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## Book Review

### SOME THOUGHTS AND TRUTHS ABOUT IMMIGRATION MYTHS: *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS*<sup>†</sup>

By Harvey Gee\*

#### I. INTRODUCTION

As an avid reader of Kevin R. Johnson's previous legal writings about race and immigration, I was extremely pleased to find his most recent book, *The "Huddled Masses" Myth: Immigration and Civil Rights* ("*Huddled Masses*") resting on the shelf in the law books section of the San Diego Border's bookstore.<sup>1</sup> Johnson, a prolific writer, is a member of the Critical Race Theory Movement. For those readers unfamiliar with the Critical Race Theory Movement, it is a school of legal thought that functions as an alternative approach to addressing race jurisprudence. Critical Race Theory scholars, most of whom are racial minorities situated in the nation's legal academies, seek to challenge the ways in which race and racial power are constructed and represented in American legal culture and society.<sup>2</sup> Their scholarship offers racial minorities an opportunity to add a distinct perspective to legal scholarship by revealing the viewpoints of those who have been historically subjected to social domination and subordination.<sup>3</sup> Critical Race Theory scholars question the traditional assumptions of both

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<sup>†</sup> KEVIN. R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* 254 (2004).

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<sup>1</sup> KEVIN. R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* 254 (2004).

<sup>2</sup> See Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Movement*, 30 ST. MARY'S L.J. 759, 764 (1999) [hereinafter *Beyond Black and White*]; see also Harvey Gee, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 642-44 (1996) [hereinafter *Changing Landscapes*].

<sup>3</sup> *Beyond Black and White*, *supra* note 2; *Changing Landscapes*, *supra* note 2.

liberals and conservatives with respect to the goals and means of traditional civil rights reforms.<sup>4</sup>

Johnson's *Huddled Masses* is much more theoretical in comparison to his first book, *How Did You Get to Be Mexican?: A White/Brown Man's Search for Identity*,<sup>5</sup> which was an autobiographical essay articulating his experiences negotiating the color-line between white and brown. In Johnson's first book, he explored his primary argument: Because America is far from being a color-blind society, an individual's race greatly influences his or her life experiences and probably his or her place in society.

In *Huddled Masses*, Johnson, Associate Dean and Professor of Law in Chicana/o Studies at the University of California, Davis, is much more consistent with his earlier work. In *Huddled Masses*, Johnson again writes broadly and frankly about the intersection of race and the law. The focus this time is U.S. immigration law and civil rights. *Huddled Masses* is a fascinating and important volume, which divides itself into eight succinct chapters. The first chapter discusses immigration and civil rights in the United States. Next, chapters two through five share the common theme of addressing the exclusion and deportation of racial minorities, political undesirables, the poor, and criminals. Chapter six then analyzes the marginalization of women under the immigration and nationality laws. Chapter seven examines the exclusion and deportation of lesbians and gay men. The book closes with Johnson's perspective on the future of immigration and civil rights in this country. Each section is concise, and each chapter logically leads into the next part. This organization allows the reader to skip to sections of particular interest. Johnson's expressed intent was to write his book for a general audience, and for the most part, he succeeds.

*Huddled Masses* is timely. Recently, the U.S. Commission on Civil Rights heard reports and allegations of abuses by U.S. Border Patrol Agents against indigenous peoples along the international border.<sup>6</sup> These incidents include harassment, intimidation, and racial profiling.<sup>7</sup> Further north, in Denver, a citizens group by the name "Defend

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<sup>4</sup> *Beyond Black and White*, *supra* note 2; *Changing Landscapes*, *supra* note 2.

<sup>5</sup> KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN?: A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* (1999).

<sup>6</sup> Brenda Norrell, *Civil Rights Commission Hears Indigenous Peoples at Mexican Border*, *INDIAN COUNTRY TODAY*, Sept. 29, 2004, available at 2004 WLNR 12397482.

<sup>7</sup> See Lynn Bartels, *Group Seeks Action on Illegal Immigration; Defend Colorado Now Weighs Ballot Initiative*, *ROCKY MOUNTAIN NEWS*, Jan. 5, 2004, at 20A.

Colorado Now" is frustrated with what they perceive to be an illegal immigration problem out of control. The group is considering a 2006 ballot initiative that will prevent undocumented immigrants from receiving government services.<sup>8</sup> Against this type of contemporary anti-immigrant sentiment, Johnson starts by looking back in time to address this country's lengthy history of excluding and deporting the immigrant poor.<sup>9</sup> His survey begins with the early days of this nation's history, when restrictions were imposed for the purpose of limiting immigration of potential benefit recipients, and it ends with the efforts of the federal, state, and local governments to substantially restrict immigration during the late twentieth century.<sup>10</sup>

With an almost cliché statement, Johnson explains that the United States accepts many more immigrants than most nations, admitting hundreds of thousands each year.<sup>11</sup> However, another aspect of U.S. immigration history is a source of shame to those committed to equality under the law.<sup>12</sup> Contrary to popular beliefs, a review of American history actually reveals a lack of U.S. openness to and acceptance of the "huddled masses"—the "tired" or the "poor." Here lies the straightforward premise of *Huddled Masses*:

[T]he U.S. immigration laws and their enforcement have barred racial minorities, political dissidents, the poor, actual and alleged criminals, and homosexuals from our shores and—often pursuant to procedures that are difficult, if not impossible, to square with the notion of due process of law—have caused them to be deported from the country.<sup>13</sup>

Johnson builds on the common argument that U.S. immigration laws have been discriminatory, writing, "[Historically], the United States has sought to exclude those categories of immigrants who share common characteristics with groups that are disfavored in this country."<sup>14</sup> Despite the nation's egalitarian pronouncements, many notable episodes in U.S. history demonstrate harsh treatment of its minority citizens. Johnson proceeds to cite a few well-known examples: "The segregation

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<sup>8</sup> *Id.*

<sup>9</sup> JOHNSON, *supra* note 1, at 92.

<sup>10</sup> *Id.* at 94.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.* at 2.

<sup>14</sup> *Id.*

of [African American] and white children in schools, the genocide of Native American peoples, the internment of Japanese Americans during World War II, and the deportation of Mexican American citizens during the Great Depression.”<sup>15</sup>

The remainder of the book offers less-known examples, such as the passage of the Refugee Act of 1980. Many of the contemporary books about immigration and civil rights have centered on the experiences of Latinos and African Americans. In contrast, what really stands out in *Huddled Masses* is its thoughtful inclusion of Asians and Asian Americans and its meaningful discussion of the existing tensions between immigration law and civil rights. This discussion is showcased in Johnson’s valuable analysis of the history of exclusion and deportation of noncitizens under the U.S. immigration laws, which, incidentally, serve as the bedrock for modern immigration law.<sup>16</sup>

## II. THE RACIAL ORIGINS OF THE PLENARY POWER DOCTRINE

Professor Johnson correctly recalls that “[c]onsistently unwilling to intervene on behalf of noncitizens, the courts have emphasized the ‘plenary power’ of Congress, based on notions of national sovereignty over the substantive admissions and deportation provisions of the immigration laws.”<sup>17</sup> Professor of Law Gabriel Chin also shares this view. Chin asserts that Congress has not hesitated to use the Supreme Court-recognized plenary power to discriminate against perceived undesirable groups, such as homosexuals, Mormons, the mentally retarded, Southern and Eastern Europeans, Africans, Mexicans, and Asians.<sup>18</sup> Johnson explains that the plenary power doctrine has its origins in the foundational cases *Chae Chan Ping v. United States*<sup>19</sup> (the *Chinese Exclusion Case*) and *Fong Yue Ting v. United States*<sup>20</sup> (the *Chinese Deportation Case*), which together established the formal rule that Congress’ power over the admission of aliens to this country is absolute. Johnson then states that the government and the courts all explicitly relied on the racial characteristics of the Chinese to justify establishing the doctrine.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 4; see also Kevin R. Johnson, A “Hard Look” at the Executive Branch’s Asylum Decisions, 1991 UTAH L. REV. 279, 305 (1991).

