

Discrimination and the Presumptive Rights of Immigrants

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**DISCRIMINATION AND
THE PRESUMPTIVE
RIGHTS OF
IMMIGRANTS**

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Abstract

Philosophers have assumed that as long as discriminatory admission and exclusion policies are off the table, it is possible for one to adopt a restrictionist position on the issue of immigration without having to worry that this position might entail discriminatory outcomes. The problem with this assumption emerges, however, when two important points are taken into consideration. First, immigration controls are not simply discriminatory because they are based on racist or ethnocentric attitudes and beliefs, but can themselves also be the source of social and civic ostracism. Second, by focusing so much on questions of admission and exclusion, philosophers have tended to overlook the discriminatory potential of immigration enforcement mechanisms. In this essay, I make the case that philosophers who deal with the issue of immigration cannot dispense with the potential for discrimination in a state's enforcement mechanism as easily as they have with the potential for discrimination in a state's admission and exclusions criteria. In addition, I put forth the positive claim that the way to combat



this potential for discrimination (e.g., xenophobia) must begin with a defense of, and advocacy for, immigrant rights.

Keywords: immigration; xenophobia; Latino/a philosophy; race; ethnicity

Introduction

Among philosophers who work on the ethics and politics of immigration, a near consensus has formed around the view that discrimination is wrong and ought not to be entailed in one's position on immigration.¹ With this caveat firmly in place, philosophers have focused their energies on trying to determine whether a state has the presumptive—meaning all things being equal—right to exclude nonmembers or if all persons, including nonmembers, are entitled to certain basic rights and protections that limit a state's ability to control immigration. The assumption is that so long as discriminatory admission and exclusion policies are off the table, it is possible for one to adopt a restrictionist position on immigration and not worry that this position will have discriminatory implications.

On the surface, this assumption appears sound. The problem with it, however, begins to emerge when we take two important points into consideration. The first is that the relationship between immigration controls and discrimination is not unidirectional but works in two ways. It is common to assume that discriminatory immigration controls are simply the result of racist or ethnocentric attitudes and beliefs, but it is also the case that explicitly nondiscriminatory—and at times even anti-discriminatory—forms of immigration control can themselves be the source of social and civic ostracism (i.e., xenophobia).² This latter possibility has not been sufficiently appreciated by philosophers who work on this issue. Second, by focusing so much on questions of admission and exclusion, philosophers have tended to overlook the discriminatory potential of immigration enforcement mechanisms. This oversight is problematic because concerns over border control and deportation are, at least in places like the United States, currently the most hotly contested aspects of the immigration debate. Moreover, immigration enforcement also happens to be the site where xenophobic forms of discrimination remain largely unabated by anti-discriminatory immigration reforms.



In this essay, I make the case that philosophers who deal with the issue of immigration cannot dispense with the potential for discrimination in a state's enforcement mechanism as easily as they have with the potential for discrimination in a state's admission and exclusions criteria. I put forth the further, positive claim that the way to combat this potential for discrimination (e.g., xenophobia) must begin with a defense of, and advocacy for, immigrant rights.

The Philosophy of Immigration and the Concern over Discrimination

As I've noted, the philosophical literature on immigration can be broken down into two general camps: those who favor a state's presumptive right to exclude nonmembers and those who oppose it by appealing to principles of universal equality and/or individual freedom. Within this debate, supporters of the former position have benefited from what Joseph Carens calls the conventional assumption: "The power to admit or exclude aliens is inherent in sovereignty and essential for any political community."³ The Achilles' heel of this position, however, has always been its difficulty with issues of discrimination. For example, Michael Walzer, a communitarian and arch supporter of a state's right to control immigration, was forced to bite the proverbial bullet and concede that on his account some version of the notorious "White Australia Policy"⁴ would be permissible.⁵

