

CONSIDERING RACE IN AMERICAN IMMIGRATION JURISPRUDENCE

Imagine that you are President, fifteen years from now. You have been sitting in the Oval Office, thinking to yourself for over an hour. The silence is uncommon, considering your hectic schedule, and reflects the gravity of the situation and importance of the decision you must make. Time is moving slowly. Your mind races from one impossible solution to the next. Time is running out.

The atrocities of September 11 seem like a distant memory. Since then, the vigilance of your predecessors has secured stability and complete freedom from domestic terror. This was no small task. Threats large and small presented themselves; each was disrupted, averted, or deterred. As time passed, the nation gradually transitioned from constant fear to a sense of security. Just like every candidate for President since September 11, during your campaign you declared that you had not forgotten that day and promised to protect the nation and maintain its safety. Your promises are being tested now.

As you fidget in your seat you re-read the short memo that was delivered to you this morning. The memo is similar to every intelligence memo that you have received every day since taking office except that it has three characteristics that you have never seen at the same time. First, the threat described in the memo is imminent. The attack is in late stages of development, scheduled to occur in six days. Second, the threat is enormous. Individuals have acquired a weapon of mass destruction and have smuggled it to a major metropolitan area. Third, the threat is relatively specific. Your intelligence, verified by comparison across agencies and with our allies, indicates that the perpetrators are a group of about twelve individuals of Mexican or Asian descent. Despite this level of specificity, what strikes you is that what you do know is dwarfed by what you do not know: You know neither what city is under attack nor actionable descriptions of the inevitable perpetrators.

Your intelligence experts and national security advisor have prepared a plan of action in the short hours that they have known of this threat: a massive incarceration of all individuals of Mexican or Asian descent in major metropolitan areas. You do not want to use this plan. You have done the calculations a dozen times and you know that due to current law enforcement capabilities and available

space in prisons, implementation would require rapid deportation of many who fit the vague characteristics described in the memo. Additionally, although citizens may indeed be the perpetrators of this crime, you are uneasy with the plan because it would necessarily target both aliens and citizens alike. Furious when you were presented with this solution, you demanded that your team come up with alternatives.

Your fury has turned to anxiety. The time that you have spent thinking alone has not garnered any solutions and has drawn the nation closer to its fate. The uncommon silence, silence that you wished for so many mornings, is unwelcome now because it indicates that which you already know: Your team has no alternatives. You knew that you would have to make important decisions, but the decision you are about to make will define your presidency, your life, and the lives of many people in America. You shift uneasily in your chair, and pick up the phone.

INTRODUCTION

If, for the sake of national security, you were forced to make a decision that would limit the rights of individuals inside the United States, which groups' rights would you limit first? In the 2003 term, with *Demore v. Kim*,¹ the Supreme Court held that mandatory detention of a lawful permanent resident ("LPR")² pending a deportation hearing did not violate the Due Process Clause of the Fifth Amendment. After *Kim*, the Federal Government has the right to detain LPRs, prior to a determination regarding deportation, without having to give individualized justification for—and without giving the immigrant the opportunity to challenge—the detention.³ The *Kim* decision, and its resulting restriction of LPR rights, was unexpected in light of general trends in

¹ 538 U.S. 510 (2003).

² Lawful permanent resident aliens include close relatives of U.S. citizens who are beneficiaries of visa petitions filed by citizen spouses and parents. See Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b)(2)(A)(i) (2000). This also includes persons granted permanent residence as employees with special skills not possessed by other LPRs or citizens. See *id.* § 203(b). LPRs can be removed on various behavior-related grounds, including criminal convictions. See *id.* § 237(a).

³ *Kim*, 538 U.S. 510.

noncitizen⁴ rights jurisprudence⁵ as well as specific Supreme Court precedent that evidenced movement by the Court in the direction of granting broader rights to resident aliens.⁶

Kim was not surprising, however, if viewed with a more comprehensive understanding of the role the “other” has played in American immigration law. Specifically, when taking the concept of race into account, the blurry and contradictory landscape of immigration jurisprudence becomes more coherent—betraying an unsettling image of immigration law. The Court’s reliance on the plenary power doctrine to limit the rights of this “most favored”⁷ category of immigrants has far reaching implications not only for the specific LPRs being held pending deportation in the status quo but also for the broader conception of immigrant rights in America.

Part I of this Comment focuses on the history of legal permanent resident due process rights in American immigration law. This Part provides a pragmatic framework for understanding the recent procedural due process inconsistency as well as an explication of the most recent decisions that frame the reality for the many LPRs in the United States. This history shows that over time legal permanent residents have been afforded increasingly protected rights but that recently many of those rights have been rolled back. Specifically, this Part dissects the *Kim* decision and analyzes its detrimental impact upon the evolving treatment of due process rights of all aliens in the United States.

Part II explores the role that racism has played, throughout history and in the present, for the constructed immigrant “other” in immigration law. This Part analyzes a historical root of immigration law, the plenary power doctrine, and the role that racism has played in its construction and maintenance. Part II continues by providing a theoretical explanation of racism in immigration law. Finally, this Part integrates the *Kim* decision into this historical and theoretical

⁴ The term “alien” is employed throughout the Comment because it is the term used by the majority of the literature. That being said, the term “noncitizen” would be preferable for the goals of this project because it lacks the pejorative connotation of “alien.” See generally Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 268–70 (1997).

⁵ This Comment provides a more complete description of the rights afforded persons with LPR status in Part I.

⁶ See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (limiting the plenary power doctrine by holding that methods used by Congress to regulate immigration must be constitutionally permissible).

⁷ The courts have termed LPRs “the most favored category of [immigrant]” *Kim v. Ziglar*, 276 F.3d 523, 528 (9th Cir. 2002), *rev’d sub nom*, *Demore v. Kim*, 538 U.S. 510 (2003).

foundation to establish how racism plays out in current immigration law, policy, and precedent. This Part argues that society's blindness to the underlying role that race plays in the system has created immigration policy with negative effects that could not have been foreseen.

Part III discusses the methodological void in current immigration scholarship for the concept of race. By actively taking race into account not only in a traditional analysis of the law but also in a nontraditional, critical race theory analysis, the Comment serves as a vehicle, itself, to counter traditional immigration jurisprudence's underlying disregard for race as a concept and critical race theory as a methodology. Combination—the more traditional immigration analysis found in Parts I and II.A. coupled with the more theoretical race intervention analysis found in Part II.B—will serve to facilitate confrontations, comparisons, and permutations that may reconcile the disjointed and erratic jurisprudence in this area. This combination of the traditional analysis, that takes race into account, and the unconventional analysis, which also takes race into account, may be the most effective method for introducing immigration jurisprudence to the possibility that race should always be considered. This Part argues that considering these nontraditional methodologies, although not the only or best solution to problems in this area of the law, is necessary to move forward into an era of coherent immigration policy.

Coming to grips with the *Kim* decision and overall immigration jurisprudence while utilizing a critical race theory lens may provide a greater understand of underlying trends and deconstruct the discriminatory basis for some immigration policy. This Comment concludes by describing the uncertain future for the “other” in immigration law at the point where due process liberty and security of the nation meet.

I. THE HISTORY OF LEGAL PERMANENT RESIDENT DUE PROCESS RIGHTS

Although aliens do not enjoy exactly the same rights as U.S. citizens—as there are elements of immigration law that inherently restrict their rights—in all other areas LPRs have consistently attained rights similar in both quality and quantity to those of actual citizens.⁸ In the area of immigration law,

⁸ See *Zadvydas*, 533 U.S. 678; see also David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 93–95 (explaining that LPRs, with minor exceptions, have rights comparable to citizens in many areas of the law).

however, the judicially constructed plenary power of the political branches⁹ to regulate matters has precluded judicial oversight and limited the ability of aliens to obtain due process rights.¹⁰ The narrow exception to the plenary power principle has been the due process rights of LPRs. In immigration, LPRs have gained broad due process rights, carving out a special class exception, despite the plenary power of Congress and the Executive over immigration.¹¹ This special exception, however, is in jeopardy of complete rollback.¹² This Part describes, first, the advances LPRs have made generally in due process protection, and, second, the most recent specific setback in this trend: *Demore v. Kim*.

A. *The Court Recognizes that LPRs Have Broad Due Process Rights*

The state power to lock up a human being is not trivial. No matter what the classification of person, this power must have safeguards and standards. In the United States, the Constitutional system safeguards against physical constraint with the Due Process Clause. Indeed, “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”¹³ Lawful permanent residents have been granted broad due process rights in all areas of the law. Even in the special area of immigration, where the plenary power doctrine restricts judicial oversight of due process concerns, LPRs have achieved substantial due process rights.

1. *LPRs Have Extensive Due Process Rights Outside of Immigration Law*

The Constitution and the courts clearly make a distinction as to the amount, kind, and quality of rights that citizens and aliens enjoy.¹⁴ The Bill of Rights—specifically the Due Process and Equal Protection Clauses—makes reference to a much broader category of individuals, when discussing who is entitled to rights protection, than merely citizens. The courts reference the use of “persons” in these clauses to extend due process protections to aliens in

⁹ The political branches are the executive and legislative.

¹⁰ See Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should Not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1112 n.68 (2002).

¹¹ See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

¹² See *Kim*, 538 U.S. 510.

¹³ David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1008 (2002) (quoting *Zadvydas*, 533 U.S. at 690).

¹⁴ See *Martin*, *supra* note 8, at 85; see also *Mathews v. Diaz*, 426 U.S. 67, 84 (1976).

many areas of the law.¹⁵ Although this expansive application of due process and equal protection principles has not yielded complete equality between aliens and citizens,¹⁶ it has brought relatively comparable protections in many areas of society. Thus, courts have found substantial due process protections appropriate for LPRs.

In terms of general rights protection, the Court has recognized LPR due process rights since *Yick Wo v. Hopkins*.¹⁷ In *Yick Wo*, the Supreme Court struck down unequal administration of a San Francisco laundry ordinance that systematically disadvantaged Chinese aliens. As such, equal protection and enforcement of the laws applied regardless of alienage. *Yick Wo* thus represents the foundation and starting point for any analysis of due process rights for LPRs as well as for all other categories of immigrants. Making good on the broad reference to “persons” in the Bill of Rights, the Court held that noncitizens were entitled to due process rights.

Since this beginning, courts have built on noncitizens’ right to due process. Nearly thirty years after *Yick Wo*, but still early in the development of immigration law, the Court, in *Truax v. Raich*, protected resident aliens from state targeted private employment discrimination.¹⁸ When the state passed legislation intended to restrict employment of LPRs in the private sector, the Supreme Court deemed the statute unconstitutional.¹⁹ More recently, courts have built on this foundation by extending due process and equal protection rights to resident aliens in many areas of the law—including rights to employment and state funded goods.²⁰ Importantly, in *Plyler v. Doe*, the Court gave aliens protection under the Fourteenth Amendment’s Equal Protection Clause, holding that aliens could not be denied public benefits.²¹ Thus, LPRs,

¹⁵ See Martin, *supra* note 8, at 85 (examining the textual differences between the Constitution and the Bill of Rights and accompanying differential treatment by the courts in many areas of the law).

