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The Limits of Borders: A Moderate Proposal for Immigration Reform

by

Frank H. Wu

This article presents a moderate proposal for immigration reform: the Supreme Court should apply the same standards to immigration laws that it applies to all other laws.

INTRODUCTION

This article presents a moderate proposal for immigration reform: the Supreme Court should apply the same standards to immigration laws that it applies to all other laws. The constitutional limits that govern at the borders should be similar to the constitutional limits which are accepted everywhere else.

The proposal rests on textual and structural rationales. A literalist interpretation of the Constitution supports the proposal, because many of the rights articulated in the document are attributed to individuals and not necessarily limited to citizens. A structural approach to the Constitution also supports the proposal, because under even a restrictive reading of equal rights, the equality of citizens is compromised by immigration legislation.

As an initial matter, the Court should abolish the archaic doctrine of “plenary power,” which it developed a century ago in a series of cases upholding immigration policies that today a consensus would regard as being based on race in the most objectionable sense. The plenary power doctrine is a judicial creation from an era the constitutional theory of which has been superseded in almost all other respects. It rests on an erroneous understanding of challenges to immigration policies, which takes them to be efforts by and for foreigners rather than
than citizens. Efforts to restrict immigration across the national border and efforts to limit migration over state and local boundaries share the same objectionable features, and the Court has recognized the problems at the latter levels.

This article describes some effects of applying domestic constitutional norms in the area of immigration. A Supreme Court that chose to follow this course would overrule some earlier precedent, but it likely would validate much contemporary immigration law and all but the most extreme pending legislation. It may even strengthen, rather than weaken, the distinction between citizens and aliens.

As a corollary to the change in substantive standards, citizens would more clearly have standing to challenge immigration statutes for their impact on native communities. In turn, citizen standing forms part of a reconception of how the immigration debates impinge upon the status on citizens, especially racial minorities perceived as foreign. The relationship of immigration and civil rights, captured by the so-called “blacks versus browns” dilemma, shows how immigration law should alter our understanding of color-blindness as a constitutional theory. In the greatest departure from prior thinking, but closest alignment with political realities, the constitutional change would reinforce a corresponding conceptual change: immigration issues should be understood as intimately related to civil rights issues.

The article responds to current conservative efforts to restrict immigration. But in a sense it is addressed to the liberal who has been sympathetic to immigrants though ambivalent about the relatively high numbers of immigrants that the United States is now receiving and the accompanying social changes, real and perceived. In a response to restrictionists who have attempted to portray their opposition as motivated by self-interest or emotions, the article offers a set of principles that are extended from conventional constitutional theory and applied in a new manner. This proposal falls between the philosophical extremes, on the one hand that the sovereign nation can make any decisions whatsoever with respect to outsiders, and on the other hand that a liberal democracy lacks moral authority to refuse entry to anyone. The article is an attempt to advance an agenda for positive social change, rather than merely defending against extreme reactionary proposals.

The article is organized into three sections. Section I describes social and political trends which connect the debates on the national border to debates over state and local boundaries. Section III analyzes the application of domestic constitutional standards to immigration law.

I. WITH LIBERALS LIKE THESE, WHO NEEDS CONSERVATIVES?

Proponent of a military presence on the U.S.-Mexico border:

I’ve been a liberal Democrat all my life.2

A. THE ASCENDANT REACTIONARY VIEW OF IMMIGRATION

As “the American Century” approaches its end, immigration issues have become so divisive that reform can mean anything from abolishing immigration to abolishing immigration laws.3 Immigration policies are means of defining the national community and giving meaning to the concept of citizenship. In their contradictory efforts to develop immigration policies, liberals have become scared of the straw man of “political correctness.” In contrast to the confused reactions of liberals, conservatives have consistently appealed to color-consciousness, not color-blindness, in developing their vision of an immigration policy.4

Under the guise of attacking “political correctness,” immigration restrictionists have appealed to a racialized vision of citizenship. Their arguments have attracted wide popular support. Whether it is called “politically correct” or “politically incorrect,” however, the troubling trend is toward closing the borders and prohibiting further immigration, legal or otherwise.5

Today, the most prominent proponent of immigration restriction is Peter Brimelow. Brimelow — himself an immigrant from England6 — has authored the polemical tract, Alien Nation: Common Sense About America’s Immigration Disaster.7 A few years earlier, Brimelow had written a magazine article that would serve as a preliminary draft of Alien Nation.8 His concern then was whether immigrants would assimilate.9 His distress has now sharpened, as he has concluded that immigrants are racially inassimilable.10

By making his arguments both more expansive and more extreme in book form, Brimelow has shaped the substance and the style of the immigration debate.11 He says nothing new in his work.12 His book has its roots in a long line of arguments that have been made since the founding of the nation.13

During the decade preceding publication of Brimelow’s book, a few other advocates for lowering levels of immigration had operated at the margins of mainstream politics.14 But overall, anti-immigrant activities had been in a lull since 1965,15 when Congress finally replaced with a new system an immigration system borne of the turn-of-the-century eugenics and Social Darwinist movements. The pre-reform statutory scheme discriminated against not only people of color but also...
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white ethnic groups. It did so intentionally and explicitly through national origin quotas designed to maintain a racial balance equivalent to the early twentieth century composition of the country.16

Following passage of the 1965 Immigration and Nationality Act,17 immigration increased, especially Asian and Latino immigration. Immigration again became a divisive issue in the early 1990s. It was then that the Census revealed that whites might become a racial minority group in the foreseeable future.

Accompanying the change in the color of immigrants, the recent round of the battle over immigration began during the 1992 Presidential elections. Adopting an “America First” attitude in an aggressive challenge to then incumbent President George Bush, conservative candidate Pat Buchanan casually remarked on the David Brinkley television show that “I think God made all people good, but if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?” As Buchanan explained at greater length on the David Brinkley television show that “I think God made all people good, but if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?”20 As Buchanan explained at greater length in his syndicated column, America had become “so uncivil and angry” because “a flood tide of immigration has rolled in from the Third World.”19

Anti-immigrant arguments prevailed in the 1994 California elections. By ballot referendum, a majority of voters in the state passed Proposition 187 (Prop. 187), a measure which was ostensibly focused on “illegal” immigrants but expressly covered any individual “suspected” of being an “illegal” immigrant.20 Prop. 187 echoed Brimelow’s magazine article arguments with its call-to-arms preamble. Through Prop. 187, “the People of California [found and declared] that they have suffered and are suffering economic hardship caused by the presence of illegal aliens.”21 As proponents of Prop. 187 declared to voters, “you are the posse and [the proposal] is the rope.”22

After their victory, the hard-core backers of Prop. 187 went on to attack legal immigrants as well, much to the chagrin of some of their supporters who had believed campaign promises that the targets were “illegal” immigrants only. The hard-core view reflects the belief that an astute observer ascribed to the Immigration and Naturalization Service (INS): “a legal immigrant is merely an illegal alien with papers.”23

Inspired by Prop. 187, pending federal legislation, which has a high likelihood of passing (or having already passed prior to publication of this symposium issue), may be the most significant revision of immigration laws in a generation. The leading bills share as their primary feature lower limits on legal immigration. Some restrictionists are advocating amending the Constitution to end birthright citizenship.28 The restrictionist policies envisioned by Brimelow would become law through these proposals.26 It would be an understatement to say that if immigration restrictionists succeed in the legislative process and the statutes subsequently survive court challenges, the new era of immigration policy will significantly alter the future of the United States — for better or for worse.

In its latest form, immigration law has expanded in its reach. Just as it does not end with “illegal” immigrants, it also does not stop at the border. Whatever its merits, Prop. 187 does not touch on the event of crossing the border and entering the United States, but instead reaches the conduct of citizens and those presumed to be aliens in their daily lives within the community.27

And so it is that Brimelow, by reintroducing a vision of America as racially white and culturally homogeneous, has captured public attention with his anti-immigrant attacks. If the title of his book were not signal enough, his thesis is stated succinctly: “America needs another time-out from immigration.”28 He is forthright in declaring his allegiance to an America that is in conception racial rather than political; his nation is one of white men, not one of laws.

Brimelow’s primary argument purposefully blends the racial and the cultural: “Race is destiny in American politics” because “[c]ulture is a substitute for ethnicity.”29

As he makes similar statements throughout his book,30 never bothering to define race, ethnicity or culture, or critically question the meaning of those concepts, he can be taken quite fairly as assuming that race and culture are essentially equivalent.

Even to another immigration restrictionist, Brimelow’s argument should appear to be curiously missing the crucial link between race and culture. He has only to say, in response to another writer who asserted that he was promoting “the racial hegemony of white Americans”: “I was immediately stricken by guilt…”31

Brimelow’s guilt did not last long:

But then it occurred to me: Suppose I had proposed more immigrants who looked like me? [Until 1950] nine out of ten Americans looked like me... And in those days, they had another name for this thing dismissed so contemptuously as “the racial hegemony of white Americans.” They called it “America.”32

As for any inquiry about whether an American who failed to look like Brimelow could assimilate to become more like him, his response is threatening: “the only possible answer is: they’d better.”33

Brimelow repeats himself often enough to dispel doubt that he means to “set forth,” as Michael Lind noted,
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“what looks very much like a defense of old-fashioned white racial nationalism.”

Brimelow writes, “The American nation has always had a specific ethnic core. And that core has been white.”

To be more precise, “the American stew of 1790... for better or worse... tasted distinctly British.”

His complaint is that Americans are unwilling to think in terms of racial group generalizations, even when they believe them to be true.

Brimelow opens and closes by arguing that Asian Americans and Latinos, who are immigrants and support immigration are alienated from America; they threaten to “break down white America’s sense of identity.”

Furthermore, blacks, in whose economic condition Brimelow professes to take an interest, fare poorly in Brimelow’s racial analysis. In particular, Zulus have not reached the level of “Alfred the Great, let alone... Elizabeth II or any civilized society,” as Brimelow is compelled to add.

Likewise, Brimelow disparages white ethnic groups. He remarks, “[I]n recent years the Mafia or Cosa Nostra has been in decline, not least because of the acculturation of Italian Americans.”

The Irish immigrants of the nineteenth century “displayed social pathologies striking similar to those of the contemporary American black ghetto,” but they improved over the next several generations because “America changed the Irish — and they changed themselves.”

Of course, Brimelow sees some positive points in immigration. He is “sentimental” about Asian immigration, in part because, as he recounts it, “the young female students I see every morning entering the Parsons School of Design [in New York City, next to his office] are very charming, and fashionable.”

Brimelow’s secondary argument is economic: immigration “is a luxury. And like all luxuries, it can help — or it can hurt.”

He devotes many pages to a cost-benefit analysis of immigration, but admits that rational calculations can conceal racial beliefs.

In later presentations of his proposals, Brimelow has varied. On some occasions, he has been more outrageous, and on other occasions more circumspect. He has called the move toward race-neutral immigration policies the “absurd end of the anti-Nazi crusade” and described the resulting shifts in the racial composition of the country as “Hitler’s posthumous revenge.” He also has argued for lowering immigration levels with only an uncharacteristic passing reference to the racial characteristics of current immigrants.

In finishing off his attack on immigrants, Brimelow has the gall to suggest that he and other critics of immigration be called — one might imagine the requisite drumroll — “Patriots.” As self-important as he is, it would be difficult to write a better parody of Brimelow than Brimelow himself has done.

If only he were making mischief with his italicized warning, “Remember — practically until the Civil War, white Protestants were America.”

Unintentionally, Peter Brimelow has done liberals a service by revealing what is wrong with the conservative view of immigration. Unfortunately, his will be the prevailing view unless liberals take up the issue aggressively.

B. AN ALTERNATIVE VIEW OF IMMIGRATION

Instead of reacting to Brimelow and his peers, liberals should advance their own agenda for positive social change. Liberals may be currently divided on immigration issues, but liberal principles should unite them.

While it may seem less than an ideal moment in American history to suggest that the borders should be more open than closed, the country has always had an ambivalent attitude toward immigration, seeing it through an opposed pair of traditions.

The positive myth, symbolized by the Statue of Liberty, celebrates the contributions of innumerable ethnic groups. The negative myth, contained in metaphors of a flood tide, an invasion, and the Tower of Babel, condemns the literal and symbolic costs associated with absorbing newcomers.

It may be heartening, then, to remember that anti-immigrant forces were regarded as extremist until recently. Whether these trends run in cycles, the arguments here are offered with the hope that over time reason will prove persuasive.

The dormant fissure among liberals on immigration, especially “illegal” immigration, erupted again during the campaign for Prop. 187. The ballot measure introduced a theme that resonated in the ensuing public discourse: “I am a liberal — BUT...”

Like everyone else, liberals filled in the blank with reactions ranging from “this is a country of laws and there’s a right way and a wrong way to become a citizen,” to “immigration hurts the most disadvantaged among us.”

Liberals rationalized their litany of complaints as a principled form of selfishness. By their negative image, immigrants compete for jobs, consume affirmative action benefits, or become dependent on welfare entitlements. They might refuse to learn English and assimilate, and instead become militant multi-culturalists. They are among the sources of crime, terrorism, disease, pollution, and overpopulation.

Many politicians, pundits and voters expressed their feeling defensively, as the mayor of...
a California city did. Well before the Prop. 187 campaign was underway, when immigration was an issue of local concern, this politician argued for posting the military on the U.S.-Mexico border, insisting as he did so, "I've been a liberal Democrat all my life."\(^6\)

Against this movement of the majority, the moderate proposal that should persuade liberals is as follows: in considering "reform" options, apply the same standards at the border that apply within the borders.\(^6\) Stated in terms of constitutional law: eliminate the plenary power doctrine and permit challenges to immigration laws that discriminate based on suspect classifications such as race.\(^6\) There is nothing wrong with limiting immigration, but it should be troubling if the limits are racial, either explicitly or implicitly.\(^6\)

By such standards, the racial justifications used to define outsiders and keep them out, which might seem seductive at the national border, appear as repulsive as they would at any other border. Many ideas that are considered within the mainstream where the national border is concerned would be rejected as racist by any definition of that term and beyond the pale if applied at any other border: taking military measures, building a wall, violent vigilante actions, and routine detention.\(^6\) These ideas are all the more disturbing where internal borders are racially different — as they often are — outsiders literally and metaphorically. Every argument advanced by Brimelow applies with the same force to new residents of a state or would-be neighbors in a suburb. That Brimelow dislikes the conception of the nation as a civil society with a unifying political identity should make it easier to transfer his arguments from the national level to state and local levels. If anything, the realities of the situation should compel a reversal in thinking: the national border is less, not more, critical than state and local boundaries to the extent that a genuine community wishes to maintain its identity and well-being.\(^6\) Many Americans, however, would balk at adopting Brimelow's suggestions at borders within the United States, either state or local. That inconsistency is the potential source of progressive social change.

Set alongside one another, as Joseph Carens has argued,\(^7\) arguments for limiting immigration are virtually the same as the arguments used to prevent "Okie" farmers displaced from the dustbowl from moving to California during the Depression, and prohibiting African Americans from moving into suburban neighborhoods during the civil rights era. It is inconsistent, and should be subject to legal scrutiny, to believe that the national border can be controlled in a manner that would be indisputably unconstitutional and deemed unwise at a local or state boundary line. It would be consistent, although subject to legal scrutiny for other reasons, to believe that all borders can be controlled by equally extreme measures.

Immigration restrictionists have used various rhetorical tricks to distinguish between borders. These procedural and structural moves have neither logical nor moral significance. They deserve little legal consideration. The argument of national sovereignty, their favorite device, has historical counterparts that carry little intellectual weight, among progressives at any rate. "National sovereignty" finds an equivalent in "states' rights," invoked by the South during the Confederacy and a century later in the reaction against the civil rights movement.\(^7\) "National sovereignty" has another equivalent in the "local control" repeatedly asserted by counties, townships and municipalities as an ineffective bulwark against external influences.

As Bruce Ackerman has observed, the assumption that the national border has special significance eventually must fall back on the assertion that it is different by nature.\(^7\) It rests, at bottom, on little more than its own definition — power rather than principle. At best, it depends on priority in time as a compelling claim; i.e., the people who arrived earlier are entitled to exclude the people who appeared later.\(^7\) Even then, Brimelow's approach reads into priority in time an implicit guarantee of racial group entitlement. Without this racial link, the immigration restrictionist position makes no sense. It is the racial group, not the individual, whose arrival counts for the creation of rights.\(^7\)

Yet it would be naive verging on utopian to argue for open borders and against the existence of nations. In a world with severe socioeconomic differences among nations, and for a country that has an extensive welfare system, it would be impossible to adopt a policy of allowing entry to every potential immigrant.

