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Strange Neighbors

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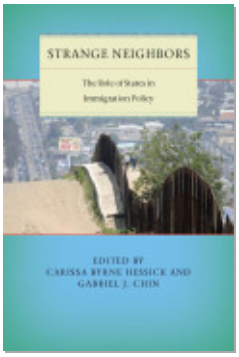

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Post-Racial Proxy Battles over Immigration

MARY FAN

Introduction

Amid economic and political turmoil, anti-immigrant legislation has flared again among a handful of fiercely determined states.[1] To justify the intrusion into national immigration enforcement, the dissident states invoke imagery of invading hordes of "illegals"[2]—though the unauthorized population actually fell by nearly two-thirds, decreasing by about a million people, between 2007 and 2009 as the recession reduced the lure of jobs.[3]

Arizona's Senate Bill 1070—recently invalidated in part by the U.S. Supreme Court in *Arizona v. United States*[4]—led the charge.[5] By pre-election-year summer 2011, several states enacted laws patterned after Arizona's controversial Senate Bill 1070, including Alabama's even more aggressive HB 56.[6] A host of lawsuits are pending against the new laws,[7] which are at least partially invalid after *Arizona v. United States*. Other controversial proposals circulate, such as eliminating birthright citizenship or branding the birth certificates of alleged "anchor babies" implanted in the United States by foreigners.[8]

This chapter examines how the spurt of state legislation is a proxy way to vent resurgent racialized anxieties and engage in friend-enemy politics founded on conflict with the "Other"—the foreign enemy within—in a time of economic and political turmoil. Despite the

ostensibly a-racial construct of the illegal alien used to legitimize the lashing out, it is suffused with racialized perception.[9] Current tactics parallel the overtly racialized hostility of past episodes of states enacting out anti-immigrant legislation. The oft-raised concern in such a fiercely polarized time is racial discrimination. Antidiscrimination law, however, does not offer the remedy for this concern.

The chapter explores alternate frames for rendering antidiscrimination commitments legally legible. Rather than striking dissident state immigration legislation because of the interests of "them"—the marginalized people most impacted by the laws—invalidation is grounded in shared interests and constitutional commitments. Convergent interests include the constitutionally designed balance of federal power on issues requiring coordinated rather than conflicting approaches. Such an approach mitigates polarization by making convergent interests, rather than racial divergence, salient. Hearteningly, recent landmark decisions, including *Arizona v. United States*, do not ignore antidiscrimination values. Rather, the decisions illuminate the shared interests impacted by discrimination concerns, such as impairment of foreign relations and commerce. This chapter analyzes the way antidiscrimination values inform preemption analyses used to invalidate encroaching state immigration laws fueled by fear and loathing.

Part 1 analyzes two hot-button forms of resurgent state and local anti-"alien" laws of our times—laws patterned on the Arizona template and the anti–birthright citizenship movement. It explores the dominance of racialized anxieties behind the seemingly race-neutral construct of the vilified alien. Part 2 contrasts the friend-enemy politics and legislation of our contemporary scene with the state and local legislation and furor against the Chinese during the turbulent politics of the last quarter of the nineteenth century. Part 3 examines the polarization-ameliorating bases for decisions to cut back on overreaching state and local laws in order to make shared interests, rather than racial difference, salient while protecting underlying antidiscrimination values. The approach helps build bridges between dissonant worldviews to navigate the profoundly polarized politics and legislation of our times.

I. The Resurgence of Aggressive State Anti-"Alien" Laws

Two of the most aggressive and controversial forms of state and local anti-immigrant legislation include (1) the "attrition-through-enforcement"-type laws patterned after Arizona Senate Bill 1070 that aim to drive out perceived aliens by creating a hostile environment through a multifront attack and (2) and the anti–birthright citizenship movement aimed against U.S.-born children of aliens.

A. The "Attrition-through-Enforcement" Attack Strategy

The strategy behind the "attrition through enforcement" approach is to create an atmosphere of fear that drives undocumented people to "self-deport." As the bill's cosponsor, Arizona State Representative John Kavanagh, explained, "it's about creating so much fear they will leave on their own."[10] The details of the laws vary somewhat, but they share a similar strategy of creating a totalizing atmosphere of hostility through a multipronged attack.

For example, Arizona's template law directs police to check immigration status during mundane traffic and other temporary stops if there is a "reasonable suspicion" of unlawful status.[11] Though it generally is not a crime for a removable alien to remain in the United States, the legislation also authorizes police to arrest people without warrant based on probable cause of removability due to commission of a public offense.[12] Reaching into private interactions, some of the new laws also criminalize such mundane but vital activities as job seeking by aliens, giving a ride or renting to a suspected undocumented person, or leaving home without carrying alien registration documents.[13]

To take Alabama's particularly aggressive example, the state's controversial House Bill 56 criminalized, among other things, transporting someone or entering into a rental agreement in "reckless disregard[]" of a person's undocumented status.[14] The controversial rental provision was later legislatively deleted in May 2012.[15] Plainly, the criminalization of such mundane things as giving rides or renting—without even requiring knowledge of undocumented status—chills interaction with people who might be undocumented. Alabama's legislation even

reaches into the schoolhouse, requiring school officials to determine the immigration status of children.[16]

The laws press public officials and private actors—willing or not—into creating an atmosphere of surveillance and suspicion.[17] In the process, the laws upend previous policies aimed at building community trust.[18] To prevent the problem of crime victims fearing to turn to police or to bear witness, many police agencies have assured immigrant communities that they are not immigration-law enforcers.[19] Upending the wisdom built on experience, the new breed of laws bars police from nonparticipation in federal immigration enforcement.[20] Arizona's template law also authorizes warrantless arrests of persons the officer believes has committed "any public offense that makes the person removable from the United States."[21] The Arizona law also requires that law enforcement officers in any lawful stop, detention, or arrest attempt to determine immigration status if "reasonable suspicion exists that the person is an alien who is unlawfully present" unless "the determination may hinder or obstruct an investigation."[22]

As originally enacted, the law provided that officers "may not *solely* consider race, color or national origin,"[23] apparently taking advantage of the Supreme Court's 1975 decision in *United States v. Brignoni-Ponce* providing that race can be a relevant—albeit not sole—factor in establishing reasonable suspicion of alienage.[24] *Brignoni-Ponce* held that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[25]

In response to the firestorm of controversy, the Arizona legislature amended Senate Bill 1070 to delete the adjective "solely."[26] As amended, the law provides that officials may not consider race, color, or national origin "except to the extent permitted by the United States or Arizona Constitution"[27]—which under *Brignoni-Ponce* means what the law said before: that race can be a relevant but not a sole factor.[28] The amendment gave Arizona some cover, however, in the ensuing political and legal battles. Indeed, the district court of Arizona apparently missed the wiggle clause and analyzed the law as if it barred consideration of race, color, or national origin.[29] The states claim that their legislation avoids impermissibly intruding on the federal power over foreign affairs,[30]

foreign commerce,[31] and nationality rules[32] because they merely mirror and enforce federal standards.[33] A host of other provisions in the Arizona law were constructed as mirror images—in some instances imperfectly so—of federal immigration crimes in an attempt to further thrust Arizona into immigration law and policy.[34] The state law criminalizes failing to carry alien registration documents, transporting aliens, inducing aliens to enter Arizona, and employing illegal aliens, among other actions.[35] The act also goes further than federal law in criminalizing the actions of applying for work, soliciting work, or performing work by an undocumented person.[36]

