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THE INTERSECTION OF RACE AND CLASS IN U.S. IMMIGRATION LAW AND ENFORCEMENT

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I. INTRODUCTION

Since its emergence beginning in the 1960s and 1970s, ethnic (including white) studies scholarship has analyzed race and class as intertwined and interrelated.[1] An inherently conservative discipline, law is notoriously resistant to scholarly change. As a result, legal scholarship often lags behind the cutting edge of other disciplines. Not surprisingly, only in recent years has the intersection of race and class become a subject of critical *legal* scholarship.[2]

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[1] *See, e.g.*, RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (5th ed. 2004); MARIO BARERRA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY (1979); ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

[2] *See, e.g.*, LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR (Paul D. Carrington & Trina Jones eds., 2006); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, WHEN MARKETS FAIL: RACE AND ECONOMICS (2005); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Beverly I. Moran, *Explaining the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629 (1998); *LatCrit V Symposium; Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DEN. U.L. REV. 467 (2001).

A bit of intellectual history helps explain the isolation of two bodies of legal scholarship that would seem to naturally analyze race and class both critically and in tandem. The late 1970s and early 1980s, saw the emergence of Critical Legal Studies (CLS), which viewed the law through a class conscious lens.[3] After considerable acrimony, Critical Race Theory later split off from CLS with the aim of more thoroughly interrogating the impact of race on the development of the law.[4] Over the years, the two bodies of scholarship have developed in separate spheres and different directions, as well as with different goals.[5]

This issue of *Law and Contemporary Problems* will no doubt make a contribution to the literature on the intersection of race and class in modern American social life. The symposium is especially timely in light of the fact that the 2008 Presidential campaign undeniably focused national attention on both race (with a major political party for the first time nominating an African American candidate for President) and class (given the faltering U.S. economy, the spike in gasoline prices, the home mortgage loan crisis, and the torn and tattered stock market).

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[3] *See generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed., 1998) (offering chapters with perspectives on Critical Legal Studies from leading scholars in the movement).

[4] *See* Darren Lenard Hutchinson, *Foreword: Critical Race Theory In and Out*, 53 AM. U.L. REV. 1187, 1191-96 (2004); *see also* Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (analyzing the failure of Critical Legal Studies to adequately incorporate race into critical scholarly analysis).

[5] A 2005 symposium analyzed the need to integrate issues of class into Critical Race Theory scholarship. *See* Symposium, *Going Back to Class? The Rememergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L. 1 (2005); *see also* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writings About Race*, 82 TEX. L. REV. 121 (2003) (calling on critical race scholarship to more thoroughly consider class and material deprivation in the analysis of racial subordination).

In my estimation, there is no better body of law to illustrate the close nexus between race and class than U.S. immigration law and enforcement.[6] At bottom, the U.S. immigration laws historically have operated – and continue to operate – to prevent many poor and working people of color from migrating to, and punish those living in, the United States.[7] The laws are nothing less than a "magic mirror" into the nation's collective consciousness about its perceived national identity – and the exclusion of poor and working people of color from that identity as well as from full membership in American social life.[8]

But, as in many areas of law, matters of race and class in the U.S. immigration laws unquestionably are more complicated today than in the past. Namely, express racial exclusions fortunately can no longer be found in the U.S. immigration laws. A by-product of the civil rights movement, the Immigration Act of 1965[9] abolished the discriminatory national origins quotas system that had remained a bulwark of the U.S. immigration laws since 1924.[10] As a consequence of the change in the law, the nation saw a dramatic shift in the racial demographics of immigration, with an especially sharp increase in migration from Asia.[11]

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[6] *See* Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER, RACE & JUST. 315, 315-16 (2003) ("While race and class have been a constant and recurring theme in U.S. immigration law, it is only recently that legal scholars have begun to give it serious attention.") (footnote omitted); *see also* Ali Noorani, *Race, Class, and the Emergence of An Immigrant Rights Movement*, 31 FLETCHER F. WORLD AFFAIRS J. 185 (2007) (analyzing influence of race and class on the possible emergence of an immigrant rights movement).

[7] *See infra* Parts II and III.

[8] *See* Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975) (stating that list of grounds for exclusion of noncitizens in U.S. immigration laws "is like a magic mirror, reflecting the fears and concerns of past Congresses").

[9] Pub. L. 89-236, 79 Stat. 911 (1965).

[10] *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (3d ed. 1994) (analyzing history surrounding congressional passage of the national origins quotas system in 1924).

[11] *See* Immigration Act of 1965, Pub. L. 89-236, 79 Stat. 911 (1965). For analysis of whether Congress contemplated the increase in immigration from Asia in enacting the 1965 immigration legislation that repealed the national origins quotas system, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 76 N.C. L. REV. 273 (1996).

Importantly, although Congress eliminated the racial exclusions from the immigration laws, economic litmus tests, arbitrary annual limits on the number of immigrants per country,[12] and other provisions of the current U.S. immigration laws that limit entry into the United States, all have racially disparate impacts.[13] Everything else being equal, people from the developing world -- predominantly "people of color" as that category is popularly understood in the United States – find it much more difficult under the U.S. immigration laws to migrate to this country than similarly situated noncitizens from the developed (and predominantly white) world.[14] Nonetheless, because of the consistently high demand among people in the developing world to migrate to the United States, people of color consistently dominate the stream of immigrants to this country.[15]

Although racial exclusions are something of the past, the express – and aggressive – exclusion of the poor remains a fundamental function of the modern U.S. immigration law, the Immigration and Nationality Act of 1952 (INA).[16] In sharp contrast, domestic laws generally cannot – constitutionally at least -- discriminate *de jure* against the poor. The express discrimination against poor and working immigrants by U.S. law, as we shall see, has disparate national origin and racial impacts.[17]

Part II of this article sketches how race and class interact synergistically in the U.S. immigration laws and their enforcement. Part III offers case studies from recent immigration events in the United States demonstrating race and class at work in the experiences of noncitizens.

II. THE NEXUS BETWEEN RACE AND CLASS IN U.S. IMMIGRATION LAW AND ENFORCEMENT

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[12] *See infra* text accompanying notes 60-68. The per country ceiling of less than 26,000 generally limits the number of immigrants from any single country that can be admitted to the United States in any one year. *See* Immigration & Nationality Act (INA) § 203(a)(3), 8 U.S.C. § 1153(a)(3).

[13] *See infra* Part II.A.

[14] *See infra* Part II.B.

[15] *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499-1510 (2002).

[16] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[17] *See infra* Parts II and III.

Race and class permeate U.S. immigration law and enforcement. This in part results from the fact that both play critically important roles in the formation and maintenance of the American national identity, which ultimately rests at the core of a nation's immigration laws.[18] Immigration law helps determine who is allowed access to the United States and who, once they are here, possesses full membership in U.S. society (and thus who is truly American).[19] The exclusion of poor and working people of color from the group of immigrants eligible for admission into the United States, reveals how we as a nation see ourselves as well as our aspirations.[20]

"Intersectionality,"[21] one of the rich insights of Critical Race Theory, has proven to be an important tool for understanding how membership in more than one marginalized group can increase the magnitude of the disadvantage facing particular sub-groups.[22] Women of color, for example, are generally speaking more disadvantaged in American social life than white women and men of color, groups with members who in general possess only a single subordinating characteristic.

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[18] *See, e.g.*, VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003); SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004); PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1991).

[19] *See generally* LINDA S. BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006) (analyzing ambivalence in United States over the proper treatment of immigrants).

[20] *See infra* Part II.A.

[21] *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 51-56 (2001).

[22] *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). *See generally* ADRIEN KATHERINE WING, CRITICAL RACE FEMINISM: A READER (2d ed. 2003) (collecting foundational readings in the field of Critical Race Feminism, which is premised on the concept of intersectionality); Symposium, *The Future of Critical Race Feminism*, 29 U.C. DAVIS L. REV. 73 (2006) (analyzing from many perspectives the evolution of Critical Race Feminism).

Intersectionality proves to be particularly valuable in fully appreciating the relationship between race and class in U.S. immigration law. Many, although not all, immigrants are prototypical examples of people subordinated on multiple grounds. A significant component of the immigrant community – especially among the undocumented – is comprised of poor and working people.[23] The majority of immigrants in modern times are people of color. Immigrants as a group find themselves marginalized in U.S. society as a result of their immigration status, with undocumented status more stigmatizing and subordinating than lawful status (but with lawful immigrants afforded fewer legal and social advantages than U.S. citizens).[24] As the concept of intersectionality suggests, poor and working immigrants of color

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[23] Immigrants tend to be over-represented compared to the overall U.S. population in the lowest- and highest-skilled jobs. "Some have characterized the educational distribution of immigrants as an `hourglass' because immigrants tend to be over-represented at both extremes relative to natives. . . ." JEFFREY S. PASSEL, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 24 (Pew Hispanic Center, June 2005). This article focuses on noncitizens in the lower-skilled, and more modestly paid, end of the job spectrum.

[24] *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class,* 42 UCLA L. REV. 1509 (1995). I have previously advocated for increased Critical Race Theory analysis of the impacts of U.S. immigration law and its enforcement. *See* Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry, in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187 (Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris, eds., 2002); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 535-46. Other scholars have as well have as well. *See* Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007) (analyzing need of immigration scholars to interrogate the role of race in U.S. immigration law and enforcement).

Recent years in fact have seen increased critical inquiry into U.S. immigration law and its enforcement. *See, e.g.*, Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263 (2007); Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005) (book review); Maria Pabón López, *The Phoenix Rises From El Cenizo: A Community Creates and Affirms a Latino/a Border Cultural Citizenship Through Its Language and Safe Haven Ordinances*, 78 DEN. U.L. REV. 1017 (2001); George A. Martínez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335 (2007); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting From INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEVE. ST. L. REV. 75 (2005); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

are marginalized on multiple grounds. They generally are subordinated in American social life based on, among other characteristics, race, class, and immigration status.

