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Interest Convergence in Immigration Law and Theory

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INTEREST CONVERGENCE IN IMMIGRATION LAW AND THEORY

Richard Delgado[†] & Allen Slater^{††}

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INTRODUCTION

The two of us have written about policing in minority communities,¹ as well as about immigration law and practice.² Because of a growing suspicion that the two systems operate in similar fashion and serve many of the same ends, we were pleased by the invitation by the *Case Western Reserve Law Review* to offer a few thoughts about one of those systems (immigration) through a lens—critical race theory—that we have found useful in discussing the other (policing). We take as our point of departure a recent book on the role of the President in formulating U.S. immigration policy.

In *The President and Immigration Law*, Professors Adam Cox and Cristina Rodríguez analyze that body of law and offer suggestions for improving it.³ Their analysis proceeds largely in structural and separation-of-powers terms and notes that the underlying policy purposes that the immigration system purports to serve shift markedly from one period to another, thus making it tempting for presidents to take initiative in changing immigration policy.⁴

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1. *E.g.*, Allen Slater, *It Should Never Be Justified: A Critical Examination of the Binary Paradigm Used to Categorize Police Shootings*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 1, 4 (2020) (proposing a new framework for analyzing police shootings); Richard Delgado, *Remedies for Police Shootings: A Comment on Slater*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 37, 38–39 (2020) (same); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1544–49 (2016) (discussing community-based alternatives to policing minority neighborhoods).
 2. *E.g.*, Allen Slater & Richard Delgado, “*The Least of These*”: *The Case for National Injunctions in Immigration Cases as a Critical Democratic Institution*, 25 U.C. DAVIS SOC. JUST. L. REV. 100, 127–28 (2021) (discussing a remedy for agency overreaching); Richard Delgado, *J'Accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. 119, 151–52 (2018) (discussing a remedy for presidential measures fueled by animus).
 3. ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 2–4 (2020). Their suggestions include that courts should take a more active role in reviewing presidential action, *id.* at 12–13, 72–76, 212–13, 229–37, and that Congress and the President see themselves as “co-principals,” *id.* at 12, 192–95, 243–47; *id.* at 191–214, 215–37 (discussing the pros and cons of this arrangement). Our system also should periodically offer legal status to many who are living here without official authorization. *Id.* at 126, 244–45; *see also* Jill E. Family & David Rubenstein, *Symposium Introduction: The President and Immigration Law*, YALE J. REGUL. (Mar. 25, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-01/> [<https://perma.cc/M939-DKXF>] (agreeing with this proposal as a means of reducing stress on the system).
 4. COX & RODRÍGUEZ, *supra* note 3, at 3 (documenting how the President, not Congress, has originated many major shifts in immigration policy and explaining why this is not to be deplored). Congressionally enacted

This structural approach, very common among scholars in this field, although appealing in its simplicity, can easily disserve many of the constituents—namely, immigrants—whose rights, livelihoods, and well-being are at stake. This perspective also takes little note of a body of scholarship—critical race theory—that seems directly relevant to the concerns of immigrants since (1) many of them are minority group members, as are many immigration law scholars; and (2) many of the currents that roil the sea of immigration regulation are overtly racial.⁵

immigration laws and categories are so broad, and enforcement so lax, that the authorities cannot deport every unauthorized entrant who comes to their attention; someone must choose whom to prioritize for deportation, and traditionally this decision has fallen to the President. *Id.* at 2–12, 47, 102–12, 124, 215–19, 222–37 (noting that “[e]xecutive priority setting . . . contributes profoundly to the structure of modern immigration law”). This discretion also can lead to chaos and unpredictability from one administration to the next, *id.* at 238; *see also id.* at 44–45, 103–30 (noting how border policy accomplishes its purposes via selective, discretionary deportation as conditions change and particular groups come into favor or disfavor), so that the resulting supervisory scheme is both shared and “fluid,” *id.* at 45, 56 (noting that this can appear to be inherent in the exercise of foreign affairs leadership); *see also id.* at 56–59 (noting that a President is often in a position to act quickly in response to changing political circumstances, whereas Congress is much slower); Family & Rubenstein, *supra* note 3 (noting the same feature).

5. *See, e.g., infra* notes 7, 9–15, 19 and accompanying text. Cox and Rodríguez often treat historical episodes that practically scream racism as examples of presidents exercising a “foreign policy” power, of regulating the labor supply, or pursuing a given presidential “vision.” COX & RODRÍGUEZ, *supra* note 3, at 68, 77, 91; *see also id.* at 27–35 (discussing Chinese exclusion); *id.* at 55–76 (discussing Cuban refugees); *id.* at 41–45, 95–97 (discussing the Bracero program); *id.* at 56–76 (discussing Haitian boat people and Cuban refugees). *See generally id.* at 162–88 (describing the ebb and flow of Executive exercise of power in recent times in response to shifting priorities). Cox and Rodríguez took a similar approach in two earlier articles. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 484–509 (2009); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107–09, 185 (2015). For a somewhat similar view, see HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 3–9 (2006) (discussing would-be immigrants sympathetically, but not describing their exclusion as racist, much less as exemplifying racial realism, interest convergence, or other critical race theory concepts). Only rarely do Cox and Rodríguez describe immigration, laws, policies, or practices as outright wrong or “cruel.” *See* COX & RODRÍGUEZ, *supra* note 3, at 4, 238 (deploring Trump’s restrictions of asylum as cruel or racist). But they generally revert promptly to discussing the racist measure in separation-of-power terms, *e.g., id.* at 62–63, 72, or even the relief of it in those terms, *id.* at 76–77. Other times, they treat deportation as a function of simple bureaucracy and the growth of enforcement budgets, *id.* at 100–01; at other times as a matter of allocation of state versus federal power, *id.* at 133–61; and still other times as the executive branch’s delegation of

Most recent books on immigration, with only a handful of exceptions,⁶ likewise rely heavily on conventional analytical tools such as economic efficiency, fidelity to regulatory principles, and cost-benefit analysis. Even though a May 2021 online symposium in the *Yale Journal on Regulation* discusses the Cox-Rodríguez book from many angles, none of the contributors use the terms “critical race theory,” “interest convergence,” or “white nationalism,” even though to any reader versed in critical thought these concepts would seem to practically jump off the page of any history of the U.S. immigration system.⁷

Although a few scholars profess to be applying critical thought⁸ to immigration law, their work does not address why a developed country such as the United States has operated such a highly restrictive system of immigration throughout history. To be sure, an occasional legal writer mentions critical race concepts when discussing the Muslim Ban⁹

enforcement power to underlings, *id.* at 162–88. In their epilogue, they concede that the co-principals model, which turns over much discretionary authority to the President, can allow “cruelty and abuse [to] triumph,” *id.* at 238, and be wide open to “large-scale humanitarian tragedies at worst,” *id.* at 239. But they glide over these defects quickly, as though they were merely unfortunate consequences of a complex reality. *Id.* at 238–39.

