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## Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law

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# PLAYING THE TRUMP CARD: THE ENDURING LEGACY OF RACISM IN IMMIGRATION LAW

David B. Oppenheimer, Swati Prakash, and Rachel Burns\*

Introduction .....	1
I. European Immigration and American Immigration Policy .....	6
A. Early American Demographics and Immigration Policy .....	6
B. Irish Immigration .....	7
C. Eastern European Jewish Immigration .....	11
D. Italian Immigration .....	14
E. Early Twentieth-Century Changes to Immigration Policy .....	17
II. Chinese and Japanese Immigration and American Immigration Policy .....	18
A. Chinese Immigration .....	18
B. Japanese Immigration .....	25
III. Black Americans .....	30
IV. Mexican Americans .....	35
V. The Future of Mexican Americans in the United States .....	40
A. Racialization of Immigrants: Then and Now .....	41
B. Geography as Context .....	42
C. Economic Integration: The Role of Labor Organizing .....	43
Conclusion .....	45

## INTRODUCTION

As this Article goes to press in spring of 2016, Donald Trump is the leading candidate for the Republican nomination for President of the United States. He has built his campaign on promises to build a wall on the United States-Mexico border to prevent illegal immigration; to deport all of the estimated twelve million Mexican immigrants who are not legally authorized to live in the United States (“U.S.”); to prohibit Syrian refugees from entering the U.S.; and to exclude all Muslims who are not U.S. citizens from entering the country. While many complain that these views are in violation of our history of welcoming immigrants and visitors of all races, creeds, and colors, a historical examination reveals that from its beginnings, racism and xenophobia have been a driving force behind immigration law in the United

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States.

To understand immigration law in the United States, one must examine the history of racial exclusion and inequality. Immigration law and racial, ethnic, and religious discrimination in the United States can be seen as opposite sides of a single coin. From the formation of the Republic, our immigration laws have reflected racist policies toward various and changing racial, ethnic, and religious minority groups. In 1790, the first Congress enacted our first naturalization law, providing citizenship to any “free white person . . . of good moral character.”<sup>1</sup> Ever since, our immigration laws have tried, with varying success, to exclude the disfavored groups of each era, usually defining those groups in racial terms. Yet for all these efforts, the “unwanted”<sup>2</sup> continued to arrive. For the most part, those who emigrated on their own (relatively) free will in time largely assimilated (in the case of Europeans), or at least integrated (in the case of the still-racialized Asians and to some extent Latin Americans) into American society, transforming it as they did. The notable exceptions for the assimilation or integration of immigrant groups are the descendants of Africans, forcibly brought to the New World and held in bondage for more than three centuries, who continue to face significant structural barriers to integration.

Today, anti-immigrant hysteria is as great as it has ever been in American history. It is directed largely at immigrants from Mexico and, increasingly, at Muslims or those associated (correctly or not) with Islam, especially immigrants from the Middle East and South Asia. One question that emerges is whether Mexican immigrants will follow the same patterns of assimilation or integration as past groups of immigrants, or whether they will join Black Americans<sup>3</sup> as long-standing second-class citizens. In addition to the mixed judicial disposition of state legislation that targets undocumented immigrants, an array of social, economic, and political factors will continue to influence whether Mexican immigrants are ultimately fully embraced as the latest members to join America’s racially heterogeneous identity.

In addressing this question, we confront our own history as the descendants of immigrants. We write this as Americans of European and South Asian descent, respectively. Two of us are descendants of one of the great migrations in recorded

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1 Naturalization Act of 1790, 1 Stat. 103, 103–04 (1790).

2. Unwanted by law, that is. In most cases, immigrants subjected to exploitation were very much wanted by their potential exploiters, principally employers who wanted demand for jobs to outstrip supply. Immigration had a sufficient link to labor markets that the federal immigration service became part of the Department of Commerce and Labor in 1903, which became the Department of Labor in 1913. Immigration services moved to the Justice Department in 1940 and then to the Department of Homeland Security in 2003.

3. The terms “Black,” “Black American,” “minority,” “racial minority,” and “ethnic minority” are used differently in different countries. This Article describes Americans of African descent who either self-identify or are identified as “Black” or “African American,” or in an earlier era, as “Negro.” We understand that no term perfectly describes the “otherness” of those Americans of African descent who are identified as a minority “race”—itself a social construct—or group. In this work, we chose to use “Black” as an adjective, and “Black American” as a noun, over the frequently used term “African American.” Most of the social science research we rely on herein uses the term “Black,” and distinguishes the treatment of Black Americans from Whites, or White Americans, and from other racial and ethnic minority groups—including Latino/a-Hispanic Americans, Arab Americans, Asian Americans, Native Americans and, increasingly, Muslims—based on appearance, rather than ancestral origin. But we urge our readers to remind themselves that, as James Baldwin wrote, Whites “decid[ed] that they were white.” James Baldwin, *On Being “White” . . . and Other Lies*, in *BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE* 177, 179 (David R. Roediger ed., 1998). Or as Ta-Nehisi Coates puts it, Whites are “people who believe they are white.” TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 42 (2015).

history, the European diaspora. Our own family stories embody a few of the migration patterns we explore in this essay. The earliest American family members for one of us immigrated from near Frankfurt, Germany, in the early nineteenth century, in search of relief from religious persecution and access to greater economic opportunity. Other family members followed from villages near Vienna, Prague, and Riga in the late nineteenth and early twentieth centuries.

The earliest family members for another of us crossed the Atlantic during the mid-seventeenth century as part of the early English settlement of North America. Family members continued to trickle in from England throughout the late seventeenth and eighteenth centuries, initially settling on the East Coast and then moving west. Other family members arrived during the early to mid-nineteenth century in a wave from Germany, Norway, and Denmark as part of the European Diaspora.

Another one of us is a second-generation South Asian–American whose parents immigrated to the United States after the Immigration Act of 1965 relaxed quotas for individuals from many Asian nations. Although we do not explore the migration of South Asians per se in this essay, their immigration history has at least some commonalities with the United States’ treatment of other Asian immigrants.

We all made our way to California, from which we write this Article.

Who are “we the people of the United States?” In our nation of just over three hundred million people, there are approximately two hundred million individuals classified as “White non-Hispanic,” most of whom are of European ancestry.<sup>4</sup> Another 16 percent (approximately fifty million) are classified as “Hispanic/Latino” ethnicity; that is, having descended from Spain or (in most cases) former Spanish colonies, mostly in Central and South America. Because race and ethnicity are classified as separate categories, in most cases, people of Hispanic ethnicity are at least partly descended from European Whites as well, and half self-identify to the Census Bureau as both “Hispanic” and “White.” Some 13 percent are “Black” or “African American,” largely the descendants of slaves. Another 5 percent self-describe as “Asian,” while less than 1 percent descend from American Indians, the continent’s sole human inhabitants prior to the European invasion and genocide that began in the late fifteenth century.

Why did our ancestors come here? Even when immigrants are needed (usually for their labor), they are paradoxically unwelcome. In every generation of American immigration, the predominant immigrant group has been the victim of discrimination and oppression. In this Article we describe the experience of several migrations to and within the United States, focusing on the immigration of seven groups—Irish Catholics, Italian Catholics, Eastern European Jews, Chinese, and Japanese—to the U.S. during the early to mid-nineteenth through early twentieth centuries. We also review the migration of African Americans from the rural Southern U.S. to the industrial Northeastern, Midwestern, and Western United States in the early to mid-twentieth century, as well as the immigration of Mexicans to the U.S. in the late twentieth and early twenty-first centuries. While these groups by no

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4. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 (2012). Our population includes approximately forty-three million of German descent, thirty-one million Irish, twenty-five million English, sixteen million Italian, nine million Polish, five million Scottish, eight million French, five million Norwegian, five million Dutch, four million Swedish, three million Russian, two million each Welsh, Hungarian, and Czech, and one million each of Danish, Greek, and Austrian descent. See U.S. CENSUS BUREAU, 2004 INTERIM NATIONAL POPULATION PROJECTIONS (2004).

means represent an exhaustive list of immigrants to the U.S., they represent both a historical and contemporary cross section of the largest groups to enter the U.S. since the seventeenth century. We also leave for another day an in-depth discussion about the experience of Native Americans, whose presence within the borders of what was to become the United States did not exempt them from experiencing genocidal violence and continued economic and cultural oppression.

The U.S. desperately needed each of these immigrant groups for economic reasons, and each group experienced sustained exploitation, discrimination, and diminished legal status in its new home. However, members of several of these groups eventually experienced and/or brought about some degree of integration into the social, political, and economic mainstream of the United States, either through evolving definitions of “White” (in the case of Irish Catholics, Italian Catholics, and Eastern European Jews), or through relaxing the significance of Whiteness as a critical factor for broader acceptance (in the case of Chinese and Japanese individuals).

Throughout this Article we distinguish between assimilation and integration, borrowing from Professor John Berry’s theoretical framework. Berry discusses two key dimensions influencing the relationship between immigrant groups and other minority and majority groups in culturally plural societies: (1) the orientation of minority groups and their members towards one’s own group—for example, the extent to which minorities exhibit “a relative preference for maintaining one’s heritage culture and identity”; and (2) the orientation of those groups and individuals towards other groups, or the “relative preference for having contact with and participating in the larger society along with other ethnocultural groups.”<sup>5</sup> Assimilation results “[f]rom the point of view of non-dominant groups . . . when individuals do not wish to maintain their cultural identity and seek daily interaction with other cultures.”<sup>6</sup> In contrast, integration results “[w]hen there is an interest in both maintaining one’s heritage culture while in daily interactions with other groups.”<sup>7</sup> To the extent that we depart from Professor Berry’s work, it is in our observation that the majority group (here long-settled European Americans) substantially control whether a minority group remains segregated, is integrated, or is assimilated. Thus, our assertion that European immigrants have been assimilated, while Asian immigrants have begun to integrate, and that Black Americans and Mexican Americans remain substantially segregated and subordinated, reflects the racism of White European Americans toward those categorized as the “other.”

Recognizing the complexity of the social construction of “otherness,” in this Article we explore three aspects of assimilation or integration by immigrant and migrant groups into American society: social/cultural, economic, and political. The relative progress of each of the groups we examine has not always been even with respect to all three of these dimensions. Indeed, as we explore in this essay, a current conundrum of race relations is that although we have a Black president, and here in California recently had, or still have, a Black mayor in Sacramento, Asian American and Black mayors in San Francisco and Oakland, and a Mexican American mayor in Los Angeles, we continue to see substantial evidence of racial discrimination against

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5. John W. Berry, *Acculturation: Living Successfully in Two Cultures*, 29 INT’L J. INTERCULTURAL RELATIONS 697, 704 (2005).

6. *Id.* at 705.

7. *Id.*

African Americans, Mexican Americans, and Asian Americans based on their racialized otherness.<sup>8</sup>

For the most part, Irish Catholics, Italian Catholics, and Eastern European Jews have assimilated fully into American society with respect to all three of these aspects. Although, in terms of social and cultural factors, the persistence of ethnic self-identification remains a distinctive feature for some descendants of Eastern and Southern European immigrants. While occasional experiences of ethnic stereotyping and even hate crimes remain for people of Irish, Italian, or Eastern European Jewish descent, for the most part what remains of a separate ethnic identity for these groups is by and large self-generated, as reflected in ethnic pride celebrations or religious and cultural institutions.<sup>9</sup> Japanese Americans and Chinese Americans, in contrast, remain to some degree a racialized “other” in many respects, primarily socially and culturally. As we discuss in Part II, *infra*, this is not so much a self-generated phenomenon as it is an imposition by the White European majority. Nonetheless, people of Chinese and Japanese descent are also well along in the process of integration, as reflected in terms of economic and increasingly political success. Borrowing from Professor Ian Haney López’s concept that an “honorary white” status exists “for certain persons and groups whose minority identity seems unequivocal under current racial schemas, but who are nevertheless extended a functional presumption of whiteness,”<sup>10</sup> we describe the diminished significance that being non-White now has for many members of East Asian groups as “constructive Whiteness.”

Black Americans, by contrast, have never been fully accepted as a group into the core of American opportunity and society, and they continue to face significant social, economic, political, and legal obstacles to full integration. This raises the question of whether Mexican immigrants, currently comprising the largest proportion of arriving immigrants and facing considerable exploitation and discrimination, will end up more like preceding waves of European and Asian immigrants and eventually assimilate or integrate into American society, or if they will share the status of Black Americans as a permanent underclass. Although, as we explore in this essay, the migration of Mexicans within and to the United States is more than 150 years old, the reaction to them by American citizens has oscillated between desiring the presence of Mexicans as a valuable economic asset and vilifying their presence as unwanted interlopers. While the current prevailing sentiment tilts far toward vilification, one possibility for the long term is that, as with preceding groups of immigrants, the current animosity toward Mexican Americans, both enabled by and expressed as their racialization as non-White, will yield to their absorption into either a White or “constructively White” status. Another possibility, however, is that the racialization as non-White of Mexican Americans will take on a more permanent nature, confronting this latest group of immigrants with a bleak future unless the underlying racism of American society is fundamentally transformed.

This Article is organized into five parts. Part I provides an overview of

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8. See, e.g., MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (Xavier de Souza Briggs ed., 2005).

9. See generally NATHAN GLAZER & DANIEL P. MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (2d ed. 1970).

10. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 152 (2006).

early U.S. immigration policy and describes the assimilation experiences of three European immigrant groups: Irish Catholics, Eastern European Jews, and Italians. Part II explores the racism faced by Chinese and Japanese immigrants to America's West Coast and their struggle for integration. Part III discusses the involuntary immigration of Africans to the U.S. and their continued struggle for social and economic integration. Part IV provides an overview of Mexican immigration to the U.S. Finally, Part V presents and analyzes various factors likely to affect future integration and assimilation of Mexican immigrants to the U.S.

## I. EUROPEAN IMMIGRATION AND AMERICAN IMMIGRATION POLICY

### A. *Early American Demographics and Immigration Policy*

The earliest roots of American political treatment of immigrants can be found in pre-Revolutionary English and colonial policies. Emigrants from England and their children in the colonies were considered subjects of the English king, and therefore citizens, as distinguished from outsider "aliens."<sup>11</sup> As early as 1620, some colonies recognized a common law intermediate category of "denizen," a person "in a kind of middle state, between an alien and a natural-born subject."<sup>12</sup> Both the English and colonial governments selectively naturalized some immigrants to the colonies, displaying strong biases against Catholics, the poor, convicts, and individuals they feared would not exhibit loyalty to the colonies. For example, a 1643 Virginia law ordered Catholic priests be deported within five days of their arrival, while in 1717, Pennsylvania, concerned about the "great numbers of Foreigners from Germany," ordered all immigrants to take loyalty oaths.<sup>13</sup> The 1740 Plantation Act provided for the naturalization of Protestants who resided in American colonies and met certain restrictions.<sup>14</sup>

In the first United States Census, taken in 1790—a year after the first Congress met—the total population of what was then the United States (thirteen States devolved from British colonies, plus the districts of Kentucky, Maine, Vermont, and the Southwest Territory (Tennessee)) was slightly less than four million.<sup>15</sup> Approximately seven hundred thousand were slaves from Africa or of African descent.<sup>16</sup> Among the other 3.3 million, most were members of various Protestant denominations and were property owners descended from, or immigrants from, England or Scotland, or indentured servants from Ireland or Germany. We have found no reliable estimate of the number of American Indians living in the U.S. at the time, and the number present before the European invasion is heavily contested. The French community in Louisiana, the Spanish communities of the Southwest, and the Russian outposts of the Northwest were not yet part of the U.S.