Most philosophers, even those who support a state's presumptive right to control immigration, find this implication in Walzer's view to be unacceptable. Yet defenders of a state's right to control immigration face a serious challenge in avoiding a similar outcome. David Miller, for example, has tried to temper his own nationalist position by explicitly stating that race and ethnicity should not be used in determining criteria for exclusion because "[for immigrants] to be told that they belong to the wrong race . . . is insulting, given that these features do not connect to anything of real significance to the society they want to join."⁶ Yet not all supporters of a state's right to control immigration are convinced by Miller's "insult exemption." Christopher Heath Wellman, for example, has responded directly to Miller by stating that "as much as I abhor racism, I believe that racist individuals cannot permissibly be forced to marry someone outside of their race . . . [therefore] why does [a state's presumptive right to control immigration] not similarly entitle racist citizens to exclude immigrants



based upon race?”⁷ In other words, if a state has the presumptive right to control immigration why should it matter that outsiders will find the state’s criteria for exclusion to be insulting?

As a response to this problem, Michael Blake has presented an interesting and original solution. He states, “In all cases in which there are national or ethnic minorities [already within a state] . . . to restrict immigration for national or ethnic reasons is to make some citizens politically inferior to others.”⁸ In other words, discriminatory immigration policies must be rejected, regardless of whether they are or are not detrimental to outsiders, because these sorts of policies can undermine the social and civic standing of citizens (i.e., it violates the political equality of citizens) who happen to share the race, ethnicity, national origin, religion, or gender that is being used as criteria for exclusion.

Philosophers who, like Wellman, believe in a state’s presumptive right to control immigration, have now gladly adopted some version of Blake’s position. Wellman, for example, writes that “whether or not we are sympathetic to the idea of a state designed especially to serve a specific racial, ethnic, or religious constituency, such a state is not exempt from the requirement to treat all its subjects as equal citizens.”⁹ And even Walzer concedes that “no community can be half-metic, half-citizen and claim that its admissions policies are acts of self-determination or that its politics is democratic.”¹⁰

In this way, most philosophers who support a state’s presumptive right to control immigration now believe that the potential for discrimination, which their position appeared to have a difficult time in definitively rejecting, is now addressed. They can now claim that, all things being equal, a state has a right to admit and exclude whomever it likes, but that out of respect for the political equality of its own citizens, such admission and exclusion decisions cannot be based on discriminatory criteria. Therefore, there appears to be no contradiction in both being a staunch opponent of discrimination and favoring a state’s presumptive right to control immigration.

In an effort to show why this is not the case, it is useful to begin by looking at the ups and downs of U.S. immigration law and policy. This particular history is of interest because it closely mirrors the aforementioned philosophical discussion. For example, the first law passed in the United States that relates to issues of immigration and citizenship was the Naturalization Act of 1790. This act made it emphatically clear that only “white persons” were eligible for naturalized U.S. citizenship.¹¹ Then,



beginning in 1882, the U.S. federal government passed—and the U.S. Supreme Court came to uphold the constitutionality of—various Chinese Exclusion Acts. These acts denied entry to Chinese immigrants and were based entirely on racist beliefs and attitudes.¹²

In 1917, the United States passed its first comprehensive immigration act. One of the key provisions of this act expanded the scope of those ineligible for U.S. citizenship to include all immigrants from Asia (a geographical area referred to in the act as the “Asiatic Barred Zone”).¹³ Seven years later, the Johnson-Reed Act of 1924 introduced a system of “national origin” quotas, which disproportionately favored northern Europeans and barred from entry all persons ineligible for U.S. citizenship.¹⁴ Essentially, this meant that “nonwhite” people were not only ineligible for naturalized U.S. citizenship, but they were also not allowed to even enter the United States.