6. See the scholarship of Kevin Johnson, *infra* note 20 and accompanying text.
7. Family & Rubenstein, *supra* note 3; see also Hiroshi Motomura, *Making Immigration Law*, 134 HARV. L. REV. 2794, 2795–96 (2021) (reviewing COX & RODRÍGUEZ, *supra* note 3, and commending the authors for analyzing how Congress and presidents have shared immigration authority and power—sometimes none too easily). For a discussion of the frequent shifts in power and authority between the two branches—and even the two political parties—see, e.g., Robert Barnes, *Supreme Court Considers Whether Biden Properly Ditched Trump Immigration Rule*, WASH. POST (Feb. 23 2022, 5:12 PM), <https://www.washingtonpost.com/politics/2022/02/23/supreme-court-trump-public-charge-rule> [<https://perma.cc/JV5G-VWSZ>]. For a discussion of white supremacy in immigration theory and doctrine, see JUAN F. PEREA, IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1–4, 18–28 (Juan F. Perea ed., 1996).
8. *E.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 158 (3d. ed., 2017) (discussing this field of law); see also CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii (Kimberlé W. Crenshaw et al. eds., 1995) (showing how the movement took shape and grew).
9. *E.g.*, DELGADO & STEFANCIC, *supra* note 8, at 3–4, 24, 82; see COX & RODRÍGUEZ, *supra* note 3, at 2, 47–49, 56–76, 145–46, 156–57, 184–85 (discussing the ban and similar restrictive measures in terms of national security concerns or the need to preserve executive authority—not in terms of racism, white supremacy, or fundamental fairness).

or the practice of family separation.¹⁰ But these amount to little more than gestures, not deep analysis. If critical race theory does appear in the body of prominent scholarship on immigration, it is very hard to find—not in the indexes of the major books nor discoverable by a reasonably diligent search of the law review literature in this field.

The failure to apply critical race theory to immigration law and practice is surprising considering that at least one principal tool of critical thought lies close at hand. Years ago, Derrick Bell, the father of critical race theory,¹¹ taught that society is likely to tolerate and encourage advances for people of color only when these will also benefit elite whites.¹² Bell put forward his “interest convergence” hypothesis in connection with *Brown v. Board of Education*, an education case.¹³ Mary Dudziak subsequently confirmed it with original archival research,¹⁴ and others have shown how it explains a number of other civil rights breakthroughs.¹⁵

This Article posits that significant change is unlikely to arrive in immigration law by pointing out that many of its practices are lacking

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10. See Richard Delgado & Jean Stefancic, *Lessons from Mexican Folklore: An Essay on U.S. Immigration Policy, Child Separation, and La Llorona*, 81 U. PITT. L. REV. 287, 294–301 (2020) (discussing family separation and other similar measures deployed against would-be immigrants).
 11. See DELGADO & STEFANCIC, *supra* note 8, at 9, 22–24, 48, 154, 177 (discussing Bell’s role in the development of critical race theory). Cox and Rodríguez discuss the rise of a large undocumented population in general terms, but little more. COX & RODRÍGUEZ, *supra* note 3, at 108–11, 215–19, 222–23, 227–32.
 12. DELGADO & STEFANCIC, *supra* note 8, at 9, 22–24, 48 (discussing Bell’s interest-convergence thesis).
 13. 347 U.S. 483 (1954); see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).
 14. See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY*, 82, 87, 90, 101, 110 (William Chafe et al. eds., 2000) (discussing how foreign policy concerns dictated much of civil rights policy during this period).
 15. *E.g.*, Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 40–48 (2006) [hereinafter *Rodrigo’s Roundelay*] (discussing a Supreme Court milestone for Latinos as a case of interest convergence); Richard Delgado, *Why Obama? An Interest Convergence Explanation of the Nation’s First Black President*, 33 LAW. & INEQ. 345, 361–62 (2015) [hereinafter *Obama*] (discussing how background factors, including ruling-class needs, enabled his presidency); cf. Spencer Bowley, *Learning from History: Predicting the Development of Class-Based Interest Convergence*, 101 B.U. L. REV. 125, 131–35 (discussing the emergence of Cold-War-like competition with China as a spur for newly-increased attention to domestic minorities and the working class).

in procedural protections,¹⁶ are inefficient,¹⁷ are reviewed by courts under the wrong standard,¹⁸ or are even racist or inhumane.¹⁹ Rather,

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16. *E.g.*, Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 840–44, 847–49 (2020) (noting that the procedural approach, even if perfected, inadequately protects the interest in substantive equality); *see also* Ilya Somin, *How to Curb Executive Power to Exclude Immigrants*, YALE. J. REGUL. (Mar. 31, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-05/> [<https://perma.cc/X2ZJ-CGDJ>] (observing that Cox and Rodríguez understate the importance of eliminating double standards in immigration law; immigration rules must make it easier for potential immigrants to enter the United States in the first place, not merely harder to carry out deportation after the fact). The main authors in the Symposium treat the central problem in this area of law as getting the procedure right. *Symposium on Adam Cox and Cristina Rodríguez’s “The President and Immigration Law,”* YALE. J. REGUL. (Apr. 14, 2021), <https://www.yalejreg.com/topic/symposium-on-adam-cox-and-cristina-s-the-president-and-immigration-law/> [<https://perma.cc/5YUA-4CTX>]. “DACA,” for example, a program by which undocumented youth may extend their stay in the country, emerges as a matter of administrative or prosecutorial discretion and deferred action, not equity, human need, or basic fairness. *Id.*; *see also* COX & RODRÍGUEZ, *supra* note 3, at 174–81.
17. *See, e.g.*, Daniel Farber, *The Crisis of Legitimacy in Immigration Law*, YALE J. REGUL. (Apr. 1, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-06/> [<https://perma.cc/9NDX-3VVJ>] (observing that the current system is fragmented, hit-or-miss, and does not contribute to the rule of law—and urging that courts take steps to improve the current chaotic system). The other contributors to the Symposium similarly devote much coverage to matters of immigration procedure, not substance. *See, e.g.*, Family & Rubenstein, *supra* note 3 (emphasizing the importance of judicial review of presidential mandates); Zachary Price, *A Brilliant but Unsettling Vision of Separation of Powers*, YALE. J. REGUL. (Mar. 26, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-02/> [<https://perma.cc/43Q8-N4AP>] (questioning the efficacy of a structural model of immigration law and expressing concern that it could lead to a ratcheting up of presidential power); Jessica Bulman-Pozen, *Principals and Principles in Immigration Law*, YALE. J. REGUL. (Mar. 29, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-03/> [<https://perma.cc/RW9U-M8AB>] (noting that separation of powers is a weak reed for assigning responsibility for decisions in immigration law, requiring constant rebalancing, but noting that this can lead to both Congress and the President paying respectful attention to the other); Shalini Bhargava Ray, *Supervision, Line-Drawing, and Faithful Execution*, YALE. J. REGUL. (Mar. 30, 2021), <https://www.yalejreg.com/nc/the-president-and-immigration-law-04/> [<https://perma.cc/2YG4-B36A>] (commending Cox and Rodríguez’s book but noting that the President can easily evade congressional constraints and has often done so). *But see* Somin, *supra* note 16 (urging modifying immigration law so as to enable immigrants to more easily enter the United States).
18. *E.g.*, Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 19 (2019) (positing that only a mixed standard

critics must show that it lies in the self-interest of influential majoritarian groups to modify the current system in a fundamental fashion. In Part I, we review a sample of some of the leading literature in this field, including the main exceptions noted just above.²⁰ In Part II, we outline Derrick Bell's interest-convergence hypothesis and discuss its influence in subsequent civil rights scholarship and litigation.

In Part III, we show that immigration policy currently operates to the detriment of six separate groups: retirees,²¹ the military,²² major corporations,²³ the U.S. State Department,²⁴ minorities who reside legitimately in this country,²⁵ and all who find cruelty distasteful, offensive, and wrong, particularly when it is conducted in their names.²⁶ These six constituencies would likely benefit from a change in the current paradigm and unite in a movement in favor of it.

How likely is such a movement to form and make headway? Part IV considers the most likely objections to a liberalized immigration policy, even one that promises to advance the interests of elite and non-elite whites. These include that immigrants from certain cultures will change ours if we let too many of them in the door. Sometimes called the "replacement" theory, put forward by Samuel Huntington and adopted today by a number of white supremacist groups²⁷ and prominent

of review that shifts back and forth at different stages of a typical immigration case will do justice to the many interests at play).

