

## ARTICLES

### UNFIT FOR THE CONSTITUTION: NATIVISM AND THE CONSTITUTION, FROM THE FOUNDING FATHERS TO DONALD TRUMP

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#### ABSTRACT

*The executive order on travel issued by President Donald Trump in January 2017 identified the foreigners who should be barred from entry as those who “bear hostile attitudes” toward the United States “and its founding principles” and who “do not support the Constitution.” As this Article shows, anti-immigrant movements have long used hostility-to-the-Constitution as the touchstone for identifying unwanted immigrants. In the 1840s, the Know-Nothings opposed Irish immigration based on a belief that Catholicism was incompatible with the Constitution. In 1882, when Congress enacted the Chinese Exclusion Act, it declared that the Chinese people were too foreign to embrace constitutional principles. In 1924, Congress enacted the National Origins Act out of the belief that members of the so-called Nordic race alone were genetically disposed to embrace constitutional values, while Jews, Italians, Poles, and others should be excluded because they would destroy the nation’s constitutional system. That policy continued until 1965 when Congress adopted the Immigration and Nationality Act, which declares that people of any race or nationality are equally capable of embracing the nation’s constitutional values. President Trump’s executive order, however, demonstrates the persistence of the belief that foreigners who do not share the nation’s predominant demographics are likely to harbor hostility to constitutional values.*

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## INTRODUCTION

This Article tells the story of an idea. It is an old idea, an ugly idea, a discredited idea. It is a nativist idea: the idea that the United States Constitution was made only for some people, while others should be excluded from entering the country out of suspicion that their race or religion make them likely to harbor hostility to the nation's constitutional principles.

Because it is an old idea, there have been different names for the people who are included and excluded. Sometimes the people for whom the Constitution was made were called white, sometimes Anglo-Saxon, Nordic, or European. Sometimes they were called "real Americans," or "100% Americans," or just plain old Americans. Sometimes the people who were said to be unfit for the Constitution were called Negro or Irish or Chinese or Italian or Jewish or Hispanic or Muslim. But each time the idea has been pretty much the same: the Constitution was not made for them, and they must be excluded out of suspicion that their presence in the United States would undermine the nation's republican values.

Today, the nativist constitutional idea runs counter to prevailing notions of American national identity. When Americans tell themselves who they are, they usually say something along the lines of what Franklin Roosevelt said in 1943:

The principle on which this country was founded and by which it has always been governed is that Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy.<sup>1</sup>

Roosevelt expressed what has become the conventional understanding of American nationalism, that what unites the nation, and what makes America America, is a shared devotion to a common creed of liberty, equality, and democracy, a creed expressed in the Declaration of Independence and the Constitution. In the conventional understanding, the American creed consists of a universal set of principles that can be embraced by anyone without regard to race, religion, or ancestry. And, as Roosevelt claimed, American national identity has “always” meant devotion to the American creed and has “never” been about race or ancestry.

As this Article shows, however, for most of American history the dominant view that has guided American policies has been the nativist belief that only people who share the nation’s dominant ethnicity and religion are capable of constitutional devotion while others must be excluded because of the dangers they are suspected to pose to the nation’s fundamental values. To provide a framework for understanding what is distinctive about nativist invocations of the Constitution, Part I looks at conventional understandings of American nationalism. As that Part shows, American national identity is conventionally understood to be defined by devotion to the nation’s fundamental commitments to liberty and equality, expressed in the Constitution. Nativist movements are frequently but erroneously described as embracing an aberrant conception of American nationalism, in which race, religion, and ethnicity are seen as core aspects of American identity, rather than commitment to a common set of ideals.<sup>2</sup> In fact, throughout American history nativist movements have shared the conventional belief that being American means believing in a common creed embodied in the Constitution. What makes nativism distinctive is the claim that only those who share the race, religion, or ethnicity of the dominant group of native-born Americans are capable of embracing that creed.

Part II explores the long dominance of policies excluding unwanted immigrants based on suspicions of hostility to the Constitution. As that Part shows, the belief that constitutional devotion can only be expected by those who share the predominate traits of native-born Americans goes back at least to the Naturalization Act of 1790, when Congress established that naturalized citizenship could only be bestowed upon someone who was both a “free

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<sup>1</sup> *Praises Army Plan for Japanese Unit*, N.Y. TIMES, Feb. 5, 1943, at 6.

<sup>2</sup> See, e.g., Rogers M. Smith, *The “American Creed” and American Identity: The Limits of Liberal Citizenship in the United States*, 41 WESTERN POL. Q. 225, 228 (1988) (describing “nativism” as “ethnocultural Americanism . . . at its extreme”).

white person” and who swore to “support the Constitution of the United States.”<sup>3</sup> Under that law, which continued in force with little change until 1952, only persons identified as “white” were seen as capable of embracing constitutional principles. This belief animated the anti-Catholic hostility of the Know-Nothing Party of the 1850s, which asserted that Catholicism was incompatible with the Constitution because Catholics would always owe allegiance to the Pope and not the Constitution.<sup>4</sup> When Congress enacted the Chinese Exclusion Act in 1882, it declared that Chinese people were too foreign to abide by the Constitution.<sup>5</sup>

Part II focuses on the high-water mark of American nativism, the enactment of the National Origins Act of 1924, which was based on a belief that protecting the Constitution requires maintaining the nation’s original ethnic stock.<sup>6</sup> As the history of that enactment reveals, in the years leading up to 1924, two competing national movements sought to address the problems associated with immigration. On the one hand, an Americanization movement sought to transform immigrants into good citizens by educating them on American values, principally the nation’s civic values expressed in the Constitution. On the other hand, an immigration restriction movement sought to exclude unwanted immigrants based on the conviction that they could never embrace American values. Both movements shared a common understanding that American national identity is defined by commitment to a creed expressed in the Constitution. Where the movements differed was over who was capable of embracing that creed. In enacting the National Origins Act, Congress sided with the nativists and concluded that maintaining constitutional government required the exclusion of races deemed unfit for the Constitution.

Part III examines the persistence of the belief that people who have a different race, religion, or national origin from those considered prototypically American are likely to bear hostility to constitutional values. In 1965, Congress repudiated this belief when it adopted the Immigration and Nationality Act and declared that people of any background are equally capable of embracing the values necessary to become American citizens.<sup>7</sup> Since then, the conviction

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3 Naturalization Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795); *see also infra* Part II.A.

4 *See infra* notes 70–72 and accompanying text.

5 Chinese Exclusion Act of May 6, 1882, ch. 123, 22 Stat. 58; 13 Cong. Rec. 1742 (1882) (statement of Sen. Jones); *see also* Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 22–36 (1998) (reviewing legislative history of the Chinese Exclusion Act).

6 Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 (1924); H. COMM. ON IMMIGRATION & NATURALIZATION, RESTRICTION OF IMMIGRATION, H.R. Rep. No. 68-350, at 13 (1st Sess. 1924).

7 8 U.S.C. § 1152 (2016); *see also infra* Part III.A.

that American identity is defined solely by commitment to the nation's constitutional principles has gained the status of conventional wisdom. Every President elected since 1965—with the possible exception of Donald Trump—has declared adherence to the now-orthodox view that anyone can become American by embracing the nation's constitutional ideals.<sup>8</sup> Despite this orthodoxy, white nationalists and others have kept alive the belief that, at heart, the United States is really a white, European, Christian nation and that its constitutional values can only be claimed by members of that cohort. They look on 1965 as the year that America betrayed its heritage by opening the floodgates to immigrants from Latin America and Asia whose presence undermines American values. Today, Muslims are a principal target of anti-immigrant activists, who declare that Islam is incompatible with the Constitution.

With the election of Donald Trump, nativism has moved from the margins back to the White House, and the government once again has adopted policies to exclude some people, defined by religion and national origin, out of suspicion that they are hostile to the Constitution.<sup>9</sup> As a candidate, President Trump campaigned on a pledge to completely bar Muslims from entering the country,<sup>10</sup> and, on January 27, 2017, President Trump signed an executive order that sought to bar citizens from seven predominately Muslim countries from entering the United States.<sup>11</sup> The order does not use the word Muslim

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<sup>8</sup> For example, in his first inaugural address, President George W. Bush declared that “America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests and teach us what it means to be citizens.” George W. Bush, *The First Inaugural Address*, in SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH 2001–2008, at 2, [http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf); see also, e.g., President William J. Clinton, Remarks by the President in Address to the Liz Sutherland Carpenter Distinguished Lectureship in the Humanities (Oct. 16, 1995), [https://clintonwhitehouse1.archives.gov/White\\_House/EOP/OP/html/ut.html](https://clintonwhitehouse1.archives.gov/White_House/EOP/OP/html/ut.html) (“We must be one—as neighbors, as fellow citizens; not separate camps, but family—white, black, Latino, all of us, no matter how different, who share basic American values and are willing to live by them.”); President Barack Obama, *Inaugural Address by President Barack Obama*, WHITE HOUSE: OFF. PRESS SECRETARY (Jan. 21, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> (“[W]hat binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea . . .”); President Richard Nixon, Remarks in Williamsburg, Virginia: The American Spirit (Oct. 2, 1968), <http://www.presidency.ucsb.edu/ws/index.php?pid=123879>; President Ronald Reagan, *Labor Day Speech at Liberty State Park, Jersey City, New Jersey* (Sept. 1, 1980), <https://reaganlibrary.archives.gov/arch-ives/reference/9.1.80.html> (stating that Americans “came from different lands but they shared the same values, the same dream”). For a discussion of the civic nationalism of President George H.W. Bush, see MARY E. STUCKEY, *DEFINING AMERICANS: THE PRESIDENCY AND NATIONAL IDENTITY* 288–334 (2004).

<sup>9</sup> See *infra* Part III.C.

<sup>10</sup> See Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN POLITICS (Dec. 8, 2015, 4:18 AM), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html>.

<sup>11</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 203, Stat 2989, 2991 (2016); Exec.

but instead identifies the foreigners who should be excluded as those who “bear hostile attitudes” toward the United States “and its founding principles” and who “do not support the Constitution.”<sup>12</sup> The order carries out the conviction, advanced by many on the conspiracy-minded right, including numerous officials in the new administration, that Islam is incompatible with the Constitution.<sup>13</sup> It is but the latest episode in which unwanted foreigners have been excluded out of suspicion that they will undermine the Constitution.

### I. THE CENTRAL ROLE OF THE CONSTITUTION IN CONVENTIONAL CONCEPTIONS OF AMERICAN NATIONALISM

A major focus of scholarship on nationalism has been to understand how different nations and nationalist movements understand what binds together a community and makes it a nation, whether it is ties of blood, language, ideology, or some other common attribute.<sup>14</sup> Nationalist movements are commonly divided into two broad types—civic nationalism and ethnic nationalism.<sup>15</sup> Nations exhibiting ethnic nationalism identify members of the national community as those sharing a common ethnic, religious, or racial background, while nations exhibiting civic nationalism identify membership by commitment to the nation’s political creed.<sup>16</sup>

In discussing nationalism, it is important to distinguish citizenship, the formal designation of persons with political rights and responsibilities, and national identity, the often unwritten convictions that members of a nation have about what it means to be a legitimate member of the national community.<sup>17</sup> Under the Fourteenth Amendment and federal statutes, Americans

Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Press Office, U.S. Dep’t Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

<sup>12</sup> Exec. Order No. 13,769, 82 Fed. Reg. at 8977; *see also infra* Part III.C.2.

<sup>13</sup> *See infra* Part III.C.

<sup>14</sup> *See, e.g.*, NATIONALISM 3–5 (John Hutchinson & Anthony D. Smith eds., 1994).

<sup>15</sup> *See, e.g.*, LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 11 (1992); MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 9 (Farrar, Straus and Giroux, 1st Am. ed. 1994) (“Ethnic nationalism provided an answer that was intuitively obvious: Only trust those of your own blood.”); ANTHONY D. SMITH, NATIONALISM: THEORY, IDEOLOGY, HISTORY 42–46 (2d ed. 2010) (discussing the differences between “ethnic” and “civic” nationalism); *see also* JAMES G. KELLAS, THE POLITICS OF NATIONALISM AND ETHNICITY 66 (1991) (discussing possible middle ground between ethnic and civil nationalism). Criticism of the categories of ethnic and civic nationalism is voluminous. *See, e.g.*, Rogers Brubaker, *The Manichean Myth: Rethinking the Distinction Between Civic and Ethnic Nationalism*, in *NATION AND NATIONAL IDENTITY: THE EUROPEAN EXPERIENCE IN PERSPECTIVE* (Hanspeter Kriesi et al., eds. 1999).

<sup>16</sup> IGNATIEFF, *supra* note 15, at 6.

<sup>17</sup> For discussions of the nature of citizenship, *see, for example*, RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP AND REPUBLICAN LIBERALISM 52 (1997) (discussing one version of what citizen membership can mean); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L.

become U.S. citizens by being born in U.S. territory, by having parents who are American citizens, or through the naturalization process. Although citizenship and national identity have some relationship, the two concepts are distinct because, as Benedict Anderson has usefully described, nations are “imagined communities,” imagined because “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”<sup>18</sup> Members of a nation carry within their imaginations notions of what defines the community and what binds it together. President Obama expressed a common conception of American national identity when he said that “what binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea.”<sup>19</sup> National identity is a frequently contested concept. Within the category of American citizens, some people may be considered authentic Americans, and others are deemed outsiders even though formally accorded citizenship.<sup>20</sup>

Most scholars agree with the conception of American nationalism articulated by President Obama, that the United States is a civic rather than an ethnic nation. Writing in 1944, Gunnar Myrdal famously described the “American creed” that binds the nation together: “Americans of all national origins, classes, regions, creeds, and colors, have something in common: a social ethos, a political creed. It is difficult to avoid the judgment that this ‘American Creed’ is the cement in the structure of this great and disparate nation.”<sup>21</sup> The first book-length examination of the nature of American nationalism, Hans Kohn’s *American Nationalism*, published in 1957, similarly described American nationalism in purely civic terms. As Kohn wrote, the United States “was not founded on the common attributes of nationhood—language, cultural tradition, historical territory or common descent—but on

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REV. 1471, 1488 (1986) (“Citizenship is not a *right* held *against* the state; it is a *relationship* with the state or, perhaps, a *relationship* among persons in the state. It is membership in a common venture.”). For discussions of the nature of national identity, see, for example, ELIZABETH THEISS-MORSE, WHO COUNTS AS AN AMERICAN? THE BOUNDARIES OF NATIONAL IDENTITY 3 (2009) (“[N]ational identity, like other group identities, is inherently social and is centered on people’s strong bond and sense of community with their fellow group members . . . .”), see also HANS KOHN, THE IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND 10 (Collier Books ed. 1967) (“Nationalism is first and foremost a state of mind, an act of consciousness.”).

18 BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS IN THE ORIGIN AND SPREAD OF NATIONALISM 6 (Verso rev. ed. 2006).

19 Obama, *supra* note 8.

20 See THEISS-MORSE, *supra* note 17, at xiii, 3 (discussing the phenomenon of perceived “true Americans”).

21 GUNNAR MYRDAL, AN AMERICAN DILEMMA 3 (Harper & Bros. Pub. 9th ed. 1944).

an idea which singled out the new nation among the nations of the earth.”<sup>22</sup> More recent scholars have expressed their agreement with this conclusion.<sup>23</sup>

The standard model of American nationalism can be characterized as *constitutional nationalism* because the Constitution is understood to represent the central expression of the nation’s civic ideals that bind together the people of the United States. As Kohn wrote: “The American Constitution represents the lifeblood of the American nation, its supreme symbol and manifestation. It is so intimately welded with the national existence itself that the two have become inseparable.”<sup>24</sup> Legal academics, especially constitutional law professors, have enthusiastically endorsed the view that what defines American identity is a commitment to constitutional ideals. As Laurence Tribe has written: “[The Constitution’s] text and invisible structure are part of the nation’s beating heart . . . .”<sup>25</sup> This view is widely shared on both the left and right. Mark Tushnet and Akhil Amar have each explained that “[t]he Constitution constitutes the American people,” while Steven Calabresi has expressed the same idea in the language of civil religion: “The Constitution is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel.”<sup>26</sup>

Political scientists and constitutional law professors are far from alone in proclaiming that American national identity is defined by commitment to the principles found in the Constitution. For decades, every American president has invoked this understanding of American identity. As George W. Bush declared in his first inaugural address, “America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift

<sup>22</sup> HANS KOHN, *AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY* 20 (1961).

<sup>23</sup> See, e.g., SMITH, *supra* note 15, at 45; Kenneth L. Karst, *The Bonds of American Nationhood*, 21 *CARDOZO L. REV.* 1141, 1144 (2000) (“From the time of the earliest European arrivals, we have lacked the homogeneities of ancestry, language, and religion that have combined in other countries to unite a ‘people’ and make a nation. The center of gravity for American identity has been the cluster of values that, together, constitute the American civic culture: individual liberty, egalitarianism, democracy, nationalism, and tolerance.”).

<sup>24</sup> KOHN, *supra* note 22, at 8.

<sup>25</sup> Laurence Tribe, *America’s Constitutional Narrative*, *DAEDALUS*, Winter 2012, at 34. Jack Balkin has endorsed the same view, declaring that the project of American democracy requires Americans to view the Constitution as “our Constitution,” which “simultaneously constitutes us as the people to whom our Constitution belongs . . . [and] accepts and endorses a constitutional story about who Americans are and what America is.” JACK M. BALKIN, *LIVING ORIGINALISM* 61 (2011). Justice Felix Frankfurter declared that “American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.” *DIARIES OF FELIX FRANKFURTER* 212 (Joseph P. Lash ed., W.W. Norton & Co., Inc. 1975).

<sup>26</sup> Akhil Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1463 n.163 (“[T]he most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People . . . .”); Steven G. Calabresi, “*A Shining City On A Hill*”: *American Exceptionalism And The Supreme Court’s Practice Of Relying On Foreign Law*, 86 *B.U. L. REV.* 1335, 1411 (2006); Mark Tushnet, *Thinking About the Constitution At the Cusp*, 34 *AKRON L. REV.* 21, 29 (2000).



us above our interests and teach us what it means to be citizens.”<sup>27</sup> Presidents Reagan, Clinton, and Obama said the same thing in almost identical language.<sup>28</sup> In what Michael Billig has called “banal nationalism”—the daily and often unnoticed reminders that instill national identity—a distilled version of the American creed is invoked every day by millions of school children who pledge allegiance to the Republic and its constitutional ideals—“one Nation under God, indivisible, with liberty and justice for all.”<sup>29</sup> Before the start of sporting events, from high school football games to the Super Bowl, millions of Americans sing of our constitutional ideals, declaring the United States “the land of the free and the home of the brave.”<sup>30</sup> Candidates for office, from small town mayors to Presidents of the United States, routinely remind us that what makes us American is devotion to the Constitution.<sup>31</sup> A large body of popular literature agrees that the Constitution makes us who we are.<sup>32</sup> A national museum is devoted to it.<sup>33</sup> In case we forget, Congress has declared Constitution Day an annual holiday to remind us.<sup>34</sup>

Outsiders also believe that national identity in the United States arises out of shared values expressed in the nation’s Constitution. In advocating for a stronger European Union, the German philosopher Jurgen Habermas argued that Europe should adopt what he called “constitutional patriotism,” a term synonymous with what I have called constitutional nationalism, asserting that the United States’ experience could serve as a model for an

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<sup>27</sup> Bush, *supra* note 8, at 2 (“America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests and teach us what it means to be citizens.”).

<sup>28</sup> See Clinton, *supra* note 8 (“We must be one—as neighbors, as fellow citizens; not separate camps, but family—white, black, Latino, all of us, no matter how different, who share basic American values and are willing to live by them.”); Obama, *supra* note 8 (“[W]hat binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea . . .”); Reagan, *supra* note 8 (stating that Americans “came from different lands but they shared the same values, the same dream.”).

<sup>29</sup> 4 U.S.C. § 4 (2016); MICHAEL BILLIG, BANAL NATIONALISM 6 (1995).

<sup>30</sup> See 36 U.S.C. § 301(a) (2016) (“The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem.”).

<sup>31</sup> See, e.g., VANESSA B. BEASLEY, YOU, THE PEOPLE: AMERICAN NATIONAL IDENTITY IN PRESIDENTIAL RHETORIC 6–67 (2011); MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 22–23 (2d ed. 2004).

<sup>32</sup> See, e.g., CHARLES KRAUT, THE PATRIOT’S GUIDE TO TAKING AMERICA BACK 159 (2010) (“Most of all, to support and defend the Constitution Americans must understand, appreciate, and love the principles put forth by this sacred document.”); SARAH PALIN, AMERICAN BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG 63 (2010) (declaring that what makes the United States exceptional is a “unique set of beliefs and national qualities” established by the Founders); see also ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND (2006).

<sup>33</sup> See *About the Constitution Center*, NAT’L CONST. CENT., <http://constitutioncenter.org/about> (last visited Jan. 31, 2018) (describing the National Constitution Center, in Philadelphia, Pennsylvania, as the “Museum of We the People”).

<sup>34</sup> See 36 U.S.C. § 106 (2016) (establishing September 17th as “Constitution Day and Citizenship Day”).

integrated Europe, which would be dedicated to a set of principles enshrined in a Europe-wide constitution.<sup>35</sup> Opponents of strengthening the EU countered that there is no common European identity, no feeling of commonality among Europeans that would justify the loyalty of citizens to a European state.<sup>36</sup> Habermas and others responded that national identity does not need to be based on common language or ethnicity, pointing to the example of the United States to argue that national identity can be based principally on values enshrined in a constitution alone.<sup>37</sup>

Constitutional nationalism provides a comforting, even inspiring ideal of national identity.<sup>38</sup> It is said to avoid the irrational hatred and bigotry associated with more primitive forms of ethnonationalism, identified by President Bush as nations “united by blood or birth or soil.”<sup>39</sup> Instead of violent, sectarian, tribal, and other forms of nationalism, constitutional nationalism teaches that being American means being committed to universal ideals like individual liberty and human equality.

American political leaders and scholars frequently assert that constitutional nationalism has formed the basis for American national identity from the nation’s founding. When Franklin Roosevelt declared that “[a] good American is one who is loyal to this country and to our creed of liberty and democracy,” he claimed that is how it has “always” been.<sup>40</sup> American historian Rogers Smith has challenged this belief and advances a “multiple

35 See JAN-WERNER MULLER, CONSTITUTIONAL PATRIOTISM 1 (2007) (“‘Constitutional patriotism’—as understood by those who originally put forward the idea . . . —designates the idea that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution.”).

36 See, e.g., Jurgen Kaube, *Are We Reasonable?*, in OLD EUROPE, NEW EUROPE, CORE EUROPE: TRANSATLANTIC RELATIONS AFTER THE IRAQ WAR 53–58 (Daniel Levy et al., eds. 2005).

37 To Habermas, and his allies, the United States’ experience serves both as a model and as a foil for European constitutional patriotism. Compare JURGEN HABERMAS, *Citizenship and National Identity*, in BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY app. II at 500 (William Rehg, trans. 1996) (arguing that the experience of the United States and Switzerland demonstrate “a political culture in which constitutional principles can take root need by no means depend on all citizens’ sharing the same language or the same ethnic and cultural origins”), with Gianni Vattimo, *The European Union Faces the Major Points of Its Development*, in OLD EUROPE, NEW EUROPE, CORE EUROPE: TRANSATLANTIC RELATIONS AFTER THE IRAQ WAR, *supra* note 36, at 28, 32–33 (contrasting the “profound, ‘libertarian’ religiosity that characterizes the American spirit” with the “more tormented secularism of Europe” and concluding that European recognition of their differences from America “will become the inspiring principle for a political system able to bestow on Europe the dignity and significance it deserves”).

38 In earlier articles, I have explored some episodes in the history of constitutional nationalism. See generally Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMPLE L. REV. 287 (2014); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827 (2011) [hereinafter Goldstein, *The Tea Party Movement*]; Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. L. REV. 1807 (2011).

