RACE AND THE SHAPING OF U.S. IMMIGRATION POLICY

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INTRODUCTION

The date is October 13, 2004, some 147 years after Chief Justice Roger Taney and the infamous *Dred Scott* case. Representing the United States government, Deputy Solicitor General Edwin Kneedler, stands before the United States Supreme Court and tells the Court that the nation needs to protect its borders and in doing so some noncitizens must be treated as if they have no rights to due process.[1]

At issue is the ultimate fate of over 1000 persons of color, Mariel Cubans held in federal custody nearly 25 years after the boatlift. Two of the Cuban detainees have been incarcerated for 19 years. A total of 33 aliens have waited in jail for more than 15 years to be deported.

Justice Souter grills Solicitor General Kneedler about the legal "fiction" of pretending that Mariel Cubans, who have been here for a quarter-century, have no more rights than immigrants showing up at the border: "That fiction of exclusion can't be used for constitutional purposes, can it? . . . You have a due process clause that says 'persons,' not 'citizens' are entitled to constitutional protections?" Justice John Paul Stevens continues the questioning of Kneedler by asking "how far the government would carry the 'no rights' argument?" "Can we kill them?" he asks.[2]

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1. Oral argument before the U.S. Supreme Court, Clark v. Martinez, 543 U. S. 371 (2005) (Oct. 13, 2004).

2. *Id.*

Six miles away at the local Immigration and Naturalization Service ("INS")[3] office in Arlington, Virginia, things are not much better:

> Dante would have been delighted by the Immigration and Naturalization Service waiting rooms. They would have provided him with a tenth Circle of Hell. There is something distinctly infernal about the spectacle of so many lost souls waiting around so hopelessly, mutually incomprehensible in virtually every language under the sun, each clutching a number from one of those ticket-issuing machines which may or may not be honored by the INS clerks before the end of the civil service working day. . . . [These] huddled masses accept this treatment with a horrible passivity. Perhaps it is imbued in them by eons of arbitrary government in their native lands. Only rarely is there a flurry of protest."[4]

Only a mile or so away from the Supreme Court, the House of Representatives—led by a hard-line Republican majority—has just passed its version of the 2006 immigration bill, the Border Protection, Antiterrorism, and Illegal Immigration Reform Act of 2005 (H.R. 4437). The bill is all about enforcement and building fences, and it is silent on the issue of legalization of the estimated 12 million illegal aliens in the United States. The bill would make visitors to the United States who overstay their visas (currently a civil offense) even by a day, felons, subject to federal prosecution. An amendment to reduce the crime of over-staying to a misdemeanor was defeated. And seven million employers would be required to submit social security numbers and other information to a national database to verify the legal status of workers.

So now we have the imagery. Why the organized assault on immigrants? Could it be because they are largely persons of color? Is it anti-immigrant fervor or racist fervor or both? In order to probe these questions, one must recognize that the current assault on immigrant rights can only be explained by understanding the fundamental weaknesses in the underpinnings of support for immigrant rights and causes. In particular, one must understand the following factors, all of which have played—and continue to play—a large role in the formation of U.S. immigration policy:

a) The U.S. has provided no fundamental constitutional protection for immigrants, which has fostered blind judicial deference to administrative agency decisions against

3. Now the U.S. Citizenship and Immigration Services.

4. Peter Brimelow, *Time to Rethink Immigration?*, NAT'L REV. (June 22, 1992), *available at* http://www.vdare.com/pb/time_to_rethink.htm.

immigrants and judicial indifference to the rights of aliens.

b) Many U.S. immigration policies have been crafted and administered by white Anglo-Saxon supremacists.

c) The U.S. provided no due process rights for aliens until the twentieth century.

d) White Americans have created a culture of racial superiority that existed for hundreds of years from 1789 until 1965 and beyond.[5]

When one examines the composition of immigrants, both legal and illegal, in the 1990s, the numbers are telling. And one point is clear: one cannot separate race from the shaping of U.S. immigration policy.[6] Professor Lucas Guttentag has noted that the U.S. has a "legacy of racism," and "immigration law and policy cannot be divorced from issues of race, national origin, ethnicity, and color."[7] Indeed, U.S. immigration policy has a history that "is steeped in race and racism."[8] Historically, "the U.S. government [has] commonly [gone] to extraordinary lengths to halt feared mass migrations of people of color."[9]

A look at the actual immigration numbers during the 1990s reveals the strong connection between immigration and race. Between 1991 and 2000, 9.1 million legal immigrants arrived in the United States.[10] The following chart provides a breakdown of the origins of these 9.1 legal immigrants:

5. ROGER M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 17 (Yale Univ. Press 1997); *see also* NEUMAN, GERALD L., STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (Princeton Univ. Press 1996).

6. *E.g.*, Lucas Guttentag, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 157, 158 (2007).

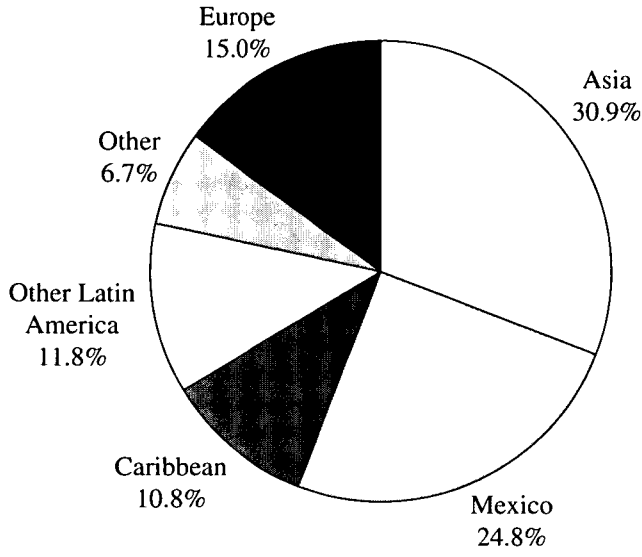
7. *Id.*

8. *Id.*; *see also* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 Fla. St. U. L. Rev. 363, 407 (2007) ("The federal government's early restrictions on immigration were motivated by racial animus . . . .").

9. KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 40 (Temple Univ. Press 2004).

10. U.S. Dep't of Homeland Sec., Office of Immigration Statistics, *2003 Yearbook of Immigration Statistics*, at 14 (Sept. 2004), *available at* http://www.dhs.gov/ximgtn/statistics/publications/YrBk03Im.shtm.

FIGURE 1[11]



As this chart shows, of these legal immigrants, roughly 25% were from Mexico, 31% from Asia, 11% from the Caribbean, and 12% from the rest of Latin America.[12] Of the remaining 21% from Europe and other countries, it is likely that a significant proportion of those persons were persons of colors, particularly considering the high numbers of East Indian, Caribbean, and Arab immigration to Europe and elsewhere. In sum, better than 90% of the legal immigrants who immigrated to the United States in the previous decade were persons of color.

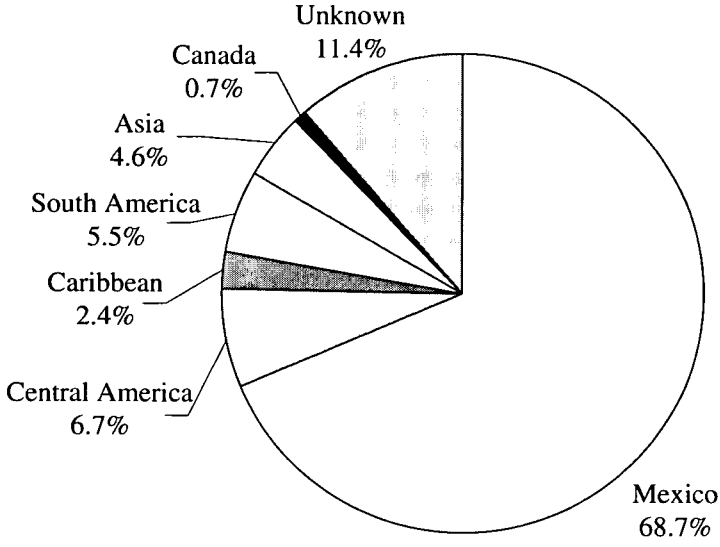
In that same decade, 1991-2000, the number of illegal immigrants residing in the United States rose to 7 million.[13] The following chart provides a breakdown of the estimated origins of these 7 million illegal immigrants:

11. *See id.*

12. *See id.*

13. U.S. INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, at 1 (Jan. 31, 2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf.

FIGURE 2[14]



As this chart shows, in this category, the predominance of the Americas is even greater: roughly 69% of the entire total of 7 million undocumented immigrants were from Mexico, 12% were from the rest of Latin America, and 2% were from the Caribbean.[15] Again, an overwhelming number of immigrants during this time period were persons of color.

To better explore and understand these questions about race and the shaping of U.S. immigration policy, this Article examines these and other issues as follows. Part I describes the "white supremacist" order model of Professors Desmond King and Rogers Smith—a model that explains some of the racial underpinnings in immigration law. Part II provides a brief historiography of the origins of the major immigration statutes and policies underpinning the development of the "white supremacist" order as applied to immigration policy. Part III analyzes and dispels the notion that the 1965 Immigration Act's removal of national origins quotas effectively removed most aspects of "racial" selection or color in immigration preferences, and further argues that race continues to shape our immigration policies. Part IV describes some of the ways that color-based discrimination against immigrants is harmful not only to immigrants, but also to the entire U.S. and our economy, which is currently dependent in many ways on an influx of foreign talent—talent that is increasingly

14. *See id.*
15. *See id.*

headed elsewhere. Finally, this Article concludes with a brief exploration of some of the ways that we could change U.S. immigration policy to work toward eliminating the vestiges of racism that currently prevail.

I. THE KING AND SMITH MODEL

For the purposes of this paper, this Article will accept and apply the "white supremacist" order model delineated by Desmond King and Rogers Smith.[16] That model argues that "American politics has historically been constituted in part by two evolving but linked 'racial institutional orders': a set of 'white supremacist' orders and a competing set of 'transformative egalitarian' orders."[17] This thesis rejects the idea that racial injustices are regrettable deviations from American traditions that generally tolerate other cultures.[18] According to Professors King and Smith, the nation has actually "been pervasively constituted by systems of racial hierarchy since its inception."[19] They summarize their thesis as follows:

> To sketch the argument developed here: at the nation's founding, a political coalition of Americans formed that gained sufficient power to direct most governing institutions, and also economic, legal, educational, residential, and social institutions, in ways that established a hierarchical order of white supremacy, though never without variations, inconsistencies, and resistance.[20]

This framework challenges the "strong tendency in American political development literature, tracing to Louis Hartz (1955), to theorize racial issues as ultimately products of the antebellum 'master/slave' order."[21]

The Tocquevillian and Hartz liberal America paradigms are largely deficient because those traditions were meant to be shared only by white men, largely of northern European descent: "White northern Europeans thought themselves superior, culturally and probably biologically to, to Africans, Native American

16. *See generally* Desmond S. King and Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75, 75-89 (2005).

17. *Id.* at 75.

18. *See, e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 20 (New York Univ. Press 2007) (emphasis added) ("Most Americans, for example, today look with shame at the exclusion of Chinese immigrants in the late 1800s and of southern and eastern Europeans, including many Jews, in the early twentieth century. Mass deportations of Mexican immigrants throughout the twentieth century . . . are *blemishes on this nation's proud history*.").

19. *See* King et al., *supra* note 16, at 75.

20. *Id.* at 77.

21. *Id.* at 79.

Indians, and all other races and civilizations."[22] Indeed, in the earlier part of the twentieth century, "[r]acial and ethnic stereotyping and eugenics were popularly discussed as an exact science."[23] Prominent scholars "called for 'Nordic supremacy,'" and one key congressional leader "complained about the 'mongrelizing' effect the new immigration had on American society."[24] Only those who were "100 percent American"—which at the time referred to white Anglo-Saxons and other "pure Caucasians"—were free from the attacks spurned by this renewed nativism.[25]

The assault on immigration can take two broad forms. The first and most blatant instance is legislation (such as the Chinese Exclusion Laws) which singles out persons from specific countries. These laws often "encod[ed] racial prerequisites to citizenship according to the familiar black-white categories of American race relations."[26] The second instance is a class view of immigrants of all kinds and races as a lower form of humanity when viewed by white Anglo-Saxon males.

