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The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws

In the midst of current anti-immigration sentiment,[1] which is motivating dramatic changes in the United States' immigration laws, there exists the myth that prior immigration laws were more equitable and humanitarian.[2] Yet historical analysis reveals that immigration law has been put to uses far from idyllic, and has always been concerned with the racial makeup of the nation.[3]

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[1] A. M. Rosenthal, Editorial, *Dred Scott in San Diego*, N.Y. TIMES, Aug. 9, 1996, at A27 ("[t]he stinkweed of anti-immigrant prejudice [has spread] across the country").

[2] *See, e.g.,* Peter Rekai, Editorial, *Canada's Upscale Influx*, N.Y. TIMES, Sept. 16, 1996, at A15 (history of U.S. immigration laws based upon the desire for "untutored ingenuity" of penniless immigrants); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race and Other Deep Divides*, 21 SO. ILL. U. L.J. 101, 110 (1996) ("Very few members of the public realize how restrictive our current immigration laws actually are. Only those who fall within a few specific categories are admitted, and then only if they are not within any of the statutory exclusion grounds.").

[3] "Historically, American immigration policy has expressly selected immigrants and citizens on the basis of national origin and race." Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1933 (1996). *See also* HARRY H. LAUGHLIN, IMMIGRATION AND CONQUEST 32 (1939) ("If the American people find that they need no more imported human seed-stock, they can stop all immigration, or they can set very high immigration standards, so that every future immigrant will constitute a very definite asset by race, inborn soundness and capacity to the reproductive stocks of the American people." [The author was a congressionally appointed eugenics expert who was instrumental in the enactment of the racially restrictive National Origins Quota Act of 1924]). Some commentators also note that the discourse surrounding immigration reform reflects "this nation's collective frustration with the problem of race relations in the

Specifically, national preoccupation with the maintenance of a "White country"[4] is reflected in immigration law.[5] The continued national preference for White immigrants is explicitly featured in the visa profiling codes of U.S. embassies and consulates.[6] This Essay employs a race-conscious[7] lens to analyze the way in which immigration law has been structured to perpetuate a racial hierarchy which privileges Whiteness, primarily by preferring White immigrants to immigrants of color, and secondarily by drafting immigrants of color to form a middle-tier buffer[8] and, alternatively, to provide a bottom-tier surplus labor supply.

My thesis is that the structure of immigration laws[9] in the

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United States." Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111, 119 (1996).

[4] The desire for a "White country" refers to the preoccupation with maintaining large numbers of White persons in the United States in order to preserve an economic and social hierarchy which privileges whiteness. *See generally* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

[5] *See* John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 820 (1982) ("United States immigration law is rooted in the fundamental premise that the law can and should control the numbers and the *characteristics* of individuals entering the United States . . . .") (emphasis added); William R. Tamayo, *Asian Americans and the McCarran-Walter Act*, *in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 337, 341 (Hyung-chan Kim ed., 1996) ("The use of race or attempts to use race in immigration law are as American as apple pie.").

[6] Olsen v. Albright, No. CIV.A.96-570 (SS), 1997 WL 811966, at *6 (D.D.C. Dec. 22, 1997) (United States' use of race-based profiling codes in embassies' and consulates' visa allocation violates the law).

[7] Race-consciousness, as advanced by critical race theorists, emphasizes the explicit recognition of race, and its usage in our society. CRITICAL RACE THEORY: THE CUTTING EDGE at xiv (Richard Delgado ed., 1995). *See also* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

[8] I use the term middle-tier buffer class to describe the positioning of certain immigrants in the middle of a racial hierarchy which privileges whiteness. The middle-tier effectively buffers those at the top of the racial hierarchy from the discontented bottom tier. *See, e.g.*, CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 226 (1971) (in the context of Brazilian race relations mulattos are a buffer between privileged Whites and bottom-tiered Blacks).

[9] This Essay will focus upon the use of immigration laws to control the flow of legal immigration, and not the separate but related dynamic of undocumented immigration except as it informs the maintenance of a racial and hierarchical model of immigration. This is because legal immigration controls not only demonstrate the disregard for communities of color, but also the governmental preference for White immigrants. The significance of immigration policy as a form of control over the "character" of U.S. residents can be fully demonstrated only by examination of gov-

United States has often facilitated the formation and maintenance of a middle-tier buffer class of residents to preserve racial hierarchy.[10] I utilize the model of the middle-tier buffer to reveal the use of race in immigration policy and the need for recognition of its strategic deployment in hindering movements for solidarity in opposition to racial hierarchy. This Essay will first present the origins and purpose of middle-tier buffer classes, and then review the United States history of race-based nativism in its preference for White immigrants. This will be followed by an analysis of historical and present constructions of middle-tier buffer communities during cyclical national concerns with the number of White residents. I conclude by observing that this nation's racial hierarchy cannot be dismantled until immigrants of color take note of the divisive function of middle-tier buffer formation.

I

THE ORIGINS AND PURPOSE OF MIDDLE-TIER BUFFERS

Sociologists have developed the concept of "middleman minorities" to describe the structural positioning of various ethnic minorities into an intermediate status level between a privileged class and the lowest socioecomic class of residents.[11] Such structural positioning allows the privileged class to use the intermediate class as a buffer to deflect hostility and as a scapegoat during times of crisis.[12] Middle-tier communities are accorded greater

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ernmental preferences and the exclusion of groups. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1 (1996) (for much of U.S. history being White was a condition precedent for becoming a naturalized citizen); JOHN HIGHAM, STRANGERS IN THE LAND 221 (2d ed. 1988) (deportation laws function to purify American society).

[10] "Constitutional immigration law must acknowledge that immigration policy shapes racial and ethnic communities." Motomura, *supra* note 3, at 1950.

[11] HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 79 (1967). The middleman minority theory was developed in 1940 to explain the socio-economic bases of antisemitism. Howard Becker, *Constructive Typology in the Social Sciences*, *in* CONTEMPORARY SOCIAL THEORY 17, 33-35 (Harry E. Barnes et al. eds., 1940). The theory later evolved to encompass the positioning of other ethnic minorities, such as Asians, into intermediate buffer classes. Edna Bonacich, *A Theory of Middleman Minorities*, 38 AM. SOC. REV. 583, 584 (1973).

[12] BLALOCK, *supra* note 11, at 81; THOMAS SOWELL, MIGRATIONS AND CULTURE: A WORLD VIEW 34 (1996) ("Often middleman minorities are middlemen not only in a purely economic sense but also in social and political senses. Where a ruling class or race collects money from a large class of poorer people whom they do not wish to

access to economic opportunity than the masses of the lower class, but at the same time are prevented from entering the privileged class.[13] Yet middle-tier buffers are inherently fluid in that demographic and socio-economic changes in a society will motivate either a shift in the groups that comprise the middle-tier or, in the alternative, motivate an interest in temporarily deactivating the use of a middle-tier buffer. Thus, who is treated as a middle-tier buffer, and when, is not static but varies with the perceived status stability of the privileged class.

Groups of persons are treated as a middle-tier buffer when a marked status gap exists between elites and the lower class.[14] Immigration often serves to fill status gaps.[15] Yet not all immigrants are positioned as middle-tier buffers, which indicates that there is a factor at work separate from the need to fill a status gap. Although sociologists have analyzed the ways in which the culture of being an immigrant has contributed to the dynamic of a middle-tier buffer,[16] the degree to which immigration laws themselves have facilitated the construction of middle-tier communities and the ways in which racial thinking underlies such formations has been an open question. The structure of immigration laws is one of many pull factors[17] for immigrants, but a very forceful one.[18] For instance, although labor demands influence the flow of immigration, not all countries with similar economic instabilities are subject to the same U.S. urging for em-

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deal with directly, middleman minorities may take the role of collecting rents or feudal dues for the landlords, or taxes for government — all roles virtually guaranteeing unpopularity.").

13 WALTER P. ZENNER, MINORITIES IN THE MIDDLE: A CROSS-CULTURAL ANALYSIS 16 (1991) ("Modern colonial and national governments allow the importation of labor and control stranger groups through designated leaders. They make laws and rules preventing them from owning land or entering civil service. They limit eligibility for citizenship and thus may actually facilitate the creation of a class of sojourners.").

14 *Id.* at 15 (status gaps exists when "superordinates and subordinate portions of a society are not bridged by continuous, intermediate degrees of status").

15 *Id.* at 16.

16 Bonacich, *supra* note 11, at 585-87.

17 Everett S. Lee, *A Theory of Migration*, 3 DEMOGRAPHY 47, 50 (1966) (all migration flows correspond both to political and economic "push" factors at the place of origin and political and economic "pull" factors at the place of destination).

18 Michael J. Greenwood & John M. McDowell, *The Supply of Immigrants to the United States*, *in* THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 54, 68 (Barry R. Chiswick ed., 1982) (institutional framework of receiving country's immigration laws is an important factor in the number and mix of people who immigrate).

igration to the United States.[19] Instead, the U.S. bias in favor of White immigrants and the consequent invisibility of persons of color as recognized citizens of the United States[20] influences the structure of immigration laws.

This Essay will explore the manner in which a privileged White class' fear of becoming overwhelmed by the demographic increase of ethnic minority populations in a pluralistically diverse society informs the use of immigration laws for the two-fold purpose of increasing the number of White residents and constructing a middle-tier buffer to preserve the privileges of White supremacy. Although this Essay focuses on the construction of middle-tier buffers in the United States, I note that the power of this model is borne out by its use in other ethnically diverse countries with a small White privileged class.[21]

II

UNITED STATES' HISTORY OF RACIAL NATIVISM

The impetus for utilizing a middle-tier buffer model of immigration at various points in U.S. history and presently has been rooted in the White privileged class' concern with maintaining its status. In fact, the shift in what groups constitute a middle-tier buffer is triggered by fluctuating concerns with the continued predominance of White persons as a numerical majority of the U.S. population. Thus, before examining the operation of middle-tier buffers, this Essay shall set forth the tangible U.S. preference for White immigrants as a mechanism for maintaining a system of White privilege.

