

# RACE MATTERS: IMMIGRATION LAW AND POLICY SCHOLARSHIP, LAW IN THE IVORY TOWER, AND THE LEGAL INDIFFERENCE OF THE RACE CRITIQUE

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## I. INTRODUCTION

After the elimination of the discriminatory national origins quota system in 1965,<sup>1</sup> the United States experienced a dramatic change in the demographics of immigration. Many more immigrants of color from de-

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The author borrows the introductory phrase in the title from CORNEL WEST, *RACE MATTERS* (1993).

This essay builds on comments made at the Immigration Law Teachers Workshop at the University of California, Berkeley School of Law in May 1998. Thanks to Michael Scaperlanda and Patty Blum for their leadership in organizing the workshop and allowing me to participate. Although I previously had shared the ideas generally expressed here with several people, this essay began in earnest as introductory remarks to the panel entitled "Different Perspectives on Immigration Law and Policy" at the workshop. I am indebted to the panelists, Gil Gott, George A. Martínez, and John A. Scanlan, for preparing papers that stimulated my thinking. Some of the ideas expressed here were also developed for the Section on Immigration Law program "Perspectives on Citizenship" at the Association of American Law Schools (AALS) 1999 annual meeting. Thanks to my co-panelists, Neil Gotanda, Susan Forbes Martin, Dorothy Roberts, Peter Schuck, Anna Williams Shavers, and Peter Spiro, for making presentations that challenged my analysis. Some of the ideas articulated here were also presented at the American Society of International Law 1999 annual meeting, where my co-panelists (Gil Gott, Susan Akram, and Leti Volpp) and the audience, especially Peter Spiro, offered helpful feedback. Thanks to Berta Hernandez and Gil Gott for arranging this platform. This paper benefited from comments of the Asian Pacific American Critical Race Theory reading group at UC Davis. Thanks to Kent Ono for inviting me to present this paper and to Angie Chabram-Dernersesian, Bill Ong Hing, Wendy Ho, Beatriz Pesquera, and Karen Shimikawa for their thoughtful comments. The presentations at the AALS 2000 annual meeting of Linda Bosniak, Lolita Buckner Innis, George A. Martínez, Natsu Taylor Saito, and John A. Scanlan on the joint program of the Minority Groups and Immigration Law Sections on Race and Immigration Law also informed my analysis. I appreciate the thoughtful comments of Cecelia Espenoza, Bill Ong Hing, George A. Martínez, Michael A. Olivas, Victor C. Romero, Michael Scaperlanda, Leti Volpp, Gil Gott, Peter Margulies, Anupam Chander, and Joel C. Dobris on a draft of this article, as well as the financial and other support of Dean Rex R. Perschbacher. Finally, thanks to Joan Fitzpatrick, Bill Ong Hing, George A. Martínez, Michael A. Olivas, and John A. Scanlan for engaging the ideas in my article in this special issue.

1. See Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1994 & Supp. III 1997)).

veloping nations have come to this country since the revolutionary reform.<sup>2</sup> Over the decades following the elimination of the quota system, public concern with immigration ebbed and flowed.<sup>3</sup> In the early 1990s, restrictionist sentiment peaked, culminating in changes to the immigration laws in 1996,<sup>4</sup> which have been characterized by one knowledgeable commentator as “the most radical reform of immigration law in decades — or perhaps ever.”<sup>5</sup>

Many concerns contributed to the rise of this most recent spate of restrictionism, including economic, social, and cultural anxieties.<sup>6</sup> That so many of today’s immigrants are racially different from the Anglo norm in the United States also provoked calls for immigration reform. Although economic and related concerns with immigration are not legally suspect on their face, race is in our constitutional scheme.<sup>7</sup> Ultimately, immigration scholars face the daunting challenge of ensuring the removal of racial discrimination’s taint on the development of immigration law and policy. It may prove difficult, perhaps impossible, to separate the permissible from the invidious arguments for restrictionist action. Nonetheless,

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2. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 276 (1996) (noting that, since 1965, 75% of immigrants to the United States have come from Africa, Asia, and Latin America).

3. See generally Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 STUD. AM. POL. DEV. 37 (1992) (analyzing immigration politics of the 1980s).

4. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C. & 28 U.S.C.).

California’s Proposition 187, designed to reduce public benefits to undocumented immigrants, see *infra* note 35, served as a precursor to some of the recent federal restrictionist laws. During the same time period, attacks on affirmative action designed to remedy discrimination against racial minorities and ensure diversity were increasingly successful. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to a federal program encouraging prime contractors on government projects to hire subcontractors from disadvantaged groups); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that a law school affirmative action program that considered race violated equal protection), *cert. denied*, 518 U.S. 1033 (1996). In 1997, California voters passed Proposition 227 prohibiting bilingual education in the public schools, which had a disparate impact on the Mexican immigrant community in the state. See Proposition 227, English Language in Public Schools Initiative Statute, 1998 Cal. Legis. Serv. A-6 (West) (codified at CAL EDUC. CODE §§ 300-340 (West Supp. 2000)); *Valeria G. v. Wilson*, 12 F. Supp.2d 1007, 1026 (N.D. Cal. 1998) (refusing to enjoin implementation of initiative). These contemporaneous events suggest a relationship between anti-immigrant and antiminority sentiment.

5. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998).

6. See generally, e.g., ROY BECK, *THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING IMMIGRATION BACK TO TRADITIONAL LEVELS* (1996).

7. See, e.g., *Adarand*, 515 U.S. at 213-18 (applying strict scrutiny to the consideration of race in a federal program designed to increase the number of minority contractors); see also *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality opinion) (stating that because electoral district lines are facially neutral, “a more searching inquiry is necessary before strict scrutiny can be found applicable” and that “plaintiffs must prove that . . . legitimate districting principles were ‘subordinated’ to race,” that is, “that race [was] ‘the predominant factor motivating the legislature’s redistricting decision’” (citations and emphasis omitted)); *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (stating that the equal protection clause “extends not just to explicit racial classifications, but also to laws neutral on their face but unexplainable on grounds other than race” (citations omitted)).

inquiry is warranted. This article offers some observations on the place of race in immigration law scholarship and outlines some future possibilities for analysis.

My comments are directed at two distinct audiences. First, I hope to convince mainstream immigration scholars focused on legal doctrine to consider racial critiques of the law, including Critical Race Theory, Critical Latino/a Theory, and Asian American legal scholarship. Such consideration will lend power to their analyses and allow for a fuller understanding of immigration law. Second, I aim at persuading race scholars that immigration law doctrine must not be shunned but should be analyzed and explained through critical inquiry. This will not undermine their critiques but in all likelihood will bolster them and allow the scholars to unveil the racial privilege encoded in immigration law doctrine.

Part II contends that mainstream immigration law scholarship fails to confront squarely the reality of the influence of race. For example, immersed in doctrine, the conventional wisdom does not seriously question the distinction between “aliens” and citizens, which is the bedrock of all analysis in the immigration law field and historically has been linked to race. Part II further suggests that the addition of new theoretical lenses incorporating race holds great promise in aiding our understanding. Part III outlines how minority scholars engaging in LatCrit (Critical Latino/a) Theory, Asian American, and Critical Race Theory legal scholarship have constructed novel analytical frameworks useful for studying the racial underpinnings and impacts of immigration law. In part IV, I analyze how the two separate legal discourses on immigration—an “ivory tower” perspective focusing on doctrine and race scholarship—are akin to ships passing in the night. The “imperial scholar” phenomenon identified in civil rights scholarship<sup>8</sup> is alive and well in immigration law scholarship, with a small cadre of elite, predominantly white scholars engaging each other while marginalizing the work of outsiders. At the same time, race scholars hoping to effectively challenge the ivory tower wisdom must unravel the intricacies of legal doctrine and the racial discrimination that it obscures. They must confront the traditionalists in the conventional immigration venues<sup>9</sup> and initiate a true race and immigration dialogue. Although not without costs, mainstreaming the race critique of immigration law will assist in prodding scholars in the field to confront the issues and offer a better understanding of the law and its enforcement.

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8. See *infra* text accompanying notes 112–37 (explaining the phenomenon).

9. See *infra* text accompanying notes 44–45 (describing the mainstream immigration law conferences).

## II. IMMIGRATION LAW SCHOLARSHIP: THE NEED FOR ANALYSIS OF RACE

Race<sup>10</sup> ordinarily has been submerged in modern immigration law scholarship, much of which focuses on thorny doctrinal issues of great importance, such as the plenary power doctrine and its impact, judicial review of removal decisions, detention policies, and eligibility for asylum, to name a few.<sup>11</sup> Legal scholarship in other fields finds itself similarly immersed in doctrine, or theoretical frameworks not too distant from practical application. For example, in looking at trusts law, two prominent observers find that although “there is an extensive legal literature on the institution of the trust, that literature . . . tends to be doctrinal rather than broadly functional in perspective.”<sup>12</sup> This doctrinal emphasis persists despite critics’ longstanding contention that the overemphasis on legal doctrine fails to capture fully how social forces shape the law.<sup>13</sup>

Doctrinal analysis, of course, is essential to serious legal scholarship. I “do” doctrine; for example, I have analyzed the requirement that an asylum applicant establish a well-founded fear of persecution on account of political opinion.<sup>14</sup> My representation of immigrants, which necessarily required formulating arguments based on legal doctrine, significantly contributed to my scholarly interest in immigration and refugee law.<sup>15</sup> The point here is not that doctrinal scholarship is unimportant, unworthy, or unwanted. Rather, I believe that an exclusive focus on legal doc-

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10. I employ the term “race” based on the understanding that the concept is a social rather than a biological construction. *See generally* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994) (exploring how concepts of race are formed and change and how they have come to permeate U.S. society).

11. *See* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3 (2000) (criticizing a “formalistic” view of asylum law). Similarly, although offering a new theoretical approach, the “membership” literature, which focuses on which members of U.S. society are entitled to certain legal rights, attempts to explain the extension of legal rights to noncitizens. *See infra* note 51 and accompanying text.

12. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 435 (1998) (footnote omitted). For a notable exception in the trusts and estates scholarship, see Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALB. L. REV. 543 (1998); *cf.* Holly Doremus, *The Rhetoric of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. (2000) (analyzing stories used by nature advocates seeking environmental protection).

13. *See generally* KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1930) (Legal Realists); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998) (Critical Legal Studies); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995) (Critical Race Theory); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995) (same).

14. *See, e.g.*, Deborah E. Anker et al., *The Supreme Court’s Decision in INS v. Elias-Zacarias: Is There Any “There” There?*, 69 INTERPRETER RELEASES 285 (1992), *reprinted as adapted in* 4 INT’L J. REFUGEE L. 267 (1992).

15. *See, e.g.*, Barapind v. Rogers, 114 F.3d 1193 (9th Cir. 1997); Brief for *Amicus Curiae* American Immigration Lawyers Association in Support of Respondent, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (No. 90-1342).

trine fails to tell the full story.<sup>16</sup> One can all too easily lose the proverbial forest for the trees.

A famous immigration example is instructive. During the Chinese exclusion period, immigration debate focused on the nuts and bolts of the various exclusions without full appreciation, much less critical scrutiny, of the racial antipathy toward the Chinese.<sup>17</sup> Although not without blatantly racist statements, some judicial decisions upholding those laws focused on the inability of the Chinese to assimilate into U.S. society because of their cultural differences.<sup>18</sup> Today, we have no doubt that this exclusionary history is unquestionably racist.<sup>19</sup> Similarly, contemporary scholars studied the legal requirement before 1952 that naturalization applicants be “white” by considering the consistency of the case law rather than challenging the now-obvious racist premises.<sup>20</sup>

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16. To the extent that race is part of the story and ultimately must be factored into any comprehensive analysis, I agree with Professor Martínez that my article calls for a paradigm shift. See George A. Martínez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517.

