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Richard A. Boswell

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Racism, racial discrimination and xenophobia are not naturally instinctive reactions of the human beings but rather a social, cultural and political phenomenon born directly of wars, military conquests, slavery and the individual or collective exploitation of the weakest by the most powerful all along the history of human societies.¹

I. INTRODUCTION

While race and class have been a constant and recurring theme in U.S. immigration law, it is only recently that legal scholars have begun to give it

¹. President Fidel Castro of the Republic of Cuba, Address at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), Durban, South Africa, Sept. 7, 2001 (on file with author). While one can legitimately criticize the human rights record of Cuba, the statements of the Cuban President nevertheless, have a ring of truth.
serious attention. U.S. government leaders and others in public life make repeated references to the fact that we are “a nation of immigrants,” yet as a nation there has been an unwillingness to acknowledge the fact that since the earliest days of the republic, immigrants have been excluded for reasons of race and class, thus experiencing great difficulties integrating into the society. This difference between rhetoric and reality in U.S. immigration policy has created an immigration myth. This, and other similar immigration myths, are problematic because they cloud our national self-perception, thereby precluding positive immigration reform. Other countries likely share this national self-image myth. However, in the case of the United States, it is particularly problematic because it tends to obfuscate serious structural problems with the immigration system. These problems in U.S. immigration policy have carried over since the nineteenth century and were for the first time only partially addressed in the United States in legislative immigration reforms of 1965.

It is not my purpose to engage in a comparative investigation of racism—that is, to explore whether the United States is better or worse on racial exclusion than other countries. Rather, my purpose is to describe some of the more pernicious and institutionalized racial barriers in U.S. immigration laws and to offer some specific recommendations for their correction. Additionally, I will argue that progressive immigration reforms that focus on removing some of the racial exclusionary barriers are possible,

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4. Peter H. Schuck notices some of these contradictions in his article Citizenship in Federal Systems, 48 AM. J. COMP. L. 195, 208 n.56-57 (2000) and accompanying text. To be sure, there are positive aspects of the U.S. immigration system such as the provisions that allow permanent residents to become citizens and thereby be integrated in the national polity. But the focus of this article is not on the positive aspects of the U.S. immigration system.

5. For example, Australia maintained a “white-only” immigration policy beginning with its Immigration Restriction Act of 1901 until the 1970’s during which time non-white asylum seekers faced daunting challenges in immigrating to that country. MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 13 (1998); Robert Birrell, Immigration Control in Australia, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 108 (1994); HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA’S CONSTITUTION 100-11 (1997). Germany has heretofore had very restrictive citizenship rules. KAY HAY HAIBROMNER, CITIZENSHIP AND NATIONHOOD IN GERMANY: A CHAPER IN IMMIGRATION IN EUROPE AND NORTH AMERICA 67-68 (1989).
even in the present climate of increased xenophobia in the United States and despite our national self-image myth.

The central focus of this discussion will revolve around the history of U.S. immigration law and will identify the needed reforms within the structural edifices of racism in U.S. immigration policies. In presenting an approach for dealing with the structural problems of U.S. immigration law, I will focus on the efforts that advocates have put forth in influencing some of the language of the Declaration and Programme of Action produced at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban, South Africa in September 2001 and the effects that post “9/11” U.S. immigration policy and international relations will have on the possibilities for U.S. immigration reform.

II. BRIEF HISTORY OF RACIAL EXCLUSION IN U.S. IMMIGRATION POLICY

From the early days of the new nation, the United States instituted far-reaching forms of exclusionary measures to keep out foreigners. In the earliest days of the Republic, U.S. laws did not even consider African-Americans and others who were not “free white persons” in the calculus of persons worthy of citizenship. Indeed, it was not until the end of the Civil War in 1865 that the United States officially considered African-Americans to be citizens of the United States. Before the Civil War, the Supreme Court had ruled that a person could be born in the United States and still not be

6. NGO FORUM 2001, REPORT OF THE WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE (WCAR), Durban, South Africa, Aug. 31-Sept. 8, 2001 (on file with author). The “Declaration” is a statement agreed upon and adopted by the delegates at the WCAR that represents the consensus of the delegates regarding the problems that needed to be addressed. In essence, the Programme of Action is the “action plan” that accompanies the document participating states agreed upon at the WCAR. This document is a road map for the conference participants and includes concrete questions addressing relevant problems upon which the conferees agree to focus at the WCAR.


7. See Naturalization Act of 1790, 1 Stat. 103 (1790) (repealed 70A Stat. 644 (1956)). The 1790 Naturalization Act was enacted because the Constitution did not define the word “citizen.” In addition to limiting citizenship to “free white persons,” the 1790 Act provided the first uniform system for naturalization and the conferment of citizenship. See IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 42-46 (1996) [hereinafter HANEY-LÓPEZ, WHITE BY LAW], for an excellent discussion of racial exclusion from citizenship analyzing cases applying the naturalization prerequisite that a non-citizen be “white” before that person could naturalize.

8. See U.S. CONST. amend. XIV, which provides, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside ....” The notion that a person could be born in the United States and not be a citizen was upheld by the Supreme Court in Dred Scott v. Sandford, 60 U.S. 393, 399 (1856). The Fourteenth Amendment extended citizenship to all persons born in the United States. See JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 14 (1991).
considered a citizen. The Fourteenth Amendment, enacted after the Civil War, extended citizenship to all persons born in the United States. But despite the Fourteenth Amendment, U.S. laws continued to preclude Native Americans from citizenship or its benefits until the late 1880's and precluded many other groups from citizenship, such as Chinese and other Asians. These exclusion provisions remained in place until nearly halfway through the twentieth century.

Many immigrants chose to move to the United States because of increasingly intolerable situations in their homeland. Most U.S. immigrant groups tell similar stories of their journey to the United States. They describe their journey and treatment as a narrative of worsening conditions in their ancestral land causing them to migrate, their voyage to the United States and the challenge to attempt to build a better life for their families in their new home. Interspersed in this story of migration, nearly every immigrant group also depicts a period of difficulty and hostility at the hands of the immigrant group who preceded or overlapped them. For example, many Irish immigrants came to the United States during a series of potato famines in the early part of the 1800’s. Their numbers swelled to a level where they comprised approximately forty percent of the foreign born population in the United States by the middle of the century. Upon arrival, the Irish, most of whom were poor and unskilled, took whatever work they could find. In time, they advanced within their jobs, becoming foremen and bosses. Eventually, other immigrants took their places in the positions formerly held by Irish immigrants. The Irish experience was not an easy one and their

9. Dred Scott, 60 U.S. at 399.
10. U.S. Const. amend. XIV; see also Shklar, supra note 8, at 15.
11. See the Act of Feb. 8, 1887, ch. 119 § 6, 24 Stat. 388, 390 (1887); Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that the Fourteenth Amendment did not apply to Native Americans born in the United States because they were not considered to have been born "subject to the jurisdiction" of the United States).
increasing numbers caused much hostility among those immigrants who had arrived earlier; hostility which was directed primarily toward their differences—most Irish immigrants were Catholic.\textsuperscript{18}

While not all of the difficulties encountered by the early immigrants were attributable to race, those not attributed to race were connected to nativist or xenophobic fears. Since the early colonists viewed themselves as superior to the native inhabitants, it should not be surprising that the colonists viewed themselves as superior to the new immigrants. Colonists consistently treated members of different groups with much hostility. The nativist movement of the 1830’s was, for the most part, anti-Catholic and included violent attacks on the newly arrived immigrants. For example, California, which was the destination of many immigrants both from the East and Asia, was a hotbed of anti-Irish, anti-Chinese, anti-Chilean and anti-Australian activities.\textsuperscript{19} Each successive wave of U.S immigrants could relate a similar story of their treatment, with the only significant difference being the degree and speed with which they were able to integrate into American society. The immigrants’ story has been one of difficulty and adversity. The newcomers were consistently viewed as the cause of social and economic ills, and were the victims, not the beneficiaries, of the law.\textsuperscript{20}

Immigrants’ success in a new country often depends on their ability to assimilate. Ian Haney-Lópe, and other legal scholars, while critiquing the use of “race,” describe this assimilation in racial terms as the notion that every group which struggled against oppression in the United States had to, in effect, “become white” because whiteness was the measure of full membership in the American community.\textsuperscript{21} As a legal matter, in order for an immigrant to naturalize he would have to be white. Similarly, as a social

\textsuperscript{18} It was during this period that groups such as the Ku Klux Klan, the American Protective Association and the so-called Know-Nothing party were formed, in part to combat the wave of Catholics immigrating to the United States. See Eric Foner, \textit{The Story of American Freedom} 187-92 (1998).


\textsuperscript{20} As Gerald Neuman notes, there was an extensive regime of state laws that imposed restrictions on immigrants in the early years of the nation’s history. See Gerald L. Neuman, \textit{Strangers to the Constitution: Immigrants, Borders, and Fundamental Law} 21-43 (1996) [hereinafter Neuman, Strangers]; Gerald L. Neuman, \textit{The Lost Century of American Immigration Law}, 93 Colum. L. Rev. 1833, 1841-83 (1993) [hereinafter Neuman, The Lost Century]. Professor Neuman’s work also challenges the idea that immigration was unrestricted in the early days of the nation. \textit{Id.} at 1834.

matter, he would have to overcome these hurdles. Therefore, in becoming
Americans, each group would have to show that they were white. While
the struggle to “become white” might have been attainable by some
immigrants of the past, it is increasingly less of an aspiration for some and
unattainable for others. Indeed, the struggle for many contemporary
immigrants is that they cannot become white. This is true because present
day America seems to be in a period of transition, changing in the last
several decades from a white nation with European culture to a much more
diverse and international society, in which neither whiteness nor the concept
of race can describe what binds its people together.

That which has been occurring in the United States in terms of the
composition of its population has also been happening in many of the major
cities of other industrialized countries. It also seems that this demographic
change has caused increased tensions in the receiving countries—a
phenomena born out in a recent report by the U.N. showing that an
increasing number of these countries view their immigration numbers as too
high.

The clash between rhetoric and reality, which is reflected in U.S.
immigration policy, is not uniquely American. While other countries are

22. See, e.g., NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 2 (1995); KAREN BRODKIN,
HOW JEWS BECAME WHITE FOLKS: AND WHAT THAT SAYS ABOUT RACE IN AMERICA 138-75

23. See, e.g., U.S. v. Thind, 261 U.S. 204 (1923), which is representative of many cases
where the applicant, because of the naturalization laws, had to show that they were “white” by law.
In Thind, the applicant was a Hindu of a high caste and the U.S. government argued that because he
was not white he was ineligible for citizenship. Id. at 206. The applicant argued that he came from
the Punjab and was of the Caucasian or Aryan race, an argument that the Court ultimately rejected
on grounds that the prohibition was intended to apply to all Asiatics. Id. at 214. Immigrants from
other countries made similar arguments, but the law remained in place until 1952. With the removal
of a “white” requirement for naturalization, one logically, at least for purposes of legal eligibility,
did not need to prove he or she was white.

24. As Sharon Stanton Russell points out, in 1965 there were 75 million international
migrants and by 1990 there were 120 million representing an increase of more than fifty percent of
the countries participating in migration. Sharon Stanton Russell, International Migration: Global
Trends and National Responses, 20 FLETCHER F. WORLD AFF. 1,2 (1996).

25. Id. at 7 (citing UNITED NATIONS, POPULATION DIV., DEP’T FOR ECON. AND SOC. INFO.
AND POL’Y ANALYSIS, DRAFT WORLD POPULATION MONITORING 1993 (N.Y., Feb. 23, 1994),
ESA/P/WP.121, 410 (Table VI.12)).

Reactions in countries of destination vary widely, can change with time, and may differ
depending on the sources and circumstances of the migrants. In both developed and
developing countries, those with booming economies and labor shortages have initially
welcomed labor migrants, only to become less welcoming or even hostile to immigrants
when economic conditions (and with them, domestic political conditions) deteriorate.

Id. at 8.

26. Demetrios Papademetriou suggests that all countries seem to share in this dilemma over
immigration. See Demetrios G. Papademetriou, Reflections on International Migration and Its

Remarkably, the duration and depth of a society’s engagement with immigration does
not seem to inoculate it against excessive reactions to immigration. In fact, during
hostile, or at times, distrustful of foreigners, the United States is different because it perceives itself as a land of immigrants that welcomes newcomers. While it might not be accurate to state that U.S. immigration law and policy is wholly dominated by race, a historical review of legislative enactments leads one to conclude that race has been and continues to play a prominent role.

