

COMMENT

CRITICAL RACE THEORY AND PROPOSITION 187: THE RACIAL POLITICS OF IMMIGRATION LAW

I. INTRODUCTION

In mid-1993, a group of concerned California residents were fed up. They were tired of the “illegal aliens”¹ whom they blamed for sapping the state’s resources. These “aliens” were everywhere: crowding their children out of public schools, crowding welfare offices, and crowding the emergency rooms of hospitals. To attack these problems, these angry residents formed a political movement. They saw themselves as the last hope for California, economically battered and bleeding from tax revolts, race revolts, natural disasters, and the crash of the defense industry. Accordingly, they gave their group a bold name: the “Save Our State” (SOS) movement. Their movement placed Proposition 187 on the November 1994 California ballot — a proposal to deny undocumented immigrants the few public benefits to which they are legally entitled.² The central question of this Comment is whether Proposition 187 is an attempt to save state resources

1. “Alien” is a legal term that defines all noncitizens of the United States. 8 U.S.C. § 1101(a)(3). Although the term “illegal aliens” is often used to refer to those who enter the United States without immigration documents, it further demonizes undocumented immigrants as lawbreakers and outsiders. In opposition to this rhetoric, I will throughout this Comment use the term “undocumented immigrants,” unless the term “alien” is more descriptive as a legal category. *See also* Jennifer M. Bosco, Note *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 71 n.1 (1994) (“If we assume that undocumented immigrants are a criminal element, then we are automatically accepting that the existing immigration laws are just and fair.”).

2. Undocumented immigrants are ineligible for federal programs such as Aid to Families with Dependent Children (AFDC), Medicaid, Food Stamps, and Social Security Insurance (SSI). They are eligible for other programs including emergency medical treatment, the Women, Infants, and Children (WIC) nutrition program, Headstart, and public education through the 12th grade. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1528-31 (1995) (discussing the ineligibility of undocumented persons for most major federal public assistance programs).

or an attempt to save the state's racial identity from becoming increasingly nonwhite³.

Immigration law and politics have been historically intertwined with racial prejudice. Many of those who have called for immigration restrictions have also sought an end to the racial and cultural diversity brought by immigrants.⁴ With the end of legally sanctioned race discrimination in the 1960s, immigration rhetoric has lost some of its overt racist overtones. However, in the 1990s, many politicians and lawmakers have emphasized the difference between "legal" and "illegal" immigration. This change begs a central question: Have the racist motivations of past immigration law and policy been completely displaced by a concern for law and order? This Comment argues that immigration law and policy continue to be at least partially motivated by a drive for cultural and racial homogeneity.

This Comment uses Critical Race Theory as a vehicle to explore the racial underpinnings of immigration law and policy.⁵

3. In this Comment, the term "whites" loosely refers to the descendants of European immigrants to the United States. While the term has a broad definition, the arguments in this Comment will not apply to all whites, just as they will not apply to all nonwhites. As far as capitalization is concerned, my approach tracks the one taken by Neil Gotanda: "As a term describing racial domination, 'white' is better left in the lower case, rather than privileged with a capital letter. 'Black,' on the other hand, has deep political and social meaning as a liberating term, and, therefore, deserves capitalization." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 n.12 (1991).

The term "nonwhites" in this Comment refers to African-Americans or Blacks, Asians, Latinos, and Native Americans. Latinos will be considered a racial minority in this Comment, even though the current federal government racial classification system provides that "Hispanics" can be of any race. See Luis Angel Toro, "A People Distinct from Others": *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15,* 26 TEX. TECH L. REV. 1219 (1995). Further, a biological theory of race has been discredited by a number of scientific studies. See, e.g., Masatoshi Nei & Arun K. Roychoudhury, *Gene Differences between Caucasian, Negro, & Japanese Populations,* 177 SCIENCE 434 (1972) (refuting the idea that race is biologically or genetically significant). Further, the denial that Latinos constitute a distinct racial group ignores the social construction of race in our society. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice,* 29 HARV. C.R.-C.L. 1, 7 (1994) (rejecting a biological notion of race, instead defining race as a "vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry").

4. See, e.g., ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 10-11 (1985) (describing the nativist Know-Nothing party of the 1830s and 1840s, which called for an end to Irish and German Catholic immigration to the United States based on their "racial" inferiority).

5. Critical Race Theorists reject false objectivity as an analytic tool. Instead, Critical Race Theory is informed by individual experience and embraces subjective interpretation as a necessary and instructive mode of critique. The work of Patricia Williams is particularly instructive of this tradition. See, e.g., PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE & RIGHTS (1991).

My personal experiences as a Latino who grew up in the border town of El Paso, Texas inform this Comment. When speaking of how Proposition 187 affects nonwhites, I will place most of my focus on its impact on the Latino/Latina commu-

Critical Race Theory is a theoretical framework that explores the ways that purportedly race-neutral laws and policies perpetuate racial subordination.⁶ The repeated assertions that anti-immigration measures are not racially motivated make immigration law and policy a unique candidate for analysis through a Critical Race lens.⁷ This Comment will focus on Proposition 187, the November 1994 California ballot initiative passed by the voters which, if declared constitutional by the courts, would deny education and numerous social services to undocumented immigrants.⁸ This Comment argues that Proposition 187 was not passed to punish undocumented immigrants, nor out of a wish to return to the "rule of law," as many of its proponents argued. Rather, it was propelled by fears of the increasing racial diversity of California and the United States. In this way, Proposition 187 is consistent with the racism underlying the history of United States immigration law and policy.

Critical Race Theory analyzes laws in their historical context, revealing the racial, historical underpinnings of purportedly race-neutral laws. Thus, Part II explores the racial history of immigration law and policy, and how white supremacy has been reinforced through United States immigration law and policy. Part III explores the current situation in immigration politics and analyzes sections of Proposition 187.

Part IV unmaskes the contemporary racialization of Proposition 187. Politicians have used anti-immigrant rhetoric to mobilize white voters who feel that immigrants are "taking jobs" from them. Intragroup tensions are also exacerbated by pitting racially and economically subordinated groups against one another in a competition for scarce resources. Latino citizens are viewed by many as having a lesser claim to membership in the American community because the stereotypical undocumented immigrant

nity. Nevertheless, it is undeniable that Proposition 187 has had an impact on other nonwhite immigrant communities in similar ways. See K. Connie Kang, *Asian American Groups Organize to Fight Measure*, L.A. TIMES, Oct. 9, 1994, at B1 (describing how Asians organized to fight Proposition 187 out of fear that the measure would lead to greater discrimination against them regardless of their immigration status).

6. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

7. See Rich Connell, *Prop. 187's Support Shows No Boundaries*, L.A. TIMES, Sept. 25, 1994, at A1 (quoting Veronica Rodriguez, a college student in the Imperial Valley: "I'm Hispanic and I don't think that race is really the issue.").

8. Eight lawsuits were filed in state and federal courts to enjoin the enforcement of Proposition 187. Paul Feldman & Rich Connell, *Wilson Acts to Enforce Prop. 187; 8 Lawsuits Filed*, L.A. TIMES, Nov. 10, 1994, at A1.

is Latino or Latina.⁹ Thus, many view Latinos as not belonging in the United States because of the immigrant history of their ancestors. Measures such as Proposition 187 stigmatize Latinos regardless of their immigration status. This stigma results from the ways that Latino immigrant history has been criminalized, through the prevalent “illegal alien” rhetoric. In addition, this Comment attempts to explain why anti-immigrant measures enjoy support from economically subordinated minority citizens, and even from Latinos themselves.

In light of the racially charged nature of measures such as Proposition 187, Part V argues for strict scrutiny of immigration-related ballot initiatives. Alienage classifications have not uniformly received the strict scrutiny usually given to racial classifications, creating a false dichotomy between race and alienage classifications.¹⁰ The United States Supreme Court has reinforced this dichotomy by refusing to recognize discrimination against non-citizens as tied to race.¹¹ In so doing, the Court has protected white economic and cultural privilege and further insulated racial discrimination from challenge. This Comment argues

9. This Comment will use the term “Latino” to refer to persons who trace their roots to Mexico and Latin America, both male and female. For a discussion of terms, see RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS ix-xi* (3d ed. 1988). Though “Latino” is in the Spanish masculine gender, it is meant in this Comment to be inclusive of both males and females. Nevertheless, the term “Latina” also will be used herein in favor of a gender inclusive vocabulary. This is particularly important in the immigration debate because of the prominent stereotypical image of the pregnant Mexican woman who dashes across the border to have a United States citizen baby. See Johnson, *supra* note 2, at 1552 n.198 (discussing negative stereotypes of immigrant women).

10. In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court applied strict scrutiny and held that a state’s denial of welfare benefits to documented aliens violated the Equal Protection Clause of the United States Constitution. However, the post-*Graham* cases have applied strict scrutiny inconsistently, carving out a number of exceptions resulting in lower levels of Equal Protection Clause scrutiny. See *Developments in the Law — Discrimination Against Documented Aliens*, 96 HARV. L. REV. 1400, 1432 (1983) (“[I]nstead of subjecting citizenship requirements to the consistently strict scrutiny applied to other suspect classifications, the Court has in effect treated alienage as only partially suspect and has accorded documented aliens a largely unacknowledged form of intermediate protection.”).

It is important to note that strict scrutiny of a legislative classification will not necessarily result in the invalidation of a discriminatory statute. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (where the decision to intern Japanese Americans during World War II survived the Supreme Court’s application of strict scrutiny based on government’s compelling interest of military necessity). Nevertheless, strict scrutiny represents a strong presumption against the constitutionality of the statute or governmental action. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985).