<sup>18</sup> Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6-7 (1998) (citations omitted).

<sup>19</sup> 130 U.S. 581 (1889).

<sup>20</sup> 149 U.S. 698 (1893).

Undoubtedly, racially and culturally, the Chinese were frequently compared with black Americans and white Americans—comparisons that stressed racial hierarchies, the perceived immorality of the Chinese, their supposed cultural inferiority, and their ultimate inability to assimilate into American society. Johnson explains that what legal rights the country formally extended to blacks, it truthfully denied Chinese immigrants.<sup>21</sup> For example, in an early showing of how the shared interests of African Americans and Asian Americans are connected, Justice John Marshall Harlan—often lauded for his grand pronouncement in his dissent in *Plessy v. Ferguson*<sup>22</sup> that “our constitution is color-blind,”—noted a particular irony.<sup>23</sup> Emphasizing that the “separate but equal” doctrine applied to blacks, whose participation in the political community was unquestionable, Harlan noted that Chinese immigrants are “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”<sup>24</sup> Johnson pointed out that Justice Harlan sought the protection of blacks by denigrating the Chinese, leaving no doubt about his sympathies on the question of racial superiority.<sup>25</sup>

Asian Americans are also referred to in Johnson’s examination of the U.S. immigration laws in terms of what the laws reveal about society’s dominant views toward the civil rights of subordinated groups in the United States. Johnson discusses the wholesale prohibition of the immigration of Chinese working class people to this country in the late 1800s, which, at the time, reflected the dominant white population’s view of Chinese Americans and the status of Chinese American civil rights.<sup>26</sup> More specifically, “the era of exclusion of Chinese immigrants in the 1800s occurred almost simultaneously with punitive, often violent, action against the Chinese on the West Coast,” where anti-Chinese sentiment and widespread discrimination were rampant.<sup>27</sup> Ultimately,

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<sup>21</sup> JOHNSON, *supra* note 1, at 16, 19-20.

<sup>22</sup> 163 U.S. 537 (1896).

<sup>23</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>24</sup> *Id.* at 552, 561 (Harlan, J., dissenting); JOHNSON, *supra* note 1, at 20.

<sup>25</sup> JOHNSON, *supra* note 1, at 20 (reviewing Justice Harlan’s opinion).

<sup>26</sup> *Id.* at 14; see also Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 816 (1996).

<sup>27</sup> JOHNSON, *supra* note 1, at 14. The number of Chinese was minuscule in the United States until the discovery of gold in California in 1849, and with the scarcity of laborers in the minefields, Chinese immigration was initially encouraged. Henry S. Cohn & Harvey Gee, “No, No, No, No!”: *Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 22 (2003).

Soon after the completion of the railroad in the 1870s, the country entered an economic downturn, and the Chinese became scapegoats for the nation’s economic ailments. There

Johnson says, Congress passed the anti-Chinese exclusionary laws of the 1800s on the heels of the abolition of slavery and the ratification of the Reconstruction Amendments.

To be sure, Johnson notes that “[t]he shameful treatment of Chinese immigrants by federal, state, and local governments (as well as by the public at large) in the 1800s represents a bitter underside to U.S. history.”<sup>28</sup> Johnson further explains that the categories of people that the nation seeks to exclude reflect society’s attitude toward both citizens and legal immigrants residing in the United States. Also, the law protects against such discrimination toward citizen minorities, but Johnson warns that no such moderating influence exists to protect noncitizens.

Johnson acknowledges that the periods and episodes of volatile xenophobic attacks on aliens in the United States is a cyclical matter that will likely continue, along with popular opinions about “foreigners.”<sup>29</sup> He explains that immigrant status and race are immutable characteristics, not fixed by biology: “The law creates ‘aliens’ as outsiders who are allocated few political and legal rights. Moreover, the legal construction of ‘aliens’ not only affects the general public’s view of noncitizens but also contributes to their harsh treatment.”<sup>30</sup>

### III. THE REFUGEE ACT OF 1980 AS A PURELY HUMANITARIAN MEASURE?

Johnson theorizes about unequal treatment against foreigners, or those perceived to be foreigners. Johnson contends that this notion was reified with the historical Chinese exclusionary laws and reincarnated in the anti-Asian legislation invoked against Indochinese refugees during the late 1970s. With this in mind, Johnson argues that a war on noncitizens of color focuses on their immigration status as opposed to their race, and this serves to vent social frustration and hatred. For example, he notes that “[m]any commentators have lauded the Refugee Act of 1980, which for the first time allowed noncitizens who flee political and related persecutions in their homelands the general right to

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was a severe economic downturn in 1873. When the initial curiosity about the Chinaman began to fade, the resentment against the Chinese became more apparent. Although the Chinese quickly gained a reputation for being exceedingly industrious and hardworking, they soon fell victim to the ill will of whites. Chinese were seen as taking away the jobs of native workers.

*Id.* at 24-25.

<sup>28</sup> JOHNSON, *supra* note 1, at 17.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.*

apply for asylum in the United States."<sup>31</sup> However, Johnson points out that "Congress's passage of the Refugee Act of 1980 counted among its more humanitarian purposes the hope of reducing the number of refugees admitted from Vietnam."<sup>32</sup>

The Refugee Act has been overlooked by mainstream scholars, who seem more interested in citing to the Act only for its perfunctory purpose: to function as a historical background for analyses of more recent immigration legislation. Many immigration scholars have lauded the Act as a great accomplishment in immigration law. For instance, immigration scholars Deborah Anker and Michael Posner, in an article outlining the legislative history of the Refugee Act, argue that the Act reflects the evolution of a consensus for a humanitarian nondiscriminatory policy, and that the Act created mechanisms to resolve the continual friction between the Executive Branch and Congress over the control and standards for refugee admissions.<sup>33</sup> They conclude by stating: "We believe that the Refugee Act provides a sound and practical legislative base from which a successful refugee policy can be developed. Accordingly, we do not recommend nor do we believe that it would be wise to modify the Refugee Act as enacted in 1980."<sup>34</sup> Remarkably, restrictionists have also misunderstood the Act and refugee policy. For example, in his published anti-immigrant polemic, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic*, John Miller, a political reporter for the National Review and former vice-president of the Center for Equal Opportunity, renews the issue of national identity. Miller states that due to the increased immigration of people who do not want to be Americans, the United States is losing its national purpose.<sup>35</sup> Miller professes that "[r]efugee policy is driven almost entirely by humanitarian concerns and the refugees themselves have not always had much time for their departure" from their native countries.<sup>36</sup>

These sentiments have since become the standard and generally accepted view of the Refugee Act of 1980. But was it really meant to serve a humanitarian end in granting asylum to refugees, or was it

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<sup>31</sup> *Id.* at 26.

<sup>32</sup> *Id.* at 39; *see also* Johnson, *supra* note 18, at 354.

<sup>33</sup> *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

<sup>34</sup> *Id.* at 12.

<sup>35</sup> JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA'S ASSIMILATION ETHIC* 104 (1998).