19. *E.g.*, PEREA, *supra* note 7, at 23–28, 176; GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 7–9 (1996) (noting that immigration law is replete with contradictions and unexamined premises).
20. The main exceptions are KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 6–7, 19–22 (Richard Delgado & Jean Stefancic eds., 2007) [hereinafter FLOODGATES], which posits that the nation would benefit from a much more open system of border regulation; Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 527 (2000) (same); and PEREA, *supra* note 7, at 23–28, 176.
21. *See infra* Part III.A.
22. *See infra* Part III.B.
23. *See infra* Part III.C.
24. *See infra* Part III.D.
25. *See infra* Part III.E.
26. *See infra* Part III.F.
27. *See* SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 221–24 (2004) (identifying growing numbers of immigrants, especially Latinos, as a serious major threat to American society and cohesiveness); *see also infra* Part IV.A (discussing this theory).

politicians,²⁸ this approach wielded much influence during the Trump administration and still does with many of his followers, many of whom believe that even if immigration benefits the economy, we should discourage it because it will change the nature of our society.²⁹

Our application of critical race theory, particularly interest convergence, to the area of immigration is forward-looking rather than historical, substantive rather than procedural. We posit that interest convergence offers a strategy to achieve a better future. We also believe that it explains the past and that reviewing certain key chapters of immigration history such as the Chinese Exclusion Act,³⁰ the Bracero Program,³¹ Haitian interception,³² and the Cuban resettlement program³³ from the perspective of interest convergence will explain an otherwise chaotic-seeming story. But that exercise awaits another day and, perhaps, another article.

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28. See, e.g., Susan Milligan, *From Embrace to ‘Replace,’* U.S. NEWS (May 20, 2022, 5:00 AM), <https://www.usnews.com/news/the-report/articles/2022-05-20/the-republican-embrace-of-the-great-replacement-theory> [<https://perma.cc/JFK4-3RN4>]; Domenico Montanaro, *How the ‘Replacement Theory’ Went Mainstream on the Political Right*, NPR (May 17, 2022, 5:00 AM), <https://www.npr.org/2022/05/17/1099223012/how-the-replacement-theory-went-mainstream-on-the-political-right> [<https://perma.cc/QM77-HCF8>]; Aaron Blake, *How Republicans Learned to Stop Worrying and Embrace ‘Replacement Theory’—by Name*, WASH. POST (Sept. 27, 2021, 4:54 PM), <https://www.washingtonpost.com/politics/2021/09/27/how-republicans-learned-stop-worrying-embrace-replacement-theory-by-name/> [<https://perma.cc/23VD-RV2X>]; Shane Goldmacher & Luke Broadwater, *Republicans Play on Fears of ‘Great Replacement’ in Bid for Base Voters*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/politics/republicans-great-replacement.html> [<https://perma.cc/W4Q3-X3K3>].
29. HUNTINGTON, *supra* note 27, at 181 (advancing the theory for the first time in the modern era).
30. An Act to Execute Certain Treaty Stipulations Relating to Chinese, Pub. L. No. 47-126, 22 Stat. 58 (1882) (prohibiting the immigration of Chinese laborers to the United States for ten years).
31. See Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 895–97 (2001) (discussing the bilateral agreement between the United States and Mexican governments permitting Mexican agricultural workers to temporarily work in the United States).
32. See Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 295–96 (1993) (discussing a program under the Reagan administration that directed the U.S. Coast Guard to intercept vessels carrying Haitian refugees and return them to Haiti).
33. See Lisandro Pérez, *Cubans in the United States*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 130 (1986) (discussing the “freedom flights” that brought Cuban immigrants to the United States between 1965 and 1973).

I. IMMIGRATION LAW SCHOLARSHIP: A CRITICAL DESERT

As mentioned, relatively few immigration law scholars employ critical race theory tools or concepts or even mention the role of race or racism as a driving force in the field, even though their operation is immediately apparent in, for example, Chinese Exclusion,³⁴ the national-quota system,³⁵ Operation Wetback,³⁶ family separation,³⁷ or the Muslim Ban.³⁸ Many casebook writers barely mention race, racism, or white supremacy, and those who do so do not attempt a systemic analysis of how they operate. The most liberal of the major writers, Gerald R. Neuman, addresses the role of race and racism at a number of points,³⁹ but without deploying a critical analysis, much less examining the role of interest convergence as a driving force behind the twists and turns of immigration history. And Cox and Rodríguez's *The President and Immigration Policy*, while admirable in many ways, barely scratches the surface. Dedicated almost entirely to structure and procedure, it offers a prime example of what Lani Guinier and Gerald Torres in a recent essay deplore—jurisprudence, not demosprudence, an analysis grounded in and arising from the people's wants and needs.⁴⁰

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34. See JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA* 382, 394–407 (3d ed. 2015) (discussing this chapter in immigration history).
 35. *Id.* at 28, 41–43 (discussing this chapter); *id.* at 337, 341 (describing a Eurocentric bias in a long-standing immigration program). COX & RODRÍGUEZ, *supra* note 3, at 107–14, describe it as a problem of labor-force imbalance, resulting from under- or over-enforcement of federal immigration authority and vigilance.
 36. See COX & RODRÍGUEZ, *supra* note 3, at 80–81 (describing Operation Wetback, which deported over one million Mexican-looking people, some of them U.S. citizens, as a case of “deportation as a regulatory regime . . . [and a] significant source of presidential authority”).
 37. See Delgado & Stefancic, *supra* note 10, at 292 (describing a policy of separating parents and children at the US-Mexico border); see also *id.* at 294–95, 298–300 (discussing the impact on families and young children of the separation policy).
 38. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–06 (2018) (discussing the Trump administration's policy of suspending entry of foreign nationals from several Muslim majority countries). Cox and Rodríguez discuss the ban as a national security problem. COX & RODRÍGUEZ, *supra* note 3, at 62.
 39. NEUMAN, *supra* note 19, at 20, 22.
 40. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–56 (2014) (explaining the two approaches to legal scholarship and interpretation). See also COX & RODRÍGUEZ, *supra* note 3, at 86–87, for an example of Guinier and Torres's dichotomy. Cox and Rodríguez treat deportation, surely one of the worst misfortunes that can befall an

The most prominent exception to the above generalization is Kevin Johnson, whose *Opening the Floodgates* documents the role of race and racism in immigration law throughout history and urges opening the border to most entrants.⁴¹ The law review literature is even more desiccated and procedural than the casebooks, with the exception of a small number of scholars, principally Johnson.⁴² When leading immigrant law scholars review each other's books, they generally focus on how the author treats procedure, not substance.⁴³ Reference to critical tools like interest convergence,⁴⁴ material determinism, or racial realism is scarce.

II. DERRICK BELL'S INTEREST-CONVERGENCE HYPOTHESIS

Among the concepts and tools that play relatively little role in mainstream immigration scholarship is interest convergence. This is noteworthy because Bell's hypothesis has proven helpful in explaining other currents and events in American legal history, particularly public education.⁴⁵ His hypothesis first appeared in print in connection with *Brown v. Board of Education*.⁴⁶

individual or family, as a matter of changing statutes of limitations—short during one period, long in another. On another occasion, they boost discretionary deportation for its ability to offer authorities a longer period to size up and gather information about an immigrant: if it decides it does not like him or her, it merely deports the individual, correcting the original error. (We are not making this up; see *id.* at 88.) On the mental kink that is in high display in certain official circles, see David Brooks, *The Southern Baptist Moral Meltdown*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/26/opinion/the-southern-baptist-sexual-abuse.html> [<https://perma.cc/8NHY-PBEZ>]. Brooks notes that bureaucrats often “create a system of nonresponsibility in which rules and procedures matter, not people.” *Id.*

41. FLOODGATES, *supra* note 20, at 45, 47–48, 50–51, 168.
42. See examples of Johnson's work in this area, *supra* note 20; see also Rosenbaum, *supra* note 16, at 840–42, which states that immigration law amounts to a near-total negation of the Equal Protection Clause, thus opening the doors for racial favoritism and oppression.
43. *E.g.*, Motomura, *supra* note 7, at 2815–18 (reviewing COX & RODRÍGUEZ, *supra* note 3, largely in terms of its contribution to the study of immigration procedure); see also Delgado, *supra* note 2, at 134, 138–39 (commenting on this emphasis in mainstream immigration scholarship).
44. See *supra* notes 5 (explaining the term), 13 (explaining its origin), and 34–35 (explaining its use); and *infra* notes 46–56 (discussing its invention and early history) and accompanying text.
45. See Bell, *supra* note 13, at 518–33 (using interest convergence to explain a sudden shift in U.S. education policy vis-à-vis African American students and families).
46. 347 U.S. 343 (1954).

