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## AN ESSAY ON IMMIGRATION POLITICS, POPULAR DEMOCRACY, AND CALIFORNIA'S PROPOSITION 187: THE POLITICAL RELEVANCE AND LEGAL IRRELEVANCE OF RACE

Kevin R. Johnson\*

In elegantly referring to “government of the people, by the people, and for the people,”<sup>1</sup> Abraham Lincoln famously tapped into the nation’s enthusiasm for democracy. From the founding of this nation, however, the potential excesses of democracy also have generated considerable concern.<sup>2</sup> In an attempt to avoid such excesses, the Constitution moderates popular sentiment through a representative form of government.<sup>3</sup>

An odd combination of devotion to and ambivalence about democracy carries forward to this day. The debates over civic republicanism, for example, reflect differing visions about the benefits of a more democratic government. Some applaud an expanded role for “the people” in governance while others express fear about how the majority might treat the minority.<sup>4</sup> Similarly, conflicting views about trial by jury typify the sharp disagreements about democracy in action. While juries are often

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1. Gettysburg Address (Nov. 19, 1863), reproduced in Garry Wills, *Lincoln at Gettysburg* 261 (1992) (analyzing intellectual foundations for Lincoln’s famous speech).

2. See Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 7 (1989) (“Americans of the Revolutionary era were profoundly ambivalent about democracy.”); Terrance Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1164 (1977) (“The concern that democratic government will provide inadequate protection for minorities is as old as the nation—perhaps as old as the idea of democracy itself.”).

3. See *infra* text accompanying notes 61–74 (analyzing framers’ concerns with direct democracy).

4. Compare Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988) (arguing that liberal republican ideas suggest need for reform of a number of areas of public law) with Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 Yale L.J. 1609 (1988) (expressing skepticism about what Republican revival has to offer people of color).

revered as a bastion of democracy,<sup>5</sup> judges have a myriad of devices at their disposal that allow them to override perceived jury excesses.<sup>6</sup>

The popular initiative process, which takes a variety of forms in the various states,<sup>7</sup> reflects the nation's ambivalence about democratic rule.<sup>8</sup> Generally, legislative bodies, such as Congress and state legislatures, composed of elected representatives make the law. The initiative process, as an exception to that general rule, affords voters themselves the opportunity to directly enact laws. The initiative, consistent with its Progressive era roots,<sup>9</sup> often is regaled as a populist tool that may force

5. See, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (lauding "democratic ideals of trial by jury"); Alexis De Tocqueville, *Democracy in America* 293-94 (Vintage ed. 1945) (making similar observations about trial by jury in United States). *But see* Warren E. Burger, *Thinking the Unthinkable*, 31 *Loy. L. Rev.* 205 (1985) (offering reasons why trial by jury is dysfunctional); Julius Paul, *Jerome Frank's Views on Trial by Jury*, 22 *Mo. L. Rev.* 28 (1957) (summarizing Frank's deep reservations about trial by jury).

6. See, e.g., Fed. R. Civ. P. 50(a)-(b) (providing for judgment as a matter of law that allows court to take case away from jury); Fed. R. Civ. P. 56 (providing for summary judgment so that case can be taken from jury); Fed. R. Civ. P. 59 (allowing judge to grant new trial after jury has returned verdict).

The jury verdict acquitting police officers of state criminal charges in the beating of Rodney King, which triggered civil unrest in Los Angeles in 1992, is a well-publicized example of so-called jury excesses. See Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 *Denv. U. L. Rev.* 283, 286 (1993) (noting that most explanations of verdict in Rodney King case "center around the image of jury lawlessness—the idea that the jury's result was corrupted because they ignored the clear evidence of brutality to acquit the police"). For concrete reforms designed to reinvigorate public confidence in the jury system, see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 *U.C. Davis L. Rev.* (forthcoming 1995).

7. See Philip Dubois & Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* ch. 4 (forthcoming 1995) (offering comparative analysis of initiative process in states). Among other worthwhile studies of the intricacies of the initiative process are Cronin, *supra* note 2 and David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984).

8. See Lawrence G. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 *Harv. L. Rev.* 1373, 1403 (1978) (observing "sharp clash of constitutional values" implicated by legislation through initiative and referendum).

9. Professor Richard Briffault nicely summarizes the roots of the initiative process in the United States:

Voter initiated legislation—"the initiative" is a product of the turn-of-the-century Progressive movement. The Progressives believed that party bosses, political machines, and special interests had seduced representative institutions away from serving the public interest. Late nineteenth century politics, like the marketplace of that era, was believed to be in the grip of powerful and rapacious combinations. Much as antitrust law was designed to break the economic power of these combinations and restore free competition, the initiative, with the allied reforms of the direct primary, the popular election of Senators, the referendum, and the recall, was intended to break the stranglehold these combinations had on the political process by bringing the people directly into lawmaking. "The people" would act only on behalf of the public as a whole, not to advance selfish, private interests. Moreover, Progressives thought that direct democracy would improve the people as well as their government. Through involvement in government, people

change on a government captured by special interests.<sup>10</sup> In this spirit, initiatives have furthered a number of laudable goals in some states, including eliminating the poll tax and extending the franchise to women.<sup>11</sup>

On the other hand, some initiatives, and at times the initiative process, have been less praiseworthy.<sup>12</sup> Voters, for example, have enacted laws that have violated the Constitution by impinging on individual rights.<sup>13</sup> Some initiatives, even though they survived constitutional challenges, have been thinly veiled attempts to exclude outsiders from the community because of their race or class.<sup>14</sup> The initiative process in

could learn about important issues; they would discuss and debate them with each other; they would develop civic virtue.

Richard Briffault, *Distrust of Democracy*, 63 *Tex. L. Rev.* 1347, 1348 (1985) (book review) (footnotes omitted); see Benjamin Parke DeWitt, *The Progressive Movement* 213–43 (1915) (articulating Progressive arguments for initiative, referendum, and recall); Dubois & Feeney, *supra* note 7, chs. 2–3 (describing history of initiative and analyzing how it fits into American democracy).

10. See, e.g., *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 673 (1976) (“The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to ‘give citizens a voice on questions of public policy.’”) (citation omitted); see also V.O. Key, Jr. & Winston W. Crouch, *The Initiative and the Referendum in California* 423 (1939) (discussing efforts of Progressives to institute initiative process and stating that “[i]ts fundamental aspect was a profound attachment to the principles of democracy”).

11. See Cronin, *supra* note 2, at 50–52, 59, 97–98, 199.

12. See Dubois & Feeney, *supra* note 7, at 1 (recognizing that, while some view initiative as the “very essence of democracy,” others are “appalled by the demagoguery and simple-minded campaigns that characterize many initiative elections”). Compare *James v. Valtierra*, 402 U.S. 137, 141 (1971) (Black, J.) (“Provisions for referendums demonstrate devotion to democracy . . .”) with *Wallace v. Zinman*, 254 P. 946, 949 (Cal. 1927) (“It is common knowledge that an initiative measure is originated by some organization or a small group of people . . . that the measure is then placed up on the ballot and a large number of the population, not knowing what the context of the act is, rely solely upon its title as a guide to intelligent voting thereon.”).

13. See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (invalidating municipal ordinance adopted by initiative because it violated First Amendment); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down state initiative prohibiting teaching of evolution in public schools because it ran afoul of Establishment Clause); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating on equal protection grounds initiative that made it more difficult to enact housing anti-discrimination laws than other laws); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964) (holding that reapportionment scheme adopted by electorate violated Equal Protection Clause); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating on substantive due process grounds initiative requiring parents and guardians to send children to public schools); see also William Howard Taft, *Popular Government* 64–71 (1913) (expressing concern with potential impact of initiative process on fundamental rights).

14. See, e.g., *City of Eastlake*, 426 U.S. 668 (upholding in face of constitutional challenge voters’ decision to require that changes in land use plan be approved by 55% of vote in response to proposal for zoning change for multifamily, high-rise apartment building); *James*, 402 U.S. 137 (upholding initiative providing that no low income housing project be built without approval of majority of electorate).

certain circumstances has allowed a majority to burden the least politically powerful. California's so-called alien land law passed by the voters in 1920, which restricted the ability of noncitizens to own land, is a vivid historical example.<sup>15</sup>

Focusing on this underside of the initiative process, Professor Derrick Bell published an article in 1978 in this law review arguing that initiatives serve as a barrier to racial equality.<sup>16</sup> He reviewed some historical examples of this phenomenon, such as the approval in the 1800s by voters in the Oregon territory of a referendum intended to exclude free blacks from settling there.<sup>17</sup> Bell's concerns are reflected in Proposition 187, an initiative passed by an overwhelming majority of California voters (59–41%) in November 1994.<sup>18</sup>

The measure, if implemented,<sup>19</sup> would bar state and local governments in California from providing non-emergency medical care, public assistance, social services, and education to undocumented immigrants.<sup>20</sup> It would further require California law enforcement, health and social service agencies, and public school officials to report persons suspected

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15. See text accompanying notes 91–100 (analyzing alien land laws).

16. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503 (1990) (advocating careful judicial review of laws enacted through initiative because of potential that majority will ignore rights of minorities). Others have questioned this assertion and have argued that plebiscites are not so different from representative bodies. See, e.g., Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 Mich. L. Rev. 930 (1988); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 Chi.-Kent L. Rev. 707 (1991).

17. See Bell, *supra* note 16, at 16–17; see also Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 641 (1980) ("From the antiblack plebiscites of the nineteenth century [referring to fact that before Civil War, voters in Indiana, Illinois, Kansas, and Oregon approved proposals for excluding black settlers] to today's efforts by homogeneous suburbs to ward off heterogeneity, initiatives and referenda have played a questionable role.") (footnote omitted).

18. See Tony Miller, Acting California Secretary of State, *Statement of Vote, November 8, 1994, General Election* 115 [hereinafter *Statement of Vote*].

19. The lawfulness of Proposition 187 was challenged in a number of lawsuits soon after its passage. The courts have enjoined implementation of most of its provisions. See *infra* note 196. When this Article went to press in July 1995, the various legal challenges to the initiative had not been finally decided.

20. See Tony Miller, Acting California Secretary of State, *California Ballot Pamphlet: General Election November 8, 1994*, at 50–53 [hereinafter *California Ballot Pamphlet*] (providing analysis of proposition by nonpartisan state Legislative Analyst Office); California Senate Office of Research, *Analysis of State Propositions on the November 1994 Ballot, August 1994*, at 69–105 (analyzing measure).

of being undocumented to the Immigration and Naturalization Service.<sup>21</sup> Perhaps due to the complexities of the initiative's provisions, debate during the heated campaign often was on an abstract plane. Proponents proclaimed that passage of Proposition 187 would "send a message" to the federal government that it must address illegal immigration.<sup>22</sup> Opponents, particularly ethnic activist and immigrant rights groups, countered that the initiative was nativist, racist, and motivated by antipathy toward undocumented Mexicans and, more generally, Mexican-Americans.<sup>23</sup>

Many factors in combination unquestionably led to the passage of Proposition 187, including an ailing California economy and an unprecedented budget crunch extending over a number of years, an incumbent governor searching for an issue on which to base his re-election campaign, and the growing pains of a changing multi-cultural society. These considerations helped focus popular concern on undocumented migration from Mexico. The public outcry culminated in an attempt by the electorate of the state of California, at the center of the immigration firestorm, to take a stab at immigration policymaking.

My contribution to the Symposium considers how Proposition 187 fits into the peculiar politics of immigration, which in many ways are without parallel. The hope is to shed light on the dynamics culminating in the passage by the California electorate of a measure that in time may

21. I analyze the provisions and impacts of Proposition 187 from a different vantage point in Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. Rev. (forthcoming 1995).

22. See Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds*, L.A. Times, Nov. 9, 1994, at A1 (reporting results of exit polls showing that 78% of those voting for Proposition 187 believed that it "sends a message that needs to be sent" and 51% of that group agreed that measure "will force the federal government to face the issue"); see also Magleby, *supra* note 7, at 179 (analyzing how voters in deciding on initiative focus on generalized ideology as opposed to details of measure).

23. See Weintraub, *supra* note 22 (reporting that exit poll showed that 39% of persons voting against Proposition 187, and 18% of the total voters, characterized the measure as "racist/anti-Latino"); see also Fingerhut, Powers, Smith & Associates, *National Survey of the Attitudes of Hispanic Voters* 37-38 (1994) (survey on file with the *Washington Law Review*) (showing that 39% of Latinos surveyed agreed that politicians attacking "illegal immigrants" are "really attacking people of different cultures and languages, like people of Hispanic background," that 73% were at least "a little angry" when undocumented workers were attacked for taking jobs or causing crime, and that 53% were at least "somewhat sympathetic" toward "illegal immigrants").

Claims of racism were not made exclusively by minorities. For example, the President of the American Bar Association stated that California voters endorsed Proposition 187 "[b]ased on unfounded economic arguments, ugly stereotypes and racial prejudice." *Statement by ABA President George E. Bushnell, Jr. on the Passage of California Proposition 187*, PR Newswire, Nov. 9, 1994; see also *infra* text accompanying note 42 (describing positions of prominent conservatives about how initiative scapegoated undocumented immigrants).

prove to be a watershed in immigration policymaking. In analyzing Proposition 187, this Article generally considers the risks posed to discrete and insular minorities by the initiative process and the difficulties in mounting legal challenges under current constitutional doctrine to democratic subordination of minority interests through initiatives. It raises serious questions about whether lawmaking by initiative fits properly into the constitutional scheme.

In performing this analysis, I uncovered something that struck me as curious. One of the most vociferous, and serious, contentions made by Proposition 187 opponents in the heated campaign was that, at bottom, it is racist. This often is a damning claim in our legal culture. For a variety of reasons, however, including the difficulties of proving claims of discrimination under existing constitutional doctrine, the many lawsuits challenging Proposition 187 do not squarely raise the issue. Part of the reason is that it is difficult to separate the permissible from the impermissible motives for supporting Proposition 187. On the one hand, an anti-undocumented, or even an anti-immigrant, law is not necessarily suspect. On the other hand, anti-people-of-color or anti-Mexican laws generally are. Some Proposition 187 supporters were motivated by impermissible factors while others were not. Some were motivated by a mix of the two.