Nothing so extreme need be proposed. National sovereignty must be accepted.\(^7\) National sovereignty, however, establishes only that the nation can regulate its borders. National sovereignty, by itself, does not establish that the nation can regulate its borders by standards that a consensus would hold absurd applied everywhere else. Thus, even if national sovereignty establishes that the United States can and should distinguish among potential new citizens, it does not directly follow that race-based restrictions on immigration are natural or any more acceptable at the border than elsewhere.\(^7\)

Understood in this manner, national sovereignty speaks to challenges by aliens or by foreign governments to United States immigration policy. At the same time, national sovereignty in a liberal democracy ought to encourage challenges by citizens to immigration policy.\(^7\) A nation that is a constitutional democracy may especially be expected to uphold its intrinsic values at the limits.

Liberals who take the political position that national sovereignty forecloses questioning restrictive immigration policies should acknowledge that they are diverging...
greatly from their ideals. Better yet, they could return to those ideals.

The best path back toward liberal ideals is viewing immigration as part of domestic politics, looking at it from the inside out, while also viewing immigration as part of foreign policy, looking at it from the outside in. Exclusion of use of the foreign policy perspective only ensures that immigration will be likened to invasion.

Immigration issues have always fragmented political parties and failed to divide neatly along the political spectrum, thereby demonstrating the inadequacy of traditional labels and metaphors. Some conservatives have argued in favor of immigration as an extension of laissez-faire economic principles. They also have been less sanguine about attacking "illegal" immigration, if not actually tolerant of it. Their philosophy is based on an opposition to welfare entitlements as a more important problem (although with an apparent acceptance of the notion that "illegal" immigrants take advantage of those benefits and services as well).

In this vein, William Bennett and Jack Kemp, stalwarts of the Reagan and Bush administrations, placed themselves among the opponents of Prop. 187. Joining them was California gubernatorial candidate Ron Unz, who positioned himself to the "right" of incumbent Pete Wilson in the 1994 Republican primaries; Unz opposed Prop. 187 while Wilson served as one of its backers.

Aside from Bennett, Kemp and Unz, about the only people whose arguments for unrestricted immigration are taken seriously are pure libertarians who believe in free markets and free movement of labor, unregulated by government in any form. They may have the wrong principle, but they do have a principle, which is better than can be said of many others.

Brimelow may base his argument on race confused with culture, but there are individuals who have legitimate reasons for wishing to limit immigration. People ought to be able to find a middle ground upon which to resolve their disagreements. The challenge lies in finding that place.

II. MEMBERSHIP HAS ITS PRIVILEGES

From an internal memorandum written by the founder of the Federation for American Immigration Reform (FAIR):

— on whites becoming a racial minority:

     Will they simply go quietly into the night? Or will there be an explosion?

— on the birthrates of whites compared to nonwhites:

     Perhaps this is the first instance in which those with their pants up are going to be caught by those with their pants down.

The rush to close the gates — local, state and national — is driven by several trends. These trends shape the context within which any discussion of immigration policy must take place. They form the subtext of Brimelow's Alien Nation and lie beneath the surface in many discussions of immigration policies. The five phenomena are: (1) the changing role of whites in the United States; (2) the changing role of the United States in the world; (3) mass migration worldwide; (4) the unimportance of being anywhere; (5) apocalyptic predictions for the turn of the millennium. These social and political forces, as much as any intellectual arguments, generate nativism. Any legal response must account for them.

A. THE NEW FACE OF AMERICA

The first two phenomena are linked. The dramatic demographic changes sweeping across the country have become a cliched concept. The shifts in the balance of power among nations have become perhaps equally cliched. Together, these phenomena have created twin trends of perceived decline. Some whites worry that they will cease to be the dominant racial group in the United States. Many Americans fear that the United States will lose its position as the dominant superpower of the world.

These acute anxieties are connected through immigration. Brimelow and Buchanan make the connection. As the latter has written, "Does this First World nation wish to become a Third World country? Because that is our destiny if we don't build a wall against the waves of immigration rolling over our shores." Or as one supporter of Prop. 187 put it, "People are saying, 'I don't like this Third World takeover.' It is literally an invasion and very upsetting."

The common complaint that "we" are becoming "Third World" is ambiguous. The risk of becoming a "Third World" nation refer both to an internal condition and an external position. It is as rooted in the belief that whites are diminishing in power as it is in the feeling that the country is declining in influence.

These perceptions of change have the proverbial grain of truth to them. The nation has entered an unprecedented phase in race relations, as a result of immigration and intermarriage. At the turn of the century, the population consisted of approximately ninety-percent nonHispanic whites. Before the turn of the millennium, the population already consists of less than seventy-five percent nonHispanic whites. The numbers of immigrants in the population is higher than ever before, but the proportion is lower than during the entire period between the Civil War and the Depression. The number of mixed marriages has doubled in the past decade. Still, the grain of truth has grown into a weed of
distortions and exaggerations: social science research shows that white Americans, like all other Americans (to different degrees), overestimate the extent to which demographic changes have already occurred.101

Until the relatively recent past, the country could plausibly be mythologized as a unified community. In fact, it was predominantly white racially and Anglo-Saxon Protestant culturally. Today, the society could be perceived as a mosaic of communities occasionally in conflict. Regardless, it is undeniably multi-racial and multicultural. Non-white racial groups and individuals are increasing not only their numbers, but also their presence and participation in economic, political and cultural spheres. Coinciding with these changes, many citizens have come to see the United States as a slowly sinking lifeboat.102

It is more than a coincidence though. Although it would be simplistic to attribute resistance to immigration solely to racism or nativism (or false consciousness on the part of those immigrants who are less enthusiastic about admitting others after them), it would be wrong to deny that there is a complex relationship between efforts to restrict immigration and the race of the immigrants. The immigration debate is about the numbers of new arrivals, but it also is about their races and their cultures.

B. ON THE ROAD TO NOWHERE

The third and fourth phenomena also are connected, but in opposition to one another. Everyone is moving; or more accurately, groups and individuals are more mobile than ever before are mobile. Simultaneously, thanks to technology it is increasingly irrelevant where a person is located physically (if the person is well-situated socioeconomically). These contradictory trends are global as well as local.

Human migration may well be a natural and timeless phenomenon. Individual mobility today is restricted by abstract laws, rather than primitive territoriality, physical barriers or practical constraints. According to recent United Nations estimates, in 1985 there were over 100 million migrants throughout the world.103 People depart from their homelands destined for the United States, but people leave for other nations as well — much of the worldwide pattern of migration consists of movement from developing nations to other developing nations.104

Within overall migration patterns, another counterrtrend is emerging which suggests the rise of a transnational class: upwardly-mobile young Americans are working overseas temporarily and settling elsewhere permanently.105

In contrast with the compulsion to migrate, individuals who have the means are able to rely on technological advances and the integration of communications to conduct their business affairs and personal lives from almost anywhere. While a generation ago media prophet Marshall McLuhan forecast a “global village,”106 today Internet enthusiasts speak of the forthcoming virtual community.107 The Economist, the cosmopolitan London-based newsmagazine that promotes a libertarian philosophy, asked in a provocative cover article, “Does it matter where you are?”108 The Economist concluded that geography remains economically important, but increasingly less so.109

The sense that people are free of their physical location, even if based more on optimism than fact, presents a means of overcoming immigration restrictionism. The divergent trends in the importance of location are metaphorical as well: as Benjamin Barber has observed, based on basic ideological conflict increasing even as mass culture becomes more influential, “the planet is falling precipitantly apart and coming reluctantly together at the very same moment.”110

C. APOCALYPSE NOW

Finally, the fifth phenomenon presents itself as overshadowing all else. The popular culture has been inundated by a variety of neo-Malthusian doomsday scenarios.111

The themes of overpopulation, overdevelopment and overconsumption form the basis for an environmental objection to immigration. The argument seems to be that if everyone stays in place, people will lose their opportunities to deplete natural resources and generate waste — at least in the manner to which Americans have become accustomed.112 In his controversial book Living Within Limits, Garret Hardin argues against allowing migration from poorer to wealthier societies on biological and ecological grounds.113 As a leading environmental organization, the Sierra Club has published a book raising similar claims.114 In doing so, it lent its reputation to the cause of immigration restriction. By these means, immigration restrictionists acquire scientific credibility and liberal credentials.

Meanwhile, The Atlantic Monthly, an intellectual mass media magazine that is moderate in its politics, has published several cover stories in the past few years describing impending chaos the world over and in this country as well. The myriad predictions, all of them negative, have been based on historical, social scientific and scientific data. These articles, which have been well received, have asked whether it "must be the rest against the west,"115 and whether the end of the world is near because of breakdown of the social order,116 overpopulation,117 or fundamentalism of many forms.118 Such a bleak intellectual climate has fostered the growth of anti-immigrant feelings.

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D. THE COMMUNITY AS A COMMODITY

The five trends apply at all levels, local, state and national. The similarity of the levels is as empirical as it is analytic. Immigration and internal migration form different levels of the same subject.

Migration crosses borders and borders within borders. Here in the United States, internal migration has always been the norm rather than the exception. The levels of internal migration are so high that people who move around within the country outnumber immigrants coming into the country.119

Coupling the positive myth of immigration with the frontier myth, arrival in this country typically is only one step in a long series of moves.120 The local, state and national levels also are connected through “white flight”: as nonwhite immigrants move to the specific regions of the country, white natives move elsewhere within the country.121 One supporter of Prop. 187 displayed his regional rather than national concerns by stating, “Someone is going to be leaving the state. It will either be them or us.”112

As people move across all forms of boundaries, people react adversely at each of those boundaries. Communities are becoming closed, in the local, state and national spheres. At the local level, literal gates are being built and closed around exclusive developments, some of which are so large-scale as to be entire towns that have been basically privatized.123 At the state level, factions within the Deep South have attempted to reassert a states’ rights movement, as a revival of antebellum traditions to the extent of secession, though ostensibly free of their racial components.124 The aspirations of these local and state movements show that the real risk of national disintegration lies with whites, not Latinos. The local and state developments mirror Brimelow’s proposals for the national border.

The resurgence of communitarianism as such has not been tested legally, but some of its elements have faced and failed constitutional scrutiny already. At a local level, the Constitution has been interpreted to forbid official decisions to physically divide communities by race.125 At a state level, the Constitution creates a right to interstate travel that trumps official decisions to exclude migrants because of economic status or assumed economic status.126

There is no question that constitutional standards exist for the control of local and state boundaries.127 As with all constitutional standards, these limits restrain political actions that are supported by a majority, in this case if they are based on racial or economic motivations.

Immigration law raises many of the same issues of membership in the national community as arise at the local and state levels.128 However, immigration law at the constitutional level differs from other border-related law because it lacks guiding principles.

There was a time when immigration law was animated by nativist principles. Before passage of the 1965 Immigration and Nationality Act, immigration statutes had passed through phases when Eastern and Southern Europeans were limited by strict quotas, especially if their countries of origin were more heavily Catholic or Jewish; Latinos were recruited as workers when needed and repatriated when convenient; and Asians were barred.129 There was a time, too, when immigration practices were integral to racist policies. Forced migration of Africans as slaves, for all its scale and severity, “the largest known migration over such a distance in world history up to that time,”130 is usually conspicuously absent from the stories of immigration.131

All of that changed with the 1965 Act, which established more or less neutral principles, by replacing national origin quotas with hemispheric quotas.132 The 1965 Act was imperfect. By imposing hemispheric caps, it reduced permissible levels of Mexican immigration.133 But it was revolutionary as a repudiation of a race-based immigration policy.

In the post-1965 era, continuing minor alterations of immigration policies have caused it to steadily drift away from somewhat neutral principles. A series of political bargains resulted in the programs allowing wealthy investors to buy their citizenship,134 and the lottery that provides players from designated countries with the chance to win their citizenship.135 In the best light, the former suggests that people may earn citizenship, the latter that they may be rewarded for their luck. Reflecting the worst aspects of American culture, they might send the cynical message that benefits are distributed as much by luck as by work. Together, they are at odds with one another, and not part of a cohesive public policy.

Perhaps appropriately, the highly technical substance of the existing statutory scheme is weakened by its convoluted procedure.136 The immigration process is so arcane as to benefit nobody except lawyers and con artists.137 The bureaucracy of the INS has been plagued by scandals such as bribery.138

Now, Prop. 187 and related proposals threaten to return immigration policy to a pre-1965 racial basis. Unlike in other areas of the law, the lack of principles governing immigration policy assumes constitutional dimensions because of the plenary power doctrine.

III. SOVEREIGNTY AS THE LAST REFUGE OF THE SCOUNDREL

[In the exercise of its broad power over immigration and naturalization, “Congress regularly makes rules that would be unacceptable if applied to citizens.”139]
A. THE HISTORY OF THE PLENARY POWER DOCTRINE

Before considering the possible constitutional analysis that could be applied to immigration, the sources and weaknesses of the extraordinarily durable plenary power doctrine must be revisited and explained. The plenary power doctrine has enjoyed a long life for a constitutional theory.141 The Constitution itself states no more than that Congress, among its enumerated powers, “shall have the power to . . . establish an uniform Rule of Naturalization.”142 The Supreme Court has construed the clause to mean that Congress has “plenary power” over immigration if not immigrants, beyond constitutional norms and judicial review.

I. The Anti-Asian Cases

The plenary power doctrine has its origins in cases challenging race-based immigration restrictions which formed the beginnings of federal immigration legislation. The Court offered its interpretation of the doctrine in the late nineteenth century in the course of upholding the outright exclusion of Chinese immigrants. Since then, the Court has continued to adhere to its view that it will defer to whatever the federal legislature chooses to do with respect to immigration. Normal constitutional review vanishes.

The Supreme Court introduced the plenary power doctrine in what is known aptly as the Chinese Exclusion Case. In the case, Chae Chan Ping v. United States,143 the Court upheld an 1888 Congressional act prohibiting Chinese residents of the United States who had visited China to return to the United States.144 The 1888 act was itself an amendment to the 1882 legislation that forbade further Chinese immigration to the United States.145 That earlier legislation, in turn, had been the political outcome of a nationwide movement blaming Chinese immigrants for an economic downturn.

Before the Exclusion Act, Chinese men had been recruited to the Reconstruction South and in Northeastern factories as laborers, and for work crews building the transcontinental railroad. They were pitted against freed black slaves and white ethnic minorities in an attempt to replace those groups as a source of controlled labor, especially as freedmen began to assert their rights and unions began to organize.146 During the time period shortly before the Chinese Exclusion Act was passed, Chinese communities were attacked by white mobs, with dozens of fatalities in numerous incidents.147 Significantly, the popular slogan used by anti-Chinese forces was directed not only at immigrants but also at residents: “The Chinese Must Go!”148

The Chinese Exclusion Act and its later amendments prevented further immigration, while also making it much more difficult for those already within the United States to travel overseas to see their wives and families.149 With the artificial absence of Chinese women in the United States, along with miscegenation laws enforced by societal norms, the Chinese American community would have died out had the Exclusion Act been as effective as intended.

The racial motivations of the Chinese Exclusion Act were unremarkable in the eyes of the Supreme Court. In the Chinese Exclusion Case, Justice Stephen J. Field, writing for the majority, identified the fundamental issue as national sovereignty and not racial discrimination. With that approach, he found the issue beyond debate. That the United States government “can exclude aliens from its territories is a proposition which we do not think open to controversy.”150 He reasoned that this power was derived directly from the principle of national sovereignty. “Jurisdiction over its own territory . . . is an incident of every independent nation.”151 Otherwise, Justice Field continued, the United States, “if it could not exclude aliens . . . would be to that extent subject to the control of another power.”152 The passage suggests that Justice Field perceived the tension in the case as being between the United States controlling its own borders, and foreigners having power over the borders — the foreign individuals involved in litigation coming to embody their homelands.153 Framed this way, the tension is not between legislative choice and constitutional limits, as represented by Congress and the Court, respectively.

Notwithstanding the importance of control over the borders, Justice Field was somewhat ambiguous about the extent of constitutional constraints on this power. He provided a lengthy list of the “sovereign powers” — “to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republication governments to the States, and admit subjects of other nations to citizenship . . . ” To this, however, he added what might seem to be a constitutional caveat, that those powers were “restricted in their exercise only by the Constitution itself.”154

The racialization of immigration law was explicit in the Chinese Exclusion Act, but only implicit in the Supreme Court case. While the Chinese Exclusion Act singled out a racial group by name, the Supreme Court assumed, without addressing the issue, that the power of the legislature to regulate immigration included the power to regulate it based on race. Insofar as the Court considered race, it gave its approval to the Congressional conclusion. The majority opinion asserted that “the differences of race added greatly to the difficulties of the situation,”155 in the decidedly unsympathetic sense that “our country would be overrun by them”156 without the Exclusion Act. “The existence of war would render the
necessity of the proceeding only more obvious and pressing.”\textsuperscript{157}

The reasoning went straight from the reality of war to the possibility of war to immigration: “The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.”\textsuperscript{158} Whether the majority understood the war to be literal or metaphorical, it understood the racial issue to pose the risk of war and the risk of war to justify exclusion. It is doubtful that Justice Field distinguished much between a literal war — military invasion by Chinese soldiers — and a metaphorical war — racial invasion by Chinese immigrants.

