Article

RACE, RELIGION AND NATIONALITY IN IMMIGRATION SELECTION: 120 YEARS AFTER THE CHINESE EXCLUSION CASE

Liav Orgad*
Theodore Ruthizer**

INTRODUCTION

120 years ago, in May 1889, the U.S. Supreme Court ruled that "the power of exclusion of foreigners being an incident of sovereignty ... cannot be granted away or restrained."[1] Sixty years later, in January 1950, at the height of the Cold War, the U.S. Supreme Court reaffirmed the plenary power doctrine by holding that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[2] Another sixty years have passed and more recently, in February 2009, the U.S. Court of Appeals for the D.C. Circuit held that "a nation-state has the inherent right to exclude or admit foreigners

   1.   *See* Chae Chan Ping (*The Chinese Exclusion Case*). 130 U.S. 581, 609 (1889).
   2.   *See* Knauff v. Shaughnessy, 338 U.S. 537, 542–43 (1950).

and to prescribe applicable terms and conditions for their exclusion and admission."[3] The principle to decide "which alien may, and which alien may not, enter the United States, and on what terms," Judge Randolph firmly asserted, "has been a matter of political determination by each state—a matter wholly outside the concern and competence of the judiciary."[4]

In principle, the political branches continue to enjoy plenary power to decide who may enter and who may stay. But this is not the full picture. One should not think that nothing has changed since the nineteenth century, and that the political branches are given carte blanche to decide the rules of the immigration issue. As a matter of fact (and law), a lot has been changed since—in the United States and elsewhere. In the most detailed book on ethnic selectivity in immigration law, Christian Joppke shows how liberal democracies have generally abandoned ethnic selection and moved in a more liberal course.[5] Changes in domestic law and international human rights law have restrained states' power to regulate the terms for immigration selection. States can still control immigration, but they are more limited by some base-level standards of permissible and impermissible criteria. Determining the limits of what is permissible, and discussing whether permissible criteria include decisions made on the basis of race, religion and nationality, is the focus of this Article.

The topic of permissible and impermissible immigration criteria is a neglected field in constitutional law and political theory. There is little literature on the ethics of criteria for exclusion and inclusion of immigrants. It is also rare to find a detailed account on the ethics of permissible and impermissible criteria in other fields, such as security policies. Back in 1997, Vice President Al Gore's Report on *Aviation Safety and Security* noted that it is permissible to develop and implement profiling systems in aviation procedures for questioning and searching passengers—as long as the profile is not based on "national origin, racial, ethnic, religious or gender characteristics" of citizens.[6] In Canada, a Governmental Commission concluded

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3. *See* Kiyemba v. Obama, 555 F.3d 1022, 1025, (D.C. Cir. 2009), *cert. granted,* 130 S. Ct. 458 (2009).

4. *Id.* at 1026.

5. *See generally* CHRISTIAN JOPPKE, SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE (2005).

6. *See* WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY: FINAL

that national security investigations can be based upon country of origin, but "must not be based on racial, religious or ethnic profiling."[7] In Europe, the Council of the European Union recommended that Member States develop and use terrorist profiles in combating terrorism—with special attention given to their use in immigration context. Factors of terrorist profiles may include nationality, place of birth, age, gender, and physical distinguishing features but must exclude race, ethnicity, and religion.[8] Why are these criteria impermissible, while others are permissible? What are the factors that make the difference? Little literature exists on the theory and typology of immigration criteria. This Article is intended to fill the gap.

The Article proceeds as follows: Part I offers an innovative approach to tackle the issue of immigration restrictions. It challenges the traditional concept in the literature under which *criteria* and *justifications* for controlling immigration are tied together. According to the conventional view, there are some permissible and impermissible justifications to limit immigration and, accordingly, some permissible and impermissible criteria. Thus, if one believes that preserving the national culture is a legitimate justification to restrict immigration, one usually concludes that it is also legitimate to use culture as a criterion for immigration selection. On the other hand, if one believes that cultural continuity is an unjustifiable purpose in restricting immigration, one usually concludes that immigrants' cultural backgrounds should be excluded from the process of immigration selection. Part I departs from this view by distinguishing between criteria and justifications. It calls for a two-stage process of immigration selection under which states will be required to present a legitimate justification to restrict immigration and, in addition, a legitimate criterion serving this justification. In other words: in order to restrict immigration, states will need to justify both the justifications and the criteria used.[9] The Article focuses on the second stage. It asks whether

REPORT TO PRESIDENT CLINTON (Feb. 12, 1997).

