

Michigan Law Review

Volume 94 | Issue 6

1996

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Recommended Citation

Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss6/24>

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WHOSE ALIEN NATION?: TWO MODELS OF CONSTITUTIONAL IMMIGRATION LAW

Hiroshi Motomura*

ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER. By *Peter Brimelow*. New York: Random House. 1995. Pp. xix, 327. \$24.

I. RACE AND IMMIGRATION: THE PROBLEM ACCORDING TO BRIMELOW

Who is an "American," and how do we choose *new* Americans? Immigration law and policy try to answer these questions, and so it is no wonder the immigration debate attracts so much public attention. After all, it represents our public attempt to define ourselves as a community, and to decide what we ask of those who want to join our ranks.

The stream of immigrants to the United States continues unabated. Many come here legally; others come any way they can. This seemingly inexorable trend highlights a complex national ambivalence about our past, present, and future. We share a deeply rooted tradition of being a "nation of immigrants" — the America of Emma Lazarus's Golden Door,¹ of the poor and huddled masses welcomed by the Statute of Liberty. Despite this tradition of openness, a skeptical, restrictionist view of immigration has equally deep historical roots, and a growing number of Americans believe that we must limit immigration or risk jeopardizing our national future.

Peter Brimelow, a senior editor at both *Forbes* and *The National Review*, has become a recognized proponent of severe immigration restrictions. Brimelow and his book, *Alien Nation: Common Sense*

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1. See Emma Lazarus, *The New Colossus*, in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 40, 41 (Morris U. Schappes ed., 1944) (poem written for Bartholdi Pedestal Fund in 1883, now inscribed on a plaque on the Statue of Liberty).

About America's Immigration Disaster,² have generated a great deal of interest. Reviews by prominent commentators in respected publications put *Alien Nation* in the spotlight.³ Brimelow even presented his views to Congress⁴ during its still-continuing consideration of immigration-slashing proposals.⁵ Like it or not, his perspective has influenced the current immigration debate.

Alien Nation uses simple and straightforward language — in the style of a radio talk show — to advance two major arguments against immigration. One is economic. Drawing heavily on the work of George Borjas,⁶ Brimelow argues that immigration has not contributed to America's economic success but has instead precipitated its economic decline (pp. 137-77). He offers the example of Japan and its extremely restrictive attitudes toward immigration to argue that a nation can achieve economic prosperity without a significant immigrant flow (pp. 168-72).

Despite Brimelow's lengthy discussion of economic considerations, it becomes plain — and Brimelow himself acknowledges (pp. 56, 177) — that the crux of his case against immigration is cultural, not economic. Brimelow grounds this cultural argument in considerations of race and ethnicity. As he puts it, "[e]thnicity is destiny in American politics" (p. 195; emphasis omitted). For Brimelow, United States immigration law has gone wrong because it has undermined what he terms "a plain historical fact: that the American nation has always had a specific ethnic core. And that core has been white" (p. 10). He elaborates: "As late as 1950, somewhere up to nine out of ten Americans looked like me. That is, they were of European stock. And in those days, they had another name for this thing dismissed so contemptuously as 'the racial hegemony of white Americans.' They called it 'America.'"⁷

2. The book expands on Peter Brimelow, *Time to Rethink Immigration? The Decline of Americanization of Immigrants*, NATL. REV., June 22, 1992, at 30. See p. 3.

3. See, e.g., Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963 (1996); Michael Lind, *American by Invitation*, THE NEW YORKER, Apr. 24, 1995, at 107-13; Jack Miles, *The Coming Immigration Debate*, THE ATLANTIC MONTHLY, Apr. 1995, at 130-40; Samuel Francis, *Hercules and the Hydra*, NATL. REV., May 1, 1995, at 76-77 (book review); Francis Fukuyama, *Culture Vulture*, NATL. REV., May 1, 1995, at 77-78 (book review); Nathan Glazer, *What He Should Have Said*, NATL. REV., May 1, 1995, at 78-79 (book review); Glenn Loury, *Terms of Engagement*, NATL. REV., May 1, 1995, at 79-80 (book review); Peter Skerry, *Closing the Door*, COMMENTARY, May 1995, at 70-73 (book review).

4. See Statement of Peter Brimelow, House Subcommittee on Immigration and Claims, 1995 WL 10386204 (May 17, 1995).

5. See, e.g., H.R. 2202, 104th Cong., 1st Sess. (1995) (Smith, R-Tex), S. 1394, 104th Cong., 1st Sess. (1995) (Simpson, R-Wy).

6. See GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 79-97 (1990).

7. P. 59; see also p. 197 ("Remember — practically until the Civil War, white Protestants were America.").

Brimelow does not bother to mention Native Americans, except to quote approvingly the Declaration of Independence where it denounces "the merciless Indian Savages."⁸ He dismisses African Americans by reminding us that they were just property:

To get a sense of perspective, we have to go back to the beginning. And in the beginning, the American nation was white.

That sounds shocking because blacks were almost a fifth (19.3 percent) of the total population within the borders of the original Thirteen Colonies. But almost all these blacks were slaves. They had no say in public affairs. They were excluded from what I have called *the political nation* — aka "the racial hegemony of white Americans" . . . aka "America." And the first federal naturalization law in 1790 was absolutely explicit about this: applicants for citizenship had to be "free white persons."⁹

Brimelow warns that for America "the breaking of . . . 'the racial hegemony of white Americans'" (p. 122; emphasis omitted) portends radical social upheaval, which he compares to the fall of the Roman Empire (pp. 131-33). On this same theme, he writes: "[t]here is no precedent for a sovereign country undergoing such a rapid and radical transformation of its ethnic character in the entire history of the world."¹⁰ Brimelow's response?

It is simply common sense that Americans have a legitimate interest in their country's racial balance. It is common sense that they have a right to insist that their government stop shifting it. Indeed, it seems to me that they have a right to insist that it be shifted back.¹¹ He contends that our empire will fall if current immigration patterns continue to make our society multi-racial and multi-ethnic.¹²

Brimelow squarely blames the 1965 Immigration Act for this drop in the white share of the population.¹³ The 1965 Act abolished the "national origins" system that had dominated immigration law since the 1920s. As a general rule, the national origins system limited immigration from a country to two percent of the total number of people already in the United States with that ancestry in 1920. In practice, this system strongly favored immigrants from Northern and Western Europe. Brimelow complains that but for the 1965

8. P. 209 (emphasis omitted). Brimelow relies on passages in the Declaration of Independence and the Federalist Papers that he sees as assuming an American ethnic and cultural homogeneity. P. 210.

9. Pp. 66-67. Here Brimelow refers to the Act of March 26, 1790, ch. 3, 1 Stat. 103.

10. P. 57; see also p. 129 (making same statement).

11. P. 264; see also p. 232 (posing *The National Question*).

12. See pp. 129-33. It is thus fitting that Brimelow's book shares its title with the movie, *Alien Nation*, starring James Caan and Mandy Patinkin, about the unsuccessful efforts to "assimilate" by "aliens" from outer space who land in California. I am grateful to Frank Wu for calling this to my attention.

13. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. §§ 1101-1351 (1995)).

Act, "the American population would still be where it was in 1960: almost 89 percent white" (p. 90).

Brimelow repeatedly warns us that immigrants — given their racial and ethnic composition and higher fertility rates — will reduce whites to a minority of the United States population by the mid-twenty-first century (pp. 62, 74, 96, 137). To drive this point home, Brimelow invokes the image of white America in the grasp of "pincers." He displays a graph in which whites are squeezed over time by a growing Hispanic population — rising from the bottom of the graph — and by a growing Asian and black population — choking them from above (p. 63).