In light of the difficulties in ascertaining the motive of the electorate, a court of law in all likelihood never will address the issue that immediately jumps into the minds of many who condemn the initiative. This phenomenon is consistent with more general charges that claims of racism and discrimination increasingly go unheard and unresolved in the United States. Only in the court of history will it be decided whether Proposition 187—like the alien land laws of yesteryear—was passed for invidious reasons and thus whether it is properly classified as racist and discriminatory.<sup>24</sup>

Part I of the Article considers generally the nature of immigration politics and how it affected the campaign culminating in the passage of Proposition 187. Part II first focuses on the concerns of the framers of the Constitution, particularly James Madison, with direct democracy and their fear that the majority, motivated by “passion” and “self-interest,” might enact laws detrimentally affecting minorities. It then illustrates how these concerns came to pass in the fervent anti-Japanese campaign

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24. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 Cornell L. Rev. 1258 (1992) (analyzing how history shows that, although today we view many practices in retrospect as racist, they were not viewed as such at the time).

resulting in the passage through initiative of the alien land law in California and notes the parallels between that initiative campaign and the one culminating in the passage of Proposition 187. This part also considers the evidence that nativist and racist sentiment influenced the initiative's passage and how, under current equal protection doctrine, it nonetheless would be difficult to successfully challenge Proposition 187 for those reasons. Part III concludes the Article by considering the potential legacy of Proposition 187.

## I. THE UNIQUE POLITICS OF IMMIGRATION AND ITS IMPACT ON IMMIGRATION LAW AND POLICYMAKING

The politics of immigration in the United States, an issue-area where bizarre alliances resulting from the desires of divergent groups are the norm rather than the exception, may be without equal. As one would expect, this greatly influences the formulation of immigration law and policy. Most notably, the perhaps unique interest group interaction has sporadically produced extreme immigration policy choices. The judiciary has deferred to some most extreme policy pronouncements even when the policy judgment would be patently unconstitutional if the rights of citizens, rather than noncitizens, were at stake.

### A. *Some History*

Extremes mar the history of immigration law and policy in the United States. Nativist outcries have been directed at the leading immigrant group of the day, such as the Irish in the early and mid-1800s, the Chinese in the late 1800s, and Mexicans at various times in the twentieth century.<sup>25</sup> One explanation for the fluctuations is the absence in immigration matters of the usual moderating influences on the political process. This results from the limited membership rights of immigrants in the community.

Immigrants, at least prior to naturalization, have minimal input into the political process.<sup>26</sup> Those lawfully in the country who have not become naturalized citizens, referred to in immigration jargon as lawful

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25. See generally John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (1955); Kenneth L. Karst, *Belonging to America* 81-104 (1989).

26. For a more thorough analysis of the complexities of immigration politics, see Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. Rev. 1139.



permanent residents, as well as undocumented immigrants, cannot vote.<sup>27</sup> Although immigrant rights and some ethnic groups lobby aggressively for immigrants, their pull with politicians naturally is restricted by the electoral powerlessness of their constituency. As Professor Lani Guinier has succinctly stated with respect to minority citizens, “[a] discrete and insular electoral minority often remains an outvoted legislative minority.”<sup>28</sup> This statement would seem to apply with even greater force with respect to disenfranchised noncitizens.

Harsh immigration policies historically have been proposed by those searching for answers to the particular political, social, and economic woes of the day.<sup>29</sup> In part because of the limited political power of the immigrant lobby, the proposals at various times—particularly times of crisis—have met only token resistance.<sup>30</sup> This ready-made recipe for extremism may account for why immigration law and policy diverge so dramatically from other areas of public law.

Although the courts in other circumstances may serve as a moderating influence on political excesses that injure minorities,<sup>31</sup> the judiciary not infrequently is deferential to the immigration decisions of the political branches of the federal government. The so-called plenary power doctrine, though it has suffered cracks in its armor in its 100-plus years of existence, still shields some rather extreme immigration judgments.<sup>32</sup>

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27. See Gerald L. Neuman, “*We Are The People*”: Alien Suffrage in German and American Perspective, 13 Mich. J. Int’l L. 259 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 Mich. L. Rev. 1092 (1977).

28. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1416 (1991).

29. Proposition 187, in my view, is an example. See *infra* text accompanying notes 101–54 (analyzing factors culminating in passage of initiative).

30. See, e.g., T. Alexander Aleinikoff, David A. Martin, & Hiroshi Motomura, *Immigration: Process and Policy* 2–5 (3d ed. 1995) (summarizing anti-Chinese legislation passed in late 1800s).

31. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

32. See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). Because courts at times have employed a variety of devices to avoid invoking the doctrine and to engage in meaningful judicial review of immigration decisions, the force of the plenary power doctrine to some extent has eroded over time. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power*, 100 Yale L.J. 545 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984). Still, the doctrine remains intact and has been invoked by the courts to shield from review some deeply troubling immigration decisions. See Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965, 994–1002.

While first employed to uphold laws passed by Congress generally excluding the immigration of Chinese,<sup>33</sup> a version of the doctrine surfaced more recently in the Supreme Court's refusal to disturb the Executive Branch's decision to interdict and repatriate Haitians fleeing political violence.<sup>34</sup> Put simply, the political branches of the federal government, in which noncitizens have little input, often are given considerable freedom by the courts in immigration matters.<sup>35</sup> In contrast, the Supreme Court, although not entirely consistent, has appeared more willing to invalidate state alienage classifications than it has been to strike down federal immigration laws.<sup>36</sup>

In sum, the political process is unlikely to offer enduring protection to immigrants and, at certain times, tends to result in rather extreme anti-immigrant laws and policies. Unlike other areas in which courts serve as protectors of the rights of minorities, the judiciary cannot be relied upon to intervene to shield noncitizens from democratic excesses.

### B. *Political Correctness and Immigration*

In light of the fact that the political branches frequently have the final say on immigration law and policy, it is important to have a basic understanding of the position of various interest groups on immigration.<sup>37</sup>

It is difficult to peg a so-called politically correct position for immigration or to pinpoint "liberal" and "conservative" positions on the issue. Some conservative elements of society have been extremely

33. See *Chae Chan Ping v. United States (the Chinese Exclusion Case)*, 130 U.S. 581 (1889).

34. See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2567 (1993). For criticism of the Supreme Court's decision, see Harold Kongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391 (1994).

35. See Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115, 176 (1992) (summarizing conclusion of empirical study showing that "overall success rate for aliens in court declined from 36% in 1979 to 27% in the 1989-90 period").

36. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating state law limiting alien eligibility for welfare benefits); see also Laurence H. Tribe, *American Constitutional Law* § 16-23, at 1544-53 (2d ed. 1988) (analyzing Court decisions scrutinizing state alienage classifications under equal protection clause); *infra* text accompanying notes 159-60, 187 (comparing differential judicial treatment afforded state and federal alienage classifications). These decisions undoubtedly will bear on the various challenges to Proposition 187.

37. For a fascinating analysis of the politics culminating in important changes to the immigration laws in the 1980s, including an insightful analysis of the shifting alliances of the various interests groups, see Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 16 Am. Pol. Dev. 37 (1992); see also Holly Idelson, *Immigration: Bridging Gap Between Ideas and Action*, 13 Cong. Q. 1065 (Apr. 15, 1995) (describing various political divisions on immigration issues in 104th Congress).

intolerant of immigrants at various times in U.S. history.<sup>38</sup> Consistent with that tradition, a Republican presidential candidate, Patrick Buchanan, strenuously advocated an all-out effort to seal the U.S.-Mexico border, a plank in the 1992 Republican Party platform.<sup>39</sup> In contrast, other conservative bastions with a more free-market orientation, including some business interests that desire a ready supply of low-wage labor, have called for fewer rather than more immigration restrictions.<sup>40</sup>

The campaign over Proposition 187 nicely contrasts the divergent views of conservatives on immigration. A moderate Republican governor of California, though not one of the original sponsors of the measure, became the vanguard for the initiative and made immigration the central issue in his ultimately successful re-election campaign.<sup>41</sup> In contrast, two nationally prominent Republicans spoke out against Proposition 187 and contended that its proponents were scapegoating immigrants for the state's economic woes.<sup>42</sup>

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38. See Karst, *supra* note 25, at 81-104 (discussing various nativistic epochs in U.S. history). In contrast, some religious groups, often viewed as conservative, including elements of the Catholic Church, have advocated a less restrictionist stance toward immigration. See, e.g., David Gonzales, *Bishops Assail Rule Hostile to Immigrants*, N.Y. Times, Nov. 18, 1994, at A21 (reporting that National Conference of Catholic Bishops urged greater emphasis on federal immigration policies as opposed to punitive measures such as Proposition 187); Roger Mahoney, *Perspective on Proposition 187: Protect the Children from Politics*, L.A. Times, Oct. 25, 1994, at B7 (Catholic archbishop criticizing Proposition 187); see also Ann Crittenden, *Sanctuary: A Story of American Conscience and Law in Collision* (1988) (describing religious persons involved in providing sanctuary to Central Americans fleeing political persecution in 1980s).

39. See John Marelius, *Confusion Over Platform's Border Plank Drives GOP Delegates Up the Wall*, San Diego Union-Trib., Aug. 18, 1992, at A7.

40. See, e.g., Schuck, *supra* note 37, at 63, 65 (noting that growers had opposed Chinese exclusion laws and Mexican border controls and sought to defeat employer sanctions in Immigration Reform and Control Act). Indeed, even California Governor Pete Wilson, while a Senator, supported a temporary farm labor program. See Robert Pear, *Senate Kills Plan on Alien Workers*, N.Y. Times, Sept. 13, 1985, at A17 (reporting that Wilson proposed such an amendment to immigration reform bill).

41. See Weintraub, *supra* note 22. Candidates, particularly in California, running for state-wide office have backed initiatives in hopes of improving chances for winning election. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 28-29 (1995) (offering examples of candidates for state-wide election sponsoring initiatives); Eugene C. Lee, *California*, in *Referendums: A Comparative Study of Practice and Theory* 87, 99 (David Butler & Austin Ranney eds., 1978) (offering examples of how candidates' election campaigns were tied to initiatives in California).

42. See Ronald Brownstein & Patrick J. McDonnell, *Kemp, Bennett and INS Chief Decry Prop. 187*, L.A. Times, Oct. 19, 1994, at A1 (reporting that Bill Bennett and Jack Kemp registered opposition to Proposition 187); see also Ron K. Unz, *Experience Reveals No Need for S.O.S.*, Sacramento Bee, Oct. 23, 1994, at F3 (stating opinion of conservative challenger to California Governor Pete Wilson in Republican Party primary that Proposition 187 was unnecessary); William J. Bennett, *Immigration: Making Americans*, Wash. Post, Dec. 4, 1994, at C7 (arguing against Proposition 187 and related immigration measures); Dick Kirschten, *Second Thoughts*, Nat'l J., Jan.

Liberal ranks in the United States also historically have been divided on immigration. At various times in U.S. history, immigrants were readily integrated into urban Democratic political machines.<sup>43</sup> Such integration occurred more easily when the immigrants could more easily shed their “immigrantness” and become citizens with the right to vote. That, however, was something far easier accomplished by the predominantly European immigrants of past generations than for immigrants of color who have come in increasing numbers to the United States since 1965.<sup>44</sup> With low naturalization rates for the largest group of immigrants—Mexican nationals—to the United States,<sup>45</sup> political, social, and economic assimilation has not been as smooth as it was for some previous immigration generations.<sup>46</sup> Still, the Democratic Party has voiced concern for immigrants’ rights, often at the behest of certain ethnic activist groups.<sup>47</sup>

At the same time, however, some traditional liberal interest groups historically have been deeply antagonistic toward immigrants and immigration.<sup>48</sup> Organized labor, for example, was one of the strongest proponents of the racist Chinese exclusion laws of the late 1800s.<sup>49</sup> Labor

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21, 1995, at 150 (noting concern of business with Proposition 187). Concerns with the political repercussions of being labeled anti-immigrant and anti-minority may prevent a Republican-led Congress from proceeding with far-reaching immigration reforms. See Marc Sandalow, *After Much Ado on Immigration, GOP Backs Off*, S.F. Chron., Mar. 13, 1995, at A3.

43. See Johnson, *supra* note 26, at 1150–52.

44. See Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 Colum. J. Transnat’l L. 319, 328–29 (1993).

45. See U.S. Dep’t of Justice, *1993 Statistical Yearbook of the Immigration and Naturalization Service* 130 (1994) [hereinafter *INS 1993 Statistical Yearbook*] (presenting data showing that 16.6% of immigrants from Mexico for time period under review naturalized compared to 39.6% of immigrants from all countries); U.S. Dep’t of Justice, *1992 Statistical Yearbook of the Immigration and Naturalization Service* 130 (1993) (presenting data showing that 16.2% of immigrants from Mexico for time period under review naturalized compared to 38.7% of immigrants from all countries).

46. See Karst, *supra* note 25, at 87–90 (analyzing difficulties of assimilation of immigrants of different races and cultural backgrounds). This is not to suggest that assimilation was easy for any generation of immigrants. See Nathan Glazer & Daniel P. Moynihan, *Beyond the Melting Pot* (2d ed. 1970); see also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum. L. Rev. 1060, 1124 (1991) (noting that invitation to immigrants on Statue of Liberty “has always been an offer to join us on our terms. The immigrant story is one of assimilation, not multi-culturalism.”).

47. See Schuck, *supra* note 37, at 70–74.

48. See Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. Davis L. Rev. 937, 945–47 (1994).

49. See Aleinikoff, Martin, & Motomura, *supra* note 30, at 2 (describing role of Workingmen’s Party in California in passage of Chinese exclusion laws); Schuck, *supra* note 37, at 63–64 (noting that for most of the century “unions, like most of their rank and file, had favored restrictions on immigration”); see also *Oyama v. California*, 332 U.S. 633, 651–53 (1948) (Murphy, J., concurring)

backed employer sanctions, bitterly opposed by immigrant rights and Latino activist groups, in the Immigration Reform and Control Act.<sup>50</sup> In recent years, some claiming sympathy with the interests of labor have advocated the need to limit immigration.<sup>51</sup> A number of environmentalists have advocated immigration restrictions.<sup>52</sup> Not surprisingly in light of the support of traditional liberal interest groups for immigration restrictions, many Democrats in recent years, including President Clinton, advocated increased immigration enforcement measures.<sup>53</sup>

During the 1990s, the divide among liberals on the subject of immigration by some accounts has widened. Ethnic minority groups, historically in the Democratic fold, typify the dissension. On the one hand, Latino activist organizations generally have opposed restrictionist measures in no small part because the Latino community is composed of a sizable immigrant population, and the citizen component fears the adverse ripple effects of heightened immigration enforcement efforts.<sup>54</sup> On the other hand, some African-Americans have expressed reservations about the perceived negative impacts of immigration on their

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(noting that opposition to Chinese immigration in mid-to-late 1800s "came from trade unionists, who feared economic competition, and from politicians, who sought union support" and that immigration by Japanese in early 1900s was resented by "[w]hite workers" who demanded "that Japanese immigration be limited or prohibited entirely") (footnote omitted).

