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Abstract

This note seeks to understand the place of a South Asian American in a country that considers itself bi-racial. The note analyzes the racial ambiguity of the South Asian in two major historical contexts. First, it provides an overview of the legal history of South Asian migration, the first "wave" of which occurred from 1885 to 1923. It analyzes the various exclusionary laws (both state and federal) that set a framework for how to view and treat the common Indian migrant. It further looks at California and the Pacific Northwest's deliberate, xenophobic acts during this time period, such as the Bellingham Riots and the Hindu-German Conspiracy Trial of 1918. This portion of the note concludes with a comparison of the Supreme Court's analysis in two anticanonical cases, *United States v. Bhagat Singh Thind* and *Plessy v. Ferguson*. *Bhagat Singh Thind*'*s* blanket ban on an Indian resident ever being classified as a free white person for the purpose of naturalization was a direct result of the long-standing tensions between American workers, Congress, and the unwanted Indian migrant. This exclusionary ruling set the stage for cautious, deliberate immigration reform less than fifty years later.

The second portion of the note analyzes the second "wave" of South Asian migration after the 1965 Immigration and Nationality Act (INA). It seeks to answer the question of how South Asian Americans can seek

constitutional and political legitimacy after *Brown v. Board of Education*. It also examines how the federal statute has provided access to only a certain type of immigrant, therefore heavily contributing to the "model minority" stereotype without ever being discriminatory on its face. The statute created a modern South Asian America, giving South Asians access to whiteness and its capitalistic benefits while denying them true and equal protection under the law. The nature of the INA reduced South Asians to a limbo "other" category that is neither black nor white. The note then analyzes modern South Asians, such as Dinesh D'Souza, Nikki Haley, and South Asian American activist groups, and how they have sought to create a politically legitimate space for themselves in the space of the "other." Finally, this note concludes by calling for a deeper South Asian American political engagement; one that recognizes the xenophobic and exclusionary history of Indian migration instead of simply benefitting from the access to white privilege and using it to promote conservative rhetoric.

Introduction

South Asian American political legitimacy has boomed in the twenty-first century. The stereotype of the docile Asian is alive and well, but South Asians are starting to disrupt previously unoccupied spaces in politics and literature. Surprisingly, the most famous or notorious political figures of South Asian descent have been political conservatives. South Asians are a staunchly liberal group by all statistics, voting Democratic more than any other Asian American demographic.[1] The note seeks to understand why some of the most prominent South Asian Americans in politics have begun to support legislation similar to the exclusionary policies that existed to disenfranchise their ancestors.

The first portion of the note explores the earliest period of Indian migration from 1885 to 1923 in juxtaposition with *Plessy v. Ferguson*. During the period between the Alien Contract Labor Law of 1885 and the Immigration Act of 1917 (or Asiatic Barred Zone Act), two major waves of Indian immigrants, Punjabi laborers in the Pacific Northwest and intellectuals pursuing a degree at the University of California (now University of California, Berkeley), formed an unlikely pairing. Together, the two groups formulated the development and rise of the Ghadar Party, a response to British colonial rule in India. This political party, inspired by American ideals of emancipation and independence, attracted the concern of British intelligence officers stationed in the United States. Less than twenty years after the party's conception, over 100 Indian immigrants stood accused of conspiring to overthrow a foreign government. Most of these men were put on trial, convicted,

1. ERIKA LEE, THE MAKING OF ASIAN AMERICA 24 (1st ed. 2015).

and eventually deported.[2] The Hindu-German Conspiracy Trial of 1918 was the beginning of the end of early Indian migration. Thanks to the convictions and the already arbitrary nature of naturalization in the United States, the Supreme Court abruptly declared Indians would never be considered "white" under the naturalization statute in *United States v. Bhagat Singh Thind*.[3] This officially ended a turbulent, conflicting, and highly exclusionary period of Indian immigration to the United States.

The second part of the note discusses the passage of the INA and its subsequent effects on South Asian Americans. It also seeks to answer how South Asian Americans can seek both constitutional and political legitimacy after *Brown v. Board of Education* in a country where they are not defined as either white or Black. The INA added skills and family reunification categories, thus creating a remarkably different South Asian American population. These immigrants were highly skilled or often had a highly skilled family member already in the United States. The new face of South Asian immigration gave them access to a level of privilege that was unprecedented, and also initiated the backhanded compliment of being a "model minority," someone who quietly conforms to white societal norms and quickly overcomes adversity without using government assistance.

On its face, the INA claimed to be reformative and a representation of American ideals. It created a strange political landscape for South Asians, however, who took two divergent paths to gain political legitimacy in country which had historically excluded them, yet currently welcomed a certain subset of them. Some South Asians preached the conservative rhetoric that had excluded their ancestors less than a century before to gain respect and power. They utilized the model minority myth and further pushed for the notion that an ideal American immigrant should be productive and submissive in order to be considered desirable by pre-existing society. Others formally organized with other immigrant communities to research and criticize the discriminatory nature of immigration and labor laws. The current South Asian American is not white but is granted certain benefits of whiteness in exchange for promoting "good immigrant" stereotypes and anti-black rhetoric.

First and foremost, it is necessary to understand how the terms "Indian" and "South Asian" have evolved as a result of history. India was a colony of the British Empire, and what constituted "India" back then is today's geographical regions of India, Pakistan, and Bangladesh. In 1947, India gained independence from the British Empire and divided into India, West Pakistan, and East Pakistan. In 1971, East Pakistan was officially recognized as

2. JOAN M. JENSEN, PASSAGE FROM INDIA: ASIAN IMMIGRANTS IN NORTH AMERICA 225 (1988).

3. *See* United States v. Bhagat Singh Thind, 261 U.S. 204, 214–15 (1923).

Bangladesh, while West Pakistan was just Pakistan. Therefore, the word "India" in a pre-1947 context encompasses all three modern day countries. Likewise, the term "South Asian" developed as a result of the 1947 India-Pakistan partition. The word "South Asian" currently encompasses several countries: present day India, Pakistan, Bangladesh, Nepal, and Sri Lanka. The word "India" used in the post-1947 context therefore means today's current geographical region of India.

I. Early Indian Migration from 1885 to 1923

A. Setting the Stage through Statutory History

The rapid industrialization of the United States at the end of the nineteenth century, combined with the recent abolition of slavery, led to a newly heightened demand for immigrant labor. A statute preceding the Alien Contract Labor Law of 1885 actually encouraged immigration to the United States by supporting industries that paid passage for immigrant workers in exchange for their labor.[4] The law was eventually repealed but demonstrated a time in early American history where foreign labor was supported and even encouraged. Furthermore, the 1858 Burlingame Treaty established China as the most favored nation in terms of immigrant labor,[5] but this privilege was quickly taken away due to anti-Chinese sentiment stemming from the cheap and plentiful labor provided by China. California led this movement with the Anti-Coolie Act of 1862,[6] leading to the federal exclusion of people of Chinese descent under the Chinese Exclusion Act of 1882. The enactment and repeal of these statutory laws finally led to the blanket ban on any company or institution paying for the transportation of foreign labor.[7] The statute was facially discriminatory, targeting the resented "coolie" labor provided by China while providing exemptions for skilled workers, those who worked outside of a unionized industry, artists, and servants.[8] This allowed Southern and Eastern European immigrants to keep migrating to the East Coast, since many of them were either facing religious persecution, or belonged to industries that were not unionized.

4. MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 67 (2006).

5. Burlingame-Seward Treaty, China-U.S., Jul. 28, 1858, 16 Stat. 739.

6. Anti-Coolie Act of Feb. 19, 1862, ch. 27, 12 Stat. 340, *repealed by* Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58.

7. Alien Contract Labor (Foran) Act of Feb. 26, 1885, ch. 164, §1, 23 Stat. 332, 333 (repealed 1868).

8. EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 89 (1981).

B. "Undesirables" and a Rise in Punjabi Labor

The Chinese Exclusion Act of 1882 was a direct response to the growing hostility among white laborers against Chinese laborers, who they felt were in direct competition for their labor jobs. The hostility, mostly centered in the West, often escalated to violence even after the passage of this xenophobic legislation. By 1907, Chinese laborers were driven from Washington state, creating a wider space for Indian labor.[9] Subsequently, the Asiatic Exclusion League (AEL), an association dedicated to organization of anti-Asian sentiment and legislation, began to target Indians in response to the rise in the Indian workforce.[10] Many laborers, already prevalent in the railroad industry, had begun to work in Washington lumber mills.[11] This new wave of mill workers settled into an area that was already deeply distrustful of any Asiatic influence. Sikh men attempting to preserve their cultural identity were particularly easy to target because of their turbans. The AEL, mostly led by white laborers, pushed to exclude all Indian labor after Labor Day in 1907.[12]

When Indian workers showed up for work the Tuesday after the holiday, white mill workers turned their anger into violence. Several Indians were beaten in defense of "white womanhood."[13] The police continued to ignore these signs of growing unrest and violence, and eventually, what is now known as the Bellingham Riots began. The police were so understaffed and in fear of these young laborers that they eventually acquiesced to the violence, allowing the laborers to beat and even stone Indian men in Bellingham.[14] The police chief allowed the rioters to use the city hall to house Indian laborers as an unofficial jail.[15] Eventually, the rioters were exhausted and the violence ended on its own accord without any support from law enforcement.[16] Similar riots occurred during this time period in Vancouver (Canada), Everett (Washington), and St. John (Oregon).

This began a wave of anti-Indian language in West Coast publications, coupled with an underlying support for white mill workers organizing

9. JENSEN, *supra* note 2, at 43.
10. *Id.* at 44.
11. *Id.* at 40.
12. *Id.* at 45.
13. *Id*.
14. BELLINGHAM HERALD, Sept. 2, 1907, at 7.
15. *Id.*
16. JENSEN, *supra* note 2, at 46.

against cheap Asian labor.[17] Indians were labeled as "undesirables" with dirty turbans and as a threat to the American economy.[18]

C. The "Fresh Air of Freedom" and Development of the Ghadar Party

British rule in India (referred to as the British Raj) meant that Indian labor and migration held a delicate role in world politics. The British Raj existed from 1858 to 1947 and established two major policies that affected Indian migration during this time period. First, the British used their own rigid class system to better understand the Indian caste system, which was a paradigmatic classification scheme reserving jobs and occupations to different people based on their group. The British codified the Indian caste system and reserved powerful administrative positions to those belonging to higher castes.[19] British administrators relied on eugenics, using the length of an Indian's nose to codify the seven different castes.[20] These policies were a precursor to the same arguments that Indians in the United States would try and use to gain naturalization.

The second effect of the British Raj was that Indians were a significant part of the British military in World War I, which was around the same time that Indian unrest against the British Raj began to develop. 1.4 million British soldiers fought in World War I, a large portion of which were residents of India, leading to a global presence and subsequent League of Nations membership after the war.[21] Indian leaders began to call for a self-governed nation.[22] The proliferation of Indian portrayal in the worldwide media and the literal proliferation of Indian people themselves created a new level of tension between British rule and India.

Specifically, British politicians began to fear that the "fresh air of freedom" in the United States would promulgate ideas of emancipation and unrest among Indian immigrants, and that these ideas would then be taken back to the subcontinent and used to overthrow the British (they were not wrong in this assumption).[23] Many of these Indian men were agricultural workers subsisting off two to three dollars per day, but they formed communities of

17. Mary Lane Gallagher, *1907 Bellingham Mob Forced East Indian Mill Workers Out of Town*, BELLINGHAM HERALD, (Sept. 2, 2007, 12:01 AM), https://www.bellinghamherald.com/news/local/article22195713.html.

18. JENSEN, *supra* note 2, at 51.

19. NICHOLAS B. DIRKS, CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA 198-225 (2001).

20. *See generally* THOMAS R. TRAUTMANN, ARYANS AND BRITISH INDIA (2005).

21. JUDITH M. BROWN, MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY 195 (2d ed. 1994).

22. *Id.*

23. MAIA RAMNATH, HAJ TO UTOPIA 19 (2011).

resistance and strength.[24] The Sikh community, in particular, created multiple *gurdwaras*, or Sikh places of worship, as community centers where laborers could seek legal assistance to negotiate terms, find group living arrangements, and procure jobs.[25]

As infrastructure developed, other Indians came to the United States seeking the fresh air of freedom through higher education. University of California organized scholarships to sponsor Indian students, and Indian periodicals published pieces on how to live and create a life in America.[26] One of the members of the selection committee for these scholarships was Har Dayal, a future Indian freedom fighter.[27] Unsurprisingly, many of the students selected also possessed radical notions of freeing India from British imperialism.[28]

It is unclear who radicalized who, but this unlikely duo of Indian farmer and student groups and interests were organized and often won the sympathy of leftist Americans, who were also against British rule.[29] The early Ghadarites, as they called themselves, published writings that praised American ideals and thoughts as the catalyst for their own political movements back at home.[30] Gobind Behari Lal, one of the first organizers of the Ghadar Party, stated that the unique combination of university bred intellectuals and farmers who possessed the discipline that accompanied manual labor, was the movement's most "outstanding characteristic."[31] The pressures of the Asiatic Exclusion League and other white laborers, however, forced policymakers and legislators to ostracize Indian workers and intellectuals without explicitly banning them. In response, Dayal gave an impassioned speech that reframed the immigration battle Indians were fighting in America. He called for a liberated India, claiming that "as long as the Indians remained in subjection to the British, they would not be treated as equals by Americans or any other nation."[32]

The Dillingham Commission was created in 1907 as a bipartisan special committee of Congress in order to understand the recent wave of migration to the United States and its subsequent effect on the American people.[33] This Commission undertook research and proposed ideas until 1911.[34] In particular, the Commission recommended policies that would negatively impact