Although a comprehensive federal immigration legal structure was not instituted until 1875,[22] the United States quickly became

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[19] Silvia Pedraza, *Origins and Destinies: Immigration, Race, and Ethnicity in American History*, *in* ORIGINS AND DESTINIES: IMMIGRATION, RACE AND ETHNICITY IN AMERICA 1, 12 (Silvia Pedraza & Rubén G. Rumbaut eds., 1996) (If the economic activity in the United States were the only pull for immigration, "immigrants would be equally selected from all nations and all regions at all times. Instead, we find that immigration was (and still is) highly selective . . . .").

[20] *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 10 (1995) ("[T]he American nation has always had a specific core. And that core has been white . . . ."). *See generally* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) (residents of color in the United States are not viewed as belonging to the nation of citizens).

[21] *See infra* notes 63-75 and accompanying text.

[22] The first federal immigration law, approved in 1875, prohibited foreign convicts

concerned about the growing racial makeup of the nation.[23] Such preoccupation is evident in congressional debates from 1900 to 1916 surrounding the legal status of residents of two newly acquired U.S. possessions—Puerto Rico and the Philippines. Although not immigration laws per se, the debates about status and citizenship were rooted in concerns about the entry of "others" into the contiguous United States which would be facilitated by granting U.S. citizenship to residents of the two possessions. Such citizenship proposals were often met with skepticism and concern, and were treated as if they were proposals for direct immigration of persons from the U.S. possessions. For instance, during the debates one congressman cautioned Congress against "open[ing] wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country."[24] Therefore, decisions regarding citizenship for residents of U.S. territories effect a type of immigration control.

In the congressional debates regarding the citizenship status of Filipino and Puerto Rican residents, which extended from the 56th Congress through the 64th Congress, the racial makeup of such populations figured prominently.[25] Congress preferred Pu-

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and prostitutes from entering the United States. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (repealed 1974). E.P. Hutchinson explains:

> The Immigration Act of 1875 marks the beginning of direct federal regulation of immigration. It was only a limited beginning, under the immediate pressure of concern and moral indignation at the alleged importation of Chinese prostitutes and European criminals, but began an extension of federal authority that soon was to be developed much further.

E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 66 (1981). Later entry was also barred to lunatics, idiots, and persons likely to become public charges. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (act repealed 1966).

[23] Kevin Johnson, *The New Nativism: Something Old, Something Borrowed, Something Blue*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 166 (Juan F. Perea ed., 1997) ("Illustrating the importance of the racial composition of the immigrant stream, the immigration debate historically has been especially volatile whenever significant numbers of people of color immigrated to the country from non-Western nations.").

Before the federal government preempted state action in the area of immigration, states also expressed their preference for White immigrants with state legislation to encourage the importation of White servants. *See, e.g.*, Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 768 (1996) ("In 1708, a [Massachusetts] law 'to Encourage the Importation of White Servants' offered forty shillings a head to each master of a vessel or merchant who imported male servants between eight and twenty-four years of age.") (footnotes omitted).

[24] 33 CONG. REC. 2,172 (1900) (remarks of Rep. Gilbert).

[25] *See* JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON

erto Rican immigration to the contiguous United States due to the mistaken perception that Puerto Ricans were primarily White.[26] Furthermore, Congress articulated the sentiment that "[t]he people of Porto Rico are of our race, they are people who inherit an old civilization—a civilization which may be fairly compared to our own."[27]

In contrast, the perceived African attributes of Filipinos rendered them a less desirable supply of immigrants. Filipinos were denigrated by Congress because they were perceived by Whites as "physically [sic] weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet" who would not be as beneficial to the nation as the Europeans who were incorporated as citizens when Louisiana was made a state.[28] "How different the case of the Philippine Islands . . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries can not assimilate them . . . . They can never be clothed with the rights of American citizenship . . . ."[29] When assessing the distinctions between the Philippine and U.S. populations, it is clear that Congress did not consider the presence of African-American U.S. citizens, from whom Filipinos would not be a "wholly different race." Nor did Congress appreciate the irony of admitting many more persons of African ancestry into the contiguous United States when Pu-

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THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 39 (1979) (noting that the debates were filled with racist rhetoric and overtones).

[26] 53 CONG. REC. 7,469 (1916) (Remarks of Rep. Towner: "Nearly three-fourths of the population are white, mostly of Spanish descent.").

Although Congress was correct in its assumption that some Puerto Ricans are direct White descendants from Spain, a great number were and are persons with African ancestry. *See generally* JALILI SUED BADILLO & ANGEL LÓPEZ CANTOS, PUERTO RICO NEGRO (1986). It is thought that Congress relied upon questionable census data in its conclusion that Puerto Ricans were primarily White. CABRANES, *supra* note 25, at 31. The census data was faulty given the proclivity for Latin Americans to claim whiteness as identity of status regardless of actual African ancestry. Roberto P. Rodriguez-Morazzani, *Beyond the Rainbow: Mapping the Discourse on Puerto Ricans and "Race"*, 8 J. OF HUNTER COLLEGE'S EL CENTRO DE ESTUDIOS PUERTORRIQUEÑOS 158 (Spring 1996).

[27] 64 CONG. REC. 8,471 (1916) (remarks of Rep. Huddleston).

[28] 33 CONG. REC. 3,613 (1900) (remarks of Sen. Bate, quoting report of the Philippine Commission to the President).

[29] 33 CONG. REC. 2,105 (1900) (remarks of Rep. Spight).

erto Rico was extended U.S. citizenship.[30]

The preference for White immigrants regardless of skill level is not exclusive to the United States. Comparison to a Latin American context demonstrates the general role maintenance of racial boundaries plays in the development and implementation of immigration law. When Argentina sought to industrialize, it constitutionally mandated an increase in the number of European immigrants to improve the country by "whitening" it.[31] The decision to recruit European immigrants was not based primarily upon any considerations of skill level or wealth, but upon a belief that the White race was superior to that of the Afro-Argentines and native peoples who inhabited Argentina up until the twentieth century.[32] The European immigrants who arrived in Argentina displaced Afro-Argentines from most forms of employment and social status.[33]

Similarly, the United States recruited European immigrant labor before and after the Civil War to fill a presumed need for labor, despite the surplus of labor available from newly freed slaves.[34] European immigrants recruited to the United States

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[30] Puerto Ricans were accorded U.S. citizenship in 1917. 39 Stat. 951 (1917) (codified as amended at 8 U.S.C. § 1402 (1994)).

[31] Samuel L. Baily, *The Adjustment of Italian Immigrants in Buenos Aires and New York, 1870-1914*, 88 AMER. HIST. REV. 281, 298-99 (1983) ("The Argentine elite viewed the [Italian] immigrants as a means of 'civilizing' the country as well as developing its economy. . . . European immigrants would, they thought, intermix with the indigenous population and in time help create a biologically superior population.").

[32] GEORGE REID ANDREWS, THE AFRO-ARGENTINES OF BUENOS AIRES, 1800-1900, 102 (1980) (pseudo-scientific theories about the "innate superiority of the white race and the inferiority of Africans, Amerindians, and other nonwhite races" had great influence in Latin America and Argentina in particular). Part of the move towards progress also involved the campaign to rid the country of its Afro-Argentine population by encouraging miscegenation to lessen the presence of the Black gene pool and filling the front-line ranks of the military during the wars of 1810-70 with Afro-Argentine men. *Id.* at 68, 111.

[33] *Id.* at 178, 183. Similar developments have occurred in other Latin American countries such as Uruguay, Chile, and Paraguay. *Id.* at 64.

[34] JAMES OLIVER HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY 134 (1993) (before and after the Civil War free Blacks in most of the urban North "faced stiff competition from immigrant workers who generally refused to tolerate [B]lacks as skilled co-workers"); IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 231 (1974) ("The influx of Irish and German workers into Southern cities speeded the exclusion of Negro freemen from many occupations. . . . With white workers available in growing numbers, white employers exercised their racial preference in many trades traditionally dominated by blacks."); Pedraza, *supra* note 19, at 4 (from 1820-1920, 33,654,803 Europeans legally immigrated to the United States and usually consti-

displaced free Black persons from employment.[35] The historical preference for a White workforce in the United States continues today.[36] It is the consistent preference of White employers for White employees which, in part, accounts for the opposition some persons of color currently have towards increased immigration,[37] despite the common struggles which immigrant and non-immigrant persons of color face. As the section that follows

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tuted 70% to 96% of all legal immigrants admitted); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY AND SOCIETY 28 (1983) ("[t]he only period when Black employment approached 100 percent was during slavery").

[35] HIGHAM, *supra* note 9, at 17, 19 (after the Civil War federal and state governments encouraged European immigration as demonstrated by the 1864 Act to Encourage Immigration, Act of July 4, 1864, 13 Stat. 385); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 645 n.158 (1981) ("After the Civil War . . . competition among states for Europeans intensified, and efforts to attract them expanded on a vast scale. At least 33 states and territorial governments eventually set up immigration bureaus, advertised in European and American foreign-language newspapers, sent agents to northern and western Europe, and published their brochures, guidebooks, and maps in English, Welsh, German, Dutch, French, Norwegian, and Swedish.") (footnote omitted); KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924 3 (1984) ("[n]one of these [European] migrations was truly spontaneous but was triggered and shaped by state policies"). *See generally* John E. Bodnar, *The Impact of the "New Immigration" On the Black Worker: Steelton, Pennsylvania, 1880-1920*, 17 LABOR HISTORY 214 (Spring 1976) (with the steady increase in European immigration in the early twentieth century African American workers enjoyed fewer semi-skilled positions and less upward mobility).

[36] Norman Matloff, *How Immigration Harms Minorities*, 124 PUB. INT. 61 (Summer 1996). Matloff writes:

> In regions with high immigration levels, low-skilled jobs in hotels, restaurants, airports, and so on—which could be held by African Americans (and often used to be)—are now typically held by immigrants. . . . In fact, a now-famous study by the General Accounting Office found that employers in Los Angeles had deliberately and systematically fired black janitors and replaced them with lower-paid immigrants.