39 Bush, *supra* note 8, at 2.

40 See *Praises Army Plan for Japanese Unit*, *supra* note 1.

traditions” hypothesis, in which he argues that the United States has long had competing conceptions of nationalism.<sup>41</sup> As Smith asserts, the “orthodoxy on American civic identity” has failed to give sufficient weight to inequalitarian traditions throughout American history.<sup>42</sup> If the conventional understanding were correct that American nationalism is based on commitment to the American creed, Smith argues, then episodes in American history that conflict with the creed—slavery and segregation, the conquest of Native American peoples, the denial of women’s suffrage, the Chinese Exclusion and Japanese internment, to name a few prominent examples—must be seen as mere aberrations, mistakes when the nation diverged from its true identity.<sup>43</sup> Smith rejects this view and argues that commitment to a hierarchy of race, gender, and religion, among other ascriptive beliefs, “have had great prestige through most of American history.”<sup>44</sup> Smith argues that the conviction that American identity is reserved for white Protestant men has not been a mere “inconsistent afterthought” in American history but should instead be acknowledged as an independent and traditional conception of American identity, albeit a highly contested one.<sup>45</sup>

Smith has performed an invaluable service by demonstrating that American history has long had competing traditions of nationalism and that constitutional nationalism, the creedal conception of national identity associated with the liberal, republican tradition, has not always had hegemony. Several scholars have criticized Smith’s work because it divides American nationalist traditions into two neat categories, a liberal, republican tradition and an illiberal, undemocratic, ascriptive tradition.<sup>46</sup> Political scientist James Morone has summarized this critique:

[A]scriptive theorists like Smith portray the two visions of community locked in a continual dialectic. Generous American visions of equality and inclusion face off against prejudice and exclusion. For Smith, the liberal interpretation of American history is merely the angel of America’s better nature. In every era, it confronts an entirely different impulse: the equally American urge to reject groups and repress rights on the basis of ascriptive traits.<sup>47</sup>

As Morone points out, Smith identifies two competing traditions—a civic nationalist traditional, which identifies American nationalism with the

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<sup>41</sup> See generally ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

<sup>42</sup> *Id.* at 14.

<sup>43</sup> *Id.* at 28 (discussing conventional view that racism and sexism “are merely ‘an inconsistent afterthought’ in the American mind”).

<sup>44</sup> *Id.* at 23.

<sup>45</sup> *Id.* at 28.

<sup>46</sup> See, e.g., BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 12 (2001); Karen Orren, *Structure, Sequence, and Subordination in American Political Culture: What’s Traditions Got to Do With It?*, 8 J. POLY HIST. 470, 470–78 (1996).

<sup>47</sup> James A. Morone, *Political Culture: Consensus, Conflict, and Culture War*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT* 132, 140 (Richard Valeyly et al., eds. 2016).

American creed embodied in the Constitution, and an ethnonationalist tradition, that defines what it means to be American by race, religion, and sex—and suggests that the two traditions are independent and distinct.

The history of nativist constitutional claims explored in this Article serves to demonstrate that civic and ethnic nationalism should not be seen as distinct traditions in American history but in fact have always been intertwined. Nativist movements—political movements that emphasize the privileged status of members of the nation’s historically dominant demographic groups and oppose bestowing rights or benefits on groups because of their perceived foreignness—are typically described as ethnonationalists who define national identity by reference to racial, religious, and ethnic traits, in contrast to civic nationalists, who define national identity by reference to shared civil values.<sup>48</sup> Rogers Smith, for instance, describes nativists as “ethnocultural Americanism . . . at its extreme,” which identifies membership in the national community by ancestry, religion, and race, and “not with freedom for personal liberal callings or republican self-governance.”<sup>49</sup>

In fact, throughout American history nativist movements have argued that unwanted foreigners should be excluded from the nation out of suspicion that they are incapable of embracing the nation’s values embodied in the Constitution. Nativists and those who have opposed them have largely agreed that commitment to constitutional principles is central to American identity. They have disagreed, however, over who is capable of making that commitment. Thus, when Know-Nothings sought to exclude Catholics, when Congress excluded Chinese immigrants, and when Congress adopted the National Origins Act of 1924, nativists declared that restricting immigration to people who shared the nation’s ethnic, racial, or religious heritage was justified, not in spite of the nation’s constitutional traditions, but in order to preserve them. As this history shows, beliefs in racial, religious, and ethnic supremacy have often been embedded in claims about what it means to embrace the Constitution.<sup>50</sup>

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<sup>48</sup> See, e.g., ANATOL LIEVEN, *AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM* 7 (2012) (contrasting nativism and civic nationalism); JAMES M. MCPHERSON, *IS BLOOD THICKER THAN WATER?: CRISES OF NATIONALISM IN THE MODERN WORLD* 37 (1999) (same); JEFFREY MIREL, *PATRIOTIC PLURALISM: AMERICANIZATION EDUCATION AND EUROPEAN IMMIGRANTS* 11 (2010) (same).

<sup>49</sup> Smith, *supra* note 2, at 234.

<sup>50</sup> Cf. CHARLES W. MILLS, *BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM* (2017) (arguing that racism should be recognized as an intrinsic component of liberal ideology rather than an anomalous violation of it).

## II. WHO IS FIT FOR THE CONSTITUTION? THE LONG HISTORY OF THE NATIVIST ARGUMENT THAT UNWANTED FOREIGNERS ARE HOSTILE TO THE CONSTITUTION

As the American historian John Higham has explained, nativism should be understood as “intense opposition to an internal minority on the ground of its foreign (i.e. ‘un-American’) connections.”<sup>51</sup> The basis for nativist opposition to different minority groups has varied over time—some were singled out because of their religion, others for their race, others for their ethnicity, and others for their political views.<sup>52</sup> As Higham has noted, however, “While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.”<sup>53</sup>

This Part provides a history of nativist invocations of constitutional commitment as a touchstone for dividing good Americans from dangerous foreigners. As this history shows, nativists have long employed the patriotic language of constitutional devotion to argue that some peoples must be excluded from the nation. Subpart A discusses nativist movements from the founding era to the Chinese Exclusion Act. As that Subpart shows, throughout the nineteenth century, American political movements asserted that only people of British descent were capable of embracing America’s constitutional system, and this belief repeatedly formed the basis for immigration and naturalization policies. Subpart B focuses on the crowning achievement of American nativism, the adoption of the National Origins Act of 1924. The history leading up to the 1924 reveals a clash between competing conceptions of American national identity, between those who believed that, through Americanization programs, immigrants of various backgrounds could embrace America’s national values and those who believed that only members of the groups comprising America’s longstanding ethnic core were suited to become American citizens. In enacting the National Origins Act, Congress sided with the nativists and declared that the preservation of the Constitution and American national identity required closing the doors to immigrants who did not share the racial background of the nation’s original ethnic stock.

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<sup>51</sup> JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 4 (2d ed. 1977); *see also* BRIAN N. FRY, *NATIVISM AND IMMIGRATION: REGULATING THE AMERICAN DREAM 1–8* (2007) (cataloging various definitions of nativism and defining it as “a collective attempt by self-identified natives to secure or retain prior or exclusive rights to valued resources against the challenges reputedly posed by resident or prospective populations on the basis of their perceived foreignness”).

<sup>52</sup> HIGHAM, *supra* note 51, at 4.

<sup>53</sup> *Id.*

A. *A Brief History of Nativism and the Constitution from the Founding Era to the Chinese Exclusion*

Traditions of American nativism predate the establishment of the United States.<sup>54</sup> In 1751, Benjamin Franklin expressed his belief that immigration to the American colonies should be limited to “the lovely white” and should exclude “all blacks and tawneys.”<sup>55</sup> Franklin conceded that his racial preferences arose because he was “partial to the Complexion of my Country,” but he insisted that “such Kind of Partiality is natural to Mankind.”<sup>56</sup> Franklin further argued that it was not merely whites who should be preferred, but British subjects alone should be allowed to immigrate, while Germans (whom he referred to as “Palatines”) should be excluded:

Why should the Palatine Boors be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a Colony of *Aliens*, who will shortly be so numerous as to Germanize us instead of us Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion.<sup>57</sup>

Franklin’s call to keep out the Palatines expresses many familiar nativist themes: immigration should be restricted to those who share the traits of the native-born population—their complexion, culture, national origin, and language. Foreigners who do not share these traits are inherently suspect; they are “Boors” who “herd together” instead of assimilating, maintaining their “Language and Manners” instead of adopting British ones. As with many subsequent nativists, Franklin described unwanted immigrants in animal metaphors, as a “swarm” and as a “herd,” and their arrival in military metaphors, as an “invasion.”<sup>58</sup> Admitting these foreigners, Franklin warned, would undermine and ultimately destroy the predominant culture of the American colonies.

At the time of the nation’s founding, beliefs about the nation’s republican values were often linked to beliefs about the nation’s ethnic heritage. Thomas Jefferson, for instance, appealed to Americans’ “Saxon” heritage, which he declared established in Britain “that system of laws which has so long been the glory and protection of that country.”<sup>59</sup> Members of the new

<sup>54</sup> The history of American nativism is traced most authoritatively in HIGHAM, *supra* note 51.

<sup>55</sup> BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN 234 (Leonard W. Labaree et al. eds., 1961).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* For a discussion of how the same metaphors are often used to describe unwanted immigration and unwanted insects, see generally Jared A. Goldstein, *Aliens in the Garden*, 80 U. COLO. L. REV. 685 (2009).

<sup>59</sup> THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 14 (Historical Printing Club 1892) (1774).

American nation identified the nation's republican values as uniquely British. As John Higham has written, Americans "had always proclaimed orderly self-government as the chief glory of Anglo-Saxons—an inherited capacity so unique that the future of human freedom surely rested in their hands."<sup>60</sup> As Rogers Smith has similarly written, the American revolutionary leaders believed that their "Anglo-Saxon heritage . . . bestow[ed] a special awareness of men's natural liberties and also unique capacities for self-government."<sup>61</sup> Indeed, the American Revolutionaries often justified their cause by arguing that as British men they were uniquely driven toward self-government while colonial subjugation thwarted this natural inclination.<sup>62</sup>

Thus, by the time the Constitution was adopted, Americans had a long history of thinking of the nation's republican values as uniquely British. In *Federalist No. 2*, John Jay emphasized the connection between the nation's shared civic values and its shared national and religious heritage:

Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.<sup>63</sup>

As Sanford Levinson has pointed out, Jay was greatly mistaken in asserting that the at the time of ratification the people of the United States shared a homogenous culture, religion, and heritage, or even that they spoke a common language.<sup>64</sup> Yet *Federalist No. 2* makes undeniably clear that, in urging the ratification of the Constitution, its framers believed that the Constitution arose out of a common national and religious heritage.

In the year after ratification, the newly created Congress acted quickly to enact into law the conviction that the ability to embrace the nation's Constitution was connected to race. The Naturalization Act of 1790 provided that naturalized citizenship could only be bestowed upon someone who was both a "free white person" and who swore to "support the constitution of the United States."<sup>65</sup> In linking these two traits, Congress effectively declared that only people of the dominant race were capable of forming an attachment

<sup>60</sup> See HIGHAM, *supra* note 51, at 137.

<sup>61</sup> SMITH, *supra* note 41, at 86.

<sup>62</sup> *Id.*

<sup>63</sup> THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961).

<sup>64</sup> See Sanford Levinson, *What One Can Learn from Foreign-Language Translations of the U.S. Constitution*, 31 CONST. COMMENT. 55, 64 (2016) (arguing that John Jay must have been aware that languages other than English were spoken, given the prevalence of Dutch speakers in New York).

<sup>65</sup> Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790). In 1795, Congress amended the act in several ways but maintained the limitations that naturalization was only available to "free white persons" who could show they were "attached to the principles of the constitution of the United States." Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (1795).

to the nation's fundamental principles. These dual requirements for naturalized citizenship—commitment to constitutional principles and membership in the white race—persisted, with relatively few changes, until 1952, when Congress finally repealed any racial criteria for citizenship.<sup>66</sup>

Belief in the uniquely British capacity for self-government also served to justify the enslavement of Africans and the conquest and displacement of Native Americans, because those peoples were understood to lack the capacity of self-government.<sup>67</sup> In *Dred Scott v. Sandford*, the Supreme Court incorporated into its constitutional interpretation this nativist belief about the capacity of different peoples to participate in American self-government, concluding that the Constitution was written by and for white people, while persons of African descent could not be considered any part of “We the People” for whom the Constitution was written.<sup>68</sup> Native Americans too, the Court explained, could not be considered part of the American people because they too were not “capable of enjoying[] the privileges of an American citizen.”<sup>69</sup> The Court's majority was far from alone in believing that the Constitution was uniquely suited to white persons. In his debates with Abraham Lincoln, Stephen Douglas defended *Dred Scott* by saying that “this government was made by our fathers on the white basis. It was made by white men for the benefit of white men and their posterity forever, and was intended to be administered by white men in all time to come.”<sup>70</sup> Lincoln disagreed with *Dred Scott* yet agreed with Douglas that persons of African descent were not capable of participating in American democracy and should not be allowed to vote, a position he later moderated to some degree.<sup>71</sup>

Around the same time as *Dred Scott*, the Know Nothing movement sought to exclude Irish Catholic immigrants by invoking the same principle, that the Constitution was intended solely to protect persons of English descent, who

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<sup>66</sup> Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163, ch. 477, § 311 (1952) (stating that the right of naturalization will not be denied on account of race).

<sup>67</sup> SMITH, *supra* note 41, at 63–67.

<sup>68</sup> 60 U.S. 393, 407 (1856).

<sup>69</sup> *Id.* at 420.

<sup>70</sup> Stephen A. Douglas, Fifth Joint Debate, at Galesburgh, Ill. (Oct. 7, 1858), in THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 107 (1912); see also Speech of Stephen A. Douglas, Third Joint Debate, at Jonesboro (Sept. 15, 1858), in POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 239, 250 (Scott, Foresman & Company 1895) (“I hold that a negro is not and never ought to be a citizen of the United States. . . . I do not believe that the Almighty made the negro capable of self-government.”).

<sup>71</sup> Abraham Lincoln, Fourth Joint Debate, at Charleston (Sept. 18, 1858), in THE LINCOLN-DOUGLAS DEBATES 189 (Harold Holzer ed., 1993) (“I will say then, that I am not nor ever have been in favor of bringing about in any way, the social and political equality of the white and black races—that I am not nor ever have been in favor of making voters of the negroes . . . .”); *id.* at 226 (“I am not in favor of [negro citizenship].”).



had a unique capacity for self-government.<sup>72</sup> In 1856, the American Party (the official name of the “Know-Nothing” Party) adopted a platform that articulated its opposition to Irish immigration in expressly constitutional terms.<sup>73</sup> Irish Catholics brought disease and stole American jobs, the Know-Nothings charged, but, even worse, Catholics would always be loyal to a foreign despot and could never embrace the principles of the American Constitution. As one Know Nothing tract warned: “The strange, cruel monster of Rome . . . can never amalgamate with the beautiful form of America. Liberty and Despotism are two eternal opposites.”<sup>74</sup> In order to protect the Constitution and the American way of life, the Know Nothings argued, Catholics must be excluded from immigration and barred from positions of power.<sup>75</sup>

Although the Know Nothings achieved only limited success in stopping Irish immigration, in the following decades nativists succeeded in restricting immigration from China. In 1876, the Democratic Party adopted a platform that denounced all “Mongolian” immigration.<sup>76</sup> As the party’s platform declared, such immigration should be barred because it amounted to “the incursions of a race not sprung from the same great parent stock, and in fact now by law denied citizenship through naturalization.”<sup>77</sup> In particular, the Democrats charged, Chinese were unsuitable to immigration because they could never participate in constitutional self-government: they were “unaccustomed to the traditions of a progressive civilization, one exercised in liberty under equal laws.”<sup>78</sup> The Republican Party soon adopted a similar policy, and in 1882, Congress enacted the Chinese Exclusion Act.<sup>79</sup> It did so based on the widespread belief that the Chinese were simply incapable of participating in the nation’s constitutional system. As one Senator said:

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72 See KEVIN PHILLIPS, *THE COUSINS’ WARS* 483 (1999) (“The huge midcentury Catholic wave, however, stirred Protestant fury at a population that seemed to equal squalor, drunkenness, crime, and unthinking support for big-city political machines.”); see also ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, at 10–11 (2004) (describing the circumstances that gave rise to anti-Catholic sentiment in the mid-1800s).

73 See *American Platform Of Principles*, ¶ 2 (Feb. 21, 1856), <http://www.yale.edu/-glc/archive/974.htm> [hereinafter *American Platform*] (“The perpetuation of the Federal Union and Constitution, as the palladium of our civil and religious liberties, and the only sure bulwarks of American Independence.”).

74 PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: NATIVISM AND IMMIGRATION* 31–32 (2010) (internal quotation marks omitted) (quoting *Rome and America Eternal Opposites*, in *THE TRUE AMERICAN’S ALMANAC AND POLITICIAN’S MANUAL FOR 1857* (1857)).

75 *American Platform*, *supra* note 73, ¶ 3 (“Americans must rule America, and to this end native-born citizens should be selected for all State, Federal, and municipal offices of government employment, in preference to all others.”).

76 *1876 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29581> (last visited Jan. 31, 2018).

77 *Id.*

78 *Id.*

79 See Act of May 6, 1882, 22 Stat. 58.

Free institutions are only possible with the favored races. It is not because they are a monopoly of the favored races, but because no other race is capable of creating them; no other race is capable of perpetuating them; no other race is capable of treading freedom's heights with firm and unwavering step.<sup>80</sup>

Only the white race could create and sustain a free government, Congress concluded, and that government would be destroyed by allowing immigration of other people who were incapable of participating in the American political system. As one Congressman put it: “[I]f the Republic endures it must be a homogeneous population,” while another declared that “unrestricted Mongolian immigration means ultimate destruction.”<sup>81</sup>

Thus, by the time of the great nativist movement that began in 1894 and succeeded thirty years later in limiting immigration to persons of the so-called Nordic race, it had long been asserted that the Constitution was made solely for members of the nation's native racial stock and others must be excluded as a threat to the Constitution and the American way of life.

*B. Americanizers and Immigration Restrictionists: Protecting the Constitution from the New Immigrants*

During the last quarter of the nineteenth century, immigration to the United States greatly increased.<sup>82</sup> Not only did the number of immigrants and the percentage of foreign-born residents increase, the national origins of the immigrants also changed.<sup>83</sup> While most immigrants before 1860 had come from England, Ireland, and Germany, beginning in the 1880s immigration from southern and eastern Europe increased, with millions of Italians, Russians, Greeks, Hungarians, and Poles arriving in the United States.<sup>84</sup> A majority of the new immigrants were Catholics and Jews.<sup>85</sup>

Many native-born Americans looked on the increase in immigration with alarm, believing that the new immigrants brought crime, disease, poverty, and dangerously foreign ideas.<sup>86</sup> There were widespread fears over the ability of the new immigrants to assimilate and participate in American public life. Two popular movements arose to address the increased immigration. On the one

<sup>80</sup> 13 Cong. Rec. 1742 (1882) (statement of Sen. Jones); see also Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 22–36 (1998) (reviewing legislative history of the Chinese Exclusion Act).

<sup>81</sup> 13 Cong. Rec. 2223 (statement of Rep. Cannon); *id.* at 1978 (statement of Rep. Cassidy).

<sup>82</sup> In the 1850s, 2.6 million immigrants came to the United States, and in the 1880s, that number increased to 5.2 million, and in the first decade of the twentieth century 8.8 million people immigrated to the United States. DANIELS, *supra* note 72, at 5 tbl. 1.2.

<sup>83</sup> The percentage of United States residents who were foreign-born rose from 9.7% in 1850 to 14.7% in 1890 and stayed around that level through 1920. *Id.* at tbl. 1.1.

<sup>84</sup> Helen F. Eckerson, *Immigration and National Origins*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 6 (1966).

<sup>85</sup> DAVID GOLDFIELD, *ENCYCLOPEDIA OF AMERICAN URBAN HISTORY* 122 (2007).

<sup>86</sup> HIGHAM, *supra* note 51, at 159–75; see also James S. Pula, *The Progressives, the Immigrant, and the Workplace: Defining Public Perceptions, 1900–1914*, 52 POLISH AM. STUD. 57, 57–69 (1995).

hand, a movement arose to “Americanize” the immigrants by teaching them English and inculcating American values. On the other hand, a movement to sought to stop immigration from southern and eastern Europe out of a belief that these immigrants were incapable of becoming good American citizens.

Although the two movements advocated very different responses to immigration, they shared a similar understanding of what it means to be American. Both movements identified being American with adherence to a set of values, including commitment to personal autonomy, individual liberty, and democratic self-government, and both movements identified the U.S. Constitution as the embodiment of those values. Where they disagreed was over who was capable of embracing these values. Americanizers believed in the “melting pot” idea, that with the right kind of education and persuasion, the new immigrants could learn to embrace the Constitution and become good Americans. Immigration restrictionists, in contrast, embraced eugenics and scientific racism and believed that immigrants from southern and eastern Europe had evolved in ways that did not breed appreciation for liberty and self-government, and no education or persuasion could change that. As one popular immigration restriction tract put it, “We cannot make a well-bred dog out of a mongrel by teaching him tricks.”<sup>87</sup>

With the adoption of the National Origins Act of 1924, Congress embraced the nativism of the immigration restrictionists and openly declared that immigration must be restricted to maintain the nation’s original ethnic stock. The Constitution could be preserved, Congress declared, only if the nation stayed white.

### 1. *The Americanization Movement*

Until 1921, when Congress adopted substantial immigration restrictions, the primary public response to increased immigration consisted of attempts to help the immigrants assimilate. The belief that immigrants would soon acculturate was frequently expressed through the metaphor of the “melting pot” that had become part of the national vocabulary after the production of Israel Zangwill’s play of that name in 1908.<sup>88</sup> The idea was considerably older. In 1782, Hector St. John de Crèvecoeur, published his *Letters from an American Farmer*, which declared that in the United States various nationalities were “melting” together to create a new nation:

What, then, is the American, this new man? . . . I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four

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<sup>87</sup> Robert DeC. Ward, *Fallacies of the Melting-Pot Idea and America’s Traditional Immigration Policy*, in *THE ALIEN IN OUR MIDST* 231 (Madison Grant and Chas. Stewart Davison, eds., 1930).

<sup>88</sup> ISRAEL ZANGWILL, *THE MELTING POT* (new & revised ed., MacMillan Co. 1926) (1908).

wives of different nations. . . . Here individuals of all nations are melted into a new race of men . . . .<sup>89</sup>

Until World War I, conservatives, centrists, and progressives generally agreed that, at least among white immigrants, differences associated with nationalities, culture, ethnicity, and religion, would melt away to form a new homogenous, American culture.<sup>90</sup>

Although no organized program had developed over the nineteenth century to help new immigrants assimilate into American ways, the public school system had always been devoted to inculcating republican values.<sup>91</sup> As Steven Green has written, nineteenth century educators “worked tirelessly to create an education system that would acculturate children from diverse social, religious, and national backgrounds and assimilate them into the unfolding republican experience.”<sup>92</sup> Public schools were dedicated to teaching morality in order to help children become good citizens. As Green has explained, public schools were created out of a “widespread belief that instilling moral virtue in children was indispensable for perpetuating the nation and its republican system of government.”<sup>93</sup>

In response to increasing concerns that the new immigrants needed additional training to assimilate, patriotic organizations representing the nation’s established elites began to provide programs specifically to educate immigrants on American values. In 1898, the Daughters of the American Revolution (“D.A.R.”) launched a lecture series on American history and government, given in several foreign languages, to teach immigrants the “spirit of true Americanism.”<sup>94</sup> Other patriotic societies, like the Sons of the American Revolution, followed the D.A.R.’s lead, as did the YMCA, which began offering evening classes for immigrants that combined English language instruction and lessons on American civics.<sup>95</sup> By 1914, YMCA Americanization programs involved more than 30,000 students.<sup>96</sup>

In 1914, Henry Ford began requiring foreign-born workers to attend Americanization classes at his factories, which like other programs combined language training and civics lessons.<sup>97</sup> Ford’s program culminated in an

<sup>89</sup> J. HECTOR ST. JOHN DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 69–70 (Penguin American Library 1981) (1782).

<sup>90</sup> MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 237 (1995) (“[T]he then-new and progressive ideal of melting-pot nationalism . . . was centrist or liberal in a time when the right was still strongly racist and nativist.”).

<sup>91</sup> HIGHAM, *supra* note 51, at 235.

<sup>92</sup> STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* 11 (2012).

<sup>93</sup> *Id.* at 11–12.

<sup>94</sup> HIGHAM, *supra* note 51, at 237.

<sup>95</sup> *Id.* at 238.

<sup>96</sup> *Id.* at 238–39.

<sup>97</sup> See *Melting Pot Ceremony at Ford English School, July 4, 1917*, HENRY FORD,

elaborate graduation ceremony, held on the Fourth of July and referred to as “Americanization Day.”<sup>98</sup> In the ceremony, immigrants wearing their “native dress” would descend from a model boat into a large pot labeled “Melting Pot,” which the school’s teachers would stir with ten-foot ladles.<sup>99</sup> The immigrants would then emerge from the pot wearing typically American clothes and waving American flags.<sup>100</sup> As the director of the program explained, “Into the pot 52 nationalities with their foreign clothes and baggage go and out of the pot after a vigorous stirring by the teachers comes one nationality, viz, American.”<sup>101</sup> The graduation ceremony perfectly captured the widespread notion that, through education in the common American culture, immigrants would lose their backward foreign ways and become good patriotic Americans.

