJOBS), *at* http://www.nclr.org/content/publications/download/2609 (last visited Mar. 6, 2005).

63. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a)-(b) (2000).

64. For a comparison of these programs, see Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79 (2004), and Medige, *supra* note 42.

65. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 118-19 tbl.26 (2003), [hereinafter 2002 YEARBOOK] (documenting nonimmigrants admitted by class of admission, selected fiscal years 1985-2002), *at* http://uscis.gov/graphics/shared/aboutus/statistics/TEMP02yrbk/Temp2002.pdf.

66. *See Another Bracero Program Considered*, RURAL MIGRATION NEWS, *at* http://migration.ucdavis.edu/rmn/more.php?id=30_0_4_0 (last visited April 8, 2005).

67. *See* Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. LAB. & EMP. L. 571, 588 (2004).

68. *See* Maria L. Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 161 (2003).

69. For a critique of the H-2A program, see Laura C. Oliveira, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153 (2002).

One response to the Bush proposal, coming from David Limbaugh, columnist and brother of radio talk show host Rush Limbaugh, raised divergent concerns. He asked:

> And why are we even talking about fairness in the same breath with illegal aliens? Do we owe them a duty of fairness? . . . What many opponents of loose immigration fear is not the influx of foreigners in American society, nor the immigrants themselves, who can't be blamed for wanting a better life and who would likely welcome assimilation into our culture. Rather, it is the deliberate destruction of the unique American culture and American civilization by 'multiculturalists.'[70]

To understand the connection made by Limbaugh between illegal aliens and the destruction of American culture and civilization by multiculturalists, we can turn to Samuel Huntington, who links multiculturalist criticism of American identity with illegal immigration in his new book *Who Are We.* In his book, Huntington argues that the United States ignores the failure of Mexicans to assimilate into mainstream U.S. culture at the nation's peril.[71] America, says Huntington, was created by settlers who were overwhelmingly white, British and Protestant. With the "achievements of the civil rights movement and the Nationality Act of 1965," race "virtually disappeared" as a defining component of national identity.[72] Instead, American identity is defined in terms of "culture and creed" — whose bedrock remains the Anglo-Protestant culture of the founding settlers.[73] This culture, laments Huntington, came under assault in the late twentieth century by the doctrines of multiculturalism and diversity, the rise of group identities based on race, ethnicity, and gender, the effect of transnational diasporas and immigrants with dual loyalties, and the growing salience of cosmopolitan identities.[74] But the greatest challenge today comes from "the immense and continuing immigration from Latin America, especially from Mexico, and the fertility rates of these immigrants compared to black and white American natives."[75]

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70. *January: The Last Straw? Bush's Guest-Worker Gamble*, RIGHT WING WATCH ONLINE, Jan. 23, 2004 (quoting David Limbaugh), *at* http://www.pfaw.org/pfaw/general/default.aspx?oid=13565.

71. HUNTINGTON, *supra* note 8; *see also* Samuel Huntington, *The Hispanic Challenge*, FOREIGN POLICY, Mar./Apr. 2004, *at* http://www.foreignpolicy.com/story/files/story/2495.php. [hereinafter Huntington, *The Hispanic Challenge*].

72. Huntington, *The Hispanic Challenge*, *supra* note 71, at 1.

73. HUNTINGTON, *supra* note 8, at xv-xvi.

74. Huntington, *The Hispanic Challenge*, *supra* note 71, at 2.

75. Huntington, *The Hispanic Challenge*, *supra* note 71, at 2. For a response to Huntington's concern about fertility rates, see Mireya Navarro, *For Younger Latinos, A Shift to Smaller Families*, N.Y. TIMES, Dec. 5, 2004, at A1. For multiple responses pointing out endemic factual misstatements in Huntington's book, see www.foreignpolicy.com.

There are numerous contradictions contained within Huntington's argument, for one, his argument that "race has disappeared" as a defining component of national identity, even while he seeks to limit national identity to the "Anglo-Protestant culture and creed."[76] Here Huntington attempts to distinguish racial distinctions between people from racial distinctions between cultures. Because he focuses on cultures and not people, he believes he is not engaging in racial distinctions.[77] But concerns about cultural difference serve as proxies for racial concerns about people.[78] Presumptions about fitness for membership in the United States have always rested upon ideas about assimilability.[79] In considering which immigrant cultures are capable of assimilation into the United States, Huntington stereotypes cultures in a fashion that will leave many readers incredulous, for example, he states that Anglo-Protestant culture, unlike Mexican culture, values hard work.[80] Thus, he can argue that he does not object to Mexican people, per se, but only to Mexican cultural values. Obviously, whether one considers hard work a Mexican or Anglo-Protestant cultural value depends upon whom one centers as the prototypical Mexican or Anglo-Protestant. The fact that Huntington can disparage a monolithic — and mythical — Mexican culture as not valuing hard work shows that race remains a defining component of his analysis through a hierarchy of cultures.

For our purposes in this Review, let us focus on Huntington's discussion of "illegality" as a factor differentiating Mexican immigration from past and most other contemporary immigration to the United States. He writes:

> Substantial illegal entry into the United States is a post-1965 and Mexican phenomenon. For almost a century after the Constitution was adopted, illegal immigration was virtually impossible: no national laws restricted or prohibited immigration, and only a few states imposed modest limits. During the following ninety years, illegal immigration was minimal: control of immigrants coming by ship was fairly easy, and a good proportion of those arriving at Ellis Island were denied entry. The 1965 immigration law, the increased availability of transportation, and

76. HUNTINGTON, *supra* note 8, at xvii.

77. *Id.*

78. For the argument that culture is the terrain on which racism is most often today expressed, see Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1600-04 (1996).

