

UC Davis

UC Davis Previously Published Works

Title

Race, History, and Immigration Crimes

Permalink

<https://escholarship.org/uc/item/15m984vg>

Journal

IOWA LAW REVIEW, 107(3)

ISSN

0021-0552

Author

Fish, Eric S

Publication Date

2022

Peer reviewed

Race, History, and Immigration Crimes

Eric S. Fish*

ABSTRACT: The two most frequently charged federal crimes are immigration crimes: the misdemeanor of entering the United States without inspection, and the felony of reentering the United States after deportation. Federal prosecutors charge tens of thousands of people with these two crimes each year. In 2019, these two crimes comprised a majority of all federal criminal cases. About 99 percent of the defendants in these cases are nationals of Mexico or other Latin American countries.

These two crimes were enacted into law through the Undesirable Aliens Act of 1929. The legislative history of that Act reveals that its authors were motivated by pseudoscientific racism. They sought to preserve the purity of the white race by preventing Latin American immigrants from settling permanently in the United States. And they spoke forthrightly about this motive. They described Latin American immigrants as “mongrelized,” “peons,” “degraded,” and “mixed blood.” They held hearings where experts in eugenics testified about Latin Americans’ undesirable racial characteristics. They gave speeches about the need to protect American blood from contamination. They described Latin American immigration as a “great race question” concerning invasion by “people essentially different from us in character, in social position, and otherwise.”

*This Article thoroughly documents the legislative history of the Undesirable Aliens Act of 1929. It relies on primary sources—speeches, legislative reports, testimony, statements in the congressional record, private correspondences, eugenicist scholarship, and other writings by the men who conceived and enacted the law. The Article shows that this history brings the law into conflict with the Constitution’s Equal Protection Clause. While the crimes of unlawful entry and reentry are racially neutral on their faces, the story of their enactment reveals explicit racial animus against Latin American immigrants. Consequently, they are unconstitutional under the framework established by the Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corp.* The Article also considers whether these crimes can be*

* Law Professor, University of California at Davis. For their invaluable help the author would like to thank Jack Chin, Ingrid Eagly, Genesis Rodriguez Fish, Thomas Frampton, Kara Hartzler, Nora Hirozawa, Doug Keller, Kelly Lytle Hernández, Carrie Rosenbaum, and Lawrence Solum.

defended under Congress's broad power to enact immigration laws, and whether their 1952 reenactment purged them of racial animus.

I. INTRODUCTION.....	1052
II. WHITE SUPREMACY AND IMMIGRATION LAW IN THE 1920S.....	1059
A. <i>EUGENICS AND THE QUOTA SYSTEM</i>	1059
B. <i>THE WESTERN HEMISPHERE EXCEPTION</i>	1065
III. EFFORTS TO STOP LATIN AMERICAN IMMIGRATION IN THE 1920S.....	1067
A. <i>REPRESENTATIVE BOX AND THE EFFORT TO EXTEND IMMIGRATION QUOTAS TO THE WESTERN HEMISPHERE</i>	1068
B. <i>CHAIRMAN JOHNSON AND THE EFFORT TO EXPAND DEPORTATIONS</i>	1071
C. <i>CONGRESSIONAL PUBLICATIONS ON EUGENICS AND LATIN AMERICANS' RACIAL CHARACTERISTICS</i>	1075
IV. THE UNDESIRABLE ALIENS ACT OF 1929.....	1080
A. <i>SENATOR BLEASE AND SECRETARY DAVIS'S PROPOSALS</i>	1080
B. <i>THE LEGISLATIVE HISTORY OF THE UNDESIRABLE ALIENS ACT</i>	1085
C. <i>THE LAW'S SUBSEQUENT ENFORCEMENT</i>	1090
V. FEDERAL IMMIGRATION CRIMES ARE UNCONSTITUTIONAL.....	1091
VI. RACIAL DISCRIMINATION AND THE POWER TO REGULATE IMMIGRATION.....	1096
VII. THE QUESTION OF REENACTMENT.....	1098
A. <i>THE REENACTMENT OF THE UNDESIRABLE ALIENS ACT</i>	1098
B. <i>SILENT REENACTMENT, BENIGN REENACTMENT, AND CONSCIOUS REENACTMENT</i>	1101
VIII. CONCLUSION.....	1105

I. INTRODUCTION

Federal prosecutors charge tens of thousands of people each year with victimless immigration crimes.¹ Indeed, based on the numbers, criminalizing

1. See Press Release, Dep't of Just. Off. of Pub. Affs., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 19, 2019), <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year> [<http://perma.cc/Q259-3PFZ>].

immigration seems to be the main function of the federal criminal justice system.² Other types of cases get more headlines—white collar cases, terrorism cases, public corruption cases. But immigration cases dominate the day-to-day work of federal courthouses.³ Two crimes in particular play an outsized role in the federal system: unlawful entry (typically a misdemeanor),⁴ and unlawful reentry (a felony).⁵ These are the first- and second-most-commonly charged federal crimes.⁶ Of the 76,538 felony cases federal prosecutors brought in the United States in 2019, 25,426 (about 33 percent) involved defendants charged with unlawful reentry.⁷ The average sentence in these cases was nine months in prison.⁸ In the same year, federal prosecutors brought 80,886 prosecutions for misdemeanor unlawful entry.⁹ These charges combined make up a comfortable majority of all federal criminal cases.¹⁰ About 99 percent of the defendants in these cases are nationals of

2. This has been true for at least a decade. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010) (“Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution.”) (footnote omitted); Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 136 (2012); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635–40 (2012).

3. While these cases are most prevalent in the states along the U.S.-Mexico border, they are also a significant part of the caseload in non-border states. See *Federal Judicial Caseload Statistics 2020 Tables*, U.S. CTS. (Mar. 31, 2020), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables> [http://perma.cc/4A8Z-664Z] (showing in table D-3 the number of felony unlawful reentry prosecutions in each federal district).

4. 8 U.S.C. § 1325 (2018).

5. *Id.* § 1326.

6. See JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, *INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER* 12 (2016) (“Improper entry and re-entry are now the two top criminal charges being filed in our federal court system . . .”).

7. See Dep’t of Just. Off. of Pub. Affs., *supra* note 1; U.S. SENT’G COMM’N, *FISCAL YEAR 2019 OVERVIEW OF FEDERAL CRIMINAL CASES* 3 (2020), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2020/FY19_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/GNS5-W7SF].

8. U.S. SENT’G COMM’N, *QUICK FACTS: ILLEGAL REENTRY OFFENSES*, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf [https://perma.cc/Q3BL-VN2C].

9. Dep’t of Just. Off. of Pub. Affs., *supra* note 1.

10. See AM. IMMIGR. COUNCIL, *PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES* 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/LD69-AF9R]. The number of federal immigration prosecutions did drop starting in March 2020 due to the Coronavirus pandemic. See *Major Swings in Immigration Criminal Prosecutions during Trump Administration*, TRAC IMMIGRATION (Dec. 18, 2020), <https://trac.syr.edu/immigration/reports/633> [https://perma.cc/5898-8275]. Statistics are not yet available on the full extent of this drop-off. But there is no reason to believe it will continue after the pandemic ends. The number of these cases has grown dramatically over the last two decades, during both Democratic and Republican administrations. See Dep’t of Just. Off. of Pub. Affs., *supra* note 1 (showing the number of § 1325 and § 1326 prosecutions brought each year since 2004).

Mexico or other Latin American countries.¹¹ Indeed, because these two crimes are prosecuted so frequently, a majority of all federal arrestees are noncitizens.¹²

These two crimes are unconstitutional. They were created in the 1920s by a group of white men who believed in racial eugenics. These men thought that immigration from Latin America posed a racial threat to the United States. And they did not keep their views secret. Quite the opposite. They published articles, gave speeches, held legislative hearings, and made statements in the Congressional Record arguing that Latin Americans should be purged from the United States in order to protect Caucasian Americans from racial contamination.¹³ The men who created these crimes did not merely intend to punish illicit border crossing. They did not distinguish between Latin Americans who came here legally and those who came illegally. Rather, they created these crimes to advance their goal of removing all Latin Americans from the United States.

This Article argues that the two main federal immigration crimes are unconstitutional because of their racist history. It examines the legislative history of the 1929 law that created these two crimes, the “Undesirable Aliens Act of 1929.”¹⁴ The Article’s principal methodology is archival research. It relies on systematic, original review of historical sources from the 1920s, including: (1) legislative hearings concerning the Undesirable Aliens Act and several other major immigration bills proposed in Congress between 1924 and 1930; (2) debates in the congressional record concerning those bills; (3) speeches, articles, and other writings made by several prominent anti-immigration politicians of the time; and (4) speeches, articles, private correspondences, and legislative testimony by prominent eugenicists who influenced immigration law in the 1920s.¹⁵ This Article also relies on the excellent work of several historians who have written about the immigration law and politics of this period.¹⁶ The narrative focuses in particular on the

11. See U.S. SENT’G COMM’N, *supra* note 8.

12. Press Release, Dep’t of Just. Off. of Just. Programs, 64% of All Federal Arrests in 2018 Were of Non-U.S. Citizens (Aug. 22, 2019, 9:00 AM), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/pressreleases/2019/ojp-news-08222019_a.pdf [<https://perma.cc/WB22-LVVG>].

13. See *infra* Parts II–IV.

14. An “act making it [a] felony with penalty for certain aliens to enter [the] United States [of America] under certain conditions in violation of law,” S.5094, 70th Cong. (1929) (enacted).

15. Many of the materials from the eugenicist Harry Laughlin were obtained from an archive of his papers maintained at Truman State University. *Harry H. Laughlin Papers: Manuscript Collection L1*, TRUMAN STATE UNIV.: PICKLER MEM’L LIBR., <https://library.truman.edu/manuscripts/laughlinindex.asp> [<https://perma.cc/qJZ8-B3JL>] (describing the collection, which includes Boxes B-E).

16. See, e.g., ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924–1952* (1957); KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (2d ed. 2002) (1955); DESMOND KING, *MAKING AMERICANS:*

roles of five immigration restrictionists: Albert Johnson, the Republican Chairman of the House Committee on Immigration and Naturalization; John Box, a Democratic congressman from Texas; Coleman Livingston Blease, a Democratic Senator from South Carolina; James Davis, the Secretary of Labor during the Coolidge Administration (the Labor Department administered immigration laws in the 1920s); and Harry Laughlin, a prominent eugenicist and the “Expert Eugenics Agent” of the House Committee on Immigration and Naturalization from 1921 to 1931.

The narrative begins with the Johnson-Reed Act, passed in 1924.¹⁷ That law imposed a system of immigration quotas that effectively ended immigration from most countries outside of Western Europe. The proponents of this quota system relied on the then-popular science of eugenics.¹⁸ They believed that the Nordic race (Caucasians from Western Europe) had evolved to become genetically superior to other races, and was responsible for the success of American civilization. They feared that immigration from countries in Southern Europe, Eastern Europe, and Asia would dilute America’s Nordic racial stock. Chairman Albert Johnson, the main author of the Johnson-Reed Act, vigorously advocated this ideology of scientific racism. So did his Committee’s Expert Eugenics Agent, Harry Laughlin, who provided testimony and numerous reports arguing for restriction in eugenicist terms. These arguments would feature prominently in all the immigration debates of the 1920s.

While the Johnson-Reed Act was the restrictionists’ greatest triumph, it did contain a major exception: it allowed unlimited immigration from countries in the Western Hemisphere.¹⁹ This exception permitted migrants from Latin America to enter without a quota. It was motivated in part by businesses’ desire for cheap labor, and in part by foreign policy concerns. Due to this exception, immigration from Latin America expanded significantly after 1924. At the same time, immigration from most other parts of the world diminished.

After 1924, Chairman Johnson and the other restrictionists refocused their efforts on a new goal: ending Latin American immigration. Their strategy had two complementary prongs. The first was ending lawful immigration from Latin America, and the second was deporting the Latin Americans already here. To end lawful immigration, Representative John Box of Texas repeatedly presented a bill (the “Box Bill”) that would have imposed

IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY (2000); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2014); BENJAMIN GONZALEZ O’BRIEN, *HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA* (2018); Mark Reisler, *Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant During the 1920s*, 45 PAC. HIST. REV. 231 (1976).

17. Immigration Act of 1924, H.R. 7995, 68th Cong. (1924) (enacted).

18. See *infra* Section II.A.

19. See *infra* Section II.B.

immigration quotas on the countries in the Western Hemisphere.²⁰ This bill was proposed and debated by Congress in 1926, 1928, and 1930. To remove the people already here, Chairman Johnson proposed a bill (the “Johnson Bill”) that would have significantly expanded the power to deport immigrants.²¹ The Johnson Bill also contained a provision making unlawful entry a misdemeanor. This bill was proposed and debated by Congress in 1925, 1926, and 1928. Throughout the legislative hearings on these bills, Harry Laughlin and other eugenicists argued that immigrants from Latin America threatened our Nordic racial purity.²² These hearings focused especially on the mixed racial makeup of Latin America, where people often have a combination of Spanish, indigenous, and African ancestry. To Laughlin and other eugenicists, this meant racial degeneracy.

Neither the Box Bill nor the Johnson Bill ultimately became law. However, in 1929 the Senate passed a pair of bills that led to the restrictionists’ first major victory since 1924.²³ These bills were proposed by South Carolina Senator Coleman Livingston Blease, and were drafted by Secretary of Labor James Davis. The first, S.5093, created registration cards for non-citizens bearing their name, nationality, photograph, date of admission, location of entry, and other identifying information.²⁴ The second, S.5094, created the felony crime of reentry after deportation.²⁵ These proposals were designed to work in concert, creating an enforcement regime where Latin American immigrants could be stopped by the authorities, asked for a registration card, and then prosecuted for an immigration crime. Only S.5094 was taken up by the House of Representatives in 1929, and Chairman Johnson combined it with the Johnson Bill. The House Committee called this fused bill the “Undesirable Aliens Act of 1929.” The subsequent debate in the House of Representatives focused overwhelmingly on the issue of Latin American immigration, and featured eugenic arguments concerning Latin Americans’ racial characteristics.²⁶ The congressmen who discussed the Undesirable Aliens Act made it clear that this proposal was part of the larger strategy to remove Latin Americans on racial grounds. Most of the Johnson Bill was ultimately removed in conference committee, and the Blease/Davis Bill was enacted into law along with the misdemeanor provision of the Johnson Bill. Immediately after the law’s passage, the federal government began using it to prosecute Latin American immigrants.²⁷ The law has remained in force, with some modifications, up to the present day.

20. See *infra* Section III.A.

21. See *infra* Section III.B.

22. See *infra* Section III.C.

23. See *infra* Section IV.A.

24. S. 5093, 70th Cong. (1929) (enacted); see also 70 CONG. REC. 2,092 (1929).

25. S. 5094, 70th Cong. (1929) (enacted); see also 70 CONG. REC. 2,092 (1929).

26. See *infra* Section II.B.

27. See *infra* Section III.C.

Because this law was motivated by anti-Latin American racism, it violates the Equal Protection Clause.²⁸ The law is neutral on its face—it does not categorize people by race, nor does it explicitly burden a particular racial group. But delving into the law’s legislative history reveals that racial animus prompted its enactment.²⁹ In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court elaborated a framework for this kind of equal protection claim.³⁰ The first question is whether a discriminatory purpose “has been a motivating factor in the decision”³¹ To answer that, one looks at evidence like the law’s historical background, its specific enactment history (including the statements of its supporters), and its impact on the affected racial group.³² Once it has been established that racism was at least one motivating factor, the other party must then prove that the law would still have been enacted without the impermissible purpose.³³ As this Article will show, anti-Latin American racism was the primary motivation behind the Undesirable Aliens Act, and the law would not have been enacted absent this motivation.³⁴ The evidence for these propositions is strong. It includes statements by the law’s proponents, the sustained efforts of those same proponents to end all Latin American immigration, their consistent reliance on racial eugenics as a justification, and their particular focus on the supposed racial degeneracy of Latin American immigrants.³⁵

The federal legal system needs to grapple with the racist history of its two most frequently charged crimes. Congress should repeal these crimes.³⁶ Defense lawyers should challenge them as unconstitutional. Judges should

28. U.S. CONST. amend. XIV, § 1. See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Equal Protection Clause to the federal government through the Due Process Clause). There are originalist arguments against the validity of *Bolling*, but these are beyond the scope of this Article. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 510–11 (2010). But see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 772–73 (1999). An originalist methodology may also find difficulties with the constitutionality of federal immigration enforcement in the first place. See, e.g., Ilya Somin, *Immigration and the US Constitution*, OPEN BORDERS (Mar. 18, 2013), <https://openborders.info/blog/immigration-and-the-us-constitution> [<https://perma.cc/MPC2-5PX5>]. Thank you to Lawrence Solum for informing me about this argument.

29. For similar historical analysis of the discriminatory origins of the crime-based deportation system, see Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018).

30. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–71 (1977).

31. *Id.* at 265–66.

32. *Id.* at 266–68.

33. *Id.* at 270–71 n.21.

34. See *infra* Part III.

35. See *infra* Parts I–III.

36. See H.R. 5383, 116th Cong. § 601 (as introduced in the House, Dec. 10, 2019) (repealing 8 U.S.C. § 1325 and 8 U.S.C. § 1326); Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020).

strike them down. Prosecutors should decline to prosecute them.³⁷ Juries should nullify them.³⁸

The Article proceeds as follows.

Part II provides the larger historical context of the effort to end Latin American immigration. It describes how the eugenics movement inspired the creation of the quota system through the Johnson-Reed Act. It also explains the Western Hemisphere exception, which caused Latin American immigration to expand significantly post-1924 while immigration from other parts of the world declined.

Part III lays out restrictionists' efforts to stop Latin American immigration after 1924. Their strategy had two main components: ending the Western Hemisphere exception and expanding the government's power to deport. It also shows that experts in eugenics played a starring role in the legislative hearings on the restrictionists' various bills. These eugenicists argued before Congress that Latin American immigrants were "peons," "mongrels," and "degenerates," and that they posed a threat to the racial purity of white America.

Part IV examines the specific legislative history of the Undesirable Aliens Act of 1929, and how it fit into these efforts to end Latin American immigration. It describes the original proposal of Senator Blease, the amendments and debate in the House of Representatives, and the post-enactment commentary on the law. It also discusses the subsequent enforcement of the law, which was directed almost entirely against Latin American immigrants.

Part V argues that this history matters. The law's larger historical context, immediate legislative history, and unequal enforcement prove that it was motivated by racial animus. Further, the law would not have been enacted but for this racist motivation. Consequently, federal immigration prosecutions violate the Constitution's guarantee of equal protection.

Part VI considers one counterargument—that Congress has plenary authority to regulate immigration and that this authority implies a power to racially discriminate. This proposition is rejected because immigration crimes are criminal statutes and thus receive greater constitutional scrutiny than do immigration laws.