After beginning as a private movement, Americanization programs soon were offered by local and state governments. In the first decade of the twentieth century, many cities with large immigrant populations, including New York, Chicago, Detroit, Cleveland, and Boston, began offering night classes for immigrants to learn English and civics.<sup>102</sup> In 1907, New Jersey became the first state to support immigrant education classes, a program followed the next year by New York, which declared that its goal was the “making of new races into Americans.”<sup>103</sup> At the same time, states increased their efforts to Americanize immigrant children in public schools and began to mandate civics classes, the display of the American flag, and daily recitation of the newly composed Pledge of Allegiance.<sup>104</sup>

Demand for Americanization programs soon became a national issue. The Progressive Party platform condemned “the fatal policy of indifference and neglect which has left our enormous immigrant population to become the prey of chance and cupidity” and proposed action “to promote their assimilation, education and advancement.”<sup>105</sup> Conservatives too called for Americanization programs as a way to fight against radical alien ideas and to create a homogenous American culture.<sup>106</sup>

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<https://www.thehenryford.org/collections-and-research/digital-collections/artifact/254569> (last visited Nov. 6, 2017).

<sup>98</sup> Clinton C. DeWitt, *Industrial Teachers*, in PROCEEDINGS AMERICANIZATION CONFERENCE 114, 119 (1919).

<sup>99</sup> *Id.*

<sup>100</sup> A photograph and description of the ceremony can be found at the website of the Henry Ford Museum. *Melting Pot Ceremony at Ford English School, July 4, 1917*, *supra* note 97.

<sup>101</sup> DeWitt, *supra* note 98, at 119.

<sup>102</sup> EDWARD GEORGE HARTMANN, THE MOVEMENT TO AMERICANIZE THE IMMIGRANT 24 (1948).

<sup>103</sup> CHRISTINA A. ZIEGLER-MCPHERSON, AMERICANIZATION IN THE STATES: IMMIGRANT SOCIAL WELFARE POLICY, CITIZENSHIP, & NATIONAL IDENTITY IN THE UNITED STATES, 1908–1929, at 20, 25 (2009).

<sup>104</sup> HIGHAM, *supra* note 51, at 237.

<sup>105</sup> *Id.* at 238; *see also* ZIEGLER-MCPHERSON, *supra* note 103, at 10.

<sup>106</sup> HIGHAM, *supra* note 51, at 237 (discussing the “two sides of the Americanization movement”).

World War I led to a surge in interest in Americanization programs. The military discovered that illiteracy was especially common among foreign-born draftees.<sup>107</sup> Wartime also brought an increase in xenophobia, which increased pressure for programs to encourage rapid assimilation.<sup>108</sup> During the war, nativists alleged that German-Americans were disloyal, but soon they focused on all recent immigrants—so called “hyphenated Americans”—who were suspected of remaining loyal to their countries of birth.<sup>109</sup> Teddy Roosevelt denounced the “hyphenated Americanism” of those “who spiritually remain foreigners in whole or in part” and declared that all Americans should adhere to “the simple and loyal motto, AMERICA FOR AMERICANS.”<sup>110</sup> As Roosevelt put it, “unless the immigrant becomes in good faith an American and nothing else, then he is out of place in this country, and the sooner he leaves it the better.”<sup>111</sup> Failure by immigrants to assimilate, the President warned, “will spell ruin to this nation.”<sup>112</sup>

The federal government responded to demands for increased Americanization efforts through the bureaus of Naturalization and Education.<sup>113</sup> In 1916, the Bureau of Naturalization distributed materials for a course on citizenship, which was widely used in Americanization efforts.<sup>114</sup> The U.S. Bureau of Education also created a Division of Immigrant Education.<sup>115</sup> These agencies encouraged states to adopt Americanization programs and sought to coordinate state programs.<sup>116</sup> In 1920, the Bureau of Naturalization distributed nearly 100,000 textbooks on citizenship to help immigrants assimilate as

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<sup>107</sup> See F.V. Thompson, *Reorganization of the Administration of Our Educational Facilities for Americanization*, in PROCEEDINGS AMERICANIZATION CONFERENCE, *supra* note 98, at 68, 74 (noting that 25% of military-aged adults are illiterate).

<sup>108</sup> As John Higham has written, World War I led to “the most pervasive nativism that the United States had ever known.” HIGHAM, *supra* note 51, at 195; see also S. E. Weber, *Promotion of Education in the Mines*, in PROCEEDINGS AMERICANIZATION CONFERENCE, *supra* note 98, at 150, 150 (“The Great War has made the problem of Americanization nation wide. Literacy and loyalty are its symbols.”).

<sup>109</sup> See HIGHAM, *supra* note 51, at 198 (discussing the view that “hyphenated Americans” had divided loyalty).

<sup>110</sup> HIGHAM, *supra* note 51, at 199; Theodore Roosevelt, *America for Americans* in EXEC. COMM. OF THE PROGRESSIVE NAT’L COMM., *THE PROGRESSIVE PARTY: ITS RECORD FROM JANUARY TO JULY, 1916*, at 85 (1916).

<sup>111</sup> Roosevelt, *supra* note 110, at 77.

<sup>112</sup> *Id.* at 78.

<sup>113</sup> See, e.g., *Origins of the Federal Naturalization Service*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/or-igins-federal-naturalization-service> (Feb. 4, 2016).

<sup>114</sup> BUREAU OF NATURALIZATION, U.S. DEP’T OF LABOR, AN OUTLINE COURSE IN CITIZENSHIP TO BE USED IN THE PUBLIC SCHOOLS FOR THE INSTRUCTION OF THE FOREIGN AND NATIVE BORN CANDIDATE FOR ADULT-CITIZENSHIP RESPONSIBILITIES 3 (1916) [hereinafter BUREAU OF NATURALIZATION, AN OUTLINE COURSE IN CITIZENSHIP].

<sup>115</sup> Fred C. Butler, *Purposes of the Conference and Plans of the Americanization Division*, in PROCEEDINGS AMERICANIZATION CONFERENCE, *supra* note 98, at 22, 22.

<sup>116</sup> *Id.* at 24.

rapidly as possible and to protect American culture from foreign infiltration.<sup>117</sup> In the midst of the post-war Red Scare, Americanization was seen as key to fighting communism and anarchism.<sup>118</sup> The U.S. Senate declared that a program of Americanization was the best way to avert industrial strikes.<sup>119</sup>

These widespread Americanization efforts sought to transform immigrants into Americans by “preaching the gospel of Americanism,” as one enthusiast put it.<sup>120</sup> Yet there was little consensus on what it took to transform immigrants into Americans. California adopted a program that sought to help new immigrants Americanize their homes by making them more sanitary and tidy, declaring: “[B]efore a man should be asked to become a good American by being worthy of his surroundings, those surroundings should be made worthy of a good American.”<sup>121</sup> Other Americanization programs focused on increasing wages and living standards for immigrants in the belief, expressed by one Americanization activist, that, unless immigrants were provided a higher standard of living, they would continue to live in the “foreign quarters where the native language only is spoken, where the foreign news is printed in the mother tongue, and where the anarchist is reared.”<sup>122</sup>

<sup>117</sup> DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY* 88 (2000).

<sup>118</sup> The National Security League, for instance, argued that patriotic Americans must “preach Americanism” and accelerate Americanization as key to “the fighting of Bolshevism and other un-American tendencies.” HARTMANN, *supra* note 102, at 218, 220.

<sup>119</sup> HIGHAM, *supra* note 51, at 255; *see also* Fred H. Ringe, Jr., *Promotion of Work for Foreigners and Illiterates in the Lumber Camps*, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 165, 166 (noting the efforts of socialists to organize lumbermen and arguing that “these facts and the growing industrial unrest emphasize the special need for education in English, citizenship, and the real meaning of American democracy”).

<sup>120</sup> *See* Address of Felix J. Streyckmans, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 200, 204; *see also* Grover C. Huebner, *The Americanization of the Immigrant*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, May 1906, at 191, 191 (defining Americanization as “that process by which immigrants are transformed into Americans” and stating that “an immigrant has been Americanized only when his mind and will have been united, with the mind and will of the American so that the two act and think together”); Address of John J. Mahoney, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 120, 126 (“[Americanization] is the business of instilling into the hearts of everyone who inhabits American soil those ideas and ideals, those attitudes, convictions and points of view that the real American believes in and swears by and reveres.”); Address of S. E. Weber, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 150, 151 (“[W]e believe that adequate provision should first be made for the instruction of American youth in the American language, in American traditions, customs, and ideals, and then their permanent assimilation in American life is assured.”).

<sup>121</sup> *COMM’N OF IMMIGRATION & HOUS. OF CAL., ANNUAL REPORT*, at 11, in 5 *JOURNALS OF THE LEGISLATURE OF THE STATE OF CALIFORNIA* (1919). The National Americanization Committee—a private effort led by the former director of New York’s Americanization program—included an “American Standards of Living Campaign,” designed to teach immigrants how to live like Americans. As the Americanization program adopted in Ipswich, Massachusetts, explained, immigrants were encouraged to adopt “American standards of living, and make the homes of these Ipswich Greeks and Poles American and not Southern European homes.” HARTMANN, *supra* note 102, at 124–26.

<sup>122</sup> Address of William Lamkie, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 178, 179.

Franklin Lane, the United States Secretary of the Interior who oversaw much of the federal Americanization effort, articulated a belief that Americanization could be accomplished through an enormous variety of programs:

America is the expression of a spirit, an attitude toward men and material things, an outlook and a faith. . . .

Now, this can not be taught out of a book. It is a matter of touch, of feeling, like the growth of friendship. Each man is approachable in a different way, appealed to by very contradictory things. One man reaches America through a baseball game, another through a church, a saloon, a political meeting, a woman, a labor union, a picture gallery, or something to eat.<sup>123</sup>

Based on the belief that Americanization could occur through contact with anything authentically American, the Department of the Interior organized an Americanization conference in which advocates recommended programs to Americanize immigrants through public schools, movies, records, dances, and sports; through infiltration of the foreign press; through improved hygiene and housing; through improved working conditions; through participation in unions; and through programs in lumber camps, factories, and farms.<sup>124</sup>

Although Americanization efforts encompassed a wide range of activities, a central focus of all Americanization programs was to educate immigrants on American political ideals.<sup>125</sup> English language instruction, always understood as a central component of Americanization programs, was seen as important principally as a means to teach American values. As one speaker at a 1919 federal Americanization conference explained, “The fundamental idea has been very largely the idea of giving the newcomer a working knowledge of the English language in the hope that he would, somehow or other, gradually assimilate the American spirit of freedom and gradually conform to the American ideal.”<sup>126</sup> Americanization programs thus emphasized the founding of the nation and the philosophy and culture of the Founding Fathers. As another speaker at the Americanization conference explained:

We need harbor no hazy notions as to what the original Americans conceived Americanism to be. . . . You find it in the Declaration of 1776; you find it in the preamble of the Constitution—liberty, freedom, equality, abolition of destructions that divide us into castes, fraternity, brotherhood, union, cooperation, public welfare. No perusal of the speeches, papers, or letters of the fathers of the Republic is possible without apprehending their distinct and earnest prophecies of a new and better race arising upon these shores.<sup>127</sup>

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<sup>123</sup> Franklin K. Lane, Sec’y of the U.S. Dep’t of Interior, Americanization Speech at Hotel Astor, New York, in *AMERICA AMERICANISM AMERICANIZATION* 3, 18 (1919).

<sup>124</sup> See generally *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98.

<sup>125</sup> See Address of P.P. Claxton, *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 26, 27 (“[E]ducation is the fundamental thing in Americanization.”).

<sup>126</sup> See Address of H.D. Rickard, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 60, 60–61.

<sup>127</sup> Address of William McAndrew, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note



Americanization efforts thus centered on inculcating the nation's founding political principles, as can be seen in a widely used handbook on Americanization, which focused on teaching about early American history and the founding of the nation, with lengthy excerpts and explanations of the Declaration of Independence, stories of the founding fathers, and the Constitution.<sup>128</sup>

The Americanization movement thus focused on inculcating devotion to the Constitution and other founding ideals as the central representation of Americanism. As Secretary of the Interior Lane declared: "We know that there are principles enunciated in the Declaration of Independence and in the Constitution of the United States which are necessary to get into one's system before [an immigrant] can thoroughly understand the United States."<sup>129</sup> While naturalization law had required attachment to the Constitution as a prerequisite to citizenship since 1795, it was only during the fervor of the Americanization movement that the government became involved in trying to teach devotion to the Constitution.<sup>130</sup>

Although the Americanization movement sought to welcome rather than exclude foreigners, it should be recognized that it had a substantial nativist element, in that it sought to eradicate foreign cultures from the midst of the United States.<sup>131</sup> As historian Benjamin Schwarz has written, "Americanization' was a process of coercive conformity [whereby] various nationalities

98, at 242, 242.

<sup>128</sup> See generally ELSWOOD GRISCOM, JR., *AMERICANIZATION: A SCHOOL READER AND SPEAKER* (1920). To be sure, another less widely distributed Americanization handbook presented more varied and contemporary materials, including excerpts from John Dewey, W.E.B. DuBois, and Walt Whitman. *AMERICANIZATION: PRINCIPALS OF AMERICANISM, ESSENTIALS OF AMERICANIZATION, TECHNIC OF RACE-ASSIMILATION* (Winthrop Talbot & Julia E. Johnsen eds., 2d ed. 1920).

<sup>129</sup> Address of Franklin K. Lane, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 293, 295; see also Address of Louis Post, in *PROCEEDINGS OF THE FIRST CITIZENSHIP CONFERENCE* 11, 14 (1916) ("If our citizens native or alien born are to become real citizens it is the ideals of our country that must be put before them. Its Constitution, of course, and reading and writing the English language."). Writing in 1948, historian Edward George Hartmann stated that Americanizers rarely defined the content of "Americanism" and "American ideals" with any precision but: "[W]hat they had in mind by these terms was what was generally believed at that time to constitute a proper 'American' orientation, namely, a staunch belief in and support of the ideals expressed by the founding fathers in the great American documents, the Declaration of Independence and the Constitution . . ." HARTMANN, *supra* note 102, at 269–70.

<sup>130</sup> In its coursebook for citizenship, the Bureau of Naturalization declared: "The matter most intimately concerning the naturalization of aliens is such an understanding of the principles of the Constitution as to make credible the declaration that he is 'attached' to those principles." *BUREAU OF NATURALIZATION, AN OUTLINE COURSE ON CITIZENSHIP*, *supra* note 114, at 3; see also HARTMANN, *supra* note 102, at 220 ("They must tell the immigrant population our living faith in American doctrines of law, liberty, progress and justice, as explained by the Constitution and our representative form of government." (quoting National Security League pamphlet)).

<sup>131</sup> See, e.g., Address of J.E. Owen Phillips, in *PROCEEDINGS AMERICANIZATION CONFERENCE*, *supra* note 98, at 101–02 ("[W]e have to eliminate in ourselves, as Americans, in our system, in our whole community life, everything and anything that is un-American . . .")

were made into American as ore is refined into gold. ‘Americanization’ purified them, eliminating the dross.”<sup>132</sup> The idealized American presented by Americanization efforts was, of course, a white, Anglo-Saxon Protestant. As Michael Olneck has written:

Not only did the content of the Americanizers’ rhetoric, texts, and rituals symbolically assign status to those adhering most closely to the culture of native-born Americans. The activity of Americanizing the immigrants also assigned to native-born Americans the roles of tutor, interpreter, and gate-keeper, while rendering immigrants the subjects of tutelage and judgment.<sup>133</sup>

In seeking to persuade immigrants to give up their foreign ways, the Americanization movement nonetheless had an optimistic view of human nature, believing that all peoples, regardless of national origin, race, or religion, were capable of adopting American values and embracing the nation’s constitutional principles.

## 2. *The Immigration Restriction League*

At the same time that the Americanization movement worked to transform the new immigrants into good, Constitution-loving Americans, another movement arose to exclude them on the ground that they could never learn to love the Constitution. In 1894, three Harvard graduates, Charles Warren, Robert DeCourcy Ward, and Prescott Farnsworth Hall, formed the Immigration Restriction League (“IRL”) and declared that the group’s purpose was to advocate for the “exclusion of elements undesirable for citizenship or injurious to our national character.”<sup>134</sup>

The IRL’s leaders were alarmed by the ethnic, racial, and cultural composition of the recent immigrants.<sup>135</sup> The League declared that the “new immigrants” from southern and eastern Europe compared unfavorably with

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<sup>132</sup> Benjamin Schwarz, *Exporting the Myth of a Liberal America*, WORLD POL’Y J., Fall 1998, at 69, 72 (1998); see also Harry H. Laughlin, “Analysis of the Metal and Dross in America’s Melting Pot,” Hearings, House Immigration Comm., Nov. 21, 1923, 67th Cong., 3d sess.

<sup>133</sup> Michael R. Olneck, *Americanization and the Education of Immigrants, 1900–1925: An Analysis of Symbolic Action*, 97 AM. J. EDUC. 398, 400 (1989).

<sup>134</sup> IMMIGRATION RESTRICTION LEAGUE CONST., art. II. Although other groups joined with the IRL in urging immigration restriction, I focus on the IRL because it has been well-recognized as the leading anti-immigrant group of the era, whose advocacy led directly to the enactment of the 1924 Immigration Act. See DANIELS, *supra* note 72, at 31 (noting that the most effective anti-immigrant group was the IRL).

<sup>135</sup> See, e.g., IMMIGRATION RESTRICTION LEAGUE, *Study These Figures and Draw Your Own Conclusions: Recent Changes in the Nationality of Immigrants*, in 2 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE (2d ed. 1894) (noting the rising rates in immigration from eastern European countries, the levels of education and skilled labor among immigrants by country, percentage of immigrants who do not speak English, and the percentage of immigrants composing the populations of prisoners, “insane,” and “paupers”).

the “old immigrants” from northwestern Europe.<sup>136</sup> The League charged that the new immigrants contributed a disproportionate number of the nation’s illiterates, criminals, and the insane.<sup>137</sup> In fact, the League argued, foreign governments were intentionally dumping their criminals and paupers on the United States.<sup>138</sup> The League further charged that, unlike the old immigrants, the new immigrants did not assimilate into American culture and instead lived in ethnic enclaves, where they continued their alien ways and spoke in alien tongues.<sup>139</sup>

Although the IRL relied on various allegations about the new immigrants—that they harmed the economy, were culturally backwards, and were disproportionately disposed to crime and insanity—its central charge was that the new immigrants were unfit to participate in American political life. The League claimed that the new immigrants did not make good citizens because, by virtue of their races and cultures, they were not adapted to participate in self-government in a nation committed to individual liberty.<sup>140</sup> As one IRL pamphlet declared in 1896, “the immigration of recent years is largely composed of elements unfitted to absorb democratic ideas of government, or to take part in the duties and responsibilities of citizenship under

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<sup>136</sup> See IMMIGRATION RESTRICTION LEAGUE, *The Present Aspect of the Immigration Problem*, in 1 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE 4 (2d. ed. 1894) (“Our immigration has, until lately, been chiefly made up of the most intelligent and of the most desirable races of Europe, but recently the numbers have greatly increased of those who are without question the most illiterate and the most depraved people of that continent.”).

<sup>137</sup> See, e.g., *id.* at 6 (comparing the percentage of immigrants in the overall population to the percentage of immigrants that compose the total populations of “criminals, . . . inmates of our reformatories, . . . and paupers in our almshouses.”); see also IMMIGRATION RESTRICTION LEAGUE, *Twenty Reasons Why Immigration Should Be Further Restricted Now*, in 4 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE ¶¶ 6–8 (1894) (arguing that recent immigrants impose a cost on communities and institutions due to poverty, criminal behavior, and a failure to assimilate).

<sup>138</sup> See IMMIGRATION RESTRICTION LEAGUE, *Twenty Reasons Why Immigration Should Be Further Restricted*, *supra* note 137, at ¶ 2 (“Because foreign courts of law and foreign governments, acting in their strongest self-interest, are shifting the responsibility for and support of their own criminals and paupers upon this country, by allowing them their freedom on the condition of their emigration to the United States.”).

<sup>139</sup> See Robert DeC. Ward, *The Restriction of Immigration*, 179 N. AM. REV. 226, 230 (1904) (arguing that, in contrast to the Anglo-Saxon immigrants who “merged in a great mass of many millions” during the 1880’s, the immigrants from eastern Europe and Asia settle in established communities of “relatives and friends” and thus do not assimilate); see also IMMIGRATION RESTRICTION LEAGUE, *Twenty Reasons Why Immigration Should Be Further Restricted*, *supra* note 137, at ¶ 8 (“Because the undesirable classes of immigrants have come in upon us in such numbers of late years that they have neither been assimilated nor Americanized, the result being that many of them remain a menace to our institutions by reason of their foreign language, habits, customs and political beliefs.”).

<sup>140</sup> See Prescott F. Hall, *The Future of American Ideals*, 195 N. AM. REV. 94, 95 (1912) [hereinafter Hall, *American Ideals*] (“These races have an entirely different mental make-up from the Baltic race; they bring with them an inheritance of widely differing political and social ideals, and a training under social and political institutions very different from ours.”).

such a form of government.”<sup>141</sup> Not only were the new immigrants unsuited to become good citizens, the IRL warned, they brought over politically dangerous ideas, and their increasing presence threatened to undermine the American constitutional system.<sup>142</sup>

Leaders of the IRL supported their positions with the new science of eugenics, which asserted the inheritability of many human traits, including intelligence, criminality, and morality.<sup>143</sup> The IRL believed that science had demonstrated that Americanization could never succeed in assimilating the new immigrants.<sup>144</sup> As Prescott Hall, one of the founders of the League, explained, the American character was defined by “energy, initiative, and self-reliance” and this made Americans “[i]mpatient of much government, relying upon self-help rather than the paternalism of the State.”<sup>145</sup> These traits, Hall asserted, were racial traits and belonged to people who were “mainly Teutonic, belonging to what is now called the Baltic race, from northern Europe.”<sup>146</sup> The immigrants arriving since 1880, in contrast, were people “of entirely different races—of Alpine, Mediterranean, Asiatic, and African stocks” and “[t]hese races have an entirely different mental make-up from the Baltic race; they bring with them an inheritance of widely differing political and social ideals, and a training under social and political institutions very different from ours.”<sup>147</sup>

Hall recognized that many Americans believed that through the melting pot the new immigrants could be Americanized, that “we can continue, as we have in the past, to assimilate all this material and turn it into good

<sup>141</sup> IMMIGRATION RESTRICTION LEAGUE, *Twenty Reasons Why Immigration Should Be Further Restricted*, *supra* note 137, at ¶ 19.

<sup>142</sup> See Hall, *American Ideals*, *supra* note 140, at 100, 102 (asserting that “we have already begun to despotize our institutions in order to deal with large masses of citizens not capable of intelligently supporting representative government” and arguing that immigration restriction is necessary so that “the United States may continue strong to uphold the cause of democracy and liberty throughout the world”).

<sup>143</sup> Eugenists dreamed of improving the human race through the social control of breeding. As Francis Galton, founder of the eugenics movement, pronounced, “If talented men were mated with talented women . . . generation after generation, we might produce a highly-bred human race . . . .” JONATHAN PETER SPIRO, *DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT* 120–21 (2009) (quoting Francis Galton, *Hereditary Talent and Character, Second Paper*, 12 *MACMILLAN’S MAG.* 318, 319 (1865)).

<sup>144</sup> See Hall, *American Ideals*, *supra* note 140, at 101 (“Recent investigations in eugenics show that heredity is a much more important factor than environment as regards social conditions . . . . If this position is sound, education and distribution can only palliate the evils and delay fundamental changes.”).

<sup>145</sup> *Id.* at 94.

<sup>146</sup> *Id.*; see also Prescott F. Hall, *The Present and Future of Immigration*, 213 *N. AM. REV.* 598, 606 (1921) [hereinafter Hall, *Present and Future*] (“Before the Civil War the population was almost entirely Nordic, and our political and social institutions were developed along the lines of the Nordic spirit.”).

<sup>147</sup> Hall, *American Ideals*, *supra* note 140, at 95; see also Hall, *Present and Future*, *supra* note 146, at 605 (“I doubt if [Americanization] will be very successful in the case of aliens whose habits, ideals and historical background are different from ours.”).