As Gerald Neuman pointed out, this clouded self-perception that the United States is a welcoming nation of immigrants and the recurring myths about immigration can have negative consequences on serious reform efforts. The prevalence of myths about periods when consensus about most forms of immigration collapses (as it has done repeatedly in recent years in virtually all countries) how deeply a society's evolution and economic progress may be tied to organized immigration, and the experience that society has gained in managing it, seem to have a limited effect on how fractious the politics surrounding the issue will be.

Id. at 935.


The welcoming of immigrant theme is a recurrent one in the discussions of U.S. history. In President Kennedy's book which was part of the campaign for immigration reform in the 1950's, he noted that:

The continuous immigration of the nineteenth and early twentieth centuries was thus central to the whole American faith. It gave every old American a standard by which to judge how far he had come and every new American a realization of how far he might go. It reminded every American, old and new, that change is the essence of life and that American society is a process not a conclusion.

JOHN F. KENNEDY, A NATION OF IMMIGRANTS 68 (Rev. ed. 1964) [hereinafter NATION OF IMMIGRANTS]. To be sure Kennedy acknowledged that there were also significant challenges for immigrants in the United States. Id. at 77-79.

For an excellent exploration of the role that race has played in U.S. history, see FONER, supra note 18, at 130-37.

As Neuman described, the most widely held myth of immigration is that the United States welcomes immigrants with open arms. Id. Another myth is that the present day rate of migration is the largest in U.S. history. Id. In fact, current immigration to the United States has been less than one million per year during the last decade. U.S. Dep't of Justice, Immigration and Naturalization Service, Office of Planning, Statistics Div., Annual Report Fiscal Year 2001, 5 (Aug. 2002). During a comparable period at the turn of the last century the numbers were slightly larger. MAURICE R. DAVIE, WORLD IMMIGRATION: WITH SPECIAL REFERENCE TO THE UNITED STATES 217 (1949). At the same time it should be recognized that there has been much controversy regarding immigration statistics. See e.g. GEN. ACCT. OFF., GAO/GGD-98-164, Immigration Statistics: Information Gaps, Quality Issues Limit Utility of Federal Data to Policymakers (1998). Another myth is that most immigrants come from Mexico. Historically, immigration from Canada to the United States far exceeded that from Mexico from the earliest days of the republic until 1955. See GEORGE THOMAS KURIAN, DATAPEDIA OF THE UNITED STATES 1790-2000, 72-73 (1994). In the period between 1820-1930, 2.9 million immigrants came from Canada and approximately 750,000 from Mexico. See DAVIE, supra at 208. Immigrants from Canada made up seventy percent of the total immigrants to the United States during this more than 100-year period. Id. In fact, Mexican and Canadian immigration to the United States was not vastly
racially neutral immigration regimes discourages and stymies reform efforts because it prevents U.S. immigration legal reformers from truly understanding our immigration problems. Therefore, a very important question is whether as a society we are able to explore these issues and understand the degree to which race continues to dominate our national policy and whether this understanding will help us move towards positive reform.

A. Mexican, Asian and African Exclusion

While much can be said about the mistreatment of European immigrants in the United States, such as the Irish, the experience of non-Europeans in U.S. immigration law has been and continues to be much worse. Several legislative actions relating to non-European immigrants bear special mention because of their durable and long-lasting consequences. Legislation such as the previously mentioned "white only" rules of immigration, the multiple efforts to exclude Asians and persons of African descent and the national origin quotas had a significant affect on the migration pattern of non-European immigrants. As will be described later, the national origin quotas were specifically designed to perpetuate earlier racial exclusion—rules that were later modified by the establishment of the immigrant preference system in 1965.

Early immigration laws were consciously designed to treat all "non-white" persons as ineligible for U.S. citizenship. At the same time that U.S. leaders were preventing non-white immigration, they were also conquering and forcibly removing indigenous persons to "reservations" or relegating them to positions of servitude. The concept of equality was non-existent. Enslaved Africans, including their children born in the United States were likewise treated as non-persons. The United States similarly treated the "non-white" inhabitants of the Western territories formerly under the control of Mexico. As with other "non-whites," persons of Asian descent were

30. See Naturalization Act of 1790, 1 Stat. 103 (1790) (restricting naturalization to "free white persons"), repealed 70A Stat 644 (1956).


32. HANEY-LÓPEZ, WHITE BY LAW, supra note 7, at 15, 23-33.

33. See Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952). The 1921 Act was made permanent in 1924 with the enactment of the Johnson-Reed Act, 43 Stat. 153 (1924).

34. See discussion infra note 41 and accompanying text.


36. For an excellent discussion of conditions on the southern border of the United States, see Mae M. Ngai, The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921 - 1965, 21 LAW & HIST. REV. 69, 80-89 (2003). In the American construct, a person was defined by whiteness and while for some purposes Mexican-Americans were
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ineligible to become citizens and, beginning in 1882, were barred from admission, a bar that continued until the enactment of the McCarran-Walter Act in 1952.37

This description of the codified U.S. laws was only a prelude to the kind of treatment that non-whites experienced up to, through and beyond the 1952 McCarran-Walter Act. This was a period in which racism maintained a very strong presence throughout the United States and racial violence was common.38 Because of the rampant racist consciousness throughout the United States, little legislative effort was needed to dissuade persons from African countries from coming to the United States, even during periods when immigration was permitted. The racial climate was so strong that significant efforts were made to persuade African-Americans to leave the United States and emigrate to the newly formed Republic of Liberia and other places.39 Immigration statistics maintained by the United States are testimony to the statutory and social bars to immigration facing persons from these banned regions of the world.40

regarded as "not black," however, they were still regarded as something in-between and therefore prevented from assimilating. id.


38. See FONER, supra note 18, at 242-43.

39. For an interesting online history of the colonization of Liberia prepared by the Library of Congress, see The African-American Mosaic, Colonization Liberia, available at http://www.loc.gov/exhibits/african/afam003.html (last visited Feb. 14, 2003). Founded by freed slaves in 1821, Liberia became an independent country in 1847 and is the oldest African Republic. id. Earlier voyages to what is now Liberia occurred in 1815. id. The forces involved in the movement, which resulted in the encouragement (and financing) of African-American migration to Liberia, was a group called the "American Colonization Society." id. This society was composed of philanthropists, clergy, abolitionists and slave owners, all of who believed that freed slaves could never assimilate into the American society and therefore returning them to Africa was the preferable solution. id.

40. For example, African immigration during the height of the great immigration of the early 1900's was negligible. In the period from 1901-1910, a total of 7,368 persons were admitted to the United States from Africa with the highest number of immigrants, 1,486, coming in 1907 and the lowest number, 37, coming in 1902. See U.S. Dep't of Commerce, Bureau of Statistics, A Statistical Abstract Supplement, Historical Statistics of the United States: Colonial Times to 1957-58 (1960). During this same period approximately 8.7 million persons immigrated to the United States. See DAVIE, supra note 29. It was only in the period after World War II that Mexican migration accelerated, since during the 1800's a substantial number of immigrants came from Canada, and one could conclude were mostly white. id. For example, in the period from 1870-1890 and 1910-1930 Canadian immigrants made up two-thirds of all immigrants and in 1924 alone more than 200,000 Canadians came to this country. id. at 210. In 1930 and 1931, the number of Africans admitted under the quota was 273 and 206 respectively for each these years. See MARION TINSLEY BENNETT, AMERICAN IMMIGRATION POLICIES 68 (1963). The non-quota African immigrants admitted in 1930 and 1931 were 117 and 71 for these years. id. at 69.
B. The National Origin Quota

The most expansive period of immigration in U.S. history occurred from 1900-1920, a period in which twenty million new immigrants arrived.\(^41\) This period of immigration was spurred by the increased demand for labor during America’s growth in the Industrial Revolution.\(^42\) During this same period, many U.S. citizens migrated within its borders. Much of this internal or domestic migration consisted of African-Americans and poor whites traveling from the South to the burgeoning northern cities as well as to the West.\(^43\) By 1917, Congress began to impose stricter controls on foreign migration.\(^44\) Legislation enacted that year created the so-called “Asia-Pacific Triangle,” otherwise known as the Asiatic Barred Zone, which was intended to completely exclude Asians from the United States.\(^45\) Two years earlier, U.S. leaders made an effort to exclude all persons of African ancestry.\(^46\) These efforts reflected the widely held notion that racial mixing would cause severe economic and social problems.\(^47\) By 1921, in an effort to further curtail the immigration restrictions established in the 1917 legislation, Congress enacted a temporary quota law that limited the number of persons who could immigrate to 3% of the population of that nationality living in the United States in 1910.\(^48\) This was just part of the legislation that eventually formed the National Origin Quota in 1924. The total annual immigration

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41. Especially when one takes into account the total U.S. population, that in 1900 was approximately 76 million and in 1920 was approximately 106 million, this was a major period of migration. U.S. CENSUS BUREAU, Historical National Population Estimates, July 1, 1900 to July 1, 1999 (2000), available at http://www.census.gov/population/estimates/nation/popclockest.txt (last visited Aug. 4, 2003).

42. This time, sometimes referred to as the “Gilded Age,” was also a period of great insecurity, class divisions and conflict causing increased sentiments of nativism and xenophobia. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 TEX. L. REV. 1, 257-61 (2002).

43. BLACKS IN WHITE AMERICA SINCE 1865: ISSUES AND INTERPRETATIONS 171-202 (Robert C. Twombly ed., 1971). See FLORETTE HENRI, BLACK MIGRATION: MOVEMENT NORTH 1900-1920 49-80 (1975), for an excellent historical description on this migration. Indeed, the curtailment of migration as a result of later-instituted immigration restrictions may have fueled even more migration by African-Americans to northern industrial cities; See Barry C. Feld, Race, Politics and Juvenile Justice: The Warren Court and the Conservative “Backlash,” 87 M N N. L. REV. 1447, 1462 (2003).

44. See The Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917) (codifying the existing grounds of inadmissibility and prohibiting the admission of illiterate people in an effort to control immigration from southern and eastern Europe).


46. However, while the bill had sufficient support in the Senate, supporters were unable to win its passage in the House of Representatives.


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quota in 1910 was set at 350,000.\textsuperscript{49} At that time, persons from the world's Western Hemisphere were exempt from the quota if the country of their nationality was an independent nation and they had lived in the United States for at least one year.\textsuperscript{50} The clear purpose of the 1910 national origin quota was to "confine immigration as much as possible to western and northern European stock."\textsuperscript{51} The national origin quota was made permanent in 1924 by enactment of the 1924 National Origins Act which lowered the annual quota of immigrants allowed into the United States to 150,000, and the nationality-based limit was set at 2% of the members of that nationality already represented in the United States according to the 1890 census.\textsuperscript{52}

Between the time of the National Origins Act of the 1924 and the 1965 Immigration Act, Congress enacted very little immigration legislation. One act Congress took during that period was to deport Mexican-Americans. Immigration to the United States had fallen significantly after the Great Depression, and in the 1930's the government embarked on a program of mass deportations of nearly a half-million Mexican-Americans, including U.S. citizens, under a program called the "repatriation campaign."\textsuperscript{53} It was during this period that the modern perception of immigration deluge and uncontrollable borders began when the restrictions created a new class of "illegal aliens;" most notably along the U.S.-Mexican border.\textsuperscript{54} Consequently, most of the immigration legislation enacted after the deportation of Mexican-Americans dealt primarily with issues of security and reflected fears of political instability.\textsuperscript{55} During this period, the United States also admitted more than 700,000 immigrants, including a large number of European refugees as well as spouses, children and fiancés of U.S. servicemen.\textsuperscript{56} The United States made all of these admissions without

\begin{itemize}
\item \textsuperscript{50} Effectively, this legislation placed the brunt of the national origin quota on many of the Caribbean nations that had not become independent at the time.
\item \textsuperscript{51} U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 8 (1980) [hereinafter THE TARNISHED GOLDEN DOOR].
\item \textsuperscript{52} Act of 1924, Pub. L. No. 139, 43 Stat. 153 (1924).
\item \textsuperscript{54} For an excellent discussion of the political and legal climate of this period, see Ngai, supra note 36, at 70-76.
\item \textsuperscript{55} In 1940, Congress enacted the Alien Registration Act, Pub. L. No. 40-670, 54 Stat. 670 (1940) and following the war it expanded the inadmissibility and deportability grounds as well as the government's authority over criminals and subversives by enacting the Internal Security Act of 1950, Pub. L. No. 50-831, 64 Stat. 987 (1950).
\item \textsuperscript{56} Under the Displaced Persons Act, Pub. L. No. 48-774, 62 Stat. 1009 (1948), more than 400,000 persons were admitted to the United States. See GORDON, ET AL., supra note 12, at § 2.02. Legislation enacted to admit the family of U.S. servicemen brought more than 120,000 persons that
\end{itemize}
regard to the immigration quotas established earlier. While these numbers stand out in contrast from the earlier discussion of restrictionist immigration policies, these admissions did not come easily as was evidenced by the significant efforts which had to be made by President Eisenhower to secure the admission of Hungarian refugees following the revolt in that country.\textsuperscript{57}