<sup>36</sup> *Id.* at 16.

passed to limit the number of Indochinese refugees arriving in the United States? A closer reading of the legislative history of the Refugee Act reveals some support for the popular perception that Congress implemented the Act to move the United States into accord with the obligation imposed under international refugee law. Hence, it can be argued that the Refugee Act, for the first time, provided noncitizens fleeing political and related persecution in their homelands a general right to apply for asylum in the United States.<sup>37</sup> Nevertheless, the more probable conclusion is that the passage of the Act was designed to exclude the admission of refugees from Southeast Asia.

Johnson asserts that “the Act was motivated in part by a desire to limit U.S. acceptance of Vietnamese refugees, of whom the President had allowed liberal admissions after the 1975 fall of Saigon.”<sup>38</sup> Surprisingly, this view is also shared by the Federation for American Immigration Reform, a well-known conservative immigration restrictionist group.

Congress enacted the 1980 refugee legislation partly in response to its increasing frustration with the difficulty of dealing with the ongoing large-scale Indochinese refugee flow under the existing ad hoc refugee admission and resettlement mechanisms. By the end of the 1970s, Congress reached the consensus that a more coherent and equitable approach to refugee admission and resettlement was needed. As a result, the Refugee Act of 1980 was enacted.<sup>39</sup>

In the hope of preventing future mass migrations, the Refugee Act established numerical limitations and generally restricted the power of the President with respect to refugee admission. Interestingly, legal challenges have been brought against the Act. Johnson remarks that “[y]ears after Congress passed the law, Vietnamese citizens brought suit against the U.S. government, charging discrimination based on nationality in the processing of visa applications.”<sup>40</sup> He contends: “The

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<sup>37</sup> *Id.*; see also Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 594-96 (2000); David D. Jividen, Comment, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943, 954 (1986).

<sup>38</sup> JOHNSON, *supra* note 1, at 26.

<sup>39</sup> *Id.*; see also Federation for American Immigration Reform, *U.S. Immigration History*, available at <http://www.fairus.org/Research/Research.cfm?ID=1820&c=2> (last visited Feb. 25, 2005).

<sup>40</sup> JOHNSON, *supra* note 1, at 26. Vietnamese refugees have brought some challenges against the Refugee Act on the basis that it discriminates based on national origin. See, e.g., *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 74 F.3d 1308 (D.C. Cir. 1996); *Fang-Sui Yau v. Gustafson*, 623 F. Supp. 1515 (C.D. Cal. 1995).

Vietnam War also reveals a relationship between Asian subordination and improvements for African Americans. As the civil rights movement of the 1960s gained rights for African Americans, the escalation of the war in Vietnam increased racism toward the Vietnamese people, which lingers to this day."<sup>41</sup> Here, many legal scholars may be disappointed that Johnson did not expand his narrative of the issues much more. Had he done so, his thesis would have been noticeably strengthened.

To this day, the Refugee Act of 1980 is still widely misunderstood. Most academic commentators have focused on the fact that special humanitarian restrictions on Vietnamese immigration undermined the avowed foreign policy purposes of the Refugee Act. Others suggest that reference to the Vietnam War in and of itself is insufficient to explain the structure of the law. The reality, however, is that the Refugee Act provided strict controls on the admission of Vietnamese. The fact that the Act was passed to terminate the continual ad hoc admissions of Indochinese refugees underlies the rhetoric of those who regard the Act as a great law passed in the spirit of humanitarianism and those who view its implementation as largely preventing the practice of political favoritism allowed by pre-1980 refugee laws. The legislative history demonstrates that the Act was neither entirely humanitarian nor egalitarian. Indeed, Congress passed it even though the Act would create a comprehensive ceiling on the number of Indochinese refugees permitted to enter the United States.

Without doubt, there was an unpredictable flow of refugees after the end of the Vietnam War. The United States' withdrawal from Vietnam left the region in a state of social chaos. The large Southeast Asian immigration following the Vietnam War could not have been anticipated. Before 1975, Vietnamese immigration was small. Between 1966 and 1975, 20,038 Vietnamese arrived in the United States.<sup>42</sup> When U.S. military troops evacuated Vietnam after the fall of Saigon in 1975, the number of Vietnamese Americans was negligible, but the collapse of the South Vietnamese government in April of 1975 caused a mass exodus from Vietnam. All in all, from 1975 through 1979, at least ten separate paroles, each limited in duration and number and overwhelmed by the following crisis, were used to admit over three hundred thousand Indochinese refugees.<sup>43</sup>

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<sup>41</sup> JOHNSON, *supra* note 1, at 22.

<sup>42</sup> *Id.* at 34.

<sup>43</sup> *Id.* at 23.

A review of the legislative record illustrates congressional awareness of the Vietnamese refugee crisis. As the world's attention was placed on the plight of the boat people, the upsurge in Asian entrants that started in the mid-1970s caused policymakers to have dissatisfaction and serious concern.<sup>44</sup> In fact, the continual admission of refugees from Vietnam resulted in a negative reaction to Southeast Asians.<sup>45</sup> After 1975, policymakers became less patient as Asians began entering the United States in increasing numbers under existing guidelines.<sup>46</sup>

The Indochinese refugees became the topic of public debate. An overwhelming majority of Americans disfavored any further assistance in evacuating the Vietnamese. This great anti-Vietnamese sentiment amongst the general public was mirrored in the generally restrictionist attitudes of interested congressional committees.<sup>47</sup> The traditional restrictionist attitude was prevalent among some members of Congress and mainstream American society.

The resettlement assistance for refugees increased when the Refugee Act was adopted in 1980.<sup>48</sup> The Act authorized a resettlement assistance program to last for three years. During that period, the agencies that managed the reception and settlement of new refugees were allocated funds for the necessities of the incoming refugees in the form of clothing, housing, food, English language instruction, and job training.<sup>49</sup> Almost immediately, there was a negative reaction to Vietnamese refugees.<sup>50</sup>

Although foreign policy was a major motivation for the change in immigration policy, it was not the sole motivation. The salience of race and xenophobia was very apparent during the refugee crisis.<sup>51</sup> In the

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<sup>44</sup> Anker & Posner, *supra* note 33, at 3.

<sup>45</sup> See Bill Ong Hing, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION 27 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 551 (2000).

<sup>48</sup> JOHNSON, *supra* note 1, at 2.

<sup>49</sup> GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 115-17 (1986).

<sup>50</sup> *Id.* The tensions between native-born Americans and Vietnamese immigrants and refugees still exist today, as evidenced in the racial dimensions of the recent deer hunting accident, which involved a Hmong suspected of killing six white hunters. See, e.g., *Hunting Tradition Strong Among Hmong in State*, CAPITAL TIMES, Nov. 26, 2004, at 3A; Vikki Ortiz, *Cultural Gap Puts Wedge Between Hunters; Hmong Leaders, DNR See Room for Greater Outreach*, MILWAUKEE J. SENTINEL, Nov. 28, 2004, at 6.

<sup>51</sup> See Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-

late 1970s, politicians in Congress seized upon the refugee crisis and the feelings that it aroused, and magnified an already acute apprehension—if not fear—of the seemingly endless flow of Asians into the country. The crisis was defined in ways that invited readily ascertainable policy solutions to create political opportunities.