Brimelow professes some concern that immigration adversely affects African Americans (pp. 173-75). Yet, he provokes: "when you enter the INS waiting rooms you find yourself in an underworld that is not just teeming but is also almost entirely colored" (p. 28). He adds: "You have to be totally incurious not to wonder: where do all these people get off and come to the surface?" (p. 28). Brimelow asserts that were it not for U.S. immigration policy, Colin Ferguson, with his "hatred of whites," would not have come to this country, and no one would have been killed in the Long Island Rail Road shootings (pp. 6-7). Brimelow warns us not to "embrace" Haitian refugees because they may be HIV-positive (p. 113). He tells us that seventy-five percent of Nigerians are involved in perpetrating fraud schemes (p. 186), and that the "legacy of Chaka, founder of the Zulu Empire . . . is not that of Alfred the Great, let alone that of Elizabeth II or any civilized society" (p. 108). He approvingly quotes President Calvin Coolidge's view: "America must be kept American," and adds that: "Everyone knew what he meant" (p. 211). In case the meaning is unclear, here is what Coolidge said in 1921: "America must be kept American. Biological laws show . . . that Nordics deteriorate when mixed with other races."¹⁴

Even on its own terms, Brimelow's argument is flawed analytically. For example, his projections rely on fragile assumptions about future fertility and mortality rates. Moreover, he fails to see that race is a social construct.¹⁵ The accuracy of Brimelow's demographic predictions depends on who calls themselves "white."¹⁶ But racial categorization is inexact, especially for Hispanics and Asians and especially given the rising rate of intermarriage, a diffi-

14. See Lind, *supra* note 3, at 108 (quoting a 1921 GOOD HOUSEKEEPING article by then Vice President Coolidge).

15. See, e.g., Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Fukuyama, *supra* note 3.

16. Brimelow acknowledges some of these uncertainties. See p. 67.

culty that Brimelow mentions but does not take seriously.¹⁷ Brimelow claims that early in this century "immigration from the traditional northern and western European sources meant that not all immigrants were alien to American eyes" (p. 59). In fact, early twentieth-century restrictionists viewed Italians and Eastern Europeans (especially Jews) as outside their "race." Earlier and in like manner, many who sought to preserve American "racial purity" in the mid-nineteenth century did not consider the Irish to belong to the same race as Anglo-Saxon Protestant immigrants.¹⁸

These analytical flaws, however, are not what is most disturbing about *Alien Nation*. Much more troubling is Brimelow's essential perspective on race, ethnicity, and immigration. Brimelow, and others who fear "they" will overwhelm "us," naively and invidiously ignore those of "us" who not only welcome "them" but also see "them" as vital to our national self-interest. The rest of this essay discusses this problem with *Alien Nation*.

In immigration as elsewhere, race is a difficult, often uncomfortable, and even incendiary topic — but we, as Americans, avoid it only at our great peril. There is a reason that *Alien Nation* has received so much attention. Brimelow's call to reverse current racial and ethnic demographic trends resonates deeply with the many who feel threatened by these changes. Their fear surely fortified public support for California's Proposition 187, which won fifty-nine percent of the vote in November 1994.¹⁹ It may be tempting to dismiss Brimelow himself as little more than an advocate of "old-fashioned white racial nationalism."²⁰ But to understand and criticize Brimelow's perspective, we need to go beyond the simple question: Is he a "racist"? Indeed, much of this essay discusses why such labeling is often quite difficult in the immigration context. Ironically, if *Alien Nation* has any value at all, it is that its simplistic approach forces us to grapple more carefully with this important, complex

17. See pp. 273-74. For a similar point, see Schuck, *supra* note 3, at 1999 (citing Mary C. Waters, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* 16-51 (1990)). On the increasing number of "multiracial" Americans, see Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 *STAN. L. REV.* 957, 964-69 (1995).

18. See, e.g., MADISON GRANT, *THE PASSING OF THE GREAT RACE* 68-82 (1916); WILLIAM Z. RIPLEY, *THE RACES OF EUROPE* (1899). For background, see JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 131-57 (2d ed. 1963).

19. Proposition 187 would deny most public services, including nonemergency medical services and public education, to undocumented aliens. It would also require certain government workers to verify the immigration status of persons with whom they come into contact and to report suspected undocumented aliens to enforcement agencies. Court injunctions have kept almost all of its provisions from taking effect; see *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 n.1 (C.D. Cal. 1995); *Pedro A. v. Dawson*, Case No. 965089 (Cal. Super. Ct., City & County of San Francisco, filed Nov. 9, 1994).

20. Lind, *supra* note 3, at 108.

question: How *should* we take race and ethnicity into account in making immigration law and policy?

II. THE 1965 ACT AND OTHER STORIES

There is no doubt that the racial and ethnic composition of immigrants has shifted dramatically in the past forty years. From 1951 through 1960, fifty-three percent of our legal immigrants came from Europe.²¹ In fiscal year 1993, only eighteen percent came from Europe, while over seventy-five percent came from Asia and Latin America.²² The European share of current immigration would fall further if we included undocumented immigration.²³

To understand what happened in 1965 and to assess Brimelow's call to undo the past thirty years, we must examine the immigration system that the 1965 Act replaced. Before 1875, immigration was regulated only by the states, if at all.²⁴ The first federal immigration law appeared in 1875.²⁵ The earliest federal statutes listed grounds for excluding aliens, and later statutes added deportation grounds.²⁶ The Immigration Act of 1921 provisionally adopted the first numerical restrictions on immigration in the form of the national origins system. For eligible countries, this system allowed annual immigration for up to three percent of "the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910."²⁷

In 1924, Congress made the national origins system permanent and limited immigration from outside the Western Hemisphere to 150,000 annually. The 1924 Act also reduced the limit to two per-

21. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, INS STATISTICAL YEARBOOK 27, Table 2 (1993).

22. See *id.* at 28.

23. See U.S. GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: DESPITE DATA LIMITATIONS, CURRENT METHODS PROVIDE BETTER POPULATION ESTIMATES 46-57 (1993); ROBERT WARREN, ESTIMATES OF THE RESIDENT ILLEGAL ALIEN POPULATION: OCTOBER 1992, at 1, 4-10 (Immigration and Naturalization Service Statistics Division 1993).

24. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

25. Act of March 3, 1875, ch. 141, 18 Stat. 477 (exclusion, repealed 1974). The only earlier federal statutes on the general subject of immigration were the Alien and Sedition Acts of 1798. See Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 571 (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577 (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing) (codified at 50 U.S.C. §§ 21-23).

26. See, e.g., Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (exclusion, repealed 1917); Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (deportation, repealed 1917); Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1086 (exclusion and deportation, repealed 1917); Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898 (exclusion and deportation).

27. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5 (repealed 1952).

cent and changed the baseline year to 1890.²⁸ Changing the baseline year materially favored immigrants from Northern and Western Europe because the great waves from Southern and Eastern Europe did not arrive until after 1890.²⁹ Finally, this Act also provided that in 1927 the baseline year would change again — to 1920 — and that the 150,000 ceiling would be divided up pro rata according to ancestry, not foreign birthplace.³⁰ Immigrants from the Western Hemisphere countries had to meet qualitative requirements but remained free of numerical limits.

While the 1924 Act disadvantaged Southern and Eastern European immigrants, at least they were not *barred* from coming. Historically, American immigration policy has expressly selected immigrants and citizens on the basis of national origin and race.³¹ Starting in 1882, the Chinese Exclusion Acts cut off virtually all Chinese immigration.³² In like manner, the “Gentlemen’s Agreement” of 1907-08 between the Japanese and United States governments severely limited immigration from Japan,³³ and the 1924 Act prohibited it completely.³⁴ The 1917 Immigration Act prohibited immigration from an “Asiatic barred zone”; it also excluded anyone who traced his ancestry to those countries.³⁵ The statute excluded practically all blacks — “the descendants of slave immigrants” — from the national origins system calculations.³⁶

Naturalization laws were similarly race-based. The original naturalization laws made only “free white persons” eligible.³⁷ In 1870, “persons of African descent” became eligible,³⁸ but other racial

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

29. See E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 484 (1981) (quoting H.R. REP. NO. 350, 68th Cong., 1st Sess. 13-14 (1924)); John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 826 n.31 (1982) (arguing that the baseline change was a deliberate effort to limit immigration from Southern and Eastern Europe).

