

A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities

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INTRODUCTION

Despite being questioned on many grounds,¹ direct democracy remains popular in many states.² Calls for reform of the initiative process abound.³

Consider a few frequently expressed concerns about initiative lawmaking. Some critics contend that direct democracy benefits well-financed interest

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1. See, e.g., Symposium, *The Voice of the Crowd – The Colorado Initiative*, 78 U. COLO. L. REV. 1337 (2007) (collecting articles analyzing Colorado’s initiative process); *Symposium on the Impact of Direct Democracy*, 78 S. CAL. L. REV. 835 (2005) (analyzing many significant issues implicated by initiative lawmaking); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 906-11 (2006) (summarizing the “pathologies of direct democracy”); Ben Hovland, Comment, *Championed by Progressives and William U’Ren: Can Oregon Give the Ballot Initiative to the People Again?*, 85 OR. L. REV. 275 (2006) (analyzing many possible reforms to the initiative process). For a recent—and most forceful—claim that initiatives are unconstitutional, see Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007).

2. See generally PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE* (1998) (comprehensively analyzing initiative lawmaking).

3. See, e.g., Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299 (2007); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003); Glenn C. Smith, *Solving the “Initiatory Construction” Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257 (2007).

groups—often derided as “special interests”—that are able to fund expensive initiative drives and campaigns, thus exploiting the process for their benefit.⁴ At a most fundamental level, some have challenged the initiative process for not allowing voters to speak thoughtfully on complex public policy matters.⁵

As a practical matter, courts regularly grapple with the difficult task of reviewing the lawfulness of initiatives, especially deciding how and when to strike them down.⁶ More often than not, courts reject legal challenges to initiatives. By so doing, they avoid the negative political fallout that ordinarily accompanies the judicial rejection of the will of the voters.

More mundane questions about initiatives also plague the courts. Simply interpreting initiatives, for example, poses numerous complicated questions that differ dramatically from those raised in interpreting laws passed by legislative bodies.⁷ Legislatures ordinarily conduct hearings and produce committee reports; bills are generally subject to debate and amendment through the legislative process.⁸ In sharp contrast, nothing comparable is available to courts to assist in the interpretation of initiatives, with television advertisements—and their obvious limitations—often the most readily-available sign of voter intent (aside from the text).⁹

Most importantly, because of the transparency of the legislative process, legislators can be held accountable for their votes on a piece of legislation. In contrast, voters cannot be held accountable politically, or otherwise, for the initiatives they enact into law.

In the Progressive Era, the champions of the initiative process trumpeted direct democracy as a populist lever for citizens seeking to rein in “big government” and “big business.”¹⁰ Unfortunately, as history demonstrates, the voters often have passed initiatives for less than admirable reasons and have

4. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041 (2005).

5. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998). *But see* Lynn A. Baker, *Preferences, Priorities, and Plebescites*, 13 J. CONTEMP. LEGAL ISSUES 317 (2004) (questioning this critique).

6. See Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748 (2005).

7. See generally Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995) (analyzing difficult issues of interpretation raised by initiative lawmaking).

8. See *infra* text accompanying notes 81-89.

9. See *infra* text accompanying notes 81-89.

10. See THOMAS E. CRONIN, *DIRECT DEMOCRACY* 44 (1989) (analyzing the initial popularity of initiatives because “the two main political parties were largely, and sometimes entirely, under the influence of the railroads, trusts, and monopolies”); DUBOIS & FEENEY, *supra* note 2, at 2 (“[Populists and progressives] believed that legislators and political party machines had become far too dependent on special interests. Trusting the populace itself to make better judgments, they thought that the cure was more democracy.”); *id.* at 12 (“The party machines [in California] were controlled largely by the Southern Pacific railroad. One of the principal aims of the initiative movement was to break out of this control.”).

frequently passed laws that have injured political minorities.¹¹ Generally speaking, racial and other historically disfavored minorities have fared poorly in the initiative process. As one commentator observed, “distrust of the [initiatives] by groups such as African Americans and gays that are minorities on a broad range of issues, is a sensible perception of how initiatives work.”¹² In modern times, direct democracy has regularly injured racial minorities, gays and lesbians, immigrants, non-English speakers, and the poor.¹³

Recent years have seen a twist in the strategic political deployment of initiatives. Activists in pursuit of a conservative political agenda have begun aggressively to employ initiatives as a last resort to undermine the civil rights gains of racial and other minorities bestowed by legislators, administrators, and the courts.¹⁴ Major contemporary examples of this trend include the much-publicized rejection of affirmative action by the voters of California and Michigan. In these two large, industrial states with world-renowned public university systems that employ highly selective admissions standards,¹⁵ voters ended affirmative action through initiatives—Proposition 209 and Proposal 2, respectively—after courts declined to end race-conscious admissions in higher education.¹⁶ Similarly, in response to governmental policies that many voters

11. See *infra* Part II. This article focuses on the initiative process, not the general discrimination against Latina/os in the voting process. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (finding violation of Latina/o voting rights in Texas redistricting plan and recognizing “the ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas, . . . [which] may well ‘hinder their ability to participate effectively in the political process’”) (citations omitted); see also Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL’Y 561, 580-82 (2007) (criticizing *Perry*); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008) (analyzing the role of race of judges in voting rights cases); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 746-52 (2008) (analyzing *Perry*).

12. Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 994 (2001); see also Chemerinsky, *supra* note 1, at 294 (“Time and again, initiatives are used to disadvantage minorities: racial minorities, language minorities, sexual orientation minorities, political minorities.”).

13. See *infra* Part II.

14. See *infra* Part II.

15. The state of Washington also saw an initiative mark the demise of race-conscious affirmative action in its public colleges and universities. See *infra* text accompanying note 108. Florida eliminated affirmative action not by initiative but through a more complicated series of events. The Florida Supreme Court struck from the ballot a proposed anti-affirmative action initiative. See Advisory Op. to Atty. Gen. *re* Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888 (Fla. 2000). Governor Jeb Bush followed the decision by issuing an executive order prohibiting race-conscious affirmative action. See Martin D. Carcier, *Due Process and the Florida Civil Rights Initiative*, 74 TEMP. L. REV. 595, 596 & n.3 (2001).

16. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan law school’s race conscious affirmative action program that required individualized review of each application); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating undergraduate admissions scheme that relied excessively on race in allocating points for admission); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (finding unconstitutional racial quotas in UC Davis School of

believe to be too liberal, immigrants—disproportionately Latina/o in modern times—consistently have suffered setbacks through the initiative process, including reduced access to public benefits and services, English-only laws, and the elimination of bilingual education in the public schools.¹⁷

This Article focuses on the devastating impacts of lawmaking by initiative on two overlapping, although both discrete and insular, minorities—Latina/os and immigrants.¹⁸ Because racial minorities are, in fact, political minorities, we can expect them to fare poorly in the political arena, and especially when laws are made through the initiative process.¹⁹ The question remains whether it is possible to ensure fair treatment of political minorities, especially discrete and insular minorities who may suffer discrimination at the hands of the majority in the electoral process. It is this important question to which I will turn in this Article.

The issue addressed here is symptomatic of a more general defect in the American democratic political process: a majority of the electorate may not adequately consider the interests of minorities, a problem loosely condemned as the tyranny of the majority.²⁰ This process defect, of course, is not limited to lawmaking by initiative, but occurs with respect to legislative and administrative decisions as well.

In this respect, Latina/o and immigrant communities suffer unique political disadvantages. Latina/os as racial and political minorities often have suffered the disfavor of the majority.²¹ The group's lack of political power as a minority is exacerbated by an oft-ignored fact: a significant portion of the community is composed of noncitizens, who lack the right to vote.²² With only about 75% of all Latina/os in the United States being U.S. citizens²³ (with a large percentage (34.3%) compared to whites (25.5%) under 18 and not eligible

Medicine admissions scheme but holding that race could be one factor considered in admissions decision).

17. See *infra* Part II B.

18. See *infra* Part II. The simultaneous discussion of the limited political power of Latina/os and immigrants makes sense in light of the interrelationship between the two groups in modern U.S. social life. See Cristina M. Rodriguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. 247 (2008); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998).

19. See *infra* Part II.

20. See JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW 113-27 (2004) (discussing concerns with “majority tyranny” in lawmaking by initiative).

21. See *infra* Part II.

22. See Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 928-33 (2002).

23. See U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY—HISPANIC: 2004, at 11 (2007) (“Nearly three-quarters of Hispanics were U.S. citizens, either through birth (about 61 percent) or naturalization (about 11 percent.)”); see also Pew Hispanic Center, A Statistical Portrait of Hispanics at Mid-Decade (2006) (Table 2), available at <http://pewhispanic.org/files/other/middecade/Table-2.pdf> [hereinafter Pew Hispanic Study] (compiling data showing that roughly 40% of Latina/os are foreign-born).

to vote),²⁴ the group enjoys substantially less raw political power than minorities of roughly equal numbers with higher percentages of citizens, such as the African American community.²⁵ Immigrants themselves have historically been lightning rods for fear and loathing among the general public.²⁶ A history of discrimination is vividly apparent in the majority's repeated passage of initiatives that have injured Latina/os and immigrants.

Part I of this Article outlines the special political process defects that severely handicap Latina/os and immigrants in the United States. Part II offers concrete illustrations of how the process defects operate and demonstrates that the political difficulties facing Latina/os and immigrants, many of whom are barred from voting, in direct democracy exceed those facing other minority groups that lack a significant noncitizen component. To ameliorate the political process defects diluting the electoral power of people of color and immigrants, Part III advocates more scrutinizing—and less deferential—judicial review of initiatives that implicate the rights of Latina/os, as well as other racial minorities, and immigrants.

24. See U.S. Census Bureau, *supra* note 23, at 7 (Figure 3).

25. I recognize that some immigrants come to the United States from Africa. See, e.g., Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999) (describing the black American experience as an immigrant experience); Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women*, 50 ME. L. REV. 309 (1998) (analyzing the human rights problems facing Black women who migrate between the United States and Jamaica); Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539 (2003) (describing the problems facing Jamaican immigrants desiring to return to their homeland). Indeed, forced migrants from Africa constituted an early, large immigrant group to this fledgling nation. See Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996). However, in 2004, only about 8% of the Black population in the United States was foreign-born, see U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY—BLACKS: 2004, at 2 (2007), compared to as many as 40% of all Hispanics. See *supra* text accompanying note and note 23.

Issues similar to those affecting Latina/o political power arise with respect to Asian Americans, as well as other minority groups with significant numbers of noncitizens. See, e.g., Kathay Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849 (2002); see also Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1438-46 (1997) (analyzing emergence of coalition of Latina/os and Asian Americans based on common interests that brought forth constructive political change in a Los Angeles suburb).

26. For a sampling of the literature on the harsh treatment of immigrants throughout U.S. history, including the present day, see JOHN HIGHAM, STRANGERS TO THE LAND (4th ed. 2002); BILL ONG HING, DEPORTING OUR SOULS (2006); BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2004); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH (2004); LUCY E. SALYER, LAWS HARSH AS TIGERS (1995); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE (rev. ed. 1998).

I

THE SPECIAL POLITICAL PROCESS DEFECTS CONFRONTING LATINA/OS AND IMMIGRANTS

In his path-breaking book, *Democracy and Distrust*, John Hart Ely, relying on the famous footnote four of the Supreme Court's *Carolene Products* decision,²⁷ discussed the need for meaningful judicial review—known as strict scrutiny review—of legislative action directed at discrete and insular minorities in order to protect them from the excesses of the political process.²⁸ It is generally accepted that courts should strictly scrutinize laws with racial classifications and, when necessary, intervene when the classifications cannot be justified by a compelling state interest.²⁹ Courts unquestionably play an important role in correcting political process failures of this type.³⁰ Unfortunately, electoral defects continue to adversely affect racial minorities, showcased most clearly in the passage of the anti-affirmative action initiatives in California and Michigan.³¹

Few would question that Latina/os and immigrants both satisfy John Ely's definition of a "discrete and insular minority" deserving of judicial protection.³² Noncitizens barred from formal political participation³³ are especially

27. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for . . . more searching judicial inquiry.") (citations omitted).

28. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); see, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (invalidating Virginia's anti-miscegenation law).

29. See Robert Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 51 (2006) (discussing the role for the courts suggested by John Ely but suggesting that courts should go even further in carefully scrutinizing laws that disadvantage minorities).

30. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating ban on interracial cohabitation by unmarried persons); *Hernandez v. Texas*, 347 U.S. 475 (1954) (ruling that Equal Protection rights of Mexican-Americans were violated by their exclusion from jury service); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down *de jure* racial segregation in public schools).

31. See *infra* text accompanying notes 104-121.

32. See ELY, *supra* note 28, at 135-79.

33. Contrary to popular belief, it has not always been the case that noncitizens could not vote in the United States.

The history of noncitizen voting rights in the United States is a well-kept national secret. Most Americans today have no idea that during the nineteenth century, at least twenty-two states and territories permitted noncitizens to vote, and that it was not until 1926 that the last state, Arkansas, limited its voter qualifications to include only citizens.

Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 301 (2005) (footnote omitted); see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-1417 (1993) (reviewing rise and fall of noncitizen voting in the United States). See generally RON HAYDUK, *DEMOCRACY FOR ALL* (2006) (arguing for the extension of the vote to noncitizen residents).

A few local governmental entities in the United States allow noncitizens to vote in certain elections. See Raskin, *supra*, at 1463-67 (noting that some localities, including Takoma Park,

vulnerable to the whims of the majority.³⁴ Professor Ely specifically observed that noncitizens constitute precisely the type of discrete and insular minority warranting vigilance and judicial protection:

Aliens cannot vote in any state, which means that any representation they receive will be exclusively “virtual.” That fact should at the very least require an unusually strong showing of a favorable environment for empathy, something that is lacking here. *Hostility toward “foreigners” is a time-honored American tradition.* Moreover, our legislatures are composed almost entirely of citizens who have always been such. Neither, finally, is the exaggerated stereotyping to which that situation lends itself ameliorated by any substantial degree of social intercourse between recent immigrants and those who make the laws.³⁵

The disadvantages facing immigrants today are even greater than those that they encountered when Professor Ely penned his words in 1980. In 2008, a significantly larger percentage of immigrant noncitizens in the United States are people of color—the vast majority from Latin America and Asia—than in

Maryland, allow noncitizens to vote in local elections); *see also* Kini, *supra* (contending that noncitizens should be permitted to vote in local school board elections). Interestingly, Takoma Park in 1992 extended the vote in local elections to lawful immigrants after a lengthy process that began with a voter referendum on the issue. *See* Raskin, *supra*, at 1463-64. Some other countries permit noncitizens to vote in certain state and local elections. *See, e.g.,* Eamon Quinn, *Ireland Learns to Adapt to a Population Growth Spurt*, N.Y. TIMES, Aug. 19, 2007, at A3 (“Ireland permits all residents, not just Irish citizens, to cast ballots in local elections. That has helped immigrants win seats in local councils. The mayor of the midlands town of Portlaoise, Rotimi Adebari, is from Nigeria.”).

34. For that reason, the Supreme Court at various times has employed strict scrutiny to review state laws that discriminate against lawful permanent residents. *See, e.g.,* Bernal v. Fainter, 467 U.S. 216 (1984) (holding that state citizenship requirement for notary publics was unconstitutional); Sugarman v. Dougall, 413 U.S. 634 (1973) (finding aliens to be a discrete and insular minority, applying strict scrutiny, and invalidating citizenship requirement for state civil service positions); Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny to an alienage classification and striking down a bar of state welfare benefits to lawful residents).

35. ELY, *supra* note 28, at 161-62 (emphasis added) (endnote omitted). Despite Professor Ely’s insightful observation, for a variety of reasons, including the so-called “plenary power” doctrine barring substantive review of the immigration laws, *see infra* text accompanying notes 133-136, courts reviewing federal laws affecting noncitizens often take an extremely deferential approach. *See, e.g.,* Mathews v. Diaz, 426 U.S. 67, 79-82 (1976) (finding that Congress could limit the eligibility of lawful immigrants for a federal medical insurance program and emphasizing that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government’s power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not itself imply that such disparate treatment is ‘invidious.’” (footnotes omitted)); *see also infra* text accompanying notes 133-136 (discussing plenary power doctrine). At times, however, the Supreme Court has applied strict scrutiny review to noncitizen classifications in state laws. *See, e.g.,* Sugarman, 413 U.S. 634 (finding aliens to be a discrete and insular minority, applying strict scrutiny, and invalidating citizenship requirement for state civil service positions); Graham, 403 U.S. at 371-72 (applying strict scrutiny to a state welfare law discriminating against lawful immigrants).

the past.³⁶ Today's immigrants thus suffer disfavor in the political process not only because of their immigration status, but also because of their race. Consider that many people in the Western part of the United States—where lawmaking by initiative is particularly popular—employ the word “immigrant” as a synonym for “Mexican,” even though the immigrant stream is much more diverse and many persons of Mexican ancestry are U.S. citizens.³⁷

This section analyzes the particular political process defect facing Latina/os, a heterogeneous group that includes a sizeable immigrant component. It begins by defining the political process defect that makes Latina/os and immigrants especially vulnerable in the political process. The next subsection then demonstrates how the defect has skewed the initiative process to the detriment of Latina/os and immigrants.

A. The Latina/o Political Process Defect Defined

According to the U.S. Census Bureau, Latina/os are the largest minority group in the United States, comprising approximately 44.3 million people or roughly 14.8% of the total U.S. population.³⁸ The best available estimate is that between 11.5 and 12 million undocumented immigrants reside in the United States; more than half are of Mexican origin.³⁹ The Pew Hispanic Center estimated that, in 2005, approximately 40% of the Hispanic population was foreign born.⁴⁰ The Census estimates that about a quarter of all Latina/os in this country are *not* U.S. citizens.⁴¹ In 2003, 33.5 million foreign-born people lived in the United States, with more than one-half born in Latin America.⁴²

The media has heavily publicized the rapid growth of the Latina/o population, fueled in large part by immigration, over the last few decades.⁴³ Importantly, the demographic transformation is a national, not a regional, phenomenon. With increasing Latina/o numbers, the press frequently trumpets the growing political power of Latina/os, often referring to it as the awakening of a “sleeping giant.”⁴⁴ The truth of the matter is that Latina/os are not

36. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499-510 (2002).

37. See JEFFREY S. PASSEL, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 5 (Pew Hispanic Center, Mar. 7, 2006) (reviewing statistical data showing that approximately 56% of undocumented immigrants were from Mexico).

38. See U.S. Census Bureau, *Minority Population Tops 100 Million*, <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html> (last visited Mar. 16, 2008) (reporting that, as of July 1, 2006, Hispanics remained the largest minority group in the United States, with 44.3 million people comprising 14.8% of the total population).

39. See PASSEL, *supra* note 37, at 1, 4.

40. Pew Hispanic Study, *supra* note 23, at 1.

41. See *supra* text accompanying note 23.

42. U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003*, at 1 (2004), available at <http://www.census.gov/prod/2004pubs/p20-551.pdf>.

43. See, e.g., Haya El Nasser & Paul Overberg, *Nation's Minority Numbers Top 100M; Hispanics Account for Nearly Half of Growth*, USA TODAY, May 17, 2007, at A1.

44. See Roberto Suro, *Latino Power? It Will Take Time for the Population Boom to*

“sleeping,” but lack full and effective access to the political process.

Despite the popular stereotype of the community as a cohesive bloc, Latina/os are an extremely heterogeneous community in terms of national origin, political ideology, immigration status, physical appearance, and class, to name just a few salient variables.⁴⁵ Rather than a monolith, Latina/os constitute a community of communities, and are not always unified on political, economic, and social matters. Such heterogeneity significantly affects the political cohesiveness of Latina/os as a group.

Moreover, the fact that many Latina/os are not U.S. citizens is essential for purposes of analyzing and understanding the relative political power of Latina/os in the United States. Some Latina/os are U.S. citizens, while others are not, including those who are lawful permanent residents but have not naturalized. Other Latina/o noncitizens are undocumented immigrants; even if they have lived in the United States for many years, they are subject to deportation. None of the different categories of Latina/o noncitizens are eligible to vote; *all* noncitizens for the most part are lawfully denied formal participation in the political process. Because noncitizens comprise a significant percentage of the Latina/o community, the sheer number of Latina/o residents—and their nearly 15% of the overall U.S. population—fails to fairly reflect Latina/o political power relative to other racial groups.⁴⁶

Characteristics of the Latina/o community other than noncitizen status dilute Latina/o political power. For example, the voting rates of Latina/o citizens consistently have lagged behind those of Anglos in the United States.⁴⁷ Activist groups continue to bring voting rights litigation to eliminate barriers to Latina/o political participation.⁴⁸ Language differences also have dampened Latina/o political participation. Some Latina/os speak primarily Spanish, others

Translate, WASH. POST, June 26, 2005, at B1 (discussing the “sleeping giant” metaphor for Latina/o voters); Anthony York, *Flexing Latino Muscle*, CAL. J., June 1, 2004, at 40 (“Throughout the 1990s, many journalists and political scientists routinely referred to the state’s Latino voters as a ‘sleeping giant.’”).

45. See Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? : *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1290-91 (1997) (“Latinos differ widely in terms of race, immigration status, duration in this country, the circumstances under which they came, social class, linguistic abilities, and culture, to name a few salient characteristics.”) (footnote omitted).

46. See Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1511-13 (1993); see also Sylvia R. Lazos Vargas, *The Latina/o and APIA Vote Post-2000: What Does It Mean to Move Beyond “Black and White” Politics?*, 81 OR. L. REV. 783, 801 (2002) (“Latina/o registration lags as much as fourteen and fifteen percentage points behind the registration rates for Whites.”) (footnote omitted).

47. See de la Garza & DeSipio, *supra* note 46, at 1499-1501.

48. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (finding that Texas congressional redistricting plan violated Latina/o citizens’ voting rights); *Lopez v. Monterey County*, 525 U.S. 266 (1999) (ruling on a claim that voting rights of Hispanics had been violated through system of judicial districts).

are bilingual, while still others speak only English.⁴⁹

When it comes specifically to lawmaking by initiative, the limits on Latina/o political power are especially prominent. That process allows a law that disadvantages minorities to be passed in the secrecy of the voting booth, absent the transparency of the legislative process. Initiative lawmaking further lacks the compromising and logrolling, as well as the requirement that legislators explain their votes, that are routine features of the legislative process.⁵⁰ Because of these procedural characteristics, racist and nativist sentiments frequently surface in lawmaking by initiative in ways that they never could in laws subject to the ordinary legislative process, resulting in harsher, more extreme—and more racist and nativist—laws.⁵¹

In sum, Latina/os and immigrants are distinctly disadvantaged in the political process because a subset of these groups (noncitizen Latina/os and unnaturalized immigrants) are disenfranchised, and thus are limited in the ability to protect themselves politically, much less pursue their enlightened self-interest. Moreover, harsh majoritarian action, fueled by racism and nativism, has contributed to the history of discrimination against Latina/os and immigrants. It therefore is predictable that with respect to lawmaking by initiative, Latinas/os will be on the losing end more often, and by wider margins, than minority groups comprised predominantly of citizens, than they are in ordinary legislative lawmaking. It also is predictable that immigrants, who can only hope that others in the political process will vote to protect their interests, will not be adequately represented in the initiative process, and thus frequently will bear the brunt of discriminatory laws. Finally, the privacy and anonymity of the voting booth—as well as the uncompromising nature of an initiative vote—make it particularly easy for the majority to pass laws that are adverse to the interests of people of color and immigrants.