¹⁶ *Mathews*, 426 U.S. at 79–80 (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

¹⁷ 118 U.S. 356, 374 (1886) (holding that legal permanent residents were entitled to due process protection in the same capacity that citizens were entitled to that protection).

¹⁸ *Truax v. Raich*, 239 U.S. 33 (1915).

¹⁹ *Id.*

²⁰ See *Plyler v. Doe*, 457 U.S. 202 (1982) (applying the Equal Protection Clause to reject denial of public education to aliens); *In re Griffiths*, 413 U.S. 717 (1973) (striking down a citizenship requirement for the practice of law).

²¹ *Plyler*, 457 U.S. at 210.

continuing on into current jurisprudence, have extensive and far reaching due process rights in many important areas of the law.²²

One major exception to this evolution of due process and equal protection rights for lawful permanent residents was the denial of political rights,²³ such as participation in democratic processes.²⁴ Many LPRs are excluded from politics and participation in elections.²⁵ Despite this caveat, which has not been applied universally,²⁶ in almost all areas of society, except for immigration, the courts have systematically granted due process rights to aliens on par with those afforded U.S. citizens. Indeed, courts made alienage distinctions in the application of due process rights a suspect categorization unless they were “sufficiently tied to the regulation of immigration or naturalization.”²⁷ This creation of a suspect categorization is important because requiring that the state provide compelling justification for citizenship classifications highlights the extent that LPRs have achieved virtual equality with citizens in areas of rights protection.²⁸ When immigration concerns are not at stake, “the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders.”²⁹ As such, courts generally recognize broad LPR due process rights outside of the area of immigration.

²² *Id.*; *Graham v. Richardson*, 403 U.S. 365 (1971); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

²³ This is, by far, not the only difference in treatment between citizens and aliens. The extent of the differences is the subject of a rich and developed literature the specifics of which are beyond the scope of this Comment.

²⁴ *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).

²⁵ *Id.* (“The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.”). In most instances, citizenship is a requirement to vote. Additionally, many local, state, and federal public offices have citizenship requirements. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 4. The extent of allowed alien participation in democratic systems is a rich and interesting area of the law, but it is unfortunately beyond the scope of this Comment.

²⁶ For many years, citizenship was not an invariable requirement to voting. *See Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). Additionally, in some modern jurisdictions resident aliens are permitted to vote in local elections. *See generally* Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259 (1992). Indeed, some have argued that a truly representative democracy should include the votes of all people, whether they are citizens or not. *See generally* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right To Vote?*, 75 MICH. L. REV. 1092 (1977).

²⁷ *Martin, supra* note 8, at 88.

²⁸ *See Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (suggesting that any state-law usage of alienage distinctions amounted to a suspect classification and demanding a compelling justification).

²⁹ *Jean v. Nelson*, 472 U.S. 846, 881 (1985) (Marshall, J., dissenting).

2. *LPRs Have Extensive Due Process Rights Even Inside Immigration Law*

During America's first century as a nation, Congress did little to regulate immigration.³⁰ Specifically, the federal government had little involvement with the regulation of immigration prior to 1875, and consequently each individual state had distinct power to regulate immigration through many different types of legislation.³¹ Federal regulation began with the Page Act,³² which created a nationwide ban on immigration of certain Chinese women, and the Chinese Exclusion Act,³³ which responded to anti-Chinese sentiment in the West by suspending immigration of Chinese laborers for ten years.³⁴ In the ensuing litigation, the Supreme Court upheld these decisions by Congress to discriminate in immigration and, more importantly, established the plenary power of the political branches to control immigration.³⁵ The power of Congress to exclude aliens was deemed "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government."³⁶ Thus, in the context of immigration, the plenary power doctrine has given the legislative and executive branches free reign to make decisions irrespective of the due process considerations of the aliens impacted by their rulemaking.³⁷ This deference has had drastic effects on the due process rights of many immigrants who have not shared

³⁰ Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 297 (2003) (citing EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 11–46 (1981)).

³¹ See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–43 (1996).

³² Act of Mar. 3, 1875, ch.141, 18 Stat. 477. The Page Act ostensibly intended to exclude only Chinese women who would be prostitutes in America, but it was interpreted so broadly that it also precluded the entry of Chinese wives. See Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 380 (1996).

³³ See Act of May 6, 1882, ch.126, 22 Stat. 58, 58–61, amended by Act of July 5, 1884, ch.220, 23 Stat. 115 (repealed 1943).

³⁴ While many commentators begin their analysis of federal immigration policy with the Chinese Exclusion Act, the Page Act actually predates it.

³⁵ See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (holding that immigration policy is under the exclusive control of Congress).

³⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (internal quotations omitted).

³⁷ This nearly absolute deference to the political branches continued throughout history. See *Carlson v. Landon*, 342 U.S. 524 (1952) (four aliens detained without bail pending deportation for membership in the Communist Party); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103 (1927) (deporting an alien for advocating the overthrow of the U.S. government).

popular political views.³⁸ This federal control, however, has not completely been without oversight by the judicial branch.

Complete judicial deference to the political branches, implemented through absolute respect for the plenary power doctrine, was fractured by *Zadvydas v. Davis*,³⁹ a 2001 Supreme Court decision. *Zadvydas* evidenced the Court's unwillingness to continue to blindly follow the plenary power doctrine and completely ignore the due process concerns of LPRs. Although the case fell well short of explicitly repudiating the doctrine of plenary power, the case did, importantly, question a legislative determination in the area of immigration law.

In *Zadvydas*, the Court considered the question of law created when an LPR, who is deportable, is ordered to be deported but whose country refuses to accept him.⁴⁰ Put in other words, the alien was told to leave but had nowhere to go. In this circumstance, the Court overturned the indefinite detention of removable aliens whose homelands will not accept their repatriation.⁴¹ In the case, the alien would have been held indefinitely because he was held pending a deportation that was impossible. Crucially, the Court held that plenary power over immigration matters was subject to "important constitutional limitations."⁴² This ability to subject regulation of immigration to "constitutional limitations" signaled that the Court was willing to begin to review due process claims of aliens.⁴³ As such, many commentators hailed *Zadvydas*, a decision limited by unique facts, as an important signal of retreat from absolute deference to the political branches.⁴⁴

Zadvydas was an important decision because it expanded the historical precedent that makes exception to the plenary power doctrine's complete bar of judicial review of due process claims of resident aliens. Although the

³⁸ See, e.g., *Carlson*, 342 U.S. 542; *Vajtauer*, 273 U.S. 103.

³⁹ 533 U.S. 678 (2001).

⁴⁰ *Id.* at 684. Actually, Germany, Lithuania, and the Dominican Republic all told the Immigration and Nationalization Service that they would not take custody because he was not a citizen of their countries. *Id.*

⁴¹ *Id.* at 701.

⁴² *Id.* at 695.

⁴³ T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (noting that the phrase "constitutional limitations" may "represent a radical shift, a turning point" for immigration law).

⁴⁴ See, e.g., *id.*; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002). To be fair, there was, before *Zadvydas*, precedential support for judicial review of legislative and administrative decisions on the basis of constitutional considerations. See *INS v. Chada*, 462 U.S. 919, 941-42 (1983).

history of substantial deference to the plenary power doctrine is long and consistent,⁴⁵ there exists support for the concept that all aliens should be afforded more complete due process protections once inside the United States.⁴⁶ Indeed, early in immigration jurisprudence, the Court held that “foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country.”⁴⁷ Throughout its history, the Court has used this narrow exception to the plenary power doctrine for due process rights of aliens once physically inside the United States.⁴⁸ U.S. law makes a large distinction between an alien admitted for permanent residence purposes, such as LPRs, as opposed to an alien admitted for a temporary stay, such as those with student visas.⁴⁹ Just as in *Yick Wo* and other early Supreme Court cases,⁵⁰ in which the Court began to afford LPRs general due process protections, the Court began to recognize resident aliens’ due process rights in the specific context of immigration jurisprudence. One of the most striking early manifestations of these rights afforded to LPRs, *Wong Wing v. United States*,⁵¹ is an example of this recognition of resident alien due process rights.⁵²

The key distinction—residence—is clear, as aliens not yet residents inside the United States have been historically denied due process protections.⁵³

⁴⁵ See *supra* notes 35–37 and accompanying text; *infra* notes 101–06 and accompanying text; see also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁴⁶ See *Lau Ow Bew v. United States*, 144 U.S. 47 (1892).

⁴⁷ *Id.* at 61–62; see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 658 (1892) (holding that immigration officials had to do examinations “on board of the ship or after removal by him from the ship temporarily for examination . . . [with] no power or authority to examine into the status of aliens already ashore in the United States”).

⁴⁸ See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (stating that aliens have right to fairness in the system because their “roots may have become . . . deeply fixed in this land”); *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (establishing that when aliens are in the United States, the Court will hear constitutional challenges based on procedural due process).

⁴⁹ See *Martin*, *supra* note 8, at 93–97.

⁵⁰ See *supra* notes 17–22 and accompanying text.

⁵¹ 163 U.S. 228 (1896) (striking down a federal act that authorized the detention of illegally present Chinese aliens in the United States because it was illegitimate to inflict punishment or deprive of property or liberty without due process).

⁵² *Id.*

⁵³ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (holding that whatever due process Congress deemed appropriate was legitimate in regards to an alien’s entry to the United States and that the petitioner’s status as a “war bride” did not legitimize entry); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding that an alien born abroad but that had lived in the United States for twenty five years, could, upon leaving the country and attempting to return, be treated as an entrant under the regulations and excluded without a hearing).

Aliens' ability to take advantage of this exception and receive due process rights despite the political branches' plenary power over immigration law rests upon the status of the alien as a Lawful Permanent *Resident*.⁵⁴ The distinction between an "alien who has effected an entry into the United States and one who has never entered" is present throughout immigration law⁵⁵ because "once an alien enters the country, the [alien's] legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States."⁵⁶ Thus, once aliens enter the United States, they are provided a level of constitutional rights available to all persons within its borders.

As such, categorization of aliens as either physically inside or outside the United States, and concomitantly either deportable or excludable,⁵⁷ is crucial to Supreme Court decisions in this area of the law.⁵⁸ The ultimate determination of the extent of rights protection an alien receives depends upon whether the alien is an entrant to the United States and has achieved LPR status,⁵⁹ as "even while the Court has been highly deferential to the political branches' plenary power over substantive deportation grounds, it has insisted that LPRs are entitled to an undiluted measure of procedural due process protection."⁶⁰

⁵⁴ See Motomura, *supra* note 11, at 1634–37.