\section*{C. The 1965 Immigration Act}

In July 1963, President Kennedy proposed immigration reforms that had their origins in work he had started while he was in the Senate in 1957.\textsuperscript{58} These proposed reforms would eliminate the national origin quotas created in 1924.\textsuperscript{59} The proposed legislation would remove spouses and minor children and parents of U.S. citizens from quota restrictions.\textsuperscript{60} The legislation also called for removing parents of permanent residents from the national quota restrictions.\textsuperscript{61} In place of the National Origin Quota,\textsuperscript{62} President Kennedy proposed a system based on skills needed in the United States, family ties to U.S. citizens and issuing immigrant visas based on “priority of registration.”\textsuperscript{63} Kennedy’s proposal also contemplated the need for flexibility allowing for an adjustment in the numbers of immigrants admitted in a given time frame as well as a transition period to deal with the changes that the immigrant population would experience as a result of the amendments.\textsuperscript{64} With regard to immigrants coming to the United States based on their work skills, the proposal included a preference for immigrants with special skills and even allowed for some immigrants with lesser skills in that it would not require those immigrants to first have a U.S. employer.\textsuperscript{65} Kennedy also proposed to lessen the restrictions on those immigrants with

\textsuperscript{57} President Eisenhower had requested a liberalization of the stricter Refugee Relief Act for Hungarian refugees but that did not occur until many of the refugees were admitted under the Attorney General’s parole power. See John A. Scanlan, \textit{Immigration Law and the Illusion of Numerical Control}, 36 U. MIAMI L. REV. 819, 851 n. 137-38 (1982).

\textsuperscript{58} \textit{See Nation of Immigrants, supra} note 27, at ix.

\textsuperscript{59} \textit{Id.} app. D at 102.

\textsuperscript{60} Under the proposal, the spouse and minor children of U.S. citizens would be termed “immediate relatives.” \textit{Id.} at 103.

\textsuperscript{61} \textit{Id.} at 104.

\textsuperscript{62} One of the critiques of the national origin system was that it favored northern European immigration over southern and eastern Europe. \textit{Desmond S. King, Making Americans: Immigration, Race, and the Origins of the Diverse Democracy} 229 (2000).

\textsuperscript{63} \textit{Nation of Immigrants, supra} note 27, at 106.

\textsuperscript{64} \textit{Id.} at 104.

\textsuperscript{65} \textit{Id.} at 105.
President Kennedy's 1963 proposals were finally enacted in 1965. However the legislation was only enacted after significant compromise. While the 1965 amendments to U.S. immigration law removed the national origin barriers and were hailed as the elimination of racial barriers to U.S. immigration admission, they were in no way a complete solution to the problem of racial barriers that had taken so long to develop in the United States. The 1965 Amendments were enacted at the same time that pressure was building outside of the United States with world leaders calling for the eradication of racial discrimination and the adoption of an international convention to fight racism. The United States was in a furious battle with the communist Soviet Union for moral high ground in the international arena and was constantly criticized for its domestic racist law and practices. While I am not arguing that there was a concerted effort to take a two track approach in blunting international criticism—that of reforming the immigration laws and removing some of the vestiges of slavery present in the current domestic laws—I am arguing that international pressures made it imperative that both pieces of legislation be enacted during this same historic period.

D. The 1964 Civil Rights Laws

At the same time Congress was drafting the 1965 Amendments, U.S. leaders were debating domestic legislation that would eventually become the Civil Rights Act of 1964. While there was a great deal of growing domestic political pressure that was brought to bear and which caused the eventual enactment of this historic legislation, the civil rights legislation was significantly influenced by Cold War foreign policy considerations. It is

66.  Id. at 106.


68.  Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 524 (1980); see also Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 66, 93-97 (1988) (arguing that U.S. foreign policy interests encouraged the desegregation efforts of the 1950's); see also Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. REV. 273, 282-86 (1996) (pointing out that the reform effort was given additional force during World War II when China and other Asian nations were allied in fighting with the United States against the Japanese and following the war the retention of these blatantly racial barriers undermined the fight against Communism).


70.  See Bell, Jr., supra note 68, at 524.

I contend that the decision in Brown to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances
notable that these two important pieces of legislation, the 1965 Amendments and the 1964 Civil Rights Laws, were under consideration at the same time.\(^1\) Additionally, both of these laws were not officially adopted until after the assassination of President Kennedy when President Johnson steered their passage. As one writer noted, the legislation nicely complemented President Johnson's other two major democratic reforms, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Together these three pieces of legislation consolidated democratic principles and institutions in the United States.\(^2\) The enactment of the 1964 Civil Rights Act provided an opportunity to both deal with unrest at home as well as to counter attacks from abroad that claimed that the United States was not in a position to criticize the lack of freedoms in the Soviet Union given its ill treatment of its own citizens and racial exclusion policies.

E. The "Modern" Reform Movements

At the time Congress enacted the 1965 Amendments, immigration to the United States had dropped from its peak during the period from 1910-1920. After Congress enacted the 1965 Amendments lifting the national origin barriers, a new problem arose for Western Hemisphere immigrants. After removing the national origin barriers, the United States implemented a worldwide quota restriction for all immigrants.\(^3\) Much like the national quota system before it, these new restrictions resulted in increasing delays and backlogs in the immigration of persons from Western Hemisphere countries. "Modern" reform efforts in the early 1970's to the present were largely ineffective in gaining significant legislative change to these persistent backlogs and delays; in fact, there seemed to be increasing


\(^{2}\) See KING, supra note 62, at 243.

\(^{3}\) See SELECT COMM'N ON W. HEMISPHERE IMMIGR., REP. OF THE SELECT COMM'N ON W. HEMISPHERE IMMIGR. (1968).
resistance to providing means for immigrants to gain legal status in the United States.\textsuperscript{74}

To be sure, the idea of progressive immigration reform was a matter of concern for some. Beginning in the early 1970's, U.S. leaders began discussing reform in the immigration laws. Many desired reform in order to combat perceived immigration problems at the U.S.-Mexico border. This "problem" was not new, and was part of steady demand by U.S. agribusiness for lower paid labor—a demand that had been previously satisfied either through agricultural labor programs or illegal immigration.\textsuperscript{75} The result was a growing movement of farm labor organization with efforts that eventually became a major farm-worker movement seeking improvements for those migrants and others engaged in fieldwork.\textsuperscript{76} Over time, the influx of these field workers created a class of immigrants without legal status. Many of these workers faced the possibility of immediate capture and deportation if U.S. immigration authorities caught them. In addition, whenever the workers left the United States, they risked capture and deportation if they were caught trying to return.

It was also in this same period of the 1970's that a significant number of refugees with strong ties to the United States were admitted as a consequence of the withdrawal of U.S. troops from Vietnam and Southeast Asia. The war in Vietnam that had ultimately spread to the neighboring countries of Laos and Cambodia, introduced thousands of U.S. troops and other non-military personnel to those areas. These increased contacts created refugee responsibilities for the United States when it withdrew from the region and increased refugees' desire to come to the United States. This influx may well have represented the largest number of non-white refugees to ever be admitted to the United States up to that time.\textsuperscript{77}

In 1978, Congress enacted amendments establishing the Select
Commission on Immigration and Refugee Policy (otherwise known as the Hesburgh Commission) to study immigration laws and policies. The Commission’s role was to assess U.S. immigration policies and report back to Congress by September 1980.\textsuperscript{78} The result of the Hesburgh Commission’s review of immigration policy was a compromise between those interested in greater controls on immigration and those wishing to at least grant protection to people who had already come to the United States, for example, as illegal immigrant field workers.\textsuperscript{79} The effort culminated with the enactment of legislation in 1986 granting amnesty to undocumented persons who had come to the United States prior to January 1, 1982 and imposed sanctions on future illegal hires by U.S. employers.\textsuperscript{80}

The 1986 immigration reforms did not address the underlying structural problems in U.S. immigration laws and policies previously described. Lost in the reform effort was the search for a long-term solution to the difficult immigration problems of racial exclusion.\textsuperscript{81} Absent from this entire discussion was the fact that immigrants who were coming from Asia, Latin America and Africa would eventually seek the admission of their own families. Instead, the 1986 immigration legislation provided for a “diversity visa pilot program” that allowed special immigration slots for persons from countries that had not traditionally sent immigrants to the United States.\textsuperscript{82} The legislation was jokingly referred to as the “Irish Sweepstakes” because it provided for the admission of immigrants based on a lottery and included a special preference for persons with education and skills, including a special allocation for Northern Ireland to be treated as if it were a separate country.\textsuperscript{83}

\begin{footnotes}
\footnotetext[78]{See Section 4 of the Act entitled, “An Act to Amend 201(a), 202(c) and 203(a) of the Immigration and Nationality Act, as amended, and to establish a Select Commission on Immigration and Refugee Policy,” Pub. L. 95-412, as amended by Pub. L. 96-132, § 23, 93 Stat. 1051 (Nov. 30, 1979).}
\footnotetext[79]{The Commission’s report is contained in the U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY (1981). The Commission had recommended the expansion of the immigration quota from 270,000 to 350,000. \textit{Id}. The major features of the legislation ultimately enacted were those proposed by a cabinet task force established by President Reagan with the exception of the quota increase to 310,000. \textit{See White House and Department of Justice Press Release of July 3, 1981, reprinted in 58 INTERPRETER RELEASES 379 (1981).}}
\footnotetext[80]{Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359. A part of the compromise established a special office and created a cause of action for unfair immigration-related employment practices that might result from employers who improperly discriminated against certain persons in their efforts to comply with the employer sanction provisions. \textit{See 8 U.S.C. § 1324b (2000).}}
\footnotetext[81]{Indeed the pressures on the immigrant quota system that existed at the time of IRCA in 1986 were only exacerbated in the coming years. These pressures were intensified by the desire of newly naturalized citizens to petition for family members or of recent immigrants in petitioning for their family.}
\footnotetext[83]{Folan Sebben, \textit{supra} note 16, at 765.}
\end{footnotes}
Prior to the events of September 11, 2001, modern reform consisted of incremental legislative efforts designed to address problems that had garnered sufficient political traction within Congress and the Executive branch. For example, immediately prior to the events of September 11, the Bush Administration, at the urging of Mexico’s Fox Administration and with the support of the Congressional leadership, was considering an immigration amnesty that would have granted legal status to many undocumented workers in the United States. This legislation was expected to pass in Congress and reach the President’s desk in the fall of 2001, but was set aside after the events of September 11. While the long-term impact of the events of September 11 on the modern reform movement are not clear, the short-term effects have been significant. The Executive branch has focused most, if not all, of its attention on the national and domestic security issues and has set aside discussions of immigration reform. The Immigration and Naturalization Service (INS) has been reconstituted into and made part of a new super-agency called the Department of Homeland Security (DHS). Meanwhile, the agency has relied heavily on profiling based on a person’s religion, or national or regional origin in enforcing the immigration laws. The Executive branch has further engaged in testing the limits of its powers by asserting that foreigners and U.S. citizens wherever they are located, if suspected of terrorist ties, may be detained indefinitely in centers outside U.S. territory.