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11. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 24–25 (2007).

12. *Id.* at 24.

13. *Id.* at 30.

14. *Id.* at 25.

15. *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1793).

16. *Id.*

and thus were not counted by the U.S. Census.<sup>17</sup>

In the early years of the Republic, immigration policy could be characterized more as an open door than as a barbed wire fence. Any healthy, self-sufficient person could immigrate, although immigrants in those early decades were almost entirely from Europe. Even then, immigration law was racially marked. Most African immigrants, as slaves, were considered property and thus ineligible for citizenship or internal migration. The Naturalization Act of 1790, the first act of Congress to address the question of immigration, recognized only “free white persons” of “good moral character” as eligible for naturalization. Subsequent amendments to this law increased the residence period for naturalization, initially to five years in the Naturalization Act of 1795, then to fourteen years in 1798.<sup>18</sup>

However, although immigration policy in the U.S. began as an “open door,” as Noel Ignatiev and Ian Haney López have demonstrated, the racial status of “White”—an important mediator of quality of life and opportunity—was not bestowed upon all European immigrants. Successive waves of European immigration led “only to shifts in where, not whether, racial lines [were] drawn.”<sup>19</sup> Hence, German immigrants were not considered “White” until the 1840s to 1860s, Irish immigrants until the 1850s to 1880s, and eastern and southern Europeans immigrants until the 1900s to 1920s.<sup>20</sup> As discussed below in the example of Irish immigrants, “enter[ing] the white race was a strategy to secure an advantage in a competitive society.”<sup>21</sup> In this Section, we explore the ways in which successive waves of European immigrants challenged and helped redraw the often-overlapping categories of who was considered “White,” and who was considered deserving of citizenship through naturalization and a continued open-door immigration policy.

### B. Irish Immigration

The Irish were one of the earliest and largest non-English groups of immigrants to enter the U.S., with a total of seven million entering the country between the early seventeenth century and 1921.<sup>22</sup> Approximately 250,000 to 350,000 immigrants arrived between 1700 and 1776, primarily Presbyterians from the North of Ireland.<sup>23</sup> Many of the arrivals during the seventeenth and eighteenth centuries were indentured servants. Some of these had been forcibly removed to the New World by the English government, which feared the development of Catholic influence in Ireland.<sup>24</sup> Others “voluntarily” left Ireland for the New World through the indentured servant system, seeking to escape the oppressive regime under England’s Penal Laws.<sup>25</sup> Still others simply left in search of better economic opportunities.<sup>26</sup>

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17. *Id.*

18. KANSTROOM, *supra* note 11, at 54.

19. HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 10, at 149.

20. *Id.*

21. NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 2 (1995).

22. KERBY A. MILLER, *EMIGRANTS AND EXILES: IRELAND AND THE IRISH EXODUS TO NORTH AMERICA* 3 (1985) [hereinafter MILLER, *EMIGRANTS AND EXILES*].

23. KERBY A. MILLER, *IRELAND AND IRISH AMERICA* 145 (2008) [hereinafter MILLER, *IRISH AMERICA*].

24. KANSTROOM, *supra* note 11, at 26–28.

25. *Id.* at 27; *see also* JAY P. DOLAN, *THE IRISH-AMERICANS: A HISTORY* 18 (2008).

26. MILLER, *IRISH AMERICA*, *supra* note 23, at 48–50.

Irish immigration sharply dropped between the American Revolution and the War of 1812, but beginning in 1815 and continuing through 1844, between eight hundred thousand and one million Irish came to the U.S.<sup>27</sup> Until 1830, the majority were Presbyterians and Anglicans—not Catholics—from the North of Ireland, and many were farmers, artisans, tradesmen, and professionals.<sup>28</sup> Many were descendants of Scots who had settled in Ireland.<sup>29</sup> After 1830, the demographics of arriving Irish shifted to include far more laborers and servants, and the majority switched from Protestant to Catholic.<sup>30</sup> Their arrival was not always met with enthusiasm. Indeed, the Federalists, the political party then in power, enacted the Alien and Sedition Acts of 1798 in part out of fear of Irish sympathies to French radicalism and to the Republican Party.<sup>31</sup> One Congressman advocated for such measures as necessary because he did “not wish to invite hoards of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility, after having succeeded in the overthrow of their own governments.”<sup>32</sup>

The next notable wave of Irish immigration took place between 1845 and 1855, when 1.8 million immigrants emigrated during the Great Famine in Ireland.<sup>33</sup> This group was predominantly Catholic, considerably poorer than previous immigrants, and primarily from southern Ireland. These immigrants were widely regarded as non-White and were subjected to terrible exploitation. Many of the males worked in canal, railroad, and building construction; as dock laborers; or in other “dirty, backbreaking, poorly paid jobs that white native Americans and emigrants from elsewhere generally disdained to perform.”<sup>34</sup> Women found employment as domestic servants and in textile factories, garment sweatshops, and other needle trades.<sup>35</sup> Families lived crowded together in both urban and rural communities. For example, in the primarily Irish Fifth Ward of Providence, Rhode Island, an average of nine people lived in one- and two-room dwellings.<sup>36</sup> In the southern states, Irish workers were often preferred to slaves for intensive construction projects, because slaves represented a capital investment, whereas “if the [slur used to describe Irish deleted] are knocked overboard, or get their backs broke, nobody loses anything.”<sup>37</sup> In the North, “[m]any of the newly arrived Irish, hungry and desperate, were willing to work for less than free persons of color.”<sup>38</sup>

By the middle of the nineteenth century, Irish immigrants and their descendants comprised nearly 10 percent of the total United States population and, in some cities, much more. For example, in 1855, they comprised 28 percent of the population in New York City.<sup>39</sup> Even as the economic situation for some Irish stabilized in the decades following the Great Famine, by 1870 fully 40 percent of

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27. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 169, 193.

28. MILLER, IRISH AMERICA, *supra* note 23, at 255.

29. IGNATIEV, *supra* note 21, at 38–39.

30. MILLER, IRISH AMERICA, *supra* note 23, at 198.

31. IGNATIEV, *supra* note 21, at 65.

32. *Id.*

33. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 280.

34. *Id.* at 318.

35. *Id.*

36. *Id.* at 319.

37. IGNATIEV, *supra* note 21, at 109 (quoting an Alabama stevedoring company official).

38. *Id.*

39. MILLER, IRISH AMERICA, *supra* note 23, at 288.

Irish-born immigrants to the United States worked as unskilled laborers or domestic workers.<sup>40</sup> The Irish who arrived prior to the Great Famine, both Protestants and Catholics, who were relatively more economically secure than those arriving during the Famine, were “still too small, insecure, or indifferent to extend paternalistic assistance to the newcomers.”<sup>41</sup>

Although labor organizing would eventually become a key path to economic stability, it also served to focus anti-Irish sentiment and justify a growing “nativist” movement in the mid-nineteenth century. In 1859, Irish workers in New Jersey who blockaded the railroad tracks they had just finished building were denounced as “a mongrel mass of ignorance and crime and superstition,” and “utterly unfit for . . . the common courtesies and decencies of civilized life.”<sup>42</sup> In 1854, the “Know-Nothing” party, fueled by growing anti-Catholic sentiment in the preceding decade, burst briefly onto the national political stage on an expressly nativist, anti-Irish, and anti-German platform.<sup>43</sup> This same period saw the appearance of “No Irish Need Apply” signs.<sup>44</sup>

Despite this period of intense exploitation and discrimination, several social, political, and economic institutions helped the Irish ultimately become integrated and then assimilated into the central core of an American identity. In terms of economic institutions, labor organizing played a key role in ensuring upward economic mobility, which in turn enhanced political and social advancement and vice versa. By 1870, more than 85 percent of Irish immigrants were working in non-agricultural sectors, and they were heavily represented in the rapidly expanding manufacturing, construction, and transportation industries.<sup>45</sup> Ireland had a long history of labor organization dating back to 1641.<sup>46</sup> Some of the laborers who began arriving in larger numbers during the 1830s engaged in strikes and other labor unrest, often attacking competing English and German workers. Ignatiev notes that “[t]he participants showed little awareness that being white, or immigrant, or Catholic, or even Irish formed a basis for solidarity,” although they exhibited some solidarity based on Irish county lines.<sup>47</sup> Eventually, however, this atomized labor unrest gave way to labor organization based on ethnic solidarity and on the incorporation of Irish into a “White” identity.<sup>48</sup> Thus, as argued by Ignatiev, “[e]arly labor unions . . . should be regarded not so much as Irish institutions, in the way they later became, but as institutions for assimilating the Irish into white America.”<sup>49</sup> By 1900, Irish men were engaged in approximately the same proportion of white-collar and skilled work as other White Americans.<sup>50</sup> Some scholars have observed that the arrival of the Irish (and, as discussed later, Eastern and Southern Europeans) in mid-nineteenth-century America coincided with, and indeed likely helped fuel, the shift

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40. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 319.

41. *Id.* at 321.

42. *Id.* at 322.

43. TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850'S, at 3, 9–15 (1992).

44. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 323.

45. MILLER, IRISH AMERICA, *supra* note 23, at 254.

46. IGNATIEV, *supra* note 21, at 92.

47. *Id.* at 95.

48. *Id.* at 96.

49. *Id.* at 103.

50. MILLER, IRISH AMERICA, *supra* note 23, at 254.

of the American economy from largely agricultural and rural to primarily urban and industrialized.<sup>51</sup> Thus, “in the 1870’s Irish predominance in factory labor, construction, and transportation proved highly advantageous as those sectors expanded in subsequent decades.”<sup>52</sup>

The Catholic Church can also be seen as an important social and cultural factor that contributed to the integration of the Irish in America. Although the majority of Famine immigrants to the United States were Catholic, they were not necessarily practicing Catholics when they first arrived to the United States.<sup>53</sup> Miller has noted that, “in circumstances which demanded abandonment of so many indices of nationality, such as the Irish language, Catholicism itself became the primary expression of Irish-American identity.”<sup>54</sup> Over time, as the Catholic Church expanded and began establishing parochial schools and hospitals to counter growing anti-Catholic sentiment, more Irish immigrants and later generations began flocking to the Church. These institutions played a key role in upward economic mobility for many Irish Catholics,<sup>55</sup> and by the 1870s, “the gothic spires of the newly completed St. Patrick’s Cathedral, towering above New York’s fashionable Fifth Avenue, symbolized the Irish-dominated Catholic church’s increasing solvency and self-confidence.”<sup>56</sup>

Another key factor permitting the assimilation of the Irish into the mainstream of America was the expansion of the White identity to include the Irish. Irish immigrants who arrived in America prior to the Civil War were often identified as a race independent of, and somewhere between, White and Black.<sup>57</sup> As abolitionism gained momentum, the Democratic Party represented Southern White slave owners, who sought an alliance with workers of European descent in the North. The slave owners achieved this alliance by appealing to workers’ fears that emancipation would lead to labor competition caused by newly freed Black Americans migrating north. Constructing a common ground on the basis of skin color was a key strategy in building this alliance. Whiteness was defined through the nature of work—“White man’s work” became work from which Black Americans were excluded.<sup>58</sup> This led to the gradual expulsion from their trades of skilled, free Black artisans and craftsmen in the North.<sup>59</sup> Thus, Ignatiev argues that “the assimilation of the Irish into the white race made it possible to maintain slavery. The need to gain the loyalty of the Irish explains why the Democratic Party, on the whole, rejected nativism (against the Irish).”<sup>60</sup>

Politically, the Democratic Party also became an important institution for the assimilation of Irish Americans, based “partly on historic alliances . . . partly on antagonism to the strong evangelical Protestant and anti-Irish Catholic strains which ran through opposing political organizations . . . and partly on pragmatic

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51. *Id.* at 253–55.

52. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 500.

53. *Id.* at 327.

54. *Id.* at 327, 332.

55. ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 332 (3d ed. 2006).

56. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 495.

57. IGNATIEV, *supra* note 21, at 76.

58. *Id.* at 112.

59. *Id.* at 99–101.

60. *Id.* at 69.

considerations” in which Democratic politicians offered “opportunities for upward mobility” in exchange for the Irish vote.<sup>61</sup> In New York City, the rise of Boss Tweed, a fourth-generation American of Scotch Irish descent, in the 1860s paved the way for Irish American politicians in municipal government, a trend reflected throughout Northeastern cities.<sup>62</sup> The ascent of Irish politicians at this municipal level—and eventually in state and federal government—fueled the positive cycle of Irish participation in political institutions, which in turn stabilized economic and social well-being by returning resources and opportunities, such as jobs and support for cultural and religious expressions, to Irish communities.

Today Irish Americans represent one of the most assimilated groups of immigrants absorbed into American society. Although institutions for displaying cultural pride, such as Irish-American parades on St. Patrick’s Day, remain an important facet of life for many Americans of Irish descent, the extent of residential integration, loss of language, and parity of economic and political well-being achieved by Irish Americans illustrates the nearly complete absorption of this once-outside ethnic group into American identity. Today, Americans with Irish ancestry have higher high school and college graduation rates, a higher median income, and higher rates of homeownership than the average American.<sup>63</sup>

### C. Eastern European Jewish Immigration

The first wave of Irish Catholic immigration in the mid-nineteenth century overlapped with the first of two waves of Jewish immigration. This first Jewish wave, between 1840 and 1880, raised relatively little controversy. During the colonial period, there had been a small Jewish population in the United States, known as “Spanish Jews,” or “Sephardim,” whose families had immigrated primarily from Spain, Portugal, and Holland.<sup>64</sup> Those arriving in the middle of the nineteenth century were largely German Jews seeking greater economic opportunity, and they were largely undifferentiated from the general category of “German” immigrants who settled in the East and Midwest. This was in part because they “had undergone a high degree of cultural assimilation in Germany.”<sup>65</sup> As a whole, this first wave of European Jewish immigrants had high literacy rates. Early twentieth-century scholarship suggests that this wave of immigrants had illiteracy rates of just 2.5 percent (compared with illiteracy rates of 25.7 percent for Jewish immigrants from 1880 to 1909),<sup>66</sup> and their numbers were small enough that they could be integrated into the existing Jewish community. Thus, in 1840, the Jewish population was 15,000 (out of seventeen million total in the United States). By 1880, the population had reached 250,000 (out of fifty million total United States population), compared with an Irish Catholic population of over two million.<sup>67</sup>

Beginning in about 1880, substantial numbers of Eastern European Jews began immigrating to the United States. These were primarily Yiddish-speaking Russian Jews escaping persecution in Russia after the anti-Semitic Tsar Alexander

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61. MILLER, EMIGRANTS AND EXILES, *supra* note 22, at 329.

62. *Id.* at 329–31.

63. U.S. CENSUS BUREAU, 2011 NATIONAL TOTAL POPULATION ESTIMATES (2011).

64. DALE S. MCLEMORE, RACIAL AND ETHNIC RELATIONS IN AMERICA 63 (1983).

65. *Id.*

66. *Id.*

67. *Id.*

III took the Russian throne in 1881. Two million Jews left Russia between 1880 and 1914,<sup>68</sup> and the wave continued through 1924. As a result of this persecution, including their relegation to the Pale of Settlement and confrontation with organized violence in the form of pogroms, Russian Jews “remained strongly united and had maintained their native culture and language to a high degree.”<sup>69</sup> Unlike the previous generation of German Jews, these immigrants had fewer resources and were less educated and less Western in their customs and appearances. They also “had every intention to keep their culture intact in the New World” and thus were far more likely than German Jews already living in America to maintain their outward “Jewish-ness” through their language and cultural expression.<sup>70</sup> The Eastern European Jews also came in far larger numbers. In fifty years, the Jewish population rose from 250,000 (0.5 percent of the overall population of fifty million) to 4.5 million (3.7 percent of the population of 123 million).