24. RAMNATH, *supra* note 23, at 19.
25. *Id.*
26. *Id.* at 20.
27. *Id.*
28. *Id.*
29. *Id.* at 23
30. RAMNATH, *supra* note 23, at 23.
31. *Id.* at 22.
32. *Id.* at 33.
33. *Id.* at 24.
34. *Id.*

Indian workers without explicitly banning them, such as a literacy test for Indians or a "gentleman's agreement" with Britain to restrict the number of Indians leaving the Indian subcontinent.[35] A 1910 immigration report specifically stated that Indians were "universally regarded as the least desirable race of immigrants thus admitted to the United States."[36] This report preceded an early draft of the 1917 Immigration Act, which contained an amendment stating that any foreign immigrant coming to the United States to conspire with other foreign nationals to overthrow a foreign government would be deported.[37] Although this amendment never made it to the congressional floor for debate, it marks the specific yet general way legislators in Congress at the time sought to exclude Indians implicitly. Indian workers (and subsequently early members of the Ghadar Party) were in a different and even more delicate position than their Asian counterparts purely because of the Indians' subordinate relationship to Britain.

D. The Hindu-German Conspiracy Trial of 1918

In March of 1914, American immigration authorities began deportation proceedings against Dayal because of his anarchist teachings.[38] He escaped to Europe, leaving an associate, Mahesh Ram Chandra, as the *de facto* leader of the party.[39] Also in 1914, a forty-one page pamphlet titled *Deutschland—Indiens Hoffnung* (*Germany—India's Hope*) was published and circulated to captured Indian soldiers in Germany (Indian soldiers made up a significant part of the British Army).[40] The British became increasingly concerned with a transnational Indian expatriate network that would gain skills and resources to use against British rule in India.[41] They began covert surveillance activities and sent numerous undercover agents to the Pacific Coast, pressuring the Justice Department to arrest political activists[42] and culminating in the infamous 1918 Hindu-German conspiracy trial in San Francisco.

The term "Hindu conspiracy" itself was a successful trial strategy used by the prosecution. Thanks to the exclusionists' concerted efforts to restrict Asian immigration, the people of California equated the word "Hindu" with the xenophobic legislation that the AEL pushed for. The activities of Indian revolutionaries were further criticized and even labeled as a criminal conspiracy, in which at least two people are working together to perform some

35. RAMNATH, *supra* note 23, at 24.
36. *Id.*
37. *Id*.
38. JENSEN, *supra* note 2, at 185.
39. *Id.* at 190.
40. *Id.* at 196.
41. *Id.*
42. *Id.* at 214.

sort of illegal act.[43] This extended the definition of the conspiracy statute by applying it to political activism. If the jury could believe that political activism was a crime, then the prosecution had done its job. Specifically, the prosecution directed the jury to a neutrality law that prohibited organizing a military expedition against a nation with which the United States was at peace.[44]

As evidence, the prosecution used a series of communications between Britain and the United States that included: memos debating the consequences of letting the Ghadar Party stay in California; detailed reports of activities by Indian revolutionaries; a complaint of international conspiracy regarding a German arms shipment to Indians in California; and finally, a complaint against the editor of a newspaper who allegedly incited murder, arson, and assassination.[45] These reports were frequent, excitable, and often had no conclusory findings.

On May 1, 1917, Ram Chandra and seven other Indians were finally indicted by a grand jury.[46] Trial commenced in November 1917 and continued for five months, in which the prosecution broadened the scope of "military expedition or enterprise" to include any sort of political activism in order to convict the men on trial. The prosecution, aided by British documents and witnesses, painted an elaborate picture of a Hindu conspiracy orchestrated by Germans in the United States who were trying to stir up an Indian revolution in order to distract British Armed Forces from World War I.[47]

The trial was long and messy. The Court disregarded hearsay rules and admitted poorly authenticated evidence, and the prosecution painted the Indians as sneaky, plotting spies.[48] The trial also increased tensions amongst the defendants, which culminated in Ram Chandra being shot and killed in the courtroom by another co-defendant.[49] The prosecution succeeded in distinguishing Indian freedom from British rule from the American Revolutionary War. By painting the Indians as spies and secret plotters working with Germans (a public enemy in 1918), no jury would see this Indian struggle as anything close to what their ancestry endured at the hands of the British.[50] All Indian defendants were convicted. A country founded on political freedom and refuge from oppression publicly approved the oppression of another people and disparaged any political uprising.

43. JENSEN, *supra* note 2, at 216.
44. *Id.* at 214.
45. *See* JENSEN, *supra* note 2, at 215.
46. *Id.*
47. *Id.* at 223.
48. *Id.* at 224.
49. *Id.*
50. *Id.* at 225.

Despite both the trial and British concern, scholars have never been able to definitively determine the extent to which Germany offered assistance to rebels in India.[51] It is unclear how much assistance was given, what it was for, or even when it started and ended.[52] There has also been little to no analysis of the effect this ambiguous level of assistance actually had on the Indian independence front.[53] For example, Ram Chandra, leader of the party and editor of the newspaper accused of inciting violence, was not held responsible for the crimes in question.[54] The graphics and articles in the newspaper were "brutal" but also an honest political critique of the British Empire in India.[55] The arms shipment, however, became the central dispute in litigation because it carried the most ambiguity. Any men involved with the arms shipment who were also in the San Francisco Ghadar Party were put on the Justice Department's lists of watched individuals.[56] There was no proof, however, that the arms were being used for a military expedition in India to overthrow British rule.[57] The British and United States state departments went back and forth; the United States was concerned with fair prosecution and not admitting faulty evidence, while Britain continued to push for national security as the priority.[58]

II. Political tensions and United States v. Bhagat Singh Thind

A. The Arbitrary Method to Naturalization before *Thind*

Naturalization, according to the first Congress in 1790, has always been granted only to those who were classified as "white."[59] After the Civil War, Congress amended the naturalization statute to include those of African descent, but explicitly made it clear that all other immigrants seeking naturalization must be "white."[60] The meaning of the word "white" continued to be a point of debate once Asian Indians started seeking naturalization in the early twentieth century.