Part VII considers another counterargument—that the Undesirable Aliens Act was reenacted in 1952, and that this later reenactment absolves the law of racial animus. This proposition is rejected for two reasons. First, the reenactment was pro forma. It was part of a general reorganization and recodification of the immigration laws. It involved no debate over the merits

37. See Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237 (2017).

38. See Eagly, *supra* note 2, at 1327 (noting that in the 1940s, federal grand juries in the southwest border would refuse to indict immigration cases); cf. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

of these crimes. Congress understood itself to be simply keeping the same law in place. Second, when a law is enacted with a racist purpose, that purpose is not purged by later reenactment unless the legislature actually grapples with the law's racist history. Congress did not do so in 1952, and it has not done so since.

Part VIII concludes.

II. WHITE SUPREMACY AND IMMIGRATION LAW IN THE 1920S

In early 20th century America, pseudoscientific racism was accepted as legitimate science. This racism inspired major changes in American immigration law. In the 1920s, Congress created a system of quotas designed to keep out racially undesirable immigrants from Southern and Eastern Europe. These quotas were permanently codified by the Johnson-Reed Act of 1924. But the law contained a major exception: it permitted unlimited immigration from countries in the Western Hemisphere. This exception was justified by American businesses' desire for cheap labor, as well as by foreign policy concerns. It led to a significant increase in immigration from Latin American countries.

A. EUGENICS AND THE QUOTA SYSTEM

The concept of eugenics was originally invented by Francis Galton, who was Charles Darwin's half-cousin.³⁹ The basic idea was that we should selectively breed human beings to improve the genetic quality of the population, similar to how dogs and horses are selectively bred.⁴⁰ This idea became immensely popular in the United States and was treated as an intellectually respectable science. Professors at universities like Harvard, Stanford, and Princeton believed in eugenics, published scholarship on it, and taught it to their students.⁴¹ Even progressive figures like Margaret Sanger and Oliver Wendell Holmes endorsed eugenics.⁴²

39. See FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24–25 (1883); DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 3–19 (1986).

40. GALTON, *supra* note 39, at 30.

41. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 224–32 (rev. 1996) (discussing the role of Princeton professor and eugenicist Carl Brigham in the passage of the 1924 Johnson-Reed Act); LOUIS MENAND, *THE METAPHYSICAL CLUB* 382–83 (2001) (discussing Edward A. Ross, a Stanford professor, eugenicist, and opponent of immigration on racial grounds); ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 4 (2016) (discussing Harvard anthropology chair Earnest Hooton, a believer in eugenics, and noting that “[e]ugenics was taught at 376 universities and colleges, including Harvard, Columbia, Berkeley, and Cornell”).

42. See Nikita Stewart, *Planned Parenthood in N.Y. Disavows Margaret Sanger Over Eugenics*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/nyregion/planned-parenthood-margaret-sanger-eugenics.html> [https://perma.cc/6Q3Y-P2GM]; COHEN, *supra* note 41, at 251–82; KING, *supra* note 16, at 169 (discussing progressive support of eugenics).

Perhaps the most noteworthy American work on eugenics was the 1916 book *The Passing of the Great Race*, written by lawyer and conservationist Madison Grant.⁴³ Grant explicitly tied eugenics to the idea of white racial superiority.⁴⁴ He divided humanity into three racial groups—“Caucasoids,” “Negroids,” and “Mongoloids.”⁴⁵ He further subdivided the “Caucasoids” (Europeans) into three categories—“Nordics” (from Western and Northern Europe), “Alpines” (from Central Europe), and “Mediterraneans” (from Southern Europe).⁴⁶ Grant argued that the Nordic race’s superior qualities were responsible for the success of American civilization.⁴⁷ In order to avoid “race suicide,” American Nordics must selectively breed, segregate from other races, and sterilize the undesirable.⁴⁸ Grant warned in particular that immigration from countries like Italy and Poland threatened America with racial decline.⁴⁹ Grant’s ideas were enormously influential. Calvin Coolidge endorsed Nordicism in a 1921 article.⁵⁰ Adolph Hitler himself told Grant in a letter that “the book is my Bible.”⁵¹

Grant’s arguments for scientific racism helped build a movement to end non-Nordic immigration. Beginning in the late 1800s, millions of people migrated to the United States from Southern and Central Europe.⁵² Numerous pro-eugenics organizations began lobbying to end this immigration.⁵³ One of

43. MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR, THE RACIAL BASIS OF EUROPEAN HISTORY* (1916).

44. See DIVINE, *supra* note 16, at 11–12.

45. GRANT, *supra* note 43, at 33.

46. *Id.* at 20–21.

47. *Id.* at 88–94; DIVINE, *supra* note 16, at 12.

48. E.g., GRANT, *supra* note 43 at 51–52, 228 (“The Nordics are, all over the world, a race of soldiers, sailors, adventurers and explorers, but above all, of rulers, organizers and aristocrats in sharp contrast to the essentially peasant and democratic character of the Alpines.”). This ideology is sometimes called “Nordicism.”

49. *Id.* at 89–90 (“[T]he new immigration . . . contained a large and increasing number of the weak, the broken and the mentally crippled of all races drawn from the lowest stratum of the Mediterranean basin and the Balkans, together with hordes of the wretched, submerged populations of the Polish Ghettoes. Our jails, insane asylums and almshouses are filled with this human flotsam and the whole tone of American life, social, moral and political has been lowered and vulgarized by them.”).

50. Calvin Coolidge, *Whose Country Is This?*, 72 GOOD HOUSEKEEPING 13, 14 (1921) (“There are racial considerations too grave to be brushed aside for any sentimental reasons. Biological laws tell us that certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration on both sides. Quality of mind and body suggests that observance of ethnic law is as great a necessity to a nation as immigration law.”).

51. JONATHAN PETER SPIRO, *DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT* 357 (2009).

52. See Ran Abramitzky, Leah Platt Boustan & Katherine Eriksson, *A Nation of Immigrants: Assimilation and Economic Outcomes in the Age of Mass Migration*, 122 J. POL. ECON. 467, 470 (2014).

53. KING, *supra* note 16, at 52–56; ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS* 24–25 (2020).

the most influential of these groups was the Immigration Restriction League, on which Grant himself served as vice president.⁵⁴ These organizations, and their eugenics-based arguments, ultimately transformed American immigration law in the 1920s.⁵⁵

The restrictionists' first major victory was the Immigration Act of 1917.⁵⁶ That law completely excluded immigrants from most of Asia, increased the entrance tax imposed on all immigrants, and required that all immigrants pass a literacy test.⁵⁷ This victory was followed by the Emergency Immigration Act of 1921, which imposed numerical limits on immigration for the first time in American history.⁵⁸ The Emergency Quota Act temporarily created an overall cap of 350,000 new immigrants per year.⁵⁹ It also restricted the number of immigrants from each country to three percent of the total people from that country living in the United States as of the 1910 census.⁶⁰

This quota system was made permanent in 1924 through the Johnson-Reed Act, which imposed even more restrictive limits.⁶¹ The Johnson-Reed Act lowered the annual cap to around 150,000.⁶² It also changed the country-based numerical limits to two percent of each country's immigrants based on the 1890 census.⁶³ This change was intended to exclude immigrants from Southern and Central Europe, who only began immigrating in large numbers after 1890.⁶⁴ The Johnson-Reed Act was the greatest triumph of the American eugenics movement.⁶⁵ By ensuring that future immigration would be heavily tilted towards the countries of Northern and Western Europe, it preserved the United States as a white Anglo-Saxon nation.⁶⁶ The report of the House

54. KING, *supra* note 16, at 52. The organization was founded by a Harvard professor named Robert Ward, and boasted Senator Henry Cabot Lodge as a member. *Id.* at 52-53.

55. *Id.* at 169-72; GOULD, *supra* note 41, at 231-32.

56. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917) (discussing regulation of immigration).

57. See NGAI, *supra* note 16, at 18-19; KING, *supra* note 16, at 78-79; O'BRIEN, *supra* note 16, at 26-27.

58. Emergency Immigration Act of 1921, Pub. L. No. 67-5, 42 Stat. 5 (1921) (discussing limiting the number of immigrants); HIGHAM, *supra* note 16, at 311.

59. O'BRIEN, *supra* note 16, at 27.

60. *Id.*

61. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

62. See NGAI, *supra* note 16, at 22-23; O'BRIEN, *supra* note 16, at 27-28.

63. The quota based on the 1890 census remained in effect from 1924 until permanent country-based quotas were established by a commission in 1929. See KING, *supra* note 16, at 203, 206-07; HIGHAM, *supra* note 16, at 323-24.

64. See DIVINE, *supra* note 16, at 14-16; Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1127-31 (1998); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999).

65. See GOULD, *supra* note 41, at 231.

66. See KING, *supra* note 16, at 224-25; NGAI, *supra* note 16, at 23; DIVINE, *supra* note 16, at 13-15. The Los Angeles Times marked the passage of the 1924 law with a headline declaring "Nordic Victory Is Seen in Drastic Restrictions." HIGHAM, *supra* note 16, at 300.

Committee on Immigration and Naturalization summed up the law's purpose: "It is hoped to guarantee, as best we can at this late date, racial homogeneity in the United States."⁶⁷

The main architect of this quota system was Albert Johnson, the Chairman of the House Committee on Immigration and Naturalization.⁶⁸ Johnson was a Republican from the State of Washington, a eugenicist, and an ardent immigration restrictionist.⁶⁹ He ascended to the committee chairmanship in 1919, when the Republicans took control of Congress. From that position, he became the leading immigration restrictionist in American politics.⁷⁰ In 1919, Johnson unsuccessfully pushed a measure to suspend all immigration to the United States.⁷¹ After that proposal failed, he accepted the 1921 emergency quota law as a compromise.⁷² From 1921 to 1924, he waged a sustained campaign for more drastic and permanent curbs to immigration from southern and eastern Europe.⁷³ He ultimately succeeded with the law that bears his name: the Johnson-Reed Act of 1924.⁷⁴ After the law's passage, he wrote that "[t]he day of indiscriminate acceptance of all races has definitely ended."⁷⁵

Johnson's efforts to restrict immigration were informed by his deep commitment to the principles of eugenics. He met regularly with Madison Grant and other leading race-science intellectuals.⁷⁶ He invited eugenicists to testify and submit reports for his committee's hearings.⁷⁷ He also personally served in leadership roles at pro-eugenics organizations. He was president of the Eugenics Research Institute from 1923 to 1924, and was an active member of the American Eugenics Society.⁷⁸ He also worked with Grant on the

67. ALBERT JOHNSON, RESTRICTION OF IMMIGRATION, H.R. REP. NO. 68-350, at 16 (1924).

68. See KING, *supra* note 16, at 201.

69. See Kristofer Allerfeldt, 'And We Got Here First': Albert Johnson, *National Origins and Self-Interest in the Immigration Debate of the 1920s*, 45 J. CONTEMP. HIST. 7, 8-9 (2010); DENNIS WEPMAN, AN EYEWITNESS HISTORY: IMMIGRATION: FROM THE FOUNDING OF VIRGINIA TO THE CLOSING OF ELLIS ISLAND 242 (2002).

70. See HIGHAM, *supra* note 16, at 307; KING, *supra* note 16, at 201 ("By 1928 [Johnson] had become the éminence grise of American immigration policy, dominating the seventeen-member House committee . . .").

71. See HIGHAM, *supra* note 16, at 304-07; *Will Offer New Bill to Curb Immigration*, N.Y. TIMES, Nov. 13, 1920, at 11, <https://www.nytimes.com/1920/11/13/archives/will-offer-new-bill-to-curb-immigration-house-committee-plans-to.html> [<https://perma.cc/88J3-J2H6>].

72. HIGHAM, *supra* note 16, at 309-11. It is worth noting that anti-semitism played a significant role in the development of the 1921 law, especially in Johnson's committee. *Id.*

73. *Id.* at 313-24; KING, *supra* note 16, at 201-06.

74. HIGHAM, *supra* note 16, at 324.

75. ROGER DANIELS, GUARDING THE GOLDEN DOOR 55 (2004).

76. HIGHAM, *supra* note 16, at 313; KING, *supra* note 16, at 202; SPIRO, *supra* note 51, at 204-05 (describing the "kitchen cabinet" of eugenicists who advised Johnson).

77. HIGHAM, *supra* note 16, at 313-14.

78. MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 83 (1999); KING, *supra* note 16, at 202.

Eugenics Committee of the U.S. Committee on Selective Immigration.⁷⁹ In that capacity, he helped produce a report arguing that Northern and Western Europeans are of “higher intelligence” and provide “the best material for American citizenship.”⁸⁰

Another key player in the creation of the quota system was a eugenicist named Harry Laughlin.⁸¹ Laughlin was quite a unique figure in American history. He was an influential public intellectual whose work inspired several major changes in American law. Laughlin received a doctorate in biology from Princeton, writing a dissertation that focused on cell division in onions.⁸² In 1910 he was hired to manage the Eugenics Record Office, a think tank focused on racial science.⁸³ The Eugenics Record Office was the largest and best-funded eugenics organization in the United States.⁸⁴ It was supported by the Carnegie Institution, as well as by personal donations from John Rockefeller.⁸⁵ It had a board of scientific directors that included Alexander Graham Bell (the chairman), William Welch (dean of John Hopkins Medical School), and Irving Fisher (professor of economics at Yale).⁸⁶ It was the intellectual hub of eugenics in the United States, producing endless volumes of research and lobbying for laws that would preserve white racial superiority.⁸⁷

At the Eugenics Record Office, Laughlin became an influential proponent of laws against interracial marriage.⁸⁸ He also popularized laws providing for forced sterilization of the disabled. In 1922 he published a model involuntary sterilization law, and his lobbying efforts were instrumental in convincing 30

79. JACOBSON, *supra* note 78, at 83.

80. *Id.*

81. See KING, *supra* note 16, at 173 (“The eugenicist with the greatest influence on immigration policy during the 1920s was Dr. Harry H. Laughlin . . .”) (footnote omitted).

82. Frances Hassencahl, Harry H. Laughlin, ‘Expert Eugenics Agent’ for the House Committee on Immigration and Naturalization, 1921 to 1931, at 61–62 (Sept. 1970) (Ph.D. dissertation, Case Western Reserve University) (ProQuest).

83. COHEN, *supra* note 41, at 112; Garland E. Allen, *The Eugenics Record Office at Cold Spring Harbor, 1910-1940: An Essay in Institutional History*, 2 OSIRIS 225, 226 (1986).

84. SPIRO, *supra* note 51, at 179; Allen, *supra* note 83, at 227 (“The ERO . . . was the only major eugenics institution with a building, research facilities, and a paid staff.”).

85. KING, *supra* note 16, at 173; COHEN, *supra* note 41, at 111.

86. Allen, *supra* note 83, at 238; COHEN, *supra* note 41, at 110–11.

87. Allen, *supra* note 83, at 226 (“The ERO became a meeting place for eugenicists, a repository for eugenics records, a clearinghouse for eugenics information and propaganda, a platform from which popular eugenic campaigns could be launched, and a home for several eugenical publications.”); SPIRO, *supra* note 51, at 179; COHEN, *supra* note 41, at 103–04.

88. See Philip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928-1930*, 16 AM. J. MED. GENETICS 483, 486, 489 (1983); Paul A. Lombardo, “The American Breed”: Nazi Eugenics and the Origins of the Pioneer Fund, 65 ALB. L. REV. 743, 775 (2002); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 245 (2008).

states to adopt such laws by 1935.⁸⁹ Laughlin personally testified as an expert supporting sterilization in *Buck v. Bell*, which culminated in the Supreme Court affirming the government's power to forcibly sterilize people it deems unfit.⁹⁰ Laughlin's model law also served as a template for Nazi Germany's own sterilization law.⁹¹ Laughlin himself was antisemitic, and expressed great enthusiasm about the Nazis' embrace of scientific racism.⁹² He was even feted by the Nazi regime, which awarded him a Doctorate of Medicine from the University of Heidelberg to recognize his contributions to the "science of racial cleansing."⁹³

From 1920 until 1931, Chairman Johnson employed Laughlin as the "expert eugenics agent" for the House Committee on Immigration and Naturalization.⁹⁴ From this position Laughlin exerted enormous influence over the legislative debate on immigration, both through his committee work and through his relationship with Johnson.⁹⁵ Laughlin argued that Southern and Eastern European immigrants were burdens on society, and that they threatened to dilute America's Nordic racial stock.⁹⁶ He used congressional funds to prepare several large studies advancing these ideas.⁹⁷ In 1920 he presented to the Committee his estimate of the total cost of maintaining immigrants deemed "feeble-minded"—the insane, criminals, the disabled, and those with chronic illnesses, among others.⁹⁸ He concluded that racially

89. SPIRO, *supra* note 51, at 236–37, 362; Allen, *supra* note 83, at 247; HARRY BRUNIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 57–58 (2006).

90. KEVLES, *supra* note 39, at 110–12; BRUNIUS, *supra* note 89, at 61–62; *Buck v. Bell*, 274 U.S. 200, 207 (1927).

91. SPIRO, *supra* note 51, at 362; Allen, *supra* note 83, at 253.

92. See COHEN, *supra* note 41, at 125 ("The Jew is doubtless here to stay and the Nordics' job is to prevent more of them from coming.") (quoting Laughlin from a letter to Madison Grant); SPIRO, *supra* note 51, at 367 (stating Laughlin wrote a note to himself that "Hitler should be made honorary member of the Eugenics Research Association"); *Harry H. Laughlin Papers: Manuscript Collection L1: "E" Boxes*, TRUMAN STATE UNIV.: PICKLER MEM'L LIBR., <https://library.truman.edu/manuscripts/laughline-boxes.asp> [<https://perma.cc/68BY-CFG6>] (denoting document E-1-4-2, a newspaper clipping on which the note was written); Lombardo, *supra* note 88, at 759–63; BRUNIUS, *supra* note 89, at 292–94.

93. KING, *supra* note 16, at 167; Lombardo, *supra* note 88, at 763–65; Allen, *supra* note 83, at 253–54. Writing to the University in thanks, Laughlin observed that the award was "evidence of a common understanding of German and American scientists of the nature of eugenics as research in and the practical application of those fundamental biological and social principles which determine the racial endowments and the racial health—physical, mental, and spiritual—of future generations." *Id.* at 253; see also BRUNIUS, *supra* note 89, at 293–94.

94. KING, *supra* note 16, at 173.

95. *Id.* at 173–78; Hassencahl, *supra* note 82, at 358–61; HIGHAM, *supra* note 16, at 313–14; JACOBSON, *supra* note 78, at 82–85.