11. See, e.g., *Espinoza v. Farah*, 414 U.S. 86 (1973) (citizenship requirement for factory workers found not to violate Title VII of the Civil Rights Act of 1964 as national origin discrimination). But see *Espinoza*, 414 U.S. at 96-7 (Douglas, J., dissenting) (arguing that the Civil Rights Act prohibits “practices, procedures, or tests” neutral either in their intent or on their face, if they create “artificial, arbitrary, and unnecessary” barriers to employment).

that alienage classifications should uniformly receive strict scrutiny, in light of their close relationship to race and national origin. In addition, immigration-related voter initiatives should receive strict scrutiny on the basis that these ballot initiatives are unusually prone to the expression of racism.¹² Part VI concludes with a call for Latinos and Latinas to reject the politics of immigrant bashing because of its harmful effects on the entire community.

II. IMMIGRATION AS A RACIAL ISSUE: HISTORICAL CONTEXT

Critical Race Theory emphasizes the importance of viewing laws and lawmaking within the proper historical context, in order to deconstruct their racialized content.¹³ Proposition 187 can be viewed as the latest in a long line of immigration laws which have a racial subtext. Through its exclusion of non-natives, immigration law has operated to define whiteness and nonwhiteness.¹⁴ Although the United States is a country of immigrants, whites are not generally thought of as immigrants. However, this misconception neglects the fact that Native Americans and Mexicans occupied vast portions of North America before whites.¹⁵ Immigration law, through its exclusion of non-natives, has given legal validity to the false belief that whites were the first to claim North America.¹⁶

Immigration law has also provided the legal mechanism for the importation of nonwhite laborers. As Michael Olivas points out, immigration law has been used to import racial groups "for their labor and . . . then denying them participat[ion] in the society they built, or expelled when their labor was no longer consid-

12. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

13. See KIMBERLÉ WILLIAMS CRENSHAW, ET AL., *Introduction to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 3* (1993) ("Critical race theory is grounded in the particulars of a social reality that is defined by our [the authors'] experiences and the collective historical experience of our communities of origin.").

14. See Ian F. Haney López, *White By Law*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 542-49 (Richard Delgado ed., 1995) (discussing how citizenship was reserved for whites and how whiteness was judicially determined).

15. See TOMÁS ÁLMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 19-22 (1994) (discussing white conquest of California, and the racial hierarchy whites constructed which placed Indians at the bottom of the social scale).

16. See Ibrahim J. Wani, *Truth, Strangers, & Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 116 (1989) ("Immigration law acquired its structure in the racist and xenophobic environment of the late nineteenth century . . .").

ered necessary."¹⁷ This disregard for nonwhites except as a source of exploitable labor can be seen historically in the cases of Africans, Asians and Latinos.

A. *Naturalization, Dred Scott, and Black Citizenship*

From the founding of the nation, United States citizenship has been racially constructed. The drafters of the Constitution gave Congress the power to "establish a uniform naturalization."¹⁸ In 1790, Congress acted pursuant to this grant of authority and limited naturalization to free, white persons.¹⁹ A series of court cases followed, which defined who could be naturalized as citizens on the basis of whether they could be considered "white."²⁰

The limitation of naturalization to whites was yet another way to deprive the African slaves of any citizenship rights. The Supreme Court gave legal validity to the restriction of citizenship to whites in the *Dred Scott*²¹ decision. There, Chief Justice Taney held that citizenship could not be extended to descendants of African slaves. In his opinion, Taney stated that the Congressional limitation of citizenship to whites was perfectly consistent with the Constitution.²² Taney reasoned that because whites consented to the presence of Blacks only as slaves, they could not be considered citizens.²³ This consent theory of citizenship was upset by the passage of the Fourteenth Amendment to the Constitution in 1866, which granted citizen status by birth within the United States.²⁴

Despite its association with the *Dred Scott* decision, consent theory has been revived around the debate over undocumented immigrants. Some have suggested denying citizenship to the children of anyone but citizens or legal residents.²⁵ These commentators argue that because the state did not consent to the

17. Michael A. Olivas, *The Chronicles, My Grandfathers Stories, and Immigration Law: The Slave Traders Chronicle As Racial History*, 34 ST. LOUIS U. L.J. 425, 429 (1990).

18. U.S. CONST. art. I, § 8, cl. 4.

19. See Haney López, *supra* note 14, at 542.

20. *Id.*

21. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

22. *Id.* at 420 ("[Congressional limitation of naturalization to whites] followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, governed at their own pleasure.")

23. Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (book review).

24. U.S. CONST. amend. XIV, § 1.

25. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that historical notions of citizenship cannot apply to the children of undocumented parents because the state has not consented to the alien's presence.)

presence of the undocumented alien, the State does not consent to the presence of the alien's children.²⁶ However, this theory is at odds with the literal language of the Fourteenth Amendment, which grants citizenship at birth regardless of the citizenship of the parents. The legislative history as well as the literal reading of the Constitution shows that Congress meant to give citizenship by birth to all, regardless of the status of the parents.²⁷

Gerald Neuman has challenged this theory as not just a strategy to control our borders, but as a struggle over the future racial, linguistic and cultural development of American society.²⁸ He argues that restricting citizenship to the children of the undocumented bears an unhealthy resemblance to *Dred Scott*.²⁹ In light of the current debate surrounding the undocumented, Neuman correctly concludes that we should reject arguments for doing away with universal citizenship at birth because of the danger of manipulation on racial grounds.³⁰

B. *Chinese Exclusion*

After slavery was made illegal by the Thirteenth Amendment to the Constitution,³¹ capitalists continued to look internationally for sources of cheap labor. International treaties facilitated the entry of Chinese laborers into the United States to work in the railroad and agriculture industries.³² Immigration law developments in the late 1800s were dominated by racial devices employed to control the Chinese laborers and deny them formal rights.³³

Anti-Chinese sentiment was particularly severe in California, where most of the Chinese immigrants had settled.³⁴ One author has outlined the political climate in California in the late nineteenth century, which is strikingly similar to today's attitudes towards immigrants: "[The Chinese immigrant] was made the scapegoat for mining and real estate booms and slumps; for crime waves requiring vigilance committees; for corruption, extravagance, and profligacy in state and city government; and for

26. *See id.*

27. Neuman, *supra* note 23, at 492.

28. *Id.* at 500.

29. *Id.*

30. *Id.*

31. U.S. CONST. amend. XIII.

32. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 22 (1993) (discussing how the labor needs of the Central Pacific Railroad led to the Burlingame Treaty of 1868, and greater Chinese migration to the United States).

33. Olivas, *supra* note 17, at 435.

34. *See HULL, supra* note 4, at 11.

land and railway monopoly.”³⁵ The Chinese government’s inquiries about the condition of its citizens and protests were ignored by the American government.³⁶ Furthermore, California was frequently an uncertain state in national elections. As a result each political party made an effort to win its support through open racism against the Chinese.³⁷ Finally, Chinese immigration was linked to the South’s attempt to control Blacks when it came to voting in Congress on anti-Chinese measures. The South was “quite willing to join with the Pacific Coast in fitting the Chinese into a caste system which, in many respects, resembled that which prevailed throughout the former slave belt.”³⁸

In order to control the growth of the Chinese population, Congress enacted the Chinese Exclusion Act of 1882, suspending new Chinese immigration into the United States for ten years.³⁹ A more severe act was passed in 1888 which virtually prohibited the Chinese from entering or reentering the United States.⁴⁰ In a series of cases, the United States Supreme Court refused to strike down the anti-Chinese federal laws and treaties. In Justice Field’s opinion in *Chae Chan Ping v. United States*, the Court held:

If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, *who will not assimilate with us*, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.⁴¹

Race and “assimilability,” Justice Field concluded, are permissible bases for Congress to formulate immigration policy. Field further argued that the Chinese were “strangers in the land, residing apart by themselves and adhering to the customs and usages of their own country.”⁴² He concluded that because the Chinese grew in numbers each year, “at no distant day [the West Coast] would be overrun by them, unless prompt action was taken to restrict their immigration.”⁴³

Field first articulated “assimilability” arguments in a dissenting opinion written five years earlier: “[The Chinese] have re-

35. MILTON KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 10 (1965); see generally STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 16-17 (1992).

36. KONVITZ, *supra* note 35, at 11.

37. *Id.*

38. *Id.* at 12.

39. 22 Stat. 58 (1882).

40. 25 Stat. 476 (1888).

41. *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (emphasis added).

42. *Chae Chan Ping*, 130 U.S. at 595.

43. *Id.*

mained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language They do not and will not assimilate with our people."⁴⁴ Thus, Field concluded: "Thoughtful persons who were exempt from race prejudice saw . . . vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization."⁴⁵

Although the aliens challenging restrictive immigration laws prevailed in some instances,⁴⁶ the racist wave that swept California continually found legitimation in the Supreme Court's decisions. In *Fong Yue Ting v. United States*,⁴⁷ a treaty provision suspended deportation for those Chinese laborers who could furnish "one credible white witness" on their behalf. The Supreme Court upheld the expulsion of an alien under this statute on political question grounds. The Court's opinion speculated the Chinese would not be truthful.⁴⁸

Olivas analogized Chinese immigration history to Derrick Bell's fictitious account of Space Traders who propose to rid the United States of its Black citizens: "If the Space Traders had landed in the later 1800's or early 1900's and demanded the Chinese in exchange for gold, antitoxins and other considerations, there is little doubt but that the States, Congress, and the United States Supreme Court would have acquiesced."⁴⁹ The Supreme Court's decisions during this period fully support this metaphor.