The King & Smith model can and has been applied specifically to immigration.[27] Immigration policy was shaped by the dominant thinking of white Anglo-Saxon Protestant male superiority: "Until the 1920s, southern and eastern Europeans could immigrate and be naturalized without limit. From then until 1965, their numbers were limited explicitly because lawmakers now viewed them, too, as 'lower races.'"[28] As a result, "from the 1882 Chinese Exclusion Act, through the Johnson-Reed 1924 Immigration Act . . . to the Immigration and Naturalization Act of 1952 affirming racial discrimination, domestic racial institutions

22. *See* SMITH, *supra* note 5, at 17.

23. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 54 (Temple Univ. Press 2004).

24. *Id.*

25. *Id.*

26. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 38 (Princeton Univ. Press 2004).

27. For an interesting description of general societal acceptance of discrimination in immigration policy see Catherine Dauvergne, *Citizenship with a Vengeance*, 8 Theoretical Inquiries L. 489, 494-95 (2007) ("Migration laws aim to discriminate—to determine who will be admitted and who will be excluded. . . . The underlying assumption of the immigration preferences of prosperous Western nations is that liberal nations are generally morally justified in closing their borders. That is, the discrimination inherent in this law is justified by the need of the liberal community for closure and its right to identity. Racist provisions eventually came to be seen as abhorrent to liberal principle, but the basic logic of a migration law which discriminates between applicants on the basis of choosing those who best meet the needs and values of the nation has not been impugned. The criteria that immigration laws enshrine read as a code of national values, determining who some "we" group will accept as potential future members. . . . The bodies for whom these answers are a fit can pass through this filter and become formal legal citizens.").

28. *See* SMITH, *supra* note 5, at 17.

and their proponents have interacted profoundly with immigration policy."[29] Their model seeks to highlight how the southern and western alliance linked immigration and segregation into a more potent white supremacist order, as demonstrated by the new political alliances in those regions.[30]

And lastly, the King & Smith model has been applied to the federal bureaucracy: "[F]ederal departments helped to devise, implement, and monitor the segregationist order legally in place between 1896 and 1954."[31] I argue that this racial order has been transformed from the segregationist slavery order to a federal bureaucracy racial order that is all but too visible in its effect and application to immigrants, who are persons primarily of color.

II. THE ORIGINS OF U.S. IMMIGRATION POLICY

The American Constitution was remarkably silent on the subject of immigration and citizenship:

> The 1787 text mentioned citizenship three times as a requirement for federal offices, though only the elective ones. It gave Congress the power to establish a uniform rule of naturalization. It also referred to citizenship in assigning jurisdiction to the federal courts . . . . But the Constitution did not define or describe citizenship, discuss criteria for inclusion or exclusion, or address the sensitive relationship between state and national citizenship.[32]

The great constitutional historian Alexander Bickel wrote that "the concept of citizenship plays only the most minimal role in the American constitutional scheme."[33] In truth, the Constitution said little about citizenship, even though it was of pivotal—not minimal—importance.[34] And despite America's receptivity to brilliant immigrants, courts have long denied immigrants rights not explicitly protected by provisions in the U.S. constitution. For instance, "one strategy for silencing objections to gov-

29. *See* King et al., *supra* note 16, at 75, 88.

30. *See id.* ("It is doubtful that the prorestriction immigration regime, initiated in 1882 and in place until 1965, could have existed without a white supremacist alliance in Congress of southern Democrats and western Republicans, a coalition that provided successive chairs of the two houses' Immigration Committees. They gained further reinforcement from northeastern nativist elites. These "strange bedfellow" alliances show that the racial order promoted linkages across diverse political groupings that, in turn, helped maintain that order.").

31. *Id.* at 85.

32. *See* SMITH, *supra* note 5, at 115.

33. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33 (Yale Univ. Press 1975).

34. *See id.* at 36.

ernment policy has been to deny that the Constitution affords any protection to the objector."[35]

Eventually, the courts recognized that aliens had due process rights,[36] but too often relaxed or ignored those rights on the grounds of national emergency or compelling national interest.[37] As one scholar has noted, "[u]nder traditional immigration law, the government is afforded free reign to treat noncitizens, denominated 'aliens,' as it sees fit."[38] This situation stands in stark contrast with U.S. citizens, who enjoy rights that (at least in theory) "generally cannot lawfully be revoked."[39]

The first law related to immigration was the Immigration Act of 1790, which restricted naturalized citizenship to "whites." Mainstream immigration literature generally avers that immigration to America in the nineteenth century was largely open, without regard to race or restrictions on numerical limitations.[40] Granted, there was no federal control over immigration until 1891, when immigration technically became the province of the federal government by the creation of the Office of Immigration

35. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 3 (Princton Univ. Press 1996).

36. *See, e.g., id.* at 4 ("The Supreme Court has also held for more than a century that aliens within the United States are persons entitled to constitutional protection."). Professor Neuman was referring to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Wong Wing v. United States*, 163 U.S. 228 (1896), and he notes that the "Court had never suggested a contrary holding before" these two cases. *See id.* at 191.

37. The aftermath of September 11 has provided numerous examples of significant restrictions on alien rights. *See, e.g.*, HING, *supra* note 23, at 268 ("In some situations, the Bush administration attempted to bypass certain processes by imposing 'military justice.' The president asserted the authority to hold people in military custody incommunicado, without any individualized hearing into the basis for their detention, without access to a lawyer, and without judicial review. He set up military tribunals in which detainees could be tried, and ultimately executed, without independent judicial review and without anyone outside the military, including the defendant, ever seeing the evidence on which the conviction rested."); *see also* JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 32 ("Unfortunately, the 'war on terror' has been used to rationalize a wide variety of aggressive policies that have had little to do with national security and public safety. For example, in the name of fighting terrorism, the Department of Justice announced that it would begin enforcing a rule allowing for the deportation of immigrants who fail to report their change of address within ten days.").

38. JOHNSON, THE "HUDDLED MASSES" MYTH, *supra* note 9, at 3.

39. *Id.* at 4. Of course, the word "lawfully" does some work here. Although American history is rife with instances of the government ignoring the rights of citizens, the point here is that such actions are not lawful. In the immigration context, on the other hand, when the same actions are taken against immigrants, the law often has nothing to say on the matter. *See id.* at 3-4.