79. For a discussion of the way in which cultural difference is both presumed and exaggerated, so that immigrants of color are described as inassimilable into Western norms, in particular in the context of gendered treatment, see *id.*, Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000), and Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

80. Huntington, *The Hispanic Challenge*, *supra* note 71, at 12.

> the intensified forces promoting Mexican emigration drastically changed this situation.[81]

But *Impossible Subjects* shows us the many errors in Huntington's claim. Illegal entry became a phenomenon not after 1965, but in the 1920s. Illegal immigration before that period was "minimal" and "easily controlled" not because fewer immigrants were seeking entry but because there were fewer laws that made immigrants illegal as well as less surveillance. Illegal immigration post 1965 is perceived as a "Mexican" problem because assigning Mexico only 20,000 annual slots for lawful immigration has rendered illegal a large proportion of the Mexican population that sought entry. And the achievements of the 1965 Immigration Act hardly include making race disappear as a defining component of national identity. Instead, its formal equality against a background of unequal distributions of wealth and opportunity allow illegal immigration to be defined as "Mexican." Moreover, if Huntington is concerned with illegal immigration, he might consider the phenomenon of visa overstayers, who make up one-third of all undocumented immigrants in the United States,[82] and contemplate the history — and present day phenomenon — of white illegal immigrants.[83]

In Ngai's words, the illegal alien is an "impossible subject" — a "person who cannot be" — as a person whose very identity is defined through the illegality of his existence (p. 5). And the illegal alien is also an "impossible subject," as a "problem that cannot be solved." (p. 5). But *Impossible Subjects* shows us how the distinction between legal and illegal immigration came into being, which might give us hope that there may be ways to think creatively about illegal immigration as a problem. Yet we also see the hardened nature of the racialization of the "illegal alien," which might make us despair. Illegal and legal are mutable categories in immigration law. But the link between race and "illegal alien" seems immutable. As Louis Menand has written, the characterizations of immigrants as "legal" and "illegal" are not only

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81. HUNTINGTON, *supra* note 8, at 225.

82. *See Homeland Security Overstay*, *supra* note 7.

83. Canada ranked in the top fifteen in a 2000 estimate by the INS of countries of origin of illegal immigrants; a previous 1996 study estimated the country to rank fourth. *See* Jack Jedwab, *Canadian Aliens: The Numbers and Status of Our "Illegals" South of the Border*, (Canadian-American Research Symposium on Immigration, Niagara Falls, Ont.) Apr. 26, 2003, *at* http://www.acs-aec.ca/Polls/Poll29.pdf. While these individuals might be of any race, only 13.4% of Canadians are so-called "visible minorities." *See* James McCarten, *Canada's Mosaic More Colourful, Crowded Than Ever*, Candian Press, Jan. 21, 2003, *available at* http://65.109.70.118/sections.php?op=viewarticle&artid=1741.

As a regional matter, in 1994, the largest community of undocumented persons in New York state was Italian, followed by Ecuadorian, Polish, Irish, and then Russian. *See* Jeff Yang & Karen Lam, *Could it Happen Here?*, VILLAGE VOICE, Dec. 6, 1994, at 14.

always subject to change, they also do not tell us anything about the desirability of the persons so constructed.[84] In other words, we must maintain a consistent practice of disaggregating the notion of illegal immigration from its subsuming of particular individuals or entire racial groups. Centering the history of the European illegal alien may be helpful in this regard, in dislodging the racialization of the illegal alien.

II. ALIEN CITIZENS

If the "illegal alien" is racialized as Mexican, the generic "alien" is racialized as Asian. In contrast to the immigrant, who carries within herself that teleology of settlement, assimilation, and citizenship, the alien is not presumed to be able to access lawful admission,[85] let alone citizenship. The Asian is the quintessential alien. Asians were excluded from immigration in legislation first directed against Chinese, and then against the "barred Asiatic zone," stretching all the way from Afghanistan to the Pacific with the exceptions of Japan, which the State Department did not wish to offend, and the Philippines, which was a U.S. colony. In 1924 Asian exclusion was made complete with the statutory exclusion of Japanese, excluded along with all other aliens "ineligible to naturalize," fusing Asians into one unassimilable and undigestible race, and as utterly foreign to American national identity.[86]

The citizen and the alien are oppositional terms; placing them together suggests a dissonance, an inappropriateness. The alien is not supposed to engage in citizenship.[87] And the citizen can no longer be an alien. Thus the alien citizen also seems an "impossible subject."[88]

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84. Menand is relying here upon Ngai's research. Louis Menand, *Patriot Games: The New Nativism of Samuel P. Huntington*, NEW YORKER, May 17, 2004, at 92.

85. Just as I use the word "immigrant" more broadly than is technically appropriate under the Immigration and Nationality Act, here I use the word "alien" more broadly as well. Technically speaking, legal permanent residents are referred to as "aliens" in the Act. But in common parlance, legal permanent residents are more commonly referred to as "immigrants." By "alien" here I refer to the category of person who stands outside what Hiroshi Motomura would refer to as the "citizen-in-waiting," in other words, one who is racially removed from incorporation into the national citizenry. Motomura, *supra* note 2.

86. Pp. 96-126. Filipinos were turned from nationals to aliens with the Tydings-McDuffie Act of 1934, Pub. L. No. 73-121, 48 Stat. 456, which granted the colony independence. Ngai's chapter 3, *From Colonial Subject to Undesirable Alien: Filipino Migration in the Invisible Empire*, explains how Filipinos occupied the anomalous status of American nationals, as subjects of a U.S. colony, from the U.S. acquisition of the Philippines in 1898 up to the point of transition to independence from the United States in 1934. She analyses Filipinos as experiencing a corporeality of contradictions: they experienced a colonialism that has been denied through the doctrine of American exceptionalism and they lived the contradiction between domestic racism and the assertion of the idea of benevolent assimilation. *Id.* at 96-126.

