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Harvey Gee

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Harvey Gee*

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* Staff Attorney, U.S. District Court, Reno, Nevada; LL.M., 1999, George Washington School of Law; J.D., 1998, St. Mary's University School of Law; B.A., 1992, Sonoma State University. I would like to thank Professor Kevin Johnson at the University of California, Davis School of Law for giving me the topic for this piece. In 1991, Professor Johnson represented 132 members of Congress as co-counsel on a Supreme Court brief analyzing the purpose and legislative history of the Refugee Act of 1980. Correspondence with Professor Johnson on preliminary ideas focused my research. His encouraging comments on an earlier draft proved invaluable. I am also grateful to Professor Jack Chin at the University of Cincinnati School of Law for his feedback. Todd Roessler provided excellent editorial advice and suggestions.
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I. Introduction

The Refugee Act of 1980 was a major reform and a giant step forward in our ability to meet the resettlement needs of refugees. . . . There is no need to review this history again; instead we should focus on some of the refugee and asylum issues we will face in these areas as we attempt to implement the Refugee Act in the years ahead. . . . There is no question that [the] Refugee Act will form the basis for our refugee policies and programs for many years to come.

—U.S. Senator Edward M. Kennedy

Peter H. Schuck, Simeon E. Baldwin Professor at Yale Law School, compiled his previously published works on various features of immigration law and policy in his new book entitled, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship.* This comprehensive tract serves as an informative

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2 PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON
source for sophisticated and engaging analysis and discussions of important contemporary policy issues. Professor Schuck’s book contains an exhaustive history of state and federal immigration laws that forbade newcomers on the basis of race, ideology, and class. He should be commended for his in-depth research, which provides an understanding of the relationship between immigration law and foreign policy.

*Citizens, Strangers, and In-Betweens* distinguishes itself from other immigration work through its timeliness and inclusiveness in scope. For instance, the front cover of the book features a photograph of young immigrant Hmong children in an elementary classroom. Unlike most recent publications covering immigration, Schuck moves beyond the trite “whites versus browns” and “blacks versus browns” normative mode of analysis to address issues affecting Asian immigrants, and in turn, to what most of this country has seemed to have forgotten, or to have taken for granted—the Refugee Act of 1980. The Act has been overlooked by mainstream scholars, who seem more interested in citing to the Act only for its perfunctory purpose: to function as historical background for their analyses of more recent immigration legislation.

This article discusses *Citizens, Strangers, and In-Betweens* in relation to a reexamination of the Refugee Act of 1980. Using as a basis Professor Schuck’s preliminary background research and normative understanding of the Refugee Act, especially Chapter 13, entitled “Refugee Burden-Sharing: A Modest Proposal,” this article examines the conflicting viewpoints concerning the meaning of the Refugee Act of 1980. In the process, this essay also illustrates how the Asian refugee and immigrant experience can contribute to the jurisprudence of race. The discussion implicitly provides an important lesson: the inclusion of Asian Americans in conversations about immigration and race expands the traditional bipolar analytical framework of race relations and racial hegemony.

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This article consists of seven sections. Part II summarizes the descriptive sections of Schuck’s volume discussing the history of the United States immigration system by focusing on its laws and policies as well as its effects on American society. Part III explores the popular, and I would argue mistaken, understanding of the design of the Refugee Act of 1980. This section examines the legislative history of the Act, and makes the argument that the Act was not passed solely for humanitarian reasons, but also for the purpose of limiting the number of Vietnamese refugees coming into this country. Part IV explores the history of nativism and its modern era resurrection. It also draws a direct relationship between nativism and the Refugee Act. Part V reexamines the historical events immediately following the end of the Vietnam War and creates and develops the historical context in which the Act is best understood. Part VI applies a Critical Race Theory approach to the Act to show Congress actually passed the Act to reduce the flow of refugees coming from Vietnam. This section specifically focuses on the legislative history of the Act to show that this legislation was anti-Asian at its core. Part VII concludes with the proposition that the Refugee Act, known and often lauded as a great law for creating asylum, remains misunderstood by many commentators and by the general public.


5 See infra notes 12-61 and supporting text.
6 See infra notes 62-80 and supporting text.
7 See infra notes 81-180 and supporting text.
8 See infra notes 181-324 and supporting text.
9 See infra notes 325-544 and supporting text.
10 See infra note 545 and supporting text.
II. Immigration, Policymaking, and the Law

A. Citizenship and Community: The Racial and Cultural Politics of Belonging and the Plenary Power Doctrine and Judicial Review

Professor Schuck makes many persuasive points throughout his book. He suggests that “[i]mmigration law often implicates the nation’s basic foreign policy objectives, a circumstance that has sometimes provoked the Supreme Court, even in non-immigration contexts, to be less scrupulous in safeguarding constitutional values and more deferential to the other branches of government.” Schuck extends this important point in his intriguing critique of the plenary power doctrine. Schuck finds “no textual warrant for it in the Constitution . . . and the structural and policy justifications that have been used to support it, such as the need for a single voice in foreign affairs, are either weak or over-broad.” According to Professor Schuck, the differences between citizens and aliens make the heightened judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment,

11 SCHUCK, supra note 2, at 19.


Historically, the Court has held that Congress’ power to exclude aliens is plenary, “inherent in sovereignty,” and exclusive. Under the plenary power doctrine, courts have accorded statutes concerning Congress’ exclusion power a very deferential standard of review. Although the exclusion power was not specifically enumerated in the Constitution, the Court has denominated it a sovereign power delegated to Congress by the Constitution.

Id. Nicholas J. Johnson, Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments, 57 OHIO ST. L.J. 1555, 1558 (1996) (claiming that “plenary power constitutionalism is arguably as great a danger to American minorities as a more formalist, power-limiting constitutionalism that some consider the domain of contemporary political conservatives”).

13 SCHUCK, supra note 2, at 195-96.
which is the main alternative doctrinal constraint on state alienage discrimination, difficult to apply.\textsuperscript{14}

Professor Schuck provides a discussion of the need for providing legal protections to aliens. For example, he notes the strong belief of some immigration scholars who argue that the federal government’s broad power over aliens should be subject to constitutional limitations.\textsuperscript{15} But here, Professor Schuck’s arguments do not go far enough.\textsuperscript{16}

Law Professor Frank Wu provides a more meaningful analysis. According to Professor Wu, the Supreme Court should abolish the archaic doctrine of plenary power and apply the same standard of review to immigration laws that it applies to all other laws.\textsuperscript{17} Wu argues that allowing federal immigration laws to be reviewed under strict scrutiny would protect immigrants from discriminatory laws.\textsuperscript{18} Strict scrutiny requires the government to present a compelling interest substantially related to the discriminatory classification, and then to utilize the least restrictive means available to accomplish that goal.\textsuperscript{19} Wu contends that while the Supreme Court has labeled immigrant status a “suspect class” in the context of state laws, the Court has resisted affording immigrants protection from federal laws because of its interpretation of the plenary power doctrine.\textsuperscript{20} The important

\textsuperscript{14} Id. at 196.
\textsuperscript{15} Id.
\textsuperscript{16} Cf. Noah M.J. Pickus, To Make Natural: Creating Citizens for the Twenty-First Century, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 114 (Noah M.J. Pickus ed., 1998) [hereinafter IMMIGRATION AND CITIZENSHIP] (contending that a more substantive naturalization process is necessary to form a “single complex sense of constitutional identity . . . to integrate our allegiances to the multiple communities to which we belong”). Schuck offers no realistic recommendations in his analysis. On the other hand, Pickus provides policy alternatives that are pragmatic in nature and are necessary for a more meaningful naturalization and asylum process. Id.
\textsuperscript{17} Frank H. Wu, The Limits of Borders, 7 STAN. L. & POL’Y REV. 35, 35 (1996). A long line of Supreme Court precedents has made clear that, regarding immigration, Congress may do what would be forbidden elsewhere. E.g., Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (upholding immigration statute that discriminated on basis of gender and legitimacy in a manner that concededly is not “carefully tuned to alternative considerations” as applied to citizens).
\textsuperscript{18} Wu, supra note 17, at 48-49.
\textsuperscript{19} See id.
\textsuperscript{20} Id.; see also Gabriel J. Chin, Is There a Plenary Power Doctrine? A Tentative
lesson, Wu says, is that "[t]he realities of immigration policy should shape our civil rights jurisprudence, but because immigration law has been exempted from traditional constitutional review, it has not had an effect on legal doctrine."\textsuperscript{21}

Professor Schuck devotes a great deal of his book to the relationship between citizenship and community. He seems especially concerned with the question of how aliens are to be treated in a federal system in which the national government possesses primary responsibility for regulating aliens, "while the states, which sometimes have fiscal and political incentives to discriminate against them, possess some degree of policy autonomy, especially in a devolutionary era."\textsuperscript{22}

In his writing, Professor Schuck makes clear his strong belief that racism no longer plays a crucial role in immigration law.\textsuperscript{23} However, he also concedes that immigration does shape a number

\textit{Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law}, 14 Geo. Immigr. L.J. 257, 260 (2000) (stating that even if equal protection principles were applied to the national government under the law at the time that the Supreme Court upheld various portions of the Chinese Exclusion Act, equal protection was not understood then as requiring identical treatment of different races).

For more than a century, immigration law has been haunted by the so-called plenary power doctrine, a Court-crafted rule of extreme judicial deference to congressional and executive exercises of the immigration power. The doctrine has never been applied to all cases involving aliens. The Court has made clear that outside the immigration and naturalization context, immigrants (even unauthorized migrants) enjoy most of the constitutional rights afforded citizens; and state regulations that discriminate on the basis of alienage (other than those involving political rights) will be strictly scrutinized.


\textsuperscript{23} \textit{Schuck, supra} note 2, at 327.
of racially charged policy questions, such as the future level and composition of the population, affirmative action, multicultural education, and legislative districting.\textsuperscript{24} Perhaps the strongest indications of Schuck’s political ideology and his views on the immigration debate are found in a chapter entitled “Consensual Citizenship,”\textsuperscript{25} which is an abbreviated version of his coauthored book, *Citizenship Without Consent: Illegal Aliens in the American Polity*.\textsuperscript{26} In this section, Schuck makes the controversial proposal that the children of illegal aliens should not, as a matter of constitutional right, be American citizens.\textsuperscript{27} His proposal that the traditional basis for citizenship be reexamined runs directly against the 1898 Supreme Court decision in *United States v. Wong Kim Ark*,\textsuperscript{28} holding that the children of Chinese legally present in the United States were automatically American citizens, provided that the children were born on American soil.\textsuperscript{29}

Law Professor and prominent Critical Race Theorist Richard Delgado disagrees with Peter Schuck’s call for national autonomy and his view that a nation ought to have unlimited discretion in deciding whom it shall admit.\textsuperscript{30} Delgado finds especially

\textsuperscript{24}Id. at 327-28.

\textsuperscript{25}Id. at 207.


\textsuperscript{27}Schuck, supra note 2, at 212-13. But see Hiroshi Motomura, *Alienage Classification in a Nation of Immigrants: Three Models of “Permanent” Residence, in Immigration and Citizenship*, supra note 16, at 199-202 (offering a more textual understanding of alienage classifications than the account that prevails in public policy and constitutional law analysis).

\textsuperscript{28}169 U.S. 649 (1898).

\textsuperscript{29}Id. at 694. Perhaps Schuck would find solace in knowing that Chief Justice Fuller held similar views, as expressed in his dissenting opinion that American-born Chinese were not citizens of the United States. See id. (Fuller, C.J., dissenting).

\textsuperscript{30}Delgado, supra note 22, at 321.
troublesome Schuck's conviction that communities should be able to determine their own membership. Interestingly, Delgado suggests that:

The [Schuck] argument draws on the premises of communitarianism, a moderate-liberal school of jurisprudence that sprang up in the 1980s, perhaps as an antidote to the unfettered individualism of the early Reagan-Bush years. But the argument struck a chord as well with conservatives, offering them a principled argument for accomplishing what many of them wanted to achieve—the promotion of an America-first philosophy—but for a much less noble reason, namely a dislike of foreigners and immigrants.

Delgado claims that the Schuck vision of community is too ideal because we live in a world that is shaped by racism, sexism, and xenophobia that serves to perpetuate the racist past. In other words, Delgado asserts that immigration policy is influenced by racism and exclusionary practices.

Schuck maneuvers around the question of race in his proposal to eliminate birthright citizenship, an issue that is deeply entwined with the significant modern racial issues of Mexican, Central American, West Indian, and Asian immigrants in technical violation of immigration laws. In his discussion, Schuck treats the status of undocumented immigrants as unrelated to racial questions, and only in passing does he acknowledge the ethnic dimension when referring to the practice of blaming domestic problems on recent immigrants. Apparently, only two developments seem to cause Schuck uneasiness: the dramatic increase in the number of undocumented aliens, and the emergence of the American welfare state. These two factors reinforce Schuck's belief that unless measures are taken to address these trends, American society may become destabilized to its detriment.

Schuck's views have drawn notable attention. Professor

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31 Id.
32 Id.
33 Id.
34 SCHUCK, supra note 2, at 214-16.
35 Id. at 213-14.
36 Id. at 215-16.
Richard Delgado disfavors Schuck's argument that "if large numbers of outsiders were free to settle, bringing with them new values, languages, and patterns of behavior, they would in effect have the right to force the nation to become something it is not."37 Delgado contends that this "state of affairs is inconsistent with the idea of a community of self-defining citizens; any nation is free to resist."38

Throughout Schuck's writing, there are allusions to "controll[ing] our borders" and complaints about the highly visible presence of "un-American communities."39 The direction of complaints over "foreign" cultures prevalent in our communities is exemplified by the efforts to make English the official language.40 If Schuck had his way, he would deny governmental benefits for all non-citizens and impose any existing economic and social burdens on them.41

In proposing that birthright citizenship be abolished, Schuck recognizes that this would create a group of aliens who are permanent residents but are ineligible for citizenship.42 He fails to discuss how an earlier version of the status of aliens ineligible for

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37 Delgado, supra note 22, at 321.

38 Id.

39 SCHUCK, supra note 2, at 214-18.


41 See SCHUCK, supra note 2, at 215-16; see also Peter H. Schuck, The Re-Evaluation of American Citizenship, 12 GEO. IMMIGR. L.J. 1, 18 (1997).

In the United States the welfare state—especially the creation of entitlements to support income, food stamps, medical care, and subsidized housing—expanded rapidly during a brief period of time, at least when compared to the more gradual, long-term evolution of European social support systems. . . . In contrast to the historical pattern, immigration no longer ebbed and flowed with the business cycle—presumably because of the growth of the social safety net. Immigration increasingly pitted citizens and aliens against one another as they competed for scarce public resources.

Id.

42 Cf. SCHUCK & SMITH, supra note 26, at 99 (asserting that it is "morally perverse" to reward those who break the immigration laws with the benefits of citizenship). Illegal aliens are much less deserving of citizenship than their legal competitors for limited available services. Id. at 99, 114.
citizenship was the basis of racially discriminatory actions by both the state and federal government. Similarly, Schuck’s thesis effectively sidesteps the issue of the xenophobic aspects of these complaints against immigrants as a revival of old-fashioned nativism. This ignores the simple fact that as a matter of history and law, racial considerations have always been deeply implicated in the debates over immigration and citizenship and cannot and should not be summarily dismissed.

Professor Schuck downplays the influence of race in immigration law policymaking throughout his analysis. His discussion of only “illegal” immigrants and his refusal to acknowledge the racial link to foreignness serve to undermine the practicality of his project. Neil Gotanda, a strong critic of Schuck’s work on citizenship, remarks of Schuck’s version of mutual consent to citizenship between the governed and the government:

As applied to citizenship, consensual principles would mean that Congress would determine preconditions for citizenship such as residency, which an individual could either accept or reject. However, under [Schuck’s] consensual approach, the democratic majority acting through Congress would set the terms for immigration as a whole. But a fully developed consensual citizenship, combined with majoritarian democratic principles, would raise the possibility of majority discrimination against an unpopular minority.43

Schuck’s analytical framework is severely weakened when one considers the category of racial jurisprudence that affects non-black racial minorities, primarily Latinos, Asians, and Arab Americans. These “other” non-whites face a recurrent form of racism because they possess a dimension of “foreignness.” According to Neil Gotanda, “the popular understandings of ‘foreignness’ suggest that the concept is now infused with a racial character.”44 The internment of Japanese Americans during World War II and its subsequent analysis by the Supreme Court under a foreigner/alien paradigm instead of a black/white equal protection framework illustrates this point.45

43 Gotanda, supra note 26, at 240.
44 Id. at 253.
45 See Frank H. Wu, The Truth at the Heart of Internment, CHI. TRIB., Oct. 5, 1998,
In a quartet of cases, the most famous of which is *Korematsu v. United States*, the Supreme Court upheld the constitutionality of the Japanese American internment. By doing so, the Court condoned racist attitudes and the subversion of the civil liberties of Japanese Americans. Angelo Ancheta observes that “[t]he most

at 11 (arguing that racism against people of Asian descent led to the internment of Japanese Americans during World War II, and that the Japanese were considered outsiders who could not assimilate because of their race). According to Wu, “[e]ven today, decisions about who is allowed to immigrate legally and who is entitled to become a citizen depend on race. It’s time to throw out these distinctions, once and for all.” Id.; see also Harry H.L. Kitano & Mitchell Maki, *The Passage of Redress: The Proper Alignment Model*, 7 *Asian Am. Pol’Y Rev.* 55, 59 (1998).

No matter how hard [the Nisei, or second generation Japanese Americans] tried to become “American,” they faced rejection from the mainstream community and their parents, who believed they were becoming “too American” too fast. An additional factor, which continues to the present day, was the inability of the American society to differentiate between Japanese Americans and the actions of Japan. This was an important factor in the wartime incarceration, when the prevailing thought was that since they all looked alike, they must be alike.

Id.

46 Hirabayashi v. United States, 320 U.S. 81 (1943) (affirming that the restriction on individuals of Japanese ancestry at certain addresses remain in their residences between 8:00 p.m. and 6:00 a.m. was within the constitutional powers of the Executive, and holding that said restriction did not unconstitutionally discriminate between citizens of Japanese ancestry and citizens of other ancestries); Yasui v. United States, 320 U.S. 115, 115-117 (1943) (citing *Hirabayashi* and stating that the curfew order was valid when applied to citizens, as well as sustaining the conviction of American-born individuals of Japanese ancestry); *Ex parte* Mitsuye Endo, 323 U.S. 283, 284, 304 (1944) (citing *Hirabayashi* and ordering an unconditional release by the War Relocation Authority); *Korematsu v. United States*, 323 U.S. 214 (1944).

47 323 U.S. at 214.

disturbing irony of the Korematsu decision lies in the Court’s skirting of the basic racial issues after it established an exacting standard for governmental classifications based on race.”

According to Ancheta:

[the Court made no inquiry into the overinclusiveness of excluding loyal citizens and permanent residents from the West Coast, nor did the Court make an inquiry into the underinclusiveness of a program that targeted people of Japanese ancestry . . . . By granting lip service to its newly established principle of strict scrutiny, the Court racialized Japanese Americans as enemy aliens.  

Juan Pera shares Ancheta’s disdain for the lack of judicial integrity during World War II. He suggests that “the discriminatory treatment of Japanese Americans because of their race becomes very clear by comparing their treatment with that of German and Italian citizens and aliens who might have posed similar threats of sabotage during World War II.” Pera argues that:

only German and Italian aliens were burdened by the curfew and exclusion orders, and those excluded were permitted to return home promptly, unlike the Japanese. It is also clear that the degree of threat presented by Japanese citizens and aliens were knowingly exaggerated; there was never any significant military
threat posed by persons of Japanese ancestry.52

This anti-Japanese fervor permeated even the high levels of
government. According to Perea:

the Justice Department's lawyers, in their briefs and
representations to the Supreme Court, suppressed evidence that
showed that responsible military authorities, including members
of the FBI and the Office of Naval Intelligence, felt that
evacuation and detention of all persons of Japanese ancestry
were unnecessary and that individualized determinations of
loyalty were both possible and preferable to mass, race-based
incarceration.53

B. Sharing the Burden of Refugees

In Chapter 13, entitled "Refugee Burden-Sharing: A Modest
Proposal," Schuck reaffirms the failings of present policy and
insists that improvements need to be made to ensure refugee
protection.54 In this section, Schuck argues that the international
refugee problem could be better addressed by having wealthier
industrialized countries, such as Germany or Japan, either share
the responsibility of receiving refugees, or compensate other
countries that are reasonably safe but less desirable as migration
destinations, for accepting a disproportionate number of
refugees.55

Schuck then discusses the burdens that massive refugee flows
impose on states. Within this context, he argues that: (1) "the
emerging state responses to the burdens are jeopardizing the
viability of any meaningful regime of internal human rights
protection"; (2) a realistic solution to this problem must ease these
burdens in exchange for obligations likely to be accepted and
implemented by states; and (3) these obligations must be
distributed widely and equitably among states over time.56

Schuck ultimately desires to salvage a meaningful human
rights regime. Though Schuck doubts that his proposed provisions
will be adopted given the practical realities of refugee crises and
international politics, he offers four broad strategies for improving

52 Id.
53 Id.
54 SCHUCK, supra note 2, at 282.
55 Id. at 283.
56 Id.
refugee protections: (1) the elimination of “the root causes of refugee flows;” 57 (2) the “prompt repatriation of refugees;” 58 (3) the “temporary protection of refugees,” 59 and (4) the “permanent resettlement of refugees in third world countries.” 60 This chapter is clearly the thrust of his analysis, as evidenced by its extremely detailed discussions and his creative attempt to wrestle the Gordian knot of refugee law.