30. See Immigration Act of 1924, ch. 190, § 11(b), 43 Stat. 153, 159.

31. For a useful summary, see Scanlan, *supra* note 29, at 823 nn.12-13.

32. See Act of May 6, 1882, ch. 126, 22 Stat. 58; Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of May 5, 1892, ch. 60, 27 Stat. 25.

33. See generally, ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 123-28 (1988).

34. Japanese exclusion was not accomplished by expressly naming Japan, but through a neutral phrase — “aliens ineligible to citizenship” — that was clearly intended to have that effect. Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (referring to “aliens ineligible to citizenship”). On the intent of the phrase, see RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 208-10 (1989).

35. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-76. See BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 32 (1993).

36. Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159.

37. See Act of March 26, 1790, ch. 3, 1 Stat. 103.

38. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254; 256.

bars continued long after that. During the 1920s the Supreme Court twice declared Asians ineligible to naturalize.³⁹ "Races indigenous to the Western Hemisphere" remained ineligible until 1940,⁴⁰ and Chinese were unable to naturalize until 1943.⁴¹ Only in 1952 did citizenship become open to all regardless of race or national origin.⁴²

The 1965 Act abolished the national origins system. A new selection system, which took full effect on July 1, 1968, limited immigration from outside the Western Hemisphere to 170,000 per year. This annual limit was divided into seven "preference" categories for various close relatives of citizens and noncitizen permanent residents, for workers of various skill levels, and for refugees. Immigration from any single country was capped at 20,000 per year. This basic scheme has endured to the present day, with some modifications.⁴³

What went "wrong" in 1965 to increase Asian and Latin American immigration so dramatically? Brimelow seems to trace the increase in Latin American immigration to the 1965 Act (pp. 60-61), but this argument is hard to understand. The 1965 Congress feared a dramatic increase in Latin American immigration⁴⁴ and *restricted* it accordingly.⁴⁵ Before the 1965 Act, any Mexican who could pass a Spanish-language literacy test — and who bothered to go through immigration formalities, which many did not — could enter as a lawful permanent resident. The Act changed this by adopting the first-ever numerical limit on Western Hemisphere immigration — 120,000 annually.⁴⁶

Although Brimelow is right that Asian immigration increased under the 1965 Act, he misunderstands how.⁴⁷ Brimelow argues

39. See, e.g., *United States v. Thind*, 261 U.S. 204 (1923) (Asian Indians); *Ozawa v. United States*, 260 U.S. 178 (1922) (Japanese).

40. Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1140.

41. See Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

42. See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

43. See Immigration Act of 1990, Pub. L. No. 101-649, §§ 101, 102, 104 Stat. 4978, 4980-85; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 4, 100 Stat. 3655, 3655; Act of Oct. 5, 1978, Pub. L. No. 95-412, § 3, 92 Stat. 907, 907.

44. See Scanlan, *supra* note 29, at 830 (citing CONG. RESEARCH SERV., U.S. IMMIGRATION LAW AND POLICY, 1952-1979, at 54 (1979), quoting H. REP. NO. 745, 89th Cong., 1st Sess. 48 (1965)). In the process of legislative compromise, the Western Hemisphere limit was "a price to be paid for abolishing the national origins systems." SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report) 208 (1981).

45. Schuck points out this "delicious irony." See Schuck, *supra* note 3, at 1975.

46. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 920-21. Legislation in 1978 combined the Eastern and Western Hemisphere ceilings into a single worldwide ceiling. See Act of Oct. 5, 1978, Pub. L. No. 95-412, § 1, 92 Stat. 907, 907.

47. Under the prevailing view, the supporters of the 1965 Act in Congress did not predict the dramatic increase in Asian immigration that followed. See, e.g., ROGER DANIELS, COM-

that the Act changed the ethnic composition of the immigrant flow by discarding the national origins system's bias in favor of Europeans, especially Northern and Western Europeans.⁴⁸ This argument overlooks the effects of the 1965 Act's new immigration categories, which put greater emphasis on family reunification and made job-based immigration more difficult. Citizens could petition for their spouses, children, and siblings to immigrate. Permanent residents could petition for their spouses and children. In turn, all of these immigrants could later petition for *their* qualifying relatives. With these changes, the overall number of immigrants increased far beyond Congress's expectations.⁴⁹

Suppose we were to do as Brimelow urges and undo the effects of the 1965 Act.⁵⁰ We could, for example, restore the predominantly Northern and Western European character of immigration — assuming sufficient numbers to shift the racial balance would want to come. Or we could allow in only “white” immigrants. Brimelow sees these as easy solutions. But immigration policy goes beyond mere statistics. It also reflects a society's most basic values. What values must we abandon before we can restore pro-European bias to immigration policy?

To answer this question we must first understand the 1965 Act's place in broader historical trends in both American immigration law and public law generally. The 1965 Act marked the full adoption of a basic nondiscrimination principle in American immigration law. In so doing, it crystallized the sentiments that had already led to the repeal of the laws barring Asian immigration and naturalization.⁵¹

The predecessor to the 1965 Act — the 1952 McCarran-Walter Act — left many discriminatory provisions intact. It limited immigration from the Asiatic barred zone, modified and relabeled the

ING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 338-44 (1990); HING, *supra* note 35, at 39-41; DAVID M. REIMERS, *STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA* 74-91 (2d ed. 1992). See generally HUTCHINSON, *supra* note 29, at 366-79. For persuasive observations to the contrary, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. (forthcoming 1996) (manuscript on file with author).

48. Brimelow characterizes this change as “de facto discrimination against Europe.” P. 79. Great Britain, Northern Ireland, Germany, and Ireland received over two-thirds of the 158,000 immigrant visas authorized annually under the 1952 Act. In fact, large numbers of immigrant visas went unused each year because of insufficient demand. See Thomas J. Scully, *Is the Door Open Again? — A Survey of Our New Immigration Law*, 13 UCLA L. REV. 227, 229 (1966).

49. See, e.g., REIMERS, *supra* note 47, at 83.

50. “The 1965 Immigration Act, and its amplifications in 1986 and 1990, has been a disaster and must be repealed.” P. 258.

51. Cf. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (eliminating racial qualifications for citizenship); *id.* at §§ 202(b)-(c), 66 Stat. at 177-78 (ending Japanese exclusion); Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (repealing Chinese exclusion).

"Asia-Pacific Triangle," to 2,000 immigrants annually, with extremely small allotments for individual countries. It allowed only 105 immigrants of Chinese descent per year regardless of their birthplace.⁵² Because the McCarran-Walter Act also retained the national origins system, President Truman vetoed it⁵³ — but Congress overrode the veto. Truman charged that the "greatest vice" of the national origins system was "that it discriminate[d], deliberately and intentionally, against many of the peoples of the world,"⁵⁴ and that it violated "the great political doctrine of the Declaration of Independence that 'all men are created equal.'"⁵⁵ His Commission on Immigration and Naturalization had similarly harsh words.⁵⁶

Just thirteen years later, the 1965 Act abolished the national origins system. Why? This change makes sense only in light of two parallel developments — the Civil Rights Act of 1964⁵⁷ and the Voting Rights Act of 1965.⁵⁸ Many in Congress saw the end of the national origins system as the necessary international component of a comprehensive civil rights program. Some of these arguments focused on the domestic scene,⁵⁹ and others focused on the foreign policy implications, especially in the context of the Cold War and the growing American involvement in Vietnam.⁶⁰ In signing the

52. See Immigration and Nationality Act, ch. 477, §§ 202(b)-(c), 66 Stat. 163, 177-78. The 2,000-visa limit was eliminated in 1961. See Act of Sept. 26, 1961, § 9, Pub. L. No. 87-301, 75 Stat. 650, 654.