Id. at 64.

[37] David J. Hellwig, *Strangers in Their Own Land: Patterns of Black Nativism, 1830-1930*, 23 AM. STUD. 85, 90 (Spring 1982) (African American opposition to immigration rooted in experiences of racism in workforce where immigrants are often preferred and not from nativistic beliefs). Sociologists note that "the more that members of a particular racial group feel collectively oppressed and unfairly treated by society, the more likely they are to perceive members of other groups as potential threats." Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Social Context*, 61 AM. SOC. REV. 951, 951 (1996). Yet, it should be noted that African American opposition to immigration is often overstated by conservatives in their efforts to denounce immigration in general, as demonstrated by the African American reluctance to join nativistic organizations. ROY BECK, THE CASE AGAINST IMMIGRATION 156-202 (1996); Hellwig, *supra*, at 93.

reveals, this preference for Whites became the rule of law with the enactment of the Immigration Act of 1924.[38]

III

THE FLUID CONSTRUCTION OF MIDDLE-TIER BUFFER COMMUNITIES IN THE UNITED STATES: 1924-1965

The Immigration Act of 1924 restricted immigration on the basis of national origin and set quotas which favored immigrants from northern and western Europe. This legislation was tied to the rise of the pseudo-science of eugenics.[39]

During the House hearings on the Act, genetic theories regarding the superiority of White Nordic persons and the inferiority of all others were the prominent arguments for selective immigration.[40] Representative Robert Allen of West Virginia stated: "The primary reason for the restriction of the alien stream, however, is the necessity for purifying and keeping pure the blood of America."[41] A Pennsylvania representative stated: "[W]e must set up artificial means through legal machinery to hand pick our immigrants if we are going to prevent rapid deterioration of our citizenship."[42] The Act "hand-picked" immigrants by establishing a quota for the number of immigrants who could

[38] Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924). The Act is also known as the National Origins Quota Act. Although the Immigration Act of 1924 contained the most blatant preference for White immigrants, it was not the most racist immigration legislation in U.S. legal history, given the Asian exclusion policies which preceded the 1924 Act. The Asian exclusion laws included: the 1881 Immigration Treaty with China, which provided for the suspension of Chinese immigration whenever it threatened to affect the interests of the United States; the Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882), which precluded the admission of citizenship to Chinese immigrants, suspended immigration from China for 10 years, and was continually renewed; the Chinese-exclusion Law of July 5, 1884, ch. 220, 23 Stat. 115 (1884), which suspended the immigration of Chinese subjects regardless of their country of origin; and the Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917), which precluded the admission of immigrants from the "Asiatic barred zone" (the region covered by South Asia from Arabia to Indo-China and the islands adjacent to Asia and not possessed by the United States) up until 1943.

[39] DANIEL J. KEVLES, IN THE NAME OF EUGENICS 96-97 (1985) (noting that eugenicists were involved in lobbying for the immigration restrictions contained in the 1924 Act).

[40] KENNETH M. LUDMERER, GENETICS AND AMERICAN SOCIETY 105 (1972). "The dominant attitude in Congress was that one 'race' was better than another; the great majority of legislators accepted the eugenicists' claim that this was the dictate of science." *Id.* at 110.

[41] 65 CONG. REC. 5,693 (1924).

[42] *Restriction of Immigration: Hearings Before the House Committee on Immigra-*

be admitted by race and national origin. The quota was linked to the number of persons in the United States from a geographic region at the time of the 1910 U.S. Census. The 1910 Census was chosen as the barometer rather than the more recent 1920 Census because White Nordics figured more prominently in the 1910 Census. The larger a group's demographic representation in the 1910 Census, the higher the level of its quota for admittance of immigrants under the Act.

The racist underpinnings of the Act are particularly apparent in the provision to exclude the descendants of *slave immigrants*[43] from admission as quota immigrants or non-quota immigrants.[44] The country was hardly overrun with such immigrants, as the slave trade in the United States had been abolished in 1808. Hence the representation of African immigrants in the 1910 Census would not have triggered a high quota level for entry under the Act.[45] At the time, however, the United States was concerned that the "rapid multiplication of the yellow and brown races . . . would soon overwhelm the whole white world."[46] One congressman went so far as to state that "the northern European, and particularly Anglo-Saxons, made this country. . . . It is a good country. It suits us. And what we assert is that we are not going to surrender it to somebody else or allow other people, no

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tion and Naturalization, 68th Cong. 767 (1924) (statement of the Honorable Thomas W. Phillips, Jr., Representative from Pennsylvania).

[43] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 35-37 (1996) (emphasis added). It hardly seems accurate to categorize the persons forcibly brought to this country for slavery as immigrants. Yet, it should be noted that the descendants of slaves were often treated as immigrants when attempting to travel from state to state.

[44] Immigration Act of 1924, ch.190, §§ 4, 11(d)(3), 43 Stat. 153, 155, 159 (1924). To be excluded under the numerical limitation of the Act and not be included in the list of exempted non-quota immigrants effectively barred any English speaking person of African ancestry from admission. Presumably Spanish speaking persons of African ancestry could be admitted as non-quota immigrants from the Western Hemisphere countries of Mexico, Cuba, Haiti, the Dominican Republic and the Canal Zone, but as such were also subject to exclusion under prevailing English literacy tests. The political reasons for the latter exemption shall be explored infra.

[45] "Regulation of the admission of Blacks was accomplished primarily through the operation of the national origins quota system. That system, almost from its inception, discriminated against Black admissions by excluding descendants of slave immigrants from the United States census population base." Scanlan, *supra* note 5, at 823 n.12 (citations omitted).

[46] HIGHAM, *supra* note 9, at 149, 272 (White monied men who felt increasingly socially displaced in a democratic age clung to notions of their own racial superiority).

matter what their merits, to make it something different."[47] Thus, the preference for White Nordic immigrants was not one existing in isolation, but a preference borne out of fears of being overcome by "non-White"[48] foreigners who would thus undermine the existing system of White privilege.[49]

While the Act restricted the continued admission of immigrants perceived as non-White (like Southern Europeans), this was accompanied by the growing tendency to view European immigrants who had assimilated as White.[50] The Americanization campaign of the 1910s helped to rid the immigrant "taint" from those who had previously immigrated to the United States,[51] while the staggered flow of immigration decreased contacts with "old world" ways to further the assimilation of European immigrants.

Without providing European immigrants any significant additional economic opportunity, the United States elevated them into a middle-tier position based on their claim to Whiteness.[52] The transformation of European immigrants into White persons was for the purpose of having them function as a middle-tier

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[47] 65 CONG. REC. 5,922 (1924) (statement of Colorado Rep. John N. Vaile).

[48] At this period in time the United States viewed Irish, Italian, and Jewish immigrants as non-White. DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS 184 (1994).

[49] Racial nativists desired the continued dominance of the Anglo-Saxon over all newcomers and feared the deterioration of their exalted position by national mixing with lesser quality persons akin to a Darwin race war. HIGHAM, *supra* note 9, at 11, 135.

[50] NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 76 (1995) (when the Irish initially immigrated to the U.S. they were consigned "to an intermediate race located socially between black and white" but were later politically transformed into Whites). *See also* Richard D. Alba, *Italian Americans: A Century of Ethnic Change*, *in* ORIGINS AND DESTINIES: IMMIGRATION, RACE, AND ETHNICITY IN AMERICA 172, 175 (Silvia Pedraza & Rubén G. Rumbaut eds., 1996) (upon arrival in the United States the whiteness of Italians was questioned, but after World War II the identity of Italians more surely began to collapse into whiteness).

[51] HIGHAM, *supra* note 9, at 238, 260 (the Americanization Campaign involved the nationwide movement to transform immigrants with state-sponsored English and civics classes which some states mandated by law—the transformation being that of "'fusing these people who come to us from the Old World civilization into . . . a real brotherhood among men'"); ROEDIGER, *supra* note 48, at 187 ("in the process of Americanizing European immigrants acquired a sense of whiteness and of white supremacy").

[52] DAVID R. ROEDIGER, THE WAGES OF WHITENESS 13 (1991) ("[T]he pleasures of whiteness could function as a 'wage' for white workers. . . . That is, status and privileges conferred by race could be used to make up for alienating and exploitative class relationships . . . .").

buffer against a growing minority community of surplus labor.[53]

After the First World War ended in 1918, those Europeans who previously had immigrated to the United States were perceived by promoters of industry as union agitators who needed to be controlled while capitalizing upon their labor,[54] thus indicating the vulnerability of middle-tier buffers to cyclical waves of advantage and disfavor. Rather than lobbying for additional European immigrants who might be "susceptible" to the union agitation of their fellow compatriots and keep the current immigrants from assimilating, industry magnates lobbied for the admission of Mexicans and other persons of color to make up a bottom-tier labor reserve. Accordingly, the 1924 Act treated Western hemisphere immigrants from such areas as Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, and Central and South America as non-quota immigrants and, thus, exempted them from the numerical limitations of the Act.[55] As potential strike breakers, the bottom-tier laborers could serve as a warning to White workers against demanding better wages and other work-related improvements.[56] This utilitarian view of immigrants as bodies to fill a labor force has its roots in immigration law's early assumption that immigrants were articles of commerce.[57]

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[53] CALAVITA, *supra* note 35, at 160 (discussing the growing preference for transient labor of color over European immigrants).

[54] HIGHAM, *supra* note 9, at 225.

[55] Immigration Act of 1924, ch. 190, § 4(c), 43 Stat. 153, 155, 162 (exemption from numerical limitation on admission of Western hemisphere immigrants).