At any rate, Schuck is correct in his self-evaluation of his proposals. As a realist, he states, “[l]ike many promises, its hopes might not be fully realized, but even so it could hardly leave refugees worse off than they are now. In view of both the deplorable status quo and the potential for human rights gains, can we afford not to try?” 61

As a major contribution to immigration law literature, *Citizens, Strangers, and In-Betweens* is both academic and practical. The book’s theoretical coverage of immigration is tremendous, as is Schuck’s intellectual curiosity. The volume is also practical in the sense that Schuck provides pragmatic policy recommendations focusing on procedure and structure. However, as with all works in progress, Schuck’s analysis needs to be extended to gain a broader and more complete understanding of how race influences immigration and refugee policy.

### III. Reinterpreting Old Laws with New Perspectives

This author has strong contentions with certain technical points in Schuck’s research. More specifically, the author of this article disagrees with two mistaken assumptions. First, in his analysis of the Immigration Act of 1965, Schuck errs in suggesting that Congress and the Johnson Administration predicted that few non-Europeans, especially Asians, would come to the United States. 62 Many commentators, including Schuck, have come to embrace the belief that when Congress passed the 1965 Act it had a conscious belief that white immigrants would continue to dominate the

57 *Id.* at 285.
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.* at 325.
62 *Id.* at 12.
immigrant stream.\footnote{See Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. Rev. 273, 277 (1996); see also Hyung-chan Kim, American Naturalization and Immigration Policy: Asian American Perspective, in ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 2 (Hyung-chan Kim ed., 1996) [hereinafter ASIAN AMERICANS AND CONGRESS] (stating that "it is important, albeit painful, for us to recognize that American immigration and naturalization policy has been extremely discriminatory against non-white people until 1965"); HARRY H.L. KITANO & ROGER DANIEL, ASIAN AMERICANS: EMERGING MINORITIES 161 (1988) (asserting that discriminatory laws against Asian immigrants were an important part of U.S. national policy until the Immigration Act of 1965). But see JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC 104 (1998) (arguing that "[n]obody expected that the [Immigration and Nationality Act of 1965] would radically alter immigration patterns").} Those who share Schuck's view believe that Congress offered legal equality because Congress believed that non-white immigrants would not take advantage of immigration opportunities.\footnote{See SCHUCK, supra note 2, at 12; see also PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 188 (1995) (stating that "according to the 1965 Bill's advocates, the U.S. ethnic balance would not be altered at all").} As John Miller notes, "[i]f Congress had known in 1965 that its reforms would open the door to more than 18 million immigrants over the next three decades—about one-third of them from Asia—they may not have passed the new law. They were just plain wrong about what the bill would bring."\footnote{MILLER, supra note 63, at 104. For a more generalized review of Miller's volume, see Harvey Gee, The Book Adds Nothing to Immigration Debate, S.F. DAILY J., Sept, 26, 2000, at 6 (reviewing MILLER, supra note 63).} Schuck claims that "[t]he 1965 reform had dramatically and unexpectedly shifted the source-country pattern toward high-volume Asian and Hispanic Flows."\footnote{SCHUCK, supra note 2, at 99.} In reality, according to Law Professor Gabriel Chin, Congress passed the Immigration Act of 1965 with the opposite assumption.\footnote{Chin, supra note 63, at 273.} Professor Chin makes the argument that the 1965 Immigration Act's revolutionary feature was its race-neutrality.\footnote{Id. at 297.} It was the first time since the United States began regulating immigration that race was not a factor.\footnote{Id.} Chin's thesis has made a major contribution to the immigration law literature because it
sheds light on important facts that were previously overlooked by mainstream scholars. Chin’s methodology was comprised largely of a close reading of the Act itself, combined with an understanding of the sociopolitical context for its passage and sound legal reasoning.

Second, Schuck sides with many commentators in presenting the Refugee Act of 1980 as law crafted by a systematic legal structure for controlling refugee admissions and adjudicating refugees and asylum claims in the idea and spirit of humanitarian admissions and equality. Unfortunately, Schuck is only partially correct in his understanding of the Act.

Consistent with this dominant image, Schuck reports that Congress implemented the Refugee Act of 1980 in response to increased immigration in the 1980s, which created enormous pressures for legal change. The enactment of the Refugee Act of 1980 created a legislative basis for asylum status and the necessary systematic basis for its determination. His immediate perception is the one shared by the general public and mainstream academics. In his view, “[t]he Refugee Act... regularized refugee and asylum criteria and procedures in the interest of equal treatment while preserving discretion to favor some countries and regions over others.” According to Schuck, this was just one of several fundamental changes in American and administrative law that shifted immigration law away from its exclusionary history and toward a more pro-alien focus.

Schuck’s views of refugee asylum law, however, are far from complete, if not entirely wrong. Schuck’s perceptions of the Indochinese refugee crisis in relationship to the passage of the Refugee Act of 1980 and the Comprehensive Plan of Action resettlement program, which he believes were both successful,
are particularly troubling. In addition to praising the Refugee Act of 1980 as a high water mark in the name of worldwide humanitarianism, Schuck seems to be have been swept up in his belief and enthusiasm that the United States acted only upon its own commitment of protecting its wartime allies and in providing what he terms a "noncommunist alternative to the peoples of Indochina." According to Schuck, "[i]n addition to providing humanitarian assistance, the U.S. interest was served by a system that accorded presumptive refugee status to all those fleeing the southeast Asian communist regimes. The resettlement program also supported the conventional immigration policy goals of resettlement countries." Similarly, Schuck reifies the efforts on behalf of the United Nations working in conjunction with the leadership of the United States. For example, Schuck reports that:

[F]rom 1979 until 1989, over 1.7 million Indochinese refugees were resettled under the framework laid out at the 1979 conference, and over 150,000 left through the ODP [Orderly Departure Program]. . . . [T]he Indochinese resettlement program demonstrates . . . the leadership of the United States and UNCHR. UNCHR coordinated international discussions, established refugee camps and holding centers, channeled funds to care for the refugees, and monitored the implementation of the resettlement programs. The United States, the largest resettlement country, shouldered a significant share of the costs. The sheer number of cooperating countries reflected, at least in part, U.S. leadership. Had the United States and UNCHR not borne the brunt of the resettlement and organizational burdens, the international consensus might have unraveled.

Throughout his book, Professor Schuck uses a great deal of laudatory words to underscore what he believes was sound public policy behind the resettlement efforts following the Indochinese refugee crisis. In this author's view, his beliefs are partly disingenuous, if not wholly misguided. Schuck seems to gloss over the reality that the resettlement programs for the Vietnamese refugees were a failure. A closer examination of the facts supports this author's contention.

78 Id. (quoting Astri Suhrke, Indochinese Refugees: The Law and Politics of First Asylum, in REFUGEES AND WORLD POLITICS 136, 145 (Elizabeth G. Ferris ed., 1985)).
79 Id.
80 Id. (footnotes omitted).
IV. The Refugee Act of 1980

We have sent tens of thousands of American soldiers to Vietnam to defend the people of that country because we believed that as free people they are worthy of our support. But if the finest citizen of Vietnam wanted to come and live in America today, he would have to wait for many years.

—U.S. Senator Edward Kennedy.81

This nation has committed itself to the defense of the independence of South Vietnam. Yet the quota for that country of 15 million is exactly 100. Apparently we are willing to risk a major war for the right of the Vietnamese people to live in freedom at the same time our quota system makes it clear that we do not want very great numbers of them to live with us.

—U.S. Representative John Lindsay82

This examination of the Refugee Act of 1980 is timely, given the fact that last spring marked its twentieth anniversary, and that it has been misunderstood since its passage. What was the real purpose behind the Act? Many immigration scholars have lauded the Act as a great accomplishment in immigration law. For instance, immigration scholars Deborah Anker and Michael Posner wrote in an article outlining the legislative history of the Refugee Act that it reflects the evolution of a consensus for the humanitarian, nondiscriminatory policy, and that it created mechanisms to resolve the continual friction between the Executive and Congress over the control and standards for refugee admissions.83 They conclude by stating, "[w]e believe that the Refugee Act provides a sound and practical legislative base from which a successful refugee policy can be developed. Accordingly, we do not recommend nor do we believe that it would be wise to modify the Refugee Act as enacted in 1980."84

Likewise, restrictionists have also misunderstood the Act and

81 111 CONG. REC. 24, 777 (1965).
82 111 CONG. REC. 21, 769 (1965).
84 Id.
refugee policy. For example, in his recently published anti-immigrant polemic, *The Unmaking of Americans: How Multiculturalism Has Undermined the Assimilation Ethic*, John Miller, a political reporter for the *National Review* and former vice-president of the Center for Equal Opportunity, renews the issue of national identity by stating that, due to the increased immigration of people who do not want to be Americans, the United States is losing its national purpose. Miller professes that “[r]efugee policy is driven almost entirely by humanitarian concerns and the refugees themselves have not always had much time for their departure” from their native country.

These sentiments have since become the standard and generally accepted view of the Refugee Act of 1980. But was it really meant to serve a humanitarian end in granting asylum to refugees, or was it passed to limit the number of Indochinese refugees arriving in the United States? A close reading of the legislative history of the Refugee Act reveals some support for the popular perception held by many that Congress implemented the Act to move the United States into accord with the obligation imposed under international refugee law, which for the first time created a general right to apply for asylum in the United States for noncitizens fleeing political and related prosecution in their homelands. Nevertheless, the more probable conclusion is that the passage of the Act was designed to exclude the admission of refugees from Southeast Asia.

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85 *Miller, supra* note 63.

86 *Id.* at 216.


A. A Critical Theory of the Racial Animus Against the Vietnamese and the “Political Relevance and Legal Irrelevance of Race.” Applying the Critical Race Theory Cultural Meaning Test

Immigration Law Professor Kevin Johnson notes that “[t]hough the overtly racist views expressed about Asians seen in the past are rarely found in modern mainstream discourse about immigration, anti-Asian sentiment remains alive and well in the United States. Increased Asian immigration since 1965 has reinvigorated such sentiment.” The Refugee Act of 1980 is an example that bolsters his contention. Johnson argues that “[t]he Refugee Act of 1980, often praised [as a generous and flexible policy of] humanitarian admissions, was motivated in part by the desire to end the Executive Branch’s [liberal] ad hoc admission[s] of sizeable numbers of refugees from Southeast Asia.”

Johnson asserts that “[t]he law established numerical limits on refugee admissions and generally restricted the power of the President to admit refugees, with the hope of preventing future mass migrations.”

Likewise, Bill Ong Hing, Law Professor at the University of California at Berkeley and Executive Director of the Immigrant Legal Resources Center, observes that, “[t]he unpredictable numbers of Southeast Asian refugees provided the impetus for reform and ultimately, the passage of the 1980 Refugee Act.”

Even anti-immigration lobbying groups, such as Federation for American Immigration Reform (FAIR), suggest that one of the primary motivating factors behind the passage of the act was to

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89 This metaphor is presented in an influential article on the racial aspects of California’s Proposition 187. See Kevin R. Johnson, An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race, 70 WASH. L. REV. 629 (1995).


91 Id.; see also, e.g., 126 CONG. REC. H4501 (daily ed. Mar. 4, 1980) (comments of Rep. Rodino) (characterizing the law as “one of the most important pieces of humanitarian legislation ever enacted”).


limit the admission of Indochinese refugees. According to FAIR, Beginning with the fall of Vietnam and Cambodia in April 1975, this five-year period saw the admission of more than 400,000 Indochinese refugees, [and] the enactment of major amendments to the Immigration and Nationality Act in the form of the Refugee Act of 1980. . . . [The] legislation was enacted in part in response to Congress’ increasing frustration with the difficulty of dealing with the ongoing large-scale Indochinese refugee flow under the existing ad hoc refugee admission and resettlement mechanisms.

The Congressional efforts to limit the number of Indochinese refugees has its roots in historical racism. To understand fully the context in which the Refugee Act of 1980 was created and passed, an understanding of the historic and contemporary dynamic interrelationships of race, immigration, and asylum law must first be established.

The primary reason why mainstream scholars have ignored the racial aspects of the passage of the Refugee Act of 1980 is because a strictly legal analysis is historical and incomplete. A fuller analysis would reveal the complex relationship that exists between immigration and race. An alternative examination, employing new analytical frameworks offered by the progressive Critical Race Theory intellectual movement, allows the use of contextual

95 Id.
96 Critical Race Theory, in its purest form, is best understood as the antithesis to the traditional belief in “color-blindness” . . . . Critical Race Theorists postulate that because legislative bodies have historically utilized racial classifications to discriminate against minorities and racial classifications in the law have persisted—thus legitimizing the notion that individuals are defined by their race—members of society can no longer think of themselves and others in racial terms. As a result, Critical Race Theorists demand that the modern-day legal system address the systematic effects that derive from the mode of “racial-thinking.”


For an overview of Critical Race Theory, see Kimberle Crenshaw et al., Critical Race Theory: The Key Writings That Formed the Movement (1996); Kimberle Crenshaw et al., Critical Race Theory: The Cutting Edge (Richard Delgado ed., 1995).
sources to place the Refugee Act into its proper historical, social, and economic context, which is necessary for a broader, more accurate understanding of the Act as being anti-Vietnamese at its core. Removing the Act from abstract legal analysis supports the fact that racial identities are created and recreated to accommodate the economic and political conditions of America and proves that underlying the Act were nativistic sentiments motivated by racist animosity against Indochinese refugees. The factors that combined to lead to the passage of the Act include an ailing national economy and the growing pains of an increasingly multicultural and multiracial America. These considerations helped focus public concern on the perceived burden that Vietnamese refugees imposed on this country’s economic and cultural health.

Professor Neil Gotanda theorizes that “[c]ongressional actions carry within them overlapping, and even contradictory distinctions about citizenship, ethnicity, border geography, and race.” Gotanda terms the end product as “American Orientalism:”

That concept includes as a crucial element a distinct understanding of race—a socially constructed category linked to physiognomy—applied to persons of Asian ancestry. In addition to including notions of race, American Orientalism has developed through a definition and redefinition of the Orient—a cultural and ideological location related to, but distinct from, geographical Asia. American Orientalism also includes a complex re-working of Americans through the mechanisms of ethnicity and the legal category of citizenship.

Unlike earlier restrictionist laws in United States history, contemporary immigration legislation affecting persons of Asian

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99 Id.; see also Lisa Lowe, Critical Terrains: French and British Orientalisms ix (1992) (arguing that “Orientalism is a [heterogeneous] tradition of representation that is crossed, intersected, and engaged by other representations”).

100 Gotanda, supra note 97, at 129, 130.
ancestry has long avoided mentioning race. With respect to revealing hidden racist intent behind ostensibly race-neutral legal policymaking decisions, legal scholar-activist Frank Wu has taken an innovative approach to equal protection analysis, as developed by Critical Race Theorist Charles Lawrence, and applied it to an analysis of discriminatory state action against Asian Americans.

Wu explains Lawrence’s “cultural meaning test” and its potential applications:

“This [cultural meaning] test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance.” The cultural meaning approach uses an interpretation of history and current understandings of legislative action, drawing on social science methodologies, to tease out conscious, half-conscious, and unconscious forms of discrimination, in a more nuanced manner than disproportionate impact theory. It permits inferences of intent where hidden meanings are not only likely but are the norm.

Wu then applies the Lawrence cultural meaning test to the Japanese internment cases and the contemporary use of the Asian American “model minority myth” stereotype. Although beyond Wu’s scope of analysis, his work is also useful in interpreting the Refugee Act of 1980 and the area of immigration law because there is such an important cultural meaning to accepting immigrants and refugees as people within the protection of the Constitution.

A strict legal analysis and interpretation of the language of the

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101 Id. at 149.

For Asian Americans, sorting through this new direction of racial politics into private conduct and political and popular culture is best carried out through continuing examination of American Orientalism. As an analytical framework, American Orientalism makes possible an understanding of how the United States has treated, and continues to treat immigrants of Asian ancestry.

Id.

102 Wu, supra note 50, at 254.

103 Id. at 254-55 (footnotes omitted) (quoting Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 333-34 (1987)).

104 Id. at 254-56.

105 Wu, supra note 17, at 50.
Refugee Act reveals not only the wording about how many refugees are to be admitted, but also substantive policy information and associated procedural requirements. The Act, when considered within its appropriate sociohistorical context, proves that in formal terms, even a race-based law can be superficially characterized as being race-neutral.\textsuperscript{106}

The cultural meaning test is necessary to understand why the Refugee Act was passed.\textsuperscript{107} The benefit of the doubt is given to Congress, and its claim that the Act was passed for humanitarian reasons alone avoids any need to characterize them as "racist." Whether the Act might be properly classified as "racist," however, is deeply complicated. Many were concerned with the fiscal consequences of the apparently limitless flow of refugees entering this country. Some members of Congress echoed the fears of their constituents of a loss of control over their culture, society, and lives. If nothing else, it is difficult to refute the claim that the ethnicity and race of the refugees played at least some role in the Act's passage.

The Refugee Act was the product of truly complex relationships of political forces in the United States. Neil Gotanda suggests that, "[historically and modernly,] legislation affecting immigrants and immigration at the state and federal levels . . .

\textsuperscript{106} Wu, supra note 50, at 256.

\textsuperscript{107} Kenneth Karst believes that the politics of exclusion are intertwined with judicial review. Aware that America has always been a multicultural nation, Karst criticizes equal protection jurisprudence centered solely on legislative deliberation. He questions the value of reason-based legislative motives. In the process, Karst notes the difficulties entailed in any search for the unconscious, ideology-based motivations that lie beneath a legislator's vote. According to Karst, "[e]ach of the contending cultures, after all, sees the other as ideology-laden . . . The problem with a judicial inquiry focused on a legislator's 'reasoned analysis' is not merely theoretical; it has serious practical implications." \textsc{Kenneth L. Karst, Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion} 175 (1993). Along these same lines, Karst states that "it is also especially difficult for judges to envision a legislative classification's roots as being based in 'ideology' when the law discriminated against a particular group that has been customarily low in the food chain of political importance." \textit{Id.} This same approach has been taken by Kevin Johnson in his insightful examination of California's Proposition 227 Initiative, "English for the Children." Kevin R. Johnson & George Martinez, \textit{Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education}, 33 \textsc{U.C. Davis L. Rev.} 1227, 1227 (2000). Johnson argues that "[t]his is now an especially appropriate time to analyze the circumstances surrounding the initiative's passage, because, as time passes, it becomes more difficult to marshal the evidence necessary to prove this discriminatory intent." \textit{Id.}
have all involved considerations toward constructing American Orientalism.\textsuperscript{108} In Congress, anti-refugee and anti-immigration attitudes were captured and used to effuse bipartisan support for the passage of the Act.\textsuperscript{109} The Refugee Act won bipartisan support because it tapped into populist sentiment at several levels. Vietnamese refugees were perceived to injure working citizens by taking jobs.\textsuperscript{110} The Act, at least in part, was an effort directed at dissuading "those" Vietnamese with "their" language and "their" culture from entering this country.\textsuperscript{111}

A traditional and formal legal outlook of the Act would take the law at face value, and consider it as positive law. Such an approach would enable government officials to rationalize and dismiss any allegations of racism, which would be considered reasonable and legitimate, absent a consideration of context. Kevin Johnson suggests that "the heavy burden of proving the discriminatory intent of [government]... makes an equal protection claim based on race especially problematic."\textsuperscript{112} He contends that "[d]octinal uncertainty concerning alienage classifications and the frequent link between alienage status and race, ethnicity, and color, further complicate matters."\textsuperscript{113} However, when context is restored, an understanding of the circumstances and motivations behind the passage of the Act becomes apparent and realized. As such, the popular perception of the Refugee Act as a good law gives way to the reality that the law was actually bad. Likewise, in its formal function, the democratic legislature is involved in an elaborate network of external relations in its efforts

\textsuperscript{108} Gotanda, supra note 97, at 131.