84. The INS has been reorganized within the DHS into the Bureau of Immigration and Customs Enforcement (BICE) and the Bureau of Customs and Immigration Services (BCIS). See David A. Martin, Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements, 80 INTERPRETER RELEASES 601, 603-04 (2003).

85. See, e.g., Registration and Monitoring of Certain Nonimmigrants, 67 FED. REG. 52,584 (Aug. 12, 2002), amended by 67 FED. REG. 57,032 (Sept. 6, 2002). For example, in August 2002, the INS issued a notice in the Federal Register requiring persons from predominately Muslim countries to report for special questioning. Id. This caused widespread panic in these communities throughout the country. Interestingly, the one known incident of attempted terrorism following September 11 involved a U.K citizen, Richard Reid who, as a citizen of the U.K., was allowed to travel to the United States without a visa and would not have been subject to the special questioning policies. Alfonso Chardy, Critics Seek Major Change at INS Agency: Visa Case Shows Size of Task, MIAMI HERALD, Mar. 17, 2002, at B1. In addition, it was not until December of 2002 that Saudi citizens were placed on the list of persons subject to the special questioning by immigration officers, notwithstanding the fact that most of the known terrorists to have been involved in the terrorist attacks were either Saudi or Yemeni citizens. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 FED. REG. 77, 135-38 (Jan. 2, 2002).


87. The government announced that all refugee admissions would be put on hold until new security checks were completed of all persons to be admitted. Mary Beth Sheridan, Terrorism’s Other Victims: Refugees Cleared to Join Family in U.S. Stuck in Limbo After Attacks, WASH. POST, Dec. 2, 2001, at C1. Even before September 11, all persons including refugees who were being admitted on a permanent basis went through a national security check where their backgrounds were vetted by the intelligence agencies, the Department of State and FBI. State Dept. Discusses Security Opinions for Certain Visa Applicants, 67 INTERPRETER RELEASES 668 (1990).
disruption of travel of persons who, without any intention of coming to the United States, are required by their air carrier to travel through a U.S. port. 88

III. PROBLEMS IN THE IMMIGRATION SYSTEM

As noted earlier, the 1965 Amendments were regarded as groundbreaking because the legislation dismantled a legacy of discriminatory immigration policy. The passage of the 1965 Immigration Act was heralded as removing “race and creed” and place of birth as a basis for determining a person’s admissibility to the United States. While most scholars have lauded the 1965 Amendments as removing many of the discriminatory provisions from the immigration laws, discriminatory aspects of the system remained intact and in fact continued to increase in the years following 1965. In retrospect, it appears that the 1965 Amendments have been the last positive immigration reform of the twentieth century.

The immigration “reform” legislation after 1965 consisted of small efforts to provide amelioration for the pre-1965 restrictionist policies that survived the 1965 Amendment. For example, in 1986, amendments otherwise known as the Immigration Reform and Control Act of 1986 “IRCA” 89 established immigration amnesty for many who had been living illegally in the country to become legalized. 90 Yet the 1965 legislation still continued the restrictive programs of the past by increasing border enforcement and adding sanctions on employers with undocumented migrant workers—thereby turning the employers into surrogate immigration law enforcers. 91 More recent immigration amendments have provided increased

88. In August, 2003 the Department of Homeland Security announced that it would suspend for sixty days the admission of persons into the United States who were in transit without a visa. See Transit Without Visa, International-to-International Transit Programs, 80 INTERPRETER RELEASES 1065 (2003); see also 68 FED. REG. 46, 926-29 (2003). Due in part to the airlines' creation of hub systems, up to 600,000 people per year travel through the United States en route to other destinations. “National Security Emergency,” DHS, DOS Seek Comments on Suspended TWOV, ITI Programs: Reinstatement Possible, 80 INTERPRETER RELEASES 1097 (2003); see also Abby Goodnough, Airports Ready for Impact of Tightened Visa Rules, N.Y. TIMES, Aug. 4, 2003, at A8.


90. Id.

91. See Richard A. Boswell, Immigration Reform Amendments of 1986: Reform or Rehash?,
restrictions on immigration as well as removed ameliorative devices designed to alleviate the hardships caused by more punitive parts of the immigration law. In short, immigration legislation has taken a decidedly restrictionist position, resulting in the institutionalization of a permanent class of "illegal" persons and placing them outside protection of the law.

Many structural, doctrinal and attitudinal barriers existed, and still exist, in the United States that prevent positive reforms in removing racism from U.S. immigration laws. Each barrier or obstacle to a non-discriminatory policy feeds the other in the same way that oxygen feeds a fire. "Structural barriers" refer to problems evident in law and court decisions that allow legislative or regulatory enactments to stand. "Doctrinal barriers" refer to several long-standing policies in the treatment of U.S. immigration that perpetuate racist laws. "Attitudinal barriers" refer to problems evident in the public or government officials' attitude or perception of foreigners and immigration in general.

A. Structural Barriers

Serious structural barriers to non-discrimination efforts were left untouched by the 1965 Amendments. Perhaps it was because of the passage of the 1965 legislation and the wrenching nature of the immigration debates that very little has been done to deal with these structural barriers. The current immigration system has many structural barriers to establishing non-discriminatory immigration policies, such as requiring a potential immigrant to have a sponsoring family member who is either a U.S. citizen or permanent resident. Otherwise an immigrant must have an offer of employment in the United States that can be shown as not displacing U.S. workers or having an adverse effect on U.S. workers' wages and working conditions. Both of these statutory schemes tend to preserve the existing population of persons already in the United States. This causes problems for many migrants, especially persons of color who have historically had greater difficulty in getting a visa, and thus do not have a U.S. citizen or resident family member or employer who is able to sponsor them as an immigrant.

14 J. LEGIS. 23 (1987), for a critique of IRCA.


95. These are termed "family-based immigrants." 8 U.S.C. § 1153(a) (2000).


The most important structural barrier is the current policy that requires that a prospective immigrant already have ties to the United States. A person can legally come to the United States on a long-term basis in one of two ways: either under an immigrant visa or as a refugee. The immigration system allows persons to immigrate if they have certain immediate family members who are either U.S. citizens or permanent residents, or a sponsoring U.S. employer. This anchor immigration system therefore requires that a person not just get to the United States, but also that she has a family member or an employer in the United States as well as a skill that is in short supply. These requirements make it very difficult for persons from a group previously excluded from admission to pass through the process. It naturally favors those who are already here. The many decades of racial exclusion means that immigrants of color have an extremely difficult obstacle to overcome, for it is very difficult to have a qualifying family member who can petition for them. This effectively means that even though the national origin quotas were removed, groups of possible immigrants still would have no legal basis to gain admission. It is mainly for this reason that a large number of African-descended immigrants came from the Caribbean region and faced fewer barriers than African migrants from Africa.

The second structural barrier to a non-discriminatory immigration policy is grounded in the inflexible worldwide quota system that grew out of the immigrant quotas established in the 1920’s. In 1963, President Kennedy began a dialogue about immigration reform and suggested eliminating the strict national origin quotas. While President Kennedy’s proposal did not include the introduction of an adjustable quota, he did recommend increased numbers and a more flexible approach. Kennedy’s proposal would allow

98 See 8 U.S.C. § 1154 (d) (2003). This is accomplished through a preference system that allows the spouse children and parents (as long as the petitioning child is over the age of twenty-one) to immigrate without regard to the quota. Id. The other family members who may immigrate are the spouse and unmarried children of permanent residents, married or unmarried adult children of U.S. citizens and siblings of U.S. citizens. Id. Those immigrating based on their skills come under an employment based preference system that seeks to preclude the admission of persons who will displace U.S. workers or whose employment will have an adverse effect on their wages and working conditions. See 8 U.S.C. § 1182(a)(5), Sec. 212(a)(5) (2003). All of these immigrant admissions, with the exception of those who are minor children or spouses of U.S. citizens, are subject to an annual quota. Id. In addition, there is a country quota, precluding the admission in any given year of more than approximately 25,000 persons from any single country. 8 U.S.C. § 1152 (a) (2) (2003).


100 The Afro-Caribbean migrant has the advantage of proximity to the United States, whereas the African migrant would face more racial, financial and physical barriers to migration.

101 NATION OF IMMIGRANTS, supra note 27, at ix–xi.

102 See Text of President Kennedy’s Proposal to Liberalize Immigration Statutes. Id. at 102-07 app. d. The President proposed that parents of U.S. citizens be allowed to immigrate without regard to the quota and urged the creation of a separate category for parents of permanent residents. Id.
for fluctuations in the demand for immigration. The quota system that was incorporated into the McCarran-Walter Act of 1952 came about, as previously noted, from the earlier Quota Acts and remained essentially unchanged until it was revised in 1965. The 1965 Amendments that eliminated the earlier national origin quotas established a worldwide quota. Following 1965, Congress made adjustments bringing Western Hemisphere nationals into the quota system.

The period following the U.S. military withdrawal from Vietnam and Southeast Asia and the refugee crisis that followed led to additional petitions for family members to come to the United States. This increased demand on the immigration system put pressure on the inflexible quota system in place, causing many to call for reform. The heralded IRCA legislation in 1986, while beneficial to those who had been in the United States illegally for many years, placed greater pressures on the quota system by creating more immigration petitioners yet not addressing the growing quota problem. In 1990, Congress made its first adjustments to the quota since 1965, but the solution was not forward-looking and dealt primarily with the more immediate needs of employers in the United States and permanent residents without a commensurate adjustment in the quota.

The legislative branch has implemented awkward solutions to the pressures that continue to build on the quota system. Most recently, Congress established a new nonimmigrant visa for the spouse and children of permanent residents who had been waiting for more than three years to gain admission to the United States or for spouses of U.S. citizens. Therefore, instead of providing real immigration relief, it provided a temporary solution and at the same time confused the nonimmigrant visa scheme. These various legislative schemes avoid the difficult yet
important question of dealing with the inadequacy of the present quota system that remains a vestige of an earlier period of racial exclusion. Congress used a similar pressure-relieving technique to deal with highly skilled workers who were either unable to immigrate because of quota delays or because their employers were not yet prepared to offer permanent positions. Legislation enacted in 1990 allowed skilled technical workers and certain nurses to remain in the United States for up to five years as non-immigrants even if they later intended to remain in the United States as permanent residents. While the immigrants who benefit from this temporary solution will be happy to get some relief, there are still many improvements that need to be made. Similar remedies are not yet available to brothers and sisters of U.S. citizens who can expect to wait more than twenty years for permanent residency, or for adult children of a U.S. citizen who can expect to wait eight to ten years before they can immigrate.109 At the same time, it is not implausible in the future, that qualified employment-based immigrants might have to wait for many years to be able to immigrate.110

One of the consequences of an outdated quota is the increase of the illegal immigrant population.111 Indeed, recent changes in the immigration laws may make it more difficult for those waiting inside the United States to ever obtain permanent residency.112 Today, the applicant is faced with the
choice of either waiting outside of the country for an extended period of
time, separated from loved ones, or facing future ineligibility for legal status
because he remained in the United States without permission for too long.
These people are more vulnerable to abuse in the workplace and are more
likely to be victims of unreported criminal acts because their employers are
aware of their vulnerable situation and use it as a coercive tool against
them.\textsuperscript{113} In present day America, these undocumented persons are more
likely to be persons of color or from the lower economic classes. In today's
immigration system, many of these people are also the immediate family of
lawful permanent residents or are working in jobs where there are
insufficient numbers of domestic workers. Under today's immigration
system, these people are also less likely to be able to find a way to ever
obtain legal status.\textsuperscript{114}

When President Kennedy made his case for removing the national
origin quotas, he focused on the extensive delays that many immigrants had
to endure to be reunited with their family members. In his argument, he used
the example of Italian and Greek-Americans who had to wait at least
eighteen months to bring loved ones to the United States.\textsuperscript{115} Yet, now, nearly
fifty years after the great reforms of 1965, it is not unusual for immigrants of
color from Mexico, India, China or the Philippines to wait five or six times
as long as President Kennedy's Greek and Italian immigrants to be reunited
with their family.\textsuperscript{116}