⁵⁵ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)). Interestingly, this distinction shows recently to play more of a limited importance. See *Clark v. Martinez*, 125 S. Ct. 716 (2005) (applying the *Zadvydas* standard regarding reasonable time of detention to inadmissible aliens).

⁵⁶ *Id.*; see, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.

Id. (internal citations omitted); but see T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 867 (1989) ("[R]esident aliens—whether in exclusion or deportation proceedings—are entitled to due process.").

⁵⁷ See 8 U.S.C. § 1227(a) (2000); N. Alejandra Arroyave, *Preserving the Essence of Zadvydas v. Davis in the Midst of a National Tragedy*, 57 U. MIAMI L. REV. 235, 237 (2002) ("[A]n alien is considered deportable as opposed to excludable because he or she is present within the United States.").

⁵⁸ See *Martin*, *supra* note 8, at 94.

⁵⁹ See *id.*

⁶⁰ *Id.*

Aliens inside the United States are entitled to due process rights.⁶¹ This is evidenced by the protections they have received against preventive detention, i.e., detention without an individualized hearing.⁶² Indeed, aliens enjoyed full due process protections during criminal proceedings, except in certain specific and narrow circumstances.⁶³ These are circumstances:

where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or flight risk; (2) is dangerous because of a harm-threatening mental illness that impairs his ability to control his dangerousness; or (3) is an enemy alien during a declared war.⁶⁴

Importantly, in determining whether the alien is “an individual falling within the first two categories,” the Court has held that an individualized hearing is necessary.⁶⁵ This historical guarantee of procedural safeguards, paired with the *Zadvydas* decision, showed that the Court was beginning to recognize broader fundamental LPR rights to due process.

B. The Impact of Demore v. Kim on LPR Due Process Rights

Although it appeared that the plenary power doctrine was fading as a justification for denying aliens due process rights,⁶⁶ the *Kim* decision represents a repudiation of recent gains. Indeed, this tacit reversal signals a new era of judicial deference to congressional rulemaking regarding the procedural rights of aliens inside America. This subpart tracks the *Kim* decision, its fractured majority, and two major implications for LPRs.

⁶¹ *E.g.*, *Landon*, 459 U.S. at 21; *see also* Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (applying the full measure of due process protection to a returning LPR facing exclusion proceedings regarding his alleged terrorist connections).

⁶² *See* Cole, *supra* note 13, at 1009–11.

⁶³ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁶⁴ *See* Cole, *supra* note 13, at 1010 (internal citations and quotations omitted).

⁶⁵ *Id.* at 1010–11; *see also* *United States v. Salerno*, 481 U.S. 739 (1987) (holding that an individualized hearing was necessary in the Bail Reform Act context). *Contra* *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (“Persons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States and have little hope of clemency [The] legal right [of aliens in the Petitioner’s position] to remain in the United States has come to an end.”) (emphasis in original). Note that *Parra* considers specifically the contingency that the alien is successful in his or her case. *See* Pauw, *supra* note 10, at 1105 n.43 (citing Brief of Amici Curiae Citizens and Immigrants for Equal Justice et al. at 10–20, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491)).

⁶⁶ *See supra* Part I.A.

Kim, a citizen of South Korea, entered the United States at the age of six and became a lawful permanent resident two years later.⁶⁷ Kim was convicted of two crimes—burglary at the age of eighteen and theft at the age of nineteen.⁶⁸ Pursuant to the Immigration & Nationality Act,⁶⁹ the Attorney General could hold in custody an alien who was deportable subsequent to conviction for an “aggravated felony.”⁷⁰ Thus, the Immigration and Naturalization Service (“INS”) deemed Kim deportable on the grounds that his second offense, petty theft with priors, was an aggravated felony.⁷¹ As a result, the INS took Kim into custody.⁷²

Kim did not contest his convictions’ validity but filed a habeas petition claiming that detention pending a deportation hearing violated his Fifth Amendment due process rights because the INS did not make an individualized determination that he either posed a danger to society or was a flight risk.⁷³ Specifically, Kim challenged § 1226(c) because it prohibits release from detention even when the INS never asserts that the immigrant poses a danger to society or significant flight risk.⁷⁴ The district court sustained this facial constitutional challenge to the statute, holding the INS failed to justify no-bail detention over Kim’s liberty interest.⁷⁵

On appeal, the Ninth Circuit Court of Appeals declined to affirm the facial challenge to the law but held more narrowly that § 1226(c) was unconstitutional as specifically applied in Kim’s case.⁷⁶ The Ninth Circuit found that § 1226(c) violates substantive due process because Kim is an LPR.⁷⁷

⁶⁷ Kim v. Schiltgen, 1999 U.S. Dist LEXIS 12511, at *2 (N.D. Cal. Aug. 10, 1999).

⁶⁸ *Id.*

⁶⁹ Immigration and Nationality Act §§ 212(d)(5)(A), 236(b) (2000) (codified at 8 U.S.C. § 1182(d)(5)(A), 1226(b) (2000)).

⁷⁰ Aliens are deportable if convicted of an “aggravated felony,” a term of art defined in the statute and rigorously litigated in the courts. See 8 U.S.C. § 1227(a)(2)(A)(iii); see also Cook, *supra* note 30; Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIGR. L.J. 507, 515 (1997).

⁷¹ Kim, 1999 U.S. Dist. LEXIS 12511, at *2.

⁷² *The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: D. Due Process*, 117 HARV. L. REV. 287, 288–89 (2003) [hereinafter *The Supreme Court, 2002 Term*] (“The INS detained Kim without bail pursuant to 8 U.S.C. § 1226(c), which mandates the detention of criminal aliens pending their removal hearings.”); see also 8 U.S.C. § 1226(c)(1)(B).

⁷³ Kim, 1999 U.S. Dist. LEXIS 12511, at *4.

⁷⁴ *Id.* at *3–4.

⁷⁵ *Id.* at *29 (“[T]here are no circumstances under which § 236(c) could be valid.”).

⁷⁶ Kim v. Ziglar, 276 F.3d 523, 539 (9th Cir. 2002).

⁷⁷ *Id.* (holding “only that [the statute] is unconstitutional as applied to Kim in his status as a lawful permanent resident alien”) (emphasis added).

Importantly, and relying on *Zadvydas*, the Ninth Circuit concluded that the INS had not provided a justification “for no-bail civil detention sufficient to overcome a lawful permanent resident alien’s liberty interest[s].”⁷⁸ In a fractured decision, the Supreme Court reversed, holding that mandatory detention of an LPR prior to a deportation hearing did *not* violate Fifth Amendment due process right protections.⁷⁹

Chief Justice Rehnquist, writing for the Court, and joined on the substantive claim by Justices O’Connor, Scalia, Kennedy, and Thomas, referenced the legislature’s interest in detaining resident aliens because, as a class, they present flight risks and a danger to the community due to possible recidivism.⁸⁰ After establishing that the statute does not explicitly bar habeas review, the majority found that, fundamentally, the state’s interest outweighed the due process rights of the LPR. Put simply, the Chief Justice concluded that rules of immigration are intertwined with national security concerns, and since detention during removal proceedings is part of immigration rules, due process standards that would be unacceptable for citizens are legitimate. Chief Justice Rehnquist cited statistics and legislative history that supported the proposition that deportable aliens, as a class, represent a criminal threat to society and flight risk.⁸¹ Thus, deportation serves a state interest. The Chief Justice then stated that, “this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”⁸² Thus, Congress has the power to order the temporary detention of aliens during removal proceedings.⁸³

Chief Justice Rehnquist concluded by distinguishing *Zadvydas*. He argued that in *Zadvydas* the purposes of detention were unjustified because deportation was practically unattainable; in Kim’s case, detention was justified because the legislative history indicated the entire class of persons like Kim was a threat to society. Additionally, the Chief Justice argued that the detention in *Zadvydas* was “indefinite,” whereas the detention in this case was “much shorter.”⁸⁴ The Chief Justice’s rationale for mandatory detention

⁷⁸ *Id.* at 535.

⁷⁹ *Demore v. Kim*, 538 U.S. 510, 531 (2003).

⁸⁰ *Id.* at 518–20. The legislative history points to studies conducted that showed both that a percentage of aliens did not appear for deportation hearings if allowed free on bail and that there was a degree of recidivism among those who were not detained post conviction and prior to deportation. *Id.*

⁸¹ *Id.* at 518–21.

⁸² *Id.* at 522.

⁸³ *See Reno v. Flores*, 507 U.S. 292 (1993); *Carlson v. Landon*, 342 U.S. 524 (1952).

⁸⁴ *Kim*, 538 U.S. at 528 (internal quotation marks omitted).

pending a deportation hearing was thus that the legislative branch has plenary power to set immigration rules. Specifically, the Court found that detention is part and parcel to the deportation process over which Congress has plenary power.⁸⁵

Justice O'Connor, joined by Justices Scalia and Thomas, concurred with the majority on the merits of the case, but made a sweeping jurisdictional argument that betrays a broader vision of the plenary power doctrine. O'Connor argued for a complete lack of judicial involvement in the Attorney General's practices regarding the detention of "criminal aliens under § 1226(c) while removal proceedings are ongoing."⁸⁶ O'Connor read the text of the statute, which states that "[n]o court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole," to preclude any judicial oversight of action by the Attorney General pursuant to the aggravated felony provision in question.⁸⁷ This interpretation bans judicial oversight of LPR due process rights during deportation proceedings. Thus, a substantial minority of the Court believed that a "strong" version of the plenary power doctrine made this issue nonjusticiable.

Justice Kennedy's concurrence argued first that Kim had declined the opportunity to contest whether his crime was an "aggravated felony." Kennedy also maintained that the deportation hearing had not been unreasonably delayed. This set of arguments, with their close analysis of the facts of the case,⁸⁸ did not address the constitutional question of what due process rights LPRs retain during deportation proceedings.⁸⁹ Interestingly, Kennedy's concurrence cites *Zadvydas* and states that an LPR should be given an individualized determination as to flight risk and dangerousness if the continued detention becomes unreasonable or unjustified.⁹⁰ That stance highlights the tenuous nature of the substantive outcome achieved by the

⁸⁵ *Id.* at 522–23.

⁸⁶ *Id.* at 533 (O'Connor, J., concurring in part and concurring in the judgment).

⁸⁷ *Id.* at 533–34 (citing 8 U.S.C. § 1226(e) (2000)) (emphasis in original).

⁸⁸ This focus on the facts instead of the Constitutional question may indicate that Kennedy relies and defaults to his evaluation in *Zadvydas* of the Constitutional questions. See *Zadvydas v. Davis*, 533 U.S. 678, 705–25 (2001).