\textsuperscript{110} Kathryn M. Bockley, Comment, A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise, 21 N.C. J. INT’L L. & COM. REG. 253, 276 (1995) ("The Vietnamese were perceived as potential competitors for jobs and federalized programs.").

\textsuperscript{111} Johnson, supra note 92, at 1142 ("Congress passed the Refugee Act of 1980... with the hope of reducing the number of refugees that the President admitted from Vietnam."). Cf. Johnson, supra note 90, at 181.

\textsuperscript{112} See Johnson, supra note 90, at 673.

\textsuperscript{113} Id. at 673.
to establish and maintain legal order.\textsuperscript{114} This legitimate purpose, if coupled with a consideration of the long history of providing refuge to foreign nationals displaced by war or persecution, may pass any heightened scrutiny by the American public and the international community. In absence of the cultural meaning test, the Refugee Act is treated solely as a law passed to address the refugee crisis after the end of the Vietnam War.

Analyzed under a purely formalist approach to legal interpretation, an immigration law lauded as being passed for humanitarian reasons goes unquestioned and unchallenged, as would any other legislative measure passed with the power vested in Congress by the United States Constitution.

The Act was tantamount to a resurrection of historical nativism and provided the impetus for its current resurgence. Without doubt, contemporary nativism is race-based.\textsuperscript{115} Asian and Latino immigrants have become the scapegoats for the United States' economic troubles, and they are usually targeted because they represent the two largest racial categories of immigrants. Asian and Latino immigrants have been criticized for their inability to assimilate and "fit in." The most prominent attacks have been espoused by restrictionists such as Patrick Buchanan, Peter Brimelow, and David Duke,\textsuperscript{116} whose rhetoric has been based on


\textsuperscript{115} Cf. HYMAN RUCHLIS & SANDRA ODDO, CLEAR THINKING: A PRACTICAL INTRODUCTION 179 (1990) (declaring that "misconceptions, intertwined with stereotypes and prejudices intensify many of today's group hatreds and conflicts").

\textsuperscript{116} HING, supra note 93, at 147-48. For a comprehensive review of Hing's volume,
the flawed propositions that America has a strictly white, Christian, European heritage, and that immigrants of color fail to acculturate.\textsuperscript{117}

The reaction to the Vietnamese resettlements was overwhelmingly negative. Economic and social class divisions were also contributing factors to this interethnic conflict.\textsuperscript{118} Notably, the racial tensions between Vietnamese and other Asian immigrants, and between Latinos and African Americans reveal volumes about the inadequacy of the traditional black/white paradigm of race relations that has developed in this country. Historically, this inter-group dynamic has gone largely unnoticed due to the inadequacies of the bipolar dichotomy to measure interracial conflict.\textsuperscript{119}

Kevin Johnson has suggested “that the debate about immigration is really about a larger social debate about race in this country.”\textsuperscript{120} He claims that, historically, the dominant images of immigrants in society have had a tremendous, albeit detrimental, influence on the formation of law and policy towards immigrants.\textsuperscript{121} To Johnson, “immigrants of color have been singled out for particular antipathy, the most negative imagery, and the harshest of laws and policies.”\textsuperscript{122} He considers that “[a]t various

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\textsuperscript{117} HING, supra note 93, at 147-48.

\textsuperscript{118} See, e.g., Alice H. Choi, A Closer Look at the Conflict Between the African American and the Korean American Communities in South Central Los Angeles, 1 ASIAN AM. PAC. IS. L.J. 69, 69-72 (1993) (addressing the sources of conflict between Korean merchants and African Americans, which lead to incidents such as the Soon Ja Du and Latasha Harlins incidents); Mari Matsuda, We Will Not Be Used, 1 ASIAN AM. PAC. IS. L.J. 79, 79-81 (1993) (examining the use of Asian Americans as a wedge group to further divide racial minority communities and to weaken race relations).

\textsuperscript{119} Aside from the differences between conservatives and liberals on immigration, there has been a great deal of discussion among liberals on the issue. Latino activist organizations have generally opposed measures to limit immigration because their communities represent a sizable immigrant population, and thus would experience the adverse effects of any heightened immigration enforcement. Conversely, African American communities have expressed fears about the perceived negative impact of immigration. The Korean-African American conflicts in Los Angeles after the release of the Rodney King verdict in 1992 are examples of the concerns motivating African American ambivalence towards immigration. See Johnson, supra note 90, at 640-42.

\textsuperscript{120} Johnson, supra note 90, at 181.

\textsuperscript{121} Id. at 173.

\textsuperscript{122} Id. at 166.
times in U.S. history . . . the difference of race has inflamed nativist sentiment. This makes perfect sense [because] of the central importance of race in this country. People of color who are citizens often are viewed as the other, foreign, un-American, and an internal minority."

Under the theory of racial animus advanced by Kevin Johnson, immigration laws are defended as being "colorblind" because they do not explicitly discriminate on the basis of race. Yet, in their application, they disproportionately and negatively affect communities of color. Nonetheless, "modern restrictionists regularly deny that race is the reason for the immigration policy." "Instead, they employ other non-race-based arguments that too many people are immigrating to the United States."

**B. Contextual Background: The Roots of Anti-Asian Animus**

**1. Historical Nativism**

Professor Gabriel Chin claims that:

Control of the potentially massive numbers of would-be Asian immigrants was [always] a special focus of American immigration law . . . . Asians were the only group whose immigration was restricted on the basis of race. A consistent feature of anti-Asian immigration laws was categorization by race and ancestry, rather than by place of birth.

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123 *Id.* at 167.

124 *Id.* at 174. Kevin Johnson has recently extended and applied his racial animus theory to the 1998 California ballot measure, Proposition 227 Initiative, "English for the Children," passed by California voters to prohibit bilingual education programs for non-English speakers in the state's public school system. Johnson & Martinez, *supra* note 107, at 1227.

125 Johnson, *supra* note 90, at 174.

126 *Id.*

The racialization of Asian Americans and Asian immigrants as foreign-born outsiders has been a pervasive undercurrent in Asian American history. This resulted in racial prejudice as reflected in immigration, business, and education, as well as on social restrictive immigration policy in the United States; Derek Ludwin, Note, Can Courts Confer Citizenship? Plenary Power and Equal Protection, 74 N.Y.U. L. Rev. 1376, 1380 (1999) (emphasizing that “[i]n the early history of the United States, naturalized citizenship was available only to ‘free white persons’ who satisfied basic residency and good moral character requirements... Chinese aliens, for example, were statutorily prohibited from naturalizing until 1943”).

Cole & Chin, supra note 127, at 325 (suggesting that recent legal studies recast the historical role of Chinese immigrants, shaping their own history and contributing to the development of American legal culture); see also LUCY SALYER, LAWS HARSH AS TIGERS 2 (1996) (reporting that the Chinese played an essential, though indirect, role in the development of immigration law).


The Asian Americans who made it to the United States in previous generations experienced familiar forms of racial discrimination at the hands of the law. They were subject to electoral disenfranchisement, exclusion from desirable neighborhoods through restrictive covenants, testimonial disqualification, school segregation, prohibitions on property ownership, racial violence, prohibitions on marriage to whites, unequal enforcement of racially neutral laws, and disqualifications from many businesses and professions.


See, e.g., Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (holding that the school district’s failure to provide English language instructions violated the Civil Rights Act of 1964); Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927) (interpreting the separate but equal
and political levels. Unfortunately, this discrimination began as soon as the first Chinese immigrants set foot on American shores. Chinese Americans were not the only Asian Americans to be subjected to a history of discrimination. Japanese immigrants and their American-born children also endured great hardship and animosity, even before the bombing of Pearl Harbor.

132 Johnson, supra note 90, at 168 (reporting that “Chinese immigrants found it impossible to assimilate. This resulted in no small part from resistance to their assimilation by dominant American society. Neither the courts nor the body politic accepted the Chinese as members of the national community.”); Chin, supra note 63, at 23 (discussing racially motivated exclusion of Asian immigrants during the nineteenth century); Johnson, supra note 90, at 167-68 (describing horrendous treatment of Chinese immigrants by federal, state, and local governments during the 1800s).

133 See U.S. COMM’N ON CIVIL RTS., RECENT ACTIVITIES AGAINST CITIZENS AND RESIDENTS OF ASIAN DESCENT 7 (1986) [hereinafter U.S. COMM’N ON CIVIL RTS.] (explaining that discriminatory laws were enacted against immigrants as soon as they arrived in the United States); John Hayakawa Torok, Asians and the Reconstruction Era Constitutional Amendments and Civil Rights Laws, in ASIAN AMERICANS AND CONGRESS, supra note 63, at 14 (stating that Chinese immigrants soon experienced institutionalized discrimination in law and public policy after their migration to California during the Gold Rush period); Daina Chiu, Comment, The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism, 82 CAL. L. REV. 1053, 1060 (1994) (asserting that Americans have historically discriminated against Asians and precluded them from participating in American society by enacting immigration laws); see also K. Scott Wong, Cultural Defenders and Brokers: Chinese Responses to the Anti-Chinese Movement, in CLAIMING AMERICA: CONSTRUCTING CHINESE AMERICAN IDENTITIES DURING THE EXCLUSION ERA 4 (1998) (reporting that “American opposition to the Chinese presence in the United States centered on two main issues, economics and race, both of which were usually framed as a critique of Chinese culture”).

The first naturalization law, passed in 1790, restricted naturalization to “free White persons.” This was amended in 1870, after the Civil War, to include persons of African descent. Since Asian immigrants were deemed to be neither White nor of African descent, they could not become citizens. In numerous cases, culminating in a pair of Supreme Court decisions in the 1920s, judges repeatedly recognized that Asian applicants for naturalization were qualified in every respect but one: They were not White.


134 See Gee, Changing Landscapes, supra note 4, at 629 n.42 (outlining possible reasons for anti-Chinese behavior).

After getting rid of the Chinese, employers began to encourage Japanese workers to immigrate. Later, white workers rallied to exclude the Japanese, pressuring the U.S. government into signing the infamous “Gentleman’s
Much to America's chagrin, the Japanese American internment and the nineteenth century anti-Chinese legislation are quite illustrative of how the ethnic backgrounds of immigrants can inflame public opinion and legal policy as well as how race and immigration status are often combined to enhance the unpopularity of immigrants. In fact, this latter interrelationship between race and immigration has even been categorized into what is now referred to as "nativism," a term that has been defined as an "intense opposition to an internal minority" because of the minority's foreign connections. In this regard, nativism has often been linked to the history of Asian American discrimination.

2. Modern Era Nativism

The recently enacted immigration policies of the late 1990s, which targeted Asian and Latino immigrants, are the latest manifestations of the social construction of these racial groups as foreigners not entitled to equal protection under the law. The failure to incorporate racial meanings into immigration laws and policies means that law rooted in citizenship, sovereignty, or

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Agreement" of 1907 with the Japanese government, which barred Japanese laborers from leaving Japan for America. The exclusion of the Chinese and Japanese did not, of course, stop the employers' demand for a continued supply of more cheap labor from Asia, or white labor's insistent demand for the exclusion of all Asians.


136 Chang & Aoki, supra note 135, at 309 ("In the United States, this differentialist racism, might be termed nativistic racism. Nativistic racism is not just an intersectional term, but signifies that both nativism and racism are mutually constitutive of the other and operate in tandem to preserve a specific conception of the nation."); see also Gee, Asian Americans, the Law, and Illegal Immigration, supra note 4, at 76 (1999) (illustrating the nativistic racism and stereotyping that plagues Asian Americans and addressing the link between the history of discrimination against Asian Americans and contemporary discriminatory acts).

137 Gee, supra note 134, at 685.
national interest may mask racism. A close analysis of modern-day nativism reveals that the contemporary immigration debates are not really about economics, but instead are about race.

This immigrant reform fervor has also caught the attention of the American public, and the recent increase in legislation is in large part fueled by growing anti-immigrant sentiments against Asians. As this anti-immigration animus and xenophobia gained momentum, it culminated in recent legislation such as California’s Proposition 187, English-Only laws, and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

138 Id. at 686.

139 Id.


142 CAL. EDUC. CODE § 48215 (Deering 1999); see also Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. REV. 1509, 1510 (1995) (stating that “California’s Proposition 187, an extreme response to the public’s concern with immigration, drew national attention”). “The groundswell of support for Proposition 187 showed how extreme the California electorate could be.” Id. at 1559.


The hostile anti-immigrant environment in the United States is exemplified in the Federal Welfare Reform Act and California’s Proposition 187. In particular, Proposition 187 is a weapon that nativists have used to close the nation’s borders. Under Proposition 187, undocumented immigrants, primarily Latinos and Asians, are denied access to public school education, non-emergency health care from state and local governments, and government social services. Furthermore, the current backlash against immigrants has also found its way into the controversies over bilingual education and bilingual ballots, which also reflect the more fundamental debate over linguistic pluralism and the place of non-English languages in public life. Law Professors Richard Delgado and Jean Stefanic observe that:

Echoing themes from California history, including denying the Japanese the right to own land, the Chinese in San Francisco to license laundries, and the Mexicans the right to speak their language, the campaign for Proposition 187 bore unmistakable overtones of xenophobia and exclusionism. It featured television commercials showing a flood of foreign-looking people with a narrator’s voice intoning, “They keep coming.” Governor Pete Wilson even lobbied President Bill Clinton to have legal aliens declared ineligible for federal welfare benefits.

It was common knowledge that resistance to large-scale, uncontrolled refugee admission and immigration was likely to increase among the American public. Jean Stefanic considers this anti-immigrant animus in terms of socioeconomic stresses and competition over shrinking resources and jobs. Richard Delgado

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145 Gee, supra note 134, at 687.

146 Id. at 686.

147 Richard Delgado & Jean Stefanic, California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education, 47 UCLA L. REV. 1521, 1555 (2000). Richard Delgado and Jean Stefanic have recently documented the ambivalent treatment of citizens of color beginning in its early days and continuing into the present. Id. California’s momentum has inspired broad action around the country at the state level. Id.


149 Jean Stefanic, Funding the Nativist Agenda, in IMMIGRANTS OUT!, supra note 22, at 119.
argues that "[h]istory teaches that nativist movements tend to flourish when the country's social and economic situation is unsettled and then [tend] to take one of two broad forms. Society enacts restrictive immigration laws and policies to keep foreigners—usually ones of darker coloration—out." Delgado asserts that anti-immigrant measures have the specific aim of making immigration or naturalization difficult and that recent policies favoring the elimination of social services for immigrants illustrate forms of legal treatment designed to disadvantage the foreign born.

C. Origins of Asylum Law and the Core of the Refugee Act

The United States has always taken pride in its long history of providing refuge to foreign nationals displaced by war or persecution. The modern human rights movement began its revolution with the events surrounding the end of World War II. The atrocities committed by the Nazi regime during the Holocaust provided the impetus. Professor Hing observes that:

[The tensions between humanitarian aims and practical concerns] make plain the link between refugee and immigration policy. In the 1930s for example, the United States turned away thousands of Jews fleeing Nazi Persecution, in large part because of the powerful restrictions then dominating immigration laws. Congress and U.S. consular officers consistently resisted Jewish efforts to emigrate and impeded any significant emergency realization or limitation on quota. A 1939 refugee bill would have rescued twenty thousand German children had it not been defeated on the grounds that children would exceed the German quota.

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150 Delgado, supra note 22, at 318.
151 Id. at 318-19.
153 John A. Scanlan, Immigration Law and the Illusion of Numerical Controls, 36 U. MIAMI L. REV. 819, 847 (1982) ("Immediately after World War II, the United States began admitting large numbers of refugees and displaced persons to its shores.").
154 HING, supra note 152, at 123.
155 Id. at 124; see also James F. Smith, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 236 (1995) (reporting that in 1939 Congress defeated a bill to rescue 20,000 from Nazi Germany on the grounds that it would exceed the German quota). Cf. Wendy B. Davis &
"The international community was so outraged at the egregious acts of inhumanity committed that it could not let such acts go ignored." Since then, refugee laws and policies have always reflected the intractable tensions between humanitarian aims and practical domestic and international concerns.

The early steps toward aligning American law with the minimum standards of protection owed to refugees under international law were reflected in the Refugee Acts enacted after World War II. Hundreds of thousands were escorted to this nation's shores by various congressional acts that, on an ad hoc basis, superseded the national quota systems. For example, the 1948 Displaced Persons Act enabled 400,000 refugees and displaced persons to enter from Europe, and in 1953, the Refugee Relief Act admitted 200,000 refugees, including 18,000 Hungarians and 28,000 refugees of the Chinese Revolution. Perhaps the most significant international instrument upon which United States refugee law is based is the 1951 United Nations Convention Relating to the Status of Refugees (the Convention). The Convention arose out of an increasing international concern for refugees. The Convention extended protections,

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Angela D. Atchue, No Physical Harm, No Asylum: Denying a Safe Haven for Refugees, 5 TEX. FOR. ON C.L. & C.R 81, 120 (2000) (claiming that "Jews fleeing the Nazi regime in the 1930's would today be denied asylum under the courts' present interpretation of persecution, because they have not yet been physically harmed").

156 HING, supra note 152, at 123.
157 Id.
158 Id.

which were originally intended as temporary measures, to address the rising numbers of displaced individuals in Europe.\footnote{See GOODWIN-GILL, supra note 159, at 12 (reiterating the fact that the Convention’s protection was limited to individuals eligible for refugee status as a result of events before January 1, 1951); Fitzpatrick, supra note 159, at 232 (explaining that the Convention’s protection was limited to certain individuals).} The substantive language of the Convention provides two principles relevant to current refugee law in the United States. The most essential principle established by the Convention is the definition of the term “refugee.”\footnote{The UNHCR argues that two elements must be considered when determining refugee status: (1) the individual’s frame of mind; and (2) whether that frame of mind is “supported by an objective situation.” Handbook for Determining Refugee Status, supra note 160, para. 38, at 11-12.} In Article 1, the Convention establishes that a refugee is an individual who has a well-founded fear of persecution in his or her country of origin based on “race, religion, nationality, membership in a particular social group, or political opinion.”\footnote{Karen Musalo, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms, 15 MICH. J. INT’L L. 1179, 1197-98 (1994) (noting that the definition of refugee originates in the Constitution of the International Refugee Organization (IRO)).} The United States and other non-European countries did not sign the 1951 Convention.\footnote{Brian K. McCalmon, Note, States, Refugees, and Self-Defense, 10 GEO. IMMIGR. L.J. 215, 218 (1996) (stating that United States did not sign Convention). Eighteen out of the twenty-three European nations became parties to the Convention before 1960. David A. Martin, The New Asylum Seekers, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 2 (David A. Martin ed., 1988) [hereinafter THE NEW ASYLUM SEEKERS].} The 1952 McCarran-Walter Act, however, granted the Attorney General discretionary authority to “parole” into the United States any alien for emergency reasons deemed strictly in the public interest.\footnote{Martin, supra note 164.} This permitted policymaking consistent with their political preference for refugees from communism.\footnote{William R. Tamayo, Asian Americans and the McCarran-Walter Act, in ASIAN AMERICANS AND CONGRESS, supra note 63, at 348-49.} The original intent was to apply this primarily on protecting individuals fleeing their homeland because of government persecution, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 3 (Ved P. Nanda ed., 1989); Michele Altermus, The Sanctuary Movement, 9 WHITTIER L. REV. 683, 688 (1988) (explaining that the Convention arose because of massive displacement resulting from World War II).
parole authority on an individual basis.\textsuperscript{167} For example, the 1956 Hungarian refugee crisis led to the expanded use of parole authority to accommodate those fleeing communist oppression.\textsuperscript{168} Similarly, the parole authority was used to admit more than 15,000 Chinese who fled mainland China after the 1949 Communist takeover and more than 145,000 Cubans who sought refuge from Cuba after Fidel Castro’s 1959 coup.\textsuperscript{169}

The United States later acceded to the 1967 United Nations Protocol Relating to the Status of Refugees,\textsuperscript{170} (the Protocol) which effectively adopted and extended the Convention’s protections.\textsuperscript{171} The Protocol modernized the Convention by removing the Convention’s temporal and geographic limitations in order to meet the burgeoning refugee problem that persisted beyond World War II.\textsuperscript{172}

The greatest significance of the Protocol continues to be its embodiment of the international community’s commitment to comply with Article 33(1) of the Convention. No contracting nation-state may be a party to the Protocol without agreeing to the minimum standard of protection under Article 33(1) of the Convention—the mandatory requirement of withholding of deportation of refugees who would otherwise face certain

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\textsuperscript{167} HING, \textit{supra} note 93, at 27.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Mosquera-Perez v. INS, 3 F.3d 553, 556-57 (1st Cir. 1993) (explaining that the Refugee Act of 1980 attempted to comply with the Protocol Relating to the Status of Refugees by incorporating Articles 2 through 34 of the Convention); \textit{Handbook for Determining Refugee Status, supra} note 160, para. 9, at 4 (concluding that accession to the Protocol binds signatories to Convention’s principles).
\textsuperscript{172} \textit{See} GOODWIN-GILL, \textit{supra} note 159, at 13 (discussing the Protocol’s extension of the Convention’s protection to individuals otherwise not within the Convention’s limited protection); McCalmon, \textit{supra} note 164, at 218 (noting that the Protocol’s expansion of the Convention’s protections was triggered by decolonization of African states in the 1960s).
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persecution.\textsuperscript{173}

Although the United States acceded to the 1967 Protocol, it did not establish formal procedures for granting asylum and withholding of deportation until the Refugee Act of 1980,\textsuperscript{174} which established the first statutory procedures for administration of refugee and asylum cases in the United States.\textsuperscript{175} Before the advent of the Refugee Act, the Immigration and Naturalization Service conducted asylum proceedings through regulations pursuant to the U.S. Attorney General's broad discretionary authority.\textsuperscript{176} The

\textsuperscript{173} Lowenstein International Human Rights Clinic, \textit{Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary}, 15 \textit{Immigr. \& Nat'lity L. Rev.} 333, 346 (1994) (arguing that the principle of nonrefoulement is nonderogable and that no reservation should be allowed).