Because of modern sensibilities about race in the United States, it is not surprising that the race of immigrants tends to be suppressed as an outwardly-expressed reason for restricting immigration.<sup>52</sup> Legislative history shows that Congress desired to change the term to be applied in determining the allocation of refugee admissions from “special concern” to “special humanitarian concern.”<sup>53</sup> The intent of congressional committees was to emphasize the plight of the refugees themselves rather than their national origins or political affiliations. More likely, however, the committees intended to limit the total number of Indochinese refugees, instead of any genuine humanitarian concerns. Many times, House Reports and House Committee statements stressed human rights concerns on the Judiciary. These statements emphasized humanitarian considerations, placing the plight of the refugees and the pattern of human rights violations in the country of origin as the first factors the courts should weigh. Interestingly, in the final conference report, all use of the term “special concern” was replaced with “special humanitarian concern.”<sup>54</sup> In this subtle way, the public’s negative opinion of Vietnamese refugees was reflected and echoed in the opinions held by many members of Congress.<sup>55</sup>

Despite the view by some that the Refugee Act is an instrument for humanitarian ends, the Act’s actual administration has not prevented egregious abuse by the Executive Branch as expected. In practice, the Refugee Act of 1980 has been administered in a manner that is reminiscent of the arbitrary use of the seventh preference and parole provisions. The 1980 Refugee Act, which established new controls on refugee admissions, actually caused the decline—if not permanent stoppage—of the flow of refugees entering the United States, despite

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IMMIGRANT IMPULSE IN THE UNITED STATES 174 (Juan F. Perea, ed. 1997); *see also* Anker & Posner, *supra* note 33, at 31.

<sup>52</sup> *See* Johnson, *supra* note 51, at 174.

<sup>53</sup> H.R. 2816, 96th Cong., (1st Sess. 1979); 125 CONG. REC. 12367 (1979).

<sup>54</sup> *Refugee Act of 1970: Hearing on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and Int’l Law of the House of Comm. on the Judiciary*, 96th Cong. 44 (197) (testimony of Whitney Ellsworth and Hurst Hannum, Amnesty International U.S.A.); 8 U.S.C. §§ 13-14 (1980).

<sup>55</sup> LOESCHER & SCANLAN, *supra* note 49, at 102-69.

persistent humanitarian pressure on the United States. Needless to say, as a result of the Refugee Act of 1980 and the adoption of subsequent recommendations made by the Selection Commission, the admission of Vietnamese refugees has experienced a gradual downward trend.<sup>56</sup>

Interestingly, in the decades after the passage of the Refugee Act of 1980, the allegations of discrimination against Vietnamese immigrants were made in other areas of immigration and refugee law. In one case, the Plaintiff successfully challenged the State Department policy requiring his wife's return to Vietnam for resettlement through Vietnam's Orderly Departure policy on the basis that it discriminated against visa applicants based on their nationality.<sup>57</sup> As Johnson points out in *Huddled Masses*, there were also actions brought challenging the State Department's consular venue policy with regard to Vietnamese and Laotian migrants seeking immigrant visas. In *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*<sup>58</sup> two Vietnamese migrants, the migrants' U.S. sponsors, and a nonprofit legal rights organization challenged the State Department policy that prohibited U.S. consular officials from discriminating on the basis of nationality in the issuance of immigrant visas.<sup>59</sup> The Appellants argued that the State Department's refusal to process the immigrant visa applications of Vietnamese nationals on the same basis that it processes the applications of aliens of other nationalities violated the constitutional rights of Vietnamese applicants.<sup>60</sup> According to the appellant's brief, the Executive Branch sought to justify its discriminatory conduct in this case on what it characterized as foreign policy concerns:

[T]his nationality-based classification . . . denies Resident Plaintiffs their right to equal projection of the law under the U.S. Constitution . . . . The Department's April 1993 policy discriminates against Resident Plaintiffs by denying their family members the right to have their IV applications processed because of their Vietnamese nationality . . . . While the courts have generally acknowledged the plenary authority of Congress to make classifications in the area of immigration, Congress has not made a classification in this case—only the Department has. To the contrary, Congress has

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<sup>56</sup> *Id.* at 107-08.

<sup>57</sup> *Chau v. U.S. Dep't of State*, 891 F. Supp. 650 (D. D.C. 1995).

<sup>58</sup> 104 F.3d 1349 (D.C. Cir. 1997).

<sup>59</sup> *Id.* at 1350-51.

<sup>60</sup> *Id.* at 1351.

expressly prohibited discrimination on the basis of nationality in the visa issuance process. Accordingly, the Department may not invoke the mantle of plenary power over the admission of aliens as a means of shielding its discriminatory conduct from strict judicial scrutiny . . . .

The fact that in formulating its April 1993 policy the Department may have been motivated by administrative or even foreign policy concerns—rather than any type of racial or ethnic animus toward persons of Vietnamese origin—does not alter the inherently discriminatory nature of the Department's conduct.<sup>61</sup>

However, the substance of the equal protection claim was never reached by the court because the court determined that Appellants lacked standing to bring it.<sup>62</sup> But even if the court had fully analyzed the constitutional claim, it would have been unlikely that the court would have been able to detect any racial or foreign policy bias in the Executive Branch's asylum determinations. In a law review article written by Johnson over a decade ago, he asserts as much: "The Executive Branch rarely admits that foreign policy influences an asylum decision . . . . Unfortunately, a decade of experience with the Refugee Act has made clear that the foreign policy influence on the Executive's asylum decisions will not be eliminated absent some sort of intervention."<sup>63</sup>

#### IV. BLACK AND YELLOW: AFRICAN AMERICANS AND ASIAN AMERICANS IN THEIR HISTORICAL AND CONTEMPORARY CONTEXTS

It bears repeating that Johnson's book is a major contribution to the immigration literature due to its inclusion of Asian Americans and its accompanying insights. A particular strength of *Huddled Masses* lies in Johnson's comparison of the experiences between Asians and African Americans. As Johnson recalls throughout the book, the relationship between the treatment of African Americans and other racial minorities, including Asians, can be traced back to nineteenth century constitutional jurisprudence, and well into the future in the affirmative action forum. As a historical matter, Gabriel Chin notes:

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<sup>61</sup> Br. for Appellants, *Legal Assistance for Vietnamese Asylum Seekers*, 104 F.3d 1349 (D.C. Cir. 1997), available at 1994 WL 16182778.

<sup>62</sup> *Legal Assistance for Vietnamese Asylum Seekers*, 104 F. 3d at 1353-54.

<sup>63</sup> Johnson, *supra* note 17, at 283-84.

The parallels between the African-American and Asian-American legal experience in America are not coincidental. Rather, the similarity exists because the presence of Asians, like African-Americans, threatened white supremacy. Consequently, the Asian threat, like the African-American threat, was eliminated by laws that were in turn blessed by the Supreme Court.<sup>64</sup>

However, Chin says that modernly, “[s]ome commentators seem to believe that Asian Americans and African Americans occupy the opposite ends of a certain spectrum; Asian Americans are called the ‘model minority’ in pointed contrast to African Americans, while African Americans are regarded as the paradigmatic case of a racially subjugated group.”<sup>65</sup>

Johnson’s assertion that historical events demonstrate how particular ethnic and racial groups have been pitted against one another is a recurring theme. For instance, he notes that “the historical context of the infamous decision to intern Japanese Americans and Japanese immigrants during World War II sheds light on the interrelationship between society’s treatment of different minority groups.”<sup>66</sup> The Supreme Court ruling in *Korematsu v. United States*<sup>67</sup> allowed U.S. citizens of Japanese ancestry, including many born in this country, to be detained in internment camps. The *Korematsu* decision “reveals the difficulties inherent in drawing fine legal distinctions between noncitizens and citizens who share a common ancestry.”<sup>68</sup> A long-time civil rights attorney, Dale Minami writes:

In the original 1944 *Korematsu* decision, the United States Supreme Court upheld the mass incarceration of 120,000 Americans of Japanese ancestry during World War II without charges, notice, trial or due process, and without any evidence of espionage and sabotage by persons of Japanese ancestry. Despite the Court’s lofty pronouncements that it would subject the government’s discriminatory action to the highest level of scrutiny, it nevertheless took judicial notice of innocent facts, half-truths, and stereotypes of Japanese Americans.<sup>69</sup>

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<sup>64</sup> Chin, *supra* note 18, at 28.