The overt racism and ethnocentrism of early U.S. immigration law and policy is unquestionable and inexcusable, but during in the second half of the twentieth century this was supposed to have changed. Beginning in 1943, the Chinese Exclusion Act was repealed.¹⁵ Then, in 1952, the citizenship ban on persons from the “Asiatic Barred Zone” was lifted.¹⁶ Finally, in 1965, the “national origins” quota was replaced with a system of preferences for family reunification, immigrants with technical skills, and a numerical cap set at 20,000 persons per country per year.¹⁷

According to some historians, part of the reason for this change was that U.S. citizens of Jewish, Greek, Polish, Portuguese, and Italian descent—ethnic groups that by 1965 had come to be regarded as racially white in the United States—found certain stipulations in U.S. immigration law, like the “national origins” quota, to be discriminating against their particular ethnic group.¹⁸ In other words, the racist and ethnocentric elements of prior immigration laws and policies were repealed, not because of the negative impact they had on noncitizens, but (along the lines of Blake’s argument) because of the negative impact these laws and policies had for certain U.S. citizens.

On the surface it would seem that these reforms addressed most, if not all, of the discrimination that had plagued earlier U.S. admission and exclusion policies. In short, the belief is that so long as immigration controls are not based on something akin to racism or ethnocentrism, they do not entail discriminatory outcomes. My view is that this is not quite right. As I will highlight in the next section, immigration controls do not need to be based on or be motivated by racism or ethnocentrism in order to be



discriminatory. Immigration controls can be perniciously discriminatory even when their stated aim is to redress prior forms of discrimination. A further claim that I make is that in order to adequately address the discriminatory aspect of immigration controls, certain rights (in the form of protections against the excesses of a state's immigration enforcement mechanism) need to be put in place, and these protections must extend not only to citizens but also to immigrants—including undocumented immigrants. In short, if the goal is to have a position on immigration that is discrimination-free, when it comes to immigration control the presumptive right must be on the side of immigrants. This means that it is not possible to consistently support a state's presumptive right to control immigration, while also claiming to be a staunch opponent of discrimination.

Xenophobia Rising

Post-1943 U.S. immigration reforms, with their appearance of formal equality, were largely designed to be nondiscriminatory and culminated with a system in which every country, regardless of race or ethnicity, was allotted the exact same number of immigrants each year. The aftermath of these reforms, however, did not yield a discriminatory-free immigration system. In the wake of these reforms, the Latino/a community quickly became one of the principle targets of xenophobic¹⁹ forms of discrimination. This is not to imply that before 1965 Latino/as in the United States did not experience various forms of discrimination, some of which were directly related to U.S. immigration controls,²⁰ but unlike other marginalized communities,²¹ the Latino/a community had a history of court decisions and treaties in which they were declared “white” and thereby eligible for U.S. citizenship.²² The question then is how did specifically non-racist and non-ethnocentric immigration reforms end up fostering, instead of further diminishing, xenophobic attitudes and beliefs about the Latino/a community in the United States?

The answer seems to be that after 1965 there was a “sudden rise” in the number of undocumented immigrants coming from Latin America—specifically Mexico. The causes for this “sudden rise” are multiple and complicated, but one of the principle causes was the policy of numerical caps. These caps, as already mentioned, applied equally to all countries and in this sense were regarded as being formally equal. The problem



is that this type of formal equality did not take into account the different relationships that different countries have with the United States. Mexico, for example, has had a very close historical and geographical connection to the United States. Furthermore, before the 1965 Act, migration from Mexico into the United States was *not restricted at all* and by the early 1960s accounted for approximately 200,000 migrants annually.²³ Most of the migrants were laborers that would work in the United States for a season or two and then return home. According to the 1965 Act, however, Mexican immigration was to be capped at 20,000 annually. The establishment of this cap was not necessarily based on racism or ethnocentrism (in fact, as mentioned above, it aimed to do the exact opposite of that and treat all persons equal), but the establishment of this cap did not magically reduce the number of Mexican migrants into the United States overnight. Instead, the cap turned a large percentage of previously legal migrant workers from Mexico into undocumented immigrants and in turn helped perpetuate the attitude and belief that the Latino/a community within the United States was an inherently un-American community.