Refugee Act signified Congress’ express intent to move the United States into accord with the obligations imposed under international refugee law.\(^{177}\)

In passing the Refugee Act, Congress adopted the international legal definition of refugee and attempted to establish a uniform standard for adjudicating refugee and asylum claims.\(^{178}\) The Refugee Act incorporated the mandatory nonrefoulement requirement, essentially verbatim from the 1967 Protocol, into the Immigration and Nationality Act (INA).\(^{179}\) Moreover, the Refugee Act required a balancing of factors to determine whether an alien convicted of an aggravated felony could be excluded under the narrow exception to nonrefoulement laid out in the Convention.\(^{180}\)

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\(^{178}\) Jacqueline Reardon, Deportation—Applying an Objective Standard to Determining a “Well-Founded Fear of Persecution,” 13 SUFFOLK TRANSNAT’L L.J. 855, 859 (1990) (stating that the Refugee Act of 1980 marked a significant revision of the United States’ immigration policy); James F. Smith, A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 236 (1995) (stating that the Refugee Act of 1980 was designed to bring the United States into conformity with the Refugee Protocol of 1968, which followed the 1951 Convention); see also Sanchez & Lomangino, supra note 176, at 18 (noting that the Act adopted the international definition of refugee).

\(^{179}\) 8 U.S.C. § 1101(a)(42)(A) (1982). The Act defined a “refugee” as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . The term refugee does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion.


\(^{180}\) Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (maintaining that most deportation proceedings should be determined on a case-by-case basis).
V. Post-Vietnam War Aftermath

A. Richard Nixon, America, and the Unwinnable War

"Vietnam marked the end of an era in world history and of American foreign policy, an era marked by constructive achievements but blemished by ultimate, although not irreparable failure."181

When North Vietnam maintained its military pressure against South Vietnam, Laos, and Cambodia, Nixon gradually disengaged from the war, and reduced United States’ troop strength in Vietnam from 550,000 in 1969, to about 30,000 late in 1972.182 During this time, Nixon declined to set a date for the withdrawal of all U.S. troops, and simultaneously accelerated the training of Vietnam’s armed forces.183 Nixon chose to expand the war, and argued that there was a need to protect the lives of American troops; thus, he approved a joint United States-Vietnamese attack against Communist sanctuaries in eastern Cambodia in April 1970.184 A critical Congress barred the President from any further use of American ground combat troops in Cambodia and Laos, and some congressmen sought to impose a time limit on United States participation in the war.185

In the spring of 1972, the combination of military pressure and the likelihood of Nixon’s reelection persuaded North Vietnam to bargain more earnestly for a cessation of hostilities.186 An agreement was finally devised that provided for the withdrawal of all American troops from South Vietnam, the creation of an international commission to supervise the truce, and a framework within which various Vietnamese factions were to work towards

183 GARDNER, supra note 182, at 542-43.
184 Id.
185 Id.
186 Id.
reconciliation. The Vietnam War was deeply embedded in the United States' psyche. In the immediate aftermath of the War, the United States experienced selective and collective amnesia. Journalist Joseph C. Harsch said in 1975 that "[t]oday it is almost as though the war had never happened." Many public figures avoided the issue, as well as any finger-pointing about the great debacle. And because both the Republicans and Democrats were deeply implicated in the war, it never became a partisan political issue.

Unlike other post-war periods, Vietnam veterans came home to a nation that was either hostile to them or indifferent to their plight. When forced to discuss Vietnam, Americans remained confused and divided about its meaning, particularly its implications for U.S. foreign policy. The Vietnam War significantly weakened the power of the United States and demoralized this country. It was the only war in which the United States was unable to claim victory, and it was the third major war against an Asian country. It was also a very unpopular war and the most controversial political issue on the home front.

The tremendous indifference of many, as well as the general attitude favoring withdrawal, gradually gave way to bitter memories of the Vietnam War. These sentiments combined with the frustration of the Iranian hostage crisis to produce a growing nationalistic assertiveness and a yearning to restore the United States to its pre-Vietnam position exuding dominant power and

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187 Id.
188 HERRING, supra note 181, at 273.
189 Id.
190 Id.
191 Id.
192 Id. at 274.
193 Id. at 275.
194 KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 238 (1992) (considering the Vietnam War as the most political issue of the decade of the 1970s). "The Vietnam War was a matter of ongoing presidential and congressional concern throughout 1964." Id. at 246; see generally NELSON W. POLSBY & ARRON WILDAVSKY, PRESIDENTIAL ELECTIONS: CONTEMPORARY STRATEGIES OF AMERICAN ELECTORAL POLITICS 7-8, 204-05 (7th ed. 1988) (describing the Vietnam War as a major issue in Presidential campaigns during the 1960s).
influence in world politics. The breakdown of detente, the steady growth of Soviet power, and the use of that power in Afghanistan produced a heightened concern for American security. The defense budget soared to record proportions in the early 1980s and support for military intervention in defense of traditional allies increased significantly.

B. The Unpredictable Flow of Refugees After the End of the Vietnam War

The United States' withdrawal from Vietnam left the region in a state of social chaos. The large Southeast Asian immigration following the Vietnam War could not have been anticipated. Before 1975, Vietnamese immigration was small. Between 1966 and 1975, 20,038 Vietnamese arrived in the United States. When United States military troops evacuated Vietnam after the fall of Saigon in 1975, the number of Vietnamese Americans was negligible, but the collapse of the South Vietnamese government in April 1975 caused a mass exodus from Vietnam. Shortly thereafter, in 1975, Pol Pot, the leader of the Khmer Rouge, installed himself in power in Cambodia and began a program of systematic genocide of the Cambodian people. Close to two million Cambodians were killed in his Year Zero campaign and hundreds of thousands more were tortured and terrorized.

Southeast Asian refugees fled their countries in different

195 HERRING, supra note 181, at 275-76.
196 Id. at 276.
198 Chin, supra note 63, at 308.
199 U.S. COMM'N ON CIVIL RTS., supra note 197, at 26.
200 Id.
201 U.S. COMM'N ON CIVIL RTS., supra note 133, at 34.
202 Id.; see also Minh-Duc T. Le, Note, ROVR: Resettlement Opportunities for Vietnamese Returnees or Refoulement of Vietnamese Refugees?, 12 GEO. IMMIGR. L.J. 125, 126 ("The fall of Saigon in the spring of 1975 triggered the flow of refugees from Vietnam.").
203 Le, supra note 202, at 126; see also STANLEY KARNOW, VIETNAM: A HISTORY 55-56 (1997).
204 Le, supra note 202, at 126; see KARNOW, supra note 203, at 55-56.
waves. The “first wave” of Vietnamese refugees arrived at the United States mainland by 1977. The “second wave” was comprised of small groups that often left Vietnam in fishing boats. A massive increase of refugees beginning in late 1978 was triggered by: (1) the Vietnamese invasion of Cambodia, which ended three years of Khmer Rouge rule; (2) the subsequent border warfare between Vietnam and China in early 1979; (3) a new guerilla war in the Cambodian countryside, already devastated by famine and the destruction of the country’s infrastructure; and (4) the collapse of the Chao Pa guerilla resistance against the Pathet Lao and the new system of collective agriculture in Laos, compounded by mismanagement and natural catastrophe.

In 1975, during the onset of a recession, President Ford felt

\[\text{waves.}^{205}\] The “first wave” of Vietnamese refugees arrived at the United States mainland by 1977.\[^{206}\] The “second wave” was comprised of small groups that often left Vietnam in fishing boats.\[^{207}\] A massive increase of refugees beginning in late 1978 was triggered by: (1) the Vietnamese invasion of Cambodia, which ended three years of Khmer Rouge rule; (2) the subsequent border warfare between Vietnam and China in early 1979; (3) a new guerilla war in the Cambodian countryside, already devastated by famine and the destruction of the country’s infrastructure; and (4) the collapse of the Chao Pa guerilla resistance against the Pathet Lao and the new system of collective agriculture in Laos, compounded by mismanagement and natural catastrophe.\[^{208}\]

In 1975, during the onset of a recession,\[^{209}\] President Ford felt


\[^{206}\] U.S. Comm’n on Civil Rts., \textit{Recent Activities Against Citizens and Residents of Asian Descent}, 34 (1987); Zhou & Gatewood, \textit{supra} note 205, at 11 (asserting that, in 1975, only the Vietnamese and a small number of the Hmong resistance force had the privilege of being “paroled” into the U.S. immediately after the war). “Approximately 130,000 Vietnamese refugees and only 3,500 Hmong refugees landed on U.S. soil in 1975, while the majority of Hmong resistance forces, Laotian royalists, and Cambodians sought refuge in Thailand.” \textit{Id}.

\[^{207}\] U.S. Comm’n on Civil Rts., \textit{supra} note 133, at 34.

The refugee exodus was shaped by complex political and economic factors. The first waves of Indochinese refugees were disproportionately composed of elites who left because of ideological and political opposition to the new regimes, whereas later flows included masses of people of more modest backgrounds fleeing regional conflicts and deteriorating economic conditions.

Ruben G. Fumbaut, \textit{Vietnamese, Laotian, and Cambodian Americans}, in \textit{Contemporary Asian America}, \textit{supra} note 205, at 178; see also Zhou & Gatewood, \textit{supra} note 205, at 11 (stating that a large refugee exodus occurred at the end of the 1970s during what is known as the “second wave,” when thousands of refugees fled Vietnam by boat, creating the “boat people” crisis, while many others fled by land to China and Thailand).

It was reported that almost half of the “boat people” perished at sea, and the remaining half ended up in camps in Thailand, Indonesia, Malaysia, Singapore, the Philippines, and Hong Kong. Thousands of refugees also fled Laos and Kampuchea (formerly Cambodia) on land to seek refuge in crowded camps along the Thai border.

\textit{Id}. at 11-12.

\[^{208}\] Fumbaut, \textit{supra} note 207, at 178-79.

strongly about the responsibility of the United States and insisted that the "United States could not desert the Vietnamese." On April 18, 1975, President Ford established a temporary Interagency Task Force (IATF) to coordinate the activities of federal agencies, including the Department of Health, Education, and Welfare and their responses to the resettlement of the increasingly large influx of Southeast Asians. At the time of this refugee flood into the United States, there was no established legal mechanism for admitting the refugees. The pre-1980 law permitted only 17,400 refugee admissions annually, a number inadequate for the situation. The "annual arrivals of Southeast Asian refugees increased almost exponentially: 20,400 in 1978, 80,700 in 1979, and 166,700 in 1980." All in all, from 1975 through 1979, at least ten separate paroles, each limited in duration and number and overwhelmed by the following crisis, were used to admit over 300,000 Indochinese refugees.

During the early 1970s, few complaints existed about refugee policies and laws that were registered on Congressional floors. However, many members of Congress wanted to limit the numbers of Vietnamese, "fearing the rumor that Ford wanted to evacuate a
As an initial matter, Congress, though unenthusiastic about the massive migration, felt no strong domestic pressure to buck the Executive Branch in order to limit the influx, especially after the world press began recording the plight of the "boat people."  

Professor Bill Ong Hing strongly asserts that: 

Policymakers showed every sign through the early 1970s of being pleased by their system of policies, laws, and ad hoc decisions. As they saw it, whenever large numbers of deserving refugees appeared, new legislation could be enacted or existing laws and regulations manipulated. That sort of flexibility in a legal regime was, to their minds, to be unashamedly admired. These policymakers seemed satisfied with the status quo of the greater numbers seeking refugee status from abroad. "Rather than being disingenuous, this attitude was entirely consistent with their sense of humanitarianism." 

Congress was well aware of the Vietnamese refugee crisis. As the world’s attention was placed on the plight of the boat people, the upsurge in Asian entrants that started in the mid-1970s caused policymakers dissatisfaction and serious concern. In fact, the continual admission of refugees from Vietnam created great concern and resulted in a negative reaction to Southeast Asians, which was reflected in the United States' refugee policy. After 1975, policymakers became less patient as Asians began entering in increasing numbers under existing guidelines. Bill Ong Hing states that:

217 SUTTER, supra note 210, at 167.
219 HING, supra note 152, at 124.
220 Id. at 125.
221 Id.
222 Anker & Posner, supra note 83, at 31.
223 Id.; see also Paul Ong & Evelyn Blumenberg, Welfare and Work Among Southeast Asians, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES & POLICIES 116 (Paul Ong ed., 1994) (stating that "the influx of Southeast Asians to the United States was thought to be a short-term phenomenon, the immediate consequence of the violent communist takeover that occurred in Vietnam in 1975. However, contrary to expectations, the flow of refugees did not wane").
224 HING, supra note 93, at 27.
Initially, the United States merely wanted to evacuate fewer than 20,000 American dependents and government employees. However, to involve numerical restrictions in the midst of a controversial and devastating war would have been unconscionable, and evacuees soon also included former employees, some 4,000 orphans, 75,000 relatives of American citizens and residents, and 50,000 Vietnamese government employees and officials. Between April and December 1975, the United States thus admitted 130,400 Southeast Asian refugees, 125,000 of whom were Vietnamese.\textsuperscript{225}

The Indochinese refugees became the topic of public debate. An overwhelming majority of Americans disfavored any further assistance in evacuating Vietnamese.\textsuperscript{226} This great anti-Vietnamese sentiment amongst the general public was mirrored in the generally restrictionist attitudes of interested congressional committees.\textsuperscript{227} The traditional restrictionist attitude was prevalent among some members of Congress and mainstream American society.\textsuperscript{228} Public opinion polls voiced opposition to American rescue initiatives and demonstrated the rampant fears, especially among African Americans and the poor, that any infusion of refugees would exacerbate the severe unemployment problem.\textsuperscript{229} These sentiments were juxtaposed against the international community’s perception that the evacuation from Vietnam was an apt conclusion to the United States’ fiasco in Vietnam and the refugees who were escaping Indochina were America’s unassignable responsibility.\textsuperscript{230} In the face of overwhelming public desire to turn away and end the “Vietnam problem”\textsuperscript{231} and its tragic

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item LOESCHER & SCANLAN, supra note 218, at 130.
\item Id.
\item Id.
\item Id.
\item Id. at 109. Cf. Kathryn M. Bockley, supra note 110, at 276.
\item The United States’ attempt to provide assistance to the Vietnamese refugee population stemmed from political sympathy to the former Vietnamese allies who had fought with the United States in support of the Nguyen Van Thieu regime. Many Americans felt a sense of obligation to a people that the United States had supported and then abandoned.
\item LOESCHER & SCANLAN, supra note 218, at 121.
\end{enumerate}
\end{footnotesize}
legacy of American involvement, President Ford declared in a television interview that the United States had a real obligation to evacuate large numbers of South Vietnamese.\textsuperscript{232}

In 1976, the sheer magnitude of the exodus and the resettlement effort for over 130,000 refugees evacuated from Indochina made parole the only feasible method for their admission.\textsuperscript{233} The use of the parole authority as a vehicle for Indochinese admission reflected the inadequacies of the ad hoc procedures. With reference to the poorly coordinated flow of Southeast Asians, Bill Ong Hing remarks:

The executive branch repeatedly waited until the number of refugees in countries of “first asylum” (those first reached by refugees) reached crisis proportions before declaring an emergency. Only then would a new parole program be instituted. Attacks on the inconsistent treatment of refugees and calls for a consistent policy became commonplace. Many were uncomfortable with the attorney general’s considerable unstructured power to hastily admit tens of thousands of refugees under the parole mechanism. Others were genuinely concerned with the government’s erratic response to the plight of Southeast Asian refugees.\textsuperscript{234}

The parole process involved considerable concentration of power in the Chairman and ranking minority members of both House and Senate Judiciary Committees and the key members of the refugee subcommittees.\textsuperscript{235} The key decision-makers in the

\textsuperscript{232} Id. at 110; see also Daniel P. Moynihan, The Presidency & the Press, Commentary, Mar. 1971, at 41 (commenting on the President’s near limitless capacity to “make” news and influence the national press agenda).

[Television] affects not only the timing of major policy decisions but their substance as well. A TV news lead item hits reviewers with the speed and force of a laser beam, and it attracts the interest of a much wider audience than the permitted word. It therefore can speed the coalescence of public backing for an initiative the president favors but is reluctant to take before the public is ready to support it.

\textsuperscript{233} See Anker & Posner, supra note 83, at 30; see also GOODWIN-GILL, supra note 159, at 280 (characterizing the Indochina exodus and automatic resettlement regardless of refugee status as unique).

\textsuperscript{234} HING, supra note 152, at 27; see also Anker & Posner, supra note 83, at 30.

\textsuperscript{235} LOESCHER & SCANLAN, supra note 218, at 123.
Senate were Strom Thurmond, James Eastland, and Edward Kennedy, and their counterparts in the House were Judiciary Chairman Peter Rodino, Joshua Eilberg, and Hamilton Fish.\textsuperscript{236}

The issue was as much legal as political. By 1978, thousands of additional refugees were admitted through a series of Indochinese Parole Programs authorized by the Attorney General. Bill Ong Hing suggests that “[i]nvoking numerical restrictions [in response to the increased flow of Asian refugees] in the midst of a controversial and devastating war would have been unacceptable; too many understood such inflexibility as morally treacherous and politically high-priced. Consequently, the Attorney General on several occasions used the parole authority to permit Asians to enter—the first time it was employed since the 1965 amendments.”\textsuperscript{237}

Throughout the 1970s, congressional committees had expressed growing frustration with how the Executive Branch handled the “spasmodic” and uncontrolled refugee flows.\textsuperscript{238} Several hundred thousand boat people and many Cambodian and Laotian refugees entered soon after due to the further expansion by the Vietnamese into Cambodia.\textsuperscript{239} Mainstream American society then realized that controls were desperately needed to curb the refugee burden.

In 1975, during the onset of a recession,\textsuperscript{240} President Ford felt strongly about the responsibility and insisted that the “United States could not desert the Vietnamese.”\textsuperscript{241} Congress was concerned about the apparent “unlimited authority” of the Attorney General.\textsuperscript{242} “The pressures of the Indochina refugee emergency prompted congressional action on a more equitable and regulated refugee program, which resulted in the Refugee Act of 1980.”\textsuperscript{243} “The Refugee Act interpreted by the State Department

\textsuperscript{236} Id.
\textsuperscript{237} HING, \textit{ supra} note 152, at 125-26.
\textsuperscript{238} LOESCHER & SCANLAN, \textit{ supra} note 218, at 115-17.
\textsuperscript{239} HING, \textit{ supra} note 93, at 28.
\textsuperscript{240} KOENIG, \textit{ supra} note 209, at 262.
\textsuperscript{241} SUTTER, \textit{ supra} note 210, at 167 (quoting SNEPP, \textit{ supra} note 210, at 412-13).
\textsuperscript{242} Id. at 168.
\textsuperscript{243} Id.
appeared to some to emphasize foreign policy goals unduly.”  