50. See Schuck, *supra* note 37, at 64. A prominent African-American organization did as well. See Richard L. Strout, *Controversial Immigration Reform Gets New Hearing in Washington*, Christian Sci. Mon., Mar. 1, 1983, at 3 (reporting that NAACP and organized labor endorsed employer sanctions proposed in immigration reform legislation).

51. See, e.g., Vernon M. Briggs, Jr., *Mass Immigration and the Nation's Interest* (1992) (arguing that immigration policy and circumstances of domestic labor market are out of synch); Philip L. Martin & David A. Martin, *The Endless Quest: Helping America's Farm Workers* 170-78 (1994) (concluding that one important way to improve working conditions of farmworkers was through better control of immigration); see also Federation for American Immigration Reform, *Immigration 2000: The Century of the New American Sweatshop* (1992) (compiling articles articulating theme that immigration has had negative impacts on U.S. labor market).

52. See, e.g., Garrett Hardin, *Living Within Limits* 276-93 (1993) (noted environmentalists arguing for immigration restrictions); Robert W. Fox & Ira H. Mehlman, *Crowding Out the Future: World Population Growth, U.S. Immigration, and Pressures on Natural Resources* (1992) (publication of Federation for American Immigration Reform emphasizing environmental justifications for immigration restrictions); see also Peter L. Reich, *Environmental Metaphor in the Alien Benefits Debate*, 42 UCLA L. Rev. (forthcoming 1995) (analyzing environmental arguments made for restricting public benefits available to noncitizens).

53. See, e.g., James Bornemeier, *Clinton Moves to Curb Illegal Immigration*, L.A. Times, Feb. 8, 1995, at A3 (proposing increased immigration enforcement); *Clinton Vows More Immigration Enforcement, Bills Introduced in Congress*, 72 Interpreter Release: 169 (Jan. 30, 1995) (summarizing immigration enforcement themes in President Clinton's State of the Union speech).

54. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 La Raza L.J. (forthcoming 1995).

community.<sup>55</sup> The much-publicized conflict in Los Angeles, California between the African-American and Korean immigrant communities is a tangible example of the concerns motivating African-American ambivalence toward immigration.<sup>56</sup>

Though perhaps less visibly the case than for Republicans, a split among Democrats also emerged in the Proposition 187 campaign. Many traditional liberal groups, especially Latino activists, strongly lobbied against Proposition 187. African-American activist groups appeared less active, and a significant number of African-Americans (as well as Asian-Americans) ultimately supported the measure.<sup>57</sup>

As reflected by the measure's widespread support, Proposition 187 held bipartisan appeal. This may result in part from the fact that the initiative tapped into populist sentiment on at least several levels. At one level, Proposition 187 pitted citizens against undocumented immigrants who were perceived to injure working citizens by taking jobs. In addition, the initiative, at least in part, was an effort directed at keeping "those" Mexicans with "their" language and "their" culture out of the state.<sup>58</sup> Such nativism, dating at least as far back as the Alien and Sedition Acts of the 1790s,<sup>59</sup> has not infrequently enjoyed popular support in the United States. At another level, support for Proposition 187 challenged the federal government, which is entrusted with regulating immigration. Part of the tension between the state and federal

55. See Lawrence H. Fuchs, *The Reactions of Black Americans to Immigration*, in *Immigration Reconsidered: History, Sociology and Politics* 293 (Virginia Yans-McLaughlin ed., 1990); Jack Miles, *Blacks vs. Browns*, *The Atlantic*, Oct. 1992, at 41; see also Otis L. Graham Jr. & Roy Beck, *To Help Inner City, Cut Flow of Immigrants*, *L.A. Times*, May 19, 1992, at B7 (contending that excessive immigration may contribute to plight of African-Americans and suggesting that violence in Los Angeles in spring of 1992 may have been caused in part by such immigration-related tension). In past nativist epochs, African-Americans have joined in the anti-immigrant clamor. See Fuchs, *supra*, at 296-97 (describing criticism of Asian and Mexican immigration by black leaders and media).

56. See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 *Cal. L. Rev.* 863, 889 (1993). Another example is the conflict between African-Americans and Cuban immigrants in south Florida. See Alejandro Portes & Alex Stepick, *City on the Edge: The Transformation of Miami* 176-202 (1993).

57. See Patrick J. McDonnell, *State's Diversity Doesn't Reach Voting Booth*, *L.A. Times*, Nov. 10, 1994, at A1 (reporting that exit polls showed that almost one-half of the African-American and Asian-American voters supported the Proposition, compared to overwhelming rejection by Latino voters (77% opposed-23% in favor)); see also *infra* notes 144-46 (providing exit poll results breaking down the vote by ethnic group).

58. See *infra* text accompanying notes 147-54.

59. See generally James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

governments with respect to immigration results from the fact that the federal government receives the bulk of tax revenues from the undocumented, while state and local governments provide most of the services.<sup>60</sup> By supporting the measure, the taxpayers of the state of California challenged the federal government.

## II. POPULAR DEMOCRACY, ALIENS, AND PROPOSITION 187

This section first will describe the concerns of the framers of the Constitution with popular democracy. It then will analyze how initiatives at various times have adversely impacted minorities, including noncitizens. Finally, it will consider the formidable barriers to the mounting of successful challenges to such laws under the Equal Protection Clause.

### A. *The Framers' Suspicion of Direct Democracy*

From the day of the nation's founding, the excesses of popular democracy, often described as "mob rule" and "tyranny of the majority," have preoccupied Americans.<sup>61</sup> A desire to bridle the unfettered democratic impulse unquestionably influenced the framing of the Constitution.<sup>62</sup> Indeed, the Bill of Rights in part sought to constrain the democratic potential for trampling upon individual rights.<sup>63</sup>

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60. See Johnson, *supra* note 21 (analyzing federal-state tensions resulting from fiscal consequences of undocumented immigration). See generally Urban Institute, *Fiscal Impact of Undocumented Aliens: Selected Estimates for Seven States* (1994) (estimating costs to states of undocumented immigration); Michael Fix & Jeffrey S. Passel, Urban Institute, *Immigration and Immigrants: Setting the Record Straight* (1994) (estimating that costs to states are outweighed by benefits bestowed by undocumented immigration).

61. See Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 19 (1969) (analyzing framers' fear that "the disorder of absolute liberty would inevitably lead to the tyranny of the dictator"); William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 11-50 (1972) (analyzing origins of representative government in the Constitution and framers' fear of direct democracy).

62. See Eule, *supra* note 16, at 1522-26 (analyzing concerns expressed in Federalist Papers on this point); Gillette, *supra* note 16, at 940-44 (recounting "tradition of anti-participatory thought" influencing framers). For skepticism over the orthodox view that the framers feared direct democracy, see Akhil Reed Amar, *The Constitutional Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 756-59 (1994).

63. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.").

James Madison was vocal in articulating the concerns with potential democratic excesses. He observed that “there are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.”<sup>64</sup> Madison elaborated on the specific dangers in *The Federalist No. 10*:

[A] pure democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. *A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual.* Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and they have in general been as short in their lives, as they have been violent in their deaths.<sup>65</sup>

Put simply, “[i]f a majority be united by common interest, the rights of the minority will be insecure.”<sup>66</sup>

Hans Linde has succinctly described the “passion” and “interest” to which Madison referred in these passages:

[The framers] feared that governmental power would be misused from motives of “interest” and “passion,” which they meant to contain by designing divided and deliberative institutions of government. The two terms had a long and familiar history in eighteenth century political theory. Interest meant the pursuit of personal self-interest, mainly in the form of wealth. Political “passions” were not selfish political desires but collective emotions such as love, fear, or hatred. *The politics of collective passion appeals to people’s identification with one or rejection of another social group for reasons transcending an ordinary political*

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64. *The Federalist No. 63*, at 425 (James Madison) (Jacob E. Cooke ed., 1961). “What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions?” *Id.*

65. *The Federalist No. 10*, at 61 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added); see also *The Federalist No. 14*, at 83–89 (James Madison) (Jacob E. Cooke ed., 1961) (distinguishing between democratic and republican government).

66. *The Federalist No. 51*, at 351 (James Madison) (Jacob E. Cooke ed., 1961).



*disagreement about policy. In the European and American experience known to the founding generation, the strongest passions divided communities and nations into contending religious factions, or "sects," in Madison's terms, until race and non-European immigration kindled new passions.*<sup>67</sup>

One aim of the framers was to create a representative form of government that ensured against the democratic excesses resulting from the passion and self-interest that so troubled Madison.<sup>68</sup> As the concern with "self-interest" suggests, the primary concern of the framers may have been with the tyranny of the majority over the *property rights* of the minority. With the experience of government under the Articles of Confederation, including the famous debtors' uprising known as Shay's Rebellion, fresh in mind,<sup>69</sup> the Federalists feared that, unless checks were put in place, the debtor majority might trample the rights of the creditor minority in the political process, as well as in the courts.<sup>70</sup>

The concern with the excesses of passion in modern constitutional law revolves around discrete and insular minorities.<sup>71</sup> As true to some extent in any form of democracy, minorities are especially threatened by popular democracy.<sup>72</sup> Because of that threat, Professor Julian Eule has argued for searching judicial review of laws enacted by the electorate:

It may be politic to invoke an abiding trust in public judgment, but racism, sexism, nativism, and self-interest are too much a part of

67. Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709, 723 (1994) [hereinafter Linde, *Republican Government*] (emphasis added).

68. Some have suggested that initiatives may violate the guarantee clause of Article IV, § 4, which provides that the federal government pledges to "guarantee to every State in this Union a Republican Form of Government." See, e.g., Hans A. Linde, *When is Initiative Lawmaking Not "Republican Government"?*, 17 Hastings Const. L.Q. 159, 169 (1989).

69. See Wood, *supra* note 61, at 409-13; see also Wiecek, *supra* note 61, at 27-42.

70. See Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1459 (analyzing history surrounding creation of federal courts and referring to "pro-creditor Constitutional Convention").

71. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

72. The Supreme Court has recognized this potential:

[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.* . . . In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

*Washington v. Seattle School Dist.*, 458 U.S. 457, 486 (1982) (citations & footnotes omitted).

American history to be ignored. In a multitude of ways we continue to demonstrate our fear of the other and our distrust of difference. While public proclamations of racist attitudes have lost their respectability, prejudice continues to receive an airing in the privacy of the voting booth. . . . [T]he very definition of unpopularity is that unpopular groups normally will fare poorly at the ballot box.<sup>73</sup>

History reflects that Professor Eule's fears of popular democracy are not unwarranted. For example, two of the ten most popular initiatives in California electoral history implicated the rights of minorities.<sup>74</sup>

### B. *Popular Democracy in Action*

The last twenty-five years have seen a resurgence in lawmaking by initiative in some states, particularly California.<sup>75</sup> Initiatives have, among many other purposes, sought to protect the environment,<sup>76</sup> reform the

73. Eule, *supra* note 16, at 1553 (footnotes omitted); see Magleby, *supra* note 7, at 184–94 (expressing similar concerns); Bell, *supra* note 16, at 19 (“Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns.”) (footnote omitted); see also Linde, *Republican Government*, *supra* note 67 (advocating need for careful judicial review of initiatives appealing to “popular passion” or self-interest); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. Cal. L. Rev. 733, 747–49 (1988) (expressing concern with potential in initiative process for “majority tyranny” to the detriment of minorities).

For a critique of Professor Eule's thesis, see Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527 (1994) and Baker, *supra* note 16, at 752–75. Professor Eule responded to some criticism in Julian N. Eule, *Representative Government: The People's Choice*, 67 Chi.-Kent L. Rev. 777 (1991) [hereinafter Eule, *People's Choice*].

74. See March Fong Eu, California Secretary of State, *A History of the California Initiative Process* 9 (1992) (noting that Alien Land Law (Proposition 1) received 75% of popular vote and Official State Language (Proposition 63) received 73% of vote); see also *id.* at 7 (noting that “Voting Material in English Only” initiative received nearly 71% of votes cast).

75. See Magleby, *supra* note 7, at 26–31; see, e.g., March Fong Eu, California Secretary of State, *supra* note 74, at 13–14 (showing that from 1950 to 1970, only 22 initiatives qualified for the ballot while from 1971 to 1990, 84 did). This does not mean that all are happy with the process. See *Legislature of State of California v. Eu*, 816 P.2d 1309, 1336 (Cal. 1991) (Mosk, J., dissenting) (“At the outset, I must observe that “The initiative process is out of control in California.”) (citation omitted).

One political scientist suggests that the increase in initiatives tending to reflect concerns of the white middle class in California, may be directly related to the increasing representation of minorities in representative bodies. See Bruce Cain, *The Contemporary Context of Ethnic and Racial Politics in California*, in *Racial and Ethnic Politics in California* 9, 23–24 (Bryan O. Jackson & Michael B. Preston, eds., 1991).

76. See *San Diego Coast Regional Comm'n v. See the Sea, Ltd.*, 513 P.2d 129 (Cal. 1973) (interpreting Coastal Zone Conservation Act of 1972, Proposition 20).

insurance industry,<sup>77</sup> and impose term limits on elected officials.<sup>78</sup> Although a proposal for a national initiative process has not come to fruition,<sup>79</sup> some successful state initiatives have had national implications, perhaps the most prominent example being California's Proposition 13, which reduced property taxes and triggered a so-called Taxpayer Revolt.<sup>80</sup>

A proposition's effect on minority groups may be direct or indirect. Examples of an initiative *directly* affecting a minority group are those involving the rights of lesbians and gay men.<sup>81</sup> At times, certain racial minorities have been targeted by a plebiscite. For example, in 1879, the California voters voiced their opinion on Chinese immigration. The results were 883 "for Chinese immigration" and 154,638 "against Chinese immigration."<sup>82</sup> California Governor William Irwin explained the need for the vote in a way that foreshadowed the arguments made in support of Proposition 187:

[W]hy is it necessary or desirable that the position of the people of this State, or this Coast, on this question should be understood by the people on the other side of the continent? It is because we can obtain effectual relief from the evils of Chinese immigration only

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77. See *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566 (Cal. 1994) (reviewing challenges to regulations implementing rate rollback provisions of Proposition 103, which made fundamental changes in insurance regulation in California).

78. See Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J.L. & Pub. Pol'y 1, 2 & nn.2-3 (1994) (listing increasing number of states that have adopted through initiative some sort of term limits for members of Congress).

