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The Social and Legal Construction of Nonpersons

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“ALIENS” AND THE U.S. IMMIGRATION LAWS: THE SOCIAL AND LEGAL CONSTRUCTION OF NONPERSONS

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* Professor of Law, University of California at Davis. A draft of this paper was presented at the Hispanic National Bar Association (HNBA) 1996 annual conference in Miami, the 12th Annual Critical Theory Workshop at the University of California at Davis in October 1996, and the National Association of Chicana and Chicano Studies 1997 annual conference in Sacramento, California. I thank Berta Hernández for inviting me to participate on the civil and political issues panel of the *Colloquium on International Law, Human Rights & LatCrit Theory* at the HNBA conference and to Lisa Iglesias and Frank Valdes for organizing the event. I also thank Georges Van Den Abbeele, who invited me to participate in the Critical Theory Workshop. Comments of participants at all three conferences were invaluable. Tom Joo, Arturo Gándara, Michael Scaperlanda, Margaret Taylor, George A. Martínez, and Berta Hernández offered extremely helpful comments on a draft of this article as well as much-needed encouragement. Jennifer Shih's much appreciated editorial assistance facilitated completion of this article.

I. INTRODUCTION

International human rights issues in the United States obviously are shaped by many factors. My focus in this essay is on an issue that, at first glance, might appear insignificant. Nonetheless, it greatly influences thinking in the United States about acceptance of immigrants from other countries as well as this nation's response to refugees fleeing human rights abuses in their homelands.

My topic relates to terminology and specifically to the use of the word "alien,"¹ a term of art used extensively in discussing the legal rights of immigrants in the United States. By definition, aliens are outsiders to the national community. Even if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized "other," different and apart from "us."

The classification of persons as aliens, as opposed to citizens, has significant legal, social, and political importance. Citizens have a large bundle of political and civil rights, many of which are guaranteed by the U.S. Constitution; aliens have a much smaller bundle and enjoy far fewer constitutional and statutory protections.² Citizens can vote and enjoy other political rights, such as jury service. Aliens, no matter what their ties to the community, enjoy limited political rights. They cannot vote and risk deportation if they engage in certain political activities that, if they were citizens, would be constitutionally protected.³ Non-

1. For a sketch of some preliminary thoughts and concerns about this terminological issue, see Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279, 281 n.5.

2. Despite the disparities in rights between citizens and aliens, some contend that the steady expansion of the rights of noncitizens in recent years has "devalued" citizenship. See Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989).

3. See, e.g., *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (scrutinizing lawfulness of efforts by the Immigration and Naturalization Service to deport noncitizens for supporting Popular Front for the Liberation of Palestine). Historically, the United States has been none too kind to noncitizens classified as political "subversives." See, e.g., *Galvan v. Press*, 347 U.S. 522 (1954) (upholding deportation of former Communist Party member); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding deportation of three former Communist Party members).

citizens cannot sit on juries deciding the fate of fellow noncitizens charged with crimes, thereby ensuring that the jury most definitely will *not* reflect a cross section of the community.⁴

Perhaps most importantly, aliens can be deported from the country while citizens cannot be. For example, under the immigration laws, an alien convicted of possession of more than thirty grams of marijuana may be deported,⁵ while a citizen convicted of mass murder cannot be.⁶

The concept of the alien has more subtle social consequences as well. Most importantly, it helps to reinforce and strengthen nativist sentiment toward members of new immigrant groups, which in turn influences U.S. responses to immigration and human rights issues. Aliens have long been unpopular in the United States, though the particular disfavored group has varied over time. Over two centuries ago, the courts of the various states were perceived as being unfair in the treatment of the British, especially British creditors. Consequently, Article III of the U.S. Constitution authorized the federal courts to hear disputes between noncitizens and citizens, known from its time of creation as "alienage" jurisdiction.⁷ Demonstrating the artificiality of the construct, the British, who colonized and at one time ruled the region that became the United States, were socially transformed into aliens by loss of the Revolutionary War. The

4. See 28 U.S.C. § 1865(b)(1) (1994) (specifying that a person who "is not a citizen of the United States" is ineligible for jury service). To make matters worse, the Supreme Court upheld the dismissal of Latino/a citizens from juries simply because they spoke Spanish, which has a disparate impact on Latinos/as. See *Hernandez v. New York*, 500 U.S. 352 (1991). See also Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (analyzing impact of *Hernandez* on jury service by Latinos/as).

5. See Immigration and Nationality Act § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i) (1994 & Supp. I 1995). The INA, the comprehensive immigration law, was passed in 1952 and has been amended many times. See Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (1994 & Supp. I 1995)) [hereinafter INA].

6. At various times in U.S. history, however, the deportation efforts of government have focused on persons of Mexican ancestry, *citizens* as well as *noncitizens*. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (1995) (analyzing governmental efforts of this type).

7. See generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1 (1996). In the Judiciary Act of 1789, the first Congress implemented the authorization of Article III by extending federal court jurisdiction over civil suits in which "an alien is a party." Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (partially codified as amended at 28 U.S.C. § 1332 (1994)).

British, however, were not the only relevant aliens in this nation's early history. The Federalists in the late 1790s pressed for passage of the now infamous Alien and Sedition Acts in order to halt the migration of radical ideas from France and to cut off the burgeoning support for the Republican Party offered by new immigrants.⁸

Animosity toward other groups of aliens has occurred sporadically in U.S. history. Irish immigrants in the 1800s were the subject of hostility.⁹ Near the end of the nineteenth century, Chinese immigrants suffered violence and bore the brunt of a wave of draconian federal immigration laws.¹⁰ Animosity directed at Japanese immigrants, as well as citizens of Japanese ancestry, culminated in their internment during World War II.¹¹

As this sequence of historical events suggests, race has influenced the social and legal construction of the alien. Although the British may have been one of the nation's first groups of unpopular aliens, the term increasingly became associated with people of color. Some restrictionist laws, such as those passed by Congress in the late 1800s barring almost all Chinese immigration, were expressly race-based. Others were more subtle in their impact. Before 1952, for example, the law barred most nonwhite immigrants from naturalizing to become citizens,¹²

8. See generally JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) (analyzing genesis of the Alien and Sedition Acts).

9. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 26-29 (3d ed. 1994).

10. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581 (1889) (upholding law expressly excluding most Chinese immigrants from United States). In some instances, hatred for the Chinese allowed for their harsh treatment in the immigration laws without resorting to the alien euphemism. However, alien terminology still was relied on to justify anti-Chinese laws. In rejecting challenges to one such law, the Supreme Court emphasized "[t]he power of Congress ... to expel [and] exclude *aliens*." *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893) (emphasis added).

11. See *Korematsu v. United States*, 323 U.S. 214 (1944). This demonstrates how anti-alien sentiment may translate into animosity toward citizens who share ancestry with the disfavored immigrant group of the day. See *infra* text accompanying notes 70-72, 127-29.

12. See Act of March 26, 1790, ch. 3, 1 Stat. 103 (providing that only a "free white person" could naturalize). See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW* (1996) (analyzing history of this legal requirement). This Act was later amended to allow persons of African descent to naturalize as well. See Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256. For analysis of the political dimension to the construction of race in the context of naturalization rules, see George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. (forthcoming 1997).

thereby forever relegating noncitizens of color to alien status and effectively defining them as permanent outsiders in U.S. society. This essay will explain how the word "aliens" today often is code for immigrants of color, which has been facilitated by the changing racial demographics of immigration.¹³

Many have expressed general concerns with the alien terminology in immigration law. Hiroshi Motomura noted that the "term 'alien' is standard usage, but ... [has] a distancing effect and somewhat pejorative connotation."¹⁴ Gerald Neuman has observed that "[i]t is no coincidence that we still refer to noncitizens as 'aliens,' a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space."¹⁵ Gerald Rosberg acknowledged that "[t]he very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way."¹⁶ Despite such concerns, the term is regularly used, often with some reluctance or at least the felt need for explanation, in immigration discourse.¹⁷ This is the almost inevitable result of the fact that the alien is the nucleus around which the comprehensive immigration law, the Immigration and Nationality Act,¹⁸ is built.