53. See *The President's Veto Message*, reprinted in 6 OSCAR M. TRELLES & JAMES F. BAILEY, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 275 (1979) (vetoing the bill to revise the laws relating to immigration and nationality, and for other purposes).

54. *Id.* at 277.

55. *Id.* at 278.

56. See PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 52-56 (1953); see also Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 LAW & CONTEMP. PROBS. 401, 409-18 (1956) (discussing the popular opposition to the national origins system).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

58. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. s. 1973-1973bb-1 (1988)).

59. See, e.g., Statement of W. Willard Wirtz, Secretary of Labor (Mar. 18, 1965), in 10 OSCAR M. TRELLES & JAMES F. BAILEY, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 114 (1979) (stating that all three proposals "write into our laws the essential principle of the free society: that we hold each other in equal respect, without false prejudice and without one member's using his own image to measure his neighbor's rights"); Statement of Rep. Annunzio (Apr. 6, 1965), *id.* at 162, 163 ("It seems strange to me that at a time when the Congress is taking vigorous action to insure that no American will be denied their full privilege of citizenship because of race, we still maintain an immigration policy which relegates millions of other Americans to second-class citizenship because of national origin."); see also *Letter From the President to the Speaker of the House*, 111 CONG. REC. 20,996 (daily ed. Aug. 25, 1965).

60. See, e.g., Statement of Dean Rusk, Secretary of State (March 11, 1965), in 10 TRELLES & BAILEY, *supra* note 59, at 88 ("[W]e are concerned to see that our immigration laws reflect our real character and objectives because what other people think about us plays an impor-

1965 Act into law at the base of the Statue of Liberty, President Johnson declared that it "repair[s] a deep and painful flaw in the fabric of American justice. . . . The days of unlimited immigration are past. But those who do come will come because of what they are, not because of the land from which they sprung."⁶¹

Since 1965, nondiscrimination principles have shaped areas of immigration law not directly touched by the repeal of the national origins system. The Refugee Act of 1980 provides one example.⁶² While this Act allowed foreign policy and other ad hoc factors to influence the selection of some overseas refugees, it largely rejected selection based on country of origin. Furthermore, it commanded that "uniform and neutral standards" govern asylum decisions.⁶³

That America is "a nation of immigrants" is superficially a demographic observation about how many of our ancestors came from foreign lands and how long ago. More fundamentally, however, it is a statement of civic values. In denouncing the 1965 Act as "a national emotional spasm" (p. 98), Brimelow rejects — or trivializes — core constitutional values such as equality before the law. He yearns to return not only to pre-1965 immigration law, but also to pre-1965 America.⁶⁴ His discussion of African Americans shows that he really wants to turn back the clock even further, not just

tant role in the achievement of our foreign policies."); Statement of Rep. de la Garza (Apr. 6, 1965), *id.* at 191, 192 ("At a time when the true spirit and philosophy of the United States must be made evident to the world, we can no longer afford to have on our statute books any reference to the fact that people are welcome to this country depending upon their race or ethnic origin."); Statement of Rep. Fino (Apr. 6, 1965), *id.* at 193, 195 ("Isn't it embarrassing for a country that in 1964 passed the Civil Rights Act as an affirmation of the fact that all men were to be treated equal under the law to retain an immigration law that says in fact that all men from other countries were not created equal?; [the bill] will bring our immigration policy into line with our foreign policy."). On the broader connection between the civil rights movement and foreign policy, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

61. *Remarks at the Signing of the Immigration Bill, Liberty Island, New York, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON* 1037, 1038-39 (1966). Brimelow himself notes the link. See P. 76; see also Vernon M. Briggs, Jr., *MASS IMMIGRATION AND THE NATIONAL INTEREST* 104 (1992); DANIELS, *supra* note 47, at 338.

Professor Peter Schuck similarly notes the connection between the 1965 Act and domestic civil rights legislation as part of his analysis of the stresses that immigration places on the traditional civil rights coalition. Peter H. Schuck, *The New Immigration and the Old Civil Rights*, 15 AMERICAN PROSPECT 102, 103 ("This law was in fact a momentous civil rights victory, extending the notion of equal treatment beyond U.S. borders to national and ethnic groups traditionally disfavored by our immigration laws. That it also contributed to the coalition's future decline is an arresting political irony.").

62. Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102.

63. See *id.* § 101(b) (providing "comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted"). See also Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 250-62 (1984).

64. Brimelow asks, "[W]hat was wrong with America as it existed in 1965?" P. 274. In spite of his disdain for the Voting Rights Act of 1965, Brimelow argues in defense of the America of 1965 that at that time "the federal government was intervening massively throughout the South to prevent voting fraud." P. 106. Elsewhere, Brimelow dodges ques-

before *Brown v. Board of Education*, but before the Emancipation Proclamation.

Brimelow also rejects core constitutional values in his unabashed praise for "Operation Wetback," the 1954 government program that rounded up and expelled great numbers of Mexican workers and their families — plus some United States citizens of Mexican ancestry.⁶⁵ He commented in an interview that "[t]he illegal immigration crisis in the 1950s was ended in a few months by the Eisenhower administration through its famous Operation Wetback. Which I essentially think should be reproduced, you should do it again."⁶⁶ In so saying, he grossly overstates the effectiveness of Operation Wetback in blocking the already well-established migration routes from Mexico to the United States. Brimelow also rejects — or trivializes — the equal protection and due process implications of an enforcement strategy that targets persons on the basis of appearance.⁶⁷

Brimelow can point to the policies of Japan and other closed-door countries for support only because he views immigration as divorced from any social context. Japan's immigration policies reflect a sense of national community and civic values that is radically different from our American sense.⁶⁸ How Japan or other countries regulate immigration sheds precious little light on how America should (pp. 250-54).

III. NONDISCRIMINATION, RACE, AND ETHNICITY IN IMMIGRATION LAW

Brimelow gives simplistic answers to complex questions. He acknowledges the difficulties of defining *discrimination* in immigration policy (p. 104), but then he shirks the task. Yet, these questions — about race, ethnicity, and immigration — are impor-

tions about America before 1965 by saying, "[m]aybe America should not have been like this. *But it was.*" P. 15.

65. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* 54 (1992); JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 194-96 (1980).

66. See Interview with SAN DIEGO UNION-TRIBUNE, at G5 (June 4, 1995); see also pp. 34-35, 260; Peter Brimelow, COMMENTARY Nov. 1995, at 34, 35.

67. The Immigration and Naturalization Service (INS) recently settled a class action that alleged that its Border Patrol relied solely on Hispanic appearance to stop, question, and detain students, graduates, and staff of an El Paso, Texas, high school located next to the U.S.-Mexico border. After a preliminary injunction, the INS agreed in the settlement to provide the public with information and assistance in filing complaints against the Border Patrol. See *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992) (preliminary injunction), digested at 71 INTERPRETER RELEASES 987 (1994).

68. See generally Daniel H. Foote, *Japan's "Foreign Workers" Policy: A View From the United States*, 7 GEO. IMMIGR. L.J. 707, 711-12 (1993).

tant, and they demand cogent answers. So we must ask: what makes some immigration decisions intolerably "discriminatory"?

Constitutional principles usually provide a framework for, and set outer boundaries on, legislative and executive decisionmaking. They also influence the eventual subconstitutional interpretation of those legislative and executive decisions.⁶⁹ In short, a dialogue between politics and constitutional law usually informs our encounters with race and ethnicity. Unfortunately, those constitutional principles provide little guidance on how to deal with race and ethnicity in immigration law and policy. Would Brimelow's proposal to restore the predominantly white character of immigration to the United States be constitutional? Would the national origins system, if reenacted, be constitutional?