87. *See, e.g.*, Editorial, *A Citizen's Right*, N.Y. TIMES, Apr. 19, 2004, at A22 (suggesting that noncitizens not be allowed to vote in New York City). *But see* JENNIFER GORDON,

But "alien citizenship" does capture the particular racialization of Asian Americans.[89] Although literal citizens, through naturalization, or through birth, and thus Americans in terms of formal legal citizenship, Asian Americans have historically not been considered Americans in terms of kinship, or belonging. The foreignness essential to the racialization of Asian Americans[90] has operated to vitiate the notion that Asian Americans stand at the center of national membership. Thus, it may be useful to disaggregate the nation and state from each other in considering the relationship of racialization to the nation-state. Asians constituted as aliens had citizenship in neither state nor nation. Asian Americans, constituted as alien citizens, had citizenship in the state, but not the nation. This partial citizenship produced vulnerability when one's identity was not a matter of national indifference, but formed the very substance against which national identity coalesced.[91]

Important to consider is the relationship between alien citizenship and ideas of gender and family.[92] Contained within the normal trajectory of lawful permanent resident to citizen is the presumption of a normative heterosexual family.[93] The Asian as alien has been cast

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SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) (mentioning the concept of "alien citizenship"); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993) (documenting both historical and present-day noncitizen voting); Linda Bosniak, *The Citizen and the Alien* (2005) (unpublished manuscript, on file with the author) (elaborating on the concept of "alien citizenship").

88. I mean this primarily in the first of Ngai's two senses, as a person who cannot be. To think of alien citizens as a problem which cannot be solved might suggest that Asian Americans, as defined as antithetical to American citizenship, can never be assimilated into citizenship. But as who is cast out from citizenship is contingent and not stable, a more accurate prediction might be that someone or some groups will always occupy the category alien vis-à-vis the American citizen; the alien may not always and for all purposes be Asian.

89. This seems true for Mexican Americans as well (witness the "repatriation" program referenced above), but I am confining my discussion here to Asian Americans.

90. On the racialization of Asian Americans as foreign, see Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

91. This provides a different articulation of what, in other publications, I have differentiated as citizenship as formal status and citizenship as identity. *See, e.g.*, Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002). The notion of citizenship in the nation versus citizenship as identity seems productive in thinking about how to capture nationalism produced against those who lack this form of citizenship. For a masterful disaggregation of forms of citizenship, see Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

92. I am indebted to David Eng for suggesting this point.

93. That our immigration laws presume heterosexual family relations is made evident in the fact that same-sex spouses cannot be admitted into the United States as immediate relatives, unlike heterosexual spouses. Moreover, until 1990 gay and lesbian noncitizens were barred altogether from entering the United States. For a discussion of these laws see STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, THIRD EDITION 151-64 (2002). *See generally* EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY

out from this trajectory through a racial categorization that depicted the Chinese male immigrant as sexually deviant for his lack of access to Chinese women and the Chinese female immigrant as sexually deviant as a presumptive prostitute.[94] Both depictions reflected patterns in early Chinese immigrant population, patterns shaped by immigration laws.[95] The racial characterization of the Chinese immigrant as inassimilable and strange relied upon notions of normal sexual relations, which were conceptualized only as occurring within the heterosexual marital relationship. Furthermore, the Chinese immigrant was denied access to reproducing a family, which additionally produced the Chinese as aberrant, alien, and non-citizen, given the notion of the family as the foundation of civil society.

Gender is an undertheorized category in *Impossible Subjects*. The reader wonders how the policies Ngai described specifically affected women,[96] and how those policies were motivated by presumptions about gender. The metaphoric association between nation and family is a rich one, and it is difficult to imagine that exclusionary policies about national belonging did not invoke ideas about kinship or reproduction.[97]

The notion of Asian Americans as engaged in family relationships that were defective, as different from the desired norm, was an issue in Japanese American internment camps, as I will explain. Japanese-American internment, writes Ngai, stands as the most extreme case of alien citizenship (p. 175). The U.S. government imprisoned some 80,000 American citizens, and 40,000 noncitizens in internment camps between the years 1942 and 1945. While the government did not formally strip Japanese Americans of their citizenship, it was, in effect, "nullified" (p. 175).

Military evacuation orders, as she suggests, rhetorically effaced the citizenship of the 80,000 citizens, by ordering "all persons of Japanese ancestry, both aliens, and non-aliens," to report to assembly centers

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AT THE BORDER (2003).

94. *See* DAVID ENG, RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA (2001); GEORGE PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION (1999); NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN (2001).

95. *See* sources cited *supra* note 94.

96. Today a substantial share of undocumented immigrants are women. *See Undocumented Immigration: Facts and Figures* (2004), at http://216.239.63.104/search?q=cache:Er4lpCobjKUJ:www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf++undocumented+immigrants+women&hl=en (estimating that women made up 41 percent of the adult undocumented population). It is not apparent to the reader what the estimated gender breakdown of illegal immigration might have been in the 1924 to 1965 period.