"The growing perception that American refugee policy was responding to the Indochina refugee crisis primarily for foreign policy reasons forced a confrontation between the Immigration and Naturalization Service (INS) and the State Department concerning authority over refugee admissions." The assertiveness of the INS toward the Indochinese refugees may reflect its efforts "to compensate for its poor performance in controlling illegal entry, especially along the Mexican border." INS officer Jack Fortner believed that his agency was the "necessary brake" to the admission of refugees to the United States. He stated that "if the State Department was given the reins, there would be no stopping the refugee flow." Also, according to Fortner, "the American government's complex and bureaucratic refugee program, 'feeds a huge conveyor belt' of voluntary agencies that assist the refugees."  

C. Resettlement: Nativism Against Indochinese Refugees

The resettlement assistance for refugees was increased when the Refugee Act was adopted in 1980. The Act authorized a resettlement assistance program to last for three years. During that period, the agencies that managed the reception and settlement

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244 Id. at 169.
245 Id.
246 Id. at 185.
247 Id. at 172.
248 Id.
249 Id.
250 See U.S. COMM'N ON CIVIL RTS., supra note 133, at 20.
251 Id.

One of the major goals of the Federal Settlement Program was to spread the economic and social impact of the refugees as evenly as possible throughout the nation. Conventional adaptation theory holds that a geographic distribution which reduces contact among members of an immigrant group, while promoting maximum contact between the immigrants and native-born Americans, tends to stimulate economic and cultural adaptation.  

Id. (quoting Jacqueline Desbarats and Linda Holland, Indochinese Settlement Patterns in Orange County, Am. J., vol. 10, at 23-24 (Spring/Summer 1983)). These beliefs inspired the Federal Government in 1982 to require settlement agencies to place refugees in areas without large numbers of previous arrivals. Id.
of new refugees were allocated funds for the necessities of the incoming refugees in the form of clothing, housing, food, English language instruction, and job training.\textsuperscript{252} Notwithstanding the well-meaning intent of the program, the federally funded program proved problematic from the outset.\textsuperscript{253} Among the litany of issues was its lack of consideration for the long-term effects on the refugee communities and the manner in which the refugees were summarily dispersed to various parts of the country.\textsuperscript{254}

Although the IATF hoped to ease the refugees' transition into mainstream American culture by monitoring and manipulating them, the plan failed miserably.\textsuperscript{255} Primarily due to the difficulties of monitoring the communities and the unintentional creation of opportunities for refugees to communicate with and reinforce each other, the communities formed alliances to mobilize and resettle elsewhere through secondary migration.\textsuperscript{256}

1. Refugee Life and the Negative Socioeconomic Impact on American Communities

Almost immediately, there was a negative reaction to Vietnamese refugees.\textsuperscript{257} Unquestionably, the refugees have had an impact on the economy, jobs, wage scales, and neighborhood character in many parts of the nation.\textsuperscript{258} California had the largest

\textsuperscript{252} LOESCHER & SCANLAN, supra note 218, at 115-17.

\textsuperscript{253} Id.

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} Id.

\textsuperscript{257} Kevin Johnson states that:

A recurring theme in U.S. history is that new immigrants, like welfare recipients, are disfavored by the voting public. Consistent with a historical cycle of nativism roughly correlated with the ups-and-downs of a market economy, immigrants, particularly ones who enter or remain in the United States in contravention of the law, have grown increasingly unpopular in recent years. Johnson, supra note 92, at 1511.

\textsuperscript{258} SUCHENG CHANG, ASIAN AMERICANS: AN INTERPRETATIVE HISTORY 100 (1991); see also Craig Trinh-Phat Huynh, Vietnamese-Owned Manicure Business in Los Angeles, in THE STATE OF ASIAN PACIFIC AMERICA: REFRAISING THE IMMIGRATION DEBATE 201 (Bill Ong Hing & Ronald Lee eds., 1996).

Vietnamese domination of the business and their competitive prices have created resentment among some non-Vietnamese nail salon owners who decry
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refugee population, and Texas had the second-largest refugee population. A large number of refugees were relocated to Pennsylvania, and about 40% of the Hmong population in the United States resettled in Minnesota. From the beginning of 1981, it became apparent that most of the recent Indochinese arrivals were finding it difficult, if not impossible, to adjust to American life. Added to their difficulties was the unfavorable attitude that many Americans had towards these refugees entering their neighborhoods. A poll of attitudes of Americans in nine cities towards refugees showed that many had a negative feeling about them. This poll revealed that 47% of those surveyed believed that “Indochinese refugees take jobs away from others in my area.” Moreover, “[o]nly 21 percent of those surveyed believed that Indochinese refugees should be encouraged to move into their community.” Sucheng Chang asserts that many taxpayers deeply resent the continual extension of public assistance given to the very people whom, just a short while ago, American military troops were indoctrinated to hate and to kill immediately. Also, the efforts on the part of voluntary refugees to get Vietnamese jobs and to become self-sufficient often conflicted with the interests of other minority groups.

“Unlike the earlier flows of refugees from Eastern Europe and Cuba . . . few of the new arrivals had significant formal education, professional and occupational skills relevant to an industrial

the lowering of prices to just one-third of what they were a decade ago. Many Vietnamese manicurists, however, counter that this trend has simply made nail services more affordable for more customers.

Id.

259 CHANG, supra note 258, at 161.

260 Id.

261 LOESCHER & SCANLAN, supra note 218, at 167.


263 Id.

264 Id.

265 Id. at 37.

266 CHANG, supra note 258, at 164.

267 U.S. COMM’N ON CIVIL RTS., supra note 133, at 36-38.
society or familiarity with the English language and the American way of life." These refugees faced tremendous social and economic hurdles. In this new and often hostile land, Southeast Asians were deprived of necessary familiar, cultural, and ethnic support. In addition, due to the lack of governmental support, families often ended up separated and divided.

These conditions created fertile ground for the growth and spread of anti-Asian sentiment that was "aggravated by the increased visibility of Asian Americans due to a large influx of immigrants and refugees from Asia." According to Bill Ong Hing:

By 1980, 45 percent of the first wave of Southeast Asian refugees had moved from their assigned locations to a different state, thereby frustrating the dispersal policy's goals of minimizing the impact of refugees on local economies. They became concentrated most heavily in California, Texas, and Louisiana. Urban areas having warm climates and an Asian

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268 LOESCHER & SCANLAN, supra note 218, at 167. Refugees "had little money and few job skills related to work in an industrialized society. They settled in low-income neighborhoods, [took] low-paying jobs when available, and [were] otherwise eligible for public assistance. This made them competitors with low-income Americans for the same resources." U.S. COMM'N ON CIVIL RTS., supra note 133, at 36.

269 U.S. COMM'N ON CIVIL RTS., supra note 133, at 36. At this time, "[t]he United States has resettled more Indochinese refugees than any other country, continues to pledge large quotas for resettlement . . . and funds all refugee programs in the amount of over $794 million annually in federal monies, plus millions more at the state and local levels." SUTTER, supra note 210, at 166-67.

270 HING, supra note 152, at 132-33.

271 Id. "The refugee experience is a major cause of the lower social and economic indicators among Vietnamese, Cambodian, Laotian, and Hmong immigrants. Along with language and cultural differences, wartime traumas, forced uprooting, relocation, and resettlement make the incorporation of Southeast Asian refugee populations into American society especially challenging and complex." ANCHETA, supra note 49, at 133.


[Because] Asian Americans are heavily concentrated geographically, the increase in the Asian population in some communities has been much more dramatic. For example, in Lowell, Massachusetts, the Cambodian population increased from a negligible percentage to roughly 25 percent of the population after 1980s. Many California communities have been similarly affected by Asian immigration.

Id.
population were preferred. . . . By the time the second wave began arriving in 1978, Southeast Asian refugees, particularly the Vietnamese, were no longer as widely dispersed as they had been under the original plan. . . . Housing shortages, perceived job competition, and high welfare dependency became associated with many of these resettlement areas, only fueling hostility and resentment.\footnote{HING, supra note 152, at 130. Gill Loescher and John Scanlan assert that: Concern mounted over the increasing size of local refugee welfare budgets, inequities in the distribution system which allowed certain refugees to receive more benefits than other welfare recipients, the lengthening time many refugees appeared to spend on welfare, and the impact they had on housing, employment, education, and public health services. LOESCHER & SCANLAN, supra note 218, at 202.}

This newfound xenophobia was ubiquitous. Almost immediately, “[f]ear and hostility toward ‘foreigners’ erupted.”\footnote{Id.; see also Penelope McMillan, Fact-Finding Project Began Anti-Asian Bigotry: An ‘Alarming’ Rise as Refugees Pour In, L.A. TIMES, Feb. 4, 1995 at 1 (reporting that “[the] Racial Violence Monitoring Project” was established in response to antagonism, bigotry, and violence against Indochinese refugees in Southern California).} Inevitable conflicts arose.\footnote{LOESCHER & SCANLAN, supra note 218, at 167.} Though an influencing factor may have been the fact that refugees were recipients of public assistance, a more important facet was “the fact that refugee children, because of their lack of English and need for remedial instruction, put heavy strains on the local schools.”\footnote{Id. “The factors that may contribute to anti-Asian sentiment in the United States include increasing numbers of persons of Asian origins and their changing demographic patterns, problems in the resettlement process for refugees, and competition between low-income refugees and other low-income groups for jobs and housing.” U.S. COMM’N ON CIVIL RTS., supra note 133, at 39.}

Oftentimes, “hardworking Indochinese adults were resented . . . because they competed with their American counterparts for increasingly scarce employment.”\footnote{LOESCHER & SCANLAN, supra note 218, at 202.} The strife over employment and housing was not limited to conflicts between whites and Asians, but between racial minority communities and Asians as well. Latinos, who found it especially difficult to compete with the Indochinese, voiced particular concerns.\footnote{LOESCHER & SCANLAN, supra note 218, at 202. Kevin Johnson refers to the racial dynamics of immigration, which have complicated the debate over civil rights. This is evident in minority citizens, particularly African Americans who “have long
dislike of the refugees culminated in racially motivated behavior against persons of Asian descent as a result of general anti-Asian sentiment exacerbated by misperceptions about Asians and their characteristics. Not uncommon were incidents of racially motivated violence against these refugees.

The Vietnamese encountered hostility in areas where there was high unemployment or there was a housing shortage. "In Maine, unemployed young people occasionally roughed up and robbed the Vietnamese." Similarly, "when Vietnamese shrimp fishermen were moved to Galveston, Texas, they were perceived as a threat to the livelihood of local fishermen and were terrorized by members of the Ku Klux Klan." One commentator provided an example that typifies the hate targeted against Indochinese refugees: "[t]wo Cambodian residents [were] assaulted by Vietnam veterans 'who were angry that Vietnamese were coming to this country and buying new cars.' When told that their victims were Cambodians, not Vietnamese, the assailants retorted, 'it's the

279 U.S. COMM'N ON CIVIL RTS., supra note 133, at 31.

280 ANCHETA, supra note 49, at 73-74. According to Angelo Ancheta, the foreigner racialization and "the racialization of Asian Americans as 'enemies' can stretch beyond periods of actual war." Id. He suggests that:

Military propaganda that portrays wartime enemies in racial terms becomes part of the racialization process that subordinates Americans of Asian ancestry. Examples include the popular use of the term "japs" during World War II or the vulgar use of the term "gooks" during the Vietnam War. The racial learning that is reinforced through military propaganda can extend long after military activities have ceased. Aggregated military conflicts with Japan during World War II, with China and North Korea during the Korean War, and with North Vietnam during the Vietnam War have bred aggression and hostility against Asians and Asian Americans that persist even today. And when contemporary political rhetoric concerning "trade wars," "drug wars," or the "war on illegal immigration" is used, Asian Americans are among the first to suffer.

Id.; see also Andrew M. Gilbert & Eric D. Marchand, Note, Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999, 30 ST. MARY'S L.J. 931, 940-50 (1999) (detailing the great prevalence of racially motivated violence and crimes targeting minority individuals, including Asian immigrants, with current raw statistical data and analysis).

281 LOESCHER & SCANLAN, supra note 218, at 116.

282 Id.

283 Id. at 117.
same thing." This anti-Vietnamese violence was not limited to white against Asian violence. In Denver, Mexican-Americans reacted violently when Indochinese families were given preference over them in a housing project that had a long waiting list.

2. Orange County, California: A Case Study

Though race has been the prime factor in early immigration conflicts in California, labor relations and class have served, over time, as major influences as well. Nativism against Asians was resurrected and reinvigorated as the Indochinese began arriving in what were previously cozy, quiet, and largely white neighborhoods in California. These communities were especially burdened by the refugee resettlement. "[A]lthough a lower proportion of initial placements of refugees have been made in California relative to earlier years, secondary migration has increased the proportion of refugees ultimately settling there." According to the U.S. Commission on Civil Rights, "California has the largest population of Indochinese refugees with 40 percent of Southeast Asian refugees living there. About 73 percent reside in the 10 States with the largest numbers of refugees." In the early 1980s, communities where refugees settled in large numbers became uneasy. Orange County was no different.


285 Loescher & Scanlan, supra note 218, at 116.

286 Delgado & Stefanić, supra note 148, at 1532.

287 See U.S. Comm'n on Civil Rights, supra note 133, at 20.

288 Id.

289 Id.

290 Id.

291 Loescher & Scanlan, supra note 218, at 201-02.

292 Id. at 202; see also Jim Cooper, Orange County Voices Immigration, L.A. Times, May 3, 1990, at 11:

The number of Vietnamese, Cambodian and Laotian refugees throughout the Nation has since grown to 1 million. Orange County with one-percent of the national population, is now home to ten-percent of all the nation’s Indochinese refugees. It is estimated that Orange County has 100,000 Vietnamese, 8,000 Cambodians and 3,000 Laotians.
1975 and 1982, 60,000 Indochinese settled there, representing about one-ninth of the Indochinese then resettled in the United States.\textsuperscript{293}

The refugees were drawn to the Golden State "by good weather and favorable employment opportunities, by welfare and social services generous by national standards, and by a desire to rejoin family and friends."\textsuperscript{294} However, the transition was far from smooth.\textsuperscript{295} For instance, the refugees "overloaded the public schools and medical facilities and were blamed for a rise in the rate of tuberculosis and other diseases."\textsuperscript{296}

The concerned citizens of Orange County found a spokesman

\textsuperscript{293} Id.; see also Pyong Gap Min, \textit{Introduction, in Asian Americans: Contemporary Trends and Issues} (Pyong Gap Min ed., 1995):

Indochinese refugees have established several ethnic enclaves in Orange County. About half of Orange County Indochinese refugees reside in Santa Ana, Garden Grove, and Westminster, their largest enclave. In 1988, the area along Bolsa Avenue from Magnolia to Bushard was officially designated "Little Saigon" by the City Council of Westminster.

\textsuperscript{294} Loescher & Scanlan, supra note 218, at 202; see also Ong & Blumenberg, supra note 223, at 122 (stating that "[t]he decline of federal assistance has not translated into a decline by refugees in the reliance on welfare. Instead, refugees have shifted to regular public aid programs"). Ong and Blumenberg also report that:

A 1992 survey shows that two-thirds of Southeast Asian households that entered the U.S. in 1985 still relied, wholly or partly, on public assistance. This is roughly the same usage rate among refugees who arrived in the 1990s. Since most of these refugees did not qualify for federal grants, their payments came primarily from state-operated and funded programs. The only thing that the change in federal policy has accomplished is to shift the refugees into the welfare system more rapidly.

\textit{Id.} at 122-23.

\textsuperscript{295} Hieu Tran Phan, \textit{Escaping From Welfare; Vietnamese Refugees Face Cultural Obstacles in Search for Work, Orange County Reg.,} Aug. 16, 1998, at A1 (describing contemporary social and economic difficulties facing Vietnamese refugees in their resettlement efforts, which reflect the same issues encountered by Indochinese refugees during the 1970s and 1980s). Orange County Supervisor Cynthia P. Coad recalls her work in helping the Indochinese refugee population: "There was a large influx of Indochinese refugees after 1979. They needed help with language training, with basic skills of how to interview for a job and [with] job skills . . . as machinists or computer operators." Statement available at http://www.oc.ca.gov/supes/fourth/coadarticle.htm (last visited Jan. 28, 2001).

\textsuperscript{296} Loescher & Scanlan, supra note 218, at 202; see also Kenneth F. Bunting, \textit{Competing Bills Could Aid 2 County School Districts}, L.A. Times, Apr. 24, 1995, at 12 (stating that the influx of Indochinese refugees is responsible for the need for substantial increases in educational funds for the school systems).
in Representative Daniel Lungren, who led efforts at the state and local levels to reform the welfare system.\textsuperscript{297} Lungren, "a Republican who represented the most heavily impacted area, sought unsuccessfully to obtain more federal aid."\textsuperscript{298} With a reputation as a hard-liner in Congress, Lungren was known to give angry and vociferous speeches on the floor of the House.\textsuperscript{299} Along with other Orange County elected public officials, Lungren pleaded with the Reagan Administration that the local communities could not easily handle any more refugees and insisted that the federal government take the necessary steps to keep them away.\textsuperscript{300}

The economic situation in California has been used to foment anti-immigrant hysteria. During the early 1980s, the state endured a monumental fiscal crisis.\textsuperscript{301} Throughout this period a severe budget deficit persisted, and these economic concerns were bolstered by anti-immigrant sentiment.\textsuperscript{302} California Governor Deukmajian added a good deal of fuel to the fire in 1983 by blaming many of the state’s fiscal woes on Vietnamese refugees.\textsuperscript{303} In Deukmejian’s Economic Report, he revealed that “[o]f special interest are the Southeast Asian refugees from Vietnam, Cambodia, and Laos. Over one-third of those coming to the United

\begin{itemize}
  \item \textsuperscript{297} \textsc{Loescher} \& \textsc{Scanlan}, \textit{supra} note 218, at 202. Lungren also supported the 1996 California Civil Rights Initiative, which is a state-wide ban of all racial, ethnic, and gender-based preferences in state employment, education, and contracting in the history of affirmative action. \textsc{Lydia Chavez}, \textit{The ColorBind: California’s Battle to End Affirmative Action} 2, 68 (1998).
  \item \textsuperscript{298} \textsc{Loescher} \& \textsc{Scanlan}, \textit{supra} note 218, at 202. Recent Indochinese refugees were more likely to be poor and on welfare than any other ethnic group in America. David Whitman, \textit{Asian Un-Success Stories}, \textsc{Wash. Post}, Dec. 27, 1987, at C1.
  \item \textsuperscript{299} Dirk Olin, \textit{Lungren’s the One: He’s Tan, He’s Rested, He’s Ready to Bring Nixonian Politics Back to California}, \textsc{Cal. Law.}, Nov. 1993, 50-51. Dan Lungren also “voted against reparations for interned Japanese Americans, fought the creation of a Martin Luther King Jr. holiday . . . and averaged a support rate of more than 80 percent for Ronald Reagan’s legislative agenda.” \textit{Id.} at 51.
  \item \textsuperscript{300} \textit{Id.}
  \item \textsuperscript{301} \textsc{George Deukmejian}, \textit{Economic Report of the Governor} 25-27 (1983).
  \item \textsuperscript{303} \textsc{Deukmejian}, \textit{supra} note 301, at 25.
\end{itemize}
States settle in California."

An equally important element in the anti-refugee crusade was the doubt that Southeast Asians could successfully assimilate into American society. The assumption that the Vietnamese were an infusible element seemed to trouble melting-pot assimilationists and more extreme supporters of Anglo-conformity.

"At a congressional hearing in late 1981, a county official from Iowa spoke of the adverse impact federal cuts in domestic programs [had] on local refugee resettlement." Similarly, a 1983 California delegation report indicated that "U.S. resettlement was subordinate to many other American foreign policy objectives."

"The report was also highly critical of the refugees' dependence on public assistance." Paul J. Strand and Woodrow Jones, Jr. emphasized the fact that the Indochinese refugee was different from an immigrant to the United States. They suggested that "[e]mployment and self-sufficiency are particularly troublesome issues for the Indochinese refugees . . . as they do not come to the U.S. to market skills that are supported by the U.S. economy. They came to escape persecution."