40. *See, e.g.*, DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 2 (Princton Univ. Press 2002) ("Save for the fleeting Alien and Sedition Acts, the national government embraced an essentially laissez-faire approach to immigration for many decades after the founding."); *see also* NEUMAN, *supra* note 35, at 19 (noting that legal discussions often rest upon the "myth . . . that the borders of the United States were legally opn" during this time").

Control, under the auspices of the U.S. Treasury Department.[41] Also, there "was no formal Border Patrol until 1924."[42] Nevertheless, the concept that America enjoyed "open borders" from 1789 until the 1924 National Origins Act may be severely overstated.[43] According to one scholar, state and local governments have always regulated the movement of people across legal borders through the use of criminal laws, vagrancy laws, quarantine laws, registration laws, and (before 1865) the law of slavery.[44]

That being said, the 1882 enactment of the Chinese Exclusion Act, which prevented Chinese immigration for sixty years, heralded the first major legislatively based racial attack on immigrants. This law was undoubtedly the result of fears that had been "inflamed by racism."[45] It marked the legislative naissance of "the undesirable Asian" mentality in the United States.[46] The act was brought on by a xenophobic panic and hysteria surrounding large amounts of Chinese laborers imported to build the railways and work in the mines.[47] It was followed by amendments in 1885 and 1887 banning the trade in contract labor and thereby "prohibiting anyone from prepaying an immigrant's transportation to the United States in return for a promise to provide service."[48]

Leading up to the Chinese Exclusion Act, the Chinese were the first to enter the United States in large numbers:

> Driven by the rice shortage and devastation of the Taiping Rebellion and drawn by the lure of gold, Chinese peasants and laborers began making the long journey in the 1840s. As the population of China increased dramatically from 275 million in 1779 to 430 million in 1850, rice became scarce . . . . With the cession of Hong Kong to Britain . . . in 1842, southeastern China was for the first time open to travelers and trade with the West.[49]

The Chinese were at first officially welcomed in the United States.[50] The 1848 discovery of gold "led to a growing demand for a ready supply of Chinese labor."[51] American industries ac-

41. NEUMAN, *supra* note 35, at 19.

42. ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 188, 237 (Hill and Wang, 2004).

43. NEUMAN, *supra* note 35, at 19.

44. *Id.* at 19-43.

45. JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 23.

46. For a thorough explanation of the rise of "the undesirable Asian" mentality, *see generally* HING, *supra* note 23, at 28-50.

47. *See, e.g.*, *id.* at 37 ("By 1982, . . . most public sentiment now favored exclusion . . . ."); *id.* at 38 (noting that Congress passed the Chinese Exclusion Act in response to "xenophobic national clamor").

48. *Id.* at 121.

49. *Id.* at 28.

50. *Id.* at 29.

51. *Id.*

tively recruited Chinese to work on railroad construction, mining, and other activities, and in 1852 "the governor of California even recommended a system of land grants to induce the immigration and settlement of Chinese.[52] As a result, by 1882, roughly 300,000 Chinese had entered the U.S., and many of them remained to work in California and other western states.[53] Soon, however, groups—particularly labor groups that felt threatened by the new influx of immigrants—began to organize a strong resistance movement that ultimately led to the Chinese Exclusion Act.[54]

Around 1905, the assault on Asians shifted from Chinese to Japanese.[55] In 1907, a "gentlemen's agreement" between President Theodore Roosevelt and the Government of Japan curtailed Japanese immigration to the United States.[56] Unfavorable sentiment toward the Japanese had begun to grow at the turn of the century as they began migrating to the western United States.[57] Originally, Japanese had come to Hawaii to satisfy agricultural labor demands; however, after "Hawaii was annexed in 1898, the Japanese were able to use it as a stepping stone to the [U.S.] mainland[,] . . . [and] [e]conomic competition with white farm workers soon erupted."[58]

The 1917 Literacy Law is another important example of the "who-is-a real-American" enactments that have historically played a major role in U.S. immigration policy.[59] The Immigration Act of 1917 required all aliens who were both over the age of sixteen and were physically capable of reading to be able to read English or some other language or dialect. One scholar has noted that "[t]he history of the immigration literacy requirement finds its origins in the nativism that was directed at southern and eastern Europeans who dominated the numbers of immigrants to the United States at the turn of the century."[60] At the time, "opponents of immigration noted with dread that the national origins of most newcomers to the United States were shifting steadily from northern and western to southern and eastern European sources,"[61] and southern and eastern Europeans were not seen as "*true Americans*."[62] In efforts that were remarkably simi-

52. *Id.*
53. *Id.*
54. *Id.* at 30-40.
55. *Id.* at 42.
56. *Id.*
57. *Id.* at 41.
58. *Id.*
59. *Id.* at 50.
60. *Id.*
61. TICHENOR, *supra* note 40, at 12.
62. HING, *supra* note 23, at 50.

lar to those used to exclude Chinese immigrants, nativists claimed to have "expert findings . . . that portrayed southern and eastern Europeans as *racially* inferior."[63] The nationalist outlook viewed "a homogenous population as the foundation of a strong state."[64]

The Quota Law of 1921, enacted as a "temporary" measure, introduced for the first time numerical limitations on immigration.[65] With certain exceptions, an annual ceiling of 350,000 was set alongside a new nationality quota limiting admissions to 3% of each nationality's group representation based upon the 1910 census.[66] The law was designed to stem the flow of immigrants coming from southern and eastern Europe.[67] It also contained restrictions that were "overtly anti-Semitic," and Albert Johnson, who was the Chairman of the House Committee on Immigration at the time, even went so far as to call Jews "filthy" and "un-American" in his efforts to persuade others that quotas were needed to prevent an influx of Jews.[68]

In 1924, Congress enacted the now famous National Origins Act, which further reduced the annual ceiling on immigration to 150,000 and further reduced per country nationality immigration to 2%.[69] The law adopted a national origins formula that was based on the number of foreign-born persons of each national origin in the United States in 1890, which, as one scholar notes, predated "the major wave of southern and eastern European immigrants."[70] A House report explicitly stated that these measures were racially based: "[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."[71] Just as prominent scientists and academics

63. TICHENOR, *supra* note 40, at 12; *accord* HING, *supra* note 23, at 61 (emphasis added) ("The history of the efforts that led to the enactment of the 1917 literacy law makes it clear that southern and eastern Europeans, particularly Jews and Italians, were not welcomed as Americans by much of the polity. The eugenics movement was in full swing, and *racial distinctions were now placed on a scientific hierarchy* with those of Nordic descent (i.e., western Europeans) at the zenith. Now, barring certain races from intermingling was not only socially desirable but also scientifically appropriate.").