Applying for citizenship was complex, federally unregulated, and often did not rely on any statutory interpretation.[61] The issue of whether the applicant was "white" or not was decided by the clerks of the court, since

51. JENSEN, *supra* note 2, at 184.
52. *Id.*
53. *Id.*
54. *Id.* at 219.
55. *Id.*
56. JENSEN, *supra* note 2, at 220.
57. *Id.* at 217.
58. *Id.* at 222.
59. *Id.* at 246.
60. *Id.* at 247.
61. *Id.*

Congress had yet to define the boundaries of the statute.[62] Clerks were not required to provide reasoning for their decisions. To add to the confusion, a convention between the United States and England in 1870 made it so that citizens of one country were eligible to be naturalized in the other but did not clarify whether that holding extended to subjects of British colonial rule.[63] The United States Attorney General Charles Bonaparte declared eventually that "[i]t seems to me clear that under no construction of the law can natives of British India be regarded as white persons."[64]

Although California exclusionists welcomed Bonaparte's sentiment, courts were not bound to follow it.[65] For example, Abdullah Dolla came prepared to his hearing; despite the United States Attorney Office's opposition to his admission, Dolla had a deputy collector and a white doctor testify to his Caucasian heritage.[66] The judge listened to this testimony and asked to examine Dolla's arms, since they had received less sun exposure.[67] He declared Dolla white because his skin was pale enough to show the blue veins running underneath it.[68] Thus, federal courts continued to interpret the statute on their own and disregarded the United States Attorney Office's arguments. This led to a slew of arbitrary decisions in which Indians gained citizenship based on a strange combination of "scientific" findings, a person's heritage, and what the common man understood to be white.

On the other hand, federal district court judge Henry A. Smith in South Carolina used even more arbitrary reasoning to define the word "white" in terms of granting citizenship. He looked to the framers' intent when writing the statute in 1790, a time when the word "Caucasian" or "Aryan" held no meaning to the writers.[69] The applicant in question was Faras Shahid, a Christian Syrian man who claimed that his Syrian heritage made him a member of the Indo-European race that included Persians (Persians at that time had received citizenship because they were considered Caucasian).[70] Smith accepted this reasoning, but denied Shahid citizenship because in 1790, the word "white" did *not* include the geographic regions of Caucasian people.[71] Therefore, Smith used textualism and common meaning to define the word "white" in the most exclusionary way possible, referring only to "white Europeans and their descendants." The word was limited by what it meant in 1790 when it was written.

62. JENSEN, *supra* note 2, at 247.
63. *Id.* at 248.
64. *Id.* at 248.
65. *Id.* at 249.
66. *See* United States v. Dolla, 177 F. 101 (5th Cir. 1910).
67. *Id.*
68. *Id.*
69. JENSEN, *supra* note 2, at 253–54.
70. *See Ex parte* Shahid, 205 Fed. 812 (1913).
71. *Id.*

Furthermore, while Shahid and other Persians could be descended from European conquerors, Smith ruled that "the conqueror seems to have been soon swallowed up in an enormously preponderant brown or black people of difference race" and that this "dark-colored people" was the controlling race for these applicants.[72] Perhaps to appeal to exclusionists, Smith further articulated his racist theories, claiming that if he allowed these vague descendants of Europeans to be citizens, then he would have to open the door to Chinese and Japanese applicants, who very well could have European heritage way back in their ancestry.[73] Smith created the borders and subsequently determined whether applicants could qualify as white. He upheld his decision in later cases, telling an applicant that if the interpretation of the statute seemed arbitrary or even absurd, it was the job of Congress or the Supreme Court to settle this matter.[74]

B. External Pressures Leading to *Thind*'s Holding

Some courts followed Smith's reasoning, while other courts, including those in California, continued to interpret the statute using the arguments that Dolla and Shahid had brought in their defense.[75] These inconsistencies prompted the Supreme Court to clarify and create a single line of reasoning, first in *Ozawa v. United States*, and a year later in *United States v. Bhagat Singh Thind*.

Smith's arbitrary criteria for determining who was white started to gain traction in the Supreme Court in the 1920s. Justice Sutherland delivered the opinion of the court for *Ozawa*, in which he denounced the color of someone's skin being the legal test for naturalization.[76] Instead, Sutherland said that the word "white" extended to persons of the Caucasian race, including Indians.[77] That being said, Sutherland anticipated the problem of equating "white person" with "Caucasian" and said that cases in the gray area would have to be decided individually.[78] Since Ozawa, a Japanese immigrant, was not Caucasian by clear evidence of science, then he was not eligible for citizenship.[79]

Ozawa created a legal context for *Thind* to make his argument before the Court. Ozawa was born in Japan but had lived in the United States for twenty years.[80] He attended the University of California, educated his

72. JENSEN, *supra* note 2, at 253.
73. *Id.* at 253.
74. *Id.* at 254.
75. JENSEN, *supra* note 2, at 255.
76. *See* Ozawa v. United States, 260 U.S. 178 (1922).
77. *Id.* at 189.
78. *Id.* at 198.
79. *Id.*
80. *Id*.

children in American schools, and attended an American church.[81] He was, by all means, a model immigrant. Ozawa lost purely because he was not white, and in Sutherland's eyes, Congress meant "white" to include only descendants of the Caucasian race.

Thind was born in Punjab, India and attended Punjab University until he came to the United States in 1913.[82] He continued studying at the University of California but was not associated with the predecessors of the Ghadar Party at the time.[83] When his loyalty to India was questioned, he admitted his support for an India free from British rule but openly denounced any armed rebellion.[84] Most importantly, Thind was a United States war veteran and was honorably discharged with glowing performance reviews.[85] He was a model immigrant like Ozawa in every way, and furthermore, Thind would argue his Aryan ancestors, who invaded Punjab centuries ago, were Caucasian. Since Justice Sutherland had explicitly expressed his support for the Caucasian race in *Ozawa*, Thind's attorneys believed that a model immigrant such as himself, with a direct tie to the Caucasian race, would secure a pathway to naturalization for Thind and all future applicants. Thind would also argue that his high-caste status in India was similar to the white man's exclusion of Black Americans.[86] High-caste Indians were not allowed to interact with or marry lower caste Indians, similar to the anti-miscegenation laws in the United States at the time.[87] Thind had evidentiary support tying him to the Caucasian race, making him a white man according to the precedent set forth in *Ozawa*.

Thind brought his case to a federal district court in Oregon in 1920, under the naturalization law of 1906.[88] This law was Congress's first attempt at creating uniform immigration and naturalization laws and established a bureau to handle these matters. The law required that an applicant learn English to be considered for naturalization.[89] Despite the liberal attitude of the nearby California courts, the bureau denied Thind's application.[90] By 1920, the Asiatic Barred Zone Act was also in effect, which barred Indians from entering the United States but did not answer the question of whether Indians already in the country were eligible for citizenship.[91] On appeal, the judge decided that the Asiatic Barred Zone Act did not retroactively apply to

81. JENSEN, *supra* note 2, at 198. *Id.*
82. *Id.* at 256.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. DIRKS, *supra* note 19, at 199.
88. *See* United States v. Bhagat Singh Thind, 261 U.S. 204 (1923).
89. *Id.*
90. *Id.*
91. *Id.*

Indian naturalization and granted Thind citizenship.[92] Of course, the bureau appealed the case, which finally reached the Supreme Court in 1923.[93]