A few terms later, the Supreme Court clarified its theory in \textit{Fong Yue Ting v. United States}.\textsuperscript{159} Much as \textit{Chae Chan Ping} is the Chinese Exclusion case, \textit{Fong Yue Ting} might be called the Chinese Deportation Case. In \textit{Fong Yue Ting}, the Court upheld another revision of the anti-Chinese legislation, which specifically provided for the deportation of individuals who by definition were aliens unable to naturalize.\textsuperscript{160} “The power to exclude aliens and the power to expel them . . . are in truth but parts of one and the same power.”\textsuperscript{161}

Writing for the majority, Justice Horace Gray expressed himself with even more conviction than had Justice Field: “The Constitution of the United States speaks with no uncertain sound upon this subject.”\textsuperscript{162} Justice Gray limited judicial review to instances where “it has been authorized by treaty or by statutes or is required by the paramount law of the Constitution.”\textsuperscript{163} Again, the exception seems stronger than the rule, despite the reference to the “paramount law of the Constitution.”

Justice Gray concluded that “it behooves the Court to be careful that it does not undertake to pass upon political questions.”\textsuperscript{164} More than that, Justice Gray recited another lengthy list of responsibilities entrusted to the President. Harbelling back to war, the list opened with the President’s role as “the commander-in-chief of the army and navy.” A similar list attributed to the Congress began with its “power to regulate commerce with foreign nations.”\textsuperscript{165} Within the powers attributed to Congress was the power of “bringing of persons into the ports of the United States.”\textsuperscript{166} With that line of reasoning, the Court’s authority was limited by the Constitution, but immigration laws were not.

As with the Chinese Exclusion Case, the Court understood the Chinese Deportation case as raising no racial issues worth considering. The statutory provision that was challenged in the case was a requirement during deportation proceedings that “at least one credible white witness” attest to a Chinese individual’s residency in the United States prior to the enactment of the Chinese Exclusion Act.\textsuperscript{167} Far from evoking any concern about unfairness, the racial discrimination was regarded as reasonable. Congress had had experience with “the loose notions entertained by the witnesses of the obligation of an oath” when Chinese individuals were permitted to testify.\textsuperscript{168} Thus, the provision was an example of what might be termed reasonable racism.

Writing in dissent, Justice David J. Brewer corrected the majority’s version of the facts: The Chinese individuals were “resident aliens” and not sojourners through the country and that they had been in the country “almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion.”\textsuperscript{169} Justice Brewer argued in vain that “the governments of other nations have elastic powers — ours is fixed and bounded by a written Constitution.”\textsuperscript{170} Under that Constitution, it was improper to “drive from our territory” people “for no crime, but that of their race and birthplace.”\textsuperscript{171}

Presaging later developments in immigration law, Justice Brewer distinguished the result reached in Chinese Exclusion Case on what were to him “obvious” grounds. The Chinese Exclusion Case had concerned immigrants who were outside of the community — not people already part of the community — and “[t]he Constitution has no extraterritorial effect.”\textsuperscript{172} Justice Brewer was not quite progressive by today’s standards, for he admitted in a well-known piece of dicta that “it is true that this statute is directed only against the obnoxious Chinese.”\textsuperscript{173} Justice Brewer transformed his prejudice against the Chinese into an appeal to universal standards of sorts, for he argued, “if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?”\textsuperscript{174} Justice Field, who recalled that he “had the honor to be the organ of the court in announcing” the earlier Chinese Exclusion Case, numbered himself among the dissenters in this later case. Introducing an argument that has gone undeveloped in immigration law, Justice Field argued that “the government of the United States is one of limited and delegated powers” and the actions of expelling the Chinese without due process of law exceeded those powers.\textsuperscript{175}

The language of the majority opinions in the two cases appear almost to impose an affirmative duty on the executive and legislative branches to protect the country from foreign invasion, if only symbolic, by military action if necessary and immigration laws in any event. The plenary power doctrine, at this high point, goes well beyond a limitation on the judicial branch. The plenary power doctrine is asserted as a defense against a potential racial war. When the court turned away from foreign policy to domestic politics, the debate over the plenary power doctrine focused on the division of authority among branches of the federal government, or federalism concerns over the allocation of authority between the
federal government and the respective state governments. Any discussion about the justice of discriminatory restrictions against a racial minority never began.

There would be nothing unusual about this judicial attitude toward race in general and the Chinese in particular, were it not for a decision the Court had issued prior to either of the immigration cases but after the Chinese Exclusion Act of 1882 had already become the law of the land. In the celebrated case of Yick Wo v. Hopkins, the Supreme Court struck down a San Francisco regulation of laundries that while neutral on its face had been discriminatorily applied against the Chinese for racial reasons alone. The case remains “good law” for the proposition that a facially neutral law cannot be the product of impermissible legislative intent, nor can it be applied in a discriminatory manner.

In contrast to Yick Wo, the Chinese Exclusion Case suppressed the racial references in the law. The difference in the approach to immigration is all the more striking because Yick Wo involved a statute that contained no overt racial references while the Chinese Exclusion Case involved a statutory scheme that consisted of nothing but racial references.

This contradiction continued over time. As immigration law evolved toward greater reliance on race, the Court emphasized the irrelevance of race. If there were doubts about the racial basis of an immigration law, the Court resolved them as a matter barely worth comment in dicta. In its 1903 decision of what is known as the Japanese Immigrant Case, Yamataya v. Fisher, the Court issued the pronouncement making explicit what had been implicit: “That Congress may exclude aliens of a particular race from the United States... and commit the consequences of the proceedings, lack of assistance of counsel, and denial of an opportunity to contest the findings.”

2. The Twentieth Century Cases

As a recurring theme throughout the nineteenth century of immigration case law, the plenary power doctrine has more recently been strangely submerged. It has receded from view without diminishing in influence. Over time, though, it has lost complexity. Immigration law has developed other peculiarities to be sure, but the plenary power doctrine has become all the simpler.

At the turn of the century, the Court stated, “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [immigration].” Since then, plenary power doctrine has continued to be a set of stock citations bereft of further reasoning.

Over the latter half of the twentieth century, the Court has continued to make similar statements about the plenary power doctrine regardless of whether its decision was favorable to the immigrant challenging a statute. During the Cold War, for example, the nonidentical twin decisions of Knauff and Mezei, each of which upheld the exclusion of an alien with strong legal arguments grounded in compelling circumstances, contained a concise if facile statement of the view: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”

In that same era, immigration discrimination moved beyond race to include ideology. In a concurring opinion in the 1952 case of Haristades v. Shaughnessy, concerning deportation of an individual for his membership in the Communist Party, Justice Felix Frankfurter recited the plenary power doctrine as follows: “[T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.”

Nearly one hundred years after introducing the plenary power doctrine, the Supreme Court restated it. In 1972, the Court stated in Kleindienst v. Mandel that “the Court’s general reaffirmations of [the plenary power doctrine] have been legion” and “[t]he Court without exception has sustained [it]...” In 1977, the Court declared in Fiallo v. Bell: “at the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation.” The Court wrote, “our recent decisions have not departed from this long-established rule.” The consequence, as the Court conceded freely, was that “in the exercise of its broad power over immigration and naturalization, “Congress regularly makes rules that would be unacceptable if applied to citizens.”

The majority approach adopted in Fiallo is the best example of the plenary power doctrine retrieving while retaining its vitality. There, the statute at issue distinguished by legitimacy and gender: children born within wedlock were treated better than children born out of wedlock. Furthermore, the relationship of an illegitimate child to the mother was recognized but not the relationship of the same child to her putative father. The majority reasoned that “it could be argued that the line should have been drawn at a different point... [b]ut it is clear from our cases that these are policy questions

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entrusted exclusively to the political branches of our government..." Justice Thurgood Marshall dissented, writing "this case, unlike most immigration cases... directly involves the rights of citizens, not aliens." He continued, "once it is established that this discrimination among citizens cannot escape traditional constitutional scrutiny simply because it occurs in the context of immigration legislation, the result is virtually foreordained."

The majority's treatment of the dissent is unresponsive. It purported to address the discriminatory nature of the challenged provision, but overlooked the type of discrimination that would be unconstitutional if applied to citizens. The majority mischaracterized the dissent of Justice Marshall as directed against any "line drawing" among family members. The majority responded in a footnote that "there are widely varying relationships and degrees of kinship" and "in the inevitable process of 'line drawing,' Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and it has granted preferential status only to those classes."

The majority, by defending distinctions on the basis of abstract family relationships which it did not further specify, avoided the problem of discrimination on the concrete bases of legitimacy and gender. Whether other distinctions, such as those between immediate family and distant cousins would be acceptable in domestic law, the discrimination between legitimate and illegitimate children, and mothers and fathers, are invidious and would merit heightened scrutiny if enforced against citizens. The question remains, and the constitutional moment is suspended, when the distinction is sanctioned in immigration law. The problem is rendered especially compelling because, even though the statute regulates immigration, it is applied to and affects directly the interests of citizens.

Recent decisions in the immigration area have not presented a serious threat to the plenary power doctrine because they have assumed its existence without addressing its effects. The Court has decided a batch of cases in the 1990s on immigration, none of which do more with the plenary power doctrine than mention it: While immigration issues have appeared on the docket repeatedly, majority opinions have failed to criticize, defend or even explain the plenary power doctrine.

The Court has been quiet about its chief analytic principle in high-profile immigration matters. In the politicized and publicized immigration litigation which led to the Haitian Centers Council case, the Court upheld an Executive Order that the Coast Guard "interdict" boats on the high seas and turn away refugees with colorable claims to legal immigration status. The Executive Order, facially neutral, was directed at a specific group of refugees — Haitians. An unprecedented form of immigration restriction, the Executive Order also violated of the plain language of international treaty obligations. The Court held that the federal government, through the executive branch, could take official actions outside of the borders for the purpose of preventing aliens from arriving on U.S. shores and applying for legal status (along the way gaining access to procedural due process protections). There is no language in the majority opinion that would limit its application to immigrants presumed to be "illegal" nor which imposes any apparent limit on the extraterritorial powers of the government over immigration.

As many observers noted, the Congressional Black Caucus among them, the treatment of black refugees from Haiti differed from the treatment of white refugees from Cuba. Aside from race, the primary difference in these situations were the ideologies of the regimes from which they were fleeing — hardly a better basis for the different treatment.

In reviewing the interdiction program, the Court relied on the precedent established in Mezei. It did not quite adhere to the plenary power doctrine. It did worse than that. As Justice Harry A. Blackmun argued in dissent, if the plenary power doctrine were applied, it ought to have compelled the Court to choose the Congressional policy expressed in the statute over the Executive Order which disregarded it. Consequently, plenary power proved to be of little use to immigrants on the rare occasion when it would have favored them.

The only exceptions to the plenary power doctrine that are likely to have any significance have been identified by Hiroshi Motomura, building on work by Stephen Legomsky. In a pair of law review articles, Professor Motomura has reoriented the constitutional dimensions of immigration law.

First, Professor Motomura has argued that "phantom" constitutional norms have been developed by the Supreme Court through statutory interpretation. This tactic is illustrated by Jean v. Nelson. There, the plaintiffs alleged that the defendants, federal immigration authorities, had discriminated on the basis of race and national origin. The Court held that the challenged parole statutes and regulations barred race and national origin discrimination, and accordingly remanded for a determination of whether the statutes and regulations were being violated. It avoided altogether the much more difficult issue of whether the statutes and regulations could have been written the other way around.

Second, Professor Motomura has argued that lower courts have sometimes avoided the plenary power doctrine by characterizing a particular constitutional challenge as procedural rather than substantive.
In the late nineteenth century, the Supreme Court had not even propounded the color-blindness principle that the conservatives of today would advance to give meaning to the Equal Protection Clause. The Supreme Court had still to entertain the attack on racial segregation presented in *Plessy v. Ferguson,* much less render its ruling striking down separate-but-equal in *Brown v. Board of Education.* Even a cursory review of Supreme Court precedent turns up numerous concepts that commanded a place in constitutional theory then but have been jettisoned since: the notion that equal protection is "the usual last resort of constitutional arguments" and that forced sterilization of the disabled was progressive; the natural law basis of gender discrimination; the idea that political dissent could pose a "clear and present" danger beyond First Amendment protection; the whole of substantive due process; and the limits on federal government authority pursuant to the commerce clause (which also has since seen its resurrection).

The plenary power doctrine belongs to this same company. Indeed, it has occupied a dubious place in constitutional law since its invention. The Court itself has recognized that "much could be said for the view" that it is ill-considered, "but the slate is not clean." The *stare decisis* argument for the plenary power doctrine is weak for three reasons. First, *stare decisis* can be best justified as a check on raw political power shaping judicial decisionmaking. Its application is appropriate where a reversal of precedent is urged quickly. This is not such an instance. Second, the erosion of the entire surrounding terrain of constitutional theory leaves little support for this last remaining piece of nineteenth-century racial case law. If the other doctrines were rightly repudiated, so too the plenary power doctrine should be "as application of constitutional principles to facts as they had not been seen by the Court before." The Chinese Exclusion case stands as a "decision [that] has been proved manifestly erroneous" in its characterization of Asian immigrants and "its underpinnings [have been] eroded by subsequent decisions of the Court." Third, the plenary power doctrine is an especially peculiar constitutional theory to defend by the device of *stare decisis.* *Stare decisis* protects the legitimacy of judicial review by insisting that courts be bound by their decisions, but the plenary power doctrine itself is an abdication of the function of judicial review. To use *stare decisis* to defend the plenary power doctrine is to persist in a refusal to take action. While implicating constitutional concerns, as distinguished from statutory interpretation, the plenary power doctrine has also resulted in no private reliance that would counsel against its reversal.

Not surprisingly, the plenary power doctrine finds few defenders. Since its introduction, Supreme Court
Justices have written strong dissents casting doubt on its validity and wisdom.\textsuperscript{237} Generally, academics have condemned it as a misguided gloss on the Constitution in a “sustained shelling” of critical commentary.\textsuperscript{238} Nobody is heard to contend that a contemporary counterpart to the Chinese Exclusion Case, or other early decisions following its plenary power doctrine, could or would be decided with the same outcome or by similar reasoning.\textsuperscript{239} Ironically, there is nothing to the plenary power doctrine. The powerful force it exerts is hidden. It preempts as a constitutional matter almost any challenges on substantive grounds to laws applicable to immigrants, certainly at the time or place of their actual admission to the country, and possibly in their later encounters with straightforward discrimination.

Even for immigration restrictionists, including those activists who espouse restriction for racial reasons, the Supreme Court has done a frustrating disservice with respect to the plenary power doctrine. The Court has taken the worst possible course as an institution of final authority in constitutional interpretation, by neither overruling the plenary power doctrine, nor reaffirming it with any analysis. If it intends to follow the plenary power doctrine, the Supreme Court should say so. It should declare that a renewal of the Chinese Exclusion Act would be constitutional. It should be forced to articulate its own institutional weakness and acknowledge its willingness to countenance racial discrimination. If it cannot do so, it has a responsibility as the arbiter of constitutional boundaries to present an alternative.

B. THE FUTURE OF THE PLENARY POWER DOCTRINE

The Supreme Court could follow a better course. The Supreme Court should abolish the plenary power doctrine. The Constitution should apply to immigration.\textsuperscript{236} Aside from consistency, which, standing alone, is less than compelling as a constitutional principle, there are two primary reasons for applying the Constitution to immigration. Both of these reasons have been raised in the case law, but neither has been clearly adopted by a majority of Justices.

1. The Potential of Citizenship

The first rationale for abolishing the plenary power doctrine is a plain language reading of the text: many of the rights guaranteed by the Constitution belong to persons, not citizens.\textsuperscript{237} Most importantly, the Constitution prohibits the state from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{238} Alexander Bickel provided the leading analysis of the constitutional importance of personhood and the relative insignificance of citizenship.\textsuperscript{239} In a work which would be characterized as more conservative than liberal in conventional terms, Bickel traced the problems of citizenship to “the contradiction of slavery.”\textsuperscript{240} According to Bickel, because the Supreme Court’s reasoning in \textit{Dred Scott}\textsuperscript{241} equated “people” with “citizens” in the course of denying that blacks were either, the precedent “had to be effectively, which is to say constitutionally, overruled by a definition of citizenship in which race played no part.”\textsuperscript{242} After the \textit{Slaughter-House Cases}\textsuperscript{243} rendered the Equal Protection Clause more authoritative than the Privileges and Immunities Clause, the reference to “persons” in the former was elevated over the reference to “citizens” in the latter.\textsuperscript{244}

As the Court stated in \textit{Yick Wo} before it had announced the plenary power doctrine: “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.”\textsuperscript{245} Or as the Court has stated almost a century after \textit{Yick Wo}, “There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty or property without due process of law.”\textsuperscript{246}

Although its later pronouncement seems to offer strong civil rights protection to persons without regard to citizenship, the Court in that very case and on other occasions has drawn a distinction with immigration that it has withdrawn from elsewhere as a constitutional matter, between rights and privileges.\textsuperscript{247} The Court distinguished between participation in the political process and receipt of governmental entitlements, protecting the right of immigrants with regard to the former but not the latter (presumably because immigrants could use the political process to obtain governmental entitlements; maybe so, but that reasoning would apply to any plaintiff in an entitlements case).\textsuperscript{248} The constitutional distinction is reflected roughly in the political assertion by many immigration restrictionists that the problem with which they are concerned is not immigration itself but use of public benefits.\textsuperscript{249} The constitutional problem that must be resolved is for the most part the right-privilege dichotomy, and only to a lesser extent the citizen-immigrant dichotomy.