96. See Hassencahl, *supra* note 82, at 232–33; KING, *supra* note 16, at 171–74.

97. See KING, *supra* note 16, at 171–74; SPIRO, *supra* note 51, at 215–20; Hassencahl, *supra* note 82, at 227–82 (describing in detail Laughlin's presentations before the Committee).

98. *Biological Aspects of Immigr.: Hearings before the H. Comm. on Immigr. and Naturalization*, 66th Cong. (1920) (statement of Harry H. Laughlin).

undesirable foreigners contributed disproportionately to these groups.⁹⁹ In 1922 he returned to the Committee with a new report, as well as numerous visual aids including maps from *The Passing of the Great Race*.¹⁰⁰ This report again concluded that the “socially inadequate” came disproportionately from Southern and Eastern Europe.¹⁰¹ He came back once more in 1924 to present his eugenicist case for the Johnson-Reed Act based on a factfinding trip he had taken to Europe.¹⁰² Laughlin’s arguments ultimately carried the day, with Congress embracing his ideas and enacting a permanent quota that largely excluded non-Nordic Europeans.¹⁰³ As Laughlin later observed, Johnson-Reed created “a biologically-based policy” in which future immigration “would have to be compatible racially with American ideals.”¹⁰⁴

B. THE WESTERN HEMISPHERE EXCEPTION

The Johnson-Reed Act did contain one major gap, however. It did not impose any immigration quotas on countries in the Western Hemisphere.¹⁰⁵ This meant that people from Canada, Mexico, the rest of Latin America, and Caribbean Island nations could immigrate to the United States without facing a numeric cap. They only had to satisfy two conditions: pass the literacy test established by the 1917 law, and pay an \$18 entry tax/visa fee.¹⁰⁶ Aside from those administrative requirements, the United States maintained open borders with the rest of the Americas.

Congress included this exception for two main reasons. First, there was significant business demand for workers from Mexico, especially in the southwest. Railroad companies, agricultural companies, and other business interests expressed concern that a rigid quota system would limit their access to cheap

99. *Id.* at page 12; KING, *supra* note 16, at 176–77.

100. *Analysis of America’s Modern Melting Pot: Hearings before the H. Comm. on Immigr. and Naturalization*, 67th Cong. (1922) (statement of Harry H. Laughlin) [hereinafter *Melting Pot*]; SPIRO, *supra* note 51, at 215.

101. *Melting Pot*, *supra* note 100, at 734–36; KING, *supra* note 16, at 181–84; Hassencahl, *supra* note 82, at 247–56.

102. *Europe as an Emigrant-Exporting Continent and The United States as an Immigrant-Receiving Nation: Hearings before the H. Comm. on Immigr. and Naturalization*, 68th Cong. (1924) (statement of Harry H. Laughlin); KING, *supra* note 16, at 186–87.

103. Laughlin was the most prominent eugenicist in the 1920s immigration debates, though he was by no means the only one. For example, Princeton professor Carl Brigham’s analysis of race in the army intelligence tests also helped build the case for restriction. CARL C. BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* 64–71 (1923); see SPIRO, *supra* note 51, at 216–20; GOULD, *supra* note 41, at 224–32.

104. HARRY H. LAUGHLIN, *IMMIGRATION AND CONQUEST* 39 (1939).

105. Immigration Act of 1924, Pub. L. No. 68-139, § 4, 11, 43 Stat. 153, 155, 159 (1924); Ngai, *supra* note 64, at 72.

106. HERNÁNDEZ, *supra* note 16, at 133; Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 85–86 (2003); DANIELS, *supra* note 75, at 53.

labor.¹⁰⁷ Second, some members of Congress were worried about maintaining the Monroe doctrine and keeping strong relationships with the other countries in the Western Hemisphere.¹⁰⁸ They did not want to compromise America's diplomatic and trade interests by closing off immigration from its closest neighbors. On the other hand, several congressmen did advance cultural, economic, and eugenics-based arguments against Mexican immigration.¹⁰⁹ For example, a congressman from Connecticut said during the House debate "that the average Italian is as much superior to the average Mexican as a full-blooded Airedale is to a mongrel."¹¹⁰ But proponents of the exception carried the day.¹¹¹ Even Representative John Box of Texas, the leading congressional opponent of Mexican immigration, supported the Western Hemisphere exception out of concern that the law might not pass without it.¹¹²

The Johnson-Reed Act thus created a system in which people from Latin America could immigrate freely, and people from most other parts of the world were kept out. This led to a significant increase in Latin American immigration, especially from Mexico.¹¹³ The official government statistics reflect that 89,336 people from Mexico immigrated to the United States in 1924, a dramatic increase over the preceding few years.¹¹⁴ The official numbers tail off a bit after that, fluctuating between 30,000 and 60,000 from 1924 to 1929.¹¹⁵ Canadian immigration also increased significantly during this period, roughly doubling the recorded immigration from Mexico.¹¹⁶ But

107. HERNÁNDEZ, *supra* note 16, at 134; NGAI, *supra* note 16, at 23, 50; O'BRIEN, *supra* note 16, at 25, 42.

108. See, e.g., 65 CONG. REC. 6,623 (1924) (statement of Sen. Warren Reed) ("So far as Central and South America go, the policy indicated by this amendment is obviously unwise if we intend to attach any importance to the Pan-American idea."); *Id.* at 6,628 (statement of Sen. Hale Bursum) ("I am not in favor of disrupting the Pan American Union . . ."); DIVINE, *supra* note 16, at 52-53; NGAI, *supra* note 16, at 23, 50; O'BRIEN, *supra* note 16, at 25.

109. O'BRIEN, *supra* note 16, at 41-43 (noting that members of the House mentioned Mexicans 109 times during the debate over Johnson-Reed, and that many of them argued Mexicans were more racially undesirable than the European being excluded); *id.* at 36-39 (analyzing the Senate debate, where restrictionists focused on the economic threat posed by Mexicans, as well as their supposed cultural inferiority and criminality).

110. 65 CONG. REC. 5,900 (statement of Rep. O'Sullivan). O'Sullivan was complaining that the law excludes Italians while letting Mexicans immigrate freely. *Id.*

111. DIVINE, *supra* note 16, at 52.

112. 65 CONG. REC. 6,132 (statement of Rep. Box) ("Rome was not built in a day, and we cannot overcome all of the difficulties at once. . . . I want the Mexicans kept out, but I do not want this bill killed by men who want these and all others admitted in unrestricted numbers.").

113. See DANIELS, *supra* note 75, at 57.

114. *Id.* at 51 (also noting that there were 52,316 Mexican immigrants in 1920; 30,758 in 1921; 19,551 in 1922; and 63,768 in 1923); DIVINE, *supra* note 16, at 53.

115. U.S. DEP'T OF LAB., ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 207 (1932) [hereinafter 1932 ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION] (reflecting 32,964 Mexican immigrants in 1925; 43,316 in 1926; 67,721 in 1927; 59,016 in 1928; and 40,154 in 1929).

116. DANIELS, *supra* note 75, at 57.

the official statistics likely capture only a fraction of total Mexican immigration, because most Mexican immigrants did not cross through official ports of entry.¹¹⁷

Immigration restrictionists came to believe that vast numbers of people from Mexico were entering the United States each year.¹¹⁸ The Johnson-Reed Act had cut off the supply of unskilled laborers from Europe, and now Latin Americans were replacing it.¹¹⁹ The introduction to a book by Harry Laughlin captures this belief well: “The outstanding defect of the Immigration Act of 1924 was the failure to extend its provisions to countries of the Western Hemisphere. The restrictions imposed upon entries from Europe stimulated an influx of a most undesirable class of aliens from Mexico, Central and South America and from our own possessions in the West Indies.”¹²⁰

III. EFFORTS TO STOP LATIN AMERICAN IMMIGRATION IN THE 1920S

After their triumph in 1924, Albert Johnson and other restrictionists found a new goal: ending Latin American immigration.¹²¹ The slogan of this new movement was “close the back door.”¹²² Johnson’s House Committee on Immigration and Naturalization was its command center.¹²³ From 1924 to 1930, that committee held hearings on numerous bills designed to keep Latin Americans out of the United States. These bills adopted two distinct but complementary strategies. One strategy was to end lawful immigration by adding Latin American countries to the quota system. Congressman John Box of Texas repeatedly introduced a bill (the Box Bill) intended to do just that. The other strategy was to expel the Latin Americans already here. Chairman Johnson repeatedly introduced a bill (the Johnson Bill) intended to significantly expand the government’s deportation powers. The Johnson Bill also criminalized entering the United States without permission.

Racial eugenics was a constant theme in the hearings on these bills. Congressmen like Box, Johnson, and others argued that Latin Americans were racially unfit. They also heard testimony from eugenicists like Harry Laughlin (still the committee’s Expert Eugenics Agent) and Princeton Professor Robert Foerster. These eugenicists emphasized the mixed racial composition of Latin American countries, and particularly of Mexico. Due to this mixed

117. DIVINE, *supra* note 16, at 53; Ngai, *supra* note 64, at 90 (noting estimates of around 100,000 undocumented entrants from Mexico each year); U.S. DEP’T OF LAB., ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 10 (1926) (estimating that over 500,000 Mexicans cross back and forth across the border every month); Reisler, *supra* note 16, at 232.

118. DIVINE, *supra* note 16, at 53; Reisler, *supra* note 16, at 241–42.

119. ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION, *supra* note 117, at 9.

120. LAUGHLIN, *supra* note 104, at 1–2.

121. Reisler, *supra* note 16, at 241–42; HERNÁNDEZ, *supra* note 16, at 134–35; O’BRIEN, *supra* note 16, at 46–47; DIVINE, *supra* note 16, at 53–54.

122. DIVINE, *supra* note 16, at 54.

123. This committee was dominated by restrictionists. See Hassencahl, *supra* note 82, at 224.

heritage, they reasoned, assimilating Latin American immigrants created a special risk of racial contamination.

A. *REPRESENTATIVE BOX AND THE EFFORT TO EXTEND IMMIGRATION
QUOTAS TO THE WESTERN HEMISPHERE*

John Box was a Democratic congressman from Texas. He served in the House of Representatives from 1921 to 1930 and worked with Johnson in the House Committee on Immigration and Naturalization.¹²⁴ Box was also a committed eugenicist.¹²⁵ He was especially passionate about ending immigration from Mexico, which he believed posed a serious threat to America's racial stock. In a 1928 speech before a group called the "Key Men of America," which was later published in the Congressional Record, Box said the following:

Another purpose of the immigration laws is the protection of American racial stock from further degradation or change through mongrelization. The Mexican peon is a mixture of Mediterranean-blooded Spanish peasant with low-grade Indians who did not fight to extinction but submitted and multiplied as serfs. Into that was fused much negro slave blood. This blend of low-grade Spaniard, peonized Indian, and negro slave mixes with negroes, mulattoes, and other mongrels, and some sorry whites, already here. The prevention of such mongrelization and the degradation it causes is one of the purposes of our laws which the admission of these people will tend to defeat.¹²⁶

Box spent much of his political career pushing for a law to exclude these Mexican immigrants. From 1926 to 1930, he repeatedly proposed a bill that would impose immigration quotas on all countries in the Western Hemisphere.¹²⁷

124. Marshall Roderick, *The "Box Bill": Public Policy, Ethnicity, and Economic Exploitation in Texas* 24 (Dec. 2011) (Masters Thesis, Texas State University-San Marcos), <https://digital.library.txstate.edu/bitstream/handle/10877/2416/RODERICK-THESIS.pdf> [<https://perma.cc/W6KL-EV2M>].

125. This is clear from his extensive correspondence with Harry Laughlin concerning racial eugenics and Mexican immigration. See *Harry H. Laughlin Papers: Manuscript Collection LT: "C" Boxes*, TRUMAN STATE UNIV.: PICKLER MEM'L LIBR., <https://library.truman.edu/manuscripts/laughlinc-boxes.asp> [<https://perma.cc/SBB5-ZPVB>] (containing over a dozen letters between Box and Laughlin); Letter from John C. Box, Member, House of Representatives Committee on Immigration and Naturalization, to Dr. H. H. Laughlin (on file with Pickler Memorial Library at Truman State University as Document C-4-1-7) (writing to Laughlin about a survey of Mexican immigration); Letter from John C. Box, Member, House of Representatives Committee on Immigration and Naturalization, to Dr. H. H. Laughlin (on file with Pickler Memorial Library at Truman State University as Document C-4-6-13) (writing to Laughlin about their efforts to restrict Mexican immigration).

126. 69 CONG. REC. 2,817-18 (1928) (statement of Mr. Box).

127. A Bill to amend the immigration act of 1924 by making the quota provisions thereof applicable to Mexico, Cuba, Canada, and the countries of continental America and adjacent islands. H.R. 6741, 69th Cong. (1st sess. 1926); H.R. 6465, 70th Cong. (1st sess. 1928) (same);

Johnson's House Committee on Immigration and Naturalization held hearings on the Box Bill in 1926, 1928, and 1930.¹²⁸ These hearings lasted for multiple days and involved numerous witnesses who testified both for and against the Bill. The Box Bill's supporters presented three main arguments.¹²⁹ First, that immigrants from Latin America were taking work away from American laborers.¹³⁰ Second, that Latin American immigrants were a burden on society, committing crimes, spreading diseases, and becoming public charges.¹³¹ Third, that Latin American immigrants were racially undesirable.¹³²

Eugenics-based arguments were prominent in these hearings, sounding similar themes to Box's Key Men speech.¹³³ Box warned in one committee hearing "that no other alien race entering America provides an easier channel for the intermixture of bloods than does the mongrel Mexican," concluding that "[t]heir presence and intermarriage with both white and black races . . . create the most insidious and general mixture of white, Indian, and negro blood strains ever produced in America."¹³⁴ Similarly, Representative Robert Green argued in a speech: "Another reason why the quota should apply to any country south of the Rio Grande and the islands is because their population in the main is composed of mixed blood of white, Indian, and negro. This makes their blood a very great penalty upon the society which assimilates it."¹³⁵ Expert Eugenics Agent Harry Laughlin also testified in support of the Box Bill, asserting that Mexican immigration represented the sixth great

A Bill to limit the immigration of aliens to the United States, and for other purposes. H.R. 8523, 71st Cong. (2d sess. 1930).

128. *Seasonal Agricultural Laborers from Mexico: Hearing on H.R. 6741, H.R. 7559, and H.R. 9036 Before the H. Comm. on Immigr. & Naturalization*, 69th Cong. (1926) [hereinafter 1926 Hearings] (discussing in part H.R. 6741 by Rep. Box); *Immigration from Countries of the Western Hemisphere: Hearing on H.R. 6465, H.R. 7358, H.R. 10955, and H.R. 11687 Before the H. Comm. on Immigr. & Naturalization*, 70th Cong. (1928) [hereinafter 1928 Hearings] (discussing in part H.R. 6465 by Rep. Box); *Immigration from Countries of the Western Hemisphere: Hearing on H.R. 8523, H.R. 8530, and H.R. 8702 Before the H. Comm. on Immigr. & Naturalization*, 71st Cong. (1930) [hereinafter 1930 Hearings] (discussing in part H.R. 8523 by Rep. Box).

129. See DIVINE, *supra* note 16, at 54–57; O'BRIEN, *supra* note 16, at 46–50; Reisler, *supra* note 16, at 244–48.

130. See, e.g., 1926 Hearings, *supra* note 128, at 301, 324, 343–44; 1928 Hearings, *supra* note 128, at 6–8, 690–98, 724, 782; 1930 Hearings, *supra* note 128, at 347–51, 368.

131. See, e.g., 1926 Hearings, *supra* note 128, at 190, 329–31, 343; 1928 Hearings, *supra* note 128, at 10, 16, 28, 55, 323–24, 646, 764; 1930 Hearings, *supra* note 128, at 384.

132. See, e.g., 1926 Hearings, *supra* note 128, at 296–97, 301; 1928 Hearings, *supra* note 128, at 42–45, 90–91, 347, 677–80, 702–17, 759–61, 777–78, 780–82, 790–91; 1930 Hearings, *supra* note 128, at 128–29.

133. See *supra* note 125 and accompanying text.

134. 1930 Hearings, *supra* note 128, at 75; see also, e.g., 1928 Hearings, *supra* note 128, at 43 ("Rep. Box: There is another large class of people of Mexico who are sometimes called 'greasers' and other unfriendly names, the great bulk of them are what we ordinarily call 'peons,' and from this class we are getting this great migration. It is a bad racial element, gentlemen, to speak frankly without unkindness."); 1926 Hearings, *supra* note 128, at 111.

135. 69 CONG. REC. 2,462 (1928) (statement of Rep. Robert Green).

“racial problem” to face the United States in its history (the fifth was immigration from Southern and Eastern Europe, newly solved by the Johnson-Reed Act).¹³⁶

The Box Bill’s opponents ultimately defeated it, making the same arguments that had preserved the Western Hemisphere exception in 1924: that Mexican immigration was economically necessary, and that the quota was bad for foreign relations.¹³⁷ The hearings in the House Committee on Immigration and Naturalization featured testimony from numerous farmers and other representatives of the agricultural industry.¹³⁸ These witnesses argued that the agricultural sector needed farm workers from Mexico, and that closing off immigration would create a crushing labor shortage.¹³⁹ The Coolidge Administration also came out strongly against the Box Bill on foreign policy grounds. In 1928, Secretary of State Frank Kellogg testified before the Senate Immigration Committee that the United States’ relationship with Canada and Latin America would be jeopardized by new quotas.¹⁴⁰ These arguments seemed to succeed. The Box Bill was not voted on in 1926 or 1928 by either chamber of Congress.¹⁴¹

In 1930, the political winds shifted towards restriction.¹⁴² That year the Senate passed a modified version of the Box Bill.¹⁴³ While Box’s proposal would have imposed quotas on every Western Hemisphere country, the Senate version only targeted Mexico.¹⁴⁴ Chairman Johnson’s committee quickly approved its own version of this Mexico-only Box Bill, and recommended that the House pass it.¹⁴⁵ Johnson’s report approving the bill echoed the racist language that had characterized the debate for the last four years. He wrote:

136. 1928 Hearings, *supra* note 128, at 707–08, 711–12. Box requested that Laughlin conduct a larger study of Mexican immigration and offered to fund it, but the Carnegie Institution nixed the idea. Hassencahl, *supra* note 82, at 319–20. Box also wrote a letter to Laughlin admitting the Committee was especially focused on ending immigration from Mexico. Letter from John C. Box, Member, House of Representatives Committee on Immigration and Naturalization, to Dr. Harry H. Laughlin (Feb. 16, 1928) (on file with Pickler Memorial Library at Truman State University as Document D-2-3-12) (“Those who favor the legislation are much more interested in restricting immigration from Mexico, South America and the West Indies, and especially from Mexico, than from elsewhere.”).