C. *The Bracero Programs and Operation Wetback*

In the same way that American employers sought the labor of the Chinese in the late 19th century, agricultural employers made heavy use of Mexicans escaping economic and political persecution after the political upheaval of the Mexican Revolution of 1910. However, when Congress passed the Immigration

44. *Chew Heong v. United States*, 112 U.S. 536, 566-7 (1884) (Field, J., dissenting).

45. *Chew Heong*, 112 U.S. at 569 (Field, J., dissenting). Justice Brewer, in his dissent in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), conceded that the statutes had been "directed only against the obnoxious Chinese," whom he described as a "distasteful class." 149 U.S. at 732, 743 (Brewer, J., dissenting). See LEGOMSKY, *supra* note 35, at 16-17.

46. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (striking down provisions of the 1892 Immigration Act that required "hard labor" for Chinese prior to deportation).

47. 149 U.S. 698 (1893).

48. *Id.* at 730 (citations omitted).

49. Olivas, *supra* note 17, at 435.

Act of 1917, agricultural employers worried that the Act's literacy and head tax requirements would severely reduce their immigrant labor supply.⁵⁰ Due to pressure from agribusiness, the government waived these requirements for Mexicans.⁵¹ These official actions were crucial to maintaining an exploitable, non-white work force of hundreds of thousands of Mexicans.⁵²

As jobs became scarce during the Great Depression, the Mexican worker population was controlled through mass deportations of persons with Spanish sounding names or Mexican features who could not produce formal papers. Over 300,000 Mexicans were deported from 1931-1934.⁵³ Many of these persons were citizens or legal residents, but simply could not prove their status. By 1942, labor shortages and World War II had created the need for more agricultural workers.⁵⁴ Thus, growers convinced the United States government to enter into the Bracero Program, a large scale contract labor program with Mexico.⁵⁵ Braceros were the perfect exploitable underclass, willing to work for low wages and in deplorable conditions.

By 1946, it became impossible to separate Mexican Americans from deportable Mexicans. Thus, in 1954, over one million people were deported under "Operation Wetback."⁵⁶ Many United States citizens were mistakenly "repatriated" to Mexico, including individuals who looked Mexican but had never even been to Mexico.⁵⁷ The program included a relentless media campaign to characterize the Operation as a national security necessity, and a tightening of the border to deter undocumented immigration.⁵⁸

50. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874 (1917). In addition, the Act prohibited immigration from Asiatic countries, and established a quota system based on the percentage of each nationality already residing in the United States. HULL, *supra* note 4, at 83.

51. RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 129-30 (2nd ed. 1981).

52. *Id.*

53. HULL, *supra* note 4, at 83; ACUÑA, *supra* note 51, at 138.

54. See ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 41-5 (1964).

55. *Id.* at 48. The agreements of 1942 and 1943 were informal ones. There was no specific act of Congress to create them. The 1943 agreement was financed through appropriations in Public Law 45, approved Apr. 29, 1943, Public Law 229 of 1944 continued these appropriations, and they were extended through Public Law 529 of December 1945. *Id.*

56. *Id.* at 69-70.

57. Olivas, *supra* note 17, at 438 (citing MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* 104-07 (1979)).

58. *Id.*

ety found ways to keep more nonwhites from coming and disempowering those already here. This system of marginalization of nonwhite immigrants and their descendants continues today. Since the passage of employer sanctions against those who hire undocumented immigrants in 1986, it has become more difficult and less socially acceptable to hire undocumented workers.⁶⁴ Since undocumented immigrants can no longer *legally* serve as cheap labor, their presence in the United States has come under attack from politicians, voters, and legislators.

III. MODERN ANTI-IMMIGRANT POLITICS AND PROPOSITION 187

Undocumented immigrants provide a convenient scapegoat for the social problems currently confronting America, making anti-immigrant rhetoric prevalent and acceptable in politics today. Nowhere has this virulence been more severe than in California. As the state where most immigrants choose to settle, undocumented immigration is seen as a major problem.⁶⁵ Many Californians now fear an "illegal alien invasion" from Mexico to take back what used to be their country.⁶⁶ Fear of a nonwhite California has manifested itself in a number of ways, including the recent attacks on multi-lingualism through the voter initiative process. For example, California voters in 1986 overwhelmingly approved Proposition 63, which declared English the state's official language.⁶⁷ The initiative was in some sense symbolic, since it did not prohibit other languages in a variety of contexts where it is most often used, such as in everyday conversation in ethnic communities.⁶⁸ However, English-Only measures also symbolize

64. When it was revealed that President Bill Clinton's first two nominees for Attorney General, Zoe Baird and Kimba Wood, had each hired undocumented immigrants as domestic help, the public outcry that ensued caused their nominations to be withdrawn. Lynn Smith & Bettijane Levine, *Flap Over Hiring Illegal Employees May Cause Chill*, L.A. TIMES, Feb. 9, 1993, at E1, E7.

65. See Johnson, *supra* note 2, at 1546 (citing 1992 INS estimates that 43% of the undocumented population reside in California).

66. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION: NOV. 8, 1994, at 54 (1994) ("We have to act and ACT NOW! On our Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion."). See also Ed Leibowitz, *Master Race Theater*, L.A. WEEKLY, Oct. 14-20, 1994, at 26, 30 (quoting Barbara Coe: "They [students on campuses] are screaming . . . that the Treaty of Guadalupe [Hidalgo] is nothing but a fraud document that we have put together for our own purpose; we have stolen their land. This truly belongs to Mexico, and they have every right, and if they have to destroy us they will.").

67. Richard Simon, *Bradley Handed Only L.A.-Area Defeat in Valley*, L.A. TIMES VALLEY EDITION, Nov. 6, 1986, at II-8 (discussing in part the passage of Proposition 63, by a margin of 73% to 27%).

68. Indeed, such a prohibition would likely be unconstitutional under the First Amendment to the Constitution. Cf. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994), *aff'd*, 69 F.3d 920 (9th Cir. 1995) (en banc).

a growing anxiety about the many languages present in the state, and the concomitant racial diversity.⁶⁹ The California initiative was followed by similar measures in other states, as well as numerous calls for a reduction in funding for bilingual education and implementation of English-Only job rules by many employers.⁷⁰

Nearly ten years after the English-Only initiative, the multiplicity of immigrants and languages in California continues unabated. Calls for assimilation have been supplemented by restrictions against the undocumented in the legislative process. In 1993, representatives in the California legislature introduced 21 pieces of legislation aimed at taking away rights from undocumented immigrants.⁷¹ In early 1994, Governor Pete Wilson made undocumented immigration the cornerstone of his 1994 re-election campaign. He supported much of the anti-immigrant legislation in the legislature, and sued the federal government for reimbursement of state funds spent on undocumented immigrants.⁷² In addition, Governor Wilson and other politicians have proposed an amendment of the United States Constitution to deny citizenship to the children of undocumented immigrants.⁷³ After several months of low poll ratings, Wilson's political fortunes improved in mid-1994 when a loosely organized group of Orange County residents collected enough signatures to place Proposition 187 on the November 1994 ballot.⁷⁴

Proposition 187 attacks the undocumented on several fronts. First, it aims to increase full law enforcement cooperation with the Immigration and Naturalization Service (INS). That is, local police departments would be required to notify the INS of anyone who is arrested and whom they "suspect" is here in violation

69. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 346-47 (1986) ("For some voters, surely the ballot issue symbolized dominance itself: 'foreigners' were not to be allowed to 'take over.' . . . In other words, the attitudes of the California majority probably reflected the same range of feelings that had fed the Americanization movement around the turn of the century.").

70. See Rey M. Rodriguez, *The Misplaced Application of English-Only Rules in the Workplace*, 14 CHICANO-LATINO L. REV. 67, 69 (1994).

71. Bosco, *supra* note 1, at 74.

72. Daniel M. Weintraub, *Wilson Plans Immigration Offensive*, L.A. TIMES, Apr. 20, 1994, at A16.

73. See Ronald Brownstein, *Immigration Debate Roils GOP Presidential Contest*, L.A. TIMES, May 14, 1995, at A1, A18.

74. Section 1 of Proposition 187, in its Findings and Declaration, reads: *The People of California find and declare as follows: . . . That they have suffered and are suffering economic hardship caused by the criminal conduct of illegal aliens in this state. . . . That they have a right to the protection of their government from any person or persons entering this country unlawfully.*

1994 Cal. Legis. Serv. A-78 (West).

of United States immigration laws.⁷⁵ Second, the law would require providers of public social services to deny services to anyone whom the service provider determines or "reasonably suspects" is "an alien in the United States in violation of the federal law."⁷⁶ Proposition 187 sets up the same "reasonable suspicion" standard for the provision of publicly funded, non-emergency health services.⁷⁷

Finally, Proposition 187 aims to exclude undocumented children from both public elementary and secondary schools⁷⁸ as well as public postsecondary institutions.⁷⁹ The authors of Proposition 187 knew the education sections of the initiative were in direct contradiction with the Supreme Court's decision in *Plyler v. Doe*,⁸⁰ which held that the State of Texas could not bar undocumented children from public elementary schools. In fact, one of their goals was to invite the Supreme Court to overturn *Plyler*,⁸¹ now that the Court is politically more conservative than it was in 1982. As with the other sections of the initiative, a school administrator's "reasonable suspicion" is enough to trigger an investigation of students' immigration status. Civil rights groups have blasted the measure charging that the "reasonable suspicion" standard will lead to widespread discrimination against nonwhites, especially Asians and Latinos.⁸²

On November 8, 1994, California voters passed Proposition 187 by a margin of 59 to 41 percent. Whites overwhelmingly supported the proposition, while groups of color generally opposed the measure.⁸³ The day after its passage, a federal court enjoined enforcement of the initiative.⁸⁴

75. CAL. PENAL CODE § 834b (Deering 1995).

76. CAL. WELF. & INST. CODE § 10001.5 (Deering 1995).

77. CAL. HEALTH & SAFETY CODE § 130 (Deering 1995). Section 130(a) reads: "In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted may receive the benefits of publicly funded health care."