<sup>65</sup> *Id.* at 23.

<sup>66</sup> JOHNSON, *supra* note 1, at 20-21.

<sup>67</sup> 323 U.S. 214 (1944).

<sup>68</sup> JOHNSON, *supra* note 1, at 21.

<sup>69</sup> Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: “A Constant Caution” in a Time of Crisis*, 10 ASIAN L.J. 37, 37-38 (2003); see also DAVID COLE, *ENEMY*

At the same time, Johnson reveals that World War II labor demands offered African Americans unprecedented access to employment.<sup>70</sup> Had Johnson focused on Asians here and analyzed Asian American jurisprudence, he could have discussed that there has always been a racialized identification of Asian Americans as foreign and "un-American" that emerged through a process involving the social construction of an Asian "race." The Court's treatment of the Chinese as foreign reverberated the controversy over the racial positioning of Asians at the time. Academic Lisa Lowe explains that "oriental racializations" portrayed Asians as physically and intellectually different from whites, especially during periods of economic downturn. When coupled with nativist anti-Asian backlash, these perceptions promoted the immigration exclusion acts. Similarly, Chin argues that the "Asian Exclusion Laws enshrined the idea that Asians were ineradicably foreign and un-American, that they were dangerous and inferior."<sup>71</sup> Nevertheless, Johnson draws his attention to a better known and more infamous event in American history.

Undoubtedly, the internment of Japanese Americans during World War II was one of most egregious examples of the social construction of Japanese and Japanese Americans as all foreigners, without any distinction whatsoever. Even before Pearl Harbor, Japanese immigrants and their American-born children endured great hardship in this country because they were perceived as economic threats. As such, Japanese immigrants were subjected to official discrimination and political protest. Fueled by fear and hostility, the Japanese faced exclusion through legislation, boycotts, school segregation, and propaganda. The flames of anti-Japanese animus were further fueled by the bombing of Pearl Harbor. The bombing allowed for the creation and maintenance of concentration camps for all individuals of Japanese descent, including American citizens who did not identify with Japan or the Japanese culture, but rather fully assimilated into the mainstream American culture. Other than his or her skin color, each internee was

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ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 97 (2003). David Cole comments:

The role that racial stereotypes played in the transition is underscored by the fact that there was never any evidence to support the concern that all Japanese living among us posed a threat. None of the interned Japanese was ever charged with, much less convicted of, espionage, sabotage, or treason. But the absence of evidence did not stop the demands for internment.

*Id.*

<sup>70</sup> JOHNSON, *supra* note 1, at 21.

<sup>71</sup> Chin, *supra* note 18, at 47.

just like any other American. Such queries and astute observations lead up to Johnson's section on alienage rights in the United States.

Noticeably, affirmative action is only mentioned once or twice in *Huddled Masses*. While Johnson may be excused on the basis that affirmative action is beyond the scope of his volume, I suggest it warrants some attention in the discussion of immigration and civil rights. Until fairly recently, the affirmative action debate was largely framed in a black and white binary. Occasionally, minimal attention is given to Latino concerns, but the identity of Latinos tends to be subsumed by the African American experience. Discussions about affirmative action rarely include Asian Americans.<sup>72</sup>

All too often, mainstream America does not think of Asian Americans as being beneficiaries of affirmative action because of the "model minority myth," which perpetuates the fiction that somehow Asian Americans are shielded from racial prejudice.<sup>73</sup> The "model minority myth" describes the racial experience of Asian Americans. The name gives note to how Asian Americans are portrayed as a model of success, a characteristic which has lent itself to the creation of "the model minority myth."<sup>74</sup> This myth depicts Asian Americans as one monolithic ethnic group that achieves economic success and social acceptance through education and hard work without governmental assistance or racial preferences.<sup>75</sup> The problem with the myth image is two-fold: It obfuscates the fact that many Asian Americans are still in need of affirmative action, and it is often used by opponents of affirmative action to show that affirmative action is not needed to help minorities.<sup>76</sup> The

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<sup>72</sup> See Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 5 (2003) ("[The black/white paradigm] is assumed to be factually correct without substantial analysis. Such an approach leads to the exclusion of Asian Americans, Latinos, and other non-African American minority groups, or implicitly deems them to be the equivalent of blacks or whites."); Deanna K. Chuang, *Power, Merit, and the Limitations of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School*, 8 ASIAN L.J. 31, 38 (2001).

<sup>73</sup> See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 60-61 (2000).

<sup>74</sup> JOHNSON, *supra* note 1, at 40; see also Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L. J. 1, 2 (2000) ("Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.").

<sup>75</sup> See FRANK. H. WU, *YELLOW: RACE IN AMERICA BLACK AND WHITE* 40 (2002).

<sup>76</sup> *Id.*

model minority stereotype is often used to place Asian Americans in a falsely elevated position relative to African Americans and Latinos.<sup>77</sup> What is lost with these controversies is the fact that while Asian Americans have experienced prejudice in the past, and still continue to endure societal discrimination—however subtle it may or may not be—the African American experience is much worse.

Christopher Edley Jr., a former professor at Harvard Law School and current dean at UC Berkeley School of Law, claims that affirmative action is still necessary, providing evidence of continuing discrimination in our society.<sup>78</sup> Edley points out that the economic disparity between blacks and whites in America is daunting considering that, while fewer than three percent of all college graduates are unemployed, whites are nearly twice as likely as blacks to have college degrees. Using raw data to show racial inequality, Edley places the burden of persuasion to end affirmative action on its opponents.<sup>79</sup> He believes that because of the absence of clear and compelling empirical data showing that the costs of affirmative action outweigh its benefits, its use should be continued. Edley argues that most employment decisions and application selections are not made strictly on the basis of merit, but rather, these decisions incorporate some form of generally accepted bias or preferential treatment based on nepotism or cronyism.<sup>80</sup> These choices are often based on “personal preferences having everything to do with taste, comfort, and convenience and nothing to do with efficiency in maximizing profits or with conventional excellence.”<sup>81</sup>

The U.S. government’s treatment of citizens differs from its treatment of “aliens” — those who are not U.S. citizens. Johnson asserts that even though the United States claims to exercise inherent rights as a sovereign nation, it has often, both historically and modernly, refused to welcome people of color, political dissidents, the poor, criminals, women, and lesbians and gay men who sought to immigrate. Unlike the courts’ participation in the struggle for citizens’ rights, Johnson argues that “judicial review of the constitutionality of laws that provide for the exclusion and deportation of immigrants has been negligible.”<sup>82</sup> He

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<sup>77</sup> See ANGELO ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* 158 (1998).

<sup>78</sup> CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 42-45 (1996).

<sup>79</sup> *Id.* at 42.

<sup>80</sup> *Id.* at 120.