Arizona's template for the new breed of state laws was fueled by incendiary politics painting Arizona as a state under siege. Bill sponsor Senator Pearce explained that his impetus was to stem the flood of Mexicans, proclaiming, "We have been overrun. . . . [M]illions more will come behind them, and we will be overrun to the point that there will no longer be a United States of America. . . . How long will it be before we will be just like Mexico?"[37] Arizona governor Jan Brewer proclaimed, "We cannot afford all this illegal immigration and everything that comes with it, everything from the crime and [sic] to the drugs and the kidnappings and the extortion and the beheadings and the fact that people can't feel safe in their community."[38] The president of the Arizona Sheriff's Association, Paul Babeu, also helped sound the crime and immigration alarm, telling FOX News that criminal "illegals" were to blame for Arizona having "the highest crime rates in America."[39]

In reality, Arizona is experiencing as much of a decline in crime as the national average, if not more.[40] Figures 8.1 and 8.2 plot crime rate data from the FBI's Uniform Crime Reports for Arizona compared to the nation as a whole. As depicted, Arizona's crime rate, like that of the nation overall, has been falling dramatically in recent years. Indeed, in 2009, Arizona enjoyed a lower violent crime rate than the nation overall. And while the curve for Arizona's property crime rate has been higher than the national average, by 2009, the gap was narrowing because Arizona has experienced a steeper decline in property crimes than the national average.

Indeed, sociologists have argued that rather than aggravating crime, immigrants have a "protective" effect against crime. The protective effect stems from such factors as immigrants diluting violent street culture

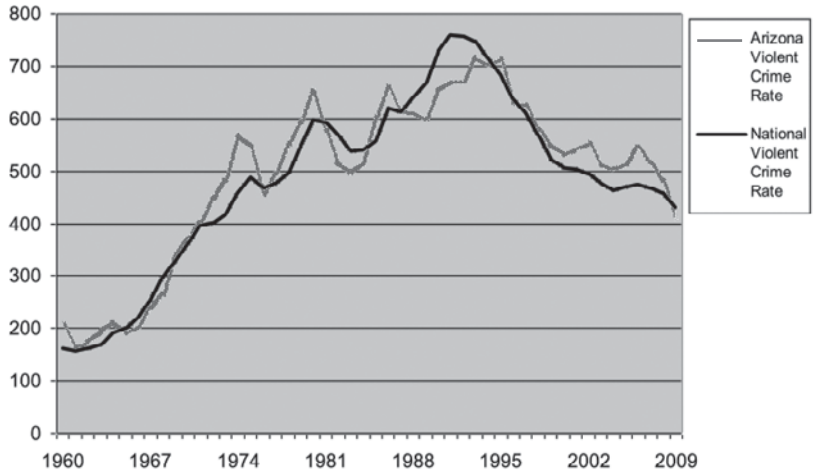

Figure 8.1. Arizona vrs. national violent crime rate per 100,000 of the poplulation.

with new norms: downplaying violence as the appropriate response to perceived slights, emphasizing strong family and ethnic ties, and revitalizing abandoned or malaised neighborhoods.[41] A new study using pooled time-series cross-sectional data found that cities with the greatest declines in homicides and robberies had the largest influx of immigrants.[42] But perception—and social cascades of misperception spurred by opinion leaders—are what count in politics. And the immigration-crime paradigm helped spur passage of Arizona Senate Bill 1070.

The Arizona attrition attack strategy is not the first of recent state legislation attempting to intervene in regulating immigrant life. During another intense anti-immigrant political broil, for example, Arizona enacted the Legal Arizona Workers Act of 2007.[43] The law makes it a state-law offense to "knowingly" or "intentionally" employ "an unauthorized alien," defined so as to incorporate the federal-law definition of illegal status.[44] The law also mandates that employers verify the employment eligibility of new hires using the E-Verify system,[45] though under federal law, E-Verify is only a voluntary-use pilot program, in part because of concerns about the risk of error and resultant discrimination. The mandates are backed by penalties centered on licensing revocation, relying on a savings clause for "licensing and similar laws" in the

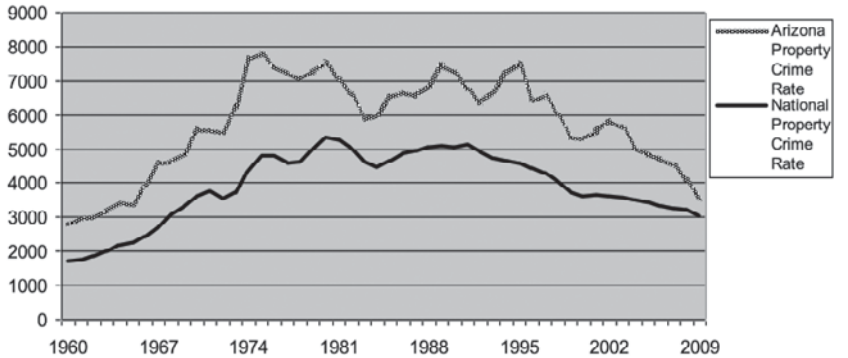

Figure 8.2. Arizona vrs. national property crime rate per 100,000 of the poplulation.

express preemption provision of the federal Immigration Reform and Control Act (IRCA). The Supreme Court ruled that the law was valid under the licensing savings clause, noting that the law was confined to licensing of in-state businesses, not an area of traditional federal dominance.[46]

The distinguishing aspect of the new breed of laws, however, is the multifront attack with the aim of "attrition" —interfering in the admission and expulsion of suspected aliens—by rendering suspected foreigners into an untouchable caste.[47] Because of the prevalence of race, language, and culture-based heuristics for outsider alienage—cognitive rules of thumb that may generate persistent biases—the laws sweep overbroadly to impact people perceived as foreign, even if lawfully present. Concern over the impact on people perceived as foreign has roused protest not only within the United States but also abroad, interfering with diplomatic relations.[48]

Decades ago, the Supreme Court explained that in enacting a uniform national immigration system, Congress manifested the purpose of leaving the law-abiding "free from the possibility of inquisitorial practices and police surveillance. . . ."[49] The new breed of laws aggressively transgresses this approach in aiming for an atmosphere of fear and hostility that impacts not only those who are unlawfully present but also those who are suspected to be so because of race, culture, and language.

B. The Attack on U.S.-Born Children of Noncitizen Parents

Another movement afoot is the attack on U.S.-born children of alien parents. Proponents would overrule longstanding Supreme Court precedent and rewrite the Constitution to deny citizenship to native-born people whose parents are noncitizens.[50] The movement capitalizes on anti–illegal alien hostility to claim a righteous struggle against the sinister, sneaking "anchor baby" and the alleged incentive to enter the United States illegally in order to gain birthright citizenship for the baby.[51] But behind the anti–"illegal alien invasion" banner, the movement has an even more aggressive aim.

Proponents argue that even native U.S.-born children of many lawfully present noncitizens should not be birthright citizens.[52] Legislative proposals aim to exclude children of parents lawfully present on temporary visas.[53] Most broadly, theorists trying to justify the attack suggest that children of foreign nationals in general, lawfully present or not, are ineligible for birthright citizenship.[54] Proponents would exclude from the purview of the Fourteenth Amendment's Citizenship Clause, for example, first-generation Americans, such as this writer, born of people who lawfully immigrated to America to attend school or lawfully reside in America on work visas. The scope of the attack shows the enduring wisdom behind Martin Niemöller's poem that begins, "First they came for the [vilified group] and I did not speak out / Because I was not a [member of the vilified group]." The poem ends, "Then they came for me—and there was no one left to speak for me."