78. CAL. EDUC. CODE § 48215 (Deering 1995).

79. CAL. EDUC. CODE § 66010.8 (Deering 1995).

80. 457 U.S. 202 (1982).

81. Ron Prince, *Americans Want Illegal Immigrants Out*, L.A. TIMES, Sept. 6, 1994, at B7. ("[A court challenge to Proposition 187] . . . will force the U.S. Supreme Court to revisit its narrow (5-4) decision of 1982 that required public education for illegals.")

82. See AMERICAN CIVIL LIBERTIES UNION (ACLU) BALLOT PAMPHLET, *Vote No on Prop. 187* (1994) ("The initiative recklessly mandates that anyone suspected of being undocumented must prove his or her residence status.").

83. Proposition 187 won among whites by 59% to 41%. It failed 78% among Latinos, 54% among Asian Americans and 56% among blacks. Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds*, L.A. TIMES, Nov. 9, 1994, at A1.

84. See Feldman & Connell, *supra* note 8. On November 20, 1995, U.S. District Judge Mariana Pfaelzer ruled that major portions of the initiative are an unconstitutional infringement on the federal government's exclusive power to regulate im-

IV. CRITICAL RACE THEORY AND PROPOSITION 187

The racial issues surrounding Proposition 187 have centered around two opposing views. The proponents of Proposition 187 contend the measure has nothing to do with race, arguing that the proposition is merely an attempt to save scarce state resources and uphold the law.⁸⁵ The opponents view the initiative as an attack on racial and cultural minorities, seeing it as part of a historical continuum of race-based immigration policies.⁸⁶ This section will examine the debate through the lens of Critical Race Theory using the history and context of immigration law discussed in the previous two sections.⁸⁷

Critical Race Theory aims to understand the structure and content of legal thought, so that the law may be used more effectively for racial and other types of reform.⁸⁸ Critical Race Theorists also aim to deconstruct the cornerstones of liberal jurisprudence, such as colorblindness and the rule of law, and show how they operate to disadvantage nonwhites and further solidify white supremacy.⁸⁹ These themes will be employed in the following analysis.

A. *Fictions: The Rule of Law and Race-Neutrality*

Proponents of Proposition 187 argue that undocumented immigrants have no claim to public entitlements because of their violation of United States immigration laws.⁹⁰ Their assertions illustrate a type of "rule of law" argument — that those who have entered the United States illegally in the past are worthy of punishment through the denial of public services. There are several responses to the "rule of law" theory. First, the children of undocumented immigrants often come to this country at a young age with their parents and cannot be considered morally culpable

migration. California Attorney General Dan Lungren vowed to appeal the ruling, which he called, "[T]he first round of a 10-round heavyweight fight." Paul Feldman, *Major Portions of Prop. 187 Thrown Out by Federal Judge*, L.A. TIMES, Nov. 21, 1995, at A1.

85. See Coleman, *supra* note 61.

86. Antonio H. Rodriguez & Carlos A. Chavez, *Latinos Unite in Self-Defense on Prop. 187*, L.A. TIMES, Oct. 21, 1994, at B7 ("In the Latino community, there is widespread understanding that, while the immigrant-bashing nominally targets the undocumented, it is in fact . . . a direct attack on everyone of Latino heritage.")

87. For an exposition of the various themes included in Critical Race Theory, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

88. See, e.g., Patricia J. Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990); Charles Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

89. Delgado & Stefancic, *supra* note 87, at 462.

90. See Coleman, *supra* note 61. It is a federal misdemeanor to enter the United States without inspection (EWI) or by fraud. 8 U.S.C. § 1325.

for their status.⁹¹ Second, the focus on the crime that the immigrant commits overlooks that employers continue to violate⁹² the employer sanctions laws that Congress enacted in 1986.⁹³ A strict “rule of law” analysis also ignores the fact that immigration law is biased in favor of wealthy, talented immigrants and those who share the dominant American political ideology.⁹⁴ Finally, criminalization of the undocumented also belies the many contributions that they make to our economy and society.⁹⁵

The preceding history of immigration policy renders suspect the characterization of the current debate over Proposition 187 as race-neutral. As was the case during Chinese Exclusion, concepts such as sovereignty have historically served as proxies for racism. The “rule of law” is being used today in much the same way that “sovereignty” functioned during Chinese Exclusion — as a concept that is inconsistently applied to exclude and penalize only nonwhites from American society. For example, if the rule of law is the basis for the current vitriol against the undocumented, then the employers who hire undocumented immigrants should also be attacked by the public. However, while there were several border crackdowns in the weeks before the vote on Proposition 187, there were not concurrent raids on employers who hire the undocumented.⁹⁶

Proposition 187 was also supported by those who believed it was race-neutral. Neil Gotanda argues that “nonrecognition” — noticing but not considering race in a decisionmaking process —

91. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (“[T]he children who are the plaintiffs in these cases can affect neither their parents’ conduct nor their own status.”) (citations omitted).

92. Besides the continued violations of employer sanctions, one commentator has argued that they were conceived for lax compliance on behalf of employers. See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White Collar Crime*, 24 *LAW AND SOC’Y REV.* 1041, 1060 (1990).

93. Enacted as part of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (IRCA).

94. See Legomsky, *supra* note 35, at 181-216 (describing the preference system for superstar immigrants and entrepreneurs).

95. See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615, 699 (1981) (citations omitted) (“[U]ndocumented Mexicans, despite the formal illegalities of their entrance and presence, are the people who hold the jobs and share in our efforts; they are ‘here.’”). López further argues that adherence to the rule of law has replaced rational debate about a just immigration policy. *Id.* at n.473 (quoting ROBERTO UNGER, *KNOWLEDGE AND POLITICS* 141-42 (1975): “[O]ur very conception of rationality has become identical to the idea of following rules.”).

96. See also Sebastian Rotella, *Agents Begin Massive Sweep Along Border*, *L.A. TIMES*, Oct. 2, 1994, at A1 (describing “Operation Gatekeeper,” a massive enforcement effort along the California-Mexico border); Gloria J. Romero & Antonio H. Rodríguez, *Perspective on Immigration: A Thousand Points of Xenophobia*, *L.A. TIMES*, May 21, 1990, at B3 (discussing the vigilante “Light Up the Border” movement in San Diego County).

is self-contradictory.⁹⁷ “Nonrecognition fosters the systematic denial of racial subordination and the psychological repression of an individual’s recognition of that subordination, thereby allowing such subordination to continue.”⁹⁸ As an analogue to the way that race neutrality and nonrecognition are legal fictions which legitimate racial subordination, Gotanda argues that immigration law fictions such as sovereignty, entry, and community are often used to achieve ends that would be unthinkable in other areas of American law and popular belief. “[T]hese fictions are favored in immigration law primarily because of their expediency in allowing immigration law to achieve purposes that would otherwise be constitutionally or morally suspect.”⁹⁹

The fictions of nonrecognition and “colorblindness” were a prevalent part of the campaign for Proposition 187. Jesse Laguna, a member of the Save Our State Committee, wrote that Proposition 187 has nothing to do with race: “If Latinos are caught more often, it is because they illegally cross the border more often. Most of the Anglos I work with on . . . the ‘Save Our State’ Committee would feel exactly the same way if the border invaders were Canadians setting up camp in Montana and hollering for freebies.”¹⁰⁰ This statement ignores the reality that the Canadian border is a very porous one, and is ill-patrolled compared to the militarized United States-Mexico border.¹⁰¹

Perhaps the greatest difference between the situation of Canadians and Mexicans is that Canadians do not have to “holler for freebies” because they are accepted more readily as part of American society because of their race, and thus, not thought of as undocumented immigrants.¹⁰² Latinos and other nonwhites, on the other hand, are the stereotype of an “illegal alien” and thus presumed undocumented in white society. Therefore, to say that Proposition 187 is a race-neutral law ignores modern re-

97. Gotanda, *supra* note 3, at 16.

98. *Id.*

99. *Id.*

100. Jesse Laguna, *Latinos Want a Tighter Border Too*, L.A. TIMES, Sept. 23, 1994, at B7.

101. The Clinton Administration recently proposed eliminating INS enforcement on the Canadian Border. H.G. Reza, *U.S. to Curb Checks at Customs, Open Canadian Border*, L.A. TIMES, Aug. 27, 1995, at A1. However, the proposal was rejected by the Customs Department. Sam Fulwood III & Craig Turner, *Customs Rejects Plan to Relax Border Checks*, L.A. TIMES, Aug. 31, 1995, at A1.