Their arrival in large numbers was met with a rise in virulent anti-Semitism. The exclusion of Jews from elite institutes of higher learning exemplified one of the most visible forms of this anti-Semitism. Elite universities saw the number of Jewish applicants and admitted students rise steadily after 1908. In that year, Jews comprised 7 percent of Harvard’s incoming class, a number that rose to over 20 percent in 1922. Because many Jewish immigrants performed well on entrance exams, Harvard and other elite schools reacted with alarm. As Malcolm Gladwell describes, “Jews were thought to be sickly and grasping, grade-grubbing and insular. They displaced the sons of wealthy Wasp alumni, which did not bode well for fundraising.”<sup>71</sup> A. Lawrence Lowell, Harvard’s president in the 1920s, noted that “[t]he summer hotel that is ruined by admitting Jews meets its fate . . . because they drive away the Gentiles, and then after the Gentiles have left, they leave also.”<sup>72</sup> Three elite universities—Harvard, Yale, and Princeton—changed their entire admissions systems to incorporate a personal statement and assessment of an applicant’s “character” as ways to exclude Jews without imposing explicit quotas.<sup>73</sup> Schools required applicants to provide a photograph and information about their “character,” including personal references, a list of extracurricular activities, and an essay demonstrating their leadership potential.<sup>74</sup>

In addition to these changes, these universities became early adopters of the recently developed Scholastic Aptitude Test (SAT)—today a hallmark of college admissions. They were motivated in part by the test’s potential to exclude Jewish applicants.<sup>75</sup> In 1926, Columbia University adopted the test as a basis for college admission, in part because this test was considered to be a measure of “inherent” intellectual ability and “uncoachable.” As Gladwell has chronicled, the dean of Columbia College, Herbert Hawkes, liked this approach:

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68. See PORTES & RUMBAUT, *supra* note 55, at 128.

69. MCLEMORE, *supra* note 64, at 64.

70. *Id.*

71. Malcom Gladwell, *Getting In: The Social Logic of Ivy League Admissions*, THE NEW YORKER, Oct. 10, 2005.

72. *Id.*

73. *Id.*

74. *Id.*

75. Malcom Gladwell, *Examined Life*, THE NEW YORKER, Dec. 17, 2001.

[B]ecause the typical Jewish student was simply a ‘grind,’ who excelled on the Regents Exams because he worked so hard, a test of innate intelligence would put him back in his place . . . I do not believe however that a College would do well to admit too many men of low mentality who have ambition but not brains.<sup>76</sup>

Another expression of prejudice against arriving Jewish immigrants took the form of racially restrictive covenants, which expressly barred homeowners from selling their homes to Black Americans, Jews, and many other racial and religious minorities.<sup>77</sup> In 1917, after the *Buchanan v. Warley* decision struck down as unconstitutional a city ordinance prohibiting the sale of property to Black Americans,<sup>78</sup> White homeowners turned en masse to private agreements between themselves. These racially restrictive covenants permitted private parties who wished to create precisely the same sort of racial segregation to simply include such a covenant in their sales contracts or rental leases. The Supreme Court upheld their right to engage in this form of “private” discrimination in 1926 in *Corrigan v. Buckley*,<sup>79</sup> and this practice thrived well into the 1940s, until the Court finally ruled it unconstitutional in *Shelley v. Kraemer*.<sup>80</sup> Although homeowners most often used covenants to exclude Black Americans, it was not uncommon to use them against Eastern Europeans.<sup>81</sup> In part for this reason, Jews in many parts of the country crowded into tenements such as the Lower East Side of New York City.

As with Irish Americans, labor organizing was one factor that facilitated the eventual economic integration of some Jews, particularly in the Northeast. Segregation and religious persecution in tsarist Russia had forced many Jews into a limited range of occupational trades, including textile and needle trades.<sup>82</sup> As they moved into this occupational niche, Russian Jews also simultaneously benefitted from and helped expand existing labor organizing in this trade. For example, the United Hebrew Trades—founded in 1888 to organize Jewish needle trade workers in the Lower East Side of New York City—comprised a vigorous core of organizing workers in the extensive garment industry in New York City well into the twentieth century.<sup>83</sup>

Today, American Jews have by and large assimilated into American culture, changing both it and Jewish culture in the process.<sup>84</sup> Most see Jews not as a separate race, but as White Americans. A 2009 survey by the Anti-Defamation League found that anti-Semitic sentiments held by Americans were at their lowest point since the survey began forty-five years ago, although that figure then showed an uptick two

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76. *Id.*

77. See *Shelley v. Kraemer*, 334 U.S. 1, 5 (1948) (describing a covenant between neighbors forbidding the sale of a home to “any person not of the Caucasian race”); CATHERINE SILVA, SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT, RACIAL RESTRICTIVE COVENANTS: ENFORCING NEIGHBORHOOD SEGREGATION IN SEATTLE (2009), [http://depts.washington.edu/civilr/covenants\\_report.htm](http://depts.washington.edu/civilr/covenants_report.htm).

78. 245 U.S. 60 (1917).

79. 271 U.S. 323 (1926).

80. *Shelley*, 334 U.S. at 1.

81. ROBERT M. FOGELSON, *BOURGEOIS NIGHTMARES: SUBURBIA 1870–1930*, at 128–31 (2005).

82. MCLEMORE, *supra* note 64, at 65.

83. HOWARD M. SACHAR, *A HISTORY OF THE JEWS IN AMERICA 179–80* (1992).

84. See ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY* (1997).

years later, from 12 percent to 15 percent<sup>85</sup> This assimilation was internally driven, to some degree, as Russian Jews fleeing persecution in the late nineteenth century “were extremely eager to make use of their new freedom and, consequently, embraced the opportunities that existed in public education and politics.”<sup>86</sup> While anti-Semitism still exists, it does not define American life as it did in the early part of the twentieth century.

#### D. Italian Immigrants

The same period that saw the largest influx of Jews to the United States—the 1880s to 1920—also saw the arrival of four million Italian immigrants to America.<sup>87</sup> Eighty percent of these were southern Italians, who left Italy due in large part to declining economic conditions following the unification of Italy in 1861.<sup>88</sup> Many chose the United States as a destination in response to American labor recruiters who had gone abroad to induce sufficient migration of labor to sustain the insatiable appetite of the rapidly expanding American industrial sector.<sup>89</sup>

Italian Americans (like European Jews) arrived in America during Reconstruction, an era that gave rise to what David Richards calls “cultural racialization.” “The central mechanism of the cultural construction of racism was the radical isolation . . . of a race-defined people from the culture-creating rights extended to all others.”<sup>90</sup> Richards argues that after the Civil War and the Reconstruction Amendments created a constitutional presumption of equality between all men, the justification for ongoing oppression of Black Americans, particularly in the South, shifted from the pseudoscientific explanations of biologically-based racial inferiority to a culturally-based racial inferiority.<sup>91</sup>

If race and culture were in this period so unreasonably confused, it is not surprising that American intolerance . . . should turn from blacks to non-Christian Asians or Catholic Latins or Jewish Slavs, whose cultures appeared, to nativist American Protestant public opinion, so inferior and (equating culture and race) therefore peopled by the racially inferior.<sup>92</sup>

The ease with which American nativists could express racial animosity toward European Jews and Italians arriving after 1880, despite the ostensibly “White” physical characteristics of these groups, can be seen as a product of the same thinking that had disregarded the fact that Homer Plessy was a man of “one-eighth African blood [whose] mixture of colored blood was not [visibly] discernible,”<sup>93</sup> when it came to the question of whether he had a right to sit in the

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85. See ANTI-DEFAMATION LEAGUE, *AMERICAN ATTITUDES TOWARD JEWS IN AMERICA* (2009).

86. MCLEMORE, *supra* note 64, at 64.

87. HUMBERT S. NELLI, *FROM IMMIGRANTS TO ETHNICS: THE ITALIAN AMERICANS* 19 (1983).

88. DAVID A.J. RICHARDS, *ITALIAN AMERICAN: THE RACIALIZING OF AN ETHNIC IDENTITY* 99–100 (1999).

89. See PORTES & RUMBAUT, *supra* note 55, at 17, 355.

90. RICHARDS, *supra* note 89, at 166.

91. *Id.* at 166–71.

92. *Id.* 171.

93. *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896).

“White” section of a segregated train. Richards further suggests that the lack of animosity arriving Italians felt towards Black Americans and Jews furthered White nativist suspicion.<sup>94</sup>

The southern Italians arriving in the United States encountered significant discrimination. Their Catholic faith served as one target, as did their stereotypically perceived involvement in organized crime. This stereotype regarding criminal involvement catapulted to national visibility following the 1891 lynching of eleven Italians, who had been accused and acquitted of killing a New Orleans police commissioner.<sup>95</sup> Italians also faced accusations that they hesitated to assimilate because they worked long days, earned little money, and sent much of that money back home with the hope of eventually going back. Many Italians took manual-labor positions, including railroad and other construction work, ditch digging, and coal mining. They also occupied positions in the garment industry and as pushcart vendors in the burgeoning cities.<sup>96</sup> Others migrated to the South, Midwest, and far West to work as agricultural laborers. As one contemporary newspaper account noted, in “sections of the South, where it has been extensively tried, Italian labor has proved itself well-nigh indispensable in the cultivation of the immense plantations.”<sup>97</sup>

The vast majority of Southern Italians during this period earned less than \$600 per year—less than half the income of American-born workers.<sup>98</sup> Labor contractors also often recruited Italians to play a strike-breaking role, earning them additional scathing criticism from trade unions. For example, in 1874, southern Italian immigrants went to the Pennsylvania coalmines to break a strike, and in 1882, they acted as strike breakers on New York’s docks and railroads.<sup>99</sup> As late as 1904, John Mitchell, president of the United Mine Workers, declared:

No matter how decent and self-respecting and hard working the aliens who are flooding this country may be, they are invading the land of Americans, and whether they know it or not, are helping to take the bread out of their mouths. America for Americans should be the motto of every citizen, whether he be a working man or a capitalist. There are already too many aliens in this country. There is not enough work for the many millions of unskilled laborers, and there is no need to for the added millions who are pressing into our cities and towns to compete with the skilled American in his various trade and occupations.<sup>100</sup>

This animosity from trade unions, combined with the strong belief held by many Italian workers that they would soon return home, meant that Italians remained a fairly unorganized workforce. However, many Italians were familiar with the strong agricultural trade unions and benevolent societies back in their home country,

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94. RICHARDS, *supra* note 89, at 173.

95. Barbara Botein, *The Hennessy Case: An Episode in Anti-Italian Nativism*, LA. HIST., July 1979, at 261, 272.

96. LAWRENCE F. PISANI, *THE ITALIAN IN AMERICA: A SOCIAL STUDY AND HISTORY* 87–89 (1957).

97. ELIOT LORD, *THE ITALIAN IN AMERICA* 171 (1905).

98. NELLI, *supra* note 88, at 91.

99. *Id.*

100. LORD, *supra* note 98, at 159–60.

and eventually workers began organizing themselves in order to challenge their economic exploitation.<sup>101</sup> By 1903, they led a strike of excavation workers who were digging New York City's subway lines, which eventually resulted in the induction of the predominantly Italian-American Excavators Union into the American Federation of Labor.<sup>102</sup> Trades in which Italians were heavily represented—including as longshore workers, garment workers, shoemakers, masons, and bricklayers—also began seeing more Italians get involved with union organizing.<sup>103</sup> In turn workers of Italian descent helped these unions grow in size and power.

While the majority of Italian organized labor leaders occupied a political middle ground, a few of these leaders developed a reputation as extreme leftists and anarchists. These few highly visible leaders in turn helped make Italians a target during the Palmer Raids of 1919–20. These raids were the political culmination of the wider “Red Scare” phenomenon that the Bolshevik Revolution of 1917 had triggered. In addition, the newly formed class of wealthy industrialists who had grown frustrated by the growing power of the organized labor movement also fed the fear of communism.<sup>104</sup> Indeed, 1919 saw 3,600 strikes involving over four million workers.

Fears about the potential “Bolshevik” threat represented by European and Russian Jewish immigrants coalesced with parallel fears of anarchists. In the spring of 1919, followers of the extremist Luigi Galleani mailed and set off a series of bombs around the United States, aimed directly at prominent business and political leaders. In response, Attorney General A. Mitchell Palmer launched a series of raids, resulting in the issuance of some 6,000 arrest warrants for alien “reds,” and some 4,000 arrests made (including of citizens).<sup>105</sup> On December 21, 1919, the government loaded 249 people, including famed anarchist and literary celebrity Emma Goldman, onto the “Soviet Ark” and deported them to Finland and Soviet Russia.<sup>106</sup> Suspicion that Italians were anarchists who posed a significant domestic threat also fueled the 1927 execution of Nicola Sacco and Bartolomeo Vanzetti, anarchists convicted of robbing a bank in Massachusetts—despite a remarkable absence of evidence.<sup>107</sup>

Eventually, however, Italian immigrants and their descendants experienced a significant rise in their economic, social, and political status that can be described as their slow assimilation into American society. As it did with Irish immigrants a few generations before, the Catholic Church played an important role as a “mobility machine,” creating an infrastructure of schools, universities, and hospitals “to counter the hostility and disadvantages of a Protestant-dominated society.”<sup>108</sup> Additionally, just as it did with the Irish, politics proved to serve as “an avenue of individual upward mobility when other paths remain blocked,”<sup>109</sup> and the election of Fiorello LaGuardia as Mayor of New York in 1934 paved the path for many

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101. PISANI, *supra* note 97, at 93.

102. NELLI, *supra* note 88, at 91.

103. *Id.*

104. KANSTROOM, *supra* note 11, at 146.

105. *Id.* at 149, 154.

106. *Id.* at 150.

107. Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC, Mar. 1927, <http://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/>.

108. See PORTES & RUMBAUT, *supra* note 55, at 332.

109. *Id.* at 64.

subsequent politicians of Italian descent. The absorption of Italian Americans into a “White” identity also played a key role. Today, despite lingering stereotypes about connections to organized crime, the descendants of Italians in America by and large have achieved social, economic, and political parity with other Americans.<sup>110</sup>

### E. Early Twentieth-Century Changes to Immigration Policy

At the turn of the twentieth century, concerns about the rising tide of “non-White” immigrants from Eastern and Southern Europe reflected a deep racial anxiety that gave rise to a race-based “political irrationalism.”<sup>111</sup> This racial anxiety, compounded by fears of the growing industrial class of radicalism in the labor movement, took advantage of the 1901 assassination of President William McKinley by Leon Czolgosz—an anarchist and son of Polish immigrants—to pass the first federal immigration legislation since the Chinese Exclusion Act.<sup>112</sup> The Immigration Act of 1903 excluded “anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government.”<sup>113</sup> While on its face, the law was designed to keep out political enemies and anarchists, as some commentators have noted, “[a] growing belief that the new immigrants from Eastern and Central Europe held political values that threatened the existing social and political status quo helped fuel the attack on anarchism.”<sup>114</sup>

As nativist sentiment ramped up in the early twentieth century, Congress passed the Immigration Act of 1917, which barred immigration by those over the age of sixteen “who can not read the English language, or some other language or dialect, including Hebrew or Yiddish.” As Kevin R. Johnson notes, the test restricted the immigration of most non-English speakers, including Italians, Russians, Poles, Hungarians, Greeks, and Asians.<sup>115</sup>

Despite these restrictions, by 1920 nearly one million immigrants were arriving in the United States annually, most of whom were Catholics and Jews from Southern and Eastern Europe. In 1921, Congress applied the brakes, limiting total immigration to 300,000 for 1921 and 1922 combined. Congress then passed the Immigration Act of 1924, also known as the Johnson-Reed Act. Johnson-Reed restricted immigration to 150,000 people per year and set national-origin quotas proportionate to the number of foreigners residing in the United States. However, instead of using the population residing in the United States at the time the law was enacted, the Johnson-Reed act reached back thirty-four years to set 1890 as the

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110. For example, in 1990, the last year in which the United States census reported specific economic statistics for persons of Italian ancestry, the median household income for households of Italian ancestry was \$36,060, higher than the national median household income of \$29,943. See U.S. CENSUS BUREAU, CPH-L-149 SELECTED CHARACTERISTICS FOR PERSONS OF ITALIAN ANCESTRY: 1990 (1990), <https://www.census.gov/population/socdemo/ancestry/Italian.txt>; U.S. CENSUS BUREAU, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1990 (1990), <http://www2.census.gov/prod2/popscan/p60-174.pdf>.