Thus, the argument turns more on the level of constitutional scrutiny that should be applied to immigration laws than on whether there should be any review whatsoever.\textsuperscript{250} A few aspects of applying the Constitution to immigration should be clarified. The change would necessarily be toward permitting challenges to immigration laws that discriminated on the basis of a suspect classification — aside from alienage — such as race. Logically, the change could not be to allow challenges to immigration laws that discriminated on the basis of the ambiguous classification of alienage, as all immigration laws inherently draw lines between citizens and aliens.\textsuperscript{251}
It may well be that immigration proponents would relent on the citizen-alien distinction, and the Court would approve alienage discrimination (including perhaps discrimination against permanent resident aliens), if discrimination on the basis of race in immigration were established as unconstitutional. In this sense, alienage discrimination serves as a proxy for race discrimination. After the change, alienage discrimination might become permissible precisely because race discrimination vis-à-vis immigrants would be prohibited. It would no longer be possible for immigration restrictionists to work through alienage to reach race, nor necessary for responses to follow the same route.

Admittedly, immigration enthusiasts may not be of one mind about the consequences of constitutional review of immigration. There are approaches other than those suggested here, but whatever path is followed is likely to lead away from the makeshift devices that have developed under the plenary power doctrine. The change fits well with mainstream constitutional thinking: if an individual can easily alter the characteristic (alienage), and it is not immutable, then it becomes much more acceptable to use it as a classificatory trait. Any change that provided greater protection for immigrants at the border than they receive now need not necessarily reduce the level of protection available to them after they have passed within the borders. The change, in sum, would not require extreme results such as either open borders or extending domestic standards beyond the borders, although those more robust possibilities would remain available as public policy options.

2. The Standing of Citizens

The Constitution itself — and civic culture as a result — is strengthened if it is applied to immigration. The commitment to the Constitution is affirmed by its application to immigration; it will have positive ripple effects on rights elsewhere. The converse also is true, that the commitment to the Constitution is weakened by creating an exception for immigration; that, too, has ripple effects on rights elsewhere. Specifically, one of the impacts of immigration legislation is on citizens who are or are perceived as members of the same racial groups that, as immigrants, are being excluded.

In other words, the second rationale for abolishing the plenary power doctrine is based on the rights of members of the community, not outsiders to it: citizens stand to benefit directly and indirectly from the proposed change. As a practical matter, citizens and not aliens, would become the likely primary plaintiffs in much of the ensuing litigation. Citizens could challenge immigration policies that, either facially or as applied, discriminated by race rather than alienage.

Those laws that were intended to focus on race or in operation did focus on race rather than alienage should be flushed out. Laws of this type are of immediate concern to citizens who may be mistaken as immigrants — particularly, as "illegal" immigrants — and disadvantaged as a result. Consider the following scenario. High proportions of the Asian and Latino population are foreign-born. The cultural stereotypes elevate the real proportions. If Prop. 187 were to operate anything at all like the Immigration Reform and Control Act (IRCA) — and Prop. 187 is likely to be more harmful than IRCA, because IRCA contained specific anti-discrimination safeguards which Prop. 187 lacks — it would be reasonable to predict that reasonable suspicion would focus on Asians and Latinos who are citizens. Those citizens should be allowed to sue under traditional constitutional theories of race discrimination.

Although a survey of the citizen standing issue lies beyond the scope of this article, there are immigration cases in which citizens have been the co-plaintiffs, notably in Fiallo and Kleindienst. These cases were failures for the citizen standing approach, but lesser-known cases have brought success to citizens and their immigrant family members.

Earlier in the century, the Court invalidated the California Alien Land Law — again facially neutral but indisputably aimed at Japanese immigrants and their Japanese American children — by analyzing part of it as a case of citizen standing to challenge alienage discrimination. In the tradition of analyzing state restrictions based on alienage in a federalism mode, the Court wrote, "This case presents the conflict between a state's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States." But then the Court wrote, "When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's [ineligibility for citizenship]."

More recently, the Ninth Circuit has found that two individuals met standing requirements when they brought suit seeking injunctive relief in the form of a declaration that they were citizens. The two plaintiffs had been born outside of the United States to mothers who were United States citizens and fathers who were foreign nationals, at a time when the statutes conferring citizenship on foreign-born offspring of citizens discriminated between mothers and fathers; the children of citizen mothers did not automatically become citizens, but the children of citizen fathers did. The statute was amended prospectively, leaving the plaintiffs no remedy, short of their claim of an equal protection violation for the failure to treat them like others similarly situated but whose citizen parent had been male. The court found standing and held for them on the merits. In its standing...
analysis, the court reasoned that the plaintiffs "have suffered a concrete injury" and "their interests coincide with their mothers and are equally as intense."271 The court mentioned that the plaintiffs' mothers were deceased, but it did not rely solely or primarily on that fact.272

On the surface, the Ninth Circuit case may appear to be the reverse of citizen standing. Below the surface, the case is stronger than an affirmation of citizen standing. It assumes that citizen standing would be permissible, if the deceased mothers were to have been joined as plaintiffs. It then goes further because it accepts not only standing but also an argument on the merits from an immigrant who is bringing the claim based on the rights of a citizen.

Citizens would also benefit indirectly, though concretely, because of their family ties to immigrants. The relationship of immigrant parents and their citizen children were weighed in the balance in Plyler v. Doe,273 where the Court applied rationality review and struck down a Texas state law that prohibited children who could not provide documentation of their status or their parents' status from attending public schools. As already discussed, the relationship of immigrant children to their citizen parents failed to persuade a majority in Fiallo.274 This particular argument should have broad appeal. Family "reunification" should be a prime example of family values that cultural conservatives presumably wish to encourage and the type of tradition and institution communitarians believe need to be affirmed and supported.275 The connection between citizens and their family members may serve to offset the tendency within communities of color to impose internal distinctions that disfavor immigrants among them. At the most theoretical level, the citizen standing problem turns on the basic question of who belongs to the community and can assert her rights within it; denying citizen standing in immigration matters means that members of the community lose their ability to contest its norms.

3. The Limits of Limits

In the end, applying constitutional limits to immigration would have relatively modest effects.276 The change would offer an opportunity to aggrieved parties to challenge immigration statutes and regulations; it would be far from an assurance that they would succeed in litigation. The potential plaintiffs would face the same extreme difficulties of any civil rights litigant under the applicable doctrine.277 Following Adarand v. Pena,278 the affirmative action case decided by the Supreme Court in its 1994-95 term, suspect classifications may trigger strict scrutiny, but strict scrutiny is not always fatal.279

As the Prop. 187 litigation continues through the courts, it remains to be seen whether Plyler will remain good law. Whatever the outcome of the new case, Plyler remains a rarity: an immigration case where plaintiffs prevail by demonstrating the irrationality of a statute under the most deferential standard of review available.280 The anomalous status of Plyler underscores the evolutionary, rather than revolutionary, nature of the likely results from applying the Constitution to immigration. What would happen is as important as what would not happen.

The most important positive result would be that courts would strike down any restrictions based on a racial rationale, in the same manner that a locality or state could not rely on race to exclude individuals. They also conceivably could strike down some, though by no means all, restrictions based on a cultural rationale, to the relatively limited extent that the First and Fourteenth Amendments offer protection of cultural rights or may be interpreted to do so in the future.281 The Chinese Exclusion case, the source of the plenary power doctrine, would be reversed, both as to the general principle and the specific holding.282 In short, Brimelow's approach to immigration could not be constitutionally legislated.

Neither race and culture, nor race and socioeconomic status, should be equated with respect to immigration any more than they can be collapsed as a general matter. Brimelow's tendency to equate race and culture would be problematic under constitutional doctrine outside of the immigration area. Absent a nexus that would satisfy strict scrutiny, race cannot be justified as a classificatory device because of the asserted difficulties associated with an individual determination regarding culture.283 Individuals making the counterargument that race and culture are not necessarily the same sometimes serve as an example of their claim. For example, Francis Fukuyama, who happens to be Japanese American, is a leading neo-conservative working within an historically Anglo-American tradition — though without stated self-consciousness of the fact.284

An equally important negative result is that courts would apply the very deferential standard of rationality review to limitations on immigration based on nonracial factors. Essentially, these forms of discrimination would remain constitutional.285 As iconoclast Michael Lind has proposed, we could have lower limits on immigration that are race-neutral, along with strong civil rights protection for permanent resident aliens.286 Or as one sympathetic reviewer of Alien Nation suggested, substituting class for race, "We could easily have a much more discriminatory immigration policy aimed at raising the average level of human and financial capital of new entrants, while maintaining the current, high proportion of non-Europeans."287 That these options would be permissible as a constitutional matter does not mean that they would be wise as a legislative choice.
Most immigration restrictions based on economic rationales would be left intact. Needless to say, the economic impact of immigrants is important. However, it bears emphasizing that similar considerations about migrants cannot constitutionally be given full consideration at local and state levels. Therefore, at the national level, the proposed change to the plenary power doctrine may be incomplete. Accepting some difference between national and other borders might result in a standard of review which permits economic factors to be weighted against allowing immigration, provided that they are not purely pretextual. If Congress were to provide an economic basis for restrictive immigration laws, and a plaintiff challenging the laws could not demonstrate that the economic reasons concealed racial reasons, then the plaintiff would need to carry the burden of regular rationality review. Only a limited number of plaintiffs would be able to meet that standard.

Again, what distinguishes the current doctrine is that plaintiffs are precluded from even trying to show irrationality much less invoking strict scrutiny. But as Brimelow candidly concedes, "People habitually justify their immigration preferences in economic terms, but really they are motivated by a wide range of ethnic, moral and even psychological agendas." A covert version of Brimelow's racial agenda would be equally unconstitutional.

To take specific existing case law that would have a positive impact if brought to bear on immigration, the principle derived from Palmore v. Sidotti would prevent prejudice from being used as its own justification. In Palmore, the Court held that a white woman who was living with a black man could not be denied custody of her child from a former marriage on the basis of possible prejudice against interracial relationships from the community. The Court found unpersuasive the circular argument that potential discrimination by the public at large justified discrimination by the government — even if the former prejudice could be proven. Likewise, under the proposed reform, it would not be enough to save an otherwise racially discriminatory immigration law by arguing that a consensus supported it. The means would not justify the ends.

Coming full circle, the Prop. 187 campaign demonstrates the importance of constitutional standards and judicial review. In the campaign for Prop. 187, proponents frequently argued that a vote in favor of the measure would "send a message" without harming anyone, because the courts would apply constitutional safeguards. Whether this was a blithe or cynical assumption that constitutional limits applied to immigration, sponsors of the measure complained after it passed that judicial review would be undemocratic.

C. IMMIGRATION AND OTHER CIVIL RIGHTS

Finally, there is important cultural meaning to accepting immigrants as people within the protection of the Constitution and immigration as an issue within the purview of judicial review. Within constitutional limits, immigration issues should be viewed as integral to the civil rights movement — for Asian American and Latino communities certainly, but for all racial groups in some sense. Understanding immigration issues as related to civil rights, if not understanding immigration itself as a civil right, strengthens immigration rights as much as it strengthens traditional civil rights. It enhances the claim that civil rights are universal rights rather than special interests. The current discussion of immigration and civil rights has the relationship backwards.

Politicians of all persuasions have sometimes argued against immigration on the grounds that it harms the most disadvantaged native-born citizens. Conservatives have recently developed an especially potent strain of this argument. Their inflammatory claim is that immigrants, most of whom today are Asian and Latino, are taking advantage of affirmative action, which was originally meant for African Americans. This claim forms the basis of the "blacks versus browns" dilemma.

Needless to say, the relationship between immigration and affirmative action presents complex issues. To take examples from litigation, the named defendant in the Adarand decision was a Latino member of the Clinton administration Cabinet, but the plaintiff in a recent appellate case challenging affirmative action also was Hispanic. Chinese Americans have challenged the consent decree that desegregated the San Francisco schools, while an African American has challenged the inclusion of Asian Indians in an Ohio affirmative action program. Significant numbers of Latinos and African Americans voted for Prop. 187 (though a lower proportion than among whites). As these situations show, people of color face great internal tensions — even over whether they form any cohesive community within racial groups before they build coalitions across racial groups. The "blacks versus browns" dilemma creates as much as it describes the situation.

Progressive individuals and communities, whether people of color or whites, can and should address their disagreements cooperatively and constructively. The opposition of immigration and affirmative action, however, divides communities with common interests in civil rights and exacerbates their differences.

The opposition of immigration and affirmative action serves political purposes. Its central claim is curious if not paradoxical because it is used to attack not only immigration, but also affirmative action. The two issues — and respective racial groups who are represented
I. What the Immigration Debate Tells Us About Affirmative Action

The argument that immigrants should be excluded from affirmative action, assuming it accepts that immigrants are entitled to civil rights otherwise, implies that affirmative action is an aberration, unrelated to civil rights as a whole. The dynamics of immigration and affirmative action may be difficult, and one or the other may need public policy revisions, but the interplay between the two deserves more careful consideration than it has received.

The arguments for exclusion of immigrants from affirmative action programs are self-defeating. The argument that focuses on excluding immigrants because of affirmative action presents the circular and paternalistic logic that discrimination against racial minorities within a society justifies their exclusion from it. The perverse result is that efforts to remedy discrimination need never include immigrants. Immigrants are deemed to have consented to assuming a subordinate status. Some politicians have gone so far as to suggest that immigrants be barred for their lifetimes from receiving any government entitlements, not only those with a race-based component.

Brimelow himself would create a lower caste of citizen. He objects that the citizens who sponsor immigrants sometimes are not “native born” but “immigrants who have simply graduated to citizenship.” If he had his way, they would never effectively graduate to citizenship, or having done so, would remain in significant respects inferior to the native born. Immigrants would be forced to sacrifice not simply allegiance to another nation, but also the possibility of family reunification — that is, the possibility of family reunification that would be taken for granted by native-born citizens with respect to their native nuclear families as well as their foreign-born extended families. Accepting for the sake of argument that this regime may be a defensible conception of immigration, it is not so by any theory of liberal democracy that allows immigrants to become citizens with the implicit promise that the status once conferred will be regarded in an equal and meaningful manner.

The racial arguments against immigration show the emptiness of color-blindness. Color-blindness has content only within its context. As the United States did for several generations, a community could appear to be color-blind among its members by the expedient means of being highly color-conscious at the threshold. It would exclude nonwhites from entry and membership.

Correspondingly, the Court can become color-blind jurisprudentially by adopting a principle such as the plenary power doctrine, which renders legislative color-consciousness invisible. As a result, color-conscious immigration policies would transform Justice Antonin Scalia’s recent pronouncement: “In the eyes of the government, we are just one race here. It is American.”

The result is to equate being American with being white, under the guise of color-blindness. Toward the end of his book, Brimelow cautiously expresses goodwill toward Asian immigrants because “[t]heir ethnic message... may be different” than that of other nonwhites, thanks to the similarity of their beliefs to whites’ beliefs. Demonstrating knowledge of an obscure part of American history, he recounts the arrival of Asian immigrants “in the South directly after the Civil War.”

What Brimelow admires about these Asian immigrants was that they “seem to have graduated... in the era of segregation, to a sort of honorary white status.” Brimelow likes them all the more because they further graduated “to an actual white status” as “unreinforced by immigration, the Chinese communities... intermarried... and essentially vanished from the Census returns.” One may be in favor of assimilation — and indeed quite assimilated — and regard this vision of what it means to be a citizen as markedly inferior to the promise held out by America.

The idea that some Americans have been here longer and should have more power to determine who enters the country rests on their racial ancestry rather than their individual right. It is people as racial groups and not as individuals who are presumed to have a greater stake in American identity due to their lengthier presence in the country. Under this theory, lineage, not longevity, is what counts.