64. TICHENOR, *supra* note 40, at 10.

65. *E.g.*, HING, *supra* note 23, at 68.

66. *Id.*

67. *See, e.g.*, DANIELS, *supra* note 42, at 48 ((noting that the Senator who introduced the bill was "clearly aim[ing] at reducing immigration from Eastern and Southern Europe"); *see also* HING, *supra* note 23, at 68 ("Since most of those living in the Unites States in 1910 were northern or western European, the quota for southern and eastern Europeans was smaller . . . .").

68. DANIELS, *supra* note 42, at 47-48.

69. *E.g.*, HING, *supra* note 23, at 68-69.

70. *Id.* at 68.

71. JOHNSON, THE "HUDDLED MASSES" MYTH, *supra* note 9, at 23 (emphasis removed) (citing STAFF OF HOUSE COMM. ON IMMIGRATION AND NATURALIZA-

supported the racial superiority model that led to the 1917 Literacy Law, the National Origins Act enjoyed similar support:

> As one commentator remarked approvingly in 1924, the national origins quota system was "a scientific plan for keeping America American." Implicit in such rationale, or course, was the view that persons of northern European stock were superior to members of other groups. . . . The racial hierarchy endorsed by proponents of the national origins quota system was entirely consistent with the academic literature of the day, which viewed the "races" of southern and eastern Europe as inferior to those of northern Europe.[72]

The 1924 law further provided that there would be a new quota beginning in 1929. Professor Bill Ong Hing noted the ways in which the new quota perpetuated racial biases that favored white society:

> The national origins formula used the ethnic background of the entire U.S. population, rather than the first-generation immigration population, as its base for calculating national quotas. Because the U.S. population was still predominantly Anglo-Saxon, the national origins quota restricted the newer immigrant groups more severely than the foreign-born formula of the previous quota laws. The national origins quota allotted 85 percent of the total 150,000 [immigrants] to countries from northern and western Europe, while southern and eastern countries received only the remaining 15 percent of the total.[73]

These efforts met the goals they set out to achieve, and the U.S. experienced a major decline in the amount of immigrants coming from southern and eastern Europe.[74]

The passage of the 1952 Immigration Act confirmed quotas based on national origins.[75] But the Act went much further: "Influenced by the cold war atmosphere and anticommunist fervor of the post-World War II era and the onset of the Korean War, . . . [t]he 1952 law was more direct and reminiscent of the Alien and Sedition Laws of early America: individuals who held certain political viewpoints were not welcome [as] those viewpoints were deemed un-American."[76] "Subversives" and communists were

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TION, REPORT ON RESTRICTION OF IMMIGRATION, H.R. REP. NO. 68-350, pt. 1, at 16 (1924).

72. *Id.* (citations omitted).

73. HING, *supra* note 23, at 69.

74. *Id.* at 68-70.

75. *E.g.*, *id.* at 74 (citing President Truman's veto message) ("The bill would continue, practically without change, the national origins quota system, which was enacted into law in 1924.").

76. *Id.* at 73-74.

specifically excluded for eligibility, as were gays and lesbians.[77] Indeed, the 1952 law led to nearly forty years of explicit exclusion of the immigration of homosexuals,[78] followed by various aspects of U.S. immigration policy that continue to have disparate impacts on this group of individuals.[79]

In sum, the 1952 Act "was not just about perpetuating old exclusion regimes directed at Asians, Jews, Catholics, and southern and eastern Europeans."[80] Now, persons whose political opinions or sexual identities did not fit within the American model were added to the list of undesirables. Professor Albert Memmi, a preeminent scholar on racism, has noted that racism is in many ways an expression of ethnophobia, or, more generally, "'heterophobia,' which covers all forms of domination based on real or imaginary differences between groups: men and women, gays and straights, natives and immigrants, and so on."[81]

III. THE 1965 ACT AND BEYOND: VESTIGES OF COLOR-BASED DISCRIMINATION REMAIN

The 1965 Immigration Act technically abolished the national origins quota system and statutory vestiges of Asian exclusion laws.[82] The Act placed a 20,000 annual limit on immigration for persons from any single country. However, the Act established an overall limit of 120,000 immigrants from the Western Hemisphere. As a result, "[a]lthough the rest of the world enjoyed an expansion in numerical limitations after 1965, Mexico and the Western Hemisphere for the first time were suddenly faced with numerical restrictions."[83]

The 1965 Act was "sold" as the piece of legislation that would end national-origin-based quotas and thereby help end discrimination of persons of color in the United States. Shortly after the law was passed, it became apparent that it would have the opposite impact. Specifically, persons from Mexico, Hong Kong, India, and the Philippines quickly exceeded the 20,000 per

77. *See generally id.* at 73-92; The use of immigration laws to discriminate against homosexuals has a long history in the United States. *See, e.g.*, JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 235 n.16 ("Along these lines, the U.S. immigration laws historically have regulated sexuality by denying entry into the country of gays and lesbians."); SMITH, *supra* note 5, at 22-23 ("[H]omosexuals . . . had [long ago] become explicit targets of discrimination in American citizenship laws.").

78. JOHNSON, THE "HUDDLED MASSES" MYTH, *supra* note 9, at 140.

79. *Id.* at 141, 145-51.

80. HING, *supra* note 23, at 91.

81. Kwame Anthony Appiah, Foreward, *in* ALBERT MEMMI, RACISM ix (Steve Martinot trans., Univ. of Minnesota Press 1999).

82. *See, e.g.*, HING, *supra* note 23, at 95 ("President Kennedy's hopes for abolishing the quota system were realized when the 1965 amendments were enacted.").