In a much-cited 1980 article, Bell addressed a question that had eluded civil rights historians—namely, why the Supreme Court handed down this major civil rights breakthrough when it did, in 1954.⁴⁷ The question was puzzling since the NAACP Legal Defense Fund had been litigating school desegregation cases, mainly in the South, under dangerous conditions for decades and losing or, at most, winning narrow victories.⁴⁸ (Bell was one of the intrepid lawyers.)

Then, in 1954, the sky opened, and the Supreme Court granted them practically everything they had been asking for. Why just then? Bell hypothesized that the Cold War with the Soviet Union supplied much of the answer. The United States was then in the midst of a titanic struggle with the forces of a communist, atheist superpower for the loyalties of the uncommitted Third World, much of which was Black, Asian, or Latin American.⁴⁹ Every time the world press headlined stories of lynching, mass deportations, or Southern sheriffs brutalizing peaceful civil rights protesters, the Soviets registered gains at our expense.⁵⁰

Bell posited that it was pressure emanating from the State Department and ambassadors abroad that persuaded elite figures in Congress and the Department of Justice to intervene on behalf of the Black community.⁵¹ The Supreme Court soon followed suit.

The judicial breakthrough conveyed two further benefits to the United States. Black servicemen and women had been serving gallantly in the U.S. military in two wars against totalitarian forces.⁵² Many were returning to this country having experienced for the first time in their lives a workplace where a Black person who performed well could advance and become a sergeant or even gain a battlefield commission.⁵³ These returnees were unlikely to settle back into the former regime of shining shoes, menial jobs, and “yes, sir,” “no, sir.” For the first time in years, the prospect of domestic unrest loomed.⁵⁴ The Supreme Court responded with a heartwarming victory. The decision also prompted the South, mired in a poor economy, to revolutionize its educational

47. Bell, *supra* note 13, at 518–33.

48. DELGADO & STEFANCIC, *supra* note 8, at 22 (discussing examples of interest-convergence analysis).

49. *Id.* at 22–23.

50. *Id.* at 23.

51. *Id.* at 23–24.

52. *Id.* at 22–24; *see also* Aziz Huq, *As Brown Has Waned*, 88 U. CHI. L. REV. 1659, 1660 (2021) (discussing the impetus from returning veterans).

53. *See* DELGADO & STEFANCIC, *supra* note 8, at 23.

54. *Id.*; *see also* Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1507 (2009) (noting the role of impending unrest a few years later).

system and infrastructure, providing a further spark for post-War industry.⁵⁵

A few years later, legal historian Mary Dudziak confirmed what Bell had merely hypothesized.⁵⁶ What had been merely a product of Bell's astute observation and speculation now lay confirmed in the pages of an article and book.⁵⁷ Through a series of interviews and Freedom of Information Act requests, Dudziak produced the paper trail showing how actors in the Department of State and other high places prevailed on the Justice Department and Supreme Court to produce the breakthrough decision.⁵⁸ Subsequent scholarship applied interest convergence to other civil rights milestones, including Latino breakthroughs⁵⁹ and even Barack Obama's presidency.⁶⁰

III. APPLYING INTEREST CONVERGENCE TO PRESENT-DAY IMMIGRATION LAW AND PRACTICE— SIX CONSTITUENCIES WITH A STAKE IN CHANGE

Recent scholarship has shown that immigrants are by and large a law-abiding,⁶¹ hardworking, and economically productive group,⁶² and

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55. Huq, *supra* note 52, at 1660 (discussing the North's desire that the South modernize).
 56. DUDZIAK, *supra* note 14, at 118–19 (building on and substantiating Bell's hypothesis).
 57. *Id.*; see also Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988) (advancing an early version of her thesis).
 58. DUDZIAK, *supra* note 14 (discussing speeches, editorials, and Voice of America broadcasts documenting the role of interest convergence in the period leading up to *Brown*).
 59. *Rodrigo's Roundelay*, *supra* note 15, at 31 (discussing the role of interest convergence in producing a breakthrough case for Latinos).
 60. *Obama*, *supra* note 15, at 361–62 (discussing how majoritarian interest convergence aided his successful campaign). To be sure, a few writers have disagreed with Bell's analysis. See, e.g., Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 164–65 (2011) (asserting that its explanatory power is weaker than Bell believed); Huq, *supra* note 52, at 1671–72 (asserting that Stuart Hall's analysis is superior to Bell's).
 61. See NAZGOL GHANDNOOSH & JOSH ROVNER, THE SENT'G PROJECT, IMMIGRATION AND PUBLIC SAFETY 6–7 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf> [<https://perma.cc/8FZG-SHBQ>] (discussing crime rates in regions with large numbers of immigrants).
 62. Arvind Magesan, *Nobel Prize Winner David Card Shows Immigrants Don't Reduce the Wages of Native-Born Workers*, THE CONVERSATION (Oct. 14, 2021, 3:35 PM), <https://theconversation.com/nobel-winner-david-card-shows-immigrants-dont-reduce-the-wages-of-native-born-workers>

good for the economy at large.⁶³ They are also successful in science and industry, accounting for a large share of Fortune 500 companies, scientific prizes, and Nobel Prizes.⁶⁴ Moreover, they bring new music, art, cuisines, and other forms of cultural enrichment benefiting the U.S. population at large.

In addition to these diversified benefits, immigrants confer gains on specific groups of U.S. citizens.

A. Retirees

Many retirees require medical services and nursing home care of many kinds.⁶⁵ Without immigrants, particularly from the Philippines and Mexico, these service pools would dry up.⁶⁶ Many retirees also rely on Social Security and Medicare benefits, the funding for which rests on an increasingly narrow and unstable pyramid of aging workers.⁶⁷ But immigrants help mitigate the strain on the system, sparing these critical benefits programs from collapse.⁶⁸

According to a 2018 Social Security Administration (SSA) report, some of the main reasons behind the program's financial difficulties are

-169768 [<https://perma.cc/4XS8-L74Z>] (noting that immigrants' success does not come at the expense of native workers).

63. See Miriam Jordan & Robert Gebeloff, *Amid Slowdown, Immigration Is Driving U.S. Population Growth*, N.Y. TIMES (Feb. 5, 2022), <https://www.nytimes.com/2022/02/05/us/immigration-census-population.html> [<https://perma.cc/EH5G-PDDB>]; see also Giovanni Peri, *The Economic Benefits of Immigration*, BERKELEY REV. LAT. AM. STUD., Fall 2013, at 14, 18 (explaining how immigrants helped increase per capita income in the United States by 8 percent in the last twenty years).
64. See Delgado & Stefancic, *supra* note 10, at 296–98 (noting the many accomplishments of this group) (citing Stuart Anderson, *Immigrants Keep Winning Nobel Prizes*, FORBES (Oct. 8, 2017, 11:32 AM), <https://www.forbes.com/sites/stuartanderson/2017/10/08/immigrants-keep-winning-nobel-prizes/#7ae4a554117b> [<https://perma.cc/WX8Y-XWXJ>]).
65. See Linda Carroll, *Immigrants Play Big Role in Caring for Elderly and Disabled in U.S.*, REUTERS (June 4, 2019, 2:46 PM), <https://www.reuters.com/article/us-health-immigrants-caregivers/immigrants-play-big-role-in-caring-for-elderly-and-disabled-in-u-s-idUSKCN1T52KK> [<https://perma.cc/K2UG-C3C3>].
66. On the relatively slow growth of the U.S. population, see Delgado & Stefancic, *supra* note 10 (citing Carla K. Johnson, *US Births Lowest in 3 Decades Despite Improving Economy*, AP (May 15, 2019), <https://www.apnews.com/0463abca6436472cb44176602078b24f> [<https://perma.cc/P7PC-XQ7G>]). See also *infra* notes 68–73, 119, and accompanying text.
67. *Rodrigo's Roundelay*, *supra* note 15, at 59–60.
68. Alexia Fernández Campbell, *Why Baby Boomers Need Immigrants to Fund Their Retirement, in 2 Charts*, VOX, <https://www.vox.com/2018/8/1/17561014/immigration-social-security> [<https://perma.cc/5FJR-YWAE>] (Oct. 23, 2018, 3:39 PM).