97. For the association of these notions in another context, see RHODA ANN KANAANEH, BIRTHING THE NATION: STRATEGIES OF PALESTINIAN WOMEN IN ISRAEL (2002).

for evacuation (p. 175). Obviously, "citizen" and "non-alien" are not equivalent terms. The first promises a panoply of rights and guarantees; the other only speaks a negation, one that provides no guidance as to the positive status of the person nor any sense as to where she might ground her rights. By subsuming citizenship identity within the enemy alien status of "Japanese ancestry," and by incarcerating citizens for the duration of the war, the U.S. government severed the link that Hannah Arendt claimed as so fundamental. Citizenship, Arendt wrote, is nothing less than the "right to have rights."[98] But citizenship must be recognized by the state that would be the guarantor of those rights.

Ngai works through different conceptions of citizenship to explain the policies enacted against Japanese Americans through internment. In the camps, Japanese Americans were aggressively reeducated in an effort to instruct them in American cultural assimilation (p. 177). Programs within the camps were touted as Americanizing projects and a testimony to the value of American democracy. Thus, Ansel Adams could label a photograph of Japanese teenaged girls in the Manzanar camp: "Manzanar is only a detour on the road to American citizenship" (pp. 178-79).

These young girls were presumably American citizens as a matter of birthright, a citizenship whose associated rights, as interned citizens, they could not enjoy. We could read Adams's label to suggest that Manzanar was a necessary detour to allow Japanese Americans to better learn how to be American citizens before they could realize their rights as American citizens. Ngai describes the forms of citizenship Japanese Americans were to learn in the camps as cultural citizenship and political citizenship. To develop political citizenship, the War Relocation Authority (WRA) set up programs of self-government meant to tutor Japanese Americans in democratic processes. WRA policy limited leadership positions in these programs, which created community councils of elected block representatives, to U.S. citizens; further, meetings had to be conducted only in English. As Ngai suggests, this led many Japanese Americans to reject these programs as divisive and as dismissive of older family and community members (p. 180).

Cultural citizenship was a project of inculcating American mores and traditions considered more conducive to liberal citizenship than Japanese culture, which was stigmatized as traditional and feudal. As Caroline Chung Simpson and Orin Starn have demonstrated, Japanese

98. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1951). As Arendt writes, "The Rights of Man, supposedly inalienable, proved to be unenforceable — even in countries whose constitutions were based upon them — whenever people appeared who were no longer citizens of any sovereign state." *Id.* at 293.

culture was the subject of serious study in the camps. The WRA established an anthropological study of Japanese Americans in the camps, for the explicit purpose of developing theories of Japanese behavior that would be useful after the war when the United States occupied Japan.[99] What the anthropologists theorized was a tense duality between Japan and America, played out as intergenerational conflict between Issei (traditional) and Nissei (modern), which suggested that the Japanese American had to be freed from the value of filial piety into a modern existence in America. Within the camps, Japanese Americans were aggressively reeducated to abandon traditional family practices thought to inhibit the "natural" development of character that would allow one to progress.[100]

The political disenfranchisement of Japanese Americans, thrust from citizenship into the category of the "enemy alien," was in part justified through this purported cultural difference.[101] Now, this cultural difference was to be shed in internment camp as a precondition for successful incorporation into the American way of life. Thus, Manzanar, in the eyes of Adams and the War Relocation Authority, potentially constituted not only a detour, but a necessary reeducation process before American citizenship.

But the camps must not be remembered solely as locations for experimentation in anthropology and education. They were also the site of enormous anxiety. Ngai explains in careful detail the result of the 1944 Denationalization Act, which authorized citizens to make voluntary renunciation of citizenship if the renunciation was not considered detrimental to the interests of the United States. Voluntary

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99. *See* CAROLINE CHUNG SIMPSON, AN ABSENT PRESENCE: JAPANESE AMERICANS IN POSTWAR AMERICAN CULTURE, 1945-1960, at 43-45 (2001). As Simpson argues, the anthropological study not only reflected the American propensity for seeing Japanese Americans as Japanese aliens, but also assisted in constructing a particular idea about the culture and character of both Japanese and Japanese Americans. *Id.* at 45-47; *see also* Orin Starn, *Engineering Internment: Anthropologists and the War Relocation Authority*, 13 AM. ETHNOLOGIST 700 (1986).

100. *See* SIMPSON, *supra* note 99. Ngai does not address ideas about family in her discussion of culture in the camps, but focuses upon the use of native language, kinship structures of leadership, religion, and recreational activities.

101. As Justice Murphy wrote in *Korematsu* in a sharply-worded dissent:

> In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited . . . .
>
> . . . .
>
> Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds . . . . Individuals of Japanese ancestry are condemned because they are said to be a "large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."

Korematsu v. United States, 323 U.S. 214, 236-37 (1944) (Murphy, J., dissenting). For discussion, see Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933 (2004).

renunciation was conceptualized by Attorney General Francis Biddle as a means of distinguishing loyal from disloyal Japanese Americans; presumably only those disloyal to the United States would choose to renounce their U.S. citizenship, facilitating the release of all internees who chose to keep their citizenship (p. 187). An earlier attempt at sorting loyal from disloyal had relied upon the Leave Clearance questionnaire, which had been issued to all internees over the age of seventeen.[102] This earlier attempt was a failure. Many more purportedly disloyal Japanese Americans were identified than expected. Loyalty and disloyalty acquired perverse meanings for citizens imprisoned by their own government, who were now asked to agree to serve in the U.S. military and renounce any allegiance to Japan.[103]

Many Japanese Americans approached renunciation with the belief that it was the only way to remain in camp. From our present vantage point, it might seem strange that Japanese Americans would choose to remain in camp, but internees felt enormous fear that they would face violence, be separated from their families, or be drafted into the military if they left.