To achieve their aim, proponents strain constitutional text and seek to overrule Framer intent, longstanding precedent, and the progress of American history and antidiscrimination values. Forged in the post–Civil War era of progress in humanity and equality values, Section 1 of the Fourteenth Amendment provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[55] Automatic citizenship for U.S.-born people bound the nation to the mast against the demons of racial loathing and caste carving that resulted in decisions such as *Dred Scott v. Sandford*, ruling that descendants of African slaves, even if emancipated, cannot be citizens.[56]

The criterion that U.S.-born people must be "subject to the jurisdiction" of the United States is a narrow exception to birthright citizenship for the children of foreign ambassadors, hostile enemies in occupation, and Native Americans of sovereign tribes not taxed. The scope of the restrictive clause was settled by the Supreme Court's decision in *United States v. Wong Kim Ark* in 1868.[57] The Court ruled that a Chinese American born in the United States to legal permanent resident parents was a U.S. citizen within the meaning of the Fourteenth Amendment.[58]

Wong Kim Ark linked the interests of first-generation Chinese with those of first-generation Europeans in explaining its interpretation of the Citizenship Clause. The Court reasoned, "To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States."[59] The Court concluded that whatever the animosities that led the political branches to exclude Chinese, the judiciary branch must "give full effect to the peremptory and explicit language" of the Fourteenth Amendment.[60]

Latter-day revisionists argue that the notion of citizenship flowing from birth within the dominion (*jus soli*) is a feudal notion that clashes with American values. They argue for citizenship based on consent of the subject and of the nation. While they claim that this is a progressive vision, it is in actuality a cruelly regressive attempt to unbind ourselves from the mast of interests joined across racial lines that has weathered the shifting racial animosities of the day. Community consent to belonging is influenced strongly by race. Without the automaticity of place of birth as a unifying force of belonging, there is a danger that racial fear and loathing would split the nation.

Campaigners against U.S.-born children of noncitizens are also wrong in oversimplifying the choice as between a supposed outmoded feudal concept and the purported progressive notion of consent. The heritage and purpose of American birthright citizenship is not the feudal tradition of the past but rather the realization that leaving citizenship to the vagaries of racial animosities would lose the progress hard won in the Civil War that ravaged the nation.

II. Friend-Enemy Politics

In another society under strain, riven by economic woes and fierce doubt, Carl Schmitt argued that the fundamental distinction on which political life rests is that of friend and enemy.[61] The enemy is "the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case, conflicts with him are possible."[62] As for the friend side of the equation, the "us" in a democratic polity, Schmitt argued that homogeneity was crucial and necessitated—"if the need arises—elimination or eradication of heterogeneity."[63] He cited as examples the expulsion of the Greeks from Turkey and the prevalence of national laws, such as those of Australia at the time, restricting immigrants to the "right type of settler."[64]

Schmitt wrote during the economic travails of the Weimar Republic preceding the Third Reich, for which he would be later the "crown jurist."[65] He openly voiced a logic that flares with particular ferocity when nations struggle with economic travails and doubts. In the past and our present, the political[66] and the polity reinvigorate in times of doubt and turmoil through conflict with the "Other" and attempts to purge this foreign enemy within. Dissident political groups try to rouse support against current power holders using a rallying cry of threat with an explicitly or implicitly racialized face. This process of pronounced differentiation is a means through which faith and fervor in an "us" as an identity is regenerated despite the travails of the times.

Those vilified and used to define the boundary between our national "us" and the threatening "Other" have historically taken different—generally raced—forms. Nativists of the past have vilified the Italians, Jews, Eastern Europeans, Irish, Blacks, Japanese, and Chinese, among others.[67] Demonstrating the acutely racialized nature of animosity, out-group Caucasians were often not perceived as white but instead as degraded "swarthy types" in the Social Darwinian scale.[68] In this multitextured history of animosity, the story of the intensification of hostility and state and local laws against the Chinese in California around the time of the severe recession of the 1870s has resonances with, and insights for, our contemporary political and legal scene.

A. Déjà Vu Politics

In 1878, Representative Horace Davis of California said of the "Chinaman,"

> Twenty-eight years ago the pioneer Chinaman was welcomed with an eager curiosity, but with no foresight of the eventful consequences of his coming. To-day, he is found in every village, in every mining camp, utterly an alien in the body-politic, and like some foreign substance in the human body, breeding fever and unrest till that system is relieved of its unwelcome presence.[69]

Times were getting tougher after the boom years of the 1850s drew the Chinese to the gold fields, swamps, and mountains of California to clear the land and lay the tracks for the then-expanding economy. By the time of the severe recession that seized the United States in the 1870s, "many thousands of unemployed men" were saying "with great bitterness that but for [the Chinese] presence work and bread would be plenty."[70] The Chinese were accused of degrading labor and displacing white workers, of being by nature "voluntary slaves," capable of subsisting and living cheaply like vermin.[71] Opponents warned that masses of Chinese would render America an "Asiatic state."[72] The fear over the racial transformation of the nation and states presents a parallel with contemporary fears, voiced, for example, by Senator Russell Pearce, sponsor of Arizona Senate Bill 1070, of America being "overrun" by "illegal aliens" and transformed into Mexico.[73]

In another tactic with parallels to our present, the vilified alien "Chinaman" was associated with crime; advocates of anti-Chinese legislation warned that China was sending masses of its unwanted criminals.[74] The Chinese were accused of, among other things, selling and buying their women, gambling, prostitution, thievery, and violence against whites.[75]

In a third striking parallel with our present, fractious political groups campaigned against the presidential administration tenuously in power by whipping up anti-immigrant sentiment. In the last quarter of the nineteenth century, national politics were closely divided, with control of Congress and the presidency frequently shifting between the two

parties.[76] Two "minority presidents" failed to win a majority of the vote and two presidents were elected on close splits, with a bare majority of less than twenty-five thousand votes.[77] In an example of the tactics of the anti-administration reform politics of the era, a "Committee of Fifty" assembled in San Francisco decried the president and national government for "wantonly den[ying] to the people of the Pacific . . . relief from a scourge that menaces their very existence"—the "invasion of the subjects of the Mongolian empire."[78] They castigated the Republican presidents for opposing their calls to purge the Chinese, ignoring their "pleading for deliverance."[79]

B. Déjà Vu Laws

In this foment of overtly racialized hostility, state and local laws were deployed in an attempt to expel the Chinese through direct and indirect methods. These state immigration interventions sometimes tried to skirt and sometimes unabashedly usurped the federal power over foreign commerce and admission of aliens.