Due to continued high foreign immigration, and the high fertility rates of some of these immigrants, the racial/ethnic composition of the State's population will continue to change in the coming decade. . . . The Southeast Asian refugees . . . have an English language difficulty and are economically and educationally disadvantaged. Their need for social and educational assistance

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304 Id.
305 "[M]any Americans misunderstand the status of refugees in this country . . . [leading to] feelings of mistrust and resentment." U.S. COMM'N ON CIVIL RTS., supra note 133, at 34.
306 "Cultural differences between Americans and recent arrivals also lead to anti-Asian sentiment. Americans unfamiliar with the practices misinterpret certain customs of refugees. Refugees . . . may not be aware of American customs or laws, and may do things that violate either local ordinances or rules of conduct found acceptable by Americans." Id. at 36.
307 SUTTER, supra note 210, at 180.
308 Id.
309 Id.
310 Id.
311 Id.
can therefore be expected to continue.\footnote{312}

Orange County’s elected public officials expressed sentiments that it would be difficult for local communities to handle any more refugees.\footnote{313} Representatives from Colorado and Florida, along with a significant number of Congressmen from other states, shared these sentiments.\footnote{314} In response to the deleterious effects of the national recession, they voiced their concerns and called for limitations to be placed on the influx of refugees.\footnote{315}

St. Paul, Minnesota . . . discovered that it had become, virtually overnight, the home of thousands of Hmong tribesman from Laos, and Seattle, Washington, which struggled with a massive refugee problem at the same time that it sought to survive layoffs in the aircraft manufacturing industry. The federal government attempted to steer new arrivals away from heavily impacted areas but could do little to control secondary migration.\footnote{316}

"President Ronald Reagan . . . responded to the problems posed by refugees and illegal aliens by proposing a number of new immigration plans, some more restrictive than others.\footnote{317} "The Reagan Administration . . . also [took] a more aggressive approach to discourage the flow of refugees to the United States."\footnote{318}

\footnote{312} DEUKMEJIAN, supra note 301, at 27.
\footnote{314} LOESCHER & SCANLAN, supra note 218, at 202.
\footnote{315} Id.

One commonly held belief about refugees is that the United States Government is making very low-interest loans to immigrants and refugees or giving them money to start businesses. . . .

Another misconception about refugees is that the government is providing them with cash grants as a part of the resettlement process. Actually, most refugees have little if any money and are entirely dependent upon their families or upon the refugee resettlement agencies.

\footnote{316} LOESCHER & SCANLAN, supra note 218, at 202.
\footnote{318} Id.
Meanwhile, there were subsequent efforts to further limit the number of refugees coming to the United States. Senator Alan Simpson, a member of the Hesburgh Commission, believed that immigration reform was a quagmire. His vantage point was shared by other politicians at the time who interpreted reform as a "no win issue, a lost cause, the domestic equivalent of Vietnam." Simpson feared the economic effects of illegal immigration on domestic workers, the creation of growing ethnic enclaves, and the cultural deportation that it might engender among unassimilated aliens unable to speak English.

Senator Simpson, chairman of the Subcommittee on Immigration and Refugee Policy and a longtime advocate of immigration restriction, held an avowedly strong position in cautioning "that the Refugee Act of 1980 was intended to correct the abuses of humanitarian parole." He expressed the concern some felt about the parole authority and its potential to admit large numbers of refugees: "[I want to know] how many will come in under humanitarian parole. I would like to have someone give me a figure. No one does. . . . It was because of the parole authority of the United States that we had to come to the Refugee Act." Further, Simpson reported that his constituents complained when more was provided to refugees, while cuts were being made to government programs, food stamps, and welfare benefits for American citizens. All of this in totality illustrates the strong desire that was present to implement a solution to the refugee crisis that plagued America in the late 1970s and early 1980s. The panacea was in the form of the subtly titled Refugee Act of 1980.

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319 SUTTER, supra note 210, at 178.
320 Id.
321 Id.
322 Id.
323 Id.
324 Id. at 179-80.
VI. Legislative Efforts to Limit the Number of Indochinese Refugees From Entering

A. The Idea for the Refugee Act and the Political Tug of War Between the Executive and Legislative Branches

The Refugee Act was not merely the brainchild of Senator Edward Kennedy and Congresswoman Elizabeth Holtzman. Rather, it represented the culmination of various attempts during the 1970s to follow the tradition set forth with the passage of the 1965 Amendments to the INA. While the 1965 Amendments represented a shift in policy, many gaps nevertheless existed. To address these gaps:

Various refugee reform provisions appeared in omnibus immigration bills introduced through 1976 in the 94th Congress. These reform proposals constituted a new approach to the definition of refugee, as well as to how, and by whom, the admission of refugees was to be controlled. While none was adopted into law, the evolution of these different refugee proposals and the hearings in which they were discussed helped to define the parameters of the debate that finally resulted in refugee reform in 1980.

Some members of Congress contended that the Attorney General was using parole authority too liberally. "Congress was concerned about the apparent 'unlimited authority' of the attorney general." "The pressures of the Indochina refugee emergency prompted congressional action on a more equitable and regulated

\[ \text{footnotes} \]

325 Anker & Posner, supra note 83, at 20.

To restore faith in our immigration policies—to establish an immigration law that is in America's long run interests and faithful to our humanitarian traditions—I urged in 1976 that we should follow the precedent established by President Truman and create a high-level Commission on Immigration and Naturalization. The work of the Truman Commission had laid the basis for the 1965 reforms, and a new commission could provide the serious and comprehensive review of our immigration law that was so long overdue.

Kennedy, supra note 1, at 2.

326 Anker & Posner, supra note 83, at 20.

327 Id.

328 Id.

329 SUTTER, supra note 210, at 168.

330 Id.
refugee program, which resulted in the Refugee Act of 1980."\textsuperscript{331} 
"[T]he Refugee Act as interpreted by the State Department appeared to some to emphasize foreign policy goals unduly."\textsuperscript{332} For instance, "[t]he Indochinese parole program was the most dramatic . . . example of the problem (at least as perceived by a number of congressional members) of the use of the parole authority for refugee admission."\textsuperscript{333} 

During this period of perceived crisis, the Ford Administration made an announcement for a moratorium on new parole programs.\textsuperscript{334} "The sequence of \textit{ad hoc} parole programs, the elimination of refugee clauses from the 1976 Act . . . and a pledge by President Ford to cooperate in legislative efforts at refugee reform, motivated a new congressional effort" to develop a meaningful refugee law in response to the situation.\textsuperscript{335} 

The Refugee Act of 1980 was Congress' attempt to treat refugee and immigration policies separately and distinctly.\textsuperscript{336} The Act was "introduced, debated, and passed when the federal Select Commission on Immigration and Refugee Policy was preoccupied with other issues."\textsuperscript{337} Initially, commission members were presented with the Act and provided with the impression that the refugee and immigration policies were separable.\textsuperscript{338} As such, their work on immigration policies was to focus solely on the selection and admission regulations while keeping an eye on their effects on the nation's economic, social, and political well-being.\textsuperscript{339} 

Leading congressional efforts to limit refugee admissions was Congressman Joshua Eilberg, the influential Chairman of the House Judiciary Committee's Subcommittee on Immigration, 

\textsuperscript{331} Id. at 168-69.  
\textsuperscript{332} Id. at 169.  
\textsuperscript{333} Anker & Posner, \textit{supra} note 83, at 31 n.99.  
\textsuperscript{334} Id. at 31.  
\textsuperscript{335} Id.  
\textsuperscript{336} HING, \textit{supra} note 152, at 126.  
\textsuperscript{337} Id.  
\textsuperscript{338} Id.  
\textsuperscript{339} Id. at 127. Cf. Scanlan, \textit{supra} note 152, at 820 ("United States immigration law is rooted in the fundamental premise that law can and should control the numbers and the characteristics of individuals entering the United States. . . . [T]his strong interest in controlling immigration is likely to exert special pressure on . . . refugees.").
Citizenship, and International Law.  

Conversely, the Executive Branch desired to obtain "autonomy in deciding the number of refugees admitted while maintaining its ability to be politically selective in excluding some nationalities," but at the same time allow "extremely generous quotas for others."  

President Ford's supporters included individuals who clung to the view that parole authority allowed the United States to bring the refugee problem under control. Sheppard Lowman, Hank Cushing, and Lionel Rosenblatt, with the support of a number of senior State Department officials, argued for the continuation of the Admission Program for the Indochinese Refugees.  

According to Gil Loescher and John Scanlan:

Many of these people were simultaneously affected by the misery of the Indochinese and by the geopolitical concerns about the political future of all of Southeast Asia if the thousands of migrants who sought protection there were not resettled. All [of these program supporters] had previously served in Vietnam and had personal and emotional attachments to the country.  

"These officials were instrumental in persuading a sometime reluctant Congress to keep immigration channels open for Vietnamese and Laotians."  

Powerful sponsors in the State Department often bolstered support for the refugees. For example, Philip Habib, first as Secretary of State for East Asian Affairs and later as Undersecretary for Political Affairs, was the most senior of the program's supporters. Also, Frank Wisner, Jr., Deputy Executive Secretary of the Department sensitized the President and the Secretary to the Indochinese refugee crisis and the need for more expansive admissions by screening the flow of information to the

340 LOESCHER & SCANLAN, supra note 218, at 123.  
341 Anker & Posner, supra note 83, at 34.  
342 LOESCHER & SCANLAN, supra note 218, at 123.  
343 Id.  
344 Id.  
345 Id. at 124.  
346 Id.  
347 Id.
Secretary of State. Future program advocates included David Newsome, Habib's successor as Undersecretary for Political Affairs, and Richard Holbrooke, the Assistant Secretary for East Asian Affairs in the Carter Administration.

In November 1977, Sheppard Lowman briefed Leo Cherne, the Chairman of International Rescue Committee, on the Southeast Asia situation. Cherne's personal background informed his position. He was a supporter of the Republic of South Vietnam, as well as a staunch anti-Communist "hard-liner" who led most postwar refugee efforts. Without doubt, political and humanitarian interests motivated Cherne and many State Department officials who advocated for the entry of refugees from the Communist countries of Indochina. In his large and more ambitious projects, Cherne wanted, through a public relations program coupled with coalition-building efforts, to build broad public, congressional, and Executive support for a large Indochinese Refugee Program.

Situated on the other side of the issue, Congressman Eilberg led the opposition, resisting the reopening of America's borders on the grounds that the Vietnamese could not easily assimilate into American society. In Eilberg's mind, "the widespread use of parole undercut the basic principles of American immigration law." Interestingly, Eilberg's subcommittee was closely linked with labor unions that were concerned that refugees would represent great competition in an already depressed economy.

The following exchange typifies the banter back and forth on the issue of the refugee flow: Congressman Joshua Eilberg stated, "I am . . . concerned with how long the compassion and patience of the American people will continue, as we come in with these

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348 Id.
349 Id.
350 Id. at 129.
351 Id. at 130.
352 Id.
353 Id.
354 Id. at 123.
355 Id. Peter Brimelow shares a similar view, believing that the American nation has always had a specific "white" ethnic core. Brimelow, supra note 64, at 10.
356 See Loescher & Scanlan, supra note 218, at 133.
continued requests on an *ad hoc* basis," while Assistant Secretary of State for East Asian Affairs Philip Habib stated, "[t]he parole would 'clean up' the region of refugees, this would be [the] State's final request and [President Ford] would not come back to Congress for an increase in parole authority in this category."\(^{358}\)

These discussions were commonplace and reflected the intense dissatisfaction with the continued use of the Executive Parole by the Ford Administration in admitting refugees. Edward Kennedy, as chairman of the Judiciary Subcommittee on Refugees, seemed to represent the small middle ground. In fact, he was largely responsible for steering the Refugee Act of 1980 through Congress.\(^{360}\) At another level, there was also conflict involving competition between the two branches for control over decision-making policy.\(^{361}\)

Bill Ong Hing suggests that the disturbing anxiety felt by some members of Congress that thousands of Southeast Asians would eventually destabilize many communities was a major catalyst for the Refugee Act. According to Phillip N. Hawkes, former director of the Office of Refugee Resettlement, over half of the refugees who have been in the United States for three years or less "are on public assistance."\(^{363}\)

Yet at the same time, many witnesses and legislators recognized that existing law was unfair to the Vietnamese

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\(^{357}\) *Id.* at 124.

\(^{358}\) *Id.*

\(^{359}\) *Id.*

\(^{360}\) SCHUCK, *supra* note 2, at 104. Kennedy favored a liberalized immigration and refugee policy. According to Schuck, "[Kennedy] considered himself, and was viewed by others, as continuing his brother Robert's leadership of the ethnic-civil rights coalition in the Senate. Kennedy's liberalizing agenda, although sometimes constrained by his close ties to organized labor and the Hispanic caucus's abhorrence of sanctions, was hardly surprising." *Id.*

\(^{361}\) *Id.*

\(^{362}\) HING, *supra* note 152, at 127; *see also* S13713, 100th Cong., 1st Sess., Vote 309 (1988) (examining the legislative history of the Refugee Act of 1980 and recalling, during that time period, Senate members contended that the plight of the Southeast Asians was an economic one and not a refugee problem).

\(^{363}\) SUTTER, *supra* note 210, at 178.
refugees. Civil rights leader Bayard Rustin argued that a refugee rescue policy had the support of the African American community and downplayed the notion that refugees would take jobs away from the poor. Rustin suggested that "[m]ost Americans will not . . . take the . . . ill paying and dirty work that many of these refugees will take as they start the upward path to mobility, as all of us in the past, wherever we come from, had to take."  

B. The Indochinese Parole Program and the 1977 Hearings on the Admission of Refugees

A close examination of the legislative history reveals that the passage of the Refugee Act of 1980 was essentially a legislative battle between Congress and the Executive Branch, which was led by the Carter Administration and State Department. On the one hand, members of Congress were beholden to a constituency that was voicing its growing antagonism to increased immigration within the United States. The very large number of Indochinese admitted in the country since 1975 crystallized their ill will against immigration.

Not only was there a negative reaction to the Vietnamese refugees, but Congress and the Carter Administration also wanted to punish Vietnam for mass expulsion of its own citizens. Some commentators have asserted that:

[A] majority in Congress believed that the U.S. should maintain a policy of economic and political coercion to try to force Vietnam to change its ways. Since 1977, Congress had prohibited bilateral aid to Vietnam and expressed strong opposition to loans by international financial institutions to Hanoi on the grounds that Hanoi violated human rights and such aid would not serve U.S. interests or increase stability in Southeast Asia. Attempts to resume relations with Vietnam during 1977 and the first half of 1978 had failed principally

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364 Loescher & Scanlan, supra note 218, at 132.
365 Id. at 132.
366 Id.
367 Anker & Posner, supra note 83, at 34.
368 Id.
369 Id.
370 Loescher & Scanlan, supra note 218, at 138.
because of Hanoi's insistence that the U.S. provide reconstruction aid before the establishment of diplomatic relations.\[371\]

Although foreign policy was a major motivation for the change in immigration policy, it was not the sole motivation. The salience of race and xenophobia was very apparent during the refugee crisis. In the late 1970s, politicians in Congress seized upon the refugee crisis and the feelings that it aroused, and magnified an already acute apprehension, if not fear of the seemingly endless flow of Asians into the country.\[372\] The crisis was defined in ways that invited readily ascertainable policy solutions to create political opportunities.

1. House Subcommittee Hearings

There was a series of hearings in 1977 continuing through 1978 before the House Subcommittee on Immigration, Citizenship, and International Law on the admission of refugees into the United States.\[373\] Two bills (H.R. 3056 and H.R. 7175) were considered to review the procedures for the admission of refugees.\[374\] As the hearings were taking place, the Indochinese crisis continued to escalate.\[375\] According to scholars Deborah Anker and Michael Posner:

The Carter Administration, not considering itself bound by President Ford's moratorium, initiated yet another parole program in 1977. Informal consultation with Congress on this program, involving 15,000 Vietnamese boat and land refugees, occurred during these 1977 congressional hearings on refugees. The Subcommittee disapproved of the confused procedures involved in the request, the lack of selection criteria, and the abandonment of those criteria formulated in the 1976 program.\[376\]
In reaction to Chairman Eilberg’s continual pressuring for more formal consultation procedures, the Carter Administration argued that the existing informal requirement of Congressional consultation worked as an impediment to any effective response to the present emergency. Throughout the Senate debates, a few State Department officials decided to solicit the assistance of outside advocacy groups to overcome the inevitable political impediments within the Administration and to mobilize public opinion. As Gill Loescher and John Scanlan explain:

The subsequent formation of a special commission for Indochinese refugees, whose membership includes a number of representatives of humanitarian and public and private agencies and individuals who spawned the gap between governmental and private interests was part of a long tradition of close collaboration between the voluntary agencies and the State Department on U.S refugee policy. Working together to influence admission policy, both played a major role on subsequent decisions made by the Carter administration to admit thousands of Indochinese.

In rebuttal, Congress strongly questioned the nature and sincerity of the Administration’s efforts. The members of the subcommittee believed that the Administration was not working hard enough on their part. The subcommittee members even went so far as to complain that they received no research materials during the consultations on emergency parole requests “so that about all that the Administration was accomplishing at various points in these various programs was conveying their [own] sense of emergency but certainly [possessing] no sense of refugee policies.”

The tension between Congress and the Carter Administration continued seemingly without end. As Chairman Eilberg

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378 LOESCHER & SCANLAN, supra note 218, at 129.
379 *Id.*
380 *Hearings on H.R. 3056, supra* note 373, at 9.
381 *Id.*
382 *Id.*
continually criticized the Administration for an incoherent refugee policy, the subcommittee members came to view the Attorney General as being both a sword and a shield for White House requests.\textsuperscript{384}

"Congress, in response to the severe limitations and consequences of the existing ad hoc policy, considered [two proposed] bills [(H.R. 3056 and H.R. 7175)] during the 1977-78 hearings."\textsuperscript{385} While these two bills contained standard language from previously debated legislation, such as a ban against firmly resettled refugees, and a definition of a "normal flow" category of 20,000 annually, it also included some major changes which signified the existing conflict between the Executive and the Congress over two major issues: (1) specific numerical limits in response to the very large number of Indochinese admitted into the country since 1975; and (2) control over refugee decision-making.\textsuperscript{386}

Significantly, Congress attempted to move away from the flexibility inherent in earlier bills by placing, for the first time, numerical and categorical limitations on emergency admission while retaining more power and access to information.\textsuperscript{387} In essence, Congress perceived parole authority as a vehicle for misuse in emergency admissions. Given the past Executive abuse of it, the parole authority was amended to prohibit the parole of refugees.\textsuperscript{388} The committees' leaders were finally able to mobilize enough support for a new refugee admissions system.\textsuperscript{389} According to Peter Schuck, "[t]hey envisioned a process that would be more predictable, manageable, and consultive, that would enhance Congress's policy influence, and that would limit the administration's parole power."\textsuperscript{390} The bill established two emergency refugee categories that were to be the executive basis for triggering the President's authority to initiate a refugee

\textsuperscript{385} Anker & Posner, supra note 83, at 33.
\textsuperscript{386} Id. at 33-34.
\textsuperscript{387} Id. at 34.
\textsuperscript{388} H.R. 3056, supra note 374, § 212(d)(5).
\textsuperscript{389} See Anker & Posner, supra note 83, at 34.
\textsuperscript{390} Id.
admission program.\(^{391}\)

First, Congress required emergency refugee program decisions to be made in consultation with the House and Senate Judiciary Committees upon a determination that the emergency admissions would significantly promote the national interest.\(^{392}\) Second, a determination had to be made that the decision was justified by grave humanitarian concerns and that regular admission provisions were inadequate.\(^{393}\) These two important requirements allowed Congress to retain more authority than in the past.\(^{394}\)

During this time of intense negotiation and deliberation, continuing worries still existed in Congress and in individual states about the long-term costs of recent Indochinese migrants, which outweighed any "humanitarian concern" leading to "compassion fatigue,"\(^{395}\) a term that came to be associated with the Indochina refugee issue.\(^{396}\)

Despite the fact that the international community was overwhelmed by the human tragedy initially, the interest in the plight of the Indochinese eventually dissipated, as a result of the growing familiarity with the problem, frustration over its resolution, and the attraction of events elsewhere.\(^{397}\) "One refugee official speculated that incidents like the Indochina migration have a public attention span of about eighteen months. After more than

\(^{391}\) H.R. 3056, supra note 374, § 207(b). According to Anker and Posner:

The emergency refugee categories in H.R. 3056 were intended to be modeled on the town principle types of past parole programs: a refugee emergency determined by the President to be of special concern to the United States would authorize the President to admit 20,000 refugees; an appeal from an international refugee organization would enable the President to admit fifteen percent of the total involved, or 5,000 refugees, whichever is less. The President was required to solicit the cooperation of the international community in resettling refugees and, in the later event, to make a determination that other countries in the international community would accept their fair share of resettlement.