In the first century of this nation's existence, a number of states sought to exclude the poor, as well as criminals and other "undesirables," from their territorial jurisdiction.[25] When the federal government began comprehensively regulating immigration to the United States in the late 1800s, U.S. immigration law from its inception sought to exclude the poor from our shores.[26] The United States also has a long history of restricting entry of, if not outright excluding, certain groups of racial minorities into the country.[27] Not coincidentally, the federalization of the U.S. immigration laws culminated with Congress's decision to exclude the poor *and* specifically targeting Chinese laborers, as well as criminals, prostitutes, and other noncitizens deemed to be unworthy of admission into the national community.[28]

In the modern era, popular American culture often demonizes prospective immigrants of color as "aliens" or, even worse, "illegal aliens."[29] Class as well as racial aspects of the stereotypical noncitizens contribute to the conventional wisdom that immigrants are a pressing social problem. The widespread perception is that all "illegals" are poor and unskilled, a stereotype that is not supported by the available empirical evidence.[30] Nonetheless, "[t]*he term `illegal alien' now . . . carries undeniable racial overtones and is typically associated with the stereotype of an unskilled Mexican male laborer*."[31] With both racial and class components, the

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[25] *See* Gerald L. Neuman, A *Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

[26] *See* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 91-108 (2004).

[27] *See* Kevin R. Johnson, Race, *The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

[28] *See generally* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1998).

[29] For analysis of the importance of the terminology in the legal and public discussion of immigration, see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

[30] *See* Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 188-91 (2007).

[31] *Id.* at 188-89 (emphasis added).

stereotype helps to rationalize the harsh legal treatment of "illegal aliens" and aggressive enforcement of the U.S. immigration laws through, among other things, force, technology, and fences.

One exceptional feature of U.S. immigration law, which facilitates the promulgation of harsh immigration laws and policies, warrants comment at the outset. Unlike mainstream constitutional law in which the courts are charged with vindicating the rights of discrete and insular minorities,[32] the courts generally defer to the decisions of the Legislative and Executive Branches of the U.S. government – which are said to possess "plenary power"under the law over – on immigration matters; through invocation of this doctrine, the courts permit "aliens" to be expressly disfavored under the law in ways that U.S. citizens – including the poor and racial minorities – could never be.[33]

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[32] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (recognizing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for more searching judicial inquiry") (citations omitted); *see, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985) (stating the general rule that courts should apply strict scrutiny review to legislation with suspect classifications). For the contention that immigrants are discrete and insular minorities warranting judicial protection, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980); *see also* Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1383 (2007) ("Political accountability is a crucial component for deference, and when legislation only impacts people without a vote, it cannot be easily justified . . . ."); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002) ("[T]he fact that . . . aliens [cannot] vote makes it that much more essential that the basic rights reflected in the Bill of Rights be extended to aliens in our midst. As a group that is subject to government regulation but denied a vote, aliens are without a meaningful voice in the political bargains struck by our representative system."). When the states have disadvantaged noncitizens through various alienage classifications in its laws and policies, the Supreme Court at times has treated them as discrete and insular minorities and subjected the classification to strict scrutiny review. *See, e.g.*, Sugarman v. Dougal, 413 U.S. 634, 642 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

[33] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 522 (2003); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 80-82 (1976); Chae Chin Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889).

For example, the U.S. immigration laws on their face discriminate against poor aliens (with rarely a negative comment);[34] in contrast, ordinary U.S. domestic law cannot infringe upon the right to travel (at least domestically) of poor citizens in this country.[35] The immigration laws have permitted race and class to operate in ways that are truly extraordinary in U.S. law – often to the detriment of immigrants.[36] Why is this the case, one might ask? The answer is the plenary power doctrine, which remains the law of the land even though the Supreme Court forged it out of whole cloth initially to shield blatantly discriminatory laws from judicial review; the doctrine creates a wide gulf between ordinary constitutional law and the constitutional law of immigration.[37] The Supreme Court continues to invoke the doctrine,[38] as academics just as frequently criticize it.[39]

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[34] *See infra* Part II.A.

[35] *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999) (holding that state could not provide reduced public benefits to new residents in the state).

[36] *See infra* Parts II and III.

[37] *See* Kevin R. Johnson, *Minorities, Immigrants and Otherwise*, YALE L.J. POCKET PART (forthcoming 2008), available at http://yalelawjournal.org/; *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing continuing vitality and modern significance of plenary power doctrine).

[38] In the 2003 decision of *Demore v. Kim*, 538 U.S. 510, 522 (2003), for example, the Court upheld the mandatory detention of an immigrant convicted of an "aggravated felony" pending his deportation and emphasized that the "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." (citations omitted). *See* Margaret v. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 344-45 (David A. Martin & Peter H. Schuck eds., 2005) (contending that decision in *Demore v. Kim* was influenced by fears surrounding the "war on terror" after September 11, 2001).

For a sampling of the emerging scholarship analyzing the intersection of immigration and criminal law exemplified by *Demore v. Kim*, see Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[39] *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION – IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996);

Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965; Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005).

The bottom line is that the proverbial deck is stacked against potential immigrants from the developing world. The U.S. immigration laws presume that "aliens" cannot enter the United States.[40] Available immigrant visas are directed toward noncitizens with family members in this country and high skilled workers.[41] Various exclusions and other features of the U.S. -- immigration laws make it difficult for noncitizens with a limited education and moderate means even if eligible for an immigrant visa -- to immigrate to the United States.[42] Due to the plenary power doctrine, the courts let it all stand.

A. *Class*

For starters, I will summarize generally three features of the modern U.S. immigration laws – many more could be added – that in operation directly or indirectly discriminate on the basis of class. The public charge exclusion, the per country caps on immigration, and the limited employment visas for low- and moderately-skilled workers, all have distinct class impacts on potential immigrants to the United States.[43]

1. *The Public Charge Exclusion*

For much of its history, the United States, despite the stated ideal that the nation openly embraces the "huddled masses" from the world over, has not been particularly open to poor and working people seeking admission into the country.[44]

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[40] *See* INA § 214(b), 8 U.S.C. § 1184(b) (presuming that every noncitizen seeking admission to the United States is an immigrant, i.e., a noncitizen who seeks to remain indefinitely in this country); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 54 (2007) (discussing this presumption in U.S. immigration laws).

[41] *See infra* Part II.A.

[42] *See infra* Parts II.A, B.

[43] *See infra* text accompanying note 44-76.

[44] For that reason, I titled my book analyzing the history of the U.S. immigration laws, *The "Huddled Masses" Myth*. *See* JOHNSON, *supra* note 26.

Buried in the American psyche is the deep and enduring fear that, unless strong defensive measures are put into place and aggressively enforced, poor immigrants will come in droves to the United States, flood the poorhouses, and overconsume scarce public benefits that many believe should be reserved for U.S. citizens.[45] Responding to that fear, the U.S. immigration laws long have provided that, even if otherwise eligible for an immigrant or nonimmigrant (temporary) visa, aliens "likely at any time to become a public charge" cannot be admitted into the United States.[46] Over time, Congress has significantly tightened the public charge exclusion and, during the last decade, enforced it with great vigor.[47]

Currently, consular officers must consider the following factors in applying the public charge exclusion to noncitizens seeking entry into the United States: the noncitizen's age, health, family status, assets, resources and financial status, and education and skills.[48] Put differently, a prospective entrant must establish that they are and will continue to be a member of a particular socioeconomic class – most definitely not poor or likely to ever become poor – to lawfully migrate to the United States.

To this end, the law requires that each prospective immigrant secure a well-heeled sponsor willing to "agree[ ] to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line . . . ."[49] Sponsors must submit legally enforceable "affidavits of support," which obligate the sponsor to reimburse

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[45] *See* JOHNSON, *supra* note 26, at 93-96; Neuman, supra note 25, at 1847-48.

The receipt of public benefits by *U.S. citizens*, as the public discussion of welfare recipients demonstrates, also is deeply controversial and often the subject of heated public debate in the United States with race – and the stereotypical African American "welfare queen" – central to the discussion. *See* Catherine R. Albiston & Laura B. Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls,* 38 HOW. L.J. 473, 476-88 (1995) (analyzing the racialized images of Black women in the debate over welfare and welfare reform in the United States); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure As the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1665-73 (2005) (same).

[46] Immigration & Nationality Act (INA) § 212(a)(4), 8 U.S.C. § 1182(a)(4) ("Any alien, who . . . is likely at any time to become a public charge is inadmissible."). The INA further provides that the receipt of public benefits within five years of entry also may result in the deportation of an immigrant. *See* INA § 207(a)(5), 8 U.S.C. § 1227(a)(5).

[47] *See infra* text accompanying notes 48-59.

[48] *See* INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B).

[49] INA § 213A(a)(1), 8 U.S.C. § 1183A(a)(1).

government if an immigrant somehow secures public benefits.[50]

[50] *See* INA § 213A, 8 U.S.C. § 1183A; Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens From Becoming Public Charges*, 31 CREIGHTON L. REV. 741 (1998); Kevin K. Ban, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Are You Wealthy Enough to Be Reunited With Your Alien Family Members?*, IMMIGRATION BRIEFINGS, May 1999, at 1.

The U.S. government routinely invokes the public charge exclusion as a ground to deny immigrant and nonimmigrant (temporary) visas to the United States to noncitizens from the developing world.[51] For well over a century, the exclusion in one form or another has made it especially difficult for poor and working people from Asia, Africa, and Latin America to travel lawfully to the United States.

In 1996, Congress toughened the public charge exclusion, including by significantly tightening the affidavit of support provisions to, among other things, expressly make the affidavits legally enforceable in courts of law.[52] The unmistakable intent was to make it more difficult for noncitizens of modest means to migrate to the United States. The very same year, Congress stripped lawful immigrants – including even those who paid taxes – residing in the country of eligibility for several major federal public benefit programs.[53]

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[51] *See* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2007, at Table XX (2008) (listing grounds for finding of visa ineligibilities and significant numbers of public charge exclusions). For Department of State visa statistics from 2000 to the present, see http://travel.state.gov/visa/frvi/statistics/statistics_1476.html.

[52] *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

[53] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Two years later, Congress restored certain benefits to lawful immigrants. *See* Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, 112 Stat. 2926.

For a summary of the negative impacts of welfare reform and the 1996 reforms to the public charge exclusions on noncitizens, see Aldana, *supra* note 24, at 272-78; Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998); Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736 (2007); Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge"*, 78 DEN. U.L. REV. 1161 (2001).