17. See, e.g., Ruben H. Klainer, *Deportation of Aliens*, 15 B.U. L. REV. 663, 665–66, 675, 710–12 (1935); Thomas R. Powell, *Judicial Review of Administrative Action in Immigration Proceedings*, 22 HARV. L. REV. 360, 360–65 (1909).

18. See *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 595 (1889).

19. See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 152 (4th ed. 1998) (“Some federal [immigration laws] have been blatantly racist, prohibiting immigration and naturalization of aliens from China and Japan and favoring northern and western Europeans over southern and eastern Europeans.”); Louis Henkin, *The Constitution and United States Foreign Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987) (“[T]he *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension.”). This nonrecognition of racism is consistent with the fact that people generally fail to perceive the racism of their day. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1275–84 (1992).

20. See, e.g., George W. Gold, *The Racial Prerequisite in the Naturalization Law*, 15 B.U. L. REV. 462, 462 (1935) (reviewing case law interpreting the legal requirement without seriously questioning it but suggesting that it was justified because, “[w]hile such exclusion is in a sense arbitrary, it is not without foundation in reason”); see also *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (noting that Asian immigrants as nonwhite could not assimilate into the mainstream but denying any claim of “racial superiority,” rationalizing that “[w]hat we suggest is merely racial difference, and it is of such a character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation”). See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (analyzing the significance of case law applying the whiteness requirement). *United States citizenship laws historically have been exclusionary on racial, gender, and other grounds. See generally CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998) (documenting the history of gender discrimination in citizenship laws); ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997) (analyzing the history of exclusionary citizenship laws designed to limit citizenship to white males).

Although the most invidious discrimination in the naturalization laws has been removed, the legacy of exclusion must be examined to ensure that its discriminatory influence can be extracted root and branch. Cf. Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983) (studying the problem of employing legal doctrine to bar perpetuation of past racial discrimination).

A. *The Need for a Theoretical Lens to Analyze Immigration Law*

Applying various theoretical approaches to immigration law promises to offer deeper insights into its underpinnings and operation. Consider a few possibilities. Law and economics has sharpened our analysis of the immigration laws.<sup>21</sup> An interdisciplinary law and society approach has raised critically important equality issues that go to the core of this nation's vision of itself as a bellwether of freedom.<sup>22</sup> The emerging law and religion scholarship<sup>23</sup> also provides an innovative critique of immigration and welfare reform.<sup>24</sup> Feminist theory has shed much-needed light on some of the darker, often hidden impacts of our immigration laws on women.<sup>25</sup>

21. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1150 (1997); see also Jean-Pierre Benoit & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1424 (1992) (employing economic analysis to study Haitian refugees' decisions to flee the political violence of their homeland).

22. See Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1051 (1994) [hereinafter Bosniak, *Membership*]; Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996).

23. See generally, e.g., MILNER S. BALL, *THE WORD AND THE LAW* (1993) (aligning the study of law and religion); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (demonstrating how Dr. King's philosophy applies to Critical Legal Studies scholarship).

24. See Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1588–92 (1997) [hereinafter Scaperlanda, *Who is My Neighbor?*]; Michael Scaperlanda, *Immigration Justice: Beyond Liberal Egalitarian and Communitarian Perspectives*, 57 REV. SOC. ECON. 523 (1999).

25. See generally, e.g., Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991) (analyzing the legacy of the common law doctrine of coverture in modern immigration laws); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997) (arguing that Congress is largely oblivious to the effects of immigration laws on migrant women); Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47 (1995) (analyzing how migration is gendered and the legal impact of immigration laws on women); Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993) (discussing asylum claims of battered women); Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665 (1998) (analyzing legal rules applicable to battered immigrant women).

Indeed, feminist analysis of immigration and immigrant law, especially that touching on issues of race, may be one of the most intellectually vibrant areas in the field. See, e.g., Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992) (analyzing the inability of international human rights law to address the problem of female genital surgeries); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995) (studying similar issues); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996) (addressing linkages between gender and race in analysis of culture); see also Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993) (criticizing the failure of international human rights norms to protect women). Feminist immigration analysis has positively influenced the law for women immigrants during a time when the law became increasingly onerous for immigrants generally. See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1241–42 (3d Cir. 1993) (recognizing that feminism might constitute a political opinion for purposes of asylum laws and holding that, in certain circumstances, women from Iran might be eligible for asylum); *In re Kasinga*, Int. Dec. 3278, at 17 (BIA June 13, 1996) (en banc) (ruling that a woman who fled possible female genital mutilation was eligible for asylum); Janet Calvo, *The Violence Against Women Act: An Opportunity for the Justice*

One “big picture” issue still lacking a theoretical compass remains to be fully explored, however. The racial impacts of the modern immigration laws have been touched on in mainstream legal scholarship but not carefully scrutinized.<sup>26</sup> This is odd, especially because the bedrock principle of modern immigration law—the plenary power doctrine and its bar on judicial review of Congress’s substantive immigration judgments—grew out of the racist laws designed to exclude, deport, and punish Chinese immigrants.<sup>27</sup> The failure to analyze race in immigration law scholarship appears all the more anomalous in light of the frequent charge by public observers that restrictionist measures and their proponents are racist.<sup>28</sup>

*Department to Confront Domestic Violence*, 72 INTERPRETER RELEASES 485, 487 (1995) (analyzing the Violence Against Women Act (VAWA), which includes provisions remedying certain negative impacts on women); Cecelia Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163 (1999) (analyzing how VAWA provisions fail to fully protect women immigrants); Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators (May 26, 1995), reprinted in 72 INTERPRETER RELEASES 781, 782–84 (1995) (offering guidelines to ensure that women’s asylum claims are fairly adjudicated). *But see In re R-A*, Int. Dec. 3403 (BIA June 11, 1999) (denying asylum to a Guatemalan woman brutalized by her husband for over a decade).

During roughly the same time period, immigration commentary challenging the discrimination against homosexuals in the immigration laws, see, e.g., Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994); Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605 (1993), has been accompanied by improvements in the treatment of gay men and lesbian immigrants. See, e.g., *Pitcherskaia v. INS*, 118 F.3d 641, 646–47 (9th Cir. 1997); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 823 (BIA 1990).

26. For example, in an in-depth review of PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995), which calls for drastic reductions in immigration because of the racial and cultural differences of today’s immigrants, Peter Schuck admits that the charge could be made that Brimelow is racist, but he relegates the discussion to a long footnote. See Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 1968 n.25 (1996) (book review).

At the 1998 Immigration Law Teachers Workshop in Berkeley, see *supra* note \*, Alex Aleinikoff suggested that immigration law scholarship could benefit from some Critical Race Theory (CRT) insights, as well as those from a number of other fields. My discussion here is generally consistent with this suggestion.

27. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); *supra* text accompanying notes 17–20; see also GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 119 (1996) (noting that the *Chinese Exclusion Case*, similar to other Supreme Court decisions of the era, “was influenced by . . . racist assumptions . . . , but set forth more general reasoning in support of congressional power” over immigration); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 69–93 (1995) (analyzing the enforcement of restrictionist laws during this period). Interestingly, until relatively recently, legal historians ignored the significance of the rich history of anti-Chinese laws that dominated this period of U.S. history. See Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consequences: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325 (1999).

The Supreme Court consistently has refused to curtail the plenary power doctrine, see, e.g., *Miller v. Albright*, 523 U.S. 420 (1998) (gender discrimination); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (ideological exclusions), and the doctrine is the topic of a large body of immigration scholarship. See, e.g., Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

28. See, e.g., Jodi Wilgoren, *Chastised GOP Softens Stance on Immigration*, L.A. TIMES, Nov. 23, 1997, at A1 (reporting that some Republican politicians feared being labeled as racist because of their

### B. *The Unquestionable Relevance of Race*

The modern immigration debate often is racially polarized. Unlike the old Chinese exclusion laws, however, the modern immigration laws for the most part are facially race-neutral. Despite the facade of neutrality, these laws have unmistakably disparate impacts on immigrants of color from developing nations. The per-country limits (a ceiling on the number of immigrants from any one nation) and the “diversity” visa program (a formulaic program that favors immigration from “low” immigration countries, thereby favoring white immigration) have precisely such effects.<sup>29</sup> The immigration laws historically have operated to limit immigration from Africa.<sup>30</sup> Southern border enforcement, including the efforts to exclude and deport Mexican and Central American immigrants, also has disparate impacts.<sup>31</sup> The U.S. government’s interdiction of Haitian refugees before they make it to our shores and of Chinese persons after the ill-fated *Golden Venture* ran aground in New York in the early 1990s by design impede migration of certain national origin (and racial) groups.<sup>32</sup> The reinvigorated “public charge” exclusion, which excludes

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support for immigration reform); see also Susan Pinkus, *Latinos, Asians Figure Prominently in California’s New Electoral Landscape*, 10 PUB. PERSP. 116, 117 (1998) (stating that Republicans in California were trying to mend political fences with Latino/a voters after Governor Pete Wilson’s Proposition 187 campaign, which was widely viewed among Latino/as as anti-Latino/a as well as anti-immigrant). Restrictionist advocates challenge this charge as chilling the discussion about immigration reform. See, e.g., BRIMELOW, *supra* note 26, at 9 (“[A]nyone who says anything critical of immigration is going to be accused of racism.” (emphasis omitted)); RICHARD D. LAMM & GARY IMHOFF, *THE IMMIGRATION TIME BOMB* 19–22 (1985) (stating that the claims of racism stalled immigration reform in the 1980s).

29. See Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 320, 333 (1993); 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 TEMP. POL. & CIV. RTS. L. REV. 301, 308–10 (1995).

30. See Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 244–47 (1994).

31. See, e.g., Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 344 (1994) (presenting evidence that fear of the imposition of sanctions on employers for hiring undocumented workers increased discrimination against persons of Mexican ancestry); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1982) (analyzing how the United States historically has encouraged migration from Mexico while, at the same time, enhancing border enforcement); Michael A. Olivas, “Breaking the Law” on Principle: *An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 820–33 (1991) (studying circumstances of undocumented children detained by the INS in south Texas). In fiscal year 1999, almost 90% of all noncitizens removed from the United States were citizens of Mexico or Central American countries. See IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, *INS SETS NEW REMOVALS RECORD* (Nov. 12, 1999) (press release on file with the *University of Illinois Law Review*); see also Patrick J. McDonnell, *Deportations Increase Almost 50% in U.S.*, L.A. TIMES, Jan. 9, 1999, at A17 (reporting on the release of the latest INS statistical data on removals for fiscal year 1998). About nine percent of those removed were Central Americans. See *id.* Thus, 81% of those removed were from Latin America.

32. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); Ting, *supra* note 29, at 310–12; see also Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747 (1993) (criticizing U.S. policy toward Haitian refugees); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994) (same).

poor and working people because their incomes and assets are found to render them likely to become public benefit recipients, likewise discourages potential immigrants of color from developing nations, as well as citizens and immigrants of color in this country seeking to reunite families.<sup>33</sup> Similarly, the welfare “reform” legislation of 1996<sup>34</sup> adversely affects immigrants of color.<sup>35</sup>

Race unquestionably is *not* the full story behind the various restrictionist measures; class, social, and economic considerations also factor into the analysis. People, including U.S. citizens who are members of racial minority groups,<sup>36</sup> worry about competition from cheap immigrant labor. Concerns that poor immigrants will sap public resources in a myriad of ways also enter the mix.<sup>37</sup> Moreover, the political power of certain

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33. 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, 1134 n.142 (1998).

34. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

35. See Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare “Reform,”* 71 S. CAL. L. REV. 547, 556 (1998) (stating that 1996 immigration and welfare reforms affect not only undocumented and lawful immigrants but also “citizens who, because of their race or ethnicity, are perceived as being foreign”); see also Scaperlanda, *Who is My Neighbor?*, *supra* note 24, at 1612–25 (suggesting constitutional challenges to the new welfare reform). Congress later restored some benefits for certain categories of immigrants. See Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, 112 Stat. 2926 (codified as amended at 8 U.S.C. § 1611(b)(5) (Supp. IV 1998)).

Some states have endeavored to enter the immigration fray. The most prominent example is California’s Proposition 187, with its ominous anti-Mexican undertones, which would have reduced public benefits to undocumented persons. See 1994 Cal. Legis. Serv. Prop. 187 (West) (codified at scattered sections of CAL. PENAL CODE, CAL. WELF. & INST. CODE, CAL. HEALTH & SAFETY CODE, CAL. EDUC. CODE, CAL. GOV’T CODE); see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787–94 (C.D. Cal. 1995) (reprinting the text of Proposition 187 in its entirety); 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 campaign for the measure). A court enjoined implementation of the initiative. See *League of United Latin Am. Citizens*, 908 F. Supp. at 787. A century earlier, state and local governments also sought to regulate immigration and immigrants during a period of high Chinese immigration. See generally CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA* (1994) (describing the resistance of the Chinese community to local, state, and federal laws aimed at Chinese persons in the late 1800s).

36. See DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* (1995) (examining concerns with immigration from Mexico in the Mexican American community); Lawrence H. Fuchs, *The Reactions of Black Americans to Immigration*, in *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY AND POLITICS* 293 (Virginia Yans-McLaughlin ed., 1990) (documenting a history of restrictionist sentiment in the African American community); see also VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST* (1992) (contending that “mass immigration” has not been in the national interest and has had various detrimental impacts, especially on the labor market); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998) (analyzing conflict between established Mexican Americans and Mexican immigrants). For a much-publicized popular account of the conflict between African Americans and Latin American immigrants, see Jack Miles, *Blacks vs. Browns*, ATLANTIC MONTHLY, Oct. 1992, at 41.

37. See, e.g., *IMMIGRATION 2000: THE CENTURY OF THE NEW AMERICAN SWEATSHOP* (Federation for American Immigration Reform ed., 1992) (collecting essays on this point).

groups<sup>38</sup> and U.S. foreign policy<sup>39</sup> toward other nations affect immigration law and immigrant flows.

Factors that appear racially neutral, however, may mask legally impermissible racial motives. This potential legal disguise poses analytical difficulty for immigration law scholars:

Many critics of restrictionism charge that despite their more pragmatic appearance, cost arguments are really proxies for arguments about race . . . . There is not much question that the antidiscrimination norm has driven much of the racial animus in the immigration debates underground and that cost arguments [sometimes] have a racial subtext.<sup>40</sup>

This point, in my estimation, also applies to some extent to many of the arguments for restrictionist measures.

At the same time, we must acknowledge that, since 1965, people of color have comprised a majority of all immigrants. Nine of the top ten immigrant-sending countries for fiscal year 1997 were Mexico, the Philippines, China, Vietnam, India, Cuba, the Dominican Republic, El Salvador, and Jamaica, thereby making it eminently clear that a racially diverse group of immigrants is coming to the United States.<sup>41</sup> Consequently, one cannot categorically state that the U.S. immigration laws are "racist." Nonetheless, a greater percentage of immigrants would be people of color without the many screening devices that disparately impact potential immigrants from developing nations.

In the end, one cannot plausibly contend that the racial demographics of immigration have *not* contributed to the negative reaction toward immigrants.<sup>42</sup> The corpus of immigration law scholarship, however, lacks a systematic discussion of race. Not much immigration law scholarship, for example, considered the influence of race on the anti-

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38. For example, Irish Americans successfully pushed for a "diversity" visa program, see Immigration & Nationality Act § 203(c), 8 U.S.C. § 1153(c) (1994 & Supp. III 1997), which at its outset benefited Irish immigrants. See Johnson, *supra* note 33, at 1135. Cubans, in large part due to the political influence of the Cuban American community in Florida, often have received favorable treatment under the immigration laws. See, e.g., Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (providing that any Cuban paroled into the United States could seek permanent resident status within one year of arrival); Immigration and Nationality Act § 235(b)(1)(F), 8 U.S.C. § 1225(b)(1)(F) (Supp. III 1997) (providing in effect that certain Cuban citizens are exempt from the expedited removal provisions applicable to all other aliens).

39. Foreign policy considerations, for example, have influenced the treatment of asylum seekers. See generally GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986).

40. Linda Bosniak, *Immigration Crisis, "Nativism" and Legitimacy*, 1994 AM. SOC'Y INT'L L. PROC. 440, 444.

41. See U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 22 tbl. C (1999) [hereinafter INS STATISTICAL YEARBOOK].

42. See Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 108 (1996) ("[I]t seems undeniable that racism is a substantial part of today's anti-immigrant sentiment."); see also Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2115 (1997) ("Nativism . . . is not merely a shameful feature of our past. . . . Nativism afflicts our politics today, posing a clear and present danger of new anti-immigrant legislation.").

immigrant backlash of the 1990s.<sup>43</sup> Rather, doctrinal topics predominate. Reflecting the scholarship's focus, presentations and panels at the conventional immigration law conferences and programs generally have not considered race. Before the 1998 immigration law teacher workshop in Berkeley, which included a panel devoted to the topic, the two previous workshops, Albuquerque, 1994 and Boulder, 1996, did not offer much on the connection between race and the immigration laws.<sup>44</sup> Similarly, the Section on Immigration Law programs at the annual meetings of the Association of American Law Schools until recently have not generally looked at issues of race.<sup>45</sup>

### III. RACE SCHOLARS ON IMMIGRATION: THE MISSING LINK

While mainstream immigration law scholarship has proceeded on a nonracial, primarily doctrinal course, other bodies of scholarship have begun the analysis of race and immigration law. Although not fully immersed in the doctrinal details, the race scholarship on immigration, which offers different perspectives and approaches, warrants consideration.<sup>46</sup>

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43. For examples of the few who did consider the role of race in the anti-immigrant backlash, see Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 872-74 (1993); Hughes & Crane, *supra* note 32 (indicating that the United States excludes Haitian refugees in part because of their race); Legomsky, *supra* note 29 (discussing the role of ethnicity in the United States' immigration policies); Ting, *supra* note 29 (discussing the bias of U.S. immigration law against Asian immigrants).

44. Minority scholars were on panels at these conferences, however. Some touched on issues of race in their presentations, although none of the papers presented generally scrutinized the impact of race on modern immigration law and enforcement. One paper, which garnered an AALS scholarly paper award, claimed that the Supreme Court should overrule the plenary power doctrine insofar as it permits racial discrimination in the immigration laws. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1 n.1 (1998). My sense is that the workshops have not been particularly hospitable forums for many scholars, especially junior ones, to discuss the impact of race on immigration law and policy. Generally speaking, various disincentives, including but not limited to marginalization, negative evaluation of scholarship, and ostracization, exist to bringing race to the forefront and challenging the conventional wisdom. Cf. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 619 n.15 (1995) (noting these possible explanations for the failure to examine comprehensively racism in college sports).

45. Two recent exceptions were the Section on Immigration Law program, "Perspectives on Citizenship," at the AALS 1999 annual meeting, where the four minority scholars on the panel raised issues of race in their discussions of citizenship, and the AALS 2000 annual meeting, where I organized a joint program of the Minority Groups and Immigration Law Sections on Race and Immigration Law. See *supra* note \* (referencing these panels).

46. Some of the commentary in this special issue focuses on narrative methodology employed in some critical scholarship. See Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 U. ILL. L. REV. 603, 610; Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 559-83; John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639, 639-40. Narrative, however, is only one method employed by some critical theorists; indeed, some critical race theorists expressly engage Supreme Court doctrine in sophisticated ways. See, e.g., Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (analyzing Colorado's history to demonstrate how, as the Supreme Court has approved, past

### A. *LatCrit Theory*

The lack of discussion of race in current mainstream immigration law scholarship contrasts sharply with developments in civil rights and race scholarship during the 1990s. Presentations on immigration law and race can be seen regularly at conferences and symposia sponsored by minority groups. For example, the emerging LatCrit, or Critical Latino/a, Theory movement, which analyzes legal issues of particular importance to the Latino/a community,<sup>47</sup> has specifically engaged race and immigration law and the impact on the civil rights of Latino/as in the United States. At the third annual LatCrit conference in Miami in 1998, for example, a keynote speaker discussed “InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida.”<sup>48</sup> Other presentations were entitled “Immigration, Assimilation, and Language Regulation”<sup>49</sup> and “The Crisis of Citizenship.”<sup>50</sup>

The growing body of immigration-related LatCrit scholarship is directly relevant to the analysis in mainstream immigration scholarship of the membership of immigrants in U.S. society.<sup>51</sup> For example, Professor

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discrimination required affirmative action as a remedial measure); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (challenging the Supreme Court’s requirement that discriminatory intent be established to prove violation of the equal protection clause). The unifying theme to CRT generally is the importance of race to the development of law and its enforcement. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

47. See generally THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) (collecting readings on LatCrit theory). For an introduction to themes in the literature, see Francisco Valdes, *Foreword: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997), published concurrently in 10 LA RAZA L.J. 1 (1998). LatCrit theory has been the subject of a number of symposia in the last few years. See Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), published concurrently in 10 LA RAZA L.J. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

48. See Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717 (1999).

49. For the published version, see Yvonne A. Tamayo, *Literal Silencing/Silenciando la Lengua*, 53 U. MIAMI L. REV. 995 (1999).

50. This presentation was based on Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998). For the conference proceedings, see Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999).

51. See, e.g., T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (arguing that the immigration power should be decoupled from theories of membership to render it less immune from constitutional norms applied to other congressional powers); Bosniak, *Membership*, *supra* note 22, at 1053 (discussing the restrictionist vision of limiting alien rights and benefits in the United States to “properly reserve the benefits of membership for those deemed to belong within the moral boundaries of the national community”); Nora V. Demleitner, *The Fallacy of Social “Citizenship,” or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997) (arguing that the United States should reconceptualize the concept of citizenship); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (exploring membership as a means for evaluating immigration procedures); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (dividing “alienage jurisprudence” into two paradigms of membership and personhood and contending that membership should be interpreted more inclusively). For a source questioning the utility of mem-

Rachel Moran has analyzed the relationship between civil rights and immigration for the Latino/a community<sup>52</sup> and, among other things, examined whether Latino/as, with their immigrant history, are full members of U.S. society enjoying the panoply of civil rights that citizens possess.