79. See Cronin, *supra* note 2, at 157-95; see also Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 Neb. L. Rev. 965 (1979). Compare Bruce Ackerman, *We the People: Foundations* 54-56 (1991) (suggesting possibility of national referenda on major constitutional transformation) with Charles L. Black, Jr., *National Lawmaking by Initiative? Let's Think Twice*, Human Rights, Fall 1979, at 28 (questioning propriety of national initiative proposal).

80. See Cronin, *supra* note 2, at 157-95; see also David D. Schmidt, *Citizen Lawmakers* 125-45 (1989).

81. See, e.g., *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (enjoining enforcement of state constitutional amendment directed at gays, lesbians, and bisexuals), *cert. granted*, 115 S. Ct. 1092 (1995); *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (rejecting challenge to voter-enacted city charter amendment barring "preferential treatment" for gays, lesbians, and bisexuals); *St. Paul Citizens for Human Rights v. City Council*, 289 N.W.2d 402 (Minn. 1979) (upholding local initiative repealing St. Paul gay rights ordinance); see also Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19 (1993) (analyzing 1992 campaign in Oregon on initiative aimed at homosexuals); *Merrick v. Board of Higher Educ.*, 841 P.2d 646 (Or. App. 1992) (invalidating initiative under Oregon constitution).

82. *Biennial Message of Governor William Irwin to the Legislature of the State of California*, Twenty-Third Session, 1880, at 36, reprinted in Appendix to the Journals of the Senate and Assembly of the Twenty-Third Session of the Legislature of the State of California.

through the action of the Federal Government. And to secure such action, we will be compelled to get a preponderance of the public sentiment of the whole country into harmony with ourselves on this question. When it becomes definitely and authoritatively known, that the opposition to the Chinese in this State, and on this Coast, is not limited to a class—and that class the least intelligent—but embraces substantially the whole people, irrespective of classes, we may expect that this opposition will receive respectful consideration from the people of the whole country.<sup>83</sup>

In his inaugural address, Governor George C. Perkins denied that race influenced the vote on Chinese immigration.<sup>84</sup>

A type of initiative with a more indirect effect on minority groups is the almost-perennial anti-crime measure that has a disproportionate impact on minority communities.<sup>85</sup> Similarly, tax and related measures that primarily benefit the middle class may place a disproportionate burden on the poor and minorities.<sup>86</sup>

Consider for a moment the initiatives designating English as the “official” language, often referred to as the English-Only laws, passed by the electorates of a number of states.<sup>87</sup> Despite the fact that the laws are facially neutral, their impact often is most directly felt by particular national origin minorities. This may be explained by the linkage between

83. *Id.*; see also Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* 62–63 (1991) (describing election and how it fit into broader anti-Chinese sentiment in state).

84. *Inaugural Address of His Excellency, George C. Perkins, Governor of California, Jan. 8th 1880*, at 9, reprinted in Appendix to the Journals of the Senate and Assembly of the Twenty-Third Session of the Legislature of the State of California (1880).

85. See, e.g., *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (reviewing Crime Victims Justice Reform Act, Proposition 115); *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982) (reviewing Victims’ Bill of Rights, Proposition 8); *People v. Superior Court*, 37 Cal. Rptr. 364 (Cal. Ct. App. 1995) (reviewing “Three Strikes” initiative, Proposition 184).

86. See *Eule*, *supra* note 16, at 1560; see also *Bell*, *supra* note 16, at 19 n.72 (“The success of California’s initiative limiting property taxes, Proposition 13, can be seen as a response not only to high tax rates but also to the belief of many voters that approval would result in reduction of funds paid to unwed mothers and other welfare recipients.”).

87. See *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1224 nn.9–10 (9th Cir. 1994) (listing states), *petition for reh’g en banc granted*, 53 F.3d 1084 (9th Cir. 1995); see also Daniel J. Garfield, Comment, *Don’t Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 Nw. U. L. Rev. 690, 691–92 & n.9 (1995) (stating that voters in seven states, Alabama, Arizona, California, Colorado, Florida, Nebraska, and Hawaii, had passed some version of English-Only law); *Montero v. Meyer*, 13 F.3d 1444 (10th Cir. 1994) (deciding procedural challenge to Colorado’s English-Only initiative); *Eu*, *supra* note 74, at 7 (noting that Proposition 38 in 1984 entitled “Voting Material in English Only” garnered 70.7% of vote).

language and ethnicity in the United States.<sup>88</sup> Moreover, these laws affect those national origin groups composed of a significant percentage of immigrants, such as the Latino and Asian communities. At least in the Southwest, these measures are voted upon primarily with Spanish as the “competing” language in mind.<sup>89</sup> Designation of English as the official language, though facially neutral, has a meaningful impact on the Latino community.<sup>90</sup> In important ways, initiatives dealing with noncitizens are similar—though facially neutral, they may disparately affect immigrants from certain countries.

### 1. *The Infamous Alien Land Laws*

Facial neutrality is not necessarily a legal prerequisite to the disadvantaging of noncitizens.<sup>91</sup> Consequently, a number of initiatives have expressly attempted to discriminate against aliens. In *Truax v. Raich*,<sup>92</sup> for example, Arizona voters passed a measure purportedly designed to protect U.S. citizens by barring any employer of five or more employees from employing less than 80% “qualified electors or native-born citizens.” Perhaps concerned more with protecting certain

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88. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 Minn. L. Rev. 269, 357–60 (1992) (analyzing regulation of use of language as proxy for disadvantaging unpopular national origin groups); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293 (1989) (analyzing similar themes); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991) (analyzing application of antidiscrimination law to accent discrimination, which may mask ethnic animus).

89. See Perea, *supra* note 88, at 316–23 (discussing English-Only movements in California and New Mexico). Some localities have passed versions of English-Only laws in response to the growth of other linguistic and national origin minorities, such as Southeast Asians. See *id.* at 344.

90. See *Yniguez*, 42 F.3d at 1241 (“[T]he adverse impact [of the Arizona English-Only law’s] overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities.”) (citations omitted), *petition for reh’g en banc granted*, 53 F.3d 1084 (9th Cir. 1995).

91. See *infra* text accompanying notes 159–60 (discussing lawfulness of alienage classifications). In a manner reminiscent of the English-Only laws, initiatives sometimes have indirectly reflected responses to the influx of immigrants. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating initiative responding to immigration into Oregon of Catholics, who frequently attended parochial schools, by requiring children to attend public schools); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating law passed by Nebraska legislature, inspired by German immigration, barring teaching any language other than English in private elementary schools).

92. 239 U.S. 33, 35 (1915).

constitutional values than with protecting minorities, the Supreme Court invalidated the measure.<sup>93</sup>

One of the most well-known types of state laws directed at noncitizens, at least before Proposition 187, were the alien land laws. A number of states, including California and Washington, early in the twentieth century passed laws that barred the ownership of certain real property by aliens ineligible for citizenship.<sup>94</sup> The history and the context of the 1920 version of California's alien land law, which was passed by initiative, make it clear that the measure was directed at the Japanese, one of the groups of immigrants ineligible for citizenship at the time.<sup>95</sup> Despite the fact that racial animus motivated passage of the laws, the Supreme Court let them stand.<sup>96</sup>

That is not to say that there might not be any legitimate concerns with alien ownership of property.<sup>97</sup> Such concerns, however, were not the ones that carried the day. Consider the blatantly anti-Japanese campaign waged by supporters of the alien land initiative in California.<sup>98</sup> Justice Murphy described its essence:

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93. The Court arguably was more interested in protecting the substantive due process jurisprudence of *Lochner v. New York*, 198 U.S. 45 (1905), than the rights of noncitizens. See *Truax v. Raich*, 239 U.S. 33, 41 (1915) (emphasizing that state could not deny noncitizens "the right to work for a living in the common occupations of the community [which] is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure") (citations omitted); see also *Tribe*, *supra* note 36, § 16-23, at 1546 n.17 (stating that decision "seems understandable as an expression of *Lochner*-era solicitude for the employer's liberty of property and contract").

94. See *Cockrill v. California*, 268 U.S. 258 (1925) (upholding California law); *Frick v. Webb*, 263 U.S. 326 (1923) (same); *Webb v. O'Brien*, 263 U.S. 313 (1923) (same); *Porterfield v. Webb*, 263 U.S. 225 (1923) (same); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Washington law). *But cf.* *Oyama v. California*, 332 U.S. 633 (1948) (holding that California law was invalid as applied to deny ownership of property to citizen because his parents were Japanese citizens ineligible for naturalization); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (striking down on equal protection grounds California statute barring issuance of commercial fishing license to persons ineligible for citizenship). See generally *Dudley O. McGovney, The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947); *Edwin E. Ferguson, The California Alien Land Law and the Fourteenth Amendment*, 35 Cal. L. Rev. 61 (1947). The California Supreme Court invalidated its state's version of the law on federal equal protection grounds in 1952, after it had been in place for over three decades. See *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952); see also *Namba v. McCourt*, 204 P.2d 569 (Or. 1949) (invalidating Oregon alien land law on equal protection grounds).

95. See *Oyama*, 332 U.S. at 635 n.3; *Sei Fujii*, 242 P.2d at 628.

96. See *supra* note 94 (citing cases).

97. See Fred L. Morrison & Kenneth R. Krause, *State and Federal Legal Regulation of Alien and Corporate Land Ownership and Farm Operation* 59-60 (1975) (summarizing briefly arguments for and against regulation of ownership of farm land by noncitizens).

98. See Bruce A. Castleman, *California's Alien Land Laws*, 7 W. Legal Hist. 25, 41 (1994) (describing initiative campaign); *Ferguson, supra* note 94, at 62-73 (reviewing anti-Japanese animus

A spirited campaign was waged to secure popular approval, a campaign with a bitter anti-Japanese flavor. All the propaganda devices then known—newspapers, speeches, films, pamphlets, leaflets, billboards, and the like—were utilized to spread the anti-Japanese poison. The Japanese were depicted as degenerate mongrels and the voters were urged to save “California—the White Man’s Paradise” from the “yellow peril,” . . . Claims were made that the birth rate of the Japanese was so high that the white people would eventually be replaced and dire warnings were made that the low standard of living of the Japanese endangered the economic and social health of the community. Opponents of the initiative measure were labeled “Jap-lovers.” The fires of racial animosity were thus rekindled and the flames rose to new heights.<sup>99</sup>

Justice Murphy’s observations show that both racist and economic considerations influenced California voters in passing the alien land law.<sup>100</sup> In Madison’s terms, both “passion” and “self-interest” poisoned the process. As we shall see, similar factors influenced the passage of Proposition 187.

## 2. *Proposition 187 as Racist?*

Though more subtle in light of modern sensibilities, the Proposition 187 campaign bore some striking similarities to the campaign culminating in the passage of the alien land laws in California. The question whether the initiative might properly be classified as “racist,” however, is deeply complicated. Part of its support may result from

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that motivated initiative’s passage); see also *Takahashi*, 334 U.S. 410, 422–27 (1948) (Murphy, J., concurring) (detailing how California statute barring issuance of commercial fishing licenses to persons ineligible for citizenship was “but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century”).

99. *Oyama*, 332 U.S. at 658–59 (Murphy, J., concurring) (footnote omitted); see also *Terrace v. Thompson*, 274 F. 841, 849 (W.D. Cal. 1921) (“It is obvious that the objection on the part of Congress [to naturalization of Japanese] is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hall-mark of Oriental despotisms, or was at the time the naturalization law was enacted.”), *aff’d*, 263 U.S. 197 (1923).

100. See McGovney, *supra* note 94, at 49 (quoting California Attorney General’s Brief to the California Supreme Court in *Frick v. Webb*: “It was the purpose of [California Alien Land Law] to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer.”) (emphasis added); *Sei Fujii v. State*, 242 P.2d 617, 628 (Cal. 1952) (“[T]he real purpose of the legislation was the elimination of competition by alien Japanese in farming California land.”).

concerns with the fiscal consequences of undocumented immigration. Such a motive is not necessarily suspect.<sup>101</sup> Some voters undoubtedly were fearful of a loss of control of their culture, society, and lives.<sup>102</sup> Others, however, were motivated by a desire to halt the flow of Mexican immigrants to the United States and to hasten their return to Mexico. Others were unabashedly anti-Mexican, regardless of the immigration status of the persons. It also is possible that the passage of Proposition 187 resulted from sheer frustration with immigration.<sup>103</sup> All this said, we shall see that it is difficult to refute the claim that the ethnicity of the stereotypical undocumented immigrant<sup>104</sup> played at least *some* role in the passage of Proposition 187.

Nativist and racist undertones to the Proposition 187 campaign suggest that passion, so feared by Madison, influenced the voters. Self-interest, another of Madison's fears, swayed the electorate as well. Such factors, of course, also culminated in the alien land laws. In addition, there are similarities of purpose between the land laws and Proposition 187. Both, at least in part, were designed to discourage immigration into the state of outsiders undesirable to the majority.<sup>105</sup> Because the federal government has exclusive control over the regulation of immigration,

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101. However, the desire to reduce spending on benefits to immigrants to maintain a larger piece of the benefit and services pie offered by government (or to stabilize or reduce taxes) may implicate the self-interest that troubled Madison about direct democracy. See *supra* text accompanying notes 64–70. Thus, self-interest and passion may have worked in combination to ensure the passage of Proposition 187. See *infra* text accompanying notes 108–54 (discussing evidence of racism and nativism motivating initiative's victory).

102. See Peter H. Schuck, *The Message of 187*, Am. Prospect, Spring 1995, at 85 (stating belief that passage of Proposition 187 "is less a spasm of nativist hatred than an expression of public frustration with a government and civil society that seem out of touch and out of control . . .").

103. See Magleby, *supra* note 7, at 30–31 (explaining that voter frustration may have influenced increase in initiative activity); see also Cain, *supra* note 75, at 23–24 (contending that passage of some recent initiatives represents reaction of middle-class white voters to increased representation of minorities in legislatures).

104. I refer to the stereotypical undocumented immigrant as being from Mexico. Despite the stereotype, it is undisputable that the undocumented population in the United States is far from monolithic. It has been estimated that, as of October 1992, less than 40% of the undocumented persons in the United States are from Mexico. See *infra* note 148.