    7. *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR. REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS (Sept. 18, 2006).

    8. *See* Draft Council Recommendation on the Development of Terrorist Profiles, Council of the European Union (Nov. 28, 2002).

    9. The terms qualifications, criteria, grounds, terms and conditions are used here interchangeably. We also use interchangeably the terms permissible or impermissible and legitimate or illegitimate criteria, though they are not always the same (permissible

race, religion and nationality could ever be legitimate immigration criteria when they serve a legitimate purpose.

Part II is descriptive: It presents current immigration laws in the United States. In a pre-9/11 world, many scholars believed that race-based immigration law was withering away.[10] Part II shows that these forecasts were premature. Racial classifications continue to shape the process of immigration selection. Part II also distinguishes between different criteria used to select immigrants: race, ethnicity, religion, and nationality. These are different criteria that require a different analysis. Part II demonstrates how official and central race-based classifications remain to date. While there is a general process of liberalization—racial classifications have become less direct and arbitrary, positive rather than negative, nationality-based more than race-based—it was too early to celebrate their disappearance. Race-based criteria remain formal, group-based in nature, and apply to admission and naturalization. This reality has been strengthened by three reasons: the "War on Terror" and post-9/11 security concerns, ongoing cultural clashes between native and immigrant groups, and a process of re-ethnicization under which nation-states grant privileges to ethnic diaspora in admission and eligibility to citizenship.

Part III is normative: It asks whether the use of race, ethnicity, religion and nationality in immigrant selection can be legally permitted. The conventional view is that race, ethnicity and religion (as opposed to nationality) are impermissible criteria. Under this dichotomous view, there are clearly permissible and clearly impermissible immigration criteria.[11] Part III challenges this view by considering three normative disciplines to analyze race-based immigration classifications: constitutional law, international human rights law and moral philosophy. It shows that under each discipline, the use of race, ethnicity, religion and nationality could (and sometimes should) matter in the process of immigrant selection. This might not be desirable or a wise policy, but it still permits a narrow road to

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criteria are not necessarily legitimate).

   10.   *See, e.g.,* Gabriel J. Chin, *Is There a Plenary Power Doctrine:? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law,* 14 GEO. IMMIG. L.J. 257 (2000).

   11.   *See, e.g.,* Joseph H. Carens, *Who Should Get In?: The Ethics of Immigration Admissions,* 17 ETHICS & INT'L AFF. 95 (2003) (arguing that race, religion and ethnicity are always illegitimate immigration criteria).

use race as a criterion in immigration policy. Part III also sketches the considerations required to withstand the legal conditions for such race-based use. In a nutshell, from a constitutional perspective, race can be a permissible criterion under the Fourteenth Amendment when it is based on reliable statistical evidence and as long as race is not the exclusive factor, whether the policy is racially motivated or not. The Fourteenth Amendment takes account of racial prejudice yet does not require satisfying strict scrutiny because immigration is usually seen as extraconstitutional area. From an international human rights law perspective, the prohibitions against racial discrimination have broad exemptions in the field of immigration. In principle, race can matter when its use is not arbitrary, serves a legitimate purpose and is proportional. From a moral perspective based on the principle of corrective justice, race can matter when it is aimed at correcting past wrongs, a kind of reparation for past exploitation. From a perspective of distributive justice, race can matter when it is intended at allocation of goods. In these situations, race-based classifications have different justifications, goals and scope, nonetheless they are not excluded per se; they are context-based.