The immigrants and natives are groups which have identities that survive over generations; if they are not groups, it is difficult to see how an individual native could demonstrate his “arrival” several generations prior to his birth. One might optimistically believe that they could be groups, without assuming that they are racial groups, but given American history and Brimelow’s “common sense,” it is difficult to conceive of them as anything else. Hence Brimelow’s concern with his son and his appeal to children collectively — or, rather, the children of the white Founders of the Republic, and the children of Brimelow’s readership.

With a color-blind world view, it would be nonsensical to state, as another leading restrictionist has written: “racial justice means that the majority in a country treats minorities fairly and equally; it does not mean that the majority is required to turn itself into a minority.” Even with a color-conscious world view, it is not clear that racial justice is meaningful when people of color must remain always and everywhere racial minorities.
The argument that immigrants from some nations, but not other nations, have more in common with citizens is rooted in racial group generalizations. Even the argument that newer immigrants are assimilating more slowly than older immigrants rests on racial group generalizations, as the conclusion is not reached on an individual basis. Again, the reasonable response might be something along the lines of, “well, yes, but we must make some generalizations.” This reaction fails to answer either of the two questions it raises: why the generalizations must be racial generalizations, and if they must be, why they cannot be in other areas of the law.  

In immigration, it also becomes clear that conservatives can recognize neutral standards that lack invidious intent as having disproportionate impact in practice, and that they can complain of the same. For critics of immigration who hold racial concerns, the facial neutrality of immigration laws is less persuasive than their as-applied impact. The 1965 reforms, which were more or less neutral standards, were passed with a mix of intentions that was at worst benign toward whites and at best (from the white perspective) favorable toward whites.  

As Brimelow has argued, the neutral standards have had an effect that is anything but racially neutral. Due to migration patterns over which the United States has little control (white Europeans from developed countries have fewer incentives to emigrate) immigrants are predominantly Asian and Latino. The critics of immigration legislation are not assuaged by good intentions and neutral language if the outcomes favor Asians and Latinos. In response, Congress has adopted an immigration counterpart to affirmative action, borrowing the buzzword of “diversity.” The “diversity” lottery is a visa quota based on national origin. It functions through a set-aside of extra visas for countries that are “underrepresented” within the immigrant pool, thereby benefiting Europeans and Africans (the former purposefully; the latter as a side effect) and for the most part disadvantaged Asians and Latinos. In 1995, for example, 24,549 extra visas were allocated to Europe; 20,200 to Africa; 8 to North America; 2,589 to South America; and 6,837 to Asia.  

Concern about immigration can be concern about race. Peter Brimelow is right about that. If the public is persuaded by Brimelow, and Asian and Latino immigrants are deemed undesirable, it would follow that Asian and Latino citizens also would be rendered less than desirable. Though the latter may remain in the eyes of many aliens within the community, there are constitutional protections that should prevent their mistreatment. But as what could not be done within the community is being done at the borders, there is an undesirable impact within. Asian Americans and Latinos are rendered perpetual guests in their own country.  

In this way, immigration issues illustrate the tendency of conservatives, rather than liberals, to think along the lines of racial group entitlement. Immigration law presents the strong form of racialization of the law: arguments based on race are not only permitted, they are accepted as the norm; they are not only private beliefs, but also embedded in public actions. Immigration shows the weakness of color-blindness and intent-based approaches to equal protection. While color-blindness conceals racial motivations, an intent-based approach overlooks them. Brimelow can agitate for racial restrictions, and politicians may be persuaded but offer other reasons for lower limits on immigration. Courts and commentators, in their zealous watch for openly racial restrictions on immigration, ignore programs with undisputed but hidden racial motivations — such as the diversity lottery for visas.  

The success of efforts to limit immigration may undermine the attacks on affirmative action. If anything, the attempts to end immigration when it has become predominantly colored show that color-blindness is far from a universally shared ideal. The people who would prefer immigrants who are racially Caucasian and culturally Anglo-Saxon Protestant can hardly complain about remedial programs such as affirmative action because they rely on racial characteristics. They may oppose the measures on other grounds, but the principled claim of color-blindness is irretrievably undermined. The concerns raised by the white majority with respect to colored immigration carry over to affirmative action: it is not procedural justice that is paramount, but resulting substantive changes, not the number of people who are to be allowed to enter, but their racial and cultural identity and their political power that matters.  

For those reasons, constitutional limits are critical. Immigration is unique because the Court has recognized that the Constitution is silent on basic facets of government structure and federal power. The Court has sought to interpret the text. Its mistake is in the specific interpretation, not in the act of interpretation itself. The arguments over affirmative action also show how constitutional limits shape political outcomes. Alongside the contentious debate on what affirmative action, if any, is desirable, effective, or counterproductive, there is a parallel constitutional discourse about what affirmative action, if any, is required, permitted, or forbidden. Whatever their position, virtually all participants in the political process recognize that the public policy which results is still bounded by constitutional norms. In this way, constitutional theory informs and contributes to political action; a civic culture is created which also is a constitutional culture. We are creating a constitutional
culture; our immigration laws can contribute toward that constitutional culture, rather than contradicting it. The constitutional constraints can and should be flexible, but they must exist if there is to be a more deliberative democracy and principled political choices.

2. What the Affirmative Action Debate Tells Us About Immigration

The rhetorical similarities between anti-immigrant and anti-affirmative action campaigns emerge in the juxtaposition of Prop. 187 with the cleverly misnamed California Civil Rights Initiative (CCRI) — the anti-affirmative action referendum that will follow it in the 1996 elections. Prop. 187 and CCRI share something pernicious. Each contains an appeal to racial minority groups at the expense of other people of color.

Perhaps the most galling aspect of the Prop. 187 campaign was the false promise made to African Americans. Without evidence, advocates for Prop. 187 asserted loudly and repeatedly that Asian and Latino immigrants were taking jobs from blacks or using government services intended for underprivileged citizens. Backers of Prop. 187 implied that excluding Asians and Latinos from the country would benefit blacks directly. What was never mentioned is that there were no plans to spend the purported savings from passage of Prop. 187 on either creating employment opportunities for blacks or increasing benefits for the poor.

In an almost perfect reversal, CCRI is targeted at the rapidly growing and increasingly powerful Asian American community. Proponents of CCRI argue to Asian American audiences that they are limited in their upward mobility because African Americans receive racial preferences. In particular, the argument goes, Asian American alumni children or outright quotas for whites such as at the prestigious Lowell High School in San Francisco.

Taken together, Prop. 187 and CCRI send the message to racial minority groups that they must compete for the crumbs left on the table after the pie has been eaten by the majority. They also send the message that political problems should be solved by blaming them on parts of the population traditionally seen as outsiders. Moreover, Prop. 187 and CCRI implicitly urge racial minority groups to turn upon themselves. Asian and Latino immigrants and African Americans who have assimilated, prospered and moved to the suburbs are welcomed as good minorities. The others become the “illegal” immigrants and the “unqualified” who are to be left behind.

It is important to note that one can be ambivalent about immigration and affirmative action, but also be appalled at the disingenuous and manipulative manner in which they have been bound together. It is possible to oppose immigration without being “racist,” however that term may be defined. The more important inquiries, politically and constitutionally, look beyond blame and intent, good intentions and bad faith; victims and wrongdoers; they are directed, instead, toward identifying the real economic and structural problems — and possible solutions to them. Along the way, though, individuals who are concerned about justice in immigration would do well to ask themselves whether they believe what they are being asked to believe about immigrants. All of this is to point out contradictions in the immigration restrictionist position when it is asserted with an anti-affirmative action position; none of this should be taken to suggest that increased color-consciousness, in a conventional sense, is required or preferable.

In the volume of cases and the contentiousness of the decisions, immigration law has developed as a leading field for development of constitutional theory. This has occurred despite the persistence of the plenary power doctrine. It may well be that the plenary power doctrine has been weakened over time, but the current legislative proposals are likely to bring its return with a vengeance. Even if it were considered moribund, it is far from certain what if any norms have taken its place. The plenary power doctrine has distorted constitutional discourse, by excepting an entire area of law from normal review. Major immigration cases that presented an opportunity to overturn the plenary power doctrine have been settled, which, while beneficial to the litigants, has prevented the development of standards favorable to all immigrants.

If the Supreme Court is unwilling to impose constitutional limits on Congress, the legislature will have the opportunity to assert its independent role in evaluating the Constitution by adopting a more moderate course in immigration reform.

One last caveat is in order. Contrary to their references to reason, immigration restrictionists have employed a galling strategy which should be resisted. That *ad hominem* strategy is the characterization of advocates of liberal immigration policies as motivated merely by bias due to their own personal circumstances, and able to argue only in emotional terms as a consequence. The same could be said of proponents of conservative immigration policies — who would be as adamant, if not outraged, if their right to take part in the political process were denied and their right even to remain in the country of their birth denigrated. Immigration enthusiasts have as much of a claim to the national interest.
CONCLUSION
The change proposed here would bring to the immigration debate the limits which are recognized in every other sphere of American law. In the face of contested normative judgments, whether immigration is racially desirable or not, and disputed facts, whether immigration is economically beneficial or detrimental, the Constitution should mark the limits of the law. It is commonplace to suggest that the treatment of strangers reveals most deeply the morality of a society. It would be remarkable if the treatment of its potential members reflected as well the confidence of a society.

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NOTES
1 FRANZ KAFKA, Before the Law, in THE COMPLETE STORIES 3 (Willa & Edwin Muir trans., 1971).
3 For an overview of the immigration debate, I have relied on ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA (Nicolaus Mills ed., 1994) [hereinafter ARGUING IMMIGRATION], especially Nathan Glazer, The Closing Door, id. at 37, Toni Morrison, On the Backs of Blacks, id. at 97; Jack Miles, Blacks vs. Browns, id. at 101, especially 133-38; Francis Fukuyama, Immigrants and Family Values, id. at 15; Lawrence Auster, The Forbidden Topic, id. at 169.


6 This is to make nothing more of Brimelow's personal status than he himself would. Neither the fact that he is an immigrant nor the fact that he is an Englishman should be held against him. To the contrary, he offers those characteristics to enhance his arguments. In an attempt to establish authority for his arguments by reference to himself, Brimelow has a habit of invoking his immigrant status and refers at least a half-dozen times to his concern about "politically correct" persecution of "my little son Alexander," who is white. See PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 9, 11, 20, 103, 221, 249-50 (1995).
For major reviews of the book in mass media publications, see, e.g., Nicholas Lemann, Too Many Foreigners, N.Y. TIMES, Apr. 16, 1995, § 7 (Book Review), at 3; Christopher Hitchens, Id. See infra notes 34-41 and accompanying text.

In recent history, Brimelow was preceded by, among others, the former Governor of Colorado in Richard D. Lamm & Gary Imhoff, THE IMMIGRATION TIME BOMB: THE FRAGMENTING AND DESTRUCTION OF AMERICA BY IMMIGRATION (1985) and Lawrence Auster, THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM (1990).

Brimelow is apparently unaware that his book shares a title with a popular science fiction movie, starring James Caan and Mandy Patinkin, in the story of aliens from outer space related to undocumented immigration using personal profiles). These articles and books, along with oral histories of immigrants, autobiographies and biographies, appear to have had much less of an impact on public opinion than Brimelow.

For general information about debates immediately before Brimelow appeared on the scene, I have consulted Thomas Muller, IMMIGRANTS AND THE AMERICAN CITY (1993) and Ellis Cose, A NATION OF STRANGERS: PREJUDICE, POLITICS AND THE POPULATING OF AMERICA (1992). The Muller book, as the title suggests, focuses on immigration to urban areas; it includes summaries of many of the leading economic studies through the passage of the Immigration Reform and Control Act (IRCA).

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Brimelow is apparently unaware that his book shares a title with a popular science fiction movie, starring James Caan and Mandy Patinkin, in the story of aliens from outer space arriving in contemporary Los Angeles and struggling to assimilate. ALIEN NATION (20th Century Fox Film Corp. 1988). The very term "alien," and the association of science fiction aliens with real aliens is a method of demonizing the latter. H.G. Wells, among other authors, recognized the power of alien invasion as a metaphor. Cf. Gerald L. Neuman, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine, 42 UCLA L. REV. 1425, 1428 (1995) (discussing imagery of "nonhuman invaders from outer space" used in immigration context).


In the past few years, there have been more optimistic views on immigration, see, e.g., Ben J. Wattenberg, THE FIRST UNIVERSAL NATION: LEADING INDICATORS AND IDEAS ABOUT THE SURGE OF AMERICA IN THE 1990s (1991), as well as more mixed views on immigration, see, e.g., Michael Lind, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION (1995). See also Fuchs, supra note 13 (arguing for a pluralist democracy with a shared civic culture); Richard Rayner, What Immigration Crisis?, N.Y. TIMES, Jan. 7, 1996, § 6 (Magazine), at 26 (recent article with balanced view of immigrants, discusses problems faced by and related to undocumented immigration using personal profiles). These articles and books, along with oral histories of immigrants, autobiographies and biographies, appear to have had much less of an impact on public opinion than Brimelow.

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I have, however, only selectively examined the fast-growing social science scholarship on immigration. See, e.g., IMMIGRATION RECONSIDERED: HISTORY, SOCIETY, AND
20. Although the suspicion must be "reasonable," no standards are provided for determining reasonableness. CAL. WELF. & INST. CODE § 10001.5(c) (West 1995) (as revised by Prop. 187); HEALTH & SAFETY CODE § 130(c) (West 1995) (same); GOV'T. CODE § 53069.65 (West 1995) (same). The key effect of Prop. 187 is to challenge the Plyler v. Doe decision. By denying not only undocumented immigrant children but also children of undocumented immigrant parents (and those suspected of such status), the measure contravenes the decision holding unconstitutional a Texas statute which was limited to the former group. The remainder of Prop. 187 is symbolic. Prop. 187 affects not only undocumented immigrant children but also children of undocumented immigrant parents (and those "suspected" of such status), it denies to individuals "suspected" of being "illegal" immigrants a range of government services, including services to which they are entitled under federal law, as well as services to which they are entitled under federal law. It also requires that public employees who come into contact with these "suspected" individuals report them to the law. It also requires that public employees who come into contact with these "suspected" individuals report them to the law.


26. BRIMELOW, supra note 6, at 262 (proposing drastic or total reduction in immigration immediately) and 265 (proposing abolition of birthright citizenship).


28. BRIMELOW, supra note 6, at 262.

29. Id. at 264.

30. See id. at 11 ("Race and ethnicity are destiny in American politics") (emphasis in original); id. at 121 ("Once again, ethnicity, and demography, is destiny in American politics.").

31. Id. at 58-59.

32. Id at 59.

33. Id. at 48 (emphasis in original).

34. Lind, supra note 11, at 108. Brimelow himself defines racism as winning an argument with a liberal. BRIMELOW, supra note 6, at 10-11. It is tempting to respond by defining political correctness as winning an argument against a conservative. But the more important point is that such facile and glib sound bites fail to advance understanding and cooperation. As for Brimelow, I do not call him a "racist" and should not be taken as implying that he is one. That term is much too simple to describe Brimelow's views.

35. BRIMELOW, supra note 6, at 10.

36. Id. at 18.

37. Id. at 11, 116-17, 178-81, 215-16.
minorities and breaking down white America’s sense of identity.

Because he is Asian in a predominantly white society. And there is no cure for that except radically increasing the numbers of minorities and breaking down white America’s sense of identity.” (emphasis added).

Id. at 271-72 (criticizing historian Ronald Takaki for his anecdote about being perceived as foreign, because “to the extent that there is any content to Takaki’s complaint, it is because he is Asian in a predominantly white society. And there is no cure for that except radically increasing the numbers of minorities and breaking down white America’s sense of identity.”) (emphasis added).

Id. at 105-07 (criticizing Raoul Lowery Contreras for “his emotional attitudes” toward immigration).

Id. at 189-90.

Id. at 197.


While each of the works deserves, and has received, significant scholarly response, whether they are persuasive depends almost entirely on whether their premise is accepted, namely that nations should have different standards externally than internally. The debate concerns not only the normative standards that govern the community after it has been constituted, but also the normative standards that define how the community comes into being to begin with. The levels cannot be separated without assumptions about sovereignty, because the process of defining membership is continually ongoing and self-fulfilling.

There are flaws in WALZER and SCHUCK & SMITH. Neither of the two major works, with their emphasis on abstract consent of the polity to newcomers, addresses at length the realities of prejudice and discrimination based on race and ethnicity faced by those who are already members of the community.

Moreover, Walzer, while insisting that entry is a “political decision” made by members of the community, recognizes that “decisions of this sort are subject to constraint.” WALZER, supra note 56, at 40. I have no quarrel with either argument, that immigration is subject to a “political decision” or that it can legitimately be made by those already part of the society. My point is to examine who is considered a part of the society, and where the constraints might reasonably be set.
This is hardly an original point. Virtually every history of immigration notes the conflicting national myths and native responses surrounding immigration and immigrants.