13. See Jeffrey S. Passel & Barry Edmonston, *Immigration and Race: Recent Trends in Immigration to the United States*, in IMMIGRATION AND ETHNICITY 31 (Barry Edmonston & Jeffrey Passel eds., 1994) (studying impact of immigration on racial and ethnic composition of U.S. population since Congress repealed discriminatory national origin quota system in 1965).

14. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990). Professor Motomura also "admit[s] to some hypersensitivity on this point as a former 'alien.'" *Id.*

15. Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection*, 42 UCLA L. REV. 1425, 1428 (1995) (footnote omitted).

16. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. CT. REV. 275, 303.

17. See, e.g., Gary S. Goodpaster, *Illegal Immigration*, 1981 ARIZ. ST. L.J. 651, 654 n.8; Johnson, *supra* note 7, at 2 n.4; Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 118 n.19 (1992); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1089 n.9 (1995).

18. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (1994 & Supp. I 1995)). See *infra* text accompanying note 41 (describing usage of the term "alien" in the Immigration and Nationality Act).

Race as a social construction has been thoroughly analyzed.¹⁹ However, surprisingly little has been written about how the alien is socially constructed as well. The alien is made up out of whole cloth. The alien represents a body of rules passed by Congress and reinforced by popular culture. It is society, often through the law, which defines who is an alien, an institutionalized "other," and who is not. It is society through Congress and the courts that determines which rights to afford aliens. There is no inherent requirement, however, that society have a category of aliens at all.²⁰ We could dole out political rights and obligations depending on residence in the community, which is how the public education and tax systems generally operate in the United States. Indeed, a few have advocated extending the franchise to noncitizen residents of this country, a common practice in a number of states and localities at the beginning of the twentieth century.²¹

Many alternatives to the term alien exist, including "person," "immigrant," or "undocumented worker." My point in this essay, however, is not to offer an alternative terminology. Rather, my hope is to illustrate how the term alien masks the privilege of citizenship and helps to justify the legal status quo.

Similar to the social construction of race, which legitimizes racial subordination, the construction of the alien has justified the fact that our legal system offers noncitizens limited rights. Alien terminology helps rationalize the harsh treatment of persons from other countries.²² Consider the terms of the public de-

19. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

20. Cf. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POLITICS 251 (1987) (making moral argument for open borders); R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265 (1994) (offering case for open borders).

21. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-1417 (1993).

22. See ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 976 (1995) (noting that the term "[i]llegal aliens" seems to dehumanize the 'undocumented alien' and to desensitize the reader [and that the word] 'illegal' creates an inference that the person has done something wrong to justify a restriction of rights"). For example, in one egregious case, the Supreme Court emphasized that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)

bate. Today's faceless "illegal aliens" are invading the nation and must be stopped or we shall be destroyed.²³ Such images help animate, invigorate, and reinforce the move to bolster immigration enforcement efforts and seal the borders.

The images that alien terminology creates have more far-reaching, often subtle, racial consequences. Federal and state laws regularly, and lawfully, discriminate against aliens. It is sanctioned by the Constitution, which provides, for example, that the President must be a "natural born citizen."²⁴ Under certain circumstances, discrimination against aliens is legally permissible.²⁵ In contrast, governmental reliance on racial classifications generally are subject to strict scrutiny and ordinarily are unconstitutional.²⁶ Because a majority of immigrants are people of color,²⁷ alienage classifications all-too-frequently are employed as a proxy for race. Alienage discrimination, though overinclusive because it includes persons who are not minorities, allows one to disproportionately disadvantage people of color.

California's much-publicized Proposition 187²⁸ is an example of this phenomenon at work. Although debate during the tumultuous campaign centered on aliens, specifically "illegal aliens," the Mexican-American leaders in California knew which specific group of aliens at which the measure was truly directed. With that in mind, it is not surprising that "[w]hite voters supported the proposition at about a two-to-one ratio while Latinos over-

(emphasis added).

For an analysis of the use of rhetoric in the constitutional law decisions of the U.S. Supreme Court, see L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995).

23. See *infra* text accompanying notes 62-69 (describing imagery surrounding term "illegal alien").

24. U.S. CONST. art. II, § 1, cl. 5.

25. See, e.g., *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state law barring aliens from employment as public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state law requiring police officers to be U.S. citizens).

26. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2105-14 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989).

27. See U.S. DEPT OF JUSTICE, 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 22 (1996) [hereinafter INS 1994 STATISTICAL YEARBOOK] (Table D) (providing breakdown for fiscal years 1993 and 1994 of immigrants by country of birth showing that the majority of immigrants came from nations populated by people of color).

28. See TONY MILLER, ACTING SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, NOV. 8, 1994, at 91-92 [hereinafter CALIFORNIA BALLOT PAMPHLET] (reprinting the text of Proposition 187, which includes amendments to California Penal, Welfare and Institutions, Health and Safety, Education, and Government Codes).

whelmingly opposed it by over a three-to-one margin."²⁹

My point is that the terminological issue is not simply a word game. Alien terminology serves important legal and social functions. Alexander Bickel perhaps said it best in the context of analyzing citizenship: "It has always been easier, it always will be easier, to think of someone as a *noncitizen* than to decide that he is a *nonperson*" ³⁰ In Stephanie Wildman's words, "language veils the existence of systems of privilege."³¹ Lucinda Finley put it differently though with the same flavor: "[l]anguage matters. Law matters. Legal language matters."³²

Let us investigate how this works. Keep in mind that it should not be surprising that law serves this legitimating function. Lawyers attempt to reconcile conflicting legal precedents to make persuasive arguments. In so doing, they attempt to rationalize that which may seem, and may well be, inconsistent.

II. CITIZENS AND "ALIENS"

A popular, and important, topic in modern immigration law scholarship focuses on how immigration and alienage law defines "community membership."³³ The definition of aliens as a group distinct and apart from citizens assists in ensuring that noncitizens are only limited, conditional, or "partial members"³⁴ of the community. Importantly, these partial members of U.S. society are deportable if they violate the conditions of admission. We should not underestimate the severity of deportation, which the Supreme Court has emphasized "may result in the loss 'of all

29. See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 659 (1995) (citing exit polls).

30. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975) (emphasis added).

31. STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 9 (1996).

32. See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886 (1989).

33. See, e.g., T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1993); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

34. I base this term on Michael Scaperlanda's idea that noncitizens are afforded "partial membership" rights under U.S. law. See Scaperlanda, *supra* note 33.

that makes life worth living."³⁵

Aliens are partial members of the community with limited membership rights, which includes the fact that they may be subject to treatment, such as deportation, that *never* could be afforded citizens.³⁶ An extreme example drives this point home. Aliens not convicted of any crime under certain circumstances may be detained indefinitely.³⁷ Citizens, of course, could never be subject to such treatment.³⁸

The value of citizenship is nothing new to American law. For example, long ago, the Supreme Court held that Dred Scott, a black man suing for his freedom, was not a "citizen" and therefore could not invoke the diversity of citizenship jurisdiction of the federal courts.³⁹ By denying citizenship to Dred Scott, the Court denied him a right—access to the federal courts—to which citizens are entitled,⁴⁰ thereby highlighting the fact that freed

35. *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citation omitted). See also JONATHAN ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 555 (1888) (notes of James Madison) (noting that "if banishment [of an alien from the country] be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied").