137. See *supra* Section II.B.

138. See, e.g., 1926 Hearings, *supra* note 128, at 4–113 (statements of S.P. Frisselle, T.A. Sullivan, C.S. Brown, S. Maston Nixon, Fred Cummings, I.D. O’Donnell, C.V. Maddux, and T.W. Tomlinson); 1928 Hearings, *supra* note 128 at 99–101, 160, 187, 191, 253, 388–91, 403–08, 418.

139. See DIVINE, *supra* note 16, at 57–60; HERNÁNDEZ, *supra* note 16, at 134–37; O’BRIEN, *supra* note 16, at 49–50; Reisler, *supra* note 16, at 249–51.

140. *Restriction of Western Hemisphere Immigration: Hearing Before the Senate Comm. on Immigr.*, 70th Cong. 156–62 (1928); see DIVINE, *supra* note 16, at 60–61.

141. DIVINE, *supra* note 16, at 61.

142. This change was likely due to the 1929 crash. See O’BRIEN, *supra* note 16, at 50.

143. See DIVINE, *supra* note 16, at 65; Reisler, *supra* note 16, at 252–53.

144. 72 CONG. REC. 8841–44 (1930).

145. *Restriction of Immigration from the Republic of Mexico*, H.R. REP. NO. 71-1594 (1930).

“Congress, exclusively charged with the great responsibility of protecting the country from the menace of infiltration by alien people whose numbers, economic standards, social and racial qualities threaten serious injury to the country, should meet that responsibility with American welfare as a paramount consideration.”¹⁴⁶ The Hoover Administration came out hard against the bill for foreign policy reasons, and was able to kill it in the House Rules Committee.¹⁴⁷

While the Box Bill never became law, its advocates did achieve their main goal: stopping immigration from Mexico. Starting in 1929, the executive branch dramatically reduced the number of visas for Mexican immigrants. They did this by aggressively interpreting a law excluding immigrants “likely to become a public charge.”¹⁴⁸ Because of this administrative policy change, Mexican immigration declined precipitously starting in 1930.¹⁴⁹ Johnson noted as much in his 1930 report on the Mexico quota bill.¹⁵⁰ The restrictionists ultimately failed to enact a new quota law covering the Western Hemisphere. But, by pressuring the administration to act, they largely succeeded at ending legal Mexican immigration to the United States.¹⁵¹

B. CHAIRMAN JOHNSON AND THE EFFORT TO EXPAND DEPORTATIONS

The restrictionists also pursued a second strategy: deporting the Latin Americans already in the United States. While there was no numerical limit on immigration from Latin America, an immigrant could still be deported if they did not pay the \$18 entrance tax and pass a literacy test.¹⁵² Many Latin Americans entered the United States without meeting these requirements, and were thus deportable notwithstanding the lack of a quota.¹⁵³ Recognizing this, Johnson and the other restrictionists sought to expand deportations as a way of removing Latin American immigrants.

146. *Id.* at 2.

147. Reisler, *supra* note 16, at 252; DIVINE, *supra* note 16, at 66.

148. DIVINE, *supra* note 16, at 62; Natalia Molina, “*In a Race All Their Own*”: *The Quest to Make Mexicans Ineligible for U.S. Citizenship*, 79 PAC. HIST. REV. 167, 188–89 (2010); Reisler, *supra* note 16, at 253–54.

149. ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939, at 32–33 (1974).

150. H.R. REP. NO. 71-1594, at 2 (“[B]eginning some 10 or 12 months ago, the State Department has been engaged in a more vigorous effort to enforce certain provisions of the immigration laws, which efforts have doubtless helped materially to restrict this immigration.”).

151. The Roosevelt Administration relaxed these restrictions somewhat in 1933, much to restrictionists’ chagrin. See LAUGHLIN, *supra* note 104, at 2.

152. Ngai, *supra* note 106, at 84–86.

153. O’BRIEN, *supra* note 16, at 42–43; HOFFMAN, *supra* note 149, at 30–31; HERNÁNDEZ, *supra* note 16, at 138.

These efforts were motivated by eugenic racism. Expert Eugenics Agent Harry Laughlin made that connection explicit when he testified in 1928 on the “eugenical aspects of deportation.”¹⁵⁴ During this testimony he concluded:

Deportation is the last line of defense. If we do not deport the undesirable individual, we can not get rid of his blood[] no matter how inferior it may be, because we can not deport his offspring born here. A child born here, regardless of race or degeneracy, is a citizen of the United States and is eligible to the Presidency, so far as birth and citizenship are concerned.¹⁵⁵

Laughlin also proposed creating a national registry of aliens, so that the undesirable ones could be more easily found and deported.¹⁵⁶ After Laughlin had finished this testimony, Chairman Johnson thanked him and concluded: “Immigration looks more and more like a biological problem, and if the work of this committee results in establishing this principle in our immigration policy we will be well repaid for our efforts.”¹⁵⁷ He was not keeping his motivations secret.

One of Johnson’s major goals was to repeal statutes of limitations for deportation. These placed significant restrictions on the government’s power to remove people. Under then-existing law, the government only had a limited number of years to deport certain categories of immigrants.¹⁵⁸ For example, it had three years to find and deport a person who had entered the United States without being approved by immigration agents.¹⁵⁹ As Laughlin observed in his testimony, these statutes of limitations prevented the government from deporting many eugenically undesirable immigrants.¹⁶⁰ To

154. *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immigr. and Naturalization*, 70th Cong. (1928) (statement of Harry H. Laughlin) (arguing that eugenics and sterilization of “undesirable individuals” would assist in regulating then-current immigration issues).

155. *Id.* at 45.

156. *Id.* at 20–22, 38; see also *Biological Aspects of Immigr.*, *supra* note 98, at 7 (arguing that aliens affiliated with the Communist party are to be deported, irrespective of time or method of entry into the United States).

157. *The Eugenical Aspects of Deportation*, *supra* note 154, at 46. Immediately before Johnson thanked him, Laughlin said this:

Immigration can be made to improve the quality of the American people, but if the present standard is not raised and rigidly enforced, and if the aliens of degenerate or inferior stock who are found within our borders, especially those who will become the parents of future Americans, are not deported, then, depending on the number of such cases, immigration will tend to work not toward the improvement but toward the degeneration of the American people.

Id.

158. See H.R. REP. NO. 70-484, at 3–4 (1928).

159. *Id.* at 4.

160. *The Eugenical Aspects of Deportation*, *supra* note 154, at 5 (reporting a study conducted of foreign-born inmates, claiming that 95 percent of them were not deportable, and that for 45 percent of them it was because the statute of limitations had run).

remedy this problem, Johnson proposed a bill that would expand the government's deportation powers. The Johnson Bill included a variety of different provisions that loosened statutes of limitations, expanded categories of deportability, and more.¹⁶¹ Notably, it ended the three-year statute of limitations for people who entered the United States without authorization.¹⁶² This would have empowered the government to deport anyone from Latin America who came across the border without permission, no matter how long they had lived in the United States. The Johnson Bill also contained a new provision making it a misdemeanor punishable by up to a year in custody to enter the United States illegally.¹⁶³

Johnson successfully had this Bill reported out of the House Committee on Immigration and Naturalization in 1925, 1926, and 1928.¹⁶⁴ During the floor debate in the House in 1926, Congressman Adolph Sabath presented statistics making it clear that Mexicans were by far the largest group of deportees.¹⁶⁵ Congressman Box then argued that the deportation laws needed to be applied more forcefully against immigrants from Mexico, and that the Johnson Bill would be a step in the right direction.¹⁶⁶ Another Congressman, Noble Johnson, defended the law in nationalist terms: "If we allow the undesirable aliens who are smuggled into our country to stay here, we sound the death knell of our national existence."¹⁶⁷ Opposition to the Johnson Bill focused on the harshness of its provisions, especially the one removing the three-year statute of limitations, as well as on the harm caused by deporting vulnerable immigrants.¹⁶⁸ The Johnson Bill was not ultimately

161. H.R. REP. NO. 70-484, at 2-21.

162. *Id.* at 3-4.

163. *Id.* at 20, 27.

164. DEPORTATION OF ALIENS: REPORT TO ACCOMPANY H.R. 11796, H.R. REP. NO. 68-1292 (1925); DEPORTATION OF ALIENS: REPORT TO ACCOMPANY H.R. 12444, H.R. REP. NO. 69-1348 (1926); *see also* H.R. REP. NO. 70-484, at 3-4.

165. 67 CONG. REC. H10863-65 (daily ed. June 7, 1926) (statement of Rep. Sabath) (showing that 1,751 Mexicans were deported in 1925, and that 346 of them were deported for entering without inspection—both were by far the highest numbers of any nationality).

166. *Id.* at H10865-67 (statement of Rep. Box) ("We already have many more aliens whose deportation the law requires than we are deporting. The department's estimate, based on general surveys, is that there are now approximately 1,300,000 aliens in the United States whom the law would require to be deported but for the fact that limitation statutes have barred the deportation of many of them."). Box was particularly incensed about a program in Imperial Valley, California permitting Mexicans to cross and find work without paying the head tax. *Id.*

167. *Id.* at H10875 (statement of Rep. Johnson).

168. *Johnson Alien Bill Vigorously Opposed; Four Representatives Object That Its Deportation Provisions Are Too Drastic*, N.Y. TIMES, Mar. 9, 1928, at 4 ("The members named feel that the provisions of the bill are too drastic and would be likely to operate unjustly in many instances."); H.R. REP. NO. 70-484, at 2; 67 CONG. REC. H10862-63 (daily ed. June 7, 1926) (statement of Rep. Sabath).

enacted into law. The House of Representatives did pass it in 1926 and 1928, but it was not approved by the Senate.¹⁶⁹

The restrictionists also focused their energy on building up the government's administrative capacity to deport people. The Border Patrol was created in 1925, shortly after the enactment of the Johnson-Reed Act, and tasked with policing the U.S./Mexico border.¹⁷⁰ It started as a small agency with only 45 agents, but its budget and size grew over the 1920s.¹⁷¹ The Department of Labor also significantly expanded the number of deportations it conducted in the 1920s. In 1925 it expelled 1,751 Mexican immigrants, and in 1929 that number was over 15,000.¹⁷² The restrictionists in the House Committee took a keen interest in ensuring that both the Border Patrol and the Labor Department had adequate resources to conduct these expulsions. They held numerous hearings between 1926 and 1930 at which representatives of those agencies testified about the need for more funding.¹⁷³ Congressman Box proposed legislation to expand funding for the Border Patrol, and pushed for more deportation funding on the floor of the House.¹⁷⁴ Once the 1930s began, the government's expulsion machinery kicked into overdrive. It conducted a massive repatriation campaign against Mexican immigrants that resulted in hundreds of thousands of people (by some estimates over a million) being expelled, many of them U.S. citizens of Mexican descent.¹⁷⁵

169. H.R. REP. NO. 70-484, at 1; 70 CONG. REC. H3542 (daily ed. Feb. 15, 1929) (statement of Rep. Johnson).

170. HOFFMAN, *supra* note 149, at 31.

171. WEPMAN, *supra* note 69, at 247; HOFFMAN, *supra* note 149, at 31; KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* 32-33 (2010).

172. NGAI, *supra* note 16, at 67; *see also* Ngai, *supra* note 64, at 90 ("The number of Mexicans deported formally under warrant rose from 846 in 1920 to 8,438 in 1930. In addition, some 13,000 Mexicans a year were expelled as 'voluntary departures' in the late 1920s and early 1930s.")

173. *See, e.g., Proposed Deportation Act of 1926: Hearings Before the H. Comm. on Immigr. and Naturalization*, 69th Cong. 10-20 (1926) (statement of Hon. Harry D. Hull); *Lack of Funds for Deportations: Hearings on H.R. 3, H.R. 5673, H.R. 6069 Before the H. Comm. on Immigr. and Naturalization*, 70th Cong. (1928); *Salaries in the Immigration Service: Hearings Before a H. Subcomm. on the Comm. on Immigr. and Naturalization on Proposed Bills to Fix Pay Scales*, 70th Cong. (1928); *Immigration Border Patrol: Hearings Before the H. Comm. on Immigr. and Naturalization H.R.*, 70th Cong. (1928) (statement of Grover C. Wilmuth, District Director of Immigration, El Paso, Tex.).

174. A Bill to increase the immigration border patrol for the purpose of enforcing the immigration laws on and adjacent to the boundary between the United States and the Republic of Mexico, and elsewhere, H.R. 11687, 70th Cong. (1928); 67 CONG. REC. 10,865 (1926) (statement of Rep. Box) ("[J]ust as 1,000,000 out of 1,300,000 [total deportable immigrants] have escaped deportation through lack of funds, lack of force, the failure to enforce the law, and statutes of limitation, so only a small minority of the 250,000 or 300,000 [deportable immigrants since 1921] whose deportation is not barred will be sent out of the country. Most of the 1,300,000 mentioned were smuggled in.")

175. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 119-57 (rev. ed. 2006); Ngai, *supra* note 64, at 91; HOFFMAN, *supra* note 149, at 83-86, 100, 116-27. This campaign could be described as ethnic cleansing,

C. CONGRESSIONAL PUBLICATIONS ON EUGENICS AND LATIN AMERICANS'
RACIAL CHARACTERISTICS

Eugenicists considered Latin Americans uniquely inferior because of their mixed racial heritage. This belief was widespread in American intellectual culture in the 1920s.¹⁷⁶ Madison Grant himself asserted it in *The Passing of the Great Race*:

What the Melting Pot actually does in practice can be seen in Mexico, where the absorption of the blood of the original Spanish conquerors by the native Indian population has produced the racial mixture which we call Mexican and which is now engaged in demonstrating its incapacity for self-government. The world has seen many such mixtures and the character of a mongrel race is only just beginning to be understood at its true value.¹⁷⁷

Such eugenic racism was a major theme of the congressional debates over Latin American immigration between 1925 and 1929. To understand the role this ideology played, it will be helpful to review in more detail the claims eugenicists made about people from Latin America. Two government-issued publications are especially illuminating. The first is a 1925 report by Robert Foerster, a professor of economics at Princeton, entitled *The Racial Problems Involved in Immigration from Latin America and the West Indies to the United States*.¹⁷⁸ The second is a 1928 report by Harry Laughlin, the House Committee's Expert Eugenics Agent, entitled *Six Major Racial Problems in American History*.¹⁷⁹

Foerster originally wrote his report for the Department of Labor, at the request of Secretary of Labor James Davis.¹⁸⁰ Chairman Johnson liked it so much that he held a hearing on the report in March 1925, and published it as part of the Committee's official record.¹⁸¹ In his comments introducing

especially in light of the government's embrace of racial eugenics. See Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 6 (2005).

176. See Reisler, *supra* note 16, at 242–48; DIVINE, *supra* note 16, at 61–62.

177. GRANT, *supra* note 43, at 17.

178. ROBERT F. FOERSTER, THE RACIAL PROBLEMS INVOLVED IN IMMIGRATION FROM LATIN AMERICA AND THE WEST INDIES TO THE UNITED STATES, in *Immigration from Latin America, the West Indies, and Canada: Hearings Before the H. Comm. on Immigr. and Naturalization*, 68th Cong. 303–38 (1925).

179. HARRY H. LAUGHLIN, SIX MAJOR RACIAL PROBLEMS IN AMERICAN HISTORY, in *Immigration from Countries of the Western Hemisphere: Hearings on H.R. 6465, H.R. 7358, H.R. 10955, H.R. 11687 Before the H. Comm. On Immigr. and Naturalization*, 70th Cong. 702–22 (1928).

180. FOERSTER, *supra* note 178, at 303.

181. *Id.*

Foerster's work, Johnson noted that he believed it "worthy of incorporation in the permanent records of the committee" and that it contained "some very illuminating matter which members probably will desire to study."¹⁸²

Foerster framed his report as an inquiry into the effects of the "recent rapidly rising tide of immigration into the United States from the southern lands of this hemisphere," including "whether the new additions to the race stock of the United States can be regarded as beneficial or as detrimental."¹⁸³ He came down strongly on the side of "detrimental." The report begins with a lengthy breakdown of the racial demographics in Mexico and every Central and South American country.¹⁸⁴ The main point of this survey is that Latin Americans are overwhelmingly of mixed Spanish and indigenous heritage, with some African ancestry as well. He writes about Mexico, for example: "It is doubtful whether the people of exclusively white origin are more than 10 per cent of all the people. . . . [T]he full-blooded Indians and those of mixed stocks—quite as much Indian as they are white—together amount to approximately nine-tenths of the entire nation."¹⁸⁵

After this survey of racial topography, Foerster proceeds to evaluate the eugenic quality of Latin America's racial groups.¹⁸⁶ About the "Indians," he observes that they once built great civilizations, but have now fallen into weakness and poverty.¹⁸⁷ He then concludes that they are not up to the standards of white civilization:

It will henceforth be the view of this report that the Indian races, so far as can be known to-day, provide a less valuable stock for the responsibilities of citizenship in a civilization maintained by European white stocks than such white stocks themselves provide. At the best they can be described as competent within limits to abide by such a civilization but as apparently almost never competent to advance and even to sustain such a civilization.¹⁸⁸

About the white people of Latin America, he asserts that they are mostly of the "Mediterranean" and "Alpine" types (namely Spanish and Portuguese), and not of the "Nordic" type (British and German) that eugenicists considered superior.¹⁸⁹ About people of African ancestry he is overwhelmingly negative: "None other of the great primary races of mankind has had so slender a history of achievement They have had civilizations, yet have made but little mark on the general problems, political and technical,

182. *Id.*

183. *Id.* at 304.

184. *Id.* at 306–27.

185. *Id.* at 307.

186. *Id.* at 327–29.

187. *Id.* at 327–28.

188. *Id.* at 328.

189. *Id.* at 328–29.

which are found at the center of the civilization of the white races.”¹⁹⁰ These assertions made, Foerster goes on to argue that Latin America has more racial intermixing than any other place on earth.¹⁹¹ He believes that the superior white racial stock has become degraded by this mixing:

By far the most usual generalization concerning hybrids produced by the union of distant stocks is that they tend to be superior to the poorer strain and inferior to the better strain. The Mexican mestizo, for example, is deemed more capable than the Indian but less capable than the pure Spanish, and the mulatto is deemed more capable than the negro but less capable than the white. . . . [T]he observation accords precisely with the implications of Mendelian heredity¹⁹²

He goes on to conclude: “Where a race is in a position to maintain its purity, it is best that it should not breed with what appears to be an inferior or distant race.”¹⁹³

Foerster ends his report by applying these insights about racial hierarchy and racial mixing to the specific issue of Latin American immigration. He observes that immigration from Latin America has increased dramatically, particularly from Mexico. He blames the Johnson-Reed Act for this development.¹⁹⁴ By excluding low-wage workers from Europe, the quota system ensures that workers from Mexico and other Latin America countries will come to meet businesses’ demand for labor.¹⁹⁵ Foerster claims that this was a terrible decision, because it replaced white European immigrants with mixed-race Latin American ones. And the former are more racially desirable than the latter. He writes:

In its simplest terms, then, the question of Latin American immigration may be stated thus: Are the race elements involved therein such as this country should to-day welcome into its race stock?