Part IV focuses on one common justification invoked by some advocates of immigration restrictions—protecting national security. In a post 9/11 world, the use of race, religion and nationality in immigrant selection has increased. In the public debate, a common locution was the "yes, but" argument, that is, racial selection may be forbidden *BUT* the War on Terror is a different context. Under this view, avoiding enhanced scrutiny of Muslims would be "an invitation to further terror."[12] Part IV tackles the contention on the effectiveness of racial immigration criteria as a counterterrorism measure. It casts doubts on three issues: *First*, on the statistical level, the use of racial classifications often lacks statistical correlation. *Second*, on the effectiveness level, such use has not yet proved as cost-effective. *Third*, on the psychological level, there is an unconscious human tendency to use racial criteria more than their actual predictor contribution justifies. The "most-likely-strategy" is sometimes a cognitive bias and a psychological (and statistical) error. Hence,

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12. *See* Daniel Pipes. *The Enemy Within*. N.Y. POST. Jan. 24. 2003; Paul Sperry. *When the Profile Fits the Crime*. N.Y. TIMES. July 28. 2005.

it is necessary to consider some alternatives for immigration selection.

Part V develops a typology of immigrant selection. It employs two tests—the policy's motivation and the policy's effect—to distinguish between legitimate and illegitimate cases: using racial criteria to achieve either a racial purpose or a non-racial purpose, and using facially-neutral criteria to achieve either a racial purpose or a non-racial purpose. Part V then presents four alternative methods of immigrant selection. The first is universal selection. This method focuses on non-racial immigration criteria. These can be ascribed characteristics, such as one's gender, or achieved characteristics, such as one's education or skills. The second is positive selection. This method does not target unwanted immigrants but instead is designed to identify preferred immigrants. While universal selection is premised on non-racial criteria, positive selection permits the use of race as one of the preferred criteria. The third is random selection. This method calls for lottery distribution of visas. Immigrants are selected by casting lots. The fourth is racial selection with just compensation. This method permits the use of race so long as it is accompanied by just compensation for the discriminatory effect. Part V shows how none of these methods has taken away the controversy about race, and how even facially-neutral methods, such as random or universal selection, are rooted in race. As the immigration debate in the country continues to percolate, the issue of immigrant selection has both theoretical and practical significance.

I. CRITERIA AND JUSTIFICATIONS

In *The Law of Peoples*, John Rawls argued for a "qualified right to limit immigration."[13] The challenge is to grasp what the legitimate qualifications are. The starting point of this Article is thus the premise that a sovereign state has a qualified right to limit immigration and thereby set some criteria for exclusion and inclusion. It is possible to challenge this premise, as some scholars have done,[14] but the still widely accepted proposition in

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13. *See* JOHN RAWLS, THE LAW OF PEOPLES 39 (1999).

14. *See. e.g..* Joseph H. Carens. *Migration and Morality: A Liberal Egalitarian Perspective. in* FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 25 (Brian Barry & Robert Goodin eds.. 1992): Jonathan Seglow. *The Ethics of Immigration*, 3 POL. STUD. REV. 317 (2005).

international human rights law is that states can generally decide the qualifications for admission and naturalization.

Many scholars have enriched the discussion on justifications to limit immigration. Henry Sidgwick notes that states can restrict immigration to protect "the internal cohesion of a nation" and to "maintain an adequately high quality of civilized life."[15] Joseph Carens supports states' right to restrict immigration based on a threat to the public order, national security, liberal democratic values and economic well-being.[16] In *The Ethics of Immigration Restriction*, James Hudson analyzes five common justifications to restrict immigration—protecting the wages of the native workers, protecting the ethnic and cultural makeup of the society, avoiding unwanted burden on the native population (air pollution, welfare burden, etc.), preventing criminal activity and harm to national security interests, and maintaining a dominant, privileged position.[17] In *Immigration: The Case for Limits*, David Miller presents two justifications for limiting immigration—cultural continuity and population control.[18] In a later essay, Miller makes a case for other justifications, such as protecting principles of political liberalism.[19] In a recent article, Stephen Macedo describes several justifications used by liberal democracies to restrict immigration, such as protecting the social solidarity and supporting social justice at home.[20] But whether one finds the justification in a liberal theory[21] or a communitarian theory,[22] the

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15. *See* HENRY SIDGWICK. THE ELEMENTS OF POLITICS 309 (4th ed., 1919).

16. *See* Joseph H. Carens. *Aliens and Citizens: The Case for Open Borders, in* THEORIZING CITIZENSHIP 229. 237–41 (Ronald S. Beiner ed., 2007). Carens actually makes a case for open borders yet accepts some narrow liberal justifications for limiting immigration.