that U.S. citizens are retiring and living longer after retirement, and not being replaced quickly enough by subsequent generations of workers.⁶⁹ In 1960, each person receiving retirement or disability benefits was supported by approximately 5.1 workers, but by 2013, that pyramid had decreased to 2.8 workers per beneficiary.⁷⁰ The report concludes that an increase in immigration can mitigate the strain on the system.⁷¹

As a group, immigrants tend to be relatively young, and, having more years to work and pay taxes before retirement, they increase the number of workers sooner than they increase the number of beneficiaries.⁷² Unmentioned is another contribution—undocumented immigrants boost the Social Security system because they pay into it through taxes, but cannot receive benefits.⁷³ Indeed, both legal and undocumented immigrants contribute billions of dollars in taxes each year at the local, state, and federal levels.⁷⁴ Earlier, the SSA found that undocumented workers contributed approximately \$12–13 billion to the SSA fund, but are unlikely to receive benefits so long as they remain undocumented.⁷⁵

The interest convergences between retirees and immigrants are almost self-evident: the Social Security system is politically popular,

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69. SOC. SEC. ADMIN., THE 2018 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 23 (2018).
70. *Ratio of Social Security Covered Workers to Beneficiaries Calendar Years 1940-2013*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ratios.html> [<https://perma.cc/RSL6-ZXGS>] (last visited Sept. 12, 2022).
71. SOC. SEC. ADMIN., *supra* note 69, at 181.
72. Campbell, *supra* note 68; SOC. SEC. ADMIN., *supra* note 69, at 181.
73. Campbell, *supra* note 68.
74. Alexia Fernández Campbell, *Trump Says Undocumented Immigrants Are an Economic Burden. They Pay Billions in Taxes.*, VOX, <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes> [<https://perma.cc/U3EH-K87M>] (Oct. 25, 2018, 2:15 PM) (noting that in 2015, workers who do not have Social Security numbers, including a large number of undocumented immigrants, paid \$23.6 billion in taxes); U.S. INTERNAL REVENUE SERV., 2014 IRS NATIONWIDE TAX FORUM: IMMIGRATION AND TAXATION 6 (2014) (noting that undocumented immigrants pay over \$9 billion in annual payroll taxes); LISA CHRISTENSEN GEE, MATTHEW GARDNER, MISHA E. HILL & MEG WEIHE, INST. OF TAX'N & ECON. POL'Y, UNDOCUMENTED IMMIGRANTS' STATE & LOCAL TAX CONTRIBUTIONS 2 (2017) (noting that undocumented immigrants contribute an estimated \$11.74 billion in local and state taxes, and that granting them legal status would increase their ability to contribute even more).
75. STEPHEN GOSS, ALICE WADE, J. PATRICK SKIRVIN, MICHAEL MORRIS, K. MARK BYE & DANIELLE HUSTON, SOC. SEC. ADMIN., EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS 2–3 (2013).

and the current approach allows wealth and labor to be extracted from an outgroup that is politically weak and passed upward to the majoritarian group. Immigrants may be convenient scapegoats for those who are currently seeking political power and willing to deploy fallacious rhetoric against them.⁷⁶ But longer-term interests, like the sustainability of the Social Security program, weigh heavily in the other direction, and it is only a matter of time before this convergence receives widespread recognition by decision-makers as well as the public at large.

B. The Military

The U.S. military has long operated as a magnet for minority youth and immigrants.⁷⁷ Indeed, immigrants have served in the armed forces since the inception of the country, fighting in every major conflict from the American Revolution through the War on Terror.⁷⁸ In the past 100 years, more than 760,000 noncitizens have enlisted and obtained citizenship through military service, and as of 2019, immigrants or their children comprised approximately 13 percent of U.S. military veterans.⁷⁹

Noncitizens do not just increase the military's numbers; they make vital contributions. Many possess critical language and cultural skills that enable military leaders to build relationships critical to their strategic goals.⁸⁰ Indeed, thousands of noncitizen interpreters risked

76. See Raul Hinojosa Ojeda & Edward Telles, *Trump Paradox: How Immigration and Trade Affected White Voting and Attitudes*, SOCIUS, 2021, at 1, 2, 10.

77. PEREA ET AL., *supra* note 34, at 952–53 (noting this attraction).

78. Russel Contreras, *AP Explains: Immigrants in US Military Throughout History*, AP (July 15, 2018), <https://apnews.com/article/63693023ff5546458303b5a5e218d7de> [<https://perma.cc/FV4N-G7FR>]; MUZAFFAR CHISTI, AUSTIN ROSE & STEPHEN YALE-LOEHR, NONCITIZENS IN THE U.S. MILITARY: NAVIGATING NATIONAL SECURITY CONCERNS AND RECRUITMENT NEEDS 1–5 (2019).

79. CHISTI ET AL., *supra* note 78, at 1; Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MPI (May 16, 2019), <https://www.migrationpolicy.org/article/immigrant-veterans-united-states-2018> [<https://perma.cc/V7BA-GCRX>].

80. See H.R. COM. ON ARMED SERVICES S. COMM. ON OVERSIGHT & INVESTIGATION, 110TH CONG., BUILDING LANGUAGES AND CULTURAL COMPETENCIES IN THE MILITARY: DOD'S CHALLENGE IN TODAY'S EDUCATIONAL ENVIRONMENT (Comm. Print 2008) (observing that foreign language skills necessary to communicate with native populations and governments are “critical warfighting skills”); MOLLY F. MCINTOSH, SEEMA SAYALA & DAVID GREGORY, NON-CITIZENS IN THE ENLISTED U.S. MILITARY 2 (2011) (declaring that “non-citizen recruits are likely to possess language and cultural skills that are of strategic interest to the U.S. military”); MAJ JOHN M. LORENZEN, THE MILITARY ACCESSIONS VITAL TO NATIONAL INTEREST PROGRAM 26–27 (2011) (declaring that in counterinsurgency actions, a deep understanding of the culture of a

their lives to serve with the U.S. military in Afghanistan and Iraq.⁸¹ Their contributions, and the U.S. government's failures in the aftermath of their service, illustrate how much noncitizens benefit the United States, as well as the human and moral costs of our collective failures to repay them in kind.⁸²

In addition to language and cultural skills, noncitizen soldiers often have higher education levels than their U.S.-citizen peers, particularly in critically important computer-related fields.⁸³ Educated immigrants, soldiers, and civilians alike helped create critical technologies that are integral to today's military operations, like the helicopter and the submarine.⁸⁴ Noncitizen soldiers also tend to have lower attrition rates than their U.S.-citizen counterparts, staying in the military longer

society is necessary to the overall success of the campaign and immigrant service members can provide an invaluable resource in that regard).