In 1849, the Supreme Court held in *The Passenger Cases* that states may not interfere with the federal power to regulate foreign commerce by imposing passenger head taxes on ships entering a port.[80] In one of eight opinions in the case, Justice McLean suggested that while "the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress," the state could "guard its citizens against diseases and paupers" by denying foreigners residence unless "security" was posted "to indemnify the public should they become paupers."[81] Apparently acting on this suggestion, in 1852 the California legislature enacted a law requiring a bond of five hundred dollars per noncitizen passenger.[82]

By 1855, the legislature had gotten bolder and enacted a direct tax titled "An Act to Discourage the Immigration to This State of Persons Who Cannot Become Citizens Thereof"[83]—in other words, to discourage the immigration of nonwhites because, since 1790, Congress had limited naturalization to "a free white person."[84] The 1855 California law required ship masters or owners to pay a fifty-dollar head tax for any person "incompetent" to become a citizen.[85] This unsubtle law was struck down two years later by the California Supreme Court in *People*

v. Downer, which arose from an action to exact $12,750 from a ship bearing Chinese passengers.[86]

Undaunted, the California legislature in 1858 enacted another unsubtle law in an attempt to steer immigration policy—"An Act to Prevent the Further Immigration of Chinese or Mongolians to This State"—which forbade Chinese or Mongolians from entering the state or its ports.[87] The act made it a misdemeanor, punishable by fine or imprisonment for three months to a year, for Chinese to land or to bring Chinese in.[88] When California attempted to enforce the law, the California Supreme Court declared it void and unconstitutional in an opinion never reported.[89]

In 1876, the U.S. Supreme Court invalidated a modified version of the California statute requiring the posting of a $500 bond for every incoming passenger that a state-appointed "Commissioner of Immigration" deemed "lunatic, idiotic, deaf, dumb, blind, crippled, or infirm," a convict or "lewd or debauched woman," or otherwise "a public charge, or likely soon to become so."[90] Justice Field, riding circuit, had earlier ordered the release of Chinese women held under the statute as an impermissible state interference with the exclusive federal power over "the intercourse of foreigners with our people, their immigration to this country and residence therein."[91]

Enfolded in Justice Field's analysis were burgeoning equality concerns. He stated that anti-Chinese feelings could not "justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith."[92] He deplored the discriminatory application of laws by state officials who were "shocked when a frail child of China is landed on our shores, and yet allow[] the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure."[93] He suggested that an alternative basis for invalidating the legislation was the newly enacted legislation of 1870, implementing the equal protection guarantee of the recently adopted Fourteenth Amendment.[94] In *Chy Lung v. Freeman*, a unanimous Supreme Court ruled that the law impermissibly interfered with the power of Congress to regulate commerce with foreign nations, reasoning in essence that one state could not inflict nationwide externalities marring foreign relations and trade.[95]

While the Court did not address the discrimination argument Justice Field had made, it obliquely deplored the "extraordinary statute" that gave the commissioner arbitrary discretion to require bonds for any passenger who appeared to him to be an "idiot" or a potential "pauper" or "lewd woman."[96] Such unbounded discretion opened the door to "systematic extortion of the grossest kind," the Court wrote.[97] The specter of discrimination was thus obliquely acknowledged in the guise of concern over the law's conferral of open-ended discretion through the use of vague terms. *Chy Lung*'s arbitrariness analysis was thus an intriguing precursor to vagueness doctrine cases a century later, such as *Papachristou v. Jacksonville*, which addressed antidiscrimination concerns in the guise of arbitrariness and vagueness analysis.[98]

The legislature and localities also tried alternative ways to drive out the Chinese, such as through licensing, taxes, and employment and housing laws.

California was particularly hard hit by the 1870s recession, the worst the fledgling nation had experienced, and widespread unemployment, mortgage foreclosures, and homelessness stirred radical reactions and calls for state constitutional reform.[99] The anti-Chinese campaign was intensifying, stirred by rabble rousers such as Dennis Kearney of the self-styled "Workingmen's Party."[100] The resulting revised California Constitution of 1879 included an article, simply titled "Chinese," that forbade corporations from employing any Chinese or Mongolian and forbade the employment of Chinese in any state, county, municipal, or other public work "except in punishment for crime."[101] Lest there be any doubt about the intent behind the legislation, the final section declared, "The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power."[102]

In response, the legislature enacted laws criminalizing the employment of Chinese on pain of fines, imprisonment of at least two hundred days and up to two years, and, upon a second conviction, forfeiture of the corporate charter, franchise, and privileges.[103] Businessman Tiburcio Parrott was imprisoned for an alleged violation of the law.[104] He appealed his conviction, arguing first that the anti-Chinese law was void because it violated the Fourteenth Amendment and legislation

implementing the equal protection guarantee.[105] Two judges wrote for the federal Circuit Court for the District of California, which invalidated the conviction and voided the anti-Chinese employment laws. Judge Hoffman noted, in an early interest-tying type of argument, that the law "might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."[106]

Judge Hoffman ultimately framed his decision, however, not in the violation of the rights of the Chinese but in the violation of the rights of corporations, many of which, he noted, had ceased operations or faced closure if the anti-Chinese laws were enforced.[107] He held that the right of corporations "to utilize their property, by employing such laborers as they choose" could not be overridden by the prohibited purpose of driving the Chinese out.[108] Judge Sawyer, in contrast, was less shy about directly ruling that the California law was in violation of treaty protections, as well as the Fourteenth Amendment and laws implementing the Fourteenth Amendment that gave "all persons" the "same right" to make and enforce contracts and enjoy "full and equal benefit of all laws."[109]

These skirmishes with aggressive state anti-immigrant legislation thus enfolded antidiscrimination concerns within alternate frames of invalidation that made shared interests in foreign commerce and vibrant business salient. The deployment of alternate frames for vindicating antidiscrimination values helped transition a fractured and polarized polity in a time of social strain. These alternate modes of analysis underscored the shared interests at stake in ameliorating the harsh state legislation. Ultimately, these transitional frames paved the way for the development of antidiscrimination doctrine—including *Yick Wo v. Hopkins*, which invalidated the selective prosecution of Chinese laundry operators on equal protection grounds.[110] The Supreme Court famously held,

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to

> their rights, the denial of equal justice is still within the prohibition of the constitution.[111]

The many skirmishes with aggressive state legislation directly or indirectly interfering with the admission and expulsion of the Chinese had sensitized the judicial eye to the underlying impact and intent behind formal legal guises.

Part of the point of examining the history of unruly state and local passions is to show how even as law evolves, new forms can be vehicles for old impulses to drive out racially distinctive others. The lesson is important for our avowedly "postracial" times when racialized anxieties cannot be voiced openly aloud and must be dressed in legitimizing constructs that still pursue old goals.

III. Alternate Frames for Antidiscrimination Values

While the legislation creating proxy vehicles for venting racialized animosities rightly rouse fears of racialized harms, antidiscrimination law supplies scant succor. The Equal Protection Clause has a very high hurdle for plaintiffs to surmount, requiring proof of discriminatory intent behind the law[112] or discrimination in the claimant's case, if discriminatory application is alleged.[113] Savvy officials socialized in contemporary forms and conventions of behavior generally no longer provide such blatant evidence.

Moreover, the Equal Protection Clause's conscious-purpose standard altogether neglects the problems of implicit bias or racialized anxieties and angers that are unconscious or not fully acknowledged to ourselves but that nonetheless generate racialized harm.[114] Constitutional criminal-procedure protections also offer no succor for racial harms because criminal-procedure doctrine simply directs claimants to the strictures and blind spots of equal protection doctrine.[115] Antidiscrimination concerns can, however, inform alternate frames for assessing the validity of the laws. The dangers of discrimination posed by the most aggressive forms of new state laws can conflict with the balance struck by federal law between enforcement and antidiscrimination and be impliedly preempted. The risk of harm against suspected foreign nationals poses foreign policy complications that impermissibly intrude on the federal

power over foreign affairs. And the unleashing of discriminatory exclusion posed by the campaign against native-born children of noncitizens should inform interpretation of constitutional text framed to protect against the dangers of carving out a lower caste.