36. Some have argued for change in this regard. See, e.g., Aleinikoff, *supra* note 33 (arguing that lawful permanent residents should be treated as full-fledged members of community).

37. See *infra* text accompanying notes 121-22 (discussing case law surrounding indefinite detention of Cuban nationals).

38. Citizens generally are entitled to bail and can only in limited circumstances be detained without bail *until* trial on an alleged crime. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (upholding detention before trial under Bail Reform Act of person charged with serious crime).

39. See *Scott v. Sanford*, 60 U.S. 393 (1857). In so holding, the Court emphasized that, at the time of the framing of the Constitution, blacks were:

considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404-05. See also *id.* at 407 (stating that blacks "had no rights which the white man was bound to respect").

40. Language was employed to justify denial of full citizenship rights to freed blacks, who were classified as "denizens" rather than citizens, before the Civil War. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 319-23 (1978). See, e.g., *Scott*, 60 U.S. at 562 (1857) (McLean, J. dissenting) ("Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them ...") (citation omitted). Interestingly, the courts at times equated aliens with "denizens." See *Fong Yue Ting v. United States*, 149 U.S. 698, 723-24 (1893) ("[I]t appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right, as a *denizen*, or otherwise, to be and remain in this country, except by the license, permission, and sufferance of

blacks, like slaves, generally were not full members of the community.

Consider the linkage between alien status and citizenship under the modern immigration laws. The comprehensive immigration statute, the Immigration and Nationality Act, rather blandly defines an "alien" as "any person *not a citizen* or national of the United States."⁴¹ Despite the blandness of the definition, the word alien immediately brings forth rich imagery. One thinks of space invaders⁴² seen on television and in movies, such as the blockbuster movie *Independence Day*.⁴³ Popular culture reinforces the idea that aliens may be killed with impunity and, if not, "*they*" will destroy the world as we know it. Synonyms for alien have included "stranger, intruder, interloper, ... outsider, [and] barbarian,"⁴⁴ all terms that suggest the need for harsh treatment and self-preservation. In effect, the term alien serves to dehumanize persons. We have few, if any, legal obligations to alien outsiders to the community, though we have obligations to persons.⁴⁵ Persons have rights while aliens do not.⁴⁶

Congress, to be withdrawn whenever, in its opinion, the public welfare might require it.") (emphasis added). In England, a "denizen" was a foreign-born person whom the King designated as an English subject; a denizen possessed a legal status somewhere between an alien and citizen. See *id.* at 736 (Brewer, J, dissenting) (citing authority).

41. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994) (emphasis added).

42. See Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1227, 1229 n.12 (1996) (noting that movie *Alien Nation* told of unsuccessful efforts of aliens from another planet to assimilate). Others have analyzed how science fiction, replete with aliens from other planets, reflects racial attitudes. See Edward James, *Yellow, Black, Metal and Tentacled: The Race Question in American Science Fiction*, in SCIENCE FICTION, SOCIAL CONFLICT AND WAR 26 (Philip John Davies ed., 1990).

43. See Jonathan Freedland, *Aliens are Coming Home*, OBSERVER, July 7, 1996, at T7 (discussing popularity of movie in which United States thwarted attack of aliens bent on destroying human race by attacking major cities). The comments of one movie viewer reflected the anti-immigrant sentiment that some saw in the movie: "the aliens [in *Independence Day*] only want to immigrate and take over. That's what all immigrants want: To come in and get power" Gregory Freeman, *Superheroes, Schools Fill Columnist's Mailbox*, ST. LOUIS POST-DISPATCH, July 9, 1996, at 13B (letter to columnist).

44. ROGET'S POCKET THESAURUS 18 (1969 ed.).

45. See Scaperlanda, *supra* note 33, at 713 n.16 ("Personhood denotes constitutional status. Persons have constitutional rights, nonpersons do not.") (citations omitted).

46. I acknowledge that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect not just citizens, but "persons." See U.S. CONST. amend. XIV ("[N]or shall any State deprive *any person* of life, liberty, or property, without due process of law: nor deny to *any person* within its jurisdiction the equal protection of the laws.") (emphasis added). See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that undocumented immigrants present in United States are "persons" entitled to Fourteenth Amendment protections). Nonetheless, Congress and the courts have allowed aliens to be treated much less favorably under the laws than citizens. See *infra* text accompany-

The term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering. Cognitive dissonance theory from psychology, which posits that the human mind strives to reconcile inconsistent phenomena, helps to explain the utility of this intellectual device.⁴⁷ Persons have dignity and their rights should be respected. Aliens have neither dignity nor rights. By distinguishing between aliens and persons, society is able to reconcile the disparate legal and social treatment afforded the two groups. To further rationalize the differential mistreatment, aliens may be "racialized," even if they are, at least by appearance, "white."⁴⁸

Look at this phenomenon concretely. If we think that persons who come to the United States from another nation are hard-working and "good," it is difficult to treat them harshly.⁴⁹ If we consider these foreigners to be criminals who sap finite public resources and damage the environment, it is far easier to rationalize their harsh treatment. These different visions help us better understand the ongoing political debate about undocumented immigration. While serving as Western Regional Commissioner of the INS in charge of border enforcement in the West, Harold Ezell, later a sponsor of Proposition 187, said the following about illegal aliens in 1989: "[i]f you catch 'em, you ought to clean 'em and fry 'em."⁵⁰ Absent from this characterization is the human toll on undocumented immigrants who migrate to the United States: the often painful decision to leave family, friends, and community, the arduous journey replete with dangers, and their uncertain status upon arriving in this

ing note 120 (citing authority).

47. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). We see this phenomenon in the archetypal tale of the racist who claims that his "best friend is black." See Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1049 n.40 (noting "oft-expressed sentiment of the seventies and eighties, 'some of my best friends are blacks, but I certainly would not want one of my [sons or] daughters to marry one'...").

48. See HIGHAM, *supra* note 9, at 131-57 (analyzing nativism directed at southern and eastern European and Jewish immigrants and how they were classified as being of another "race"); RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 149-51 (1993) (describing how Irish immigrants in 1800s were classified as a nonwhite "race").

49. See *infra* text accompanying notes 60-73 (discussing influence of "good" (legal immigrant) "alien" and "bad" (undocumented) "alien" characterization on Supreme Court decisions).

50. George Ramos, *Even if Days are Numbered, Ezell is Making Them Count*, L.A. TIMES, May 29, 1989, at 31, col. 2 (quoting Ezell).

country.⁵¹

By obscuring the human tolls of utilitarian policy, alien terminology facilitates such policy choices. Consider the nation's schizophrenia about undocumented Mexican labor. Following World War II, a perceived labor shortage in agriculture provoked Congress to establish the Bracero Program, which allowed Mexican workers to enter the country temporarily.⁵² Even after the program's dismantling, the U.S. Border Patrol informally collaborated with growers in the Southwest to ensure ready availability of cheap undocumented labor.⁵³ Coming full circle, the U.S. Border Patrol implemented a mass deportation program in 1954 officially known as "Operation Wetback."⁵⁴ As in the 1950s, it is politically popular today to crack down on "illegal aliens" from Mexico.⁵⁵ The need for a disposable labor force of aliens, with little concern for the human consequences on persons, explains these shifting policies.

A. *Deportable and Excludable "Aliens"*

Students of the immigration laws might challenge any blanket assertions about aliens and claim that there are important legal distinctions between different groups of aliens. True, U.S. law makes distinctions between aliens with different categories of aliens enjoying different rights. For example, "deportable aliens," that is, noncitizens who are physically present in the country, have more legal protections than "excludable aliens," that is, aliens who may be excluded from admission at the borders.⁵⁶

51. For a story about one undocumented person (Jose Serrano) with whom I worked years ago, see Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1233-34.