Five thousand, five hundred citizens chose to renounce their citizenship. In Tule Lake, the camp segregated for disloyals after the Leave Clearance questionnaire, eighty-five percent of citizens over seventeen renounced their citizenship. Exemplifying the mental strain under which some were operating is the following passage, written by an internee who had renounced his citizenship as "the one last thing I could do to express my fury toward the government of the United States" (p. 192):

> They got me! The American government threw me into a concentration camp, labeled me dangerous because I wouldn't declare my loyalty, intimidated me, and subjected me to extreme mental and physical stress. In fact, the government did such a good job of manipulating me that I just gave up my United States citizenship — voluntarily! Now they could deport me to Japan without any trouble at all, I realized.[104]

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102. The Leave Clearance questionnaire was issued to camp residents in 1943. Question #27 asked: "Are you willing to serve in the armed forces of the United States on combat duty wherever ordered?" Question #28 asked: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?" *See* ERIC YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 197-98 (2001). Those who answered "no" to both questions were known as "no-no boys." *See* JOHN OKADA, NO-NO BOY (1976).

103. Renunciation of allegiance to Japan meant statelessness for the Issei, who had no birthright citizenship in the United States and were racially ineligible to naturalize.

104. P. 192 (quoting MINORU KIYOTA, BEYOND LOYALTY: THE STORY OF A KIBEI 111-12 (Linda Kepinger Keenan trans., 1997)).

Wayne Collins, an ACLU lawyer, engaged in a heroic battle for thirteen years to restore citizenship to the 5,409 renunciates who sought to regain it, using the argument that citizenship had been renounced under conditions of duress and coercion inculcated not only by the internment but also by Japanese nationalists in the camps (p. 195). Ngai is careful to point out that this legal approach — necessary as legal strategy, but which has shaped subsequent scholarly representations of the renunciates — reproduces the very stereotypes of Japanese culture as patriarchal, coercive and fanatical that underlay both the internment and the cultural citizenship project (p. 200). What is missing from the narrative, she asserts, is the role of individual agency and dual nationalism in actually producing renunciation (pp. 199-200). But when the Asian American political project of seeking acceptance as full citizens has been precisely grounded on the denial of dual nationalism or complicated loyalties, it is not surprising that representations of the renunciates have submerged any ties to Japanese nationalism. As perpetual foreigners, Asian Americans have had to deny their foreignness in order to be accepted into citizenship.[105] And the idea of Japanese American loyalty to the United States, exemplified through valorous military service, has been pivotal to the grounding of the movement for redress.[106]

But after invoking dual nationalism, Ngai steps away, describing it as only a weak dual nationalism that was felt by the renunciates. Instead, she writes, we must think of Japanese Americans as above all "pragmatic people" who made "pragmatic choices that were neither irrational nor primarily motivated by nationalist politics," and who "were no different from most ordinary people, who are concerned more with their individual and family's well-being than with the interests of the nation-state" (p. 200). I am struck by Ngai's language here, which suggests the need to cast the Japanese Americans who renounced their citizenship into the language of pragmatism, ordinariness, rationality, individuality and the unit of the family. This is the language we use when we want to assert the humanity of actors who are otherwise thought to be not quite human, through grounding

105. The reluctance to envision Asian Americans as having linkages outside of the American nation seems to have shaped a historical reluctance to examine ties of transnationality. The anthropologist Sylvia Yanagisako has shown this in an examination of Asian American history course syllabi; she notes that historical demands for exclusive national allegiance by the United States seem replicated through the curricular inclusion of only people, relations, communities, and institutions located on U.S. soil as the field of inquiry. *See* Sylvia Yanagisako, *Transforming Orientalism: Gender, Nationality, and Class in Asian American Studies*, *in* NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS 275 (Sylvia Yanagisako & Carol Delaney eds., 1995).

106. *See* Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1999).

their behavior in explicitly Western concepts of the human.[107] Perhaps this is not surprising in writing about a context in which Japanese Americans were interned precisely because they were not seen as individuals who could be discerned as loyal or disloyal.[108] But we might pause to consider what underlies this depiction, which is the association of the idea of the human with the individual, the rational actor, and the family member. I would caution that this association risks lessening the enforcement of rights of those who do not fit within normative constructs of the human and the citizen.

What has been arguably even more forgotten by historical memory than Japanese American citizenship renunciation is the Chinese Confession Program. The Confession Program addressed an illegal immigration that was both foundational to the existence of the Chinese American community and concealed. Ngai estimates that at least twenty-five percent of the Chinese American community in 1950 was unlawfully present (p. 204); some estimate that at least one-half of all Chinese immigrants entered illegally during the exclusion era, which spanned the late nineteenth century through 1943 (p. 204). Because only merchants, teachers, treaty traders and diplomats were granted immigrant visas, the primary alternative for entry was for a Chinese immigrant to falsely claim that he was entitled to enter as the child of a Chinese American citizen, through what was called "derivative citizenship."[109] These illegal claims to derivative citizenship, establishing what were called "paper sons" — sons only on paper — occurred in the context of racist exclusion.[110] Nonetheless, this was an illegality which was shameful, dangerous, and rarely discussed.

Central to the problem of the illegal immigration of Chinese was the inability of the state to authenticate identity. Ngai describes an

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107. Here I would reference the concern that Asians and Asian Americans are persistently described as motivated by culture in a way that white Americans are not. As a case in point, one could look to media depictions of Chai Soua Vang, currently indicted for killing six deer hunters, and who was reported to be a "shaman Hmong healer" who "seeks the aid of the spirit world." Stephen Kinzer, *Hmong Hunter Charged With 6 Murders is a Shaman, Friends and Family Say*, N.Y. TIMES, Dec. 1, 2004, at A18. This is not to say that Vang, or any other Asian American, is unmotivated by culture. Rather, we must all be understood to be both individual agents and shaped by cultural forces, in which are embedded political and material histories and pressures.