102. Mark I. Pinsky, *Blending In*, L.A. TIMES, Jan. 26, 1987, at A1. Recent immigration laws have also favored white immigrants. The Immigration Act of 1990, for example, created a “diversity” program which allotted 55,000 visas to immigrants from countries underrepresented in the immigrant stream such as Great Britain and Ireland. 8 U.S.C. § 1153(c). See also LEGOMSKY, *supra* note 35, at 218-25.

alities of discrimination in today's society, because the law will disproportionately affect people of color.¹⁰³

B. *The Racialization of Crime: Fear of the Undocumented Criminal*

In addition to the discriminatory effects of Proposition 187, racial overtones were present in the campaign to pass the initiative. Casting the undocumented as criminals is particularly effective politically. In contemporary society, crime is closely associated with race, and politicians have successfully used the fear of crime to defeat opponents who were seen as too lenient on nonwhite criminals. The most famous example of this type of race-baiting was President George Bush's successful 1988 "Willie Horton" television advertisement, where he associated opponent Michael Dukakis with the parole of a Black rapist.¹⁰⁴

The political efficacy of such commercials was not lost in the statewide 1994 California campaign. In the 1994 California elections, Proposition 187 was similarly used to marshal white fears. In a television commercial supporting Governor Wilson's re-election bid, immigrants were shown massed at the California-Mexico border as an announcer ominously spoke, "They keep coming."¹⁰⁵ These advertisements play into the fears of crime that many Americans feel in today's society.¹⁰⁶ The undocumented are cast as a threat to not only the economic security of California, but also to the personal safety of Californians.¹⁰⁷ Since the undocumented are primarily seen as Latinos, such political advertisements only further legitimate the notion that crime is a nonwhite phenomenon.¹⁰⁸ The Wilson advertisement furthers the misconception that those who do not obey immigra-

103. There is already ample evidence that Latinos and Asians have suffered discrimination because of Proposition 187's passage. See Nancy Cervantes, et.al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1 (1995).

104. Cathleen Decker, *Race Often Plays Real But Unspoken Role in Politics*, L.A. TIMES, Oct. 16, 1994, at A1. (describing studies by Princeton Political Scientist Tali Mendelberg, which showed that the Willie Horton ad aroused more interest in race than it did in crime).

105. *Id.*

106. *Id.*

107. A Los Angeles Times Poll of Orange County Residents found that more than 52% of the respondents believed either that "a good deal" or a "good" amount of crime and street violence was caused by illegal immigrants. Dave Leshner, *O.C. Residents Call Migrants a Burden*, L.A. TIMES (Orange County Edition), Aug. 22, 1993, at A1.

108. Louisa Arnold, a participant in an Orange County pro-187 organizing meeting, stated: "When you read in the newspaper about certain crimes and carjackings, whatever, you count — count how many of these names are Hispanic or in other words of some foreign nature In other words, it isn't our own people who are getting into all this trouble." Leibowitz, *supra* note 66, at 27.

tion laws are more likely to commit other crimes once in the United States.¹⁰⁹

In public debate, the "illegal aliens" responsible for increases in crime are portrayed only as those who enter surreptitiously at the Mexican border, as evidenced by Wilson's commercial.¹¹⁰ This stereotype belies the argument that the immigration debate has not unfairly targeted Latinos. Crossing the United States border without documents is only one way of being an "illegal alien."¹¹¹ An estimated one-half of undocumented immigrants overstay tourist or student visas.¹¹² Many Canadians also enter our northern border without documents, but there is not a massive enforcement effort on the northern border of the United States.¹¹³

C. *White Entitlement to Compliant Nonwhite Labor*

A justification for the passage of Proposition 187 is that undocumented take away benefits from citizens and permanent residents.¹¹⁴ However, these arguments are based less in fact and more on the resentment that nonwhites should not be entitled to anything not available to whites. This is evident in the story of Barbara Coe, one of the authors of Proposition 187:

[B]arbara Coe [had been caring for] a crippled World War II veteran . . . [who] suddenly had the medical coverage pulled out from under him. During a futile visit to a social services agency, she saw crowds of Asian and Spanish speakers lining up for checks that had been denied her American friend. Coe channeled her outrage into the founding of Citizens for Action Now in January 1992; a month later she established an um-

109. "Our state is overrun with people whose first experience here teaches them that the most valuable thing they ever did was to break the laws of the United States." Coleman, *supra* note 61, at B7.

110. A supporter of Proposition 187 lamented how his street had become home to many people whom he believed to be undocumented, and criminals. "They [illegal aliens] sit out there and drink most of the time if they don't get picked up. They've caused criminal elements to come in such as hookers, drug dealers." *Californians Consider Illegal Alien Proposition*, Part 1, (Morning Edition, National Public Radio Broadcast), Oct. 13, 1994, 1994 WL 8692497 (MORNE Database).

111. In the parlance of the Immigration and Nationality Act (INA), this is "Entry Without Inspection" (EWI). 8 U.S.C. § 1325(a).

112. Johnson, *supra* note 2, at 1546 (citing Robert Warren, *Immigration and Naturalization Service, Estimates of the Unauthorized Immigrant Population Residing in the United States, By Country of Origin and State of Residence*, Oct. 1992, at 16-17).

113. See *supra* note 92.

114. See *Californians Consider Illegal Alien Proposition*, *supra* note 110 (quoting Proposition 187 co-author Alan C. Nelson: "If you're going to educate the illegal alien, you're going to take away from the citizen or the lawful alien child. If you're going to medicate the illegal alien, and again, other than emergency care — then you're going to take away from the U.S. citizen or lawful alien.").

rella organization of anti-illegal-immigrant groups called the California Coalition for Immigrant Reform¹¹⁵.

The assumption that Asians and Latinos must be "illegal aliens" only fuels the belief that expression of one's culture makes others question their immigration status. The desire to keep nonwhite immigrants out of schools and health clinics while at the same time keeping them as a source of cheap labor has historic parallels to the Chinese Exclusion and Operation Wetback.

The ability to deny nonwhites full social participation can be conceptualized as a form white entitlement.¹¹⁶ Put another way, many whites assume that they are entitled to nonwhite labor on their terms, and able to deny these same laborers the rights of full participation in society.¹¹⁷ This attitude was exemplified by one of Proposition 187's most vocal proponents, 1994 United States Senate candidate Michael Huffington. During the campaign it was revealed that he hired an undocumented woman as a nanny in violation of the employer sanctions provisions of IRCA. Huffington refused to change his position on Proposition 187, saying that it "deals with taxing Californians for welfare, health and educational services for illegal immigrants."¹¹⁸ This statement contradicts the fact that Huffington's own employee paid federal income taxes, Medicare taxes, and Social Security taxes from 1991 to 1993.¹¹⁹ Thus, even when whites know that undocumented immigrants work and pay taxes, the undocumented are still viewed as parasites on the economy.

D. *Calls for Assimilation: Proposition 187 as a Reaction to Cultural and Racial Diversity*

The calls for curbing undocumented immigration are concurrent with the rhetoric that programs and services such as bilingual education result in the Balkanization of America.¹²⁰ Many who espouse this position also support an end or a severe cut-back to legal immigration as well.¹²¹ These groups are strong

115. Leibowitz, *supra* note 66, at 30.

116. See ÁLMAGUER, *supra* note 15, at 18 (1994) ("This sense of entitlement . . . rested primarily on either exclusive or prior rights in many important areas of life.").

117. White entitlement is perhaps best summarized by the comments of one immigrants rights activist upon hearing of Gov. Pete Wilson's proposal for a guest worker program after the passage of Proposition 187. "It's like saying, you can pick cotton for us, but you can't attend our schools." Brownstein, *supra* note 60, at A1.

118. William Claiborne, *Huffingtons Say Employing Nanny Tested Consciences*, WASH. POST, Oct. 28, 1994, at A22.

119. *Id.*

120. See Patrick J. Buchanan, *What Will America Be in 2050?*, L.A. TIMES, Oct. 28, 1994, at B7 (arguing that Proposition 187 was necessary to combat intragroup conflict and rising "ethnic militancy, solidarity").

121. The Federation for American Immigration Reform (FAIR) is one example of a proponent of this position. Patrick J. McDonnell, *For Them, Prop. 187 is Just*

proponents of an assimilationist perspective, which would effectively eliminate any display of the immigrant's culture once in the United States.¹²² While assimilation may be good for immigrants in that it opens up economic opportunities, assimilationism is also tied to rendering nonwhites invisible to the greatest extent possible.¹²³ Assimilationism confers a psychological benefit upon members of mainstream society, privileging the notion that the immigrant should aspire to American culture and deny his or her own culture.¹²⁴ Assimilationism is also proxy for the fear of shifting demographics which will make whites the minority in some areas of the country. This is the predicted fate of California, where demographers predict that the majority of the state's residents will trace their roots to Latin America, Africa, Asia, the Middle East and the Pacific Islands by the beginning of the next century.¹²⁵

Bill Ong Hing has tracked the parallels between extremist anti-undocumented attacks and assimilationist rhetoric.¹²⁶ Extremists such as former Ku Klux Klan leader David Duke and 1992 presidential candidate Patrick Buchanan advocate for an immigration policy based on "assimilability," or in other words, whiteness. Duke has argued that undocumented immigrants are fraying the fabric of society: "We've got to begin to realize that we're a Christian society. We're part of Western Christian civilization [Because of] illegal immigration . . . [o]ur traditions are being torn away. Our values are being torn away."¹²⁷ Buchanan has said, "[I]f we had to take a million immigrants in, say, Zulus, next year or Englishmen and put them in Virginia,

the Beginning, L.A. TIMES, Jan. 28, 1995, at A1 (discussing FAIR's seizure of 187 to promote reductions in legal immigration); Paul Feldman, *Group's Funding of Immigration Measure Assailed*, L.A. TIMES, Sept. 10, 1994, at B3 (discussing the relationship between FAIR and Pioneer Fund, which has claimed that Blacks are inherently intellectually inferior to whites).