American citizens.”<sup>148</sup> Hall, however, argued that the new immigrants could never assimilate because Americanization efforts could never “appreciably alter[] their characters.”<sup>149</sup> The new immigrants were simply incapable of becoming American: “You cannot change the leopard’s spots,” Hall declared, “and you cannot change bad stock to good.”<sup>150</sup>

The case for immigration restriction received significant support in 1916, when Madison Grant published the enormously influential *The Passing of the Great Race*.<sup>151</sup> In the book, Grant, a long-time vice president of the IRL, as well as a famed conservationist and founder of the Bronx Zoo, argued that race was the single explanation for the development of European and American civilization: “The progress of civilization becomes evident only when immense periods are studied and compared, but the lesson is always the same, namely, that race is everything.”<sup>152</sup> In Grant’s typology, there were three European races—“Alpines,” who were “always and everywhere a race of peasants”;<sup>153</sup> “Mediterraneans,” who are superior artists but poor athletes;<sup>154</sup> and “Nordics,” who are “a race of soldiers, sailors, adventurers and explorers, but above all, of rulers, organizers and aristocrats,” and whom he described as having blond hair, blue eyes, pale skin, and tall stature.<sup>155</sup> Grant attributed all of the key advances in Western civilization, from the Roman Empire to the Renaissance, to the Nordic race, which he believed constituted a discrete and distinctly superior subspecies of humanity: “*Homo europæus*, the white man par excellence.”<sup>156</sup>

The scientific racism advanced by Grant and others had a great deal to say about who was capable of embracing America’s constitutional values and who would forever be hostile to it. As Grant asserted, members of the Nordic race were self-reliant, fiercely individualistic, and “jealous of their personal

<sup>148</sup> Hall, *American Ideals*, *supra* note 140, at 97.

<sup>149</sup> *See id.* at 97–98 (arguing that a person’s “home and [their] companions” shape much of their character, and thus formal schooling would do little to assimilate where many immigrants filter into communities composed of “neighbors and co-workers of the same race.”).

<sup>150</sup> *Id.* at 101 (citation omitted).

<sup>151</sup> It has been referred to as the “bible of scientific racism,” and Adolf Hitler is said to have called the German edition “my bible.” SPIRO, *supra* note 143, at xi, 140; *see also* HIGHAM, *supra* note 51, at 271 (“Intellectually the resurgent racism of the early twenties drew its central inspiration from Madison Grant’s *The Passing of the Great Race*.”).

<sup>152</sup> MADISON GRANT, *THE PASSING OF THE GREAT RACE* 100 (2d ed. 1918); *see also* Henry Fairfield Osborn, *Preface* to MADISON GRANT, *THE PASSING OF THE GREAT RACE*, at vii (“European history has been written in terms of nationality and of language, but never before in terms of race; yet race has played a far larger part than either language or nationality in moulding the destinies of men; race implies heredity and heredity implies all the moral, social and intellectual characteristics and traits which are the springs of politics and government.”).

<sup>153</sup> GRANT, *supra* note 152, at 227.

<sup>154</sup> *Id.* at 229.

<sup>155</sup> *Id.* at 228.

<sup>156</sup> *Id.* at 167, 214–15.

freedom both in political and religious systems.”<sup>157</sup> With their extreme devotion to individualism and autonomy, the Nordics developed the concept of individual liberty that forms the basis of the United States Constitution and core American values.<sup>158</sup> As one of Grant’s disciples wrote: “Americanism is actually the racial thought of the Nordic race, evolved after a thousand years of experience, which includes such epoch-making documents as the Magna Charta and the Declaration of Independence.”<sup>159</sup>

*The Passing of the Great Race* purports to tell a racial history of Europe and the United States. As Grant saw it, almost all of the colonists and founders of the nation were pureblooded members of the Nordic race, and the American populace remained pure until the Civil War.<sup>160</sup> Not only did the war lead to the deaths of large numbers of what Grant referred to as the nation’s “best breeding stock,” even worse the war led the nation to grant citizenship “to Negroes and to ever increasing numbers of immigrants of plebeian, servile or Oriental races, who throughout history have shown little capacity to create, organize or even to comprehend Republican institutions.”<sup>161</sup> By giving citizenship to African Americans and allowing immigration by non-Nordics, Grant asserted, “the whole tone of American life, social, moral and political, has been lowered and vulgarized by them.”<sup>162</sup>

Grant argued that immigrants from southern and eastern Europe should be excluded precisely because they lacked the fundamental American capacity for self-government: “Instead of retaining political control and making citizenship an honorable and valued privilege, [the American] intrusted the government of his country and the maintenance of his ideals to races who have never yet succeeded in governing themselves, much less any one else.”<sup>163</sup> Instead of sharing American values, Grant argued, the foreign races immigrating to the nation brought the diseases of socialism and Catholicism, two value systems he believed inherently conflicted with individualism, which Grant considered the quintessential American value.<sup>164</sup>

Relying on Grant’s book and others that followed, immigration restrictionists argued that science had disproven the melting pot ideology of the Americanization movement.<sup>165</sup> Robert DeCourcy Ward, a Harvard

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<sup>157</sup> *Id.* at 228.

<sup>158</sup> *Id.*

<sup>159</sup> CLINTON STODDARD BURR, *AMERICA’S RACE HERITAGE* 208 (1922).

<sup>160</sup> GRANT, *supra* note 152, at 83–84.

<sup>161</sup> *Id.* at 88, 218.

<sup>162</sup> *Id.* at 89–90.

<sup>163</sup> *Id.* at 12.

<sup>164</sup> *Id.* (“Although these phenomena appear to be contradictory, they are in reality closely related since both represent reactions from the intense individualism which a century ago was eminently characteristic of Americans.”).

<sup>165</sup> *See id.* at 17–18 (“What the Melting Pot actually does in practice can be seen in Mexico, where the

climatology professor and one of the founders of the IRL, said that Americanizers had deceived themselves into believing that “we could change inferior beings into superior ones”:

We thought that sending alien children to school, teaching them English, giving them flag drills, and making them read the Declaration of Independence and recite the Gettysburg Address, would make them Americans almost over night. Yet the laws of heredity are at work. We cannot make a heavy draft horse into a trotter by keeping him in a racing stable. We cannot make a well-bred dog out of a mongrel by teaching him tricks. Nor can we make a race true to the American type by any process of Americanization . . .<sup>166</sup>

With the backing of the best science of its time, the IRL argued that the problems associated with the new immigrants—crime, unemployment, immorality, and the spread of radical ideas—could not be addressed through education.<sup>167</sup> Rather than continuing to attempt the impossible task of transforming dangerous immigrants into good Americans, the IRL advocated a much simpler solution: keep unwanted immigrants out.<sup>168</sup>

### 3. *The Push for a Literacy Test*

Initially, the IRL’s legislative agenda focused on the adoption of a literacy test.<sup>169</sup> As originally proposed, the literacy test would have barred admission to immigrants unless they could demonstrate an ability to read and understand portions of the Constitution.<sup>170</sup> The IRL believed that such a test would effectively exclude members of undesirable races and ethnicities because if they could not even read the Constitution they surely could never embrace its principles.<sup>171</sup>

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absorption of the blood of the original Spanish conquerors by the native Indian population has produced the racial mixture which we call Mexican and which is now engaged in demonstrating its incapacity for self-government. . . . Whether we like to admit it or not, the result of the mixture of two races, in the long run, gives us a race reverting to the more ancient, generalized and lower type.”)

<sup>166</sup> Ward, *supra* note 87, at 230–31.

<sup>167</sup> See Hall, *American Ideals*, *supra* note 140, at 97–98 (arguing that education would be unlikely to “alter [immigrants’] characters, or [do] anything more than bring out their inherited instincts and tendencies” and that the result would be a collection of “races . . . living side by side . . . but never wholly merging into a general national type”).

<sup>168</sup> See Hall, *Present and Future*, *supra* note 146, at 607 (advocating for legislation that would restrict immigration by percentages that would favor the “Nordic races” as a protection against unwanted foreigners).

<sup>169</sup> HIGHAM, *supra* note 51, at 103 (describing the focused lobbying efforts by the IRL to push for the adoption of a literacy test to prevent the admittance of “illiterates, paupers, criminals, and madmen who endangered ‘American character’ and ‘American citizenship’”).

<sup>170</sup> See 29 CONG. REC. 1125 (1897) (statement of Rep. Danford) (introducing legislation that would have amended the immigration laws to include a literacy test for admission into the United States).

<sup>171</sup> See *The Case for the Literacy Test*, UNPOPULAR REV., Jan.–Mar. 1916, reprinted in IMMIGRATION RESTRICTION LEAGUE, 66 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE 7, 12–14, 17 (arguing for the restriction of immigration through the passage of a literacy test that would allow for the admittance of only those who could assimilate into the American democratic system, which is

In 1896, Senator Henry Cabot Lodge, a longtime IRL supporter, introduced the first bill to create a literacy test.<sup>172</sup> Lodge made no effort to hide the fact that the purpose of the test was to exclude ethnicities and nationalities deemed too foreign to assimilate into American life:

[T]he illiteracy test will bear most heavily upon the Italians, Russians, Poles, Hungarians, Greeks, and Asiatics, and very lightly, or not at all, upon English-speaking emigrants or Germans, Scandinavians, and French. In other words, the races most affected by the illiteracy test are those whose emigration to this country has begun within the last twenty years and swelled rapidly to enormous proportions, races with which the English-speaking people have never hitherto assimilated, and who are most alien to the great body of the people of the United States.<sup>173</sup>

Lodge asserted that immigration from these exotic lands had led to an increase in “the slum population, with criminals, paupers, and juvenile delinquents.”<sup>174</sup> Although Lodge claimed that the new immigrants hurt the wages of real Americans, he argued that “the danger which this immigration threatens to the quality of our citizenship is far worse.”<sup>175</sup> To fully understand the threat to American citizenship posed by the new immigrants, Lodge argued, “we must look into the history of our race.”<sup>176</sup> Lodge claimed that the nation’s greatness resulted from its racial composition, which gave the American people its distinctive qualities: independence, initiative, and a strong sense of morality.<sup>177</sup> The racial qualities of native-born Americans kept socialism at bay, Lodge believed, but the new immigrants came from races that were disposed to embrace radical politics.<sup>178</sup>

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“necessary for the preservation of the high ideals of the United States”); IMMIGRATION RESTRICTION LEAGUE, *The Present Italian Influx, Its Striking Illiteracy*, in 14 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE (supporting the efficacy of the literacy test with data from newly arrived Italian immigrants and their literacy rates, and noting that the passage of such an amendment would exclude “those who are degraded, ignorant alike of their own language and of any occupation, incapable of appreciating our institutions and standards of living, and very difficult of assimilation”).

<sup>172</sup> HIGHAM, *supra* note 51, at 103.

<sup>173</sup> 28 CONG. REC. 2817 (1896) (statement of Sen. Lodge).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 2817–18.

<sup>176</sup> *Id.* at 2818.

<sup>177</sup> *See id.* at 2819–20 (arguing that the racial composition of the United States remained relatively constant prior to 1875, through which the “fixed and determinate character of the English-speaking race” maintained its “moral and intellectual character[ ]”).

<sup>178</sup> *See id.* (raising the concern that the immigrants of “other races of totally different race origin” will bring down the “higher [race],” resulting in a population more susceptible to socialism that would threaten the stability of the United States). The bill’s supporters in the House agreed. *See, e.g., id.* at 5475 (statement of Rep. Mahany) (declaring that from the Germanic race “we draw . . . those democratic ideas which are the historic foundation of this very House now deliberating on this question”); *id.* at 5474 (declaring that Italians and others should be excluded for the same reason that Chinese are excluded, “that by the very nature of their blood and instincts, they are unfitted to assimilate with our civilization”).



With the support of progressives and organized labor, the literacy bill passed both Houses of Congress, but President Cleveland vetoed it, rejecting the idea that limiting immigration to those who could read the Constitution would somehow protect the American way of life.<sup>179</sup> Cleveland also rejected the argument that the recent immigrants were “undesirable.”<sup>180</sup> “The time is quite within recent memory,” Cleveland’s veto message explained, “when the same thing was said of immigrants who, with their descendants, are now numbered among our best citizens.”<sup>181</sup>

Although Congress was unable to override Cleveland’s veto, in 1907 Congress created a commission to study the immigration situation.<sup>182</sup> Known as the Dillingham Commission after its chairman, Senator William Dillingham of Vermont, the Commission included Senator Henry Cabot Lodge, a longtime supporter of the IRL and several other immigration restrictionists.<sup>183</sup> Its conclusions, issued in forty-two volumes over four years and backed by voluminous data, set the stage for decades of debate over immigration restrictions.<sup>184</sup>

The Commission concluded that race should be the central focus of congressional efforts to regulate immigration.<sup>185</sup> To help policymakers sort through the various races comprising the nation’s immigrants, the Commission issued a 150-page “Dictionary of Races and Peoples,” which meticulously attempted to define and describe the races and sub-racial groups of the world’s peoples.<sup>186</sup> The dictionary gave detailed descriptions of the physical traits said to characterize each race, as well as the unique personal character said to be typical of each race.<sup>187</sup> Albanians, for instance, were said to be

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<sup>179</sup> Grover Cleveland, *Veto Message*, in 13 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 6189, 6191 (Mar. 2, 1897) (“I can not believe that we would be protected against these evils by limiting immigration to those who can read and write in any language twenty-five words of our Constitution.”).

<sup>180</sup> *Id.* at 6190.

<sup>181</sup> *Id.*

<sup>182</sup> John M. Lund, *Boundaries of Restriction: The Dillingham Commission*, U. VT. HIST. REV., Dec. 1994, <http://www.uvm.edu/~hag/histreview/vol6/lund.html>.

<sup>183</sup> *Id.*

<sup>184</sup> See James S. Pula, *American Immigration Policy and the Dillingham Commission*, POLISH AM. STUD., Spring 1980, at 5, 8, 14 (1980) (“While the emotional bases for the long period of immigration restriction were many and varied, the authoritative foundation was clearly the United States Immigration Commission.”).

<sup>185</sup> 1 U.S. IMMIGRATION COMM’N, *Brief Statement of the Investigations of the Immigration Commission, with Conclusions and Recommendations and Views of the Minority*, in ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. DOC. NO. 61-747, at 17–20 (3d Sess. 1911).

<sup>186</sup> U.S. IMMIGRATION COMM’N, *DICTIONARY OF RACES OR PEOPLES*, S. DOC. NO. 61-662, at 1 (3d Sess. 1911).

<sup>187</sup> *Id.*

“brave, but turbulent in spirt—warriors rather than workers,” while Serbo-Croatians were said to be “well adapted to hard labor.”<sup>188</sup>

The Commission concluded that, due to the racial composition of the new immigrants, immigration from southern and eastern Europe posed a severe threat to the United States. It agreed with the IRL that the “old and the new immigration differ in many essentials.”<sup>189</sup> While previous waves of immigrants had been settlers who sought to work the land and assimilated into American life, the new immigrants were unskilled laborers who sought industrial jobs and kept to themselves.<sup>190</sup> The Commission reported that, “as a class,” the new immigrant “is far less intelligent than the old,” and “[r]acially they are for the most part essentially unlike the British, German, and other peoples who came during the period prior to 1880.”<sup>191</sup>

The Commission agreed with Lodge and the IRL that the literacy test was “the most feasible single method of restricting undesirable immigration.”<sup>192</sup> As the Commission noted, the level of literacy represented one of the most striking differences between the immigrants from northwest Europe, who share the same racial traits as the nation’s original population, and those from southern and eastern Europe, making literacy a straightforward way to exclude members of unwanted races.<sup>193</sup> The Commission said it could not determine whether differences in literacy resulted from environmental factors or “racial tendencies,” but it suggested that genetics was the likely cause because “races living under practically the same material and political conditions show widely varying results.”<sup>194</sup>

With the backing of the Dillingham Commission, Congress renewed its push for a literacy test, and in 1912 Congress once again passed a literacy test bill.<sup>195</sup> President Taft vetoed it once again, as did President Wilson when

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<sup>188</sup> *Id.* at 15, 47.

<sup>189</sup> S. DOC. NO. 61-747, at 13 (3d Sess. 1911); *see also* S. DOC. NO. 61-662, at 32 (“The most interesting fact in immigration is the sudden and astounding recent change in the character of the immigration. While up to 1880 it was almost entirely from northwestern Europe, or, in other words, was composed of races or peoples which now constitute the older American stock, immigration comes mainly at the present time from southern and southeastern Europe: that is, chiefly from Italian, Hebrew, and Slavic stocks that differ widely from the American in language, character, and political institutions.”).

<sup>190</sup> S. DOC. NO. 61-747, at 13–14.

<sup>191</sup> *Id.* at 14.

<sup>192</sup> *Id.* at 40.

<sup>193</sup> *See* U.S. IMMIGRATION COMM’N, IMMIGRANTS IN INDUSTRIES: PART 2: IRON AND STEEL MANUFACTURING, S. DOC. NO. 61-633, at 27–28 (2d Sess. 1911).

<sup>194</sup> U.S. IMMIGRATION COMM’N, EMIGRATION CONDITIONS IN EUROPE, S. Doc. No. 61-748, at 31 (3d Sess. 1911).

<sup>195</sup> *See* GEORGE M. STEPHENSON, A HISTORY OF AMERICAN IMMIGRATION: 1820–1924, at 166 (1926) (showing the popularity in the Legislature of the new literacy test bill).

it was re-enacted in 1915.<sup>196</sup> Finally in February 1917, the literacy test was enacted over President Wilson's veto.<sup>197</sup>

To the disappointment of immigration restrictionists, the adoption of a literacy test did little to restrict the flow of large number of immigrants from southern and eastern Europe. While literacy rates in eastern and southern Europe had been low in the 1896 when Senator Lodge first introduced a bill for a literacy test, literacy had increased considerably by 1917.<sup>198</sup> Requiring immigrants to demonstrate an ability to read the Constitution failed to keep out members of undesirable and unassimilable races, as its supporters had hoped.

#### 4. *The Demise of the Americanization Movement*

Although Americanization efforts had increased during World War I, once the war was over these efforts began to fade as the country entered a period of increased nativism and hostility to immigrants. The war and the Russian Revolution increased the concerns many Americans had about immigrants, who were suspected of disloyalty and spreading radical political ideas.<sup>199</sup> The war had convinced many Americans of the urgency of national unity, which they believed was threatened by ethnic diversity, a conviction captured by the slogan of "100-Percent American."<sup>200</sup> Although immigration greatly diminished during the war, once the war ended it began to increase again, and nativists began to fear that a flood of undesirable immigrants would soon arrive.<sup>201</sup>

In 1920, with the increased suspicion of foreigners and the decrease in support for Americanization as a workable solution to the problems associated with immigrants, Congress stopped appropriating money to the Americanization efforts of the Federal Bureau of Education.<sup>202</sup> Some state Americanization programs continued, as did private efforts, but as a movement Americanization ebbed.<sup>203</sup>

Even many supporters of Americanization deemed the movement a failure.<sup>204</sup> Frances Kellor, Director of the National Americanization

<sup>196</sup> *Id.*

<sup>197</sup> H.R. 10,384, 64th Cong. (1917).

<sup>198</sup> HIGHAM, *supra* note 51, at 308.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 313.

<sup>201</sup> See *Emergency Immigration Legislation: Hearings Before the H. Comm. on Immigration & Naturalization*, 67th Cong. 23 (1921) [hereinafter *1921 Hearings*] (showing the imminent threat of unwanted immigration in the early 1920's).

<sup>202</sup> HARTMANN, *supra* note 102, at 269 (identifying 1920–1921 as the time when "Americanization as a drive or crusade was over"); *id.* at 225, 236.

<sup>203</sup> *Id.* at 237–253 (detailing state post-war Americanization programs).

<sup>204</sup> See CONSTANTINE PANUNZIO, *IMMIGRATION CROSSROADS* 254 (1927) ("When the war and post-war scares were spent, however, it became clear that all this Americanization agitation was worse

Committee, believed that the programs had gone too far in demanding that immigrants give up their cultures and pushed “more and more toward repression and intolerance of differences.”<sup>205</sup> Immigrants also complained that Americanizers demanded more from them than native-born Americans. As one immigrant involved in Americanization programs put it, “There is a mistaken notion among some well-meaning people that the foreign-born would be better Americans if they understood the Constitution of the United States. We do not agree with this because the average American native does not know it either . . . .”<sup>206</sup> Others argued that Americanization efforts failed because they did not go far enough in demanding complete assimilation. Henry Pratt Fairchild, author of *The Melting Pot Mistake*, argued:

The traits of foreign nationalities can neither be merged nor interwoven. They must be *abandoned*. . . . The whole idea of assimilation is that there should be one body, bringing other elements into conformity with its own character, and that body in this particular case of assimilation is and must be America.<sup>207</sup>

To immigration restrictionists like those in the IRL, however, the failure of Americanization efforts proved that the new immigrants could never be transformed into Americans.<sup>208</sup> With the demise of the Americanization movement, demands to severely restrict immigration, rather than trying to make immigrants into good Americans, rapidly became the dominant answer to the immigration problem.

##### 5. *The Passage of the National Origins Act and the Triumph of Nativism*

In March 1919, advocates of strict immigration control gained control of Congress, and the chairman of the House Immigration Committee became Albert Johnson, an enthusiastic nativist and member of the IRL-supported Eugenics Research Association.<sup>209</sup> Johnson was convinced that the nation’s immigration laws should be based principally on eugenics and the need to preserve the nation’s racial heritage.<sup>210</sup> Johnson consulted frequently with the leadership of the IRL and met often with Madison Grant, author of *The*

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than futile.”).

<sup>205</sup> HARTMANN, *supra* note 102, at 259. As one Italian-language newspaper declared, “Americanization is an ugly word. Today it means to proselytize by making the foreign-born forget his mother country and mother tongue.” *Id.* at 257 (quoting L’AURORA (Reading, Pa.), June 12, 1920).

<sup>206</sup> *Id.* at 257–58.

<sup>207</sup> HENRY PRATT FAIRCHILD, IMMIGRATION: A WORLD MOVEMENT AND ITS AMERICAN SIGNIFICANCE 431 (1925); HENRY PRATT FAIRCHILD, THE MELTING POT MISTAKE (1926).

<sup>208</sup> See HIGHAM, *supra* note 51, at 263 (the failure of the Americanization movement served to “prove the incorrigibly unassimilable nature of the material on which they worked”).

<sup>209</sup> *Id.* at 307; SPIRO, *supra* note 143, at 203.

<sup>210</sup> HIGHAM, *supra* note 51, at 313–14; SPIRO, *supra* note 143, at 202–07.

*Passing of the Great Race.*<sup>211</sup> Johnson's committee heard testimony from leading eugenicists and in 1920 appointed its own "eugenics expert."<sup>212</sup>

In 1921, with Representative Johnson's support, Congress acted to protect the nation's traditional ethnic mix by enacting what was termed an emergency measure to restrict immigration. The Emergency Quota Act restricted annual immigration to three percent of the number of foreign-born persons of each nationality present in the nation.<sup>213</sup> The quota operated on a country-by-country basis, which had the effect of greatly limiting immigration from southern and eastern Europe.<sup>214</sup>

In 1924, Congress enacted the National Origins Act, also known as the Johnson-Reed Act, which extended and made permanent the national origins system for immigration restriction it had begun to construct in 1921.<sup>215</sup> The 1924 Act sought to freeze the nation's racial and ethnic mix as of 1920 by allocating the annual number of immigrants based on the national origins of the nation's white population as of 1920.<sup>216</sup> As a presidential commission created by the Act later determined, 79% of the white population in 1920 were descended from the countries of northern and western Europe, and as a result, those countries were allocated 79% of the annual immigration quotas.<sup>217</sup> In contrast, because only 15% of the white population was estimated to be descended from the countries of southern and eastern Europe, countries in those areas were allocated 15% of the annual immigration quotas.<sup>218</sup> In addition, the National Origins Act prohibited immigration of any people who were ineligible for naturalization, which effectively eliminated all immigration from Asia because the Naturalization Act of 1790 continued to bar naturalization by persons who were not white.<sup>219</sup>

Proponents of the national origins system made no secret that the law was intended to maintain white rule—and in particular, control by what supporters referred to as the "Nordic" and "Anglo-Saxon" sub-categories of the

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211 HIGHAM, *supra* note 51, at 313.

212 *Id.* at 314.

213 See H.R. 4075, 67th Cong. (1921) (demonstrating the application of the immigration quotas); see also HIGHAM, *supra* note 51, at 308–11.

214 HIGHAM, *supra* note 51, at 311.

215 See Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 (solidifying the immigration quotas as law).

216 *Id.* § 11(a).