111. RICHARDS, *supra* note 89, at 172.

112. See *infra* Part III.A.

113. KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 61–62 (2004) [hereinafter JOHNSON, HUDDLED MASSES].

114. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCannan-Walter Act*, 66 TEX. L. REV. 1481, 1518 (1988).

115. JOHNSON, HUDDLED MASSES, *supra* note 114, at 23.

baseline—the year that waves of immigration from Southern and Eastern Europe first began arriving. By doing this, Congress addressed concerns that the “continued arrival of great numbers [from Southern and Eastern Europe] tends to upset our balance of population, to depress our standard of living, and to unduly charge our institutions for the care of the socially inadequate.”<sup>116</sup>

Johnson-Reed dramatically reduced the flow of immigrants from Eastern and Southern Europe, and—as with the Chinese Exclusion Act discussed in Part III.A below—created a class of illegal immigrants who found their way to the United States despite their lack of documents. Immediately after the passage of Johnson-Reed, Europeans from not only Southern and Eastern Europe, but also Belgium, the Netherlands, and Switzerland, found ways to illegally enter the country through Canada and Mexico.<sup>117</sup> Over time, many took advantage of a loophole that permitted Europeans to enter the United States after residing in Canada for five years.<sup>118</sup>

The pernicious effects of the Johnson-Reed Act reached an acute pitch during World War II, when few Jewish refugees from Hitler’s Europe could enter the United States. The United States government returned some of those who tried to enter the country to Germany, where they were shipped to the death camps.<sup>119</sup>

Congress did not direct either the Immigration Act of 1917 or the Johnson-Reed Act exclusively at Europeans, of course. Congress also acted to completely exclude people from Asia through these laws. In doing so, they built on decades, if not centuries, of anti-Asian sentiment that had been codified through immigration policy and legal precedent.

## II. CHINESE AND JAPANESE IMMIGRATION AND AMERICAN IMMIGRATION POLICY

### A. *Chinese Immigration*

As European immigrants settled in the eastern United States during the mid-nineteenth century, the western United States saw the arrival of immigrants from Asia. James Marshall’s discovery of gold in Coloma Creek, California, in 1848 attracted thousands of Chinese with big dreams of striking it rich on *Gum Saan*, or Gold Mountain, as Chinese migrants called the United States.<sup>120</sup> Between 1852 and 1882, over three hundred thousand Chinese workers arrived to work in the gold fields and to help build the first transcontinental railroad.<sup>121</sup> When it became clear that many Chinese intended to stay, hysteria against them escalated in California and

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116. *Id.* at 23.

117. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 83 (2003).

118. *Id.*

119. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 44 (1994) (noting that Article 33.1 of the Refugee Convention “was drafted largely in response to the experience of Jewish refugees during World War II—refugees the United States and nations of Europe repelled and returned to the gas chambers of Nazi Germany”).

120. ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 1 (2003).

121. CHINESE AMERICAN VOICES: FROM THE GOLD RUSH TO THE PRESENT 1 (Judy Yung, Gordon H. Chang & Him Mark Lai eds., 2006).

spilled over into the national political arena. As a result, the United States excluded Chinese immigrants for nearly a century, and those who managed to make it to the U.S. suffered discrimination and diminished legal status. The anti-Chinese movement developed an ideology of “white supremacy/Oriental inferiority that was wholly consistent with the mainstream of American racism.”<sup>122</sup> As discussed herein, this “inassimilable” group ultimately fought for its legal rights and gradually integrated into mainstream American society.

Chinese immigration can be effectively divided into four periods: “[1] years of free immigration from 1849 to 1882; [2] an age of exclusion from 1882 to 1943; [3] a period of limited entry under special legislation from 1943 to 1965; and [4] an era of renewed entry under special legislation from 1965 to the present.”<sup>123</sup> The vast majority of early immigrants who arrived during the period of unrestricted immigration were young and middle-aged men who had left China to earn wages in the United States and to send part of their savings home to their families.<sup>124</sup> By 1860, the United States Census reported 34,933 Chinese immigrants in the country, almost all of whom resided in California.<sup>125</sup>

Americans tolerated Chinese immigrants during this period to the extent that they filled demand for flexible, low-cost labor. The 1868 Burlingame Treaty between the U.S. and China ensured a sustained supply of cheap labor from China, and large mining and railroad companies heavily recruited and ruthlessly exploited these new arrivals.<sup>126</sup> Like many White Americans during this era of “Manifest Destiny” and White supremacy, the mining industry viewed Chinese immigrants as racial inferiors and put them to work for long hours in harsh conditions in gold and quicksilver mines.<sup>127</sup> Mining companies also recruited Chinese laborers for grueling and dangerous work in borax deposits and coalmines for subsistence-level wages.<sup>128</sup> By 1870, the United States Census reported sixty thousand Chinese, with some fifty thousand of them in California and about half of the entire Chinese work force involved in mining.<sup>129</sup>

In addition to exploitative working conditions, Chinese miners suffered discrimination, resentment, and violence on the job. In 1875, the Union Pacific Company stirred racial hostility when it hired Chinese immigrants to replace White coal miners who had gone on strike in Rock Springs, Wyoming.<sup>130</sup> Employers frequently hired racial minorities as strikebreakers during this period, as noted above with Italian Americans.<sup>131</sup> Tensions intensified between White and Chinese miners for years until 1885, when a mob of White labor union members opened fire on

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122. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 3 (1977) [hereinafter DANIELS, *POLITICS OF PREJUDICE*].

123. *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943*, at viii (Sucheng Chan ed., 1994).

124. *Id.*

125. BIBIN QIN, *EARNINGS ATTAINMENT OF CHINESE AMERICAN: A MULTILEVEL ANALYSIS* 8 (2008).

126. *Id.*

127. *See CHINESE AMERICAN VOICES*, *supra* note 122, at 2.

128. *Id.*

129. QIN, *supra* note 126, at 8.

130. *See CHINESE AMERICAN VOICES*, *supra* note 122, at 48.

131. *See supra* Part II.D.

Chinese miners, killing twenty-eight and wounding fifteen.<sup>132</sup> This tragic event exemplified the increasingly hostile attitude of White workers towards Chinese immigrants, whom they viewed as cultural threats, labor competition, and racial inferiors. Prompted by growing hostilities, many mining companies passed regulations and special taxes to exclude the Chinese, despite the immense profits that Chinese laborers earned for the mining industry.<sup>133</sup> After gold fever subsided in California, the Central Pacific Railroad Company recruited Chinese laborers, putting Chinese immigrants to work “leveling roadbeds, boring tunnels, blasting mountainsides, and laying tracks.”<sup>134</sup> Some of the most grueling work brought Chinese laborers to the High Sierra, where they lived in caverns carved below the snow and often fell victim to snowstorms and avalanches.<sup>135</sup>

California entered the United States as a state in 1850 and almost immediately began passing laws restricting the rights of Chinese immigrants. In 1852, the California state legislature passed the foreign miners tax, the first piece of discriminatory legislation to target Chinese immigrants in the United States.<sup>136</sup> Authorities initially enforced the tax almost exclusively against Chinese gold miners, and the California legislature later amended the bill to apply exclusively to Chinese miners.<sup>137</sup> Between the tax’s enactment in 1852 and its repeal in 1870, the State of California collected five million dollars from Chinese miners, a sum that represented between 25 and 50 percent of the state’s revenue.<sup>138</sup> In 1862, the California legislature passed a “measure of special and extreme hostility to the Chinese” that extended the Chinese miner’s tax to most other Chinese laborers in the state.<sup>139</sup>

The anti-Chinese sentiment that permeated Sacramento politics also infiltrated San Francisco’s courts. In 1854, the California Supreme Court barred Chinese witnesses from testifying against White men in *People v. Hall*, which upheld and expanded a Civil Code provision that “no Black, Mulatto person, or Indian shall be allowed to give evidence against a white man.”<sup>140</sup> This ruling proved especially damaging to the Chinese community because Chinese residents often served as the sole witnesses to violence perpetrated by White Americans against Chinese residents.

The Civil Rights Act of 1870 and the Fourteenth Amendment to the U.S. Constitution ended California’s explicit discrimination against the Chinese. The California state legislature, however, adapted to the new legal landscape by passing laws that appeared neutral on their face but that operated effectively only on the Chinese or could be selectively enforced against the Chinese.<sup>141</sup> The City of San Francisco passed one such facially neutral law in 1870; the law required every lodging house to provide at least five hundred cubic feet of air per inhabitant.<sup>142</sup> Although the ordinance appeared neutral on its face, the city enforced the law

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132. See CHINESE AMERICAN VOICES, *supra* note 122, at 48.

133. See ENTRY DENIED, *supra* note 124, at 2.

134. See CHINESE AMERICAN VOICES, *supra* note 122, at 3.

135. *Id.*

136. See ENTRY DENIED, *supra* note 124, at 2.

137. *Id.* at 4.

138. See CHINESE AMERICAN VOICES, *supra* note 122, at 2.

139. See ENTRY DENIED, *supra* note 124, at 6–7.

140. 4 Cal. 399 (1854).

141. See ENTRY DENIED, *supra* note 124, at 8.

142. *Id.* at 9.

exclusively against Chinese residents.<sup>143</sup> The law afforded violators a choice between imprisonment and a fine, and convicted Chinese residents routinely chose jail time.<sup>144</sup> In order to encourage the payment of fines, the San Francisco Board of Supervisors enacted the infamous “Queue Ordinance” in 1873.<sup>145</sup> The measure, which has since been described as “an action that must surely rank as one of the most spiteful and vindictive of all official measures directed against the Chinese,” required jailers to crop the hair of every male prisoner within one inch of the scalp.<sup>146</sup> The ordinance effectively discriminated against the Chinese, who wore their hair in long queues, or braids, as the laws of the Qing dynasty required (the penalty in China for not doing so was execution).<sup>147</sup> The law stood until 1879, when a federal court struck it down on equal protection grounds in *Ho Ah Kow v. Nunan*.<sup>148</sup>

Perhaps the most notorious example of discriminatory legislation in California were the “Laundry Ordinances” that the San Francisco Board of Supervisors enacted between 1873 and 1884. The anti-Chinese movement in California viewed the roughly 240 Chinese-owned laundries in San Francisco as a symbol of Chinese economic success and as proof that the Chinese intended to reside in California permanently.<sup>149</sup> Over three nights in July 1877, mobs swept through the streets of San Francisco, attacking Chinese laundries, “smashing windows, pelting their interiors with rocks, and looting their contents.”<sup>150</sup> The Board responded to the violence by enacting “laundry ordinances,” which appeared neutral on their face but which had the clear design of driving Chinese laundries out of business. The ordinances required all laundry owners to obtain licenses from the Board, which reserved the power to approve or deny applications at will.<sup>151</sup> Every White laundryman who applied for a license received one, but not a single Chinese laundryman obtained a license under the ordinances.<sup>152</sup> The Supreme Court of the United States ultimately invalidated the ordinances in the landmark case *Yick Wo v. Hopkins*,<sup>153</sup> in which Associate Justice Stanley Matthews spoke for a unanimous Court when he declared, “[t]hrough the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution.” As discussed herein, though the Chinese community successfully vindicated its rights in court, community leaders struggled unsuccessfully to influence public opinion, which remained staunchly anti-Chinese throughout the United States, particularly in California.

After decades of lobbying by anti-Chinese activists in California, Congress finally heeded the request of Californians to protect them from the so-called “Chinese invasion,” passing a series of laws restricting immigration from China. The Page Law of 1875, which excluded Asian contract labor and women suspected of

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143. *Id.*

144. *Id.*

145. LEE, *supra* note 121, at 9.

146. *Id.*

147. *Id.*

148. *Id.* at 11.

149. See ENTRY DENIED, *supra* note 124, at 12.

150. *Id.*

151. *Id.* at 13.

152. *Id.*

153. 118 U.S. 356 (1886).

entering the country for “lewd or immoral purposes,” represented the United States’ first regulation of immigration at a national level.<sup>154</sup> Despite its general mandate, the law targeted Chinese immigration and served as an important step toward general Chinese exclusion. The Chinese Exclusion Act of 1882 struck the final blow to Chinese immigration, limiting entry into the United States to members of certain “exempted classes”—merchants, diplomats, students, and travelers.<sup>155</sup> The Act required deportation of some who were already present in the United States, and it precipitated the first wave of illegal immigration to the United States, as Chinese immigrants seeking work continued to arrive, smuggled in as if contraband goods.

In affirming the legality of the Chinese Exclusion Act, the Supreme Court of the United States accepted as legitimate its racist motivation. The Court noted in *Chae Chan Ping v. United States* that Congress had passed the Chinese Exclusion Act in response to the fact that Chinese immigration to California “was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”<sup>156</sup> The Court further observed that the Chinese “remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country,” and that “[i]t seemed impossible for them to assimilate with our people.”<sup>157</sup> In justifying the Congressional exercise of power to protect the national security against “the vast hordes of [a foreign nation’s] people crowding in upon us,” and “the presence of foreigners of a different race in this country, who will not assimilate with us,” the Supreme Court picked up on the “extra-constitutional” concept of federal plenary power initially articulated in *Johnson v. M’Intosh*—<sup>158</sup> the Supreme Court decision that limited judicial review of the exercise of governmental power “to extinguish the Indian title of occupancy.”<sup>159</sup>

The language of the Chinese Exclusion Acts—as well as the willingness of the federal judiciary to look the other way while state and federal governments restricted or forced the movement of racially designated groups—also drew from the Fugitive Slave Act of 1793 and from antebellum state laws that had regulated the migration of slaves.<sup>160</sup> By accepting “a large-scale, relatively efficient federal system for the forced removal of people from one place to another on the basis of rather scanty proof, with minimal or no judicial oversight, and with only the most flimsy constitutional protections,”<sup>161</sup> the Supreme Court in *Prigg v. Pennsylvania* set the stage for later race-based restrictions on immigration and permissive deportation schemes, elements that continue to characterize the United States’ immigration and deportation policies.<sup>162</sup>

In 1892, Congress passed the Geary Act, which extended the Chinese Exclusion Act for another ten years and added onerous new requirements for Chinese residents. First, the Act required all Chinese residents to carry a resident

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154. LEE, *supra* note 121, at 24.

155. See ENTRY DENIED, *supra* note 124, at viii.

156. 130 U.S. 581 (1889).

157. *Id.*

158. 21 U.S. 543 (1823).