105. Compare Estate of Yano, 206 P. 995, 1001 (Cal. 1922) (stating that one purpose of law was to "discourage the coming of Japanese into this state") and McGovney, *supra* note 94, at 51 ("The . . . real purpose of the California 'ineligible alien' land law was to make the residence of Japanese in the state as little attractive as possible. Since the state lacked constitutional power to drive them across its borders by direct legislation, the attempt was made to approximate that objective by indirection.") with *California Ballot Pamphlet*, *supra* note 20, at 54 (reprinting arguments by Proposition 187 supporters including statement that initiative "will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion") (capitals in original).



both the alien land laws and Proposition 187 arguably are preempted.<sup>106</sup> Consistent with the view that both impinged upon distinctively federal concerns, the land laws and Proposition 187 provoked hostile responses from the governments whose nationals were affected and thus impacted U.S. foreign relations.<sup>107</sup>

a. *The Campaign for the Initiative*

At the risk of understatement, California experienced a spirited, hotly contested campaign over Proposition 187. Nativist and racist as well as economic, social, and cultural themes arose in the campaign.<sup>108</sup> Governor Pete Wilson, up for re-election, capitalized on public dissatisfaction with immigration by ardently supporting the initiative. Some of his campaign advertisements showed shadowy Mexicans crossing the border in large numbers.<sup>109</sup> This was not the governor's first foray into immigration politics in the 1990s. By arguing that pregnant women unlawfully

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106. See *Toll v. Moreno*, 458 U.S. 1, 10–17 (1982) (holding that state could not place additional burdens on noncitizens not contemplated by Congress); *Graham v. Richardson*, 403 U.S. 365, 378 (1971) (“State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area constitutionally entrusted to the Federal Government.”); see also *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) (contending that California’s alien land law was preempted). *But cf.* *DeCanas v. Bica*, 424 U.S. 351 (1976) (holding that California law barring employment of undocumented persons was not preempted).

107. Compare *Oyama*, 332 U.S. at 655–56 & n.7 (Murphy, J., concurring) (acknowledging Japanese government’s hostile response to passage of California’s alien land law) with Tim Golden, *The 1994 Campaign: Mexico; Government Joins Attack on Ballot Idea*, N.Y. Times, Nov. 3, 1994, at A29 (reporting that Mexican president criticized Proposition 187 and “xenophobic campaign” culminating in its passage) and Mark Fineman, *California Election: Mexico Assails State’s Passage of Prop. 187*, L.A. Times, Nov. 10, 1994, at A28 (reporting that Mexican president stated that Proposition 187 was “racist” and “a disgrace for U.S.-Mexican relations”). There also were reports of anti-American violence in Mexico after Proposition 187’s passage and a call by some Mexicans to boycott California businesses. See Tod Robberson, *Salinas, Other Mexicans Protest California Anti-Immigrant Vote*, Wash. Post, Nov. 10, 1994, at A49. Leaders of a number of Latin American nations besides Mexico also attacked Proposition 187. See William Booth, *Latin Leaders Criticize Growing U.S. Nativism*, Wash. Post, Dec. 10, 1994, at A6.

108. Cf. Aleinikoff, Martin, & Motomura, *supra* note 30, at 2 (noting that so-called Chinese exclusion laws of late 1800s “like many later immigration laws—were the product of economic and political concerns laced with racism and nativism”).

109. See John Marelius, *Wilson Ad Out to Ease Prop. 187 Drumbeat*, San Diego Union-Trib., Oct. 25, 1994, at A3 (reporting that Governor Pete Wilson’s advertisement “showed blurry black-and-white footage of people dodging cars as they dash through the San Ysidro border crossing . . . [accompanied by] pulsating cop-show-style music and an announcer who menacingly intones, ‘They keep coming.’”); John Jacobs, *The Sleazy Ads on Proposition 187*, San Diego Union-Trib., Nov. 4, 1994, at B11 (reporting that Wilson campaign advertisement showed Mexican immigrants coming the “wrong way” to United States by “swimming across the Rio Grande or dodging cars on the freeway at the border entrance”).

immigrate to this country to secure free medical care and to give their children U.S. citizenship, Wilson previously had attacked the provision of public assistance to the undocumented.<sup>110</sup>

But it was seldom the case during the campaign that Mexicans were singled out among the undocumented population. Undocumented immigrants as a group were blamed for California's fiscal and other woes, as the initiative's "Save Our State" moniker suggests.<sup>111</sup> The fact that Proposition 187 placed in jeopardy federal funding of \$15 billion, an amount that dwarfed any potential savings, was virtually ignored in the campaign.<sup>112</sup> That fact alone suggested that other factors besides a desire to save money were at work.<sup>113</sup>

Some supporters of Proposition 187 expressed hopes and aims well beyond simply fiscal ones. One of the initiative sponsors, Ron Prince, baldly asserted that "[i]llegal aliens are killing us in California . . . . Those who support illegal immigration are, in effect, anti-American."<sup>114</sup> One argument in support of Proposition 187 in the voters' pamphlet suggests the deeply negative feelings about immigration and immigrants: "Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion."<sup>115</sup> The Proposition 187 media director for southern California expressed even more disturbing concerns:

Proposition 187 is . . . a logical step toward saving California from economic ruin. . . . By flooding the state with 2 million illegal aliens to date, and increasing that figure each of the following 10 years, Mexicans in California would number 15 million to 20

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110. See, e.g., Major Garrett, *California Dreaming? Cries for Immigration Relief Shake Nation*, Wash. Times, Aug. 15, 1993, at A1 (quoting California Governor Pete Wilson: "We give people a reward for violating the law and successfully entering the country illegally . . . . If you come to this country illegally and have a baby, the reward is your baby will become a citizen, entitled to all the rights and perquisites of any American citizen."). Wilson placed a full page advertisement in the New York Times asking the following question: "Why does the U.S. government reward illegal immigrants who successfully violate the law and manage to have a child born on U.S. soil?" Suzanne Espinosa, *Attacks by White Supremacists*, S.F. Chron., Aug. 13, 1993, at A1 (quoting advertisement).

111. See, e.g., *California Ballot Pamphlet*, *supra* note 20, at 54 (Argument in Favor of Proposition 187) ("It has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year. . . . While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer. . . . IT IS TIME THIS STOPS!") (capitals in original).

112. See *California Ballot Pamphlet*, *supra* note 20, at 50-53.

113. See Johnson, *supra* note 21 (exploring this theme).

114. See Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. Times, Aug. 10, 1994, at A1 (quoting Ronald Prince, co-sponsor of Proposition 187).

115. *California Ballot Pamphlet*, *supra* note 20, at 54 (capitals in original).

million by 2004. During those 10 years about 5 million to 8 million Californians would have emigrated to other states. *If these trends continued, a Mexico-controlled California could vote to establish Spanish as the sole language of California, 10 million more English-speaking Californians could flee, and there could be a statewide vote to leave the Union and annex California to Mexico.*<sup>116</sup>

b. *The Views of the Drafters*

The positions of the individuals who composed the committee that drafted Proposition 187 help one gain a sense of the mixed motives behind the measure.<sup>117</sup> Ron Prince, whose anti-immigrant animus apparently grew out of a business dispute with a legal immigrant he later claimed was an "illegal,"<sup>118</sup> conjured up disturbing imagery from another era in advocating passage of the initiative: "You are the posse and SOS is the rope."<sup>119</sup> Besides suggesting that Proposition 187 opponents were "anti-American,"<sup>120</sup> Prince linked "illegal aliens" with criminals: "[t]he . . . mindset on the part of illegal aliens, is to commit crimes. The first law they break is to be here illegally. The attitude from then on is, I don't have to obey your laws."<sup>121</sup>

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116. *Letter to Editor by Linda R. Hayes*, N.Y. Times, Oct. 15, 1994, at A18 (emphasis added); see Gebe Martinez & Patrick J. McDonnell, *Prop. 187 Backers Counting on Message, Not Strategy*, L.A. Times, Oct. 30, 1994, at A1 (quoting leaders of anti-immigrant groups, one stating that "I have no intention of being the object of 'conquest,' peaceful or otherwise, by Latinos, Asians, blacks, Arabs or any other group of individuals who have claimed my country" and another claiming that undocumented immigration is "part of a reconquest of the Southwest by foreign Hispanics . . . Someone is going to be leaving the state. It will either be them or us.").

117. See Paul Feldman, *Figures Behind Prop. 187 Look at Its Creation*, L.A. Times, Dec. 14, 1994, at A3 (reporting that drafting committee included Ron Prince, Harold Ezell (former Immigration and Naturalization Service (INS) official), Alan Nelson (former INS Commissioner), Barbara Kiley (mayor of Yorba Linda, California), Robert Kiley (political consultant), Richard Mountjoy (Republican member of California legislature), and Barbara Coe (head of the California Coalition for Immigration Reform and Citizens for Action Now)).

118. See Gebe Martinez & Doreen Carvajal, *Creators of Prop. 187 Largely Escape Spotlight*, L.A. Times, Sept. 4, 1994, at A1 (reporting that Prince at one time claimed that he had been defrauded by a Canadian "illegal alien," who in fact was a lawful permanent resident).

119. George Ramos, *Prop. 187 Debate: No Tolerance But Abundant Anger*, L.A. Times, Oct. 10, 1994, at B3 (quoting Prince).

120. See *supra* text accompanying note 114 (quoting Prince).

121. Marc Cooper, *The War Against Illegal Immigrants Heats Up*, Village Voice, Oct. 4, 1994, at 28 (quoting Prince); see also Johnson, *supra* note 21 (analyzing frequent link in political debate between immigrant benefit recipient and "criminal alien").

Well before the advent of Proposition 187, Harold Ezell, Western Regional Commissioner of the Immigration and Naturalization Service (INS) in the 1980s, was infamous for comments made about “illegal aliens”—that they should be “caught, skinned and fried.”<sup>122</sup> Ezell’s statements prompted Latino activists to demand his resignation on the grounds that he was racist.<sup>123</sup> During the debate over Proposition 187, Ezell explained that support for the measure was strong because “[t]he people are tired of watching their state run wild and become a third world country.”<sup>124</sup>

Alan Nelson, former Commissioner of the INS, at one time was a consultant with the Federation for American Immigration Reform, which received funding from the Pioneer Fund, a group believing in racial superiority.<sup>125</sup> Concerned with mass migrations from Mexico,<sup>126</sup> Nelson resigned his position with the INS in the wake of conflict with the Attorney General and allegations of poor leadership and inefficiency.<sup>127</sup>

Richard Mountjoy, a member of the California legislature, consistently has proposed bills directed at immigrants, many of which have been bitterly opposed by immigrants’ rights activists.<sup>128</sup> He has little

122. Olga Briseno, *Mister Migra, Harold Ezell*, San Diego Union-Trib., Aug. 23, 1989, at F1 (quoting Ezell). Senator Dennis DeConcini reportedly complained to Ezell’s superior, INS Commissioner Alan Nelson, that Ezell used the term “wets,” apparently a shortened version of the pejorative “wetbacks,” to refer to immigrants seeking to cross the Rio Grande. See Jay Mathews, *Tough-Talking INS Official Raises Profile, Ire in the West*, Wash. Post, Mar. 24, 1986, at A1.

123. See George Ramos, *Atty. Gen. Aide Calls Ezell a ‘Short-Termer’ in His INS Post*, L.A. Times, May 19, 1989, at A3.

124. Daniel B. Wood, *Ballot Vote on Illegal Immigrants Set for Fall in California*, Christian Sci. Mon., June 1, 1994, at 1 (quoting Ezell).

125. See Pamela Burdman, *White Supremacist Link Trips Prop. 187*, S.F. Chron., Oct. 13, 1994, at A4.

126. See, e.g., Alan C. Nelson, *NAFTA: Immigration Issues Must Be Addressed*, 27 U.C. Davis L. Rev. 987 (1994) (criticizing failure of North American Free Trade Agreement to address immigration of Mexicans to United States).

127. See Lee May & Ronald J. Ostrow, *Bush Replaces Controversial Chief of INS*, L.A. Times, June 27, 1989, at A1 (noting reasons for Nelson’s resignation and quoting Justice Department official as stating that Nelson “has been an increasing embarrassment”); U.S. Gen. Accounting Office, *Immigration Management: Strong Leadership and Management Reforms Needed to Address Serious Problems* (1991); U.S. Gen. Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Deported* (1987); see also Maralee Schwartz, *Nelson Out at INS*, Wash. Post, June 27, 1989, at A21 (noting that audit of INS revealed that agency spent \$1500 for portrait of Nelson, and also produced a videotape tribute to him entitled “The Nelson Years”).

128. See, e.g., Senate Bill 1267, California 1995–96 Reg. Sess. (1995) (Mountjoy) (proposing that state agencies be required to list all costs of preparing materials in languages other than English); Assembly Bill 24, California 1995–96 Reg. Sess. (1994) (Mountjoy) (proposing to implement English as official language provision of state constitution by requiring state and local governments to take steps to preserve, protect, and enhance role of English); Assembly Bill 2434, California

sympathy for undocumented immigrants. According to Mountjoy, undocumented mothers “come here for that birth certificate. They come here to get on the California dole.”<sup>129</sup> “[I]f you want to stop the flow of illegal aliens to our hospitals, stop the benefits.’ . . . ‘*Having a child at our expense is not an emergency.*’”<sup>130</sup> In Mountjoy’s eyes, “[t]he people of California are subsidizing the illegal [alien] invasion to the tune of somewhere around \$5 billion a year,” and “[w]hen you have a flood of immigration . . . there’s not long until this life boat sinks.”<sup>131</sup>

Barbara Kiley, mayor of a city in southern California, reportedly described the children of undocumented immigrants as “those little f—kers.”<sup>132</sup> Kiley and her husband, who is a campaign consultant, reportedly became involved in the Proposition 187 campaign as “a business consideration.”<sup>133</sup> Mr. Kiley reportedly stated that:

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1993–94 Reg. Sess. (1994) (Mountjoy) (same); Assembly Joint Resolution 46, California 1993–94 Reg. Sess. (Mountjoy) (1994) (resolving that United States government should negotiate agreements with countries to which it gives foreign aid that would allow nationals of those countries convicted of crimes in United States to serve sentences in those countries); Assembly Joint Resolution 49, California 1993–94 Reg. Sess. (Mountjoy) (1993) (resolving that Congress should propose amendments to Constitution limiting citizenship to persons born in United States to mothers who are citizens or lawful permanent residents); Assembly Bill 12a, California 1993–94 Spec. Sess. “A” (Mountjoy) (1994) (providing criminal penalties for use of fraudulent documents to conceal immigration status); Assembly Bill 131a, California 1993–94 Spec. Sess. “A” (Mountjoy) (1994) (proposing measures to facilitate deportation of alien felons); Assembly Bill 149, California 1993–94 Reg. Sess. (1993) (Mountjoy) (proposing prohibition of expenditure of state funds for education of undocumented aliens); Assembly Bill 150, California 1993–94 Reg. Sess. (1993) (Mountjoy) (proposing the state funds not be provided to Medi-Cal provider who fails to report to INS undocumented alien to whom it has provided services); Assembly Bill 151, California 1993–94 Reg. Sess. (1993) (Mountjoy) (proposing that undocumented aliens not be permitted to receive workers’ compensation); Assembly Bill 2171, California 1993–94 Reg. Sess. (1993) (Mountjoy) (requiring that undocumented alien could not be issued driver’s license, or have one renewed); Assembly Bill 2228, California 1993–94 Reg. Sess. (1993) (Mountjoy) (proposing that undocumented aliens be prohibited from enrolling in any public postsecondary institution).