The Court was not persuaded by Thind's reasoning. Anthropological and scientific evidence tying Indians to the Caucasian race was disregarded by the Justices, who wrote a unanimous opinion in 1923.[94] Regardless of what the evidence presented, the Court choose to employ yet another criteria to push their exclusionary agenda, that of "the common man." When interpreting the statute, the Court argued that the phrase "free white persons," a common man's phrase, should be used instead of "Caucasian," a word of scientific origin.[95] This is because in 1790, the word "Caucasian" was not used and carried no meaning to the framers (note that this is a reiteration of Smith's argument in the North Carolina courts).[96] Therefore, the word "Caucasian" is meant to aid the legislative intent of the statute, and not substitute the words already written.[97] Furthermore, the meaning of the word "Caucasian" is unclear as to which people it includes.[98] A common man, therefore, would not include Indians in his interpretation of "free white persons."[99] The Court concluded its point by drawing on the intent of the current Congress, as well. Since the Asiatic Barred Zone Act had just passed less than a decade before, overruling a presidential veto, there was a clear "congressional attitude of opposition" to Indians entering the United States.[100] That logic could then extend to the fact that if Indians were being excluded from entering the country, they should also be excluded from applying for citizenship.[101] The unanimous decision in *Thind* closed the door on the first, inconsistent chapter of Indian entry and naturalization to the United States.

The aftermath of *Thind* created an opportunity for California exclusionists to further ostracize Indians from their communities. District attorneys in various counties began proceedings that revoked Indian purchases of land and terminated leases early.[102] Officials began to refuse marriage licenses and, finally, cancelled naturalization papers of Indians, regardless of their political involvement.[103] Justice departments eventually organized to adopt a uniform standard to exclude Indians from naturalization. Nonetheless,

92. *See In re* Bhagat Singh Thind, 268 F.683 (1920).
93. *Thind*, 261 U.S. at 204.
94. *Id*. at 209.
95. *Id*.
96. *Thind*, 261 U.S. at 210.
97. *Id.*
98. *Id.* at 211.
99. *Id.*
100. *Id.* at 215.
101. *Id.*
102. JENSEN, *supra* note 2, at 259
103. *Id.*

Indians continued to appeal and litigate their cases for years after the *Thind* decision.[104]

Using the "common man" standard for what was considered to be white meant that what a person identified as was based on how well they passed for a certain race. It was the first subjective legal test that governed the rights of an individual based on race. This was a sharply different standard than the ones set forth in slave state statutes pre-Civil War, which denoted and identified how much white ancestry a slave would require to gain access to legal rights. The shift from numerical amounts to subjective appearance allowed for greater restrictions and arbitrary standards set by the judicial system, leading to a tighter protection of white supremacy. For example, the "common man" test in one instance was interpreted to include mixed people of color; a common man would only consider a person white if a quarter or more of their blood lineage was proven to be white.[105]

C. *Plessy v. Ferguson* Paved a Difficult Path to Naturalization

The touchstone of modern equal protection analysis is discriminatory legislative intent; this is a far cry from the strict textualist approach used to interpret the Fourteenth Amendment in the nineteenth and early twentieth centuries.[106] The decision in the landmark and later reversed Supreme Court case *Plessy v. Ferguson* was consistent with the older, original understanding of the Fourteenth Amendment. A showing of discriminatory legislative intent was not even required when *Plessy* was decided.[107] This is because segregation as a policy was considered to be a part of social order and, therefore, could not have been intentionally discriminatory; *Plessy* was decided seven to one.[108]

Thind was decided only twenty-seven years after *Plessy*, while separate but equal policies were still an established part of society. Even though none of the Justices on the Court were the same, the same sentiment rang strong and true. Like the *Plessy* Court, the Justices in *Thind* did not consider any potential discriminatory intent behind the naturalization statute. Instead, the Court maintained its textualist, plain language approach. Naturalization being contingent on white lineage was automatically upheld due to the plain reading of the statutory text.

This reliance on an original reading of the Fourteenth Amendment was strictly because the Court did not want to address the uncomfortable notion of association. The Court was unwilling to acknowledge a society in which

104. JENSEN, *supra* note 2, at 264.
105. *See* Morrison v. California, 291 U.S. 82 (1933).
106. Jamal Green, *The Anticanon*, 125 HARV. L. REV. 379 (2011).
107. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).
108. Green, *supra* note 106.

recently liberated slaves would occupy the same spaces as their former owners, and where naturalization was granted objectively and not for the purpose of protecting white males. What did it mean for Homer Plessy to have the right to sit in a train car among white passengers? What did it mean for Bhagat Singh to achieve identical status as a German or Irish immigrant? The Court maintained its position as a gatekeeper to an integrated society, using textualism and plain language to uphold the social order of the time.

The Fourteenth Amendment was Congress' first foray into civil rights, but the legislature began its journey hesitantly. It entertained and permitted the right to own property, the right to contract, and the right to contribute to the economy and capitalism at large. This did not include the right to associate, to intermarry, to bear children with, and to receive the same respect and treatment as to that of a free white person. This is the precursor to "racial capitalism," which is the practice of deriving only social and economic value from the acknowledgment of another's racial identity.[109] The decisions in *Plessy* and *Thind* touted falsely progressive values by acknowledging the presence of Black and Indian Americans to the degree that it was useful and comfortable. Simultaneously, they continued to allow white Americans and United States citizens to barely tolerate the presence of others without feeling forced to do so. This left Indian Americans to ask an uncomfortable question: are we Black or are we white?

IV. Neither Black nor White: The 1965 Immigration and Nationality Act and its Consequences on South Asian America

A. *Brown v. Board of Education* and its Abandonment of Textualism

Brown v. Board of Education reversed the holding in *Plessy* by doing away with the "separate but equal" doctrine. *Brown* took a sharp turn in its abandonment of the strictly textual reading of the legislation and of court precedent, instead relying on sociological studies and the future-facing effect that discrimination would have on children of color.[110] The lesser cited, equally curious concurrence from Justice Jackson also highlights that the change in times required a different reading of the Fourteenth Amendment. Similar arguments were made in *Loving v. Virginia* and affirmative action cases.

Thanks to the rapidly evolving legal landscape of equal protection analysis under *Brown*, South Asian Americans were finally granted equal protection under the law, less than fifty years after *Thind*. Yet several modern South Asian Americans continue to seek political legitimacy through

109. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).
110. Brown v. Board of Education, 347 U.S. 483, 494 (1954).

conservative means, employing "good immigrant" stereotypes, promoting anti-blackness and championing exclusionary policies through textualist interpretations of statutes not dissimilar to the ones that kept them out of the United States.

B. South Asian Americans and a Tri-Racial America

The placement of South Asian Americans in twentieth century politics and media has always been ambivalent and contradictory, in part due to the racial and religious diversity of South Asia. Immigrants from South Asia may be Hindu, Muslim, Sikh, Buddhist, Catholic or Protestant. They possess a wide variety of physical characteristics and skin tones. Furthermore, some Hindus may choose to strongly identify with the caste and community they grew up in, while other Hindus may be the product of inter-caste marriages and have no cultural tie to the caste. And finally, indigenous Native Americans have long been mistakenly referred to as "Indians," adding to the confusion and diverse array of populations here in the United States.