This association of the Latino/a community with being un-American has in turn given rise to something we might refer to as “xenophobic profiling.” One example of this sort of profiling is when the state’s enforcement agencies, such as the border patrol, feel justified in citing “Mexican appearance” as sufficient cause to warrant a stop or to interrogate those whom they come into contact with. After 1965, this practice was so endemic in the United States that by 1975 the first case of “xenophobic profiling” went before the Supreme Court in *United States v. Brignoni-Ponce*. This case involved roving border patrol agents who had stopped a car being driven by Felix Humberto Brignoni-Ponce. The reason for the stop was that Brignoni-Ponce and his two passengers had a “Mexican appearance.” The question put before the Court was whether “Mexican appearance”—which technically speaking was not referred to in this case as a race or ethnicity but as a nationality—was a permissible reason for this sort of stop. The court ruled that roving border patrol agents could not stop people *solely* for having a “Mexican appearance” but that because of the sudden increase in undocumented immigrants from Mexico, “Mexican appearance” could be used as one relevant factor for such a stop.²⁴

A year later another similar case, *United States v. Martinez-Fuerte*, went before the Supreme Court. In this case, Amado Martinez-Fuerte and two female passengers attempted to cross a border checkpoint. Based on their



“Mexican appearance,” their car was directed to the secondary inspection area. Once referred to that area, it was discovered that the two female passengers were unlawfully present. The question before the Supreme Court, however, was not about the outcome of this particular referral but about the process itself: a referral based solely on “Mexican appearance.” In this case the Court again cited the sudden influx of undocumented immigrants from Mexico and the need to protect the sovereignty of the United States through more stringent enforcement of immigration laws. These concerns, the Court ruled, were important enough that it was:

. . . constitutional to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.²⁵

In the United States today, roughly 80 percent of undocumented immigrants are of Latin American descent.²⁶ This means that aggressive internal enforcement strategies, such as *attrition through enforcement*,²⁷ will disproportionately target citizens who are (or appear to be) of Latin American descent. This is the case even though the vast majority of Latino/as currently in the United States are lawfully present. For a more concrete example, note the following results from a Pew Hispanic Center survey:

Just over half of all Hispanic adults in the US worry that they, a family member or a close friend could be deported. . . . Nearly two-thirds say the failure of Congress to enact an immigration reform bill has made life more difficult for all Latinos. Smaller numbers (ranging from about one-in-eight to one-in-four) say the heightened attention to immigration issues has had a specific negative effect on them personally. These effects include more difficulty finding work or housing; less likelihood of using government services or traveling abroad; and more likelihood of being asked to produce documents to prove their immigration status.²⁸

The case of the Latino/as in a post-1965 United States is instructive in that it shows how effective and efficient enforcement of formally nondiscriminatory immigration controls can have the consequence



of generating xenophobic attitudes and beliefs against a particular community. Philosophers have overlooked this possibility because they have focused almost entirely on questions of admission and exclusion and have not paid sufficient enough attention to the issue of immigration enforcement. Philosophers who favor a state's presumptive right to control immigration have therefore not shown that their position can definitively reject the potential for discrimination. In the next section, I will show what is needed in order for an immigration enforcement mechanism to be free of discriminatory entailments, and why this makes it incompatible with a state having the presumptive right to control immigration.

Combating Xenophobia

As we saw in the prior section, when certain communities are forced to bear a disproportionate amount of the surveying, identifying, interrogating, and apprehending that goes along with a state's immigration enforcement mechanism, the members of that community become socially and civically ostracized. In order to avoid such an outcome (i.e., in order for a state's immigration enforcement mechanism to be free of discriminatory entailments), two things need to transpire. First, a state's immigration enforcement mechanism must be designed in such a way that all citizens come to bear the brunt of this mechanism equally. This can be referred to as the *equality of burdens* standard. Second, certain protections must be put in place that will shield all citizens equally from the pernicious effects of immigration enforcement. This can be referred to as the *universal protections* standard.