81. Nell Clark & James Doubek, *An Afghan Interpreter Who Helped the U.S. Military Is Now a Target for the Taliban*, NPR, <https://www.npr.org/2021/08/16/1028016074/an-afghan-interpreter-for-the-u-s-army-is-trying-to-get-out-of-afghanistan> [<https://perma.cc/QY26-VKKP>] (Aug. 16, 2021, 6:27 PM); T.A. Frail, *The Tragic Fate of the Afghan Interpreters the U.S. Left Behind*, SMITHSONIAN MAG. (Nov. 2016), <https://www.smithsonianmag.com/history/tragic-fate-afghan-interpreters-left-behind-180960785/> [<https://perma.cc/3AXF-TWBY>]; Lynsea Garrison, Annie Brown, Stella Tan & Luke Vander Ploeg, *The Interpreters the U.S. Left Behind in Afghanistan*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/19/podcasts/the-daily/afghanistan-interpreters-special-immigrant-visas-taliban.html?> [<https://perma.cc/YV7T-T3MV>]; Holly Honderich & Bernd Debusman Jr., *From Afghan Interpreter to US Homeless—The Long Road to the American Dream*, BBC (Aug. 2, 2021), <https://www.bbc.com/news/world-us-canada-58020494> [<https://perma.cc/YW8P-J2Q9>].
82. *See supra* notes 80–81.
83. CHISTI ET AL., *supra* note 78, at 2, 9–11; LTC CHE T. AROSEMENA, IMMIGRANTS AND THE US ARMY: A STUDY IN READINESS AND THE AMERICAN DREAM 49 (2016) (abstract available at <https://www.semanticscholar.org/paper/Immigrants-and-the-US-Army%3A-A-Study-in-Readiness-Arosemena/ecebe48ff5cc01dd346b6e3e1a0b17a4dbf2e028> [<https://perma.cc/R9SK-PFDR>]) (observing that noncitizen soldiers, including Mexicans, who joined the military through the Department of Defense's Military Accessions Vital to the National Interest (MAVNI) program were high-value soldiers).
84. *See* S. Paul Johnston, *Igor Sikorsky*, BRITANNICA, <https://www.britannica.com/biography/Igor-Sikorsky> [<https://perma.cc/9HM8-8USN>] (last visited Sept. 1, 2022) (discussing a Ukrainian immigrant who invented the helicopter); *John Philip Holland*, BRITANNICA, <https://www.britannica.com/biography/John-Philip-Holland> [<https://perma.cc/R68L-XM9Q>] (Aug. 8, 2022) (discussing an Irish immigrant who sold the U.S. Navy its first submarine).

because they “generally have a stronger attachment to serving the United States, which they now consider ‘their country.’”⁸⁵

Immigrants, then, not only bring the military educated, long serving recruits that enhance its capabilities and readiness—they have also been avatars of our military’s highest values. As the late Senator John McCain pointed out, more than 20 percent of the recipients of the Congressional Medal of Honor—the nation’s highest award for valor—have been immigrants.⁸⁶

In short, noncitizens are highly valuable to U.S. military and national security interests. As with retirees and the groups mentioned below, embracing immigration represents a convergence of interests for many Americans, whether they realize it or not.

C. Major Corporations and the Economy

Immigrants often display a strong “work ethic,” sometimes holding down two or even three fulltime jobs.⁸⁷ David Card, a Nobel Prize-winning economist at U.C. Berkeley, won acclaim for demonstrating that immigrants are generally good for the economy in regions where they settle.⁸⁸ Other economists demonstrated much the same.⁸⁹ Moreover, as of 2018, immigrants made up nearly a third of the workforce in several critical areas of the economy; they were 36 percent of the workers in farming, fishing, and forestry, 36 percent of building and grounds cleaning and maintenance workers, 29 percent of textile and apparel manufacturing workers, 27 percent of food manufacturing

85. MCINTOSH ET AL., *supra* note 80, at 26–31.

86. *Contributions of Immigrants to the United States Armed Forces: Hearing 109-884 Before the S. Comm. on Armed Serv.*, 109th Cong. 6 (2006) (statement of Sen. John McCain).

87. See *Rodrigo’s Roundelay*, *supra* note 15, at 60; Nicole Rodriguez, *Immigrants Preferred by Employers over Native Workers*, *Report Says*, NEWSWEEK (Nov. 27, 2017, 3:25 PM), <https://www.newsweek.com/immigration-facilitates-workplace-discrimination-against-americans-report-says-723681> [<https://perma.cc/36RS-2DTL>] (noting that many employers are impressed by their willingness to work hard at jobs that native-born Americans disdain); see also Nicholas Riccardi, *Less Immigrant Labor in U.S. Is Contributing to Price Hikes*, BOSTON GLOBE, <https://www.bostonglobe.com/2022/05/07/business/less-immigrant-labor-us-is-contributing-prices-hikes/> [<https://perma.cc/7SRR-VNZP>] (May 7, 2022, 11:17 AM).

88. See Magesan, *supra* note 62 (discussing the award to Card for his studies of the economic consequences of immigration).

89. See Peri, *supra* note 63, at 18 (documenting the benefits that immigrants confer on the regions where they settle).

workers, 27 percent of hotel workers, 24 percent of construction workers, and 21 percent of home health care aides.⁹⁰

During the COVID-19 pandemic, many of those workers sacrificed their health and lives to continue providing critical services, even as they were excluded from unemployment benefits or federal stimulus programs.⁹¹ Though these contributions speak for themselves, it is noteworthy that many efforts to push immigrants out of the economy have been demonstrably harmful. For example, Arizona injured major sectors of its economy when it passed the Legal Arizona Workers Act⁹² in 2007 and SB 1070⁹³ in 2010.⁹⁴ These laws aimed to force undocumented immigrants out of the state so that citizens could take their jobs. But that did not happen, and it instead slowed the economy when native-born workers were slow to come forward.⁹⁵

Similarly, in 2011, when Alabama passed HB 56⁹⁶—a law based on Arizona’s SB 1070 that granted police the authority to demand the immigration papers of suspected undocumented immigrants—the state’s agricultural sector was devastated when much of the workforce disappeared, harming the majority group that the law was ostensibly

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90. Arloc Sherman, Danilo Trisi, Chad Stone, Shelby Gonzales & Sharon Parrott, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 15, 2019), <https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations> [<https://perma.cc/AZW4-LQSB>].
91. See Faith Miller, *The Pandemic Has Been Hard. It’s Been Harder on Immigrants.*, COLO. NEWSLINE (Nov. 17, 2021, 5:00 AM), <https://coloradonewslines.com/2021/11/17/pandemic-hard-harder-on-immigrants> [<https://perma.cc/3AYM-92WE>]; Miriam Jordan & Caitlin Dickerson, *Poultry Worker’s Death Highlights Spread of Coronavirus in Meat Plants*, N.Y. TIMES, <https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html> [<https://perma.cc/3WYN-JK49>] (Jan. 28, 2021); Tom Jawetz, *Immigrants as Essential Workers During COVID-19*, CTR. AM. PROGRESS (Sept. 28, 2020), <https://www.americanprogress.org/article/immigrants-essential-workers-covid-19/> [<https://perma.cc/CMR6-CT79>] (noting the dangers to essential workers in meatpacking and similar work settings).
92. H.R. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007).
93. S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
94. Alex Nowrasteh, *The Aftermath of Arizona’s Immigration Laws*, CATO INST. (Mar. 29, 2016, 12:32 PM), <https://www.cato.org/blog/aftermath-arizonas-immigration-laws> [<https://perma.cc/JG2J-2W6Y>].
95. *Id.*
96. H.B. 56, Reg. Sess. (Ala. 2011).

protecting.⁹⁷ In short, the exclusion of immigrants from the workforce is actively deleterious for citizens and noncitizens alike.