This Article does not consider the circular reasoning used to define "illegal" immigrants, or the contradictory political factors that have caused the immigration debate to focus on them. Two excellent articles on the subject are Gerald P. Lopez, "Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy," 28 UCLA L. REV. 615 (1981) and Linda S. Bosniak, "Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law," 1988 WIS. L. REV. 955 (1988).

Suffice it to say that the image of the "illegal" immigrant is constructed poorly; it is a proxy for race, class, welfare use, etc. Consider that a California politician, from Europe, who was an "illegal" immigrant in a strict sense of entering the country in an "illegal" manner could have had little trouble voting in a recent general election. In Ingram, California Elections: 4th Senate District, Prop. 187 Serving as Backdrop in Yet Another Race, L.A. TIMES, Nov. 7, 1994, at A3. The image of the "illegal" immigrant is almost exclusively nonwhite, (basically, Mexican), and the manner of entry portrayed is crossing the Southern border on foot or in a smugglers' van. The majority of "illegal" immigrants, however, are neither Mexican nor did they arrive from Mexico via an illegal entry. Michael Fux & Jeffrey S. Passec, Immigration and Immigrants: Setting The Record Straight 24-25 (1994).


I encountered these arguments while working on the campaign against Prop. 187. Some of the difficulties faced by liberal candidates during the Prop. 187 campaign are discussed in Greg Krikorian & Amy Wallace, Prop. 187 Rises as Key Theme In Top 2 Races, L.A. TIMES, Oct. 25, 1994, at A1; B Drummond Ayres, Jr., The 1994 Campaign: California: Candidates Hedge Their Bets on an Immigration Measure, N.Y. TIMES, Oct. 25, 1994, at B8.

Koh, supra note 2.

My article may be read as a dialogue with and extension from Joseph H. Carens, Aliens and Citizens: The Case for Open Borders, 49 REV. OF POL. 251, 264-70 (1987) [hereinafter Carens, Open Borders] (the essay is a contemporary classic in its articulation of the open borders argument, considering Nozick, Rawls and Walzer). Carens is concerned with the universal nature of liberal values. Id. at 265, 269. Carens also argues that the national, state and local borders are comparable. Id. at 258, 266-67. See also Joseph H. Carens, Immigration and the Welfare State, in DEMOCRACY AND THE WELFARE STATE 207 (Amy Gutmann ed., 1988).

For a recent version of the open borders argument, see R. George Wright, Federal Immigration Law and the Case for Open Entry, 27 LOY. L.A. L. REV. 1265 (1994); see also Alan Dower, Closed Borders: The Contemporary Assault on Freedom of Movement (1987) (discussing right to emigrate as well to immigrate, using international perspective); contra Whelan, supra note 56, at 27.


64 I hasten to emphasize this point: my concern is with racial motivations for lowering the numbers of immigrants or selecting them. I am concerned about cultural arguments as well, but only insofar as culture masks race, or culture is protected within domestic constitutional standards. I am not concerned with economic arguments, except to note that they, too, may be economic arguments only on the surface and something else altogether below the surface; as discussed throughout the notes, the empirical evidence for an objective argument against immigration is weak.

65 See, e.g., Koh, supra note 2 (mayor of Culver City supports military on border); Bunting, supra note 59 (Democratic Senator from California supports military on border).


68 See, e.g., Jean v. Nelson, 472 U.S. 846 (1985) (no need to reach constitutional issues possibly presented by detainees who may have been excludable, because of statutory ground for decision).

69 Cf. Aleinikoff, Citizens, supra note 63, at 33-34 ("But our immigration laws are not primarily concerned with the construction or maintenance of a particular kind of community"); contra WALZER, supra note 56, at 35-42 (considering analogies for the nation).

70 The use of the term "Americans," rather than U.S. citizens is intentional. Brimelow uses the term to mean U.S. citizens; and U.S. citizens tend to view themselves as "Americans" to the exclusion of Canadians, Mexicans and others in the Western Hemisphere. I am sensitive to the claim that just as American does not mean white, it also does not mean U.S. citizen.

71 Carens, Open Borders, supra note 62.

72 In an historical reflection of the equivalence between federal and state immigration restriction, Professor Gerald Neuman discusses the 1803 federal statute that forbade importation of foreign blacks into states whose laws contained the same prohibition; he suggests that the congruence at federal and state levels "may hereafter occupy a prominent place in the history of our legislation." Neuman, The Lost Century, supra note 63, at 1869-70. Neuman is a notable exception in that he clearly links slavery-related anti-immigrant legislation directed at blacks with other anti-immigrant legislation such as the Chinese Exclusion Act. Id. at 1872.

The normative arguments made in this article do not depend on the romanticized notion that the nation had "open borders" in the past. See Neuman, The Lost Century, supra note 63 (describing numerous state statutes and regulations governing immigration and immigrants prior to the Chinese Exclusion Act).

73 BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4, 89-95 (1980) (describing rationality principle whereby "whenever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is" and imagining dialogue in which native defends right to exclude immigrant based on earlier arrival). Ackerman would tolerate limits on immigration if they were necessary to ensure the "liberal dialogue." Though this may prove to be a dangerous exception, susceptible to claims of crisis, it at least indicates that Ackerman cannot be dismissed as an absolute proponent of open borders.

74 See WALZER, supra note 56, at 34 ("there are certain similarities between strangers in political space (immigrants) and descendants in time (children).").

75 See, infra note 318 and accompanying text.

76 Or as Louis Henkin stated, "[f]There is no reason to resist . . . [the] suggestion that control over immigration is a right of every sovereign state and that it is inherent . . . ." Henkin, supra note 63, at 857.

77 National sovereignty is invoked often and uncritically as "directly" justifying immigration policies. See, e.g., Peter H. Schuck, The Message of 187: Facing Up to Illegal Immigration, 21 AM. PROSPECT, Spring 1995, at 85, 88 (1995) (arguing that "harsh options" for illegal aliens "follow directly from the premise of national territorial sovereignty.").

78 Carens, Nationalism, supra note 56, at 49, 54 (distinguishing between arguments made by outsiders and insiders).

79 For the latter view, see, e.g., Joan Fitzpatrick & William M. Bennett, A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States, 70 WASH.
justifications of the plenary power doctrine based on the foreign affairs power, the war powers, or the commerce power (with respect to commerce with foreign nations). A useful summary of the different justifications offered for the plenary power doctrine can be found in ALENKOFF, supra note 13, at 7-15 and Legomsky, supra note 63, at 261-78.

80 See Carens, Open Borders, supra note 62, at 271.

81 On the side that supports immigrants, former New York Governor Mario Cuomo, a leading Democrat, and current New York City mayor Rudolph Guliania, a law and order Republican, have been willing to extend their welcomes to legal immigrants together with undocumented immigrants. See Michael S. Teitelbaum & Myron Weiner, Introduction, in THREATENED PEOPLES, THREATENED BORDERS supra note 15, at 20.


82 By and large, contrary to the premise of Prop. 187, immigrants do not immediately enjoy the same entitlements as citizens; this is all the more true of "illegal" immigrants. Legal immigrants underutilize benefits and services to which they are entitled, with the possible exception of elderly refugees whose immigration to the United States arises from unique circumstances — in many cases a result of U.S. foreign policy. On legal immigration and welfare, see Richard A. Boswell, Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response, 42 UCLA L. REV. 1475, 1482-87 (explaining virtually absolute discretion of United States embassies in denying visas to applicants deemed likely to become a "public charge," citing 8 U.S.C. § 1182 (a)(4) (1994)). On "illegal" immigration and welfare, see Stephen H. Legomsky, Immigration, Federalism, and the Welfare State, 42 UCLA L. REV. 1453, especially 1468-70 (1995) (discussing principles that might be used to "draw the line"). For empirical data concerning the use of government entitlements, see Fix & PASSEL, supra note 58 (concluding that immigrants, legal and illegal, create a net economic gain); JULIAN SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS (1995).


84 See Ron K. Unz, Immigration or The Welfare State; Which Is Our Real Enemy?, HERITAGE FOUND., POL'Y REV., Fall 1994, at 33 (arguing for higher immigration levels but reduced entitlements).

85 See Choi, supra note 4.

86 I take racial considerations to be "illegitimate," because they generally are considered to be illegitimate by the common culture and constitutional doctrine with respect to local and state borders. I am willing to concede the argument, at least in this Article, to anyone who takes both the position that Brimelow is right and the position that racial considerations are morally legitimate with respect to the internal borders of a liberal democracy.

87 ELLIS COSE, A NATION OF STRANGERS: PREJUDICE, POLITICS AND THE POPULATING OF AMERICA 194 (1992). Brimelow refers to the founder of FAIR rather frighteningly as "true a citizen who has taken up arms for his country." BRIMELOW, supra note 6, at 278.


90 See BRIMELOW, supra note 6, at 62-65, 72-78, 137, 191-201.

91 For an influential statement of the view that ideological conflict among nations would increase in the next century, with many countries set against the United States, see Samuel P. Huntington, The Clash of Civilizations?, FOREIGN AFF., Summer
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1993, at 22.


95 Some of the issues related to these perceptions are discussed in Hing, supra note 63; Karst, supra note 63; and Frank H. Wu, Changing America: Three Arguments About Asian Americans and the Law, AM. UNIV. L. REV. (forthcoming 1996).

96 Of course, the nation has never been wholly white, or even simply black and white. ROBERTS, supra note 88, at 73. Differences among white ethnic groups were considered significant until relatively recently. See Michael Novak, The Rise of The Unmeltable Ethnics: Politics And Culture in The Seventies (1972); see also Higham, Strangers In The Land, supra note 13; NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

97 ROBERTS, supra note 88, at 67.

98 Id. at 70.


100 Mixed marriages constitute two percent of all marriages. Some of the apparent increase over time may be due to better survey methodology. See ROBERTS, supra note 91, at 48. See also FIX & PASSEL, supra note 58, at 43; Antonio McDaniel, The Dynamic Racial Composition of the United States: An American Dilemma Revisited, DAEDALUS, Jan. 1995, at 179 (comparing intermarriage rates of African Americans with intermarriage rates of Asian Americans).

101 See Richard Morin, A Distorted Image of Minorities; Poll Suggests That What Whites Think They See May Affect Beliefs, WASH. POST, Oct. 8, 1995, at A1.

102 See Adler & Waldmann, supra note 4. Although I am skeptical of the distinction, arguably racism and nativism are diverging, and presumably most clearly among immigrants who oppose immigration. Their views, which warrant further consideration, appear to be among the least persuasive arguments to immigrants who disagree but also the most persuasive for natives who agree. Derrick Bell’s analysis of the “super-standing” acquired by racial minorities who espouse conservative political views may explain this dichotomy. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 109-26 (1992).


104 Only 16% of migrants can be found in the United States. Russell, supra note 103, at 41. To be fair, 33% of migrants to the developed world resided in the United States. Id. The United States is also unique within the developed world in experiencing increasing immigration in the past generation. Id. at 45.

105 FIX & PASSEL, supra note 58, at 23; Passel & Edmonston, Immigration and Race, supra note 88, at 34-36; William Echikson, Young Americans Go Abroad To Strike It Rich, FORTUNE, Oct. 17, 1994, at 185; Gary Belsky, Escape from America, MONEY, July 1994, at 60. Fix and Passel, who are based at the Urban Institute, estimate 200,000 American emigrants annually. FIX & PASSEL, supra note 58, at 23.


108 Editorial, Does It Matter Where You Are?, ECONOMIST, July 30, 1994, at 13. The editorial was accompanied by a special section on technological changes.

109 Id.

110 Benjamin R. Barber, Jihad vs. McWorld, ATLANTIC, Mar. 1992, at 53. The article has recently been expanded into a book of the same name.


112 Reich, supra note 111.
Records, in Journey At Destroying the Social Fabric of Our Planet, of rich, satiated, demographically stagnant societies and a large Developing Nations, Against the West? Immigration and Relations Between Western AMERICANS? POPULATION, SCIENCE author of the famous essay, Economics and Population Taboos 226.

Patterns of Legalized Immigrants: Insights from Administrative Martin Tienda, meaning to support the reactions of white natives who have fled white flight and racial polarization geographically, apparently Holmes, 800,000 natives for a net population reduction); Steven and population changed residences between probably is a problem with overpopulation).

The Settlement and Secondary Migration supra note 88, at 15-17.

Barber, supra note 110.


Robert D. Kaplan, The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet, ATLANTIC, Feb. 1994, at 44 ("Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms, and international drug cartels are now most tellingly demonstrated through a West African prism. West Africa provides an appropriate introduction to the issues, often extremely unpleasant to discuss, that will soon confront our civilization.").

The Kaplan article has been incorporated into a recent book. Robert D. Kaplan, The Ends of the Earth: A Journey At the Dawn of the Twenty-First Century (1996).

Barber, supra note 110.

In 1990, the Court unanimously struck down state public assistance provisions that discriminated against noncitizens, citing Shapiro v. Thompson throughout the opinion. Whatever these decisions meant, they were limited by the later decision in Mathews v. Diaz, 426 U.S. 67, 85, 87 (1976). Although emigration is different than immigration, and temporary travel overseas different still, see Regan v. Wald, 468 U.S. 222, 241 n.25 (1984) (upholding limitations on international travel by citizens, stating that earlier cases had treated "the constitutional right to travel within the United States and the right to travel abroad . . . indiscriminately. That position has been rejected in subsequent cases."). See also Zobel v. Williams, 457 U.S. 55, 68 (1982) (Brennan, J., concurring) (in striking down Alaska oil pipeline divided distribution plan which discriminated based on residential duration, a comparison of equality between naturalized and native-born citizens and equality between recent and long-term state residents); Kent v. Dulles, 357 U.S. 116, 126 (1958) (restricting Secretary of State's ability to deny passports, stating that "[t]ravel abroad, like travel within the country, may be necessary for a livelihood.").
The nascent communitarian movement with respect to that national service can serve as a means of introducing disrupted existing social and political hierarchies and customary United States a pure liberal democracy "would have seriously viable... though far from absent." This "Americanist" sense, but "older notions of that common have a meaningful national identity, with common values" in this "Americanist" view. This "Americanist" view "holds that Americans have used not only liberal democratic and civic ways of life. It still would do so." Smith, American Conceptions, at 237. Other peoples "they might want to avoid, could chose to assimilate, but also could rightly dominate." Id. at 244. The problem is that "today many Americans still want to feel they have a meaningful national identity, with common values" in this "Americanist" sense, but "older notions of that common nationality that were hierarchical and exclusionary are much less viable... though far from absent." Id. at 251. To make the United States a pure liberal democracy "would have seriously disrupted existing social and political hierarchies and customary ways of life. It still would do so." Id. at 252. Smith suggests that national service can serve as a means of introducing Americans to diversity.

128 See, e.g., SCIRP, supra note 13.

129 See, e.g., SCIRP, supra note 13.

130 Philip D. Curtin, Migration in the Tropical World, in IMMIGRATION RECONSIDERED, supra note 15, at 21, 27.

131 The Constitution mandated an "open borders" period with respect to Congressional control over the importation of slaves. U.S. CONST., art. I, § 9, cl. 1. See also Smith v. Turner, 48 U.S. 283 (1849) (The Passenger Cases). The slavery issue may have prevented Congress from being able to take up federal legislation over immigration. See Neuman, The Lost Century, supra note 63, at 1865-66 (discussing the historical role of slavery in shaping state immigration law prior to the Civil War).

132 Immigration and Nationality Act Amendments of 1965 (INA), Pub. L. No. 89-236, § 2, 79 Stat. 911, codified at 8 U.S.C. § 1152 (1988). Technically, it was a national origins based policy. Actually, even national origins have been reduced to race in immigration law. Prior to the 1965 reforms, the Second Circuit held that a Brazilian citizen born of Brazilian parents of Japanese ancestry was not Brazilian, but Japanese for quota purposes. Hitai v. INS, 343 F.2d 466 (2d Cir. 1965).

The increasing divergence of national origin and race, even in what might be regarded broadly as the Old World, exposes the constructed and indeterminate nature of the concepts — when there are enough individuals who are, say, Arab or African racially, French as a matter of national origin and citizenship, and some combination culturally, it is no longer an academic assertion that race, national origin, citizenship and culture are not biological matters of blood. A worthwhile area of inquiry for future scholarship would be immigration cases presenting this type of divergence. Some would-be immigrants strategically emigrate initially to another country from which further emigration to the United States is easier than from their original homeland.

133 Mexico would be further affected by per-country ceilings. 8 U.S.C. § 1152.

134 INA § 203(b)(5).

135 INA § 203(c).


137 As a result of the complexity of immigration law, the field is crowded with purveyors of fraudulent documents. See Bill Miller, INS Cracks Down on Immigration Fraud for Profit; Consultants Who Falsify Documents, Arrange Phony Marriages Are Target of Federal Probes, WASH. POST, Jan. 15, 1995, at A8; Patrick McDonell, Victimized Brothers Help End Immigration Scam; Fraud; Illegal Immigrants from Oaxaca Were Central to Suit That Unmasked Firm Selling Worthless Papers to Foreigners, L.A. TIMES, Aug. 4, 1991, at B1.