To this question the answer is bound to be negative. When every allowance is made for the fact that some pure Indian strains and some pure negro strains may be better than other Indian or negro strains and when the most favorable judgment on the mixed strains, mulatto and mestizo, is given of which they are capable, it still apparently remains true that one or another of these groups merely approaches but does not attain the race value of the white stocks,

190. *Id.* at 329.

191. *Id.* at 329–31.

192. *Id.* at 330–31.

193. *Id.* at 331.

194. *Id.* at 333–34.

195. *Id.*

and therefore that the immigrants from these countries tend to lower the average of the race value of the white population of the United States.¹⁹⁶

He concludes by arguing for an increase of immigration from Europe, and for a total prohibition on immigration from Latin America.¹⁹⁷

Laughlin's 1928 testimony echoed the themes of Foerster's 1925 report. Laughlin appeared at a hearing in the House Committee concerning the Box Bill, as well as a bill to increase the size of the Border Patrol.¹⁹⁸ He later corresponded with Chairman Johnson about having his remarks published by the Committee as an independent volume, which Johnson agreed to do.¹⁹⁹ Laughlin's topic was "the eugenic aspects of Mexican immigration in the light of American history."²⁰⁰ As a framing device, he claimed that the rise of immigration from Mexico was the most recent in a list of six historical "race problems" that the United States had faced.²⁰¹ The prior five race problems were, in order: "The White Colonists and the Indians," "The Conflict Between the British and the French, Dutch, and Spanish Colonists," "Negro Slavery," "Oriental Migration," and "The Change in American Immigration Sources from North-Western to Southern and Eastern Europe."²⁰²

Laughlin argued that the immigration of Mexicans posed an existential racial threat to white Americans. He was especially concerned with what he called racial "hybrids." He stated that when people of different races reproduce, "[t]he hybrids resulting from such wide crosses are not assimilated into either of the parent stocks, but they establish new and highly variable and unstable races."²⁰³ He claimed that white Americans could only preserve their "best qualities" if they reproduced exclusively with fellow whites, and avoided creating such hybrids.²⁰⁴ Laughlin further believed that men of mixed racial heritage posed a unique threat to white racial purity, because white women might mate with them: "[I]f the time ever comes when men with a small fraction of colored blood could readily find mates among the white women, the gates would be thrown open to a final radical race mixture of the whole population. The racial integrity of the white races would be jeopardized."²⁰⁵

196. *Id.* at 335.

197. *Id.* at 336–38.

198. 1928 Hearings, *supra* note 128, at 93, 702–22.

199. Letter from Albert Johnson, Chairman, House of Representatives Committee on Immigration and Naturalization, to Dr. H. H. Laughlin, Eugenics Record Office (May 9, 1932) (on file with Pickler Memorial Library at Truman State University as Document C-4-6-2).

200. LAUGHLIN, *supra* note 179, at 702.

201. *Id.*

202. *Id.* at 702–08.

203. *Id.* at 708.

204. *Id.* at 708–09.

205. *Id.* at 709. He concluded: "The perpetuity of the American race and consequently of American institutions depends upon the virtue and fecundity of American women." *Id.*

In this regard, Laughlin warned specifically against immigration of mixed-race people from Mexico. “The common Mexican, of course, is, as we know him, of mixed racial descent—principally Indian and Spanish, with occasionally a little mixture of black blood.”²⁰⁶ He observed that “the racial problem has become acute in the Southwest,” because “during the last few years [the Mexican] has come here in such great numbers as almost to reverse the essential consequences of the Mexican War.”²⁰⁷ He concluded that “[t]he peopling of this region with American citizens is the great problem which seems uppermost to the student of American history, when he views it in long-time terms.”²⁰⁸ And further:

Put the problem up to the average American on the street, and ask him whether it is better to bring in an immigrant simply because he can be employed cheaply, or whether it is better to wait and to take only those who are sound human seed stock, those whose children will be assets to the future American population, who can acquire an education if opportunity be offered, and whose individual intelligence and instincts are such that his present addition to the American population will raise the average of existing American talent rather than bring it down, and the good citizen will call for good seed stock of our own racial type.²⁰⁹

Laughlin ended his testimony by proposing a bill that would restrict immigration to the United States exclusively to “white persons,” and that defined a “white person” as “one all of whose ancestors are of Caucasian stocks.”²¹⁰ Congressman Clarence MacGregor pushed back on this proposal, pointing out that existing law prevented non-whites from immigrating because they were ineligible to naturalize as citizens.²¹¹ While this was true, the law did not exclude Mexicans because the Treaty of Guadalupe-Hidalgo guaranteed their right to naturalize.²¹² Thus immigration law effectively treated Mexican immigrants as white, notwithstanding eugenicists’ arguments that they were not.²¹³ “Mexican” was, however, becoming a distinct racial category in American public discourse.²¹⁴ For example, in 1930 the census included “Mexican” as a race option for the only time in American history.²¹⁵ Once the Committee had finished discussing Laughlin’s proposal, Chairman

206. *Id.* at 711.

207. *Id.*

208. *Id.* at 712.

209. *Id.*

210. *Id.* at 714.

211. *Id.* at 715–16.

212. NGAI, *supra* note 16, at 53–55; *In re Rodriguez*, 81 F. 337, 350–51 (W.D. Tex. 1897).

213. NGAI, *supra* note 16, at 54.

214. Ngai, *supra* note 64, at 70–71; Molina, *supra* note 148, at 168.

215. LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* 151–52 (2020).

Johnson concluded by stating: “The task of our committee is to prepare proposed statutes which will develop the American people along the racial and institutional lines laid down by the founders of the country, so far as the control of immigration can do it.”²¹⁶

IV. THE UNDESIRABLE ALIENS ACT OF 1929

In 1929, the Secretary of Labor and a Senator from South Carolina collaborated to pass the first significant restrictionist law since the Johnson-Reed Act. Secretary of Labor James Davis drafted two proposed bills, one creating a system of immigrant registration cards and the other making it a felony to reenter the United States after being deported. Senator Coleman Livingston Blease then introduced them and pushed them through the Senate. Together these bills represented a new strategy for fighting Mexican immigration, one based on surveillance and criminal prosecution. They would have enabled the government to demand people’s immigration cards and then prosecute those caught here after being deported. The bill criminalizing unlawful reentry, herein called the Blease/Davis Bill, was taken up by the House of Representatives and incorporated into a new version of the Johnson Bill. The subsequent debate on the floor of the House made the point of this Bill very clear: it was intended to combat Mexican immigration because of Mexicans’ perceived racial characteristics. The Blease/Davis Bill was enacted into law, alongside the provision of the Johnson Bill making it a misdemeanor to enter the United States without permission, as the Undesirable Aliens Act of 1929. This new law was then immediately used to prosecute Latin American immigrants. The crimes it created are still being prosecuted today.

A. SENATOR BLEASE AND SECRETARY DAVIS’S PROPOSALS

Coleman Livingston Blease was a Democratic Senator from South Carolina. He served two terms as the state’s governor from 1911 to 1915, and a single term in the Senate from 1925 to 1931.²¹⁷ Anti-black racism was a defining theme of his political career.²¹⁸ He was an enthusiastic proponent of lynching black men accused of crimes against white women.²¹⁹ In 1926 he offered pro

216. LAUGHLIN, *supra* note 179, at 717.

217. Daniel W. Hollis, *Cole Blease: The Years Between the Governorship and the Senate, 1915-1924*, 80 S.C. HIST. MAG. 1, 1 (1979).

218. Anthony Barry Miller, *Coleman Livingston Blease, South Carolina Politician 57-60*, 183 (1971) (Master’s Thesis, University of North Carolina at Greensboro), https://libres.uncg.edu/ir/uncg/f/miller_anthony_1971.pdf [<https://perma.cc/U7WN-PJHG>]; Ronald Burnside, *The Governorship of Coleman Livingston Blease of South Carolina, 1911-1915*, at 74-82 (1963) (Ph.D. Dissertation, Indiana University, 1963); HERNÁNDEZ, *supra* note 16, at 137-38.

219. Hollis, *supra* note 217, at 2; Miller, *supra* note 218, at 57 (“For Blease, only one crime justified lynching: the rape of a white woman by a Negro. . . . In fact he claimed he would lead such a mob himself if the opportunity arose.”).

bono legal services to a county being sued by the heirs of three lynched black men.²²⁰ At a national governor's conference he was asked if his advocacy of lynching violated his state's constitution, and he replied:

Whenever the constitution of my state steps between me and the defense of the virtue of the white woman, I will resign my commission, tear it up, and throw it to the breezes and march to the defense of her honor and virtue. If the [C]onstitution causes my state to blush and allows her women to be forsaken, then I say to hell with the [C]onstitution!²²¹

Blease was no better as Senator. In 1928 he proposed a constitutional amendment that would criminalize interracial marriages.²²² In 1929 First Lady Lou Hoover hosted Jessie DePriest, the wife of a black congressman, at a traditional White House tea for congressional wives. Blease protested by introducing a resolution containing a poem entitled "N[*****] in the White House," which was then read on the floor of the Senate.²²³ The resolution was only withdrawn because a senator from Connecticut objected.²²⁴

Blease served on the Senate Committee on Immigration, and his position on immigration was somewhat extreme. He did not believe that there should be any immigration to the United States at all, from any country.²²⁵ In a debate over the Box Bill, he declared: "[s]o far as I am concerned, I believe in keeping the doors shut against all immigration, in keeping them all out, no matter whether they are good or bad."²²⁶ Blease also seemed to harbor animosity towards Mexican immigrants. In 1929, echoing the DePriest incident, he had a poem read into the record about Mexicans' resistance to Christianity.²²⁷ In a 1928 committee hearing on the Box Bill, he stated that

220. *Blease in Lynching Fight*, N.Y. TIMES, Nov. 18, 1926, at 2, <https://www.nytimes.com/1926/11/18/archives/blease-in-lynching-fight-senator-offers-services-to-oppose-damage.html> [<https://perma.cc/Y9P5-9Y73>].

221. Miller, *supra* note 218, at 59–60.

222. Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 630 (2004) (noting that Blease's proposal went further than other proposals of the time, because it required Congress to punish both the married couple and the person who performed the wedding).

223. J. MICHAEL MARTINEZ, CONGRESSIONAL PATHFINDERS: "FIRST" MEMBERS OF CONGRESS AND HOW THEY SHAPED AMERICAN HISTORY 48 (2021). The poem is somehow even worse than its title suggests.

224. *Blease Poetry is Expunged from Record*, AFRO-AM., June 22, 1929, at 1 ("In withdrawing the resolution, Blease declared that he did so because it gave offense to his friend, Senator Bingham and not because it might give any offense to the Negro race.").

225. 72 CONG. REC. 7,210 (1930) (statement of Sen. Coleman Blease) ("My position, of course, is well known. It is needless for me to repeat it. I am opposed to all foreign labor. I think there are too many foreigners in this country now. If the Federal and State departments would turn out every foreigner that is working in them, and have Government and State work done by home people, and send these foreigners back home, we would have very little unemployment.").

226. *Id.* at 7,513.

227. 71 CONG. REC. 1,722 (1929) (presenting the "Mexico" poem).

Mexicans are “[p]eaceable only in our own country; that is the reason I want them kept out. They know when they get over here they have got to behave or we will kill them.”²²⁸

James Davis was more of a genteel racist. He was an immigrant from Wales and served as Secretary of Labor from 1921 to 1930, working under the Harding, Coolidge, and Hoover administrations.²²⁹ The Labor Department was responsible for administering immigration laws in the 1920s, so Davis was the chief immigration policymaker in the executive branch. He was an arch-restrictionist and believed strongly in racial eugenics.²³⁰ Davis was a major proponent of the Johnson-Reed Act. When President Coolidge signed the law, “Davis declared . . . ‘history will record it as one of the greatest acts of your administration.’”²³¹ He supported Johnson and Box’s efforts to include Mexico in the quota system.²³² Davis solicited Robert Foerster’s 1925 report on the eugenics of Mexican immigration, discussed in Section II.C.²³³ He also, at Johnson’s request, hired Harry Laughlin to serve as “special immigration agent” of the Labor Department in Europe.²³⁴

Davis wrote two books that helpfully lay out his views on race and immigration. One was an autobiography titled *The Iron Puddler*.²³⁵ In it he uses some vivid metaphors. For example, he labels different races as beavers and rats:

228. *Restriction of Western Hemisphere Immigration: Hearings on S. 1296, S. 1437, S. 3019 Before the S. Comm. on Immigr.*, 70th Cong. 25 (1928).

229. John Bruce Dudley, James J. Davis: Secretary of Labor Under Three Presidents 1921-1930 (Nov. 1971) (Ph.D. dissertation, Ball State University) (ProQuest).

230. HIGHAM, *supra* note 16, at 318–19; KING, *supra* note 16, at 205–06.

231. KING, *supra* note 16, at 206.

232. Allerfeldt, *supra* note 69, at 17; Molina, *supra* note 148, at 181–82; 66 CONG. REC. 1,366 (1925) (statement of James Davis) (“By failing to impose a quota upon these countries we are in the position of barring the front door to America while we leave the back door wide open.”).

233. FOERSTER, *supra* note 178, at 303.

234. Letter from H. H. Laughlin to Albert Johnson, Chairman, House of Representatives Committee on Immigration and Naturalization (July 30, 1930) (on file with Pickler Memorial Library at Truman State University as Document C-4-1-6) (requesting appointment to help with field investigations); Letter from H. H. Laughlin to James J. Davis, Secretary of Labor (July 30, 1930) (on file with Pickler Memorial Library at Truman State University as Document C-4-1-6) (requesting appointment to help with field investigations); Letter from H. H. Laughlin to Albert Johnson, Chairman, House of Representatives Committee on Immigration and Naturalization (Aug. 7, 1930) (on file with Pickler Memorial Library at Truman State University as Document C-4-1-6) (requesting appointment to help with field investigations); Telegraph from Albert Johnson to Dr. H. H. Laughlin (Aug. 8, 1930) (on file with Pickler Memorial Library at Truman State University as Document C-4-1-6) (indicating that he had wired Davis about request); Telegraph from Albert Johnson to Dr. Laughlin (Aug. 13, 1930) (on file with Pickler Memorial Library at Truman State University as Document C-4-1-6) (stating that Laughlin is appointed “special immigration agent to Europe”).

235. JAMES J. DAVIS, *THE IRON PUDDLER: MY LIFE IN THE ROLLING MILLS AND WHAT CAME OF IT* (1922).

Some men are by nature beavers, and some are rats; yet they all belong to the human race. The people that came to this country in the early days were of the beaver type and they built up America because it was in their nature to build. Then the rat-people began coming here, to house under the roof that others built. . . .

A civilization rises when the beaver-men outnumber the rat-men. When the rat-men get the upper hand the civilization falls. Then the rats turn and eat one another and that is the end. Beware of breeding rats in America.²³⁶

Davis also compares racially undesirable immigrants to swine. He claims “that racial characteristics do not change,” and that “[t]ribes that have swinish traits were destroyers there and will be destroyers here.”²³⁷ He refers to “[h]ottentots and [b]ushman” (by which he probably means all Africans) as “pig-iron,” because “[t]hey break at a blow. They have been smelted out of wild animalism, but they went no further; they are of no use in this modern world because they are brittle.”²³⁸ He claims that the Chinese are too stupid to make use of their natural resources without white help.²³⁹ He also describes, in some detail, how much he loves wearing blackface and performing in minstrel shows.²⁴⁰ The other book by Davis is *Selective Immigration*, which focuses on race and immigration policy.²⁴¹ In it he praises the new “biological attitude” towards immigration policy, and in particular the work of Johnson and Laughlin in applying eugenic principles to the 1924 Johnson-Reed Act.²⁴² He also criticizes the exemption of Mexico from the quotas, noting that under the new system “nearly sixty-five thousand Mexicans entered this country in one year, bringing into American communities lower standards of living.”²⁴³

In 1929, Davis and Blease collaborated on a pair of legislative proposals. Both were prepared by Davis, and Blease sponsored them both in the Senate at the same time.²⁴⁴ S.5093 (the Registration Bill) authorized the creation of certificates of admission for immigrants, while S.5094 (the Blease/Davis Bill) criminalized unlawful reentry after deportation.²⁴⁵

236. *Id.* at 61.

237. *Id.* at 28.

238. *Id.* at 97–98.

239. *See id.* at 93–94.

240. *See id.* at 68–72.

241. JAMES J. DAVIS, *SELECTIVE IMMIGRATION* (1925).

242. *Id.* at 29–34.

243. *Id.* at 207–08.

244. *See* 70 CONG. REC. 2,091–92 (1929) (statement of Sen. Blease).

245. *Id.*

The Registration Bill would permit the Secretary of Labor to issue registration cards to immigrants who were lawfully in the country.²⁴⁶ These cards would bear the immigrant's photograph, as well as their "[f]ull name . . . ; country of birth; date of birth; nationality; color of eyes; . . . and date [and location] of admission."²⁴⁷ The Bill provided that presentation of this card would be "prima facie evidence of the lawful admission of such alien."²⁴⁸ Davis explained the purpose of this law in *Selective Immigration*. In a chapter titled "Bootlegging in Orientals," he complained that Chinese immigrants were being smuggled into the United States, and that after they arrived here there was no way to determine if they came legally.²⁴⁹ As a solution, he proposed that every Chinese immigrant should be made to register with the government and receive an ID card.²⁵⁰ If such cards were widely used, the authorities could stop any Chinese person and check to see if they were lawfully in the country: "Lacking this card, the person would be subject to inquiry as to when and how he came. If it were proved that he came in accord with the law, he could then be registered and given his credentials. If it were not proved, he would be subject to deportation."²⁵¹ Davis's book was published just as the Johnson-Reed Act was enacted.²⁵² Mexican immigration increased dramatically between the book's publication and 1929, so that now it made sense to direct this proposal against Mexicans. Other restrictionists, like Congressman Robert Green, had advocated it for exactly that purpose.²⁵³ There was significant opposition to this registration proposal in the 1920s, especially among the American Jewish community, because it was perceived as authoritarian.²⁵⁴

The Blease/Davis Bill created a new crime: the felony of unlawful reentry after deportation. It provided a sentence of up to two years in prison for any alien who reentered the United States after being deported.²⁵⁵ It also instructed that once a defendant is convicted, the clerk of the court must

246. TO AUTHORIZE THE ISSUANCE OF CERTIFICATES OF ADMISSION TO ALIENS, AND FOR OTHER PURPOSES, REPORT TO ACCOMPANY S.5093, S. REP. NO. 70-1455 (1929).