<sup>81</sup> *Id.*

<sup>82</sup> JOHNSON, *supra* note 1, at 3, 175.

observes that as long as noncitizens are afforded minimal procedural safeguards, the courts have afforded Congress free reign with respect to exclusion and deportation of noncitizens. Johnson laments:

Because of the unpopularity of—even hatred toward—foreigners among the general population in times of crisis and social unrest, a meaningful political check on the unfair treatment of immigrants does not exist. As a result, both Congress and the president have the ability to direct the most extreme action toward noncitizens with little fear of provoking a judicial response.<sup>83</sup>

Against this backdrop, Johnson asserts that the timing of the Supreme Court's decision in *Korematsu*, one of the most well-known equal protection cases of the twentieth century, should not be ignored. He explains that the infamous *Korematsu* decision came less than a decade before the much-revered decision in *Brown v. Board of Education*,<sup>84</sup> which vindicates the rights of African Americans.<sup>85</sup> *Brown*, which rejected the "separate but equal" doctrine, was a landmark achievement for African Americans.<sup>86</sup> Accordingly, Johnson explains:

Despite the brief time span, these cases represent the very best and worst of U.S. constitutional law. While persons of Japanese ancestry were rebuilding the remnants of their lives after the turmoil of legally

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<sup>83</sup> *Id.* at 3.

<sup>84</sup> 347 U.S. 483 (1954).

<sup>85</sup> JOHNSON, *supra* note 1, at 3, 175; see also Neil Gotanda, Book Review, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985). Gotanda states:

[W]hen the Supreme Court addressed Black and White race relations in *Brown v. Board of Education* . . . the Court drew upon dicta in [the internment cases] to argue that racial classifications were inherently suspect and required careful judicial scrutiny. In so doing, the Court brought Japanese-Americans and Other non-Whites into the emerging mainstream of racial jurisprudence and minimized the constitutional distance between them and Blacks.

*Id.* at 1191; cf. Frank H. Wu, *Beyond Black, White and Brown*, THE NATION, Apr. 15, 2004, available at <http://www.thenation.com/doc.mhtml?i=20040503&c=4&s=forum> ("Even at the level of technical doctrine, it is not clear what *Brown* means—if it means anything substantive at all. The controlling precedent for the interpretation of the Fourteenth Amendment's guarantee of equal protection has become, instead of *Brown*, the cases allowing the internment of Japanese-Americans during World War II.").

<sup>86</sup> Chin, *supra* note 18, at 3 ("*Brown* led the Supreme Court to invalidate racial discrimination in employment, public benefits, voting, jury selection, criminal justice, marriage and the family—that is, in virtually every area of American law and life.").

sanctioned internment, African Americans were seeing hope in the demise of "separate but equal" as the law of the land.<sup>87</sup>

In *Brown*, the Supreme Court held that segregation in the public schools fails to constitute equal protection of the laws. *Brown* became a monumental decision, in that the Court formally vindicated a major change in the U.S. civil rights landscape.<sup>88</sup> Johnson continues onward to discuss how the *Brown* decision, together with the actions of Martin Luther King Jr. and other participants in the civil rights movement, helped dismantle the state-referred segregation of public facilities throughout the South.<sup>89</sup> However, Johnson asserts that *Brown* left unresolved important questions about what constituted racial discrimination. Here though, Johnson is not as clear as he could be. I would interpret Johnson's remarks as referring to the weakening over time of affirmative action.

The differences in opinion about affirmative action began as soon as the programs were implemented. During the sixties, affirmative action combined the past discrimination and diversity rationales to command broad support for the limited principle that white male institutions should be dismantled to insure inclusion of women and previously excluded minorities.<sup>90</sup> Both race and sex created "caste" systems in which women, African Americans, and in various times and places, Asian Americans, Latinos, and other groups were excluded on a wholesale basis.<sup>91</sup> The civil rights movement won broad support for the principle that this exclusion was wrong and that its remedy required "affirmative action"—at least until individuals could receive consideration on their merits.<sup>92</sup> However, by the 1990s, opponents of

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<sup>87</sup> JOHNSON, *supra* note 1, at 21.

<sup>88</sup> JOHNSON, *supra* note 1, at 3.

<sup>89</sup> *Id.* at 21-22.

<sup>90</sup> See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 28 (1996) (acknowledging that even though affirmative action was initially justified as compensation for past discrimination, it was expanded for the new justification of diversity); NICOLAUS MILLS, *TO LOOK LIKE AMERICA, INTRODUCTION TO DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 10-14 (Nicolaus Mills ed., 1994) (outlining the history of affirmative action and noting the shift from the past compensation rationale to the goal of diversity).

<sup>91</sup> See Jean Carey Bond, *Affirmative Action at the Crossroads: An Essay*, 53 *GUILD PRAC.* 4, 6-8 (1996) (summarizing the history of social and racial discrimination against women and racial minorities, and explaining the origins of affirmative action).

<sup>92</sup> See BARBARA R. BERGMANN, *IN DEFENSE OF AFFIRMATIVE ACTION* 9-10 (1996) (explaining the three original motives for affirmative action: to fight discrimination, to be used as a tool for integration, and to reduce the poverty of women and certain racial groups); see also Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action*

affirmative action argued that affirmative action had succeeded and was no longer necessary. These opponents contend that most institutions include women and minorities and will continue to do so. Hence, to the extent remaining institutions discriminate in ways reminiscent of the caste system of old, discrimination law is the answer, not affirmative action. Furthermore, opponents allege that the continuation of affirmative action creates a racial "spoils" system.<sup>93</sup> Nevertheless, supporters of affirmative action argue that even if the caste system has been dismantled, the benefited groups are a long way from equality.<sup>94</sup> As such, the penultimate question of what it means to be an American citizen, and the privileges to which one is entitled as a member of the citizenry, remains unclear.

John Denvir, a professor of law at the University of San Francisco and author of *Democracy's Constitution: Claiming the Privileges of American Citizenship*,<sup>95</sup> makes a genuine effort to answer some of these questions. Denvir points out what he thinks are certain very specific privileges that citizens should enjoy in the United States. According to Denvir, the Supreme Court has taken an ever-narrowing approach to the Fourteenth Amendment Clause. In particular, Denvir says that the Court has generally failed to address exactly what the clause means. Denvir believes that access to education, an opportunity to earn a living, and financial security are necessary to be a productive citizen in this country.<sup>96</sup> As such, Denvir insists that an interpretation of the Fourteenth Amendment that is faithful to its authors' vision would yield a series of privileges of American citizenship, including "certain social

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in *University Admissions*, 32 AKRON L. REV. 181, 190-92 (1999) (describing the origins and original design of affirmative action). Initially, affirmative action was directed primarily at employment, but it was later expanded to other areas, including admissions programs in higher education. *Id.*

<sup>93</sup> See Charles Murray, *Affirmative Racism*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND POLITICS OF INCLUSION 204-08 (Nicolaus Mills ed., 1994) (asserting that racial preferences, instead of providing equal opportunities in education and employment, will actually perpetuate racism and discrimination).

<sup>94</sup> See Erin Anadkat, *Affirmative Action Hailed and Attacked by Student Speakers*, THE DAILY ILLINI, Mar. 10, 1999, available at [http://www.illinimedia.com/di/mar\\_99/mar10/news05.html](http://www.illinimedia.com/di/mar_99/mar10/news05.html) (reporting on Frank Wu's argument that affirmative action is still necessary to alleviate the past discrimination that created grave inequalities amongst racial minorities and whites).

<sup>95</sup> JOHN DENVIR, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP* (2001).