A. Informing Conflict Analyses

The recent opinion in *Arizona v. United States* offers excellent examples of how preemption analysis can reframe—and be enriched by—the shared interest in antidiscrimination values. Writing for the Court in affirming the invalidation of three controversial provisions of Arizona Senate Bill 1070, Justice Kennedy captured the harms to the national interest posed by the new state immigration laws. In crafting the opinion, Justice Kennedy took care to explain how federal coordination and control in setting immigration policy serve shared national interests. He explained that the "broad, undoubted power" of the national government over immigration policy benefits "trade, investment, tourism and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[116] National enforcement discretion served shared interests in "this Nation's international relations" and "immediate human concerns."[117] This approach deftly linked individual and collective interests and harms.

Portions of Justice Kennedy's preemption analysis explained how the risk of harassment of disfavored groups also impaired national interests. He began the opinion by explaining the longstanding wisdom that "[o]ne of the most important and delicate of all international relationships . . . has to do with protection of the just rights of a country's own nationals when those nationals are in another country."[118] Invalidating § 6 of the Arizona law, he noted that allowing state officers the power to arrest aliens on the basis of their assessment of removability—in disregard of federal procedures and safeguards—risked "unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed."[119] The conflicting state provision presented an obstacle to the full design and purposes of federal law and the important national interests served by entrusting removal to the procedures and discretion of national enforcers.

At this early juncture, Justice Kennedy did not invalidate § 2(B) of the Arizona law, which requires state officials to make reasonable attempts to check the immigration status of any person stopped and detained or arrested on reasonable suspicion of unlawful alien status.[120] Noting the "basic uncertainty about what the law means and how it will be enforced" at this early stage, he stated that the opinion did not "foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."[121] Nevertheless, he gave Arizona incentive to construe the law in a manner that mitigates the risk of harassment and prolonged detention.

He warned that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns" and referred to the line of cases invalidating prolonged detention after formally valid (and potentially pretextual) stops.[122] He also noted that the opinion did not address "whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law."[123] Thus, though the opinion did not directly address the great fear sparking waves of protests across the nation that people would be harassed on the basis of racial, linguistic, and cultural heuristics for "looking illegal," it gave Arizona incentive to mitigate this concern. This warning was a judicial nudge rather than a dictate, leaving states space to develop policies while relying on the utility of uncertainty to provide incentive not to transgress constitutional values.[124]

B. The Virtues of Alternate Frames for Equality Values

Alternate frames can make shared interests rather than racial difference and divergence of interests salient, helping ameliorate inflamed perceptions. We become particularly parochial and polarized during times of economic and political turmoil, and resort to the politics of ferocity toward the threatening Other to rally a fearful, fractured, and doubting polity. Racial differentiation and divergence of interests become particularly salient and can operate as blinders. Negative stereotypes can be particularly pronounced.

Studies have found that an "ego threat" to self-regard activates negative ethnic stereotypes and heightens prejudice against out-groups.[125]

Social psychologists have theorized that part of the function of negative stereotypes is to help bolster self-regard.[126] It is particularly important in such times for law to help deactivate the tendency to resort to heightened out-group vilification and remind us of common ground and interest convergence.

Invalidating the Arizona-style attrition-through-fear laws based on foreign affairs conflict, as proposed by concurring Judge Noonan in *United States v. Arizona*,[127] makes shared interests salient. Legislation is invalidated not to "accommodate" the minorities against the majority will, but to preserve shared interests in unimpaired commerce and international cooperation on important issues such as counternarcotics and counterterrorism. Ultimately, Justice Kennedy's opinion for the Court in *Arizona v. United States* eloquently rendered antidiscrimination norms majoritarian. Vindicating antidiscrimination norms did not entail a countermajoritarian pitting of an out-group's interests against the desires of an already-riled polity. Rather, vindicating antidiscrimination interests was about vindicating the shared interest in federal structure and not allowing a patchwork of rogue jurisdictions to undermine a carefully crafted national balance.

Another virtue of alternate frames is the ability to bridge across disparate worldviews.[128] Someone with a hierarchical worldview, for example, might value federalism structure and foreign affairs power even if the protection of underprivileged minorities does not have strong appeal. Someone with an individualistic orientation may find resonant due process concerns against arbitrary and unchecked government power, whereas the notion that individual interests should give way to antidiscrimination and equality interests could be riling. Alternate frames for antidiscrimination norms can thus help communicate the import of these interests to the fractious skeptical whose support is most needed.

Why should the palatability of bases for decisions matter to courts, which, after all, are customarily conceived as set above the political fray?[129] To be effective and realized in reality, decisions need to be socially contextualized. For the values implanted by courts to be realized in practice, they must take root and be accepted by the polity. Part of the art of crafting a judgment is to implant ideas that cultivate affinity among those who disagree.[130] Judges adjudicating some of the most

heated questions in our society must craft their standards carefully, cognizant of the risk of backlash and resistance that entrench the very attitudes and legislation that their decisions are trying to ameliorate.[131] The risk of resistance and divergence between pronouncement and practice is particularly acute on polarizing issues in polarized times.

Commentators have argued in different registers about the value of grounding equality interventions in shared interests.[132] In the context of the African American struggle for equality, Derrick Bell argued that progress toward racial equality "will be accommodated only when it converges with the interests of whites."[133] He recalled how couching the import of enforcing school desegregation orders in terms of federalism principles and respect for the courts' role of interpreting law had more widespread appeal.[134] In contrast, racial divergence in interests would undermine realization of equality protections, despite normative commitments and claims.[135] Early campaigners for civil rights also apparently recognized the import of making interest-convergence arguments. For example, countering the spate of anti-Chinese laws, Dr. J. G. Kerr wrote, "In this warfare against the Chinese, the rights and liberty of the white man are just as much at stake as those of the Chinaman. Both must stand or fall together."[136] While Bell's theory was positivistic, describing the world as it *is* rather than as it *ought* to be, there are prescriptive ramifications to the insight about behavior. As a pragmatic matter, choosing frames that make interest convergence salient is a way to better secure necessary majoritarian support for decisions vindicating equality values.

Besides appealing externally to the polity, alternate frames that make social cohesion and interest convergence salient may also appeal internally to judicial centrists. Reva Siegel recently has illuminated how "racial moderates" on the Supreme Court adhere to an "antibalkinization perspective" that "privileges laws that expressively affirm universalism and commonality rather than difference and division."[137] This preference for approaches that ameliorate estrangement and division may also influence the approach taken to claims of harm posed by laws facially framed in terms of immigration status, but that have a tense relationship with race. Judicial decision making is often a group project wherein internal consensus as well as external consensus must be cultivated. A more palatable pathway that underscores interest convergence

rather than difference may thus have the double benefit of securing broader judicial as well as popular support.

The danger of alternate frames is that they may be used to avoid addressing altogether what is often the biggest concern regarding anti-immigrant laws—the risk of racialized harms. Indeed, particularly in polarized and fierce times and contexts, there may be a desire to eschew or elide the vexing and ire-rousing concerns. Who wants to open Pandora's Box, or even slightly raise the lid, when times are tough enough? This approach, however, allows wounds to fester wholly unaired and emboldens the angry and anxious to enact intensifying and multifarious vehicles for venting ire at the expense of out-groups. Alternate frames are constructive rather than destructive when they take into account antidiscrimination concerns and address them in ways that are more palatable across worldviews and less polarizing—not when they ignore some of the biggest concerns altogether.