129. *Sonya Live* (CNN television broadcast, Feb. 16, 1994) (talk show with Mountjoy answering questions) [hereinafter *Sonya Live*]. But see Johnson, *supra* note 21 (discussing social science literature refuting claim that availability of public benefits is “magnet” attracting undocumented immigrants to United States).

130. Major Garrett, *Economic Plan Includes Aliens’ Medical Funds*, Wash. Times, July 14, 1993, at A1 (quoting Mountjoy) (emphasis added).

131. *Sonya Live*, *supra* note 129.

132. Elizabeth Kadetsky, *Bashing Illegals in California: ‘Save Our State’ Initiative*, Nation, Oct. 17, 1994, at 416, 418 (quoting Kiley).

133. Paul Feldman, *Figures Behind Prop. 187 Look at Its Creation*, L.A. Times, Dec. 14, 1994, at A3 (quoting Harold Ezell). A group hoping to place an initiative similar to Proposition 187 on the ballot in Florida later hired Robert Kiley as a consultant. See Greg Hernandez, *Prop. 187 Adviser To Help Florida Groups*, L.A. Times, Dec. 15, 1994, at B1.

I don't mean to be inhumane, but this [undocumented] woman [seeking medical care] is a perfect example of why we need Prop. 187 . . . She has already had two children here and now she's on her third, and she doesn't even belong here. All I can say is, these people are going to have to go back home. We're paying for her care while Americans are homeless and starving in the streets.<sup>134</sup>

Opining that those protesting Proposition 187 damaged their cause, Kiley stated that “[o]n TV there was nothing but Mexican flags and brown faces.”<sup>135</sup>

The public statements of one Proposition 187 drafter, Barbara Coe, a committed anti-immigrant activist, are worthy of special attention.<sup>136</sup> Coe's anti-immigrant crusade began after she visited a social service office where many different languages were being spoken. During that visit, Coe allegedly learned that undocumented persons were eligible for benefits for which Coe's citizen friend was not.<sup>137</sup> Based on her personal experiences, Coe has contended that undocumented immigrants “are endangering, not only our financial system, but they . . . hold, not only our laws, . . . but our language, our culture, and our very history in contempt . . . .”<sup>138</sup> One of her fears stems from the belief that the “militant arm of the pro-illegal activists . . . have vowed to take over first California, then the Western states and then the rest of the nation.”<sup>139</sup>

In Coe's mind, “illegal aliens” and crime are inextricably linked:

You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact. . . . You're not dealing with a lot of shiny face, little kiddies . . . . You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system. And we're paying them to do it.<sup>140</sup>

134. Sara Catania, *County Report: A Message Hits Home*, L.A. Times, Nov. 20, 1994, at B1 (quoting Robert Kiley).

135. Margot Homblower, *Making and Breaking Law*, Time, Nov. 21, 1994, at 68 (quoting Kiley).

136. Coe is not the first woman at the forefront of an anti-immigrant movement. See Margaret K. Holden, *Gender and Protest Ideology: Sue Ross Keenan and the Oregon Anti-Chinese Movement*, 7 W. Legal Hist. 223 (1994) (describing role of Sue Ross Keenan in anti-Chinese agitation in Oregon in the late 1800s).

137. See Martinez & Carvajal, *supra* note 118.

138. *Sonya Live*, *supra* note 129 (talk show with Barbara Coe).

139. Carol Byrne, *Proposition 187's Uproar*, Star Trib., Oct. 20, 1994, at 7A (quoting Coe).

140. Pamela J. Podger & Michael Doyle, *War of Words*, Fresno Bee, Jan. 9, 1994, at A1 (quoting Coe).

In an op/ed piece, Coe explored a similar theme: “Violent crime is rampant. Illegal-alien gangs roam our streets, dealing drugs and searching for innocent victims to rob, rape and, in many cases, murder those who dare violate their ‘turf’ . . . [N]early 90% of all illicit drugs are brought here by illegals . . . .”<sup>141</sup>

c. *Election Results*

When the initiative in question is facially neutral, it is difficult to determine how significant race and ethnicity were in the law’s approval through the electoral process.<sup>142</sup> This is true with respect to Proposition 187, even though the motives of the drafters appear less than pristine.

Consider some quantitative evidence. Three of the five counties with the highest percentages of votes favoring the initiative had non-Hispanic white populations in excess of 60%; the two counties that registered the greatest opposition to Proposition 187 had non-Hispanic white populations of 45.3% or less.<sup>143</sup> Exit polling reflects that the vote was

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141. Barbara Coe, *Keep Illegals Out of State*, USA Today, Oct. 12, 1994, at 12A. One of the organizations that Coe heads placed the following advertisement in the *National Review* that plays on similar themes:

WANTED: TESTIMONY FROM U.S. citizens who have been victims of crimes either financial (welfare, unemployment, food stamps, etc.), educational (overcrowding, forced bilingual classes, etc.) or physical (rape, robbery, assault, infectious disease, etc.) committed by illegal aliens. Legal advice welcome—possible lawsuit pending.

National Rev., July 5, 1993, at 60.

142. See *infra* text accompanying notes 155–95 (analyzing difficulties encountered in attempting to prove voters’ discriminatory intent necessary to prevail on equal protection challenge to initiative).

143. In tabular form:

Top Five Proposition 187 Counties:

County	For 187	Against 187	Non-Hispanic White Population
Colusa	77.2% (3,878)	22.8% (1,143)	43.1% (7,018)
Glenn	76.8% (6,044)	23.2% (1,830)	65.4% (16,218)
Tehama	75.1% (13,914)	24.9% (4,605)	81.5% (40,469)
Sutter	75.1% (16,623)	24.9% (5,515)	60.4% (38,929)
Madera	75.1% (20,151)	24.9% (6,694)	37.4% (32,969)

racially polarized, particularly along white-Latino lines. White voters supported the proposition at about a two-to-one ratio while Latinos overwhelmingly opposed it by over a three-to-one margin.<sup>144</sup> The landslide victory of Proposition 187 surprised many because polls before the election projected that the vote would be much closer and that the measure might even fail.<sup>145</sup> This might be explained by the fact that some white supporters, fearing being classified as “racists,” were not truthful with pollsters, a common occurrence in racially polarized elections.<sup>146</sup>

Bottom Five Proposition 187 Counties:

County	For 187	Against 187	Non-Hispanic White Population
San Francisco	29.3% (69,313)	70.7% (167,473)	39.7% (287,066)
Alameda	40.4% (160,367)	59.6% (236,910)	45.3% (580,010)
Marin	41.3% (43,284)	58.7% (61,606)	80.9% (186,198)
Santa Cruz	47.2% (43,261)	52.8% (48,351)	63.6% (146,052)
San Mateo	47.4% (101,786)	52.6% (113,134)	54.2% (352,258)

Vote tabulations are from *Statement of Vote*, *supra* note 18, at 113–15. Percentages are rounded to the closest 0.1%. Population information is from *California Cities, Towns, & Counties: Basic Data Profiles for All Municipalities and Counties* 467–524 (Edith Hornor ed., 1993). Non-white Hispanic figures were calculated by subtracting the Hispanic from the white population. *See id.* at viii.

There obviously are many other factors influencing the vote breakdown that go unexplored here, including but not limited to disparities between rural-urban voters, percentage of each demographic group who are citizens and thus eligible to vote, and areas of great migration in recent years.

144. *See Times Poll/A Look at the Electorate*, L.A. Times, Nov. 10, 1994, at B2 (describing exit poll results reflecting following breakdown of those in various groups who voted for/against Proposition 187: white (63–37%), black (47–53%), Latino (23–77%), Asian (47–53%)); *see also* Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 Am. Pol. Sci. Rev. 753, 768–69 (1968) (concluding that, because plebiscites preclude compromise between various interest groups, they polarize voters on issues of race). *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833 (1992) (analyzing increasing inquiry by courts into racial polarization of voting results in evaluating claims under Voting Rights Act).

145. *See, e.g.*, Ed Mendel, “*The Door Is Open*” *If Voters Kill 187*, *Co-Author Warns*, San Diego Union-Trib., Nov. 4, 1994, at A1 (reporting that polls showed that Proposition 187 vote was dead heat).

146. As Professor Baker has observed in the context of elections polarized along black-white lines:

It is a commonplace [phenomenon] of modern American politics that pre-election and exit polls systematically overstate the proportion of the vote that the black candidate in a racially mixed election will actually receive. A popular and plausible interpretation of this persistent finding is that (typically white) individuals are more willing to vote against the black candidate than to admit publicly that they will or did; that is, individuals are more often willing to be “racists” than to risk being *perceived* as such.

Baker, *supra* note 16, at 734 (emphasis in original) (footnotes omitted).



d. *A "Motivating Factor": Immigrants from Mexico*

Like the alien land laws, Proposition 187, though facially neutral, was directed at immigrants from a certain country. The drafters' comments make clear that the "illegal aliens" at the forefront in their minds were undocumented Mexican immigrants.<sup>147</sup> Although there are many other undocumented persons in the United States other than Mexicans,<sup>148</sup> this never figured prominently in the debate over the initiative. Moreover, the implementation of Proposition 187 would have—and indeed its passage already has had—impacts on discrete ethnic communities. Undocumented Mexicans, Mexican-American citizens, and citizens of other minority groups viewed as foreign, such as Asian-Americans, are the groups most likely to suffer the initiative's sting.<sup>149</sup> Not surprisingly, Latino and Asian ethnic organizations voiced the strongest opposition in the Proposition 187 campaign.<sup>150</sup> People with names such as Alan Nelson and Ron Prince, for rather obvious reasons, are unlikely to be suspected of being undocumented immigrants. Rather, those with names such as Perez and Chung will be the more likely suspects.<sup>151</sup>

Some of the anti-Mexican undertones to Proposition 187 came to fruition after the election.<sup>152</sup> Some Latinos reported harassment,

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147. See *supra* text accompanying notes 117–41.

148. See Statistics Division, Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States, By Country of Origin and State of Residence: October 1992*, at 14 (Apr. 29, 1994) (estimating that, as of October 1992, only 39% (1.3 million) of approximately 3.4 million undocumented persons in United States were from Mexico); see also *INS 1993 Statistical Yearbook*, *supra* note 45, at 182–83 (analyzing this estimate).

149. At least two deaths—an elderly Chinese woman and a Mexican child—have been attributed to their fear of seeking medical care because of Proposition 187's passage. See Lee Romney, *Boy in Prop. 187 Controversy Mourned*, L.A. Times, Nov. 29, 1994, at A22; Pamela Burdman, *Woman Who Feared Prop. 187 Deportation Dies at S.F. General*, S.F. Chron., Nov. 26, 1994, at A14. It has been reported that undocumented persons fear seeking health care. See Patrick J. McDonnell & Julie Marquis, *Clinics See Fewer Patients After Prop. 187*, L.A. Times, Nov. 26, 1994, at A1; *Fearful Aliens in California Staying Away from Clinics*, N.Y. Times, Nov. 12, 1994, at A9.

150. See *Lawyers Ready Strategy Against Proposition 187*, Recorder (San Francisco), Oct. 20, 1994, at 7 (reporting that, even before its passage, Mexican American Legal Defense Fund and others were preparing to challenge initiative); K. Connie Kang, *California Elections/Proposition 187: Asian American Groups Organize to Fight Measure*, L.A. Times, Oct. 9, 1994, at B1 (reporting that grassroots movement of diverse Asian-American communities joined in opposing Proposition 187).

151. See Johnson, *supra* note 21 (analyzing concerns in this regard).

152. See, e.g., Paul Feldman & Jon Garcia, *California Elections/Proposition 187*, L.A. Times, Nov. 8, 1994, at A3 (reporting that at Southern California high schools stickers bearing a swastika and stating "'stop non-white immigration'" were posted throughout campus).

including racial epithets and being told to go back to Mexico.<sup>153</sup> A founder of a group in Arizona seeking to place a Proposition 187-type initiative on the ballot in that state denied that it was a racial issue: “My friends have never heard a racist word out of me. *I just don’t like wetbacks.*”<sup>154</sup>

C. *The Equal Protection Difficulties Faced in Testing the Lawfulness of Popular Democratic Action*

In light of the fact that immigrants are discrete and insular minorities,<sup>155</sup> and considering Madison’s fear that a plebiscite might enable voters to act impulsively due to passion and self-interest,<sup>156</sup> the passage of Proposition 187 is not particularly surprising. Immigrants, who are lawfully disenfranchised, arguably are undeserving of any special constitutional protections.<sup>157</sup> This argument carries particular force with respect to undocumented immigrants in the country in violation of the law. The Supreme Court, however, consistently has held that noncitizens physically present in the country, whether their status is lawful or not, enjoy certain constitutional rights.<sup>158</sup> It therefore is not

153. See, e.g., Thomas D. Elias, *Fear, Insults Increase After Prop. 187 Vote*, *Ariz. Republic*, Dec. 10, 1994, at A31 (offering examples); *187’s Vigilante “Enforcers”*, *Christian Sci. Mon.*, Dec. 27, 1994, at 19 (same). National Public Radio broadcast a tape recording of a call received by a immigrants’ rights group after passage of Proposition 187:

Hasta la vista, you [expletive deleted] Mexicans. You’re gettin’ out of the [expletive deleted] damned country once and for all. We’re sick and tired of your [expletive deleted] damned Spanish speaking [expletive deleted]. If we go to your country, we couldn’t become a [expletive deleted] damned citizen. You son of a [expletive deleted] think you run this [expletive deleted] country. I got news for you. You’re outta here, wetback. Adios, mother.

Morning Edition: *Prop. 187 Causing Problems Despite Court Restraint* (National Public Radio broadcast, Nov. 29, 1994).

154. Maria Puente, *States Setting Stage for Their Own Prop. 187s*, *USA Today*, Nov. 18, 1994, at 3A (emphasis added).

155. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 161–62 (1980); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring). This is true even though immigration status is not an immutable characteristic. See Ely, *supra*, at 154–55.