In this vein, consider what the efforts to keep Mexican citizens out of the country reveal about society's deeper views about Mexican American citizens and immigrants in the country. Mexican Americans find themselves stigmatized by efforts to seal the borders and prevent more Mexicans from entering the country.<sup>53</sup> The practical difficulty of drawing lines between persons of the same ancestry based on immigration status<sup>54</sup> contributes to the treatment of Mexican Americans as perpetual "foreigners," a phenomenon analyzed in LatCrit literature.<sup>55</sup> Attacks on undocumented immigrants transform into attacks on undocumented Mexicans (the largest group of undocumented persons),<sup>56</sup> which translate into attacks on documented Mexican immigrants and Mexican American citizens in the United States.<sup>57</sup> It is little surprise that

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bership theory, see Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 211–34 (1998).

52. See Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1 (1995); see also Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361 (1996–97) (analyzing how the rights of Latino/as in United States are affected by international developments).

53. See Gerald M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (contending that stigma attaches to domestic minorities because of the exclusion of persons who share similar characteristics); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1947 (1996) (book review) (same); see also Hing, *supra* note 30, at 238 (arguing that limits on migration from Africa send "messages of exclusion" to African Americans).

54. Cf. T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915 (1995) (recognizing the difficult line drawing required in the allocation of legal rights between citizens and immigrants).

55. See, e.g., Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 907–11 (1997); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117–29 (1997).

56. See INS STATISTICAL YEARBOOK, *supra* note 41, at 200 tbl.N (providing statistical data estimating that Mexico was the country of origin for about 54%, or approximately 2.7 of 5 million, of the undocumented immigrants in the United States as of October 1996).

57. For example, in July 1997, in Chandler, Arizona, local police, in cooperation with the border patrol, participated in "Operation Restoration" (known as "Operation Roundup" in the Mexican American community), in which the police set up checkpoints to stop cars with occupants who "looked Mexican" to request citizenship verification. Police also stopped patrons at convenience and grocery stores allegedly frequented by undocumented persons to inquire about their immigration statuses. See Julie Amparano, *Brown Skin: No Civil Rights? July Sweep of Chandler Draws Fire*, ARIZ. REP., Aug. 27, 1997, at A1; Ruben Navarrette, Jr., *Constitutional Sights: Chandler's INS Sweep Another Black Mark in Valley's Treatment of Latinos*, ARIZ. REP., Aug. 31, 1997, at H1; Hector Tobar, *An Ugly Stain on a City's Bright and Shining Plan*, L.A. TIMES, Dec. 28, 1998, at A1. According to the Arizona Attorney General's office, Chandler police entered homes of suspected undocumented immigrants without warrants or probable cause and stopped "[n]umerous American citizens and legal residents . . . on multiple occasions . . . for no other reason than their skin color or Mexican appearance or use of the Spanish language." CIVIL RIGHTS DIV., OFFICE OF THE ATTORNEY GEN., RESULTS OF THE CHANDLER SURVEY 31 (1997). A number of lawsuits over the operation have been filed, including one that settled for \$400,000, plus attorneys' fees and other relief. See Janie Magruder, *\$400K Settles Roundup Suit in Chandler*, ARIZ. REP., Feb. 11, 1999, at A1; Bob Petric, *2nd Roundup Lawsuit Is*

border enforcement disparately impacts all persons of Mexican ancestry, not just noncitizens.<sup>58</sup>

### 1. *Latino/a Assimilation into the Mainstream*

Concerns about assimilation often are directed at Latino/a immigrants and citizens. For example, in his book *The Disuniting of America*, historian Arthur Schlesinger proclaims that “[a] cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot . . . , and to protect, promote, and perpetuate separate ethnic and racial communities.”<sup>59</sup> Peter Brimelow worries that the assimilation of Asian Americans is threatened because some feel alienated from U.S. society; he fears that “massive Hispanic immigration” may “wreck the assimilation of” Mexican Americans who may want to return to “their roots.”<sup>60</sup> In the words of one commentator, “[n]ativists say that immigrants cannot assimilate. They wrap themselves in particularist definitions of American nationhood, issue bleak predictions about the future, and seem to derive satisfaction from their talk of decline.”<sup>61</sup>

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*Filed*, ARIZ. REP., Mar. 2, 1999, at EV1. This type of unlawful action, unfortunately, is not extraordinary. *See, e.g.*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (dismissing on justiciability grounds a class action claiming that the border patrol routinely stops persons of Hispanic appearance without reasonable suspicion); *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992) (enjoining the border patrol from harassing Hispanic high school students about their immigration status). *See generally* ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987) (documenting a long history of border patrol abuse of persons of Mexican ancestry).

58. *See, e.g.*, Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996–97) (telling stories of Mexican immigrant and Mexican American lives affected by border enforcement); *see also* Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996) (studying abuse of immigrant women of color in the garment industry); Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989) (scrutinizing discrimination in employment against undocumented workers); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993–94) (analyzing the exploitation of immigrant women of color in the workplace).

59. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 15 (1992); *see, e.g.*, TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 161–65 (1995) (lamenting identity politics and divisions in U.S. society caused by, among others, Asian and Latin American immigrants emphasizing their differences); MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 129–37 (1995) (complaining that “mass immigration” from Asia and Latin America has resulted in many immigrants being eligible for affirmative action programs designed to remedy discrimination against African Americans).

60. BRIMELOW, *supra* note 26, at 271–74. With respect to Asian American assimilation, Brimelow belittled renowned scholar Ronald Takaki’s objection to the frequent assumption by whites that he immigrated to the United States by characterizing the objection as “trivial to the point of paranoia.” *Id.* at 271.

61. JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA’S ASSIMILATION ETHIC* 236 (1998). Despite this observation, Miller fears that today’s immigrants are not assimilating and advocates that steps be taken to ensure their “Americanization.” *See infra* text accompanying notes 74–75 (summarizing his proposals). Thus, although Peter Brimelow would greatly restrict immigration because of his views that immigrants are not assimilating,

The assimilationist demand has concrete impacts on Latino/a lives. Consider, for example, English-only laws and rules.<sup>62</sup> Latino/as are told that, like the European immigrants of generations past, they should learn English and become “American,” indistinguishable from the rest of society, as suggested by the “melting pot” mythology.<sup>63</sup> Past generations have been pressured to anglicize their Spanish surnames, to claim a “Spanish” ancestry, and to discard the Spanish language.<sup>64</sup> Although some Latino/as in the media spotlight ardently advocate assimilation,<sup>65</sup> physical, cultural, and other differences limit the ability of many Latino/as to gain full acceptance by the majority.<sup>66</sup> Building on philosopher Charles Taylor’s influential scholarship on multiculturalism,<sup>67</sup> Professor George Martínez contends that society cannot morally require the impossible and that the socially imposed limits on Latino/a assimilation suggest that society cannot morally demand their assimilation.<sup>68</sup>

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see BRIMELOW, *supra* note 26, at 216–19, Miller would not reduce immigration but instead would adopt policies that, in his view, would promote immigrant assimilation. See MILLER, *supra*, at 15–21.

62. See BILL PIATT, ¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES 159–60 (1990); Steve W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 146–47 (1997); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1352–54 (1997); see also Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 690–93 (1999) (offering the case for invalidating English-only regulations based on economic, moral, and political theory).

63. See Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1533 (1998) (analyzing the fallacy of imploring racial minority immigrants to assimilate like white ethnic immigrants of past generations); see also KENNETH L. KARST, *BELONGING TO AMERICA* 84 (1989) (“Anglo conformity came to dominate the idea of assimilation . . . . To call a group unassimilable implied that its people were not sufficiently similar to the old stock to adapt themselves to a society defined by the old stock’s world view, and thus that they should be excluded from the American community.”).

64. See, e.g., Kevin R. Johnson, *“Melting Pot” or “Ring of Fire”? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1281–85 (1997); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 UCLA CHICANO-LATINO L. REV. 1, 9 (1994), published concurrently in 17 HARV. WOMEN’S L.J. 185, 192–93 (1994). See generally KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN’S SEARCH FOR IDENTITY* (1999) (analyzing from an autobiographical perspective the experience of Mexican American assimilation).

65. See LINDA CHAVEZ, *OUT OF THE BARRIO* (1991); RICHARD RODRIGUEZ, *HUNGER OF MEMORY* (1981).

66. See generally JOHNSON, *supra* note 64, at 1279–90 (analyzing various limitations on Latino/a assimilation). These limits also affect Asian American assimilation. See, e.g., Neil Gotanda, *“Other Non-Whites” in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188–89 (1985); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 290–94 (1997); see also Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 28–32 (1998) (discussing the literature on Asian Americans as perpetual “foreigners” and describing personal experience with such treatment).

67. See generally, e.g., CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (1994) (discussing the relationship between recognition and identity).

68. See George A. Martínez, *Latinos, Assimilation, and the Law: A Philosophical Perspective*, 20 UCLA CHICANO-LATINO L. REV. 1 (1999).

In an attempt to institutionalize the assimilationist demand on Latin American, Asian, and other immigrants, the blue-ribbon Commission on Immigration Reform in a 1997 report embraced the need to encourage the “Americanization” of immigrants.<sup>69</sup> Although attempts to integrate immigrants (at least attempts not including forced assimilation) into the social and economic fabric of the national community may be laudable, “Americanization” is a cruelly ironic term given the shameful history of previous identically named campaigns.<sup>70</sup> The organizers of the 1920s Americanization programs shared former President Teddy Roosevelt’s frustration with “hyphenated Americans” making the United States a “poly-glot boarding house.”<sup>71</sup> This crusade— and it was a crusade—

was the most determined national effort to coerce conformity to the values of the dominant culture. Government officials joined private organizations in a zealous effort to press foreign-born Europeans to become citizens, to abandon their native languages for English, to suppress any expression of “anti-American” sympathies . . . . *The message was simple: to belong, you must conform.*<sup>72</sup>

The Commission on Immigration Reform sought to transform the word “Americanize” to mean “the cultivation of a shared commitment to American values of liberty, democracy and equal opportunity.”<sup>73</sup> One remains to wonder what this precisely means and how an Americanization program might operate in practice. In *The Unmaking of Americans*, John Miller, who finds the Americanization efforts of the 1920s to be an ideal “blueprint” for today’s policymakers,<sup>74</sup> offers his vision of a modern program. His plan would, among other things, eliminate bilingual education, allow employers to adopt English-only rules, end exemptions to the English language requirements for the elderly seeking naturalization, abolish affirmative action, stop allowing the Bureau of the Census to

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69. See U.S. COMM’N ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY* at vi (1997).

70. I will not discuss in detail here how “Americanize” is a misnomer and that, for these purposes, “Anglo Americanize” or “North Americanize” is a more accurate way of describing the Commission on Immigration Reform’s proposal.

71. U.S. SELECT COMM. ON IMMIGRATION & REFUGEE POLICY, *U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST* 189 (1981) (quoting former President Roosevelt) (footnote omitted).

72. KARST, *supra* note 63, at 84 (emphasis added). State and local governments joined in the Americanization crusade. *Cf. supra* note 35 (discussing state involvement in other nativist movements). States banned teaching foreign languages in the public schools; Oregon required elementary school children to attend public schools rather than the Catholic schools popular among immigrants; the governor of Iowa proclaimed that foreign languages were prohibited in public and private schools; and “[i]n an action eventually upheld by the Supreme Court [*State of Ohio v. Deckerbach*, 274 U.S. 392 (1927)], Cincinnati prohibited aliens from operating poolrooms, to prevent foreigners from gathering in places where they would be away from Americanizing influences.” KARST, *supra* note 63, at 85. One saving grace of this gloomy era is that the Supreme Court established some constitutional landmarks in invalidating some of these laws. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating a state law requiring children to attend public schools); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (striking down a law prohibiting teaching of any language other than English in schools).