⁸⁹ *Kim*, 538 U.S. at 531–33 (Kennedy, J., concurring). This concurrence also upheld the jurisdiction of the Court to review determinations by the Attorney General on this issue. *Id.*

⁹⁰ *Id.* at 531 ("[D]ue process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing.").

majority. Kennedy represents the crucial swing vote in the decision, but unlike Rehnquist, he made no distinctions regarding the plenary power doctrine's role in justifying disparate due process treatment for LPRs. Thus, Kennedy is uniquely puzzling due to his use of language regarding LPR due process rights and his non-use of language drawing distinctions between citizens and aliens in terms of rights protection.

Justice Breyer's dissent, which disputed the material fact that Kim had conceded deportability, narrowly supported the majority's contention that mandatory detention is constitutional when an alien concedes deportability; however, Breyer did not rule on the underlying constitutional question.⁹¹ Breyer concluded that an individualized bail hearing is necessary when the alien contests deportability, and that that hearing must incorporate "bail standards . . . from the criminal justice system."⁹² Breyer thus maintained that Kim should have been able to obtain bail as long as he was "neither dangerous nor a flight risk."⁹³ Put simply, Breyer held that LPRs are entitled to individualized hearings, and that those hearings should emulate the due process rights inscribed in the criminal justice system.

Justice Souter, joined by Justices Stevens and Ginsburg, concurred in the Court's jurisdictional holding but dissented on the merits.⁹⁴ Souter's concurrence relied on the established precedent of recognizing LPRs as "persons" and granting them broad Due Process Clause protection.⁹⁵ Importantly, Souter noted that permanent resident aliens' ties to the United States make their liberty interests worthy of protection.⁹⁶ Indeed, "[t]he constitutional protection . . . is particularly strong in the case of aliens lawfully admitted to permanent residence LPRs [get] the opportunity to establish a life permanently in this country by developing economic, familial, and social ties *indistinguishable from those of a citizen*."⁹⁷ Souter reasoned that although an LPR is subject to federal removal power, that power may not be exercised without due process in light of the difficulty in distinguishing between the liberty interests of an LPR and those of a citizen, in both "practical as well as

⁹¹ *Id.* at 576–79 (Breyer, J., concurring in part and dissenting in part).

⁹² *Id.* at 578–79.

⁹³ *Id.* at 577. Indeed, Kim has a right to an individualized hearing because "constitutional claims to bail in these circumstances are strong." *Id.*

⁹⁴ *Id.* at 540 (Souter, J., concurring in part and dissenting in part).

⁹⁵ *Id.* at 543 ("It has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause."); *see supra* Part I.A.

⁹⁶ *Kim*, 538 U.S. at 543–44 (Souter, J., concurring in part and dissenting in part).

⁹⁷ *Id.* (emphasis added).

doctrinal terms.”⁹⁸ Souter argued that LPRs deserve due process rights and that these rights cannot be statutorily dismissed. Specifically, Souter stated that, “the government [cannot] avoid the Due Process Clause . . . by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away.”⁹⁹

Relying on *Zadvydas*, the dissent further argued that physical detention requires an individualized justification that outweighs the alien’s constitutional interest in avoiding that restraint.¹⁰⁰ Thus, Souter dissented from the majority’s reliance on the plenary power doctrine to bar review of due process protections, arguing that an individualized hearing is essential to the determination of whether the interests of the state outweighed the liberty interests of the LPR in any specific circumstance.

Demore v. Kim is interesting on many levels, but it presents two issues of particular importance. First, there is the broader question of jurisdiction. Although the majority found that Kim’s claim was justiciable despite the language in § 1226(e), a strong minority—O’Connor, Scalia, and Thomas—advocated a complete bar of any judicial oversight in this area of the law. This group would provide complete deference to the legislative and executive branches under the plenary power doctrine. Even though this view did not carry the day, *Kim* still represents a new era of deference to the plenary power doctrine. By referring to detention as part and parcel to immigration policy and, thus, subject to limited judicial review out of respect for the plenary power doctrine, the Court reversed a series of district court cases that had provided for broader alien due process rights during deportation proceedings.¹⁰¹ This reversal is far from resolute, however, considering the varied and fractured majority and the contradictory justifications provided for each decision within it. The ultimate result—moving the issue of due process rights during deportation proceedings into the broader category of

⁹⁸ *Id.* at 547.

⁹⁹ *Id.* at 551–52.

¹⁰⁰ *Id.* at 554.

¹⁰¹ *See, e.g.,* *Danh v. Demore*, 59 F. Supp. 2d 994, 999 (N.D. Cal. 1999) (finding that mandatory detention “triggers heightened review because it does not reflect a substantive decision over immigration policy, but rather a means for effectuating such a decision”); *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) (stating that “[w]hile the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention”); *Martinez v. Greene*, 28 F. Supp. 2d 1275, 1281 (D. Colo. 1998) (holding that mandatory detention is not a substantive immigration issue governed by the plenary power doctrine but rather the implementation of immigration decisions).

immigration—effectively placed Kim’s due process rights behind the veil of the plenary power doctrine.

Second, there is the more specific question of whether and when LPRs are due individualized hearings regarding deportability. The majority of the Justices—Stevens, Kennedy, Souter, Ginsburg, and Breyer—used language in their decisions concerning the need for individualized hearings to accommodate some semblance of due process rights. The outcome of the fractured decision, however, creates a regime with exactly the opposite effect; LPRs will not be given individualized determinations regarding their threat to society or flight risk. Instead, courts will defer to statistical justifications and legislative history to determine threat to society and flight risk for classes of individuals. In the end, the divergent language used by the Justices joining the majority may create confusion in lower courts regarding the right to individualized hearings.

Here, plenary power excused the limitation of due process rights traditionally afforded LPRs. The Ninth Circuit, reversed here, specifically noted *Zadvydas v. Davis* and the special exemption—providing due process rights even in the face of the plenary power doctrine—that resident aliens had attained in American immigration jurisprudence.¹⁰² The reversal of the Ninth Circuit, specifically on the determination that LPRs are owed a special level of due process rights in deportation proceedings, repudiates a mountain of precedent that has established due process rights for this class of aliens.¹⁰³ The result is that LPRs may not still be the “most favored category of aliens.”¹⁰⁴ Although this decision ultimately may or may not prove to have far reaching detrimental effects to LPRs’ due process rights,¹⁰⁵ what the future holds for non-LPR classes of aliens, who are not the most favored category, could be even more devastating.¹⁰⁶

¹⁰² See *The Supreme Court, 2002 Term, supra* note 72, at 289 (noting that the Ninth Circuit Court of Appeals concluded that “the government had failed to provide a special justification for no-bail civil detention sufficient to overcome a *lawful permanent resident alien’s* liberty interest in an individualized determination of flight risk and dangerousness”) (quoting *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002)) (emphasis added; internal quotations omitted).

¹⁰³ See *supra* Part I.A.

¹⁰⁴ See *Kim*, 276 F.3d at 528.

¹⁰⁵ See *Ashley v. Ridge*, 288 F. Supp. 2d 662, 671–73 (D.N.J. 2003). One district court ruling subsequent to the decision has interpreted *Kim* strictly to limit its impact on LPR due process rights. *Id.*

¹⁰⁶ See *The Supreme Court, 2002 Term, supra* note 72, at 297. “[*Kim*] casts an ominous shadow on the constitutional rights of all other aliens.” *Id.* at 288.

II. THE ROLE OF RACE IN AMERICAN IMMIGRATION LAW

The history of LPR due process rights, and specifically *Zadvydas*, cannot easily be reconciled with *Kim*. There are many explanations for the inconsistency presented, the most powerful of which relates to the timing of the decisions. Since September 11, 2001, national security has required tighter borders, active oversight, and control of the movement of people.¹⁰⁷ Thus, the change in context presented by the threats of terrorism provides the explanation for the change in treatment of LPRs. Another, less explored, explanation¹⁰⁸ is that the race of immigrants plays into their treatment. Because those who immigrate or attempt to immigrate are predominantly nonwhite, perhaps the national community feels comfortable affording them substantially less protection.

A third approach realizes that these explanations are not mutually exclusive—and may, in fact, compliment each other for a more nuanced account. It is possible that in times of national security crisis—when the sacrifice of some liberty is necessary to achieve security—race correlates with the groups who will lose rights first. This third explanation for *Kim* seeks to explore race neither as an accusation nor as an exclusive explanation, but as a part of a more complete picture of the nation during a national security crisis. The incorporation of race into the broader discussion of national security threats in the immigration context has not been at the forefront of analysis since September 11, but race does play an inherent role in immigration jurisprudence.¹⁰⁹ For aliens affected by immigration law, the concept of race is extremely relevant, and causes many immigrants to be treated as *perpetual foreigners*:¹¹⁰

Within the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S.

¹⁰⁷ See generally Cole, *supra* note 13. There is a wealth of scholarship that describes post-September 11 transformations in immigration law and the effects of such jurisprudential changes on national security. The extent of these changes in immigration law is beyond the scope of this Comment.

¹⁰⁸ See *infra* Part III.A.

¹⁰⁹ Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 512 (2003) (noting that “[a]s LatCrit scholars have pointed out, immigration law is intensely racialized”).

¹¹⁰ Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL L. REV. 1395, 1397 (1997). Chang and Aoki use the term “perpetual foreigner” to describe how “sometimes even . . . U.S.-born descendants” are forever “marked by the border.” *Id.*; see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258 (1993).

citizen and socially an American . . . [but] these presumptions are not present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; *or, if they are U.S. citizens, then their racial identity includes a foreign component.*¹¹¹

Exploring how race operates in immigration law certainly is not the only approach to examine the inequalities in this area of the law. Incorporation of race into the analysis is, however, *an approach*, and deserves exploration.

A. *The Historical Progression of Racism in Immigration Jurisprudence*

Beginning with the earliest federal laws¹¹² that restricted immigration and the judicial establishment of the plenary power doctrine—the concept in immigration jurisprudence with possibly the most far reaching effect¹¹³—the foundation of United States¹¹⁴ immigration policy has been steeped in racism.¹¹⁵ The plenary power doctrine “allowed the United States, for years, to engage in . . . blatant racial discrimination.”¹¹⁶ This history of racism emerged because the plenary power doctrine “grew out of the racist laws designed to exclude, deport, and punish Chinese immigrants.”¹¹⁷ While establishing the policy of deference to the legislative branch, the Supreme Court noted that Congress’s focus on both race and “assimilability” was permissible.¹¹⁸ The groundwork was set, since if “[the] legislative department . . . considers the presence of foreigners of a different *race* in this country, who will *not*

¹¹¹ Huong Vu, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661, 661 (2002) (emphasis added; internal quotation marks omitted); see also Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 262–63 (1997) (quoting Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome”*, in ASIAN AMERICANS AND THE SUPREME COURT 1087, 1096 (Hyung-chan Kim ed., 1992)).

¹¹² See *supra* notes 32–33 and accompanying text.

¹¹³ Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 531 (stating that the plenary power doctrine is the “bedrock principle of modern immigration law”).