217 Eckerson, *supra* note 84, at 9 tbl. 2.

218 *Id.*

219 Immigration Act of 1924 §§ 2(a), 5. The Naturalization Act of 1870, ch. 254, 16 Stat. 254 (1870), had opened the naturalization process to "aliens of African nativity and to persons of African descent" and thus, as a theoretical matter at least, the 1924 National Origins Act did not foreclose immigration by persons of African descent. However, no immigration quotas were allotted to any African countries under the Act because immigrant visas were allocated solely based on the nation's white population.

white race.<sup>220</sup> Although the law's proponents made many arguments about the harms from Asian, Jewish, Italian, and other immigrants, they emphasized that their primary concern was that these immigrants were unfit for the duties of citizenship. As Representative Johnson said, "we must pick and choose our future immigrants, and admit only such as show some signs as being the stuff of which good Americans can eventually be made."<sup>221</sup>

In signing the National Origins Act into law, President Calvin Coolidge made it clear that he supported race-based restrictions precisely to preserve the nation's constitutional values. Coolidge had declared that, in identifying those immigrants who are "temperamentally keyed for our national background, . . . [t]here are racial considerations too grave to be brushed aside for any sentimental reasons."<sup>222</sup> Coolidge had declared in his 1923 State of the Union message that the nation had been "created by people who had a background of self-government" and that immigration should be restricted to those racial groups with the same background.<sup>223</sup> Preservation of the nation's constitutional values required that the nation must stay white, or as Coolidge more succinctly put it: "America must be kept American."<sup>224</sup>

The legislative history of the National Origins Act shows that Congress agreed that the nation's constitutional values could be preserved only by maintaining white rule and, more particularly, rule by those of northwest European ancestry. Members of Congress repeatedly depicted the unwanted immigrants as posing a threat to the Constitution. Congressman Charles Stengle of New York explained:

Mr. Chairman, we hear much on this floor about our great American Constitution, and those whose names appear beneath that sacred document are held in loving remembrance by every true American. Every statute written for the guidance of this Republic is founded upon the doctrines of that organic instrument. We find therein the hopes and aspirations of a free people, the sacred guaranties of our liberties, as well as the protection of our homes and firesides. And yet right here in this country there are those today who would make of our magna charta a mere scrap of paper, notwithstanding the fact that we welcomed them to our shores in their hour of distress and need.<sup>225</sup>

<sup>220</sup> See, e.g., 65 CONG. REC. 10,512 (June 4, 1924) (statement of Rep. Johnson) ("Mr. Speaker, with this new immigration act the United States is undertaking to regulate and control the great problem of the commingling of races. Our hope is in a homogeneous Nation.").

<sup>221</sup> See 1921 *Hearings*, *supra* note 201, at 23. Organized labor, which had supported immigration restriction to avoid economic competition, began to argue, as the president of the American Federation of Labor declared, that immigration restriction was also necessary to protect "American character and national unity." HIGHAM, *supra* note 51, at 305–06.

<sup>222</sup> Calvin Coolidge, *Whose Country Is This?*, GOOD HOUSEKEEPING, Feb. 1921, at 14.

<sup>223</sup> Calvin Coolidge, *First Annual Message*, AM. PRESIDENCY PROJECT: MESSAGES & PAPERS OF THE PRESIDENTS (Dec. 6, 1923), <http://www.presidency.ucsb.edu/ws/index.php?pid=29564>.

<sup>224</sup> *Id.*

<sup>225</sup> See 65 CONG. REC. 5848 (1924) (statement of Rep. Stengle); see also *id.* at 5847 ("[W]e should

Congressman Samuel McReynolds of Tennessee argued that continued immigration by foreigners hostile to constitutional values “means the absolute destruction of our form of government and our institutions.”<sup>226</sup>

In recommending passage of the National Origins Act, the House Committee on Immigration and Naturalization made explicit the connection between the preservation of the nation’s constitutional ideals and the preservation of the nation’s racial composition. After declaring that a nation’s government inevitably reflects the character and composition of the people, the Committee report proclaims: “If, therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained . . . .”<sup>227</sup> The Committee thus declared that preserving the Constitution required excluding unwanted races and preserving “the basic strain of our population.”<sup>228</sup>

#### 6. *The National Origins Act’s Codification of Racial Hierarchy*

As the history recounted in this Part shows, for decades leading up to the passage of the 1924 National Origins Act, the United States was divided over the ability of immigrants to embrace American values, especially those values embodied in the Constitution. On one side, the Americanization movement sought to help make the immigrants into good Americans through educational programs focused on teaching civics and inculcating respect for the American creed. On the other side, an immigration restriction movement argued that only people who shared the racial background of prototypical

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thoroughly realize that one of the greatest menaces to the proper development of our cherished ideals lies in the invasion of our country by that class of foreign immigrants who have no conception of nor interest in those ideals and principles for which we stand but have been taught and trained in antagonistic principles for many generations in the countries of their nativity.”); *id.* at 5852 (statement of Rep. McReynolds) (declaring that foreigners were flooding into the country who “have never drawn the breath of freedom; they have never lived under a republic” and they are “spreading their doctrines in this country and undertaking to force the same upon us”).

<sup>226</sup> *Id.* at 5852 (statement of Rep. McReynolds); *see also id.* at 5865 (statement of Rep. Tillman) (“We have admitted the dregs of Europe until America has been orientalized, Europeanized, Africanized, and mongrelized to that insidious degree that our genius, stability, greatness, and promise of advancement and achievement are actually menaced.”); *id.* at 5849 (statement of Rep. Stengle) (“[W]hat we are here and now trying to do is to protect America and prevent her dissolution . . . to preserve our inherited birthright of life, liberty, and the pursuit of happiness.”).

<sup>227</sup> H. COMM. ON IMMIGRATION & NATURALIZATION, RESTRICTION OF IMMIGRATION, H.R. Rep. No. 68-350, at 13 (1st Sess. 1924).

<sup>228</sup> *Id.* John Trevor, a prominent eugenicist and adviser to the House Immigration committee, put it even more bluntly: from the time of the founding, Trevor wrote, “citizenship in the United States is limited, with one exception, arising from the suppression of slavery within the States, to those races of mankind who by tradition, ideals and habits of life would tend to support and perpetuate the principles of Republican Government in this nation.” John B. Trevor, *An Analysis of the American Immigration Act of 1924*, INT’L CONCILIATION, Sept. 1924, at 375, 376–77.

Americans had the temperament and capacity to embrace America's constitutional values and all others should be excluded.

In adopting the National Origins Act, Congress made nativism the nation's official policy. As its proponents hoped, the law succeeded in greatly reducing immigrants they deemed undesirable. Before the passage of the Act, around 200,000 immigrants had arrived from Italy each year, but beginning in 1924 the annual quota for immigrants from Italy was set at less than 4,000 per year.<sup>229</sup> Russia and Poland, which together had sent hundreds of thousands of immigrants to the United States, were allotted slightly less than 10,000 per year.<sup>230</sup> In contrast, countries of northwest Europe—England, Germany, and Ireland—were together allotted 100,000 immigrants per year, though in practice immigration from these countries remained far lower because there were far fewer people from these countries who sought to immigrate.<sup>231</sup> Immigration from Japan was effectively eliminated.<sup>232</sup>

The National Origins Act carried out the principle that the United States is and should remain a white nation, ruled by white people. This can be seen in the method the Act created for calculating the nations that would receive immigration quotas. Under the Act, the Census Bureau was required to determine the national origins of the American population, but it was asked to count only the national origins of white Americans, that is, Americans who could trace their ancestry to Europe. In determining who the American people were for whom immigration quotas would be allotted, the Act explicitly excluded (1) immigrants from the Western Hemisphere, thus excluding all Americans whose families came from Latin America, (2) aliens ineligible for naturalized citizenship, as well as their descendants, thus excluding all Americans of Asian descent, (3) the descendants of slaves, thus excluding most African Americans, and (4) all American Indians.<sup>233</sup> As Letti Volp has explained, under the 1924 Act “the ‘colored races’ were erased from the history of national origins of America.”<sup>234</sup>

Only descendants of European nations counted in determining national origins under the National Origins Act. In determining who the American people are, African Americans, Asian Americans, Mexican Americans, and Native

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<sup>229</sup> BUREAU OF FOREIGN & DOMESTIC COMMERCE, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 98 tbl. 107, 100 tbl. 111 (1929).

<sup>230</sup> Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 74 tbl.1 (1999)

<sup>231</sup> *Id.*

<sup>232</sup> Immigration Act of 1924, Pub. L. No. 68-139, ch. 185, 43 Stat. 153, 159 (1924) (excluding “aliens ineligible to citizenship or their descendants” from allocations of immigration quotas).

<sup>233</sup> Letti Volp, *Impossible Subjects: Illegal Aliens and Alien Citizenship*, 103 MICH. L. REV. 1595, 1599 (2005) (reviewing MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)).

<sup>234</sup> *Id.*



American simply and literally did not count.<sup>235</sup> And, within the group of white Americans whose national origins put them in the category of authentic Americans, the Act established an unmistakable hierarchy. At the bottom were recent immigrants who had managed to get to the United States before the doors began to close in 1921.<sup>236</sup> At the top stood so-called Nordics, descendants of the race credited with founding the nation and establishing its constitutional principles. To protect the Constitution, federal policy provided, the population of this group alone must be protected, while others must be excluded.

### III. THE PERSISTENCE OF NATIVIST BELIEFS ABOUT CONSTITUTIONAL FITNESS

The National Origins Act codified an understanding of American identity that connected race with the capacity to embrace the nation's creed, embodied in the Constitution. What made America America, the Act's supporters explained, was a dedication to liberty and democracy, ideals that originated with the nation's Anglo-Saxon (or Nordic) founders and that could only be fully embraced by those of the same race. As Subpart A below discusses, however, conceptions of American national identity began to change in the decades after the enactment of the National Origins Act. During World War II, amid the fight against European fascism, American leaders began to describe national identity in universalistic terms, as based solely on a creed of liberty and equality, which they declared had nothing to do with race, ethnicity, or national origin. The civil rights movement made this conception of national identity central to its cause and demanded that America live up to its creed for all Americans. In 1965, at the height of the civil rights movement, Congress repudiated as un-American the racism and nativism that animated the National Origins Act and declared that persons of any race, religion, or national origin were equally capable of embracing the nation's constitutional ideals.

Although many Americans continue to think of national identity in terms of race, religion, and national origin, since 1965 it has become conventional to describe American identity as solely involving commitment to the American creed. Every President elected since 1965 has publicly declared devotion to this race-neutral conception of American identity. As Subpart B discusses, however, white nationalists and others at the margins of American politics continue to keep alive the idea that only some people are capable of embracing American ideals, while others cannot do so and should be excluded from the United States. They consider the Immigration and Nationality Act of 1965 to be an act of national betrayal, when America stopped being America

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<sup>235</sup> Immigration Act of 1924, §§ 4, 11(d), 43 Stat. at 155, 159.

<sup>236</sup> *Id.* § 11(a) (specifying allocation of immigration quotas).

and opened the floodgates to immigrants from Latin America and Asia. For several decades, the nativist conception of constitutional fitness remained on the margins, but it was pushed back to the mainstream through the presidential campaigns of Patrick Buchanan in the 1990s and the Tea Party movement of the Obama years.

With the election of Donald Trump, discussed in Subpart C, old-time nativist beliefs about who is fit to become American, long disavowed by the mainstream consensus, have moved from the margins to the White House.

A. *The Shift to a Race-Neutral Conception of National Identity and the Enactment of the 1965 Immigration Act*

American notions of national identity have long emphasized dedication to self-government, liberty, and other constitutional values, but during World War II American political leaders began to proclaim that national identity meant dedication to those principles alone and without regard to race or ethnicity.<sup>237</sup> In doing so, they sought to contrast the nation's universalistic creed with the Nazi blood-and-soil ideology. In the fight against a regime dedicated to Aryan supremacy, the United States' long-established hierarchies of race, religion, and national origin were recognized as an embarrassment that was best ignored. Although racism and anti-Semitism remained pervasive in American life, war-time propaganda declared that prejudice was un-American.<sup>238</sup>

In a speech given on February 4, 1943, in dedicating the creation of a Japanese-American army unit, President Franklin Roosevelt declared that national identity was, and always had been, defined by creed, not race: "Americanism is a matter of the mind and the heart; Americanism is not, and never was, a matter of race or ancestry." A "good American," Roosevelt declared, "is one who is loyal to this country and to our creed of liberty and democracy."<sup>239</sup> The speech sought to rouse the American people by reminding them of the inspiring ideals for which the nation was fighting and to distinguish the United States' national principles from the ideologies of the nations it was fighting. In Roosevelt's version, devotion to constitutional principles, "our creed of liberty and democracy," and not "race or ancestry," characterized who a "good American" is. These were not new values,

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<sup>237</sup> Aziz Rana traces back the now-conventional universalistic conception of America's civic identity to the closing of the frontier and the Spanish-American War. See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 268 (2015). While Rana may well be correct that this conception of national identity took root at that time, it was not a dominant conception among American policymakers at the time of the 1924 Immigration Act and did not become a dominant conception among policymaker until the middle of the twentieth century with the passage of the civil rights laws and the adoption of the 1965 Immigration Act.

<sup>238</sup> See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 69–70 (1988).

<sup>239</sup> See *Praises Army Plan for Japanese Unit*, *supra* note 1, at 6.

Roosevelt claimed, but were the principles “on which this country was founded and by which it has always been governed.”<sup>240</sup>

There were multiple ironies in the timing of Roosevelt’s assertion that American identity has nothing to do with race or ancestry. The speech was made to commemorate the creation of an all-Japanese-American army unit, whose members were selected solely by race and ancestry, at a time when Japanese and most other non-white immigrants were barred by law from becoming naturalized citizens and when his own administration had put thousands of Japanese-Americans in internment camps solely because of their national origin. Roosevelt’s speech engages in a familiar sort of national mythmaking, which ignored past and present inconsistencies and refashioned history to suit present-day purposes.<sup>241</sup>

The following year, in *An American Dilemma*, Gunnar Myrdal coined the term the “American Creed” and argued that the nation’s identity was defined by commitment to a common set of values. As Myrdal wrote, “Americans of all national origins, classes, regions, creeds, and colors, have something in common: a social ethos, a political creed,” which is “the cement in the structure of this great and disparate nation.”<sup>242</sup> The dilemma addressed in Myrdal’s study was the inconsistency between the nation’s creed and its system of racial segregation and racial hierarchy. In Myrdal’s conception, the true American identity involved dedication to the nation’s constitutional values, while the nation’s history of racism was conceived as aberrational, a mistake that conflicted with the nation’s true commitments.<sup>243</sup> In the end, Myrdal argued, Americans would rally around the nation’s fundamental principles, and the nation’s true self would overcome its unfortunate racism.<sup>244</sup>

Although the wartime propaganda declaring prejudice to be un-American and the widespread praise for *An American Dilemma* may suggest that there was a growing acceptance of a race-neutral conception of American national identity, in 1952 it was not yet powerful enough to overcome the national origin system for restricting immigration. That year, Congress finally repealed the

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<sup>240</sup> *Id.* As historian Eric Foner has noted, Roosevelt’s statement was “more attuned to mobilizing support for the war than to accurately describing the American past.” ERIC FONER, WHO OWNS HISTORY? RETHINKING THE PAST IN A CHANGING WORLD 165 (2002).

<sup>241</sup> Jack Balkin has written of the importance of the stories in constructing a national identity: “Constitutional stories construct a collective subject existing over many generations, whose constitution the Constitution is. The constitutional story is based on imagination, on the fiction of a collective subject that extends back into the past and forward into the future.” JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 2 (2011) (citing ANDERSON, *supra* note 18).

<sup>242</sup> MYRDAL, *supra* note 21, at 3; *see also* Rana, *supra* note 237, at 270–77 (describing how devotion to the Constitution achieved the status of orthodoxy by the mid-twentieth century).

<sup>243</sup> MYRDAL, *supra* note 21, at xli–xliii, 6–9.

<sup>244</sup> *Id.*; *see also* SMITH, *supra* note 41, at 19 (“Myrdal offered hope that this inequality, too, would soon be overcome.”).

rule imposed since 1795 that limited naturalization to “white” persons, but a supermajority in Congress nonetheless remained committed to restricting immigration to maintain the nation’s white Anglo-Saxon ethnic core. That year, Congress overrode President Truman’s veto to enact a new immigration law that maintained the national origins principle adopted in 1924.<sup>245</sup>

The fight between Truman and Congress over the Immigration and Nationality Act of 1952 replayed the conflict over national identity between Americanizers and immigration restrictionists of the early decades of the century. In vetoing the bill, Truman declared that the national origins system was based on nativist beliefs that conflicted with the nation’s fundamental principles:

The idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Baits or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that “all men are created equal.”<sup>246</sup>

In contrast, Senator Pat McCarran, the chief sponsor of the 1952 bill, defended the national origins principle, which he said served “to preserve best the sociological and cultural balance in the population of the United States.”<sup>247</sup> If the nation did not maintain its ethnic balance, McCarran warned, it would cease to be America.<sup>248</sup>

After Congress overrode Truman’s veto, Truman set up a commission to recommend new immigration legislation. Its 1953 report, “Whom We Shall Welcome,” argued that the national origin system conflicted with America’s fundamental commitment to equality: “America was founded upon the principle that all men are created equal, that differences of race, color, religion, or national origin should not be used to deny equal treatment or equal opportunity.”<sup>249</sup> Embracing the nation’s cultural diversity, the commission denounced the principle that white Europeans make better citizens and declared

<sup>245</sup> McCarran-Walter Act, Pub. L. No. 82-414, § 211(c), 66 Stat. 163, 181 (1952).

<sup>246</sup> *Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality*, AM. PRESIDENCY PROJECT (June 25, 1952), <http://www.presidency.ucsb.edu/ws/?pid=14175>.

<sup>247</sup> 99 CONG. REC. 1517 (1953) (statement of Sen. McCarran).

<sup>248</sup> *Id.* at 1518 (“I believe that this nation is the last hope of Western civilization and if this oasis of the world shall be overrun, perverted, contaminated or destroyed, then the last flickering light of humanity will be extinguished.”). Indeed, McCarran believed that, even with restrictive immigration laws, dangerous aliens had already infiltrated the nation. *Id.* (“[W]e have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life, but which, on the contrary are its deadly enemies.”).

<sup>249</sup> PRESIDENT’S COMM’N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME xii (1953); see also Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 138 (1966) (stating that “a truly concerted effort was begun to eliminate the quota system” and that “[i]t began with the work of President Truman’s Commission on Immigration and Naturalization and its historic report, *Whom We Shall Welcome*”).

that “all peoples are inherently capable of acquiring or adapting to our civilization.”<sup>250</sup> Far from protecting America’s constitutional values, the Commission argued, the national origins system conflicted with those values.<sup>251</sup> The Commission further noted that the nation’s discriminatory immigration laws harmed its foreign policy interests because those laws had long been used by the nation’s enemies to arouse anti-American sentiments.<sup>252</sup>

The civil rights movement of the 1950s and 1960s made a race-neutral conception of American identity central to its message and demanded that the United States live up to its creed.<sup>253</sup> Invoking the nation’s founding principles, Martin Luther King described the United States as a nation that failed to live up to its stated ideals: “America is essentially a dream, a dream as yet unfulfilled. It is a dream of a land where men of all races, of all nationalities and of all creeds can live together as brothers.”<sup>254</sup> Embracing the belief that American national identity is defined by commitment to the American creed, civil rights activists depicted the fight for black freedom and equality as a fight

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<sup>250</sup> PRESIDENT’S COMM’N ON IMMIGRATION AND NATURALIZATION, *supra* note 249, at 92–93 (quoting Ralph L. Beals, former president of the American Anthropological Association); *see also id.* at xiv (“The Commission believes that an outstanding characteristic of the United States is its great cultural diversity within an overriding national unity.”); *id.* at 15 (rejecting the “unfounded belief that people of western and northern Europe and their descendants make better citizens than immigrants from other areas”).

<sup>251</sup> *See id.* at 13 (stating that the national origins approach “embodies principles inconsistent with the Declaration of Independence, the Bill of Rights of the Constitution of the United States, and the institutions of government which have made our nation strong and great and the hope of free peoples everywhere”). For an additional history of the propaganda problems resulting from the national origins system, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 288–97 (1996).

<sup>252</sup> *See* PRESIDENT’S COMM’N ON IMMIGRATION AND NATURALIZATION, *supra* note 249, at 53 (reporting that a “large number of witnesses in the Commission’s hearings stressed the continuing harm to our foreign relations caused by discriminations of the national origins law against the nonwhite people of the world,” and that “the U.S.S.R. is skillfully and continuously making the most of our ethnic and racist doctrines”); *id.* at 55 (noting that in Africa, “with one hand we spend time and money to fight” anti-American racial propaganda, but “with the other hand we feed the propaganda mill with our discriminatory policies”).

<sup>253</sup> As Walter Jackson wrote, Gunnar Myrdal’s *An American Dilemma* established a liberal orthodoxy on black-white relations and remained the most important study of the race issue until the middle of the 1960s. . . . Activists, educators, ministers, and social workers referred to *An American Dilemma* in campaigns against segregation and discrimination. . . . Most significantly, Chief Justice Earl Warren cited *An American Dilemma* in the Supreme Court’s *Brown v. Board of Education* decision to support the view that segregated schools were inherently unequal.

WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA’S CONSCIENCE, at xi (1990).

<sup>254</sup> Martin Luther King, Jr., *The American Dream*, Commencement Address at Lincoln Univ. (June 6, 1961), [http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/the\\_american\\_dream\\_commencement\\_address\\_at\\_lincoln\\_university.1.html](http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/the_american_dream_commencement_address_at_lincoln_university.1.html); *see also* Aziz Rana, *Race and the American Creed: Recovering Black Radicalism*, N+1, Winter 2016, <https://nplusone-mag.com/issue-24/politics/race-and-the-american-creed> (noting that America’s “creed went hand in hand with an image of reform that was expansive enough to speak to black civil rights leaders but narrow enough to appear nonthreatening to national-level white politicians and their constituents”).

to carry out America's unfulfilled national ideals, which were embodied in the Constitution, and they fought to overcome competing conceptions of nationalism based on race, ethnicity, and religion.<sup>255</sup>

By 1960, creedal nationalism had become the consensus position, embraced by the elites of both major political parties, and the national origins system was recognized as inconsistent with national values. The GOP's 1960 platform called for doubling the annual number of immigrants and insisted that admission should be based on individual merit and not race or national origin.<sup>256</sup> The Democratic Party platform agreed that the national origins system should be abandoned as "a policy of deliberate discrimination" that "contradicts the founding principles of this nation."<sup>257</sup> President Kennedy made immigration reform a priority, and President Johnson continued the push for reform after Kennedy's assassination.

In January 1965, President Johnson urged Congress to overturn the national origins system because it was incompatible with the nation's core commitment to liberty and equality.<sup>258</sup> As Johnson put it, "The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities."<sup>259</sup> Just as Roosevelt had claimed that Americanism had never involved race or ancestry, Johnson claimed that Americans had always cared about personal merit, despite the fact that for decades American policy had determined who could become an American precisely by asking where immigrants came from. The national origins system conflicted with America's longstanding commitment to equality, Johnson declared, because it deemed some people more fit for citizenship than others.<sup>260</sup>

During the summer of 1965, Congress debated an immigration bill that would overturn the national origins system. As with earlier debates over immigration policy, the 1965 debate centered on competing beliefs about who

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<sup>255</sup> See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 278 ("In the 1950s, middle class African Americans, along with liberal white allies, presented the struggle for black freedom as one of fulfilling the universal ideals embedded in the Constitution."). During the Cold War, the fight for civil rights and a race-neutral understanding of American identity was also recognized to serve important foreign policy goals by countering communist propaganda that focused on racism in the United States. Defining American nationalism solely by commitment to creed served to cleanse the nation's character from the stains of racism. See generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335 (2015).

<sup>256</sup> *Republican Party Platform of 1960*, AM. PRESIDENCY PROJECT, <http://www.presi-dency.ucsb.edu/ws/?pid=25839>; see also DANIELS, *supra* note 72, at 129.

<sup>257</sup> *1960 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presi-dency.ucsb.edu/ws/?pid=29602>; see also DANIELS, *supra* note 72, at 129.