<sup>96</sup> *Id.* at 9.

rights such as the opportunity to earn a living and the right to a first-rate education."<sup>97</sup>

Johnson seems to implicitly echo Denvir's sentiments. The thrust of the second half of the *Huddled Masses* is its discussion of alienage discrimination, where Johnson suggests that law and judicial review could moderate the existing aggression toward noncitizens.<sup>98</sup> Johnson ends his book with his call again for expansion of legal protections for immigrants.<sup>99</sup> But he concedes that it is no substitute for the vigilance needed to protect immigrants' rights. Johnson wants this country to "strive to replace harsh, punitive, and invidiously discriminatory policies with policies that foster fairer treatment of noncitizens."<sup>100</sup> In his view, this change would be consistent with an immigration history reflective of egalitarian principles on which this great nation is based.<sup>101</sup> Johnson believes that an initial step to guaranteeing equal rights for all is reexamining the Equal Protection Clause of the Fourteenth Amendment.

Here, Johnson—to his credit—engages in an examination of traditional equal protection and points out the importance of the critical differences between traditional immigration law and ordinary public law.<sup>102</sup> Johnson states: "Although the Equal Protection Clause generally requires 'strict scrutiny' of racial classifications in the law and has frequently invalidated them, long ago, the U.S. Supreme Court . . . upheld discrimination on the basis of race and national origin with respect to the admission of noncitizens into the country."<sup>103</sup> Johnson acknowledges that in modern times "discrimination on the basis of immigration status may mask an intent to discriminate against racial minorities, the Court ordinarily defers to 'alienage' classifications made by Congress."<sup>104</sup> Along these same lines, Chin, after reexamining the plenary power doctrine, welcomes the abolishment, or at least modification of, the current standard of judicial review, which is extreme deference to Congress. Chin also advocates a move toward having the Court make reasonable distinctions between aliens and citizens, and to apply to them the same constitutional standards it applies in every other

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<sup>97</sup> *Id.* at 72.

<sup>98</sup> JOHNSON, *supra* note 1, at 175.

<sup>99</sup> *Id.* at 174-75.

<sup>100</sup> *Id.* at 176.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 17.

<sup>103</sup> *Id.* (citations omitted).

<sup>104</sup> *Id.* (citations omitted).

area of law.<sup>105</sup> Johnson is seemingly sympathetic to theories similar to those proffered by Chin, and he suggests that “because the substantive provisions of the immigration laws have historically been immune from legal constraint, the political process allows the majority to have its way with noncitizens.”<sup>106</sup>

Actually, Johnson sides with other commentators advocating for the expansion of legal protection for immigrants, suggesting that “one limited possible legal solution is to make the law [extend protections] to noncitizens and immigrants by subjecting both immigration law and the conduct of the U.S. government to constitutional scrutiny.”<sup>107</sup> This solution would expand the dialogue towards affording equal treatment to noncitizens:

This would require that the U.S. government keep its conduct consistent with the Constitution and, concomitantly, recognize legal rights for noncitizens. Current moves toward greater respect for the rights of noncitizens must be expanded to include recognition of full legal rights for noncitizens and a full review of the immigration laws for substantive fairness and equality.<sup>108</sup>

Like Johnson, Denvir also proposes a change to the current equal protection analysis so that courts no longer limit the intent requirement to situations in which they have proof that the action was purposeful in the sense of hurting minorities.<sup>109</sup> Denvir states that the current equal protection analysis utilized by the courts in their search for an evil purpose is misguided because the analysis gives an unnecessarily narrow definition to the term “intention,” and this “search for bad motivation is always costly and usually futile.”<sup>110</sup> As an alternative, Denvir favors determinism testing that balances the need for efficient government with society’s duty to be fair to minorities, suggesting that this type of balancing is central to the mission of interpreting the Constitution.<sup>111</sup> Denvir says that “[t]his relatively small doctrinal change—focusing on effects, not purpose—would have as enormous

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<sup>105</sup> See Chin, *supra* note 18, at 73.

<sup>106</sup> JOHNSON, *supra* note 1, at 17, 175.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> DENVIR, *supra* note 90, at 117.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 118.

effect on how courts consider government action that harms racial minorities."<sup>112</sup>

V. CRITICAL RACE THEORY, *OYAMA*, AND *SHELLEY*: WHAT'S RACE AND ALIENAGE GOT TO DO WITH IT?

If nothing else, *Huddled Masses* provides the necessary groundwork for future Critical Race Theory work, as it reexamines pivotal legal cases within their proper socio-historical contexts with fresh eyes in an effort to present new interpretations. In the next few passages, I provide some tentative thoughts relating to some of the themes offered in *Huddled Masses*. With this in mind, I suggest that the analysis offered by *Huddled Masses* may be extended to the area of land and property rights by comparing two important cases, *Oyama v. State of California*<sup>113</sup> and *Shelley v. Kraemer*,<sup>114</sup> in an effort to supplement Johnson's arguments. Johnson briefly remarks in his book that after World War II ended, Japanese Americans experienced measured difficulties reintegrating into the mainstream. One particular area was the right of Japanese Americans to own property, including defending their property rights against land seizure proceedings. Though the California Supreme Court previously upheld alien land laws as constitutional, these same laws were later struck down by the Court in *Oyama*. When compared against one another, *Shelley* and *Oyama* offer acutely illuminating legal points.

In an opinion by Chief Justice Fred M. Vinson, the Supreme Court in *Oyama* invalidated an alien land statute as applied, ruling that its implementation violated the constitutional right of Fred Oyama, a Japanese American, to the equal protection of the laws. Alternatively, in *Shelley*, the Supreme Court struck down a covenant that restricted property ownership on the basis of race, including "Mongolians" and "Negroes." The Court concluded that enforcing the restrictive covenant through the courts against the African American petitioners constituted "state action," and therefore violated the Fourteenth Amendment Equal Protection Clause.

Demonstrating a form of synergy, *Shelley* is cited extensively throughout the *Oyama* opinion, and vice versa. The interconnected dynamics between *Oyama* and *Shelley* illustrate how what happens to Asian Americans influences and affects African Americans, and vice

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<sup>112</sup> *Id.*

<sup>113</sup> 332 U.S. 633 (1948); *see also* *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948); *Terrace v. Thompson*, 263 U.S. 197 (1925).

<sup>114</sup> 334 U.S. 1 (1948).

versa. However, in the end, there are more questions raised than answered. First of all, *Oyama* involved an application of the California Alien Land Law in the mid-1940s, which prohibited aliens ineligible for American citizenship from acquiring, owning, occupying, leasing, or transferring agricultural land.<sup>115</sup> Under the law, any property acquired in violation of the statute would escheat as of the date of acquisition. The same result followed any transfer made with an intent to evade or avoid escheat.<sup>116</sup> Chief Justice Vinson, in the majority opinion, declared that “[t]he cumulative effect [of the Act], we believe, was clearly to discriminate against Fred Oyama solely . . . [on the] basis . . . that his father was Japanese and not American, Russian, Chinese, or English.”<sup>117</sup> The Court was not persuaded by the state’s argument that it was not race-based law but rather was a race-neutral law in both substance and application.