¹¹⁴ The United States is in no way the only country with immigration policy affected by race. Australia, for example, has had an extremely racist immigration policy for many years. See, e.g., MARY CROCK, *IMMIGRATION AND REFUGEE LAW IN AUSTRALIA* 13 (1998) (detailing Australia’s “white-only” immigration policy).

¹¹⁵ Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 338 (2003).

¹¹⁶ *Id.*

¹¹⁷ Johnson, *supra* note 113, at 531; see also NEUMAN, *supra* note 31, at 119 (noting that the case that established the plenary power doctrine “was influenced by . . . racist assumptions . . . but set forth more general reasoning in support of congressional power”).

¹¹⁸ See *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed.”¹¹⁹ Thus, the plenary power doctrine was an explicit acquiescence to legislative racism embodied in these early immigration laws.

Based on this foundation, immigration law has recreated, reconstituted, and reified racism throughout its history. A historical analysis of the legislation since the beginning of the plenary power era betrays race’s integral role in the development of immigration law.¹²⁰ Past “federal [immigration laws] have been blatantly racist, prohibiting immigration and naturalization of aliens from China and Japan and favoring northern and western Europeans over southern and eastern Europeans.”¹²¹

The race of immigrants was especially important during times of national crisis. During the Great Depression, Mexicans and Mexican Americans faced mass deportation justified by national economic woes and labor arguments eerily similar to those used against Chinese immigrants earlier in history.¹²² During World War II, the threat from the nation of Japan translated into justification for placing Japanese aliens and citizens alike in internment camps.¹²³ Finally, following World War II, during “Operation Wetback,” it is speculated that 1 million Mexicans and U.S. citizens who looked like Mexicans were deported in response to undocumented immigration and labor competition.¹²⁴ Crucially important in these examples is that many American citizens were deported simply because they looked like they belonged to the group that was to be deported.¹²⁵ Internment during World War II, however, is distinctly troubling, as the “mistaken” conflation of citizens with their similar-looking alien counterparts, as what happened in the other examples, was replaced with “purposeful” incarceration of U.S. citizens of a particular racial,

¹¹⁹ *Id.* (Field, J., writing for the majority) (emphasis added).

¹²⁰ See Boswell, *supra* note 115, at 317–30. See generally ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 130–37 (1998).

¹²¹ See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 152 (4th ed. 1998). See generally Louis Henkin, *The Constitution and United States Foreign Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

¹²² Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 127 (1995); see also ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 83 (1985).

¹²³ See COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 102D CONG., *PERSONAL JUSTICE DENIED* 9–10 (1992) [hereinafter *PERSONAL JUSTICE DENIED*].

¹²⁴ Garcia, *supra* note 122, at 127; see also ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 69–70 (1964). Indeed, “United States citizens were mistakenly ‘repatriated’ to Mexico, including individuals who looked Mexican but had never even been to Mexico.” Garcia, *supra* note 122, at 127 (citation omitted).

¹²⁵ See GALARZA, *supra* note 124, at 69–70; Garcia, *supra* note 122, at 127.

ethnic, and national descent.¹²⁶ These examples show that since the inception of the plenary power doctrine, many immigration laws impacted minorities due in major part to their race and regardless of their citizen or alien status.

Though framed in race-neutral language,¹²⁷ more recent immigration laws have reflected this foundation of racism. Indeed, many modern immigration laws—such as per-country limits, the southern border patrol policy, and interdiction to repel refugees destined for the shore—disparately impact individuals because of their race.¹²⁸ In addition, many commentators have noted a current “anti-immigrant backlash.”¹²⁹ The backlash manifests in tightened governmental support for, as well as overt individual acts of violence towards, immigrants. This anti-immigrant backlash is not only the product of an exclusionary past but also the forecast of an exclusionary future.¹³⁰ Racism, born in the past and allowed to continue throughout history, does not die easily. Immigration has a racist past, both in its origins and in specific responses to national security concerns. This has led commentators to argue that the Chinese exclusion cases are not such “a remnant of the racist past” and that the racism present then is “very much alive and well,” even today.¹³¹

¹²⁶ See PERSONAL JUSTICE DENIED, *supra* note 123. The internment of Japanese Americans is well documented. See, e.g., Information on Manzanar, at <http://www.manzanar.com/information.php> (last visited Mar. 31, 2005).

¹²⁷ See Johnson, *supra* note 113, at 554–55 (explaining that the neutral language of modern immigration law does not actually produce a neutral system).

¹²⁸ *Id.* at 532–34 (listing many immigration laws that disparately impact immigrants of color). See generally Garcia, *supra* note 122 (examining the underlying racism in Proposition 187 despite the neutrality of the language in the statute).

¹²⁹ Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guiterrez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 57–58 (2000) (noting Proposition 187, the denial of welfare benefits to certain classes of LPRs, and the curtailment of judicial review of administrative decisions under the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). See generally IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!].

¹³⁰ T. Alexander Aleinikoff, *The Tightening Circle of Membership*, in IMMIGRANTS OUT!, *supra* note 129, at 324–31 (arguing that the restrictions of public benefits to LPRs is proof that the circle of citizenship is shrinking).

¹³¹ Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003); see also Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2115 (1997) (“Nativism afflicts our politics today, posing a clear and present danger of new anti-immigrant legislation.”); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 108 (1996) (stating that racism plays an undeniable role in current anti-immigration sentiment).

B. Racism in Theory—Politics of Fear and Exclusion Create the Immigrant “Other”

American immigration law collapses upon itself, indeed ceases to be coherent, without analytical and positional separation—a theoretical barrier between those who are “Americans” and those who are not. This separation is complicated, because arbitrarily defined classes of people—natural born citizens, naturalized citizens, LPRs, temporary immigrants, visitors, illegal immigrants, and foreigners—fall on a continuum of status in the social construction of national community. Everyone in America falls somewhere on this gradient, and everyone in America contributes to and sustains it. Separation of status creates the opportunity to use fear and exclusion to impose a “foreign” component upon the social construction of the race of those who are not “Americans.”¹³²

Because of the construction of the national community as White and Black, Asian Americans and Latina/os are discursively produced as foreign. Foreign-ness is *inscribed upon our bodies* in such a way that Asian Americans and Latina/os *carry a figurative border with us*. This figurative border, in addition to confirming the belonging-ness of the “real” Americans, marks Asian Americans and Latina/os as targets of natavistic racism.¹³³

The direct product of this separation is a construction of national identity with the immigrant excluded as the “other.”¹³⁴ One unfortunate byproduct of this process is underlying and systemic racism.

¹³² Vu, *supra* note 111, at 659.

¹³³ Chang & Aoki, *supra* note 110, at 1414 (emphasis added).

¹³⁴ For a description of this phenomenon, as a general proposition, see EDWARD SAID, *ORIENTALISM* 1–2 (1978).

[T]he Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience. Yet none of this Orient is merely imaginative. The Orient is an integral part of European material civilization and culture. Orientalism expresses and represents that part culturally and even ideologically as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles.

Id.; see also Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996) (describing American “Orientalism”—an application of the theory of the “other” to immigration law in America); Chang & Aoki, *supra* note 110, at 1406 (explaining that “immigrants have replaced the threat of communism in the national imagination”); Saito, *supra* note 111, at 296 (applying Said’s theory of “Orientalism” to the Asian American experience).

To be sure, the process of creating the “other”¹³⁵ is not unique to this experience of separation between the concepts of “American” and “immigrant.” Othering exists every time an individual essentializes whenever necessary to effectively make decisions; indeed, it is inevitable to live pragmatically in the world. Every social relationship, every context one puts oneself into before acting, is based on some form of othering, because an individual’s positionality in the world—i.e., her concept of relation to that world—is defined by comparison of her experience to her perception of those outside her personal experience. Thus, othering is not always a bad process. Indeed, it is necessary to avoid paralysis. Although it is inevitable and necessary, understanding the phenomenon is important to police the possible unfortunate by-products. In this context, the unfortunate by-product in immigration policy is disparate impact based on race.

Insular and distinct categories separate what is “American” from what is “foreign.”¹³⁶ The classic dichotomy between “American” citizens and “foreign” aliens creates an “us” versus “them” relationship.¹³⁷ The foreign alien is the “other”—not American and certainly not like “us.” Specifically, it creates the immigrant “other,” the “bad immigrant . . . [who] takes things from us and has nothing to offer in return.”¹³⁸ To be fair, there are constructions of immigrant identity that posit immigrants and immigration as a good influence.¹³⁹ In this context, however, once one group begins to see other groups as clearly different—perhaps inferior—solutions that would never be

¹³⁵ The concept of the “other” is a loaded one that has taken on substantial meaning depending on the context of its use. I hope to avoid the extensive baggage that has accumulated over use of the term. I use the “other,” here, to represent simply the process of identity construction by individuals defining which people are and are not inside the popular conception of “American.”

¹³⁶ See Gotanda, *supra* note 111, at 1095; Saito, *supra* note 111, at 263–67.

¹³⁷ It should be noted that this problem is not unique to the United States. Indeed, the United States may have significantly less problems from “us” versus “them” dichotomies compared to many places in the world. See, e.g., *supra* note 114.

¹³⁸ See Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 481 n.3 (quoting BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 95–96 (2001)). See generally Daniel Kanstroom, *Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West*, in *IMMIGRANTS OUT!*, *supra* note 129, at 300–13.

¹³⁹ The United States is, truly, a nation of immigrants, and immigration’s effect on the national culture has been beneficial in many ways. The benefits of immigration have been most lauded in terms of economic impact. See generally JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989); Ron K. Unz, *Immigration or the Welfare State: Which Is Our Real Enemy?*, *POL’Y REV.*, Fall 1994, at 33. Politicians also extol the more general benefits of immigration. See, e.g., 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Miller) (“Immigrants do not hurt our country, do not take jobs from us, do not take from the Government. Rather, they invigorate our country, enrich our economy, and ennoble our Government.”).

appropriate for the citizens of a sovereign industrialized democracy somehow become suitable and acceptable for these very different beings.¹⁴⁰

In the social construction of race, the imposition of a “foreign” characteristic—making the alien a perpetual foreigner—successfully creates distinction and separation between those who look foreign and those who do not. A foreign characteristic, superimposed upon the construction of an individual’s race, cannot be overcome even by true citizenship.¹⁴¹ When an individual is seen for the first time—for instance, when two individuals pass each other on a street in a major metropolitan city—there is no difference in appearance between an American citizen, born here but of foreign descent, and a true foreigner, born abroad but here in America as an alien. To many, there are simply people who *look* foreign. But this identification of people as belonging to a race that is inherently foreign “must be understood as part of the larger process of maintaining our particular social, racial, and economic hierarchies.”¹⁴² Through this imposed social construction of race, “foreignness is used as a proxy for exclusion from the national community, such that . . . demands for justice and fair treatment may be ignored.”¹⁴³ Thus, certain races are denied rights protection, in part, because the “foreign” element of their identity construction unconsciously legitimizes disparate treatment in the eyes of the dominant culture. This legitimization of disparate treatment impacts individuals of certain races regardless of whether they are, in fact, immigrants.¹⁴⁴ Negative treatment hinges not upon foreign-ness, but on appearance as foreign.