[56] According to Frank Morrison, Secretary of the American Federation of Labor, when the packing houses of Chicago "wanted cheap labor . . . they brought it in. The idea was that they wanted an unlimited supply. They also wanted an extra supply to let their workers know that if they did not want to work under those conditions, [there were] others to take their places." CALAVITA, *supra* note 35, at 140 (citing U.S. Congress, House Committee on Immigration and Naturalization, 1919a, at 62).

This subordinated surplus labor supply also included Black migrants from the South who were recruited into Northern industry in large numbers when European immigration was suspended during World War I. CALAVITA, *supra* note 35, at 134 ("Blacks migrated and were actively recruited from southern rural areas . . . much as European immigrants had been recruited earlier from the rural areas of Europe."). In fact, some commentators view African Americans as migrants from the South of the United States. *See generally* Nathan Glazer, *Blacks and Ethnic Groups: The Difference, and the Political Difference It Makes*, 18 SOC. PROB. 444 (Spring 1971).

[57] Bilder, *supra* note 23, at 747 (Before federal immigration law was viewed as incident to the plenary power doctrine, it was linked "to an exclusive federal commerce power based on the perception that immigrants were 'articles of commerce.'").

The labor reserve of brown faces was imported as a class subordinate to the White workers already employed, so that the existence of the subordinant class would constrain the status ambitions of the White buffer class. With each class focused on the other as a threat to their existence, there would be little energy for challenging the limitations of a stratified society.[58] Unlike the European immigrants who had been subject to the Americanization assimilation campaign for transformation into a White middle-tier buffer, the brown-skinned labor reserve "escape valve" was never meant to assimilate.[59] The reason racial minorities were not expected to assimilate and were not encouraged to assimilate was to facilitate their return to their country of origin the moment a surplus labor supply was no longer advantageous to the United States.[60] European immigrants whom the United States had earlier viewed as non-White were now encouraged to grasp a White identity which could clothe them with innate superiority over the surplus labor supply.[61]

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[58] MARABLE, *supra* note 34, at 45 ("All whites at virtually every job level are the *relative* beneficiaries of racism in the labor force: Blacks, Puerto Ricans, Chicanos, etc., supply the basic 'draftees' in the permanent and semi-permanent reserve army of labor.").

[59] CALAVITA, *supra* note 35, at 136 ("In an interesting reversal of the Americanization emphasis on assimilation, immigration policy makers did what they could to ensure that these Mexican migrants remained socially marginal, constituting a labor reserve only.").

[60] *Id.* at 148, 160 ("The strong point of Mexican [and] Cuban . . . immigration was that, while supplying workers to labor-intensive and seasonal enterprises like agriculture, they returned to their countries—or could be made to return—during recessions or in the off-season.").

This same dynamic was formally replicated in the 1940s when the Bracero program brought in Bahamians, British West Indians and over 4 million Mexicans over a thirteen year period as temporary agricultural workers. Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 437 (the Bracero program was a U.S. government contract-labor program whereby immigrants were recruited as temporary agricultural workers and then returned to their country of origin "until the crops were ready to be picked again"). Michael Walzer notes that:

> They [were] typically an exploited or oppressed class as well, and they [were] exploited or oppressed at least in part because they [were] disenfranchised, incapable of organizing effectively for self-defense. That is why [a] government of guest workers looks very much like tyranny. As a group, they constitute a disenfranchised class.

MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983).

[61] ROEDIGER, THE WAGES OF WHITENESS, *supra* note 52, at 133-56; W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 700 (1935) ("It must be remembered that the white group of laborers, while they received a low wage, were compensated

In effect, the Immigration Act of 1924, with its limitation on most European immigration but exception for Western hemisphere immigration, facilitated the construction of a White European immigrant middle-tier class to buffer the privileged from demands by a bottom-tier surplus labor supply, and in turn from demands from the middle-tier class itself. The racial hierarchy maintained the privilege of the small top-tier based upon a structure of White supremacy.[62]

The use of immigration controls for the construction of middle-tier buffer communities which maintain a racial hierarchy of privilege is not unique to the United States. In fact, countries as distinct as Brazil and South Africa have also utilized a middle-tier buffer model of immigration.[63] The following comparison to Brazil and South Africa is made for the purpose of demonstrating how compelling and pervasive the use of immigration controls is in the construction of middle-tier buffers.

For example, after its abolition of slavery in 1888, Brazil systematically imported European immigrants into the southern industrial areas and placed them in positions ranking above the native African population.[64] Only during periods of suspended European immigration caused by both World Wars were Afro-Brazilians sought for employment in Brazilian industry.[65] Brazil

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in part by a sort of public and psychological wage [in that Whites were] given public deference and titles of courtesy because [they were] white.").

[62] HIGHAM, *supra* note 9, at 145 ("Under these circumstances [of exerting control over dark-skinned natives of Puerto Rico, the Philippines, and Hawaii] the Anglo-Saxon idea easily associated itself with emotions of White supremacy. In other words, while welcoming the immigrant population into the Anglo-Saxon fold, imperialists were also linking their ideal of nationality to a consciousness of color.").

[63] Similar comparisons can also be made to the immigration of diverse Asian peoples in Uganda and the Chinese in Jamaica and Guyana, among other comparisons. MICHAEL BANTON, RACIAL AND ETHNIC COMPETITION 172, 193 (1983) (In Uganda, for example, "Europeans were recruited to fill the managerial posts, Asians as supervisors and Africans as unskilled workers.").

[64] Roger Bastide, *The Development of Race Relations in Brazil*, *in* INDUSTRIALISATION AND RACE RELATIONS: A SYMPOSIUM 9, 10 (Guy Hunter ed., 1965) (explaining that after the abolition of slavery in Brazil, industrial workers "were drawn almost entirely from among the European immigrants—Italians, Germans, Portuguese and Spaniards"); FLORESTAN FERNANDES, THE NEGRO IN BRAZILIAN SOCIETY 73-74 (Jacqueline D. Skiles et al. trans., 1969) ("Higher and intermediary positions were out of reach [for Afro-Brazilians], since only members of the [White] dominant classes and vertically mobile foreigners and Brazilians of foreign descent could compete for them."). Later in the century, large numbers of Asians immigrated to the industrialized south of Brazil and functioned as a middle-tier buffer. BANTON, *supra* note 63, at 187-88.

[65] Bastide, *supra* note 64, at 10-11.

preferred Afro-Brazilians as a subordinate surplus labor source because their existence as a threatened replacement for middle-tier White immigrant workers kept wages down.[66] The Brazilian campaign for European immigrants also functioned as part of its national movement to "whiten" the nation by importing more White residents to dilute the numbers of African and Native peoples.[67] Thus Brazil, like the United States, utilized its immigration policy to preserve a system of White privilege.

It should not be surprising that South Africa also used immigration controls to maintain the hierarchy of apartheid. Once Coloureds began emigrating from South Africa to flee the strictures of apartheid in the 1960s, the South African government encouraged Europeans to immigrate to the country to increase the White population.[68] There was an attempt to have the European immigrants act as a middle-tier buffer class by according the immigrants greater social deference and economic opportunities than Coloured South African citizens.[69] One South African Coloured has reflected:

> They bring these . . . Italians and Greeks here who can't begin to speak any of the languages of the country and treat them equal. I speak English, Afrikaans, Gamtaal, and a little Xhosa and have lived here all my life, and I'm not good enough to ride on the same bus with [them]? Don't talk to me about apartheid being a way to preserve a culture or nationalism. It is a way of preserving the white [man].[70]

What is particularly interesting about the South African context is the manner in which the European immigrant middle-tier model was superimposed upon a preexisting buffer class struc-

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66 *Id.* at 21 ("Until then, the Negro obviously played a basic part in the economic development of Brazil, but only by forming a simple reserve army which weighed on the labour market, and by making possible a policy of low wages, which allowed scanty capital to be invested in factories, instead of being lost in the wages of workers.").

67 *Id.* at 17 ("Indeed, the policy of European immigration in the central and southern States was not just instituted to permit the development of productivity, by substituting contingents of free workers . . . for a mass of slaves [presumed to be] lacking professional training; it was also designed to submerge the descendants of Africans into a more prolific white population, and, in the last analysis, to change the ethnic composition of the population of the country. This, of course, implies the myth of the superiority of the white race."); FERNANDES, *supra* note 66, at 59 (the trend toward lightening the nation's population was particularly evident in Sao Paulo where between 1890 and 1929 2,316,729 European immigrants were brought).

68 JIM HOAGLAND, SOUTH AFRICA: CIVILIZATIONS IN CONFLICT 110 (1972).

69 *Id.*

70 *Id.*

ture of White supremacy. Specifically, the South African apartheid hierarchy of Whites, Indians, Coloureds, and Blacks had historically utilized Indians and Coloureds alternatively as a middle-tier buffer class.[71] Yet when the number of Coloureds in the population dramatically increased and their affluence was perceived as a threat to the social position of South African Whites,[72] the apartheid strictures were more forcefully administered against Coloureds, and European immigrants were brought in as substitutes for displaced Coloureds.[73] Evidently the same White elite fears of having their privilege impinged upon by a large population of non-White "others," which led to Coloureds functioning as a middle-tier buffer in order to preserve South African White privilege, in turn acted as a catalyst for replacing the Coloureds as a middle-tier buffer.[74] Like the United States' transformation of European immigrants into a "White" buffer class, the shift in treatment of the South African Coloureds, from holding favored status to holding disfavored status, demonstrates the cyclical nature of middle-tier buffer constructions in response to elite fears of diminished privilege.[75] The comparison to South Africa shows that the White fear of being overwhelmed by grow-

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[71] Sheila T. Van der Horst, *The Effects of Industrialisation on Race Relations in South Africa*, *in* INDUSTRIALISATION AND RACE RELATIONS: A SYMPOSIUM 122 (Guy Hunter ed., 1965) ("With few exceptions the Europeans comprise the upper income groups; their average income has been estimated to be five times the average Indian income, seven times the Coloured, and ten times the African.").

[72] The rising affluence of the Coloureds was a concern of the South African government. HOAGLAND, *supra* note 68, at 113.