B. The Political Process Defect and the Experience of Latina/os and Immigrants in the United States

U.S. society is generally aware of the longstanding history of discrimination against African Americans in the United States. Although the Latina/o experience is unique, it is possible to draw parallels between it and that of Blacks.

The political process has repeatedly injured African Americans, the prototypical discrete and insular minority in American social life. Consequently, through the long history of slavery and Jim Crow in the United States, Blacks have suffered widespread—and at times, vicious—

49. See Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543 (2004).

50. See Lazos Vargas, *supra* note 46, at 844-45.

51. See *infra* Part II.

discrimination.⁵² Importantly, the courts have intervened at critical junctures to protect the rights of African Americans from political excesses.⁵³

Similarly, Latina/os historically have been disfavored in U.S. social life.⁵⁴ The majority often classifies them as both “foreigners”—even though many are native-born U.S. citizens—and as people of color.⁵⁵ Debates over immigration often directly implicate issues of race, despite the fact that most advocates of tighter immigration restrictions consistently and fervently deny that they are motivated by racism.⁵⁶ Given the modern demographics of immigration, discrimination against immigrants arguably relies on immigration status as a proxy to discriminate on the basis of race.⁵⁷ Along these lines, Michael Olivas has suggested that the popular anti-immigrant local ordinances⁵⁸ are similar to the pig-tail laws directed at Chinese immigrants in the late 1800s—both are not-so-subtle efforts to discriminate against the unpopular immigrants of color of the day.⁵⁹

Importantly, Latina/os are more vulnerable in the political process than most other racial minorities. As discussed earlier in this section, because

52. See JUAN F. PEREA ET AL., *RACE AND RACES* 96-178 (2d ed. 2007) (summarizing history of African Americans in the United States).

53. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating *de jure* segregation laws in public schools); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating anti-miscegenation laws).

54. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding that Mexican-American citizens had been unconstitutionally excluded from juries in Texas county and historically had suffered from social discrimination as well). See generally RODOLFO F. ACUÑA, *OCCUPIED AMERICA* (6th ed. 2006) (chronicling a history of discrimination against Mexican-Americans in U.S. social life); NEIL FOLEY, *THE WHITE SCOURGE* (1997) (studying the complex history of race and class relations in Texas); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1987) (same). Consider the negative stereotypes of Latina/os frequently depicted in the media. See Richard Delgado & Jean Stefancic, *Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273-75 (1992) (analyzing the impact of negative stereotypes of various minority groups, including Mexican-Americans, in the mass media); Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1089-98 (2001) (studying the development of the stereotype of the Latino gang member). See generally STEVEN W. BENDER, *GREASERS AND GRINGOS* (2003) (offering in-depth analysis of stereotypes of Latina/os in popular culture).

55. See Johnson, *supra* note 36, at 1499-510.

56. See ANTI-DEFAMATION LEAGUE, *IMMIGRANTS TARGETED: EXTREMIST RHETORIC MOVES INTO THE MAINSTREAM* (2007), available at http://www.adl.org/civil_rights/anti_immigrant/ (discussing anti-immigrant groups and the nature of the modern immigration debate).

57. See Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1239-43 (2000) (exploring the phenomenon of discrimination through proxy). Many years ago, Derrick Bell suggested that facially neutral initiatives that have racial impacts are most in need of meaningful judicial review. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 24 (1978).

58. See *infra* text accompanying notes 161-165.

59. See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 104 & n.14 (2008).

noncitizens comprise a significant component of the Latina/o community,⁶⁰ Latina/os possess less political power with which to defend themselves in the marketplace of politics than minorities of roughly equal numbers.

The concept of intersectionality,⁶¹ an important contribution of Critical Race Theory, helps us better appreciate the limited political power of Latina/os in American social life. Certain groups may possess multiple disadvantaging characteristics—such as both gender and racial minority status for women of color, for example—that magnify their subordination in American social life.⁶² In this way, Latina/os suffer the disadvantages attributable to two distinct, yet interrelated, characteristics. As both stereotypical foreigners and as people of color, they are in certain respects more disadvantaged politically than African Americans and Native Americans, to name two examples.⁶³ This intersectionality limits their ability to protect themselves in the political process; their vulnerability is exacerbated by the simple fact that the significant noncitizen component of the Latina/o community cannot vote.

Similarly, noncitizens often experience difficulties in ensuring that immigration law and its enforcement will be responsive to their needs.⁶⁴ Consequently, the interests of immigrants often are sacrificed in the lawmaking process as well as in the administration and enforcement of immigration laws.⁶⁵ However, this problem is magnified in the initiative process because voters can act on their basest fears without the moderating influence of debate and compromise, as well as the transparency inherent in the legislative process that holds lawmakers accountable for their actions to both the public and to affected minority groups.

In sum, although populous with their numbers increasing as a proportion of the overall population, Latina/o and immigrant communities have limited

60. See *supra* text accompanying notes 25, 38–42.

61. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 51–56 (2001).

62. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

63. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1541–48 (1995). Asian Americans suffer disadvantages in U.S. social life similar to Latina/os, because of their perpetual perceived “foreigner” status and the fact that they are generally classified as racially different. See Keith Aoki, “Foreign-Ness” & Asian American Identities: *Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985) (book review).

64. See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Modern Administrative State*, 45 HOUS. L. REV. 11, 22–44 (2008) (analyzing political process defects that effectively ensure that immigration law and its enforcement will not be responsive to the needs of immigrants).

65. See *infra* text accompanying notes 131–165.

political power because of a significant political process defect. Due to the intersection of their race and the perception of them as foreigners, Latina/os can be expected to suffer frequently in the political process, and the problems with this process are magnified if the legislation at issue is enacted by initiative. The next part will offer examples of how this occurs.

II

THE POLITICAL PROCESS DEFECTS AT WORK

The latest spate of anti-affirmative action initiatives limiting the consideration of race in university and college admissions, as well as other ameliorative programs, is part of a lengthy history of initiative lawmaking that has disadvantaged discrete and insular minorities. Disfavored minorities have repeatedly fared poorly in the initiative process; initiatives often treat them more harshly than the legislative process, which itself has not always been particularly kind.⁶⁶

Historically, initiative lawmaking that disfavors African Americans dates at least as far back as the fugitive slave laws passed by the voters of Kansas and the Oregon territory before the Civil War.⁶⁷ Immigrants also have been targets of initiatives. For example, Oregon voters targeted Catholic (i.e., immigrant) schools when they, by initiative, sought to close down private schools—a measure that the Supreme Court rejected in the landmark case of *Pierce v. Society of Sisters*.⁶⁸ Immigrants of color have fared even worse. For example, as anti-Chinese agitation hit the state and nation, Californians in 1879 voted “against Chinese immigration” by a landslide vote of 154,638 to 883, more than a whopping 99% of the voters.⁶⁹ Moreover, in the early twentieth century, as part of a prolonged period of anti-Asian agitation, voters in the West passed laws prohibiting certain categories of immigrants—clearly directed at persons of Japanese ancestry—from owning certain real property.⁷⁰ And, in *Truax v.*

66. See, e.g., Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399 (1999) (proposing a three-factor test for judicial review of initiatives involving minority's civic standing); Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 641 (1980) (proposing a method for judicial review of initiatives and referendum).

67. See Bell, *supra* note 57, at 16-17.

68. 268 U.S. 510 (1925); see Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 66-70 (2003) (summarizing the anti-immigrant, anti-Catholic sentiments influenced initiative campaign in Oregon and how “[t]he Ku Klux Klan fueled nativist fires”).

69. Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 646 (1995) (quoting *Biennial Message of Governor William Irwin to the Legislature of the State of California*, Twenty-Third Session, 1880, at 36); see ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 62-63 (1991) (discussing initiative).

70. See, e.g., *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

Raich,⁷¹ the Supreme Court in 1915 struck down a law passed by Arizona voters that barred any employer of five or more employees from employing less than 80% “qualified electors or native-born citizens,” a kind of citizenship quota in the workplace.⁷²

More recently, in the heyday of the civil rights movement, those opposed to the newly emerging antidiscrimination principle resorted to anti-fair housing, anti-busing, and anti-public housing initiatives as part of an overall strategy to halt the desegregation of American social life.⁷³ Conservative activists today actively employ initiatives as a weapon of last resort in resisting improvements in civil rights for racial minorities.⁷⁴ Moreover, over the past two decades, the initiative process has resulted in measures that, although neutral on their face, have disproportionately injured people of color; some of those instances have primarily targeted persons of Mexican ancestry.⁷⁵ Unfortunately, anti-Latina/o sentiment marred the campaigns of many of those initiatives.

Initiative lawmaking also adversely affects other minority groups. Indeed, in the last decade or so, voters have passed a plethora of initiatives that curtail civil rights protections afforded by legislative bodies to gays and lesbians.⁷⁶ For example, in *Romer v. Evans*,⁷⁷ the Supreme Court struck down a Colorado referendum that amended the Colorado state constitution to affirmatively prohibit the enactment of legal protections for lesbians and gays. As the Court summarized,

[t]he impetus for the amendment and the contentious campaign . . . came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against

71. 239 U.S. 33, 35 (1915). Some commentators have contended that this decision was more a substantive due process decision that protected property rights, which was popular in the era of *Lochner v. New York*, 198 U.S. 45 (1905), than one seeking to protect immigrants against discrimination. See Timothy Sandefor, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 239-40 (2003). See generally Thomas W. Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353 (1994) (analyzing Chinese civil rights cases during the *Lochner* era through a lens of substantive due process).

72. The initiative addressed the apparent concern, which is echoed in the debate over immigration in the modern United States, that noncitizens were taking jobs from U.S. citizens. See, e.g., GEORGE J. BORJAS, *HEAVEN’S DOOR* (1999) (claiming that the current level and composition of immigration to the United States—especially of low-skilled immigrants—harm the American economy).

73. See *infra* Part II.A.

74. See *infra* text accompanying notes 104-121 (analyzing political dynamics surrounding anti-affirmative action initiatives).

75. See *infra* Part II.B.

76. See Lazos Vargas, *supra* note 66, at 428-32.

77. 517 U.S. 620 (1996).

by reason of their sexual orientation. Amendment 2 repeals these ordinances⁷⁸

Motivated by sentiments similar to those embraced by Colorado voters, the voters of the city of Cincinnati, Ohio passed an anti-gay, anti-lesbian amendment to the city charter, which, despite the Supreme Court ruling in *Romer v. Evans*, a lower court upheld. The amendment barred the city from extending “minority or protected status, quota preference or other preferential treatment” to homosexuals.⁷⁹

In the early years of this century, a national controversy has raged over same-sex marriages. As local jurisdictions, such as San Francisco, began to legally recognize such relationships, conservative activists responded through initiatives. Voters in several states passed state and local initiatives barring same-sex marriages.⁸⁰ As such, initiatives emerged as a powerful tool in the U.S. culture wars.

A. How the Initiative Process Harms Minorities and Immigrants

The problem facing racial minorities and immigrants is a general political process defect. However, for a number of reasons, the problem arises more acutely in the initiative process than it does in the legislative process generally.

Initiative lawmaking is prone to producing extreme laws that may punish certain minority groups.⁸¹ Importantly, the cloak of the voting booth makes it easier for the public to cast anti-minority votes than it would be for a public official to vote in favor of a patently anti-minority bill, in which votes are public and legislators must explain extreme positions to constituents, including minority constituents.⁸² As Derrick Bell explained,

[w]hen the legislative process is turned back to the citizenry either to enact laws by initiative or to review existing laws through referendum, few of the concerns that can transform the “conservative” politician into a “moderate” public official are likely to affect the individual

78. *Id.* at 623-24 (emphasis added) (citations omitted).

79. *See* Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 291 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

80. *See* Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191, 1238 (2005); *see also* Leib, *supra* note 1, at 905 n.11 (“Recently there have been a plethora of initiatives attempting to ban gay marriage, which have overwhelming[ly] been approved by the electorate. In 2004, for instance, voters from eleven states passed gay marriage bans.”) (emphasis added) (citation omitted); Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1633 (2005) (“During the 2004 election, Georgia was one of eleven states to allow voters to weigh in on whether its state constitution should exclude gays and lesbians from marriage.”) (footnote omitted).