Conclusion

History's repetitions, in different registers and legal forms, teach us the dangers of overreaching state and local laws used to vent frustrations on out-groups whose members are either overtly or implicitly racialized. In times of fierce politics, the form and mode of judicial intervention to curb divisive and destructive excesses matters. We must be attentive to how to manage the inflammation of feeling that gives rise to the surge of problematic laws. Unity-reinforcing frames of analysis such as preemption doctrine can be deployed in a manner that renders salient in more palatable fashion previous national commitments to antidiscrimination values and help foster the polarization-amelioration and cooperation necessary to curb the excesses and inflamed perceptions of the times.

Closing his opinion for the Court, Justice Kennedy eloquently counseled the wisdom of temperance and deliberation in the fierce and fractious domain:

> With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful,

> rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.[138]

As the nation continues to fiercely debate immigration policies, this wisdom provides an important guide for the future in this fractious domain.

NOTES

This chapter is updated and adapted from Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-Alien Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 Cardozo L. Rev. 905 (2011).

1. *See* Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply since Mid-Decade*, Pew Hispanic Ctr., i, iii, 1–2 (Sept. 1, 2010), http://pewhispanic.org/files/reports/126.pdf (reporting substantial decrease). Unauthorized migration tends to ebb and flow with the ups and downs of the economies of the United States and Mexico. *See* Douglas S. Massey et al., Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration 111 (2002); Jeffrey S. Passel & Roberto Suro, *Rise, Peak, and Decline: Trends in U.S. Immigration 1992–2004*, Pew Hispanic Ctr., 2–3, 10–11 (Sept. 27, 2005), http://pewhispanic.org/files/reports/53.pdf.
2. Now a noun signifying banned people. *See* Oxford English Dictionary Online (2010), http://oed.com (defining the noun "illegal" to mean "illegal immigrant").
3. Compare Pew Hispanic Ctr. 2010 Report, supra note 1, at i-ii, 1 (decrease data), with, e.g., Russell Pearce, *Enough Is Enough*, http://www.russellpearce.com (follow "SB 1070" hyperlink) (last visited Oct. 8, 2010) (arguing the United States is "overrun" by Mexicans).
4. Arizona v. United States, 132 S. Ct. 2492 (2012).
5. United States v. Arizona, 703 F. Supp. 2d 980, 985, 987, 1008 (D. Ariz. 2010).
6. *E.g.,* Beason-Hammon Alabama Taxpayer & Citizen Protection Act of 2011, HB 56, (Ala.), §§ 4–5, 13–18 (2011); Illegal Immigration Reform and Enforcement Act of 2011, HB 87 (Ga.), § § 3, 7–8, 20 (2011); SB 590 (Ind.), ch. 19, § 5, § § 16–26, 21, 24 (2011); Utah Illegal Immigration Enforcement Act of 2011, HB 497 (Utah), §§ 3, 4, 8, 10, 11(5) (2011). A number of these laws have been the subject of litigation, and some have been enjoined.
7. *E.g.,* Hispanic Interest Coalition v. Bentley, Case No. 5:11-CV-2484-SLB (N.D. Ala. Aug. 29, 2011); Georgia Latino Alliance for Human Rights v. Deal, No. 1:11-cv-1804-TWT (N.D. Ga. 2011); Buquer v. City of Indianapolis, No. 1:11-cv-708-SEB-MJD (S.D. Ind. 2011); Parsley v. Bentley, No. 5:11-cv-24 02736 (N.D.

Ala. 2011); United States v. State of Alabama, No.2:11-cv-02746-WMA (N.D. Ala.); Utah Coalition of La Raza v. Herbert, No. 2:11-cv-401 CW (D. Utah).

8. *See, e.g.,* Julia Preston, *Citizenship as Birthright Is Challenged on the Right*, N.Y. Times, Aug. 7, 2010, at A8 (reporting on proposal to eliminate birthright citizenship for children of illegal immigrants and frustration over "anchor babies"); Alia Beard Rau, *Migrant Hard-Liners' Next Target: High Court,* Ariz. Republic, Sept. 12, 2010, at A1 (reporting on Arizona proposal to add notation to birth certificates).
9. Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 165, 171 (Juan F. Perea ed., 1997); *see also, e.g.,* Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004) (tracing the history of how Mexicans emerged as "the iconic illegal alien").
10. *Many Migrants, Legal and Illegal, Say They Are Planning to Leave State*, Ariz. Rep., April 28, 2010, at A1.
11. Ariz. Rev. Stat. § 11-1051(B) (codifying Ariz. S.B. 1070, § 2(B)) (directing officers to make a reasonable attempt to check immigration status of people stopped, detained, or arrested and authorizing arrest if an officer has probable cause to believe a person committed any public offense rendering him or her removable from the United States).
12. Ariz. Rev. Stat. §§ 11-1051(B), 13-3883(A) (codifying Ariz. S.B. 1070, §§ 2(B), 6). *See also* Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) (noting that it generally is not a crime for removable aliens to remain in the United States and explaining the typical removal procedures).
13. *See, e.g.,* Ariz. Rev. Stat. §§ 11-1509(A), 13-2928(C) (codifying Ariz. S.B. 1070, §§ 3, 5(C)) (creating the state misdemeanor crimes of job seeking by unauthorized aliens and willful failure to carry alien registration documents); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. §§ 10, 11, 13(3), (4) (2011) (criminalizing job seeking by unauthorized aliens; failure to carry alien registration documents; and renting or transporting people in reckless disregard of potential unlawful status); S.C. S20, 2011–2012 119th Leg. Sess., §§ 4(B), (D), 5 (criminalizing transporting or giving shelter to unlawful aliens in reckless disregard of unlawful status with intent to further the unlawful entry or avoid apprehension or detection of the unlawful immigration status and criminalizing as a misdemeanor the failure to carry a certificate of alien registration). For an overview see Mary D. Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 Wash. U. L. Rev. 1269 (2012).
14. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. § 13(3), (4) (2011) [hereinafter Ala. HB 56].
15. Ala. HB 658, 2012 Leg., Reg. Sess. §31-13-13 (2012).
16. Ala. HB 56, § 28.

17. *E.g.,* Ala. HB 56, §§ 5, 12, 18; Ariz. S.B. 1070, § 2(A), (B); Ind. SB 590, §§ 2–3, ch. 18(3), ch. 19(5); Utah HB 497, § 3, 6.
18. See Brief for The Center on the Administration of Criminal Law as Amicus Curiae in Support of Plaintiff's Motion for a Preliminary Injunction at 11, United States v. Arizona, No. 10-1413 (D. Ariz. July 8, 2010), available at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__centers__center_on_administration_of_criminal_law/documents/documents/ecm_pro_066096.pdf (listing examples).
19. *See* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 Rutgers L.J. 1, 36–43 (2006); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 Iowa L. Rev. 1449, 1476–90 (2006); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1381–91 (2006).
20. *See, e.g.*, Ariz. Rev. Stat. § 11-1051(A) (codifying Ariz. S.B. 1070, § 2(A)).
21. Id.
22. Ariz. Rev. Stat. § 11-1051(B) (codifying Ariz. S.B. 1070, §2(B)).
23. *Id.* (emphasis added).
24. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).
25. *Id.*; *see also* Gabriel J. Chin & Kevin R. Johnson, *Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law*, Wash. Post, July 13, 2010, at A15 (critiquing *Brignoni-Ponce* and its consequences).
26. H.B. 2162, 49th Leg., 2d Sess. § 3(B) (Ariz. 2010), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162c.htm.
27. *Id.*
28. *Brignoni-Ponce*, 422 U.S. at 886–87.
29. United States v. Arizona, 703 F. Supp. 2d 980, 989 (D. Ariz. 2010).
30. *See, e.g.,* Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (describing deference to the executive on matters related to foreign affairs and national security); Haig v. Agee, 453 U.S. 280, 293–94 (1981) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive").
31. *See, e.g.,* U.S. Const. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations. . . ."); Chy Lung v. Freeman, 92 U.S. 275, 278–80 (1875) (striking down state statute aimed at deterring immigrant entry as impermissible intrusion on the federal power to regulate foreign commerce).
32. *See* U.S. Const. art. I, § 8, cl. 1, 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization. . . .").
33. For analyses of the flaws in this "mirror theory" see, e.g., Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 Duke L.J. 251 (2011), reprinted as chapter 6 of the present volume; Fan, *Rebellious State Crimmigration Enforcement*, *supra* note 13.