159. *Id.*; see also Philip P. Frickey, *The Status and Rights of Indigenous Peoples in the United States*, 59 HEIDELBERG J. INT’L L. 383, 390 (1999).

160. JOHNSON, HUDDLED MASSES, *supra* note 114, at 19.

161. KANSTROOM, *supra* note 11, at 82.

162. 41 U.S. 539 (1842).

permit, with violators facing either deportation or one year of hard labor.<sup>163</sup> This permit constituted the very first permanent residence card—modernly referred to as a “green card” due to its color—that the United States government required as proof of legal status. The Geary Act further provided that Chinese residents could not bear witness in court or receive bail in habeas corpus proceedings.<sup>164</sup> Quoting its earlier decision in *Chae Chan Ping*, the Supreme Court upheld the harsher Geary Act in *Fong Yue Ting v. United States*.<sup>165</sup> Congress renewed the Act in 1902 and made it permanent in 1904 until its repeal in 1943.

Another series of immigration laws passed throughout the 1920s ended Asian immigration almost entirely. As discussed earlier, the passage of the Emergency Immigration Quota Act of 1921, which restricted immigration to 3 percent of the foreign-born nationalities included in the 1910 census; the Johnson-Reed Immigration Act; and the Emergency Quota Act of 1924, which used the 1890 census to further restrict immigration to 2 percent, greatly reduced immigration into the United States. Although the most vocal advocates supported these acts as a way to limit immigration from Eastern and Southern Europe, the quotas effectively eliminated immigration from Asia entirely.<sup>166</sup> According to an official House Report, “[The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity.”<sup>167</sup>

Congress finally repealed the Chinese Exclusion Act in 1943, when Chinese troops joined United States troops in fighting Japan during World War II.<sup>168</sup> The primary groups of Chinese immigrants permitted to enter the United States during this period included refugees seeking to escape the Communist Party in China and the brides and wives of Chinese Americans who served in the United States armed forces during World War II.<sup>169</sup> Although Congress capped immigration from China at a mere 105 individuals, the repeal of the Chinese Exclusion Act marked a turning point in the history of Chinese immigration.<sup>170</sup> Most importantly, Congress finally permitted Chinese residents already in the country to gain full United States citizenship through naturalization, a right that the government had denied Chinese immigrants for nearly a century.<sup>171</sup>

In the final stage of Chinese immigration, the Immigration and Nationality Act of 1965 permitted entire families to enter the United States from China for the first time by abolishing the national quota system and prohibiting discrimination against immigrants on the basis of race, gender, nationality, and place of birth.<sup>172</sup> By 1970, the Chinese population in the United States had reached 341,583 according to the United States Census, making the Chinese the second-largest Asian ethnic group in the country after the Japanese (588,324).<sup>173</sup>

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163. BILL HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 39 (2004).

164. *Id.*

165. 149 U.S. 698 (1893).

166. *See* ENTRY DENIED, *supra* note 124, at 123–25.

167. JOHNSON, *HUDDLED MASSES*, *supra* note 114, at 23.

168. *See* ENTRY DENIED, *supra* note 124, at ix.

169. *Id.*

170. QIN, *supra* note 126, at 12.

171. *Id.*

172. *See* ENTRY DENIED, *supra* note 124, at ix.

173. QIN, *supra* note 126, at 13.

One hundred and twenty years after the decision in *Chae Chan Ping*, there are nearly four million American citizens of Chinese ancestry.<sup>174</sup> We could point to much evidence of continuing animosity by White Americans against Asians generally and against Chinese and Chinese Americans in particular, but by many measures the children and grandchildren of Chinese immigrants have successfully integrated into American culture. Drawing from Berry's distinction between assimilation and integration, the experience of Chinese Americans appears to more closely resemble the latter. For example, Chinese Americans demonstrate a "relative preference for having contact with and participating in the larger society along with other ethnocultural groups," as illustrated by the high level of Chinese participation in the American education system.<sup>175</sup> According to Professor Bibin Qin, the Chinese community has long viewed educational attainment as "an important pathway to socioeconomic mobility and self-improvement."<sup>176</sup> Today, the educational achievement of Chinese Americans exceeds the national average, with 50.6 percent of Chinese Americans over the age of twenty-five holding a Bachelor's degree or higher, compared to the national average of 28.2 percent.<sup>177</sup> Additionally, 25.3 percent of Chinese Americans over the age of twenty-five hold a graduate or professional degree, compared to the national average of 10.4 percent.<sup>178</sup>

In terms of economic integration, as measured by annual household income, Chinese Americans have matched and then surpassed the average American family. According to the 2010 United States Census, Chinese Americans earn roughly 30 percent more than the national average. Other indicators that suggest a preference on the part of Chinese Americans for interacting with other ethnocultural groups include the high rates of residential integration and intermarriage among Chinese Americans and the larger society. Although these indicators to some degree obscure differences in the availability of educational and economic opportunities between more recent immigrants and descendants of previous generations, on the whole they evidence high levels of cultural and social integration into American society relative to many other demographic groups.

Unlike European Americans, however, Chinese Americans have not fully assimilated into American society. Many Chinese Americans retain many aspects of Chinese culture. Chinese Americans also continue to be racialized as "other"—often during times of economic or political crises—and from an exclusionary perspective, many continue to suffer from hate crimes and discrimination in employment, housing, and access to public accommodations.<sup>179</sup> Thus, the Chinese community has largely integrated, though not assimilated, into mainstream American society.

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174. See U.S. CENSUS BUREAU, 2010 CENSUS DATA (2010).

175. Berry, *supra* note 5, at 204.

176. QIN, *supra* note 126, at 18.

177. See U.S. CENSUS BUREAU, 2010 CENSUS DATA (2010).

178. *Id.*

179. See, e.g., ROSALIND S. CHOU & JOE R. FEAGIN, THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM (2008); PATRICIA WONG HALL & VICTOR M. HWANG, ANTI-ASIAN VIOLENCE IN NORTH AMERICA: ASIAN AMERICAN AND ASIAN CANADIAN REFLECTIONS ON HATE, HEALING, AND RESISTANCE (2001); HUPING LING, EMERGING VOICES: EXPERIENCES OF UNDERREPRESENTED ASIAN AMERICANS (2009).

### B. Japanese Immigration

Scholars have divided Japanese immigration into five periods: (1) unrestricted and scattered immigration between 1861 and 1890 (3,000 immigrants); (2) unrestricted and growing immigration between 1891 and 1900 (27,000 immigrants); (3) peak, unrestricted immigration between 1901 and 1908 (127,000 immigrants); (4) reduced immigration under the “Gentleman’s Agreement” between 1909 and 1924 (118,000 immigrants); and (5) no immigration under the Immigration Act of 1924.<sup>180</sup> To this we add a sixth period: renewed immigration following the Immigration Act of 1965.

During the first period, Japanese citizens began migrating to Hawaii to work as laborers on sugar plantations.<sup>181</sup> At around the same time, employers in California felt the harsh effects of the Chinese Exclusion Act of 1882, which created labor shortages throughout the state (that is, a shortage of labor willing to work at close-to-subsistence levels) and, in turn, attracted a large number of Japanese workers from Hawaii to California.<sup>182</sup>

The population of Japanese in the United States increased from 150 in 1880 to 140,000 in 1930, mostly in California. Californians welcomed these new immigrants only as temporary workers and restricted their basic civil rights, including the right to own real property. Employers welcomed these early first-generation Japanese recruits, especially because Chinese laborers in the agricultural sector had begun using their diminished numbers to increase wages. Just as the railroad and mining companies had recruited Chinese laborers beginning in the 1850s, California’s agricultural and mining industries sought to replace low-cost Chinese labor by enticing Japanese immigrants with promises of high wages and new opportunity. Once the Japanese laborers arrived, however, employers required them to work long hours in return for near-subsistence-level pay. Japanese immigrants who established themselves in California initially assisted newcomers, providing them with lodging and work upon arrival in California.<sup>183</sup> Some of these first-generation Japanese immigrants joined employers in exploiting arriving Japanese. Before long, clusters of boardinghouses run by first-generation Japanese developed along the California coast, with boardinghouse owners doubling as small-scale labor contractors, recruiting and then exploiting their fellow immigrants. A typical Japanese-language advertisement running in Hawaii declared:

GREAT RECRUITING TO AMERICA: Through an arrangement made with Yasuwaza, of San Francisco, we are able to recruit laborers to the mainland and offer them work . . . Employment offered in picking strawberries and tomatoes, planting beets, mining and domestic service. Now is the time to go!<sup>184</sup>

At around the turn of the century, however, Japanese farm workers began striking for higher wages and improved working conditions, and Californians

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180. DANIELS, *POLITICS OF PREJUDICE*, *supra* note 123, at 1.

181. *Id.* at 6.

182. *Id.* at 6–7.

183. *Id.* at 7.

184. *Id.* at 8.

became increasingly hostile towards Japanese immigrants.<sup>185</sup> Without Chinese workers to supplement their agricultural labor requirements, employers grudgingly yielded to some of their demands.<sup>186</sup> Such labor actions quickly soured relations between California farmers and their Japanese workers, with one grower complaining about the “saucy, debonair [racial slur deleted], who would like to do all his work in a white starched shirt with cuffs and white collar accompaniments.”<sup>187</sup> In addition to striking for higher wages, many first-generation Japanese began to slowly acquire the capital necessary to purchase their own land. By 1904, first-generation Japanese farmers had already acquired 2,422 acres of land, a figure that would rise to 16,499 acres in 1909 and 74,769 acres in 1919.<sup>188</sup> The rapid economic success of the first-generation Japanese as farmers and businessmen quickly sparked hostility among Californians, who viewed them as economic and cultural threats. In many ways, the anti-Japanese movement was a continuation of the long-standing agitation against the Chinese. The anti-Oriental movement that targeted Chinese immigrants in previous decades turned its attention to what it perceived as a new threat to California’s economic success and cultural identity—the so-called “Japanese invasion.”

The first major protest against the Japanese in California took place in May 1900 in San Francisco, where Mayor James Duval Phelan declared:

The Japanese are starting the same tide of immigration which we thought we had checked twenty years ago . . . The Chinese and Japanese are not bona fide citizens. They are not the stuff of which American citizens can be made . . . they will not assimilate with us and their social life is so different from ours, let them keep at a respectful distance.<sup>189</sup>

That same year, the Democratic Party plank urged that the Chinese Exclusion Act apply to all “Asiatic races,” and the pro-Bryan Populists demanded a halt to the “importation of Japanese and other laborers under contract.”<sup>190</sup> Even the radical segment of the American Left staunchly opposed the Japanese, with some members putting forth blatantly racist arguments. One socialist writer stated that “our feelings of brotherhood toward the Japanese” must be postponed “until we have no longer reason to look upon them as an inflowing horde of alien scabs.”<sup>191</sup> Other prominent socialists wished to restrict immigration from all “backward races” and keep the United States “White Man’s countr[y],” lest it become “a black-and-yellow country within a few generations.”<sup>192</sup>

The anti-Japanese movement gained significant traction in early 1905, when the most influential newspaper on the Pacific Coast, the *San Francisco Chronicle*, published the following headline: “THE JAPANESE INVASION, THE PROBLEM OF THE HOUR.”<sup>193</sup> Other headlines appearing in the *Chronicle* over the next few

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185. *Id.* at 9.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 21.

190. *Id.* at 22.

191. *Id.* at 30.

192. *Id.*

193. *Id.* at 25.

months included the following:

BROWN MEN ARE MADE CITIZENS ILLEGALLY

BROWN MEN AN EVIL TO THE PUBLIC SCHOOLS

THE YELLOW PERIL—HOW JAPANESE CROWD OUT THE  
WHITE RACE

BROWN ARTISANS STEAL BRAINS OF WHITES.<sup>194</sup>

The anti-Oriental movement thus framed the Japanese issue as “brown versus White,” “Yellow versus White,” and as “good versus evil.”

In 1905, California trade unionists formed the Japanese and Korean Exclusion League, which existed solely to exclude Japanese and other Asian peoples.<sup>195</sup> The organization argued for exclusion on primarily racial grounds, alleging that “[n]o large community of foreigners, so cocky, with such distinct racial, social and religious prejudices, can abide long in this country without serious friction,” and that “it should be against public policy to permit our women to intermarry with Asiatics.”<sup>196</sup> The organization did not advance an anti-immigrant message, but rather an anti-Asian one. Members believed that assimilation could not cross the color line, declaring that “an eternal law of nature has decreed that the white cannot assimilate the blood of another without corrupting the very springs of civilization.”<sup>197</sup> Given that many of the organization’s leaders had immigrated themselves—albeit from European nations—this example highlights the ways in which the boundaries of Whiteness expanded to include European groups at the expense of Asian immigrants. Whereas European immigrants had assimilated within the span of a few decades, non-European immigrants struggled to integrate over nearly a century and still have not assimilated.

Local and state legislation during this period reflected the general anti-Japanese hysteria of the time. Following the vicious anti-Japanese campaign instigated by the *San Francisco Chronicle* in 1905, the California legislature passed a resolution that called upon Congress to “limit and diminish the further immigration of Japanese.”<sup>198</sup> The resolution enumerated ten reasons for exclusion, including that “Japanese laborers, by reason of race habits, mode of living, disposition and general characteristics, are undesirable.”<sup>199</sup> California legislatures introduced anti-Japanese bills in every biennial session for the next four decades without exception.<sup>200</sup>

California’s anti-Japanese hysteria soon spilled over into the national political arena, as the California lobby pressured Congress to pass exclusionary legislation similar to the Chinese Exclusion Act. President Theodore Roosevelt, however, feared excluding the Japanese for an important political reason: Japan had recently annihilated Russian military forces and ascended into the first rank of world

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194. *Id.*

195. ALEXANDER SXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 247 (1971).

196. DANIELS, *POLITICS OF PREJUDICE*, *supra* note 123, at 28.

197. *Id.* at 28.

198. *Id.* at 27.

199. *Id.*

200. *Id.*

powers.<sup>201</sup> California's extreme hostility towards the Japanese and its continuous enactment of discriminatory legislation—particularly the San Francisco School Board's 1906 order mandating segregation for Japanese students—created a very sticky diplomatic situation for Roosevelt, who sought to maintain friendly relations with the new world power. After weeks of dickering between Washington and California, Roosevelt finally reached an agreement with California's politicians that permitted San Francisco to place overage pupils and those with limited English in separate schools, so long as all other Japanese children continued to attend regular public schools.<sup>202</sup> In return, the federal government withdrew its lawsuits against San Francisco and promised to limit Japanese immigration.<sup>203</sup>

In 1907, American and Japanese diplomats formed the "Gentleman's Agreement," which barred Japan from issuing passports to laborers bound for the United States.<sup>204</sup> That same year, President Theodore Roosevelt signed Executive Order 589, which barred Japanese laborers with visas for Hawaii, Canada, and Mexico from re-immigrating to the United States.<sup>205</sup> These reforms did little to limit Japanese immigration, and they instead shifted the demographics from young male laborers to young female "picture brides" who arrived in the United States without ever having met their future husbands. Ultimately, however, the 1924 Immigration Act virtually ended Japanese immigration altogether.<sup>206</sup> The Immigration Act prohibited from immigrating "aliens ineligible to citizenship," and the then-existing naturalization laws allowed only free White immigrants and people of African ancestry to become naturalized citizens.<sup>207</sup>

Anti-Japanese hysteria reached a historical high during World War II, when the United States government shipped roughly 112,000 Japanese Americans to concentration (or "internment") camps.<sup>208</sup> After the attack on Pearl Harbor in 1941, nearly every newspaper on the Pacific Coast "spewed forth venom against all Japanese."<sup>209</sup> Magazines and newspapers published articles explaining how to tell the Japanese from other Asian nationalities, noting that "Chinese and Koreans both hate the [racial slur] more than we do . . . Be sure of nationality before you are rude to anybody."<sup>210</sup> The press also spread fear and incited racial violence by leading the public to believe that there were Japanese spies all around them.<sup>211</sup> Of the roughly 112,000 Japanese Americans sent to internment camps, 64.9 percent had been born in America.<sup>212</sup>

Perhaps the most visible display of Japanese participation in the courts occurred during the years of Japanese internment, when Japanese Americans brought a number of cases to the Supreme Court to test the legality of internment. Although

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201. *Id.* at 36.