[73] Jim Hoagland explains:

> The 1970 census showed that the Colored population increase was almost double that of the white. Two million colored produced as many babies as four million whites in the last ten years. Projections indicate that by the end of the century there will be as many Coloreds as whites in South Africa, six million each.

HOAGLAND, *supra* note 68, at 118.

[74] VAN DER HORST, *supra* note 71, at 101-08 (Whites feared that but for apartheid their survival as the elite group would be unlikely, given the fact that they comprised, at most, 20% of the population).

[75] This fluid shifting of persons in the buffer class points to a salient characteristic of the middle-tier buffer model—the vulnerability of those positioned as a buffer. The moment the members of the middle-tier pose a threat to the status of the privileged, replacements are sought, and when a crisis of social unrest arises, the middle-tier is positioned as a scapegoat. Bonacich, *supra* note 11, at 589 ("The Indian riots in Durban [South Africa] in 1949, in which Africans attacked Indian stores, homes, and persons, are an illustration."). The urban violence which erupted in Los Angeles after the Rodney King verdict was issued is yet another example of the vulnerability of middle-tier buffer communities. *See* discussion *infra* notes 100-02 and accompanying text.

ing numbers of non-White residents can be a motivating force in the structuring of immigration controls.[76] Even when the United States terminated the official use of the national origins immigration selection method of the 1924 Act, it still maintained a buffer class scheme in its reform of immigration laws.

IV

MAINTAINING THE CYCLICAL USE OF A MIDDLE-TIER WITH THE END OF THE NATIONAL ORIGINS QUOTA SYSTEM: 1965 TO THE PRESENT

With the enactment of the 1965 amendments to the Immigration and Nationality Act,[77] the United States abolished the national origins quota immigration selection system. In its stead, Congress created a family preference system which reserved 74% of admissions for family members of resident U.S. immigrants regardless of their geographic origin.[78] Yet this was not as racially neutral as it appeared on the surface. The family preference system most immediately benefited southern and eastern Europeans who already had a broad base of family members in the United States who could petition the government for family unification.[79] In addition, the family preference system as drafted adversely affected immigrants from Africa and Asia who had low rates of emigration to the United States before the legislation was enacted, and thus had a smaller proportion of persons in the United States who could petition for family reunification.[80]

Just as the formal barrier of the national origins quota system was abolished, the 1965 Act developed other mechanisms to exclude persons of color as immigrants to the United States. Because of congressional concerns about the rapid population growth of immigrants of color from the Western hemisphere, the 1965 Act established a limit[81] on immigration from Mexico,

[76] "The [U.S.] colonies encouraged the immigration of white Europeans and British for a variety of reasons—often to provide labor or alter regional racial composition." Bilder, *supra* note 24, at 773.

[77] Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. §§ 1-1434).

[78] Immigration and Nationality Act, Pub. L. No. 89-236, sec. 3, § 203(a)(1),-(2),-(4),-(5), 79 Stat. 911, 912-13 (1965).

[79] David M. Reimers, *Recent Immigration Policy: An Analysis*, *in* THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 13, 34-35 (Barry R. Chiswick ed., 1982).

[80] *Id.* at 38-42.

[81] 111 CONG. REC. 24,739, 24,776 (1965).

Cuba, Haiti, the Dominican Republic, and the Canal Zone. Western-hemisphere immigrants were also required to meet qualitative requirements and obtain labor certification.[82] This dichotomy in requirements between Western-hemisphere immigrants and most other immigrants suggests that the family preference system as intended was far from the great race equality measure commentators have characterized it to be.[83] In fact, the Act's proponents did not envision a radical welcoming of diverse cultures as a result of the legislation. Policy-makers predicted that the most significant increase in immigration resulting from the Act would be from Greece, Italy and Portugal, whereas they did "not expect that there would be any great influx" from the Asia-Pacific triangle.[84]

Yet the number of immigrants of color did increase for reasons not anticipated by the 1965 Act legislators.[85] Following the enactment of the law, Congress established a transition period of three years. For the first time, this provision permitted unused visas from countries with undersubscribed quotas to be entered into a visa pool which could be tapped on a first-come first-served basis by countries with oversubscribed visa quotas. This flow of additional visas into a visa pool for countries with oversubscribed quotas unintentionally benefitted immigrants of color.[86] After enactment of the legislation, Western Europe be-

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[82] Immigration and Nationality Act, Pub. L. No. 89-236, sec. 8, § 101(a)(27)(A), 79 Stat. 911, 916 (1965).

[83] One commentator suggests that family unification also hinders the entry of immigrants of color in that relatives of permanent resident aliens must enter subject to annual numerical limitations, whereas immediate relatives of U.S. citizens are not subject to numerical limitations. Because a large number of immigrants of color are petitioned for by "resident aliens" and emigrate from countries of high immigration demand, they are adversely affected by the numerical limitations. "As a result, spouses and minor children of some permanent resident aliens enter immediately, while those from countries like Mexico or the Philippines must wait as long as eight years." John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 253 (1988).

[84] *Immigration: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 88th Cong., 2d Sess. 418-19 (1964) (remarks of Attorney General Robert Kennedy).

[85] From 1951 through 1960, 53% of legal immigrants were European. In 1992, the percentage of European immigrants slowed to 18%, while 75% of legal immigrants were from Asia and Latin America. 1992 INS STAT. Y.B. 27-28, table 2.

[86] Charles B. Keely, *The Immigration Act of 1965*, *in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 529, 538 (Hyung-chan Kim ed., 1996) ("The expectation was that applicants from countries of Southern Europe, like Italy and Greece, would use these visas to clear the backlogs built up over many years. Their waiting lists were long. It turned out, however, that the waiting lists contained many

came more economically and politically stable, thereby reducing the incentive for White immigrants to enter the United States.[87] Furthermore, an unintended consequence of the United States' foreign policy of communist containment was the increase in immigrants of color, in that many immigrants of color sought refuge in the United States from communist countries of origin.[88] For example, Cambodians, Laotians, Vietnamese, Cuban, and Nicaraguan immigrants were admitted as political refugees; immigrants from the Dominican Republic entered the United States in large numbers following the U.S. military intervention of the Dominican Republic in 1965 to avoid "another Cuba;" and Korean immigrants were admitted in large numbers after the United States stationed a military presence in South Korea after the Korean War. In short, the United States' foreign policy of communist containment provided a large base of racial minorities in the United States who could petition for reunification with family members.

Furthermore, the United States' own racialized perspective of the nation as one consisting only of White persons skewed its predictions about the effects of the family preference system. The two countries with the largest source of immigrants to the United States after the enactment of the 1965 Act were Mexico and the Philippines. "In both countries, decades of active agricultural labor recruitment by the United States—of Mexicans to the Southwest, and Filipinos to plantations in Hawaii and California—preceded the establishment of chain migrations of family members and eventually of large and self-sustaining migratory social networks."[89] Nor was the United States ever a country of

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applicants who had died or who, for various reasons, had changed their minds. The old backlogs were relatively quickly eliminated and there were still additional visas in the transitional pool.").

[87] Joseph R. Meisenheimer II, *How Do Immigrants Fare in the U.S. Labor Market?*, 115 U.S. DEP'T. OF LAB. MONTHLY LAB. REV. 3, 13-14 (Dec. 1992).

[88] Rubén G. Rumbaut, *Origins and Destinies: Immigration, Race, and Ethnicity in Contemporary America*, *in* ORIGINS AND DESTINIES: IMMIGRATION, RACE, AND ETHNICITY IN AMERICA 21, 30-31 (Silvia Pedraza & Rubén G. Rumbaut eds., 1996).

[89] *Id.* at 28 (these two countries "share the deepest structural linkages with the United States, including a long history of dependency relationships, external intervention, and (in the case of the Philippines) colonization"). Mexico's structural link to the United States was particularly strong given the U.S. federal government's employment of the Bracero Program between 1942 and 1960 which contracted Mexican farm workers as temporary guest workers pursuant to Public Law 45, the Farm Labor Bill of 1943. Larry C. Morgan & Bruce L. Gardner, *Potential for a U.S. Guest-Worker Program in Agriculture: Lessons from the Braceros*, *in* THE GATE-

purely White residents, given the existence of Native Americans before the arrival of the Europeans, the coerced importation of Africans as slaves, the preexisting residence of Mexicans on Mexican land later forcibly claimed as U.S. territories, and the continual migration of diverse peoples throughout time. Thus the privileged class' image of the United States as peopled almost solely by White Nordics was defective,[90] and left the nation unprepared for the cumulative effect of the family preference system—mass arrival of the brown-skinned residents who were considered invisible to the conception of what the nation was.

The settlement of the 1965 Act's new arrivals raised the same cyclical concern regarding the diminished status of Whites in the face of a growing number of racial minorities that had influenced the passage of the 1924 National Origins Act.[91] Rather than welcoming the newest arrivals for full integration into North American society, the membership of middle-tier buffer communities shifted to constrain these immigrants with stratified access to social, political, and economic opportunities.[92]

One example[93] of the ways in which new arrivals had their

WAY: U.S. IMMIGRATION ISSUES AND POLICIES 363-64 (Barry R. Chiswick ed., 1982). *See also* Olivas, *supra* note 60, at 437 (regarding the details of the Bracero program).

[90] Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (immigration law operates under the misconception "that whites were the first to claim North America" by overlooking the fact that "Native Americans and Mexicans occupied vast portions of North America" before the arrival of White colonizers). *See also A Memorial to Jewish Small-Town Immigration*, N.Y. TIMES, July 5, 1997, at 9 (a study of Russian-Jewish immigration to the small New England communities of the United States at the turn of the century "explodes the myth that all of these old New England locations were then populated only by descendants of the Mayflower").