Anker & Posner, supra note 83, at 34.

\(^{392}\) Anker & Posner, supra note 83, at 35.

\(^{393}\) Id.

\(^{394}\) Id.

\(^{395}\) LOESCHER & SCANLAN, supra note 218, at 198.

\(^{396}\) SUTTER, supra note 210, at 213.

\(^{397}\) Id.
ten years, some [were] asking how much longer the American responsibility to the Indochinese [was] to last."\textsuperscript{398} A \textit{New York Times} article reported that a State Department official "believed the United States [had] paid its moral debt for its involvement on the losing side in Indochina."\textsuperscript{399}

Yet, according to opinion polls, the American public was never enamored with the idea of resettling large numbers of Indochinese refugees.\textsuperscript{400} In 1980, "only 19 percent of the population sampled supported President Carter's plan to admit 168,000 refugees for that year,"\textsuperscript{401} while 46 percent sought admission reductions.\textsuperscript{402} "Michael Teitelbaum noted that there is no economic justification for admitting large numbers of unskilled and ill-educated immigrant workers and their dependents."\textsuperscript{403}

In response to the refugee fervor, there were additional efforts to further tighten the Refugee Act and, in turn, limit Indochinese admissions. "Heeding the call for fresh approaches to the Indochina refugee issue, a special Indochinese Refugee Panel was appointed by Secretary [of State George P.] Schultz in September of 1985."\textsuperscript{404} Former Iowa Governor Robert D. Ray headed the panel.\textsuperscript{405} "The panel's recommendation reflected the desire both to reform the American resettlement program and to tighten up the application of the Refugee Act of 1980."\textsuperscript{406}

In the meantime, Representative Joshua Eilberg urged numerical and categorical limits on refugee admissions.\textsuperscript{407} He also criticized what he deemed the Executive Branch's failure to evaluate the special and economic impact on immigration and refugee policy and what he perceived to be the Executive's inability to contemplate the sheer impact of increased refugee

\textsuperscript{398} \textit{Id.}
\textsuperscript{399} \textit{Id.} at 185.
\textsuperscript{400} \textit{Id.} at 179.
\textsuperscript{401} \textit{Id.}
\textsuperscript{402} \textit{Id.}
\textsuperscript{403} \textit{Id.}
\textsuperscript{404} \textit{Id.} at 177.
\textsuperscript{405} \textit{Id.}
\textsuperscript{406} \textit{Id.}
\textsuperscript{407} \textsc{Loescher & Scanlan}, supra note 218, at 153.
admissions.\textsuperscript{408} In response, the Departments of State and Justice argued that the numerical and categorical limits advocated by Congressman Eilberg were too rigid in the context of international refugee crises that instead necessitated flexibility.\textsuperscript{409} Nevertheless, in the face of strong congressional support for the proposed numerical limits, the Department of State eventually compromised, for the first time, by advocating a statutory consultation requirement.\textsuperscript{410}

2. Vietnamese Refugees are of “Special Concern”

Because of modern sensibilities about race in the United States, it is not surprising that the race of immigrants tends to be suppressed as an outwardly expressed reason for restricting immigration.\textsuperscript{411} Professor Kevin Johnson noted that “[u]nlike past anti-immigrant eras, most consider it impermissible to expressly rely on race as a reason for restricting immigration.”\textsuperscript{412} He also observed that “[t]he escalation of the war in Vietnam . . . was accompanied by a growth of racism directed at the Vietnamese people, which lingers to this day.”\textsuperscript{413} With these notions in mind, Congress, in limiting the number of Indochinese refugees entering the United States after the end of the Vietnam War, accomplished indirectly what it could not have done directly.

Perhaps these politicians were trying to avoid the use of making racial references because of a fear that they might appear to be racists. Although there was also congressional testimony about refugees from countries in Eastern Europe, Africa, the

\textsuperscript{408} H.R. 7175, supra note 374, § 5.

\textsuperscript{409} Admission of Refugees into the United States: Hearing on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int’l Law of the House Comm. on the Judiciary, 95th Cong. 124-25 (1977) (testimony of William Males, HIAS). “The Executive’s position on numerical limits, however, was not always clear or internally consistent.” Anker & Posner, supra note 83, at 36.

\textsuperscript{410} Hearings on H.R. 3056, supra note 373, at 68 (testimony of Hon. John W. DeWitt, Deputy Administrator, Bureau of Security and Consular Affairs).

\textsuperscript{411} See Johnson, supra note 90, at 174.

\textsuperscript{412} Id. at 175.

\textsuperscript{413} Id. at 174; see also Legal Assistance for Vietnamese Asylum Seekers et al. v. Dep’t of State, 104 F.3d 1349-50 (D.C. Cir. 1997) (holding Vietnamese citizens brought suit charging that the U.S. government discriminates against them based on nationality in processing visa applications).
Middle East, and Latin America, there was more debate over the issue of Indochinese refugees. Throughout the hearings, the general term “refugees” was conspicuously referred to more often than the terms “Vietnamese” or “Indochinese.” Furthermore, the emergency admission of Indochinese refugees was considered to be of “special concern” to the United States.

During this time frame, Congress severely dissipated grass-roots enthusiasm for generous Indochinese refugee admissions, and, consequently, many of the forces influencing immigration policy demanded a sharp reduction in Indochinese admission levels in the United States. Almost immediately after the November 1980 presidential election, there was a tremendous thrust by anti-Indochinese refugee advocates for a more narrow and restrictive refugee admission policy. Commentators Gill Loescher and John Scanlan insightfully mention:

Congress, fully aware of those forces, has responded by pressuring the Reagan administration into reducing the number of Indochinese permitted to enter the United States by 75 percent since 1980. The reduction, although very substantial, would have been even greater except for the persistent efforts of a small group of influential people inside and outside the Reagan Administration, who have consistently argued that more generosity to the Indochinese is justified by cold war as well as humanitarian considerations.

It was common knowledge amongst members of Congress that the term “refugees of special concern” was a euphemism for the Indochinese refugee crisis. Several members of Congress advocated for statutorily determined standards to control the exercise of Executive discretion to make important political decisions regarding refugees. Insisting on the need for statutory controls, Chairman Holtzman noted:

414 See Anker & Posner, supra note 83, at 46.
415 Id.
416 Id.
417 Id.
418 See LOESCHER & SCANLAN, supra note 218, at 198.
419 Id. at 199.
420 Id. at 198-99.
421 See Anker & Posner, supra note 83, at 48.
I want you to focus on the special concern provisions. I do not think that it is sufficient to come here and say that special concern is a terrible provision because it will provide certain limitations when in fact by selecting 50,000 people out of thirteen million refugees you have to apply some kind of standards and limitations.422

Notably, the Department of State displayed a pattern and practice of couching the “special concern” terms in and around humanitarian rhetoric. These continual references to humanitarian goals were emphasized during the hearings as the underlying basis for postwar refugee policy.423 Similarly, Department of Justice witnesses commented that “humanitarian concerns present in ‘emergent’ refugee situations should not be made subject to numerical limitation inflexibly set by statute.”424 Legislative history shows that Congress also desired to change the term to be applied in determining the allocation of refugee admissions from “special concern” to “special humanitarian concern.”425 The intent of congressional committees was to emphasize the plight of the refugees themselves rather than their national origins or political affiliations.426 More likely, however, the committee’s intent was to limit the total number of Indochinese refugees, instead of any genuine humanitarian concerns. Many times, human rights concerns were stressed in House reports and in statements made by the House Committee on the Judiciary that emphasized humanitarian considerations, placing the plight of the refugees and the pattern of human rights violations in the country of origin as the first factors to be weighed.427 Interestingly, in the final conference report, all use of the term “special concern” was replaced with “special humanitarian concern.”428

The negative public opinion of Vietnamese refugees was reflected and echoed in the opinions held by many members of

422 Id.
423 Id. at 38.
424 Hearings on H.R. 3056, supra note 373, at 82.
428 Id.
Sociologist David Riesman observed in discussing the negative public reaction to Vietnamese refugees in the 1970s, racist 'attitudes have been generally repressed since World War II by the almost uniformly antiracist attitude of the enlightened stratum of our society.'

According to Joseph Sureck, INS District Director in Hong Kong, '[b]enevolence in accepting [so many Indochinese] refugees 'may have created a permanent' immigration problem.'

Sureck found solace amongst other "restrictionists[,] includ[ing] several members of Congress who launched a crusade for more restrictive immigration polic[ies], [and] budget cut[s] in the Office of Management and Budget and in the Department of Health and Human Services, the Office of Legal Counsel of the Department of Justice, and . . . UNHCR.'

The negative attitude towards Vietnamese refugees was also implicit in Ambassador, and former Senator, Dick Clark's testimony before the Senate Judiciary Committee criticizing the current law's treatment of refugee problems. Ambassador Clark argued that no preference should be given to Southeast Asians because "[w]hile the plight of the boat people in Southeast Asia presents today's most dramatic case, it must not blind us to the hardships of refugees fleeing oppression and persecution in Eastern Europe, Africa, the Middle East, and Latin America.'

Those who passed the 1980 Refugee Act claimed that they desired a less biased system. They desired a law that was not designed largely to benefit fugitives from communism or to provide protection from a country solely because of the

429 LOESCHER & SCANLAN, supra note 218, at 102-69 (documenting growing public concern from 1975 to 1980 with the large number of Indochinese refugees resettling in the United States and general fear of mass migration); see also e-mail from Kevin R. Johnson, Associate Dean, U.C. Davis School of Law, to Harvey Gee, Staff Attorney, U.S. District Court, Reno, Nevada (Oct. 4, 2000) (on file with author) (stating that some members of Congress did not like the large numbers of Vietnamese refugees changing their communities for a variety of differences including class, culture, and race).

430 Johnson, supra note 90, at 175.

431 LOESCHER & SCANLAN, supra note 218, at 197-98.

432 Id. at 199.

433 Id. at 154-55.

434 Anker & Posner, supra note 83, at 46.

435 Id.
administration’s political and ideological biases.\textsuperscript{436} Ambassador Clark was critical of the administration’s preference for Indochinese and its decisions to admit refugees based solely on political ideology.\textsuperscript{437} He testified that as a result of the allocations of refugee numbers to those of “special concern,” particular attention would be paid to “[w]hether we have a special responsibility because of previous U.S. political involvement with the refugee or his country of origin.”\textsuperscript{438} To support his argument, Clark presented witnesses who recommended that “special need, and not special political concern, should be the dominant criterion.”\textsuperscript{439} Apparently, the proffered evidence was given enough weight to carry the day for the amendment.

3. Final Session Hearings in 1978

In the final session of the hearings in April 1978, a consensus and a more precise model for the Refugee Act emerged.\textsuperscript{440} The Carter Administration, well aware of the new law’s likely effects, gave its support to legislative efforts but requested ongoing parole authorization for Indochinese, Eastern European and Soviet refugees until new refugee legislation was passed by Congress.\textsuperscript{441} On the Senate floor, Senator Edward Kennedy “emphasized the need for a high-level commission to make a comprehensive review of our present immigration laws and policies.”\textsuperscript{442} The review, Senator Kennedy explained, was “beyond the capacity and scope of a single agency of the Executive Branch or a committee of

\begin{footnotes}
\footnotetext[436]{\textit{Id.}}
\footnotetext[438]{\textit{Id.} at 44. (testimony of Dick Clark, Ambassador at Large and United States Coordinator for Refugee Affairs).}
\footnotetext[439]{\textit{Id.} at 177 (testimony of Whitney Ellsworth and Hurst Hannum, Amnesty International U.S.A.). It was asserted that an important factor to be contemplated in determining “special concern” status was whether “refugees [were] from a country wherein there exists a consistent pattern of gross violations of internationally recognized human rights.” \textit{Id.} at 174.}
\footnotetext[440]{Anker & Posner, \textit{supra} note 83, at 41.}
\footnotetext[441]{\textit{Hearings on H.R. 2816, supra} note 437, at 41.}
\footnotetext[442]{Kennedy, \textit{supra} note 1, at 2.}
\end{footnotes}
Congress, and . . . must involve a broad spectrum of opinion and groups concerned with immigration reform.\footnote{443} According to Anker and Posner, "[as a] major force behind refugee reform, Senator Kennedy a month earlier had introduced legislation in the Senate (S. 2751) which paralleled some of the [Carter] Administration’s positions. This legislation provided the immediate impetus for the [Carter] Administration to come forth with concrete proposals."\footnote{444} "[I]n late 1978, Congress approved legislation [that Kennedy] moved through the Senate (H.R. 12443),\footnote{445} establishing the Select Commission on Immigration and Refugee Policy.\footnote{446}

On the last day of the hearings, "the [Carter] Administration proposed that the ‘normal flow’ refugee admission be set at up to 50,000."\footnote{447} The Carter Administration "argued that [this] allocation represented the actual average number of refugees admitted in recent years and did not involve any numerical increase."\footnote{448} "Accommodation of the 50,000 [refugees] within the ‘normal flow’ category would avoid recurring reliance on emergency procedures which would only be utilized in new, unforeseen emergency conditions."\footnote{449} The Carter Administration also suggested that priority in allocating the “normal flow” numbers be given to refugees deemed to be of “special concern.”\footnote{450}

\footnote{443} Id. at 3.

The Commission’s membership assured the broad and high-level review of the issue that was needed. Sixteen members were drawn from the following areas: four members were selected from each of the Judiciary Committees of Congress (which have jurisdiction over immigration legislation); four cabinet members; the Secretary of State, the Attorney-General, the Secretary of Health and Human Services, and the Secretary of Labor; and four public members appointed by the President, including the Chairman, who was Father Theodore M. Hesburgh, president of the University of Notre Dame.

\footnote{444} Id. at 3.


\footnote{446} Kennedy, supra note 1, at 2.

\footnote{447} Id. at 42.

\footnote{448} Anker & Posner, supra note 83, at 41.

\footnote{449} Id. at 42. "The Administration endorsed and extended the ‘special concern’ language and supported a more inclusive interpretation." Id.

\footnote{450} H.R. 2816, supra note 425, § 201.
Largely due to Senator Kennedy’s pressure on the Administration, the congressional bills containing the universal nondiscriminatory definition of refugee and incorporating the President’s suggestion of up to 50,000 annual admissions as the “normal flow” were adopted. The “normal flow” numbers were to be allocated among groups of refugees that the President considered to be of “special concern.”

The tension between the Administration and Congress continued. Following further committee and subcommittee hearings, amendments to the original Administration bill were incorporated into House and Senate reports. The House committee bill also sought to make consultation mandatory as to the locations of refugee admission without regard to any special deference given to the President’s authority concerning groups of “special concern.” As a result, no special deference was given to refugees coming from any one country. Rather, the bill required that the President base any designation of “special humanitarian concern” on a determination after congressional consultation. Despite this narrowing of Presidential power, the House Committee sought to further limit the Executive’s authority to admit refugees in emergencies by adopting Congressman Eilberg’s proposed restrictions on the use of parole authority of refugee admissions. One fascinating point about these arguments is that they were advanced by legislators who opposed the settlement of Indochinese refugees. These congressional efforts culminated in changes made in the annual and emergency admission provisions, which substantially limited the Executive’s parole authority.

4. 1979 House and Senate Debates

The House and Senate Floor debates on December 20, 1979 were revealing. The record shows that the intense pressure to

452 H.R. 2816, supra note 425, § 201.
453 S. REP. NO. 250, supra note 451, at 3.
455 Id.
456 H.R. 3056, supra note 374, § 212(d)(5); see also 8 U.S.C. § 1253(d)(5)(B).
457 H.R. 2816, supra note 425.
involve the international community in the Indochina refugee situation increased dramatically during the first half of 1979 as the growing refugee outflow affected more countries.\textsuperscript{458} The international response grew gradually from the human tragedy and the large scale suffering that the media began to depict as an "Asian holocaust."\textsuperscript{459} Senator Robert Dole extended this analogy to the Holocaust when he remarked, "[w]e are all too familiar with the painful remembrance of ships loaded with European Jews seeking refuge during the Nazi period and in the aftermath of World War II. Many people found death after being herded from one port to another."\textsuperscript{460} Despite Senator’s Dole’s forewarning, many Southeast Asian governments continually and forcibly turned away refugees at the frontier on the high seas.\textsuperscript{461} Nevertheless, the Carter Administration played a great moral leadership role in the international effort to provide refuge to the boat people.\textsuperscript{462} Ultimately, the Carter Administration threw its weight behind the emerging international sentiment favoring the rescue drive.\textsuperscript{463} This groundswell of sympathy was driven by a fear of widespread prosecution and mass murder.\textsuperscript{464}

However, despite its earnest attempts to save the refugees, the Carter Administration was unable to move fast enough to keep up with the flow of refugees and could not obtain adequate funding for the large admissions program.\textsuperscript{465} In response to the situation, there was great debate centering on congressional control over refugee admissions numbers and the strengthening of the consultation process.\textsuperscript{466} Discussions of liberating limits were met with great opposition.\textsuperscript{467} Members were fearful of an expansive

\textsuperscript{458} Loescher & Scanlan, supra note 218, at 140.
\textsuperscript{459} Id. Public attention was also focused on the crisis as evidenced by public comments heard in Washington and New York in support of the boat people and in Time Magazine’s lead articles, entitled, Save Us! Save Us!, appealing to people’s humanitarian consciences. Id. at 143.
\textsuperscript{460} Id. at 141.
\textsuperscript{461} Id.
\textsuperscript{462} Id.
\textsuperscript{463} Id.
\textsuperscript{464} Id.
\textsuperscript{465} Id.
\textsuperscript{466} Anker & Posner, supra note 83, at 56.
\textsuperscript{467} Id.
admission policy untempered by numerical limits or by clear congressional controls.\textsuperscript{468}

The dual themes of Congress regaining authority over refugee admissions and excluding the immense numbers of Vietnamese refugees coming to the United States were repeated in the House floor debates. In a separate statement, Congressman Fascell expressed the perennial fears of opening the “numerical” floodgates to a surge of refugees into the United States. \textsuperscript{469} He proposed an amendment that required refugee status to be specially designated by the President, only after consultation with Congress.\textsuperscript{470}

Subsequently, a second amendment was proffered by Congressman Butler that called for an addition of a “sunset clause” to the admission provision.\textsuperscript{471} Under the “sunset clause,” the “normal flow” refugee admission after 1982 would be returned to 17,400, in addition to the number of refugees admitted under the provisions of Section 203(1)(7) of the INA.\textsuperscript{472} Congressman Sessenbrenner supported the amendment with his comment that sun-setting the increased flow of refugees at the end of fiscal year 1982, “will give Congress an opportunity to review the report of that commission and its recommendations and hopefully enact a permanent policy relating to both refugees and nonrefugee immigrants.”\textsuperscript{473} Congresswoman Holtzman accepted this amendment that was later adopted.\textsuperscript{474}

During the final house debates on the Conference Bill, Congresswoman Chiselhold further espoused her hopes that in the future there should not be any ethnic or racial biases in refugee decisions.\textsuperscript{475} Congressman Rodino also conveyed his strong support for the bill and exclaimed that it was:

One of the most important pieces of humanitarian legislation ever enacted by a United States Congress. . . . [I]t confirm[ed]
what this Government and the American people are all about.
. . . By their deep decision and untiring efforts, the United States once again . . . demonstrated its concern for the homeless, the defenseless, and the persecuted people who fall victim to tyrannical and oppressive government regimes.\footnote{Anker \& Posner, \textit{supra} note 83, at 58.}

Congressman Hyde made another amendment "designed to strengthen the consultation mechanism."\footnote{Anker \& Posner, \textit{supra} note 83, at 58.} Hyde's amendment provided for a hearing to be held to review any proposal to increase refugee admission.\footnote{Id.} Under the amendment, such a hearing would be required to apply in situations where the "normal flow" was to go above the 50,000 "normal flow" limit.\footnote{Id.; see also 125 Cong. Rec. H12370 (1979).} \"The amendment was adopted unopposed by Congresswoman Holtzman.'\footnote{Anker \& Posner, \textit{supra} note 83, at 58.} Furthermore, Congressman Moorehead offered the most controversial amendment, which provided that a presidential determination to increase the number of refugees admitted above the "normal flow" would not go into effect if at the end of fifteen days of continuous session either house passed a resolution disapproving the determination.\footnote{Id.} It was no surprise that this particular amendment was designed to apply only to a foreseeable influx of refugees.\footnote{H.R. 3056, \textit{supra} note 374, § 212(d)(5).} Though opposed by Congresswoman Holtzman, this additional amendment was also passed and adopted. In the end, the House passed the Refugee Act of 1980 in a close 192-107 vote.\footnote{126 Cong. Rec. 1522 (1980).}