108. On the differing treatment of German Americans and Italian Americans, who, unlike Japanese Americans, were able to access individual loyalty hearings and escape mass internment, see YAMAMOTO ET AL., *supra* note 102, at 175-76.

109. P. 204. Other alternatives were for Chinese to use fake merchant certificates or to claim they were American citizens by birth (pp. 204-05).

110. P. 206 (writing that Chinese, who believed that exclusion was immoral, even if it was legal, "believed paper immigration was morally justified because it was one of the few ways to enter the United States when exclusion made legal immigration impossible). *Id.*

upwardly spiraling body of evidentiary requirements which ironically created the documentation of citizenship (p. 205). This was a citizenship premised on oral claims that had been followed — and "authenticated" — by certificates of identity, passports, and a subsequent chain of legitimized relatives.

The only way to undo this documentation was through the same process that originally created it — through oral testimony and interrogation, in the form of the confession (p. 206). The Confession Program was launched in the context of extreme pressure on the one-hundred-five-person annual quota established for Chinese immigration in the 1943 Magnuson Act (which had lifted Chinese exclusion).[111] Turmoil in China after the Chinese Revolution led 117,000 Chinese American derivative citizens to apply for U.S. passports at the United States Consulate in Hong Kong in 1950 (p. 206). The U.S. government responded with an escalating series of requirements in an unsuccessful attempt to cut down on numbers.[112]

This overwhelming task loomed in a context where applicants were thought more likely to be Chinese spies than actual derivative citizens. By the mid-1950s Red China was American's primary enemy (p. 208). In 1956 the INS launched the Confession Program, inspired by the experience of uncovering one individual who turned out not to be a citizen, thus exposing the fact that thirty-four putative relatives of his were not citizens either. But the service had sufficient evidence to deport only three of them. After learning that ten of the alleged relatives were veterans, the INS explained to them that if they confessed they would be eligible for naturalized citizenship under their real names. After extensive family consultation, all confessed. The Service "had thus discovered a method of exposing an entire family tree."[113]

The Program, approved by the INS central office and without any statutory authorization, created a procedure for an administrative adjustment of status. If an individual confessed to having entered by fraudulent means, he would be assisted — if possible — to legalize his status. If he had served in the armed services for ninety days, he was eligible for naturalized citizenship. If he had resided continually in the United States for seven years, he was eligible for permanent residency under suspension of deportation. But the INS held out the possibility of relief only to confessors who named all the names of those in their families. The list was cross-checked against the statements of other

111. Magnuson Act, Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600.

112. These requirements were often difficult if not impossible to meet and included: blood tests to prove paternity, bone X-rays to prove age, photographs from childhood, affidavits from the American father in triplicate, and so forth. P. 207.

113. P. 219. The Program also followed grand juries that were impaneled in 1956 to investigate fraudulent entry by Chinese in San Francisco and New York. Pp. 221-28.

family members, a tedious process that meant that confession could take an entire year (pp. 219-21).

From 1957 to 1965 at least 11,336 Chinese Americans confessed. Another 19,124 were implicated as holding false citizenship by the confessions of others. The vast majority received legal status; of those who were found ineligible, a small percentage was deported. Presumably, the derivative citizens waiting in Hong Kong who were relatives of those who confessed and were then identified as false citizens were no longer able to enter the United States. Ngai suggests that the Confession Program served "as a means of renegotiating the terms of Chinese Americans' citizenship" (p. 223). Many Chinese Americans resisted the state's efforts to criminalize the entire community through engaging in citizenship practices of legal opposition and lobbying. These practices may have been important to the INS's decision to create the carrot of legalized status in return for confession, rather than to simply use the stick of criminal prosecution (p. 223).

Yet confession did not lead to redemption. Ngai writes the community "could not entirely redeem its virtue" during the Cold War and against a backdrop of a racialized vision of all Chinese as illegal and dangerous (p. 223). Thus, confession provided legal status, including formal citizenship, for many paper immigrants, but this status did not produce "social legitimacy" (p. 223). While Chinese Americans, through confession, were given the opportunity for legitimated formal citizenship in the state, they were still denied citizenship in the nation. The nation had been mapped, in part, through their exclusion, and rectifying their formal citizenship would not shift this construction.[114] President Franklin Roosevelt had stated in 1943 that Chinese exclusion was a "historic mistake" and an "injustice to our friends."[115] Whether a similar statement would have been made at the height of the Cold War, and whether the carrot of legalization would have been proffered were it not for the hope of rooting out fraud and deception among those considered proxies for an enemy nation, appears unlikely.

To think of alien citizens as "impossible subjects" in Ngai's second sense, as a "problem that cannot be solved," could suggest that Asian Americans, as defined as antithetical to American citizenship, can never be fully assimilated into the American nation. But we might also

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114. Here we could consider Lisa Lowe's statement that "the American of Asian descent remains the symbolic 'alien,' the *metonym* for Asia who by definition cannot be imagined as sharing in America." LOWE, *supra* note 56, at 6.