Thind formally declared that Indians would never be white, and yet in the 1970 national census, Asian Indians were classified as "white." Later critical race theorists have identified South Asians as "honorary whites,"[111] which calls into question the idea of America being a bi-racial country in which all its residents must conform to either whiteness or Blackness. Is America becoming "tri-racial," and if so, is the third race simply "other" or "brown"?

Racialization theory uses the legal history and processes of racial discrimination to set up a hierarchy among people.[112] The concept of racialization can go beyond statutes, however, and extend to the informal stereotypes, media portrayals, and microaggressions that people encounter on a daily basis.[113] Further theories build on the idea of "racial capitalism," which establishes the notion that white supremacy and a claim to "whiteness" allow the individual to gain property, financial capital, and a general reputation for success.[114]

It is easy to understand how racial capitalism has allowed white supremacy to benefit off the exploitation and misuse of colored bodies and labor. The most notorious example, of course, was the legal institution of slavery until 1865, which allowed the American economy to boom and develop due

111. Eduardo Bonillo-Silva, *From Bi-Racial to Tri-Racial: Towards a New System of Racial Classification in the USA*, 27 ETHNIC & RACIAL STUDIES 931, 933 (2004).

112. Vinay Harpalani, *Desi Crit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 110 (2013).

113. *Id.*

114. Leong, *supra* note 109; *see also* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J.C.R. & C.L. 51 (2005).

to the unpaid slaves' labor that white American slave-owners benefited from. This is the most direct example of both statutes and capitalism allowing the white, male population to comfortably sit on top of a racial hierarchy of their own creation. A newer example is the H-1B worker's visa, which allows United States employers to temporarily employ foreign workers in specialty occupations. H-1B visas grant South Asian workers access to "whiteness" by benefitting from a higher paid job, while also being discriminated against and exploited, due to the visa's vague and ambiguous standards.

H-1B visas have no doubt changed the landscape of South Asian America, ushering in hundreds of thousands of engineers and doctors and labelling Indians as the highest-earning minority in the United States. But the visa continues to exploit workers through substandard working conditions, less pay, and the ever-present threat of being deported if the worker is fired.[115] The creation of the visa has allowed the United States to tie labor performance to the right to remain in this country. Simultaneously, South Asian workers under the H-1B program have positive access to racial capitalism while also being discriminated against for their non-citizen status. It is uncontested that it is a better time to be South Asian today than it was in 1923 under *Thind*'s exclusionary ruling. South Asians are positively portrayed as hardworking, intelligent and quiet. They do not disrupt the status quo and are statistically less likely to complain about problems regarding their visas.[116] Donald Trump, in an effort to reach the Indian American demographic (a group that consistently votes Democratic regardless of income), spoke in Hindi during a 2016 campaign ad.[117] Regardless of these so-called "benefits," however, South Asian Americans are also consistently denied access to equal protection under the law under the creation of the H-1B visa. Furthermore, the 2018 Hate Crimes Report under the Federal Bureau of Investigations shows a consistent increase of hate crimes against Hindus, Sikhs, and Muslims, in which over fifty percent of the perpetrators are white.[118] In this manner, South Asian Americans teeter between the edges of both whiteness and blackness by gaining access and privilege to the praise and respect of the higher white class, but also continue to be the victims of hate crimes, microaggression and labor discrimination.

115. Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1, 13 (2017).

116. Ontiveros, *supra* note 115.

117. Max Bearak, *Trump Speaks Hindi (in a New York Accent) in a New Campaign Ad*, WASH. POST (Oct. 27, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/27/trump-speaks-hindi-with-a-new-york-accent-in-a-new-campaign-ad/.

118. *See* FED. BUREAU OF INVESTIGATIONS, HATE CRIMES REPORT (2018)

C. A Supposed Call for Immigration Reform

President Johnson endorsed the INA as a conservative and cautious approach compared to the immigration reform enthusiastically supported by President Kennedy before him.[119] Despite this muted endorsement, the INA is credited for modern Asian American immigration and hailed exactly as the sweeping change Johnson claimed it would not be.

The INA did three things: it abolished national origin quotas; it created categorical methods of entry to the United States based on skills and family members; and it established a global cap on immigration.[120] This made two major differences: it increased the overall population of Asian Americans by creating new categories of entry, but also began the era of undocumented immigration due to the global cap.[121]

Most South Asian immigrants today have no relation to the farmers and railroad workers that preceded them; instead, they represent the diversity of the region in terms of culture and skills. The majority of these immigrants are Indian in a modern day, post-imperialistic context. While most attention is given to the Indian H-1B worker, qualifying for entry through the skills-based category set out by the United States, a significant number of Indians come through the family reunification process. These immigrants do not have university degrees, and instead join their family members to own small businesses and franchises, most often gas stations, motels and taxicabs.

D. South Asian Political Legitimacy and the "Good Immigrant"

The creation of family reunification and skills categories in the INA put the South Asian population in a position of power they had never experienced before. A year after the statute's passing and less than twenty years after the Japanese American internment, *New York Times Magazine* debuted the phrase "model minority."[122] The article compared Japanese American treatment in the United States to that of Black Americans, and marveled at their ability to overcome the severe discrimination they had faced.[123] This ability was then compared to the sentiment among Black Americans, who were reacting negatively to "well-meaning programs" that Americans had selflessly provided with self-hatred and apathy.[124] This was the beginning

119. LEE, *supra* note 1.
120. *Id.*
121. *Id.*
122. William Peterson, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 180.
123. *Id.* at 186.
124. *Id.*

of a modern America that put Asian Americans in a position of power and used Asian American stereotypes to legitimize anti-black sentiment.

Texas Senator Phil Gramm made an unsuccessful bid for the Republican nomination for President in 1996, a move that was supported by many South Asian Americans at the time. He denounced the welfare system and how it rewarded American citizens for choosing not to work.[125] Immigration reform and current policies were not the problem; if our own citizens will not get a job, why should we punish foreigners who are willing to work?[126] Conservative rhetoric in the 1990s gave South Asians the tools they needed to succeed. Immigrants were good, Black Americans were not. The lines separating communities of color continued to deepen further.