Because of the "plenary power doctrine," the answers to these questions are unclear. Created by judges near the end of the nineteenth century, this doctrine gives Congress and the Executive Branch broad and often exclusive authority in immigration matters. Due to its existence, courts have been reluctant to apply constitutional norms and principles to immigration statutes and regulations. As a result, the growth of constitutional immigration law has been stunted severely, and any dialogue between politics and constitutional principles in immigration law has been largely cut off.

There are signs, however, that constitutional immigration law is slowly emerging from a long dormant period.⁷⁰ Courts have gradually expanded constitutional review in this area, especially for procedural due process.⁷¹ Although substantive challenges have met with less success, courts have seriously considered equal protection claims in some immigration cases. For instance, in *Francis v. INS*,⁷² the Second Circuit reviewed a rule that governed the availability of certain exclusion and deportation waivers. The Board of Immigration Appeals had ruled that permanent residents could apply for the waivers if they had traveled outside the United States but not if they had remained in the country. The court found the distinction was irrational, and thus a violation of equal protection. More recently, nondiscrimination principles prevailed when the govern-

69. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560-64 (1990) [hereinafter Motomura, *Phantom Norms*].

70. For a succinct analysis of the current state of the doctrine, see Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HAST. CONST. L.Q. 925 (1995).

71. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter Motomura, *Procedural Surrogates*].

72. 532 F.2d 268 (2d Cir. 1976).

ment agreed, in the settlement of the *American Baptist Churches*⁷³ litigation, to end its practice of treating Guatemalan and Salvadoran asylum seekers differently. Equal protection also plays a key role in procedural due process claims, which often succeed because of a difference between the procedures that two groups of similarly situated aliens receive.⁷⁴

Constitutional nondiscrimination principles also guide the judicial interpretation of immigration statutes and other subconstitutional immigration texts. For example, the 1985 Supreme Court decision in *Jean v. Nelson*⁷⁵ interpreted certain immigration statutes and regulations to bar race and national origin discrimination even when they did not do so expressly. Thus, the Court applied an equality norm subconstitutionally where it seemed unwilling to invoke constitutional grounds.

In the past few years, the nondiscrimination question has arisen in connection with several important immigration policies. Since 1981, the United States has interdicted Haitians on the high seas before they could reach our shores and apply for asylum. Before May 1992 and after May 1994, these would-be refugees received an abbreviated asylum process, either aboard a ship or at an on-shore location outside the United States, for example Guantánamo Naval Base. From May 1992 to May 1994, we repatriated Haitians without even this abbreviated procedure. Their African ancestry and our more favorable treatment of generally lighter-skinned Cubans prompted charges of racism.⁷⁶ In August 1994, the Clinton Administration responded to an influx of Cubans sailing to Florida in small homemade rafts by interdicting them as well.⁷⁷ Ships now interdict both Haitians and Cubans. Nonetheless, Cubans continue to receive uniquely favorable treatment. Under a special September

73. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991). See also *American Baptist Churches v. Meese*, 712 F. Supp. 756, 772 (N.D. Cal. 1989) ("[G]overnmental policy that makes nationality-based distinctions should at least be reviewed for equal protection violations.").

74. See, e.g., *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (permanent injunction), *aff'd. sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (affirmed on subconstitutional grounds only); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (preliminary injunction). For a fuller discussion, see Motomura, *Procedural Surrogates*, *supra* note 71, at 1673-79.

75. 472 U.S. 846 (1985); see Motomura, *Phantom Norms*, *supra* note 69, at 587-93.

76. See, e.g., *Aristide Renounces Treaty Allowing U.S. to Return Haitians*, 71 INTERPRETER RELEASES 481, 483 (1994) (reporting on a news conference held by the Congressional Black Caucus and other civil rights organizations to denounce the interdiction and return policy as "racist"); Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 714-23 (1993).

77. See "A Slow-Motion Mariel": *Cubans (and Haitians) Take to Sea*, 71 INTERPRETER RELEASES 1091, 1091 (1994).

1994 agreement, the United States will allow 20,000 Cubans to immigrate here each year.⁷⁸

Whether our policy toward Haitians is discriminatory or even racist is a complex question. As Professor Stephen Legomsky has noted, current refugee admissions do not discriminate unfairly against Canadians just because very few Canadians qualify.⁷⁹ Equal protection does not necessarily lead to equal outcomes. We may treat Cubans better than Haitians because we want to welcome those fleeing Communist regimes, or because we prefer immigrants with higher education and skill levels or a strong network of compatriots in the United States. Even assuming that these explanations run afoul of the Refugee Act's statutory call for uniform and neutral principles, they do not necessarily violate equal protection. We might compare Haitians not with Cubans, but with Salvadorans and Guatemalans — nonblack asylum seekers from non-Communist Western hemisphere countries — who have not fared well under our asylum law.

These explanations notwithstanding, the fact remains that the U.S. policy toward Haitians treats a predominantly black group unfavorably. When does an immigration law discriminate based on race so as to violate equal protection? The U.S. policy toward Haitians does not rely expressly on race, but does it reflect the race-conscious intent generally required for a finding of invidious discrimination?⁸⁰ Can critics of the policy show more than a disproportionate impact on blacks, which is generally insufficient to find an equal protection violation? Will courts accept proof of intent that falls short of true motivation?⁸¹ Will it be enough to show that race was one of several factors considered by the policymakers?

Alternatively, does the policy unconstitutionally discriminate on the basis of national origin? An amicus brief filed by the National Association for the Advancement of Colored People (NAACP) in the most recent Supreme Court challenge to our Haitian interdiction policy argued that the policy constitutes national origin discrimination. The brief pointed to "an extensive prior history of

78. See generally *INS Announces Second Cuban Migration Program*, 73 INTERPRETER RELEASES 319 (1996); REFUGEE REP. No. 9, (Sept. 29, 1995); *State Dept. Implements Cuban Migration Agreement*, 71 INTERPRETER RELEASES 1409 (1994); *U.S., Cuba Reach Important Migration Agreement*, 71 INTERPRETER RELEASES 1213, 1236-37 (1994).

79. See Stephen H. Legomsky, *Immigration, Equality, and Diversity*, 31 COLUM. J. TRANSNATL. L. 319, 332-33 (1993) [hereinafter Legomsky, *Diversity*].

80. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

81. Challengers might argue that a disparate impact plus a showing of past discrimination, presumably in the form of past immigration laws, satisfy the "intent" requirement. Cf. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126-31 (1989) (describing the court's acceptance of this method of proving intent in voting rights cases).

systematic discrimination against Haitians seeking to immigrate to this country."⁸² In fact, the government has never disputed that the interdiction policy is directed at Haitians. If this is unconstitutional, will any designation of particular countries for different treatment violate the Constitution? Finally, a more basic question: Should we treat racial or national origin discrimination challenges to immigration decisions as if they arose in a domestic, nonimmigration context? Or are discrimination challenges in immigration cases different?

Under current doctrine, courts tend to avoid rather than answer these questions. Before constitutional principles can play a meaningful role in both shaping and sometimes limiting subconstitutional immigration law, courts must develop a sound approach to deciding when to intervene — and when to defer formally to the difficult choices that the political branches make in immigration law and policy.

IV. TWO MODELS OF CONSTITUTIONAL IMMIGRATION LAW

Brimelow's own criticism of the 1965 Act provides a good starting point to approach the issue of discrimination in immigration law. He argues that the Act treats "immigration as a sort of imitation civil right, extended to an indefinite group of foreigners who have been selected arbitrarily and with no regard to American interests."⁸³ Brimelow thus apparently assumes that immigrants come to the United States out of self-interest, that it is in the self-interest of citizens to keep them out, and that if not for our misguided altruism we could secure our borders and reduce, if not eliminate, net immigration. By casting immigration as a civil rights issue, Brimelow arrogates to himself — a recent British immigrant — the role of defending the American national interest. By the same rhetorical device, he casts anyone more favorable to immigration, especially in its present racial and ethnic mix, as placing immigrants' rights above the national interest.