The problem with meeting these two standards, at least for those who support a state's presumptive right to control immigration, is that they entail that nonmembers, including undocumented immigrants, are owed certain presumptive protections against a state's right to control immigration. It is true that these protections are not necessarily moral trumps, to use Michael Blake's phrasing,²⁹ but they do shift the burden of proof away from immigrants and onto the state. This means that if one is committed to the view that discrimination is wrong and ought not to be entailed in one's position on immigration, it follows that the presumptive right must be on the side of immigrants (including undocumented immigrants) and not the state. In this last section, I will explain why meeting these two standards are



both necessary in the effort to avoid discriminatory entailments and also why they circumvent a state's right to control immigration.

I have mentioned that one of the problems with internal enforcement strategies like *attrition through enforcement* is that, even if they are not motivated by discriminatory attitudes and beliefs, they can still be the source of discriminatory attitudes and beliefs. In order to avoid this, a state's immigration enforcement mechanism must meet something like the *equality of burdens* standard. This means that however a state decides to enforce its immigration policy, that enforcement must be deployed in such a way that all citizens bear the burdens of this type of enforcement equally.³⁰ The idea here would be similar to the theory behind the screening processes used in U.S. airports: where everyone's carry-on bag gets screened, everyone is subjected to some sort of detection device, and everyone is equally likely to be subjected to further inspection and random searches. When this process is used in this way, no one gets singled out because everyone is subjected to the same procedure and the same burdens.

The problem, however, is that while the *equality of burdens* standard is necessary it is not by itself sufficient. Some people might be OK with undergoing tough inspections at points of entry, but these sorts of intrusions by the state can be more difficult to accept internally. For example, random immigration inspections on the street, or workplace immigration raids that apply to anyone and everyone, might be an excessive burden to place on the liberties of ordinary citizens. Another way of putting this is that when all citizens are asked to bear the brunt of excessive searches and seizures by the state (even if these burdens are shared equally), it does not so much assuage concerns over the potential for discrimination as it diminishes the overall status of citizenship.³¹

So along with meeting the *equality of burdens* standard, a state would also need to meet a *universal protections* standard. Meeting this standard would entail that all citizens be reasonably protected from the excesses of a state's immigration enforcement mechanism. It is difficult to say what exactly this set of protections would be, as different contexts would interpret excessiveness in different ways. It seems safe, however, to assume that one of these universal protections would be the presumption of innocence. In the immigration context, this would entail that all persons present should be assumed to be, and treated as though they were, lawfully present until their presence has been confirmed to be unauthorized. This would therefore entail a universal freedom from unreasonable searches and seizures,



and an extension of protections such as due process, equal protection under the law, and a right to an attorney in removal proceedings (which is currently not the case for everyone in the United States³²). Protections like these are essential because without them immigration controls could easily violate the rights of individuals.³³

These protections are not the only ones that would satisfy the *universal protections* standard, and it is also possible that in order to adequately meet this standard more, rather than less, protections would be necessary. That said, the protections so far mentioned are in themselves sufficient to illustrate the following point: protecting the status of citizenship from the excesses of a state's immigration enforcement mechanism shifts the burden of proof onto the state. A state must first show, and make allowances so, that its immigration enforcement mechanism does not overreach before it can deploy it.

When taken together, these two standards provide a canopy of protections that form the basis for a presumptive set of immigrant rights. Take for example the following case. Assume that it is determined that, based on the standards of *equality of burdens* and *universal protections*, police officers are disallowed from taking up immigration enforcement duties.³⁴ The reasoning for this prohibition could be either the potential for police abuse (e.g., police could use immigration enforcement duties as an excuse to harass already marginalized communities), because it might make some citizens less likely to come forward to report crime (e.g., citizens who are the victims of crimes but also happen to live in mixed-status households³⁵ would be hesitant to call police) or to come forward and serve as witnesses (e.g., the safety of all citizens is dependent on the lawful cooperation of all persons present, regardless of their immigration status). In either case, as far as domestic law enforcement goes, all persons present should be assumed to be lawfully present by police officers and there are certain tasks that police officers ought to be prohibited from performing—even when their failure to perform these tasks would undermine a state's ability to control immigration.