156. See *supra* text accompanying notes 61–74.

157. See Tribe, *supra* note 36, § 16-23, at 1545.

158. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210–16 (1982) (equal protection rights); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903) (due process rights). The rights of noncitizens not within the country, or halted at the border before entry, are much more circumscribed. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasizing that the Supreme Court “has long held that an alien seeking initial admission to the United States . . . has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”).

tenable, at least at this time in our constitutional history, to claim that the majority can have its way with immigrants.

Despite finding that aliens generally enjoy some rights under the Constitution, the Supreme Court has held that, unlike those based on race, classifications based on immigration status—at least by the federal government—generally are not “suspect” and thus are not subject to strict scrutiny.<sup>159</sup> This doctrinal characteristic makes it less likely that federal, rather than state, alienage classifications will be found to violate equal protection. State laws making alienage classifications, however, at times have been invalidated, though the Court has been less than consistent in this regard.<sup>160</sup>

Suppose that immigrants’ rights advocates desired to assert an equal protection claim that Proposition 187 discriminates not only on the basis of alienage status, but also on account of the ethnicity of the immigrants at whom it was directed. Such a claim would capture the flavor of some of the most deeply-held objections to the measure. This section analyzes two doctrinal problems that would arise in prevailing on an equal protection claim of this nature.<sup>161</sup>

### 1. *Proving a Discriminatory Intent*

One equal protection challenge to Proposition 187 might be that, though facially neutral, it will have a discriminatory impact on immigrants and citizens of particular ethnicities and national origin groups. Significant evidence could be adduced to support this position. Nonetheless, a major obstacle to any such claim would be the Supreme Court’s equal protection jurisprudence. Over the last twenty years, the Court has made it clear that the showing of a racially disproportionate impact alone is insufficient to establish that a facially neutral law violates the Equal Protection Clause.<sup>162</sup> Rather, even for legislation adopted

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159. See *Plyler*, 457 U.S. at 216–24; see also *infra* note 187 (noting difference in treatment in Supreme Court review of alienage classifications by state and federal governments). *But cf.* *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (holding unconstitutional federal regulation barring noncitizens from employment in federal competitive civil service).

160. See *supra* text accompanying note 36.

161. This section does not address the question whether the discriminatory *application* of Proposition 187 would be unlawful. It is undisputable that this would violate the Constitution. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Instead, this section focuses on whether the initiative can be challenged on equal protection grounds because it was *passed* for discriminatory reasons and may well have a discriminatory impact.

162. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 255, 264–65 (1977) (finding that rezoning denial for racially integrated low- and moderate-income housing in community in which only 27 of 64,000 residents were black did not violate equal

through initiative, the aggrieved party must establish that the law was enacted with a discriminatory intent.<sup>163</sup> Such an intent can be proven through circumstantial evidence,<sup>164</sup> including a “racially disproportionate effect.”<sup>165</sup> Still, intent is difficult to prove, clearly more so than simply

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protection clause); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that fact that black applicants failed verbal skills examination for position with police department at four times the rate of whites was insufficient to establish an equal protection violation); see also Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1118 (1989) (“After the [Supreme] Court made clear that racial . . . classifications would receive heightened scrutiny . . . governments tried to circumvent equal protection by discriminating by proxy. Instead of facially discriminating against a racial group, for example, the state would facially discriminate on the basis of a different characteristic that happened to correlate with race.”).

163. See, e.g., *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 484–85 (1982); *Crawford v. Board of Educ.*, 458 U.S. 527, 537 (1982).

The discriminatory intent requirement has been criticized. See, e.g., Tribe, *supra* note 36, § 16-20; Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1114–18 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

The equal protection clauses of certain states have been interpreted more expansively to allow a violation in certain circumstances to be predicated upon a showing of discriminatory impact. See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 Kan. L. Rev. 271, 301–05 (1992) (summarizing case law).

164. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating provision of Alabama constitution disenfranchising persons convicted of crimes of “moral turpitude” because it was clearly designed to disenfranchise African-Americans); *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that history of discrimination and a continuing governmental unresponsiveness to minority interests may support finding that discriminatory intent motivated maintenance of at-large electoral scheme); *Arlington Heights*, 429 U.S. at 266–68 (emphasizing that discriminatory intent analysis requires “sensitive inquiry into such circumstantial and direct evidence of intent as may be available” and analysis of various types of evidence, including disproportionate impact, historical background, departures from ordinary procedure, legislative or administrative history, and contemporaneous statements of members of the decisionmaking body); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) (holding that evidence demonstrated that city had engaged in intentional racial segregation in subsidized housing and public schools); see also Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. Cin. L. Rev. 1, 44–46, 74–77, 110–14 (1988) (acknowledging difficulties entailed in attempting to establish invidious motive in municipal land use decisions but offering examples in which burden had been satisfied); cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993) (acknowledging that, even if a law is neutral on its face, it may be invalid if purpose is to restrict activity because practice is performed for religious reasons); *Wallace v. Jaffree*, 472 U.S. 38, 58–60 (1985) (holding that only conceivable purpose for Alabama law permitting prayer in schools was endorsement of religion).

165. *Crawford*, 458 U.S. at 544; see *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[D]iscriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”); see also *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (striking down on equal protection grounds, before advent of intent requirement, initiative that barred state from restricting private real property owners’ right to sell, lease, or rent property on discriminatory grounds by taking into account “‘immediate objective,’

establishing a disparate impact on a minority group. Consequently, the intent requirement has deterred the filing of equal protection challenges to governmental action.<sup>166</sup>

Intent analysis raises a variety of problems that are especially acute in evaluating lawmaking by initiative.<sup>167</sup> Obviously, the larger the institution making the challenged decision, the more difficult it is to establish an invidious intent. For example, although it is difficult to determine the intent of a seven-member city council, it is even more so with respect to a 535-member legislative body, such as Congress.<sup>168</sup> A variety of motives may influence a legislator's voting decision, and a legislative decision to act necessarily is a mixed bag of the intents of many different legislators. The difficulties of such an exercise are

its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment'"); *Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring) (emphasizing that impact of allegedly discriminatory practice is best evidence of intent and that "[i]t is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process").

166. See Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1153 (1991) (opining, based on results of empirical study, that "[t]he Supreme Court's [intent] standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims").

167. See Eule, *supra* note 16, at 1562 (recognizing difficulties and advocating relaxation of intent requirement in scrutinizing lawmaking by initiative).

168. See Brownstein, *supra* note 164, at 46-47 (analyzing problems of determining motives of legislative bodies). The Supreme Court once emphasized that:

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.*

*United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (emphasis added) (footnote omitted) (refusing to invalidate law prohibiting burning of draft cards even though some legislators expressed intent to suppress speech). *But see* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1212-17, 1275-81 (1970) (questioning *O'Brien's* rejection of motive analysis).

As observed in the context of statutory interpretation, the so-called intent of a legislative body is inherently difficult to establish. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) (analyzing Justice Scalia's plain meaning interpretation of statutes, which eschews any effort to discern Congressional intent and focuses almost exclusively on statutory language); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (contending that "quest for . . . legislative intent is probably a wild-goose chase [because] Congress [probably] didn't think about the matter at all").

exponentially greater when the electorate of thousands, perhaps hundreds of thousands, or maybe millions, of voters made an allegedly discriminatory decision.<sup>169</sup> Even if a significant portion of the electorate voted for the challenged measure for invidious reasons, it is close to impossible to establish the true intent of such a diffuse decisionmaking body.

In light of the difficulties encountered in establishing a single, dominant, or primary intent of the lawmaking body, the Supreme Court has stated that a person need only establish “that a discriminatory purpose has been a *motivating factor* in the decision.”<sup>170</sup> Assuming that this standard may work well in some contexts,<sup>171</sup> it does not in evaluating decisions of the electorate. Voters as a whole do not state the factors that motivate their vote, but only whether a majority supports a measure or candidate. Voter pamphlets and campaign advertisements are imperfect indicators of illicit motive.<sup>172</sup> Moreover, it is nearly impossible to determine how significant a “motivating factor” the invidious animus need be before the law is invalidated. If race was a “motivating factor” to one percent of the electorate, would that be sufficient? What about 20%?

The barriers to determining the collective intent of the electorate are heightened by the fact that invidious discrimination is not always conscious, but may operate at an unconscious level.<sup>173</sup> When unconscious racism influences a voting decision, voters (or legislators, for that matter) are by definition unaware that they are acting in a discriminatory way.

Perhaps in recognition of such problems, lower courts have avoided inquiry into the electorate’s intent. To do so, they emphasize the sanctity of the secret ballot and have been reluctant to invalidate an initiative

169. *See Statement of Vote, supra* note 18, at 115 (providing statistical breakdown showing that over 8.5 million votes were cast on Proposition 187).

170. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

171. It is doubtful whether the “motivating factor” analysis might ever be literally applied because, if it were, the test would lead to instant invalidation of almost any governmental decision. A voter, for example, could vote for or against any political candidate for racist reasons. A vote for Ronald Reagan over Walter Mondale in 1984 or George Bush over Michael Dukakis in 1988 could have been motivated by a racist intent. The same could be said, for that matter, with respect to a vote for California Governor Pete Wilson in the November 1994 election in which Proposition 187 prevailed. Of course, most probably are not willing to consider invalidation of any of these elections. This is supported by the Court’s decision in *Arlington Heights*, in which at least some of the votes for the zoning decision must have been motivated by issues of race. *See supra* note 162 (describing context of case).

172. *See Eule, supra* note 16, at 1562 n.264; Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. Rev. 936, 954 n.73 (1983).

173. *See generally* Lawrence, *supra* note 163.

even if at least part of the electorate appeared to have a discriminatory purpose in voting for the law.<sup>174</sup> Such an approach makes the invalidation of an initiative appear possible only if the measure is discriminatory on its face.

The end result is that, in the initiative process, voters may more-or-less freely rely on invidious motives in supporting measures that have a disproportionate impact on discrete and insular minorities. Individual voters are much less likely than lawmakers and policymakers to be held accountable—politically or judicially—for discriminatory decisions. Although history teaches that legislatures are far from immune from passing laws that discriminate, the intent of legislators is far easier analyzed than that of the electorate. Moreover, because basing a law on blatantly racist motives generally is not fashionable or legally permissible, representative bodies, at least at some level, tend to moderate discriminatory sentiment, a characteristic consistent with the

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174. See, e.g., *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994) (refusing to inquire into electorate's intent in adopting electoral scheme for city council that had resulted in election of few African-Americans over lengthy period); *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("We hold that absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context."); *Kirksey v. City of Jackson*, 663 F.2d 659, 662 (5th Cir. 1981) (agreeing that "inquiry 'into the motives of voters may very well constitute an unwarranted and unconstitutional undermining of one of the most fundamental rights of the citizens under our constitutional form of government'" (citation omitted); see also Sager, *supra* note 8, at 1421 (contending that "it is highly questionable whether it is appropriate to examine motivation in the electoral process" because voting is "an intentionally opaque, impenetrable mechanism which aggregates personal preferences without regard to their nature or origin"). But see *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich. 1982) (rejecting this view and refusing "to permit cities to practice racial discrimination with impunity by the simple expedient of adopting all discriminatory policies by popular vote"), *modified*, 727 F.2d 560 (6th Cir. 1984) (reserving question whether court could inquire into electorate's intent).

Congress, responding to the Supreme Court's holding that a showing of discriminatory intent is necessary to prevail on an equal protection challenge to an electoral scheme adopted by the voters, see *City of Mobile v. Bolden*, 446 U.S. 55 (1980), passed the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). These amendments allow a finding that an electoral scheme violates the statute absent a showing of discriminatory intent, and authorize a court to consider the impact of the electoral scheme on minority representation. In so doing, Congress expressly recognized the difficulties of establishing the motive of the electorate in adopting or maintaining an electoral scheme. See S. Rep. No. 417, 97th Cong., 2d Sess. 36-37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214-15. Even if permitted to establish intent through circumstantial evidence:

defendants can attempt to rebut that . . . evidence by planting a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives. . . . [T]hat danger . . . seriously clouds the prospects of eradicating the remaining instances of racial discrimination in American elections.

*Id.* at 215.

framers' hope for representative government.<sup>175</sup> Perhaps this in part explains why the potentially explosive issues of race and class are more likely to be addressed by the electorate than by legislative bodies.<sup>176</sup>

The Supreme Court has been less than consistent in the application of the intent requirement to the laws enacted by a plebiscite.<sup>177</sup> On the one hand, the Court has stated unequivocally that:

It is plain that the electorate as a whole, whether by referendum or otherwise, could not order . . . action violative of the Equal Protection Clause . . . and [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside

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175. See Magleby, *supra* note 7, at 184–85; Bell, *supra* note 16, at 13–14; Eule, *supra* note 16, at 1531–33; Linde, *supra* note 68, at 169. *But see* Gillette, *supra* note 16 (arguing that the differences between plebiscites and legislative bodies are grossly exaggerated); Baker, *supra* note 16 (making similar contention from public choice perspective). In Madison's words, representative government:

refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. . . . [I]t may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves . . . .

*The Federalist No. 10*, *supra* note 65, at 62 (Madison) (emphasis added).

176. See Eule, *People's Choice*, *supra* note 73, at 787. In California, for example, a campaign is gearing up to place an initiative on the ballot that would dismantle affirmative action in the state. See Steven A. Holmes, *Backlash Against Affirmative Action Troubles Advocates*, N.Y. Times, Feb. 7, 1995, at B9.

177. Compare *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (invalidating Washington initiative prohibiting school board from requiring student from attending any school other than one in neighborhood, except for broad exceptions not relating to racial considerations) with *Crawford v. Board of Educ.*, 458 U.S. 527 (1982) (upholding California proposition that barred state courts from ordering bussing to desegregate schools unless a federal court would be permitted to do so). See Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 123, 155 (observing that "[i]t is difficult to believe that *Crawford* was decided by the same court as *Seattle*, much less that it was decided during the same Term and on the same day"); *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 4, 121 (1982) (contending that Court in *Seattle* and *Crawford* "failed to explain cogently why [*Hunter v. Erickson*] condemned the Washington initiative but not the California referendum"). The Court distinguished the Washington initiative on the ground that it placed special burdens on minorities in the political process, see *Seattle*, 458 U.S. at 467–70, while the California one did not, see *Crawford*, 458 U.S. at 540–42. In making that distinction, both cases relied upon *Hunter v. Erickson*, 393 U.S. 385 (1969), which invalidated a municipal ballot initiative providing that any regulation of real property transactions on the basis of race, color, religion, national origin, or ancestry, but not others, be approved by a majority of voters. See Tribe, *supra* note 36, § 16–17, at 1485–88; Eule, *supra* note 16, at 1562–68.



the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>178</sup>

On the other hand, the Court has demonstrated great reluctance to strike down popularly-enacted laws on equal protection grounds.<sup>179</sup>

In sum, the initiative process may permit the adoption by a politically unaccountable electorate of laws with a discriminatory impact—an action that a legislative body would be less likely to take. Such a discriminatory decision is less likely to be successfully challenged on equal protection grounds than that of an elected body. This dynamic, which in effect encourages the passage of discriminatory laws with minimal judicial oversight, is curious in light of the framers' deep suspicion of popular democracy, which led to their placing primary federal lawmaking authority in the hands of elected representatives.<sup>180</sup> Despite the fact that our constitutional scheme as a structural matter reflects greater trust for lawmaking by legislatures than by electorates, it is more difficult as a constitutional matter to challenge the adoption of a law by the voters on equal protection grounds.<sup>181</sup> This lends credence to the claim that lawmaking by initiative, which in certain circumstances may be immune from meaningful judicial review, is inconsistent with the representative form of government envisioned by the framers of the Constitution.