122. See Buchanan *supra* note 120 (Buchanan has stated: "We must assimilate the ones that are already here.").

123. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration Driven Multiracial Society*, 81 CAL. L. REV. 863, 904 (1993). Hing concludes:

[R]evision of immigration laws to allow only European immigrants or English speakers is telling over eighty percent of our immigrants that we don't like them; that there is something about their race and language that is offensive; that because of their race, language, and culture they do not belong in this country.

Id.

124. See *id.* at 875.

125. See Rachel F. Moran, *Foreword—Demography and Distrust*, 8 LA RAZA L.J. 1, 2 (1995) ("Census projections indicate that by 2020, Whites will constitute 34% of the state's population; Latinos, 36%; Asian Americans, 20%; African-Americans, 8%; and Native Americans, 1%.")

126. Hing, *supra* note 123, at 863.

127. *Id.* at 872-3 (citing Robert Shogan, *Duke Will Run Against Bush in Primaries*, L.A. TIMES, Dec. 5, 1991, at A1, A34).

what group would be easier to assimilate and would cause less problems for the people of Virginia? There is nothing wrong with us sitting down and arguing that issue, that we are a European country"¹²⁸

Many of the proponents of Proposition 187 also expressed concern about the increased cultural and linguistic diversity concomitant with increased immigration. Barbara Coe, one of the authors of Proposition 187, lamented the growing disappearance of her vision of America: "Is this America? Where do we live? What happened? How did it happen? Now we know and we're going to try to make it unappen."¹²⁹ They admitted that Proposition 187 was less an attempt to curb illegal immigration or save state resources, as it was an attempt to send a message to Washington about the severity of the immigration problem in California. However, to many of the nonwhites in California, Proposition 187 sent the message that the growing cultural diversity of California and the United States must be stopped.

Because of the potential for racism in defining who is likely to assimilate, assimilationism is an improper basis for immigration policy, much less an argument in support of Proposition 187. However, if assimilation is to be considered a valid goal, measures such as Proposition 187 and English Only have done little to further that goal. Instead, they have alienated both undocumented and documented immigrant populations.

E. *Division & Conquest: Cross-Racial Support for Proposition 187*

Proponents of Proposition 187 claimed that because the measure enjoyed some support from Latinos and other nonwhites, it could not possibly be racist. Such a view ignores the diversity of opinions in nonwhite communities. It is tantamount to arguing that the converse is true: that a measure is presumptively racist because whites support it. The argument that Proposition 187 is race-based has more to do with the context and history surrounding its passage, than the race of the people who supported it or did not support it. Context and history, and not statistics properly inform a Critical Race Theory analysis.

128. *Id.* (citing Patrick Buchanan on This Week With David Brinkley, ABC News Television Broadcast, Dec. 8, 1991). Buchanan has also asked, "Why are we more shocked when a dozen people are killed in Vilnius than [by] a massacre in Burundi? Because they are white people. That's who we are. That's where America comes from." Hing, *supra* note 123, at 873 (citing *A Nasty Campaign of "Us" vs. "Them": Buchanan's Appeal to Voters' Fears*, L.A. TIMES, Mar. 5, 1992, at B6).

129. See Leibowitz, *supra* note 66, at 32.

This is not to say that there are not possible explanations for the limited support that Proposition 187 enjoyed at the ballot box among people of color. For Blacks, continuing economic recession and discrimination has resulted in resentment of immigrants perceived as taking the service jobs in their communities.¹³⁰ In addition, politicians used the opportunity to give marginal inclusion to Blacks who would otherwise be at the bottom of the racial hierarchy.¹³¹ The same politicians who derided Blacks as welfare dependent now use the undocumented as the welfare scapegoat.¹³² However, claims that government benefits will be readily available once the undocumented are excluded are disingenuous, because these claims come from the same politicians whose aim is to end all government welfare.¹³³

Support of Proposition 187 by Latinos is probably also due to a desire to identify with dominant white society. However, as Kimberlé Crenshaw writes in the context of Black-white relations, this identification may be false:

[S]tereotypes serve a hegemonic function by perpetuating a mythology about both Blacks and whites even today, reinforcing an illusion of white community that cuts across ethnic, gender, and class lines. As presented by Critical scholars, hegemonic rule succeeds to the extent that the ruling class world view establishes the appearance of a unity of interests between the dominant class and the dominated.¹³⁴

Thus, Black opposition to affirmative action, for example, allows the dominated group to identify with the white community in ways that are otherwise impossible.

The same illusions that Crenshaw discusses are present in the debate around Proposition 187. Immigration categories allow Latinos to stratify themselves around alienage/citizenship

130. Evelyn C. White, *Immigration a Tough Call for Blacks*, S.F. CHRON., Oct. 10, 1994, at A1.

131. For an analysis of tensions between Black and Korean immigrant communities, see Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African-American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

132. Proposition 187 supporter Robert Kiley blamed the undocumented for the lack of government help for the poor: "We're paying for [undocumented mothers] while Americans are homeless and starving in the streets." Kevin Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 657 (1995) (citing Sara Catania, *County Report: A Message Hits Home*, L.A. TIMES, Nov. 20, 1994, at B1 (quoting Kiley)).

133. This is evident in the recent welfare reform bills proposed by the Republican-controlled congress, which not only cut government aid to the undocumented, but to resident aliens and citizens as well. See also Saul Sarabia, *The Red Herring of Illegal Immigration*, MIAMI HERALD, Jan. 19, 1996, at 27A.

134. Crenshaw, *supra* note 6, at 1371-1372.

lines.¹³⁵ Support of Proposition 187 by nonwhites may be attributable to the opportunity it gives nonwhites to ascend in society's racial hierarchy. Latino self-inclusion in the community of citizens lessens their lower status within the racial hierarchy of whites and nonwhites. Such self-identification only serves to perpetuate existing racial hierarchies, rather than challenging them as illegitimate. In this way, measures such as Proposition 187 serve to maintain white hegemony over nonwhites of all classes. That is, their position of dominance in the racial hierarchy is maintained through the creation of a citizen/alien hierarchy that wins over segments of the lower and middle classes.¹³⁶

F. *The Reification of Legal Categories: A Tainted Lineage*

Another reason for the limited Latino support of Proposition 187 may be due to the way their immigrant history has been stigmatized by dominant society. With the exception of Native Americans, all Americans share an immigrant history. Yet, the immigrant history of some ethnic and racial groups is more celebrated than others. In current parlance, however, the "illegal alien" has been reified into a composite: Latinos and Latinas who surreptitiously cross the United States-Mexico border. Like most stereotypes, this one explains only part of the undocumented immigrant population. In this way, the immigrant history of more recent immigrants such as Latinos is seen as less legitimate than those of its predecessors, despite the irregularities and illegalities of the immigration of the preceding groups, who are now classified as "white."

Latino support for Proposition 187 may be an attempt to disassociate themselves from the way that their immigrant history has been denigrated by anti-immigration rhetoric. Reification occurs when individuals and communities attribute an objective or fixed character to social or legal structures. Peter Gabel and Paul Harris call reification the result of an "authoritarian conditioning process through which people 'command' one another to acquiesce to the status quo by denying to one another the possi-

135. Acuña describes a similar stratification that occurred in New Mexico in the early 20th century. "Spanish immigrants who settled in New Mexico identified more with white settlers than the Mexican laborers. Affluent New Mexicans, thinking of themselves as Caucasians, rationalized to Anglos: 'You don't like Mexicans, and we don't like them either, but we are Spanish-Americans, not Mexicans.'" ACUÑA, *supra* note 51, at 56 (citing NANCIE GONZÁLEZ, *THE SPANISH-AMERICANS OF NEW MEXICO: A HERITAGE OF PRIDE* (1967)).

136. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 REV. OF L. & SOC. CHANGE 369, 374 n.11 (1982) ("The word 'hegemony' refers to the dominant 'sway' that these ideologies are able to gain over the more fragmented and underdeveloped ideologies of potentially revolutionary groups.").

bility of a better and more authentic form of social connection."¹³⁷ The status quo is reinforced through the internalization of racial hierarchies based upon Latinos' perceived "illegal" immigrant history. Thus, for some Latinos born or naturalized in the United States, support of Proposition 187 becomes a way of identifying with dominant society, or as Gabel and Harris put it: "[O]bedience to the status quo becomes a psychological precondition to recognition as a member of the group."¹³⁸

This delegitimation of the history of nonwhite immigrants tends to privilege the position of whites at the top of the racial hierarchy. This stigmatizes those who have nonwhite immigrant histories. This stigma, in turn, lessens nonwhites' belief that they are entitled to a place in society.¹³⁹ It also discourages their belief in the validity of their culture. Anti-immigrant proposals thus have a deterrent effect on the expression of culture, because it may subject nonwhites to suspicion of undocumented status. In this way, culture is not only suppressed — it is delegitimated.¹⁴⁰

The denial of culture is not a problem solely for recent immigrants such as Latinos and Asians, but for all groups of color who seek to express their culture because anti-immigrant proposals reinforce the stereotype of the citizen as a white person. This marginalizes all who do not fit into this model, including groups such as African-Americans whose ancestors were made citizens by the Fourteenth Amendment. Having demonstrated that race is inextricably tied to immigration law and policy, this Comment will now turn to the implications for the constitutionality of anti-immigrant ballot initiatives.