As the existence of the public charge exclusion suggests, the fear that, if the nation is not careful, immigrants may overconsume scarce public benefits remains prevalent today.[54] Consider California's watershed Proposition 187, a law passed overwhelmingly by the Golden State's voters in 1994, which would have denied almost all public benefits, including an elementary and secondary school education,[55] to undocumented immigrants.[56] Concern with the socioeconomic class of today's immigrants and deep-seated anti-Mexican animus, combined with legitimate concerns with immigration control, contributed to voter support for the measure.[57]

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[54] *See* JOHNSON, *supra* note 26, at 150-55.

[55] This part of Proposition 187 would seem to run afoul of the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which struck down a Texas law that effectively denied most undocumented children living in the United States access to public elementary and secondary schools. For analysis of the background of the case, see Michael A. Olivas, Plyler v. Doe, *The Education of Undocumented Children and the Polity*, *in* IMMIGRATION STORIES, supra note 38, at 197.

[56] A court invalidated most of Proposition 187 as an unconstitutional intrusion on the federal power over immigration. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

Arizona later adopted a measure similar in many respects to Proposition 187, which the courts refused to disturb. *See* Friendly House v. Napolitano, 419 F.3d 930 (9th Cir. 2005); *see also* Aldana, *supra* note 24, at 275-76 ("What is particularly problematic about Proposition 200 [the Arizona counterpart to Proposition 187] . . . is that its intent and effect was to provoke even greater anti-immigrant feelings during an important Arizona election during which the undocumented became the scapegoat for many of the state's problems. Proposition 200 deceivingly included provisions to deny the undocumented benefits for which they were already ineligible under federal law. Indeed, the allegation was one of pernicious fraud, purportedly costing the state of Arizona millions of dollars.") (footnotes omitted); Hector O. Villagra, *Arizona's Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. CIV. RTS. & CIV. LIB. 295 (2006) (analyzing lawfulness of Arizona measure).

For analysis of how direct democracy disadvantages immigrants and Latina/os, see Kevin R. Johnson, *The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. (forthcoming 2008).

[57] *See* Linda S. Bosniak, *Opposing Proposition 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Johnson, *supra* note 24; *see also* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race,* 70 WASH. L. REV. 629 (1995) (analyzing the anti-Mexican sentiment at the core of the campaign in support of the initiative); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial*

Although a court prevented the bulk of the initiative from ever going into effect, the passage of Proposition 187 unquestionably signaled Congress of the widespread public discomfort with immigration and specifically undocumented immigration. Not long after, Congress passed welfare reform in 1996, which achieved the bulk of its fiscal savings by denying access of *legal* immigrants to many federal benefit programs,[58] and increased funding for greatly heightened enforcement measures along the U.S./Mexico border.[59]

2. *Per Country Ceilings*

Politics of Immigration Law, 17 CHICANO-LATINO L. REV. 118 (1995) (same).

[58] *See supra* text accompanying note 53.

[59] *See infra* text accompanying note 107.

The U.S. immigration laws include what are known as per country ceilings that generally limit the immigration of immigrants from any one country in a year to less than 26,000 .[60] (Importantly, some immigrants, such as noncitizen spouses of U.S. citizens, are not subject to this ceiling.).[61] The limits apply uniformly however great the demand of the citizens of a particular country to come to the United States. Although facially neutral, the ceilings in operation have both class and nationality (and thus racial) impacts.[62]

Under the Immigration & Nationality Act, countries that have much less demand among their citizens for immigrating to the United States, such as Iceland, Denmark, and Sweden, enjoy the same annual ceilings as countries like Mexico, the Philippines, India, and China, all nations whose demand among their citizens to migrate to this country greatly exceeds their maximum immigration annual ceiling. Although there are important exceptions to the ceilings – for immediate relatives, for example,[63] the per country limits nonetheless create long lines of prospective immigrants from certain countries, such as Mexico, the Philippines, India, and China, and significantly shorter, or no, lines for similarly situated people from almost all other nations for certain immigrant visas.[64]

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60 *See* Immigration & Nationality Act (INA) § 203(a)(3), 8 U.S.C. § 1153(a)(3).

61 *See* infra text accompanying note 63.

62 *See* Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713 (demonstrating how annual ceilings on certain immigrant admissions from a single country but have disproportionate impacts on prospective immigrants from Mexico, as well as noncitizens from several other developing nations, because demand for immigration from there for reasons of proximity, jobs, and family ties, greatly exceeds the annual ceiling); Jennifer M. Chacón, Loving *Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 359-60 (same); Stephen H. Legomsky, *Immigration Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321 (1993) (commenting on disparate racial impacts of per country ceilings); Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMPLE POL. & CIV. RTS. L. REV. 301, 309 (1995) (same).

63 *See* (INA) § 201(b)(2)(A)(i), 8 U.S.C. § 201(b)(2)(A)(i).

64 *See* Johnson, *supra* note 27, at 1133.

For example, in August 2008, the State Department was processing first preference immigrant visas for sons and daughters of U.S. citizens filed in *March 2002* except for Mexico (*August 1992*) and the Phillippines (*March 1992*), whose natives had to wait *a decade longer* than similarly situated noncitizens from other nations.[65] Fourth preference immigrant visas for brothers and sisters of adult U.S. citizens filed in *September 1997* were being processed for applicants from all but a few countries, including the Philippines (*March 1986*) whose nationals had to wait more than ten years longer than all other similarly situated noncitizens.[66]

It is worth highlighting that, as the examples above illustrate, some prospective immigrants may be forced to wait more than *twenty years* to immigrate lawfully to the United States. Many prospective immigrants find such long waits to be unrealistic and undoubtedly are attracted to circumvent the immigration laws through undocumented immigration.

And these are the fortunate noncitizens. For many noncitizens without family members in this country or employment skills, there is *no* line at all for them to wait in order to come lawfully to the United States.[67] Absent legal avenues for coming to this country, the standard objection that undocumented immigrants should "wait in line" as lawful immigrants must, makes no sense.

Given the lower average annual incomes in the developing world compared to those in this country, and the relative economic opportunity in the United States, the per country ceilings have class and racial impacts. As discussed above,[68] the ceilings tend to disproportionately impact people of color from developing nations. Many low- and medium-skilled workers of color from those nations seek to immigrate to the United States to pursue superior economic opportunities. Prospective immigrants from nations with demand much greater than the fixed annual ceilings – developing nations populated by people of color – encounter much longer lines for admission than similarly situated prospective immigrants from other nations.

3. *Limited Employment Visas*

There is an enduring concern from many quarters with the number and type of employment visas available under the U.S. immigration laws. A frequently-voiced criticism is that the numerical and other requirements for immigrant visas based on employment skills, not family members in the United States, are not adequately calibrated to the nation's labor market needs.[69]

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65 *See* U.S. DEP'T OF STATE, VISA BULLETIN FOR AUGUST 2008, at 2 (2008).

66 *See id.*

67 *See infra* text accompanying notes 69-76.

68 *See supra* text accompanying notes 60-67.

69 *See* Susan Martin & B. Lindsay Lowell, *Competing for Skills: U.S.*

Immigration Policy Since 1990, 11 L. & BUS. REV. AM. 387 (2005); Special Feature, *Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT'L L.J. 691 (2005); Jonathan G. Goodrich, Comment, *Help Wanted: Looking for a Visa System That Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975 (2008); Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL'Y REV. 349 (2007). *See generally* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006) (analyzing increasing global competition among nations for skilled labor).

Importantly, employment visas under the Immigration & Nationality Act are much more plentiful for skilled workers than for unskilled ones; indeed, there are few legal avenues for unskilled workers without relatives in the United States to lawfully immigrate to this country.[70] "One critique of the entire [American] immigration system is the fact that *low-skilled workers, as a practical matter, do not have an avenue for lawful immigration to the United States, either temporarily or permanently*."[71] Consequently, many low- and moderately-skilled workers cannot lawfully migrate to the United States unless they are eligible for family visas (and then still must overcome the public charge exclusion). As a result, many enter or remain in the country in violation of the U.S. immigration laws. To make matters worse, for the undocumented immigrants who circumvent the immigration laws, they often find themselves working in the secondary law market for low wages in poor conditions.[72]

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[70] *See* INA § 203(b), 8 U.S.C. § 1153(b). For a summary of the employment immigrant visas for "priority workers," professionals, skilled workers, religious workers and foreign employees of the U.S. government, and investors. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 244-45 (4th ed. 2005).

Current temporary worker programs, *see* INA § 1101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii), also are plagued by bureaucratic inefficiencies and often fail to ensure the protection of the rights of workers. *See* Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 45–51 (2006); Arthur N. Read, *Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 429-41 (2007); David Bacon, *Be Our Guests*, THE NATION, Sept. 27, 2004, at 22.

[71] Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 643 (2006) (emphasis added); *see also* Kevin R. Johnson, *Protecting National Security through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157 (contending that immigration regime that permitted more liberal admission of workers would be better for U.S. national security by reducing incentives for undocumented immigration and to better ensure that as many noncitizens in the United States as possible are subject to ordinary admission procedures that help ensure public safety).

[72] *See infra* text accompanying & notes 103-06.

Even skilled workers often find it difficult to secure visas for which they are lawfully eligible in a timely manner.[73] The complexities and delays, as well as the potential for abuse, of the process of the certification by the U.S. Department of Labor necessary for many employment visas, has been the subject of sustained criticism.[74] Microsoft billionaire Bill Gates regularly testifies before Congress about the difficulties employers experience in seeking to bring skilled immigrant workers to the United States.[75]

In short, the bulk of the employment visas under the U.S. immigration laws are for highly skilled workers and investors. This disproportionately affects low- and moderate-skilled workers from the developing world, who generally are not eligible for employment visas but nonetheless desire to come for jobs in the United States. The lack of lawful avenues for workers to migrate helps to explain the continuing flow of undocumented immigrants to the United States. It also helps explain the persistent complaints by business leaders about the difficulties of bringing skilled workers to this country as well as advocacy for guest worker programs that would allow unskilled labor to enter the United States lawfully.[76]

B. *Race*

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[73] *See* Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post 9/11 World*, 5 GEO. J. L. & PUB. POL'Y 495 (2007).