52. See generally KITTY CALAVITA, *INSIDE THE STATE, THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992).

53. See JULIAN SAMORA, *LOS MOJADOS: THE WETBACK STORY* 48-51 (1971).

54. See JUAN RAMÓN GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 139 (1980).

55. For analysis of the intricacies of undocumented migration from Mexico, see Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

56. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 301(a), Pub. L. No. 104-208, (1996), reprinted in 1996 U.S.C.A.N. (110 Stat. 3009) [hereinafter Immigration Reform Act] changed the terminology from "excludable aliens" to "inadmissible" ones. See Linton Joaquin, *The 1996 Immigration Act: Grounds of Inadmissibility and Deportability and Available Waivers*, 73 INTERPRETER RELEASES 164

Deportable aliens are protected by the Due Process Clause while excludable aliens generally are not.⁵⁷ The differential treatment of these groups might be justified by the differing "stakes" they have in the community. Deportable aliens, who have lived in the United States, are more likely to have friends, families, jobs, and community ties in this country, than those seeking to enter.⁵⁸

Some Justices of the Supreme Court recognize the subtle impact that the terminology denoting different categories of aliens has on the legal treatment afforded noncitizens. Justice Douglas, for example, emphasized that "[w]e cannot allow the Government's insistent reference to these Mexican citizens as '*deportable aliens*' to obscure the fact that they come before us as *innocent persons* who have not been charged with a crime" ⁵⁹

Despite the legal niceties, the rights accorded to either deportable or excludable aliens are nowhere close to the rights of citizens. Importantly, both groups of aliens, unlike citizens, can be returned to their countries of origin. They can be deported against their will to a country where they may not have lived for years. Some may be torn from a country where they have lived, known, and loved.

(Nov. 25, 1996) (detailing changes in grounds for inadmissibility and deportability). The new law also eliminated some of the differences in the procedures to which the two groups of aliens are entitled by creating a uniform "removal" hearing. See INA § 240, 8 U.S.C. § 1230 (amended by Immigration Reform Act § 304(a)(3)). Nonetheless, because the grounds for the finding of inadmissibility and deportation still differ significantly (as well as for other reasons), the distinction between aliens seeking admission and deportation remains important. Compare INA § 212, 8 U.S.C. § 1182 (amended by various sections of the Immigration Reform Act) (setting forth grounds for inadmissibility), with INA § 237, 8 U.S.C. § 1227 (amended by various sections of the Immigration Reform Act) (stating deportation grounds).

57. Compare *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States ... has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.") (citations omitted), with *The Japanese Immigrant Case*, 189 U.S. 86 (1903) (holding that noncitizens in deportation proceedings enjoy Due Process protections).

58. See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION PROCESS AND POLICY* 629-38 (3d ed. 1995). This, however, is not necessarily the case. Some persons who leave the country and return may have more community ties than someone who has only briefly been within the borders. See, e.g., *Landon*, 459 U.S. 21 (1982) (describing noncitizen who lived in United States five years, briefly left country, and upon return was placed in exclusion proceedings by the INS).

59. *Hurtado v. United States*, 410 U.S. 578, 604 (1973) (Douglas, J., dissenting) (emphasis added). See *id.* at 599 (Brennan, J., concurring in part, dissenting in part) (agreeing with Justice Douglas on this point).

B. "Good" (Legal) and "Bad" (Illegal) "Aliens"

For legal purposes, the distinction between legal and "illegal aliens" often proves to be important. Legal immigrants, the largest category being "lawful permanent residents,"⁶⁰ are viewed more positively in the eyes of the law than undocumented immigrants. Lawful permanent residents and others who entered through lawful channels are "good aliens" who receive more favorable treatment by the courts than undocumented noncitizens, "bad aliens," who are "uninvited guests, intruders, trespassers, law breakers."⁶¹ Whether "good" or "bad," aliens unquestionably possess fewer legal rights and protections than citizens.

The most damning terminology for noncitizens is "illegal alien." Illegal aliens unquestionably are the most unpopular group of aliens.⁶² Although alien is found repeatedly in the Immigration and Nationality Act, illegal alien is not defined in this law.⁶³ Illegal aliens is a pejorative term that implies criminality,⁶⁴ thereby suggesting that the persons who fall in this category deserve punishment, not legal protection.⁶⁵ Nevertheless, it is common, if not standard, terminology in the modern debate in the Southwest if not the entire nation, about undocumented immigration.

60. See INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1994) (providing that "lawfully admitted for permanent residence [is] the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws").

61. T. Alexander Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, in 9 IN DEFENSE OF THE ALIEN 46, 47 (Lydio F. Tomasi ed., 1987).

62. Despite the wrath often directed at illegal aliens in the political process, the Supreme Court has rejected the claim that undocumented persons constitute a "suspect class" for equal protection purposes, which would subject classifications based on undocumented status to strict scrutiny. See *Plyler*, 457 U.S. at 219 n.19.

63. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 177, 270 n.62 (1996). The term is found in a few places in the laws. See, e.g., 8 U.S.C. § 1365 (mentioning "illegal aliens" in the context of providing for federal reimbursement of states for costs incurred in incarcerating "illegal aliens" convicted of felonies).

64. See Marc Cooper, *The War Against Illegal Immigrants Heats Up*, VILLAGE VOICE, Oct. 4, 1994, at 280 (quoting sponsor of Proposition 187: "The ... mindset on the part of illegal aliens, is to commit crimes. The first law they break is to be here illegally. The attitude from then on is, I don't have to obey your laws.").

65. See Neuman, *supra* note 15, at 1440-41. See also Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573-74 n.4 (1997) (articulating similar concerns with alien terminology).

The illegal alien label, however, suffers from inaccuracies and inadequacies at several levels. Many nuances of immigration law make it extremely difficult to distinguish between an "illegal" and a "legal" alien. For example, a person living without documents in this country for a number of years may be eligible for relief from deportation and to become a lawful permanent resident.⁶⁶ He or she may have children born in this country, who are citizens,⁶⁷ as well as a job and community ties here. It is difficult to contend that this person is an illegal alien indistinguishable from a person who entered without inspection yesterday.

The vaguely defined, but emotionally powerful, illegal alien terminology also fails to distinguish between the different types of undocumented persons in the United States. There are persons who cross the border without inspection; there are also noncitizens who enter lawfully but overstay their business, tourist, student, or other visas.⁶⁸ The illegal alien in public discussion often refers to a person who enters without inspection, often a national of Mexico.⁶⁹ This is not surprising because the furor over illegal aliens, at least in the Southwest, can be seen as an attack on undocumented Mexicans, if not on lawful Mexican immigrants and Mexican-American citizens.

History teaches that it is difficult to limit anti-alien sentiment to any one segment of the immigrant community, such as the undocumented.⁷⁰ This is evidenced by the slow reduction of public benefits to all categories of noncitizens in the 1990s. On the heels of the passage of Proposition 187, which focused on limiting benefits to undocumented persons, Congress enacted

66. See INA § 240A, 8 U.S.C. § 1230A (added by Immigration Reform Act § 304(a)(3)) (providing for relief from deportation known as "cancellation of removal"). The Immigration Reform Act modified relief previously known as suspension of deportation, see INA § 244, 8 U.S.C. § 1254 (repealed by Immigration Reform Act § 304(b)) and eliminated relief known as § 212(c) waiver. See INA § 212(c), 8 U.S.C. § 1282(c) (repealed by Immigration Reform Act § 308(8)(A)(i)) by creating the more restrictive cancellation of removal relief. See Immigration Reform Act § 304.

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

68. See INS 1994 STATISTICAL YEARBOOK, *supra* note 27, at 178 (estimating that about one-half of undocumented persons fall into each of the two categories).