In sharp contrast to the majority opinion, Justices Murphy and Rutledge in their concurrences examined the legislative history of the passage of the Alien Land Law, revealing the anti-Japanese animus that motivated its passage and also providing a summary of the history of anti-Japanese sentiment in this country. Justice Murphy, in powerful dicta, discussed the virtues of the Japanese farmers in California and their contributions to the farming industry, as well as their overall earnest efforts to assimilate into this country.<sup>118</sup> The concurrence also discussed the great racial bigotry that Japanese Americans endured during World War II, and the pervasive images that “relate to the alleged disloyalty, clannishness, inability to assimilate, racial inferiority and racial undesirability of the Japanese, whether citizens or aliens.”<sup>119</sup>

Interestingly, compared to *Oyama*, Chief Justice Vinson’s opinion for the Court in *Shelley v. Kraemer* was much more expansive. He devoted most of the narrative space to a primer on the originations of evolution of the Fourteenth Amendment Equal Protection Clause. From the outset, the Court questions the validity of a court’s enforcement of a restrictive covenant based solely on race. Unmistakably, the purpose of the restrictive covenant was to exclude persons of a designated race from purchasing property and occupying it. Justice Vinson cites to *Oyama*, reflecting on the Court’s finding that a state law denied the equal protection of property rights to a designated class of citizens of a

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<sup>115</sup> *Oyama*, 332 U.S. at 636.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 644-45.

<sup>118</sup> *Id.* at 671 (Murphy, J., concurring).

<sup>119</sup> *Id.*

specified race and ancestry and thus violated the Fourteenth Amendment. Justice Vinson wrote:

We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.<sup>120</sup>

Taken together, would the *Shelley* and *Oyama* opinions stand for the proposition that African Americans are true Americans, and as such, deserve equal treatment and rights, while the Japanese are always perceived to be less so? Could the model minority myth be the modern incarnation of the foreignness perception? Perhaps the myth has even supplanted the perpetual foreigner/alien image? Does the fact that the United States has been at war with three major Asian countries in the last century affect mainstream America's perception of Asians and Asian Americans in this country? If so, why? Regardless of the myriad of possible answers, all of the queries should serve to remind us that race, citizenship, and immigration have been historically interlinked with each other. Furthermore, as the arguments offered by *Huddled Masses* have shown, these relationships are likely to continue into the future, ever changing along with the political and social tides of the time.

#### VI. IMMIGRATION, GENDER, & SEXUAL IDENTITY

The book's wide analytical scope is demonstrated by the later chapters, where Johnson touches upon gender and sexual identity issues and how they relate to the immigration context. In chapter six, Johnson gives an insightful discussion of the treatment of women in U.S. immigration history.<sup>121</sup> In doing so, he dispels the persistent stereotyping of the immigrant as male. Women have a long documented history of immigration to the United States, but unfortunately, many of these experiences have been inequitable, and often harsh. For example, Johnson identifies how women were treated as extensions of their spouses, removed from any independent legal identity. He says that the status of women in the United States evolved in tandem with their treatment under immigration laws.<sup>122</sup> As he notes, the subordination of

<sup>120</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

<sup>121</sup> See JOHNSON, *supra* note 1, at 124.

<sup>122</sup> *Id.*

women relative to the status of men began early. Here, he makes two related points: First, nationality laws allowed a woman to be stripped of her U.S. citizenship upon her marriage to an immigrant, since a woman's citizenship was treated as identification to that of her spouse. Second, immigrant women of color were exploited in the low-wage domestic labor market. Frequently, "[s]ingle immigrant women have often presumed to be likely to become public charges . . . [W]omen's ability to immigrate has often turned almost exclusively on their spouses' income, skills, and ability to immigrate."<sup>123</sup>

Johnson proceeds to persuasively illustrate how the prostitute was one of the initial groups of criminals targeted by the federal immigration laws. Because many Chinese women were allegedly brought to the United States to engage in the sex trade in the late 1800s, Congress began to pass a series of laws addressing immigrant prostitution.<sup>124</sup> To begin, the Alien Prostitution Importation Act of 1875 outlawed the importation of immigrant women for prostitution. Next, the Page Law targeted Chinese prostitutes. In 1907, Congress broadened the prostitution provisions of the immigration laws to apply to any women seeking to enter this country for "immoral purposes." The Immigration Act of 1907 allowed the deportation of any woman or girl found to be practicing prostitution.<sup>125</sup> Finally, "Congress passed the Mann Act, also known as the White Slave Traffic Act, to stop the interstate transportation of women, including immigrant women, for prostitution purposes."<sup>126</sup>

In a passage examining the modern trends in immigration law for women, Johnson suggests that today the exploitation of immigrant women occurs in the workplace, where many undocumented immigrants who are unfamiliar with this country's language and culture are particularly vulnerable. These immigrant women often work extremely long hours for low wages, without benefits, and this practice continues into the modern era. Here, the author refers to the manner in which immigrant women have been the subject of gender-specific attacks in the political process. Johnson asserts that "[g]ender-based political attacks on immigrant women include critiques of high fertility rates and allegations that they seek free medical assistance in childbirth and automatic U.S. citizenship for their children."<sup>127</sup> Further, this kind of

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<sup>123</sup> *Id.* at 125.

<sup>124</sup> *Id.* at 126.

<sup>125</sup> *Id.* at 127.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

anti-immigration rhetoric has interjected the political debate over immigration and welfare reform, albeit against immigrants.<sup>128</sup>

In chapter seven, Johnson details the exclusion of lesbians and gay men.<sup>129</sup> Homosexuals were legally barred from immigrating to the United States from 1953 until 1990.<sup>130</sup> Over and over, the Supreme Court rejected constitutional challenges to the classification of homosexuals attempting to enter this country as "psychopathic personalities," leading lives of "sexual deviation."<sup>131</sup> However, mirroring society's sense of the unfairness of these laws, the courts began to uncover loopholes in the grounds on which homosexuals were excluded and deported. For example, in 1990, Congress repealed homosexual exclusion in response to political activism and social awareness of the rights of lesbians and gays. Referring to the changes in immigration laws in accordance with the acceptance of gays in the United States, Johnson cites to *Romer v. Evans*,<sup>132</sup> wherein the Supreme Court "invalidated a Colorado law that discriminated on the basis of sexual orientation."<sup>133</sup> For Johnson, *Evans* signals a turnabout, which aligns itself with this changing view of homosexuality.<sup>134</sup> In *Evans*, the Court rejected the Colorado Anti-Gay Rights Amendment as unconstitutional, on the grounds that the statute failed the rational basis test, on which the appellant bore the burden of proof.<sup>135</sup> The Court reasoned that the Amendment did not bear a rational relationship to any legitimate state interest because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."<sup>136</sup> At this same time, the lesbian and gay community, along with openly homosexual politicians, continued to decry sexual orientation-based discrimination. Johnson declares his broad explanation for the liberalization of immigration laws toward lesbians and gays, stating that "[i]n the end, Congress owed its ability to remove the homosexual exclusion from the immigration laws to the country's changing political landscape."<sup>137</sup>

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<sup>128</sup> *Id.* at 139.

<sup>129</sup> *Id.* at 140.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 517 U.S. 620 (1996).

<sup>133</sup> JOHNSON, *supra* note 1, at 145.

<sup>134</sup> *Id.*

<sup>135</sup> *Romer*, 517 U.S. at 635.

<sup>136</sup> *Id.* at 632.

<sup>137</sup> JOHNSON, *supra* note 1, at 145.

VII. CONCLUSION

Overall, *Huddled Masses* is well-written and often provocative. Johnson's contribution is valuable for providing the requisite information to serve as the basis for a well-informed dialogue about the inherent privileges of being an American and the historical roots and contemporary sustenance of anti-immigration fervor. In particular, Johnson's book provides extremely valuable threads of analysis, which other Critical Race Theory scholars can weave into intricate mosaics to demonstrate the relationships between civil rights and immigration. Undoubtedly, the casual reader and scholar will not be disappointed with Johnson's in-depth study.