V. TOWARD STRICT SCRUTINY OF ANTI-IMMIGRANT BALLOT INITIATIVES

As explained above, one aspect of Critical Race Theory is to probe and criticize the ways which legal doctrine operates to perpetuate racial subordination.¹⁴¹ For example, the dichotomy of

137. *Id.* at 373 n.10.

138. *Id.*

139. There has been much written on how the law creates and maintains insider and outsider status. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA* (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. REV. 323 (1987).

140. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991) (addressing the scorn that sometimes associates with expressing one's culture).

141. See, e.g., Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (book review) ("[The Japanese Internment cases] were crucial steps in the development . . . of the view that even American-born non-Whites were somehow 'foreign.' This undeserved

race and alienage in current equal protection doctrine has legally reinforced the idea that immigration policies have nothing to do with race. This is belied by the history and modern context surrounding immigration legislation. Given the Supreme Court's unwillingness to find that racial discrimination exists in a given case without evidence of intent to discriminate,¹⁴² challenges to immigration laws on equal protection grounds face an uphill battle.¹⁴³ Nevertheless, some commentators argue that state ballot initiatives are often tainted by the racial animus of voters.¹⁴⁴ Despite the Court's unwillingness to consider the racial motivations of voters, its 1967 decision in *Reitman v. Mulkey*¹⁴⁵ suggests that there may be situations which require closer scrutiny of ballot initiatives.

A. *Current Equal Protection Doctrine: The False Dichotomy of Race and Alienage*

Despite the close relationship between race and alienage classifications, the Supreme Court accords different levels of scrutiny to state and federal classifications. When a state government passes a law discriminating on the basis of alienage, the Court applies strict scrutiny under the Fourteenth Amendment to the legislation.¹⁴⁶ That is, the Court must be satisfied that the state legislation serves a "compelling governmental interest" and is "necessary" to achieve that interest.¹⁴⁷ However, a state can prohibit aliens from serving in elected government office or positions which go to the core of representative government. For these classifications, the Court applies rational basis scrutiny, thus making invalidation of the statute virtually impossible.¹⁴⁸ That is, the state law need only serve "any governmental interest," and be "rationally related" to achieving that interest.¹⁴⁹ Rational basis scrutiny also applies to Congressional statutes which

stigma became, and may remain, an unarticulated basis for the legal treatment of these groups, leading to unfair and often shocking consequences.").

142. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

143. See Johnson, *supra* note 132, at 649 (describing how the Supreme Court ignored racial animus that motivated the passage of the California and Washington Alien Land laws in upholding those laws).

144. See *Eule*, *supra* note 12, at 1553.

145. 387 U.S. 369 (1967).

146. *Graham v. Richardson*, 403 U.S. 365 (1971) (state cannot deny welfare benefits to documented aliens); *In Re Griffiths*, 413 U.S. 717 (1973) (state cannot prevent aliens from practicing law); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state cannot exclude aliens from civil service positions).

147. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (2d ed. 1988).

148. *Ambach v. Norwick*, 441 U.S. 68 (1979) (allowing state to bar aliens from becoming public school teachers); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding state's ability to prevent aliens from serving as deputy probation officers).

149. See TRIBE, *supra* note 147, § 16-2.

discriminate against aliens. Challenges to federal alienage statutes have fallen victim to the Supreme Court's deference to the Congressional plenary power to regulate immigration.¹⁵⁰

In the majority of alienage cases, the Court has interpreted statutes which discriminate against permanent resident aliens. In the few cases where the Court has construed statutes which discriminate on the basis of undocumented alienage, the Court has made clear that undocumented status will result in lesser constitutional protection than that accorded resident aliens.¹⁵¹ Despite the refusal to apply strict scrutiny to undocumented alien classifications, the Supreme Court in *Plyler v. Doe*¹⁵² held that a Texas statute barring undocumented aliens from public schools did not pass intermediate scrutiny under the Equal Protection Clause because it did not further the legitimate interest of "preserving of the state's limited resources for the education of its lawful residents."¹⁵³ Even while subjecting the statute to a lower level of scrutiny, the Court conceded that undocumented aliens constitute a "shadow population," and a "permanent caste of undocumented resident aliens."¹⁵⁴ Nevertheless, the Court refused to grant strict scrutiny to the Texas classification of undocumented aliens.¹⁵⁵ Thus, while discrimination against documented aliens may receive heightened scrutiny, the Court will not afford strict scrutiny to discrimination against the undocumented.

Given the courts' bifurcated view of race and alienage claims, a challenge to Proposition 187 on equal protection grounds would not receive strict scrutiny. As applied to the equal protection treatment of undocumented aliens, a Critical Race Theory analysis suggests that the dichotomy between un-

150. *Matthews v. Diaz*, 426 U.S. 67 (1976) (Congress can constitutionally limit Medicare benefits to aliens who have been admitted to permanent residence for five years).

151. In *Plyler v. Doe*, the Court stated:

We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class is itself a crime.

457 U.S. at 219 n.19 (citations omitted).

152. 457 U.S. 202 (1982).

153. 457 U.S. at 227.

154. 457 U.S. at 218-19. Certainly, the political process theory of *Carolene Products* is no less applicable to the undocumented. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (stating that statutes which disadvantage "discrete and insular minorities" in the political process should receive strict scrutiny). *But see* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 135-136 (1990) (discussing that while aliens are a discrete and insular minority, their condition is mutable and they do not constitute a readily identifiable group).

155. 457 U.S. at 223 (undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law).

documented alienage and race classifications is false.¹⁵⁶ United States history, as discussed above, shows racial subtext inherent in many immigration laws and policies. Regardless of the fact that strict scrutiny as applied to all alienage classifications would benefit some white undocumented aliens, modern alienage classifications disadvantage nonwhites disproportionately.¹⁵⁷ However, the racially charged campaign around Proposition 187 calls for the same strict scrutiny afforded racial classifications in determining its constitutionality. The recent history of the United States suggests that the undocumented, particularly undocumented Mexican immigrants, have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁵⁸

B. *Voter Initiatives which Encourage Discrimination: Reitman v. Mulkey*

Besides the fact that discrimination against the undocumented should be strictly scrutinized by the courts, there are other reasons for the courts to subject Proposition 187 to strict scrutiny. Supporters of the measure argue that Proposition 187 is not subject to judicial review because it was passed by the voters.¹⁵⁹ However, ballot initiatives provide the opportunity for many to vent racist inclinations in the voting booth.¹⁶⁰ Bell writes that while the referendum may seem to be the logical extension of representative government, it actually provides an outlet for the expression of racism.¹⁶¹ In several cases, Bell argues, the Supreme Court has upheld referenda which hindered the progress of racial reforms.¹⁶²

156. The Supreme Court in other instances has shied away from viewing alienage classifications as potential racial discrimination claims. See, e.g., *Espinoza v. Farah*, 414 U.S. 86 (1973).

157. In fact, those who wish to discriminate against nonwhites through immigration laws may see the fact that some whites will be harmed as the perfect stratagem. See Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1429 (1995) ("[H]ostility toward Latino immigration can provoke support for anti-alien legislation among voters who have no objection to Canadians. [Canadians] can be easily sacrificed to confer a facial neutrality on the discriminatory measures.").

158. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted).

159. Paul Feldman, *Uncertain Fate of Prop. 187 Tests Patience*, L.A. TIMES, Mar. 28, 1995, at A3 ("[Federal judges] have no right to negate the will of the people," declared initiative co-sponsor Barbara Coe.).

160. Eule, *supra* note 12, at 1553 ("While public proclamations of racist attitudes have lost their respectability, prejudice continues to receive an airing in the privacy of the voting booth.").

161. Bell, *supra* note 12, at 1-2.

162. *James v. Valtierra*, 402 U.S. 137 (1971) (where Court upheld a local referendum before a state public body could develop a federally financed low rent housing project); *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668 (1976) (where

The extreme difficulty in determining whether a discriminatory motive was present in the passage of an initiative has caused the courts to defer to the voters judgments in the majority of cases.¹⁶³ However, this deference has also operated to give ballot initiatives a kind of immunity from challenge, over and above the high burden that plaintiffs in a race discrimination case usually face. This has operated to effectively give racial minorities less protection from racially discriminatory voter initiatives than actions of the legislature.¹⁶⁴ Thus, Bell argues for a heightened scrutiny of voter initiatives.¹⁶⁵

Despite the cases which give great deference to voter initiatives,¹⁶⁶ some of the Court's decisions implicitly recognize the potential for racial prejudice inherent in many voter initiatives.¹⁶⁷ In *Reitman v. Mulkey*, the Court considered California Proposition 14, which was intended to nullify all state housing discrimination laws.¹⁶⁸ The passage of the measure was a signal to landlords throughout California that racially discriminatory conduct was legally protected. Tenants evicted because of their race sought to enjoin their evictions and declare Proposition 14 a violation of the Equal Protection Clause of the Fourteenth Amendment. In *Reitman*, the Supreme Court accepted the California Supreme Court's holding that the voters had involved the state in "private racial discriminations to an unconstitutional degree."¹⁶⁹

Given the history of immigration law and the context surrounding the campaign for the measure, such a race-based intent can also be inferred for Proposition 187. That the state has involved itself in discrimination to an unconstitutional degree is more clear in the Proposition 187 context than it was in *Reitman*, where the state refused to enforce fair housing laws. In this way,

Court upheld a local referendum which required approval of all zoning changes by a fifty five percent referendum vote), cited in Bell, *supra* note 12, at 2-8.