D. The U.S. State Department

The United States holds itself out as a beacon of hope for struggling citizens in the rest of the world.⁹⁸ Indeed, its receptive attitude toward minorities and the foreign born has enabled the foreign policy establishment to make gains at the expense of more autocratic competitors and probably does so still. For example, the United States today faces competition from both Russia and China in the race for allies in Latin America, Africa, and the rest of the world.⁹⁹ Recent scholarship and investigative journalism have highlighted how urgent this competition is and how easily, and quickly, this country could fall behind more agile competitors who present, at least superficially, a friendly face to immigrants and people of color.¹⁰⁰

E. Minorities Who Reside Legitimately in This Country

When the United States treats foreign nationals disrespectfully, domestic minorities may easily fall under suspicion as well because, to the casual eye, they may appear similar. And those domestic minorities often have family members and friends in the very countries from which

97. Ed Pilkington, *Alabama Immigration: Crops Rot as Workers Vanish to Avoid Crackdown*, THE GUARDIAN (Oct. 14, 2011 2:58 PM), <https://www.theguardian.com/world/2011/oct/14/alabama-immigration-law-workers> [<https://perma.cc/XB4B-MZFU>]; Challen Stephens, *Alabama Farmers Losing Immigrant Labor, See Produce Rotting in the Fields*, AL.COM, https://al.com/breaking/2011/09/alabama_farmers_losing_immigra.html [<https://perma.cc/4PBY-YWLL>] (Sept. 26, 2011, 8:05 PM) (describing the consequences of a harsh policy toward undocumented farmworkers).

98. See *supra* notes 14–15, 56–58 and accompanying text (discussing the work of Mary Dudziak and demonstrating this force in U.S. history).

99. See, e.g., Bowley, *supra* note 15, at 126–135 (discussing this competition); Jack Nicas & Anton Trojanovski, *A World Away from Ukraine, Russia Is Courting Latin America*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/15/world/americas/russia-putin-latin-america-bolsonaro.html> [<https://perma.cc/6GWL-GXU4>]; Richard Delgado & Jean Stefancic, Comment, *Does Interest Convergence Today Offer Opportunities for the Working Class, Much as It Did for Minorities in the Fifties and Sixties?*, 101 B.U. L. REV. 148, 148–150 (2022).

100. See *supra* notes 15, 99 and accompanying text.

they emigrated.¹⁰¹ Poor treatment of minorities seeking a foothold here can thus reverberate beyond those initially excluded.¹⁰²

To illustrate, consider how current law allows border agents to stop people and make them submit to vehicle searches at checkpoints that are close to the border, even if the stop is based on race.¹⁰³ The consequences of that approach have played out exactly as one might suspect; Black and Brown people, citizens and noncitizens alike, have been extensively subjected to racial profiling and harassment by border agents for having the effrontery to travel with the wrong skin tone.¹⁰⁴

Even border enforcement agents are not immune from the pernicious effects of racist enforcement; three minority border agents are suing the U.S. Customs and Border Patrol due to the harms they suffered from being forced to racially profile travelers who looked very much like them.¹⁰⁵ Additionally, since 2012, more than 1,000 American

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101. DILIP RATHA, SUPRIYO DE, EUNG JU KIM, SONIA PLAZA, GANESH SESHAN, WILLIAM SHAW & NADEGE DESIREE YAMEOGO, WORLD BANK GROUP, *LEVERAGING ECONOMIC MIGRATION FOR DEVELOPMENT: A BRIEFING FOR THE WORLD BANK BOARD*, 13–14 (2019) https://www.knomad.org/sites/default/files/2019-08/world%20bank%20board%20briefing%20paper-leveraging%20economic%20migration%20for%20development_0.pdf [<https://perma.cc/YTV2-NN3Y>].
102. See Eileen Sullivan, *Migrants Left in Limbo After Policy Change to Help Busy Border Officials*, N.Y. TIMES, <https://www.nytimes.com/2022/02/14/us/politics/border-immigrants-expedited-asylum.html> [<https://perma.cc/ZA8V-6HZH>] (Feb. 16, 2022) (discussing public concern over one such incident).
103. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (citations omitted) (noting that “[r]outine searches of the persons and effects of entrants [into the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause. Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity, and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever”).
104. Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far from Border*, NBC NEWS (June 5, 2019, 4:30 AM), <https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596> [<https://perma.cc/P3VR-NF3R>]; Johnny Diaz, *Greyhound to Stop Allowing Border Patrol Agents on Its Buses Without Warrants*, N.Y. TIMES, (Feb. 22, 2020), <https://www.nytimes.com/2020/02/22/us/greyhound-border-patrol.html> [<https://perma.cc/8C3H-9XNV>]; *The Border’s Long Shadow*, ACLU MICH., (Mar. 25, 2021), <https://www.aclumich.org/en/publications/borders-long-shadow> [<https://perma.cc/Z58D-5TZE>].
105. *Complaint, Grays et al. v. Mayorkas*, No. 3:21-cv-10526 (E.D. Mich. Mar. 9, 2021); Tresa Baldas, *Officer Says Racism at Port Huron-Canada Border Happens Daily: ‘It Needs to Be Exposed,’* DET. FREE PRESS,

citizens¹⁰⁶ have been detained by U.S. Immigration and Customs Enforcement (ICE) under the type of indefinite civil detention that the Supreme Court authorized for use against immigrants;¹⁰⁷ one of those citizens was held in custody for over three years.¹⁰⁸ Allowing racism to fester within law enforcement systems is not something that solely harms immigrants. It harms perfectly law-abiding citizens who have lived here all their lives; indeed, their families may have lived here for generations. Their only crime is that they “look Mexican”—or Arab or merely foreign, whatever that means.

*F. All Those Who Find Cruelty Wrong and Distasteful,
Especially When It Is Inflicted in Their Names*

Recent disparaging treatment by Donald J. Trump of African nations (“s—hole countries”) and Muslims generated immediate reactions and protest by citizens, including many without roots or ties to the countries in question.¹⁰⁹ Many citizens and allies demonstrated

<https://www.freep.com/story/news/local/michigan/detroit/2021/04/02/cbp-officers-blow-whistle-racial-profiling-daily-thing-border/4645648001> [<https://perma.cc/8GFY-WCLB>] (Apr. 3, 2021, 4:04 PM); *CBP Officers Say They Were Directed to Target Nonwhite Travelers at Blue Water Bridge*, WXYZ DET., <https://www.wxyz.com/news/cbp-officers-say-they-were-directed-to-target-nonwhite-travelers-at-blue-water-bridge> [<https://perma.cc/9L84-VHU4>] (Apr. 2, 2021, 6:19 PM).

106. For examples of harsh practices, see, e.g., Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, NEW YORKER (Mar. 21, 2018), <https://www.newyorker.com/news/daily-comment/when-ice-tries-to-deport-americans-who-defends-them> [<https://perma.cc/C6TL-FTXR>]; Dustin Dwyer, *ICE Tried to Deport This U.S. Citizen and Marine Veteran*, NPR (Jan. 17, 2019, 12:30 PM), <https://www.npr.org/2019/01/17/686188335/ice-tried-to-deport-this-u-s-citizen-and-marine-veteran> [<https://perma.cc/8WW9-57TP>]; Meagan Flynn, *U.S. Citizen Freed After Nearly a Month in Immigration Custody, Family Says*, WASH. POST (July 24, 2019, 9:25 PM), <https://www.washingtonpost.com/nation/2019/07/23/Francisco-erwin-galicia-ice-cpb-us-citizen-detained-texas/> [<https://perma.cc/3TA8-TA9F>].
107. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208–13 (1953); *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001); *Jennings v. Rodriguez*, 138 S. Ct. 830, 842–43, 46 (2018).
108. Paige St. John & Joel Rubin, *Must Reads: ICE Held an American Man in Custody for 1,273 Days. He’s Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmstory.html> [<https://perma.cc/LJ38-WX4W>] (discussing the practice of lengthy immigrant detention).
109. See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/T2WD-BUEJ>];

in the streets or airport terminals.¹¹⁰ Even when heavy-handed immigrant stops, family separation, and other cruel practices like those mentioned earlier target innocent victims from groups other than one's own, an observer may easily feel aggrieved. Why is this happening? they may ask. Could it happen to my group one day, if conditions change? They may feel acute discomfort that such unfair treatment is meted out in their names and that the authorities who perpetrate it wear uniforms emblazoned with badges and insignia of a country supposedly dedicated to fair treatment for all.