<sup>258</sup> Special Message to the Congress on Immigration, 1 PUB. PAPERS 37 (Jan. 13, 1965).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* (arguing that the national origins approach violates American traditions of equality by implying "that men and women from some countries are, just because of where they come from, more desirable citizens than others").

was capable of embracing the nation's constitutional creed. Supporters of the bill argued that the national origins system was "contrary to our basic principles as a nation" and "repugnant to our national traditions."<sup>261</sup> The bill's proponents argued that an immigration system that did not take into account race or national origins would be the natural extension of civil rights principles. As Representative Laurence Burton argued: "Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this Nation composed of the descendants of immigrants."<sup>262</sup>

Defenders of the national origins system, however, continued to argue that the foundations of constitutional government would be threatened by admitting immigrants who did not share the background of prototypical Americans. Senator Robert Byrd, for instance, argued that it was "just and wise" to restrict immigration to maintain the nation's ethnic balance, considering that the peoples of the world differ widely in "their inherited ability and intelligence, their moral traditions, and their capacities for maintaining stable governments."<sup>263</sup> Byrd criticized supporters of the bill as employing "sentimental slogans" and called on his colleagues to "resist the pressures for sharply increased immigration of persons with cultures, customs, and concepts of government altogether at variance with those of the basic American stocks."<sup>264</sup> Byrd believed that an influx of brown-skinned immigrants from "Jamaica, Trinidad, Tobago, Indonesia, India, Nigeria, and so forth" would threaten constitutional government itself because they could "profoundly affect the character of the American population, and, in the long run, can critically influence our concepts of government."<sup>265</sup> Byrd was not alone in arguing that non-European immigrants should be excluded in order to protect the nation's constitutional system.<sup>266</sup>

The bill's supporters sought to assure race-nervous Americans that opening the doors to immigrants from around the world would not lead to radical changes.<sup>267</sup> Senator Edward Kennedy declared that the "ethnic pattern of

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<sup>261</sup> 111 CONG. REC. 24,225 (1965) (statement of Sen. Kennedy); *id.* at 21,778 (statement of Rep. Krebs).

<sup>262</sup> *Id.* at 21,783 (1965) (statement of Rep. Burton); *see also* Chin, *supra* note 251, 302 n.120 (1996) (listing similar remarks).

<sup>263</sup> 111 CONG. REC. 23,793 (1965) (statement of Sen. Byrd).

<sup>264</sup> *Id.* at 23,794.

<sup>265</sup> *Id.*

<sup>266</sup> For instance, Marion Moncure Duncan, President General of the Daughters of the American Revolution, testified that the national origins system represents "a first line of defense in perpetuating and maintaining our institutions of freedom and the American way of life." Statement of Marion Moncure Duncan, National Origins Quotas Should Be Retained (1964), *in* IMMIGRATION: DEBATING THE ISSUES 117, 118 (1997).

<sup>267</sup> *See* Chin, *supra* note 251, at 310 (noting that Senator Edward Kennedy "explained that Americans need not fear the people who would be brought in under the bill," and argued that the change "would not be traumatic").

immigration under the proposed measure is not expected to change as sharply as the critics seem to think.”<sup>268</sup> President Johnson agreed that the proposal “is not a revolutionary bill. It does not affect the lives of millions. It will not reshape the structure of our daily lives.”<sup>269</sup>

With large bipartisan majorities in both Houses of Congress, Congress enacted the Immigration and Nationality Act in October 1965.<sup>270</sup> For the first time, American law prohibited discrimination “in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”<sup>271</sup> Signing the bill into law at the foot of the Statue of Liberty, President Johnson declared that the law would help the nation become true to its values. As he said, the law would “repair a very deep and painful flaw in the fabric of American justice” and would “make us truer to ourselves both as a country and as a people.”<sup>272</sup>

### *B. The Persistence of the Nativist Belief that Only White People Can Embrace the Constitution*

Although the Immigration and Nationality Act of 1965 represented the consensus repudiation of the nativist belief that people of European descent are naturally suited to embrace America’s constitutional values, the nativist constitutional idea has persisted. For decades, however, white nationalists and other nativists have kept alive the belief that the Constitution was made for them and not others. They look on 1965 as the year of national betrayal, when America stopped being America and opened the floodgates to immigration by Asians and Latin Americans, whose presence is destroying a national culture based on constitutional values. From the 1970s to the 1990s, this idea was only openly embraced by political extremists, although it was quietly suggested by some mainstream politicians and organizations.

#### *1. Radical Anti-Immigrant Nativism*

Since 1979, the leading advocate for immigration restriction has been the Federation for American Immigration Reform (“FAIR”).<sup>273</sup> FAIR’s official

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<sup>268</sup> *Immigration: Hearing on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. of the Judiciary*, 89th Cong. 2 (1965) (statement of Sen. Kennedy). For a discussion of the context of Kennedy’s remarks, see Chin, *supra* note 251, at 334–35.

<sup>269</sup> Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 1037, at 1038 (Oct. 3, 1965).

<sup>270</sup> Immigration and Nationality Act of 1965, Pub L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. § 1152(a)(1)(A) (2016)).

<sup>271</sup> *Id.*

<sup>272</sup> Remarks at the Signing of the Immigration Bill, *supra* note 269.

<sup>273</sup> See DEVIN BURGHART & LEONARD ZESKIND, INST. FOR RESEARCH & EDUC. ON HUMAN RIGHTS, SPECIAL REPORT: BEYOND FAIR: THE DECLINE OF THE ESTABLISHED ANTI-



position has been that immigration should not be restricted based on race or ethnicity, but it has nonetheless advanced a nativist agenda, sometimes quietly and sometimes openly.<sup>274</sup> FAIR received substantial funding from the Pioneer Fund, a eugenicist organization that has worked since 1937 to support white supremacy.<sup>275</sup> FAIR has frequently argued that immigrants from Asia and Latin America undermine American culture and destroy the American political system. As FAIR's founder John Tanton has written, American immigration policy should seek to preserve a homogeneous society because "[t]oo much diversity leads to divisiveness and conflict."<sup>276</sup> Tanton has declared his belief that "for European-American society and culture to persist requires a European-American majority, and a clear one at that."<sup>277</sup> Tanton has been especially concerned that immigration from Latin America undermines American political culture, telling FAIR employees that Latinos make poor citizens because they come from a cultural tradition marked by a "lack of involvement in public affairs."<sup>278</sup>

FAIR's skepticism of the ability of Latin American immigrants to embrace constitutional values has not been limited to private comments by Tanton but has long been asserted publicly. In testimony before Congress in 1996, Dan Stein, director of FAIR, testified that immigrants should only be allowed to become naturalized citizens if they can demonstrate that they share America's fundamental values—which he defined to include ambition, hard work, patriotism, and "a commitment to understand and support our republican form of government, and a commitment to participate and vote in it," and "a willingness to recognize and support the Constitution and the nation's boundaries."<sup>279</sup> Yet Stein told Congress that he doubted the ability of Mexicans to meet those standards.<sup>280</sup>

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IMMIGRANT ORGANIZATIONS AND THE RISE OF TEA PARTY NATIVISM 3 (2012) ("Within the parameters of the mainstream conservative universe, nativism owed its re-emergence largely, but not exclusively, to the Federation for American Immigration Reform (hereinafter FAIR) and the many organizations it helped spin off."). At its peak, FAIR and associated organizations had as many as 1.2 million members and over 400 local groups. *Id.*

<sup>274</sup> *Id.* at 3; see also Trmmedia, *Cost of Illegal Immigration*, YOUTUBE (Nov. 4, 2006), <https://www.youtube.com/watch?v=cY6t2ckpb5g> (displaying clip from CNN's Lou Dobbs Tonight in which FAIR is cited).

<sup>275</sup> *Federation for American Immigration Reform*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> (last visited Jan. 10, 2018); Race Science and the Pioneer Fund, Searchlight No. 277 (July 7, 1998), <http://faculty.ferris.edu/ISAR/Institut/pioneer/search.htm>.

<sup>276</sup> John H. Tanton, *End of the Migration Epoch? Time for a New Paradigm*, in IMMIGRATION AND THE SOCIAL CONTRACT: THE IMPLOSION OF WESTERN SOCIETIES 3, 17 (1996).

<sup>277</sup> HEIDI BEIRICH, THE NATIVIST LOBBY: THREE FACES OF INTOLERANCE, REPORT FROM THE SOUTHERN POVERTY LAW CENTER 5 (Mark Potok ed., 2009).

<sup>278</sup> *Id.* at 10.

<sup>279</sup> *Examining the Practices and Policies of the Immigration and Naturalization Service as it Relates to the Naturalization Process Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 291 (1996) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform).

<sup>280</sup> *Id.* In a video program produced by FAIR, Stein spoke more bluntly, asking: "How can we preserve

Although FAIR has worked to keep its nativist agenda coded, it has worked frequently with members of the radical right who openly espouse race-based nativism. FAIR has frequently publicized the work of Peter Brimelow, one of the leading voices of white nationalism and anti-immigrant nativism.<sup>281</sup> Brimelow is the author of *Alien Nation: Common Sense About America's Immigration Disaster* and founder of VDARE.com, a website “dedicated to preserving our historical unity as Americans into the 21st Century” and which has been identified by the Southern Poverty Law Center as “an anti-immigration hate website.”<sup>282</sup>

*Alien Nation* argues that the United States is fundamentally a white nation, which liberal elites and multiculturalists are seeking to destroy.<sup>283</sup> Brimelow longs for the days when America was whiter and therefore more truly American: “As late as 1950, somewhere up to nine out ten Americans looked like me. That is, they were of European stock. And in those days, they had another name for this thing dismissed so contemptuously as the ‘racial hegemony of white Americans.’ They called it America.”<sup>284</sup>

Brimelow characterizes the 1965 Immigration and Nationality Act as an act of revenge by America’s ethnic minorities and an expression of hatred for the nation’s native core, a point on which FAIR’s President Dan Stein has agreed.<sup>285</sup>

Brimelow has expressly praised earlier generations of nativists, including the anti-Catholic Know Nothings of the 1850s, describing them as patriots

America if it becomes 50 percent Latin American?” *Federation for American Immigration Reform*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> (last visited Jan. 10, 2018).

<sup>281</sup> Brimelow appeared on a television show produced by FAIR and was interviewed by FAIR’s president. *Federation For American Immigration Reform*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> (last visited Jan. 10, 2018).

<sup>282</sup> In *Alien Nation*, Brimelow expanded his essay “Time to Rethink Immigration,” which appeared in *National Review* in June 1992 and has been called “a sort of ur-text for today’s alt-right.” Robert Draper, *National Revolt*, N.Y. TIMES SUNDAY MAG., Oct. 2, 2016, at MM36; *VDARE*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/vdare> (last visited Jan. 10, 2018).

<sup>283</sup> PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* 10 (1995) (“[T]he American nation has always had a specific ethnic core. And that core has been white.”).

<sup>284</sup> *Id.* at 59. In depicting the authentic America to be white, Brimelow embraces ethnonationalism, defining a nation as an “ethno-cultural community.” *Id.* at 203. For ethnonationalists, an influx of immigrants from outside the nation’s defining ethnic identity necessarily undermines the nation, and Brimelow thus argues that the influx of non-white immigrants since the 1965 Immigration Act threatens the nation’s identity. “There is no precedent for a sovereign nation undergoing such a rapid and radical transformation of its ethnic character in the entire history of the world.” *Id.* at 57.

<sup>285</sup> *Id.* at 100–01, 105–07; *Federation for American Immigration Reform*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> (last visited Jan. 10, 2018) (describing that the 1965 Act as an attempt by liberal elites “to retaliate against Anglo-Saxon dominance”).

who were primarily concerned about preserving constitutional liberty.<sup>286</sup> Like the scientific racists of the Immigration Restriction League, Brimelow argues that today's immigrants are genetically inferior to white Americans and bring crime and disease, steal jobs, destroy the environment, and drain government resources.<sup>287</sup> What most concerns Brimelow, however, is that today's immigrants are radically undermining America's national character, turning the United States into what he calls an "Alien Nation," unrecognizable from what he understands to be the real, authentic America.<sup>288</sup> Immigrants from Asia and Latin America, Brimelow argues, "are from completely different, and arguably incompatible, cultural traditions."<sup>289</sup> Brimelow claims that the influx of these transformative foreigners results from a deliberate policy decision by ruling elites who hate American values and desire to change them fundamentally.<sup>290</sup>

Like earlier nativists, Brimelow reads the Constitution as addressed solely to the protection of the nation's white ethnic core. Brimelow thus quotes the Constitution's Preamble, which declares the nation's purpose is to "form a more perfect Union . . . [for] ourselves and our posterity."<sup>291</sup> As Brimelow argues, this refers to "the Founders' posterity, not posterity in general."<sup>292</sup> That is, the Constitution was written by the founders of a white ethnic republic to establish liberty for themselves and their white descendants.<sup>293</sup>

FAIR's orbit has also included other leading white nationalists, including Jared Taylor and Sam Francis. Taylor, founder of the white nationalist journal *American Renaissance*, has asserted that "the Constitution was written for white men, and that its protections were not intended for blacks."<sup>294</sup> In a 2012 essay,

<sup>286</sup> BRIMELOW, *supra* note 283, at 13.

<sup>287</sup> See *id.* at 56 n.\* (citing RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 359 (1994)) (asserting that today's immigrants have "an average IQ of 95, at least 5 points below the white American mean"); *id.* at 184 ("[R]andom street crime, the great scandal of American cities since the 1960s, is related to impulsiveness and what sociologists call 'present-orientation,' i.e., the inability to reckon with consequences. And this turns out to be a key cultural variable, differing significantly between ethnic groups.").

<sup>288</sup> *Id.* at xix (asserting that mass immigration is "making America an *alien nation* . . . in the sense that Americans will no longer share in common what Abraham Lincoln called in his First Inaugural Address 'the mystic chords of memory, stretching from every battle field and patriot grave, to every living heart and hearth stone, all over this broad land . . .'" ).

<sup>289</sup> *Id.* at 56.

<sup>290</sup> *Id.* at 105.

<sup>291</sup> *Id.* at 209–10 (alterations in original) (emphasis omitted) (quoting U.S. CONST. pmb.).

<sup>292</sup> *Id.* at 209–10.

<sup>293</sup> Brimelow argues that the Founders themselves shared his conception that the American people are defined by their common ancestry and the Constitution speaks only to those within the ethnic fold. *Id.* at 210 (quoting *THE FEDERALIST* NO. 2, at 16 (John Jay) (E.H. Scott ed. 1898)).

<sup>294</sup> JARED TAYLOR, *WHITE IDENTITY: RACIAL CONSCIOUSNESS IN THE 21ST CENTURY* 223 (2011). Taylor has explained that the name "American Renaissance" refers to the goal of making America great again by making it white again. Jared Taylor, *Twelve Years of American Renaissance*, *AM. RENAISSANCE* 1, 2 (Nov. 2002), <http://www.amren.com/ar/pdfs/2002/200211ar.pdf> ("[The

*What the Founders Really Thought About Race*, Taylor argues the United States can become a nation with a common creed only by becoming a white nation again.<sup>295</sup> Sam Francis, who was described as the “philosopher-general” of the radical right, also articulated the belief that the United States is, at heart, a white nation, its Constitution an expression of its white heritage.<sup>296</sup> Francis expressly embraced eugenics and argued that non-whites were incapable of adapting to America’s constitutional values.<sup>297</sup> In a 1995 article in Taylor’s *American Renaissance*, Francis argued that the “white European character of the United States” was under attack by nation’s growing non-white population and by the elite’s embrace of multiculturalism and affirmative action.<sup>298</sup> Francis called for greater racial consciousness.<sup>299</sup> Whites must rally around the longstanding historical conception of the United States as a white nation, Francis argued, or America will cease to be America.<sup>300</sup> Thus, like other white nationalists, Francis connected the nation’s racial identity with the American creed embodied in the Constitution and argued that only by reasserting white supremacy can the nation protect its constitutional values.<sup>301</sup>

Radicals like Brimelow, Taylor, and Francis kept alive constitutional nativism, and this agenda was pushed to the mainstream by the anti-immigrant

conviction of the essential “whiteness” of America was central to American thought from colonial times until only 50 or 60 years ago. . . . It is only by rekindling this sense of solidarity, loyalty, and pride that we can hope to see a real American renaissance, and it is from this vision that AR takes its name.”).

<sup>295</sup> Jared Taylor, *What the Founders Really Thought About Race*, NAT’L POL’Y INST. (Jan. 17, 2012), <https://nationalpolicy.institute/2012/01/17/what-the-founders-really-thought-about-race/> (“Today’s egalitarians are therefore radical dissenters from traditional American thinking. A conception of America as a nation of people with common values, culture, and heritage is far more faithful to vision of the founders.”).

<sup>296</sup> LEONARD ZESKIND, *BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM* 288 (2009). Francis had worked for the Heritage Foundation in the 1970s and 1980s and became a columnist for the conservative *Washington Times* in the 1990s until he was fired when his calls for white nationalism became too explicit. *Id.* at 288, 424–25. Afterwards, Francis published frequently in Jared Taylor’s *American Renaissance* and on Peter Brimelow’s VDare.com. Francis worked with FAIR on numerous projects and also served as chairman of the American Immigration Control Foundation, a virulently anti-immigrant group, which like FAIR was funded by the eugenicist Pioneer Foundation. Southern Poverty Law Center, *Anti-Immigration Groups*, INTELLIGENCE REPORT (Mar. 21, 2001), <https://www.splcenter.org/fighting-hate/intelligence-report/2001/anti-immigration-groups>.

<sup>297</sup> Samuel Francis, *Race and the American Prospect: An Introduction*, VDARE.COM (Sept. 5, 2006), <http://www.vdare.com/articles/race-and-the-american-prospect-an-introduction>. Among other things, Francis declared, “racial differences in intelligence and behavior patterns significantly affect such societal differences as levels of technological achievement, political stability and freedom, criminal violence, and standards of living.” *Id.*

<sup>298</sup> Samuel Francis, *Prospects for Racial and Cultural Survival*, AM. RENAISSANCE (Mar. 1995), [https://www.amren.com/news/2011/06/prospects\\_for\\_r/](https://www.amren.com/news/2011/06/prospects_for_r/).

<sup>299</sup> Francis, *supra* note 297.

<sup>300</sup> *Id.* (“If you reject race, then you reject America as it has really existed throughout its history, and whatever you mean by ‘America’ has to come from something other than its real past.”).

<sup>301</sup> *Id.*

activism of FAIR. Explicitly race-based nativism, however, remained largely outside the realm of acceptable public discourse until 1992, when Patrick Buchanan launched his first campaign for the Republican presidential nomination.

## 2. *The Presidential Campaigns of Patrick Buchanan: Nativism Enters the Mainstream*

The nativism hinted at by FAIR and openly espoused by Brimelow, Taylor, and Francis broke into mainstream politics in 1992 and 1996 when Patrick Buchanan challenged President George H.W. Bush for the Republican presidential nomination. Buchanan had been a speechwriter for President Richard Nixon and became a frequent guest on cable TV.<sup>302</sup> In the 1980s, Buchanan's newspaper columns began to address white nationalist themes, such as asking how the United States could "remain a white nation."<sup>303</sup>

Buchanan entered the presidential campaign as a more mainstream version of Ku Klux Klan leader David Duke, who was also running in the Republican primaries. Buchanan argued that, rather than denouncing Duke, the GOP should adopt the less objectionable elements of Duke's message: "Take a hard look at Duke's portfolio of winning issues," Buchanan wrote, "and expropriate those not in conflict with GOP principles."<sup>304</sup> In his presidential campaigns, Buchanan made what he described as "economic nationalism" the centerpiece of his campaign, arguing against free trade deals like NAFTA and against legal and illegal immigration. He frequently articulated these positions through blunt appeals to white nativism. "Who speaks for the Euro-Americans, who founded the U.S.A.?" Buchanan asked. "Is it not time to take America back?"<sup>305</sup> He declared that America would be better off accepting one million English immigrants than "a million Zulus."<sup>306</sup> He called for a moratorium on immigration and proposed the construction of a border fence.<sup>307</sup> He depicted the global situation as a battle between "Christian truths" and "Western Civilization," on the one hand, and "barbarians" such as multiculturalists, on the other.<sup>308</sup>

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<sup>302</sup> ZESKIND, *supra* note 296, at 236.

<sup>303</sup> *Id.* at 237.

<sup>304</sup> *Id.* at 279.

<sup>305</sup> Steven A. Holmes, *The 1992 Campaign: Candidates Records; White House Hopes to Trip Buchanan on His Paper Trail*, N.Y. TIMES (Mar. 1, 1992), <http://www.nytimes.com/1992/03/01/us/1992-campaign-candidates-records-white-house-hopes-trip-buchanan-his-paper-trail.html?page-wanted=all>.

<sup>306</sup> *This Week With David Brinkley* (ABC television broadcast Dec. 8, 1991) ("I think God made all people good. But if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, which group would be easier to assimilate and would cause less problems for the people of Virginia?").

<sup>307</sup> See Patrick J. Buchanan, *Mexico: Who Was Right?*, N.Y. TIMES, Aug. 25, 1995, at A27 (arguing that a "security fence" is essential for defending the United States' southern border).

<sup>308</sup> *Id.* At the 1992 Republican National Convention, Buchanan gave a vitriolic address that described

Mainstream conservatives denounced Buchanan's explicit bigotry. William F. Buckley, editor of the *National Review*, rejected Buchanan because of his thinly veiled anti-Semitism.<sup>309</sup> Columnist George Will accused Buchanan of peddling a brand of nativism that conflicted with the true nature of American identity, that being an American is a matter of creed and "not a matter of membership in any inherently privileged or especially appropriate group, Caucasian or otherwise."<sup>310</sup> Rejected by establishment conservatives, Buchanan was embraced by the extreme right.<sup>311</sup>

The influence of the radical right on Buchanan can be seen readily by the fact that Buchanan's friend Sam Francis served as a campaign adviser. Francis urged Buchanan to focus on trade and immigration because these issues directly address the "racial dispossession of the historic American people," advice that Buchanan heartily accepted.<sup>312</sup> Buchanan made clear that he shared the same white nativist worldview as Francis, Brimelow, and Taylor.<sup>313</sup> Buchanan envisions the United States as essentially a white, European nation and has described 1965 as a turning point in American history, when the United States began to lose its white identity.<sup>314</sup> For Buchanan, as for

the presidential election as part of a "religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself." Patrick Buchanan, *1992 Republican National Convention Speech*, PATRICK J. BUCHANAN—OFFICIAL WEBSITE (Aug. 17, 1992), <http://buchanan.org/blog/1992-republican-national-convention-speech-148>. On one side in this war for America's soul, Buchanan said, stood the Clintons and the rioters in Los Angeles. On the other side were traditional Americans, who he said were fighting to "take back our cities, and take back our culture, and take back our country." *Id.*

<sup>309</sup> *See Is Pat Buchanan Anti-Semitic?*, NEWSWEEK (Dec. 22, 1991), <http://www.news-week.com/pat-buchanan-anti-semitic-201176> (discussing Buckley's essay, which argued that Buchanan's columns were anti-Semitic).

<sup>310</sup> George F. Will, *Protest! What the Buchanan Candidacy Is All About*, BALTIMORE SUN (Dec. 12, 1991), [http://articles.baltimoresun.com/1991-12-12/news/1991346117\\_1\\_president-buchanan-david-duke-confetti](http://articles.baltimoresun.com/1991-12-12/news/1991346117_1_president-buchanan-david-duke-confetti).

<sup>311</sup> For instance, Buchanan was endorsed by former Klansman David Duke, and the Spotlight, published by Willis Carto's Liberty Lobby, recognized Buchanan as the new voice of white nationalism. *See* ZESKIND, *supra* note 296, at 281 (asserting that Buchanan was the "real nerve center of white nationalism in 1992" and that Duke endorsed Buchanan after Duke's withdrawal from the presidential race).

<sup>312</sup> *Id.* at 428.

<sup>313</sup> In his book *State of Emergency: Third World Invasion and Conquest of America*, Buchanan refers to both Francis and Brimelow as his friends and cites their work repeatedly. *See, e.g.*, PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THIRD WORLD INVASION AND CONQUEST OF AMERICA*, at vii (2006).

<sup>314</sup> *Id.* at 239. Buchanan finds support for his view in the work of Samuel Huntington, who argued that the American Creed can only be understood as an expression of "Anglo-Protestant culture" and that "Anglo-Protestant culture has been central to American identity for three centuries." SAMUEL HUNTINGTON, at xv–xvi (2004). Huntington, however, has made clear that he believes that Anglo-American culture, not race, is the basis for the American Creed, including its Constitution. Thus, for Huntington, people of any race or ethnicity could become authentic Americans by embracing Anglo-American culture. *Id.* at xvii ("This is, let me make clear, an argument for the importance of Anglo-Protestant culture, not the importance of Anglo-Protestant people.").