This analysis further suggests that an equal protection challenge to Proposition 187 based on a claim that it was adopted for a discriminatory purpose is problematic. This is true despite the troubling racist undertones to the campaign, the fact that the initiative appeared directed at undocumented Mexicans, and the fact that conscious and unconscious racism influenced support for the initiative.

An argument could be made that the animus toward Mexicans was a "motivating factor" behind the passage of the initiative.<sup>182</sup> The fact that economic motives also might have been relied upon by those voting for

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178. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citation omitted); see *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

179. See *supra* cases cited in note 14.

180. See *supra* text accompanying notes 61-74.

181. See *Sager*, *supra* note 8, at 1411-18 (arguing that traditional constitutional arguments for deference to judgments of governmental bodies fail to apply with equal force to legislation by initiative).

182. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223-24 (2d Cir. 1987); *United States v. Borough of Audubon*, 797 F. Supp. 353, 361 (D.N.J. 1991); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 732 (E.D. Va. 1992).

Proposition 187 is not in and of itself sufficient to immunize from scrutiny the electorate's decision to adopt the measure.<sup>183</sup> However, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>184</sup> which found that race was not a "motivating factor" in the decision to bar development of racially and economically integrated housing, illustrates that there are formidable barriers to invalidating Proposition 187 as racially discriminatory based on this sort of argument. Similarly, in upholding an initiative designed to limit busing as a remedy to desegregation, the Supreme Court emphasized that:

the Proposition was approved by an overwhelming majority of the electorate. It received support from members of all races. The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not . . . impugn the motives of the State's electorate.<sup>185</sup>

The application of a similar analysis to Proposition 187 would almost certainly ensure its survival in the face of an equal protection challenge based on race. Nonetheless, it would avoid the reality of the political dynamic leading to the initiative's passage.

## 2. *Alienage Classifications as a Proxy for National Origin Discrimination*

Although racial classifications are afforded heightened constitutional scrutiny under traditional equal protection analysis,<sup>186</sup> that is not always the case with respect to alienage classifications.<sup>187</sup> As demonstrated by

183. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 Minn. L. Rev. 739, 792-93 (1993) (summarizing land-use case law to effect that "conduct motivated by seemingly neutral financial goals such as preserving property values, enhancing the municipal tax base, or maximizing profit can include elements of invidious intent. Additionally, evidence showing that governmental planning practices were designed to create the image that persons of color are unwelcome supports a finding of discriminatory intent.") (footnotes omitted); see also *supra* text accompanying notes 64-66 (articulating Madison's concerns with influence of majority's self-interest in direct democracy).

184. 429 U.S. 252, 265-66 (1977); see also *supra* text accompanying notes 170-71 (quoting "motivating factor" language and analyzing this requirement of *Arlington Heights*).

185. *Crawford v. Board of Educ.*, 458 U.S. 527, 545 (1982) (footnotes omitted). *But see* *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 471 (1982) (rejecting contention that initiative was valid because "there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350.").

186. See generally Tribe, *supra* note 36, § 16-14.

187. Compare *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to alienage classification in *state* welfare scheme) with *Mathews v. Diaz*, 426 U.S. 67, 84-87 (1976) (deferring

the alien land laws,<sup>188</sup> alienage classifications, though presumptively lawful, may veil an invidious purpose to discriminate, which would presumptively be invalid.<sup>189</sup> This, however, would be very difficult to prove.

The formidable evidentiary burdens may force courts facing this type of case to attempt to achieve a result consistent with equality principles through means other than the Equal Protection Clause. For example, in *Yniguez v. Arizonans for Official English*,<sup>190</sup> the Court of Appeals for the Ninth Circuit invalidated on First Amendment grounds an initiative amending the Arizona constitution to compel state employees and officials to speak only English in the workplace. After finding that the initiative violated the First Amendment, the court buttressed its reasoning by emphasizing the equal protection consequences of the law: "Since language is a close and meaningful proxy for national origin, restrictions

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to congressional use of alienage classification in *federal* medical benefits program). See Tribe, *supra* note 36, § 16-23; see also *supra* text accompanying note 159 (mentioning non-suspect nature of alienage classifications under federal law). It has been argued that, except when alienage classifications in state laws are used to discriminate on the basis of race or some other impermissible ground, they should not be evaluated under the equal protection clause but on federal supremacy terms. See Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1060-65 (1979); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069 (1979).

188. See *supra* text accompanying notes 91-100.

189. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *But cf.* *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (refusing to invalidate on equal protection grounds regulation that imposed reporting and other requirements on Iranian students during time of tense U.S.-Iran relations). Though it is impermissible to discriminate on the basis of ethnicity or national origin of noncitizens in the country, the Supreme Court has not overruled precedent over a century old permitting the federal government to discriminate on the basis of race and national origin with respect to the admission of aliens into the country. See *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581 (1889). *But cf.* *Jean v. Nelson*, 472 U.S. 846 (1985) (avoiding decision on vitality of *Chinese Exclusion Case* by finding that applicable statute and regulations did not permit discrimination on basis of race or national origin). In challenging this proposition, Gerald Rosberg focuses on the damage to citizens sharing the race or national origin of the excluded groups:

[S]uch a classification would also require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification. When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry. . . . Except when necessary to protect a compelling interest, Congress cannot implement a policy that has the effect of labeling some group of citizens as inferior to others because of their race or national origin.

Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 327.

190. 42 F.3d 1217 (9th Cir. 1994) (Reinhardt, J.), *petition for reh'g en banc granted*, 53 F.3d 1084 (9th Cir. 1995); see *supra* text accompanying notes 87-90 (describing briefly English-Only laws enacted through initiative).

on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment.”<sup>191</sup>

This statement seems uncontroversial in isolation. However, it is peculiar that the court invalidated the English-Only initiative on First Amendment<sup>192</sup> rather than equal protection grounds. In light of modern equal protection law’s intent requirement, the burden of proving that the Arizona electorate employed language as a proxy for national origin was extremely great.<sup>193</sup> This helps explain why, despite the initiative’s impact on certain national origin groups, the court in *Yniguez* shied away from deciding the case on equal protection grounds.<sup>194</sup>

Like national origin and language, a link exists in the United States between national origin and immigration status. With increasing immigration from developing nations in recent years, the link has become more pronounced.<sup>195</sup> A problem for the future will be determining when facially neutral laws concerning immigration and

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191. *Yniguez*, 42 F.3d at 1241–42 (citations & footnote omitted); see also *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (“It is beyond dispute that, in this case, if the English-Only policy [of an employer in the workplace, which was found not to violate Title VII of the Civil Rights Act] causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English—and virtually all those employees for whom English is not a first language—are Hispanic.”), *cert. denied*, 114 S. Ct. 2726 (1994); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1040 (9th Cir. 1988) (“We agree that English-Only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can ‘create an atmosphere of inferiority, isolation, and intimidation.’ Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin.”) (citations omitted), *vacated*, 490 U.S. 1016 (1989). See generally *Perea*, *supra* note 88 (analyzing linkage between language and national origin and discrimination against national origin minorities through language restrictions).

192. The First Amendment analysis is not without potential flaws. See *Eule*, *supra* note 16, at 1567 n.289 (referring to “imaginative” reasoning by district court in *Yniguez* in invalidating initiative on First Amendment grounds).

193. See *supra* text accompanying notes 162–85 (analyzing intent requirement). In *Hernandez v. New York*, 500 U.S. 352 (1991), for example, the Supreme Court rejected the claim that the use of peremptory challenges to strike Spanish-speakers by a prosecutor prosecuting a Latino defendant violated the equal protection clause because it masked discrimination on the basis of national origin. See, e.g., *Pemberthy v. Beyer*, 19 F.3d 857, 872 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994) (emphasizing that, although “language-speaking ability is . . . closely correlated with ethnicity,” court was “not willing to hold as a matter of law that language-based classifications are always a proxy for race or ethnicity”); *United States v. Munoz*, 15 F.3d 395, 399 (5th Cir.), *cert. denied*, 114 S. Ct. 2149 (1994) (holding to same effect); see also *United States v. Canoy*, 38 F.3d 893, 898 (7th Cir. 1994) (refusing to reverse criminal conviction following use of peremptory challenge to excuse potential Asian-American alternate juror and accepting government’s “facially-neutral explanation” that he “had been educated outside the United States and entirely in a foreign language [and] the government was concerned with whether English was [his] first language”) (citation omitted).

194. See *Eule*, *supra* note 16, at 1567–68.

195. See *supra* text accompanying note 44.

immigrants, such as reduction of benefits to lawful permanent residents, mask an invidious discrimination against certain national origin groups. Despite the recurring nature of the problem, the link between national origin and immigration status, and the analytical difficulties it creates for traditional equal protection analysis, for the most part have gone ignored.

### III. THE LEGACY OF PROPOSITION 187

Proposition 187 is the product of a deeply complex, perhaps unique, set of political forces in the United States. As the solid support for the measure amply demonstrates, its backing did not split along classic liberal-conservative lines. The limited political power of noncitizens made it easier for one powerful politician to use Proposition 187 and anti-immigrant/anti-immigration sentiment to build a bipartisan coalition, ensuring his re-election and the initiative's passage.

The next stage in the life of Proposition 187 will be determined by the courts. Within days of the initiative's passage, immigrant advocates filed numerous lawsuits challenging the lawfulness of the initiative.<sup>196</sup> The challenges in those lawsuits run the gamut from violation of the federal Constitution and statutes to claims that the initiative violates the California constitution. Curiously enough, a much-debated aspect of the passage of Proposition 187—that it is nativistic and racist—in all probability will never be decided by the courts. Such contentions will in all likelihood be lost in legalisms.<sup>197</sup> Thus, although a particularly damning claim in U.S. legal culture, and one of critical importance to the affected communities, the charge will go untested and unresolved.

Even without deciding the claims of invidious discrimination, the courts, possibly even the Supreme Court, will face a monumental task in

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196. See, e.g., *League of United Latin American Citizens v. Wilson*, Complaint for Injunctive and Declaratory Relief [Class Action], Case No. 94-7569 MRP(JRx) (C.D. Cal., filed Nov. 9, 1994); *Gregorio T. v. Wilson*, Civil Rights Complaint for Declaratory and Injunctive Relief [Class Action] Case No. 94-7652 (C.D. Cal. filed Nov. 10, 1994); *Pedro A. v. Dawson*, Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, Case No. 965089 (Cal. Super. Ct., City and County of San Francisco, filed Nov. 9, 1994). A preliminary injunction was entered prohibiting enforcement of most of the provisions of Proposition 187. See *Gregorio T. v. Wilson*, 1995 U.S. App. LEXIS 17044 (9th Cir. July 5, 1995).

197. Some of the complaints challenging the lawfulness of Proposition 187 make unspecified equal protection claims, see, e.g., *League of United Latin American Citizens v. Wilson*, Complaint for Injunctive and Declaratory Relief [Class Action], Case No. 94-7569 MRP(JRx) Third, Fourth, and Fifth Causes of Action, ¶¶ 53-58 (C.D. Cal., filed Nov. 9, 1994), or appear to be based on the alienage status of the persons affected, see, e.g., *Gregorio T. v. Wilson*, Civil Rights Complaint for Declaratory and Injunctive Relief [Class Action] ¶ 50, Case No. 94-7652 (C.D. Cal., filed Nov. 10, 1994) (alleging that exclusion of children from public elementary and secondary schools violates Equal Protection Clause).

reviewing the California electorate's attempt at immigration policymaking. Popular democracy has a deep hold on the nation's collective consciousness, though it was not nearly as revered by the framers of the Constitution. A court reviewing the emphatic statement of the electorate, particularly without unimpeachable legal principles mandating invalidation, at a bare minimum can be expected to take a long and deep breath before invalidating the law.<sup>198</sup>

There are many explanations why courts will avoid even asking, much less deciding, whether race, color, and ethnicity impermissibly motivated Proposition 187's passage. The heavy burden of proving the discriminatory intent of a diffuse electorate with almost as many motivations as there are voters makes an equal protection claim based on race especially problematic.<sup>199</sup> Doctrinal uncertainty concerning alienage classifications and the frequent link between alienage status and race, ethnicity, and color, further complicate matters.

How the lawsuits will play out is difficult to predict. What we do know is that Proposition 187 touches on issues going to the core of national identity—issues that this nation will be grappling with well into the twenty-first century. Proposition 187 may simply mark the beginning.

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198. See, e.g., *Legislature of California v. Eu*, 816 P.2d 1309, 1313 (Cal. 1991) (“[T]he initiative power must be liberally construed to promote the democratic process. . . . [S]uch measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.”) (citations omitted) (emphasis in original omitted). *But cf.* *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (invalidating voter-imposed term limits on Arkansas’ representatives to Congress). This is particularly true for the more politically accountable state courts. See Joseph R. Grodin, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* 105–06 (1989) (stating that political accountability of California Supreme Court justices may inhibit them from invalidating initiative passed by electorate). There is evidence supporting the concern for political retribution by the electorate. In 1966, after striking down an initiative permitting racial discrimination in home sales, see *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966), *aff’d sub nom.*, 387 U.S. 369 (1967), the confirmation majorities of the California Supreme Court justices dropped over twenty percentage points from the high in the previous election. See Stephen R. Barnett, *California Justice*, 78 Cal. L. Rev. 247, 259 (1990) (book review). The refusal of the electorate in 1986 to confirm three California Supreme Court justices, including Chief Justice Rose Bird, may be attributable in part to the court’s willingness to invalidate initiatives. See Eule, *supra* note 16, at 1581–82.

199. See *supra* text accompanying notes 155–85.