202. *Id.* at 42.

203. *Id.*

204. See ENTRY DENIED, *supra* note 124, at vii–viii.

205. *Id.* at viii.

206. *Id.* at viii.

207. *Id.*

208. ROGER DANIELS, CONCENTRATION CAMPS IN NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II, at xv (1993).

209. *Id.* at 32.

210. *Id.* at 33.

211. *Id.*

212. *Id.* at 104.

the Supreme Court upheld the validity of Japanese internment, the cases represented a desire to participate within the system and to interact with the larger society. In *Hirabayashi v. United States*,<sup>213</sup> the Supreme Court upheld the conviction of a University of Washington student who had violated curfew and failed to report for evacuation, stating that just because

racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly prevented from taking into account those facts . . . which may in fact place citizens of one ancestry in a different category.<sup>214</sup>

Later, in *Korematsu v. United States*, the Supreme Court upheld the evacuation of Japanese Americans from their homes on the basis that “the gravest imminent danger to the public safety” justified their evacuation.<sup>215</sup> Korematsu’s conviction was overturned in 1984.<sup>216</sup>

The history of Japanese immigration to the United States thus reveals nearly 150 years of struggle for acceptance and integration. Like the Chinese, Japanese immigrants and their children refused to sit idly by as courts and legislatures denied them their rights. Today, Japanese Americans have largely integrated into American society, as evidenced by their interaction with other ethnocultural groups and their robust involvement in the nation’s institutions of higher education. Educational achievement among Japanese Americans exceeds the national average, with 46.1 percent of Japanese Americans over the age of twenty-five holding a bachelor’s degree or higher, compared to the national average of 28.2 percent.<sup>217</sup> Additionally, 15.2 percent of Japanese Americans over the age of twenty-five hold graduate or professional degrees, compared with the national average of 10.4 percent.<sup>218</sup> Thus, Japanese Americans have integrated, though not fully assimilated, into American society. Like Chinese Americans, Japanese Americans still retain their unique culture, though the current generation may be distancing itself from the traditions brought from Japan by their parents and grandparents.

As these two sections demonstrate, Chinese Americans and Japanese Americans faced on their path to integration a long and arduous battle fraught with discrimination and daunting structural barriers. Many factors ultimately led to the acceptance and integration of the Chinese and Japanese communities into mainstream American society. For example, the Chinese community’s continued involvement in the nation’s courts and legislatures certainly contributed to their success, as did evolving notions of “Whiteness” and the decreased salience of “Whiteness” as a requirement for successful integration. Chinese and Japanese Americans have also assumed what we call a “constructively White” status through educational, professional, and economic achievement. As Professor Haney López points out, Asian Americans “with the highest levels of acculturation, achievement, and wealth increasingly find themselves functioning as white, at least as measured by

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213. 828 F. 2d 591 (1943).

214. DANIELS, *POLITICS OF PREJUDICE*, *supra* note 123, at 133.

215. *Id.* at 137.

216. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

217. *See* U.S. CENSUS BUREAU, 2010 CENSUS DATA (2010).

218. *Id.*

professional integration, residential patterns, and intermarriage rates.”<sup>219</sup>

Thus, although the gradual expansion of the boundaries of Whiteness to include groups initially considered non-White served as a central mechanism by which European immigrant groups were absorbed into the mainstream of American life, in the case of some Asian groups, this mechanism manifested itself differently. Rather than considering Asian groups White, a dominant White culture in America has created an “exceptional” category for certain Asian groups, for which certain aspects of White identity—most notably more archaic, biological constructions of race—are considered irrelevant, while the social, economic, and cultural accomplishments are emphasized to bestow a constructive or “honorary” White identity. As the next section explores, however, the White majority very narrowly confines the development of this “constructively White” racial category and selectively metes it out to certain immigrant groups, primarily those from middle-class backgrounds or with the ability to attain rapid economic upward mobility once within the United States. In both cases, the enduring legacy of this racialized pattern of Americanization can be best understood through reference to the place of Black Americans in the broader racial hierarchy in the United States.<sup>220</sup>

### III. BLACK AMERICANS

While not usually thought of as an “immigrant” group per se, the internal movement of Black Americans has been very tightly controlled for most of United States history. Legal barriers to where Black Americans could live did not fully fall until the mid-twentieth century and to this day, extralegal barriers continue to force most Black Americans into largely Black neighborhoods. This regulation of the movement of Black Americans was closely connected to the regulation of immigration by groups considered “non-White” into the United States. However, whereas many immigrant groups ultimately assimilated or integrated into the mainstream United States population, in many ways, the mainstream has never fully accepted Black Americans economically or socially.

In 1860, the Black population in the United States numbered 4.5 million, which included four million slaves, out of a total United States population of thirty-one million. In the wake of the American Civil War (1861–65), newly emancipated slaves tried to move from the plantations where most of them had been held in bondage to towns and cities. But the Freedmen’s Bureau, established by Congress to help freed slaves transition to independence, did little to help them establish genuine economic independence. While the Bureau permitted newly freed African Americans to leave their own plantations and to search for family, it also acted quickly to restrict their ability to acquire their own land and insisted that they contract for their work with White former slave owners.<sup>221</sup> These contracts primarily consisted of sharecrop agreements, under which the Black laborer worked the land of the White property owner for a share of the crop. The laborer usually found himself in greater debt each year, and was thus increasingly tied to a near-slavery relationship.

As noted by historian Kenneth Stampp, while Southern political leaders

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219. HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 10, at 152.

220. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

221. LEON LITWACK, *BEEN IN THE STORM SO LONG* 230, 408–17 (1980).

grudgingly accepted the Thirteenth Amendment's abolishment of slavery:

[C]learly most of them intended to replace slavery with a caste system that would keep the Negroes perpetually subordinate to the whites. Negroes were to remain a dependent laboring class; they were to be governed by a separate code of laws; they were to play no active part in the South's political life; and they were to be segregated socially.<sup>222</sup>

For example, in 1865, South Carolina passed a series of repressive laws known as the "Black Code," which decreed, among other things, that Black children "whose parents are not teaching them habits of industry and honesty" may be bound by district judges as "apprentices" to a White "master" who "shall receive to his own use the profits of the labor of his apprentice."<sup>223</sup> Further, they had to apply for a permit—at an annual cost of between ten and one hundred dollars—to work as an artisan, mechanic, or shopkeeper. Any person found without "lawful and reputable employment" could be arrested, and he could serve out his sentence by working as a servant to a master, who then retained the rights to seek "suitable corporal punishment" should the servant violate the terms of the contract.<sup>224</sup> Alternately, Black Americans who did not receive an occupational license could make a "contract for service" to become a servant to a White master, usually to perform agricultural work, and "voluntarily receive[d] no remuneration except food and clothing."<sup>225</sup>

White northerners, exhausted by the brutality of the Civil War and caught up in their own concerns over the rising tide of immigrants arriving on their shores, turned their backs on southern Black Americans or actively condoned the southern caste system. In 1890 the *Nation* magazine proclaimed:

The sudden admission to the suffrage of a million of the recently emancipated slaves belonging to the least civilized race in the world . . . was a great leap in the dark . . . Who or what is . . . [the Negro] that we should put the interests of the 55,000,000 whites on this continent in peril for his sake?<sup>226</sup>

Trapped by Jim Crow laws throughout the South, a few Black Americans did manage to escape to the marginally friendlier North, with 70,000 Black Americans leaving the South in the 1870s, 80,000 in the 1880s, 174,000 in the 1890s, and 197,000 between 1900 and 1910.<sup>227</sup>

After the turn of the century, the growing needs of industrial concerns in the Northeast and Midwest (for workers, and for strike breakers as labor unions gained strength)—combined with a growing southern racial oppression—helped spark the Great Migration. Between 1915 and 1975, over six million Black Americans left the rural South, heading north and west along three major tributaries: east-coastal,

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222. Kenneth M. Stampp, *The Tragic Legend of Reconstruction*, in RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 13 (Kenneth M. Stampp & Leon Litwack eds., 1969).

223. S.C. BLACK CODE §§ XVII–XXIV (1865).

224. *Id.* §§ XCVI, XCVII, LII.

225. *Id.* §§ XXXV, XLIII.

226. Stampp, *supra* note 224, at 16.

227. DOUGLASS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 27 (1993).

central, and western.<sup>228</sup> As with many immigrants who had arrived on America's shores during the preceding century, labor recruiters instigated the initial stream of this Great Migration.<sup>229</sup> Prior to World War I, rural immigrants from southern and eastern Europe had filled the demand for unskilled labor in the industrial North.<sup>230</sup> But migration from Europe proved inconsistent—it varied with booms and busts of European economy. When this happened, recruiters turned to the rural southern United States.<sup>231</sup> Indeed, after the Johnson-Reed Act of 1924 cut immigration to a trickle, northern industrialists had few options but to encourage the movement of Black Americans from the South. Once early migrants—primarily young men—had established themselves, they sent word back home that the North had better opportunities. The *Chicago Defender*, a leading Black newspaper, exhorted southern Black Americans to escape to the North.<sup>232</sup>

Working-class Whites feared economic competition and reaffirmed their belonging to a White mainstream by “oppressing a people that was even lower in the racial hierarchy.”<sup>233</sup> While labor competition provides one explanation for northern racism, it is by no means the only one. Although the North had long prided itself for shunning the institution of slavery, it had not escaped the ideology of White racial superiority that characterized much of American history. As Massey and Denton have meticulously documented, as the number of Black residents in the North grew precipitously, residential segregation became an entrenched institution for maintaining White domination over economic, social, educational, and political resources. While racially restrictive covenants played a key role in maintaining this segregation, the federal government also contributed to it. In 1933, the Federal Home Owners' Loan Corporation (HOLC), aiming to provide home mortgage assistance to homeowners at risk of default in urban neighborhoods, designed a series of color-coded “Residential Security Maps” that portrayed the risks associated with loans in every neighborhood.<sup>234</sup> HOLC described the highest-ranking areas as “homogenous,” while it cited neighborhoods with “rapidly increasing Negro population” as giving rise to the “problem in the maintenance of real estate values.”<sup>235</sup> Additionally, the Underwriting Manual used by the Federal Housing Administration to determine whether to extend home loan insurance explicitly considered the presence of “inharmonious racial or nationality groups” a liability, and it recommended that homeowners use racially restrictive covenants as a means of ensuring “stable” neighborhoods.<sup>236</sup> As one real estate appraiser noted in 1933, “certain racial and national groups, because of their lower economic status and their lower standards of living . . . cause a greater deterioration of the property than groups higher in the social and economic scale.”<sup>237</sup>

Although many European immigrants also lived in “ethnic enclaves” in northern cities, Massey and Denton noted three important factors that distinguish

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228. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 177–78 (2010).

229. *Id.* at 216.

230. MASSEY & DENTON, *supra* note 229, at 27.

231. *Id.* at 27.

232. *Id.* at 29.

233. *Id.*

234. *Id.* at 51.

235. *Id.* at 52.

236. *Id.* at 51.

237. HOMER HOYT, *ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO* 314 (1933).

these neighborhoods from Black ghettos: (1) they had never been homogenous; (2) they had a plurality, rather than a majority, of a particular ethnicity living in those neighborhoods; and (3) they were a “fleeting, transitory stage in the process of immigrant assimilationism.”<sup>238</sup> Indeed, such ethnic enclaves proved to be “vehicles for integration, economic advancement, and, ultimately, assimilation into American life,” whereas “for rural blacks . . . cities became a trap—yet another mechanism of oppression and alienation.”<sup>239</sup>

Violence also played an important role in enforcing segregation in the North. Beginning with a series of race riots that swept northern cities between 1900 and 1920, victims were singled out on the basis of their skin color.<sup>240</sup> After these riots—and as Black neighborhoods became increasingly crowded—families attempted to leave for neighboring suburbs only to encounter more violence. Among the more spectacular displays of this unbridled violence was the 1951 Cicero, Illinois, race riot. The Clark family—a Black, college-educated couple with two children—shared a two-room apartment in Chicago with another family of five, paying 50 percent more than tenants in White neighborhoods.<sup>241</sup> They found a five-room apartment for similar rent just one block over the dividing line in Cicero, but when they attempted to move in, local police and White protesters met them and physically prevented them from doing so. The Clarks sued and won the right to occupy the apartment, and after moving their furniture in in June 1951, a mob entered the apartment, attacked them, and destroyed all their belongings.<sup>242</sup> Within days, the violence escalated, with four thousand White residents participating in the firebombing of the twenty-two-unit building. The National Guard arrived and arrested 118 rioters. None were prosecuted, but the rental agent and apartment building were indicted on charges of inciting a riot (the charges were later dropped).<sup>243</sup>

This fierce patrolling of the boundaries between Black and White spaces, and of the movement of Black people in America, illustrates the critical role played by “place” in mediating access to opportunity. Historian Ira Berlin has noted:

For much of American history, place was not merely a geographic locale, but a social imperative—as in ‘stay in your place’—that black men and women violated at great risk . . . Manifested at times in fugitive slave law, racial covenants and redlines, or urban renewal policy that required ‘negro removal’, the struggle for place was an ongoing part of the American experience.<sup>244</sup>

Like immigrants from Europe and Asia (or migrants within Europe, also moving from south to north), Black Americans fled to the North to seek economic opportunity and to escape oppression and subordination. And like immigrants from parts of Europe and Asia, they not only found better lives, but they also found exploitation and discrimination. But if the consistent story for European immigrants,

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238. MASSEY & DENTON, *supra* note 229, at 32–33.

239. *Id.* at 18.

240. *Id.* at 30, 34.

241. WILKERSON, *supra* note 230, at 372.

242. *Id.* at 373.

243. *Id.* at 374.

244. IRA BERLIN, *THE MAKING OF AFRICAN AMERICA: THE FOUR GREAT MIGRATIONS* 19 (2010).

and for some Asian immigrants, has been one of integration, assimilation, and success, for Black migrants—as well as for those who remained in the South—the story has been one of continuing segregation, discrimination, exploitation, and subordination. As set forth below, for Black Americans, the legacy of inequality has been continuing inequality.