Brimelow, Taylor, and Francis, the Constitution can only be understood as created by and for a white nation.<sup>315</sup>

In his presidential campaigns, Buchanan evoked many of the nativist themes raised by the Immigration Restriction League in the first decades of the twentieth century, but there was a crucial difference. The nativists of the 1920s represented American elites. They were Harvard men, Boston Brahmins, Senators, and Ivy League scientists, who were alarmed because they believed that the constitutional order, if not the natural order, which placed them at the top, was threatened by the arrival of crass, dirty uneducated, foreign rabble.<sup>316</sup> Buchanan, in contrast, sought to speak on behalf of working-class whites and attacked what he described as the elitism of American institutions that he accused of deserting America's ethnic core.<sup>317</sup> Buchanan embraced an ideology that Sam Francis described as Middle American Radicalism. Francis argued that the nation had been taken over by liberal elites, who used their power to steal money from the white middle class and gave it to poor persons of color.<sup>318</sup> Middle American Radicals resent both the elite establishment that governs the country and the poor, who they see as the undeserving beneficiaries of government largesse paid for by middle class taxes. According to Francis, Middle American Radicals are the natural constituency for white nationalism.<sup>319</sup>

President Bush handily won renomination in 1992 with over 70% of the Republican primary votes, but Buchanan received nearly three million votes, roughly a quarter of the votes cast in the Republican primaries.<sup>320</sup> Four years later, when Buchanan ran again, he won three primaries and received over 3 million votes.<sup>321</sup> Although he never came close to winning the Republican nomination, Buchanan tapped into a constituency of Middle American Radicals, a group that saw themselves as prototypical Americans and considered

<sup>315</sup> *Id.* at 151 (“The Constitution did not create the nation; the nation adopted the Constitution.”).

<sup>316</sup> HIGHAM, *supra* note 51, at 102–03. See generally Bluford Adams, *World Conquerors or a Dying People? Racial Theory, Regional Anxiety, and the Brahmin Anglo-Saxonists*, 8 J. GILDED AGE & PROGRESSIVE ERA 189 (2009); Barbara Miller Solomon, *The Intellectual Background of the Immigration Restriction Movement in New England*, 25 N. ENG. Q. 47 (1952).

<sup>317</sup> Zeskind, *supra* note 296, at 279–84.

<sup>318</sup> SAMUEL FRANCIS, BEAUTIFUL LOSERS: ESSAYS ON THE AMERICAN CONSERVATISM 62 (1993) (“The rich give in to the demands of the poor, and the middle income people have to pay the bill.”).

<sup>319</sup> In fact, empirical studies confirmed that many middle-class whites felt alienated from American institutions and considered themselves a victimized minority, with a distinct racial consciousness. See ZESKIND, *supra* note 296, at 290 (discussing DONALD WARREN, THE RADICAL CENTER: MIDDLE AMERICANS AND THE POLITICS OF ALIENATION (1976)).

<sup>320</sup> See Bonnie K. Goodman, *Overviews and Chronologies: 1992, PRESIDENTIAL CAMPAIGN & ELECTIONS REFERENCE*, <https://presidentialcampaignselectionsreference.wordpress.com/overvie-ws/20th-century/1992-overview/> (last visited Jan. 10, 2018).

<sup>321</sup> *E.g.*, David Leip, *1996 Presidential Republican Primary Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1996&f=0&off=0&elect=2> (last visited Jan. 10, 2018).

their traits and values to be prototypically American, and who believed that their rightful place as the center of American cultural and political life was under attack. Identifying their core values with the nation's Constitution, Buchanan's supporters thus believed that the Constitution itself was under attack. While these beliefs had flourished among extremists for decades, Buchanan succeeded as no recent candidate had in bringing them into the mainstream.

*C. Donald Trump and the Return of Nativism to the White House*

In 2016, the United States elected the first president in decades who espouses bluntly nativist views and who made clear he intended to implement a nativist agenda. It is a dramatic reversal after the presidency of Barack Obama, who, perhaps more than any other president, placed creedal nationalism at the center of his national vision.<sup>322</sup> In his second inaugural address, President Obama articulated what since 1965 has become the orthodox view that American national identity is defined solely by commitment to the American creed: "What binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea . . ."<sup>323</sup> Obama often argued that key moments in American history—the Revolution, the Civil War, Reconstruction, the New Deal, the civil rights movement, the women's rights movement, and the gay rights movement, among others—were animated by an attempt to put into practice the central American values embodied in the Declaration of Independence and the Constitution. Speaking at the foot of the Edmund J. Pettis Bridge on the fiftieth anniversary of the March on Selma, Obama declared that the march was the "the manifestation of a creed written into our founding documents."<sup>324</sup> In Obama's conception, American history has been marked by political and social movements that have demanded that America fulfill the principles of the creed for all Americans, regardless of whether they share the traits of supposedly prototypical Americans.<sup>325</sup>

As this Subpart shows, President Trump has demonstrated that he is committed to a very different understanding of American nationalism.

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<sup>322</sup> See Aziz Rana, *Decolonizing Obama: What Happened to the Third-World Left?*, N+1 (Winter 2017), <https://nplusonemag.com/issue-27/politics/decolonizing-obama> ("Obama's invocation of the Creed was the most persistent feature of his rhetoric.")

<sup>323</sup> President Barack Obama, Inaugural Address (Jan. 21, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

<sup>324</sup> Maya Rhodan, *Transcript: Read Full Text of President Barack Obama's Speech in Selma*, TIME (Mar. 7, 2015), <http://time.com/3736357/barack-obama-selma-speech-transcript/>.

<sup>325</sup> *Id.* ("Because of what [the marchers on Selma] did, the doors of opportunity swung open not just for African-Americans, but for every American. Women marched through those doors. Latinos marched through those doors. Asian-Americans, gay Americans, and Americans with disabilities came through those doors.")



### 1. *The Nativist Constitutional Positions of the Trump Campaign*

Throughout his presidency, Obama was dogged by the Tea Party movement, which used familiar nativist rhetoric to label the President and his allies as un-American, as dangerously foreign, and as enemies of the Constitution.<sup>326</sup> Obama and the Tea Party movement shared the belief that the principles found in the Constitution embody the defining American values, but the Tea Party asserted that Obama and his allies were actively seeking to undermine the Constitution and destroy America.<sup>327</sup> The Tea Party movement identified the forces it opposed as foreign and identified as its goal the restoration of authentic American values and “real Americans” whose power allegedly had been wrongly usurped.<sup>328</sup>

The Tea Party’s central target was President Obama, who was routinely depicted as fundamentally foreign.<sup>329</sup> He was sometimes described as foreign *by birth*, by so-called “birthers,” who claimed that he was not born in the United States and therefore was constitutionally ineligible to be President.<sup>330</sup> He was sometimes described as *religiously* foreign by those who believed he was secretly a Muslim living in a Christian nation.<sup>331</sup> He was sometimes described as *racially* foreign by those who envision the United States a white nation.<sup>332</sup> Most often, the Tea Party movement described President Obama as *ideologically* foreign because he did not adhere to the Tea Party’s notions of

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<sup>326</sup> See THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 3–18 (2013); Goldstein, *The Tea Party Movement*, *supra* note 38, at 847 (describing the Tea Party’s fear of Obama and “foreign invasion”).

<sup>327</sup> Goldstein, *The Tea Party Movement*, *supra* note 38, at 831–50.

<sup>328</sup> *Id.* at 348.

<sup>329</sup> See, e.g., Kevin Drum, *Tea Party: Old Whine in New Bottles*, MOTHER JONES, <http://www.motherjones.com/politics/2010/09/history-of-the-tea-party/#> (2010) (“Obama isn’t a US socialist,” thundered Fox News commentator, Steven Milloy at a tea party convention earlier this year, ‘he’s an international socialist!’”).

<sup>330</sup> See, e.g., Joseph Farah, *Keynote Address to National Tea Party Convention* (Feb. 5, 2010), <http://www.c-spanvideo.org/program/291955-1>; Judson Phillips, *The Eligibility Issue*, STEADY DRIP (Apr. 20, 2011, 10:44 AM), <http://thesteadydrip.blogspot.com/2011/04/eligibility-issue-by-judson-phillips.html?m=0>. On April 27, 2011, President Obama released a copy of his long-form birth certificate. See Dan Pfeiffer, *President Obama’s Long Form Birth Certificate*, WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), <http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate>. But many Tea Partiers reject this evidence as a forgery. See, e.g., Alan Caruba, *Pageantry, History and Change*, WARNING SIGNS (Apr. 30, 2011, 6:00 PM), <http://factsnotfantasy.blogspot.com/2011/04/pageantry-history-and-change.html> (referring to the birth certificate as “obviously fraudulent”).

<sup>331</sup> See, e.g., Alex Altman, *Racism Rift Highlights Dilemma: Who Speaks for the Tea Party?*, TIME (July 22, 2010), <http://content.time.com/time/politics/article/0,8599,2005371,00.html> (quoting Tea Party Express founder Mark Williams describing President Obama as “Indonesian Muslim turned welfare thug and a racist in chief”).

<sup>332</sup> See DEVIN BURGHART & LEONARD ZESKIND, *TEA PARTY NATIONALISM: A CRITICAL EXAMINATION OF THE TEA PARTY MOVEMENT AND THE SIZE, SCOPE, AND FOCUS OF ITS NATIONAL FACTIONS* 57–67 (2010).

the true American creed of American exceptionalism, limited government, individual liberty, and free markets.<sup>333</sup> At the same time, the Tea Party movement became the leading voice of anti-immigrant nativism, supplanting the role that FAIR had long played.<sup>334</sup>

Donald Trump came to the attention of Tea Party supporters in March 2011 as a proponent of birtherism.<sup>335</sup> Trump repeatedly claimed that Obama was not born in the United States, that Kenya was his true homeland, that he might be Muslim, that he faked his birth certificate, and that he was not legitimately President.<sup>336</sup> The birther charge arises out of the nativist suspicion that the President was of foreign-birth and therefore was constitutionally unfit for office. The birther charge thus shares the key elements of the nativist conception of the Constitution explored in this article, that the Constitution is made only for some people, defined by race and ethnicity, but rather than directing that charge against a group deemed too foreign to become legitimate Americans directed it at the legitimacy of the President himself.

When he ran for President in 2016, Trump's presidential campaign was built on the same nativist themes that animated the birther movement. His central campaign promises—building a wall on the Mexican border and barring Muslim immigration—invoke nativism by playing off fears of foreign infiltration and the need to exclude dangerous foreigners. Just as earlier generations of nativist alleged that unwanted immigrants brought crime, Trump denigrated Mexican immigrants by saying they were rapists and murders.<sup>337</sup> He faulted them for speaking Spanish and failing to assimilate.<sup>338</sup> He argued that a Mexican-American judge was unable to be unbiased against him

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333 In various permutations, the meme that Obama is foreign is widespread among conservatives. *See, e.g.*, DINESH D'SOUZA, *THE ROOTS OF OBAMA'S RAGE* 1–15 (2010) (claiming that Obama is attempting to carry out the socialist, anti-colonial dreams of his Kenyan father); Steven G. Calabresi, *The Teleprompter Presidency? Justice DeLayed or Denied?*, POLITICO (Aug. 17, 2010), [http://www.politico.com/arena/perm/Steven\\_G\\_Calabresi\\_A5D4-F886-1279-48D4-96B9-D176A986A416.html](http://www.politico.com/arena/perm/Steven_G_Calabresi_A5D4-F886-1279-48D4-96B9-D176A986A416.html) (asserting that “at some level [Obama] does not really know America very well nor does he thoroughly identify with it”).

334 *See generally* DEVIN BURGHART & LEONARD ZESKIND, INST. FOR RESEARCH & EDUC. ON HUMAN RIGHTS, *BEYOND FAIR: THE DECLINE OF THE NATIVIST ESTABLISHMENT AND THE RISE OF TEA PARTY NATIVISM* (2012).

335 Ashley Parker & Steve Eder, *Inside the Six Weeks Donald Trump Was a Nonstop 'Birther'*, N.Y. TIMES (July 2, 2016), [https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html?\\_r=0](https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html?_r=0).

336 *See* Josh Voorhees, *All of Donald Trump's Birther Tweets*, SLATE: THE SLATEST (Sept. 16, 2016, 10:15 AM), [http://www.slate.com/blogs/the\\_slatest/2016/09/16/donald\\_trump\\_s\\_birther\\_tweets\\_in\\_order.html](http://www.slate.com/blogs/the_slatest/2016/09/16/donald_trump_s_birther_tweets_in_order.html).

337 *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

338 Matt Flegenheimer, *Habla Español? Tim Kaine Is Latest Candidate to Use Spanish*, N.Y. TIMES (July 28, 2016), <https://nyti.ms/2BIHjkm> (quoting Donald Trump's statement that “[t]his is a country where we speak English . . . not Spanish”).

because Trump had proposed to build a wall with Mexico; his Mexican ancestry, Trump asserted, created an “inherent conflict of interest.”<sup>339</sup> He argued that Muslims should be barred from immigrating to the United States because of the dangers of terrorism they posed.<sup>340</sup>

The Trump campaign used many of the nativist themes developed by the Buchanan campaigns, as Buchanan himself has repeatedly said.<sup>341</sup> Adopting a policy agenda that Trump campaign manager Steve Bannon, like Buchanan before him, called “economic nationalism,” the Trump campaign focused on the same policy agenda as Buchanan, opposition to free trade and immigration, and like Buchanan sought to tap into the resentments of Middle American Radicals.<sup>342</sup> This cohort believe that the nation’s elites give away their tax money to the undeserving poor and further believe that their rightful place in American cultural and political life has been usurped by increased immigration and cultural diversity. The Obama years increased the resentments of Middle American Radicals, who believed that the nation had been taken over by un-American forces bent on the destruction of fundamental American values.<sup>343</sup> Speaking directly to the concerns of Middle American Radicals, Trump promised to reverse their fortunes and to Make America Great Again.

Trump surrounded himself with advisors with long histories of nativism. Steve Bannon, Trump’s campaign manager and later a senior White House adviser, was the editor-in-chief of the Breitbart News, which Bannon described as “the platform for the alt-right.”<sup>344</sup> Breitbart has explained that

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<sup>339</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016, 10:03 AM), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

<sup>340</sup> Dr. Ben Carson, who supported Trump during the campaign and is now Secretary of Housing and Urban Development, has argued that Islam is inherently incompatible with American constitutional values. Eric Bradner, *Ben Carson Again Explains Concerns with a Muslim President*, CNN (Sept. 27, 2015, 2:25 PM), <http://www.cnn.com/2015/09/27/politics/ben-carson-muslim-president-sharia-law/> (“I’m assuming that if you accept all the tenets of Islam that you would have a very difficult time abiding under the Constitution of the United States.”).

<sup>341</sup> Chris Gillizza, *Pat Buchanan Says Donald Trump Is the Future of the Republican Party*, WASH. POST (Jan. 12, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/01/12/pat-buchanan-believes-donald-trump-is-the-future-of-the-republican-party/?utm\\_term=.6492ca57436c](https://www.washingtonpost.com/news/the-fix/wp/2016/01/12/pat-buchanan-believes-donald-trump-is-the-future-of-the-republican-party/?utm_term=.6492ca57436c) (explaining Buchanan’s belief that the issues Trump ran on “are the issues I ran on in 1992 and 1996”); see also Jeff Greenfield, *Trump Is Pat Buchanan with Better Timing*, POLITICO MAG. (Sept./Oct. 2016), <http://www.politico.com/magazine/story/2016/09/donald-trump-pat-buchanan-republican-america-first-nativist-214221>.

<sup>342</sup> Michael Wolff, *Ringside with Steve Bannon at Trump Tower as the President-Elect’s Strategist Plots “An Entirely New Political Movement,”* HOLLYWOOD REP. (Nov. 18, 2016), <http://www.hollywoodreporter.com/news/steve-bannon-trump-tower-interview-trumps-strategist-plots-new-political-movement-948747>.

<sup>343</sup> John Judis, *The Return of the Middle American Radical: An Intellectual History of Trump Supporters*, NAT’L J. (Oct. 2, 2015), <https://www.nationaljournal.com/s/74221/return-middle-american-radical>.

<sup>344</sup> Sarah Posner, *How Donald Trump’s New Campaign Chief Created an Online Haven for White Nationalists*, MOTHER JONES (Aug. 22, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/08/>

what it calls the alt-right (and which most others call white nationalism) derives from the thinking of Sam Francis and the Patrick Buchanan presidential campaigns, among other sources.<sup>345</sup> Breitbart has heaped praise on Peter Brimelow's VDARE.com and Jared Taylor American Renaissance, describing these sources as "gathering point[s] for an eclectic mix of renegades who objected to the established political consensus in some form or another."<sup>346</sup> Brimelow, in turn, heaped praise on Trump, writing on VDARE.com that Trump spoke for American nativists and was, Brimelow said, "the clear choice of the founding stock of the Historic American Nation."<sup>347</sup> Jared Taylor, in turn, recorded a robocall encouraging whites to vote for Trump, saying that he is the only candidate who recognized that the nation should only accept immigrants "who are good for America. We don't need Muslims. We need smart, well-educated white people who will assimilate to our culture."<sup>348</sup>

Although Taylor does not claim that Trump is a fellow white nationalist—he is "not a racially conscious white man," as Taylor put it—he points to "men close to him—Steve Bannon, Jeff Sessions, Stephen Miller—who may have a clearer understanding of race."<sup>349</sup> Sessions, who drafted Trump's immigration policy during the campaign and who was appointed to be Trump's Attorney General, has longstanding ties with the nativist establishment. Sessions has long worked with FAIR to advance their anti-immigrant agenda.<sup>350</sup> Sessions has praised the National Origins Act of 1924 and has worried that the United States has too high a percent of foreign-born

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stephen-bannon-donald-trump-alt-right-breitbart-news.

<sup>345</sup> Allum Bokhari & Milo Yiannopoulos, *An Establishment Conservative's Guide To The Alt-Right*, BREITBART NEWS (Mar. 29, 2016), <http://www.breitbart.com/tech/2016/03/29/an-establishment-conservatives-guide-to-the-alt-right/>.

<sup>346</sup> *Id.*

<sup>347</sup> Peter Brimelow, "*It Will Come To Blood*"—Reflections On The Left's Anti-Trump Inauguration Tantrum, VDARE.COM (Jan. 23, 2017), <http://www.vdare.com/articles/it-will-come-to-blood-reflections-on-the-lefts-anti-trump-inauguration-tantrum>.

<sup>348</sup> Allegra Kirkland, *White Nationalist PAC Blankets Iowa With Robocalls for Trump*, TALKING POINTS MEMO (Jan. 9, 2016, 3:46 PM), <http://talkingpointsmemo.com/muckraker/trump-robo-calls-white-nationalists-iowa>.

<sup>349</sup> Rosalind S. Helderan, *Stephen Miller: A Key Engineer for Trump's 'America First' Agenda*, WASH. POST (Feb. 11, 2017), [https://www.washingtonpost.com/politics/stephen-miller-a-key-engineer-for-trumps-america-first-agenda/2017/02/11/a70cb3f0-e809-11e6-bf6f-301b6b443624\\_story.html?utm\\_term=.fdb2ffc2b719](https://www.washingtonpost.com/politics/stephen-miller-a-key-engineer-for-trumps-america-first-agenda/2017/02/11/a70cb3f0-e809-11e6-bf6f-301b6b443624_story.html?utm_term=.fdb2ffc2b719).

<sup>350</sup> In September 2007, Sessions received an award from FAIR and was the keynote speaker at FAIR's board of advisors dinner. According to FAIR's November 2007 newsletter, Sessions praised FAIR's "critical" role in protecting "American interests" and attacked the then-proposed immigration reform "grand bargain" and said that it had been drafted with the help of "cheap labor interests and ethnic interest groups" while "the American public was unrepresented in the negotiations," suggesting that "ethnic groups" (Latinos) are separate from and not part of "the American public." See FED'N FOR AM. IMMIGRATION REFORM, FAIR IMMIGRATION REPORT (Nov. 2007), [http://www.fairus.org/DocServer/Nov07\\_NL.pdf?docID=6021](http://www.fairus.org/DocServer/Nov07_NL.pdf?docID=6021).

residents.<sup>351</sup> Repeatedly criticized for his nativist advocacy, Sessions embraces the nativist term, asking, “What’s wrong with that? . . . What’s wrong with putting America first?”<sup>352</sup>

Trump’s nativist appeals were enthusiastically cheered by the conservative press. Ann Coulter quickly published a book *In Trump We Trust*, which praises Trump for recognizing that America’s constitutional identity is only possible because of its ethnic core:

There’s a reason the Magna Carta and the Glorious Revolution happened where they happened and that the Declaration of Independence was written in a British colony. It’s not in the Anglo-Saxon character either to take orders or to give them. That’s why the socialist left finally gave up on traditional Americans and pinned their hopes on immigrants, who bring their socialism with them.<sup>353</sup>

Coulter thus repeats the core nativist constitutional beliefs: the Constitution was written by white people and our constitutional culture depends on maintaining a white ethnic base; nonwhite immigrants, on the other hand, bring dangerously foreign ideas and serve to undermine the Constitution and therefore destroy America. This longstanding nativist belief, which Coulter identified as the heart of Trump’s appeal, has all the nativist hallmarks of the Know-Nothings of the 1840s, the Immigration Restriction League of the 1890s, FAIR in the 1980s, Buchanan and Francis in the 1990s, and the white nationalism espoused by Brimelow and Taylor today.

## 2. *Trump’s Executive Order and the Campaign to Exclude Muslims on the Ground that Islam Is Incompatible with the Constitution*

Within days of taking office, Trump signaled his intent to implement a nativist agenda that relies on the conviction that Muslims should be barred from immigration because their religion makes them likely to be hostile to the Constitution. In his first week in office, Trump signed an executive order that bars entry into the country from citizens of seven predominately Muslim countries.<sup>354</sup> Trump’s adviser Rudy Giuliani explained that the executive order represents an attempt to implement the promised Muslim ban.<sup>355</sup> As the

<sup>351</sup> Adam Serwer, *Jeff Sessions’s Unqualified Praise for a 1924 Immigration Law*, ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.

<sup>352</sup> *Id.*; Steven T. Dennis, *Sessions Feels Vindicated by Trump’s Nativist Surge*, ROLL CALL (Sept. 15, 2015, 11:53 AM), <http://www.rollcall.com/news/jeff-sessions-sees-agenda-heart-trump-appeal>.

<sup>353</sup> ANN COULTER, *IN TRUMP WE TRUST: HOW HE OUTSMARTED THE POLITICIANS, THE ELITES AND THE MEDIA* 10 (2016).

<sup>354</sup> Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>355</sup> Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission To Do It ‘Legally,’* WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/>?

government's lawyers have pointed out, however, the order does not use the word Muslim and says nothing about excluding Muslims.<sup>356</sup> By its terms, the order uses hostility to the Constitution, not religion, as the touchstone for identifying dangerous foreigners who must be kept out of the United States. Section 1 of the order declares that it seeks to protect national security by excluding those who "bear hostile attitudes" toward the United States "and its founding principles" and who "do not support the Constitution."<sup>357</sup> Protecting the nation against those who oppose its most fundamental principles, the President and his lawyers have said, is the definition of patriotism, not bigotry.<sup>358</sup>

Without using the word Muslim, the order casts suspicions on citizens of predominately Muslim countries and suggests that Muslims are uniquely likely to be hostile to the Constitution and must be subject to "extreme vetting" to prove otherwise. The order creates an exemption for refugees who are members of minority religions, an exemption that protects Christians and other non-Muslims.<sup>359</sup> The order thus targets Muslims, and Muslims alone. Although the order has since been revised and replaced by a permanent policy, it reflects the Administration's suspicion that Muslims are hostile to America's constitutional values.

The focus on hostility to the Constitution as a justification for restricting entry by Muslims should be understood in light of the charge, peddled for the past few years on the conspiracy-minded right, that Islam is incompatible with the Constitution. In the week after the attacks of September 11, 2001, President George W. Bush spoke at the Islamic Center of Washington, D.C., and tried to make clear to the American public that the United States was not at war with Islam and that Islam was not to blame for the attacks:

These acts of violence against innocents violate the fundamental tenets of the Islamic faith. And it's important for my fellow Americans to understand that.

. . . .

The face of terror is not the true faith of Islam. That's not what Islam is all about. Islam is peace. These terrorists don't represent peace. They represent evil and war.

When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that's made brothers and sisters out of every race—out of every race.<sup>360</sup>

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<sup>356</sup> Reply in Support of Emergency Motion Pending Appeal at 6, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017) (arguing the order is "neutral with respect to religion").

<sup>357</sup> Executive Order No. 13,769, 82 Fed. Reg. at 8977.

<sup>358</sup> Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29, 2017) (quoting Trump exclaiming that he plans to keep the United States "free" and "safe," despite what the media has claimed about the travel ban).

<sup>359</sup> Executive Order No. 13,769, 82 Fed. Reg. at 8979.