138 Stephen Engelberg, In Immigration Labyrinth, Corruption Comes Easily, N.Y. TIMES, Sept. 12, 1994, at A1 (part of a series; describes bribery scandals in Arlington, Va., office of INS, and other similar situations throughout the agency). Some authors propose that the INS would better serve its contradictory dual purposes of immigrant service and law enforcement if it were divided into two separate agencies. See DANIEL W. SUTHERLAND, CENTER FOR EQUAL OPPORTUNITY (CEO) POLICY BRIEF, ABOLISH THE INS: HOW FEDERAL BUREAUCRACY DOOMS IMMIGRATION REFORM (1996).


140 Chae Chan Ping v. United States, 130 U.S. 58, 595 (1889) (The Chinese Exclusion Case).

141 I have benefited greatly from the analyses of the plenary power doctrine by other scholars. See especially Motomura, Plenary Power, supra note 63, at 545-59 (tracing course of "classical" immigration law); Motomura, Curious Evolution, supra note 63, at 1632-38 (discussing Chae Chan Ping and Fong Yue Ting); see also Henkin, supra note 63 (considering
This article does not analyze each of the possible justifications for the plenary power doctrine, a task which Stephen Legomsky performed admirably in his article. I have tried to take up where Legomsky left off, considering how the Court could progress beyond the plenary power doctrine, and what the constitutional consequences might be. See Legomsky, Plenary Power, supra note 63, at 305 ("[The] next stage [of constitutional review of immigration law] will be marked by a return to general principles of constitutional law.") Cf. Schuck, supra note 63, at 83-85 (discussing some possible approaches in the absence of plenary power).

142 U.S. CONST., art. I, § 8, cl. 4. If anything, "uniform Rule" should be read to prevent racial discrimination. The other enumerated power of that clause is to set "uniform Laws on the subject of Bankruptcies." Nobody contends that Congress possess "plenary power" over bankruptcy, beyond constitutional limits.

143 130 U.S. 581 (1889).

144 Id. at 599-600.

145 Id. at 596-98.


148 Id.

149 See Hing, supra note 63, at 44-46.

150 Chae Chan Ping v. United States, 130 U.S. 581, 603 (1899).

151 Id.

152 The interpretation that follows is developed from Motomura, Plenary Power, supra note 63, at 551. Cf. Aleinikoff, Rights, supra note 63, at 863 (describing international law perspective on immigration as "understandable.").

153 The foreign relations aspect of the Chinese Exclusion Act are described in Henkin, supra note 63, at 863-86 and Fitzpatrick & Bennett, supra note 79, at 594-608. If immigration is evaluated by international norms, the irony is that the Chinese Exclusion Act breached international law obligations and agreements.

154 Chae Chan Ping, 130 U.S. at 604.

155 Id. at 595. Brimelow believes the case to have been decided rightly. See Brimelow, supra note 6, at 214-15 (characterizing argument as "maybe" having a "dark, nativistic motive" but being "highly rational and a very specific complaint about the difficulty of assimilating immigrants from what was then a pre-modern society.").

156 Id. at 595.

157 Id. at 606.

158 Id.

159 149 U.S. 698 (1893).

160 Id. at 706.

161 Id. at 713.

162 Id. at 711.

163 Id. at 713.

164 Id. at 712.

165 Id. at 711-12.

166 Id. at 712.

167 Id. at 729.

168 Id. at 730 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 598 (1889)).

169 Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893). Scholars have shown that Asian immigrants and European immigrants displayed similar return rates to their homelands. See, e.g., Takaki, supra note 146, at 11; Chan, European and Asian Immigration into the United States in Comparative Perspective, 1820s to 1920s, in IMMIGRATION RECONSIDERED, supra note 15, at 37, 38.

170 Fong Yue Ting, 149 U.S. at 734.

171 Id. at 738.

172 Id. at 737.

173 Id. at 743.
the country with consent" and those who came "in disregard of
imprisonment without jury trial provisions of Chinese Exclusion
United States, 163 U.S. 228 (1896) (striking down
Jurisprudence, Amendment: Nineteenth Century Chinese Civil Rights Cases
Thomas W. Joo,
corporations than equal protection of racial minorities.

Survey of anti-Chinese case law, has concluded that
63, at 864. A recent commentator, based on an exhaustive
FederalAlienage Cases,
Justice Thurgood Marshall and the Legacy of Dissent in
Legomsky predicted that
Legomsky,
decision, its discussion ignored the plenary power doctrine.

More recently, the Supreme Court invalidated the
legislative veto in the immigration context. INS v. Chadha, 462
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The Court has ignored the plenary power doctrine on plenty
of occasions.
Unable to simply defer to Congress, the Court intervened
actively in a remarkable series of early twentieth century cases
defining what it meant to be a "white" person able to naturalize.
See Ozawa v. United States, 260 U.S. 178 (1922) (Japanese
individual not permitted to naturalize because he was not white);
United States v. Thind, 261 U.S. 204 (1922) (Asian Indian
individual not permitted to naturalize because he was not white).
See IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL
CONSTRUCTION OF RACE (1996).

More recently, the Supreme Court invalidated the
legislative veto in the immigration context. INS v. Chadha, 462
U.S. 919 (1983). As Stephen Legomsky noted shortly after the
decision, its discussion ignored the plenary power doctrine.
Legomsky, Plenary Power, supra note 63, at 301-03.
Legomsky predicted that Chadha would "speed the demise of
the plenary power doctrine." Id. at 302. He has been incorrect,
alas. See Stephen H. Legomsky, Ten More Years of Plenary
Power: Immigration, Congress, and the Courts, 22 HASTINGS
CONST. L.Q. 925 (1995) (more cautious prediction that the
Supreme Court may "soften" the plenary power doctrine in the
future).

Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320,
339 (1909) (upholding levy on carriers who had transported
inadmissible aliens).
more powerful than the plenary power doctrine in insulating immigration decisions from judicial review. See Kevin R. Johnson, Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration, 71 N.C. L. REV. 413 (1993).

201 Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993). While the opinion labeled the Haitian immigrants "illegal," they might have been "legal" at the end of the process on which they were embarking, as they had a strong argument for asylum. As Justice Blackmun pointed out, if the majority accepted that the Haitian immigrants were "illegal," then the statute would have limited the discretion of the executive branch. Id. at 2568 (Blackmun, J., dissenting).

202 Id. at 2555 n.13 (Executive Order reproduced; facially neutral); id. at 2549 (characterizing order as directed at Haitians). I have relied on two articles written by Harold H. Koh, who was counsel of record in the case. Harold H. Koh, The "Haiti Paradigm" in United States Human Rights Policy, 103 YALE L.J. 2391 (1994) [hereinafter Koh, Haiti Paradigm]; Harold H. Koh, Reflections on Refoulement and Haitian Centers Council, 35 HARV. INT’L. L.J. 1 (1994).

203 Sale, 113 S. Ct. at 2569 (Blackmun, J., dissenting); see also Koh, Haiti Paradigm, supra note 202, at 2416-19.

204 113 S. Ct. at 2558-62, 2567.


206 See Kevin R. Johnson, Judicial Acquiescence to the Executive Branch’s Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers, 7 GEO. IMMIG. L.J. 1, 12-13, 26 (1993).

207 Sale, 113 S. Ct. at 2561 (citing Shaughnessy v. United States ex rel. Mezal, 345 U.S. 206, 212 (1953)).

208 Id. at 2577 (Blackmun, J., dissenting). See Koh, Haiti Paradigm, supra note 202, at 2411-16.

209 Motomura, Plenary Power, supra note 63.


211 Id. at 849.

212 Id. at 857.

213 Motomura, Curious Evolution, supra note 63.


216 Id. at *2-4.

217 This would reconcile the discrimination against immigrants at the border with the protection offered to them as immigrants within the border, as expressed by Graham v. Richardson, 403 U.S. 365 (1971) (striking down state public assistance provisions that discriminated against noncitizens).

218 Id.; see also Bosniak, supra note 58 (analyzing decisions in labor law that protect undocumented workers).

219 This again may be nothing more than an argument for consistency: the Court could be less protective of immigrants across the board.

220 See Motomura, Plenary Power, supra note 63, at 574, 600-13; Motomura, Curious Evolution, supra note 63, at 1690-92, 1702-04.

221 163 U.S. 537 (1896). This point is made by Motomura, Plenary Power, supra note 63, at 551.


224 Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (affirming denial of law license to married woman with dicta concerning the "wide difference in the respective spheres and destinies of man and woman" which is "recognized" in "the civil law, as well as nature herself."). Compare Frontiero v. Richardson, 411 U.S. 677 (1973) (heightened scrutiny for gender discrimination).


226 Lochner v. New York, 198 U.S. 25 (1905). The age of the plenary power doctrine can be measured against substantive due process: the latter came into existence after the plenary power doctrine and ceased to exist while the plenary power doctrine continued to flourish. Cf. Henkin, supra note 63, at 859 n.26 (noting early traces of substantive due process at time of the Chinese Exclusion Case).


229 For an extended discussion of the three arguments addressed


230 Casey, 505 U.S. at 863 (explaining appropriate departure from stare decisis in abandonment of substantive due process and in Brown v. Board of Education, 347 U.S. 483 (1954)).


233 Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (Brewer, J., dissenting); id. at 744 (Field, J., dissenting); id. at 762 (Fuller, C.J., dissenting); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (Douglas, J., dissenting); Fiallo v. Bell, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting).

234 The phrase is Stephen Legomycky’s. Legomsky, supra note 63, at 929. See, e.g., Motumora, Plenary Power, supra note 63; Motomura, Curious Evolution, supra note 63; Henkin, supra note 63; Legomsky, Plenary Power, supra note 63.

235 Nobody, that is, except Peter Brimelow and others who believe as he does. But see Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 VA. J. INT’L L. 121 (1994) (arguing that states should have greater leeway in passing immigration legislation and focusing on federalism concerns with apparent willingness to tolerate what would be equal protection violations in other contexts).

Some scholars are confident that the Chinese Exclusion Act, or its counterpart, could not be passed today as a political matter, and also would not be sustained by the Court. See, e.g., Aleinikoff, supra note 13, at 160.

236 Cf. Viet Dinh, Law and Asylum, in ARGUING IMMIGRATION, supra note 3, at 215, 220 (arguing without elaboration that “the standards that we employ to exclude aliens have to reflect the values of our society.”).

237 U.S. CONST., amend. V, XIV. Another elaboration of the argument that should appeal to judicial conservatives who are consistent in their views is the reluctance to recognize implied powers, rendered all the stronger here because the implied power over immigration would seem to overpower express guarantees of rights. See Haritsudes v. Shaughnessy, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting); cf. Fong Yue Ting v. United States, 149 U.S. 698, 757-58 (1893) (Field, J., dissenting).

238 U.S. CONST., amend. XIV, § 1.


240 BICKELL, supra note 239, at 36. As Bickel stated, “that is not quite an end of the matter.” Id. at 48. In a more difficult passage to interpret, he then argued that “conditions may be attached to entry permits” and “in time of war even resident enemy aliens may be subject to fairly harsh restrictions” (presumably a reference to the Japanese-American internment cases). He suggested “that is a consequence … or our perception of the meaning of foreign citizenship and of the obligations it may impose more than it is a consequence of our own domestic law.” Id. Bickel is much more helpful for articulating the rights of immigrants than he is for the right to immigrate. He implicitly distinguishes, as the Court has done, between cases involving immigrants and cases involving immigration.


242 BICKELL, supra note 239, at 41.

243 83 U.S. 36 (1873).

244 Id. at 42-43.

245 Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that facially neutral ordinance that had been applied in a racially discriminatory manner could be struck down as unconstitutional).


248 See especially Cabell v. Chavez-Salido, 454 U.S. 432, 438-40 (1982) (explaining distinction between “membership in the political community” and “distribution of economic benefits.”). Cf. Landon v. Plascencia, 459 U.S. 21 (1982) (applying procedural due process standards for exclusion proceedings involving permanent resident alien); Sugarman v. Dougal, 413 U.S. 634, 647-48 (1973) (distinguishing between state alienage discrimination in civil service positions and higher political offices, or as voters, because the latter constitute “participation in [the state’s] democratic political institutions.”) See generally Motumora, Curious Evolution, supra note 63, at 1626 (“The stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law.”), and at 1650-51 (arguing that the right-privilege distinction explains the
characterization of deportation as civil rather than criminal).

Were the court (or legislatures) serious about the distinction, they would consider granting permanent resident aliens the right to vote at least in local elections. See Raskin, supra note 63. In another example of constitutional doctrine being blind to political practice, the advocates of restricting immigration characterize violations of immigration law as criminal or quasi-criminal. The political significance of describing some immigrants as being “illegal” (rather than “undocumented”) should give the Court pause before it asserts again that deportation is civil. But if the Court recognized that deportation was criminal or quasi-criminal, it also might be forced to apply constitutional principles to the process. Cf. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), especially at 1056-57 (White, J., dissenting).

249 See Unz, supra note 84.

250 Cf. Legomsky, supra note 63, at 273.

251 This renders inconsequential the point made by Chief Justice Rehnquist that the citizen-alien distinction is mandated by the Constitution. See Sugarman, 413 U.S. at 651 (Rehnquist, J., dissenting) ("That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity.").


254 In my opinion, it is worth taking the risk that the few victories for immigrant rights achieved under plenary power will be rendered less persuasive, because they are not likely to endure without modification anyway. The greatest risk is the so-called race-to-the-bottom, where governments faced with the choice between offering an entitlement to everybody or nobody choose the latter. See Spiro, supra note 235, at 151 n.128 (arguing that equal protection analysis would be incoherent applied to aliens and would result in detriment to them due to a race-to-the-bottom scenario). A more subtle risk is that domestic constitutional standards will be weakened. It is difficult to believe that equal protection doctrine could be so undone as to reach the level of the plenary power doctrine; the more likely problem is that other forms of deference will paralyze the court. See Johnson, supra note 200.

255 The result in one pro-immigrant case might be reversed as a result if First Amendment grounds could not be found as an alternative basis to protect the individual. The Court rejected the argument by the state of New York that it was acceptable to discriminate against aliens unwilling to naturalize as soon as they were qualified to do so. See Nyquist v. Mauclet, 432 U.S. 1 (1977).

256 This border-interior distinction has been recognized in immigration law for quite some time. See, e.g., Landon v. Plascencia, 459 U.S. 21, 32 (1982) ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."). Thus, if equal protection doctrine developed along the lines suggested by critical race theorists, looking toward subjugation or cultural meaning or other factors, alienage may still be a candidate for suspect classification status.

For a discussion of problems with a more ‘complex approach to alienage, see Neuman, supra note 12, at 1426-40.

257 It would not run afoul of Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993); United States ex rel. Knauft v. Shaughnessy, 338 U.S. 537, 544 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); or cases in other contexts in which the Supreme Court has for all practical purposes indicated that constitutional standards have limited extraterritorial effect. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990) (no Fourth Amendment rights applicable when U.S. officials conduct a search in Mexico). In this respect, the arguments advanced here differ from those offered by Professor Henkin. They do not depend on any understanding that the Constitution governs foreign affairs. See Henkin, supra note 63; Legomsky, Plenary Power, supra note 63, at 275-77.

258 See Carens, Open Borders, supra note 62, especially at 270.

259 The relationship between traditional civil rights and immigrant rights would bear a family resemblance to the relationships among anti-discrimination laws covering race, gender, disability, and sexual orientation.

260 These impacts have always existed, but are acknowledged only occasionally. Schuck, for example, stated that Prop. 187 would likely result in “many U.S. citizens and legal aliens” being “caught up in the dragnet” along with “families in which some members have legal status ... while others ... do not.” Schuck, supra note 77, at 89. Although Schuck recognized the link between immigration and citizens who are racial minorities, and also identified himself as a “friend of immigration,” he nonetheless analyzed the measure in familiar terms when he presented the question “Do Outsiders Have Claims on Us?” Id. at 85, 91. Judith Shklar has argued persuasively for considering the “standing of citizens,” defining standing in a broad and colloquial sense rather than a technical legal sense. See Shklar, supra note 239, at 2.

Color-Coded Standing, 80 CORNELL. L. REV. 1422 (1995) (arguing that Supreme Court standing analysis in race cases has discriminated due to results-oriented bias disadvailing minorities).