81. *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005).

82. *See* Bell, *supra* note 57, at 18-20; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1555-57 (1990).

voter's decision. *No political factors counsel restraint on racial passions emanating from longheld and little considered beliefs and fears.*⁸³

Consider the 2007 debate over immigration reform. A group of Senators presented a compromise bill for national discussion and debate; the Senators offered a plethora of proposed amendments, which were then debated and voted upon.⁸⁴ Although their efforts ultimately failed, virtually every member of Congress understood that compromises were necessary in order for any comprehensive immigration reform legislation to be passed, including both benefits to immigrants (such as a program conferring legal immigration status on eligible undocumented workers) and increased border enforcement measures.⁸⁵ Legislators and lobbyists for months sought diligently—but unsuccessfully—to cobble together a compromise immigration bill.

In contrast, initiatives are not subject to the give-and-take of compromise and amendment. Unlike the legislative process, in which bills are drafted and debated with hearings, compromises, and committee reports, initiatives are a “take-it-or-leave it” proposition, with the only two options available to the voter being “yes” or “no.”⁸⁶ Measures are voted up or down, without any opportunity for compromise and amendment. The end result frequently has been the enactment of extreme measures that fail to show much, if any, sensitivity to the rights of minorities and immigrants.⁸⁷

Furthermore, people feel more freedom to vote their “racial passions” (identified by Derrick Bell) in the secrecy of the voting booth on initiatives than to admit them to a pollster.⁸⁸ This phenomenon is evidenced by the fact that “[i]t is a commonplace [in] modern American politics that pre-election and exit polls systematically overstate the proportion of the vote that the black candidate in a racially mixed race will actually receive.”⁸⁹

The next sections will explore how the unique characteristics of the

83. Bell, *supra* note 57, at 14 (emphasis added).

84. See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (1st Sess. 2007).

85. See Liz Stern & Carl Hampe, *Legal Implications of the Immigration Compromise*, WASH. POST., May 24, 2007, <http://www.washingtonpost.com/wp-dyn/content/discussion/2007/05/21/DI2007052101351.html>; *Immigration Compromise Said to Face Uncertain Fate*, FRONTRUNNER, May 22, 2007.

86. See *supra* text accompanying notes 50-51.

87. See *supra* Part II.B.

88. See Sherman J. Clark, *Ennobling Direct Democracy*, 78 U. COLO. L. REV. 1341, 1344 (2007) (“Direct democracy . . . potentially . . . encourage[es] citizens to exercise power over others without acknowledging or accepting responsibility for what they do.”).

89. Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 734 (1991) (footnote omitted). Some observers used this phenomenon to explain the discrepancy in some states between the poll data and actual voting results in the 2008 Democratic presidential primary race between Senators Hillary Clinton and Barack Obama, an African American. See Robert Novak, *Obama-Clinton Stalemate Worries Dem Leaders Wary of Poll Data*, CHI.-SUN TIMES, Feb. 11, 2008, at 35.

initiative process harm the two discrete and insular minorities that tend to overlap in the Latina/o experience: racial minorities, in part B, and immigrants, in part C.

B. Attacking Racial Minorities

It is not new to claim that the initiative process disadvantages racial minorities. Derrick Bell powerfully made this argument three decades ago.⁹⁰ But the use of initiatives has increased over time. The next few pages offer concrete examples of how initiative lawmaking has adversely affected minorities. I focus my attention on initiatives touching on issues in which race is most obviously implicated.

1. Discriminatory Land Use Measures

Derrick Bell identified land use as an area that is particularly susceptible to the abuse of minorities through voter initiatives, stating that

Supporters of minority rights must be concerned that both the initiative and the referendum often serve those opposed to reform. It is clear . . . that direct legislation is used effectively by residents of homogeneous middle-class communities to prevent unwanted development—especially development that portends increased size or heterogeneity of population.⁹¹

For this reason, initiatives have been popular to address land use planning decisions that touch on volatile issues of race and class.

A number of localities require certain zoning decisions to be made through initiative, a step that the Supreme Court has upheld.⁹² Decisions made in this fashion, however, can disproportionately injure racial minorities. For example, in *City of Eastlake v. Forest City Enterprises, Inc.*, the Court rejected a constitutional challenge by a developer seeking to build multifamily high-rise apartments to a city charter provision requiring that proposed land use changes be approved by 55 percent of voters.⁹³ This supermajority requirement increases the difficulty of obtaining approval of public housing developments for working and low income people, including a disproportionate number of racial minorities. Similarly, the Court in *James v. Valtierra* held that a constitutional amendment approved by the California voters prohibiting the approval of a public housing project absent voter approval did not run afoul of the Equal Protection Clause of the Fourteenth Amendment.⁹⁴

Generally, zoning initiatives represent a response to popular discontent

90. See Bell, *supra* note 57, at 2.

91. Bell, *supra* note 57, at 18 (footnote omitted).

92. See Lazos Vargas, *supra* note 66, at 426-28 (analyzing anti-fair housing and school desegregation measures).

93. 426 U.S. 668, 670-73 (1976).

94. 402 U.S. 137, 138-39 (1971).

with the ordinary operation of land use regulation, often when issues of socioeconomic and racial diversity are implicated. At various times they have even constituted an effort to stop the implementation of civil rights measures, such as efforts at residential and school desegregation. In this respect, they are similar to the efforts in recent years to halt the recognition of rights of gays and lesbians by legislative bodies.⁹⁵

At times, however, the Supreme Court has intervened to protect racial minorities from discriminatory voter initiatives in land use matters. For example, in *Reitman v. Mulkey*,⁹⁶ the Court addressed a California initiative that amended the state constitution to prohibit laws restricting the "right" of a person to lease or sell real property. Voters passed the initiative in response to the California legislature's enactment of a law prohibiting racial discrimination in housing. The Supreme Court struck down the initiative, finding that it ran afoul of the Equal Protection Clause.⁹⁷

Similarly, in *Hunter v. Erickson*,⁹⁸ the Court invalidated a city charter amendment passed by voters that required voter approval of any ordinance regulating the rental, leasing, or sale of real property on the basis of race, color, religion, national origin or ancestry. The Court recognized that "[o]nly laws to end housing discrimination . . . must run [the amendment's] gauntlet."⁹⁹

2. Anti-Busing Propositions

The civil rights movement of the 1950s and 1960s brought forward efforts to desegregate public schools. Social conflict grew as courts frequently ordered busing of students as a remedy for past racial segregation. Court-ordered busing generated national controversy, protests, and, at times, violence.¹⁰⁰ In 1978, Washington voters sought to prevent busing to desegregate the public schools

95. See *supra* text accompanying notes 76-80.

96. 387 U.S. 369 (1967).

97. See *id.* at 373-75.

98. 393 U.S. 385, 387 (1969) (emphasis added).

99. *Id.* at 390 (emphasis added). The precedent of *Hunter v. Erickson* was relied on in unsuccessful challenges to California's Proposition 209, which banned race conscious affirmative action, and Proposition 227, which ended bilingual education in the state's public schools. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 703-09 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); *Valeria v. Davis*, 307 F.3d 1036, 1039-1042 (9th Cir. 2002); see also *infra* text accompanying notes 104-121, 166-177 (discussing anti-affirmative action and anti-bilingual education initiatives); Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996) (making political structure argument in articulating a possible legal challenge to Proposition 209).

100. See, e.g., ROBERT A. DENTLER & MARVIN B. SCOTT, *SCHOOLS ON TRIAL* (1981) (discussing controversy over busing in Boston, Massachusetts); NICOLAUS MILLS, *THE GREAT SCHOOL BUS CONTROVERSY* (1973) (collecting readings on the national debate over school busing as a tool for desegregating the public schools); see also J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 161-92 (1979) (outlining arguments for and against busing to desegregate public schools).

through an initiative, which the Supreme Court later invalidated.¹⁰¹ Similarly, California voters limited the power of state courts to order school busing, but in that instance the Court refused to disturb the measure.¹⁰²

The anti-busing propositions undisputedly represented efforts to turn back the clock on civil rights gains in the legislature. These measures sought to restrict the rights of minorities in ways that in all likelihood could not have been achieved through the ordinary legislative process or the courts. As with other efforts to halt civil rights measures through initiatives, the leaders of the campaigns to limit busing through direct democracy pursued an overall strategy of limiting use of that remedy.¹⁰³

3. *Anti-Affirmative Action Initiatives*

With few exceptions, academic administrators and policymakers have fully embraced race-conscious affirmative action in higher education in recent decades.¹⁰⁴ After many attempts, efforts to end affirmative action at public colleges and universities through the courts ultimately failed.¹⁰⁵ In response, initiatives that ban race-conscious affirmative action have increased in frequency.¹⁰⁶

101. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

102. See *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982).

103. President Richard Nixon's administration advanced a number of strategies for curtailing busing as a tool for desegregating the public schools. See David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1089-99 (2004).

104. For analysis of the institutionalization of affirmative action at UC Berkeley, as well as other elite public universities, see Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985 (2007).

105. The threat to affirmative action in the courts peaked with the court of appeal's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied sub nom. *Thurgood Marshall Legal Society v. Hopwood*, 518 U.S. 1033 (1996), which held that the Supreme Court had through intervening decisions effectively overruled its precedent permitting race-conscious affirmative action and invalidated the University of Texas's race-conscious admission scheme. The Texas legislature responded by enacting a law making the top ten percent of the graduates of every high school in the state eligible for admission to the University of Texas. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 71-74 (2002). The Supreme Court later overruled *Hopwood* in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

106. See Lazos Vargas, *supra* note 66, at 454-62. Initiatives represent a political response to the refusal of the courts to dismantle affirmative action. A much-publicized article in 2004 by Professor Richard Sander added fuel to the national political debate over race-conscious affirmative action; Sander contended that the empirical data demonstrates that affirmative action in law school admissions injures, not helps, African Americans by placing them in schools in which they are under-qualified (and thus under-perform) compared to the general student body. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004); see also Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006) (contending that empirical data shows that racial preferences at law schools in some ways undermines minority attorneys' progress at law firms). Not surprisingly, this novel "mismatch" claim generated a firestorm of commentary. See, e.g., David L. Chambers, Timothy T. Clydesdale, William C. Kidder, & Richard O. Lempert, *The Real*

In 1996, the California voters approved Proposition 209, with 54% of the voters supporting the initiative, and the Ninth Circuit rejected a constitutional challenge to the measure.¹⁰⁷ In 1998, Washington voters approved a similar law, which also survived a court challenge.¹⁰⁸ Not long after the Supreme Court decided a pair of affirmative action cases involving the University of Michigan in 2003,¹⁰⁹ which together made it clear that a narrowly-tailored race-conscious admissions system could pass constitutional muster, Michigan voters passed Proposal 2, which ended race-conscious affirmative action in that state.¹¹⁰

Many factors have contributed to the growing popularity of the anti-affirmative action initiatives. U.S. racial demographics have changed significantly in recent years, with a much-publicized increase in the minority

Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637 (2007); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. LAW & POL'Y REP. 1 (2005).

107. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997) (upholding initiative). For a detailed critical analysis of Proposition 209, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); see also ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002) (chronicling demise of race-conscious affirmative action at UC Berkeley School of Law); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241 (2000) (same).

108. See WASH. REV. CODE § 49.60.400(1) (2002); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000); see also Jodi Miller, "Democracy in Free Fall": *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 N.Y.U. ANN. SURV. AM. L. 1, 8-11 (discussing California and Washington initiatives).

109. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan law school's race-conscious affirmative action program that required individualized review of each application); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating undergraduate admissions scheme that relied excessively on race in allocating points for admission); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (holding that school district failed to carry burden of showing that consideration of race in elementary and secondary school assignments was narrowly tailored to achieve a compelling state interest.). For an analysis of the evolution of the law of affirmative action in higher education, see GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION* (2000); Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006).