[74] *See* LEGOMSKY, *supra* note 70, at 295-321.

[75] *See, e.g.*, *House Science and Technology, Technology and Global Marketplace Competitiveness, William H. Gates, Chairman, Microsoft Corp.*, CQ CONG. TESTIMONY, March 12, 2008; Kim Hart, *Gates Calls on Congress for Science Education, Visas*, WASH. POST, Mar. 13, 2008 at D3; Robert Pear, *High-Tech Titans Strike Out on Immigration Bill*, N.Y. TIMES, Jun. 25, 2007, at A1; Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES, Feb. 8, 2006, at 6; S. Mitra Kalita, *For Green Card Applicants, Waiting is the Hardest Part*, WASH. POST, July 23, 2005, at D1; David A. Vise, *Gates Citing Hiring Woes, Criticizes Visa Restrictions*, WASH. POST, Apr. 28, 2005, at E5.

[76] *See* Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1106 (2005).

This section looks at several salient aspects of the immigration laws that have racial impacts. Express bars on the admission of certain races mar this nation's proud immigration history. The Chinese exclusion laws and the national origins quotas system disfavoring immigration from southern and eastern Europe represent striking examples.[77] Racial exclusions have evolved into new and different devices that have racially disparate impacts on prospective immigrants to the United States. Consequently, race remains a significant issue in the operation and enforcement of the U.S. immigration laws.[78]

There are many devices that, combined with the class-based exclusions, serve to disproportionately exclude people of color from immigrating to the United States. The public charge exclusion and per country ceilings, for example, have racial, as well as class, impacts.[79] The limited opportunities for unskilled noncitizens to secure employment visas, which tends to disproportionately impact people from the developing world (many of whom are people of color), do as well.[80]

Moreover, race-based immigration law and enforcement is endemic to the modern U.S. immigration laws. People of color dominate the populations of both legal and undocumented immigrants to the United States.[81] At the same time, people of color are disparately affected by the various exclusion grounds in the U.S. immigration laws and frequently experience roadblocks to their lawful admission to the United States.[82] Not coincidentally, people of color are disproportionately represented among the noncitizens deported from the United States.[83]

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[77] *See supra* text accompanying notes 78-102.

[78] *See, e.g.*, Boswell, *supra* note 6; Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681 (2005); *see also supra* note 24 (citing authorities analyzing role of race in immigration law and policy).

[79] *See* Johnson, *supra* note 27, at 1133.

[80] *See supra* text accompanying notes 69-76. In addition the diversity visa program, which favors immigrants from the developed (and "whiter") world, operates to decrease the percentage of immigrants who are people of color who immigrate to the United States. *See* Johnson, *supra* note 27, at 1135 & n.145 (citing authorities).

[81] *See supra* note 15 (citing authority).

[82] See Johnson, supra note 27, at 1131-36; Ting, *supra* note 62, at 310-12.

[83] *See* U.S. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS (2007) (table 39) (showing that approximately two-thirds of all persons deported from the United States were from Mexico). *See generally* BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY (2006) (analyzing critically increasing numbers of deportations pursuant to 1996 immigration reforms); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (analyzing history of

1. *Exclusions*

deportation under U.S. immigration laws).

As the moniker "Chinese exclusion laws" suggests,[84] racial exclusions were part and parcel of the early forays of Congress into the realm of immigration regulation.[85] The Chinese exclusion laws of the late 1800s were expressly race-based, as well as class conscious.[86] Congress later expanded the racial exclusions to apply to all persons of Asian ancestry, not limited to noncitizens from China.[87] In addition, the national origins quotas system, which denied admission to many southern and eastern Europeans – including many Jews – who were viewed as racially different from the desired Anglo Saxon norm, came on the heels of the Asian exclusion laws and remained central to the U.S. immigration laws until 1965.[88]

Changing racial sensibilities – and the civil rights movement of the 1960s – resulted in removal of the racial exclusions by Congress in 1965.[89] However, the operation of the immigration laws continues to have starkly disparate impacts on particular national origin groups. Features of the Immigration & Nationality Act, such as the public charge exclusion, preclude many prospective immigrants from the developing world from lawfully immigrating to the United States.[90]

2. *Immigration Enforcement*

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[84] *See supra* text accompanying note & note 28.

[85] *See* Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMANITIES 181 (2005). *But cf.* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (analyzing role of the regulation of marriage and morality in foundational U.S. immigration laws).

[86] *See, e.g.*, Chae Chin Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) (rejecting a constitutional challenge to racial discrimination in the Chinese Exclusion Act and emphasizing that courts lack power to review exercise of congressional "plenary power" over immigration); *supra* text accompanying notes 32-42 (discussing the impacts of the plenary power doctrine).

[87] *See* JOHNSON, *supra* note 26, at 17-18.

[88] *See generally* HIGHAM, *supra* note 10 (analyzing political movement culminating in the congressional passage of Immigration Act of 1924, which created the national origins quotas system).

[89] *See supra* text accompanying notes 9-12.

[90] *See supra* text accompanying notes 44-59.

Unlike the Chinese exclusion laws of old, the modern immigration laws are facially neutral and do not impose express racial bars on immigrants. Nonetheless, they have racially disparate impacts.[91] Moreover, immigration enforcement disparately impacts U.S. citizens, as well as immigrants, of particular national origin ancestries. Today, Latina/o and Asian communities, in effect claiming that they often are the targets of immigration enforcement, frequently protest what they perceive to be racial profiling and race-conscious policing.[92]

Mexican-American and Asian American citizens, as well as lawful immigrants, often contend that immigration enforcement officers engage in racial profiling in the enforcement of the U.S. immigration laws. Similarly, the claim that their communities (despite having large U.S. citizen components) are presumed generally to be "foreigners" subject to immigration enforcement measures.[93]

The increasingly rigorous enforcement of the nation's southern border with Mexico compared to the relatively lax enforcement of the northern border with Canada, often is pointed to as evidence of racism at work. Immigration raids consistently result in disparate racial impacts with large numbers of undocumented (and relatively unskilled) immigrants of color arrested.[94] At times, emphasizing enforcement over virtually all else, immigration authorities have mistakenly – and unlawfully – deported U.S. citizens of minority ancestry.[95]

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[91] *See* JOHNSON, *supra* note 26, at 25-46.

[92] *See, e.g.*, United States v. Lara-Garcia, 478 F.3d 1231, 1233-35 (10th Cir.), *cert. denied*, 127 S. Ct. 2281 (2007); Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002); Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc); Ramirez v. Webb, 787 F.2d 592 (6th Cir. 1986); Ill. Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977) (en banc); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992). *See generally* Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (analyzing prevalent racial profiling in immigration enforcement).

[93] *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997) (discussing impacts of the prevailing stereotype of all Latina/os, including U.S. citizens, as foreigners); *see also* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996) (same for Asian Americans); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (same).

[94] *See infra* text accompanying notes 149-72.

[95] *See, e.g.*, Sam Quinones, *Disabled Man Found After 89-Day Ordeal*, L.A. TIMES, Aug. 08, 2007 (reporting on developmentally disabled U.S. citizen of Mexican ancestry who had been in the custody of the Los Angeles County Sheriff's Department and had been wrongfully deported to Mexico); Marisa Taylor, *Zeal to Deport Sometimes*

3. *Naturalization and Citizenship*

Catches U.S. Citizens in Its Net, THE NEWS & OBSERVER (Raleigh, NC), Jan. 25, 2008, at A3 (reporting on a number of cases of wrongful detention and deportation of U.S. citizens).

For much of U.S. history, eligibility for citizenship through the naturalization of immigrants also had a racial component. From 1790-1952, only "white" immigrants were eligible for naturalization and thus enjoyed a path to citizenship.[96] The naturalization bar on non-whites had long term impacts on the political power of certain communities, especially Asian Americans, and on their full integration into American social life.[97]

[96] *See* IAN HANEY-LÓPEZ, WHITE BY LAW (10th anniversary ed. 2006) (analyzing caselaw interpreting the requirement in place from 1790 to 1952 that an immigrant be "white" to naturalize); *see, e.g.*, Ozawa v. United States, 260 U.S. 178 (1922) (holding that immigrant from Japan was not "white" and thus ineligible for naturalization); United States v. Thind, 261 U.S. 204 (1923) (ruling to the same effect with respect to immigrant from India). "Black" immigrants technically were eligible to naturalize but, given the stigma attached to African Americans in U.S. social life, it is not surprising that few immigrants were willing to claim a Black identity in an attempt to secure citizenship.

Unlike Asian immigrants, immigrants from Mexico were permitted to naturalize because of treaty obligations between the U.S. and Mexican governments. *See In re* Rodriguez, 81 F. 337, 349 (W.D. Tex. 1897); *see also* George A. Martínez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-27 (1997) (analyzing implications of *Rodriguez* decision).

[97] See Leti Volpp, *"Obnoxious To Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71 (2001). The citizenship and nationality laws also historically have had disparate impacts on women. *See* Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 145, 160-63 (1996).

In modern times, delays in the processing of naturalization petitions, which given the demographics of modern immigration, have disparate racial – as well as political (because only U.S. citizens can vote) – impacts.[98] More than 39 percent of the naturalized citizens in 2007 were from Asia and 18.5 percent from Mexico.[99] Over the last several decades, partisan debates over naturalization have been hot and heavy, with efforts by the Clinton administration in the 1990s to facilitate immigrant naturalization subject to harsh criticism from Republicans claiming that the President in fact was attempting to do nothing more than increase the number of Democratic voters.[100]

In 2007, the Bush administration substantially increased the fees for naturalization petitions that have had an impact on immigrants of particular classes and nationalities.[101] Despite the fee hikes, which the U.S. government promised would provide the funds necessary to enhance service to immigrants and speed the processing of petitions, processing of the petitions has continued to be exceedingly slow.[102] Delays in the processing of naturalization petitions are

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[98] *See, e.g.*, Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L. J. 42, 51-52 (1995); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 202-03 (1998); Kirk Semple, *Immigrants Eager to Vote Sue to Hasten Citizenship*, N.Y. TIMES, July 16, 2008, at B2.