In cases like this, which can be extended to include cases of employment, renting a home, enrolling children in school, and other everyday activities, we find that protections against the excesses of a state's immigration enforcement mechanism do not only protect citizens but extend to everyone present, including undocumented immigrants. This canopy of protections is a presumptive check on a state's ability to control immigration. In other words, there are certain things a legitimate state is, all



things being equal, prohibited from doing even when failing to do so will negatively impact its ability to control immigration. In the example just provided, we see that a state is *prima facie* prohibited from using its own police force in its enforcement of immigration law. The same logic would also entail that a state will have duties to immigrants as workers, renters, parents, and human beings—irrespective of their immigration status.³⁶ True, these sorts of protections might not necessarily generate positive rights. Nonetheless, they are overriding negative rights that, all things being equal, protect undocumented immigrants from a state's enforcement mechanism.

Earlier I mentioned an argument by Michael Blake that explicitly prohibited discriminatory admission and exclusion policies, while at the same time allowing that a state could maintain its presumptive right to control immigration. Given the parallel between that argument and this one, the reader might at this point wonder why a similar argument cannot be run with respect to immigration enforcement. The difference is that enforcement does not have the same amount of flexibility as there is in determining criteria for admission and exclusion. Under Blake's argument, a state's ability to exclude was never compromised by its anti-discriminatory commitment (i.e., it was never forced to admit any nonmembers). A state was only prohibited from using explicitly discriminatory criteria when, and if, it decided to exclude nonmembers. The two commitments could, therefore, coexist with each other.

With respect to immigration enforcement, however, a state is much more restricted in what it can do to disassociate itself from nonmembers—at least in ways that are consistent with prior anti-discriminatory commitments. The difficulty is that citizens and immigrants (both documented and undocumented) are intermingled within society, and a state's immigration enforcement mechanism is being asked to disentangle them in a way that also respects the rights of citizens. If the argument provided above is sound, a state will therefore, at times, be forced to interact with undocumented immigrants but its anti-discriminatory commitments will prohibit it from using these interactions as occasions to deport them. A state will be put in a bizarre position of having to actively restrict itself from enforcing its own immigration laws. In short, unlike determining its admission and exclusion criteria, a state's presumptive right to control immigration will come into conflict with anti-discriminatory commitments in matters concerning immigration enforcement and here a clear choice must be made.



Conclusion

I would like to be clear that my position is not that philosophers who argue in favor of a state's presumptive right to control immigration are somehow closet xenophobes. Instead, this article should be taken as an invitation to moral and political philosophers to consider more fully the potential for discrimination inherent in immigration enforcement. The position I have tried to lay out is that anti-discriminatory commitments cannot coexist with a state's presumptive right to control immigration, at least not if we take enforcement into consideration. I do not argue with the claim that a state has a right to security and self-determination, but I maintain that this right does not necessarily entail a presumptive right to control immigration—at least not if one wishes to remain a staunch opponent of discrimination. Therefore, the burden of proof must be on states to show how their immigration policies are not only *not* based on racism and ethnocentrism, but also how the enforcement of these policies will not give rise to incidents of xenophobia. My contention is that the only consistent way of accomplishing this task is by respecting and extending immigrant rights. In other words, by acknowledging that with regard to immigration controls the presumptive right is on the side of immigrants, including undocumented immigrants, and not the state. We should, therefore, begin by presuming that all persons present have the right to be present—even when this presumption threatens to undermine a state's ability to control immigration.