**B. Doctrinal Barriers**

There is long-standing doctrine in U.S. immigration law that treats
immigrants arriving in the United States with whatever "due process"
Congress deems appropriate.\textsuperscript{117} The Judiciary affords this deference to the

\begin{itemize}
\item \textsuperscript{113} Gregory A. Bullman, *Abuse of Female Sweatshop Laborers: Another Form of Sexual Harassment That Does Not Fit Neatly Into the Judiciary's Current Understanding of Discrimination Because of Sex*, 78 IND. L.J. 1019, 1043 n.73 (2003).
\item \textsuperscript{114} A similar situation existed in the period following the enactment of the Quota Acts of 1924 where large numbers of persons were deemed to be illegally in the United States and large-scale deportations became common and continued for many years. See, e.g., Salazar Parreñas, *supra* note 105, at 144. For example, according to the February 2003 Visa Bulletin issued by the U.S. Department of State, permanent resident petitioning for their immediate family would have to have submitted their initial application by November 1991 if they were from Mexico or by May 1994 if they were from the Philippines. See *Visa Bulletin, supra*, note 109.
\item \textsuperscript{115} NATION OF IMMIGRANTS, *supra* note 27, at 103.
\item \textsuperscript{116} To be sure, persons from most countries will have to wait for extended periods, but it is
common that citizens from these specific countries will have even longer waits. See, e.g., Salazar Parreñas, *supra* note 105, at 144. For example, according to the February, 2003 Visa Bulletin issued by the Department of State, applications by permanent residents petitioning for their immediate family would have to have submitted their initial application by November 1991 if they were from Mexico or by May, 1994 if they were from the Philippines. See http://travel.state.gov/visa_bulletin.html (last visited Feb. 10, 2003).
\item \textsuperscript{117} The Court stated in Nishimura Ekiu v. U.S., 142 U.S. 651, 660 (1892) that:
\end{itemize}
legislative and executive branches except that foreigners within the United States facing proceedings for their removal must be provided with due process protections determined by a court.\footnote{118} Congress also exercises authority over the naturalization process and the conferral of citizenship to foreign-born children of U.S. citizens.\footnote{119} For decades, scholars have severely criticized this deferential rule known as the "plenary power doctrine."\footnote{120} Despite its criticism and repeated constitutional challenges, this doctrine has survived.\footnote{121} The willingness of the courts to allow the most pernicious and venal inadmissibility and deportability provisions under the guise of the "plenary power doctrine" has been far-reaching.\footnote{122}

The "plenary power doctrine" has, at its heart, the idea that a nation-state is endowed with the inherent and absolute power to determine its members and those who might be able to enter its territory.\footnote{123} This doctrine has allowed the United States, for years, to engage in the many forms of blatant racial discrimination associated with the immigration policies discussed earlier.\footnote{124} Because the "plenary power" doctrine is so durable, it is

\begin{quote}
It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil [sic] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.
\end{quote}


\footnote{118}{Wing v. United States, 163 U.S. 228, 238 (1896).}
\footnote{119}{See U.S. CONST. art. I, § 8, cl. 4.}
\footnote{121}{See Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1, 12-21 (1998).}
\footnote{122}{For example, inadmissible persons may be subjected to indefinite detention; also U.S. citizen fathers may be treated differently in their petitions for permanent residency than U.S. citizen mothers. Fiallo v. Bell, 430 U.S. 787, 792 (1977). The government has also prevailed in First Amendment cases where American citizens invited a Marxist journalist to speak at various universities in the United States. Kleindienst v. Mandel, 408 U.S. 753 (1972) (holding that the plenary power allowed Congress to enact laws preventing the admission of alleged communist speakers irrespective of the First Amendment rights of those in the United States wishing to hear his views).}
\footnote{123}{See "Chinese Exclusion Case," 130 U.S. at 608-09.}
\footnote{124}{Chin, supra note 121, at 12-21. It should be pointed out that this concept of absolute power is no longer the case in countries such as Europe that have signed the European Convention on Human Rights. See, e.g., A, X and Y v. Secretary of State for the Home Department, (2002) H.R.L.R. 3, 69 (C.A. Civil Division (U.K.)); A (A Mental Patient) v. The Scottish Ministers, (2000) H.R.L.R. 450, 451 (Court of Session (Inner House) (First Division)). For example, Europe has rejected the practice of indefinitely detaining inadmissible persons because the practice violates international law. Id.}
apparent that many questions of citizenship and admission policies must be settled in the legislative arena and not in the courts. These questions affecting immigrants then, are not amenable to judicial intervention, forcing immigrants to rely on the beneficence of the legislative branch in order to obtain relief. This leaves non-citizens with very few choices or avenues for garnering protection. Because they cannot exert their power at the ballot box or in the courts, short of appealing to legislator's morality and sense of justice,\textsuperscript{125} they are left appealing to their own government.\textsuperscript{126}

Another doctrinal legal barrier is the non-reviewability of consular decisions.\textsuperscript{127} One of the earliest criticisms of the 1952 McCarran-Walter Act, and at least a partial reason that President Truman vetoed the Act, was that it placed unrestrained and unreviewable power in the hands of the person making the decision to grant or withhold visas.\textsuperscript{128} Because a visa is the

\textsuperscript{125} Non-citizens under U.S. law do not have a Constitutional right to vote and therefore do not enjoy a right to civic participation and accordingly are more vulnerable to the whims of the political branches. See Graham v. Richardson, 403 U.S. 365, 371 (1971) ("[a]liens as a class are a prime example of a "discrete and insular" minority" (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152-53, n. 4 (1938)). However, at the same time, there is no prohibition for states to confer the right of franchise on non-citizens. Indeed, it was common until the early part of the twentieth century that non-citizens in many states voted in local elections. See Richard Briffault, \textit{The Contested Right to Vote}, 100 MICH. L. REV. 1506, 1516-17, 1526 (2002); see also N.Y. State Assem., Memorandum in Support of Legislation, An Act to Amend the Election Law, in Relation to Granting Certain Resident Aliens the Right to Vote in Local Elections, Assem. 2001-3903, Gen. Sess., at 1 (N.Y. 2001); Gerald M. Rosberg, \textit{Aliens and Equal Protection: Why Not the Right to Vote?}, 75 MICH. L. REV. 1092, 1093 (1977); Gerald L. Neuman, \textit{"We Are the People": Alien Suffrage in German and American Perspective}, 13 MICH. J. INT'L L. 259, 293-306 (1992); Jamin B. Raskin, \textit{Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage}, 141 U. PA. L. REV. 1391, 1399 (1993).

\textsuperscript{126} In the past, reliance on one's own government was of limited value for it is rare that an individual's experience reaches the level where it might gain the attention of his or her government. However, as I discuss later in Section VII Possibilities for Reform, there may be some methods of applying pressure on the U.S. through international forums and external condemnation.

\textsuperscript{127} See, e.g., Saavedra Bruno v. Albright, 197 F.3d 1153, 1162-65 (D.C. Cir. 1999); Stephen H. Legomsky, \textit{Fear and Loathing in Congress and the Courts: Immigration and Judicial Review}, 78 TEX. L. REV. 1615, 1618-23 (2000); James A. R. Nafziger, \textit{Review of Visa Denials by Consular Officers}, 66 WASH. L. REV. 1, 14, 23 (1991) (arguing that while there is limited formal review, there is internal review of visa denials). While the immigration statute in effect prior to 1941 provided for review by the Secretary of State, the provision was removed in the 1952 McCarran-Walter Act.\textsuperscript{128}

\textsuperscript{128} See American Bar Association Committee on Immigration and Naturalization, \textit{Recommendations}, 7 ADMIN. L. BULL. 236 (1954); American Bar Association, \textit{House of Delegates Actions on Ad. Law Section Matters, Resolutions re: Immigration and Nationality} 10 ADMIN. L. BULL. 15-16 (winter-spring 1958); Harry Rosenfield, \textit{Consular Non-Reviewability}, 41 A.B.A. J. 1109 (1955) (detailing the American Bar Association's opposition to the legislation and its alternative proposals). President Truman's primary opposition to the 1952 Act was that the legislation preserved the national origin's quotas and included unreviewable harsh exclusion, deportation and denaturalization provisions. See H.R. DOC. No. 520, 82d Cong. (2d Sess. 1952). Following Congress's override of his veto of the 1952 Act, President Truman established the Perlman Commission to study the immigration laws. See Exec. Order No. 10,392, 17 Fed. Reg. 8,061 (Sept. 4, 1952). Among other things, the Perlman Commission recommended the creation of a statutory Board of Immigration and Visa Appeals that would provide a mechanism for reviewing arbitrary visa denials. \textit{See PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME} 148, 160 (1953).
essential document for gaining admission to the United States, the ability to
grant or deny visas without judicial review places enormous power in the
hands of the consular official. While our current laws, like the 1952 Act,
preface judicial review and are silent on administrative review, there
have been at least two small yet important changes since 1952. First, the
Department of State implemented a program of advisory opinions in an
effort to place some controls on errant consular officers. This advisory
program is only partially satisfactory, however, because the opinions from
the Visa Office at the Department of State are only advisory as to the law
and simply accept the consular officers’ version of the facts. The second
important change since 1952 occurred with the enactment of the 1990
Immigration Act. The 1990 Act contains a provision that the person
denied a visa is entitled to a written notice of a visa denial. These
doctrinal barriers place formidable legal obstacles to immigration reform.
On one hand, the plenary power doctrine leaves congressional enactments,
even those that may be blatantly racist, immune from judicial scrutiny. On
the other hand, the non-reviewability doctrine immunizes arbitrary executive
action from scrutiny. However, when viewed together with the attitudinal
barriers, one realizes the true nature of the challenges facing progressive
reform of the immigration law.

C. Attitudinal Barriers

The extensive history of violence against immigrants at U.S. borders at
the hands of officials or private citizens is legion and reflects some of the
attitudinal barriers that exist in the system. Throughout U.S. history there
have been periods when nativist fears were strong, but it would be hard to
identify a period in which the sentiment had fully subsided. Racism,
xenophobia and other forms of intolerance or bias are an inveterate human
problem. They are a unique condition of the human psyche. On one level,
these biases are the manifestations of an individual’s fears and reflect a
person’s attitudes about those around them. These fears may be of little
consequence when standing alone and held by persons with little power.

129. Most decisions of the Department of State on visa matters are not amenable to judicial
review. Nafziger, supra note 127, at 15. In 1989, the Administrative Conference of the United States
issued a recommendation that consular visa denials be subject to greater review and that there be
greater transparency in the decision-making. See Recommendations and Statement of the
29, 1989) (Recommendation 89-9).

130. 22 C.F.R. § 42.81(d) (2003).

131. Presumably, an errant consular officer would, in an extreme case, be placing her career
at risk for ignoring the advisory opinion.


133. 8 U.S.C. § 1182(b), Sec. 212(b) (2000). According to this provision, the Secretary of
State may waive application of this section where the visa denial is based on a criminal or security
grounds of inadmissibility.
However, when possessed by a person with the power to make a decision affecting the lives of others, these biases pose a serious force.

The Immigration and Nationality Act of 1990 delegated great authority to personnel within the U.S. Department of State and the INS to make decisions regarding whether potential immigrants or foreign visitors will be allowed to travel to or be admitted to the United States. At U.S. borders and within the United States, immigration officers make daily decisions regarding whether a foreigner may enter the country, be allowed to remain in the country or may impose conditions on the person’s stay. If a consular or immigration officer is motivated by any form of bias, it seems unlikely that the victim of bias can overcome the adverse decision. In an area of law subject to very limited review, the decision maker would have greater discretion to make arbitrary decisions; including those that incorporate bias. The 1965 reforms did not include provisions to deal with the racially motivated attitudes and biases held by consular and immigration officials. While not the primary focus of this article, these attitudes seem to persist today and the attitudes of those who make literally millions of decisions to determine whether someone will receive a visa or a favorable exercise of discretion invariably will have a major impact on who comes to this country.

D. Other Obstacles: Restrictionism in the Modern Era

Besides the structural, doctrinal and attitudinal barriers described above, other forces have acted since at least 1970 to increasingly restrict immigration to the United States. Congress has constantly created new grounds of inadmissibility and deportability and has removed previously available waivers. Congress also restricted immigration laws that

134. 8 U.S.C. § 1104(a) (2000). This statute provides that a consular officer within the Department of State issues visas allowing a person to travel to the United States. Upon arrival, the traveler will be required to present herself for inspection and admission. 8 U.S.C. § 1225(a)(3)(2000).