247. 70 CONG. REC. 2,092 (recording no objection to bill S.5093).

248. *Id.*

249. DAVIS, *supra* note 241, at 69-74.

250. *Id.* at 70.

251. *Id.* at 73.

252. *Id.* at 221 ("The Act of 1924 referred to in this appendix went into effect after the foregoing chapters were prepared.")

253. 69 CONG. REC. 2,462 (1928) (Rep. Robert Green stating that "in [his] opinion all aliens . . . should be compelled to register upon entering the United States and should be compelled to carry on their person such certificate of registration.")

254. Ngai, *supra* note 64, at 80; *see, e.g., Senate Committee Reports Favorably on Voluntary Alien Registration Bill*, JEWISH DAILY BULL., Jan. 22, 1929, at 2, http://pdfs.jta.org/1929/1929-01-22_1273.pdf [<https://perma.cc/486C-9J5H>]; 72 CONG. REC. 8,404-05 (1930) (noting opposition of the Jewish Republican Club and the National Council of Jewish Women to the registration law).

255. MAKING IT A FELONY WITH PENALTY FOR CERTAIN ALIENS TO ENTER THE UNITED STATES OF AMERICA UNDER CERTAIN CONDITIONS IN VIOLATION OF LAW, S. REP. NO. 70-1456 (1929).

notify the Department of Labor and the marshal's service so that the defendant is detained and deported.²⁵⁶ Criminalization was a novel approach to immigration enforcement in 1929. The report accompanying the bill noted that, aside from a 1919 law that applied to anarchists, there was no federal law criminalizing immigration.²⁵⁷ The Eighth Circuit Court of Appeals observed as much in a 1925 decision: "It has never been the policy of the Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation has been the remedy."²⁵⁸

These two bills were intended to work in concert. They would allow law enforcement authorities to approach Latin American people and demand to see an immigrant registration card. Those without one could be arrested and deported. Those with previous deportations could be arrested, prosecuted, imprisoned, and then deported. This represented a third strategy to implement Congress's racial immigration preferences. The Box Bill was designed to cut off legal immigration.²⁵⁹ The Johnson Bill and the efforts to grow the Border Patrol were designed to facilitate deportation.²⁶⁰ Now the Blease/Davis Bill and the Registration Bill would use police surveillance and criminal prosecution to expel Latin Americans living in the United States.²⁶¹ As one newspaper observed, commenting on the proposed bills: "Police officials will undoubtedly get into the habit of asking aliens to produce their certificates, and upon their inability to do so will probably run the risk of arrest."²⁶²

B. THE LEGISLATIVE HISTORY OF THE UNDESIRABLE ALIENS ACT

The debate over the Blease/Davis Bill in the House of Representatives, as well as post-enactment commentary by Senator Blease, make it clear that the law was targeted specifically at Latin American immigrants.

Senator Blease presented his two bills to the Senate on January 23, 1929, after they had been unanimously approved by the Senate Committee on Immigration.²⁶³ He asked that they be considered immediately, and the presiding officer replied, "I shall have no objection, provided they lead to no debate."²⁶⁴ The bills were then passed on a voice vote with no debate.²⁶⁵

256. 70 CONG. REC. 2,092 (1929) (accompanying S. 5094).

257. S. REP. NO. 70-1456.

258. *Flora v. Rustad*, 8 F.2d 335, 337 (8th Cir. 1925).

259. See *supra* Section II.A.

260. See *supra* Section II.B.

261. As Eisha Jain observes, this interior policing strategy has today become the dominant approach to American immigration enforcement. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019) (explaining that deportation is a small fraction of immigration enforcement compared to interior enforcement policy).

262. JEWISH DAILY BULL., *supra* note 254, at 2.

263. 70 CONG. REC. 2,091 (1929) (statement of Sen. Blease).

264. *Id.* (statement of Rep. Warren).

265. *Id.* at 2,092 (describing passages of S.5093 and S.5094).

Over in the House Committee on Immigration and Naturalization, Chairman Johnson declined to take up the Registration Bill. He did, however, incorporate the felony reentry provision from the Blease/Davis Bill into his own longstanding project, the Johnson Bill.²⁶⁶ This new hybrid bill contained both the felony reentry provision and the Johnson Bill's misdemeanor entry provision.²⁶⁷ It also contained numerous other provisions that created new categories of deportability and removed statutes of limitations for deportation, among other things.²⁶⁸ In the report on this Bill, Johnson noted: "A serious situation has arisen, particularly on our land borders, whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation."²⁶⁹ The House Committee reported the bill with a minority report that objected to several of the deportation provisions, and to the elimination of statutes of limitations for deportation, but that did not object to either of the two criminal provisions.²⁷⁰

The Bill was debated on the floor of the House on February 15 and 16, 1929. In the record it is referred to by the title "S. 5094, making it a felony with penalty for certain aliens to enter the United States of America under certain conditions in violation of law."²⁷¹

Chairman Johnson announced during the debate that the Committee had given it a shorter title: "the undesirable aliens act of 1929."²⁷²

The congressmen debating the Undesirable Aliens Act revealed its purpose: to target Latin American immigrants for punishment and deportation because of their race. John O'Connor of New York began the debate by criticizing the bill (and two other immigration bills proposed simultaneously) as racist. He stated: "I do not like the spirit behind all these measures. There seems to be a spirit of bigotry and intolerance in America directed at the races of the rest of the world that surely is un-American."²⁷³ And further: "How long can demagogues in all political parties continue to preach this doctrine of

266. DEPORTATION OF ALIENS, REPORT TO ACCOMPANY H.R. 16850, H. REP. NO. 70-2397 (1929) (accompanying H.R. 16850); *see supra* Section II.B.

267. *Id.* at 11.

268. Here are summaries of the major components of the bill that Johnson presented: (1.) Providing for deportation of aliens who violate drug or "white slave traffic" laws; (2.) Providing for deportation of aliens who harbor or conceal people subject to deportation; (3.) Removing the statute of limitations for deporting aliens who enter without inspection; (4.) Providing for deportation of aliens who receive sentences of a year or more each for two convictions; (5.) Providing for deportation of aliens who are sentenced to an aggregate of two years or more for three or more convictions; (6.) Providing for exclusion of aliens who have been deported within the last year; (7.) Creating the felony of unlawful reentry and the misdemeanor of unlawful entry; (8.) Ending time limits on initiating deportation proceedings. *Id.* at 2-9.

269. *Id.* at 6.

270. DEPORTATION OF ALIENS, MINORITY REPORT TO ACCOMPANY H.R. 16850, H. REP. NO. 70-2418 (1929).

271. 70 CONG. REC. 3,525 (1929).

272. *Id.* at 3,542.

273. *Id.* at 3,526.

saying ‘America for Americans only’ and further foment this vindictive intolerance evidenced by these bills?”; “Every one of these bills is directed at one or a few particular races.”; “These three bills are not needed now, but they will go to credit some men here in their districts with having furthered the cause of intolerance.”; “Perhaps immigration should be regulated. Perhaps we should close the doors. But I do detest the giving of false economic reasons to disguise intolerance.”²⁷⁴ The record indicates that O’Connor’s speech was followed by applause.²⁷⁵

The subsequent debate would validate O’Connor’s point. Congressman Charles Edwards of Georgia said the following:

Hordes of undesirable immigrants from Mexico are coming into the United States. I have seen it stated that anywhere from 65,000 to 100,000 Mexicans are annually coming over the border into this country. As a rule they are not the better or higher-type Mexicans, but generally of the less desirable type, and in many cases the criminal and diseased element. Something must be done to stop this.²⁷⁶

He continued: “This ignorant and undesirable element pouring into the United States from Mexico, not only do not understand American ideals, but many of them come into our country with hatred in their hearts for America and Americans.”²⁷⁷ And he concluded: “Let’s be just and fair to our own Republic and not poison her institutions with the riff-raff and scum of other countries who will not, and can not, from the very nature of things, become one of us because they have no conception of Americanism.”²⁷⁸

After Edwards was finished, Congressman William Hastings of Oklahoma argued: “We need additional legislation as to both countries, and particularly against admissions through Mexico. Mexican laborers come here in competition with American workmen, and those who come in from that country are less desirable citizens.”²⁷⁹

The debate continued the next day, February 16. When debate reopened, Congressman Adolph Sabath of Illinois proposed an amendment that would make a person liable for the felony only if they had been deported after the Undesirable Aliens Act was enacted.²⁸⁰ He argued that without this amendment, the law would have an ex post facto problem and might be held unconstitutional.²⁸¹ Congressman Thomas Blanton of Texas argued in reply

274. *Id.*

275. *Id.* at 3,527.

276. *Id.* at 3,555.

277. *Id.*

278. *Id.*

279. *Id.* at 3,557.

280. *Id.* at 3,618.

281. *Id.*

that there was no ex post facto problem.²⁸² Somewhat misunderstanding Sabath's point, he inquired of Sabath: "There are thousands of Mexicans who have come across the line unlawfully and who are now within the United States. Has not the Congress the right to pass a law to deport them?"²⁸³ He followed this up by noting, "It is not ex post facto if it applies to [the] whole class."²⁸⁴ No other nationalities or races were mentioned in the debate over Sabath's amendment, which was rejected.²⁸⁵

Shortly afterward, Blanton went on a lengthy rant about Mexican immigration in response to another proposed amendment:

There were thousands that came across the border unlawfully. You can go up and down the Mexican border in Texas for 10 and 15 miles and you will not see a house, and sometimes you will not see an immigration agent for 40 miles. They can wade across the river in lots of places. They come into Texas by hordes all of the time They are taking away jobs from American citizens. I am surprised that this committee would permit that to exist any longer.²⁸⁶

Congressman John Schafer of Wisconsin chimed in to support Blanton's point: "These Mexicans also come into Wisconsin in droves, and take the places of American citizens in the factories and on the farm. Often we see the spectacle of war veterans walking the streets unable to obtain employment because of the unfair competition of cheap Mexican labor."²⁸⁷

Congressman John Box then entered the debate and made the racial subtext explicit. He gave a lengthy speech on the immigration laws' failure to deal with Mexican migration. During it he observed: "There are many interested in the importation of these poor peons. They are often imported and left in pitiful condition[s]. . . . They are raising a serious race question."²⁸⁸ And further:

This Congress ought to have statesmanship enough in it to look over the past and see what grave problems have been injected into our national life by the importation for labor purposes of great numbers of people essentially different from us in character, in social position, and otherwise. We are breeding another one of those great

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 3,619.

287. *Id.*

288. *Id.*

race questions. We are degrading labor, we are defeating all of the essential purposes of the immigration laws.²⁸⁹

Box followed this up by observing that Mexicans were criminals, and that they brought in tuberculosis and other diseases.²⁹⁰

As these quotes show, the congressmen debating the Undesirable Aliens Act fixated on the problem of Mexican immigration. No other race or nationality was mentioned nearly as often.²⁹¹ After debate closed, the House approved Johnson's version of the Bill.²⁹²

Because the House and Senate versions differed, the two chambers established an eight-member conference committee to iron out the law's final language.²⁹³ Included in this committee were Johnson, Box, Sabath, and Blease.²⁹⁴ This committee stripped out most of the deportation-related provisions from the House version, and kept in the two criminal provisions.²⁹⁵ The Undesirable Aliens Act was then enacted on March 4, 1929.²⁹⁶

Post-enactment commentary by Senator Blease sheds some additional light on the law's purpose. During a May 25 discussion in the Senate about Mexican immigration, Blease said:

Mr. Davis has been doing all he can to remedy the situation to which I have referred. He recommended the enactment of two certain laws. The Senate passed both of the bills and they were sent to the House of Representatives, where one of them was never passed on at all, but is still there, and the other one was mutilated and cut all to pieces²⁹⁷

Blease also entered into the congressional record a report from the "Committee on Immigration of the Allied Patriotic Societies," which listed Harry Laughlin as a coauthor.²⁹⁸ Right after a lengthy discussion of Mexican immigration, this report described the Undesirable Aliens Act as "a distinct advance in the cause of real restriction," and one of "[t]he only bills of any importance affecting immigration which became law" in the last congressional session.²⁹⁹ Because of this law, the report asserted, the session "was not without its importance in the history of the struggle to solidify our

289. *Id.* at 3,619–20.

290. *Id.* at 3,620.

291. See O'BRIEN, *supra* note 16, at 54–55.

292. 70 CONG. REC. 3,621.

293. See *id.* at 3,766.

294. *Id.* at 3,760, 3,766.

295. S. 5094, 70th Cong. (1929). The final Act also contains minor provisions concerning the landing privileges of seamen and restrictions on readmission after deportation. *Id.*

296. *Id.*

297. 71 CONG. REC. 1,919 (1929) (statement of Mr. Blease).

298. *Id.* at 1,831–36 (1929).

299. *Id.* at 1,833.

present national policy of restricting immigration within proper bounds and on scientific principles.”³⁰⁰

C. THE LAW'S SUBSEQUENT ENFORCEMENT

The federal government immediately started prosecuting Latin Americans under the Undesirable Aliens Act.³⁰¹ According to a 1930 Attorney General report, 7,001 federal prosecutions were brought for immigration-related crimes in 1930, compared with 1,568 in 1929.³⁰² The report attributes that increase entirely to the two new crimes.³⁰³ This meant more immigration prosecutions were brought that year than every other category of federal crime except prohibition crimes.³⁰⁴ Between 1930 and 1936, over 40,000 of these immigration prosecutions were pursued with a roughly 90 percent conviction rate.³⁰⁵ Bureau of Prisons statistics show that Mexican immigrants received a significant majority of the prison sentences in these cases.³⁰⁶ Many were also kept in jail for long periods of time before conviction, due to courts in some border districts only sitting once a year.³⁰⁷ The Undesirable Aliens

300. *Id.*

301. HERNÁNDEZ, *supra* note 16, at 138–40.

302. U.S. DEP'T OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930, at 36–37 (1930).

303. *Id.* at 37. The report also notes that \$47,419.80 in fines were collected in 1930 from immigrants who were convicted under these laws. *Id.*

304. The report indicates that in the same year 2,117 postal law cases were brought, 3,505 anti-narcotics cases, 532 “white slave traffic” cases, 83 war-risk insurance cases, 255 banking-related cases, and 180 bankruptcy-related cases. *Id.* at 37–41. The report does not give the number of new prohibition prosecutions, but notes that sentences were imposed in 27,709 such cases during the year. *Id.* at 55.

305. NGAI, *supra* note 16, at 60, 292 n.14; K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1916 n.192 (2019). The average sentences for these cases were around two months from 1931 to 1936. HERNÁNDEZ, *supra* note 16, at 145 (58.3 days in 1931, 45.3 days in 1932, 52.2 days in 1933, 64.3 days in 1934, 75.9 days in 1935, and 62.8 days in 1936) (citing U.S. DEP'T OF JUST. & BUREAU OF PRISONS, FEDERAL OFFENDERS 1935-36, at 177 (1937) [hereinafter FEDERAL OFFENDERS 1935-36]).

306. These are the statistics as reported by the Federal Bureau of Prisons (note that this is not the full universe of cases, since many would have resulted in non-prison sentences like jail or time served). 1931-1932: 213 total, 120 Mexican (56 percent); 1932-1933: 199 total, 131 Mexican (66 percent); 1933-1934: 358 total, 270 Mexican (75 percent); 1934-35: 320 total, 245 Mexican (77 percent); 1935-1936: 347 total, 256 Mexican (74 percent). U.S. DEP'T OF JUST. & BUREAU OF PRISONS, FEDERAL OFFENDERS 1931-32, at 126 (1933); U.S. DEP'T OF JUST. & BUREAU OF PRISONS, FEDERAL OFFENDERS 1932-33, at 176 (1934); U.S. DEP'T OF JUST. & BUREAU OF PRISONS, FEDERAL OFFENDERS 1933-34, at 150 (1935); U.S. DEP'T OF JUST. & BUREAU OF PRISONS, FEDERAL OFFENDERS 1934-35, at 240–41 (1936); FEDERAL OFFENDERS 1935-1936, *supra* note 305, at 219. I excluded native-born prisoners from these counts where that information was indicated, because citizens cannot be convicted of these crimes.

307. See U.S. DEPT. OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE U.S. FOR THE FISCAL YEAR 1931, at 77 (Dec. 7, 1931) (“The problem was presented in certain border districts, where only one term of court is held during the year in the division of the district in which the offense was committed.”).

Act was enacted right before a wave of anti-Mexican hysteria brought on by the Great Depression. While these crimes were being prosecuted for the first time, the American government was also engaged in a forced repatriation campaign that involved tracking down and expelling hundreds of thousands of Mexican people based on their ethnicity.³⁰⁸ These prosecutions were used as part of that campaign.³⁰⁹

Almost one hundred years later, we are now in a period of even more aggressive enforcement. In the last few decades, starting around 2002, the number of prosecutions for unlawful entry and reentry has exploded.³¹⁰ It reached a peak during the Trump administration, which in 2019 alone charged 25,426 felony reentry cases and 80,886 misdemeanor entry cases.³¹¹ Most of the misdemeanor prosecutions are now brought through a program called “Operation Streamline,” in which upwards of 100 defendants at a time are expected to plead guilty on their first day in court after only a brief conversation with a lawyer.³¹² The statutory maximum sentence for felony reentry has been increased to 20 years if the defendant has certain prior convictions.³¹³ The average sentence in felony reentry cases is now nine months, and multi-year sentences are common.³¹⁴ Roughly 99 percent of the defendants in these cases are immigrants from Mexico or another Latin American country.³¹⁵ We are living in a United States where tens of thousands of Latin Americans are incarcerated each year for victimless immigration crimes. This is the United States that Blease, Davis, and Johnson created.

V. FEDERAL IMMIGRATION CRIMES ARE UNCONSTITUTIONAL

There are three ways that the government can violate the Constitution’s prohibition against race discrimination.³¹⁶ It can pass a law that explicitly discriminates by race.³¹⁷ It can enforce a race-neutral law in a discriminatory

308. BALDERRAMA & RODRÍGUEZ, *supra* note 175, at 332; Johnson, *supra* note 175, at 4–6.

309. O’BRIEN, *supra* note 16, at 55–56; *see also* GOODMAN, *supra* note 53, at 40–46.

310. *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 171–74 (2012); *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 *COLUM. L. REV. SIDEBAR* 135, 139–40 (2009); *see also* NAT’L IMMIGRANT JUST. CTR., *A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION* 12 (2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NJJC-Legacy-of-Injusticereport_2020-07-22_FINAL.pdf [<https://perma.cc/B9AQ-SEYH>].