[91] *See supra* notes 39-50 and accompanying text for a discussion of the 1924 Act. The fear of becoming a White minority once the cumulative effect of the new arrivals was discovered is borne out by the enactment of successive legislation to increase the number of European immigrants, and Irish immigrants in particular, such as the diversity visa provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439, and the Immigration And Nationality Act of 1990 § 203(c) (codified as 8 U.S.C. § 1153(c)). *See also* 136 CONG. REC. E3118-03 (1990) (remarks of Rep. Donnelly); *Reform of Legal Immigration: Hearings on H.R. 5115 and S. 2104 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 269, 542 (1988) (statements of Thomas J. Flately and Donald Martin); H.R. CONF. REP. NO. 100-1038 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5558.

[92] Pedraza, *supra* note 19, at 16 (immigrants of color have been provided differential access to "economic, political, and educational institutions").

[93] Other examples include the occasional middle-tier treatment of West Indian Blacks in the African American community and White Cubans in the Latin Ameri-

place in society structured into the middle-tier is the post-1965 treatment of Asian Americans in the United States.[94] The discussion which follows demonstrates that the pervasive "model minority"[95] discourse regarding the many nationalities of persons encompassed by the umbrella term Asian Americans is itself a mechanism for limiting the opportunities afforded to Asian Americans as a racial minority, while at the same time structurally positioning them as a community presumably dissociated from other persons of color.[96] This is because the model minority label accords prestige to some groups of persons of color but not to others, which alienates the groups and prevents them from forming coalitions against racial bias. Simultaneously, racial bias operates to limit the opportunities of the labeled model minorities. Thus, to view Asian Americans as a model minority traps them as a middle-tier buffer regardless of the actual status of individual members of the buffer class.[97]

In order to maintain a hierarchy of privilege, while defusing

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can community among others. *See, e.g.*, THOMAS SOWELL, RACE AND ECONOMICS 96-99 (1975) (immigrant Blacks viewed as outperforming African Americans in the United States); Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COL. HUM. RTS. L. REV. 369, 391-93 (1994). *But see* Roy Simón Bryce-Laporte, *New York City and the New Caribbean Immigration: A Contextual Statement*, *in* CARIBBEAN LIFE IN NEW YORK CITY: SOCIOCULTURAL DIMENSIONS 54, 63 (Constance R. Sutton & Elsa M. Chaney eds., 1987) ("The broader socioeconomic status of the U.S.-Caribbean residents, relative to other American ethnic or immigrant groups has not been clearly established." (citations omitted)).

[94] Asian Americans were not always regarded as a middle-tier buffer, and in fact were subject to great disfavor during much of U.S. history. William R. Tamayo, *Asian Americans and Present U.S. Immigration Policies: A Legacy of Asian Exclusion*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1105 (Hyung-chan Kim ed., 1992). *See generally* Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Alien Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995).

[95] JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS 344 (3d ed. 1989); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1258-65 (1993). *See generally* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

[96] Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1088 (Hyung-chan Kim ed., 1992) ("the notion of the model minority carries an implied racial context of racial stratification").

[97] Bonacich, *supra* note 11, at 588 ("It should be understood that domination by the group [of middle-tier members] as a whole does not mean that there are no poverty-stricken members; often individuals and families do not 'succeed.'").

the potential for coalition building among people of color, Asian Americans have been positioned as a middle-tier buffer. The middle-tier positioning was accomplished by providing Asian Americans with a nominal number of enhanced opportunities for advancement.[98] For instance, in the much discussed dominant positioning of Koreans vis-a-vis African Americans,[99] Koreans have been provided with enhanced access to rental properties, business licenses, and supply of goods—yet have been subject to discrimination when attempting to move into White dominated areas.[100] Such intermediate positioning of Koreans within Black communities permits Whites to use Koreans as a scapegoat for discontent because of their enhanced status in and physical proximity to the Black community.[101] During the Los Angeles riots which followed the Rodney King verdict in 1992, businesses of Korean merchants were subject to arson and looting. Koreans noted that the White media "intentionally focused on Korean-

[98] The Review of Black Political Economy 1988 Study demonstrated that 90 percent of Asian Americans, Latinos, and Whites who already owned businesses were able to obtain commercial loans, while African Americans with identical credentials only had a 66 percent approval rate. Russ Britt & Edmund Sanders, *Business Cultures Blacks Say Lending Bias Stymies Efforts*, L.A. DAILY NEWS, May 10, 1992, at B1. The census reports that in 1992 Black-owned firms comprised only 3.6% of all U.S. firms and contributed 1% to all U.S. sales and receipts, whereas Asian-American owned firms comprised 4.1% of all U.S. firms and contributed 3.1% to all U.S. sales and receipts. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. MB92, 1992 ECONOMIC CENSUS SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES (1996). The rate of mortgage loan denials to African Americans far exceeds that for Asian Americans or Whites. Yi-Hsin Chang, *Mortgage Denial Rate for Blacks in '93 Was Double the Level for Whites, Asians*, WALL ST. J., July 29, 1994, at A2 (the denial rate for conventional loans to African Americans was 34%, while the denial rate for Asian Americans was 14.5%). *But see* Ikemoto, *supra* note 95, at 1586 (comparing the social positioning of African Americans vis-a-vis Asian Americans "assumes that the competition must occur among those forced to stand in line, not between those making the handouts and those subject to those handouts").

[99] *See, e.g.*, BILL ONG HING, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION 130 (1997).

[100] Pyong Gap Min, *The Entrepreneurial Adaptation of Korean Immigrants*, *in* ORIGINS AND DESTINIES: IMMIGRATION, RACE AND ETHNICITY IN AMERICA 302, 309, 313 (Silvia Pedraza & Rubén G. Rumbaut eds., 1996) (Koreans have been provided enhanced business opportunities in Black communities where Whites have no interest in providing services directly—but have been discriminated against for any further advancements).

[101] Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 111 (1993) ("Monopoly capitalists, fearful of the ghetto tax (crime) and of the increasing tensions in ghetto markets, prefer middle merchants, subcontractors, or minority-owned distributors. This hierarchy allows affluent whites and monopoly capitalists to avoid direct confrontation with mass hostility.").

Black conflicts during the riots in order to divert Blacks' economic frustrations onto Korean merchants."[102] This is the same pattern of hierarchical "buffering" which occurred during the Durban, South Africa, riots against Indians in 1949,[103] and during the Watts riots in Los Angeles against Jewish merchants in 1965, where subordinated class members channeled their frustrations about their oppressed status in the form of urban violence against middle-tier class members.[104]

The ways in which the 1965 Act's inadvertent increase in immigrants of color motivated the transformation of Asian Americans from being a subjugated class into a middle-tier buffer demonstrate the fluidity of the middle-tier construct. The parameters of middle-tier buffers are inherently fluid, to serve the purpose of being easily modified to respond to cyclical White fears of becoming a numerical minority with diminished privilege. The cyclical pattern of White fear is characterized by: 1) preferencing White immigrants to maintain or create a numerical majority of Whites; 2) positioning non-White immigrants as a middle-tier to buffer privileged Whites from the discontent of subordinated classes when White immigrants are not available; and 3) decreasing middle-tier advantages and seeking non-White immigrants as a bottom-tier supply of surplus labor, while making renewed appeals for White immigrants when the number of middle-tier class members becomes so large or prosperous that the privileged class begins to view the middle-tier as a threat to its status rather than a shield to protect it. This cyclical pattern is evident in the post-1965 movement to "reform" immigration laws.

The enactment process of the Immigration Reform and Control Act of 1986 ("IRCA")[105] reflected undercurrents of the White fear of becoming a numerical minority,[106] as demonstrated by the following IRCA debate remarks:

> The problem western European immigrants face today is rooted in the most recent immigration reform effort, undertaken in 1965. . . .

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[102] Min, *supra* note 100, at 312.

[103] Bonacich, *supra* note 11, at 589.

[104] Robinson, *supra* note 101, at 21.

[105] 8 U.S.C. § 1101 et seq. (1986).

[106] Lawrence Auster Newsday, *Immigration Gives Birth to Unfree America*, ATLANTA CONST., May 15, 1991, at A13, A14 (that Whites of European ancestry will be a minority in the United States by the year 2050 is a concern because the nation's ability to "preserve and transmit . . . common heritage depends on the continued existence of a majority population that believes in it").

> . . . .
>
> Events of the last 20 years, however, have exacerbated the problem of discrimination, not eliminated it. No one predicted, in 1965, the massive wave of immigration from Asia. . . .
>
> . . . .
>
> As a result of this policy, in effect since 1965, Europeans are being squeezed out of the immigration mix[,] . . . immigrants from countries that have historically contributed to our immigrant stock. . . .[107]

These remarks regarding the "problem" with European immigration were made during the IRCA debates, despite the fact that a large proportion of nonpreference visas had already been reserved for Western Europe.[108] In addition, IRCA's formal method for containing illegal immigration also functioned to maintain the hierarchy of a dominant/middle-tier/subordinant socio-political structure for legal immigrants.

IRCA chose to address the matter of illegal immigration by imposing sanctions on employers who illegally hired, recruited, or employed undocumented workers.[109] Given the concern for the potential exacerbation of discrimination against documented persons who "looked foreign," IRCA also included an anti-dis-

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[107] 132 CONG. REC. H10583-01 (1986) (remarks of Rep. Donnelly).

[108] Five thousand Western European nonpreference visas were reserved in each of the fiscal years 1987 and 1988. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314(a), -(b)(1), 100 Stat. 3359, 3439 (1986) ("[t]he Secretary shall first make such visa numbers available to qualified immigrants who are natives of foreign states the immigration of whose natives to the United States was *adversely* affected by the enactment of Public Law 89-236") (emphasis added). Although the number of immigrants from African countries has always been adversely affected by the enforcement of U.S. immigration laws, their plight did not receive the same consideration as that of the European immigrants who have always been encouraged to immigrate. Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L.J. 237, 242 (1994). The Immigration Act of 1990 (codified at 8 U.S.C. § 1153) continued this preferencing of White immigrants by reserving 16,000 of 40,000 visas for natives of Ireland alone, under the guise of reserving visas for "diversity" reasons. The diversity visa program reserves visas for immigrants from low admission countries of Western Europe while excluding low admission countries of India, Korea, China, the Philippines, and Taiwan from participating. Tamayo, *supra* note 94, at 1121 ("the diversity provisions essentially cater [to] prejudices that hold that there are 'too many Asians and Latinos' despite what the population statistics say").