[99] *See* U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, NATURALIZATIONS IN THE UNITED STATES: 2007, at 2 (2008) (Table 1).

[100] *See* Kelly, *supra* note 98, at 204-08 (analyzing naturalization controversy and how Congressional reforms significantly delayed the naturalization process); *see, e.g.*, Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 2, 44-50 (1997) (contending that abuse of naturalization process was one of several charges that justified the impeachment of President Clinton). The Justice Department's Office of the Inspector General found that the Clinton Administration did not act for political ends in its Citizenship USA program, which sought to facilitate the naturalization process for immigrants, although some naturalization petitions were erroneously approved due to hasty processing. *See IG Report Finds INS's "Citizenship USA" Program Was Flawed, But Not for Political Reasons*, 77 INTERPRETER RELEASES 1198 (2000).

[101] *See* Karin Borulliard, *In D.C., Area, Citizenship Test is One of Patience; Local Immigrants Face Longest Wait*, WASH. POST, May 31, 2008, at B1; Julia Preston, *Immigration Fees Rise*, N.Y. TIMES, July 31, 2007, at A15; *Citizenship Fees Soar*, WASH. POST, July 31, 2007, at A17. *See generally* ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, PRICED OUT: U.S. CITIZENSHIP – A PRIVILEGE FOR THE RICH AND WELL EDUCATED (2008) (analyzing negative impacts of sharp fee increases on immigrants seeking to naturalize and become U.S. citizens).

[102] *See* Julia Preston, *Goal Set for Reducing Backlog on Citizenship Applications*,

likely to have racial as well as political impacts.

C. *Race and Class*

Race and class historically have operated in tandem under the immigration laws and their enforcement. Examples in American history are legion.

N.Y. TIMES, Mar. 15, 2008, at A13; *High Price, Poor Service: Despite Exorbitant Fees, the Wait to Become a Naturalized Citizen is Three Times As Long As It Was Last Year*, WASH. POST, Jan. 26, 2008, at A16.

The Chinese exclusion laws were directed primarily at Chinese laborers.[103] During the Great Depression, state and local authorities arrested many persons of Mexican ancestry, with a majority U.S. citizens, in parks and other public places often utilized primarily by people of modest means; these people subsequently were "repatriated" to Mexico.[104] The "Bracero program," which brought temporary or "guest" workers from Mexico to the United States from World War II through the mid-1960s, focused on bringing unskilled workers to this country to work in agriculture – only for the workers to be exploited as wage and labor protections under the relevant international agreements went for the most part unenforced.[105]

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[103] *See* Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249 (2006) (analyzing influence of race and class on congressional enactment of Chinese exclusion laws); *see also* Harvey S. Cohn & Harvey Gee, *"No, No, No, No!": Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 21-34 (2003) (explaining economic and other pressures for limiting Chinese immigration).

[104] *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 89-117 (rev. ed. 2006); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4-13 (2005).

[105] *See generally* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S (1992). Demonstrating the ambivalence in the United States over immigrant labor, *see* BOSNIAK, *supra* note 19, the U.S. government in 1954 instituted a massive deportation campaign known as "Operation Wetback," *see generally* JUAN RAMÓN GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).

Human trafficking through the smuggling of migrants for profit[106] and deaths of immigrants (almost all Mexicans) on the U.S./Mexico border,[107] both which have increased since the early 1990s due to heightened border enforcement measures, tend to affect poor and working noncitizens of color – those forced to take great risks to try to come to the United States because they lack legal avenues for entering the country. U.S. border enforcement efforts traditionally have focused primarily on undocumented immigrants who enter without inspection, not visa overstays, that is, undocumented persons who entered on lawful visas but overstayed, or otherwise violated, their terms.[108] This is true even though somewhere in the neighborhood of 40 percent of the undocumented population is composed of visa overstays.[109]

Congress's near-myopic focus on increased border enforcement – and undocumented immigrants who enter without inspection – has both class and racial impacts. Those who enter without inspection are more likely to be poor and working people from the developing world than visa overstays who have sufficient resources to avoid the public charge exclusion and

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[106] *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Effort to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2982 (2006); Srikantiah, *supra* note 30, at 187; *see also* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INTL L.J. 207 (2007) (comparing trade of African slaves in history of the Americas with modern human trafficking).

[107] *See* TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME (1996); KARL ESCHBACH, JACQUELINE HAGAN, & NESTOR RODRIGUEZ, CAUSES AND TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985-1998 (2001); JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 661-62 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003).

[108] *See* James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and the Global Economic Competitiveness in the Aftermath of the September 11 Terrorist Attack*, 27 N.C. J. INT'L L. & COM. REG. 419, 443-46 (2002); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & LAW 58, 75-76 (2006).

[109] *See* JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 18 (Pew Hispanic Center 2006) (estimating that, as of March 2006, the undocumented immigrant population in the United States was between 11.5 and 12 million with about 40 percent being visa overstays).

lawfully enter the United States.[110] This salient fact goes all but ignored by immigration policy-makers and proponents of greater border enforcement.

[110] *See supra* text accompanying notes 44-59.

We have seen that the noncitizens excluded and deported from the United States tend to be poor and working people, with the U.S. immigration laws exuding class-based biases that negatively affect people of color from the developing world.[111] For immigrants able to come and remain in this country, the exploitation of working class undocumented immigrants continues virtually unabated.[112] Unfortunately, undocumented workers often enjoy precious few protections under the law.[113]

As a result of the operation of the U.S. immigration laws, the undocumented immigrants who successfully make it to this country participate in a labor force that in many respects resembles a racial caste system. Dual labor markets exist with undocumented workers – predominantly people of color – participating in one market without legal protections while U.S. citizens and legal immigrants enjoy protections of law in a separate labor market.[114] For example, women farmworkers, including many from Mexico, often suffer severe exploitation in the fields where labor protections are rarely enforced.[115] The truth of the matter is that wage, labor, and other protections are but a faraway dream for many undocumented workers in the

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[111] *See* Part II.A.

[112] *See* Leticia Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004); Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008).

[113] *See* Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713 (2007) (summarizing legal and other forms of subordination of undocumented immigrants workers in the United States); *see, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that undocumented workers were not entitled to remedy of backpay for employer's violation of federal labor law). For critical analysis of *Hoffman Plastics*, see Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds, *The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 104-05 (2003); David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of* Hoffman Plastic Compounds, Inc. v. NLRB, 92 MINN. L. REV. 1424 (2008).

[114] *See* JOHNSON, *supra* note 26, at 122-23.

[115] *See* Maria L. Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157 (2003); Bill Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farmworkers*, 33 UC DAVIS L. REV. 1075 (2000).

United States.[116]

[116] *See supra* text accompanying notes 111-15.

To make matters worse, sporadic workplace immigration enforcement by the U.S. government has terrified immigrant (and minority citizen) communities and forced them further underground. In 2007-08, the U.S. government ramped up the number of immigration raids of workplaces, which negatively impacted many undocumented immigrants from Mexico and Central America as well as their families (including U.S. citizens).[117] This is consistent with past history; in the 1980s and 1990s, the U.S. government generally classified Central Americans fleeing civil war as "economic refugees" and thus ineligible from relief from deportation under the asylum provisions of the immigration laws.[118]

III. CASE STUDIES OF THE INTERSECTION OF RACE AND CLASS IN THE IMMIGRATION LAWS AND THEIR ENFORCEMENT

This section offers concrete – and very recent – examples of the clear intersection of race and class in the U.S. immigration laws and their enforcement. It demonstrates the artificiality of looking at the two factors in isolation in critically analyzing the operation and impacts of the immigration laws.

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[117] *See infra* text accompanying notes 149-72.

[118] *See* Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459 (1985) ("The government rests its denial of asylum in [Haitian and Salvadoran] cases on the claim that these are 'economic' rather than 'political' refugees . . . .").

Mexican and other Latina/o immigrants – especially undocumented immigrants – are among the disfavored immigrants of modern times.[119] Their current demonization[120] fits into a long history of discrimination against immigrants from Mexico as well as, more generally, all persons of Mexican ancestry in the United States.[121] This discrimination unfortunately often has directly affected U.S. *citizens* of Mexican descent as well as *immigrants* from Mexico.[122]

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[119] *See* Johnson, *supra* note 27, at 1136-40.

Arab and Muslim noncitizens constitute another group of immigrants who have been the subject of aggressive immigration enforcement in recent years, especially after the tragic events of September 11, 2001. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 NYU ANN. SURV. AM. L. 295 (2002); Cole, *supra* note 32, at 981; *see also* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005) (analyzing impact of "war on terror" on Arab and Muslim *citizens* as well as *noncitizens*). After September 11, the concern with fighting terrorism came to dominate immigration law and enforcement and the national debate over immigration reform, provoking criticism from many knowledgeable observers. *See* HING, *supra* note 83, at 140-63; Chacón, *supra* note 38, at 1850-56; Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North America Integration*, 91 MINN. L. REV. 1369, 1396-1404 (2007); *see also* Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383 (2007) (analyzing how immigration law can serve national security ends).

[120] *See supra* text accompanying notes 29-31.

[121] *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (finding that Mexican American citizens had unconstitutionally been barred from juries in Jackson County, Texas). For analysis of this history, see ACUÑA, *supra* note 1; NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1886 (1987); "COLORED MEN" AND "HOMBRES AQUI": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006). *See generally* RICHARD DELGADO, JUAN F. PEREA, & JEAN STEFANCIC, LATINOS AND THE LAW: CASES AND MATERIALS (2008) (collecting literature on negative impact of law on Latina/os in the United States).

[122] *See supra* note 93 (citing authorities).

Anti-Mexican sentiment, often combined with class-based bias, long has been common to American social life. Persons of Mexican ancestry often are stereotyped as nothing other than peasants who undercut the wage scale of "American" workers because of their willingness to work for "inhuman" wages.[123] The debates over the ever-expanding fence along the U.S./Mexico border[124] and border enforcement generally,[125] the proliferation of state and local immigration enforcement measures,[126] and the fear that some Americans express of the "Hispanization" of the United States,[127] reveal both anti-Mexican and anti-immigrant sentiment as well as legitimate concerns with lawful immigration and immigration controls. The difficulty of disentangling lawful from unlawful motivations for supporting such controls does not change the fact that invidious motives may influence both the enactment and enforcement of U.S. immigration law and policy.