69. See *infra* text accompanying notes 91-107, 111-14 (analyzing treatment of undocumented persons from Mexico).

70. See T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915 (1995) (noting difficulties in drawing lines with respect to community membership between lawful and unlawful immigrants).

welfare "reform" legislation that greatly limited legal immigrants' eligibility for public benefit programs.⁷¹ Later, more general attacks were made on racial minorities, such as California's so-called Civil Rights Initiative that, if implemented, would eliminate affirmative action.⁷² Put simply, nativist outbursts fail to make the fine legal distinctions among members of outsider groups like those that legal academics proudly articulate.

My point is not that all distinctions between different types of aliens and between aliens and citizens should be discarded. Rather, we must recognize that difficult choices must be made in distinguishing between the groups that we create under the law and the rights afforded to persons in those groups. In so doing, we should not employ legal terminology as a tool to obfuscate the real impacts of our judgments.⁷³ As a society, we should instead be honest in making truly difficult decisions with an understand-

71. See *infra* text accompanying notes 128-29 (summarizing legislative expansion of noncitizen categories ineligible for public benefits).

72. See generally Symposium, *The Meanings of Merit: Affirmative Action and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 921 (1996) (analyzing initiative from variety of perspectives). It is not coincidental that the height of anti-immigrant sentiment coincided with attacks on affirmative action and multiculturalism. See Robert S. Chang, *Reverse Racism: Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115, 1120-23, 1133-34 (1996) (noting linkages between these movements as part of effort to return America to "imaginary" and "glorious" past). See also Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 51-54 (1996) (analyzing relationship between modern debates over immigration and affirmative action).

This is not to suggest that all those who oppose affirmative action or support restrictionist immigration measures are racist. Concerns about race, however, influence the support for such measures. As I have emphasized in a different context it is difficult to isolate the precise role of race in shaping public opinion on such volatile issues. See Johnson, *supra* note 29, at 650-61 (analyzing role of race in passage of California's Proposition 187).

73. A somewhat similar, though perhaps more controversial, terminological question surrounds abortion. See *Roe v. Wade*, 410 U.S. 113, 156-59 (1973) (stating that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment" and accepting the proposition that a "fetus" is not a "person" for Fourteenth Amendment purposes); Ronald M. Dworkin, *The Great Abortion Case*, in PHILOSOPHY OF LAW 191 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (analyzing use of the word "fetus" in abortion debate); Naomi Wolf, *Our Bodies, Our Souls*, NEW REPUBLIC, Oct. 16, 1995, at 26 (noting that use of term "fetus" in debate over abortion hides real-life impacts of abortion procedure). Some have argued that, even assuming that the fetus is a person for constitutional purposes, the right to abortion is constitutionally protected. See, e.g., Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599 (1991); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1641-42 (1979). But Cf. Alan E. Brownstein & Paul Dao, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 743-45 (1992) (summarizing these claims and questioning their persuasiveness).

ing that *persons*, not dehumanized, demonized aliens, are being affected, often in harsh and deeply personal ways.

C. Implications of the "Alien" Terminology

In many ways, the negative images of the alien, often fed by restrictionist groups and politicians seeking punitive immigration measures, carry the day in the political process.⁷⁴ Such images influence the courts as well. Not long ago, the Supreme Court manipulated alien terminology in a subtle manner to help justify harsh treatment of perhaps the most sympathetic group of noncitizens, children who come to the United States without their parents. In the 1980s, the Immigration and Naturalization Service (INS) adopted a regulation that limited the release of noncitizen children from custody to only their parents, close relatives, or legal guardians, rather than to responsible adults. All other children were detained. Problems with the detention policy, which allowed for detention in what many found to be deeply troubling conditions, were abundant. Undocumented children frequently come to the United States with extended family members, not their parents or legal guardians. Under the regulation, these children, if apprehended by the INS, could not be released to these family members. Undocumented parents also fear deportation if they appear at the INS to release their detained children.

In rejecting the constitutional challenges to the regulation, Justice Scalia wrote for the Supreme Court in sterile terms. The first paragraph of the opinion, in relevant part, reads:

Over the past decade, the ... [INS] has arrested increasing numbers of *alien juveniles* who are not accompanied by their parents or other related adults. Respondents, a class of *alien juveniles* so arrested and held in INS custody pending their deportation hearings, contend that the Constitution and immigration laws require them to be released into the custody of "responsible adults."⁷⁵

74. See generally Johnson, *supra* note 51 (analyzing political dynamics of immigration law and policy).

75. *Reno v. Flores*, 507 U.S. 292, 294 (1993) (emphasis added).

The majority goes on to emphasize that:

[i]f we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles ... *who are aliens*. For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our *alien visitors* has been committed to the political branches of the Federal Government Over no conceivable subject is the legislative power of Congress more complete Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.⁷⁶

The Justice Stevens' dissent cut to the heart of the matter by considering the impact on *children*:

How a responsible administrator could possibly conclude that the practice of commingling harmless *children* with adults of the opposite sex in detention centers protected by barbed-wire fences, without providing them with education, recreation, or visitation, while subjecting them to arbitrary strip searches, would be in their best interests is most difficult to comprehend.⁷⁷

Note the salient difference in language between the two opinions. On the one hand, Justice Scalia, who reads their constitutional rights restrictively, calls them "alien juveniles" something akin to juvenile delinquents. On the other hand, Justice Stevens, who would find in their favor, calls them "children." Although the regulation directly affected children, its disparate impact on undocumented children from Mexico and Central America generally went ignored.⁷⁸

76. *Id.* at 305-06 (emphasis added) (citations omitted) (quotation marks in original deleted).

77. *Id.* at 327-38 (Stevens, J., dissenting) (emphasis added) (footnotes omitted).

78. Not surprisingly, two of the legal academics most critical of the regulation were a Latina and a Latino. See Cecelia M. Espenosa, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407 (1996); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990). For more general criticism of Immigration and Naturalization Service detention policies, see Taylor, *supra* note 17.

The political process has responded to the encouragement of Supreme Court decisions like *Reno v. Flores*.⁷⁹ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁸⁰ for example, expanded the categories of criminal aliens subject to mandatory detention without the possibility of bond.⁸¹ Moreover, the Act eliminated judicial review of detention and bond decisions of aliens.⁸² Detention of *aliens*, adults, and children, evidently is much easier to justify than detention of *citizens* or *persons*.

III. THE INFLUENCE OF RACE

Alienage status has not always been linked to race. As mentioned previously, the primary group of aliens that the framers of the Constitution had in mind in creating alienage jurisdiction in Article III were the British.⁸³ Over time, however, aliens have increasingly become equated with racial minorities. As Gerald Neuman has succinctly observed, "the discourse of legal [immigration] status permits coded discussion in which listeners will understand that reference is being made, *not to aliens in the abstract, but to the particular foreign group that is the principal focus of current hostility*."⁸⁴

An important first association between aliens and racial minorities can be seen in the foundational immigration cases allowing for the exclusion and deportation of Chinese persons in the late 1800s.⁸⁵ Not long after, in the early part of the twentieth century, some states passed laws known as the "alien land laws" that barred "aliens ineligible to citizenship" from owning certain real property. This facially-neutral phrase was taken from the immigration and naturalization laws, which barred most non-white persons from becoming citizens.⁸⁶ While incorporating a

79. 507 U.S. 292 (1993).

80. Pub. L. No. 104-208 (1996), reprinted in 1996 U.S.C.A.N. (110 Stat. 3009).

81. See INA § 236(c), 8 U.S.C. § 1226(c) (amended by Immigration Reform Act § 303(a)).

82. See INA § 236(e), 8 U.S.C. § 1226(e) (amended by Immigration Reform Act § 303(a)). For a thorough analysis of the detention provisions of the new immigration laws, see Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209 (Feb. 3, 1997).