311. Dep’t of Just. Off. of Pub. Affs., *supra* note 1.

312. GREENE, CARSON & BLACK, *supra* note 6; Keller, *supra* note 2, at 125–37.

313. *See* 8 U.S.C. § 1326(b)(1)–(2) (2021) (noting that certain aliens whose removal was premised on a conviction for aggravated felony can be imprisoned for up to 20 years).

314. U.S. SENT’G COMM’N, *supra* note 8, at 1–2; *see* Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 *B.C. L. REV.* 719, 719–21 (2010).

315. U.S. SENT’G COMM’N, *supra* note 8, at 1.

316. U.S. CONST. amend. XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying the Equal Protection Clause to the federal government through the Due Process Clause).

317. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

manner.³¹⁸ And it can pass a race-neutral law for racist reasons.³¹⁹ The Undesirable Aliens Act fits into the third category.³²⁰

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court set out how to challenge a government's action on this basis.³²¹ Recognizing that a government can have multiple motivations when it acts, the Court established a two-step analysis. In step one, the party challenging the law must demonstrate that impermissible discrimination was "a motivating factor" for passing it.³²² Not *the* motivating factor, just *a* motivating factor. The Court lists several types of evidence that could prove such an illicit motive. These include the historical background of the law, contemporary statements by members of the decisionmaking body, the law's legislative history, and whether the law harms the discriminated-against group.³²³ If the moving party makes this showing, the burden then shifts to the party defending the law. It must prove the law would have been enacted anyway, even without the discriminatory motive.³²⁴ In *Hunter v. Underwood*, the Court used the *Arlington Heights* test to invalidate a provision of the Alabama Constitution disenfranchising people convicted of "crimes involving moral turpitude."³²⁵ While the text of that law was racially neutral, the Court examined its enactment history (including speeches made by its supporters) and found that its purpose was to disenfranchise blacks.³²⁶

After the discussion in Parts I through III, it should be clear that the Undesirable Aliens Act is in the same category as the law struck down in *Hunter*. Racism motivated the passage of the Undesirable Aliens Act. Indeed, it was the primary motivation. Here is a summary of the evidence.

First, the historical background of the law. It was enacted at a time when racist pseudoscience was the dominant ideology of American immigration policy.³²⁷ Congress enacted the Johnson-Reed Act in 1924 to keep out Italian and Jewish immigrants thought to be racially undesirable.³²⁸ This inadvertently

318. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

319. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

320. This Article focuses on how a constitutional challenge to the Undesirable Aliens Act would fit into current equal protection doctrine. It is, of course, a separate question whether such a challenge would succeed in the current Supreme Court. See, e.g., Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 5 SUP. CT. REV. 231, 234-36 (2019) (criticizing the Court for ignoring evidence of racial animus in numerous recent cases and for failing to protect marginalized racial groups).

321. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

322. *Id.*

323. *Id.* at 266-68.

324. *Id.* at 270 n.21.

325. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

326. *Id.* at 228-33.

327. *Supra* Section II.A.

328. *Id.*

caused a huge increase in Mexican immigration.³²⁹ Congressional restrictionists then waged a sustained five-year campaign to end immigration from Latin American countries.³³⁰ They justified this effort in explicitly racial terms.³³¹ They even held official legislative hearings on eugenics, at which people like Harry Laughlin testified about Latin Americans' low racial stock.³³² These efforts were frustrated by the Senate until 1929, when the Undesirable Aliens Act provided the restrictionists' first big breakthrough.³³³ By the 1930s, they were triumphant. The Hoover Administration ended legal Mexican immigration through administrative policy changes,³³⁴ and a repatriation campaign forcibly expelled hundreds of thousands of ethnically Mexican people from the country.³³⁵

Second, the statements of the law's supporters. Three men can be considered authors of the Undesirable Aliens Act: Albert Johnson, who wrote the misdemeanor section; James Davis, who wrote the felony section; and Coleman Blease, who introduced it and got it passed in the Senate.³³⁶ All three men were racists, and all three lived in an era when there was no need to hide it. Here are a few illustrative examples of their racism.

Johnson was the primary author of the 1924 law that imposed quotas on Southern and Eastern Europe.³³⁷ After it passed, he spent the next five years pushing legislation to end all immigration from Latin America.³³⁸ He was president of the Eugenics Research Institute.³³⁹ He collaborated closely with eugenicists like Madison Grant.³⁴⁰ He hired Harry Laughlin to be the House Committee's official expert on eugenics for ten years.³⁴¹ As Chairman of the House Committee, he went out of his way to publicize eugenicists' racial theories about Latin American inferiority.³⁴² In a committee report for a bill to restrict immigration from Mexico, he wrote that he was protecting the United States from "the menace of infiltration by alien people whose numbers, economic standards, social and racial qualities threaten serious injury to the country."³⁴³

329. *Supra* Section II.B.

330. *Supra* Sections III.A–B.

331. *Supra* Section III.C.

332. *Id.*

333. *Supra* Part IV.

334. *Supra* notes 148–51 & accompanying text.

335. *Supra* note 175 & accompanying text.

336. *Supra* Sections IV.A–B.

337. *Supra* notes 68–75 & accompanying text.

338. *Supra* Sections II.A–B.

339. *Supra* note 78 and accompanying text.

340. *Supra* notes 79–80 and accompanying text.

341. *Supra* notes 94–104 & accompanying text.

342. *Supra* Section III.C.

343. *Supra* note 146 and accompanying text.

Davis was also a racist and a eugenicist. He strongly supported both the Johnson-Reed Act and the efforts by the House Committee to include Mexico in the quota.³⁴⁴ He solicited Robert Foerster's 1925 report for the Labor Department describing Latin Americans' racial degeneracy.³⁴⁵ He made Harry Laughlin the Labor Department's "special immigration agent" in Europe.³⁴⁶ He endorsed the "biological attitude" towards immigration, and praised Johnson and Laughlin's work bringing eugenics into immigration policy.³⁴⁷ He also filled his own autobiography with odd racist musings. He called various nonwhite races "swinish," "rat-men," and "pig iron," and declared his love for blackface and minstrel shows.³⁴⁸

Blease was the most flamboyant racist of the three. He passionately advocated lynching black men accused of attacking white women (but did not support it for other crimes).³⁴⁹ When asked if lynching violated his state's constitution, he famously said "to hell with the constitution!"³⁵⁰ He sponsored a constitutional amendment criminalizing interracial marriage.³⁵¹ He introduced a racist poem as a Senate resolution after the First Lady had a black woman over for tea.³⁵² He read another racist poem on the Senate floor about Mexicans not accepting Christianity.³⁵³ He argued that America should let in no immigrants at all, from any country.³⁵⁴ He also said in a hearing of the Senate Committee on Immigration that "[Mexicans in the United States] have got to behave or we will kill them."³⁵⁵

Third, the law's immediate legislative history. This too reveals that the law was part of the larger drive to end all Latin American immigration. Blease introduced the law's felony provision in the Senate alongside a bill to provide immigrants with registration cards.³⁵⁶ Davis had proposed this latter bill in 1925, pitching it as a way to find and deport Chinese immigrants.³⁵⁷ After he wrote that proposal, Mexican immigration instead became restrictionists' primary focus. In the House the felony provision was paired with the Johnson Bill, a measure that Johnson had been proposing since 1925 that would make it easier to deport Latin Americans.³⁵⁸ In the Committee report on the

344. *Supra* notes 230–32, 243 and accompanying text.

345. *Supra* note 233 and accompanying text.

346. *Supra* note 234 and accompanying text.

347. *Supra* note 242 and accompanying text.

348. *Supra* notes 235–40 and accompanying text.

349. *See supra* notes 218–19 and accompanying text.

350. *See supra* note 221 and accompanying text.

351. *See supra* note 222 and accompanying text.

352. *See supra* note 223–24 and accompanying text.

353. *See supra* note 227 and accompanying text.

354. *See supra* notes 225–26 and accompanying text.

355. *See supra* note 228 and accompanying text.

356. *See supra* notes 261–63 and accompanying text.

357. *See supra* notes 249–52 and accompanying text.

358. *See supra* notes 158–69, 266–70 and accompanying text.

Undesirable Aliens Act, Johnson noted that it was specifically designed to target immigrants who were coming across our land border.³⁵⁹ The debate in the House also focused on Mexican immigration.³⁶⁰ The law's supporters lamented that "hordes" of Mexicans were coming to this country, that they were "undesirable," "the criminal and diseased element," "ignorant," "peons," "riff-raff," and "scum."³⁶¹ John Box of Texas claimed that Mexican immigrants "are raising a serious race question," and that they are "essentially different from us in character, in social position, and otherwise."³⁶² John O'Connor of New York, the most passionate congressional voice against the law, argued that it was inspired by racist bigotry.³⁶³ In post-enactment commentary in the Senate, Blease confirmed that the purpose of the law was to deal with Mexican immigration.³⁶⁴

Finally, the impact of the decision on the affected group. The burden of these laws falls far more heavily on Latin American immigrants than on anyone else. In the 1930s, a solid majority of the prison sentences for these crimes were suffered by Mexican immigrants.³⁶⁵ Today, these are the two most commonly-charged crimes in the federal system.³⁶⁶ Ninety-nine percent of the cases are brought against Latin Americans.³⁶⁷

This evidence pretty clearly shows that racial animus was a motivating factor in the passage of the Undesirable Aliens Act. The last question is whether the law would have been enacted anyway, even without this motive.³⁶⁸

It is difficult to see how that could be proved. The law was produced by a unique confluence of forces: the rise of eugenic racial nativism in the 1920s, the increase in Mexican immigration caused by the Johnson-Reed Act, and the five-year failure of congressional restrictionists to pass a law limiting Mexican immigration. Throughout the debate over the Undesirable Aliens Act, the focus was not on legal versus illegal methods of entry, but on the reasons we should not let Mexicans immigrate at all. And the primary reason given was their race. It is hard to imagine this sequence of events happening if the country to our south had a "Nordic" population. Indeed, immigration from Canada also increased dramatically after the Johnson-Reed Act passed, but there was no comparable movement to keep the Canadians out.³⁶⁹

359. See *supra* note 269 and accompanying text.

360. See *supra* notes 271–92 and accompanying text.

361. See *supra* notes 276–88 and accompanying text.

362. See *supra* notes 288–90 and accompanying text.

363. See *supra* note 273–74 and accompanying text.

364. See *supra* notes 297–300 and accompanying text.

365. DEP'T OF JUST., *supra* note 302, at 36–37.

366. See *supra* notes 6–10 and accompanying text.

367. See *supra* note 315 and accompanying text.

368. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 492 U.S. 252, 270 n.21 (1977).

369. *DIVINE*, *supra* note 16, at 54 ("It should be emphasized again that restrictionists were primarily concerned with Mexican immigration. Though about 75,000 Canadians entered the

There is nothing inevitable about criminalizing unlawful immigration. A panel of the Eighth Circuit observed in 1925 that “[i]t has never been the policy of the Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation has been the remedy.”³⁷⁰ It is not a crime to overstay a visa in the United States, even though in recent years more undocumented people have entered that way than by surreptitiously crossing the border.³⁷¹ Indeed, one historical example supports the thesis that laws criminalizing immigration are only enacted during upswells of racism. In 1892 Congress enacted the Geary Act, which added harsh new provisions to the Chinese Exclusion Act of 1882.³⁷² The Geary Act compelled Chinese immigrants (and only Chinese immigrants) to carry certificates of residence, and subjected them to imprisonment and hard labor if they were found in the United States without permission.³⁷³ It was held unconstitutional by the Supreme Court because it permitted such punishment without even a jury trial.³⁷⁴ It and the Undesirable Aliens Act are among the few laws in American history that have criminalized the mere act of coming to the United States without permission.³⁷⁵ It does not seem coincidental that both were motivated by a drive to exclude a specific racial group.

VI. RACIAL DISCRIMINATION AND THE POWER TO REGULATE IMMIGRATION

Courts have commonly deferred to the political branches on questions of immigration. This practice is sometimes called the plenary power doctrine.³⁷⁶ In the context of an equal protection challenge to the Undesirable Aliens Act, this doctrine begs two questions. First, can Congress enact immigration laws for racist reasons? And second, can Congress enact criminal laws related to immigration for racist reasons?

United States annually, a greater influx than that from Mexico, there was little demand for a reduction of this number.”); O’BIEN, *supra* note 16, at 55; Reisler, *supra* note 16, at 241.

370. *Flora v. Rustad*, 8 F.2d 335, 337 (8th Cir. 1925); Eagly, *supra* note 2, at 1296–97.

371. Robert Warren, *US Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION STUD. (Jan. 16, 2019), <https://cmsny.org/publications/essay-2017-undocumented-and-overstays> [<https://perma.cc/TL9S-ESJK>].

372. Geary Act of 1892, Pub L. No. 52-60, 27 Stat. 25 (1892).

373. Eagly, *supra* note 2, at 1291–92; Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1712–13 (2021).

374. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

375. Eagly, *supra* note 2, at 1297, 1343–44; Ngai, *supra* note 106, at 76. Indeed, the fact that both crimes were meant to be paired with an identification requirement (Davis and Blease’s proposed registration bill, and the Geary Act’s certificate requirement) deepens the parallel. *See* Jain, *supra* note 373, at 1712–13.

376. *See* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015); Carrie L. Rosenbaum, *(Un)equal Immigration Protection*, 50 SW. L. REV. 231, 243–53 (2021) (criticizing the plenary power doctrine and arguing that equal protection challenges should be revitalized in the immigration context).

In *Chae Chan Ping v. United States*, the Supreme Court rejected a Chinese immigrant's challenge to his exclusion from the United States.³⁷⁷ This case has come to stand for the principle of political branch supremacy over immigration law, and a resulting unenforceability of constitutional rights.³⁷⁸ Some have criticized that view, however, arguing that modern constitutional rights were undeveloped when *Chae Chan Ping* was decided in 1896, and so there is no way of knowing whether the courts will enforce them in immigration cases.³⁷⁹ The Supreme Court's recent decision in *Trump v. Hawaii* sheds some light on this issue.³⁸⁰ That case involves an Establishment Clause challenge to the Trump Administration's decision to exclude people from several Muslim-majority countries. Chief Justice John Roberts's majority opinion upholds the policy. But Roberts does not reject the constitutional challenge out of hand, nor does he assert that constitutional rights have no place in the immigration realm.³⁸¹ He even goes out of his way to reject *Korematsu v. United States*, the famous anticanonical opinion granting deference to government discrimination.³⁸² However, Roberts does apply a deferential "rational basis" standard of review in *Trump*.³⁸³ He further suggests that he would normally apply an even more deferential standard, where the court only asks "whether the policy is facially legitimate and bona fide."³⁸⁴ Roberts's opinion also seems to dismiss or ignore a large number of government statements (including those of Trump himself) revealing an intention to discriminate against Muslims.³⁸⁵ In light of *Trump*, would the current Court uphold a racially-targeted immigration law like the Box Bill? Would it do so even if the law were enacted after legislative hearings on the racial inferiority of the group it targeted? This appears to be an open question.³⁸⁶

377. *Chae Chan Ping v. United States*, 130 U.S. 581, 606–11 (1889).

378. See Martin, *supra* note 376, at 31; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–16 (1998).

379. See Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 264 (2000); ADAM COX & CRISTINA RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 235 (2020).

380. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–23 (2018).

381. See *id.* at 2416–23.

382. *Id.* at 2423. There are several layers of irony in Roberts's declaration. The first is that he rejected *Korematsu* in a decision upholding a discriminatory government policy. The second is that *Korematsu* itself was the first case where the government applied a strict scrutiny standard to race discrimination, and so itself involved the Court making a statement against discrimination while still upholding it. *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

383. *Trump*, 138 S. Ct. at 2420.

384. *Id.*

385. *Id.* at 2417–18; *id.* at 2435–41 (Sotomayor, J., dissenting).

386. See COX & RODRÍGUEZ, *supra* note 379, at 235–36; see also Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 246 (2020) (“[I]n immigration law, there is now a straight line from the Chinese Exclusion Case (decided in the era of *Plessy v. Ferguson*'s embrace of ‘separate but equal’) to the Muslim Exclusion Case. The line

The Undesirable Aliens Act is not an immigration law, however. It is a criminal law. It does not admit or deport anyone. It just incarcerates people. Deference in immigration cases applies only to “matters of entry and national security.”³⁸⁷ It does not apply to criminal statutes. This distinction goes back to the Chinese Exclusion Cases themselves. In *Wong Wing v. United States*, a Chinese immigrant challenged the constitutionality of the Geary Act.³⁸⁸ That law permitted the government to incarcerate undocumented Chinese immigrants without a jury trial.³⁸⁹ The Supreme Court held that this suspension of the jury trial right in a criminal case was unconstitutional.³⁹⁰ In doing so, it expressly distinguished between Congress’s unlimited power to expel aliens and its constitutionally limited power to declare crimes.³⁹¹ The distinction drawn here between immigration and criminal law is fundamental.³⁹² Crimes are at the heart of judicially administered constitutional law, and the Constitution’s protection cannot be removed simply because a crime is immigration-related. If Congress reenacted the Geary Act today, it would surely be struck down on equal protection grounds because it specifically targeted Chinese people.³⁹³ The same reasoning should apply to the Undesirable Aliens Act.

VII. THE QUESTION OF REENACTMENT

A. THE REENACTMENT OF THE UNDESIRABLE ALIENS ACT

In 1952, Congress passed the McCarran-Walter Act.³⁹⁴ This Act was a global recodification of all the nation’s immigration laws. For the first time in American history, it brought together in a single omnibus bill all of the disparate immigration and naturalization provisions that were scattered throughout the U.S. Code.³⁹⁵ These included the comprehensive

passes straight through the era of the civil rights revolution without evidence that any disruptive force has been exerted upon it.”) (footnotes omitted); Rosenbaum, *supra* note 376, at 253.

387. *Trump*, 138 S. Ct. at 2420.

388. *Wong Wing v. United States*, 163 U.S. 228, 233–34 (1896).

389. *Id.*; Geary Act of 1892, Pub. L. No. 52-60, 27 Stat. 25 (1892).

390. *Wong Wing*, 163 U.S. at 238.

391. *Id.* at 237 (“No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.”).

392. See Eagly, *supra* note 2, at 1292; Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1443–44 (2019); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 53 (2006).

393. Geary Act § 1.

394. McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

395. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 127 (1966).

immigration laws of 1917 and 1924, in addition to more than 200 other enactments.³⁹⁶ For this massive undertaking, Congress conducted a five-year investigation into the immigration system.³⁹⁷ The investigation culminated in a 925-page Senate Judiciary Committee report that laid out the proposed law.³⁹⁸ The resulting law largely preserved existing immigration policies, reorganizing and recodifying them into a modern legislative code.³⁹⁹

As part of the McCarran-Walter Act, Congress reenacted the Undesirable Aliens Act of 1929. It moved the misdemeanor entry provision to 8 U.S.C. section 1325 and moved the felony reentry provision to 8 U.S.C. section 1326. Congress also made two technical changes to these laws. It lowered the statutory maximum for the misdemeanor to six months, and provided that for a second or subsequent conviction the maximum would be two years.⁴⁰⁰ It also added a new “found in” element to the felony, so that a defendant could now be convicted if he or she “enters, attempts to enter, or is at any time found in, the United States.”⁴⁰¹ Aside from those two changes, the provisions remained substantively the same.