[109] The discourse which surrounded the enactment of IRCA focused upon the matter of border crossers from Mexico and Central America although fifty percent of illegal immigration stems from affluent Europeans who enter the country legally and choose to overstay their visas. Alfred Del Rey, Jr., Address at St. John's University School of Law (Oct. 2, 1996) (conference entitled *The Recent Immigration Policy and Recent Developments in Congress*).

crimination provision which placed civil penalties on employers using discriminatory employment practices based on national origin or citizenship.[110] Yet this saving measure was faulty by design. When the U.S. General Accounting Office ("GAO") conducted a legally mandated evaluation of the employer sanctions provision, it found implementation of IRCA directly resulted in a pattern of widespread discrimination against persons perceived as alien because of their subordinated ethnicity.[111] IRCA also discourages redress for such discrimination by requiring a plaintiff to show a discriminatory intent on the part of the employer, in addition to providing evidence of the actual discrimination.[112] This legal standard dilutes the effectiveness of the anti-discrimination provision in that it "provides less protection to victims of discrimination because it places a heavier burden on the plaintiff, thus reducing the likelihood of successful litigation."[113] The effectiveness of IRCA's anti-discrimination principle was further diminished by the congressional delegation of enforcement of the anti-discrimination provision to the INS — an agency which "[h]istorically . . . had little or no experience in regulating businesses or employer hiring or firing practices."[114] Consequently, the GAO study found a causal link between employers' fear of receiving sanctions for employing undocumented workers and their consequent discrimination against employees and job applicants whose race, ethnicity, or English language skills were deemed to be foreign by employers.[115] Although IRCA provided for a possible repeal of the employer sanctions provision if GAO found a pattern of widespread discrimina-

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110 8 U.S.C. § 1324b(a)(1) (1994).

111 U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38 (1990) [hereinafter "GAO Report"]. *See also* Sarah M. Kendall, Comment, *America's Minorities are Shown the "Back Door" . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act*, 18 HOUS. J. INT'L L. 899, 933 (1996) (arguing that "discrimination is now entrenched within the system"). Furthermore, such discrimination was foreseeable given the discriminatory treatment meted out to resident aliens and U.S. citizens of Mexican ancestry during "Operation Wetback." LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE 124, 248 (1990) (in 1954 the U.S. government instituted the "Operation Wetback" movement of forced repatriation of undocumented and legally contracted Bracero temporary agricultural workers).

112 8 U.S.C. § 1324b(d)(2),-(g)(2)(A) (1994).

113 Kendall, *supra* note 111, at 908.

114 *Id.* at 917.

115 GAO Report, *supra* note 111, at 38 n.2.

tion,[116] Congress took no action after GAO issued its indictment against the discriminatory effect of the employer sanctions provision.

The benefit of maintaining an ineffective anti-discrimination immigration policy is the marginalization of the surplus labor supply.[117] IRCA essentially authorizes employers to use the possible denial of employment because of employer concerns with violating the law as a mechanism for keeping all wages down and discouraging employees from making demands for appropriate working conditions. Specifically, IRCA places undocumented persons of color (more likely to be considered foreign than White immigrants who "look American") and documented workers of color (who are also considered to "look foreign") in the precarious position of having to feel thankful for employment at lower wages and sometimes unsafe conditions—thankful because they easily could be turned down for employment because they look foreign and have no effective recourse for such discrimination.[118] In addition, low income Whites are provided with a scapegoat for their economic and social discontent.[119]

In short, IRCA uses an ineffective anti-discrimination provision to maintain the existence of a large marginalized population as a bottom-tier supply of surplus labor. At the same time, IRCA allows recruitment of more Whites by reserving for them large numbers of nonpreference visas, and leaves fixed the status of an Asian-American middle-tier buffer. Therefore, IRCA functions to shield the privileged from challenge to their systemic

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[116] *See* 8 U.S.C. § 1324b(K)(2)(A)(i) (1994).

[117] Rachel F. Moran, *Foreword-Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 19 (1995) ("In contrast to the traditional immigration story, these Latino workers do not find entering the United States an experience of empowerment and self-actualization. . . . They are economically marginal, socially unacknowledged, and politically excluded.").

A group which can be kept socially and politically marginal is the ideal source of surplus labor. CALAVITA, *supra* note 35, at 137; *cf.* Garcia, *supra* note 90, at 137 ("The ability to deny nonwhites full social participation can be conceptualized as a form of white entitlement. Put another way, many whites assume that they are entitled to nonwhite labor on their terms, and able to deny these same laborers the rights of full participation in society.").

[118] Olivas, *supra* note 60, at 436 ("Most crucial to the agricultural growers was the need for a reserve labor pool of workers who could be imported for their work, displaced when not needed, and kept in subordinate status so they could not afford to organize collectively or protest their conditions.").

[119] DU BOIS, BLACK RECONSTRUCTION IN AMERICA, *supra* note 63.

entitlements.[120] This works because the tripartite racial hierarchy fosters dissension among subordinated group members concerned with their status vis-a-vis one another. The imposed economic competition among subordinated groups deflects their attention from the system of privilege and thereby hinders the formation of coalitions to combat privilege.

A survey of the most recent immigration reform efforts demonstrates the desire for increased marginalization of people of color as a bottom-tier surplus labor supply to preserve this tripartite racial hierarchy. The following overview of the 1996 immigration legislation is necessarily concise given its recent enactment. Each of the racialized aspects of the 1996 legislation noted herein is worthy of its own scholarly investigation. The scope of this Essay only permits me to briefly note the racial implications of the legislation.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[121] has been touted as being part of welfare reform in general with respect to its limitations on participation in any means-tested public benefits program.[122] Yet one of the Act's more pernicious aspects is its prohibition on adjustment of immigration status for those undocumented persons who were *em-*

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[120] IRCA "has also played a major role in inducing the growth of subcontracting. Many companies that once employed immigrant workers directly are not willing to continue doing so because of possible legal repercussions; instead, they use subcontractors." Christian Zlolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305, 2321 (1994) (subcontracting has led to the expansion of an informal labor market where immigrants are employed under poor working conditions).

Summing up, Zlolniski notes that:

> [a]s the result of the restructuring process, janitorial work is an occupation for recent immigrant workers who can be easily replaced in order to keep labor costs down. Consequently, minority (e.g. Chicano) and immigrant workers who had been living and working in the United States for a long time have been largely replaced by a new cohort of recent Mexican immigrants, many of whom are undocumented. The latter, because of their vulnerable legal position, can be easily exploited by their employers, thus facilitating the high-turnover strategy.

Id. at 2315 (footnote omitted).

[121] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Title I, §§ 101-34, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 42 U.S.C.).

[122] *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 503, 504, 571, 110 Stat. 3009-671, -672, -684 (1996) (§ 503: ineligibility of aliens not lawfully present for social security benefits; § 504: procedures for requiring proof of citizenship for federal public benefits; § 571: limitation on use of assisted housing).

ployed while unauthorized.[123] Thus, even though the Act purports to concern itself with the self-proclaimed problem of nondocumented persons accessing welfare benefits, it also sanctions employed undocumented persons. The bar against ever altering the immigration status of the very same persons employers seek to hire effectively treats such residents as guest workers permanently excluded from political participation, thereby positioning them as a perpetual bottom-tier class.[124]

The Act also makes it a criminal penalty for undocumented persons to vote in a federal election.[125] Extending the sanction of criminal law to undocumented persons who feel vested enough in this country to want to vote is more than symbolic of the sentiment that immigrants perceived as problematic should in no way consider themselves part of the United States. The recurring theme of subordinated status as fixed is also made clear by the Act's provisions which allow for state prohibition of drivers licenses for undocumented persons,[126] and which deny eligibility for post-secondary educational benefits on the basis of residence within a state[127]—both of which announce that unwanted un-

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[123] 8 U.S.C.A. § 1255(c)(8) (West Supp. 1998) ("any alien who was employed while the alien was an unauthorized alien").

[124] WALZER, *supra* note 60, at 61 ("No democratic state can tolerate the establishment of a fixed status between citizens and foreigner (though there can be stages in the transition from one of these political identities to the other). Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what the authority does . . . . [The alternative is a form of] tyranny.").

[125] 18 U.S.C.A. § 611 (West Supp. 1998) (proscribing, with some exceptions, any alien from voting in federal elections). The Act also makes such unlawful voting a ground for exclusion and deportation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 347, 110 Stat. 3009-638 (1996).

[126] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 502, 110 Stat. 3009-671 (1996) (all states are permitted to conduct a pilot program in which they deny a drivers license to undocumented persons; the Attorney General shall submit a report in three years regarding the results of the pilot programs).

[127] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009-672 (1996). *See also* 42 U.S.C.A. § 1320b-7(d)(5)(A) (West Supp. 1997).

The inspiration for this provision emanated from California Proposition 187, approved on Nov. 8, 1994. Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627, 1633 (1997) ("California moved quickly to achieve its objectives in Congress. It apparently succeeded; with the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), the state was able to, in effect, federalize its preferences where those preferences could not be actuated at the state level."). CAL. EDUC. CODE § 66010.8 (West Supp. 1997) provides for the exclusion of undocumented persons from public post-secondary educational institu-

documented persons should not try to improve their station beyond that of bottom-tier surplus labor by increasing their mobility or educational level. The Act's denial of benefits from unemployment[128] and social security[129] programs (to which undocumented persons have often contributed while working in the United States) also sends a message of marginalization.[130]

The 1996 Act also includes provisions that reflect White immigrant bias in their divergent treatment of White versus non-White immigrants. For example, Cubans who arrive in the United States by airborne transport (and are primarily White[131]) are not subject to summary exclusion,[132] unlike Afro-Cuban immigrants who arrive by boat, raft, and other non-airborne transport. Yet another example of racially varied treatment of immigrants is observed in the fact that unlike similarly situated immigrants of color, Polish immigrants who were not successful in having their immigration status adjusted in 1995 after being

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tions. CAL. EDUC. CODE § 48215 (West Supp. 1997) excludes the children of undocumented persons from public elementary and secondary schools. CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1997) excludes illegal aliens from publicly funded health care except from emergency medical care required by federal law. Thus California was interested in not only maintaining the subordination of its undocumented work-force but their children as well.