115. As Ngai points out, the admission of this mistake did not serve as a basis for an amnesty program that would have legalized all Chinese who entered during the exclusion period. Pp. 223-24.

theorize the persistence of the category of alien citizenship as not inevitably linked to Asian American racialization, but as a category whose content may shift depending on U.S. foreign policy. The war in which we are presently engaged has been dubbed the "war on terror." With no specific national target, and thus no particular nationals to consider the agents of foreign states, the war on terror aims at a loosely defined group of individuals dubbed "terrorists." The "alien citizens" associated with this enemy are Arab, Muslim, and South Asian Americans.[116]

Arab, Muslim, and South Asian Americans now possess a citizenship which is both more broadly and more diffusely at risk than that of Japanese Americans during World War II, as the war on terror is not country-specific. Just as Japanese Americans were subsumed under the category "Japanese" during World War II, the racialization of this group is subsumed into the category of the putative "terrorist." If these alien citizens are considered terrorists, we might think about the tension between the terms alien, citizen, and terrorist. Both terrorist and alien constitute opposites to the idea of the citizen. Terrorist and alien are sometimes synonymous. The term "domestic terrorist" is necessary because of the unstated presumption that the terrorist is not domestic, but foreign, and an alien.[117] Governmental responses in the war on terror have primarily targeted noncitizens, aliens who are purportedly terrorists.[118] Guantánamo has become a repository for noncitizens indefinitely detained as "enemy combatants." And the category of the visa overstayer has been newly racialized as "terrorist" after the September 11th attacks, due to the fact that four of the hijackers had overstayed their visas.[119]

Terrorist and citizen are oppositional terms. Thus the "terrorist citizen" seems also an impossible subject. Putative terrorists are not considered deserving of the protections of citizenship. A recent nationwide poll conducted by Cornell University revealed that nearly half of all Americans believe that the U.S. government should restrict

116. For explanations of this racialization, see Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11th Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004), and Volpp, *The Citizen and the Terrorist*, *supra* note 91.

117. *See, e.g.*, John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 230 (2004) (referring to Timothy McVeigh as a "domestic terrorist").

118. For the argument that the war on terror has targeted unpopular noncitizens, reflecting historical patterns of incursions on civil liberties and auguring future measures against citizens, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

119. *See Homeland Security Overstay*, *supra* note 7 (exemplifying the linkage between visa overstaying and terrorism).

the civil liberties of Muslim Americans.[120] Moreover, being marked as a terrorist has correlated with the loss of one's formal citizenship. We can think here of Yaser Hamdi, whose 2004 settlement agreement with federal prosecutors required him to renounce his U.S. citizenship as a condition of his release.[121] We could also consider an increasing number of cases where prosecutors have sought to denaturalize U.S. citizens accused of engaging in terrorist activity or providing material support for organizations certified as terrorist organizations.[122] Thus, we can see as with the Japanese American renunciates, the discomfort with transnational ties and split loyalties at a time of war manifest in the notion that citizenship demands singular loyalties.[123] And the notion of the American citizen has consolidated through concerns about national security, against the idea of the terrorist.[124]

We can see present-day connections to the Chinese Confession Program, which seems to be a precursor of visa programs which provide lawful immigration status in exchange for the noncitizen providing the government critical, reliable information in criminal

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120. *See Poll Shows U.S. Views on Muslim-Americans, Nearly Half of Those Surveyed Say Some Rights Should be Restricted*, MSNBC NEWS, Dec. 17, 2004, *at* http://www.msnbc.msn.com/id/6729916.

121. *See* Settlement Agreement, Hamdi v. Rumsfeld, (Sept. 17, 2004), *at* http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrement2.html.

There are several issues to consider in his case: whether the citizenship renunciation passes muster as "voluntary" when he agreed to the renunciation as a condition of release; whether his status as a citizen of Saudi Arabia, as an Arab, and as an "accidental" citizen of the United States through birth on U.S. soil from nonimmigrant parents has engendered a different treatment than in the case of John Walker Lindh, who faced rhetorical calls for the stripping of his citizenship but none in practice; and whether the impetus for the renunciation on the part of the U.S. government was symbolic or in fact was to enable the U.S. to claim in the future that he can be dealt with through immigration law as an "alien" with lesser or nonexistent Constitutional protections.

122. *See e.g.*, Todd Bensom, *Government Moves to Strip Citizenship of Former Holy Land Foundation Board Member*, GARMO.COM, Oct. 18, 2004 (describing the case of Rasmi Khader Almallah), *at* http://www.garmo.com/archives/00000394/shtml; *U.S. Muslim Official Pleads Not Guilty, Bail Denied*, MUSLIM AM. SOC'Y, Oct. 29, 2003 (describing the case of Abdurahman Alamoudi), *at* http://www.masnet.org/news.asp?id=623.

123. We can see this as well for citizens who do not fall into the "alien citizen" category in the provisions of the Domestic Security Enhancement Act (known as Patriot Act II). This is draft legislation that was prepared within the federal Department of Justice, which has yet to be proposed in Congress. This legislation would provide for the presumptive denationalization of American citizens charged with "joining or serving in or providing material support to" an organization that the executive branch has designated a terrorist organization. *See* Memorandum Obtained by NOW Television Program, Domestic Security Enhancement Act of 2003, Section-by-Section Analysis 30-33 (Jan. 9, 2003) (analyzing Title V: Enhancing Immigration and Border Security), *at* http://www.pbs.org/now/politics/patriot2-hi.pdf.

For a discussion of the relationship between denationalization and split allegiances, see T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 Mich. L. Rev. 1471 (1986).