The expressed public concern often is with the magnitude of the flow of immigrants from

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[123] *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1163 (2008) (referring to claim of a U.S. citizen that he would not "`be worked like a Mexican'") (footnote omitted); Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. 1087, 1087-88 (2000) (relaying story of how Anglo owner of landscaping business told two Latinos about his workers: "`They're very hard workers, the Mexican fellas, they just need some guidance. I show them how they can make more money working for me.'"). *See generally* LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2008) (studying popular stereotypes of Latina/o immigrants as a threat to the United States); STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (2003) (analyzing negative stereotypes about Latina/os in American culture).

[124] *See* M. Isabel Medina, *At the Border: What Tres Mujeres Tells Us About Walls and Fences*, 10 J. GENDER RACE & JUST. 245 (2007); Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, 14 HUM. RTS. BR. 33 (2007).

[125] *See supra* text accompanying notes 91-95.

[126] *See infra* text accompanying notes 128-48.

[127] *See* HUNTINGTON, *supra* note 18, at 221-56; *see also* HANSON, *supra* note 18 (contending that demographic changes in California are transforming the state into "Mexifornia"). For criticism of Huntington's analysis, see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1364-68 (2005); *see also* George A. Martínez, *Immigration: Deportation and the Psuedo-Science of Unassimilable Peoples*, 61 SMU L. REV. 7, 10-11 (2008) (questioning claim of Huntington, and others, that Latina/o immigrants fail to assimilate into American society).

Mexico. Some contend that the United States is being inundated – "flooded" is the word frequently used – with poor Mexican immigrants and that the "flow" of so many migrants is effectively ruining the United States. The alleged failure of immigrant assimilation also is an oft-expressed concern.

Several recent developments reveal the unmistakable racial and class impacts of immigration law and its enforcement.

A. *The Modern "Sundown" Towns: Prince William County, Virginia and Escondido, California*

The conventional wisdom has been that federal power over immigration is exclusive, with little room for state and local immigration and immigrant regulation.[128] Nonetheless, in the last few years, a number of state and local governments frustrated with the failure of Congress to enact comprehensive immigration reform, and uneasy with the real and imagined changes brought by new immigrants to their communities, have adopted measures that purport to address undocumented immigration and immigrants.[129] Class and race unquestionably have influenced

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[128] *See, e.g.*, DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is *unquestionably a federal power*.") (citing *Passenger Cases*, 7 How. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1976); Chy Lung v. Freeman, 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893)) (emphasis added).

An increasing number of scholars in recent years have questioned the conventional wisdom and advocated greater state and local involvement in immigration and immigrant regulation. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994); *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L J. 459 (2008) (outlining what kinds of immigration legislation states can enact that is not preempted by federal law); Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DEN. U.L. REV. 1061 (2007) (contending that local governments should be permitted to regulate immigration in a manner consistent with U.S. immigration law and policy); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (questioning traditional account that recent efforts of local governments to regulate immigration and immigrants was a response to the failure of Congress to pass comprehensive immigration reform); Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L. 179 (2008) (analyzing complex issues raised by local involvement in immigration and immigrant law).

[129] *Compare* Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (invalidating

the passage of these measures.

Consider a piece of commentary describing an anti-immigrant rally in Hazleton, Pennsylvania, home of a much-publicized immigration ordinance that generated national controversy:

> I'm not Latino, but the anger displayed at the rally – held in support of Hazleton's anti-immigration mayor, Lou Barletta – was enough to give anyone with a soul a serious case of the chills. . . . *About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values. . . . If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.*[130]

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city immigration ordinance on federal preemption grounds), *with* Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008) (holding that similar city ordinance was not preempted by federal law). *See also* Chicanos Por La Causa v. Napolitano, ___ F.3d ___ (9th Cir. 2008) (holding that Arizona law denying business licenses to employers that employed undocumented immigrant workers was not pre-empted by federal immigration law). For critical analysis of local attempts to regulate immigration, see Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; *see also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006) (analyzing federalism issues raised in immigration enforcement); Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007) (criticizing Hazleton, Pennsylvania's immigration ordinance); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994) (arguing for adherence to the general rule that state regulation of immigration is preempted by federal law); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U.L. REV. 965 (2004) (contending that local governments cannot constitutionally enforce immigration laws); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) (questioning state and local involvement in matters involving the intersection of criminal law and immigration law); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV 49 (2001) (contending that exercise of immigration power by states might increase discrimination against all immigrants, including lawful ones, as well as U.S citizens of particular national origins); *cf.* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing the meaning of "sanctuary" that some cities claim to be providing undocumented immigrants). *But see supra* note 128 (citing scholarship contending that state and local governments could legitimately play a role in immigration and immigrant regulation).

[130] Mike Seate, *Rage Over Illegals Brings '60s to Mind*, PITT. TRIB. REV., June 7,

2007 (emphasis added); *see, e.g.*, Kristen Hinman, *Valley Park to Mexican Immigrants: "Adios, Illegals!"*, Riverfront Times, Feb. 28, 2007, at http://www.riverfronttimes.com/content/printVersion/204874 (quoting mayor of Valley Park, Missouri, which enacted an immigration ordinance similar to Hazleton's: "'You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in."); Ruben Navarrette Jr., *Hate in the Immigration Debate*, SAN DIEGO UNION-TRIB., July 29, 2007, at G3 (observing that the anti-immigrant cause has become distinctly anti-Mexican and describing hate mail he, a prominent national commentator (and native-born U.S. citizen educated at Harvard College), regularly receives, including mail calling him a "'dirty Latino'" who should go "'back to Mexico'"); John Keilman, *Hispanics Rue City's New Rules*, CHI. TRIB., October 29, 2006, at C3 (reporting that Latina/os felt under attack by local ordinances like Hazleton's); Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (to the same effect).

Some local governments have unsuccessfully attempted to address the efforts of day laborers – relatively unskilled workers, many of whom in some localities are undocumented immigrants from Mexico and Central America – to secure work.[131] "Day laborers are short-term workers that assemble in areas where they are likely to be visible to potential employers. [They] typically assemble in areas such as sidewalks, parking lots, and around construction supply stores."[132] Day laborers are among the most vulnerable workers in the workforce, often subject to exploitation, including nonpayment of wages and required to labor in substandard working conditions.[133]

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[131] *See, e.g.*, Lopez v. Town of Cave Creek, 559 F. Supp. 2d 1030 (D. Ariz. 2008); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952, 961-62 (C.D. Cal. 2006); Coalition for Humane Immigrant Rights v. Burke, 2000 U.S. Dist. LEXIS 16520 (C.D. Cal. September 12, 2000).

Some cities also have responded to growing Latina/o populations by seeking to regulate – in some cases ban – trucks that sell tacos and other Mexican foods. *See* Hispanic Taco Vendors v. City of Pasco, 994 F.2d 676 (9th Cir. 1993) (affirming the denial of injunctive relief seeking to halt enforcement of local law requiring the licensing of taco trucks and other street vendors); Miguel Bustillo, *Hold the Tacos, New Orleans Says*, L.A. TIMES, July 14, 2007, at A1 (reporting on local taco truck ban in New Orleans area); *see also* Garrett Therolf, *Taco Trucks Can Stay Parked*, L.A. TIMES, Aug. 28, 2008, at B1 (reporting on court injunction barring enforcement of Los Angeles County taco truck ordinance, which grew out of complex dispute between Mexican restaurant owners and taco trucks).

[132] Margaret Hobbins, Note and Comment, *The Day Laborer Debate: Small Town, U.S.A. Takes on Federal Immigration Law Regarding Undocumented Workers*, 6 CONN. PUB. INT. L.J. 111, 114 (2007) (footnotes omitted). For studies of day laborers, see ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES (Jan 2006), available at http://www.sscnet.ucla.edu/issr/csup/index.php (discussing the daily lives of day laborers and the conditions they face); ABEL VALENZUELA JR. & EDWIN MELENDEZ, DAY LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY (Apr 2003), available at http://www.sscnet.ucla.edu/issr/csup/pubs/papers/pdf/csup3execsumm.pdf (same, but with a focus on the New York market).

[133] *See, e.g.*, Anna Gorman, *A Darker State Economy Sends Day Laborers Packing*, L.A. TIMES, Sept. 1, 2008, at B1 (reporting that economic decline resulted in decision of some day laborers to return to their native countries). For analysis of the legal issues facing day laborers, see Lisa Zamd, *All in a Day's Work: Advocating the Employment Rights of Day Laborers*, 3 AM. U. MODERN AM. 56 (2007); Hobbins, *supra* note 132; Analiz DeLeon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241 (2008); *see also* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 192-91 (2005) (discussing efforts to organize day laborers); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 912-23 (2008) (summarizing how various legal services programs address legal issues of undocumented immigrants, including day laborers).

1. *Prince William County, Virginia*

In 2007, Prince William County, Virginia responded to an increase of Latina/os settling in the community by adopting a measure that, among other things, required police officers to check the immigration status of anyone accused of breaking the law, whether for speeding or shoplifting, if they for some reason believe that the person is in the country unlawfully.[134] Affording such broad discretion, with vague standards, to law enforcement unfortunately creates the serious potential for racial profiling.[135] Fearful of the impacts of the enforcement of the new law, Latina/o immigrants and citizens reportedly have moved out of Prince William County, to the dismay of some businesses and the approval of some white residents.[136]

Supporters of the local immigration measures have argued that the laws will promote "self-deportation" of undocumented immigrants.[137] However, the Latina/os moving out of Prince William County appear to be moving to neighboring localities and states rather than returning to their native countries.[138]

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[134] *See* Nick Miroff & Kristen Mack, *After Vote, Pr. William Immigrant Plan Faces Hurdles*, WASH. POST, Oct. 18, 2007, at A1.

The Prince William County measure implicates a larger – and much-contested – question about the role that state and local police agencies in the enforcement of the U.S. immigration laws. *Compare* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (advocating such cooperation), *with* Kittrie, *supra* note 129 (analyzing federalism issues raised in local police involvement in immigration enforcement), *and* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (contending that local police cannot constitutionally cooperate in the enforcement of the federal immigration laws).