One commentator convincingly posits that Proposition 187 was "an attempt to save [California's] racial identity from becoming increasingly nonwhite." Garcia, *supra* note 90, at 119. It is perhaps the extremity of Prop. 187's measures that contributed to the injunction against its implementation. The federal court found it to be an impermissible state scheme to usurp federal authority over immigration matters. *See* League of United Latin American Citizens v. Wilson, No. 94-7569MRP, 1998 U.S. Dist. LEXIS 3372, at *1 (D.C. Cal. Mar. 13, 1998).

128 42 U.S.C.A. § 402(y) (West Supp. 1997) (providing that "no monthly benefit . . . shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States").

129 *See* 8 U.S.C.A. § 1624(a) (West Supp. 1998) (authorizing states to "prohibit or otherwise limit or restrict the eligibility of aliens . . . for programs of general cash public assistance furnished under the law of the State").

130 Proposition 187 supporter Governor Pete Wilson proposed a large scale guest-worker program for Mexican agricultural laborers in California when the Proposition was enacted. Ronald Brownstein, *Wilson Proposes U.S. Version of Prop. 187*, L.A. TIMES, Nov. 19, 1994, at A1.

131 Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, *in* ORIGINS AND DESTINIES: IMMIGRATION, RACE AND ETHNICITY IN AMERICA 263, 270-75 (Silvia Pedraza & Rubén G. Rumbaut eds., 1996) (noting recent phenomenon of Cuban migrants reverting to desperate means of boat rafts primarily used by Black Cubans).

132 The American Immigration Lawyers Association has noted that implementation of 8 U.S.C.A. § 1225 (West Supp. 1998) would not subject Cubans arriving by airborne transport to summary exclusion. American Immigration Lawyers Association, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Section-by-Section Summary*, at Title III, § 302, in *Interpreter Releases* (Oct. 7, 1996).

selected to receive a visa are again eligible for the 1997 Diversity Visa Lottery.[133]

A more subtle, though no less racially charged provision of the Act makes female circumcision ("FC") a crime punishable by five years in prison.[134] The criminalization of FC selectively targets immigrants from certain African countries[135] where FC is practiced for culturally-based reasons.[136] In addition to the severity of criminalizing a cultural custom for which greater public debate is needed, the criminalization also adversely affects both male and female African immigrants given its intersection with the Antiterrorism and Effective Death Penalty Act of 1996.[137] The Antiterrorism Act expands the criteria for deportation from the grave category of crimes of moral turpitude to the more expansive category of crimes for which a sentence of one year or longer may be imposed, thereby encompassing the custom of FC.[138] Finally, the 1996 Act's limitation on class action litigation[139] can also be viewed as a provision rooted in White immi-

133 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 637, 110 Stat. 3009-704 (1996).

134 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 645, 110 Stat. 3009-708 (1996). *Cf.* 8 U.S.C.A. § 1374 (a)(1)-(2) (West Supp. 1997) (providing information may be made available regarding harm and potential legal consequences of performing female circumcision or allowing children to be subjected to female circumcision).

135 *All Things Considered: Seattle Doctors Consider Modified Female Circumcision*, National Public Radio Broadcast, Transcript No. 2369-7, Oct. 17, 1996 (most persons who practice female circumcision, a 6,000 year old procedure, live in East African countries); Kristin Louise Savell, *Wrestling With Contradictions: Human Rights and Traditional Practices Affecting Women*, 41 McGILL L.J. 781, 788 n.25 (1996) (citing EFUA DORKENOO & SCILLA ELWORTHY, FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 11 (1992)) ("[t]he countries where one or more forms of [female circumcision] are practised number more than 20 in Africa" along with Muslim populations in Asia and the Middle East).

136 Although there is presently a debate in the United States regarding the morality and harm of FC, it is occurring within a context which undervalues its cultural meaning to the African women who practice it. Hope Lewis, *Between* Irua *and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995). In fact, there are a number of African women who promote the eradication of FC, but do not condone the criminalization of the act. *Id.*

137 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

138 8 U.S.C.A. § 1227(a)(2)(A)(i)(II) (West Supp. 1998). The Act also provides that any final order of deportation against "an alien who is deportable by reason of having committed a criminal offense . . . shall not be subject to review by any court"—thereby barring any effective mechanism for challenging the classification of FC as a basis for deportation. 8 U.S.C.A. § 1105a(10) (West Supp. 1998).

139 8 U.S.C.A. § 1255a(f)(4) (West Supp. 1998) (limiting judicial review of a denial

grant bias, in that the provision seeks to avoid the kinds of lawsuits which disempowered immigrants from subordinated groups have successfully used to attack discriminatory immigration policies in the past.[140]

CONCLUSION

This examination of the construction of middle-tier buffers demonstrates that immigration law functions not only as a mechanism for defining our nation's borders, but also to set and reset fluid racial boundaries[141] for the purpose of preserving racial hierarchy. The members of the middle-tier may shift, but the buffer structure remains to preserve White privilege. Through the model of the cyclical middle-tier buffer, the current restrictions on immigration can be recognized as a reaction to the "browning"[142] of North America as opposed to uniform limitations on all immigration. The current resurgence of nativism[143] is not an objection to all foreigners, just foreigners of color.[144]

The primary lesson to be learned from the long history of middle-tier formations is that middle-tier formations are artificial obstacles that pit the oppressed against one another[145] and prevent

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to reverse deportation orders to only those persons who filed an application for adjustment of status within the specified time period, and whose application was actually refused by an INS officer).

140 For instance, Haitians who as a group were wrongfully refused entry, utilized class action litigation to address the racial bias which informed the refusal to admit them to the United States. *See generally* Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994).

141 *See generally* 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) (explaining the fluidity of racial categories despite their concrete social meanings); THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL (1994) (discussing the transformation of English, Scottish, Irish, and other European colonists from their various statuses as servants, tenants, planters, or merchants into a single all-inclusive status of White).

142 Itaberi Njeri, *Beyond the Melting Pot: In America, Blending In Was Once The Ideal But Since Society Has Grown More Diverse Some Say We Must Learn to Respect Our Differences*, L.A. TIMES, Jan. 13, 1991, at E1 (noting that demographic shifts have been labeled by some as the "browning of America").

143 *See* Rosenthal, *supra* note 1.

144 HIGHAM, *supra* note 9, at 9-11 (noting that racial nativism springs from the Anglo-Saxon traditional desire for continued dominance).

145 Kevin Johnson states:

> This sort of stratification obviously differs from the two dimensional Black/White hegemony. It creates tension and conflict between people of color. While White society is at the pinnacle of the hierarchy, different minority

successful coordination of solidarity movements.[146] Immigrants are useful tools in the construction of middle-tier buffers in that their status as strangers to the United States diminishes any fixed expectation about their place in the new society.[147] Yet it is the recognition of such positioning by immigrants and citizens of color which is vital to dismantling racial hierarchy in the United States.[148] An example of effective coalition building which transcended the middle-tier buffer structure is the unification of Coloureds with Blacks in South Africa in order to overturn apartheid.[149] Once Coloureds rejected the hierarchy which had used them as a middle-tier buffer, and Blacks surmounted their alienation from Coloureds who had been positioned as dominant to them,[150] the two communities were able to work together towards the dismantling of apartheid. Only when the disaffected members[151] of this country acknowledge the existence of middle-tier structures and work towards transcending them will they

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groups are left to fight for the remaining piece of the pie. Inter-ethnic conflict, which distracts people of color from the true cause of their problems, is one result.

Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 165 (1996) (book review) (citations omitted). It is this divisive function of the middle-tier buffer which informs the concern raised about the proposal for a "multiracial" race category on the decennial census for mixed-race persons. *See generally* Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998).

146 W.E. BURGHARDT DU BOIS, DUSK OF DAWN 117 (Transaction Books 1984) (1940) ("the real essence of this kinship is its social heritage of slavery; the discrimination and insult; and this heritage binds together not simply the children of Africa, but extends through yellow Asia and into the South Seas").

147 Bonacich, *supra* note 11, at 585-87.

148 Norimitsu Onishi, *Harlem's Japanese Sister: Immigrants' Daughter Who Embraced Malcolm X Keeps a Radical Flame Alive*, N.Y. TIMES, Sept. 22, 1996, at 41, 47 (Yuri Kochiyama, a long time supporter of Malcolm X, now warns Asian Americans against falling "for honorary white status, which would effectively dissect one minority group from another.").

149 Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 827 (1995) (in solidarity against white supremacy, persons classified as Coloured began to identify themselves as "black"). *See generally* ROBERT FATTON, JR., BLACK CONSCIOUSNESS IN SOUTH AFRICA (1986) (the inclusion of Coloureds within the "black" identity was instrumental in the success of the Black Consciousness movement).

150 *Cf.* Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1091 (1996) (even subordinated communities such as African Americans have exhibited nativistic tendencies against immigrants who they view as displacing them).

151 White people can also be disaffected by their socio-economic status while at the same time benefit from their claim to whiteness. *Cf.* RICHARD DELGADO, THE

start to confront White privilege in immigration law and elsewhere.[152]

COMING RACE WAR? 32 (1996) ("Whiteness is a social construct, basically a readiness to accept many privileges that come to you if you look a certain way.").

[152] HARLON L. DALTON, RACIAL HEALING 210 (1995) ("We cannot in good conscience insist that White folk take up the cause of racial justice if we are not equally willing to struggle with the issues of pecking order and bias among ourselves.").