83. *Id.*

country limitation and began to experience horrendous backlogs in visa quota availability—some as long as 10-15 year waits:

> Even though [since 1965] the law is colorblind on its face, the modern U.S. immigration laws continue to have discriminatory impacts. People of color from the developing world, especially those from nations that send relatively large numbers of immigrants to the Unites States, are the most disadvantaged of all groups, especially those of a select few high-immigration nations. They suffer disproportionately from tighter entry requirements and heightened immigration enforcement. For example, under certain visa categories, many citizens from India, the Phillipines, and Mexico face much longer waits for entry into the United States than similarly situated noncitizens from other nations.[84]

Cases involving immigrants from Hong Kong are particularly striking. Because Hong Kong was a British Crown Colony, it was allocated only 5,000 visas per annum under U.S. law.[85] In the twenty year period leading up to the July 1, 1997 handover of Hong Kong to the People's Republic of China, Hong Kong nationals who carried limited British passports began to look for places to immigrate in view of the looming change in sovereignty.[86] Because of the paltry 5,000 per annum visa limitation in the United States, Hong Kong nationals faced waiting times as long as 15 years for a visa to the United States.[87] Since this was an obviously unacceptable option, they began to look to other countries, such as Canada, for immigration options. As a result, over 500,000 Hong Kong nationals immigrated to Canada between 1977 and 1997. During that same period, the United States never seriously considered increasing the Hong Kong quota to the regular 20,000 per country limitation. As a result, the United States lost out on Hong Kong immigrants and investors.[88]

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84. JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 51.

85. *E.g.*, Carolyn Waller & Linda M. Hoffman, *United States Immigration Law as a Foreign Policy Tool: The Beijing Crisis and the United States Response*, 3 GEO. IMMIGR. L.J. 313, 352 (1989).

86. *E.g.*, *id.* at 351 (referring to the "issue of existing Hong Kong nationals anxious to leave the British Crown Colony before reversion to the PRC in 1997").

87. *E.g.*, Jesse I. Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W. L. REV. 1, 2 n.4 (1989).

88. Even specific efforts to increase investment from Hong Kong immigrants have not alleviated this problem, and the Canadian economy has continued to benefit from investments that never make their way into the U.S. *See, e.g.*, Robert C. Groven, Note, *Setting Our Sights: The United States and Canadian Investor Visa Programs*, 4 MINN. J. GLOBAL TRADE 271, 272 (1995) (noting that the U.S. Investor Visa program has "floundered, while the Canadian program continues to draw large numbers of cash-laden immigrants"). For a discussion of some of the other ways in which U.S. immigration policy has had a detrimental effect on the American economy, see *infra* Part IV.

In addition, the 1965 Act for the first time put in place a national Alien Labor Certification system. Under this system, workers who sought visas through skills or occupations were required to obtain a certification from the U.S. Department of Labor that their employment in the United States would not displace or negatively affect a U.S. worker. That system ultimately proved to be complicated, slow, and burdensome, and it reduced the number of employment-based workers who would have otherwise been eligible for a U.S. visa.

By 1976, the assault on foreign medical graduates reached peak levels. Foreign medical graduates ("FMGs") were recruited by U.S. residency training programs for one principal reason—there were not enough U.S. medical graduates to fill all of the residency slots in the U.S., and the FMGs, many of whom had been doctors in their native countries for at least ten years, were a cheap source of labor. Nevertheless, Congress came to a contrary conclusion and passed the Health Professions Educational Assistance Act of 1976 to try to limit the amount of FMGs.[89]

The assault on FMGs came in two ways. First, the J-1 or Exchange Visitor Visa program was introduced. The program allowed FMGs to come to the United States on temporary J-1 visas to work in hospitals as medical residents and upon the completion thereof receive certification of residency training requirements in their respective medical specialties. There was one catch, however, and that was the two year foreign residency requirement listed in § 212(e) of the Immigration and Nationality Act, which required FMGs, after completion of their residencies, to return to their native countries for two years. Basically, our law said that now that we the United States have availed ourselves of your services, you must go home. After departing the U.S. and returning to their home countries to serve out the two year foreign residence requirement, many of the FMGs who sought to return to the U.S. found hostile officers at U.S. embassies. These officers refused to issue any kind of visa to the would-be returning FMGs.

The second primary assault on FMGs came with the imposition of the Visa Qualifying Exam ("VQE"). The VQE was designed to stem the flow of FMGs. Spearheaded by Senator Ted

89. *See, e.g.*, HING, *supra* note 23, at 96 (noting that when Congress passed the Act, it declared "that there was no longer a shortage of physicians and surgeons in the United States and that no further need existed for the admission of aliens to fill those positions"). Professor Hing goes on to note that in reality "FMGs were providing a critical service throughout the United States," and that the efforts behind the 1976 Act were reminiscent of efforts to exclude "the competition felt by white workers when Chinese, Japanese, and Asian Indian immigrant workers arrived in the United States from 1850 to 1917." *Id.*

Kennedy, the restrictions were seen as a way to ration healthcare. The idea was that if less doctors are available, wait times to see a doctor would increase and patients who now must wait weeks to see a doctor might either be well or no longer interested in seeing a physician when facing weeks of wait time.

The VQE also had a distinct racial component. The exam included a basic science component and an English skills portion. Physicians from Asia and Mexico, in particular, had extreme difficulty in passing the exam since their basic education was not conducted in English. Contrast this to doctors from the U.K., who had a much easier time with the exam. The exam was extremely unfair in one other respect. Many FMGs already in the U.S. possessed valid state licenses to practice medicine and were in the process of acquiring permanent residence status in the United States. The imposition of the VQE was an immigration requirement, not a licensure requirement. Hence, doctors who possessed valid state licenses and who were already practicing medicine were now faced with the immigration requirement of passing the new VQE, since otherwise they would not be eligible to become permanent residents.

By 1986, the surge in Latino and Asian immigration became significant.[90] Congress, reflecting uneasy sentiments about the rising levels of these immigrants, introduced what was known as "diversity" visas:

> Although the country's population was still overwhelmingly white and of European descent, Congress added a little-publicized provision in the Immigration and Reform and Control Act to help thirty-six countries that had been "adversely affected" by the 1965 changes. To be considered "adversely affected," a country must have been issued fewer visas after 1965 than before. Thus, the list included such countries as Great Britain, Germany, and France, but no countries from Africa, which had sent few immigrants prior to 1965.[91]

Thus, the diversity program was not about diversity at all; rather, it was a carefully crafted piece of legislation designed to favor white applicants over persons of color.[92]

The new allocations under the diversity visa program were significant. Fifteen thousand visas were made available in addition to the 20,000 per country limitation. Persons qualifying for such visas needed no close family relatives in the United States

90. *See, e.g., id.* at 100.