It is not surprising that Brimelow almost succeeds with this characterization. Many of those who favor closer judicial scrutiny of the

82. Brief of the National Association for the Advancement of Colored People, Transafrica, and the Congressional Black Caucus as Amici Curiae in Support of Respondents 11, in *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344); see also *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980) (concluding that the INS actions toward Haitians "constitute impermissible discrimination on the basis of national origin" but characterizing the racial basis for the policy as merely "a possible underlying reason"), *affd. on other grounds as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). But see *Louis v. Nelson*, 544 F. Supp. 973, 1001-02 (S.D. Fla. 1982) (finding that the plaintiffs had not shown intentional discrimination based on national origin), *affd. in part and revd. in part on other grounds en banc sub nom. Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *affd. on other grounds*, 472 U.S. 846 (1985).

83. P. 5 (emphasis omitted); see also pp. 103-04, 242-43.

government's immigration decisions do, in fact, view immigration as an issue that involves the civil rights of immigrants. They see immigrants as human beings with rights that American law must recognize,⁸⁴ and this may be a fair reading of the common impetus behind the 1965 Immigration Act, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. Under this "immigrants' rights" model, immigrants are the moral — and sometimes constitutional — equals of citizens.

The history of the plenary power doctrine reveals two reasons for the link between the immigrants' rights model and closer constitutional judicial review. First, courts that relied on plenary power to uphold the government's immigration decisions typically did so by rejecting immigrants' claims that the government had violated their constitutional rights.⁸⁵ Thus, in the traditional view, plenary power conflicts with immigrants' rights. Against this background, observers have interpreted recent erosion of the plenary power doctrine as a sign that aliens who were once constitutional "outsiders" are slowly entering the constitutional fold and acquiring "rights."⁸⁶

Second, plenary power entrusts the political branches with "immigration law" powers — to decide who can enter and remain in the United States. But immigration law makes up only part of the law that governs aliens' lives. An equally important yet distinct body of law — "alienage law" — governs their status after their arrival.⁸⁷ It addresses, for example, whether aliens have access to public education, welfare benefits, government employment, or the ballot box. Aliens have fuller constitutional rights in these matters than in "immigration."⁸⁸ As plenary power erodes, it is logical to assume that the recognition of aliens' constitutional rights in alien-

84. See, e.g., Sandra L. Jamison, *Proposition 187: The United States May be Jeopardizing its International Treaty Obligations*, 24 DENV. J. INTL. L. & POLY. 229 (1995); Stephen Knight, Note, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HAST. INTL. & COMP. L. REV. 183 (1995); cf. Stephen A. Plass, *The Foreign Amici Dilemma*, 1995 B.Y.U. L. REV. 1189, 1211-15 (discussing a foreign amicus brief filed in support of Haitian asylum seekers).

85. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-91 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

86. See, e.g., Legomsky, *Diversity*, *supra* note 79, at 335 (urging us to see immigrants as "individual human beings, to be judged according to their individual needs and merits"); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 970-71 (noting that the traditional sovereignty-based plenary power doctrine was based on the now disfavored view that "persons were objects, not subjects, in international law") (emphasis omitted).

87. On the elusive distinction between immigration law and alienage law, see Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INTL. L. 201, 203 (1994) [hereinafter Motomura, *Immigration and Alienage*].

88. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971). The tradition to which these decisions belong began with *Yick Wo v. Hopkins*, 118

age law fosters the recognition of "immigrants' rights" in immigration law.

This plenary power versus immigrants' rights construct oversimplifies constitutional immigration law. Immigration law — especially the 1965 Act's repeal of the national origins system — certainly implicates civil rights. But *whose* civil rights? Those of the immigrants who want to come to the United States? Or those of the Americans who have family, employment, racial, or ethnic ties to them?

Peter Brimelow and I do have one thing in common — the belief that immigration policy must serve the national interest. Viewed from that perspective, the immigrants' rights model raises difficult questions. Is every human being a member of our constitutional community? If not, how do we set limits? If we can answer these questions, the immigrants' rights model can help to guide the development of constitutional immigration law. However, because the immigrants' rights model fails to capture the domestic effects of immigration policy, it can *only* help. Constitutional immigration law also requires a model that can capture those domestic effects.

In addition to an immigrants' rights model that focuses on immigrants' constitutional rights, I suggest a national self-definition model that focuses on the rights of those who are already members of the constitutional community.⁸⁹ Citizens are full members. Noncitizen immigrants are not — but they are still members in two important ways. First, alienage is transitional; immigrants must have access to full membership through the legal process of naturalization as citizens and through social processes of integration.⁹⁰ Second, they must be allowed to participate — though not necessarily to the same degree as full members — in choosing new members.⁹¹

Members select new members and thus decide who "we" are as Americans. This is a project of national self-definition.⁹² It in-

U.S. 356 (1886). See Motomura, *Phantom Norms*, *supra* note 69, at 565-67, 583-87; Motomura, *Procedural Surrogates*, *supra* note 71, at 1647-48, 1688-92.

89. For a similar suggestion that we focus on "citizens' rights," see Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, STAN. L. & POLY. REV. (forthcoming 1996) (manuscript on file with author).

90. See Motomura, *Immigration and Alienage*, *supra* note 87, at 212.

91. My definition of *member* is not crucial to the national self-definition model that I propose. One might define member more broadly (for example, to include undocumented aliens) or narrowly (for example, to exclude permanent residents) and still accept the notion that participation in the selection of new members is a right of membership. See generally T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HAST. CONST. L.Q. 915 (1995).

92. Here I build on Motomura, *Immigration and Alienage*, *supra* note 87, at 203; Motomura, *Procedural Surrogates*, *supra* note 71, at 1704. Readers will discern my debt to MICHAEL WALZER, *SPHERES OF JUSTICE* 35-42 (1983), and BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95 (1980).

cludes not only deciding whom to admit and expel, but also providing for each alien's transition from outsider to citizen. This national self-definition model concerns itself more with how immigration decisions affect those who already belong than with how they affect those who want to join. Under this model, immigration decisions have domestic consequences for members and, therefore, those decisions must at least potentially undergo constitutional judicial review.

The real question is not whether immigration is "necessary," as Brimelow puts it (pp. 157-59, 164-68), but whether we are better off because of immigration. To answer this, we need to think about who "we" are. The national self-definition model tells us what is wrong with Brimelow's picture of America being invaded by colored hordes. Contrary to this image, the arrival of immigrants, regardless of their race, benefits a great many of us. And a great many of us welcome immigrants of color. While one critic of *Alien Nation* calls it "an unapologetic attempt to restore the good name of nativism,"⁹³ Brimelow does not speak for all of the "natives." While some natives — mostly of Anglo-Saxon and other European origins — may share his views, many "natives" of more suspect origins probably do not.⁹⁴ Those who fear "they" will overwhelm "us" naively and invidiously ignore those of "us" who not only welcome "them" but also see "them" as vital to our national self-interest.

How would a national self-definition model foster the development of constitutional immigration law? The following discussion, though far short of exhaustive, suggests an agenda for research and thought.

A. Federalism

The national self-definition model affects how we think about the federal-state allocation of power in immigration and alienage matters.⁹⁵ In the immigrants' rights model, the strongest justification for federal preeminence is the "special concern about state, as opposed to federal, propensities to oppress aliens."⁹⁶ The national self-definition model suggests a different, and probably comple-

93. Philip Kasinitz, *Closing the Gates*, *NEWSDAY*, (Apr. 23, 1995), at 32 (reviewing *Alien Nation*).

94. "I'd like to say a word for the nativists." P. 12. For a perceptive analysis of the concept of "nativism," including Brimelow's use of the term, see Linda S. Bosniak, "Nativism" the Concept: *Some Reflections*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan Perea ed., forthcoming 1996) (manuscript on file with author).