One fascinating issue left by *Grutter* was Justice O'Connor's curious pronouncement in the majority opinion that affirmative action would no longer be necessary in twenty-five years, see *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary. . . ."), a statement that quickly provoked considerable commentary. See Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541 (2003); Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004).

110. See Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16; see also Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007) (offering insights from activist about the anti-affirmative action campaign in Michigan).

population.¹¹¹ In no small part due to immigration, the percentage of Latina/os attending elementary and secondary schools across the United States has been consistently increasing.¹¹²

Consider specifically the impacts of the demographic transformation on public education in the state of California. The Golden State once had one of the most well-funded public school systems in the United States, but now ranks among the states with the lowest spending per pupil.¹¹³ Almost simultaneously, in California and other states, access to higher education has decreased as government support for public schools declines and student fees dramatically increase—and continue to do so with no end in sight.¹¹⁴

The end result of the current state of both public primary and secondary education is that Latina/os today face serious impediments to gaining admission to elite public colleges and universities—a problem that is exacerbated by the end of race-conscious affirmative action. The elimination of affirmative action in California and Michigan likely resulted, at least in part, from the changing racial demographics in the United States, combined with racial anxieties resulting from immigration.

a. The Racial Politics of the Initiatives

Anti-affirmative action activist Ward Connerly, an African American businessman who at one time was a regent of the University of California, actively campaigned for the initiatives ending affirmative action in California, Michigan, and Washington.¹¹⁵ Some observers contend that initiative supporters duped voters into supporting the measures. For example, in Michigan, a court found that the initiative supporters “engaged in systematic voter fraud by telling voters that they were signing a petition supporting affirmative action,” but nonetheless found that the conduct did not violate the Voting Rights Act.¹¹⁶ Similarly, some observers claimed that Proposition 209, dubbed the “California Civil Rights Initiative” even though it prohibited race-conscious affirmative action and arguably was anti-civil rights, “was actually carefully drafted to confuse the voters.”¹¹⁷

Similar to other types of initiatives, anti-affirmative action initiatives have

111. See *supra* text accompanying notes 38-46.

112. See Johnson & Martínez, *supra* note 57, at 1239-43.

113. See *id.* at 1239-43.

114. See generally Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post – 209*, 96 CALIF. L. REV. 5 (analyzing impediments to Latinas/os in accessing higher education).

115. See Jennifer Rubin, *Propositioning the States: Ward Connerly's 2008 Campaign*, WKLY. STANDARD, May 7, 2007.

116. *Operation King's Dream v. Connerly*, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *2 (E.D. Mich. Aug. 29, 2006).

117. See Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 431 (2000).

increasingly become part of larger campaigns to accomplish other political ends. Conservative activists currently hope to place initiatives banning affirmative action on the ballot in Arizona, Colorado, Missouri, Nebraska, and Oklahoma and thrust the issue into the national spotlight during the 2008 presidential elections,¹¹⁸ mirroring the strategy behind the anti-same sex marriage initiatives that polarized the electorate in 2004.¹¹⁹ Organizations seeking to put the measures on the ballot in the 2008 election apparently plan to play on the public's general concerns with immigration,¹²⁰ seeking "to tie the issues of affirmative action and immigration together by raising the prospect of illegal immigrants receiving amnesty and then being favored over American citizens in the competition for jobs and college slots."¹²¹ This strategy links together affirmative action, immigrants, and Latina/os in a manner that is elaborated upon in the next section.

b. Higher Education, Immigration, and Latina/os

In recent years, debate over affirmative action has become enmeshed with controversy between and among different minority groups. Specifically, conflict has ensued over whether immigrants and Latina/os should be eligible for affirmative action. Over the last decade, this debate has become tangled up in the thorny initiative campaigns dealing with measures that eliminated race-conscious anti-affirmative action.

Some scholars, including African Americans, have questioned whether Latina/os and immigrants should be eligible to benefit from race-conscious affirmative action.¹²² For example, influential Harvard sociologist Orlando Patterson has bluntly contended that affirmative action should "exclude all immigrants"; he further opined that Latina/o eligibility for affirmative action, which, in the minds of some observers has expanded the number of slots filled through affirmative action, has diminished public support for such programs.¹²³ Although debatable, Patterson's reasoning encapsulates some liberal concerns with the modern incarnation of affirmative action.

Today, access to public higher education of Latina/os and immigration overlap in the debate over whether undocumented students, many of whom

118. Peter Schmidt, *5 More States May Curtail Affirmative Action*, CHRON. HIGHER ED., Oct. 19, 2007, at A1.

119. See *supra* text accompanying notes 76-80.

120. See *supra* text accompanying notes 84-85 (discussing the failure of comprehensive immigration reform in 2007).

121. Schmidt, *supra* note 118.

122. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 74-80, 114 (1996); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 890 (1995); Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 2000-04 (1996) (book review).

123. Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES, June 22, 2003, at D11.

came to the United States as children from Mexico without proper immigration documentation, might be eligible, like other state residents, for in-state fees at public colleges and universities.¹²⁴ Congress has considered many proposals for a law that would expressly permit states to allow undocumented students to pay in-state fees to attend public colleges and universities and to regularize their immigration status. Specifically, members of Congress almost annually sponsor legislation known as the Development, Relief and Education for Alien Minors (DREAM) Act.¹²⁵ Versions of the bill have defined residency requirements for in-state tuition without regard to immigration status, provided a path to legalization for eligible undocumented students, and made undocumented students eligible for federal financial aid (which they currently are not). Immigration restrictionists harshly criticize the many iterations of the DREAM Act, contending, among other things, that it rewards unlawful conduct and amounts to an “amnesty” for undocumented immigrants.¹²⁶

To date, Congress has not passed any version of the DREAM Act. In 2007, the DREAM Act was part of a comprehensive Senate immigration bill that ultimately failed.¹²⁷ A subsequent and narrower version of the Act, which would have permitted a path to legalization for undocumented high school

124. See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 452-56 (2004); Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admissions and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257, 266-274 (2005). For a study of the impacts of denying higher education to undocumented immigrants, see ROBERT G. GONZALES, AMERICAN IMMIGRATION LAW FOUNDATION, WASTED TALENT AND BROKEN DREAMS: THE LOST POTENTIAL OF UNDOCUMENTED STUDENTS (2007), available at http://www.aifl.org/ipc/infocus/ipc_infocus_07dream.shtml.

125. See National Immigration Law Center, DREAM Act: Basic Information (2007), <http://www.nilc.org/immlawpolicy/DREAM/index.htm>. For detailed discussions of past versions of the DREAM Act and arguments favoring its enactment, see Susana Garcia, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 247 (2006); Berta Hernández-Truyol & Justin Luna, *Children and Immigration: International, Local, and Social Responsibilities*, 15 B.U. PUB. INT. L.J. 297, 314-16 (2006); Victor Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2002); Youngro Lee, Note, *To Dream or Not To Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB. POL'Y 231 (2006); Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to This Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 HOUS. L. REV. 847 (2006); see also Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1400-04 (2005) (summarizing status of undocumented student access to higher education).

126. See Julia Preston, *In Increments, Senate Revisits Immigration Bill*, N.Y. TIMES, Aug. 3, 2007, at A1 (noting opposition to the DREAM Act in the House of Representatives and quoting Representative Brian P. Bilbray, who referred to the bill as “the Nightmare Act”). Compare Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2007) (criticizing strongly state and federal DREAM Acts), with Olivas, *supra* note 59 (advocating passage of these laws).

127. See Preston, *supra* note 126, at A1.

graduates who attend college or serve in the military, failed in the U.S. Senate, amidst criticisms that it amounted to “amnesty” for “illegal aliens.”¹²⁸ In that same year, California Governor Arnold Schwarzenegger vetoed a bill passed by the state legislature that would have permitted undocumented students to be eligible for the same state financial assistance as other California residents.¹²⁹ Similarly, in Arizona, voters passed an initiative that barred public universities from providing undocumented students with any “public benefits,” including in-state fees, state financial aid, or enrollment in adult education classes.¹³⁰

As this discussion shows, anti-affirmative action and anti-immigrant groups have joined forces in opposing both affirmative action and efforts like the DREAM Act to ease the barriers limiting access of undocumented immigrants to public colleges and universities, with a resulting negative impact on Latina/o immigrants. Together, Latina/os and immigrants are at the epicenter of both debates.

B. Attacking Immigrants

An estimated one-quarter of all Latina/os in the United States are not U.S. citizens.¹³¹ Immigration laws enacted by Congress have traditionally disfavored immigrants, in no small part because noncitizen immigrants have limited political input into the formulation and amendment of the laws that directly affect them.¹³² This section demonstrates how Latina/os and immigrants are especially vulnerable in the initiative process, and unquestionably have suffered as a result throughout U.S. history.

In addition, contrary to what John Ely’s political process analysis suggests,¹³³ the courts traditionally have taken an extremely deferential approach to the substantive review of the U.S. immigration laws and their enforcement.¹³⁴ Scholars frequently call for ordinary principles of judicial

128. See Karin Brulliard, *Bill Aimed at Immigrant Children Fails*, WASH. POST, Oct. 25, 2007, at A12. For a defense of “amnesty” for undocumented immigrants, see Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 233 (2007); Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291 (2008).

129. See Patrick McGreevy, *Gov. Signs Gun Bills Opposed by NRA*, L.A. TIMES, Oct. 14, 2007, at B1 (reporting on Governor’s veto of the California DREAM Act).

130. See *infra* text accompanying notes 156-160 (discussing Arizona measure); Sara Hebel, *Arizona’s Colleges Are in the Crosshairs of Efforts to Curb Illegal Immigration*, CHRON. HIGHER ED., Nov. 2, 2007, at A15.

131. See U.S. CENSUS BUREAU, *supra* note 23, at 11.

132. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1149-81.

133. See *supra* text accompanying notes 27-37.

134. See, e.g., *Demore v. Kim*, 538 U.S. 510, 522 (2003) (upholding the mandatory detention of certain noncitizens pending their deportation and emphasizing that the “this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”) (citations omitted); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (holding that the court of appeals erred in failing to afford proper deference to agency interpretation of the Immigration and Nationality Act); *INS v. Elias-Zacarias*,

review to apply to the immigration laws.¹³⁵ One pair of commentators even felt it necessary to call for the courts to extend the same treatment to noncitizens as afforded other human beings.¹³⁶ Nonetheless, meaningful judicial review of substantive immigration measures by the courts is extremely rare.

This section will explore several specific examples of voter initiatives that target immigrants.

I. "Alien Land" Laws

In the early twentieth century, many states—especially in the West—enacted laws that prohibited noncitizens from owning certain real property, particularly agricultural land.¹³⁷ Although facially neutral, the laws were fueled by economic self-interest and racial animus, specifically aimed at the sizeable number of Japanese immigrants in the West in agriculture.¹³⁸ At that time, the federal immigration and nationality law generally required that an immigrant be "white" to be eligible to naturalize and become a U.S. citizen;¹³⁹ the Supreme Court had ruled that immigrants from Asia were not "white" and thus were ineligible for naturalization.¹⁴⁰ As a result, the land laws in operation

502 U.S. 478, 481 (1992) (ruling that agency finding that the applicant was not eligible for asylum could be reversed only if the reviewing court found that "a reasonable factfinder would have to conclude that the requisite fear of persecution existed") (citation omitted); see also *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (referring, in an immigration case, to the Supreme Court's "customary policy of deference to the President in matters of foreign affairs"). Such deference commenced in earnest with the Supreme Court's decision in *Chae Chin Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889), in which the Supreme Court upheld a law greatly restricting Chinese immigration to the United States – one of a series of laws known as the "Chinese exclusion laws" – and emphasized that the courts should leave immigration matters to the political branches of the federal government. See generally NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY* (2007) (analyzing evolution of judicial deference to government's treatment of immigrants over time).