73. U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 69, at 25–29.

74. See MILLER, *supra* note 61, at 239.

collect race and ethnic information, end the counting of noncitizens in electoral apportionment, and deny welfare to noncitizens.<sup>75</sup>

Many reject Miller's Americanization plan, including the Commission on Immigration Reform, which advocated much-needed naturalization reform, ensuring access to English language classes, and restoring public benefits to immigrants.<sup>76</sup> But when the federal government adopts talismans like Americanization, great care must be taken to restrain the zeal for enforced conformity emblematic of this nation's nativist past.<sup>77</sup> Minority communities with immigrant histories, such as Asians and Latino/as, face persistent pressure to conform without any formal governmental declaration that they must "Americanize." For that reason, Lat-Crit theorists have created an analytical framework for evaluating these sorts of mandatory assimilation programs.

## 2. *Naturalization and Citizenship*

For mainstream immigration law scholars, naturalization traditionally has been considered the last step in the integration process for immigrants and the end of the line for analysis.<sup>78</sup> This assumption, however, neglects the nation's historical failure to integrate minority citizens fully into the mainstream, a failure that LatCrit and other race theorists have scrutinized.<sup>79</sup> Few would dispute that African Americans, whose ancestors were forced to migrate to the United States, are not completely incorporated on equal terms with whites. This is true despite the fact that the Fourteenth Amendment overruled *Dred Scott v. Sandford*<sup>80</sup> and has guaranteed citizenship to African Americans for well over a century.<sup>81</sup> Similarly, although the Supreme Court embraced birthright citizenship for all persons, including racial minorities, in 1898,<sup>82</sup> this ruling did not instantly make Chinese American citizens equal members in the national community.<sup>83</sup> Puerto Ricans are U.S. citizens but clearly are not full members of U.S. society; their rates of poverty, political representation, life expectancy, and educational attainment lag far behind whites.<sup>84</sup> Con-

75. See *id.* at 240–49.

76. See U.S. COMM'N. ON IMMIGRATION REFORM, *supra* note 69, at 25–58.

77. See *supra* text accompanying notes 70–72. See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (3d ed. 1988) (analyzing the history of nativism in the United States).

78. See, e.g., *infra* note 86 (citing articles on naturalization requirements).

79. Assimilation occurs at some level, however. For example, most immigrants must learn English, pass a driver's license test, and unravel the intricacies of the federal income tax system to make a living and to naturalize. See Hing, *supra* note 43, at 877–79. By the same token, society refuses to fully integrate racial minorities into the national community.

80. 60 U.S. 393 (1856).

81. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

82. See *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

83. See *supra* text accompanying notes 17–19, 27.

84. See, e.g., Jose A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 427 (1978); Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*,

sider also that the classification of Mexican immigrants as “white” for naturalization purposes in the early 1900s occurred simultaneously with widespread segregation, discrimination, and violence against persons of Mexican ancestry in the Southwest.<sup>85</sup> More recently, the fracas over naturalization “abuse” in the 1990s, whereby the voting qualifications of many new citizens were challenged, appears to have had an anti-Latino/a core.<sup>86</sup> Like other citizen groups, such as women, lesbians and gay men, and religious minorities, minority citizens may feel as if they do not truly “belong” to the national community and, in effect, are second-class citizens.<sup>87</sup>

In sum, a growing body of LatCrit literature critically analyzes immigration and citizenship questions and related civil rights concerns, such as the assimilationist demand and how formal legal citizenship has not ensured full equality for Latino/as. The perspective differs in outlook as

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26 FLA. ST. U. L. REV. 1, 10 (1998).

85. See George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326–27 (1997) (analyzing the court decision in *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897), which held that Mexican immigrants were “white” for purposes of naturalization, as an example of how Mexican Americans were socially and politically constructed as a “race”); see also HANEY LÓPEZ, *supra* note 20, at 61–62 (discussing *Rodriguez*). See generally STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (analyzing the hidden privileges of whiteness); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (analyzing whiteness as a property interest). For historical accounts of Mexican American subordination during this period, see generally RODOLFO F. ACUÑA, *OCCUPIED AMERICA* (3d ed. 1988); TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 1–104* (1994); 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, 1836–1986*, at 101–254 (1987).

86. See Jodi Wilgoren, *California and the West: House Dismisses Challenge to Rep. Sanchez’s Election*, L.A. TIMES, Feb. 13, 1998, at A3 (reporting that Congress dismissed Robert Dornan’s challenge to the election of Loretta Sanchez to the House of Representatives based on alleged voting by Mexican and Central American immigrants who had not yet completed the naturalization process).

This is not to suggest that reforms of the naturalization process cannot be justified. Many commentators have made thoughtful suggestions for reform. See, e.g., U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 69, at xii–xvi; T. ALEXANDER ALEINIKOFF, *BETWEEN PRINCIPLES AND POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY* (1998); Kelly, *supra* note 51, at 197–209 (tracing recent developments in naturalization reforms and questioning various legal requirements for naturalization); Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 253–55 (1994) (scrutinizing various naturalization requirements through different theoretical lenses); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479 (1999) (criticizing various naturalization requirements).

87. See Renato Rosaldo, *Cultural Citizenship, Inequality, and Multiculturalism*, in *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 27 (William V. Flores & Rina Benmayor eds., 1997) (contending that culture affects the meaning of legal citizenship in society). See generally KARST, *supra* note 63 (analyzing this history). As one commentator observed:

In the United States, discourse on citizenship is too often limited to concepts of “legal” status and formal membership in the nation-state. This country’s anti-immigrant hysteria deflects our attention from a simple reality: being a citizen guarantees neither full membership in society nor equal rights. To be a full citizen one must be welcome and accepted as a full member of the society with all of its rights. Unfortunately, full citizenship rights have systematically been denied to Latinos and to other nonwhite racial groups in the United States. In fact, even when Latinos are U.S.-born citizens, they have been treated as second-class or third-class citizens.

William V. Flores, *Citizens v. Citizenry: Undocumented Immigrants and Latino Cultural Citizenship*, in *LATINO CULTURAL CITIZENSHIP*, *supra*, at 255, 255.

well as substance from the dominant immigration law scholarship and offers insights worthy of attention by mainstream immigration scholars.

### B. *A Diversity of Race Critiques*

Besides LatCrit Theory, a growing body of Asian American legal scholarship focuses on the racial impacts of immigration law.<sup>88</sup> Similar to LatCrit Theory, this body of scholarship considers the impact of immigration law and policy on Asian immigrants and, more generally, the Asian American community. This perspective is critically important, given that Asian exclusion served as the linchpin of the U.S. immigration laws until 1965.<sup>89</sup> Moreover, the increase in Asian immigration since 1965, and the legal and political responses to it, present important new opportunities for scholarly inquiry.

Immigration also has been a topic of discussion among scholars of color in diverse settings. For example, at the Critical Race Theory Conference at Yale Law School in 1997, panels focused on Critical Race Theory and international human rights and the assimilation of Mexican Americans in the Southwest.<sup>90</sup> Some critical race theorists previously had considered interethnic conflict, often attributed to immigration, among Korean and African Americans in south central Los Angeles, which grabbed national attention with the violence of May 1992.<sup>91</sup>

Critical Race Theory, however, has yet to explore carefully immigration law and policy, although efforts are now being made to remedy this omission.<sup>92</sup> It has tended to focus on civil rights in the United States as mediating relations between African Americans and whites, without full consideration of Asian Americans, Latino/as, Native Americans, and other minority groups.<sup>93</sup> Generally speaking, immigration often is not

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88. See, e.g., BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395 (1997); Chin, *supra* note 44; Chin, *supra* note 2; Gotanda, *supra* note 66; Romero, *supra* note 66; Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997); Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the “Alien”: Lessons from Social Psychology and the “Promise Enforcement” Cases*, 32 U. MICH. J.L. REFORM 1 (1998); Saito, *supra* note 66; Volpp, *supra* note 25; Frank H. Wu, *New Paradigms of Civil Rights: A Review Essay*, 66 GEO. WASH. L. REV. 698 (1997); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35 (1996).

89. See Chin, *supra* note 2.

90. See Critical Race Theory Conference at the Yale Law School 7, 14 (Nov. 13–15, 1999) (conference program, on file with the *University of Illinois Law Review*).

91. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581 (1993); Reginald Leamon Robinson, *“The Other Against Itself”: Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993).

92. See, e.g., Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997); Gil Gott, *Race Moves: Toward a Critical Race Theory of Immigration 1–7* (May 1998) (unpublished manuscript, on file with author).

93. See Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1198 (1997). For the argument that the Afri-

seen as central to the modern African American experience (except for the important issue of the Haitians<sup>94</sup>) nor as a component of African American identity, as it is to Asians and Latino/as.<sup>95</sup>

Nonetheless, Critical Race Theory insights offer great promise for enhancing our understanding of immigration law. A central Critical Race Theory concept, Professor Derrick Bell's interest-convergence theory,<sup>96</sup> may help explain certain immigration law developments. For example, business interests have frequently opposed immigration restrictions and thus, at times, taken a position that may be described as pro-immigrant to ensure a cheap labor force.<sup>97</sup> Similarly, the concept of intersectionality from Critical Race Theory teaches much about the impact of immigration law on poor, immigrant women of color.<sup>98</sup> Commentators, including

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can American experience in the United States is exceptional, see Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596–1605 (1997). See also Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7, 39–40 (1998) (contending that “viewing race in the United States only through a binary lens is an imperfect analytical tool” but helps explain racial hierarchy, intergroup tensions, and other important matters); Anthony Paul Farley, *All Flesh Shall See It Together*, 19 CHICANO-LATINO L. REV. 163, 171 (1998) (criticizing the use of the phrase “black-white paradigm” in LatCrit discourse because it is “reactionary” and “serves white power”).

94. See *supra* text accompanying note 32 (discussing Haitian interdiction and repatriation). However, the relationship between the forced migration of slaves from Africa in U.S. history and the evolution of immigration law, based in part on the premise that immigrants are “articles of commerce,” deserves greater attention. See Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996) (contending that the legal classification of slaves as “articles of commerce” was inextricably linked to the development of immigration law); see also Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 89–92 (1999) (discussing the importation of slaves as a black immigrant experience).

95. Immigration, however, is important to the experiences of some subgroups of African Americans. See Leonard M. Baynes, *Who Is Black Enough for You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 106–13 (1996) (summarizing the history of Caribbean black migration to the United States); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567 (1997) (analyzing the experiences of black Jamaican immigrant women in the United States).

96. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). The interest-convergence theory posits that civil rights improvements come only when the interests of the powerful converge with those of the subordinated. See *id.* at 522–28; see also, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (analyzing how U.S. foreign policy imperatives influenced 1950s desegregation efforts).

97. See, e.g., KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS* (1992) (analyzing the U.S. government's role through the Bracero Program in the 1950s in ensuring a labor supply for business); Schuck, *supra* note 3, at 65–66 (describing how employers opposed employer sanctions proposals ultimately included in the Immigration Reform and Control Act of 1986); see also John Hayakawa Torok, “Interest Convergence” and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943–65, in *CHINESE AMERICA: HISTORY AND PERSPECTIVES* 1995, at 1 (Marlon K. Hom et al. eds., 1995) (analyzing how a convergence of interests of majority and minority groups contributed to reforms to immigration laws in the post-World War II period).

98. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing the impact of California's Proposition 187 on poor immigrant women of color); see also Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 542–43 (1994) (utilizing the concept of intersectionality to show the marginality of certain Haitian refugee women).

influential critical race theorist Kimberlé Crenshaw, have considered how the Immigration Marriage Fraud Amendments of 1986 failed to consider the negative impacts on immigrant women of color victimized by spouse abuse.<sup>99</sup> Much more is to be said on the subject of intersectionality in the immigration law realm,<sup>100</sup> especially because women of color form such a large portion of the immigrant population.<sup>101</sup>

Besides Critical Race Theory scholarship, the Regional Teachers of Color Conferences, organized by minority scholars in various regions of the country, have also served as forums for the presentation of papers touching on immigration-related issues.<sup>102</sup> At the Western Teachers of Color Conference at Oregon in March 1998, for example, a number of papers focused on immigration.<sup>103</sup> Two of the Oregon law professors who planned the conference, Keith Aoki and Ibrahim Gassama, previously organized a symposium spanning two issues in the *Oregon Law Review* on *Citizenship and Its Discontents*.<sup>104</sup> Neil Gotanda's contribution to the symposium critically analyzed Peter Schuck and Rogers Smith's controversial book,<sup>105</sup> which called for reevaluation of the long-settled view that birthright citizenship was constitutionally compelled by the Fourteenth Amendment.<sup>106</sup> Another contribution focused on the racial impacts of the immigration laws and how those laws affect relations between minority groups and whites.<sup>107</sup> Other contributions to the symposium, including one analyzing the experiences of Jamaican immigrant women<sup>108</sup> and another studying the treatment of Asian Americans being catego-

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99. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246–51 (1991). Congress subsequently amended these laws to alleviate some of the burdens on immigrant women. See *supra* note 25 and accompanying text.

100. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) (collecting readings on intersectionality and other tenets of critical race feminism).

101. See INS STATISTICAL YEARBOOK, *supra* note 41, at 52 tbl.12 (providing statistical data showing that in fiscal year 1997, women constituted more than 54% of immigrants admitted into the United States); *supra* text accompanying note 41 (discussing the fact that many immigrants today are from developing nations populated by people of color).

102. See, e.g., Enid Trucios-Haynes, "Family Values" 1990s Style: U.S. Immigration Reform Proposals and the Abandonment of Family, 36 J. FAM. L. 241 (1997–98) (paper presented at the Third Annual Mid-Atlantic People of Color Legal Scholarship Conference in 1997).

103. See Generations, Sixth Annual Western Law Teachers of Color Conference, at Salishan Resort, Gleneden Beach, Or. (Mar. 6–8, 1998) (conference program, on file with the *University of Illinois Law Review*) (listing various panels including ones touching on immigration).

104. Symposium, *Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination*, 76 OR. L. REV. 207, 457 (1997).

105. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

106. See *id.* at 4–5; Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People": A Review Essay on Citizenship Without Consent*, 76 OR. L. REV. 233, 234 (1997).

107. See Hernandez, *supra* note 92.

108. See Lewis, *supra* note 95.

rized as perpetual “foreigners” in the United States,<sup>109</sup> considered immigration-related topics as well.

Much of the analysis of race and immigration among communities of color is interdisciplinary, influenced by scholarship in history, philosophy, psychology, sociology, ethnic studies, Asian American studies, Chicano/a studies, critical theory, and cultural studies. Some mainstream immigration scholarship has been interdisciplinary, tending toward history, philosophy, social science, and economics literature. Not much, however, focuses in detail on the ethnic studies scholarship, which by definition scrutinizes issues of race, although some of this scholarship is cited as support for the historical racism of the U.S. immigration laws.<sup>110</sup>

In conclusion, a growing body of scholarship analyzes the racial impacts and workings of immigration law. Latino/a and Asian American scholars particularly have been focused on these impacts, in no small part because of the historical and continuing impact of the laws on their communities. This important scholarship spans both immigration law and civil rights.

#### IV. THE IVORY TOWER AND RACE ON THE FRONT LINES

Despite the great interest in immigration within communities of color in the legal academy, mainstream immigration law scholarship lags in the serious analysis of race. Race scholarship, on the other hand, tends to ignore legal doctrine. To this point, little effort has been made to link the two strands of scholarship. Rather, traditional and race-immigration scholarship exist almost in two distinct vacuums—separate conferences, separate symposia, and separate discourses.<sup>111</sup> Immigration law scholars interested in race are attracted to the race conferences where analysis of the influence of race on immigration law is warmly received as opposed to serving as the subject of quiet derision, indifference, and occasional hostility at the traditional conferences. At the same time, the analysis of doctrine may seem out of place at these alternative venues.

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109. See Saito, *supra* note 66.

110. For example, the scholarship of respected ethnic studies scholar Ronald Takaki is commonly cited for the proposition that Chinese immigrants were the subject of racism in the late 1800s. See, e.g., Motomura, *supra* note 27, at 1633 n.31 (citing RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989)); Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1872 nn.254–55 (1993) (citing same).

111. I agree with John Scanlan that the division between these two groups—like all efforts to demarcate borders, see Martínez, *supra* note 85, at 345 (discussing the difficulties inherent in drawing lines between different racial groups)—constitutes an overgeneralization and that the line between mainstream and race-based immigration scholarship is murky at the margins. See Scanlan, *supra* note 46, at 653. Nevertheless, the division serves as a rough gauge for classifying the immigration law scholarship and a useful tool for analysis.

A. *The Imperial Scholar in the Ivory Tower*

One palpable result of the two separate discourses goes far to demonstrate the need for mutual engagement. Race immigration scholarship often goes ignored in the mainstream scholarship.<sup>112</sup> This is understandable at some level because it proves difficult to fit a broad race critique into doctrinal analysis, especially if one does not consider race to significantly influence immigration law and policy. Even assuming that this may be true, the answer is not to ignore the damning charges of the race scholars but to take them seriously, whether through refutation, agreement, or otherwise.<sup>113</sup> At a minimum, we should acknowledge the relevance of race, perhaps at an unconscious level,<sup>114</sup> to immigration law and policymaking. As it stands, however, majority scholars tend to marginalize, downplay, or ignore race scholarship on immigration law.

This essay will not attempt to comprehensively document the “imperial scholar” phenomenon in immigration law that Richard Delgado analyzed in the civil rights context, where well-meaning white liberal scholars almost exclusively cite to each other in analyzing the civil rights of minorities.<sup>115</sup> Evidence suggests, however, that this practice thrives in immigration law. As one observer noted, “[t]hat immigration scholarship

112. On the other hand, race scholars who write about immigration cannot realistically ignore the work of majority scholars. It is difficult indeed to not refer to this work in the field given its status and influence.

113. Peter Schuck dissects Peter Brimelow’s extreme restrictionist prescriptions in Brimelow’s *Alien Nation*, see Schuck, *supra* note 26, at 1964 (“Although it is tempting to dismiss this book as another ideological tract, . . . that would be a mistake. The book must be taken seriously . . . because it is already influencing the public debate on immigration.” (footnotes omitted)), without much analysis of the racist claims in the book, which included such statements as “[r]ace and ethnicity are destiny in American politics.” BRIMELOW, *supra* note 26, at 11 (emphasis omitted); see also Motomura, *supra* note 53 (reviewing *Alien Nation*); *supra* note 26 (mentioning how Schuck addressed in a footnote the charge that Brimelow is racist). For analysis of the anti-Latino/a bent of *Alien Nation*, see Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111 (1996). Similar problems apparently exist in other academic disciplines. See, e.g., Eric Margolis & Mary Romero, “The Department is Very Male, Very White, Very Old, and Very Conservative”: *The Functioning of the Hidden Curriculum in Graduate Sociology Departments*, 68 HARV. EDUC. REV. 1 (1998) (discussing how, among other things, discourse on race is muted in graduate sociology programs).

114. See generally Lawrence, *supra* note 46 (criticizing the discriminatory intent requirement of modern equal protection doctrine because of the unconscious nature of much racism).

115. See generally Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (describing an “inner-circle” of white civil rights scholars who cite almost exclusively to one another) [hereinafter Delgado, *The Imperial Scholar*]; Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) (arguing that mainstream scholars control the civil rights discourse and continue to marginalize new views). For a controversial critique, see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1770–77 (1989). This citation pattern can be found in other scholarly fields touching on issues affecting minorities. See Michael A. Olivas, *An Elite Priesthood of White Males Dominates the Central Areas of Civil Rights Scholarship*, CHRON. HIGHER EDUC., May 24, 1989 (analyzing citation patterns in the literature of minority education). One variable not addressed here is whether some mainstream scholars avoid engaging race because foundations and other entities providing research and related funding would be skittish about, or perhaps not interested in, supporting race-focused research.

has remained relatively insular and fairly reliant on traditional writers and methods of interpretation seems to reflect a form of imperial scholarship suggestive of a closed clique of writers almost entirely dependent on self-reference and conventional means."<sup>116</sup> For example, a well-known book advocating reconsideration of birthright citizenship cites the scholarship of only one minority law professor in over twenty-five pages of copious notes.<sup>117</sup> Some of the works of other established immigration law scholars rarely cite to minority law professors.<sup>118</sup>

Similarly, in the two leading immigration law casebooks, excerpts from minority law professors are few and far between, even though roughly forty-two percent of the immigration law teachers are minorities, and many write in the field.<sup>119</sup> In one of the casebooks, only two of sixty-nine excerpted publications reprinted in the casebook were written by minority law professors (besides three written by one Asian American coauthor), neither of whom writes primarily in the field of immigration law.<sup>120</sup> This particular casebook also is quite selective in its citation to mi-

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116. Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1228 (1997); cf. Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 423–24 (1998) (stating that “many frequently cited articles are cited[, among other reasons,] because they fall squarely within a particular academic paradigm whose proponents make a practice of citing each other”). The citation patterns also may be explained in part by elitism; that is, that the scholarship of certain scholars not at top-twenty law schools is viewed as not worthy of citation unless published in one of the elite law reviews (regardless of the merit of the article). This claim, of course, is difficult to verify empirically. Other factors might come into play.

117. See SCHUCK & SMITH, *supra* note 105, at 141–67. More recent work by one of this book’s coauthors follows a similar citation pattern. See Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1 (1997); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 368 (1999).

118. See, e.g., David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995); Neuman, *supra* note 86. Even when the subject of the publication is racial exclusion in the immigration laws, a mainstream scholar may sparingly cite minority law professors’ work without engaging it, thereby marginalizing the analysis. See, e.g., Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999) (reviewing SMITH, *supra* note 20, which analyzes the history of racial, gender, and other exclusions in U.S. citizenship law).

119. According to the AMERICAN ASSOCIATION OF LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1999–2000, at 1167–68 (1999), 49 of 117 (41.8%) of the immigration law teachers were minorities. I calculated this figure by determining which immigration law teachers also were on the list of minority law teachers. See *id.* at 1315–24. Professors erroneously listed twice were counted only once in these calculations.

At least at UC Davis, many minority students often take immigration law courses and participate in the immigration clinical program. See Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998) (describing the clinic’s work and its impact). In my immigration law and refugee law courses at UC Davis, it is not uncommon for over half the class to be comprised of minority students. This may be the case at other law schools as well.

120. See ALEINIKOFF ET AL., *supra* note 19, at xvii–xxii. A handful of other selections were by minority scholars in disciplines other than law.