135. Recent incidents include lawsuits filed by African-American employees of the Immigration and Naturalization Service describing the biases and indignities suffered by their members. See Patrick J. McDonnell, Black Agents’ Class-Action Bias Complaint Against INS Ok’d, L.A. TIMES, Feb. 27, 1994, at A3. Other examples include testimony by a U.S. Consular officer who alleged that he was expected to place codes in applicants’ passports rating the applicant’s skin tone for purposes of determining whether they should be granted or denied a visa. See Olsen v. Albright, 990 F. Supp. 31, 31-34 (D.D.C. 1997) (describing coding and profiling of visa applicants); William Branigin, Lawsuit on Visa Process May Have Wide Impact: Claim that Consulate in Brazil Used Discretionary Codes is Back Before State Department Board, WASH. POST, Feb. 10, 1998, at A17. Professor Krenn describes the persistent problem of racial bias in the Department of State and how it has resisted reform. See KRENN, supra note 70, at 28-42.

136. Attempts to “liberalize” immigration laws have always been the subject of heavy criticism, and the policy as illuminated by the law has reflected a strong bent towards a restrictionist regime. See, e.g., David M. Kennedy, Can We Still Afford to be a Nation of Immigrants, ATLANTIC MONTHLY, Nov. 1996, at 52.

137. For example, in a major “reform” effort in 1996 Congress made sweeping changes to the immigration laws by removing many of the ameliorative provisions of the immigration laws
previously allowed some immigrants to gain admission.\textsuperscript{138} While the Immigration Commission had, for years, encouraged Congress to enact immigration amnesty laws, Congress only decided to pass the amnesty laws if they also included penalties on employers who hired persons without employment authorization.\textsuperscript{139} Later surveys revealed that these employer sanctions were the cause of a certain amount of discrimination in the work place against persons whom an employer thought might be foreign or who might have a difficult time proving their legal status.\textsuperscript{140}

Immigration to the United States increased in the 1970’s; however, the increase was more a result of large-scale refugee movements caused by war or political upheaval than by the removal of the racial quotas. The refugee influx in the 1970’s coupled with these immigrant’s efforts at family reunification increased the demand on the inflexible immigrant quota. Some examples include the refugee movements following U.S. withdrawal from Southeast Asia,\textsuperscript{141} the influx of refugees from Central American civil wars,\textsuperscript{142} the Cuban “Freedom Flotilla” of 1980\textsuperscript{143} and refugees from a


\textsuperscript{138} For example, the 1986 Immigration Reform Amendments offered an amnesty for persons who had been in the country illegally before January 1, 1982, and at the same time placed sanctions on employers who employed undocumented persons. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). Amendments enacted in 1990, while expanding the number of employment-based immigrant visas, also included additional grounds of inadmissibility. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). The 1990 Amendments appear to be a quota expansion bill as it sets the limitation of new immigrants per year at 675,000. \textit{Id}. But because the Amendments include a formula that counts the number of non-quota immigrants and then subtracts the total number of immigrants, the Amendment does not yield a significant increase commensurate to the demographic and population changes in the last 100 years. \textit{Id}.

\textsuperscript{139} BOSWELL, \textit{supra} note 104, at 47.

\textsuperscript{140} See Justice Dept’s Proposed Antidiscrimination Regs Include “Knowing and Intentional” Requirement, 64 INTERPRETER RELEASES 377 (1987); New Reports Find Widespread Discrimination Against Aliens, 66 INTERPRETER RELEASES 960 (1989). Interpretations by the Attorney General required that plaintiffs establish that the discrimination was intentional. 28 C.F.R. § 44.200(a)(1).

\textsuperscript{141} Following the fall of Saigon in 1975, hundreds of thousands of refugees fled and were paroled into the United States. See REIMERS, \textit{STILL THE GOLDEN DOOR}, \textit{supra} note 77, at 175.

\textsuperscript{142} While it is difficult to determine the actual number of refugees who came to the United States during the civil wars in Central America, large numbers of persons sought asylum in the 1980s and 1990s. \textit{Id}. at 199. Congress was extremely resistant to granting these immigrants permanent protection. \textit{Id}.
number of other countries. These refugees eventually obtained permanent resident status and citizenship, beginning a period of heavy demand for family-based immigrants, a problem of the immigration system that persists to this day. The increased demand has resulted in long delays for family unification immigration in nearly every category under the quota system. During this period, immigration specialists feared the results that such quotas were having on this huge immigration population. Those in favor of increased restrictions on immigration would settle for defensive action to preserve the quota system as it exists, as opposed to dealing with the long delays that immigrants now face.

At the same time that these federal immigration laws were being enacted, many states (most notably California) passed restrictionist immigration provisions. Voters in California passed Proposition 187 that denied undocumented persons access to many benefits and required public health workers and schoolteachers to report them to the immigration authorities. Following the adoption of Proposition 187, California voters removed affirmative action and bilingual education provisions under state law. While some portions of Proposition 187 were found to be unconstitutional, other restrictionist provisions were preserved.

During this period that I have described as “restrictionist,” there have been some positive changes to the immigration laws. In 1980, Congress enacted the Refugee Act that was heralded as comprehensive legislation to regularize the protection of persons fleeing persecution. In 1986

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143. As a result of the Mariel Boatlift, otherwise known as the Freedom Flotilla, more than 100,000 persons reached the United States. Richard A. Boswell, Rethinking Exclusion: The Rights of Cuban Refugees Facing Indefinite Detention in the United States, 17 VAND. J. TRANSNL. L. 925, 927, n.12 (1984). These refugees were initially paroled into the United States and ultimately a significant number of them were granted permanent resident status.

144. Civil wars in Afghanistan and Iran in the late 1970's caused a large numbers of persons to flee with some of them reaching the United States. In addition, the breakup of the Soviet Union and the enactment of the Lautenberg Amendments that allowed for the migration of people fleeing because of religious persecution, created the largest opening for migration that the United States had seen in many years. See Foreign Operations, Export Financing, & Related Programs Appropriations Act, Pub. L. No. 101-167, § 599D, 599E, 103 Stat. 1195, 1262 (1989) (codified as amended at 8 USC § 1157 (2000)).


146. Sanchez, supra note 145, at 1012.


Congress enacted an amnesty law, which, as described earlier, was designed to regularize the status of millions of persons who had been living and working in the country illegally. In 1990, Congress made changes that allowed increased immigration to satisfy the needs for skilled workers in the United States.\textsuperscript{151} However, all of these programs had significant problems. For example, just one year following Congress' enactment of the Refugee Act of 1980—an act that was designed to remove political bias and foreign policy considerations from individual asylum cases—the Reagan Administration stepped up enforcement at the border against Central American refugees and failed to let applicants know of their right to apply for asylum, and the Department of State issued negative advisory opinions based on foreign policy considerations and not on the merit of the individual cases.\textsuperscript{152}

During this same restrictionist period, the INS successfully resisted many challenges to its policies under the plenary power doctrine.\textsuperscript{153} While the lower courts have shown a willingness to review immigration decisions, these decisions have generally been upheld under traditional principles of plenary power.\textsuperscript{154} For example, in Sale v. Haitian Centers Council,\textsuperscript{155} a case

\begin{footnotesize}
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\item[152.] See Orantes-Hernandez v. Smith, 541 F. Supp. 351, 354-63 (C.D. Ca. 1982) (certifying class of El Salvadoran asylum seekers whose cases had been summarily dismissed and were forced to sign “voluntary departure” papers expediting their removal from the United States); Hotel & Rest. Employees Union, Local 25 v. Smith, 563 F. Supp. 157 (D. D.C. 1983) (District Court’s denial of government’s motion to dismiss where union alleged that the Department of State’s routine recommendations of denial of asylum unfairly prejudiced their Central American asylum applicants’ claims for protection before the INS); Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799-807 (N.D. Ca. 1991) (stipulating an order and settlement following allegations of due process violations by INS where the government agreed that certain Guatemalan and El Salvadoran asylum seekers would be granted de novo adjudication of their claims along with other immigration relief). During this period, the United States began experiencing large-scale influx of Central American refugees who were fleeing civil wars in their countries. See Ignatius Bau, \textit{Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS}, 7 LA RAZA L.J. 50, n.105 (1994). These civil wars were in part a result of the U.S. support for military regimes responsible for widespread human rights violations. Id. These refugees were met with resistance from INS and the Department of State. Id. Many opposed to the INS and Department of State’s action filed numerous federal cases challenging the handling of these cases asserting political bias and serious irregularities. Id. Eventually, Congress granted temporary relief for some of them. See Sec. 303, Pub. L. No. 101-649, 104 Stat. 5029 (codified at 8 U.S.C.S. § 1254a (1987 and Supp. 1993) (granting temporary protected status for El Salvadorans)).
\item[153.] Some scholars have noted that during this period, federal courts exhibited a marked willingness to question INS’s enforcement of the immigration laws—a significant change from the past. See, e.g., Peter H. Schuck, \textit{The Transformation of Immigration Law}, 84 COLUM. L. REV. 1, 52-58 (1984). However, I would argue that while federal courts have been willing to look at some INS decisions, the degree to which they have been willing to overturn those decisions has not increased in any significant way. When the cases involved challenges to Congress’s plenary power over immigration, the challenges have failed. See, e.g., Sale v. Haitian Ctr. Council, 509 U.S. 155 (1993); Barrera-Echavarria v. Rison, 44 F.3d 1441, 1444 (9th Cir. 1995).
\item[154.] The plenary power to designate who may be admitted to the territory has traditionally rested with the Congress; the Executive (INS) function being that of administering the laws. See Boswell, \textit{supra} note 143, at 946 n.86. To be sure, even under the plenary power doctrine certain powers to control immigration are bound up in Congress’ foreign affairs power. See, e.g., Narenji v.
\end{enumerate}
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involving the challenge to the INS practice of forcing Haitian refugees to board vessels on the high seas and then returning them to their country without first screening them to determine the nature of their persecution claim, the Court allowed the INS practice, reasoning that the non-refoulement doctrine did not apply to actions of the Coast Guard.156 Many commentators have cited the U.S.’s treatment of Haitian asylum seekers as an example of racial exclusion in one of its most blatant forms in recent memory.157 More recently, U.S. action toward nationals of certain selected countries and persons of the Muslim faith in the search for terrorists has raised a similar specter of race and xenophobia.158

Similarly, in cases involving indefinite detention of Cuban refugees who were found to be inadmissible and who could not be returned to their country because of their country’s refusal to accept them, courts have been unwilling to find that such detention was prohibited by the Constitution.159 Similar reasoning, based on the plenary power doctrine, has been extended

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156. Id. at 172-73. Non-refoulement is a concept in international law that prohibits states signatory to the Refugee Protocol from returning a person to a country where they face persecution. Id. at 180-82. The Court reasoned that the statute and the protocol prohibited refoulement by the Attorney General, and that since the Coast Guard was boarding the vessels and returning the refugees that it did not apply to them. Id. at 159. Originally U.S. government officials boarded the vessels and would screen the passengers allowing those screened to have their asylum applications processed, the policy was modified to taking the screened passengers to Guantanamo, Cuba and later the screening was abandoned altogether. Id. at 161-64.


158. Beginning in April, 2002, the Attorney General began the process of subjecting nationals of certain selected countries to special controls including review interviews or “registration.” These directives appear in a series of notices published in the Federal Register. See 67 FED. REG. 18,065 (2002); 67 FED. REG. 40,581 (2002); 67 FED. REG. 70,526 (2002); 67 FED. REG. 77,136 (2002); 67 FED. REG. 77,642 (2002); 68 FED. REG. 2,363 (2003); 68 FED. REG. 8,046 (2003).