135. See, e.g., THOMAS ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* (2002); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005); Gabriel J. Chin, *Segregation's Last Stronghold: Race, Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

136. See Raquel Aldana & Sylvia R. Lazos Vargas, "Aliens" in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1691 (2005).

137. See generally Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998), 19 B.C. THIRD WORLD L.J. 37 (1998) (analyzing history surrounding anti-Asian roots of alien land laws and linking their popularity with the internment of persons of Japanese ancestry during World War II); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61 (1947) (to same effect); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947) (same).

138. See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990*, at 30 (1993).

139. See generally IAN HANEY-LÓPEZ, *WHITE BY LAW* (10th anniversary ed. 2006) (analyzing caselaw interpreting the requirement in place from 1790 to 1952 that an immigrant be "white" to naturalize).

140. See *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that immigrant from Japan

disproportionately prevented Japanese farmers, who were ineligible for U.S. citizenship by virtue of their race, from owning agricultural lands.

State legislatures enthusiastically passed the alien land laws. But voters in the West, where initiative lawmaking was popular, also participated in restricting Japanese land ownership. In 1920, California voters closed perceived loopholes in the law passed by the state legislature to further restrict Japanese real property ownership; the initiative "passed with a decisive majority in *every county* in California."¹⁴¹ The U.S. Supreme Court subsequently rejected a constitutional challenge to the initiative.¹⁴²

It took twenty-five years after the voters passed California's harsh land law for the Court to rule that the law could not bar the ownership of land by a U.S. citizen son of a Japanese immigrant.¹⁴³ In a concurring opinion, Justice Murphy passionately decried the influence of racism in the initiative's history:

California has disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect. . . . However, an examination of the circumstances surrounding the original enactment of this law in 1913, its reenactment in 1920 and its subsequent application reveals quite a different story. . . . More severe and effective than the 1913 law, the initiative measure prohibited ineligible aliens from leasing land for agricultural purposes; and it plugged various other loopholes in the earlier provisions. A spirited campaign was waged to secure popular approval, a campaign with a bitter anti-Japanese flavor. All of 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 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 "Japlovers." The fires of racial animosity were thus rekindled and the flames rose to new heights.¹⁴⁴

was not "white" and thus ineligible for naturalization); *United States v. Thind*, 261 U.S. 204 (1923) (ruling to the same effect with respect to immigrant from India).

141. Aoki, *supra* note 137, at 57 (emphasis added).

142. See *Porterfield v. Webb*, 263 U.S. 225 (1923); see also *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding a similar Washington law).

143. See *Oyama v. California*, 332 U.S. 633 (1948).

144. *Oyama*, 332 U.S. at 650-51, 658-59 (Murphy, J., concurring) (citations omitted); see also *Johnson*, *supra* note 69, at 648-50. Justice Murphy expressed similar sentiments in dissenting in the Supreme Court's decision upholding the internment of persons of Japanese ancestry during World War II. See *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) ("[The] exclusion [of the Japanese from the West Coast] goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism"). See generally Symposium, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties*

Thus, as recognized by Justice Murphy, both the alien land laws, and the attempts to apply them even to the citizen children of immigrants, demonstrate how voter initiatives can serve as an outlet for racial animosity and as a weapon in efforts to restrict the rights of immigrants.

2. Proposition 187 and Beyond

Nativist measures directed at immigrants unfortunately are not solely phenomena of the past. In 1994, after a turbulent and racially charged campaign, the California voters overwhelmingly passed Proposition 187, an anti-immigrant initiative that, among other things, would have barred undocumented children from enrolling in public schools and would have denied virtually all public benefits to undocumented immigrants.¹⁴⁵ Ultimately, a federal court struck down most of the initiative as an unconstitutional state intrusion on the federal power to regulate immigration.¹⁴⁶

Many factors contributed to the passage of Proposition 187, known by some as the "Save Our State" initiative. It is apparent, however, that both anti-Mexican and anti-immigrant sentiments significantly influenced the vote.¹⁴⁷ For example, California Governor Pete Wilson, who was re-elected in no small part because Proposition 187 reinvigorated his stalled re-election campaign, ran television advertisements supporting the measure that showed dark, shadowy figures storming the U.S./Mexico border, with the narrator eerily stating "They

Cases on Their Sixtieth Anniversary, 68 LAW & CONTEMP. PROBS. 1 (2005) (critically analyzing Japanese internment and its legacy); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 (1998), 19 B.C. THIRD WORLD L.J. 1 (1998) (offering a variety of perspectives on the legacy of the internment of persons of Japanese ancestry during World War II).

145. See generally Johnson, *supra* note 63; Johnson, *supra* note 69; Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995). Proposition 187's prohibition of undocumented immigrant children from elementary and secondary schools directly conflicted with the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which invalidated a Texas law effectively barring undocumented children from public elementary and secondary schools. See Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197 (David A. Martin & Peter H. Schuck eds., 2005) (analyzing the case's background). Supporters saw Proposition 187 as a way to force the Supreme Court to reconsider *Plyler v. Doe*, which was a 5-4 decision.

146. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997). The conventional wisdom has been that the power to regulate immigration is federal and that Congress has passed comprehensive immigration laws that preempt the field. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (citations omitted); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that most of California's Proposition 187 sought to regulate immigration and thus was preempted by federal law); see also *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (holding that a local immigration ordinance was preempted by federal law). For an argument that state and local governments should be afforded more power to facilitate the integration of immigrants into U.S. society, see Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

147. See Johnson, *supra* note 69, at 650-61.

keep coming.”¹⁴⁸ The pamphlet distributed to registered voters included the following statement in support of the measure: “Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion.”¹⁴⁹ One of the drafters of the initiative invoked a metaphor replete with unquestionably racist overtones: “You are the posse and [the Save Our State Initiative] is the rope.”¹⁵⁰ Another drafter commented on marchers who protested the measure: “[o]n TV there was [sic] nothing but Mexican flags and brown faces.”¹⁵¹

Not surprisingly, the vote on Proposition 187 was racially polarized: “White voters supported the proposition at about a two-to-one ratio while Latinos overwhelmingly opposed it by over a three-to-one margin.”¹⁵² A number of factors account for this polarization. First, although Proposition 187 might not have directly affected Latina/o citizens, it would have directly impacted their undocumented family members and friends. Moreover, the pro-Proposition 187 campaign fanned the fires of racial passions because the rhetoric contained anti-*Mexican* in addition to anti-*immigrant* elements.¹⁵³ Many Latina/o citizens thus saw the initiative as nothing less than a racial attack on them. Proposition 187, along with the English-language initiatives discussed in the next section, thus not only represented the voters’ views about immigration and immigrants, but amount to public statements about the Latina/o community’s place in U.S. society. As this suggests, immigration has proven to be a social issue in which debate often boils down to a deep racial conflict between Latina/os and Anglos.¹⁵⁴

148. See John Marelius, *Wilson Ad Out to Ease Prop. 187 Drumbeat*, SAN DIEGO UNION-TRIB., Oct. 25, 1994, at A3; see also KENT A. ONO & JOHN M. SLOOP, *SHIFTING BORDERS*, at 99-100 (2002) (contending that Proposition 187 focused almost exclusively on Mexican immigrants and Mexican-Americans). Columnist Ruben Navarrette, Jr. proclaimed that Proposition 187 “was . . . about too many Latinos being too visible on too many streets in too many California cities.” Ruben Navarrette, Jr., *Is This What Prop. 187 Sought? More Latino Citizens?*, L.A. TIMES, Apr. 30, 1995, at M6.

149. TONY MILLER, ACTING SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 8, 1994, at 54 (capitals in original).

150. George Ramos, *Prop. 187 Debate: No Tolerance But Abundant Anger*, L.A. TIMES, Oct. 10, 1994, at B3 (quoting Ron Prince). The United States has a long and sordid history of lynching African Americans. See generally JAMES ALLEN ET AL., *WITHOUT SANCTUARY* (2000) (collecting photographs of lynchings in the United States); 9 PAUL FINKELMAN, *RACE, LAW, AND AMERICAN HISTORY 1700-1990* (1992) (analyzing history of lynching); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC’Y REV. 793 (2005) (reviewing history of public lynchings in the United States).

151. Margot Hornblower, *Making and Breaking Law*, TIME, Nov. 21, 1994, at 68 (quoting Robert Kiley). For analysis of the concerns about immigrant rights protesters in 2006 carrying Mexican flags, see Anupam Chander, *Flying the Mexican Flag in Los Angeles*, 75 FORDHAM L. REV. 2455 (2007).

152. Johnson, *supra* note 69, at 659 (footnote omitted).

153. See authorities cited *supra* note 145.

154. The racially polarized vote on Proposition 187 resulted in no small part from the fact that immigration has proven to be a social issue in which debate often boils down to a conflict over social status between Latina/os and Anglos. See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321 (1987) (analyzing the fight for status among Anglos and

It is true that the anti-Mexican sentiments expressed in the 1994 campaign over Proposition 187 were less vehement than those accompanying the land laws earlier in the twentieth century. Nevertheless, as with discrimination based on immigration status in other contexts,¹⁵⁵ the initiative—and others like it—allows immigration status to serve as a proxy for race. Elected officials in the legislative process could not have easily expressed such anti-Mexican, anti-immigrant sentiment. Indeed, it is difficult to imagine the California legislature ever passing a measure such as Proposition 187.

Voters have enacted Proposition 187-type measures in other states. For example, in 2004, after a campaign reminiscent of the Proposition 187 campaign in California,¹⁵⁶ Arizona voters passed Proposition 200, which restricted the eligibility of undocumented immigrants for certain public benefits, among other things.¹⁵⁷ As one scholar has emphasized, “[w]hat is particularly problematic about Proposition 200 . . . is that its intent and effect was to provoke even greater anti-immigrant feelings . . . during which the undocumented became the scapegoat for many of the state’s problems.”¹⁵⁸ Opponents of Proposition 200 challenged the measure in court, but the court of appeals found that the plaintiffs—state and local employees—lacked standing to challenge the Arizona initiative.¹⁵⁹ Supporters of Proposition 200 brought a lawsuit, which was dismissed, claiming that, in implementing the regulations, the state of Arizona had too narrowly interpreted the scope of the initiative.¹⁶⁰ For the time-being, Proposition 200 remains the law in Arizona.

Similarly, cities from Escondido, California to Hazleton, Pennsylvania have recently passed ordinances designed to make life difficult for undocumented immigrants, specifically Mexican immigrants, with the ultimate hope that they would pack up and leave town.¹⁶¹ Many of the local ordinances

Latina/as in the debate over bilingual education in public schools). Proposition 187, as well as the English-language initiatives analyzed *infra*, reflect longstanding racial conflict.

155. See *supra* text accompanying notes 137-144.

156. See Richard Marosi, *Decade Later, Prop. 187 Has an Echo in Arizona*, L.A. TIMES, Oct. 23, 2004, at A1.

157. See Susan Carroll & Yvonne Wingett, *Immigration Federal Ruling/Prop. 200 Now Law in Arizona; Tucson Judge Clears It*, ARIZ. REP., Dec. 23, 2004, at A1.

158. Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 275-76 (2007) (footnote omitted); see Hector O. Villagra, *Arizona’s Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. C.R. & C.L. 295 (2006) (contending that Proposition 200 is preempted by federal laws). Arizona later passed a state law imposing sanctions on businesses that employ undocumented workers. See *Arizona Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (upholding Arizona law that allows business licenses of employers of undocumented immigrants to be revoked).