91. *Id.*

92. *See, e.g.*, JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 235 ("In operation, the diversity visa programs makes the immigration stream whiter than it would be were the system not in place.").

or any special skills or advanced education.[93] A high school diploma was enough, and applicants merely needed to send in a simple application to be selected from the diversity lottery.[94]

Four years after the introduction of "diversity" visas, Congress passed the Immigration Act of 1990. While legal immigration continued to be dominated by Asians and Latinos even after the enactment of the diversity lottery program, Congress was apparently intent on reducing Asian and Latino immigration.[95] Congress sought to limit the number of visas allocated to such persons by restricting the family categories in the immigration system. This effort was spearheaded by one of the leading anti-immigration proponents in the history of the United States Senate, Senator Alan Simpson of Wyoming. Simpson had a long history in the Senate of introducing anti-immigrant legislation and continually typified and represented the white supremacist mentality of anti-immigrant forces within the country.[96]

The assault on persons of color intensified with the inauguration of the 42nd President of the United States, Bill Clinton. Soon after Clinton took office, he began to increase border control efforts to reduce illegal immigration from Mexico.[97] These efforts backfired and actually led to "more rather than less Mexican population growth in the United States,"[98] as illegal immigrants crossed unpatrolled areas where they were less likely to be caught, and then were much less likely to return to Mexico once they made it to the U.S.[99] The other major effect of Clinton's efforts was "a tripling of the death rate at the border."[100] This increased death rate was not merely a regrettable side effect, but was in fact entirely foreseeable, and some even claim that the government's "policy was deliberately formulated to maximize the physical risks of Mexican migrant workers, thereby ensuring that hundreds of them would die."[101]

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93. *See, e.g.*, HING, *supra* note 23, at 101.

94. Immigration Act of 1990, 8 U.S.C § 1153 (1990).

95. *See, e.g.*, HING, *supra* note 23, at 109, 111.

96. *See, e.g., id.* (noting that Simpson had engaged in efforts "to reduce the Asian- and Latino- dominated family categories" and was interested in programs that "could attract *real* American stock—those who were not Asian or Latino").

97. Douglas S. Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration,* CATO INSTITUTE'S CENTER FOR TRADE POLICY STUDIES, June 13, 2005, at 4, *available at* http://www.freetrade.org/pubs/pas/tpa-029.pdf.

98. *Id.* at 12.

99. *Id.* at 1.

100. *Id.*

101. JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 112 (citing Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 69 (2001)).

On September 30, 1996, the Illegal Reform and Immigrant Responsibility Act was signed into law, with the strong backing of the Clinton administration: "Enacted in the shadow of the Oklahoma City bombing, and with the support of the Clinton administration and a Republican Congress, the Act was labeled the Illegal Immigration Reform Act . . . . However, the term 'illegal' was a misnomer because the main thrust of the law was all about restricting legal immigration, not only about controlling [illegal immigration]."[102]

The 1996 Act for all intents and purposes gutted the law of political asylum.[103] First, it changed the law so that applicants were required to file their applications for asylum within one year of entry into the United States or forever lose their right to apply.[104] However, merely getting into the country now became problematic as a result of the provisions of the 1996 Act. That law transferred power from the legal system to immigration officers at U.S. ports of entry (most of whom had little more than high school educations), who now had the power to make on-the-spot adjudications of asylum applicants with no rights of appeal.[105] This power to determine life or death consequences for thousands of would-be asylum applicants was an astonishing development,[106] and yet it received almost no attention.

The effect of the 1996 Act on political asylum was only the opening salvo. The law included attempts by Congress to strip the federal courts of their jurisdiction to hear immigration cases. This "court-stripping" as it commonly known, is not new in the United States, but what was new was the extent to which the government would go to deprive immigrants of fundamental rights of due process.[107]

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102. Donald S. Dobkin, *The Diminishing Prospects for Legal Immigration: Clinton through Bush*, 19 ST. THOMAS L. REV. 329, 331 (2006). Although the law focused primarily on restricting legal immigration, it did include some provisions to tighten border control between the U.S. and Mexico. *See* Douglas S. Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration,* CATO INSTITUTE'S CENTER FOR TRADE POLICY STUDIES, June 13, 2005, at 4-5, *available at* http://www.freetrade.org/pubs/pas/tpa-029.pdf. Professor Massey notes that the legislation approved funding for the building of additional fences in San Diego and for purchasing new military technology and increasing the number of Border Patrol agents. *Id.* At the same time, the section of the legislation that called for tougher penalties applied to "smugglers, undocumented migrants, and *visitors who entered the country legally* but then overstayed their visas." *Id.* at 5. Again, we see that this legislation went far beyond simply increasing efforts to halt illegal immigrants from entering the country.

103. *Id.* at 332.

104. *Id. at* 329.

105. *Id.*

106. Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 Justice System J. 104 (2007).

107. *Id.* at 107.

This Act contained provisions that stripped the federal courts of their jurisdiction to hear immigration cases, which were considered to be "matters of discretion."[108] This included appeals from decisions of immigration officers on everything from immigrant and non-immigrant visas to applications for student visas, visitor visas, and extensions of stay. As the law now stands, only a handful of circuits in the federal court of appeals system recognize the rights of aliens to have their cases heard in federal courts, while the overwhelming majority have sided with the government in depriving immigrants of their constitutional rights.[109]

Because state courts cannot "address the federal government's immigration policies[,] [s]tripping the federal courts of jurisdiction eliminates any judicial check whosoever."[110] The result is a situation that I have previously described as "tantamount to a de facto elimination of judicial review."[111]