This citation pattern is particularly surprising in light of the fact that one of the coauthors is an Asian American who once was an “alien,” see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990), and another has analyzed the legal significance of racism toward African Americans in U.S. social life. See T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of*

nority legal scholars. In a competing casebook, none of the twenty-seven excerpts presented were by minority law professors, although at least one selection appears to have been written by a minority author.<sup>121</sup> Unlike the competitor, however, this casebook extensively cites the work of minority scholars. For example, although this casebook cites six articles by Professor Michael A. Olivas (including one that has become a Critical Race Theory classic),<sup>122</sup> a former chair of the Association of American Law Schools Section on Immigration Law and chair of the planning committee that organized the first immigration law teachers workshop in 1994, the competitor cites none.<sup>123</sup>

Neither casebook, however, attempts to engage seriously the work or teachings of race theorists' analysis of immigration.<sup>124</sup> Admittedly, casebook preparation requires difficult judgment calls, and these two casebooks prove to be excellent for teaching in many ways. Nonetheless, important lessons could be taught to students by integrating a racial critique of immigration law and policy.

The separation of two distinct immigration discourses is readily apparent and can be seen in the treatment of the 1997 book *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States*, which includes the contributions of a number of minority legal scholars who critically analyze the U.S. immigration laws.<sup>125</sup> Although cited with regularity in race immigration literature, the book has for the most part been ignored in the ivory tower immigration scholarship. One prominent immigration scholar summarily dismisses *Immigrants Out!* as

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*Racism*, 63 U. COLO. L. REV. 325, 351–52 (1992); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).

121. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY at xix–xxi (2d ed. 1997). As Michael Olivas documents, two other immigration casebooks by minority authors incorporate minority scholarship much more thoroughly. See Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters*, 2000 U. ILL. L. REV. 613, 626.

122. See LEGOMSKY, *supra* note 121, at lxii (listing, inter alia, Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990)). Olivas's article is excerpted in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 13, at 9, as well as in READINGS IN RACE AND LAW (Alex Johnson ed., forthcoming 2000), THE LATINO/A CONDITION, *supra* note 47, at 253–58, and NOTABLE SELECTIONS IN RACE AND ETHNICITY 377–85 (A. Aguirre & D. Baker eds., 1998). Cognizant of issues of race, the Legomsky casebook also includes an excellent “simulation exercise” raising issues of race and the plenary power doctrine, namely whether a law designed to limit immigration from Latin America (which would have racial impacts) would be constitutional, see LEGOMSKY, *supra* note 121, at 94–96, and a lengthy note about the English-only movement, with recognition of its anti-Latino/a bent. See *id.* at 220–22.

123. See ALEINIKOFF ET AL., *supra* note 19, at liv.

124. This is not uncommon in legal casebooks. An empirical study found “that new legal ideas find their way into casebooks at best slowly—though more effortlessly when they are easily named, and when they resonate well with current beliefs.” Jean Stefancic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 CHI.-KENT L. REV. 755, 756 (1998) (footnote omitted). New casebooks that attempt to look at the law critically are now emerging. See, e.g., AMY H. KASTELY ET AL., CONTRACTING LAW: A SET OF COURSE MATERIALS (1996).

125. See IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997). The minority law professors who contributed to the anthology include Gilbert Paul Carrasco, Robert S. Chang, Richard Delgado, Berta Esperanza Hernández-Truyol, Kevin R. Johnson, Juan F. Perea, and Dorothy E. Roberts. See *id.*

exaggeration based on “false” premises.<sup>126</sup> As of January 25, 2000, the book had been cited seventy-two times, fifty-one times by minority scholars and seven times in student writings.<sup>127</sup>

Importantly, any divide between the traditional- and race-immigration scholars is not necessarily along liberal/open borders versus conservative/restrictionist lines.<sup>128</sup> Many, perhaps most, immigration law scholars are sympathetic to the rights of immigrants and frequently criticize immigration doctrine in a way that generally could be classified as “pro-immigrant.”<sup>129</sup> The white, liberal immigration law scholars, however, often do not fully acknowledge the racial influences or impact of the immigration laws and, consequently, do not squarely address the thrust of the race-immigration scholarship.<sup>130</sup> This may be a result of the “ivory tower” syndrome, viewing abstract legal principles without a concrete, real-life appreciation of how they actually operate in practice.<sup>131</sup>

The failure to incorporate minority voices into mainstream immigration scholarship has costs. Most importantly, it allows for the question of the influence of race on immigration law to be avoided by the most prominent and influential immigration scholars in the legal academy, which may well retard study and policy reform in the field for years to

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126. SCHUCK, *supra* note 5, at 139.

127. Search of LEXIS, Lawrev Lib., Allrev File (Jan. 25, 2000) (search for immigrants out w/10 nativism w/10 Juan w/2 Perea).

128. Cf. Delgado, *The Imperial Scholar*, *supra* note 115, at 563 (making a similar observation about the imperial scholar phenomenon in civil rights scholarship).

129. See, e.g., ALEINIKOFF ET AL., *supra* note 19; LEGOMSKY, *supra* note 121, NEUMAN, *supra* note 27.

130. Cf. Jerome McCristal Culp, Jr., *You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021 (contending that white scholars refuse to accept stories of African American scholars that do not coincide with their views of the world). This status quo is reminiscent of the events leading to the split of CRT from the Critical Legal Studies (CLS) movement in the 1980s. CLS was dominated by elite white scholars who, though progressive in many ways, did not integrate issues of race into the analysis to the extent desired by minority scholars in their ranks. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 13, at xxii–xxvii (outlining causes of the splintering of CRT from CLS); see also Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 ASIAN L.J. 19, 25–26 (1997) (“CRT, while not totally opposed to the loose agenda of CLS, was clearly critical of the elitist and imperialistic aspects of rich, white lefty male professors drawing up blueprints for revolution and ironic rabble-rousing.” (footnote omitted)). A famous expression of minority discontent with CLS can be found in Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (including contributions by Harlon L. Dalton, Richard Delgado, Mari J. Matsuda, and Patricia J. Williams). Interestingly, the split in effect involved the significance of legal doctrine, namely rights, to people of color. CLS scholars downplayed the utility of rights and argued that they reinforced the status quo, while minority CRT scholars viewed rights as of great importance in protecting their communities. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303–07 (1987) (discussing the CLS scholars’ critique of rules and rights compared to the importance minorities place on their rights as forces that hold their communities together).

131. This is not to suggest that the mainstream scholars lack experience in immigration law outside of academia. Several, in fact, have held high-level INS positions. The rarified air found at the pinnacle of a sprawling bureaucracy, like that of academia, however, remains distant from the actual day-to-day implementation of the laws and regulations on the front lines. Cf. Roscoe Pound, *Law in the Books and Law in Action*, 44 AM. L. REV. 12 (1910) (analyzing how “law in the books” differs from “law in action”).

come. In addition, majority scholars may operate from “factual ignorance or naiveté” and “a failure of empathy, an inability to share the values, desires, and perspectives of the population whose rights are under consideration.”<sup>132</sup> Minorities from communities deeply affected by immigration, such as Latino/as and Asian Americans, generally can be expected to have different perspectives on and concrete knowledge about how immigration law and policy work in the “real” world, as opposed to an abstract, theoretical perspective. Scholars distant from those realities may not fully appreciate the facts or fail to empathize with immigrants.<sup>133</sup> Consider that the leading—and unquestionably liberal—article exhaustively documenting the legislative developments culminating in the Refugee Act of 1980 virtually ignores the desire among some members of Congress, and their constituents, to limit Vietnamese refugee admissions that had increased in the 1970s with the fall of Saigon,<sup>134</sup> while a leading Asian American scholar demonstrated how the new law was motivated in significant part by anti-Vietnamese sentiment.<sup>135</sup>

Evidence shows factual inaccuracies and lack of empathy in ivory tower immigration law scholarship. For example, although they recognize the need to control undocumented immigration, traditional immigration scholars often assume that enforcement measures will be applied in a race-neutral fashion despite evidence suggesting the contrary.<sup>136</sup> Much “ivory tower” work is abstract, distant from the impact on the lives of people affected by the operation of the law. Juiceless analysis of “the law,” however, fails to capture the law’s true effect on people’s lives. Being questioned about your citizenship when you are a fifth-generation U.S. citizen or having a relative, friend, or acquaintance deal with the INS in removal proceedings “teaches” volumes about how the U.S. immigration laws work in practice.<sup>137</sup> Although obviously not the whole

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132. Delgado, *The Imperial Scholar*, *supra* note 115, at 568; *see also* Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1367–68 (1998) (analyzing the goal of creating empathy for racial minorities in the context of racially charged trials). This is related to the issue of “voice” in legal scholarship. *See, e.g.*, Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

133. *Cf.* Robert A. Williams, Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996) (contending that traditional Indian law scholarship on Indian rights and federalism is flawed because it fails to tell the Indian side of the story). A wide variety of other factors affect whether a scholar can appreciate the realities of immigration law, including geography, particularly proximity to the border; where the person has lived or worked; and experience in the field.

134. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30–42 (1981).

135. *See* HING, *supra* note 88, at 123–28.

136. *See, e.g., supra* note 57 (discussing Operation Roundup in Arizona and other similar incidents). The concrete harms caused by the failure to address the race critique in immigration law show that not only “fragile egos” are at stake. *See* Olivas, *supra* note 121.

137. Consider a personal experience. My wife’s late grandmother, Velia Salazar, a U.S. citizen and lifetime resident of Phoenix, Arizona, worried about persons of Mexican ancestry who were stopped and interrogated about their citizenship in the nearby upscale Phoenix suburb of Chandler. *See supra* note 57 (describing this problematic attempt at immigration enforcement). She evidently

story, these practical impacts certainly are part of it, and they cannot help but influence a scholar's perspective on immigration law and enforcement.

*B. The Race Scholars: Off on Their Own*

Many minority scholars interested in immigration exhibit relatively little interest in the Section on Immigration Law program at the Association of American Law Schools annual meeting or the biannual conference of immigration law teachers—the two regularly scheduled events showcasing immigration law scholarship. It is unclear why this is so, although some might conclude that these conventional sites are not comfortable with, conducive to, or supportive of racial critiques of immigration law.<sup>138</sup> Interestingly, these events laudably have striven to include practitioners and clinicians, as well as other academics. Despite the fact that more than forty percent of the immigration law teachers are persons of color, many are not interested in the traditional immigration venues.<sup>139</sup> They may feel as if we are failing to engage the central issue of modern immigration law and policy. How, for example, can you talk about abolishing birthright citizenship in the abstract without discussing the impact on persons of Mexican ancestry in the United States?<sup>140</sup> Similarly, how could one analyze the greatly enhanced border enforcement directed at Mexican immigrants,<sup>141</sup> the public charge exclusion,<sup>142</sup> or the interdiction of Haitian and Chinese immigrants<sup>143</sup> without considering the racial impacts? I have not yet been able to formulate persuasive answers to these and similar questions.

Because of the lack of published scholarship in the area, it is difficult to say how the ivory tower scholars of immigration law might respond. One possibility is that they believe that race is not a significant

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feared that this easily could happen to her and her family. This fear understandably undermines one's sense of belonging to the greater community. *See supra* text accompanying notes 59–87. This is so even if Velia Salazar and her family could not have lawfully been deported from the United States.

138. There also are some unsettling stories about immigration scholars who have written about race, whose scholarship has been challenged by elite scholars as not tenure-worthy in the peer review process required by many law schools. Such stories tend to chill untenured professors from aggressively challenging the racial status quo.

139. *See supra* note 119 and accompanying text.