In 2010, the median household income for a Black family (including families who reported “some other race” in addition to Black on their census forms) was just 56 percent that of White non-Hispanic families (and 64 percent that of the average American household). This does not represent a significant improvement over the economic situation of black families in 1947, when their household income amounted to just a little over half (51 percent) that of White families.<sup>245</sup> In terms of education, Black Americans have enjoyed relatively little progress as a result of the Supreme Court’s landmark *Brown v. Board of Education* decision in 1954. In 2009, Black (and Latino) children attended schools more segregated than they did in 1968.<sup>246</sup> Indeed, in 2006, 38.5 percent of Black children attended schools that were more than 90 percent minority.<sup>247</sup> Just one in four black men holds an associate’s degree or higher.<sup>248</sup> A host of evidence documents that Black Americans continue to be far less likely to be hired or promoted than similarly qualified Whites,<sup>249</sup> less likely to receive prime-rate mortgage loans for which they qualify,<sup>250</sup> and more likely to be charged higher prices or higher credit interest rates for consumer goods like cars than similarly qualified Whites.<sup>251</sup>

Racial inequities express themselves perhaps most acutely in the criminal justice system, which treats Black Americans more harshly than similarly situated Whites at every step of the process, from being stopped<sup>252</sup> and searched<sup>253</sup> by the police, arrested,<sup>254</sup> incarcerated,<sup>255</sup> and receiving parole.<sup>256</sup> As a result of these

245. See U.S. CENSUS BUREAU, 2010 CENSUS DATA (2010).

246. GARY ORFIELD, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES AT UCLA, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 4 (2009).

247. *Id.* at 4 tbl.5.

248. *Id.* at 7.

249. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); JENNY BUSSEY & JOHN TRASVIÑA, THE IMPACT FUND’S DISCRIMINATION RESEARCH CTR., RACIAL PREFERENCES: THE TREATMENT OF WHITE AND AFRICAN AMERICAN JOB APPLICANTS BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA (2003); MARGERY A. TURNER ET AL., THE URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED; RACIAL DISCRIMINATION IN HIRING 1–4 (1991).

250. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006).

251. Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991).

252. William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 3 RUTGERS RACE & L. REV. 83, 103–04 (2001).

253. ERICA L. SMITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 5 (2006), <http://www.bjs.gov/content/pub/pdf/cdsp02.pdf>.

254. Alfred Blumstein, *Racial Disproportionality in the U.S. Prison Population Revisited*, 64 UNIV. COLO. L. REV. 743 (1993).

255. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf); see also MICHELLE ALEXANDER, THE NEW JIM CROW (2012).

256. TIMOTHY A. HUGHES ET AL., U.S. DEP’T OF JUSTICE, TRENDS IN STATE PAROLE, 1990–2000, at 8 tbl.8 (2001), <http://www.bjs.gov/content/pub/pdf/tsp00.pdf>.

endemic inequities, in some states, one in four Black men has a felony conviction that bars them from voting.<sup>257</sup> As the growing momentum of the Black Lives Matter movement has demonstrated, the criminal justice system has played a crucial role in marginalizing and limiting the social and economic progress of many Black Americans.

This is not to say there has been no progress for Black Americans. The Civil Rights Movement of the 1950s and 60s brought an end to legally sanctioned segregation and intentional discrimination. Affirmative action in the 1970s helped create a larger black middle class. There are some Black Americans visible at every level of American life. Indeed, perhaps the most significant paradox of race relations in the United States is that—although we have a black president—Black Americans as a whole experience overwhelming inequities in educational, economic, and health outcomes, and they continue to experience the cumulative effects of implicit bias at both the interpersonal and structural levels. The significant inequality that Black Americans continue to suffer illustrates the enduring legacy of racism in the United States, and that—as the late Derrick Bell concluded—racism against Black Americans is not only endemic, it may be ultimately permanent.<sup>258</sup>

#### IV. MEXICAN AMERICANS

Unlike U.S. immigration policies towards European, Japanese, and Chinese immigrants, which followed a pattern of free immigration, then exclusion, then gradual acceptance, U.S. immigration policies towards Mexican immigrants have oscillated between recruitment and restriction—acceptance and exclusion—depending on the economic conditions of the day.<sup>259</sup> Individuals of Mexican ancestry have resided in the United States since the United States and Mexico signed the Treaty of Guadalupe-Hidalgo in 1848. Despite their continued presence in the United States for more than 150 years—far longer than either Japanese or Chinese Americans—Mexican Americans as a group still struggle to obtain similar levels of acceptance and integration. This observation leads to the final question raised by this essay: Will Mexican Americans integrate into mainstream American society as European and (to some extent) Asian immigrants have, or will they continue to live at the margins of society as Black Americans have?

The first individuals of Mexican ancestry to reside in the United States did not arrive as immigrants, but rather remained in the country after the Treaty of Guadalupe-Hidalgo transferred vast territories from Mexico to the United States. Beginning in the 1820s, European and American immigrants settled in Texas—then still part of Mexico—which led the United States to annex Texas in 1845.<sup>260</sup> The annexation sparked the Mexican-American War, which raged from 1846 to 1848 and ended with an American victory. The resulting Treaty of Guadalupe-Hidalgo transferred immense amounts of territory from Mexico to the United States, including all or part of the present-day states of Texas, California, New Mexico,

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257. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 10 (2006).

258. See generally BELL, *supra* note 222.

259. DOUGLASS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 8 (2002).

260. MARTHA MENCHACA, RECOVERY HISTORY, RECONSTRUCTING RACE: INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS 216 (2001).

Arizona, Colorado, Utah, Nevada, Oklahoma, Kansas, and Wyoming.<sup>261</sup>

In the years following the Mexican-American War, Mexicans continued to cross the vaguely defined U.S.-Mexico border. Thousands of immigrants arrived in California to work as miners during the Gold Rush, and thousands more arrived to work on the railroads. Between 1850 and 1900, roughly 13,000 immigrants arrived in the border states from Mexico.<sup>262</sup> Like Chinese and Japanese miners, Mexican miners faced discrimination and violence in the workplace. In much the same way that White Americans viewed Chinese and Japanese immigrants as economic and cultural threats, they also lashed out against successful Mexican immigrants. Mexican Americans living in Texas suffered the worst violence at the hands of the Texas Rangers, who brutally repressed the population and who are estimated to have murdered hundreds, if not thousands, of Mexican Americans. During the second half of the nineteenth century, Mexican immigrants continued to arrive in the border states of California, Texas, Arizona, and New Mexico, where they experienced a mix of success and discrimination familiar to other immigrant groups of the time.<sup>263</sup>

From 1900 until the present, Mexican immigration into the United States can be divided into five periods: (1) a period of active recruitment between 1900 and 1929; (2) a period of deportation between 1929 and 1941; (3) a second period of recruitment under the *bracero* program between 1942 and 1964; (4) a period of undocumented migration between 1965 and 1985; and (5) a period of deep division over the fate of Mexican immigration into the United States that persists to the present day.<sup>264</sup>

During the period of immigration between 1900 and 1929, Western businesses vigorously recruited Mexican labor to fill shortages created by the exclusion of other groups. By 1908, the Chinese Exclusion Act of 1882 and the “Gentleman’s Agreement” of 1907 had cut off Chinese and Japanese immigration and renewed the demand for cheap, flexible labor in mining, railroads, agriculture, and construction.<sup>265</sup> Just as Japanese boardinghouse owners in California recruited Japanese labor from Hawaii, private labor contractors in the West employed “a variety of coercive measures to recruit Mexican laborers and deliver them to jobs north of the border.”<sup>266</sup> Recruiters traveled to Mexico and lured workers to the United States with promises of “high wages and untold riches” that awaited them in the north.<sup>267</sup> These arrangements frequently entailed a great deal of exploitation that bordered on indentured servitude: potential immigrants were loaned money to travel northward and expected to repay the loans—with interest—from their wages.<sup>268</sup> When Mexican laborers discovered they had been tricked—that working conditions were harsher and wages lower than they had been led to believe—they often had little choice but to remain in the United States and repay their debts.

Immigration from Europe dropped sharply after the onset of World War I, and industrialists from as far away as Chicago and Kansas City began employing

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261. *Id.*

262. MASSEY ET AL., *supra* note 261, at 29.

263. *Id.*

264. *Id.* at 26–51.

265. *Id.* at 27.

266. *Id.*

267. *Id.*

268. *Id.* at 28.

contractors to recruit Mexican labor.<sup>269</sup> In fact, Mexican labor was in such high demand during the decades leading up to and following World War I that the various restrictive immigration policies affecting Asian and European immigrants did not apply to Mexican immigrants. The head tax and literacy test imposed on all new arrivals in 1917, for example, exempted Mexicans, as did the quota system implemented between 1921 and 1929.<sup>270</sup> Mexican immigration boomed after 1900 as a result of (1) the United States' demand for labor; (2) the friendly immigration policies towards Mexico; and (3) Mexico's deteriorating economic condition.<sup>271</sup> Between 1900 and 1930, 728,000 Mexican immigrants entered the United States compared with the 13,000 immigrants that entered between 1850 and 1900.<sup>272</sup>

Beginning in the 1920s, a strong nativism took hold in the United States, and immigrants came to be viewed as a threat to American well-being. With the stock market crash of 1929 and the deepening of the Depression in the early 1930s, attitudes toward Mexican immigrants became more hostile. Just as the economic downturns of the 1870s and 1890s spurred resentment toward Chinese and Japanese immigrants, White Americans blamed Mexican immigrants for "taking away jobs from Americans" and "living off public relief."<sup>273</sup> As history demonstrates, "the United States has an immigration dark side. A mean-spirited, anti-immigrant impulse [that] sporadically grip[s] the nation, particularly during times of social stress. During these times, the U.S. immigration laws have been harsh, discriminatory, and aggressively enforced."<sup>274</sup> To allay the fears of struggling U.S. workers, Congress initiated a massive roundup and deportation of immigrants. Instead of using the quota system used to halt European immigration, Congress in 1924 founded the U.S. Border Patrol to apprehend and deport Mexican immigrants.<sup>275</sup> A series of deportation campaigns throughout the 1930s managed to reduce the size of the Mexican population in the United States by 41 percent.<sup>276</sup>

During the mobilization of American industry during World War II, Americans who had worked in agriculture during the Great Depression joined the armed forces via the draft or returned to the cities to take high paying, unionized jobs. Once again, agricultural growers complained about the shortage of cheap labor and turned to Congress for a solution. Fearful of disrupting America's food supply during war mobilization, the Roosevelt administration negotiated a "binational treaty for the temporary importation of Mexican farmworkers, who became known as *braceros*."<sup>277</sup> Under the *bracero* program, the Immigration and Naturalization Service (INS) regulated immigration and enforced the terms of temporary visas issued to Mexican laborers. In all, some 168,000 Mexican laborers were recruited to the United States between 1942 and 1945.<sup>278</sup> After 1945, Texas and California pressured Congress to extend the program through the late 1940s. When the program

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269. *Id.* at 28.

270. *Id.* at 29.

271. *Id.*

272. *Id.*

273. *Id.* at 33.

274. KEVIN JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 2 (2007).

275. MASSEY ET AL., *supra* note 261, at 33.

276. *Id.* at 34.

277. *Id.* at 35.

278. *Id.* at 36.

finally ended, growers began recruiting undocumented workers themselves.<sup>279</sup> In 1951, Congress caved to the pressure from growers to extend the *bracero* program permanently, passing Public Law 78.<sup>280</sup> Although the INS immediately increased the number of *bracero* visas to 200,000, as Mexicans gained connections and support through family and friends working in the United States, the number of undocumented immigrants began to rise as well.<sup>281</sup>

Following the Korean War and the ensuing recession, United States immigration policy once again reversed course from recruitment to exclusion. Even as agricultural growers pressured Congress for more workers, a strong and highly mobilized anti-immigration movement lobbied Congress to secure the borders.<sup>282</sup> This resulted in a 1954, INS-initiated attack known as “Operation Wetback,” in which the INS apprehended over one million undocumented immigrants and deported them back to Mexico.<sup>283</sup> In a move that exemplified the United States’ inconsistent immigration policy towards Mexico, the Department of Labor frequently issued *bracero* visas to immigrants deported to Mexico under Operation Wetback and immediately sent them back to the farms from which they had been arrested in the first place.<sup>284</sup> This system both ensured that growers received their workers under the *bracero* program and that the public received reassurance through the militarization of the border and the large number of apprehensions.

Between 1954 and 1965, Mexican immigration rested on the delicate compromise between the public’s demand for border control and growers’ demands for workers.<sup>285</sup> Overall, nearly five million Mexican laborers entered the United States during the *bracero* program’s twenty-two-year history.<sup>286</sup> The program finally ended in 1965, after civil rights groups attacked it, calling it exploitative, discriminatory, and detrimental to the socioeconomic well-being of Mexican Americans.<sup>287</sup> Over the next decade, U.S. immigration policy towards Mexico oscillated between unrestricted access and strict quotas.

While the federal government attempted to control the border, state legislatures attempted to control the lives of arriving immigrants. Many states, for example, passed discriminatory laws in the area of education. In 1975, revisions to Texas education laws gained national attention when the Supreme Court struck them down as unconstitutional in *Plyler v. Doe*.<sup>288</sup> The overturned law had sought to deny educational funding to children who had not been legally admitted into the United States, and to authorize local schools to deny enrollment to such students.<sup>289</sup> Although the Supreme Court invalidated the law on Fourteenth Amendment grounds, the law nonetheless reflected the widespread anti-Mexican sentiment of the time and represented but one of the many laws passed to restrict access to education for Mexican immigrants.

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279. *Id.*

280. *Id.* at 37.

281. *Id.*

282. *Id.* at 37.

283. *Id.*

284. *Id.*

285. *Id.* at 39.

286. *Id.* at 39.

287. *Id.* at 41.

288. 457 U.S. 202 (1982).

289. *Id.*

The deep economic and social anxiety that characterized the mid-1980s led Congress to pass the Immigration Reform and Control Act (IRCA) of 1986.<sup>290</sup> IRCA sought to reduce the benefits associated with immigration into the United States and increase the costs. IRCA imposed sanctions against employers who knowingly hired undocumented workers and increased the budget to carry out workplace investigations.<sup>291</sup> IRCA also authorized a 50 percent increase in the INS's budget to expand the Border Patrol.<sup>292</sup> Finally, IRCA authorized amnesty for long-term undocumented residents—provided they take English-language and civic classes—granting legal status to roughly 2.3 million Mexican workers.<sup>293</sup>

When it became clear after four years that IRCA had failed to slow Mexican immigration, Congress passed the Immigration Act of 1990. The Act focused primarily on patrolling the border, and it authorized funds for one thousand new agents.<sup>294</sup> The Act also “tightened employer sanctions, streamlined criminal and deportation procedures, and increased penalties for numerous immigration violations.”<sup>295</sup> Finally, the Act imposed limits on the total number of immigrants admissible each year, including children and spouses of U.S. residents and citizens.<sup>296</sup> At the same time, the Act increased the number of visas going to well-educated job seekers—primarily from developed European countries—thus revealing Congress's preference for European immigrants over those from other regions.<sup>297</sup>

Between 1993 and 1997, the INS launched a number of initiatives aimed at further reducing illegal immigration, including “Operation Blockade,” “Operation Hold-the-line,” and “Operation Gatekeeper.”<sup>298</sup> Under Operation Gatekeeper, the agency installed a fourteen-mile-long, eight-foot-high fence near San Diego, California, which later came to be known as the “tortilla curtain.”<sup>299</sup> In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act, which authorized funds for additional fencing, military technology, and additional Border Patrol agents.<sup>300</sup> The Act went further than the 1990 Act by declaring “illegal aliens” ineligible to receive Social Security, limiting their ability to receive other public benefits, and authorizing states to limit public assistance to aliens.<sup>301</sup>

Because immigration is primarily a matter of federal law, state actions during the 1990s had more symbolic significance. One popular way in which states displayed their dislike of foreigners was to approve initiatives making English the official language of their state.<sup>302</sup> By 1998, twenty-five states had passed such initiatives, sending a clear message to immigrants that they spoke an inferior

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290. MASSEY ET AL., *supra* note 261, at 48.

291. *Id.* at 49.