It is important to note that the immigrant is not the only “other” in American identity politics.¹⁴⁵ The plenary power doctrine (not to mention many other areas of the law) has created many “others” to which “Americans” may set their identity in opposition.¹⁴⁶ Likewise, there are many aspects of culture outside of the law that create and maintain these hierarchies. The commonality among the group impacted by this process is that they are regarded “as ‘Other’—outsiders by virtue of race, ethnicity, national origin,

¹⁴⁰ See *Mathews v. Diaz*, 426 U.S. 67, 69 (1976).

¹⁴¹ See *supra* notes 122–26 and accompanying text for a description of U.S. citizens who had immigration laws enforced against them either because they looked like their immigrant counterparts who were targeted by the laws or because they were purposefully targeted as members of the same race as the immigrants.

¹⁴² Saito, *supra* note 111, at 344.

¹⁴³ Chang & Aoki, *supra* note 110, at 1408.

¹⁴⁴ See *supra* notes 122–26.

¹⁴⁵ Saito, *supra* note 131, at 25.

¹⁴⁶ *Id.*

citizenship, or some combination thereof.”¹⁴⁷ Again, this phenomenon is common, inevitable, and necessary.

What does this othering create? Although the constructed dichotomies of “American” and “foreign” and “American” and “other” cease to exist when one “seriously question[s] the distinction between ‘aliens’ and citizens,”¹⁴⁸ the hierarchies are further solidified by creating the “other” as a common national enemy.¹⁴⁹ American identity creation in opposition to the immigrant “other” became necessary at the end of the Cold War.¹⁵⁰ The old “other”—communism—was gone and America had nothing “against which [to] define[] itself For the United States, which is not at much risk of literal invasion by another nation-state, its cultural identity and national sovereignty may [have been] at greater risk of ‘invasion’ by immigrants”¹⁵¹ Establishment of a common cause, a rallying point that necessarily excludes the alien targets within the definition of the project, successfully creates a national identity framed around an idea of membership and belonging. Thus, the inherent dichotomy and hierarchy is perpetuated by national identification in opposition to the “other.”¹⁵²

Once the distinction and hierarchy is established, fear is a catalyst that legitimizes anti-“other” sentiment.¹⁵³ Natives fear invasion and displacement both socially and economically.¹⁵⁴ These concerns may be legitimate, depending on perspective regarding the true impact of immigration, but regardless of the legitimacy of the concerns, the history of racism and nativism in U.S. immigration law and policy demonstrates how these fears spur anti-immigrant reactions.¹⁵⁵ Group fear of the “other” legitimizes racism and reifies the underlying dichotomy. Each manifestation of the racism born of this group fear further amplifies the distance in social space between the

¹⁴⁷ *Id.*

¹⁴⁸ Johnson, *supra* note 113, at 527.

¹⁴⁹ Chang & Aoki, *supra* note 110, at 1406.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1406–07.

¹⁵² *Id.*

¹⁵³ Boswell, *supra* note 115, at 353.

¹⁵⁴ See Garcia, *supra* note 122, at 135–36 (providing evidence of California advertisements that played into domestic fears concerning economic and personal safety).

¹⁵⁵ See *supra* Part II.A; see also Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1485 (2002). See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* (2d ed. 1988); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

groups.¹⁵⁶ Thus, fear is the fuel that creates and maintains the dichotomy that legitimizes treatment of aliens—or those who look like aliens—in a way that would not be generally acceptable.

The method used to maintain the dichotomy between “American” and “foreign” is exclusionary politics. The immigrant “other” may encounter exclusion in two ways. First, an immigrant may feel subtly excluded and self-select out of the national identity. Minority immigrants, stigmatized with the racial identity as foreign, “may feel as if they do not truly ‘belong’ to the national community and, in effect, are second-class citizens.”¹⁵⁷ Even immigrants who eventually achieve legal status as citizens still feel like outsiders due to the imposed foreign component to the social construction of their race in America.¹⁵⁸ Becoming a citizen does not guarantee full membership in society, nor equal rights, because “to be a full citizen one must be welcome and accepted as a full member of the society”¹⁵⁹ Thus, even immigrants who have an accession to complete citizenry still feel like the “other.”¹⁶⁰ These citizens still “carry a figurative border,”¹⁶¹ because the dominant construction of identity in the nation has imposed this foreign component on their race—and they know it.

Second, the immigrant “other” encounters exclusion when mainstream American culture exercises more concrete exclusionary politics, redefining membership in the national community as not including the “other” and refusing to accept those who have been culturally identified as foreign.¹⁶² If the “other” is not excluded by policy, then she will be excluded, de facto, by a society that creates a national identity of exclusion.¹⁶³ Immigration restrictions and refusals to integrate the “other” evolve into a new sense of national

¹⁵⁶ Boswell, *supra* note 115, at 353 (noting that “the major countervailing force against progressive immigration change is fear”).

¹⁵⁷ Johnson, *supra* note 113, at 542; see also Renato Rosaldo, *Cultural Citizenship, Inequality, and Multiculturalism*, in *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 27 (William V. Flores & Rina Benmayor eds., 1997).

¹⁵⁸ See Johnson, *supra* note 113, at 542 n.87 (citing William V. Flores, *Citizens vs. Citizenry: Undocumented Immigrants and Latino Cultural Citizenship*, in *LATINO CULTURAL CITIZENSHIP*, *supra* note 157, at 255).

¹⁵⁹ *Id.* Note that the foreign component to the construction of Latinos is present here because “even when Latinos are U.S.-born citizens, they have been treated as second-class or third-class citizens.” *Id.*

¹⁶⁰ See *id.*

¹⁶¹ Chang & Aoki, *supra* note 110, at 1414.

¹⁶² Johnson, *supra* note 113, at 541 (stating that naturalization as a goal for immigrants who aspire to be accepted “neglects the nation’s historical failure to integrate minority citizens fully into the mainstream”).

¹⁶³ Chang & Aoki, *supra* note 110, at 1412.

belonging.¹⁶⁴ Indeed, immigration restrictions “are based on a sense of who belonged in the national community” and “solidif[y] or help[] to construct the country’s sense of the national.”¹⁶⁵ This is problematic for those deemed outside the common construction of national identity, because exclusion becomes a major way that the group manifests its sense of identity. Thus, the “other” is excluded explicitly and implicitly from framing the national community both in inception and in perpetuation.¹⁶⁶

The creation of the “other” legitimizes racism, differential treatment, and specific rights abrogation.¹⁶⁷ Identification as an outsider is problematic for two reasons. First, as a theoretical matter, identification as an outsider is a manifestation of a nativist categorization that signifies underlying racism.¹⁶⁸ The project of creating and imposing the signifier—foreign-ness as an element of racial identity—serves to perpetuate exclusion and discrimination. Second, as a practical matter, this identification is problematic because “those considered foreigners in this country are often treated poorly.”¹⁶⁹ Poor treatment of immigrants throughout history makes it clear that this signifier is not desirable.¹⁷⁰ This racism is reflected in current anti-immigrant sentiment.¹⁷¹ The most salient examples of the legal backlash that accompanies this sentiment include Proposition 187¹⁷² and laws that deny welfare benefits to certain classes of LPRs.¹⁷³ Thus, once the immigrant is racially identified as foreign, regarded as the “other,” feared, and excluded from the national community, there will inevitably be discrimination and rights abrogation.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (“The stronger the sense of the national community, the more natural the restrictions were, and vice versa.”).

¹⁶⁷ See generally SAID, *supra* note 134 (describing the differential treatments and racism legitimized by creating the “other”); see also Johnson, *supra* note 155, at 1486 (explaining the internal reifying system where “lawful exclusion of certain groups of immigrants reinforced their status as racially inferior”).

¹⁶⁸ Chang & Aoki, *supra* note 110, at 1401 (stating that “nativism and racism are mutually constitutive of the other and operate in tandem to preserve a specific conception of the nation”). See generally HIGHAM, *supra* note 155, at 132–33 (exploring the intersection of racial and nativist attitudes).

¹⁶⁹ Saito, *supra* note 111, at 308.

¹⁷⁰ See *supra* notes 112–31 and accompanying text.

¹⁷¹ See generally IMMIGRANTS OUT!, *supra* note 129 (detailing the extent and scope of the anti-immigrant backlash).

¹⁷² Proposition 187, Illegal Aliens, Ineligibility for Public Services, Verification and Reporting (Cal. 1994), available at http://library.uchastings.edu/ballot_pdf/1994g.pdf.

¹⁷³ See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 8 U.S.C. § 1611 (2000)).

C. *Explaining Demore v. Kim*

Race has played a huge part in immigration law, both as a historical and as a theoretical matter. With this frame of reference, the *Kim* decision, where the Supreme Court allowed the restriction of LPR rights in complete deference to the plenary power doctrine, gains coherence. As noted,¹⁷⁴ the discriminatory justifications for the Chinese exclusion cases may be “very much alive and well . . . [and] have come back to haunt us one hundred years later. The courts . . . still hold that the Constitution provides no protection against abuses in the regulation of immigration—abuses that include arbitrary detention depriving thousands of their liberty without due process of law.”¹⁷⁵ The *Kim* decision, however, is not racist in and of itself. To claim that would betray a lack of understanding of the complexity of immigration law. The solution that *Kim* provides, however—in part a reaction to a national security crisis, a reaction that may, too, not be overtly racist—finds itself rooted in a history of racism. Additionally, the solution may be acceptable to the national community, again, in a state of national security crisis, because the easiest groups to target are those that are “foreign.”

Immigration law has long been a crucial battleground in the liberty versus security debate.¹⁷⁶ The horrible atrocities of September 11 pushed immigration to the forefront of this dispute as well as the consciousness of the entire nation.¹⁷⁷ For many who participate in this debate, the liberty interests of aliens and the security interests of the nation are in direct, mutually exclusive competition.¹⁷⁸ Thus, the tension that exists between these historically interlocking and reinforcing concepts has new relevance.

¹⁷⁴ See *supra* notes 112–31 and accompanying text.

¹⁷⁵ Saito, *supra* note 131, at 36 (quoting Henkin, *supra* note 121, at 885–86).

¹⁷⁶ See Margulies, *supra* note 138; see also MARVIN E. FRANKEL & ELLEN SAIDEMAN, *OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS* 64–65 (1989); *THE FEDERALIST* NO. 8, at 45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting, in debates that created the framework for our democratic society, that Americans would “resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights”); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 4 (1999); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 72–90 (1984).