159. See *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005).

160. See *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216 (Ariz. Ct. App. 2007).

161. See Rick Su, *A Localist Reading of Local Immigration Restrictions*, 86 N.C. L. REV. (forthcoming 2008) (understanding spate of local immigration ordinances as conventional response to demographic and socioeconomic changes at the local level). A federal court ultimately struck down the much-publicized Hazleton ordinance—the Illegal Immigration Relief Act—as preempted by federal law. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007);

made it unlawful for landlords to rent housing to undocumented immigrants.¹⁶² Although a number of the ordinances were successfully challenged as encroaching on the federal power to regulate immigration,¹⁶³ municipalities—and, in some instances, the voters themselves—continued to pass them. In May 2007, for example, the voters of one Dallas, Texas suburb, Farmers Branch,

see also Eric L'Heureux Issadore, Note, *Is Immigration Still Exclusively a Federal Power? A Preemption Analysis on Legislation by Hazleton, Pennsylvania Regulating Illegal Immigration*, 52 VILL. L. REV. 331 (2007) (analyzing the Hazleton ordinance); *Escondido, California Backs Down from Anti-Immigrant Ordinance*, U.S. FED. NEWS, Dec. 14, 2006 (discussing a settlement in which the City of Escondido agreed not to enforce a local ordinance barring rental of apartments to undocumented immigrants); Samantha Henry, *Town Sued Over Crackdown on Illegals*, HERALD NEWS (Passaic County, N.J.), Aug. 16, 2006, at B6 (reporting on a suit against Riverside, New Jersey challenging an immigration ordinance); Julia Preston, *City's Immigration Restrictions Go on Trial*, N.Y. TIMES, Mar. 13, 2007, at A13 (discussing the trial in the case challenging the Hazleton immigration ordinance); Keith Aoki, *(In)Visible Cities: Three Local Government Models, Immigration, Non-Citizen Voting and Language Regulation*, 11 OR. INT'L L. REV. (forthcoming 2008) (analyzing the consequences of local governments acting in transnational and international arenas, including immigration).

162. *See* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008) (analyzing how efforts to regulate immigration increasingly have relied on private enforcement of the immigration laws); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. (forthcoming 2008) (critically analyzing local ordinances that prohibit private landlords from renting to undocumented immigrants).

163. *Compare* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (invalidating a city immigration ordinance on federal preemption grounds), with *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008) (holding that a similar city ordinance was not preempted by federal law). For critical analysis of local attempts to regulate immigration, *see* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; *see also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006) (analyzing federalism issues raised in immigration enforcement); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994) (arguing for adherence to a rule that state regulation of immigration is preempted by federal law); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (contending that local governments cannot constitutionally enforce immigration laws); Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing the concept of public and private sanctuaries for immigrants). Recent years have seen increased calls by scholars for greater state and local involvement in immigration regulation. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 788, 792 (2008) (contending that federal preemption of state and local immigration regulation is "contestable"); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALA. L. REV. 179 (2005) (contending that local police can enforce immigration laws); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEG. F. 57 (seeing an increased role for state and local governments in immigration regulation); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994) (calling for a greater role of states in immigration regulation); *see also* Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061 (2007) (contending that local governments should be permitted to regulate immigration in a manner consistent with federal immigration law and policy).

overwhelmingly passed an anti-immigration ordinance, although a court quickly enjoined it.¹⁶⁴

As with the Proposition 187 campaign, racial and ethnic animus has unquestionably influenced the debate over immigration at the local level. For example, one commentator described an anti-immigrant rally in Hazleton, Pennsylvania, home of one of the first in the recent spate of anti-immigrant ordinances, as follows:

I'm not Latino, but the anger displayed at the rally—held in support of Hazleton's anti-immigration mayor, Lou Barletta—was enough to give anyone with a soul a serious case of the chills. . . . About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values. If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.¹⁶⁵

Unfortunately, race influences the immigration debate and fuels the popular anti-immigrant initiatives. As detailed in the following section, it also contributes to the popularity of measures to regulate the use of languages other than English.

3. Language Regulation and Bilingual Education

Voters have passed English-only initiatives with great regularity in recent years.¹⁶⁶ This effort is perhaps unsurprising, given that, in modern times, language can serve as a convenient proxy for race.¹⁶⁷ Language regulations

164. See Stephanie Sandoval, *Immigrant Proposal Wins Easily*, DALLAS MORNING NEWS, May 13, 2007, at A1. A federal court issued a temporary restraining order barring the ordinance from being enforced. See Stephanie Sandoval, *Judge's Order Stops Rental Ban, For Now*, DALLAS MORNING NEWS, May 21, 2007.

165. Mike Seate, *Rage Over Illegals Brings '60s to Mind*, PITT. TRIB. REV., June 7, 2007; see, e.g., Ruben Navarrette, Jr., *Hate in the Immigration Debate*, SAN DIEGO UNION-TRIB., July 29, 2007, at G3 (observing that the anti-immigrant cause has become distinctly anti-Mexican and describing hate mail he, a prominent national commentator, who is a native-born U.S. citizen, receives, including letters calling him a "dirty Latino" who should go "back to Mexico"); John Keilman, *Hispanics Rue City's New Rules*, CHI. TRIB., Oct. 29, 2006, at C3 (reporting that Latina/os feel under attack by local ordinances like Hazleton's); Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (to the same effect).

166. See generally JAMES CRAWFORD, *HOLD YOUR TONGUE* (1992) (analyzing English only movement in United States). For an early example of language regulation, consider *Meyer v. Nebraska*, 262 U.S. 390 (1923) in which the Supreme Court invalidated the Nebraska legislature's response to immigration by criminalizing educational instruction in languages other than English. See Abrams, *supra* note 68, at 72-77 (discussing background of case and observing that Nebraska and other similar state "laws were enacted in 1919, during the Red Scare, amid concerns that residents or citizens who could not speak English posed a national security threat") (footnote omitted).

167. See *supra* note 57 (introducing concept of discrimination by proxy).

most directly affect immigrants from non-English speaking countries, including Latin America and the Asian diaspora. Like the immigration laws, English-only measures have often reflected racial and nativist animus.

English-language laws often result in anti-immigrant and racial discrimination, both in the private sector by employers, and in the public sector, as government representatives interact with the public.¹⁶⁸ In modern American social life, “[t]he inability to speak English coincides neatly with race.”¹⁶⁹ Consequently, language regulation operates as a method of discriminating against racial minorities and immigrants.

Initiatives regulating the use of non-English languages have been especially popular with the increase in immigration from Asia and Latin America since 1965. Many states have passed initiatives establishing English as the state’s official language.¹⁷⁰ In 1988, Arizona voters amended the Arizona constitution to require state and local governments to conduct business only in English.¹⁷¹ The measure, which the Arizona Supreme Court struck down, was undisputedly directed at the state’s large Spanish-speaking—predominately Mexican-American—population.

Similarly, in 1998, in response to the increasing numbers of non-English speaking students attending public schools in California, voters passed Proposition 227, which prohibited bilingual education in public schools.¹⁷² As with the Proposition 187 campaign,¹⁷³ the campaign to pass Proposition 227 was tinged with a distinctive anti-immigrant, anti-Mexican flavor.¹⁷⁴ One of the initiative sponsors, for example, emphasized that the largest consumers of

168. See Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347 (1997); Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689 (2006). For a thoughtful approach to embracing multilingualism through encouraging participation in U.S. social life, see Cristina M. Rodríguez, *Language and Participation*, 94 CALIF. L. REV. 687 (2006).

169. 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 CALIF. L. REV. 863, 874 (1993).

170. See Lazos Vargas, *supra* note 66, at 433-47.

171. See *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (striking down the initiative on First Amendment grounds); see also *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated as moot*, 520 U.S. 43 (1997). Alaska voters also passed an initiative requiring government employees to exclusively use English in their official duties, which the Alaska Supreme Court struck down on First Amendment grounds. See *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007).

172. See generally Johnson & Martínez, *supra* note 57 (analyzing the measure’s discriminatory intent and impacts). Other states, including Massachusetts, have passed similar measures. See Lisa B. Ros, Note, *Learning the Language: An Examination of the Use of Voter Initiatives to Make Language Education Policy*, 82 N.Y.U. L. REV. 1510 (2007).

173. See *supra* text accompanying notes 145-155.

174. See Johnson & Martínez, *supra* note 57, at 1247-63.

bilingual education were “Latino-Spanish speaking children”¹⁷⁵ and “admit[ted] that some of the initiative’s supporters are no doubt anti-immigrant.”¹⁷⁶ Both Propositions 187 and 227 on their face unquestionably targeted the large population of Latina/os, particularly those of Mexican descent, in California. Unlike Proposition 187, however, a constitutional challenge to Proposition 227 failed.¹⁷⁷

C. The Intersection of Race and Immigrant Status in Initiative Law-Making

Thus far, this Article has reviewed a history of lawmaking by initiative that has adversely impacted racial minorities and immigrants. Initiatives have injured both groups through anti-discrimination and fair housing laws, anti-busing laws, exclusionary zoning laws, laws regulating the ownership of land, and, most recently, laws prohibiting race-conscious affirmative action in public colleges and universities. Moreover, many of these initiatives have revealed both anti-immigrant and anti-Latina/o prejudice on the part of the voting public.¹⁷⁸ As can be expected, these measures have produced racially polarized outcomes, which in turn resulted in long-term political consequences.¹⁷⁹

The measures that have negatively impacted the Latina/o community have not been limited to those dealing explicitly with immigration and immigrants. English-language regulations, although facially neutral, have also adversely affected minority groups with large Latina/o and immigrant populations. Similarly, the anti-affirmative action initiatives, although they do not deal directly with immigrants or Latina/os, passed in large part due to a misperceived fear of competition by those groups for precious public university spots. In the minds of many, Latina/os are “foreigners.” As a result, immigration status often serves as a proxy for race (and Latina/o identity), to the political detriment of Latina/os and immigrants.

III

CURING THE POLITICAL PROCESS DEFECT

Thus far, this Article has identified political process defects that

175. *Morning Edition* (National Public Radio broadcast, May 29, 1998) (transcript no. 98052900V14) (remarks of Ron Unz).

176. Don Terry, *Bilingual Education Facing Toughest Test*, N.Y. TIMES, Mar. 10, 1998, at A1 (quoting Unz).

177. See *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002).

178. Proposition 187 is perhaps the most infamous example of this. See *supra* text accompanying notes 145-155.

179. For example, Latina/o voters blamed then-Governor Pete Wilson, who vigorously campaigned for the measure, for the initiative’s passage. Wilson has now found himself almost exiled from the state and national political scene. Republican candidates subsequently learned from Wilson’s example and sought to avoid immigrant-bashing, for fear of alienating Latina/o votes. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 245 & n.308 (2003). Such caution, however, has recently disappeared, and politicians and voters have returned to blaming immigrants for a variety of social ills.

disadvantage Latina/os and immigrants in lawmaking by initiatives; and has demonstrated the pernicious impacts of the defects at work. The next question is what remedies might counteract the political process defect that injures Latina/os and immigrants, as well as other discrete and insular minorities. This Article contends that, rather than affording a high degree of deference to the voters, courts should exercise meaningful judicial review of initiatives that adversely affect racial minorities. Put simply, courts should avoid the instinctive desire to defer to voters who have disadvantaged minorities.

In determining what role the courts should take in reviewing the laws passed by the voters, commentators have struggled to balance the need for judicial review in protecting racial minorities with the strong desire to defer to the will of the voters. In an influential article on the proper role of judicial review of initiatives, Julian Eule called for courts to afford a “hard judicial look” at initiatives that disadvantage minorities,¹⁸⁰ a stance that finds strong support in John Ely’s political process theory of judicial review.¹⁸¹

The rationale for careful judicial review of initiatives is relatively straightforward. Both Latina/os¹⁸² and immigrants are discrete and insular minorities with limited power in the political process.¹⁸³ As David Cole has observed,

the fact that . . . aliens [cannot] vote makes it that much more essential

180. Eule, *supra* note 82, at 1558-80; see Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003) (contending that initiatives should be subject to procedural safeguards, including meaningful judicial review, similar to those that apply to the decisions of administrative agencies).