Dinesh D'Souza is perhaps the most infamous and prolific example of a South Asian American using white conservative rhetoric to gain political legitimacy. In 1995, his book *The End of Racism* openly criticized the plight of Black Americans by asking, "Why can't an African American be more like an Asian?"[127] He went on to claim that the struggles they faced were not because of institutional structures preventing them from success, but rather, the demise of the African civilization as a people.[128] D'Souza's book was widely criticized and denounced, leading to the current infamous reputation he has today for right-wing apologist behavior. The book denied America's racial history, used facts pulled out of context to support its illogical thesis, attacked Black American culture, and denounced the prohibition of private discrimination.[129]

More than anything, however, D'Souza fails to recognize that South Asian America as he understands it is a fundamental product of the INA, a statute that pulled and exploited highly skilled foreign workers for the benefit of the American economy. D'Souza is not surrounded by an accurate depiction of the South Asian diaspora; rather, he is surrounded by a sliver of South Asian society: highly skilled workers and small business owners. He fails to acknowledge the racial foundation of America, a country that would not have let him enter less than fifty years prior. Furthermore, a conservative demographic can now hide behind the theories of people of color such as D'Souza. Conservatives can now claim that they are not pushing for white supremacy. They like some immigrants—the "good" ones. They even have spokespeople standing up for their own beliefs and ideals; the "good" immigrants themselves had started to agree with them.

125. VIJAY PRASHAD, THE KARMA OF BROWN FOLK 3 (2000).

126. *Id.*

127. Vijay Prashad, *Anti-D'Souza: The Ends of Racism and the Asian American*, 1 AMERASIA JOURNAL 23, 32 (1998).

128. *Id.*

129. Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. AND POL'Y REV. 245, 245–46 (1996).

Nikki Haley, former South Carolina governor and Ambassador to the United Nations under the Trump administration, is another example of South Asian political legitimacy and all of its complexities. Born to Indian Punjabi parents, Haley became the first Indian American governor of South Carolina in 2010 and was endorsed by both Mitt Romney and Sarah Palin.[130] Although the majority of Indian Americans have historically voted Democratic, Haley has been a staunch supporter of conservative ideals and continues to preach the conservative rhetoric that allowed her to gain power in the American South.

In 2011, Haley signed a South Carolina state bill into law that called for heightened police power over immigration enforcement.[131] The law made it a state crime to knowingly harbor or transport an undocumented immigrant, required immigrants to carry their federal registration documents at all times, and required all undocumented immigrants to be transferred from state to federal custody.[132] The federal district court struck down the first two provisions of the law and upheld the third, citing the Supremacy Clause in its reasoning.[133] A representative for Haley stated that South Carolina had taken these measures because the federal government had not addressed illegal immigration adequately.[134] Haley said of the bill, "[a]s the daughter of immigrants . . . this is a bill that enforces laws."[135] She went on to state that legal immigrants have gone through the required paperwork and measures that are enforced by the government, and that she did not support (and the state could not afford) immigrants who had cheated the system.[136] Haley's rhetoric was already divisive among immigrant communities for creating false stereotypes and tensions between "good immigrants" and "bad immigrants." A co-sponsor of the bill took it one step further and denounced the illegal communities that "cling together" and bring prostitution, gangs, drugs, and violence to the state of South Carolina.[137]

130. Josh Kraushaar, *Romney Backs Haley in S.C.*, POLITICO MAG. (Mar. 16, 2010), https://www.politico.com/story/2010/03/romney-backs-haley-in-sc-034504; *see also* Andy Barr, *Palin Endorses Haley for S.C. Governor*, POLITICO MAG. (May 13, 2010), https://www.politico.com/story/2010/05/palin-endorses-haley-for-sc-governor-037225.

131. Robbie Brown, *Parts of Immigration Law Blocked in South Carolina*, N.Y. TIMES (Dec. 22, 2011), https://www.nytimes.com/2011/12/23/us/judge-blocks-parts-of-south-carolinas-immigration-law.html.

132. Brown, *supra* note 131.

133. *Id.*

134. *Id.*

135. Jim Davenport, *Gov. Nikki Haley Signs Illegal Immigration Police Checks Law*, THE POST AND COURIER (June 26, 2011), https://www.postandcourier.com/politics/state_politics/gov-nikki-haley-signs-illegal-immigration-police-checks-law/article_c56235c8-5b8d-510b-952e-3ae4834ec48c.html.

136. *Id.*

137. *Id*.

Haley is a more moderate conservative than the continuously criticized D'Souza. She has also gained a level of political power that most South Asian Americans have not achieved. Perhaps Haley believes in the conservative ideals that underlie her 2011 immigration bill, but does she also continue to preach them under the hopes that she will be taken seriously and gain political legitimacy? The court decision striking down two provisions of the law set the legal stage for similar immigration laws to be brought to court by public interest groups such as the American Civil Liberties Union and Southern Poverty Law Center.[138] It began a national debate and set a public forum for American citizens to weigh in on good versus bad immigrants. It set the stage for Donald Trump to call Mexican immigrants "criminals and rapists" during his announcement for the 2016 Presidential election.[139] What America saw from these bills and from a presidential candidate was that there were good immigrants and there were bad ones.

Furthermore, what Haley did was establish herself as one of the "good ones." While she has preached conservative rhetoric in a less alarming manner than D'Souza in *The End of Racism*, she has perpetuated the same ideals by turning communities of color against each other. Where D'Souza was mainly concerned with the civil rights of Black Americans, Haley added Latin American immigrants to this growing pot of communities that South Asians saw themselves as superior to. Her family had come to this country legally (her parents also both held advanced degrees); they had worked hard and established roots, and, therefore, they were more deserving of American humanity. Never mind that the first Indian American elected to Congress, Dilip Saund Singh, was elected less than sixty years ago. Never mind that Haley herself would not be allowed to marry her white, Methodist husband less than sixty years ago.

After the Charleston church shooting in 2015, Haley signed a bill into law that permitted removing the Confederate flag from the grounds of the capitol and was widely praised for doing so.[140] She noted that although the flag had its place among residents as a way to honor their ancestors, it was not a way to "represent the future of our great state."[141] A year later, Haley was nominated by President Trump to be ambassador to the United Nations

138. Brown, *supra* note 131.

139. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (Jul. 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/.

140. Frances Robles, *Nikki Haley, South Carolina Governor, Calls for Removal of Confederate Battle Flag*, N.Y. TIMES (Jun. 22, 2015), https://www.nytimes.com/2015/06/23/us/south-carolina-confederate-flag-dylann-roof.html.

141. *Id*.

and was confirmed by the Senate in early 2017.[142] She was simultaneously criticized for her significant lack of foreign policy experience.[143] Both of Obama's ambassadors, by contrast, had extensive foreign policy experience.[144] Haley was neither the first, nor the last less-than-qualified member of Trump's cabinet, [145] but it was nevertheless a surprise to see Trump's first female appointment to the cabinet be a woman of color. Furthermore, it was a huge gain of political power to Haley herself.

It is important to note that once Haley had placed herself in a position of political legitimacy, she eased up on certain conservative ideals. Her denouncement of the Confederate flag was a surprise to the overwhelmingly Republican state, and she was steadfast in her decision. Perhaps Haley's support of conservative rhetoric was a deft political strategy. She gained legitimacy by preaching to the ideals of her state's demographic, and then expressed more moderate beliefs once she had a platform in which people listened to her. She also did not initially support Trump's candidacy and publicly called for the release of his financial records.[146] Is Haley a true demagogue of the white conservative vote, or is she a cunning political strategist?