[135] *See supra* text accompanying notes 91-95.

[136] *See* Nick Miroff, *A Hispanic Population in Decline; Illegal Immigrant Policy Alters Pr. William on Many Levels*, WASH. POST, July 10, 2008, at A1.

[137] *See, e.g.*, Thomas G. Tancredo, *A New Strategy for Control of Illegal Immigration*, HERITAGE FOUNDATION REPORTS, Oct. 26, 2006; Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 160-61 (2008). The U.S. government offered a short-lived – because it was unsuccessful – campaign encouraging undocumented immigrants to turn themselves in and effectively self-deport. *See* Amy Taxin, *Federal "Self-Deportation" Pilot Program Ends Today A Flop*, SAN GABRIEL VALLEY TRIB., Aug. 22, 2008.

[138] *See* Miroff, *supra* note 136.

2. *Escondido, California*

The city of Escondido, California, a town that ironically enough has a Spanish name and is located not far from the U.S./Mexico border (and is located in a part of the state that once was part of Mexico), is another local government that has sought to deter Latina/o immigrants from remaining in its jurisdiction. In the last few years, Escondido has tried to discourage undocumented immigrants from being visible in the city limits through a number of aggressive means. Those means include passing an ordinance, which the city later rescinded in the face of a legal challenge,[139] barring landlords from renting to undocumented immigrants, immigration sweeps, and aggressive enforcement of city codes and other policies.[140]

Escondido currently is attacking undocumented immigration indirectly by, among other things, citing residents for code violations such as garage conversions, graffiti, and junk cars.[141]
Like other cities, Escondido city officials considered a policy restricting drivers from picking up day laborers.[142] One of the local police department's most controversial moves was to target unlicensed drivers through traffic checkpoints, which disparately impacted undocumented immigrants who are ineligible in California (and many other states) to obtain driver's licenses.[143]

Like Prince William County's, Escondido's approach has been described as a method encouraging "attrition: making life as difficult as possible for undocumented immigrants in

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[139] *See* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DEN. U.L. REV. 1041, 1056-57 (2007) (analyzing litigation resulting in settlement of a legal challenge to the Escondido ordinance barring landlords from renting to undocumented immigrants).

[140] *See* Anna Gorman, *Escondido is Using a Wave of Policies to Try to Drive Away Illegal Immigrants*, L.A. TIMES, July 13, 2008, at B1.

[141] *See id.* Such methods reflect a practice that has been described as discrimination by proxy, relying on a race-neutral proxy against Latina/os and immigrants. *See* Kevin Johnson & George Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1275-76 (2000).

[142] *See* Steven Lopez, *Migrant Has Tough Message to Others*, L.A. TIMES, July 20, 2008, at B1; *see also supra* text accompanying notes 131-33 (discussing localities that have sought to regulate day laborers).

[143] In 2007, "the department set up 18 license checkpoints, which resulted in 293 impounded cars, 14 arrests and 296 citations." Gorman, *supra* note 140.

the hope that they'll self-deport back home."[144] Again, fulfillment of this hope seems unlikely given that residence is possible in other nearby jurisdictions in the United States. A retired sheriff maintained that the city's motives are nothing less than invidious and that the city is "`looking for a way to reduce the number of brown people'" in Escondido.[145]

3. *The New "Sundown Towns"*

[144] Gorman, *supra* note 140.

[145] *Id.* (quoting Mike Flores, retired sheriff).

The end result of local immigration measures like those in Prince William County and Escondido may well be modern-day variants of the old "sundown town," communities in the United States that emerged in the North after the Civil War, when many freed slaves migrated from the South, in which African Americans were systematically excluded from town after sunset.[146] Sundown laws, often enforced through law and threats of violence, allowed workers of color to provide labor needed in town but without the perceived burden on townspeople of having Blacks living among the city's white residents.

Along these lines, ordinances that bar landlords from renting to undocumented immigrants, including ones adopted by Hazleton, Pennsylvania, Valley Park, Missouri, and Farmer's Branch, Texas, have been characterized as the new Jim Crow.[147] The enforcement of these ordinances may result in discrimination against national origin minorities, including U.S. citizens and lawful permanent residents as well as undocumented immigrants.[148]

There is little indication that the labor provided by immigrants in cities with ordinances and policies like Escondido and Prince William County will not be in demand and utilized to maintain the homes and yards of city residents and provide child care services, as well as in restaurants, hotels, construction, and service industries in those municipalities. The elimination of day laborer pick up points, for example, would likely drive the employment of these workers further underground but would not likely dramatically affect, much less eliminate, the informal labor market that helps satisfy the economy's demand for inexpensive labor. The new incarnation of the sundown town, it appears, thus will have unskilled Latina/o immigrant workers by day but will be white-dominated at night.

B. *The Immigration Raids: Postville, Iowa 2008 as a Case Study*

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[146] JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) offers a comprehensive history of sundown towns in the United States.

[147] *See* Marisa Bono, *Don't You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow*, 3 AM. U. MODERN AM. 29 (2007).

[148] *See* Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. (forthcoming 2008); *see also* Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEG. F. 93 (analyzing immigration controls as a form of residential segregation).

As Congress debated comprehensive immigration reform beginning in late 2006,[149] the Bush administration increasingly employed immigration raids in the interior of the United States in an effort to demonstrate the federal government's commitment to immigration enforcement.[150] These raids have had racial and class impacts on particular sub-groups of immigrant workers, namely low-skilled Latina/o immigrants.

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[149] For different perspectives on comprehensive immigration reform of the U.S. immigration laws like that debated in Congress in 2006-07, see Symposium, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS 1 (2007/08); Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INTL L. J. 115 (2008); Asa Hutchinson, *Keynote Address: Holes in the Fence: Immigration Reform and Border Security in the United States Symposium*, 59 ADMIN. L. REV. 533 (2007); Symposium, *Immigration Reform and Policy in the Current Politically Polarized Climate*, 16 TEMP. POL. & CIV. RTS. L. REV. 309 (2007); Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007); Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. LEGIS 267 (2006); Marc R. Rosenblum, *"Comprehensive" Legislation vs. Fundamental Reform: The Limits of Current Immigration Proposals*, MIGRATION POLICY BRIEF, Jan. 2006; Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, REL., GENDER & CLASS 151 (2005); Michael Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1502 (2008). For a proposal for more far-reaching reform of the immigration laws than that envisioned by the proponents of the comprehensive reform considered by Congress, see JOHNSON, *supra* note 40.

[150] *See, e.g.*, Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092-96 (2008) (discussing raids of Swift Company meatpacking plants in December 2006); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008) (analyzing legal impacts of raids and other forms of interior immigration enforcement); Sandra Guerra Thompson, *Immigration Law and Long-Tern Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 654-58 (2008) (same); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEMP. L. REV. 853, 862-88 (2008) (same); David B. Thronson, *Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008) (identifying negative impacts of immigration raids on families, including U.S. citizen children of immigrants); *see also* Huyen Pham, *The Private Enforcement of the Immigration Laws*, 96 GEO. L.J. 777 (2008) (studying various modes of private enforcement of the immigration laws).

Immigration raids are not an entirely new immigration enforcement strategy. Nor are their racial and class impacts. At various times in U.S. history, the U.S. government has employed raids as an immigration enforcement device.[151] However, in the last few years, the U.S. government has conducted immigration raids in increasing numbers – with greater aggressiveness – at worksites across the United States.[152]

The May, 2008 raid in Postville, Iowa, constituted one of the largest raids on undocumented workers at a single site in U.S. history. In the raid's aftermath, the U.S. government did not simply seek to deport the undocumented but pursued criminal prosecutions of the workers on immigration and related crimes.[153] The new strategy, which devastated a rural community in America's heartland, proved to be most controversial.

With a massive show of force of helicopters, buses, and vans, agents surrounded the Agriprocessors plant, the nation's largest kosher slaughterhouse and meat packing plant.[154] Officers arrested suspected undocumented immigrants and detained them at the National Cattle Congress grounds, a cattle fair ground seventy-five miles from Postville.[155]

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[151] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); INS v. Delgado, 466 U.S. 210 (1984); Int'l Molders & Allied Workers' Union Local No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986); *see* David K. Chan, Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767 (1986).

[152] *See, e.g.*, Robbie Brown, *300 Detained in Immigration Raid*, N.Y. TIMES, Oct. 8, 2008, at A19 (South Carolina); Adam Nossiter, *Nearly 600 Were Arrested In Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16 (Mississippi); William Wan, *Authorities Detain 45 in Immigration Raid of Painting Company*, WASH. POST, July 1, 2008, at B2 (Maryland); Anna Gorman, *U.S.-Born Children Feel Effect of Raids*, L.A. TIMES, June 8, 2008, at B1 (California); Libby Sander, *Immigration Raid Yields 62 Arrests in Illinois*, N.Y. TIMES, Apr. 5, 2007, at A12 (Illinois); Pam Belluck, *Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts*, N.Y. TIMES, Mar. 22, 2007, at A1 (Massachusetts); Julia Preston, *Immigration Raid Draws Protest From Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A7 (North Carolina).

[153] *See* Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A01. U.S. immigration authorities employed similar strategies in much-publicized raids at meatpacking plants in 2007. *See* Aldana, *supra* note 150, at 1092-94; Thronson, *supra* note 150, at 400-01.

[154] *See* Hsu, *supra* note 153.

[155] *See* Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in U.S. History: A Personal Account*, N.Y. TIMES, July 14, 2008.

According to news reports, immigration authorities arrested 290 Guatemalan, 93 Mexican, 4 Ukrainian, and 2 Israeli workers.[156] Shackled and chained, the workers appeared in court and listened to interpreted court appearances through headsets.[157] An observer of the mass legal proceedings commented that those arrested

> appeared to be uniformly no more than 5 ft. tall, mostly illiterate Guatemalan peasants with Mayan last names, some being relatives . . . , some in tears; others with faces of worry, fear, and embarrassment. They all spoke Spanish, a few rather laboriously [They presumably were native speakers of indigenous languages.]. . . . [A]side from their Guatemalan or Mexican nationality . . . they too were Native Americans, in shackles. They stood out in stark racial contrast with the rest of us as they started their slow penguin march across the makeshift court.[158]

The raid and criminal prosecutions, however, did not end the immigration enforcement activities in Postville. A local teacher reported that, the day after the raid, U.S. Immigration & Customs Enforcement officers searched "every home and apartment that ha[d] a Hispanic name attached it"; immigration authorities had gone to the local schools seeking student and employee files for any person with a "name that sounded Hispanic."[159] This unmistakably sounds of racial profiling.[160]

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[156] *See* Hsu, *supra* note 153. It has been reported that only five of the persons originally arrested by the authorities had criminal records. *See* Camayd-Freixas, *supra* note 155.