292. *Id.*

293. *Id.*

294. *Id.* at 91.

295. *Id.*

296. *Id.*

297. *Id.* at 92.

298. *Id.* at 94.

299. *Id.*

300. *Id.* at 95.

301. *Id.*

302. *Id.* at 93.

language.<sup>303</sup> In California, voters passed Proposition 187, which prohibited undocumented workers from using public services—including public schools—and required state and local agencies to report suspected illegal aliens.<sup>304</sup> The American Civil Liberties Union (ACLU) challenged most of the Proposition’s provisions, and courts declared them unconstitutional before they went into effect, but the public sentiment they reflected rang clear.

As this Section makes clear, Mexican immigrants in the United States do not have an easy time. The path toward integration and assimilation for Mexican Americans has spanned more than 150 years, yet it remains uncertain. Taken as a whole, the Mexican-American population falls well below the national average in a variety of indicators of economic, social, and political integration. Unlike European, Japanese, and Chinese Americans, who generally enjoy educational attainment near or above the national average, only 9.4 percent of all Mexican Americans over the age of twenty-five hold a bachelor’s degree compared with the national average of 28.2 percent.<sup>305</sup> Additionally, only 2.6 percent of Mexican Americans over the age of twenty-five hold a graduate or professional degree compared with the national average of 10.4 percent.<sup>306</sup> From the perspective of economic integration, as measured by household income, Mexican households make significantly less than the national average, with a median household income of \$39,000, compared to the \$50,000 national average.<sup>307</sup> Moreover, Mexican-American families are more likely to live in poverty and rely on food stamps to survive.<sup>308</sup>

## V. THE FUTURE OF MEXICAN AMERICANS IN THE UNITED STATES

Historically, Americans have considered immigrant groups to be inassimilable, or they have accused them of refusing to assimilate. At different points in history, opponents of immigration have claimed that Irish, German, Italian, Chinese, Japanese, and eastern European immigrants lacked the ability to assimilate into mainstream U.S. society. However, each of these groups has successfully integrated, and, in some cases, assimilated, into American social life. The difference between the experience of European immigrants (who within a few generations have assimilated into American society),<sup>309</sup> the experience of Asian immigrants (some of whom have integrated—if not assimilated—within a few generations, or become “constructively White”), and the experience of Black Americans (free of slavery for 150 years, and yet still effectively second-class citizens) leads to the final question raised by this essay: What pattern should we expect Mexican immigrants to the U.S. to follow?

Some predict that Mexican Americans will continue to experience second-class citizenship, and blame Mexican immigrants for it. For example, Samuel

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303. *See id.* at 93.

304. *Id.* at 93.

305. *See* U.S. CENSUS BUREAU, 2010 CENSUS DATA (2010).

306. *Id.*

307. *Id.*

308. *Id.*

309. Or, as some race scholars would say, have “become white.”

Huntington has expressed many of the same concerns regarding Mexican immigration that anti-immigrant activists have expressed throughout American history.<sup>310</sup> Huntington views Mexican immigration as a threat to the security and national identity of the United States,<sup>311</sup> echoing nativist fears once expressed against Irish, Italian, Chinese, and Japanese immigrants. He argues that the Founding Fathers “considered the dispersion of immigrants essential to their assimilation,” meaning that the more concentrated Mexican communities become, the slower and less complete their assimilation is.<sup>312</sup> His view resonates with nineteenth-century rhetoric that blamed arriving immigrants, regardless of country of origin, for living crowded together in “their own” neighborhoods, rather than acknowledging the legal and social constraints that prevented these groups from seeking economic opportunities elsewhere.

By exploring the social, political, and economic aspects of the assimilation and integration of previous immigrant groups and racial minorities, and by illuminating the crucial role played by the social construction of race in immigration and internal migration, we hope to lay a foundation for a wider discussion about the likely future of not only Mexican immigrants to the United States, but also the fate of recent immigrants to other industrialized nations as well.

#### A. *Racialization of Immigrants: Then and Now*

Since its inception, the United States has maintained a dominant racial hierarchy, deeply rooted in the foundational institution of race-based slavery. This hierarchy has manifested as a spectrum in which White identity has existed on one end and Black identity at the other, with the accumulation and distribution of resources, opportunity, and power depending significantly on where in this spectrum any given individual or group lies. As immigrant groups from various nations and cultures have arrived over the years, many started toward the “Black” end of the spectrum. Their upward economic, political, and social movement to the heart of “American-ness” co-occurred with their movement along the spectrum toward the “White” end.<sup>313</sup>

Indeed, the persistence of this American racial hierarchy has depended in part on new immigrants’ defining themselves in terms of their distance from Black Americans. As David Richards has noted, “American racism could not have had the durability or the political power it has had . . . unless new immigrants, themselves often regarded as racially inferior, had been drawn into accepting and supporting many of the terms of American racism.”<sup>314</sup> History suggests that one possibility for the long-term fate of Mexican Americans depends in part on where on this spectrum they presently lie, and whether or how quickly they are able to move away from the “more-like-Black-Americans” end of the spectrum to the “more-like-White-Americans” end. The possibility remains that Mexican Americans will ultimately

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310. SAMUEL HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004) [hereinafter HUNTINGTON, WHO ARE WE?].

311. Samuel Huntington, *The Hispanic Challenge*, FOREIGN POL’Y, March/April 2004, <http://cyber.law.harvard.edu/blogs/gems/culturalagency1/SamuelHuntingtonTheHispanicC.pdf> [hereinafter Huntington, *The Hispanic Challenge*].

312. *Id.*

313. See, e.g., IGNATIEV, *supra* note 21, at 34–59.

314. RICHARDS, *supra* note 89, at 2.

traverse a similar pathway of integration as the millions of preceding immigrants who arrived in the United States did of their own volition. The expansion of “White” racial identity, or the bestowal of “constructive Whiteness” on recent Mexican immigrants, may enable their integration.

On the other hand, the relevance of the White-Black, or even the White-non-White, binary has decreased in an increasingly multiethnic and multiracial United States, and in an increasingly global community in general. Indeed, in many ways, the very presence of people of Mexican descent specifically, and of “Hispanic descent” more broadly, in the United States has challenged and complicated the idea of race as a two-dimensional spectrum for decades. Consider the categorization of Mexicans by the United States Census. In 1930, for the first and only time in the history of the Census, the category of “Mexican” appeared in the racial classifications used by the United States Census.<sup>315</sup> Every other time, people of Mexican descent were considered White for Census purposes.<sup>316</sup> Then, in 1980, the category of “Hispanic Origin” appeared as an ethnic classification, separate from and in addition to racial classification,<sup>317</sup> with subcategories of Mexican/Mexican American/Chicano, Puerto Rican, Cuban, and Other.<sup>318</sup> The parallel classification system can be seen as a third dimension of the American racial hierarchy, reflecting a complex history of a group that would come to be called “Latinos” in the United States.

The emergence of a “Chicano” political identity beginning in the 1930s—with a resurgence in the 1960s—the rise of “Brown Power” as a contemporary to the Black Power movement of the 1970s, and the rise of ethnic studies programs during the 1980s also illustrate an endogenous resistance by Mexican Americans to this binary racial hierarchy.<sup>319</sup> In light of the increasingly multicultural composition of the United States, one aspirational view posits that the future of Mexican Americans, instead of reiterating the story of previous immigrant generations, may hew more closely to a cultural-pluralism model, in which structural mediators of opportunity and well-being are not meted out in accordance with one’s place in the racial hierarchy.

### B. *Geography as Context*

History and geography might partly explain the different experiences of Mexican immigrants and their European and Asian counterparts. Unlike European and Asian immigrants, who traversed oceans to arrive on foreign soil, some Mexican Americans can claim a historical right to the territories the United States acquired in 1848. In the western and southwestern United States, the shifting borders between colonial Mexico under Spanish rule, the emergent Mexican nation, and the United

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315. David Hendricks & Amy Patterson, *Genealogy Notes: The 1930 Census in Perspective*, 34(2) PROLOGUE (2002).

316. *Id.*

317. Melissa Nobles, *Racial Categorization and Censuses*, in CENSUS AND IDENTITY: THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUSES 43, 58 (David I. Kertzer & Dominique Arel eds., 2002).

318. CLARA E. RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES 8 (2000).

319. IAN HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 1–2, 18 (2003); Evelyn Hu-DeHart, *The History, Development, and Future of Ethnic Studies*, 75 PHI DELTA KAPPAN 50, 51 (1993).

States complicated the question of who was an “American” during the late nineteenth century. As Dale McLemore notes, “[l]ike the blacks and American Indians, the Chicanos did not originally become a part of American society through voluntary immigration . . . Except for the American Indians, the Chicanos have been the only American ethnic minority to enter the society through the direct conquest of their homelands.”<sup>320</sup>

The movement of immigrants from Mexico over a land border—in contrast with the primarily overseas arrival of previous major immigrant groups—may also play some role in the persistence of animosity against Mexican immigrants. History has likely amplified this anxiety. For example, Huntington invokes fear of a possible reconquest of the southwestern United States by Mexicans.<sup>321</sup> His rhetoric communicates that Mexican Americans may feel entitled to take back their lost territory—culturally, if not politically—because Mexico once possessed much of the southwestern United States. Huntington also argues that Mexican immigration into the United States is unique to the United States and to the world: “No other First World Country has such an extensive land frontier with a Third World country.”<sup>322</sup> This contiguity makes immigration much easier for prospective immigrants, who can cross the border cheaply and stay in contact with friends and family in Mexico. It also fuels fears of a so-called “immigrant invasion.” The current pitch of anti-immigrant sentiment by White non-Hispanics in Arizona, Texas, and California seems both poignant and ironic in light of the historical reality that major swaths of these states once formed part of Mexico.

### C. *Economic Integration: The Role of Labor Organizing*

For previous immigrant groups, labor organizing represented a key pathway to securing economic stability, and it has played a similar role for Mexicans. The history of immigration and migration to and within the United States, as with migration patterns worldwide, can often be told as two stories: the story of *movement toward* economic opportunity and the story of *movement away* from religious and political persecution. The need for workers has catalyzed the movement of almost every major demographic group that has moved (or been brought) to the United States. Usually, the earliest labor recruitment combines with simultaneous expulsive pressures from the home countries of immigrant groups to give way to the self-propelling momentum of early arrivals, who then send word of economic opportunity to friends and relatives back home.

The desire for a low-cost labor force that employers can exploit drives the demand for labor, which then results in major migration shifts. New arrivals within and to the United States almost always underwent severe exploitation and discrimination as workers. Industrialists have used each group as strike-breakers, in an effort to weaken the organized power of the prior generation of American workers. Indeed, culturally-based xenophobia has often given way to the pragmatism of economic realities during economic “boom” times. As discussed earlier, workers’ ability to organize and consolidate economic power played a key role in enabling the eventual assimilation of Irish, Italian, and eastern European Jewish immigrants. In

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320. MCLEMORE, *supra* note 64, at 209.

321. Huntington, *The Hispanic Challenge*, *supra* note 313.

322. *Id.*

some cases, the growth of organized labor reflected traditions of labor organizing that each of these immigrant groups brought with them from their home countries.

For Mexican immigrants (and descendants of Mexicans who have been in this country for generations), the relationship to labor organizing has yielded mixed results. The organizing work of César Chávez and Dolores Huerta—who cofounded the United Farm Workers union in 1962—and the subsequent nonviolent protest tactic of boycotting grapes to improve working conditions, stands out as a highlight of American labor history. Yet forty years after this first grape boycott ended, Mexican Americans broadly, and farm workers specifically, continue to lag behind other ethnic groups in indicators of social, economic, and physical health and well-being. The general decline of the American labor movement may be one influential factor here. Writing in 1993, Portes and Zhou observed:

Fifty years ago, the United States was the premier industrial power in the world, and its diversified industrial labor requirements offered to the second generation the opportunity to move up gradually through better-paid occupations while remaining part of the working class. Such opportunities have increasingly disappeared in recent years following a rapid process of national deindustrialization and global industrial restructuring. This process has left entrants to the American labor force confronting a widening gap between the minimally paid menial jobs that immigrants commonly accept and the high-tech and professional occupations requiring college degrees that native elites occupy.<sup>323</sup>

For previous generations of European immigrants, assimilation has gone hand-in-hand with upward mobility.<sup>324</sup> Portes and Zhou introduce the concept of “segmented assimilation,” drawing a distinction between immigrants and subsequent generations—who assimilate socially and culturally but retain a distinct status as economic “outsiders”—to help explain the differences between pre- and post-1965 immigration.<sup>325</sup> This concept mirrors our proposition that many Asian immigrants and their descendants have achieved a “constructively White” status, most strongly reflected in their economic and, to a lesser degree, political integration, even as they retain some aspects of social or cultural segregation.

Although the fundamental transformation of the American economy, as highlighted by Portes and Zhou, means that the pathway to economic stability will likely look different for the current generation of immigrants than it has for previous generations, it also further underscores the crucial role that labor organizing will continue to play in ensuring this form of success.

Other factors that mediated assimilation and integration of previous immigrant groups can also be further explored for their potential implication on Mexican-American integration. For example, the Catholic Church played an important role as an upward “mobility machine,”<sup>326</sup> for Italian and Irish immigrants.

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323. See Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and its Variants*, ANNALS AM. SOC’Y POL. & SOC. SCI., Nov. 1993, at 76.

324. See Herbert J. Gans, *Acculturation, Assimilation and Mobility*, ETHNIC & RACIAL STUD., Jan. 2007, at 152.

325. Portes & Zhou, *supra* note 325.

326. See PORTES & RUMBAUT, *supra* note 55, at 332.

Yet, while Mexicans are proportionately as or more Catholic than these preceding ethnic groups, the Church has not had a similar impact for them. While a thorough discussion of this phenomenon goes beyond the scope of this Article, other scholars have contrasted the “integrationist” stance adopted by the Catholic Church in the 1930s, which emphasized the “Americanization” of new immigrants, with the Church’s strong community empowerment ethic for previous generations of immigrants.<sup>327</sup>

### CONCLUSION

In June 2012 Professors Jorge G. Castañeda & Douglass S. Massey observed in an op-ed published in the *New York Times*, that the rate of undocumented migration to the United States from Mexico was approaching zero for the first time in decades, while the rate of permitted migration was sharply rising.<sup>328</sup> This “circular” migration pattern may simply reflect the latest oscillation of American sentiment toward immigrants, alternately courted (and exploited) for their economic power as workers, and vilified as unwanted interlopers. It may also reflect the contraction of the American economy and the accompanying decrease of employment opportunities. Regardless, the scapegoating continues through the implementation of punitive legislation and through political rhetoric that has turned hyperbolic in the 2016 presidential election campaign, even in the absence of arriving immigrants. To play the Trump card of racism in the immigration debate, facts are unnecessary; ugly opinions suffice.

As this Article demonstrates, the history of the legal and social regulation of immigration to the United States has been one of persistent discrimination, White supremacy, and overt racism. Each immigrant group that has succeeded in assimilation or integration—in “becoming American”—has done so by becoming White or constructively White. Those seen as non-White continue to suffer second-class citizenship. Thus, history suggests that the eventual social, political, and economic status of Mexican immigrants will likely depend on their racialization.

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327. Mary E. Odem, *Our Lady of Guadalupe in the New South: Latino Immigrants and the Politics of Integration in the Catholic Church*, 24 J. AM. ETHNIC HIST. 26, 28–31 (2006).

328. Jorge G. Castañeda & Douglass S. Massey, *Do-It-Yourself Immigration Reform*, N.Y. TIMES, June 1, 2012.