E. South Asian Political Legitimacy and the "Disruptive Immigrant"

The spirit of the Ghadar Party has mostly disappeared in twenty-first century South Asian America. Few South Asian organizations exist in solidarity or in protest of American right-wing politics. Despite this bleak outlook, however, several women's and LGBT South Asian groups have emerged in the fabric of South Asian American political dynamics. The majority of these women's groups seek to fight the patriarchal nature of the current immigration system, in which so many husbands possess legal status and rights over their wives.[147] This puts survivors of domestic violence living in the United States in an extremely precarious position.[148] These organizations exist on both coasts and seek to dismantle the sexist systems that prevent many women from gaining legal status.[149]

142. Nahal Toosi, *Trump Taps Nikki Haley to be UN Ambassador*, POLITICO MAG. (Nov. 23, 2016), https://www.politico.com/story/2016/11/trump-to-announce-south-carolina-gov-nikki-haley-to-be-un-ambassador-231788.

143. *Id.*

144. *Id.*

145. The role of United Nations ambassador is no longer a Cabinet position. Kristen Welker, Geoff Bennett & Daniel Barnes, *U.N. Ambassador to no longer be Cabinet-level Position*, NBC NEWS (Dec. 7, 2018), https://www.nbcnews.com/politics/white-house/un-ambassador-no-longer-be-cabinet-level-position-n945356.

146. Toosi, *supra* note 142.

147. MONISHA DAS GUPTA, UNRULY IMMIGRANTS: RIGHTS, ACTIVISM, AND TRANSNATIONAL SOUTH ASIAN POLITICS IN THE UNITED STATES 82–83 (2006).

148. *Id.* at 83.

149. Prashad, *supra* note 127, at 36.

These organizations, such as Manavi, Sakhi, and South Asian Women for Action have undergone an extensive amount of legal research to dismantle the contradictory and exclusionary nature of immigration laws working against women's rights.[150] In particular, they focus on the amendments to the INA, the 1994 Violence Against Women Act, and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[151]

Under family reunification, a woman entering the United States on the basis of marriage (which is the majority of South Asian women) is a legal beneficiary of her husband's status.[152] As a result, she has no legal rights and no agency over her own immigration status.[153] Furthermore, subsequent legislation has tried to attack fraudulent "green card marriages," in which one spouse can gain permanent residency status (colloquially referred to as a "green card") because he or she is married to a United States permanent resident. The legislation mandates the permanent residency status of the spouse to be conditional upon the appeal process to Immigration and Nationality Services (INS).[154] The spouse's permanent residency status is held in limbo for up to two years as the INS assesses whether the marriage was made in good faith.[155] Subsequently, the data regarding "green-card marriages" was blown out of proportion and used to incite fear in United States citizens that immigrants were abusing the law to enter the country en masse.[156] Furthermore, women trapped in abusive marriages were bound during the limbo period, meaning that they must stay with their husbands during the two years in order to gain permanent residency. If the woman wanted to leave her private residence in fear for her life, the INS could call that action into question since it is a violation of a "good faith" marriage.

One shining example of South Asians banding together in order to dismantle a good immigrant myth and anti-blackness is the New York Taxi Workers' Alliance (NYTWA). The taxi system, while insignificant when compared to the underground subway labyrinth of New York City, is also the seventh largest transportation network in the country.[157] Almost a third of cab drivers, who are overwhelmingly men of color, are members of the NYTWA. Initially, however, taxi worker organizations were small and advocated for singular interests (i.e., fighting for South Asian cab drivers at the expense of Haitian or Latino drivers).[158] Eventually, drivers began to make

150. DAS GUPTA, *supra* note 147, at 83–84.
151. *Id.* at 84.
152. *Id.* at 85.
153. *Id.*
154. DAS GUPTA, *supra* note 147, at 85.
155. *Id.*
156. *Id.* at 83–84.
157. Lizzie Widdicombe, *Thin Yellow Line*, THE NEW YORKER (Apr. 18, 2011), https://www.newyorker.com/magazine/2011/04/18/thin-yellow-line.
158. Prashad, *supra* note 127, at 34.

individual, concerted efforts to join together different communities of color, instead of dividing them further by making conversations about ethnicity the forefront of the organization.[159] Working together in solidarity of each other's experiences was the best way to create unity among these fragmented organizations.[160] Eventually, the leadership of the NYTWA became diverse and reflected the wide range of experiences of these drivers—Haitian, West African, Iranians, and Indians.[161]

In 1998, 24,000 taxi workers, over half of whom were South Asian, went on three different strikes in three different months despite strong threats and coercion by City Hall and Rudy Giuliani, then mayor of New York City.[162] The strike concerned seventeen different rules that heavily policed driver behavior at the expense of their dignity.[163] Some rules promulgated a $1,000 fine for rude behavior and smoking.[164]

During Giuliani's tenure, the New York Police Department continued to harass immigrant drivers, often subjecting them to beatings and harsh citations for trivial infractions.[165] Giuliani's conservative rhetoric rang through his policy changes, as he presented himself as the responsible citizen concerned about the unruly immigrant who refused to comply.[166] The NYTWA, a unified force of "bad immigrants," did not have to stir up anger and resentment; it had been there for a long time coming.[167] Angry with the success of the strikes, Giuliani signed an executive order that allowed the leasing companies renting the taxis to the drivers to encroach and enforce the taxi industry.[168] In a massive victory for the NYTWA, the judiciary struck down the executive order.[169] The city's residents overwhelmingly supported the strike at eighty percent, resulting in a dramatic culmination in which over 400 taxi drivers walked across the Queensboro Bridge in protest.[170]

V. Conclusion

The lens of history paints two historically and legally distinct South Asian Americas. The first one is a bleak, exclusionary picture of legislators, unionized workers, and even foreign government officials fighting to

159. Prashad, *supra* note 127, at 34.
160. *Id.*
161. *Id.*
162. *Id.* at 199.
163. *Id.* at 199.
164. *Id.* at 201.
165. Prashad, *supra* note 127, at 202.
166. *Id.*
167. *Id.*
168. *Id*.
169. *Id.*
170. *Id.*

suppress Indian migration. The second picture, while still controlled by the hand of implicitly discriminatory legislation, is nevertheless a brighter and more optimistic time for South Asian Americans. This note seeks to find a connection between these two legally distinct Americas, one where the modern South Asian reaping the benefits of racial capitalism is able to look back at the tide of xenophobic legislation with a sharp and critical eye. The INA was signed into law less than fifty years after the Supreme Court declared that Indians would never be white. Change does not happen overnight; deliberate immigration reform did not happen in half a century. South Asian Americans need to understand how the Immigration and Nationality Act has granted preference and privilege to one immigrant community at the expense of another. Once the "model minority" is willing to grapple with this uncomfortable truth, there is no choice but to politically engage with the consequences of being neither black nor white, but "other."