95. For more on this aspect of the national self-definition model, see Motomura, *Immigration and Alienage*, *supra* note 87, at 206-11, 214-16.

96. Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 *UCLA L. REV.* 1425, 1436 (1995).

mentary, justification for federal preeminence. In part, this justification is self-evident: In a *national* self-definition project, the federal government can offer justifications for immigration and alienage decisions that a state could not.⁹⁷

As we look more closely at national self-definition, a very real danger emerges that states will adopt different and conflicting responses. Brimelow notes that the effects of immigration vary regionally. He argues that whites are fleeing the coasts to seek refuge in a "white heartland" in the mountain states (p. 69). If this is true — Brimelow offers no supporting data — and it is a problem, it demands a *national* solution, not a variety of separate state initiatives. State efforts to strengthen enforcement of federal immigration laws — including Proposition 187 — elevate the sense of state rather than national citizenship, and thereby undermine the "nation" Brimelow purports to protect.⁹⁸

B. *Members' Rights*

The national self-definition model suggests that the answers to constitutional immigration law questions should depend on how immigration policy affects members.⁹⁹ It brings legal discourse, which currently focuses on whether or not immigrants have constitutional rights, more into line with political discourse, which currently focuses on immigration's effects on racial and ethnic communities and on American society generally. A shared judicial and political concern with *members'* rights would open a more fruitful dialogue between the judiciary and the political branches.

Thus far, the Supreme Court has refused — consistent with the plenary power doctrine — to entertain claims that immigration decisions infringe on citizens' constitutional rights. For example, in *Kleindienst v. Mandel*,¹⁰⁰ the Supreme Court rejected the argument that the ideologically based exclusion of a Marxist violated the First Amendment rights of the citizens who invited him to visit universities in this country. Similarly, in *Fiallo v. Bell*¹⁰¹ the Supreme Court rejected an equal protection challenge to an immigration statute that granted mothers, but not fathers, the chance to obtain immigrant visas for their children born out of wedlock.

97. If national self-definition is a uniquely federal enterprise, federalism in immigration matters may be quite different from federalism generally.

98. While Brimelow seems to endorse restrictionist state measures such as California's Proposition 187 (pp. 259-62, 263), I suspect that he would prefer federal laws that would accomplish the same goals nationwide.

99. Although Brimelow sometimes seems to see that citizens' rights are at stake, he readily dismisses them. See pp. 105-06, 119-20.

100. 408 U.S. 753, 765-70 (1972).

101. 430 U.S. 787 (1977).

Although *Mandel* and *Fiallo* rejected the citizens' rights argument out of hand,¹⁰² plaintiffs in immigration cases continue to cast their constitutional challenges in these terms. For example, several plaintiffs have challenged the government's restrictions on Haitian asylum seekers' access to volunteer legal counsel.¹⁰³ These citizen plaintiffs relied on their First Amendment right to provide counsel, not on the aliens' Fifth Amendment right to receive it.¹⁰⁴ Yet, judges and even the plaintiffs themselves seem to view the citizens' rights argument as a litigation tactic to curtail plenary power and not as an analytical construct that might, in time, provide a coherent alternative to an immigrants' rights model.

1. *Limiting the Right to Choose New Members*

In the context of race and ethnicity, the national self-definition model recognizes that immigration law implicates the members' rights to choose new members. Since any new Americans will participate in and shape American society and politics, the act of choosing them is central to a citizen's right to participate in this national self-definition project. In this sense, choosing new members is akin to choosing representatives in the political process. Accordingly, it may be a fundamental right for purposes of equal protection analysis, akin to the right to vote.

An immigration law that chooses immigrants by race or ethnicity limits — in ways that raise serious constitutional questions — the members' right to choose new members. Most significantly, an immigration law that excludes members of a particular race or ethnic group may cast a stigma on that group.¹⁰⁵ Unless the government can show a compelling interest, any such provable stigma violates the bedrock equal protection prohibition against treating any person as inferior to another by virtue of race or ethnicity.¹⁰⁶

102. *Mandel*, 408 U.S. at 767-69; *Fiallo*, 430 U.S. at 794-95.

103. See, e.g., *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993); *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992).

104. See also *Ukrainian-American Bar Assn. v. Baker*, 893 F.2d 1374 (D.C. Cir. 1990) (discussing the claim by the Ukrainian-American Bar Association that the government violated its First Amendment right to associate by refusing to inform aliens of its offer to free legal counsel); cf. *Ben-Issa v. Reagan*, 645 F. Supp. 1556, 1562 (W.D. Mich. 1986) (finding that a citizen's constitutional rights were not implicated by the denial of visa to her alien husband). For a more favorable response to this sort of argument, see *Manwani v. United States Dept. of Justice*, 736 F. Supp. 1367, 1379-82 (W.D.N.C. 1990).

105. Cf. *Northeastern Florida Chapter of the Associated General Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993) (noting that, in equal protection cases, injury in fact "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

106. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993) (asserting that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (asserting that racially segregated schools convey to blacks "a feeling of inferiority as to their status in

In this vein, Professor Louis Jaffe criticized the retention of the national origins system in 1952 by writing: "Its quota provisions . . . give needless offense to many of our citizens and to the people of other countries."¹⁰⁷ A generation later but in like manner, Professor Gerald Rosberg argued that immigration decisions may stigmatize citizens. He wrote: "When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry."¹⁰⁸ Thus, he said, "Congress cannot implement a policy that has the effect of labeling some group of citizens as inferior to others because of their race or national origin."¹⁰⁹

By this reasoning, a national self-definition model may mean that the judicial scrutiny of some immigration decisions should be as close as the judicial scrutiny of alienage questions. This outcome seems counterintuitive, because the plenary power doctrine has historically meant *less* constitutional judicial review in immigration cases than in alienage cases. But equally close review may indeed be appropriate in immigration decisions that infringe on citizens' rights. Choosing the immigrants who may enter in the first place is as important to national self-definition as deciding what rights those immigrants will have after they enter. Stigmatizing citizens by excluding immigrants of like ancestry poses as many constitutional difficulties as alienage discrimination.¹¹⁰

2. *The Redistricting Analogy*

When an immigration policy relies on racial or ethnic distinctions, more than stigma is at stake. The policy may extinguish or stunt the growth of a racial or ethnic community. It may also se-

the community that may affect their hearts and minds in a way unlikely ever to be undone"). For an illuminating discussion of stigma as a constitutional concept, see Jerry Kang, *Negative Action Against Asian-Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 21-36 (1996).

107. Louis L. Jaffe, *The Philosophy of Our Immigration Law*, 21 LAW & CONTEMP. PROBS. 358, 358 (1956).

108. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327.

109. *Id.* See also *id.* at 326 ("[A] classification that distinguishes among citizens on grounds that are disfavored or suspect must receive special scrutiny. Thus, if Congress were to decree that white citizens can confer an immigration preference on their alien relatives but black citizens cannot, one can hardly believe that the Court would uphold the classification.").

110. As Professor Rosberg notes:

Many aliens are indistinguishable from citizens, and discrimination against them may involve little stigma. By contrast, discrimination against the foreign-born or against persons perceived as foreign because of their ethnic or racial background will inevitably produce much greater stigma. But at this point one has moved from discrimination on the grounds of alienage to discrimination on the grounds of race or national origin, and there strict scrutiny is obviously required.

Id. at 304.

verely limit a community's ability to participate meaningfully in public processes and to work toward its vision of the American future.¹¹¹

The national self-definition model suggests that immigration and redistricting have more in common with each other than with other areas of constitutional law. Both involve threshold determinations of membership. Immigration law decides membership directly, and redistricting law determines the political effects of membership. In short, both construct a political reality.