163. Eule, *supra* note 12, at 1560-6.

164. Bell, *supra* note 12, at 23.

165. *Id.*

166. See cases cited *supra* note 162.

167. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969). These cases, as Bell suggests, have been seriously weakened by *Valtierra* and *City of Eastlake*. Bell *supra* note 12, at 7. However, the *Reitman* holding may still provide a modicum of protection for minorities in racially charged initiative campaigns.

168. The measure, which became part of the California Constitution as Article I, Section 26 provided:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Reitman, 387 U.S. 369, 371.

169. *Reitman*, 387 U.S. at 378-79.

Reitman provides a vehicle for the Court to invalidate Proposition 187 as an unconstitutional "encouragement" of discrimination.

Like the voter initiative in *Reitman*, Proposition 187 encourages state-authorized discrimination. The case for invalidation of Proposition 187 is bolstered by the documentation of its discriminatory effects.¹⁷⁰ Regardless of the intent of those who supported or voted for Proposition 187, its passage has had severe civil rights effects on people of color. In the months since the passage of Proposition 187, there have been numerous instances of discrimination against Latinos.¹⁷¹ The increase in discrimination that is likely to result from people seeking to privately enforce Proposition 187 leaves it open to challenge under *Reitman v. Mulkey*.

Voter initiatives which deal with issues of race and alienage should receive strict scrutiny in light of the long history of racism entwined in immigration laws and alienage classifications. The debate around Proposition 187 revealed the racial motivations of many of its key supporters. The reports of discrimination in the wake of the passage of Proposition 187, as well as the potential for its discriminatory enforcement call for the application of the Supreme Court's ruling in *Reitman v. Mulkey* to the initiative. Under the *Reitman* standard, Proposition 187 should be struck down as an unconstitutional state-sponsored "encouragement to discrimination."

VI. CONCLUSION

The campaign to defeat Proposition 187 signals the realization by Latinos that discrimination against undocumented immigrants harms the entire community. The campaign in favor of Proposition 187 suggests that there is something offensive about Latino and Latina culture to many of those who supported the initiative. Many see the Latino and Latina immigrant history as "illegal" and therefore illegitimate, even when compared with

170. These include: 1) A mother who went to fill a prescription for her daughter who is a U.S. citizen and was asked for immigration documents before a pharmacy would fill her prescription; 2) A legal resident who was asked for immigration documents after a hospital would accepted her sick two year-old son; and 3) A restaurant customer who demanded to see the cook's green card. Margot Hornblower, *Hot Lines and Hot Tempers*, TIME, Nov. 28, 1994, at 36.

171. Shortly after the passage of Proposition 187, the Coalition for Humane Immigrant Rights of Los Angeles received the following call: "Hasta la vista, you [expletive] Mexicans. You're gettin' out of the [expletive] country once and for all. We're sick and tired of your [expletive] Spanish speaking [expletive]. . . . You're outta here, wetback. Adios, mother." *Prop. 187 Causing Problems Despite Court Restraint*, National Public Radio Broadcast, Morning Edition, Nov. 29, 1994, available in WESTLAW, MORNED Database, 1994 WL 11220056.

the historical illegalities of white immigrant history. The limited Latino support for Proposition 187 may be an attempt to put distance between themselves and their delegitimated immigrant history. Further, it represents a sort of "passing" as white, since citizenship has been reserved for whites both historically, and stereotypically.¹⁷² Measures such as Proposition 187 question the very basis for their citizenship, as evidenced in the proposals to deny citizenship to the descendants of the undocumented. In this way, citizenship has different value depending on the national origin of one's descendants.

When viewed in the historical context that Critical Race Theory supports, Proposition 187 is an attempt to further criminalize people of color, suppress their culture, and divide them along class and racial lines. Indeed, one need only look at the racial overtones in recent immigration rhetoric to realize that the debate is about more than preserving government resources. Once courts begin to view discrimination against aliens as a proxy for race discrimination, racially-charged measures such as Proposition 187 should not survive close judicial scrutiny. Due to the increased potential for arbitrary discrimination, immigrant-bashing adversely affects Latinos regardless of immigration status. Thus, Latinos and Latinas should reject the internalized hierarchies of race and citizenship status, and recognize the connection they share with the undocumented.

*RUBEN J. GARCIA**

172. For a discussion of "passing" in the Black community, *see, e.g.* Harris, *supra* note 6, at 1710-13.

* J.D. candidate 1996, University of California, Los Angeles School of Law; A.B. 1992, Stanford University. This Comment is a product of Professor Kimberlé Crenshaw's Fall 1994 seminar in Critical Race Theory at UCLA School of Law. I would like to heartily thank all my classmates in the seminar and especially Professor Crenshaw, whose insightful comments made this Comment possible. Professor Laura Gómez, Saúl Sarabia, and Julia Mass offered helpful comments on earlier drafts. Finally, I wish to thank Victoria Carreón for her invaluable editing and support.

APPENDIX

Proposition 187: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to various codes; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declaration.

The People of California find and declare as follows:

That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.

That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state.

That they have a right to the protection of their government from any person or persons entering this country unlawfully.

Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

SECTION 2. Manufacture, Distribution or Sale of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 113 is added to the Penal Code, to read:

113. Any person who manufactures, distributes or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars (\$75,000).

SECTION 3. Use of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 114 is added to the Penal Code, to read:

114. Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-five thousand dollars (\$25,000).

SECTION 4. Law Enforcement Cooperation with INS.

Section 834b is added to the Penal Code, to read:

834b. (a) Every law enforcement agency in California shall fully cooperate with the United States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.

(b) With respect to any such person who is arrested, and suspected of being present in the United States in violation of federal immigration laws, every law enforcement agency shall do the following:

(1) Attempt to verify the legal status of such person as a citizen of the United States, an alien lawfully admitted as a permanent resident, an alien lawfully admitted for a temporary period of time or as an alien who is present in the United States in violation of immigration laws. The verification process may include, but shall not be limited to, questioning the person regarding his or her date and place of birth, and entry into the United States, and demanding documentation to indicate his or her legal status.

(2) Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States.

(3) Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

(c) Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.

SECTION 5. Exclusion of Illegal Aliens from Public Social Services.

Section 10001.5 is added to the Welfare and Institutions Code, to read:

10001.5. (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of pub-

lic social services and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien lawfully admitted for a temporary period of time.

(c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the public entity:

(1) The entity shall not provide the person with benefits or services.

(2) The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3) The entity shall also notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Services of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

SECTION 6. Exclusion of Illegal Aliens from Publicly Funded Health Care.

Chapter 1.3 (commencing with Section 130) is added to Part 1 of Division 1 of the Health and Safety Code, to read:

CHAPTER 1.3 PUBLICLY-FUNDED HEALTH CARE SERVICES

130. (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled until the legal status of that person has been verified as one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien lawfully admitted for a temporary period of time.

(c) *If any publicly-funded health care facility in this state from whom a person seeks health care services, other than emergency medical care as required by federal law, determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the facility:*

(1) *The facility shall not provide the person with services.*

(2) *The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.*

(3) *The facility shall also notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Services of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.*

(d) *For purposes of this section "publicly-funded health care facility" shall be defined as specified in Sections 1200 and 1250 of this code as of January 1, 1993.*

SECTION 7. Exclusion of Illegal Aliens from Public Elementary and Secondary Schools.

Section 48215 is added to the Education Code, to read:

48215. (a) *No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.*

(b) *Commencing January 1, 1995, each school district shall verify the legal status of each child enrolling in the school district for the first time in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized to be present in the United States.*

(c) *By January 1, 1996, each school district shall have verified the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized under federal law to be present in the United States.*

(d) *By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child referred to in subdivisions (b) and (c), to determine whether such parent or guardian is one of the following:*

(1) *A citizen of the United States.*

(2) *An alien lawfully admitted as a permanent resident.*

(3) *An alien admitted lawfully for a temporary period of time.*

(e) *Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established.*

(f) *For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. Such ninety day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition effort to ensure that the educational needs of the child are best served for that period of time.*

SECTION 8. Exclusion of Illegal Aliens from Public Postsecondary Educational Institutions.

Section 66010.8 is added to the Education Code, to read:

66010.8. (a) *No public institution of postsecondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States.*

(b) *Commencing with the first term or semester that begins after January 1, 1995, and at the commencement of each term or semester thereafter, each public postsecondary educational institution shall verify the status of each person enrolled or in attendance at the institution, in order to ensure the enrollment or attendance only of United States citizens, aliens lawfully admitted as permanent residents in the United States, and persons who are otherwise authorized under federal law to be present in the United States.*

(c) *No later than 45 days after the admissions officer of a public postsecondary educational institution becomes aware of the application, enrollment, or attendance of a person determined to be, or who is under reasonable suspicion of being, in the United States in violation of federal immigration laws, that officer shall provide that information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immi-*

gration and Naturalization Service. The information shall also be provided to the applicant, enrollee, or person admitted.

SECTION 9. Attorney General Cooperation with the INS.

Section 53069.65 is added to the Government Code, to read:

53069.65. Whenever the state or a city, or a county, or any other legally authorized local governmental entity with jurisdictional boundaries reports the presence of a person who is suspected of being present in the United States in violation of federal immigration laws to the Attorney General of California, that report shall be transmitted to the United States Immigration and Naturalization Service. The Attorney General shall be responsible for maintaining on-going and accurate records of such reports, and shall provide any additional information that may be requested by any other government entity.

SECTION 10. Amendment and Severability.

The statutory provisions contained in this measure may not be amended by the Legislature except to further its purposes by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the voters.

In the event that any portion of this act or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision or application of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are severable.