159. See Barrera-Echavarría, 44 F.3d at 1444 (permitting the continued and indefinite detention of Cubans who had arrived in the United States in 1980 on grounds that the Constitution did not apply to persons who had not been admitted or gained entry to the U.S.). This decision was consistent with decisions in other circuits holding that the age-old plenary power doctrine placed alien non-citizens seeking admission outside of the Constitution. See Garcia-Mir v. Meese, 788 F.2d 1446, 1447-48 (11th Cir. 1986) (cert. denied). Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982). In a separate case relying on statutory interpretation and not the Constitution, the Court held that the statute providing for deportation did not authorize indefinite detention for persons admitted to the United States. Zadvydas v. Davis, 533 U.S. 678, 682 (2001). Zadvydas, decided on principles of statutory interpretation, has been extended to persons seeking admission. See Xi v. INS, 298 F.3d 832, 836 (9th Cir. 2002).
to Indian tribes.\textsuperscript{160} On the other hand, while the plenary power doctrine has gone without judicial restraint, the courts have continued to recognize that all persons within the United States are inured with some protections under the Constitution (such as due process rights, protection from arbitrary prolonged detention and equal protection of the law) when the matter at issue was not bound up with Congress's immigration control power.\textsuperscript{161}

While the modern era has been characterized by many restrictionist policies created out of the nation's fear of outsiders, during this same period Congress has passed positive refugee-centered legislation. The restrictionists and the legal doctrines that provide sustenance to Congress' power over immigration explain how we can find ourselves in a restrictionist era in which the courts play a minimal role. However, as in the era of Civil Rights movement of the 1960's, moral suasion, demographic changes and international relations may offer up opportunities for positive immigration reforms.

IV. DEMOGRAPHIC CHANGES

Several scholars have commented on the changing demographics of immigration, explaining that in recent years the United States has seen an increase in the percentage of the foreign born persons in the U.S. population.\textsuperscript{162} The population shifts that have emerged in recent years can be seen in the numbers of persons of Latino and Asian descent in parts of the country that had very few Latinos and Asians twenty years ago.\textsuperscript{163} Some of this is attributable to increased immigration. In other respects the shift is due to the increased mobility of people in our society.\textsuperscript{164} Unlike the beginning of the twentieth century when an immigrant might move to New York City and

\textsuperscript{160} See Cleveland, supra note 42, at 6-10. For an interesting analysis of the plenary power doctrine as applied to Indian law, see T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002).

\textsuperscript{161} Indeed, the Supreme Court recently recognized that persons in the United States have constitutional protections and held that the removal statute does not allow indefinite detention of persons found removable where no country will accept them. Zadvydas, 533 U.S. at 682. In Zadvydas, the government argued that a person who had previously been admitted to the United States could be subjected to indefinite detention. \textit{Id.} The Court sidestepped the Constitutional question by interpreting the statute as contemplating a limited period for detention. \textit{Id.} It remains to be seen how the Court will deal with the question of extending Zadvydas beyond its own facts. For an interesting analysis, see T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002). However one interprets the Zadvydas decision, no one can argue that the Court studiously avoided wrestling with the plenary power doctrine. Indeed, because it relied on statutory interpretation in reaching its conclusion, the Court left it to Congress to clarify the issue.

\textsuperscript{162} See Bill Ong Hing, Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies, 40 BRANDEIS L.J. 861, 863-68 (2002).

\textsuperscript{163} \textit{Id.} at 869-73.

\textsuperscript{164} In Iowa, for example, many high school graduates leave the state after they graduate. Similar phenomena can be seen in states such as Kentucky, Tennessee and Pennsylvania. \textit{Id.} at 867-73.
stay there, it is not uncommon today for an immigrant to arrive in New York City, remain for a short period and then move to another large city. Another change from the immigration trends in the twentieth century is that today’s immigrants are more willing to live in rural areas across the country. This is partly due to the fact that many states increasingly determine that they need immigrants to contribute to their work force.

The changes in immigrant demographics that evolved in the latter part of the twentieth century are perhaps more a product of U.S. foreign policy than of an opening in the immigration system created by the 1965 Amendments. With the exception of Mexican and Canadian immigration, a review of significant immigration to the United States over the last thirty to forty years reveals that war and/or a former colonial relationship provides the best explanation for the changing demographics.165 These relationships have been the way that nationals from other countries managed to come to the United States as immigrants in the period following elimination of *de jure* racial exclusion. But in recent years, the United States has seen a significant amount of immigration from the Philippines, Korea and Southeast Asia.166 Filipino migration is attributable to its historic relationship with the United States as a former territory as well as to the service by Filipino citizens with and alongside U.S. soldiers during World War II.167 Intermarriage between U.S. soldiers and Filipino women no doubt created additional relationships that would not have otherwise existed to increase immigration. Korean immigration also increased because of U.S. involvement in the Korean War during the 1950’s and the relationships that naturally developed as a result.168 A similar pattern existed in Southeast Asia during the period of the war in Vietnam.169 After the war, Vietnamese, Cambodian and Laotian immigrants came in large numbers as refugees or spouses of servicemen or in some cases as children of U.S. citizens during the period that the war raged in the region.170 But for the war in Southeast Asia, immigration from that region would not likely have been as significant because very few Southeast Asians would have had knowledge about the United States or means to migrate to the United States. The relative paucity

165. One would expect that the two greatest sources of immigration would be from one’s immediate neighboring countries. Indeed this is the case for the United States. Historically the largest numbers of immigrants have come from Canada and Mexico. See infra notes 40-41.


169. *Id.* at 178.

in the number of African immigrants may be due, at least in part, to the absence of a direct and long-term military presence by the United States in any African nation. The changing demographic composition of immigrants in the United States is possibly also influenced by the diminishing birth rate and increased standard of living in industrialized countries. For example, it has been noted that the nations of Europe and Japan have been experiencing a birth dearth for some time and that these countries may have to rely on immigrants to replace their aging populations. Japan, for example, in the period from 1983-1999 reported a fertility rate of 1.34% (one of the lowest in the world) and its population is living longer than ever. While the United States is not experiencing this phenomenon to the extent felt in Europe and Japan, it is projected that by the year 2050 the white population in the United States will make up only 53% of the total population. While these numbers do not reflect the portion of the U.S. population made up by immigrants, which according to the most recent census is at 11%, the racial shifts over time could be the impetus to major political and social shifts in the United States.

V. INTERNATIONAL NORMS AND MOVEMENTS

Racial discrimination has been the subject of much discussion within the international community and was particularly pointed during the Cold War. While the United States was an active participant in the formation of the United Nations and in drafting numerous international human rights instruments, the United States has been slow to ratify these documents because of congressional opposition. In fact, congressional opposition

171. It is worth noting that the number of African immigrants in France, a country with long standing military ties to Africa, is substantially higher than the United States. Richard L. Abel, Law Without Politics: Legal Aid Under Advanced Capitalism, 32 UCLA L. REV. 474, 487 (1985).

172. In Europe, this has manifested itself in the form of changing policies designed to bring in additional immigrants in what some call "replacement migration" or bringing in foreign workers to offset the aging population and shrinking work force. See B. Lindsay Lowell & Susan Martin, Transatlantic Round Table on High Skilled Migration: A Report on the Proceedings, 15 GEO. IMMIGR. L.J. 649, 654 (2001). See also Papademetriou, supra note 26, at 966, Table 3 (citing TRENDS IN INTERNATIONAL MIGRATION, SOPEMI, 29 (1998)).


176. See David Golove, Human Rights Treaties and the U.S. Constitution, 52 DEPAUL L. REV. 579, 580 (2002) (describing how the opposition has centered on the inappropriateness of
Racism and U.S. Immigration Law
grew so strong that Congress attempted to enact a legislative effort known as
the "Bricker Amendments"\textsuperscript{177} that would have amended the Constitution to
prevent the Executive Branch from entering into international treaties that
might infringe on the rights of the states or be applicable without first
implementing federal legislation.\textsuperscript{178} This congressional opposition to
international treaties is not just a sentiment of the past; it lives on and is
currently the subject of strong feelings in Congress.\textsuperscript{179} During the Cold War
the United States considered itself particularly vulnerable to attacks,
primarily from the Soviet Union, and Congress strongly opposed U.S.
involvement in international treaties. The United States faced many
difficulties in advancing its international political agenda as a result of
Congress' opposition to U.S. involvement in international treaties. These
international difficulties played a large part in influencing both the 1965
Immigration Amendments and the Civil Rights Act of 1966.\textsuperscript{180} It was not
until many years after other nations had already signed a number of the
major human rights treaties that the United States finally adopted them. For
e.g., the United States only ratified the Genocide Convention\textsuperscript{181} in 1989
and the International Covenant on Civil and Political Rights in 1992.\textsuperscript{182} The
United States has yet to ratify the International Covenant on Economic,
Social and Cultural Rights,\textsuperscript{183} the Convention on the Rights of the Child\textsuperscript{184}

\textsuperscript{177} S.J. Res. 130, 82d Cong., 98 Cong. Rec. 908 (1952). For examples of some of these
various attempts at Constitutional amendment, see S.J. Res. 43, 82d Cong. (1st Sess. 1953), as
reported by the Judiciary Committee and S.J. Res. 1, 84th Cong. (1st Sess. 1955); see also Louis

\textsuperscript{178} See DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, \textit{INTERNATIONAL
HUMAN RIGHTS: LAW POLICY AND PROCESS} 117 (3d ed. 2001). The effort to commence the process
of garnering sufficient state support for the constitutional amendment was short circuited after the
Eisenhower Administration promised that it would not become party to any human rights treaty that
might bind the states. See \textit{Statement by Secretary of State Dulles, in Treaties and Executive
Agreements, HEARINGS BEFORE A SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY 825
(1953). For an excellent discussion of the arguments relating to the issues raised by the opponents to
these treaties, see Louis Henkin, \textit{The Treaty Makers and the Law Makers: The Law of the Land and

\textsuperscript{179} See Rep. Bob Barr, \textit{Protecting National Sovereignty in an Era of International

\textsuperscript{180} See \textit{infra} Part II.D and note 69 and accompanying text (detailing the 1964 Civil Rights
Act).

\textsuperscript{181} The Genocide Convention was entered for signatures in December 1948. Convention on
the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 102 Stat. 3045, 78
U.N.T.S. 277. It was adopted unanimously by the general assembly on Dec. 9, 1948. \textit{Id.}

\textsuperscript{182} International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1171
(convention was opened for signatures on Dec. 16, 1966).

\textsuperscript{183} International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993

\textsuperscript{184} Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th
or the American Convention on Human Rights\textsuperscript{185} despite the fact that at least two presidents have submitted these international treaties to Congress. It was not until 1994 that the United States Senate finally ratified the Convention on the Elimination of All Forms of Racial Discrimination but with a number of reservations.\textsuperscript{186}

Following the United Nations’ adoption of the Race Convention in 1966, several World Conferences were held on the subject of combating racism. The first was held in 1978\textsuperscript{187} and the others were held in 1983\textsuperscript{188} and 2001.\textsuperscript{189} The latter of which was the first to address the subject of xenophobia. A number of “expert seminars” and forums exploring issues such as remedies for racial injustices, protection of minorities and the prevention of racial conflicts led up to the 2001 conference. Additionally, the United Nations High Commissioner for Human Rights on each continent conducted a number of meetings in preparation for the World Conference. These meetings’ purported goals were to develop and identify a world consensus and plan, or “Programme of Action” to address the issues.\textsuperscript{190}

In an effort to deal with the difficulties faced by minorities in the global society, and with a recognition that people in the world are on the move now more than any time in history, the community of nations began to take a serious look at the problem of racial discrimination, xenophobia and other forms of intolerance. At the culmination of a series of meetings over many years, the United Nations convened what became the World Conference Against Racism, Racial Discrimination and Related Intolerance (WCAR) in September 2001.\textsuperscript{191} As one commentator noted, these World Conferences are a way of getting a “reality check on a set of issues particularly relevant for the global community.”\textsuperscript{192} Stated otherwise, as we attempt to deal with


\textsuperscript{186.} President Johnson signed the Convention in 1966 and it was submitted to the Senate by President Carter in 1978 but it was not until 1994 that the Clinton Administration submitted it for ratification, albeit with a numerous reservations, including preserving higher protection for speech, expression and association, precluding jurisdiction in the International Court of Justice without U.S. consent, and limiting its enforcement to the federal system. See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 103d Cong., 2d Sess., 140 Cong. Rec. S7634 (daily ed. June 24, 1994). One of the reservations added by the Senate was that the Convention would not be self-executing. \textit{Id}.


\textsuperscript{189.} WCAR, \textit{supra} note 6.

\textsuperscript{190.} \textit{Id}.

\textsuperscript{191.} \textit{Id}.