Legal schemes also govern immigration and voting in similar ways. While the constitutionally sensitive factors of race and ethnicity lie at the heart of both processes, these processes share a polycentric complexity that has made courts wary of seriously reviewing them. Much of the complexity lies in the elusiveness of any baseline for finding violations.¹¹² What, for example, is a "normal" number of Irish or Haitians to be admitted to the United States?

Consider, then, how Professor Rosberg's comment on immigration law also applies to redistricting:

The formulation of an immigration policy requires the drawing of an extraordinary number of lines, many of them necessarily arbitrary. . . . The Court is undoubtedly fearful of becoming enmeshed in the process of formulating immigration policy. Too much judicial scrutiny could bring down the entire system of intricate and interconnected rules, reducing it all to a shambles.¹¹³

In turn, consider how the following comment on redistricting from the Supreme Court would also apply to immigration policy:

Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.¹¹⁴

111. See generally HING, *supra* note 35, at 190. ("Immigration and refugee policies have influenced gender ratios, where people live, how people live, the jobs they have, their income, as well as personal identity.").

112. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 620 (1993) ("Unlike employment decisions or academic admissions, redistricting does not readily admit a neutral baseline against which 'bizarrely' shaped districts can be measured.").

113. Rosberg, *supra* note 108, at 324-25; cf. *City of Memphis v. Greene*, 451 U.S. 100, 126 (1981) (upholding a street closure allegedly intended to separate a predominantly black neighborhood from a predominantly white one; "[p]roper management of the flow of vehicular traffic within a city requires the accommodation of a variety of conflicting interests").

114. *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995).

Drafters of redistricting plans know the racial composition of the districts they create, just as those who make immigration law know the race or ethnicity of those they admit or exclude.

Both redistricting and immigration law require some essentialism — the attribution of political or cultural character to individuals based on race or ethnicity. After all, redistricting and immigration involve decisions about groups, not individuals. Essentialism would seem to violate the constitutional principle that government may not treat individuals “as simply components of a racial, religious, sexual or national class.”¹¹⁵ Under the national self-definition model of immigration law, however, the essentialism objection is less persuasive; any essentialism would focus on would-be immigrants, not citizens.

In both immigration and redistricting, race-conscious decision-making is more constitutionally palatable when it helps groups that have suffered past discrimination. However, the U.S. immigration policy toward Haiti may *harm* a historically disadvantaged group — namely, black Americans. In contrast, when Congress adopted the precursor of the current “diversity visa” program in 1986, many of its supporters sought to increase the number of European immigrants, especially Irish, who had been favored in U.S. immigration law until 1965.¹¹⁶ Indeed, for each of several years the program set aside 16,000 out of 40,000 visas for Irish nationals.¹¹⁷ Under the current version of the program, immigrant visas are distributed through an annual lottery, which only nationals of “low admission” countries may enter.¹¹⁸

V. THE NATIONAL SELF-DEFINITION PROJECT

Constitutional immigration law must acknowledge that immigration policy shapes racial and ethnic communities. The national

115. 115 S. Ct. at 2486 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

116. See Act of Nov. 29, 1990, Pub. L. No. 101-649, § 132, 104 Stat. 4978, 5000; Act of Nov. 15, 1988, Pub. L. No. 100-658, § 3, 102 Stat. 3908, 3908-09; Immigration and Reform Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439. On the desire to restore European, and particularly Irish, immigration, see 136 CONG. REC. E3118 (1990) (remarks of Rep. Donnelly); *Reform of Legal Immigration: Hearings on H.R. 5115 and S. 2104 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 269, 542 (1988) (statements of Thomas J. Flatley and Donald Martin); H.R. REP. 100-1038, 100th Cong., 2d Sess. (1988); see also *Irish-Americans Praise New Immigration Bill*, N.Y. TIMES, Oct. 7, 1990, at 47.

117. See Immigration Act of 1990, Pub. L. No. 101-649, § 132(c), 104 Stat. 4978, 5000 (allocating at least 40% of the diversity visas to nationals of the foreign state that received the most visas under the previous version of the diversity visa program).

118. See generally THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, *IMMIGRATION: PROCESS AND POLICY* 129-31 (3d ed. 1995); Legomsky, *Diversity*, *supra* note 79, at 329-33. See also 61 FED. REG. 2862, 2862-63 (1996) (registration notice for Diversity Immigrant Visa Program).

self-definition model rightly shifts the focus away from the Haitians and Irish who want to immigrate to the Haitian-American and Irish-American citizens and permanent residents who already live here. This shift admittedly prefers members over those who want to join. Yet, this shift seems vital. National cohesion requires that Americans have faith that they have a role in choosing new Americans.

Brimelow contends that "multiculturalism" undermines the already difficult integration of immigrants. He views integration in racial or ethnic terms, and he believes that nonwhite immigration decreases national cohesion because nonwhites "assimilate" poorly (pp. 269-74). It is true that a society risks serious divisions if it admits immigrants without integrating them. In fact, many immigrants are skeptical of "multiculturalism" because they see it as a way to keep them distant and disenfranchised. Moreover, the integration of immigrants into the receiving society is a much more complex process than Brimelow acknowledges. Admission only begins the integration process. The bundle of rights that immigrants enjoy as they make the transition to citizenship is just as crucial, and while only the first generation of immigrants catches Brimelow's eye, the integration process takes longer.

Brimelow's solution to the national cohesion problem — to use immigration policy to make America more white — will splinter America like nothing else. If we admit or exclude immigrants on the basis of race, we are more likely to tolerate racial distinctions in the transition to citizenship and to tolerate the divided society that will result. While Brimelow rails against multiculturalism, his proposals foster a different kind of multiculturalism — white separatism.¹¹⁹

The national self-definition model will not necessarily insulate racial and ethnic groups from dilution over time. The effects of judicial review will vary. Often, I suspect, judicial review will leave intact the immigration decisions of the political branches, because judges will find no workable standards to guide their intervention. For example, persuasive proof of invidious race-based intent is often difficult to present in constitutional litigation.¹²⁰ Inquiries into legislative intent become especially complex when immigration law is written in nonracial language that has a disproportionate impact by race or ethnicity.¹²¹ History shows us how immigration stat-

119. See p. 124 ("[T]he evidence that multiracial societies work is — what shall we say? — not very encouraging.").

120. See the discussion of the "intent" requirement *supra* notes 80-81.

121. See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (noting the difficulties in proving a discriminatory intent of the drafters of California Proposition 187). The limits of an intent-based equal protection doc-

utes can be drafted neutrally when the drafters intended to discriminate. For example, the 1924 Act barred Japanese immigrants through the apparently neutral exclusion of "aliens ineligible to citizenship."¹²² Likewise, the diversity visa statute — though drafted in neutral terms¹²³ — was intended to increase the number of European immigrants.¹²⁴ Courts will need time to find workable approaches to the intent question in the immigration context, much as they currently struggle with it in the redistricting context.

Whether or not we need more judicial intervention, we do need a serious and comprehensive discussion about when it should occur. To propel that discussion, courts should add to the nascent body of constitutional immigration law by introducing a national self-definition model that focuses on the rights of citizens and permanent residents. This model, as it happens, will expose the constitutional flaws in Brimelow's proposals far more effectively than an immigrants' rights model can. And a national self-definition model will allow courts to begin a long overdue dialogue with the political branches on matters of race and ethnicity in immigration policy.

trine seem particularly evident in the immigration field. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

122. See *supra* note 34.

123. See Immigration and Nationality Act § 203(c), 8 U.S.C. § 1153(c).

124. See sources cited *supra* note 116; cf. Wu, *supra* note 89 (discussing the proposed application of constitutional limits to immigration laws that in operation focus on race as opposed to alienage); Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMPLE POL. & CIV. RTS. L. REV. 301, 301 (1995) (discussing "the last vestiges of race-biased immigration law and practice").