IV. OBJECTIONS TO A LIBERALIZED IMMIGRATION SYSTEM

Even a system that delivers expansive benefits to the country at large or to specific segments of the populace¹¹¹ could attract opposition from sectors willing to forgo those benefits for reasons that are intangible or cultural in nature.

A. Replacement Theory

Foremost of these is the belief that large numbers of immigrants are likely to change the dominant culture or its Western values and beliefs. This is the so-called replacement theory first advanced by Samuel Huntington and, a few years later, by marchers in Charlottesville, Virginia, and elsewhere.¹¹² The replacement theory holds, in brief, that if immigration proceeds unchecked, it will radically change the character of life in the United States, to its serious detriment.¹¹³

But why would the arrival or birth of a large number of non-whites, or even non-Christians, herald a downturn for American society? No downturn set in following the arrival of large numbers of Jews, Italians, Irish, or Greeks in the early twentieth century.¹¹⁴ Braceros saved the

Slater & Delgado, *supra* note 2, at 109–10, 125, 132–35 (discussing public reaction to the ban).

110. *E.g.*, *Protests Erupt at Airports Following Trump's Travel Ban*, AP NEWS (Jan. 28, 2017), <https://apnews.com/article/new-york-donald-trump-religion-us-news-andrew-cuomo-98d4bed7e9414a86bfefc28c5f7595b1> [<https://perma.cc/SSC9-AKCR>].

111. That is, interest convergence. *See generally* Bell, *supra* note 13.

112. Alan Feuer, *Charlottesville's Extremists Lose in Court, but Replacement Theory Lives on*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/24/us/charlottesville-rally-trial.html> [<https://perma.cc/6W5C-9XRT>] (discussing the ideology of right-wing extremists); *see also* HUNTINGTON, *supra* note 27, at 17–19 (putting forward the theory).

113. Feuer, *supra* note 112; HUNTINGTON, *supra* note 27, at 20.

114. *E.g.*, *Immigration and Relocation in U.S. History: Working Across the Country*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/immigration/italian/working-across-the-country/> [<https://perma.cc/JZ4U>].

farm economy during two world wars,¹¹⁵ while immigrants from Asia built the railroads¹¹⁶ and supplied doctors, dentists, pharmacists, and nurses when required to fulfill the nation's health needs.¹¹⁷ All populations need to replace themselves, either by birth or immigration.¹¹⁸ Any sensible immigration policy would exclude those with infectious disease or histories of crime. Short of that, a self-confident country with a strong public and private sector has little to fear from immigrants.

B. Fear of Disloyalty

Might immigrants pose a threat of disloyalty during times of war or economic competition? During World War II, an anti-Japanese scare campaign resulted in the internment of hundreds of thousands of innocent Japanese, including women and children, in barbed-wire compounds reminiscent of concentration camps.¹¹⁹ And in recent times, a few scientists with Chinese ties have been accused of passing secrets to overseas competitors.¹²⁰ But almost all such scares have turned out

-LU7B] (last visited Sept. 3, 2022) (describing the labor force participation of one large immigrant group).

115. *Mexican Labor and World War II: The Bracero Program*, DIGIT. PUB. LIBR. OF AM., <https://dp.la/primary-source-sets/mexican-labor-and-world-war-ii-the-bracero-program> [<https://perma.cc/H8BN-2EY2>] (last visited Sept. 3, 2022) (discussing the role of Braceros in the farm economy); see also RICHARD DELGADO, LETICIA M. SAUCEDO, MARC-TIZOC GONZÁLEZ, JEAN STEFANCIC & JUAN PEREA, *LATINOS AND THE LAW: CASES AND MATERIALS* 495–500, 522–23, 590–92 (2d ed. 2022).
116. Lesley Kennedy, *Building the Transcontinental Railroad: How 20,000 Chinese Immigrants Made It Happen*, HISTORY.COM, <https://www.history.com/news/transcontinental-railroad-chinese-immigrants> [<https://perma.cc/9Y4K-T4PR>] (Apr. 28, 2022).
117. Jeanne Batalova, *Immigrant Health Care Workers in the United States*, MIGRATION POL'Y INST. (May 14, 2020), <https://www.migrationpolicy.org/article/immigrant-health-care-workers-united-states-2018> [<https://perma.cc/MBR4-BQXE>] (noting that Asia is the leading region).
118. See Dan Balz, *A Blinking Light Ahead: Slowing Population Growth Raises Questions About America as a Land with Unlimited Horizons*, WASH. POST (May 9, 2021, 3:15 PM), https://www.washingtonpost.com/politics/america-growth-slowing/2021/05/09/3a4b81ba-b032-11eb-ab4c-986555a1c511_story.html [<https://perma.cc/L7WK-Y8ER>]; see also Maria Sacchetti, *A Rural County in Iowa that Supported Trump Turns to Latinos to Grow*, WASH. POST (May 14, 2022, 8:00 AM), <https://www.washingtonpost.com/national-security/2022/05/14/rural-america-latinos-population-growth/> [<https://perma.cc/CQ97-A2U2>].
119. See, e.g., PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 7, 251, 365 (1983) (describing the lead-in to World War II internment).
120. Rory Truex, *What the Fear of China Is Doing to American Science*, THE ATLANTIC (Feb. 16, 2021), <https://www.theatlantic.com/ideas/archive>

to be bogus or overblown. Many immigrant groups, such as Mexican-Americans or Japanese-Americans, have indeed earned records for valor in military service at a very high rate.¹²¹

C. “*They Cost Too Much*”

Immigrants add to social service costs whenever they send a child to a public school, visit a medical center for treatment of an injury or illness, or simply drive on public roads or walk on a sidewalk. But they pay for these costs when they contribute the value of their labor, when they buy a refrigerator on a Saturday or Sunday, or when they pay sales, payroll, or income taxes.¹²² Every careful study shows that immigrants contribute to the prosperity of regions where they settle.¹²³ Otherwise, cities like Manhattan, Houston, or Los Angeles, with very high numbers of immigrants, would be very poor—which of course they are not. Earlier sections of this Article show how and why this is so.¹²⁴ The impact of immigration on a region is almost always a net positive.¹²⁵

CONCLUSION

Getting the procedure right, while a worthy goal, does not guarantee right results. One must pay at least as much attention to substantive values and the myriad respects in which wrongful action can work serious injustice. This is nowhere truer than in the field of immigration, where a wrong decision may consign a person or group to a life of abject misery. Coloring between the lines cannot be the only goal. Sometimes one must ask about the picture that will emerge in the drawing and raise questions about the person who created the coloring book. Critical race analysis helps raise these questions and shows how society may gain from addressing them.

/2021/02/fears-about-china-are-disrupting-american-science/618031
[<https://perma.cc/TJX2-WTH7>].

121. See *Medal of Honor—Medal Fact Sheet*, WETA, <https://weta.org/press/medal-honor-medal-fact-sheet> [<https://perma.cc/CS6D-235D>] (last visited Sept. 3, 2022).

122. See Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAG. (July 9, 2006), <https://www.nytimes.com/2006/07/09/magazine/the-immigration-equation.html> [<https://perma.cc/AT7A-NAZT>]; see also *supra* notes 87–97 and accompanying text (discussing the costs and benefits of immigration).

123. See Lowenstein, *supra* note 122 (discussing the work of Nobel Prize-winning economist David Card).

124. See *supra* Parts III.C, IV.A.

125. See Lowenstein, *supra* note 122; Peri, *supra* note 63.