124. See Volpp, *The Citizen and the Terrorist*, *supra* note 91.

prosecutions.[125] Shortly after September 11th, Attorney General John Ashcroft offered visas and the potential reward of legalization as an inducement to noncitizens to come forward with information concerning terrorism. It is not apparent if anyone accepted this proffer.[126] The danger for noncitizens in relying upon the hope that they will gain lawful immigration status is made apparent not only through the example of the Confession Program, but also in a recent case where prosecutors chose to issue only three visas to fourteen undocumented immigrants who offered to provide testimony in the trial of Zacarias Moussaoui in the hope that they would receive legal status. The other eleven were left in fear of deportation.[127] Bill Hing has made the explicit linkage between the Confession Program and the Bush guest-worker proposal, writing that in both cases, communities have mistakenly conceptualized the programs as providing amnesty, when, in reality, what was offered in exchange for identifying oneself to the government was the risk of deportation.[128]

Immigration tells us who belongs. On the winning side are the terms legal and citizen; on the losing side are the terms alien and illegal. *Impossible Subjects* shows us that legal categorization can shift, that belonging is not just a matter of legal categorization, and that perceptions of who belongs — and who does not — will shape legal categorization. In that sense, we need to always consider three layers of analysis: the legal category at issue; the identity of who is occupying that legal category; and the relationship between the production of that legal category and identity.

CONCLUSION

Ngai asserts that the task of her book is not to resolve the foundational problem of the relationship between sovereignty, citizenship, and immigration. But if we cannot detach sovereignty

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125. S visas can be granted for critical reliable information essential to the success of an authorized criminal investigation or prosecution and can be converted after three years into a green card. 8 U.S.C. § 1101(a)(15)(S) (2000); 22 C.F.R. § 41.83 (2002). For a discussion of the granting of S visas to exploited workers who provided testimony against those who trafficked them, see Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT'L L. & COM. REG. 507 (2002).

126. Neil A. Lewis, *The Informants: Immigrants Offered Incentives to Give Evidence on Terrorists*, N.Y. TIMES, Nov. 30, 2001, at B7.

127. Nina Bernstein, *A Visa Case With a Twist: 9/11 Illegal Immigrants Testified to Try to Stay in U.S.*, N.Y. TIMES, Sept. 16. 2004, at B2. The immigrants in this case sought a U visa, for which the S visa provided a precursor, and were planning to testify about their bereavement or trauma in the death penalty phase of Moussaoui's case. *Id.*

128. Bill Ong Hing, *Legal Status: Amnesty or Immigration Trap?* CHI. TRIB., Jan. 9, 2004, at 17. In the case of the Confession Program, only a small minority of those who confessed were actually deported. Ngai at 221.

from immigration all together,[129] we might, she writes, "detach sovereignty and its master, the nation-state, from their claims of transcendence and . . . critique them as products of history." (p. 12). Thus, we can see that the sovereign right to determine membership need not be unconditional (p. 12).

There is one story in the book that suggests such an alternative, set in the context of discussions about the reform of the national origins quotas. The Reverend Paul Empie of the National Lutheran Council, in a speech delivered to the American Immigration Conference in 1959, argued for a vision of American national interest on the terrain of "international understanding, well-being, and peace" (p. 253). Empie asserted that the conventional view of restricting immigration as an exercise of national sovereignty was not based in an appeal to reason or morality, but was justified through national power and state violence. Rather, he suggested, we think about "the interlocking and mutual interests of all nations with regard to the immigration of peoples, the interaction of culture, and the respect of universal human rights" (p. 253). Empie's position was not an uninstrumental one. He was concerned about the United States' position in a world characterized by extreme disparities in wealth and power, and he was not seeking to eliminate all controls on immigration. But he did suggest that we disaggregate our immigration policy from a nationally defined interest that separated the interests of the United States from the interests of the rest of the globe.

Empie's prescription would require us to make two epistemic leaps. First, our present-day narrative of America as a nation of immigrants is founded on the presumption of a liberal America, created by individual acts of uncoerced consent.[130] But American immigration history is better understood as shaped by conquest, colonialism, and Cold War politics.[131] Foregrounding this narrative would require that we abandon our amnesia about policies creating illegal aliens and alien citizens, forgettings that have been constituent to our national identity.[132] Second, while recognizing the central role of

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129. For an articulation of the arguments in favor of detaching sovereignty from immigration, see Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193 (2003).

130. P. 5 (quoting BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 75 (2001) (describing the role immigrants play in supporting the narrative of liberalism's "fictive foundation in individual acts of uncoerced consent")).

131. *See* Ngai's discussion of the imported colonialism of Filipino laborers, pp. 94-126, the conquest of Mexico and subsequent importation of racialized Mexican labor, pp. 127-66, and the Chinese Confession Program during the Cold War, pp. 202-24.

132. This might also mean that we reconceptualize the origin story of sovereign nations as founded not through social contract, but through force. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1998) (arguing

force in historically shaping American immigration policy, we might reject the association between sovereignty and the unlimited ability of the sovereign to determine its membership (p. 12). Ngai asks that we learn from her archive that how the sovereign has shaped membership has shifted over time, and thus, is again in our own time, alterable (p. 12). She asks that we be honest about our past, but that we also think boldly about our future.

May *Impossible Subjects* indeed lead to bold changes. Ngai creates that possibility, through altering our vision of immigration history, in showing us the constructed and contingent nature of its legal regulation. *Impossible Subjects* is essential reading. We are the beneficiaries of this luminous book, which, in bringing to our attention an archive and an analysis that has heretofore escaped us, brushes history against the grain.[133]

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that rather than see sovereignty as rooted in the social contract we should see its origins in banishment, exclusion, and the management of "bare life").

133. In the words of Walter Benjamin:

> There is no document of civilization which is not at the same time a document of barbarism. And just as such a document is never free of barbarism, so barbarism taints the manner in which it was transmitted from one hand to another. The historical materialist therefore dissociates himself from this process of transmission as far as possible. He regards it as his task to brush history against the grain.

Walter Benjamin, *On the Concept of History*, *in* 4 WALTER BENJAMIN: SELECTED WRITINGS, 1938-1940, at 392 (Michael W. Jennings, ed. 2003).