At the time the Act was passed, President Carter faced a terrible economy replete with inflation and recession, accompanied by rising unemployment. Automobile manufacturers laid off one quarter of a million workers.\footnote{Koenig, \textit{supra} note 209, at 262.} Downward trends developed in the steel, tires, and housing construction industries.\footnote{Id.} Faced with the 1980 recession, Carter agonized over decisions,
resolving to check expanding unemployment without aggravating inflation.\(^{486}\) The business community was fearful that Carter would shun tax cuts and that the inflation fight might be abandoned early, causing chaotic consequences for interest rates and the bond and stock markets.\(^{487}\) At the same time, Congress, during an election year, successfully pressured the administration to subsidize additional housing construction and to cut mortgage interest costs.\(^{488}\)


Peter Schuck states that the significance of this decade for immigration politics may be grasped by comparing the prospects for reform.\(^{489}\) In 1980, the Carter Administration was in its "final death throes, struggling with the political legacy of two straight years of double-digit inflation, high unemployment (soon to go higher), and a deliberating hostage crisis in Iran."\(^{490}\) These events were cause for concern for cautious politicians and their respective constituents.\(^{491}\)

In addition, illegal immigration across the Southern border added to this period of tremendous demographic change.\(^{492}\) This period of great influx of immigrants to the United States witnessed significant increases in animus towards immigrants.\(^{493}\) Indeed, the sheer volume of these illegal crossings caused environmental and population control organizations to form the Federation for American Immigration Reform (FAIR), an anti-immigration lobbying group, in a collaborative effort to implement restrictive immigration legislation.\(^{494}\) Schuck observes that Senator Alan Simpson of Wyoming, a politician who would exercise the most influence over the shape of the new legislation during the 1980s,

\(^{486}\) \textit{Id.}
\(^{487}\) \textit{Id.} at 263.
\(^{488}\) \textit{Id.}
\(^{489}\) \textit{Schuck, supra} note 2, at 97.
\(^{490}\) \textit{Id.}
\(^{491}\) \textit{Id.}
\(^{492}\) \textit{Id.}
\(^{493}\) \textit{Id.}
\(^{494}\) \textit{Id.}
began the decade by proclaiming his strong restrictionist leanings.495

"In the negative sense, some civil rights groups, who spurned rhetoric that echoed FAIR, also shared concerns about minority job losses."496 In 1979, "Senate Judiciary Committee Chairman Edward Kennedy, concerned that growing illegal migration could trigger a political backlash against immigration, persuaded Congress to establish a Select Commission on Immigration and Refugee Policy (SCIRP) to propose new, hopefully prudent solutions."497 Schuck asserts that, with the exception of the Immigration Act of 1965, Congress had paid little attention to immigration policy.498 However, when "[t]he Reagan administration assumed office in 1981 and the Republicans also gained control of the Senate, these stirrings seemed especially auspicious for reform."499

The year 1980 brought an abrupt change to American immigration law. The Refugee Act allowed two tracks for refugee admission into the United States: (1) a provision giving the President the power to admit refugees into the United States only after consultation with Congress; and (2) procedures for aliens in the United States or at ports of entry to apply for asylum.500 The United States has admitted more than one million refugees under the first track since 1980, although the numbers have seen more regulation than under the previous parole authority.501 "The additional annual admission category was created to accommodate crises such as the mass exodus of the 'boat people' from Southeast Asia."502 This category was also created for emergency admission of groups of "special concern" to the United States.503 Also, the reforms restrict the Attorney General's authority to parole refugees, which prevents any large, ex parte admissions, such as

495 Id.
496 Id.
497 Id.
498 Id.
499 Id.
500 HING, supra note 93, at 28.
501 Id.
502 Anker & Posner, supra note 83, at 44.
503 Id.
the pre-1980 admission of Indochinese refugees.\textsuperscript{504}

Significantly, under the language of the Refugee Act, any future bills limiting the admission of Indochinese refugees will face fewer opportunities for contest. For example:

Prior consultation was required to consider only the number of refugees admitted under the additional admissions and emergency admission clauses. No consultation was required to review the conferral of “special concern” status upon particular groups of refugees or the allocation of numbers among them. The consultation process itself was not described in detail and the bill did not contain a provision for a congressional veto.\textsuperscript{505}

Despite the view by some that the Refugee Act is an instrument for humanitarian ends, the Act’s actual administration has not prevented egregious abuse by the Executive Branch as expected. In practice, the Refugee Act of 1980 has been administered in a manner that is reminiscent of the arbitrary use of the seventh preference and parole provisions.\textsuperscript{506} Bill Ong Hing observes:

Without much congressional opposition, presidents have continued to favor refugees from Communist countries while consistently ignoring pleas of those from U.S. allies. The number of Asian refugees has declined accordingly.

The executive branch and Congress established a limit of 234,000 refugees for fiscal [year] 1980. The Carter administration then reserved 169,000 places for Southeast Asia, 33,000 for the former Soviet Union, 19,500 for Cuba, and 1,000 for the remainder of Latin America. By 1985 the total number of refugee admittees dropped to 70,000 with 50,000 reserved for East Asia. . . . The number for East Asia remains at 52,000, despite dire circumstances in Asian refugee camps.\textsuperscript{507}

Further, Hing believes that “the decency evidenced in such legislation cannot conceal the ideological bias that has permeated

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\textsuperscript{504} HING, \textit{supra} note 152, at 127. Prior to the Refugee Act of 1980, the definition and admission of refugees was based on ideology and geography. GOODWIN-GILL, \textit{supra} note 159, at 22.

\textsuperscript{505} Anker & Posner, \textit{supra} note 83, at 44.

\textsuperscript{506} HING, \textit{supra} note 152, at 127.

\textsuperscript{507} Id.
refugee practices,"\textsuperscript{508} and "the impulse to conceal and deny actual motivations has been followed. Expressly blurring the boundaries between immigration and refugee policies helps to avert the need for self-deprecation."\textsuperscript{509}

The 1980 Refugee Act, which established new controls on refugee admissions, actually caused the decline, if not permanent stoppage, of the flow of refugees entering the United States despite persistent humanitarian pressure on the United States. Needless to say, as a result of the Refugee Act of 1980 and the adoption of subsequent recommendations made by the Selection Commission, the admission of Vietnamese refugees has experienced a gradual downward trend.

Bill Ong Hing notes that "[a]lthough the 1980 Refugee Act established new controls, the flow of refugees continues due to persistent humanitarian pressure on the United States. After a second, sizable wave entered in 1980, the flow of new entries declined steadily."\textsuperscript{510} This drop began as early as September 21, 1981, when President Reagan recommended that Congress approve a 1982 ceiling of 173,000 refugee slots and reserve 119,800 of those slots for Indochinese.\textsuperscript{511} There were recommendations for lower levels of immigration by members of the House of Representatives because of their concerns about the domestic impact of large refugee flows into the United States.\textsuperscript{512} For example, three members of the House Judiciary Committee were "consulted" by President Reagan, and they subsequently recommended that the overall allocation be reduced to 140,000.\textsuperscript{513} Likewise, Representative Mazzoli recommended that the overall ceiling be limited to 120,000, with a maximum of 84,000 slots reserved for Indochinese.\textsuperscript{514}

House members Malloy, Fish, and Rodino made further appeals for more restrictions directly to President Reagan.\textsuperscript{515} In a

\textsuperscript{508} \textit{Id.} at 128.
\textsuperscript{509} \textit{Id.}
\textsuperscript{510} \textit{Id.} at 134.
\textsuperscript{511} \textit{Loescher} \& \textit{Scanlan}, supra note 218, at 201.
\textsuperscript{512} \textit{Id.}
\textsuperscript{513} \textit{Id.}
\textsuperscript{514} \textit{Id.}
\textsuperscript{515} \textit{Id.}
collaborative effort, the three representatives drafted a letter, which, in effect, utilized language about financial concerns as a proxy for their true concerns about Indochinese. The three wrote:

We are concerned by your decision to maintain a high level of refugee admissions, because it is not accompanied by a request for adequate funding to meet their resettlement needs. At a time when we are sharply cutting social programs urgently needed by the disadvantaged and the needy members of our society, it becomes more difficult to justify an annual Federal expenditure in excess of one billion dollars for refugees. Further, this growing competition for Federal resources will undoubtedly produce increasing resentment toward refugees in general.

These structured efforts to reduce the Indochinese flow were effective. Bill Hing summarizes that "[i]n 1984, 40,604 Vietnamese refugees entered, then the average dropped to about 22,000 until 1988 when 17,626 were admitted. So by 1988, 540,700 Vietnamese refugees had arrived. By October 1991, 18,280 AmerAsians (mostly from Vietnam) arrived along with another 44,071 relatives."

6. Further Limitations Imposed: When "Less" means "Less"

During the Reagan Administration, and after the passage of the Act, severe unemployment reached a high not seen since the Great Depression of the 1930s. Reagan opposed any sizable public job programs to relieve unemployment, discounting such programs as "make-work and dead-end" jobs. As an alternative, Reagan "prescribed the bitter medicine of cutting government spending as the route to economic recovery and growth."

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516 See id.
517 Id. Writing alone to President Reagan, Representative Mazzoli endorsed the views of his colleagues, emphasizing the impact of refugees on state and local governments. Id.
518 HING, supra note 152, at 134.
519 KOENIG, supra note 209, at 263; see also Carolyn Lohead, Bush and Gore Miles Apart On What Made Economy Roar, S.F. CHRON., Oct. 19, 2000, at A1 (characterizing the national economy during Reagan's first term, as the "worst recession since the Great Depression").
520 KOENIG, supra note 209, at 263.
521 Id.
Coinciding with the employment of more restrictive immigration policies, the Reagan Administration's fiscal policies created obstacles to the needs of these communities due to their emphasis on smaller federal programs and reduced spending for social services, job training, housing, education, and public welfare.\textsuperscript{522} Congress followed suit by imposing a host of new restrictions on federal reimbursement to the States for refugee resettlement.\textsuperscript{522} Peter Schuck states that:

In August 1982, Senator Walter (Dee) Huddleston of Kentucky, FAIR's chief advocate in the Senate for tighter limits on legal immigration, mobilized considerable support for a decidedly restrictive bill. It would have capped all legal immigration (including refugees and "immediate relatives," neither of which categories was capped at that time) at 425,000, a level far below the almost 600,000 immigrants and refugees admitted that year.\textsuperscript{524}

At the same time, representatives of organized labor doubled their traditional efforts to preserve American jobs for American workers as the nation experienced an economic downturn.\textsuperscript{525}

Finally, in fiscal year 1986, President Reagan trimmed 7,000 slots from his proposed refugee allocation after Senators Strom Thurmond and Alan Simpson and Representatives Rodino and Ramono Marzolli recommended that Indochinese numbers be reduced by at least 12,000.\textsuperscript{526} Eventually, the American resettlement program fell victim to efforts to reduce the budget deficit.\textsuperscript{527} For fiscal year 1986, the Gramm-Rudman-Hollings legislation resulted in the overall reduction of refugee admissions

\textsuperscript{522} \textsc{Loescher} \& \textsc{Scanlan}, \textit{supra} note 218, at 203. \textit{Cf.} \textsc{Johnson}, \textit{supra} note 143, at 1510 (commenting on the general public's lack of sympathy and frequent antipathy for welfare recipients).

\textsuperscript{523} \textsc{Loescher} \& \textsc{Scanlan}, \textit{supra} note 218, at 203; \textit{see also} \textsc{Kennedy}, \textit{supra} note 1, at 3-4 (considering the prevailing anti-immigration climate within Congress in 1981).

\textsuperscript{524} \textsc{Schuck}, \textit{supra} note 2, at 98.

\textsuperscript{525} \textit{Id. But see} \textsc{Hing}, \textit{supra} note 93, at 156-59 (explaining that such an outlook dismisses the positive impact of a diversified American society on the economy and noting that immigrants and refugees often represent the most ambitious individuals from their countries of origin and thus are assets to the American culture).

\textsuperscript{526} \textsc{Loescher} \& \textsc{Scanlan}, \textit{supra} note 218, at 207-08.

\textsuperscript{527} \textsc{Sutter}, \textit{supra} note 210, at 181.
to the United States from an expected 67,000 to 61,000 refugees. For the Indochinese refugees, the revised level of admission dropped from 45,500 to 43,500. The Office of Refugee Resettlement’s budget was cut by 4.3 percent.

The vestiges of racism surrounding the passage of the Refugee Act of 1980 persist to this day. The inability of Vietnamese refugees to support themselves and other related experiences have served as cannon fodder for immigration restrictionists. Indeed, the efforts to close the borders and allow no one to come to this country have continued without end. Many have espoused anti-immigrant feelings. For instance, John Miller is concerned that the failure of immigrants to assimilate into this country’s majority culture will result in a permanent underclass with a high welfare dependence. Miller observes the profound effect of mass immigration on the culture and racial composition of the United

528 Id.
529 Id.
530 Id.

531 See Miller, supra note 63, at 139 (stating that “Southeast Asians, however, are overwhelmingly first-generation Americans who arrived as poor, displaced refugees.”); see also Larry Hajime Shinagawa, The Impact of Immigration on the Demography of Asian Pacific Americans, in Reframing the Immigration Debate supra note 258, at 81 (stating that “[a]mong Asian Pacific American ethnic groups, the top five groups to use public assistance were Hmong Americans (64.7 percent), Laotian Americans (57.3 percent), Cambodian Americans (52.5 percent), Vietnamese Americans (50.7 percent), and Korean Americans (39.3 percent).”).

532 See generally Delgado, supra note 22, at 319.
533 See Miller, supra note 63, at 5-11, 215-17; see also Ong & Blumenberg, supra note 223, at 121 (claiming that “[u]nlike other ethnic or racial groups, Southeast Asians have been channeled into welfare programs as a part of a national strategy to facilitate their economic assimilation”).

The direct incorporation of Southeast Asians into the welfare system has created a unique population on public assistance. The most salient difference among ethnic and racial groups on welfare is household structure. Close to 90 percent of Southeast Asian [welfare] households contain two parents, a sharp divergence from the customary image of the single welfare mother. In contrast only 43 percent of non-Hispanic white, 21 percent of black, and 40 percent of Laotian households contain two parents. Southeast Asian households also have higher fertility rates. . . . [T]he average family size for Southeast Asian households is close to five persons, while the average family size for other welfare households is approximately 3.5 persons.

Id. at 123.
States, which he believes is caused by immigration itself. Part of this failure to assimilate, Miller says, is attributed to the fact that unlike past generations, immigrants today tend to maintain their identity more strongly than the immigrants of the past. For Miller, this threatens the cohesiveness of the United States by discouraging present-day immigrants from assimilating.

To restrictionist Peter Brimelow, author of the best-selling polemic, Alien Nation: Common Sense About America's Immigration Disaster, the Refugee Act of 1980 was a comprehensive refugee policy that was "promptly captured and debauched by special interests groups." In particular, Brimelow criticizes the continual admission of Vietnamese to the United States. He fervently declares:

[Even] twenty years after Saigon fell, the United States is still admitting Vietnamese claiming to be children of American servicemen. In 1992 alone, a total of 17,253 arrived under the AmerAsian Homecoming Act. Only 4,261 were the alleged children themselves—the rest were their immediate relatives, typical of the way ‘family reunification’ tends to take over all categories. But of those 4,261, over a third (37 percent) were born more than nine months after the last U.S. troops left Vietnam. They were obvious frauds . . . but the U.S. government admitted them anyway.

Furthermore, similar anti-Asian attitudes have also recently

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534 Miller, supra note 63, at 6-11.
535 Id.
536 Id.; see also Peter D. Salins, Assimilation, American Style 85-89 (1997) (acknowledging that the assimilationist norm is specifically white Anglo-Saxon Protestant). But see The “Varied Carols” of America: A Democratic History, in A Larger Memory: A History of Our Diversity, with Voices 5 (Ronald Takaki ed., 1998) (dispelling the “widely held but inaccurate view that ‘American’ means white or European in ancestry”).

Americanization must be reframed, as the commission has, as a reciprocal and mutual process of accommodation, rather than a one-way street process of assimilation by immigrants. Immigrants, aspiring Americans, have a relationship with current American citizens and with the country they wish to join. This relationship implies a mutuality of responsibility and obligation.

Pera, supra note 51, at 65.
537 Brimelow, supra note 64.
538 Id. at 246.
539 Id. at 247.
moved beyond immigration issues into the political and democratic process concerning civil rights and liberties. This was most evident in the portrayal of the myth of Asian Americans as "the model minority" in the debates over affirmative action, the John Huang/Democratic National Committee fund raising controversy, the Republican Senate’s efforts to block the confirmation of Bill Lann Lee as Assistant Attorney General for Civil Rights, and the prosecution of former Los Alamos nuclear scientist Wen Ho Lee for allegedly providing nuclear secrets to the Chinese government. In addition, the 105th Congress introduced


541 See generally Frank H. Wu & May L. Nicholson, Have You No Decency? Racial Aspects of Media Coverage on the John Huang Matter, 7 Asian Am. Pol’y Rev. 1 (1997) (analyzing the campaign fundraising efforts of Democratic Party official John Huang). Frank Wu also suggests that at the time of the campaign financing scandal, Asian Americans were facing real racial stereotyping as they attempted to participate in the electoral process. Asian American donors were closely scrutinized by the Democratic National Committee, and "[t]he questions aimed at Asian-Americans reflect the same stereotyping that has portrayed all Asian-derived people as foreigners, even if they are fifth-generation Californians." Frank H. Wu, Asian Americans Under Glass, The Nation, Mar. 31, 1997, at 15-16. The media coverage also exacerbated the racial stereotyping hysteria.

The major media outlets didn’t even bother to ask about the racial angle to the audit, perhaps they have helped generate the frenzy over foreign influence—thus neglecting the real issue of campaign influence reform. Phrases like The American Spectator’s ‘Bamboo Network’ or William Safire’s favorite, ‘The Asian Connection,’ perpetuate the stereotyping that formerly brought us the ‘Yellow Peril’ and the ‘Asiatic Hordes.’ As Congress irons out committee funding and structure to carry out its own investigations of the money connections on the presidential election, it is imperative that the focus remain on influence-buying as an issue without assuming that this is a problem to which people of Asian descent are almost genetically predisposed.

Id.

542 Frank H. Wu, Bill Lann Lee is the Best Choice, Asian Week, Apr. 8, 1999, at 10 (questioning attacks on Bill Lann Lee as being more about his race and personal views on affirmative action rather than his qualifications).

543 See, e.g., Neil Gotanda, Comparative Racialization, Racial Profiling and the
over one hundred bills affecting immigration. These examples underscore the fact that issues of race and ethnicity are just as salient today as they were during the Chinese exclusion period in the United States.

VII. Conclusion

"The Refugee Act that President Carter signed on March 17, 1980 had little to say about asylum; to the drafters of the Act, it was essentially an afterthought."543

To this day, the Refugee Act of 1980 is still widely misunderstood. Most academic commentators, including Peter Schuck, have focused on the fact that special humanitarian restrictions on Vietnamese immigration undermined the avowed foreign policy purposes of the Refugee Act. Others suggest that reference to the Vietnam War in and of itself is insufficient to explain the structure of the law. The reality, however, is that the Refugee Act provided strict controls on the admission of Vietnamese.


Even more disturbing are charges that the government routinely singled out Asian Americans, including Lee, in espionage investigations. The former chief counterintelligence officer at Los Alamos state[d] that “ethnic Chinese” laboratory employees were singled out in a joint FBI and Department of Energy investigation aimed at identifying possible spies for China. . . . Every “ethnic” Chinese is perceived as an espionage threat, but this racialization could justify racial profiling against any number of ethnic groups in the future. The government has also failed to provide any proof that Chinese Americans are more likely to spy for China. When pressed, counterintelligence officials cannot cite any studies, statistics or examples, leaving the impression that their practice may be based on a racial stereotype.

Id.544


The fact that the Act was passed to terminate the continual ad hoc admissions of Indochinese refugees underlies the rhetoric of those who regard the Act as a great law passed in the spirit of humanitarianism and those who view its implementation as largely preventing the practice of political favoritism allowed by pre-1980 refugee laws. The legislative history demonstrates that the Act was neither entirely humanitarian nor egalitarian. Indeed, Congress passed it even though the Act would create a comprehensive ceiling on the number of Indochinese refugees permitted to enter the United States.