As the Postville raid suggests, recent immigration raids have had particularly negative impacts on Guatemalan immigrants. One of the largest workplace raids before Postville occurred in March 2007 in New Bedford, Massachusetts, with more than 360 workers arrested, the majority of whom originated from Guatemala. *See* Jack Spillane, *Immigrants Feel Singled Out for Labor Abuse*, NEW BEDFORD STANDARD TIMES, June 30, 2008; Yvonne Abraham, *350 Held in Immigration Raid: New Bedford Factory Employed Illegals, US Says*, BOSTON GLOBE, Mar. 7, 2007; Maria Saccheti, *Commission Hears Testimony on US Immigration Raids*, BOSTON GLOBE, Apr. 8, 2008.

[157] *See The Shame of Postville*, N.Y. TIMES, July 13, 2008, at WK11.

[158] Camayd-Freixas, *supra* note 155.

[159] *See* Elise Martins, *Postville, Iowa, Immigration Raids Tear Apart Families, Destroy Local Economy*, Sisters of Mercy, http://www.sistersofmercy.org/index.php?option=com_content&task=view&id=1373&Itemid=193.

[160] *See supra* text accompanying notes 91-95.

More than three hundred of those arrested in the Postville raid faced criminal charges for identity theft and related crimes.[161] Most of the Guatemalans could not read or write, and most failed to understand that they were charged with *criminal* offenses, which would make it difficult, if not impossible, for them to ever immigrate lawfully to the United States, rather than simply facing deportation.[162] Court-appointed attorneys had little time to meet with the detained immigrant workers.

The rapid pace of the proceedings and the aggressive prosecution of criminal charges represented new strategies of the federal government in enforcing the U.S. immigration laws.[163] Previously, the U.S. government after a workplace raid ordinarily sought to swiftly deport the noncitizens arrested, not pursue criminal immigration-related crimes as in Postville.[164] Many of the undocumented workers accepted plea bargains, with the hopes of faster release and quick deportation.[165]

In its zealous pursuit of immigration enforcement, U.S. immigration officials did not appear particularly concerned with the exploitation of the undocumented workers by the employer. Indeed, the Postville raid may have interfered with an ongoing Department of Labor investigation looking into child labor law violations, as well as other violations of the labor laws.[166] One observer critically characterized the Postville raid as part of an effort to disrupt union organizing activities among the workers at Agriprocessors.[167]

The human damage of the raid on a small rural town was devastating:

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[161] *See* Camayd-Freixas, *supra* note 155.

[162] *See* Julia Preston, *An Interpreter Speaking up for Migrants*, N.Y. TIMES, July 11, 2008, at A1.

[163] *See id.*

[164] *See The Shame of Postville*, *supra* note 157.

[165] *See "The Jungle," Again,* N.Y. TIMES, Aug. 1, 2008.

[166] *See* Hsu, *supra* note 153 (quoting Mark Lauritsen, the international vice president of the United Food and Commercial Workers union).

[167] *See* David L. Wilson, *Union-Busting by Any Other Name . . . .* , MR ZINE, July 20, 2008, at http://mrzine.monthlyreview.org/wilson200708.html.

> Postville . . . where nearly half the people worked at Agriprocessors, had lost 1/3 of its population . . . . Besides those arrested, many had fled the town in fear. Several families had taken refuge at St. Bridget's Catholic Church, terrified, sleeping on pews, and refusing to leave for days. Volunteers from the community served food and organized activities for the children. At the local high school, only three of the 15 Latino students came back on [the day after the raid], while at the elementary and middle school, 120 of the 363 children were absent. . . . Some American parents complained that their children were traumatized by the sudden disappearance of so many of their school friends. . . . Some of the children were born in the U.S. and are American citizens. Sometimes one parent was a deportable alien while the other was not. "Hundreds of families were torn apart by this raid," said a Catholic nun.[168]

Months after the raids, the furor over the U.S. government's Postville strategy and the treatment of the immigrant workers continued.[169] The title of one *N.Y. Times* editorial – *The Shame of Postville* – pretty much said it all.[170] Congressman Bruce Braley (D-Iowa) observed that: "'[u]ntil we enforce our immigration laws equally against both employers and employees who break the law, we will continue to have a problem.'"[171] A union official opined that "'[t]his administration seems to place a larger value on big, splashy shows in this immigration raid than in vigorously enforcing other

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[168] Camayd-Freixas, *supra* note 155. Many families in the United States are composed of parents and children of different immigration statuses. *See* Campbell, *supra* note 139, at 1052; *see also* MICHAEL E. FIX & WENDY ZIMMERMAN, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 1 (Oct. 1999) (estimating that 10 percent of all families in United States had mixed immigration statuses). The recent raids have resulted in the arrests of undocumented immigrant parents, with some U.S. citizen children left without supervision. *See* Sherryl Zounes, Current Development, *Children Without Parents: An Unintended Consequence of ICE's Worksite Enforcement Operations*, 21 GEO. IMMIGR. L.J. 511 (2007). Removal of noncitizens that effectively results in the deportation of U.S. citizen children, has long been a problem with the enforcement of the U.S. immigration laws. *See* Edith Z. Friedler, *From Hardship to Extreme Deference: United States Deportation of Its Own Citizens*, 22 HASTINGS CONST. L.Q. 491 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

[169] *See, e.g.*, Press Release, Ali Noorani, Department of Homeland Security or Department of Economic Ruin? Oversight Welcome (July 24, 2008) (on file with National Immigration Forum); Preston, *supra* note 162.

[170] *The Shame of Postville*, *supra* note 157; *see also "The Jungle," Again*, *supra* note 165.

[171] *See* Hsu, *supra* note 153 (quoting Braley).

labor laws.’”[172]

[172] *Id.* (quoting union official).

The Postville immigration raids were directed at – and unquestionably impacted – unskilled Latina/o immigrant workers, among the most vulnerable in U.S. society. It is difficult to persuasively contend that the raid did not have distinctively racial and class impacts even if one defended the immigration control goals of government. To this point, the United States unfortunately has not addressed the root cause of undocumented immigration, that is, the more general problem with the U.S. immigration laws being out of synch with the nation's labor needs.[173]

CONCLUSION

In operation, and to a certain extent in design, the U.S. immigration laws serve to keep poor and working people of color out of the United States.[174] Moreover, those who suffer due to immigration enforcement most often are poor and working people of color.[175] Almost all of those who die in the desert and mountains – a nightmare that continues daily along the U.S./Mexico border – on the arduous journey to the United States are poor and working people of color.[176] Local immigration enforcement measures, such as those adopted by Prince William County, Virginia, and Escondido, California, target poor and working immigrants of color as did the spring 2008 immigration raid in Postville, Iowa.[177]

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173 *See supra* text accompanying notes 69-76.

174 *See infra* Parts II and III.

175 *See infra* Parts II and III.

176 *See infra* Parts II and III.

177 *See infra* Part III.

Relying on the Critical Race Theory concept of intersectionality,[178] this article has focused on Latina/o immigrants as stark examples of the intersection of race and class in the operation of the U.S. immigration laws and their enforcement. One could look at noncitizens of many different nationalities who suffer as a result at the intersection of race and class in the operation of the U.S. immigration laws. Africans[179] and Haitians[180] seeking to come to the United States, for example, historically have been subject to particularly harsh treatment by the U.S. government.

In some ways, this dynamic is not exceptional to U.S. immigration law and enforcement. As the other contributions to this symposium amply demonstrate, many other bodies of American law operate in a remarkably similar fashion. However, the law's clear class and racial impacts are far clearer and direct in immigration law than in other areas of U.S. law. Immigration law expressly defines who can, and cannot, enter the United States and, not surprisingly, mirrors the class and racial hierarchy in American society.[181] The law and its

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[178] *See supra* text accompanying notes 21-24.

[179] *See* Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994).

[180] *See* Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717 (1999); *see, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding U.S. interdiction on high seas and repatriation of Haitians fleeing political violence and their return to Haiti). For critical commentary on the Haitian interdiction case, see Harold H. Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold H. Koh, *Reflections on Refoulment and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994).

Many factors contributed to the harsh treatment of the Haitians, including the difference of race and class. *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. IMMIGR. L.J. 1 (1993); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000). Despite the long history of political violence in Haiti, U.S. officials historically have generally classified people fleeing that country as "economic migrants," not "political refugees" eligible for relief under the U.S. immigrations laws. *See* Johnson, *supra*, at 12-14; Note, *supra* note 118, at 459; *see, e.g.*, Haitian Refugee Center v. Smith, 676 F.2d 1023, 1030 (5th Cir. 1982) (noting that the Immigration & Naturalization Service characterized most of those who fled Haiti as "economic" refugees). Haitian immigrants created a popular fear of a flood of poor and black people of a very different culture coming to the United States. *See* Johnson, *supra*, at 5, 11, 15; Johnson, *supra* note 27, at 1140-44.

[181] *See supra* text accompanying notes 18-20.

enforcement make class, nationality, and other distinctions that are barred in other bodies of law and result in disparate class and racial impacts.[182]

[182] *See supra* Parts II, III.

The United States is not exceptional in the racial and class impacts of its immigration laws and their enforcement. The nations that comprise the European Union, for example, have experienced similar public reactions to immigrants from North Africa, with the difference of race and class contributing to sporadic nativist backlashes.[183] However, the United States as a nation has always held itself as committed to more laudable immigration ideals and often purports to embrace the "huddled masses" of the world. It is about time that U.S. immigration laws better live up to the nation's lofty ideals.

[183] *See* Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 123-30 (2007/08).