267 Id. at 647.

268 Id.

269 Wauchope v. United States, 985 F.2d 1407 (9th Cir. 1993).

270 Id. at 1409.

271 Id. at 1411.

272 Id. The Wauchope decision has been followed with respect to standing and distinguished on the merits. In Ablang v. Reno, another Ninth Circuit panel reasoned that a Fiallo type claim could be brought by a child seeking to establish citizenship through her relationship to her father, but that Fiallo also controlled and required minimal rationality review. Accordingly, the case was dismissed. Ablang v. Reno, 52 F.3d 801, 805 n.4 (9th Cir. 1995), cert. denied, 64 U.S.L.W. 3465 (1996). The Ablang court characterized the Wauchope decision in a manner that supports citizen standing but contradicts Fiallo: "Wauchope concerned the right of United States citizen mothers to transmit citizenship to their children born abroad according to the same standards set for United States citizen fathers." Id. at 804, 805-06. See also Aguayo v. Christopher, 865 F. Supp. 479 (N.D. Ill. 1994) (following Wauchope); Le Brun v. Thornburgh, 777 F. Supp. 1204, 1209-10 (D.N.J. 1991) (holding in favor of citizen standing); contra Tranter v. Secretary of State, 1994 U.S. Dist. LEXIS 8824 (D.D.C. May 17, 1994) (holding against citizen standing due to inability to redress any alleged harm, because courts could not confer citizenship); compare Acosta v. Gaffney, 413 F. Supp. 827 (D.N.J. 1976) (withholding deportation of alien parents because deportation of citizen child would result), rev'd 558 F.2d 1153 (3d Cir. 1977).


274 Fiallo v. Bell, 430 U.S. 787 (1977); Cf Kleindienst v. Mandel, 408 U.S. 753 (1972); (rejecting claim that citizens interested in being an audience for a Marxist author had a First Amendment right to hearing him speak).

275 Francis Fukuyama, for example, has made the futile and likely infuriating claim that the new immigrants espose traditional American and especially conservative values, almost more than many native-born citizens. See Fukuyama, supra note 3; Fukuyama, supra note 11. A negative reaction anticipating these arguments can be found in James J. Treires, The Dark Side of the Dream, NEWSWEEK, Mar. 20, 1989, at 10; cf BRIMELow, supra note 6, at 180-81, 269-72.

276 Professor Motomura has argued persuasively that constitutional standards have worked their way into immigration
law, in the form of statutory construction abrogating the plenary power doctrine. See Motomura, Curious Evolution, supra note 63.

277 See Johnson, Race, supra note 94, at 661-72 (describing difficulties of challenging immigration laws on constitutional grounds).

278 115 S. Ct. 2097 (1995). Adarand, incidentally, emphasizes consistency between federal and state equal protection analysis. This suggests that the Court may be willing to depart from its federal-state distinction in immigration regulation, though whether it would tend toward the former or the latter is unclear.

279 Id. at 2117.


281 See Karst, supra note 63.

282 Likewise, Fiallo, if it presented itself again, would be resolved by reference to then prevailing standards for discrimination on the basis of birth, legitimacy and gender.

283 See Adarand, 115 S. Ct. at 2117.

284 See Fukuyama, supra note 11, at 77 (arguing that race, culture and socioeconomic status are different, and that "the common American culture... is actually a sectarian Protestant Anglo-Saxon culture that was somehow detached from its ethnic roots, mixed with universalistic Lockean-liberal principles, and adopted by the non-Anglo-Saxon, non-Protestant immigrants from Europe who arrived subsequently, and who then intermarried to such an extent that it is no longer meaningful to try to determine what proportion of the country is descended from Italians, Swedes, and the like.").


286 Lind, supra note 5, at A19 (also arguing that "pro-labor liberals and non-racist populists on the right should unite to demand an immigration policy that puts the interests of American workers above the interests of the native rich."). Cf. Simon, supra note 111, at 318-19, 320 (policy recommendations including anti-discrimination laws and also cuts in welfare entitlements).

287 Loury, supra note 11.

288 The economic impact of immigration is not considered here, save to note that it is the economic impact of migrants that leads to legislation which violates the right to interstate travel. I have relied on the following major studies on the many sides of the issues: Fix & Passel, supra note 58; Simon, Facts, supra note 87; Simon, supra note 111. See also George J. Borjas, Friends or Strangers: The Impact of Immigrants on the U.S. Economy (1990); George J. Borjas, The Economics of Immigration, 32 J. Econ. Lit. 1667 (1994) (updating Borjas' earlier study); George J. Borjas, Know the Flow; Economics of Immigration, Nat'L Rev., Apr. 17, 1995, at 7 (presenting mass media version of his research results); Donald Huddle, The Cost of Immigration (1993) (the Huddle study, which was widely reported in the media, is critiqued in Fix & Passel, supra note 58, and Simon, supra note 82. See also Brimelow, supra note 6, at 137-77; see generally Thomas Muller, Immigrants and The American City (1993). For information concerning estimates of the undocumented immigrant population, one of the most controversial areas of the debate, see U.S. General Accounting Office, Illegal Aliens: Despite Data Limitations, Current Methods Provide Better Population Estimates (1993).

289 Brimelow, supra note 6, at xvii.


291 Id. at 431.

292 Id. at 433.

293 Some sophisticated writers also assume that constitutional standards apply to immigration. See, e.g., James C. Clad, Slowing the Wave, Foreign Pol'y, Summer 1994, at 139, 150 ("The United States has the sovereign right, if it constitutionally reflects the majority view, to exclude others from coming here. It is that simple; it is that awkward.") (emphasis added).

294 See Paul Feldman, Uncertainty, Lawsuits Would Greet Prop. 187; Election: Many Hospitals, Clinics Have Yet to Prepare Contingency Plans; Disobedience and Confusion Predicted, L.A. Times, Oct. 31, 1994, at A1, A1 (quoting sponsor of measure, "The purpose of the initiative is to have the court revisit and reconsider the Plyler case. Passage of the initiative will provide that vehicle."); Doreen Carrajal, Prop. 187 Has Even Backers a Bit Uneasy; Although It Still Has Substantial Appeal, 62% Say They Would Not Turn in an Undocumented Student — Which Initiative Would Require, L.A. Times, Oct. 31, 1994, at A1, A1 (quoting voter who supported the measure, "it's just to send a message... it will be ruled unconstitutional.").

295 See H. Eric Schuckman, Why Prop. 187 Needs Judicial Review: The "Voices of the People" May Mandate the Law, But Constitutional Principles Form the Rule of Law, L.A. Times, Jan. 22, 1995, at B19. Cf. Schuck, supra note 77, at 92 (observing that Governor Pete Wilson "surely knows that Prop. 187 could have dire practical consequences for his state" and speculating "he may secretly hope that an activist court will rescue him by striking it down.").

296 Cf. Motomura, Curious Evolution, supra note 63, at 1631. Two other articles from Latino perspectives have focused on the relationship of progressive immigration reform to traditional civil rights. Rachel F. Moran, Foreward — Demography and

297 Bill Ong Hing has argued at length that the Asian American community must be understood as having been constituted by immigration policies. See HING, supra note 13. Cf. Steven A. Holmes, Anti-Immigrant Mood Moves Asians to Organize, N.Y. TIMES, Jan. 3, 1996, at A1, A1 (quoting Karen Narasaki, Asian American civil rights leader, “For Asian Americans, because of their history, [immigration] is a cornerstone of what civil rights means to the community.”).

298 See, e.g., COSE, supra note 15, at 205 (quoting U.S. Representative Smith, “no other nation in the world has the delusion that it can ignore its own poor while importing a whole generation of poor people every year” and arguing that the nation has a choice between importing workers or training “our own underclass.”).

299 See, e.g., BRIMELOW, supra note 6, at 173-75; Lawrence Fuchs, What Do Immigrants Deserve? A Warm Welcome and the Usual Benefits — But Not Affirmative Action, WASH. POST, Jan. 29, 1995, at C2; Mark Krikorian, Affirmative Action and Immigration, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 300 (Nicolaus Mills ed., 1994) (FAIR representative arguing that affirmative action for some racial groups effectively subsidizes immigrants at the expense of native-born citizens). The Fuchs article is significant because the author, the former executive director of SCIRP, is considered more moderate on immigration issues. In an odd bit of dicta, Justice Stevens in an affirmative action case alluded to undocumented immigration. He stated that unlike blacks who had been enslaved, “the ‘Spanish-speaking’ subclass [of the program] came voluntarily, frequently without invitation…” Fulillove v. Klutznick, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) (emphasis added).

300 The article that introduced the “blacks versus browns” dilemma is Miles, supra note 3, especially at 138-41. See also Peter H. Schuck, The Evolving Civil Rights Movement: Old Civil Rights and New Immigration, CURRENT, Jan. 1994, at 13. Cf. BRIMELOW, supra note 6, at 103-04, 242-43.

301 See Wu, supra note 147, at 263 and accompanying notes.


307 Brimelow owns up to his political agenda. BRIMELOW, supra note 6, at 195-201. The real problem with “the immigration pincers” is the possibility that “the Clinton administration’s electoral coalition may be a harbinger of politics to come.” That coalition — “Southerners used to call them ‘scalawags’” consists of blacks, Hispanics, Jews and minority whites. Id. at 197.

308 The tensions among people of color, especially African Americans and recent immigrants (some of whom are of African origin or are considered black within American society), can be acute. See Morrison, supra note 3; Wanda Coleman, Blacks, Immigrants and America: Remembering Latasha, NATION, Feb. 13, 1993, at 187 (arguing “as a price of entry, the majority of immigrants buy into the lie of American apartheid: Black people are inferior.”). Cf. COSE, supra note 15, at 151 (NAACP endorsed early version of IRCA) and 214 (Los Angeles African American clergyman argued that Latinos brought in to weaken black voting power); MULLER, supra note 288, at 56 (NAACP opposition to undocumented immigration), 91-98 (historical views of African Americans), 167-94 (economic impact of immigration on African Americans); Lawrence H. Fuchs, The Reactions of Black Americans to Immigration, in IMMIGRATION RECONSIDERED, supra note 15, at 293; Bill Ong Hing, Immigration Policies: Messages of Exclusion to African Americans, 37 HOW. L.J. 237 (1994); ARNOLD M. SHANKMAN, AMBIVALENT FRIENDS: AFRO-AMERICANS VIEW THE IMMIGRANT (1982).

309 See Legomsky, Plenary Power, supra note 63, at 269-70 (discussing guest theory of immigration restriction). Walzer
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rejects this view that members, once accepted, can continue to be distinguished. WALZER, supra note 57, at 62.

310 In the 1996 Republican Presidential primary season, U.S. Senator Phil Gramm made this suggestion, prompting rival U.S. Senator Bob Dole to criticize him for proposing a form of second-class citizenship. See Brownstein, supra note 5.


313 Adarand v. Pena, 115 S. Ct. 2097, 2101 (1995) (Scalia, J., concurring). Justice Scalia’s statement should be read against earlier formulations of color-blindness. See Wu, supra note 95. Gabriel Chin has exposed an overlooked aspect of the first Justice Harlan’s celebrated dissent exalting color-blindness in Plessy v. Ferguson. While Justice Harlan proclaimed that color-blindness should be the constitutional norm, he also contrasted Chinese immigrants unfavorably with African Americans. See Gabriel Chin, A Streetcar Named Harlan: Asian Americans and John Marshall Harlan’s Dissent in Plessy v. Ferguson (forthcoming 1996; manuscript on file with author). Ian Haney Lopez also has pointed out that “the alien land law, which transformed the phrase ‘alien ineligible for citizenship’ into a tool for discrimination against Japanese noncitizens, shows the ease with which discriminatory statutes can be drafted without explicit reference to race.” See Lopez, supra note 312, at 141. By excluding Japanese immigrants from citizenship for racial reasons, the law could continue to discriminate against them without the need for any racial reference.

314 BRIMELOW, supra note 6, at 270.

315 Id.

316 Id.

317 Id.; see also id. at 274 (arguing that intermarriage cannot work “two ways” if it is to be effective, but must be of nonwhites into the white majority). Where all of this leaves African Americans is anybody’s guess, but Brimelow provides no answer on that score. See Glazer, supra note 11, at 78 (“one reason [Brimelow] spends so little time on the issue [of the impact of immigration on blacks] is that he makes so much of the white and European ethnic and racial character of the American nation. He is therefore at a loss as to how to make his argument if he gives full weight to the fact that at its founding the nation was 20% black, and it is now 12% and modestly rising.”).

318 See, e.g., BRIMELOW, supra note 6, at 215-16 (distinguishing today’s immigrants from “the Orient” from nineteenth century Irish immigrants, because “Irish Americans have earned the hard way their right to opinions about who and how many their country can absorb.”). Brimelow’s argument falls factually, for large numbers of Irish and large numbers of Chinese arrived in America simultaneously.

319 BRIMELOW, supra note 6, at xviii-xix, 203 (Constitution being designed to form a more perfect Union for “ourselves and our posterity — the Founder’s posterity, not posterity in general.”).

320 Auster, supra note 3, at 175.

321 Sympathetic readers of the manuscript version of this article have noted that this argument, though compelling, may be thought to cast doubt on historical rationales for affirmative action. Without addressing at length the different rationales for affirmative action, and the meaning of that debate, I accept the consequences of consistency here because I am convinced that contemporary rather than historical justifications for affirmative action are both more compelling and more likely to be held constitutional. Like the arguments about immigration, the arguments about affirmative action must take account of history in order to understand, not to blame.

322 Brimelow concedes as much. BRIMELOW, supra note 6, at 76-84.

323 Brimelow asserts that the 1965 Act discriminates against European immigrants. This claim is credible only if one accepts that the prior system — which intentionally and clearly discriminated in favor of European immigrants — was somehow neutral. Id. at 79.


“Diversity” benefiting whites in immigration and “diversity” benefiting any particular group in affirmative action share an equally weak justification. If proportionate representation were the only goal, diversity should benefit whites in immigration. But given that proportionate representation as a sole measurement of racial justice has long since been rejected by the courts and abandoned as an argument for affirmative action, it cannot serve to justify “diversity” in immigration for groups already advantaged within the polity. Washington v. Davis, 426 U.S. 229 (1976); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); William Bradford Reynolds, Individualism vs. Group Rights: The Legacy of Brown, 93 YALE L.J. 995 (1984); U.S. DEP’T OF JUSTICE, OFF. OF LEGAL POL’Y, REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1988).

To be fair, Brimelow seems no happier about the benefits to Irish foreign nationals, because the lottery “pass[ed] up any
chance to ensure that these immigrants met American needs,” and he attacks Sen. Edward Kennedy for sponsoring the measure “above all for relatives of [his] Massachusetts constituents.” BRIMELOW, supra note 6, at 83. Brimelow also acknowledges that the benefit to African foreign nationals was incidental rather than intentional. Id.

324 71 INTERP. REL. 451 (1994).

325 Cf. Peter Schuck, supra note 64, at 44 (“In a democracy, demography is political destiny.”). This is not to equate Peter Schuck with Peter Brimelow.


327 Alternatively, the success of attacks on affirmative action should make it much more difficult to sustain limits on immigration. As philosopher Frederick Whelan observes with a rhetorical question, classical liberalism would seem to prefer allocation of job opportunities based on merit “regardless of international borders or the nationality of the applicant.” Whelan, supra note 56, at 8-9.

328 See Louis Henkin, Immigration and the Constitution: A Clean Slate, 35 VA. J. INT’L L. 333, 333 (1994) (“[t]he ideology of our time is ‘the rule of law’ or, better, ‘constitutionalism.’”). Cf. Koh, Haiti Paradigm, supra note 207, at 2398 (describing transnational public law litigation, which immigration cases may sometimes be, as exhibiting a distinctive feature: “the litigants’ strategic awareness of the transportability of [transnational] norms” to domestic “political bargaining.”); LEGOMSKY, supra note 63, at 273-80, 298-30 (discussing general theories of judicial review within constitutional democracy).

329 CCRI will be replaced with a proposition number if it appears on the ballot. Prop. 187 started as “S.O.S.” — “Save Our State” — the initials being interpreted in parodies very quickly.


332 The role of Hispanics, to use the Census classification, renders the reversal somewhat incomplete, because they may be victims of Prop. 187 and CCRI. It may be that internal ethnic divisions and generational divisions among Hispanics, however, resemble the African American-Asian American tensions. See Johnson, supra note 332, at 65-72.


334 See Wu, supra note 147; Dong, supra note 304.

335 See Schuck & Wang, supra note 272 (empirical analysis of immigration litigation, both INS enforcement actions and affirmative challenges brought by immigrants showing rise over the time period studied).


337 While it should be unnecessary, along the lines of Brimelow’s attempt to cloak himself in his immigrant status to preempt any argument that he is a racist, I point out that I am a native-born American citizen to dispel any suspicion that I may be biased by my status. In the interest of disclosure, I also mention that from June to September 1994 I worked as a full-time volunteer for Californians United Against Prop. 187, a grassroots campaign centered in the San Francisco Bay Area.