83. See *supra* text accompanying note 7.

84. Neuman, *supra* note 15, at 1429 (emphasis added).

85. See *supra* text accompanying note 10.

86. See *supra* text accompanying note 12 (noting racial requirements for naturali-

facially neutral phrase from the immigration laws into the land laws, the state effectively barred certain nonwhites from owning real property. These laws undisputedly were directed at persons of Japanese ancestry.⁸⁷ More recently, since 1965 when Congress repealed the national origin quotas system, there has been a sharp increase in racial minorities as a proportion of the immigrant stream to the United States.⁸⁸

The "alien" has increasingly become associated with racial minorities in the modern debate about immigration. The words "alien" and "illegal alien" today carry subtle racial connotations. The dominant image of the alien often is an undocumented Mexican or some other person of color, perhaps a Haitian, Chinese, or Cuban person traveling by sea from a developing nation. Treating racial minorities poorly on the ground that they are aliens or illegal aliens allows us to reconcile the view that "we are not racist" and the desire to insulate ourselves from certain groups of persons viewed as different, racially or otherwise.⁸⁹

A. *Some Examples: Mexicans, Haitians, Cubans*

As the century comes to a close, concern with illegal aliens in the United States dominates debate over immigration reform. "The illegal alien is said to sneak into the United States, insinuate himself into our midst, hide, remain without asking permission. The introjection language, language of overstepping, is both literal and unmistakable."⁹⁰

Though the term illegal alien is seemingly race neutral, it is relatively easy to discern which noncitizens are the ones that provoke concern. Study of the use of the terminology in context reveals that, particularly in the Southwest, the term refers to undocumented Mexicans and plays into stereotypes of Mexicans

zation).

87. See *Oyama v. California*, 332 U.S. 633, 658-59 (1948) (Murphy, J., concurring). See also Neuman, *supra* note 15, at 1429 n.17 (acknowledging that states employed phrase "alien ineligible to citizenship" in land laws to discriminate against Japanese noncitizens).

88. See *supra* text accompanying note 27.

89. See FESTINGER, *supra* note 47, at 7 (noting how inconsistencies between perceived racial sensibilities and reality generate conflict that persons strive to reconcile).

90. Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1041-42 (1994) (footnote omitted).

as criminals.⁹¹ The terminology better masks nativist sympathies than the popular vernacular that it replaced—"wetbacks," which is even more closely linked to Mexican immigrants.⁹²

The link between "illegal aliens" and Mexican citizens often goes unstated.⁹³ The courts, with little explanation, often have approached the "illegal immigration problem" as an exclusively Mexican problem. For example, Justice Brennan, writing for the Supreme Court, suggests the equation in his mind between illegal aliens and Mexican immigrants.

Employment of *illegal aliens* in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by *illegal aliens* of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of *illegal aliens* under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx of *illegal aliens* from neighboring Mexico.⁹⁴

The best estimate of the INS, however, is that, as of October 1992, less than forty percent of the undocumented population in the United States is of Mexican origin.⁹⁵ The public debate, however, fails to focus on undocumented white aliens. The INS estimated that three of the top ten sending nations for undocumented immigrants are Canada (97,000), Poland (91,000), and

91. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273-75 (1992) (detailing stereotypes of Mexican-Americans in popular U.S. culture, including the notion of Mexicans as "bandido"). See also Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1531-34 (1995) (analyzing how undocumented immigrants often are characterized as criminals).

92. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1395 (1953) (lamenting Supreme Court dicta "say[ing], in effect, that a Mexican wetback who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation") (emphasis added) (footnote omitted).

93. Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing unconscious nature of modern racism).

94. *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) (emphasis added) (holding that federal law did not pre-empt California law prohibiting employment of undocumented persons).

95. INS 1994 STATISTICAL YEARBOOK, *supra* note 27, at 178-79.

Italy (67,000).⁹⁶ A study by the state of New York estimated that, despite the images of Chinese and Central Americans as the predominant illegal aliens in the state, the three largest undocumented groups in New York came from Ecuador, Italy, and Poland.⁹⁷

In focusing on the "illegal alien" as a Mexican immigrant, the U.S. Supreme Court decisions are replete with negative imagery about undocumented immigration from Mexico.⁹⁸ Such immigration, in the Court's view, is a "colossal problem"⁹⁹ posing "enormous difficulties"¹⁰⁰ and "formidable law enforcement problems."¹⁰¹ One Justice observed that immigration from Mexico is "virtually uncontrollable."¹⁰² Chief Justice Burger stated that the nation "is powerless to stop the tide of *illegal aliens*—and *dangerous drugs*—that daily and freely crosses our 2000-mile southern boundary."¹⁰³ Even renowned liberal Justice Brennan, in analyzing the lawfulness of a workplace raid in southern California, stated that "[n]o one doubts that the presence of large numbers of undocumented *aliens* in the country creates law enforcement problems of *titanic proportions*."¹⁰⁴

96. *Id.* at 179.

97. See Deborah Sontag, *Study Sees Illegal Aliens in New Light*, N.Y. TIMES, Sept. 2, 1993, at B1. Interestingly, governmental officials in New York defend the undocumented. See Deborah Sontag, *New York Official Welcome Immigrants, Legal or Illegal*, N.Y. TIMES, June 10, 1994, at A1 (quoting Governor Mario Cuomo, "I love immigrants. Legal, illegal—they're not to be despised," and Mayor Rudolph Giuliani, "Some of the hardest-working and most productive people in this city are undocumented aliens.").

98. For a detailed exploration of this subject, see Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165 (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!]. See also Néstor P. Rodríguez, *The Social Construction of the U.S.-Mexico Border*, in IMMIGRANTS OUT!, *supra*, at 223, 230-32 (discussing social construction of alien in analyzing the social construction of the U.S.-Mexico border). The negative image of Mexican nationals almost invariably is linked to the disfavored status of Mexican-Americans generally in the United States, which is reflected in the frequent rejection of civil rights claims by Mexican-Americans. See generally George A. Martínez, *Legal Indeterminacy, Judicial Discretion, and the Mexican-American Experience*, 27 U.C. DAVIS L. REV. 555 (1994).

99. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 n.5 (1982).

100. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

101. *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976).

102. *Plyler v. Doe*, 457 U.S. 202, 237 (1982) (Powell, J., concurring).

103. *United States v. Ortiz*, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring in judgment) (emphasis added) (footnote omitted).

104. *INS v. Delgado*, 466 U.S. 210, 239 (1984) (Brennan, J., dissenting in part) (emphasis added).

Ignoring the heated debate among social scientists about the contribution of undocumented immigrants to the economy,¹⁰⁵ the Supreme Court has stated unequivocally that undocumented Mexicans "create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services."¹⁰⁶ Such perceptions inspired Chief Justice Burger to include an extraordinary appendix to an opinion describing in remarkable detail "the illegal alien problem,"¹⁰⁷ which focused exclusively on unauthorized migration from Mexico.

Similar concerns with illegal aliens from Mexico and other developing nations influence policymakers. For example, in arguing for an overhaul of immigration enforcement in 1981, then Attorney General William French Smith proclaimed that "[w]e have lost control of our borders."¹⁰⁸ Around that same time period, the Reagan administration began interdicting Haitians fleeing political turmoil¹⁰⁹ and detaining all Central Americans seeking asylum in this country because of feared political persecution.¹¹⁰ More recently, the public perception that "illegal immigration" is out of control motivated in President Clinton to increase enforcement efforts along the U.S.-Mexico border through military-style operations like Operation Blockade—later renamed Hold the Line—in El Paso, Texas.¹¹¹ This public perception also prompted congressional action designed to bolster border enforcement.¹¹² While the government fortifies the southern

105. See BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 44-145 (forthcoming 1997, NYU Press) (summarizing and analyzing conflicting data on impact of immigration on U.S. economy).

106. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975).

107. *Ortiz*, 422 U.S. at 900 (Burger, C.J., concurring in judgment) (excerpting *United States v. Baca*, 368 F. Supp. 398, 402-08 (S.D. Cal. 1973)).

108. *Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. of the Judiciary*, 98th Cong., 1st Sess. 1 (1983) (testimony of Attorney General William French Smith).

109. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160-61 (1993) (detailing origins of Haitian interdiction policy).

110. See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 559-67 (9th Cir. 1990) (outlining various detention and related policies implemented by INS directed at Central Americans in early 1980s).

111. See U.S. COMM'N ON IMMIGRATION REFORM, *U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY* 11-19 (1994) (endorsing increased border enforcement efforts such as Operation Hold the Line).

112. See *Immigration Reform Act*, Pub. L. No. 104-208 (1996), reprinted in 1996 U.S.C.A.N. (110 Stat. 3009) (delineating a variety of methods for increased border en-

border with Mexico, reports of smuggling of undocumented immigrants across the northern border with Canada fail to provoke significant public concern.¹¹³

The use of "illegal alien" as code for Mexicans can be seen in the debate over Proposition 187. Consider the argument in favor of the measure in the pamphlet distributed to registered voters:

WE CAN STOP ILLEGAL ALIENS... .

Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion

It has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year

Welfare, medical and educational benefits are the magnets that draw these ILLEGAL ALIENS across our borders

Should our Senior Citizens be denied full service under Medi-Cal to subsidize the cost of ILLEGAL ALIENS?

We are American, by birth or naturalization

[A]s a final slap on the face, they voted to continue free prenatal care for ILLEGAL ALIENS!

Vote YES ON PROPOSITION 187. ENOUGH IS ENOUGH!¹¹⁴

Replace illegal aliens with "Mexicans" and the meaning probably would be more precise.

forcement).

113. See Mark Clayton, "Refugees" to Canada Slip to US on Mohawk "Trail," CHRISTIAN SCI. MON., Nov. 13, 1996, at 1.

114. CALIFORNIA BALLOT PAMPHLET, *supra* note 28, at 54 (Argument in Favor of Proposition 187).

The unfortunate treatment of Haitians fleeing political violence in their homeland demonstrates the powerful legal impact of alien terminology on racial minorities. President Bush issued an executive order in May 1992 entitled "Interdiction of Illegal Aliens," which authorized the extraordinary step of repatriating Haitians without inquiring, as required by international law,¹¹⁵ into whether they had a well-founded fear of persecution if returned to Haiti.¹¹⁶ Although the order did not mention Haitians or Haiti, only "illegal aliens," President Bush, and later President Clinton, implemented the repatriation policies exclusively against persons fleeing Haiti.¹¹⁷ The Supreme Court decision upholding this extreme policy is no less sterile than the executive order. In introducing the case, the Court emphasized that only the rights of aliens were at stake:

Aliens residing illegally in the United States are subject to deportation *Aliens* arriving at the border ... are subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States [T]he *alien* may seek asylum as a political refugee... . When an *alien* proves that he is a "refugee," the Attorney General has discretion to grant him asylum If the proof shows it is more likely than not that the *alien's* life or freedom would be threatened in a particular country because of his political or religious beliefs, ... the Attorney General must not send him back to that country. The [immigration laws] offer these statutory protections only to *aliens* who reside in or have arrived at the border of the United States.¹¹⁸

The word alien is used six times in the paragraph. Notably absent from the Court's opinion is any discussion of the human suffering experienced by the Haitians.¹¹⁹

115. See Brief for the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondents, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

116. Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992).

117. *Sale*, 509 U.S. at 164 n.13.

118. *Id.* at 159-60 (emphasis added) (footnotes omitted).

119. See Harold Honju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483, 488-90 (1993) (recounting a tragic stories of two Haitian refugees, including one woman who gave birth in Guantánamo Bay whose child later died while in detention).

As the Supreme Court has said on numerous occasions when upholding discrimination against aliens, "Congress regularly makes rules that would be unacceptable if applied to citizens."¹²⁰ The government's decision to detain some Cubans indefinitely is an extreme example. In 1980, Fidel Castro allowed many Cuban citizens to come to the United States in the so-called Mariel Boatlift. The INS tried to return some of the Cubans and later attempted to deport others who had initially been released. Cuba, however, refused to accept these persons. In response, the United States held these noncitizens in indefinite detention, often in maximum security federal penitentiaries. In one case challenging that detention, the court emphasized in the very first line of the opinion that "Alexis Barrera-Echavarria is an alien."¹²¹ Not surprisingly, the court upheld the indefinite detention.¹²²

B. The Absence of Race From the Public Debate

Because the immigration laws do not facially discriminate on the basis of race, they can be defended as "color blind." Consistent with this, most modern restrictionists routinely deny that race is the reason for their objections to immigration. They point to other alleged impacts of illegal immigration, and immigration generally: that aliens take jobs from U.S. citizens, that aliens contribute to overpopulation that damages the environment, and

120. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (upholding Congressional limitation on eligibility of lawful immigrants for federal medical insurance program). See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting language from *Mathews v. Diaz* and rejecting constitutional challenge to provision of Immigration and Nationality Act).

121. *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1442 (9th Cir.) (en banc), cert. denied, 116 S. Ct. 479 (1995).

122. *Id.* See also *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), cert. denied sub nom., 479 U.S. 889 (1986); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993), amended 997 F.2d 1112 (5th Cir. 1993). But see *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (holding that INA does not permit indefinite detention as alternative to exclusion). See also Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 625-26 (1995) (criticizing court in *Barrera* for failing to consider international law); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 997-1000 (1995) (summarizing litigation challenging indefinite detention of Mariel Cubans). For analysis of litigation in recent years challenging the conditions of confinement of noncitizens, see Taylor, *supra* note 17, at 1139-56.

that aliens overconsume public benefits and commit crime.¹²³ Such facially-neutral contentions deeply complicate the debate.¹²⁴

The fact that the race of immigrants ordinarily is not expressly offered as a reason for restricting immigration should not be surprising. Unlike past anti-immigrant eras, it is generally considered impermissible to expressly rely on race as a reason for restricting immigration.¹²⁵ Consequently, race ordinarily is submerged in the public discourse about immigration. However, the persistent reappearance of racist statements in the immigration debate, even if they do not dominate, suggests that race at some level influences restrictionist sentiments.¹²⁶

Though facially-neutral, restrictionist measures have disproportionate impacts on people of color. In many places in the country, Latinos/as, as well as persons of Asian ancestry, bear the brunt of heightened immigration enforcement efforts because they are perceived as "foreign" to the Anglo-Saxon mainstream.¹²⁷ Persons of Latin American ancestry are well-aware

123. See, e.g., FEDERATION FOR AMERICAN IMMIGRATION REFORM, *IMMIGRATION 2000: THE CENTURY OF THE NEW AMERICAN SWEATSHOP* (1992) (collecting essays that play on such themes).

124. See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996) (noting complexities in arguing against measures such as Proposition 187 because of such arguments).

125. But see PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995) (arguing that immigration should be restricted in part because of its impact on changing racial demographics of United States).

126. See, e.g., Douglas Jehl, *Buchanan Raises Specter of Intolerance, Critics Say*, L.A. TIMES, March 17, 1992, at A1 (quoting Patrick Buchanan, Republican Presidential candidate: "[I]f we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?").

127. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. (forthcoming 1997) (analyzing significance of treatment of Latinos/as as "foreigners," even those whose ancestors have been in the United States for generations). This may begin to explain why Latinos/as generally have a different perspective on immigration than the majority. Another reason might be that many Latinos/as themselves immigrated to this country, or have loved ones that have done so. In addition, because Latinos/as are ethnically distinct, they may not share Anglos' anxiety about the increased immigration of non-Anglo Saxons. See *infra* text accompanying note 133. Moreover, Catholicism, still the dominant religion among Latinos/as, may affect the community's collective view on immigration. See, e.g., Larry B. Stammer & John J. Goldman, *Pope Exhorts U.S. to Welcome the 'Stranger'*, L.A. TIMES, Oct. 6, 1995, at A1 (reporting that the Pope promoted generosity toward immigrants at public mass); Ted Rohrlich, *Mahony Calls Prop. 187 a Threat to Moral Principles, Urges its Defeat*, L.A. TIMES, Oct. 9, 1994, at B1 (reporting that a prominent cardinal in Los Angeles urged defeat of Proposition 187).

that the lashing out at aliens often is difficult to limit to noncitizens. A relationship exists between anti-immigrant and anti-Mexican sentiment. For example, Proposition 187 supporters claimed initially that, despite the anti-Mexican overtones to the campaign, they were not anti-immigrant but only anti-illegal alien and only wanted to limit benefits to "illegal aliens."¹²⁸ This anti-illegal alien contagion spread, however, and Congress later passed a law limiting public benefits to lawful immigrants.¹²⁹ Because Mexican nationals constitute the largest group of lawful permanent residents in the country,¹³⁰ they will be disparately affected.

Nothing in this essay should be read as suggesting that Mexican-Americans are the only racial minorities adversely affected by alien terminology. Indeed, "illegal alien" is an infinitely malleable term that may encompass the most feared outsider—often in modern times a person of color—in any region of the United States. In the Southwest, the term generally refers to persons of Mexican ancestry. In New York, it may refer to Chinese and Central Americans.¹³¹ Consequently, the beauty (if one can call it that) of anti-illegal alien rhetoric is its ability to tap into the specific racial fears in a particular region and allow for consensus on national solutions to the "alien problem."

To complicate matters, alien terminology often works in combination with other racial code. Culture, for example, in certain circumstances is loosely linked to race. Restrictionists, while denying any racist sympathies, may claim that the cultural differences of non-Anglo Saxon immigrants, not their race per se, is objectionable.¹³² The overlap between culture and race may explain Latinos/as' more favorable attitude about immigra-

128. See, e.g., *Vote Wasn't Anti-Immigration*, OMAHA WORLD HERALD, Nov. 18, 1994, at 22 (contending that Proposition 187 was not anti-immigrant but anti-illegal immigration).

129. See Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (Sept. 23, 1996) (summarizing the impact of 1996 welfare bill on benefit eligibility of lawful permanent residents).

130. See 1994 INS STATISTICAL YEARBOOK, *supra* note 27, at 22 (Table D), 134 (Chart T) (presenting statistical data indicating that, for certain time periods, Mexican citizens constituted largest immigrant group in the United States and immigrant group with lowest naturalization rate).

131. See Sontag, *Study Sees Illegal Aliens In a New Light*, *supra* note 97 (noting that many New Yorkers thought of undocumented immigrants as persons from China and Central America).

132. See, e.g., BRIMELOW, *supra* note 125.

tion than other groups;¹³³ they generally are less concerned about non-Anglo Saxon peoples immigrating to the United States. In addition to cultural differences, language skills may also be employed as a proxy for national origin and used to support the exclusion of non-English speaking immigrants.¹³⁴

Though reform proponents might deny it, race is an undercurrent to the debate over birthright citizenship. The concern, as voiced by California Governor Pete Wilson¹³⁵ and the popular television show "60 Minutes,"¹³⁶ is that undocumented Mexican women cross the border to have children, thereby bestowing U.S. citizenship on them.¹³⁷ Stereotypes of excessively fertile brown women serve as the underpinnings of such claims.¹³⁸ To counter the national threat, the 1996 Republican Party platform would have denied citizenship to children born in the United States to

133. See Thomas Epenshade & Katherine Hempstead, *Contemporary American Attitudes Toward U.S. Immigration*, 30 INT'L MIGRATION REV. 535, 543 (1996) (summarizing conclusion of study showing that Hispanics were more likely to voice pro-immigration attitudes than non-Hispanic whites).

134. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 357-60 (1992). See, e.g., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc) (invalidating Arizona English-only initiative), *vacated as moot*, 65 U.S.L.W. 4169 (U.S. Mar. 3, 1997). See also Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving Speak-English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. (forthcoming 1997) (analyzing importance of language cases to Latino/a community).

135. See Stephen Chapman, *Trading a Birthright for a Mess of Pottage*, CHI. TRIB., Aug. 11, 1996, at 25 (reporting Governor Wilson's support for changes in birthright citizenship).

136. See Dan Walters, *Wilson is a Nonperson to '60 Minutes'*, SAN DIEGO UNION TRIB., Jan. 27, 1994, at B13 (mentioning episode).

137. See Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 709-13 (1995) (observing racial overtones to public debate over birthright citizenship). See also Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 500 (1987) (criticizing proposal to rethink birthright citizenship and observing that it is part of a campaign that "is partly a struggle over the future racial, linguistic and cultural development of American society"); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994) (criticizing proposals to limit birthright citizenship).

138. See, e.g., LINDA CHAVEZ, *OUT OF THE BARRIO* 91-92 (1991) (recounting incident in which the founder of an English-only group distributed memorandum stating in crude fashion that fertility rates of Latinos/as were excessive). Not all critical examinations of the birthright citizenship rule, of course, expressly play on racial stereotypes. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

undocumented parents.¹³⁹ Not surprisingly in light of the racial impacts of a change in the citizenship law, Latino/a activists have been at the forefront of the opposition to the proposals to limit birthright citizenship.¹⁴⁰

Efforts to eliminate birthright citizenship dovetail with cries of naturalization fraud. In response to measures such as Proposition 187 and congressional limitations on benefits to lawful immigrants, petitions for naturalization were filed at a record pace.¹⁴¹ The Clinton administration was charged with pursuing partisan political ends by encouraging naturalization and allowing criminals to become naturalized.¹⁴² Noncitizens thus are placed in a no-win situation. If they do not naturalize, they are accused of refusing to assimilate.¹⁴³ But, if they naturalize in large numbers, they are accused of abusing the system.

IV. CONCLUSION

Critical analysis of immigration and human rights law, which today disparately affects people of color in particularly harsh ways, is much needed. In this realm, legal terminology is important. Legal construction of the "alien" has facilitated the rationalization of severe treatment of noncitizens. At times, "alien" has been used as a code word for racial minority. For too long, the racial impacts of legal rules and fictions have been obscured and ignored. We should remain vigilant of the use of language that masks the very human impacts of the immigration laws. Although difficult choices must be made, we should make them honestly with a full realization that *persons*, not faceless, nonhuman, demon "aliens," are affected in fundamental ways.

139. See Robert Pear, *Citizenship Proposal Faces Obstacle in the Constitution*, N.Y. TIMES, Aug. 7, 1996, at A13.

140. See *id.*

141. See William Branigin & Lena H. Sun, *Citizenship Applications Strain Background Checks*, WASH. POST, Aug. 17, 1996, at A4.

142. See Sara Fritz, *Gore Immigrant Program Role Draws Fire*, L.A. TIMES, Oct. 6, 1996, at A24. The Commissioner of the Immigration and Naturalization Service sought to fulfill her promise of reducing the agency's lengthy delays in processing naturalization petitions. See Doris Meissner, *Putting the "N" Back into INS: Comments on the Immigration and Naturalization Service*, 35 VA. J. INT'L L. 1 (1994).

143. See, e.g., BRIMELOW, *supra* note 125, at 272-74.