NOTES

1. See Michael Blake, "Immigration, Association, and Antidiscrimination," *Ethics* 122, no. 4 (2012).
2. Here I am largely following the definition of xenophobia put forth by Ronald R. Sundstrom in "Sheltering Xenophobia," *Critical Philosophy of Race* 1, no. 1 (2013). On page 71 of that article, he writes that xenophobia is "a subjective belief or affect, usually from the perspective of an individual who is in their imagination, fully rooted in the nation, that some other person or group cannot be a part of that nation. These strangers cannot be authentic participants of the cultural, linguistic, or religious traditions of the nation they inhabit; they do not derive from soil of the nation's land or the blood of its people."
3. Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1997), 331.
4. This is the name given to Australia's overall immigration policy that spanned from 1901 until 1973. This policy aimed at creating a homogenously "white" population



- within Australia by allowing mostly northern Europeans to immigrate while at the same time denying entry to nonwhite immigrants.
5. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 47.
 6. David Miller, "Immigrants, Nations, and Citizenship," *The Journal of Political Philosophy* 16, no. 4 (2008): 204.
 7. Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 138.
 8. Michael Blake, "Immigration," in *A Companion to Applied Ethics*, ed. R. G. Frey and Christopher Heath Wellman (Oxford: Blackwell Publishing, 2003), 224–37, 236, 233.
 9. Wellman, "Immigration and Freedom of Association," 141.
 10. Walzer, *Spheres of Justice*, 62.
 11. 1790 Naturalization Act, Chap. 3; 1 Stat 103., 1st Cong., 2nd Sess. (26 Mar. 1790).
 12. Chinese Exclusion Act of 1882, Chap. 126, 47th Cong., 1st Sess. (1882).
 13. 1917 Immigration Act, H.R. 10384; Pub.L. 301; 39 Stat. 874., 64th Cong., 2nd Sess. (5 Feb. 1917).
 14. 1924 Immigration Act; also see Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004), 23.
 15. 1943 Magnuson Act, H.R. 3070; Pub.L. 78-199; 57 Stat. 600.78th Cong., 2nd Sess. (17 Dec., 1943).
 16. 1952 Immigration and Nationality Act, H.R. 13342; Pub.L. 414; 182 Stat. 66. 82nd Cong., 1st Sess. (27 June 1952).
 17. 1965 Immigration and Nationality Act, H.R. 2580; Pub.L. 89-236; 79 Stat. 911. 89th Cong., 2nd Sess. (3 Oct. 1965).
 18. David Roediger, *Working Towards Whiteness: How America's Immigrants Become White* (New York: Basic Books, 2006); and Jennifer Ludden, "1965 Immigration Law Changed Face of America," *National Public Radio*, 14 June 14 2010, <http://www.npr.org/templates/story/story.php?storyId=5391395>.
 19. See note 2 for the definition of xenophobia that I am working with.
 20. See for example Kevin R. Johnson, "The Forgotten 'Repatriation' of Persons of Mexican Ancestry and Lessons for the 'War on Terror,'" *Pace Law Review* 26, no. 1 (2005).
 21. See for example *Takao Ozawa v. U.S.*, 260 U.S. 178 (1922). In this case Takao Ozawa, who had lived in the United States since he was a young man and was by all accounts an exemplar of U.S. customs and culture, was denied U.S. citizenship on grounds that modern anthropology placed him outside the Caucasian race. In conjunction see *U.S. v. Bhagat Singh Thind*, 261 U.S. 204 (1923). In this case Bhagat Singh Thind went before the Supreme Court where he argued that contemporary anthropology placed him within the Caucasian race. The court conceded this point, but rejected Thind's request for U.S. citizenship on grounds that his lack of U.S. customs and culture made him nonwhite and therefore ineligible for citizenship.
 22. See for example Arnaldo De Leon, *IN RE Ricardo Rodriguez: An Attempt at Chicano Disfranchisement in San Antonio, 1896–1897* (San Antonio: Caravel Press, 1979).