¹⁷⁷ Margulies, *supra* note 138, at 482.

¹⁷⁸ *Id.* at 481 nn.4–5 (characterizing this perceived zero-sum relationship and comparing Neil A. Lewis, *Ashcroft Defends Antiterrorism Plan*, N.Y. TIMES, Dec. 7, 2001, at A1 (quoting U.S. Attorney General John Ashcroft in Senate Judiciary Committee testimony as stating, “[t]o those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists”), with NANCY CHANG, *SILENCING POLITICAL DISSENT* 63 (2002) (stating that legislative responses to September 11 “permits guilt to be imposed solely on the basis of political associations protected by the First Amendment”)).

The *Zadvydas* decision,¹⁷⁹ less than three months before the terrorist attacks on the World Trade Center and the Pentagon, represented a step towards both judicial oversight of immigration policy, generally, and more extensive LPR due process rights, specifically.¹⁸⁰ This judicial guarantee of oversight to protect rights did not last long. In the wake of the new security threats that immediately followed, there were interpretations of *Zadvydas* by Attorney General Ashcroft, definitional changes in respect to operating immigration law, and executive orders that made security a premium prioritized over the constitutional rights of aliens.¹⁸¹ Thus, the gains that the Court created for LPRs were, in many ways, rolled back by the political branches of government.

The repudiation of *Zadvydas* by the political branches made clear that U.S. immigration law is one area where the due process rights of one group may be sacrificed for the security of the nation's citizens. *Kim* represents a victory for those who champion national security over the individual liberties of LPRs.¹⁸² Restricting the rights of aliens, as had been done many times in the past, was a reaction that had extensive precedential support.¹⁸³ Taking away due process rights of a group excluded from contemporary national identity construction is a convenient and comfortable solution. Viewed in this light, *Kim* is a completely predictable reaction—a perfect manifestation of action legitimized against the “other,” rooted in a long history of similar reactions.

Kim, and its reliance on the plenary power doctrine, necessarily draws a parallel with the history of Chinese exclusion in immigration policy. The history of antiterrorism legislation manifests exclusion based on race.¹⁸⁴ Since the beginning of U.S. history, the country “has tried to keep non-whites out . . . for fear that they would commit terrorist acts.”¹⁸⁵ The inherent foundation of immigration policy as well as the recent history of antiterrorism policy reflects that the United States is willing to “scapegoat those people who are of a

¹⁷⁹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

¹⁸⁰ See Micah Herzig, Note, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 698–99 (2002).

¹⁸¹ *Id.* at 700–01; see Press Release, Department of Justice, Justice Department Implements *Zadvydas v. Davis* Supreme Court Decision (Nov. 14, 2001), available at http://www.usdoj.gov/opa/pr/2001/November/01_ins_595.htm; see also 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2000); Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1003 (2002).

¹⁸² See *supra* notes 122–31 and accompanying text.

¹⁸³ See *supra* notes 122–31 and accompanying text.

¹⁸⁴ *Vu*, *supra* note 111, at 662 n.3 (listing laws that incorporated race to stop terrorism).

¹⁸⁵ *Id.* at 662.

different race.”¹⁸⁶ *Kim*, and its repudiation of due process rights for LPRs, is a further manifestation of the use of immigration law to counter terrorism.

In an era of national security concern, *Kim* represents a legitimate and attractive solution because it is enforced against the immigrant “other.” Those espousing the dominant ideology on this issue are satisfied by this solution to the national security problem because they truly believe that immigration is one of the major problems in the war on terror. Additionally, the policies that target the “other” and deprive them of rights are appropriate because the “other” is analytically distinct from “us.” The hierarchal dichotomy created by grafting “foreign” onto the socially constructed concept of race of the immigrant legitimizes rights abrogation. Although racially neutral, the decision depriving LPRs of due process rights is a comfortable solution for the national community, because the immigrant has racially been categorized as “other.” This comfortable solution, however, may not actually target the true source of American insecurity.¹⁸⁷

Kim, viewed in a more complete perspective that incorporates the history of immigration law, is unfortunate for LPR rights but undeniably predictable. In a time of national crisis—indeed compromised national security—the history and evolution of immigration law legitimizes and in fact demands reaction. The reaction was against the immigrant “other” because the historical basis for such a policy existed and the identity politics of the nation accept downgrading the rights of that group. *Kim* may effectively respond to the threat of terrorism. It is impossible to calculate how many terrorists have been thwarted by our national security policy that limits LPR due process rights—although reports indicate that it has not been overly successful.¹⁸⁸ *Kim*, however, probably either misdiagnoses the national security problem or clumsily provides a solution to that problem. The extent of the misdiagnosis or clumsiness can be attributed, at least in part, to the history of racism in immigration policy and the assumptions that have created an immigrant “other.” For this reason, coming to grips with this underlying racism is essential for understanding why

¹⁸⁶ *Id.* at 691.

¹⁸⁷ See Cole, *supra* note 13, at 1005 (citing Danny Hakim, *4 Are Charged with Belonging to a Terror Cell*, N.Y. TIMES, Aug. 29, 2002, at A1) (stating that immigration law has not been an effective vehicle to deal with the problem of terrorism, since the overwhelming efforts after the atrocities of September 11 have netted extremely limited results).

¹⁸⁸ *Id.*

it is that “immigrants [are] the last group to gain rights”¹⁸⁹ and, in this case, the first to have those rights taken away.

III. CRITICAL RACE THEORY APPLIED TO IMMIGRATION JURISPRUDENCE

Critical race theory is a movement that explores the systemic and pervasive nature of racism in society. Critical race theorists do not abandon completely conventional jurisprudence in regards to rights and race, but they do strive to call into question the presumption that racism is a discrete and insular problem that can be targeted and solved through traditional strategies. Instead, these scholars argue that racism is an ever-present social construction that influences identity, ideology, and the legal system in ways that cannot be completely explained.¹⁹⁰

Race, although fundamentally biological, also is a unique social construct that is perpetually defined and redefined.¹⁹¹ By examining the process of shifting identity politics in regard to race, scholars may come to grips with fundamental underlying problems in law. Because the “law both reflects and creates societal norms, to effectively reform the law we must consider existing racial and economic hierarchies and question the ways in which these hierarchies divide us.”¹⁹² Employing unorthodox perspectives and methods,¹⁹³

¹⁸⁹ Patricia G. Gittelson, *Immigration Jurisprudence from the Dark Ages Toward the Light*, 2 J. LEGAL ADVOC. & PRAC. 51, 51 (2000).

¹⁹⁰ There are several comprehensive overviews of critical race theory. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

¹⁹¹ Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (construing Kendall Thomas, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990)) (noting that “[t]he social construction of race is an ongoing process”); Saito, *supra* note 111, at 283–84 (noting that “[a]lthough the concept of race invokes biologically based human characteristics (so called ‘phenotypes’), selection of these particular human features for purpose of racial signification is always and necessarily a social and historical process [T]here is no biological basis for distinguishing human groups along the lines of race.”) (quoting MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55 (2d ed. 1994)).

¹⁹² Saito, *supra* note 111, at 338.

¹⁹³ Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 U. ILL. L. REV. 603, 610 (“One intriguing technique of critical race scholarship has been use of the narrative technique to expose and probe the racial dimensions of legal doctrine.”).

critical race theory recognizes as “social and systematic what was formerly perceived as isolated and individual.”¹⁹⁴

This Comment deploys a critical race theory tailored to immigration jurisprudence. The method chosen to implement this analysis is bifurcated.¹⁹⁵ The project uses both a traditional approach, a historical examination of race in immigration policy, as well as an unorthodox approach, the allegory included before the introduction of the Comment as well as the theoretical explication of the social construct of the race of immigrants, to recognize the absence of and need for a race analysis in immigration jurisprudence. Underlying both these approaches is the fundamental argument that race should always be taken into account. The bifurcated approach intends to introduce a vehicle, that can be replicated, for incorporating race into the traditional immigration analysis.

A. *The Traditional Immigration Analysis*

Parts I and II.A of this Comment incorporate traditional legal and historical analyses of both immigration and race. This incorporation of race into the analysis, the discussion of the history of American immigration—from its origins until the *Kim* decision—is important for immigration jurisprudence because the concept of race is largely ignored in the status quo.

1. *Traditional Immigration Jurisprudence Analysis Fails To Take Race into Account*

The relevance of race to immigration is apparent,¹⁹⁶ but the diversity of perspectives on how race affects and impacts traditional immigration analysis has not been developed. Although race has been “a constant and recurring theme in U.S. Immigration law, it is only recently that legal scholars have begun to give it serious attention.”¹⁹⁷ This void in legal scholarship, regarding the intersection of race and immigration, is surprising considering the large

¹⁹⁴ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–42 (1991).

¹⁹⁵ See Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writings About Race*, 82 TEXAS L. REV. 121, 134–35 (2003) (book review) (arguing for an immigration analysis that includes aspects of critical race theory but that does not get lost in an analysis of text and voice).

¹⁹⁶ See *supra* Part II.

¹⁹⁷ Boswell, *supra* note 115, at 315–16 (stating that both race and class have been ignored historically); Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters*, 2000 U. ILL. L. REV. 613, 621 (“Racial critiques of immigration law and more mainstream scholarship on the subject . . . ignor[e] each other’s analyses.”).

part that race has played in the history of immigration law.¹⁹⁸ For the most part, however, “[t]he corpus of immigration law scholarship . . . lacks a systematic discussion of race.”¹⁹⁹ Indeed, immigration jurisprudence has maintained itself as a “self-contained unit,”²⁰⁰ never encountering or considering race as the two concepts “glide[] past each other.”²⁰¹ Unfortunately, for the most part, “majority scholars tend to marginalize, downplay, or ignore race scholarship on immigration law.”²⁰² This failure to incorporate or recognize the importance of race has far reaching consequences and should be rectified.

2. *Taking Race into Account Is Important for Immigration Jurisprudence*

Fundamental policy problems will remain unsolved until there is an effective incorporation of race into the analysis.²⁰³ Perpetuating the myth that race-neutral immigration policies are, in fact, neutral in regards to impact on race “discourages and stymies reform efforts because it prevents U.S. immigration legal reformers from truly understanding our immigration problems.”²⁰⁴ The lack of an incorporation of a race-based analysis into the mainstream of immigration scholarship is problematic because “it allows for the question of the influence of race on immigration law to be avoided . . . which may well retard study and policy reform in the field for years to come.”²⁰⁵ Thus, until race is fully considered, problems within immigration law will be incomplete, imperfect, and underdeveloped—in short, solutions will be destined to miss their mark.

To be sure, race cannot be isolated as the only explanation for the trends and impacts in immigration policy. Recent immigration statistics indicate that there has been both racial diversity as well as large numbers of minorities allowed into the country.²⁰⁶ Class, gender, and economic—as well as other

¹⁹⁸ See *supra* Part II.A.