This reenactment provokes an interesting question—should the 1920s matter when we discuss the constitutionality of sections 1325 and 1326? Or is the relevant congressional intent instead that of the legislature that passed the McCarran-Walter Act in 1952?

Delving into the legislative materials, one finds almost no discussion of these two crimes in the debates over the McCarran-Walter Act. The 925-page Senate report comments on them twice. In one section it says that the committee heard testimony from witnesses who complained about the difficulties of enforcing alien smuggling and illegal entry laws. The report notes: “Most of the statements were devoted, not so much to the law itself, but to difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area.”⁴⁰² The Committee concluded that Congress should not change the law in light of these complaints: “Since the situation

396. *Id.* at 128.

397. *Id.*

398. THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515 (1950).

399. Bennett, *supra* note 395, at 130.

400. 8 U.S.C. § 1325 (2018). Professor Eagly has suggested that this change was designed to make prosecutions less procedurally burdensome by removing the requirements of indictment and trial by jury. Eagly, *supra* note, 2 at 1325–27.

401. 8 U.S.C. § 1326 (2018). This change appears to have been proposed in a May 1951 letter by Deputy Attorney General Peyton Ford to Senator McCarran. Statement of Peyton Ford, Deputy Attorney General (May 14, 1951) *in* REVISION OF IMMIGRATION, NATURALIZATION, AND NATIONALITY LAWS: JOINT HEARINGS BEFORE THE SUBCOMMITTEES OF THE COMMITTEES ON THE JUDICIARY, 82ND CONGRESS, 1ST SESS., ON S. 716, H. R. 2379, AND H. R. 2816 711, 711–22 (1951). It is notable that in this letter, Ford referred to Mexican immigrations by a racially derogatory term. *Id.* at 718 (“Statutory clarification on the above points will aid in taking action against the conveyors and receivers of the wetback.”).

402. S. REP. NO. 81-1515, at 654.

appears to be a local problem and a question of administration of present statutes rather than a legislative matter, it is believed that it should be left to the proper authorities to work out some solution.”⁴⁰³

Later on the same page, the report advocates repealing two minor reentry provisions (these are separate laws giving higher penalties to prostitutes and anarchists) and consolidating them with the general felony reentry provision.⁴⁰⁴ It concludes: “It was suggested that one act would suffice for all persons who have been deported, regardless of the reason therefor, and that the present act of March 4, 1929, should be reenacted to cover any and all deportations.”⁴⁰⁵

In a “Recommendations” section one page later, the Report concludes about each provision: “[t]he illegal entry section should be carried forward with an increased penalty for subsequent offenses” and “[t]he provisions relating to reentry after deportation should be carried forward in one section and apply to any alien deported for any reason and provide for the same penalty” (thus repealing the separate laws for anarchists and prostitutes).⁴⁰⁶

These are the only comments about unlawful entry and reentry in the entire committee report. A review of the floor debates over the McCarran-Walter Act in both the House and Senate produced no mention of either of these crimes.⁴⁰⁷ These few comments in the Senate Report are the entire legislative history of the McCarran-Walter Act as it concerns illegal entry and reentry.

It is clear from this record that Congress in 1952 did not debate the merits of these crimes. It did not consider whether unlawful immigration should be criminalized in the first place. This was a recodification project. Congress understood itself to be rationalizing and reorganizing an existing set of laws. The few comments in the Senate report advocate making no changes, aside from increasing the penalty for a second unlawful entry.⁴⁰⁸ And the Report describes the action Congress ultimately took as “the present act of March 4, 1929, should be reenacted.”⁴⁰⁹ Congress did not understand itself

403. *Id.* at 655.

404. *Id.*

405. *Id.*

406. *Id.* at 656.

407. The debate ran for three days in the House, from April 23 to April 25, 1952. Then it proceeded in the Senate from May 9 to May 22. A review of these debates revealed no discussion of the two criminal provisions. 98 CONG. REC. 4,296-4,446, 4,967-5,843 (1952). There was also no mention of the criminal provisions in President Truman's veto message, which focused mostly on the racially discriminatory nature of the quota system that McCarran-Walter kept in place. Memorandum from Harry S. Truman to the House of Representatives, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, HARRY S. TRUMAN LIBRARY (June 25, 1952), <https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality> [<https://perma.cc/GEM2-EKZU>].

408. S. REP. NO. 81-1515, at 656.

409. *Id.* at 655.

to be creating a new law. It was keeping the existing law in place, with some technical modifications, and changing its code section.

B. SILENT REENACTMENT, BENIGN REENACTMENT, AND CONSCIOUS REENACTMENT

Is this record enough to displace the 1920s as the relevant source of legislative intent? Two recent Supreme Court decisions provide a helpful framework for thinking about the reenactment issue.

Ramos v. Louisiana involved a constitutional challenge to a Louisiana law allowing criminal convictions based on 10-to-2 jury verdicts.⁴¹⁰ Justice Gorsuch's majority opinion held that this law violated the Sixth Amendment right to a jury trial, which requires unanimity for guilty verdicts.⁴¹¹ Gorsuch also discussed the Louisiana law's history. The nonunanimous verdict law was first enacted as part of Louisiana's constitutional convention of 1898, the declared purpose of which "was to 'establish the supremacy of the white race.'"⁴¹² A poll tax, literacy test, and grandfather clause were enacted at that convention to prevent African American voting.⁴¹³ Shortly before the convention, the U.S. Senate called for an investigation into Louisiana's exclusion of African Americans from its jury pools.⁴¹⁴ To avoid scrutiny, the Louisiana convention adopted the race-neutral rule requiring only ten votes to convict.⁴¹⁵ This rule would effectively nullify the votes of up to two African American jurors that supported acquittal. Justice Kavanaugh noted this history in his concurrence: "The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875."⁴¹⁶ Kavanaugh also wrote that these historical events were "significant to my analysis of this case" and "strongly support overruling [the prior decision upholding non-unanimous verdicts]."⁴¹⁷ He concluded that this racist history "count[s] heavily" against applying the *stare decisis* doctrine,

410. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1393–94 (2020).

411. *Id.* at 1395–97.

412. *Id.* at 1394 (quoting LOUISIANA CONSTITUTIONAL CONVENTION, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 374 (1898) (statement of Thomas J. Semmes, Chairman of the Committee on the Judiciary)); *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1597, 1615 (2018) (same); THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 16–26 (2015).

413. *Ramos*, 140 S. Ct. at 1394.

414. *Id.*

415. *Id.*

416. *Id.* at 1417 (Kavanaugh, J., concurring); *see also id.* ("And the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.").

417. *Id.*

and in favor of overruling the precedent that had approved nonunanimous verdicts.⁴¹⁸

Justice Alito dissented on *stare decisis* grounds, arguing that even if the existing precedent was wrong it should not be overruled.⁴¹⁹ In doing so, he took issue with the majority's reliance on the law's history. Alito pointed out that Louisiana reenacted its non-unanimous verdict law at another constitutional convention in 1974.⁴²⁰ That new version of the law was narrower than the original version, its stated purpose was "judicial efficiency," and during the debate "no mention was made of race."⁴²¹ Further, Alito complained that "[t]he majority makes no effort to show either that the delegates to the constitutional convention retained the rule for discriminatory purposes or that proponents of the new Constitution made racial appeals when approval was submitted to the people."⁴²² For Alito, then, the intent behind the current law was formed in 1974 rather than 1898.

Justice Sotomayor rebutted this argument. In her concurrence, she reasoned that a law's racist history is not purged by reenactment alone.⁴²³ She noted that Louisiana (and Oregon, which had a similar law) "never truly grappled with the laws' sordid history in reenacting them."⁴²⁴ She went on to note that the only time Louisiana actually faced the law's racist history was when the state repealed it in 2019.⁴²⁵ Sotomayor ultimately suggested that a reenacted law can be free of discriminatory taint in only two circumstances: where it is "otherwise . . . untethered to racial bias . . . and . . . where a legislature actually confronts a law's tawdry past in reenacting it."⁴²⁶

In an illuminating postscript to this exchange, Justice Alito discussed the reenactment issue in *Espinoza v. Montana Department of Revenue*.⁴²⁷ In that case, a group of parents brought a Free Exercise challenge to a Montana law banning the use of public scholarship funds at religious schools. The majority sided with the parents, and Alito wrote a concurring opinion that called attention to the discriminatory history of Montana's law.⁴²⁸ Alito showed that the original version of Montana's law was motivated by anti-Catholic bigotry directed at immigrant populations from Ireland and Germany.⁴²⁹ While the law had since been reenacted, Alito relied on the Court's recent decision in

418. *Id.* at 1418–19.

419. *Id.* at 1425–40 (Alito, J., dissenting).

420. *Id.* at 1426.

421. *Id.* (quoting *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13); 122 So. 3d 1028, 1038).

422. *Id.*

423. *Id.* at 1410 (Sotomayor, J., concurring).

424. *Id.*

425. *Id.*

426. *Id.*

427. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2267–74 (2020) (Alito, J., concurring).

428. *Id.*

429. *Id.* at 2269–70.

Ramos to argue that the history of the original law still mattered. He wrote: “[u]nder *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision’s ‘uncomfortable past’ must still be ‘[e]xamined.’”⁴³⁰ He also noted that, despite his dissent in *Ramos*, it is now binding: “I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.”⁴³¹

These two cases provide a helpful context for thinking about the reenactment of the Undesirable Aliens Act. We can distinguish between three different categories of reenactment: silent reenactments, benign reenactments, and conscious reenactments. A silent reenactment is one that happens without substantive consideration—often for technical, organizational, or stylistic reasons. In a silent reenactment there is no debate over whether the law is ultimately good or bad, because that is not up for discussion. Based on the legislative record, it seems the Undesirable Aliens Act was given a silent reenactment in 1952.⁴³² By contrast, a benign reenactment is one where the legislature reenacts the law for a race-neutral reason. Here the future legislature debates the ultimate merits of the law and decides to keep it, but the future legislature does not appear to have racist motivations for doing so. From *Ramos*, it seems that Louisiana’s non-unanimous jury law was benignly reenacted. The 1978 state constitutional convention did not give racist reasons for the law, but instead cited judicial efficiency as the justification.⁴³³ A conscious reenactment is one where the future legislature reenacts the law for race-neutral reasons while also acknowledging the law’s racist history. This is the kind of reenactment Justice Sotomayor mentions in *Ramos*, when she discusses a legislature that “actually confronts a law’s tawdry past in reenacting it.”⁴³⁴ It appears that the Montana law challenged in *Espinoza* may have been subjected to a conscious reenactment. Justice Alito writes that “[d]elegates at Montana’s constitutional convention in 1972 acknowledged that the no-aid provision was ‘a badge of bigotry,’” but “[n]evertheless the convention proposed, and the State adopted, a provision with the *same* material language.”⁴³⁵ The Supreme Court’s decisions in *Trump v. Hawaii* and *Abbott v.*

430. *Id.* at 2273 (quoting *Ramos*, 140 S. Ct. at 1401, n.44 (alteration in original)).

431. *Id.* at 2268.

432. *See supra* Section VI.A.

433. *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

434. *Id.* at 1410 (Sotomayor, J., concurring).

435. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (quoting 6 MONT. LEG., MONTANA CONSTITUTIONAL CONVENTION: VERBATIM TRANSCRIPT: MARCH 9, 1972 – MARCH 16, 1972, at 2012 (1981); *see also id.* at 2294 n.2 (Sotomayor, J., dissenting) (“Also missing from the concurrence (and the *amicus* briefs it repeats) is the stubborn fact that the constitutional provision at issue here was adopted in 1972 at a convention where it was met with overwhelming support by religious leaders (Catholic and non-Catholic), even those who examined the history of prior no-aid provisions.”)).

Perez also involved conscious reenactments.⁴³⁶ In both cases the government reenacted a policy for purportedly race-neutral reasons, while fully aware that that policy was being challenged in court as racially discriminatory.⁴³⁷ Whether those race-neutral reasons were ultimately pretextual is a separate question.⁴³⁸

A silent reenactment should not defeat an *Arlington Heights* equal protection claim. The theory of *Arlington Heights* is that the legislature's racist intentions make the law unconstitutional.⁴³⁹ A later reenactment can only expunge those racist intentions if the reenacting legislature forms separate intentions of its own. If the reenacting legislature does not consider the law's merits, then it cannot displace the law's original intent. Take, for example, a legislature that reorganizes and recodifies all existing laws to make them more accessible (perhaps by arranging them into clearly labeled categories). Or consider a legislature that passes a law stating "all existing laws are hereby reenacted." Such a legislature is not coming up with reasons why any particular law is ultimately justified. To ask why it wrote a certain law would be like asking why King James wrote the Book of Genesis. It was already written. Based on the lack of substantive legislative history, the 1952 reenactment of the Undesirable Aliens Act appears to be of this kind. Congress in 1952 did not debate the wisdom of keeping these crimes on the books.⁴⁴⁰ It merely reenacted them, with a few technical changes, as part of a larger project to reorganize all existing immigration laws. Because of this lack of meaningful debate, the 1952 reenactment cannot cure the law of its original racism.

A more interesting question is: what are the consequences of benign and conscious reenactments? Can a benign reenactment purge a law of its

436. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–23 (2018); *Abbott v. Perez*, 138 S. Ct. 2305, 2326–30 (2018).

437. For the details of *Trump v. Hawaii*, see *supra* Part V. *Abbott* involved an equal protection challenge to Texas's legislative redistricting. *Abbott*, 138 S. Ct. at 2315. Texas's 2011 map had been struck down as unconstitutional because it was enacted with discriminatory intent, and in 2013 Texas created a similar map for purportedly race-neutral reasons. *Id.* at 2313. The Court upheld this second map, finding that the challengers had not met their burden of proving discriminatory intent in the 2013 map. *Id.* at 2327.

438. See Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 65–70 (2020).

439. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

440. I infer here that the legislative silence concerning these immigration crimes, combined with the McCarran-Walter Act's larger purpose of recodifying existing immigration laws, implies that the crimes were reenacted simply because they were already there. It is also possible that the 1952 Congress held racist motivations similar to those that animated the 1929 Undesirable Aliens Act, and that these motivations did not appear in the legislative record. See, e.g., *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330, at *10–16 (D. Nev. Aug. 18, 2021) (finding racial animus in the 1952 reenactment based on factors including Peyton Ford's letter to McCarran containing the term "wetback," President Truman's veto statement condemning the larger McCarran-Walter Act as discriminatory, the enactment that same year of a law nicknamed the "Wetback Bill" that concerned immigration from Mexico, and the lack of debate over Section 1326 relative to other provisions).

discriminatory intent? Or is a conscious reenactment required? This is the debate between Sotomayor and Alito, which Alito concedes that he lost.⁴⁴¹ The danger of benign reenactments is that they launder the original enactors' racism.⁴⁴² This is especially dangerous in the context of *Arlington Heights* cases, which involve facially neutral laws with discriminatory effects. To future generations such laws appear, well, neutral. After a law is enacted, and then years and decades pass, that law becomes self-justifying. People assume it is inevitable and they treat it as part of the default world. It has the strength of inertia. It is what is done. The existing law also helps constitute our collective morality. Our intuitions about right and wrong are defined, in part, by what the law forbids.⁴⁴³

For instance, the Undesirable Aliens Act has helped cause the American public to associate Latin American immigration with criminality.⁴⁴⁴ That association, in turn, has helped legitimize America's crime-based approach to immigration enforcement.⁴⁴⁵ And that has made federal immigration crimes seem all the more natural. There are always race-neutral justifications for the status quo. If a legislature reenacts an old racist law without acknowledging or confronting the racism that inspired it, it does not really cure the constitutional harm.⁴⁴⁶ If anything, such a reenactment represents the original legislature's ultimate success. It hid its intentions in a race-neutral law, only to have them hidden even better by a future legislature.⁴⁴⁷ Requiring conscious reenactment is politics-forcing. It compels the legislature to face the ugly history of a law when deciding whether it should be kept. A legislature should not be able to whitewash past choices unless the past is actually faced.

VIII. CONCLUSION

The federal legal system incarcerates tens of thousands of people every year for victimless immigration crimes. Basically all of the defendants in these cases are from Latin America. Surely some federal prosecutors and judges

441. *Espinoza v. Mont. Dep't. of Revenue*, 140 S. Ct. 2246, 2268 (Alito, J., concurring).

442. Cf. Hasen, *supra* note 439, at 65–70 (criticizing the related phenomenon of “animus laundering,” where the government changes its stated rationale for a discriminatory policy in order to protect it from judicial review).

443. Robert M. Cover, *The Supreme Court: 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

444. O'BRIEN, *supra* note 17, at 56–58.

445. See Eagly, *supra* note 3, at 1283–84; Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 116–17 (2012); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 241 (2018); Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2071 (2017).

446. Cf., *United States v. Fordice*, 505 U.S. 717, 731 (1992) (“If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . the State has not satisfied its burden of proving that it has dismantled its prior system.”).

447. Louisiana readopting the 10-vote conviction rule for “efficiency” purposes is an excellent illustration of this. See *supra* note 412 and accompanying text.

have taken notice of this fact. At least a few have even, perhaps, felt tinges of conscience. It is hard not to see that, day after day, every single defendant in court has brown skin and speaks Spanish or an indigenous language. Likely more than once a prosecutor or judge has had to reassure themselves that racism is not at work here. It just so happens that the United States shares a long border with Mexico. And it just so happens that the countries to our south are poor and unstable. So, of course, it is overwhelmingly Latin Americans who get prosecuted for immigration crimes. That is not a product of racism, it is a product of geography. And geography cannot be helped.

This thought should provide no comfort. Causality moves in the other direction. Entry and reentry were criminalized precisely in order to target Latin Americans because of their race. In the 1920s, a group of powerful white men decided that Latin Americans were racially degenerate. These men went to great lengths to exclude Latin American immigrants completely from the United States. They did not focus on the merits of “legal” versus “illegal” immigration. They wanted to keep out *all* immigrants deemed racially undesirable. And they largely succeeded for a time. The quota system they enacted in the 1920s has since been repealed. But the laws criminalizing unlawful entry and reentry remain. They are a lasting legacy of those men’s commitment to white supremacy.

Ninety-two years of racist prosecutions are enough. Congress should repeal these crimes. Prosecutors should decline to charge them. Juries should nullify them. Defense lawyers should challenge them. And judges should strike them down.