\textsuperscript{192.} \textit{See A REPORT BY THE INTERNATIONAL CATHOLIC MIGRATION COMMISSION, THE
the issue of racial discrimination, xenophobia and related intolerances we need to assess the problem "on the ground." Those involved in this controversial effort to better understand the full expanse of these problems were able to agree on a number of positive recommendations in the Declaration and Programme of Action.193

VI. DECLARATION AND PROGRAMME OF ACTION194

The WCAR, like other U.N. Conferences, included two parts: 1) the NGO Forum which is made up of non-governmental organizations from around the world raising issues they believe are relevant to the themes of the conference and 2) the U.N. Conference made up of the official delegates. The NGO Forum is made up of the formal conference of representatives of member states who are present to agree on a consensus document that will guide the work of the U.N. General Assembly on the issues addressed. A number of important issues were raised at the 2001 NGO Forum and during the negotiations regarding the Declaration and Programme of Action.195

NGOs interested in issues involving immigrants, refugees, migrants and asylum seekers, participated in the Conference, along with others who met around the globe in the period leading up to the WCAR.196 They met again during the NGO Forum and during the World Conference in caucuses with a concerted effort to influence the language of both the Declaration and Programme of Action. The reason participants worked to influence the language of the Declaration and Programme of Action was because individuals hoped to be able to use these documents to influence their own governments to live up to the ideals agreed upon at the World Conference. For example, a great deal of energy was placed on making sure that no group of foreigners would be left out of protection, for it was the NGO members’ belief that all non-citizens were particularly vulnerable to racist attacks or to suffering the consequences of xenophobia and related intolerances. In this regard, the Programme of Action includes paragraphs that discuss what steps

WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE 2 (Geneva 2002) (on file with the author).

193. WCAR, supra note 6, Declaration and Programme of Action.

194. This article has focused primarily on issues particularly relevant to immigrants, refugees, migrants and asylum seekers and how those problems specifically interrelate to problems in U.S. immigration laws. This section focuses on the issues of U.S. immigration law and foreign policy that U.N. Delegates addressed in drafting the Programme of Action. While the Programme of Action is not the equivalent of a treaty or Conventions, it is valuable because it can be an important basis for launching a dialogue towards law reform. The statements contained in these documents can provide groups within civil society a tool to affect public opinion and to focus demands for justice.

195. Some of the more controversial issues included the treatment of Zionism, reparations for slavery, the caste system and the treatment of Dalits in India. See WCAR, supra note 6, at Declaration and Programme of Action ¶¶ 52, 84-90, 267-77.

states should take to protect immigrants, refugees, asylum seekers, migrants and migrant workers.\textsuperscript{197}

Along these lines, the delegates addressed three important issues: an evaluation of the extent to which laws might cause discrimination, family reunification and remedies for racial discrimination. The Programme of Action called upon countries to conduct an evaluation of their laws to assess the degree to which racism or xenophobia might be found. Delegates hoped to locate and then work to remove these racist laws.\textsuperscript{198} The Programme of Action also addressed the problem of how immigration legislation should not be a barrier to family reunification.\textsuperscript{199} In another section, the Programme specifically recognized the connection between racial discrimination and xenophobia and the necessity of providing adequate remedies for a county’s racist and xenophobic actions.\textsuperscript{200} The Declaration and Programme of Action take as a given that migration will continue irrespective of the conditions in the world and that States must make every effort to assure that all persons within their territory be treated fairly and humanely.

\textbf{VII. POSSIBILITIES FOR REFORM?}

However long and arduous the process, and however qualified its adoption, over time the United States has agreed to a number of international conventions intended to deal with the problem of racism. Given the place that racial exclusion has played in its history, it should not be surprising that the United States has been reluctant to acknowledge the importance of adopting these Conventions. It appears that one of the important elements in the United States’ acknowledgment of the validity of these Conventions has been the very international pressure it was resisting.\textsuperscript{201} What is interesting about the final process of adopting these Conventions is the time lag between the U.S. Presidents’ recognition of their importance and the Senate’s adoption. Given the United States’ unique constitutional structure, its extreme lag time should not be surprising, for the domestic interests in treaty adoption are minimal at best, unless its principles are widely shared

\begin{itemize}
\item \textsuperscript{197} See, e.g., WCAR, \textit{supra} note 6, at Declaration \textsuperscript{197}12, 16, 38, Programme of Action \textsuperscript{197}24-36, 81, 96.
\item \textsuperscript{198} \textit{Id.} at Programme of Action \textsuperscript{198}97 (finding “that further studies be conducted on how racism, racial discrimination, xenophobia and related intolerance may be reflected in laws, policies, institutions.”).
\item \textsuperscript{199} Two sections deal with this issue. Programme of Action \textsuperscript{199}28 calls upon States “[t]o facilitate family reunification in an expeditious and effective manner which has a positive effect on integration of migrants, with due regard for the desire of many family members to have an independent status.” Programme of Action \textsuperscript{200}30(b) urges States “[t]o review and revise, where necessary, their immigration laws, policies and practices so that they are free of racial discrimination and compatible with States’ obligations under international human rights instruments.”
\item \textsuperscript{200} \textit{Id.} at Programme of Action \textsuperscript{200}164.
\item \textsuperscript{201} The United States has often resisted change when the national and international communities have legitimately questioned its actions-such as during the period leading to the Civil Rights laws when the United States had a terrible record on civil rights.
\end{itemize}
among the population. Indeed, the size and insular nature of the United States has lent itself towards isolation from the international community’s concerns.

It will likely be external pressures by the international community, as well as domestic efforts in the courts and media attention focusing on the effort to remove racism from U.S. immigration law, that could lead to positive reforms in U.S. immigration law. We have already witnessed, through the 1965 Amendments and the Civil Rights Act of 1964, that international political pressures can impact domestic immigration policy. While international pressures may not have been decisive during these periods, when combined with legal action, public protest, and an appeal to morality, they went a long way to influence progress in reforming U.S. immigration laws and policies. Indeed, the fact that we live today in a much more interdependent world could lead to progress toward the elimination of racial exclusion in U.S. immigration laws.

The major countervailing force against progressive immigration change is fear. Fear is at the heart of racism and xenophobia and we need not look beyond the basic core of modern immigration law, the McCarran-Walter Act, to see the force of this emotion. The September 11th attacks on the World Trade Center occurred only three days after the conclusion of the WCAR. Within a very short period, Congress introduced legislation and enacted policies that placed unprecedented new powers in the hands of the Executive Branch to exercise even broader discretion in excluding and removing persons from the United States. See generally Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 “USA PATRIOT ACT,” Pub. L. No. 107-56, 115 Stat. 272 (2001).

The tremendous demographic changes in the United States, coupled with global interdependence might lead Congress to the realization that racist and xenophobic immigration laws are counter-productive to our goal of fighting terrorism and helping to create an environment receptive to the peaceful resolution of conflicts. In a society in which a significant and growing number of its people are foreign born and from which much of its economic and social vitality emanates, the identification of common values will become more important to achieving all of the United States’ goals.
People around the world are watching to see how the United States treats its own citizens and those allowed to come within its shores. This will ultimately influence the United States to evaluate many of its immigration laws. In this era of instant communication, if policymakers and leaders can realize the benefits in broadcasting to the world how we as a society are attempting to model the noblest of ideals, progress might be possible. Indeed, the world’s only superpower will at some point realize that its real authority comes not from military might but the example set forth in how it behaves. While it may be that the United States does not wish to bend to these pressures, it may see that it is best to do so for purposes of gaining support for its own international initiatives.

As discussed earlier, racial exclusion in the immigration context has occurred because of the complete abrogation of any restraining legal principles, thereby allowing Congress to allow its racist policies to continue unfettered. In the immigration context, this is exacerbated by numerous legal doctrines such as of the non-reviewability of consular decision and the plenary power doctrine that places these matters solely in Congress’s hands.

Therefore change in U.S. immigration policy can occur in one of the following ways: increased willingness by the judiciary to revisit established doctrine; increased domestic pressure for legislative change; or international pressure that causes the national government to recognize the advantage of reforming its structural barriers to immigration. As noted earlier, it was a combination of international criticism and presidential leadership that ultimately led to the elimination of the national origin quotas.

In order to create change in U.S. immigration law and to confront the issues that I have addressed in this paper, advocates will need to build coalitions that take advantage of the demographic changes in the United States, as well as the technological advances that have improved communication across borders. We have witnessed domestically how immigrant coalitions have been built as new arrivals learn that their continuing vitality requires political action. Indeed, these are the lessons learned from earlier social and political movements. Domestic change can

203. See infra Part III.B.

204. See infra Part II.C, note 68 and accompanying text. There is certainly a strong argument that the assassination of President Kennedy, coupled with President Johnson’s political acumen enabled the passage of this law. In short, that the stars were truly aligned enabling the correct action to take place.

205. Eric Yamamoto and others point out how in the past there have been significant divisions between minority groups in America. See, e.g., Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, 95 MICH. L. REV. 821 (1997); Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863, 886-91 (1993). Bill Ong Hing, while positing the possibility and the reality of conflict, also points out that these differences can be overcome. Ong Hing, Id. at 913-14; see also William R. Tamayo, When the “Coloreds” Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration, 2 ASIAN L.J. 1, 30-31 (1995). Kevin Johnson, in recognizing that there are conflicts between different racial groups, argues that social change can only occur through massive political movements. Kevin R. Johnson, Lawyering for Social Change: What’s a Lawyer to
Racism and U.S. Immigration Law

only occur if bridges are built between immigrant groups and others struggling for equality. Another element that can help bring about positive immigration reform is the inclusion of groups outside of the United States advocating for reform in the international arena. The efforts to bring nations to task for the deficiencies in their domestic laws can be energized by international norms that advocate the removal of racial exclusion and the repudiation of xenophobia.

VIII. CONCLUSION

Race is not a concept recognized in science but a human construct with strong historical roots. Indeed, the Programme of Action recognizes this reality. Civilized human beings throughout the world agree that this socially constructed concept of separate races contributes to nativism, xenophobia and related intolerance, which are ills that need to be combated. Nevertheless, many world leaders recognize that it will take some time before we can remove these racial barriers that exist as a part of U.S. immigration law. The removal of these barriers will require a recognition of the historical roots of the racial barriers in all of its dimensions—structural, doctrinal, attitudinal—as well as well the other barriers, before they can be eradicated.

This article presented some of the structural, doctrinal and attitudinal barriers that remain in U.S. immigration policy. The article also described how different the present situation is from what existed at the turn of the last century when the national origin barriers were created—differences which I believe provide an illustration that it is possible to create positive change toward a more humane and just immigration policy that fully recognizes the need to remove race from the immigration equation. Admittedly, the recent events of "9/11," and reaction to it, present an alternative picture of whether international perceptions and institutions will have an impact on the United States. Yet at the same time, it remains to be seen whether the United States will be at some point required to respond to these outside pressures to significantly and seriously reform its immigration system. We are at an important juncture in our history—a time in which we must confront whether economic and military clout alone can allow us to do whatever we wish or whether, in order to live in a safer world, we must accept the principle of human interdependence. An acceptance of the latter will, in my view,

Do?, 5 MICH. J. RACE & L. 201, 226 (1999) (giving examples of multiracial coalitions in civil rights litigation); Romero, supra note 174, at 381.


207. WCAR, supra note 6, at Programme of Action ¶ 171 (urging "[s]tates to recognize the challenges that people of different socially constructed races, colours, descent, national or ethnic origins, religions and languages experience in seeking to live together and to develop harmonious multiracial and multicultural societies.").
require a rethinking of the institutional barriers to immigration and international policy described above.

The structural barriers to immigration reform are quite substantial and are deeply rooted in the country’s jurisprudence. The judiciary’s reluctance to disturb established precedent suggests that the only possibility for reform will be in the political branches. The political branches respond to arguments grounded in moral suasion and external pressures. Perhaps a lesson can be taken from the civil rights movement of the 1960’s and the effort to enact positive legislation removing the barriers of racial segregation and inequality. During the Cold War, the United States was under much pressure to remove the barriers of segregation, and it was a combination of pressures from a range of fronts that created an opportunity for legislative and judicial action to reform immigration laws. As the world becomes increasingly interdependent and the United States becomes more reliant on immigration for its continuing economic vitality, just as is occurring in Europe and Japan, we can create a fertile climate for dealing with the structural and attitudinal barriers raised in this article.