The lack of judicial review is particularly problematic in light of the fact that courts are often the best suited branch of government to address matters of discrimination, such as the racism that underlies much of what occurs in U.S. immigration law. In the famous footnote four of *United States v. Carolene Products Co.*,[112] the Supreme Court recognized that "discrete and insular minorities" present a special situation where the courts cannot simply defer without inquiry to the political process.[113] The Supreme Court has also explicitly stated that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[114] Professor Erwin Chemerinsky has noted that courts must apply heightened scrutiny in these situations because "[p]rejudice and the history of discrimination make it less likely that racial and national origin minorities can protect themselves through the political process."[115] In other words, intervention by the courts—meaning judicial review—is most needed when dealing with matters af-

108. *Id.*

109. *Id.*

110. Lucas Guttentag, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 157, 161 (2007); *see also* JOHNSON, OPENING THE FLOODGATES, *supra* note 18, at 53 (citing Chae Chin Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1989)) ("The *Chinese Exclusion Case*, which the Supreme Court has not overruled to this day, held that the political branches of the federal government have the unfettered discretion—denominated "plenary power"—to act in the field of immigration. The Court emphasized unconditionally that Congress's judgment is "conclusive on the judiciary." [The result was a] lack of any judicial check on the excesses of Congress . . . .").

111. Dobkin, *supra* note 106, at 107.

112. 304 U.S. § 144 (1938).

113. *Id.* at , 152-53 n.4.

114. Graham v. Richardson, 403 U.S. 365, 372 (1971).

115. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 669 (Aspen Publishers 2d ed. 2002).

fecting minority groups, such as immigrants. Thus, the lack of judicial review in this area is all the more troublesome.

IV. THE EFFECTS OF RACE AND RESTRICTIVE IMMIGRATION POLICY

The current restrictive U.S. immigration policy—a policy that has been shaped, and continues to be shaped, by race[116]—has numerous detrimental effects. Aside from the obvious effects on immigrants, potential immigrants, and their family members, immigration restraints have also negatively impacted many others and could have devastating effects on the American economy.

Numerous commentators have noted that the American economy has suffered greatly from the current restrictive environment. As mentioned earlier, restrictive policies have led to foreign investment from countries such as Hong Kong entering Canadian and other markets, rather than supporting U.S. economic interests.[117]

Tourism provides an even clearer example. A recent interview with Jonathan Tisch, the chairman of the Travel Business Roundtable, noted that U.S. immigration is the "worst in the world" and has led to a sharp decline in tourism:

> Tisch . . . believes that potential visitors consider trips to the America to be "problematic." This is making the U.S. culturally isolated and is also having a knock-on effect on the economy. "Travel is the number one industry in the world (according to World Travel & Tourism Council figures), but the US is not benefitting," he said.[118]

Tisch has called for "a fresh approach to tourism" that would involve "fewer visa restrictions."[119]

Another big worry about restrictive immigration policies is that these policies interfere with American businesses that depend upon a steady influx of foreign talent. The "undereducation of Americans" has at various times led to efforts by American businesses to relax immigration requirements so that they can bring in "highly skilled immigrants to satisfy a growing vacuum in the labor pool."[120] In the instances where business interests succeeded in their lobbying efforts to convince Congress to allow more skilled immigrants to enter the country, it was usually done

116. *See supra* Parts II-III.

117. *See supra* note 88 and accompanying text.

118. Tom Chesshyre, *U.S. Immigration "Worst in the World"*, TIMES ONLINE, Oct. 25, 2007, *available at* http://travel.timesonline.co.uk/tol/life_and_style/travel/news/article2739096.ece.

119. *Id.*

120. HING, *supra* note 23, at 108.

in a way that excluded persons of color: "Whatever reform came about, it was always with an eye toward what color or ethnic background qualified immigrants would bring, rather than simply what skills they could offer."[121] Still, in the past, Congress (whatever its motives may have been) was at least willing to entertain the possibility of facilitating an influx of foreign talent, whereas now the business community cannot hope for any such measures, and foreign scientists and engineers are increasingly choosing to work in other countries. Professor Richard Florida has noted that in the post-September 11 climate, visa and green card restrictions, combined with an isolationist foreign policy, has led to a sharp decline in the amount of foreign talent entering the country: "In effect, for the first time in our history, we're saying to highly mobile and very finicky global talent, 'You don't belong here.'"[122]

This restrictive environment has led to massive drops in the number of foreign students applying to study in the U.S., as well as declines in the number of visiting scholars and foreign researchers.[123] Difficulties in getting visas for foreign scientists has led to decisions to host major scientific conferences in other countries, and "for the first time in modern memory—perhaps in the history of our country—top scientists and intellectuals from elsewhere are choosing not to come here."[124]

Restrictive immigration policies have even more direct financial consequences on the American economy: "Visa delays alone have cost U.S. businesses roughly $30 billion in two years, according to a June 2004 study . . . ."[125] Major companies such as Exxon Mobil have decided to set up conference offices in London to meet with foreign nationals because U.S. visas have become too hard to obtain. In all of these ways, current U.S. immigration policy has become a major impediment to future progress.

CONCLUSION

U.S. immigration policy has been—and continues to embrace—racial considerations. The U.S. has rejected color-based discrimination in many other areas, and yet vestiges of historical racism continue to prevail in modern immigration policy. This state of affairs is all the more worrisome given that these same policies have numerous negative effects on the country as a

121. *Id.* at 111.
122. RICHARD FLORIDA, THE FLIGHT OF THE CREATIVE CLASS 115 (Harper Collins 2005).
123. *Id.* at 111.
124. *Id.* at 121.
125. *Id.*

whole. In this sense, the American economy cannot afford to continue the restrictive immigration policies that are now in place.

The U.S. needs to change its current immigration policy to work toward eliminating the vestiges of ant-immigrant racism that currently prevails. This means, at the very least, relaxing visa and green card requirements, as well as streamlining these processes to eliminate long delays. Some scholars advocate going much further and adopting a general "open borders" approach to immigration.[126] Whatever approach the U.S. decides to take, it must be done in a way that is sensitive to the lasting effects of color-based discrimination. Racism has permeated U.S. immigration policy for centuries, and it will likely take a long time to undo all that has been done. To succeed in this endeavor, the U.S. will need help from all branches of government, including the courts, which will need to find ways to reinstate judicial review over important immigration matters. Only then can we hope for a more reasonable approach to U.S. immigration policy.

126. *See, e.g.*, Kevin R. Johnson, *Open Borders?*, 51 UCLA L. Rev. 193 (2003).