23. Ngai, *Impossible Subjects*, 261.
24. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Also see Kevin R. Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press, 2004), 30–31.
25. *United States v. Martinez-Fuerte*, 428 US 543 (1976).
26. Michael Hoefler, Nancy Rytina, and Bryan C. Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010," *Office of Homeland Security* (Feb. 2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.
27. "Attrition through enforcement" is a strategy that seeks to reduce the number of undocumented immigrants in the United States by employing harsh domestic policies that attempt to make life so hard for immigrants that they begin to "self-deport." See Jessica Vaughan, "Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population," *Center for Immigration Studies* (Apr. 2006), <http://www.cis.org/Enforcement-IllegalPopulation>.
28. Pew Hispanic Center, "2007 National Survey of Latinos: As Illegal Immigration Issue Heats Up, Hispanics Feel a Chill" (19 Dec. 2007), <http://pewhispanic.org/reports/report.php?ReportID=84>.
29. Blake, "Immigration, Association, and Antidiscrimination," 750.
30. In fact, according to some legal experts, this is the reading on which Justice Kennedy upheld section 2(B) of Arizona's SB1070—the notorious "show me your papers" provision. According to Charles Kuck, the former National President of the American Immigration Lawyers Association, the Supreme Court's ruling in *Arizona v. United States* on the "show me your papers provision" was that it "must be narrowly construed and enforced in order for it to remain constitutional. . . . In order to enforce a show me your papers provision, the State would have to check the immigration status of every person, in every stop, for every crime, every time. Short of doing this, racial profiling will occur, since there could be no legitimate way to determine someone's immigration status." Charles Kuck, "The Supreme Court and Immigration Arizona v. United States," *Musings, on Immigration*, 25 June 2012, <http://musingsonimmigration.blogspot.com/2012/06/supreme-court-and-immigration-arizona-v.html>.
31. While they might not put it in these exact terms, this overreach of sovereign "disciplinary" power seems to be the same worry that motivates the work of such thinkers as Michel Foucault and Giorgio Agamben. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998); *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999); and *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005); Michel Foucault, *Security, Territory, Population (Lectures at the College de France)*, ed. Michel Senellart et al., trans. Graham Burchell (New York: Palgrave Macmillan, 2009).
32. Under the "Plenary Power Doctrine" the U.S. federal government is free to deport noncitizens without judicial review and because deportation is not considered a



punishment for a crime. Noncitizens also do not have recourse to many important constitutional protections, including the right to due process and equal protection, while in “removal proceedings.” See Robert Senh, “The Liberty Rights of Resident Aliens: You Can’t Always Get What You Want, but if You Try Sometimes, You Might Find, You Get What You Need,” *Oregon Review of International Law* 11, no. 1 (2009): 137–78.

33. This is an important point to keep in mind because the United States has in recent years wrongfully deported some of its own citizens and people who were otherwise eligible to remain in the country. In one case, the citizen wrongly deported was a developmentally handicapped man, whose return trip was traumatic and very easily could have ended in tragedy. (See Kemp Powers, “Group Says U.S. Citizen Wrongly Deported to Mexico” *Reuters* [11 June 2007], <http://www.reuters.com/article/2007/06/11/us-usa-immigration-deportation-idUSN1118919320070611>.) A different case did end in tragedy when a wrongly deported man died in a fire inside the Honduran jail where the Honduran immigration agency was holding him. See Ruxandra Guidi, “Honduran LA Resident Accidentally Deported, Then Dies in Prison Fire,” *Southern California Public Radio* (2 Mar. 2012), <http://www.scpr.org/news/2012/03/02/31481/honduran-resident-los-angeles-wrongfully-deported>.
34. In the United States, federal law currently allows for immigration enforcement and local law enforcement to form a partnership under a program called “Secure Communities.” For more information on this specific program see http://www.ice.gov/secure_communities/. Also, this linking up of local law enforcement with immigration enforcement has appeared in various state immigration bills. The most notorious of these being Arizona’s SB 1070. See State of Arizona Senate, Forty-Ninth Legislature, Second Regular Session 2010, Senate Bill 1070.
35. These are households were the individual members that makeup that household can have varying degrees of immigration statuses that range from undocumented to full citizenship.
36. For a similar argument see Joseph H. Carens, “The Rights of Irregular Migrants.” *Ethics & International Affairs* 22 (2008), doi: 10.1111/j.1747-7093.2008.00141.