34. For an illuminating critique, see Chin & Miller, supra note 33.
35. Ariz. S.B. 1070, §§ 3, 5, 7–13.
36. *Id*. § 5.
37. Pearce, *supra* note 3.
38. Greta Van Susteren, *Arizona Continues Immigration Battle*, FOX News, June 16, 2010, available at 2010 WLNR 12337754 (statement of Gov. Jan Brewer during *On the Record* news show).
39. *See AZ Gov Signs Immigration Bill into Law*, FOX News, Apr. 23, 2010, available at http://www.youtube.com/watch?v=YENGkp6lREo (interview with Paul Babeu, president, Arizona Sheriff's Association).
40. Nicholas Riccardi, *Both Sides in Arizona's Immigration Debate Use Crime Argument*, L.A. Times, May 3, 2010, available at http://articles.latimes.com/2010/may/03/nation/la-na-arizona-crime-20100503.
41. Robert J. Sampson, *Rethinking Crime and Immigration*, 7 Contexts 28, 29–33 (2008), available at http://contexts.org/articles/files/2008/01/contexts_winter08_sampson.pdf; Tim Wadsworth, Is *Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime between 1990 and 2000*, 91 Soc. Sci. Q. 531, 532–33, 548–49 (2010).
42. Wadsworth, *supra* note 41, at 544–46, 549.
43. Ariz. Rev. Stat. §§ 23-211-23-214 (2010).
44. Ariz. Rev. Stat. §§ 23-212, 212-212-23-214 (2010).
45. *Id*. at § 23-214(A).
46. Chamber of Commerce v. Whiting, 131 S.Ct. 1968, 1981, 1984 (2011).
47. *See* Fan, *Rebellious State Crimmigration Enforcement*, *supra* note 13.
48. *See, e.g., Mexico Roundup: Reactions to Approval of Arizona's SB 1070*, on 27 Apr. 10, World News Connection (Newswire), Apr. 27, 2010, at 22:01:09 (collecting numerous articles expressing protest); Declaration of William J. Burns, Deputy Secretary of State, United States v. Alabama, Case Nos. 5:11-cv-02484, 02736, 02746 (SLB) (N.D. Ala. July 29, 2011) (explaining interference in foreign relations).
49. Hines v. Davidowitz, 312 U.S. 52, 74 (1941).
50. *See, e.g.,* Julia Preston, S*tate Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. Times, Jan. 6, 2011, at A16.
51. *Id*.
52. *E.g., John C. Eastman, From Feudalism to Consent: Rethinking Birthright Citizenship*, Legal Memorandum (The Heritage Foundation), Mar. 30, 2006, at 2, 5 (arguing children of even lawfully present foreign nationals should not be citizens).
53. *See, e.g.,* Preston, *supra* note 50, at A16 (summarizing state legislative proposals).
54. See id.; Margaret Mikyung Lee, *Birthright Citizenship under the 14th Amendment of Persons Born in the United States to Alien Parents*, Congressional Research Service, August 12, 2010, at 9–14 (summarizing national proposals); Eastman, *supra* note 52, at 5 (suggesting that children of even lawfully present foreign nationals are not fully "subject to the jurisdiction" of the United States).

55. U.S. Const. amend. XIV, § 1.
56. 60 U.S. 393, 403, 407 (1856).
57. 169 U.S. 649, 682 (1898).
58. *Id.* at 693–94.
59. *Id.* at 694.
60. *Id.*
61. Carl Schmitt, The Concept of the Political 26 (George Schwab trans., 1996 [1927]).
62. *Id.* at 27.
63. Carl Schmitt, The Crisis of Parliamentary Democracy 9–12 (Ellen Kennedy trans., 1985); see also Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, in The Challenge of Carl Schmitt 38, 47 (Chantal Mouffe ed., 1999) (explaining that Schmitt conceived of homogeneity as the necessary bond for a democracy and the construction of an "us").
64. Schmitt, The Crisis of Parliamentary Democracy, supra note 63, at 9 (quoting Hugo Grotius, De Jure Belli ac Pacis, bk. I, ch. 3, § 6 (2d ed., Amsterdam 1631)).
65. See Jan-Werner Müller, A Dangerous Mind: Carl Schmitt in Post-War European Thought 3, 39–51, 238–41 (2003).
66. After Schmitt's *das politische*, to convey the realm of political life.
67. *See, e.g.,* Karen Brodkin, How Jews Became White Folks & What that Says about Race in America 25–52 (2002); Ian Haney López, White by Law: The Legal Construction of Race 27–28, 35–37 (2006); Salvatore J. LaGumina, Wop! A Documentary History of Anti-Italian Discrimination 11–15 (2d ed., 1999).
68. LaGumina, *supra* note 67, at 14–16. Italians, for example, were variously referred to as "the Chinese of Europe," "dagoes" and "guineas"—a probable reference to slaves from West Africa. Michael Barone, The New Americans: How the Melting Pot Can Work Again 143 (2001).
69. Congressman Horace Davis, Speech on Chinese Immigration in the House of Representatives, 3 (June 8, 1878) [hereinafter Davis Speech], available at http://content.cdlib.org/ark:/13030/hb7h4nb21q/?order=3&brand=calisphere.
70. *Id.*
71. *See, e.g.,* Comm. of Senate of Cal., Chinese Immigration: The Social, Moral, and Political Effect of Chinese Immigration 7, 41 (1877) [hereinafter 1877 Senate of Cal. Report], available at http://content.cdlib.org/ark:/13030/hb538nb0d6/?order=2&brand=oac (referring to the Chinese as "voluntary slaves" subsisting "like vermin"); Joseph M. Kinley, Remarks on Chinese Immigration 1, 3–5, 11 (1877), available at http://www.oac.cdlib.org/ark:/13030/hb3d5n996b/?order=2&brand=oac4 (quasi-slave labor); Senator Aaron A. Sargent, Speech on Immigration of Chinese in the United States Senate, 1, 6 (May 2, 1876) [hereinafter Sargent Speech], available at http://www.oac.cdlib.org/ark:/13030/hb0j49n3vp/?order=2&brand=oac4 (explaining that the "very industries" of "this strange and dangerously unassimilative people" were a vice displacing white workers); Gen. A. M. Winn, President, Mechanics' State

Council of California, Valedictory Address, 4–5 (Jan. 11, 1871) [hereinafter Winn Valedictory Address], available at http://www.oac.cdlib.org/ark:/13030/hb2779n54f/?order=2&brand=oac4 (decrying the futility of competing against nomads with no families to support, packed into squalid living conditions and toiling endlessly without spending).