140. *See* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 927–28 (1997) (claiming that birthright citizenship encourages undocumented migration and citing studies considering the migration of “Hispanic” women); *see also* Dorothy E. Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics, and Immigration*, in IMMIGRANTS OUT!, *supra* note 125, at 205 (contending that efforts to restrict birthright citizenship will affect whether immigrant women of color may give birth to citizens). Similarly, the deportation of immigrants has an impact on citizen children, *see* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988), which disparately impacts Mexican American citizens in light of the large Mexican immigrant population in this country.

141. *See supra* text accompanying notes 53–58.

142. *See supra* text accompanying note 33.

143. *See supra* text accompanying note 32.

factor in the formulation of modern immigration law and policymaking and that the race scholarship overstates the influence of race.<sup>144</sup> Another is that the doctrine is neutral, and the race scholars have failed to make the case that race factors into the analysis. One, however, might hope that those who hold these views would explain and defend them rather than wholly ignore the racial critique of immigration law and policy.

The probing questions about immigration law posed by the race scholars reveal a schism between race and conventional scholarship. Ivory tower immigration law scholarship draws an important legal boundary between citizens and immigrants. Because of the importance of citizenship, much of the focus of immigration law is on such topics as the admission and removal of noncitizens, as well as attaining citizenship. In race scholarship, a clear boundary between immigrants and citizens does not exist; rather, the focus of the literature tends to be on the civil rights of all people of color.<sup>145</sup> The future challenge for scholarship in the field will be to expand its scope to include analysis of the effects that immigration law and its enforcement have on minority citizens. Immigration and civil rights law intersect at this juncture in fascinating ways deserving serious scholarly attention.

None of this should be read to suggest that the race immigration scholars have all the answers. Far from it. Although ivory tower immigration law scholarship fails meaningfully to engage race, some minority critics have not engaged the complexities of immigration law. Put differently, race theorists distrustful of “the law” generally have not spent much time trying to unravel immigration doctrine. Not surprisingly, mainstream immigration scholars focused on doctrine and critics, disdainful of it, may feel as if they have little in common.

A curious problem for critical race theorists scrutinizing immigration law revolves around their distrust of the legal system.<sup>146</sup> Much critical scholarship questions the efficacy of law in bringing about social change, though an emerging strand of analysis moves beyond this in an attempt to blaze a new path.<sup>147</sup> Critical analysis of legal doctrine can show how the law obscures racial motives and impacts.<sup>148</sup> It is important to avoid simple deconstruction but to engage doctrine to reveal that immigration

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144. There are some suggestions that this is the tack they would take. See Bosniak, *supra* note 40, at 444 (“[W]e should not reduce all arguments for immigration restriction to covert expressions of racial or ethnic hostility.”); Schuck, *supra* note 26, at 1966 (suggesting that racism “plays a less significant role than it did before 1965” in influencing immigration laws).

145. See *supra* text accompanying notes 46–110.

146. See Olivas, *supra* note 31, at 854–57 (analyzing this point).

147. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991); Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities*, 2 *HARV. LATINO L. REV.* 375 (1997); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 *MICH. L. REV.* 821 (1997).

148. See *supra* note 46 and accompanying text (citing examples).

law, although wrapped in facial neutrality, may have concrete racial impacts, intended or not.

Critical inquiry could add much to the study of how doctrine obscures racial impacts and maintains racial subordination.<sup>149</sup> For example, a critical race theorist analyzed the cases interpreting the whiteness requirement for naturalization in place from 1790–1952 and how the requirement fit into a larger picture of the social construction of race.<sup>150</sup> This would seem to be clearly within the purview of traditional immigration scholarship. The fact that this important work was not done until the 1990s exemplifies how immigration law scholarship has failed to engage the role of race in the development of the law.

### C. *The Need for Mutual Engagement*

Race and mainstream scholars need to engage in meaningful dialogue allowing for the exchange of ideas. Race scholars benefit much by taking their insights into traditional venues and attempting to inject the question of race into mainstream discourse, which receives the most attention from scholars in legal and other disciplines.<sup>151</sup> They also avoid having race, as well as their scholarship on the subject, marginalized. This is important so that race and race scholars are not relegated to the periphery of legal scholarship and academia. The discussion envisioned here by necessity must be a two-way conversation. Race scholars must address ivory tower scholars and consider doctrine, not as an unattractive nuisance, but as a source for insight into the racial dynamics of how immigration law works in the real world. By engaging doctrine, race scholars may reveal the insidiousness of modern discrimination hidden by the

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149. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (contending that Supreme Court doctrine on antidiscrimination law legitimizes and reinforces racial discrimination); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994) (examining Mexican American civil rights litigation to show how judicial discretion is exercised against the Mexican American community).

150. See HANEY LÓPEZ, *supra* note 20. Historically, other immigrant groups, today considered “white,” were treated as nonwhite at the time that they constituted a large portion of the immigrant population of an era. John Scanlan offers the example of how U.S. society constructed the Irish as another “race” of people in the wake of migration from Ireland from 1607–1860. See Scanlan, *supra* note 46; John A. Scanlan, *Historical Development of U.S. Immigration Law in the Colonial and Antebellum Periods* (1998) (unpublished draft, on file with the *University of Illinois Law Review*); see also Ronald Takaki, *The Tempest in the Wilderness: The Racialization of Savagery*, in *DISCOVERING AMERICA: ESSAYS ON THE SEARCH FOR AN IDENTITY* 58 (David Thelen & Frederick E. Hoxie eds., 1994). Because society today generally views the Irish as white, see generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995) (describing how the Irish secured their place in the “white Republic”), their previous classification as nonwhite lends support to the view that race is a social construction. See, e.g., HANEY LÓPEZ, *supra* note 20, at 120; OMI & WINANT, *supra* note 10.

151. Efforts are being made in this regard in other areas. As a member of the planning committee for the 1999 Law & Society Conference, Frank Valdes, for example, encouraged minorities to submit proposals for panels for this event. Similarly, Berta Hernandez, as co-chair of the American Society of International Law 1999 annual meeting, integrated race into the fabric of the conference.

immigration laws' facade of neutrality. Although the analysis cannot end at the consideration of doctrine, it is part of the big picture.

Mainstreaming may improve policymaking as well. To the extent that mainstream immigration law scholarship helps shape immigration law and policy, the incorporation of race is more likely to affect policy-making. It is crucial to build a race conscious approach to policymaking that considers the racial impacts of facially neutral policy.

In all likelihood, mainstreaming will not prove to be easy. Race scholars challenging the status quo will be challenged, perhaps harshly.<sup>152</sup> The intellectual rough-and-tumble will not always be comfortable or comforting. At the same time, adding the race critique of immigration law to mainstream venues increases the chances that it will be placed on the agenda of important questions to be addressed in the field.

My modest contribution to the discourse has been to attempt in my immigration scholarship to straddle the two discourses, with a mix of doctrine and analysis of the political, social, and economic context underlying the doctrinal developments.<sup>153</sup> Because of the linkages between immigration and the Mexican American experience in the United States, it is artificial to compartmentalize "immigration" and "race" issues. Immigration law doctrine, though facially neutral, disparately affects persons of Mexican and Asian ancestry in practice. Although generally unexplored in ivory tower immigration law scholarship, this is not a novel observation but one made long ago by Chicano/a<sup>154</sup> and Asian American Studies<sup>155</sup> scholars, who often condemn much more forcefully the immigration status quo than the race scholars do.

Ultimately, race must be considered in immigration law and policy analysis. Such consideration will allow for a better understanding of the social dynamics at work and the adoption of laws and policies suited to operating without invidious racial impacts disguised in facial neutrality.<sup>156</sup> Scholars who forego the opportunity to integrate race into the analysis will miss a critical opportunity as it becomes increasingly apparent over

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152. See Olivas, *supra* note 121. For example, CRT has been the subject of sustained criticism. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 52–71 (1997) (criticizing CRT critique of merit as, among other things, anti-Semitic and anti-Asian); Matthew W. Finkin, *Quatsch!*, 83 MINN. L. REV. 1681 (1999) (referring to critical race scholarship, including that of a minority faculty colleague, as "rubbish" and fascist); Kennedy, *supra* note 115 (challenging various positions of critical race theorists); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (lambasting narrative scholarship).

153. See, e.g., Johnson, *supra* note 98 (analyzing negative impacts of Proposition 187 on poor, undocumented women of color).

154. See, e.g., ACUÑA, *supra* note 85, at 261–78; MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST 167–70 (1979); MIRANDÉ, *supra* note 57, at 100–45.

155. See, e.g., LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 1–36 (1996); TAKAKI, *supra* note 110.

156. Cf. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (contending that it would enhance the rationality of the decision-making process to allow attorneys to expressly challenge fact finders to confront their biases against African Americans and other groups).

the next century that race is central to the social debate over immigration law and policy.<sup>157</sup>

## V. CONCLUSION

This article outlines the current state of the analysis of race in immigration law scholarship. Ultimately, the study of the racial impacts of the immigration laws will not go ignored. The question is simply one of timing. I contend that this important analysis should not be marginalized or left to this generation of race scholars to debate among themselves. The day will come when the consensus will be that race is central, not peripheral, to a full understanding of modern immigration and nationality law and policy. As scholars, we should strive to see that day come sooner rather than later. We all must engage in this central question if we are seriously interested in either immigration or race relations in the United States.

This article also challenges scholars interested in immigration to engage seriously the influence of race on the laws and their enforcement. To do so, we must begin by bringing the separate discourses on immigration law together and combine the explanatory power of the two modes of analysis. This will require some movement by all involved.

On the one hand, race scholars should work to intervene in the conventional immigration venues and “mainstream” racial critiques of immigration law. They also should not ignore the intricacies of the law and the opportunity to reveal how facially neutral doctrine in fact discriminates against racial minorities and may hide invidious motives. Doctrine must be engaged to reveal the hidden vestiges of racism.

On the other hand, mainstream immigration scholars should attempt to address the serious questions posed by the minority immigration scholarship. Integration of race promises to offer a fuller picture of the prerequisites for full membership in the United States, one of the areas of mainstream immigration scholarship.<sup>158</sup> Majority scholars should keep in mind that immigrants today more likely than not are people of color, which greatly complicates matters.

Put simply, not all immigrants are created equal in the United States. We must build into the body of immigration law scholarship the influence of race, as well as that of class, gender, and sexual orientation. These issues are too important for immigration scholars and U.S. society to ignore any longer. Ironically, immigration law scholars have spent more time analyzing the work of Peter Brimelow, an ardent restrictionist

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157. Cf. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995) (suggesting that scholars recognize jury nullification by African American juries and its proper role, rather than ignore its existence and simply claim that it is inappropriate, because the phenomenon reveals deep deficiencies with the criminal justice system's treatment of African Americans).

158. See *supra* note 51 (citing authorities on membership theory).

ideologue contending that the immigration laws must be reclaimed for white America,<sup>159</sup> than the work of race scholars challenging the discrimination embedded in modern immigration law.

Some mainstream and race scholars undoubtedly will be critical of the arguments presented in this article. Critics may claim that I am fanning the flames of race hysteria or myopically viewing race as the be all and end all of immigration law. I only contend, however, that analyzing how race influences immigration law and policy has added much to our understanding and that we collectively have much to gain, and everything to lose, including civil strife and violence, by not incorporating race into mainstream immigration discourse. All I ask is that readers evaluate for themselves whether the scholarship of those who have integrated race as *one*, although not the only, important element of analysis into the mix has contributed to our collective understanding.

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159. See *supra* note 26.