<sup>360</sup> President George W. Bush, "Islam is Peace" Says President, Remarks by the President at Islamic

In the last ten years, however, a group of anti-Muslim activists, who bill themselves as experts on Islam, have tried to show that Bush was wrong and that Islam is dedicated to violence and global domination. The primary purveyors of this claim include most centrally Frank Gaffney of the Center for Security Policy, David Yerushalmi of the Society of Americans for National Existence, Daniel Pipes at the Middle East Forum, Robert Spencer of Jihad Watch and Stop Islamization of America, and Steven Emerson of the Investigative Project.<sup>361</sup> They claim that Islam demands that believers strive to replace western democracies with Islamic theocratic states. As Robert Spencer declared: “Islam is ‘the only religion in the world that has a developed doctrine, theology and legal system that mandates violence against unbelievers and mandates that Muslims must wage war in order to establish the hegemony of the Islamic social order all over the world.’”<sup>362</sup>

The organized anti-Muslim campaign has focused especially on Islamic law, known as Sharia, which campaigners describe as a “totalitarian ideology” and “legal-political-military doctrine” that is fundamentally inconsistent with the American Constitution.<sup>363</sup> The Center for Security Policy (“CSP”), headed by Gaffney, has been one of the most ardent proponents of the view that Islam seeks to destroy the Constitution. CSP claims that Islam—not just Islamic extremists, or “radical Islamic terrorists,” but “mainstream” Islam—seeks “to supplant our Constitution with its own totalitarian framework.”<sup>364</sup> In 2010, CSP issued a 372-page report, *Sharia: The Threat to America*, principally devoted to demonstrating that Islam “rejects fundamental premises of American society and values.”<sup>365</sup> CSP claims that Islam rejects the principles of democracy and liberty and demands mindless obedience to the Quran and Sharia.<sup>366</sup> CSP argues that Islam is really an international political movement, not a religion.<sup>367</sup> CSP further claims that

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Center of Washington, D.C. (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>.

<sup>361</sup> See generally Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS (Aug. 2011), <https://cdn.americanprogress.org/wp-content/uploads/s/issues/2011/08/pdf/islamophobia.pdf> (detailing positions of the anti-Muslim activists and experts).

<sup>362</sup> ROBERT SPENCER, ARAB WINTER COMES TO AMERICA: THE TRUTH ABOUT THE WAR WE’RE IN (2014).

<sup>363</sup> See generally CTR. FOR SEC. POL’Y, SHARIAH: THE THREAT TO AMERICA (2010), [https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The-%20Threat%20to%20America%20\(Team%20B%20Report\)%20Web%2009292010.pdf](https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The-%20Threat%20to%20America%20(Team%20B%20Report)%20Web%2009292010.pdf).

<sup>364</sup> *Id.* at 7; see also William Wagner, *Islam, Shariah Law, and The American Constitution*, FAM. RES. COUNCIL (May 2011), <https://downloads.frc.org/EF/EF11E24.pdf> (“Do the Islamic authorities mean what they say? If so, their doctrines seek nothing less than to replace the American constitutional republic, grounded in deeply rooted Greco-Roman / Judeo-Christian traditions, with the formal establishment of Islamic government, birthed in jihad and grounded in the Shariah.”).

<sup>365</sup> CTR. FOR SEC. POL’Y, *supra* note 363, at 6.

<sup>366</sup> *Id.* at 6–7.

<sup>367</sup> *Id.* at 2.

“many of the most prominent Muslim organizations in America are front groups for, or derivatives of, the Muslim Brotherhood.”<sup>368</sup>

Following the lead of the anti-Muslim activists, other groups on the fringes of national politics began repeating these claims. By 2011, Tea Party groups began to argue that Muslims seek to infiltrate the United States and replace the Constitution with Sharia law.<sup>369</sup> National Tea Party groups began to argue that Islam poses a threat to the Constitution.<sup>370</sup> TeaParty.Org, one of the leading national Tea Party groups, asserted that Muslims can never be loyal to the United States because Islam teaches that supreme loyalty is owed to the Quran.<sup>371</sup> Many other conservative groups have echoed this position, including the Family Research Council, which warned that Muslims were infiltrating the United States for the purpose of establishing an Islamic theocracy.<sup>372</sup>

It did not take long before mainstream political figures began arguing that Islam poses a threat to American values. Andrew McCarthy of the National Review warned of “creeping sharia,” the concern that American Muslims were slowly finding ways to subvert American democracy in preparation for a theocratic state.<sup>373</sup> In 2010, former Speaker of the House Newt Gingrich warned an audience at the American Enterprise Institute that Sharia represents “a mortal threat to the survival of freedom in the United States and in the world as we know it.”<sup>374</sup> It was not only radical Islamists that concerned Gingrich but instead he made clear that Islam itself is incompatible with American values: “Sharia in its natural form has principles and punishments totally abhorrent to the Western world.”<sup>375</sup> In September 2015, Jeff Sessions,

<sup>368</sup> *Id.* at 18.

<sup>369</sup> NJ Tea Party Coalition, *Sharia Law vs. The Constitution*, YOUTUBE (Jan. 17, 2011), <https://www.youtube.com/watch?v=O2f5m-mI8I0>.

<sup>370</sup> *Here Are The 10 Ways Islam Is Incompatible With The Constitution*, TEA PARTY (Jan. 10, 2016), <http://www.teaparty.org/10-ways-islam-incompatible-constitution-140410/>.

<sup>371</sup> *Id.* (“The Constitution itself serves as the supreme law of the land in the U.S., while the Quran serves as the supreme law of the land for devout Muslims.”).

<sup>372</sup> Wagner, *supra* note 364, at 3 (“Immigrants from Muslim countries are moving in increasingly greater numbers to Europe and the Americas, many with the specific purpose of extending the ‘Abode of Islam.’”).

<sup>373</sup> R. James Woolsey, Andrew C. McCarthy & Harry E. Soyster, *Second Opinion Needed on Shariah*, WASH. TIMES (Sept. 14, 2010), <http://www.washingtontimes.com/news/2010/sep/14/-needed-a-second-opinion-on-shariah/>.

<sup>374</sup> Newt Gingrich, *America at Risk: Camus, National Security and Afghanistan*, Speech to the American Enterprise Institute, YOUTUBE (July 29, 2010), <https://www.youtube.com/watch?v=7&v=ht98odLCg4M>.

<sup>375</sup> *Id.*; see also Carol Kuruvilla, *5 Things You Need to Know About Sharia Law: Asking American Muslims to Swear Off Sharia Law Is a Violation of Religious Liberty*, HUFFINGTON POST (Jan. 31, 2017), [http://www.huffingtonpost.com/entry/5-facts-you-need-to-know-about-sharia-law\\_us\\_5788f567-e4b03fc3ec507c01](http://www.huffingtonpost.com/entry/5-facts-you-need-to-know-about-sharia-law_us_5788f567-e4b03fc3ec507c01) (quoting Newt Gingrich’s statement that “[w]estern civilization is in a war . . . [because] Sharia is incompatible with Western civilization”).



then a Senator, gave a speech on the Senate floor in which he denounced Islam (or at least what he termed “theologically-based Sharia”) as fundamentally incompatible with American constitutional values: it is “incompatible with the laws and freedoms we see as central to our liberty and prosperity. . . . It just will not merge with and accommodate with the freedom that we believe is essential in the Western world. Theologically-based Sharia law fundamentally conflicts with our magnificent constitutional order.”<sup>376</sup> During the 2016 presidential campaign, Republican candidate Ben Carson, now the Secretary of Housing and Urban Development, agreed that Islam is incompatible with the Constitution and argued that a Muslim must never become President because he would be loyal to Islam, not the Constitution.<sup>377</sup> The hysteria launched by anti-Muslim activists that Islam seeks global domination propelled a far reaching campaign to ban Sharia in several states.<sup>378</sup>

The American Muslim community has tried to get their message out that the claims made against by them are baseless. As the Center for American Progress explained, characterizations of Sharia law from anti-Muslim activists are “unrecognizable to the overwhelming majority of Muslims here and abroad. . . . [Sharia] is, for Muslims, the ideal law of God as interpreted by Muslim scholars over centuries to achieve justice, fairness, and mercy through personal religious observance such as prayer and fasting.”<sup>379</sup> American Muslims recognize that, at heart, the fight is over competing visions of American nationalism, as reflected in differing understandings of the American Constitution. On one side, anti-Muslim crusaders argue that Muslims should be excluded because they pose a threat to the Constitution and American values. On the other side, defenders of American Muslims argue for an inclusive understanding of who can be an American and who is entitled to protection by the Constitution.<sup>380</sup>

With the election of President Trump, the belief that Islam threatens constitutional values has moved from the margins to the White House. Trump’s

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<sup>376</sup> Brandon Moseley, *Sessions Says that West Needs a Long-term Strategy to Deal with Islamist Ideology*, ALA. POL. REPORTER (Sept. 16, 2015), <http://www.alreporter.com/2015/09-17/sessions-says-that-west-needs-a-long-term-strategy-to-deal-with-islamist-ideology/>.

<sup>377</sup> *Here Are The 10 Ways Islam Is Incompatible With The Constitution*, *supra* note 370; *Meet the Press* (NBC television broadcast Sept. 20, 2015) (transcript available at <http://www.nbcnews.com/meet-the-press/meet-press-transcript-september-20-2015-n430581>).

<sup>378</sup> The campaign succeeded in enacting an anti-sharia law in Oklahoma, which was later struck down as unconstitutional. *See generally, e.g.,* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (addressing a proposed amendment to the Oklahoma Constitution that would forbid courts from considering or using international law, such as Sharia law).

<sup>379</sup> Ali et al., *Fear, Inc.*, *supra* note 361, at 28.

<sup>380</sup> In 2011, the Center for American Progress issued a report on the network of anti-Islamic activists and explained that the fight ultimate addressing the meaning of American identity and the nation’s fundamental values: “Contending that some religions are not part of the promise of American freedoms established by our founders directly challenges who we are as a nation.” *Id.* at i.

senior White House advisers included Steve Bannon, who had mocked President Bush's suggestion that Islam is a religion of peace: "Islam is not a religion of peace. Islam is a religion of submission."<sup>381</sup> Bannon believes that Islam and Christianity are engaged in a global war and Muslims are temperamentally opposed to democratic values.<sup>382</sup> Echoing the eugenicists' claim that some people are not bred for self-government, Bannon said that Western democracies should not accept Syrian refugees: "These are not Jeffersonian democrats. These are not people with thousands of years of understanding democracy in their DNA."<sup>383</sup>

Under Bannon, *Breitbart News* gave a platform to the most vocal advocates of the claim that Islam threatens America's constitutional values. Frank Gaffney, director of the CSP, has been a frequent Breitbart contributor and appeared as a guest on Bannon's radio show 29 times.<sup>384</sup> During the presidential campaign, Donald Trump repeatedly cited Gaffney and CSP to support the proposed Muslim ban and said that CSP's staff are "very highly respected people, who I know."<sup>385</sup> Agreeing with Bannon and Gaffney that Islam is fundamentally hostile to American values, Trump declared, "Islam hates us."<sup>386</sup> At a rally before thousands of cheering supporters, Trump later explained that the entire point of the immigration order was to exclude people like that:

We want people to come into our country, but we want people that love us. We want people that can cherish us and the traditions of our country. We want people that are going to be great for our country. We don't want people with bad, bad ideas. We don't want that.<sup>387</sup>

Trump thus embraced the view that Muslims should be excluded because they do not and cannot cherish the "traditions of the country" but instead bring dangerous ideas.

Although few others recognized it, the anti-Muslim activists frequently cited by *Breitbart News* immediately understood that the President's immigration order put the force of law behind their longstanding view that Islam is incompatible with the Constitution. Brian Thomas, writer for *Jihad Watch*,

<sup>381</sup> Andrew Kaczynski, *Steve Bannon in 2010: 'Islam Is Not a Religion of Peace. Islam Is a Religion of Submission.'* CNN (Jan. 31, 2017), <http://www.cnn.com/2017/01/31/politics/kfile-bannon-on-islam/>.

<sup>382</sup> Uri Friedman, *The Coming War on 'Radical Islam,'* ATLANTIC (Nov. 29, 2016), <https://www.theatlantic.com/international/archive/2016/11/trump-radical-islam/508331/>.

<sup>383</sup> *Breitbart News Daily – Dr. Thomas D. Williams* (Breitbart broadcast Apr. 7, 2016), <https://soundcloud.com/breitbart/breitbart-news-daily-dr-thomas-d-williams-april-7-2016>.

<sup>384</sup> Peter Beinart, *The Denationalization of American Muslims,* ATLANTIC (Mar. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/03/frank-gaffney-donald-trump-and-the-denationalization-of-american-muslims/519954/>.

<sup>385</sup> *Id.*

<sup>386</sup> Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

<sup>387</sup> Jacob Gardenswartz, *Transcript: President Donald Trump's rally in Melbourne, Florida,* VOX (Feb. 18, 2017), <http://www.vox.com/2017/2/18/14659952/trump-transcript-rally-melbourne-florida>.

was exultant. In his view, the immigration order confirmed that the Trump administration had decided “to treat Islam as a hostile political ideology.” Thomas explained, “That is what has been needed for decades.”<sup>388</sup>

The Executive Order on immigration is but one illustration of Trump Administration policies that link constitutional values with the traits of prototypical Americans. In August 2017, President Trump expressed support for a proposal that would reduce by half the number of legal immigrants by restricting visas for family reunification—a policy that primarily benefits immigrants from Latin America and Asia—and which would instead give visas primarily to skilled workers, especially those who can demonstrate proficiency in English.<sup>389</sup> The proposal rejects the key policy that animates the 1965 Immigration Act—that anyone of any race, nationality, or religion is equally capable of becoming a valued part of the American nation—and would limit immigration to persons who have demonstrated an ability to assimilate, which could be shown by an ability to speak English. As President Trump has explained, immigration should be restricted to those “who share our values and love our people.”<sup>390</sup> It is a necessary step, he has said, to protect real Americans who have been edged out of their rightful place: “We’re going to take our country back, folks,” he declared, “We’re going to take our country back.”<sup>391</sup>

Other members of the Trump Administration have made clear that they emphatically believe that immigrants, especially brown-skinned immigrants, are destroying America’s constitutional values. During the campaign, Michael Anton, a former speechwriter for President Bush, wrote an essay that has been described as “as an intellectual statement of Trumpism,”<sup>392</sup> in which he accused Democrats of deliberately “importing” un-American foreigners to destroy the Constitution in order to pave the way for a leftist takeover:

[T]he ceaseless importation of Third World foreigners with no tradition of, taste for, or experience in liberty means that the electorate grows more left, more Democratic, less Republican, less republican, and less traditionally American with every cycle. As does, of course, the U.S. population . . . This

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<sup>388</sup> Neil Munro, *Left Protests While Trump Junks Obama’s Global Immigration Plan*, BREITBART NEWS (Jan. 30, 2017), <http://www.breitbart.com/big-government/2017/01/30/trump-changes-immigration-favor-american-values/>.

<sup>389</sup> Press Release, White House Press Secretary, President Donald J. Trump Backs RAISE Act (Aug. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/02/president-donald-j-trump-backs-raise-act>.

<sup>390</sup> President Donald Trump, *Speech at Warsaw* (July 6, 2017), in *Trump’s Speech at Warsaw*, CNN (July 6, 2017), <http://www.cnn.com/2017/07/06/politics/trump-speech-poland-transcript/index.html>.

<sup>391</sup> Donald Trump, *Speech at Phoenix* (Aug. 31, 2016), in *Transcript: Donald Trump’s Full Immigration Speech, Annotated*, LA TIMES (Aug. 31, 2016), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmstory.html>.

<sup>392</sup> Susan B. Glasser, *Michael Anton: The Full Transcript*, POLITICO (April 17, 2017), <http://www.politico.com/magazine/story/2017/04/michael-anton-the-full-transcript-215029>.

is the core reason why the Left [and] the Democrats . . . think they are on the cusp of a permanent victory that will forever obviate the need to pretend to respect democratic and constitutional niceties. Because they are.<sup>393</sup>

Since the election, Anton has been appointed the White House Director of Strategic Communications at the National Security Council.<sup>394</sup> In arguing that “Third World foreigners” with “no tradition . . . of liberty” are making America “less American” and destroying “democratic and constitutional niceties,” Anton makes the same point made by white nationalists, who believe the Immigration Act of 1965 marked the beginning of a “white genocide,” a deliberate plot by leftists to destroy white rule.<sup>395</sup> It was the central message of neo-Nazis, Ku Klux Klansmen, and other members of the alt-right when they marched in Charlottesville, Virginia, in August 2017, chanting a message to brown-skinned Americans: “You will not replace us.”<sup>396</sup> The Trump Administration has made clear that it shares this message, through its Muslim ban, its efforts to limit immigration to those it deems capable of assimilating into America’s constitutional culture, and the President’s expressed sympathy for the “very fine people” who marched in Charlottesville to protect “our history and our heritage.”<sup>397</sup>

The President’s policies follow a long history of American nativism. As that history shows, nativists have routinely claimed that unwanted foreigners are hostile to the Constitution. Like nativists of old, the President has tried to justify policies of exclusion in patriotic terms, claiming that he does not seek to target foreigners because of their race or religion but because they hate our constitutional ideals. Once again, hostility to the Constitution has served as a justification for exclusion.

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<sup>393</sup> Publius Decius Mus, *The Flight 93 Election*, CLAREMONT REV. BOOKS (Sept. 5, 2016), <http://www.claremont.org/crb/basicpage/the-flight-93-election/>.

<sup>394</sup> Susan B. Glasser, *Michael Anton: The Full Transcript*, POLITICO (April 17, 2017), <http://www.politico.com/magazine/story/2017/04/michael-anton-the-full-transcript-215029>.

<sup>395</sup> See “*White Genocide in the USA*,” WHITE GENOCIDE PROJECT, <http://whitegenocideproject.com/white-genocide-in-usa/> (last visited Oct. 25, 2017) (“[D]eliberately bringing in millions of non-White immigrants to change that is White genocide.”); Christian Miller, *The White Genocide Evidence Project: Immigration*, MAJORITYRIGHTS.COM (Mar. 9, 2011) [https://majorityrights.com/weblog/comments/the\\_white\\_genocide\\_evidence\\_project\\_immigration](https://majorityrights.com/weblog/comments/the_white_genocide_evidence_project_immigration) (identifying the 1965 Immigration Act as a “treasonous and traitorous piece of legislation”).

<sup>396</sup> *White US Nationalists Chant ‘You Will Not Replace Us,’* BBC NEWS (Aug. 12, 2017), <http://www.bbc.com/news/av/world-asia-40911744/white-us-nationalists-chant-you-will-not-replace-us>.

<sup>397</sup> *Full Transcript and Video: Trump’s News Conference in New York*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-transcript.html>; Mark Landler & Maggie Haberman, *At Rally, Trump Blames Media for Country’s Deepening Divisions*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/us/politics/trump-rally-arizona.html>.

## CONCLUSION

Over the last century, and especially since World War II, constitutional nationalism—the belief that being American means believing in a common creed expressed most centrally in the Constitution—has become the orthodox conception of American nationalism. Constitutional nationalism is thought of as an especially benign form of civic nationalism, in contrast to more primitive and hateful forms of ethnonationalism that define national membership by race, religion, or ethnicity.<sup>398</sup> Belief in this orthodoxy is so deeply entrenched that many prominent leaders and academics discuss it as if has always been so, as if American identity has always been understood in these terms.<sup>399</sup> Rogers Smith has offered a useful correction to this mythology by showing that, throughout American history, conceptions of American identity and American nationalism have long been contested, and civic and republican conceptions of nationalism have competed with ascriptive versions based on race, religion, and ethnicity.<sup>400</sup>

This Article has tried to further correct the mythology of American nationalism by showing that constitutional nationalism has often been advocated by nativists who also believe that being American means being white and Christian. Many historians have misunderstood nativist movements and present them as simple ethnic nationalists who believe that American nationality is defined solely by race, religion, or ethnicity.<sup>401</sup> Nativists are often depicted as the counterpart to civic nationalists, who believe that American nationality means commitment to civic values and not ascriptive categories.<sup>402</sup> What this Article has tried to show is that nativist movements frequently articulate their agendas in the language of constitutional nationalism. They too articulate an ideology that places commitment to constitutional values at the center of their

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<sup>398</sup> See, e.g., President George W. Bush, First Inaugural Address (Jan. 20, 2001) in *SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH 2* (“America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift us above our interests and teach us what it means to be citizens.”).

<sup>399</sup> See, e.g., *Praises Army Plan for Japanese Unit*, *supra* note 1, at 6 (quoting Franklin D. Roosevelt as saying, “The principle on which this country was founded and by which it has always governed is that Americanism is a matter of the mind and the heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy.”); President Lyndon Johnson, Special Message to the Congress on Immigration (Jan. 13, 1965) in *LYNDON JOHNSON, 1 PUB. PAPERS 13* (1966) (“The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities.”).

<sup>400</sup> See SMITH, *supra* note 41, at 14, 23, 28; see also *supra* notes 41–45 and accompanying text.

<sup>401</sup> See, e.g., ANATOL LIEVEN, *AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM* 7 (2012) (contrasting nativism and civic nationalism); JEFFREY MIREL, *PATRIOTIC PLURALISM: AMERICANIZATION EDUCATION AND EUROPEAN IMMIGRANTS* 11 (2010) (same); JAMES M. MCPHERSON, *IS BLOOD THICKER THAN WATER?: CRISES OF NATIONALISM IN THE MODERN WORLD* 37 (1999) (same).

<sup>402</sup> See, e.g., LIEVEN, *supra* note 401, at 5–7.

understanding of what it means to be American. What distinguishes them from others is their conviction that only some people—those who share the racial, ethnic, and religious traits of historically dominant groups in the United States—are capable of embracing America’s fundamental values.

The failure to understand that nativists frequently use the language of constitutional nationalism has real consequences because it prevents us from recognizing nativist movements. This is what happened in 2009 when the Tea Party movement arose and declared that it was dedicated solely to constitutional fidelity and returning the country to its founding principles.<sup>403</sup> The overwhelmingly white members of the movement marched and demanded to “take back the country” from the nation’s first black president and his allies, who they deemed dangerously un-American. The movement’s leaders largely refrained from saying anything explicitly in terms of race or ethnicity but instead used commitment to the Constitution, as the movement defined it, to distinguish real Americans from dangerous foreigners. The movement’s pervasive use of constitutional rhetoric served to obscure the nativism at the heart of its claims.<sup>404</sup>

As an outgrowth of the Tea Party movement, a wide-ranging campaign has employed the language of constitutional nationalism in targeting Muslims by asserting that they hold values that are fundamentally incompatible with the Constitution. With the election of Donald Trump, adherents of that view now hold positions of power in the White House. The allegation that Muslims are inherently un-American should be recognized as part of a long history of American nativism, in which anti-immigrant movements have routinely claimed that unwanted immigrants are hostile to constitutional values. In the 1850s, the Know-Nothings argued that Catholicism was incompatible with the Constitution. In 1882, Congress excluded Chinese immigrants based on the assertion that they were too foreign to embrace constitutional principles. In 1924, Congress enacted the National Origins Act out of the belief that members of the so-called Nordic race were genetically disposed to embrace constitutional values, while Jews, Italians, Poles, and Asians would inevitably destroy the nation’s constitutional government. In the late twentieth century and today, anti-immigrant groups have argued that immigration by Latin Americans and Asians is destroying the Constitution.

All of these movements invoked allegations of hostility to the Constitution as the touchstone for identifying dangerous foreigners. In these movements “the Constitution” served as the symbolic embodiment of national values. To say that some people are hostile to the Constitution is a way to say that

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<sup>403</sup> See Jared A. Goldstein, *The Tea Party’s Constitution*, 88 DENVER L. REV. 559, 576 (2011) (arguing that the Tea Party’s theory of constitutionalism is authoritarian and nationalistic).

<sup>404</sup> The perception that the Tea Party was simply a group of constitutional conservatives is well-captured in Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1 (“Not a few constitutional scholars say that it is possible to quarrel with the particulars while welcoming the discussion.”).

they are hostile to the United States, that they are un-American. This way of speaking about the Constitution comes naturally to Americans as a result of the long tradition of identifying what it means to be American by reference to the Constitution, of saying that being American means believing in a set of values embodied in the Constitution.

What the history explored in this Article should show is that constitutional nationalism—the belief that being American means believing in a common creed embodied in the Constitution—has not always been a benign and universalistic force. Devotion to the Constitution may be the cement that unites Americans, but it has also repeatedly been invoked to justify excluding unwanted people who, by race, religion, or national origin, do not share the traits of native-born Americans.