72. Davis Speech, *supra* note 69, at 8.
73. Pearce, *supra* note 3 (asking rhetorically, "How long will it be before we will be just like Mexico?").
74. *E.g.,* 1877 Senate of Cal. Report, supra note 71, at 31–32; Philip A. Roach, Senator of the District of Monterey and Santa Cruz, Minority Report on the Bill to Enforce Contracts for Labor within the State of California (Mar. 20, 1852), reprinted in Winn Valedictory Address, supra note 71, at 7, 8–9.
75. 1877 Senate of Cal. Report, supra note 71, at 5, 20–31 (women in servitude); Winn Valedictory Address, supra note 71, at 5 (describing gambling dens and "other dark dens where crimes that cannot be named are habitually committed").
76. Elmer Clarence Sandmeyer, The Anti-Chinese Movement in California 111 (Illini Books 1991) (1939).
77. *Id*.
78. Address by the Committee of Fifty to the People 1 (n.d.), available at http://www.oac.cdlib.org/ark:/13030/hb7t1nb2fw/?order=2&brand=oac4.
79. *Id*. at 2–3.
80. Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283 (1849).
81. *Id*. at 406 (McLean, J.).
82. Act of May 3, 1852, ch. 36, §§ 1–2, 1852 Cal. Stat. 78, 78–79, repealed by Act of Apr. 27, 1945, ch. 111, § 5, 1945 Cal. Stat. 424, 465. The 1852 act was struck down by the California Supreme Court two decades later in State v. Steamship Constitution, 42 Cal. 578, 589–90 (1872), as an impermissible interference in foreign commerce.
83. Act of Apr. 28, 1855, ch. 153, §§ 1–2, 1855 Cal. Stat. 194, repealed by Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 487–88.
84. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, repealed by Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.
85. § 1, 1855 Cal. Stat. at 194.
86. 7 Cal. 169 (1857).
87. Act of Apr. 26, 1858, ch. 313, § 1, 1858 Cal. Stat. 295, 295–96, repealed by Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 487–88.
88. *Id*. §§ 1–2.
89. *See* Lin Sing v. Washburn, 20 Cal. 534, 538 (1862) (recounting that the Supreme Court informed counsel of this history from the bench).
90. Chy Lung v. Freeman, 92 U.S. 274, 280 (1876).
91. In re Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874).
92. *Id*. at 217.

93. *Id.*
94. *Id.* at 218.
95. Chy Lung, 92 U.S. at 278–80.
96. *Id.* at 277–78.
97. *Id.* at 278.
98. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (invalidating on vagueness grounds an antivagrancy ordinance that permitted arrests on grounds such as "loafing," being a "vagrant," and "wandering or strolling" without apparent "lawful purpose or object").
99. *See* Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 Hastings Const. L.Q. 35, 36–37 (1989).
100. *Id.* at 39–40.
101. Cal. Const., art. XIX, § 1–3 (repealed Nov. 4, 1952).
102. *Id.* § 4.
103. *See* In re Tiburcio Parrott, 1 F. 481, 483–84 (C.C.D. Cal. 1880) (summarizing laws at issue).
104. *Id.* at 483.
105. *Id.* at 484.
106. *Id.* at 491 (Hoffman, J.).
107. *Id.* at 492–93.
108. *Id.* at 493–99.
109. *Id.* at 501–10 (Sawyer, J.)
110. 118 U.S. 356 (1886).
111. *Id.* at 373–74.
112. *See, e.g.,* Pers. Adm'r of Mass. v Feeney, 442 U.S. 256, 279 (1979) (requiring, to establish discriminatory intent, proof that the decision maker chose "a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Washington v. Davis, 426 U.S. 229, 240–45 (1976) (requiring proof of "a racially discriminatory purpose" and holding that showing substantial disproportionate impact alone is insufficient).
113. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279, 290–98 (1987) (holding that sophisticated statistical study is insufficient; there must be evidence specific to the claimant's case).
114. *See, e.g.,* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1, 5–7 & nn.10–20 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). For an overview of the findings in social psychology on implicit bias, see, for example, Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1497–1530 (2005).

115. An oft-critiqued exemplar of this approach is *Whren v. United States*, 517 U.S. 806 (1996), in which the Court declined to review allegations of racial profiling.
116. Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).
117. *Id*. at 2499.
118. *Id*. at 2498–99 (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)).
119. *Id*. at 2506 (invalidating Ariz. S.B. 1070 § 6).
120. *Id*. at 2507–9.
121. *Id*. at 2510.
122. *Id*. at 2509 (citing Arizona v. Johnson, 555 U.S. 323 (2009); Illinois v. Caballes, 543 U.S. 405 (2005)).
123. *Id*. at 2509.
124. *See* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. Rev. 581, 608–10 (2012) (discussing the utility of uncertainty and judicial nudges).
125. *See, e.g.,* Steven Fein & Steven J. Spencer, *Prejudice as Self-Image Maintenance: Affirming the Self through Derogating Others*, 73 J. Personality & Soc. Psychol. 31 (1997).
126. *See, e.g., id.*; Lennart J. Renkema et al., *Terror Management and Stereotyping: Why Do People Stereotype When Mortality Is Salient?* 34 Personality & Soc. Psychol. Bull. 553 (2008).
127. *See* United States v. Arizona, 641 F.3d 339, 366–69 (9th Cir. 2011) (Noonan, J., concurring) (writing that Arizona Senate Bill 1070 is unconstitutional because of incompatibility with U.S. foreign policy).
128. *Cf.* Dan M. Kahan, *The Cognitively Illiberal State*, 60 Stan. L. Rev. 115, 145–48 (2007) (arguing law and policy should be infused with a surfeit of meanings so that divergent worldviews can be simultaneously affirmed and people in a pluralistic society can deliberate with rather than past each other).
129. This customary portrait has long been challenged by scholars who contend that public demand, political majorities, and elite national opinion powerfully influence Supreme Court decision making. *E.g.*, Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 240–41, 250–51 (2004); Robert G. McCloskey, The American Supreme Court 260–61 (Sanford Levinson ed., 5th ed. 2010); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 280–81, 283–89 (1957), reprinted in 50 Emory L.J. 563, 565–66, 568–75 (2001); Jack M. Balkin, *What* Brown *Teaches Us about Constitutional Theory*, 90 Va. L. Rev. 1537, 1538–46 (2004); Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2606–8 (2003).
130. Robert L. Tsai, Eloquence & Reason: Creating a First Amendment Culture 44–48 (2008).
131. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007); Reva B. Siegel, *Equality Talk:*

Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 Harv. L. Rev. 1470, 1545–46 (2004).

132. *E.g.,* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. Pa. L. Rev. 839, 895–96 (2008) (arguing for framing disability accommodations in terms of third-party benefits); Richard T. Ford, *Hopeless Constitutionalism, Hopeful Pragmatism*, in The Constitution in 2020, at 143, 151–52 (Jack M. Balkin & Reva B. Siegel eds., 2009) (noting the coalition-building power of narrative about "what joins us as a political community"); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1937–38 (2000) (explaining import of shifting discourse on work-related rights from one emphasizing rights of certain demographic groups to one emphasizing rights for all).
133. Derrick A. Bell Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980). The proposition, though controversial in its time, has proved to have powerful explanatory force in an array of contexts. *See* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 Ariz. L. Rev. 911, 922–38 (2007) (analyzing examples).
134. Bell, *supra* note 133, at 530.
135. *Id.* at 523, 528.
136. J.G. Kerr, The Chinese Question Analyzed 5 (1877), available at http://www.oac.cdlib.org/ark:/13030/hb009n96wp/?order=2&brand=oac4.
137. Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278 (2011).
138. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).