181. See *supra* text accompanying notes 27-31.

182. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding that exclusion of Mexican-Americans from juries was unconstitutional); see also Jamie Crook, *From Hernandez v. Texas to the Present: Doctrinal Shifts in the Supreme Court's Latina/o Jurisprudence*, 11 HARV. LATINO L. REV. 19 (2008) (analyzing the development of the Supreme Court’s approach since *Hernandez v. Texas* to cases of discrimination against Latina/os). See generally MICHAEL A. OLIVAS, “COLORED MEN” AND “HOMBRES AGUI” (2006) (collecting essays analyzing *Hernandez v. Texas* and its impacts).

183. See ELY, *supra* note 28, at 161-62 (contending that, because noncitizens cannot vote and have suffered a history of discrimination, immigrants constitute a discrete and insular minority deserving of special protection by the courts). In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), the Supreme Court emphasized that race, alienage, and national origin are so seldom relevant to the achievement of any legitimate state interest that laws that include such classifications are presumed to reflect prejudice and antipathy. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. See *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (“[T]he fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage.”); Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991) (“When an identifiable social group has been consistently and significantly underrepresented or in other ways excluded from the legislative process, traditional political processes cannot be relied upon to protect that group. The courts must therefore step in to guard the group from unjustified selective treatment, that is, discrimination.”).

that the basic rights reflected in the Bill of Rights be extended to aliens in our midst. As a group that is subject to government regulation but denied a vote, aliens are without a meaningful voice in the political bargains struck by our representative system. Members of Congress have little reason to concern themselves with the rights and interests of those who cannot vote.¹⁸⁴

Similar reasoning applies to laws passed by the electorate. Noncitizen immigrants lack the right to vote and cannot directly influence elections, and Latina/os as a group contain a sizeable immigrant component. Thus, the same concerns that pertain to the initiative process, while magnified there, also exist with regard to legislative lawmaking. In these circumstances, meaningful judicial review is essential to protect these discrete and insular (and overlapping) minorities from the tyranny of the majority.

Barring millions of noncitizen immigrant residents from any direct input into the political process cannot help but skew lawmaking by initiative. Nor is it easy to justify deference to the will of the voters. As Neal Katyal succinctly states in arguing that deference to laws passed by legislatures affecting noncitizens cannot be justified,

Political accountability is a crucial component for deference, and when legislation only impacts people without a vote, it cannot be easily justified. . . . Indeed, there are good reasons for taking legislative activity out of the realm of deference altogether when the action directly affects only the powerless. Executives that seek to harness the benefits of deference in court would therefore be well advised to avoid blatant discrimination on the basis of alienage.¹⁸⁵

When it comes to initiative lawmaking, there is no realistic check on the electorate to ensure fair treatment of Latina/os and immigrants. One therefore can expect the voters to embrace positions that are not in the interests of Latina/os and immigrants generally, which has been played out historically time and again.¹⁸⁶ Indeed, the lack of compromise and transparency in initiative lawmaking historically has allowed for minorities—especially Latina/os and immigrants—to be harshly treated. Therefore, careful judicial review of initiatives that disadvantage Latina/os and immigrants (as well as other discrete and insular minorities) is imperative.

Unfortunately, the political process defects confronting Latina/os and immigrants are not limited to the initiative process. I previously have advocated careful judicial review of immigration decisions of Congress, as well as the decisions of the administrative agencies enforcing and implementing the immigration laws. Agency decisions of the Executive Branch that touch on

184. David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953, 981 (2002).

185. Neal Katyal, *Equality in the War on Terror*, 59 *STAN. L. REV.* 1365, 1383-84 (2007).

186. See *supra* Part II (chronicling bias against noncitizens in initiative lawmaking throughout U.S. history).

immigration and immigrants especially warrant careful judicial review.¹⁸⁷ Decisions involving asylum in which noncitizens allege that they will suffer persecution if returned to their homeland, in which life or death issues literally are at stake, deserve “hard look” review by the courts.¹⁸⁸ Although initiatives present an acute set of concerns in their own right, substantive review of the immigration laws passed by Congress, as well as the decisions of the administrative agencies interpreting and enforcing those laws, also is needed.

The political process defects facing Latina/os and immigrants are most serious in the initiative process. However, careful judicial review of other types of lawmaking affecting these groups is necessary as well, particularly in today’s anti-immigrant climate. The lack of political accountability of the immigration agencies, combined with little judicial review, has contributed to the formation and enforcement of extreme policies directed at immigrants at various times in U.S. history.¹⁸⁹ For example, the immigration reforms in 1996 subjected immigrants to many punitive measures, including the retroactive expansion of the grounds for removal, increasing exponentially the use of immigrant detention, and restricting relief from removal for long term lawful permanent residents.¹⁹⁰ More recently, the congressional response to the tragic events of September 11, 2001, especially the USA PATRIOT Act, contained many provisions that disadvantaged immigrants, including greatly expanding the definition of “terrorist activity” that renders immigrants subject to deportation.¹⁹¹ Furthermore, the Executive Branch took many aggressive steps in the so-called “war on terror” directed at Arab and Muslim noncitizens, which

187. See generally Kevin R. Johnson, *Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993) (calling for rigorous judicial review of Executive Branch immigration decisions).

188. See Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 283, 285-89.

189. Cf. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 607-13 (1990) (analyzing significance of lack of dialogue between courts and Congress about substantive immigration laws because of plenary power doctrine).

190. One commentator characterized the 1996 reforms as “the most radical reform of immigration law in decades—or perhaps ever.” PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998) (emphasis added). For analysis of some of the specific tough provisions of the 1996 immigration reform, see Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); James F. Smith, *United States Immigration Law as We Know It: El Clandestino, the American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747 (2005).

191. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). For criticism of the Act, see, for example, Cole, *supra* note 184, at 966-74; Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1111-28 (2002).

also had devastating impacts on *all* immigrants.¹⁹² All of these disadvantages implemented by law underscore the need for more searching judicial review in evaluating the validity of initiatives, which generally magnify the harms resulting from the lack of full and fair political representation.

Given their particular political disadvantages and the harshness of recent laws, other commentators might go further than advocating strict judicial review in seeking to cure this political process defect. Some observers, for example, have advocated the extension of the right to vote to noncitizen residents.¹⁹³ Increasing political accountability of government to community residents is one reason for extending the franchise.¹⁹⁴ This step would immediately increase Latina/o voting clout and tend to limit the potential that the political process would disadvantage noncitizen immigrants (at least at the local level). However, with the possible exception of elections, enfranchisement of noncitizens, as a matter of practical politics, appears highly unlikely.

A combination of factors requires searching judicial inquiry into initiatives that harm and disadvantage discrete and insular minorities. The unique challenges presented by the initiative process, which because of its wholesale lack of transparency facilitates the enactment of laws with racist and nativist sentiments, demand remedy. However, noncitizen immigrants and racial minorities are generally vulnerable in the political process, as their interests are underrepresented in the electorate; this cuts off the political realm as the possible avenue of redress. Given the unlikelihood of meaningful reform coming from the political branches of government, careful judicial review seems the most practical and reasonable way to alleviate the injuries caused by initiatives that target them. Although courts understandably are reluctant to overturn the expressed will of the voters, minorities need protection from the excesses of the political process. Because of the particularities of the initiative

192. See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Cole, *supra* note 184; Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Victor C. Romero, *Decoupling "Terrorist" From "Immigrant": An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER, RACE, & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

193. See HAYDUK, *supra* note 33, at 195-203; Raskin, *supra* note 33, at 1467-70; Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1112-15 (1977); Kini, *supra* note 33, at 272; see also JOAQUIN AVILA, UCLA CHICANO STUDIES RESEARCH CTR., LATINO POLICY & ISSUE BRIEF NO. 9, POLITICAL APARTHEID IN CALIFORNIA: CONSEQUENCES OF EXCLUDING A GROWING NONCITIZEN POPULATION (2003), available at <http://www.chicano.ucla.edu/press/briefs/archive.asp> (analyzing impacts of growing immigrant population in California disenfranchised from the political process).

194. HAYDUK, *supra* note 33, at 68-69.

process, this is even more true for initiative lawmaking than for other forms of lawmaking.

Influential constitutional law scholars, including Derrick Bell, Erwin Chemerinsky, and Julian Eule, all have called for heightened review akin to strict scrutiny of initiatives that disadvantage racial minorities.¹⁹⁵ Such review makes perfect sense in light of the special political process dangers to discrete and insular minorities inherent in the initiative process. At a bare minimum, there can be absolutely no justification for deferential review of laws enacted by the voters.¹⁹⁶ As Derrick Bell emphasizes, “[t]he evidence . . . justifies a heightened scrutiny of ballot legislation similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals.”¹⁹⁷

CONCLUSION

Anti-minority and anti-immigrant initiatives have a long history in the United States. The infamous alien land laws were facially neutral but thinly-veiled attempts to target Japanese immigrants in the West. Today, many of the anti-immigrant measures are also facially neutral but are in fact directed at persons of Mexican descent and at Latina/os generally, whether or not they are U.S. citizens. Although the rhetoric of these initiatives has been toned down to comport with modern sensibilities, race continues demonstrably to influence modern initiative campaigns over immigration, language regulation, and anti-affirmative action measures.

Roughly a quarter of the Latina/o community in the United States is composed of noncitizens, which limits the collective political power of all Latina/os. The result is that this community may be even more vulnerable than other minorities to attack in the political process. Consequently, the argument in favor of heightened judicial review for laws that adversely affect discrete and insular minorities applies even more forcefully to Latina/os, as well as to noncitizens generally, than it does to other minority groups.

195. See Bell, *supra* note 57, at 23-28; Chemerinsky, *supra* note 1, at 305-06; Eule, *supra* note 82, at 1559-73.

196. Cf. Johnson, *supra* note 64 (advocating scrutinizing review of administrative action affecting immigrants).

197. Bell, *supra* note 57, at 23; see also Lazos Vargas, *supra* note 66, at 506-07 (advocating “skeptical review” of initiatives “that impinge on minorities’ citizenship rights”). But see Robin Charlow, *Judicial Review, Equal Protection and the Problem of Plebiscites*, 79 CORNELL L. REV. 527, 607-08 (1994) (contending that the case had not been made for heightened judicial review of initiatives); Mark Tushnet, *Fear of Voting: Differential Standards of Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373 (to the same effect). Bell further suggests that the greatest need for judicial review is when the initiative seeks to roll back civil rights gained by minorities through the ordinary legislative process: “[T]he need for court protection of [the representative] system is strongest when the majority attempts through the direct ballot to take away something the minority obtained through the representative system.” Bell, *supra* note 57, at 26.

Of course, political power can be wielded outside the ballot box. For example, mass marches by Latina/os, immigrants, and their supporters, like the high-profile demonstrations in the spring of 2006, influenced the immigration debate in the United States.¹⁹⁸ Yet, despite the potential for direct political action, the electoral power of Latina/os remains diluted by the citizenship requirement for voting. In addition, elected political leaders and legislative bodies almost inevitably give more weight to the concerns of citizens than to those of their noncitizen constituents, as exemplified by the rash of local anti-immigrant ordinances in recent years. The diluted political power of Latina/os contributed to the demise of affirmative action, one of the topics of this symposium, by initiative in California and Michigan.

This Article highlights the distinct political disadvantages that racial minorities and immigrants face in the initiative process. Given the long history of majorities oppressing minorities in the United States, elections and initiative campaigns targeting these historically subordinated communities, in which a large percentage of members of the minority community cannot vote, should be subject to close, searching—indeed, strict—scrutiny by a non-political branch of government. Indeed, the Latina/o community is a prototypical example of a discrete and insular minority deserving of judicial protection, as a significant portion of this community exists at the nexus of disenfranchisement and prejudice. As perceived foreigners and racial minorities, Latina/os are doubly disadvantaged in American social life. Indeed, we might say that Latina/os are a *super*-discrete and insular minority facing the most formidable barriers in the political process. At a bare minimum, courts must engage in meaningful judicial review of the initiatives that target racial minorities and immigrants.

198. For analysis of the implications of the marches, see Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