¹⁹⁹ Johnson, *supra* note 113, at 534.

²⁰⁰ George A. Martínéz, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517, 517.

²⁰¹ Olivas, *supra* note 197, at 621; see also Fitzpatrick, *supra* note 193, at 611 (noting that although there is quality analysis of the intersection of race and immigration, there is still an indifference to the project on the part of mainstream immigration scholars).

²⁰² Johnson, *supra* note 113, at 547.

²⁰³ Boswell, *supra* note 115, at 321–22.

²⁰⁴ *Id.* The inability to recognize the impacts that these policies have on race is “particularly problematic because it tends to obfuscate serious structural problems.” *Id.* at 316.

²⁰⁵ Johnson, *supra* note 113, at 550–51.

²⁰⁶ *Id.* at 534 (stating that “since 1965, people of color have comprised a majority of all immigrants . . . making it eminently clear that a racially diverse group of immigrants is coming to the United States”) (citing

social considerations—factor heavily into any analysis of socially constructed identity. Despite these other influences, however, the absence of race from the analysis is striking. The incorporation of a race-focused inquiry into immigration law creates a relatively new opportunity to understand many perspectives more fully. Recognition of the perpetual undercurrent of race as a factor in both individual policies, as well as in the area of law as a whole, is necessary to more completely understand the past, present, and future of this law.

Specific policy analysis explains *Kim* as a continuation of the history of immigration law as well as identity construction of the immigrant “other” that legitimizes discriminatory treatment. The comparison of *Kim* to *Chinese Exclusion* describes the permanence and underlying racism inside the system. This comparison satisfies both goals of incorporating race analysis into immigration law generally and recognizing the pervasive nature of racism even in race-neutral policies and decisions. Within the legal analysis of *Kim*, there is opportunity to “acknowledge that ascribing foreignness perpetuates discrimination and . . . [recognize] both socially and legally, that foreignness is not an acceptable basis for the denial of equal treatment.”²⁰⁷ Thus, specific analyses of decisions such as *Kim* are effective when paired with the recognition of the underlying and pervasive role that race plays in the system.

The more general analysis—the act of “examining whether laws regarding citizenship and immigration status serve legitimate ends or function to mask racist policies”²⁰⁸—is also an end in itself. The Comment takes a critical first step in recognizing the role that race plays in immigration policy. Additionally, the unmasking of racial politics that fester below the surface of purportedly race-neutral law may clear space for advantageous coalitional politics.²⁰⁹ Indeed, exposing the long history that is, in many ways, the basis for all immigration policies, allows different groups to see that they face a common enemy.²¹⁰ Additionally, through the more general analysis of the history of race in immigration and by incorporating the race critique into immigration analysis, scholars may be able to “unveil the racial privilege

U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 21 tbl.C (1999).

²⁰⁷ Saito, *supra* note 111, at 339.

²⁰⁸ *Id.*

²⁰⁹ Garcia, *supra* note 109, at 530 (noting that “conflation of immigration and race . . . can be a sword, used against communities of color as in . . . antidiscrimination law, while immigrant identity can be a political shield and basis for organizing across races”).

²¹⁰ *Id.*

encoded in immigration law.”²¹¹ As such, the project of incorporating the concept that race is pervasive and inherent in immigration law is an important and crucial next step for the traditional immigration jurisprudence analysis.

B. Unorthodox Immigration Analysis in Combination with a Traditional Analysis

The allegory employed at the beginning of the Comment, it should be noted, is not a far hyperbole from the history of immigration law. Not too far in the distant past, racial minority citizens were deported to satisfy the will of the majority and its need to feel more secure.²¹² At those times, during the Great Depression, during World War II, and during the competition for jobs after World War II, a crisis in national security legitimized either incarceration of citizens, regardless of their affiliation with the foreign enemy, or deportation of citizens for looking like the targets of the national community’s disdain.²¹³ This is the same type of threat that legitimized Chinese exclusion at the very beginning of immigration law. Now, in our fictional dilemma, and just as they were in these historic moments, the rights of a group must be sacrificed to achieve the amorphous goals of national security. Is this the same dilemma that faced the Court in *Demore v. Kim*? The narrative engages the reader in the fictional dilemma again. The reader is the President, and the only way to solve the national security crisis is to sacrifice the rights of an insular minority. How would the reader react if faced with this crisis? Which group would the reader choose as the first to lose due process rights? When faced with hard decisions, do our ideals regarding individual rights prevail? These questions are difficult to answer and intend to take the reader outside of the traditional analytical space reserved for considering issues in the law.

²¹¹ Johnson, *supra* note 113, at 527.

²¹² See *supra* notes 122–26 and accompanying text for an extrapolation of historical national security justifications for deporting large groups of racial minorities, citizen and alien alike.

²¹³ See *supra* notes 122–26 and accompanying text.

The narrative, the destabilizing and unconventional approach,²¹⁴ is designed here to probe and expose the racial dimensions of immigration policy. The unconventional argument—in terms of traditional jurisprudence—is conveyed in an unconventional form. Putting the reader into the story, as the decisionmaker, opens up the possibility of different outcomes to the story. Critical race theorists believe that “experiential knowledge and subjective positioning are important.”²¹⁵ To that end, unorthodox approaches such as personal stories are employed not only to draw in new and different participants and voices but also to open up to a larger diversity of perspectives.²¹⁶ The narrative employed in this Comment is a counterstory, a vehicle that “mocks, jars, displaces, or attacks some majoritarian tale or narrative.”²¹⁷ Here, the majoritarian belief attacked is the presumption that immigration laws have race-neutral impacts in implementation and practice. The narrative facially challenges the status quo because it is subversive in form as well as content.

This type of challenge is uniquely appropriate in application to immigration law. Since “few other groups bear as literally the badge of outsider as do aliens and immigrants, the tenets of critical race theory and the application of the narrative form is both appropriate and potentially effective in legal writing about immigration law and the rights of aliens.”²¹⁸ Thus, immigration jurisprudence is ripe for application of critical race theory and the counterstory should serve as an effective vehicle to that end. By placing the reader in the position of having to make a tough decision, the reader is exposed to the

²¹⁴ Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 431 (1996) (reviewing RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995)).

Use of the narrative form of doctrinal critique also offers unique possibilities for critical inquiry. Narratives urge us to think critically about who is telling the story, why certain facts are included and others omitted, and whether the social context, and characters’ motivations and actions, are ‘realistically’ portrayed. The dialogue is participatory in important ways: independent ideas are formed through the interactions between teller and listener. In leaving responsibility for interpretation with the reader, stories encourage critical and reflective questioning.

Id. (internal citations omitted).

²¹⁵ Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1205 (1997).

²¹⁶ *Id.* (noting that the “endeavor [is] to ‘look to the bottom’ to take into consideration the voices that have been disenfranchised by the American legal system”) (quoting Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987)).

²¹⁷ *Id.* at 1215 (quoting Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 552 (1995)).

²¹⁸ *Id.* at 1219.

contours of the friction between liberty and security concerns present in this ongoing debate.

Here, critical race theory—the narrative and the more mainstream critical arguments that, historically, the impact of race should be considered in immigration law and that, theoretically, immigrants carry with them a “foreign” component inscribed on the social construction of their races—is paired with the traditional analysis of the history of LPR due process rights. This combination of approaches and perspectives is important, as the bifurcated process is designed to broaden and question immigration jurisprudence in new ways. This approach is a combination of the more radical critical race theory and more traditional immigration scholarship and “enrich[es] conventional scholarship by supplementing—not supplanting—it with . . . a measured application of the narrative form.”²¹⁹ Thus, the project of inclusion of both types of vehicles to convey the same message highlights the crucial intersection of the divergent analyses.

CONCLUSION

Race plays a large part in immigration law. In the past, the concept of foreign-ness as an element of race led to the deportation and incarceration of *both* citizens and aliens. More recently, commentators found *Demore v. Kim* troubling due to its application of the plenary power doctrine to eviscerate the robust constitutional protections afforded LPRs²²⁰ but have not looked to the underlying themes of Supreme Court and immigration jurisprudence that may explain the decision. This Comment integrates a discussion of what has happened with why it may have happened—by expanding the scope of contemporary immigration scholarship to “include analysis of the effects that immigration law and its enforcement have on minority citizens.”²²¹ Part and parcel to this goal, of the inclusion of new perspectives in understanding the role of race in immigration scholarship and law, is the expansion of traditional methods that question immigration.

Fundamentally, one structural reason that immigrants are considered “other” is that there is a species of punishment, deportation, that is available

²¹⁹ *Id.* at 1233.

²²⁰ *The Supreme Court, 2002 Term, supra* note 72, at 291 (explaining that the Court’s decision is worrisome both because it places detention issues under the plenary power doctrine and it undermines “the understanding that permanent resident aliens are entitled to robust constitutional protection”).

²²¹ Johnson, *supra* note 113, at 553.

for aliens but not for citizens.²²² This Comment does not contend that the existence of this special species of punishment is, in itself, a function of racism. To do so would be to argue that the existence of borders is racist, a task beyond the scope of the Comment. This Comment, likewise, does not contend that the *Kim* decision is itself racist. To do so would be an unjustified personal attack on the Court instead of an attack on the analytical void in immigration jurisprudence where a race analysis should reside. This Comment does contend, however, that the special species of punishment available in deportation provides an easy avenue for rights abrogation justified by national security concerns. To the extent that abrogation of LPR rights does not, in fact, aid in the fight against new security threats, the effects of the policy may manifest underlying racism. It is important to consider how closely solutions fit the problems they are trying to address.²²³ Measuring the extent that limiting due process rights of LPRs during deportation proceedings is a reflection of underlying racism or a continuation of the racist past is important to move forward, but may expose a bleak future for the immigrant “other” which may be targeted, in the future, for more extensive rights abrogation.

The chosen methodology of this Comment is to apply critical race theory to immigration. Hopefully, this approach will fill the void in current immigration scholarship: one that fails to “provide aliens and immigrants with a voice as fully as could the use of narrative . . . coupled with the more traditional approach.”²²⁴ Critical race theory, although not new as a general proposition, is a relatively new and appropriate avenue for immigration scholars to explore. The types of analysis endorsed here “can offer a powerful methodological supplement to traditional immigration scholarship . . . go[ing] a long way toward illustrating the failures of the status quo.”²²⁵ By endorsing a discussion of the interplay between race and immigration through the analysis of *Demore v. Kim* and the counterstory narrative, this bifurcated analysis opens space for speculation as to how to solve the problem of racist scapegoating implemented through immigration laws.

²²² But see notes 122–26 and accompanying text for an explication of circumstances when *citizens* were deported.

²²³ See Saito, *supra* note 111, at 339 (Do immigration laws “serve legitimate ends or function to mask racist policies[?]”) (emphasis added).

²²⁴ Fan, *supra* note 215, at 1224.

²²⁵ *Id.* at 1220.

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