17. *See* James L. Hudson. *The Ethics of Immigration Restriction*, 10 SOC. THEORY & PRAC. 201 (1984).

18. *See* David Miller. *Immigration: The Case for Limits, in* CONTEMPORARY DEBATES IN APPLIED ETHICS 193 (Andrew Cohen & Christopher H. Wellman eds., 2005).

19. *See* David Miller. *Immigrants, Nations, and Citizenship*, 6 J. POL. PHIL. 371 (2008).

20. *See* Stephen Macedo. *When and Why Should Liberal Democracies Restrict Immigration?. in* CITIZENSHIP. BORDERS. AND HUMAN NEEDS (Rogers M. Smith ed., 2010).

21. *See* WILL KYMLICKA. LIBERALISM. COMMUNITY AND CULTURE (1989); Carens. *supra* note 14; Macedo. *supra* note 20; Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*. 61 SOC. RES. 491 (1994).

22. *See* MICHAEL WALZER. SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983): Miller. *supra* notes 18 and 19.

literature on the justifications to restrict immigration is vast and well-established.

The discussion about legitimate and illegitimate justifications to limit migration—whatever these justifications are—says little about legitimate and illegitimate criteria. One could argue that a state is justified in limiting immigration for the purpose of preserving the cultural composition of the society. This justification, however, does not necessarily mean inclusion or exclusion of immigrants who share similar cultural characteristics. On the one hand, giving preferences to educated and skills-based immigrants over family-based immigrants might reduce the number of Latino immigrants and increase the number of Western European immigrants. Under this view, a points-based immigration system, similar to those used in Britain and Canada, might have cultural implications on the composition of qualified immigrants. In this case, the state uses non-cultural criteria to achieve a cultural purpose. On the other hand, states can use culture-based criteria to achieve a non-cultural purpose. One purpose can be national security: in this context, culture is a pretext for keeping out certain kinds of immigrants who might be regarded as security risks, or even as potential terrorists. A second purpose can be related to the population size, that is, culture is a criterion in the general enterprise to restrict immigration. Under that explanation, states do not want immigration on a broad scale, irrespective of its composition, and culture is just another means to reduce the number. A third purpose can be protecting the welfare system, that is, culture is used to keep out immigrants who might become a financial burden. The assumption here is that there is a link between culture and the chances of participation in the job market. A fourth purpose can be promoting the social cohesion, that is, culture is used based upon the premise under which a cultural homogeneous society is more stable. The assumption here is that a society that is too diverse may lose its solidarity and, as a result, may even cease to exist as a sovereign state.

Criteria and justifications for immigrant selection do not live in a different planet; they are related. An illegitimate justification may annul the validation of the criterion used; if the end is illegitimate, the means may be invalidated too. Yet a legitimate end is only the first step. It has to be followed by a second step, which is the need to justify the criterion used. To

return to Miller's claim about cultural continuity, even if there are legitimate reasons for such an end, one still has to deal with the question of the criteria used to achieve cultural preservation. Miller himself supports broad grounds for immigrant selection. Under his view, "given that states are entitled to put a ceiling on the numbers of people they take it in . . . they need to select somehow, if only by lottery."[23] But what does "somehow" mean? Miller mentions different criteria: speaking the native language, cultural perceptions of the applicant and, in rare cases, religion—"religion could be a relevant criterion only where it continues to form an essential part of the public culture, as in the case of the state of Israel."[24] This connection, however, is far from being simple. Even if states have a right to restrict immigration, and even if this right includes cultural continuity as a legitimate end, it does not follow that states can pick and choose whatever criteria they want.

In the next sections, we discuss the criteria of race, ethnicity, religion and nationality. We first describe their different uses in immigrant selection and then discuss related legal issues. It is important to keep in mind the following distinctions: *First*, criteria for exclusion are generally not identical with criteria for inclusion. Exclusion criteria set grounds for inadmissibility; for example, under the category of security-related issues, different exclusionary criteria exist, such as terrorist activities, participation in a Nazi-based persecution and membership in a totalitarian party.[25] Inclusion criteria set grounds for prioritizing certain aliens in immigration; examples are the use of education, economic characteristics and family ties. Joppke attractively catches this as a distinction between negative and positive immigration selection.[26] *Second*, some criteria are individual-based while others are group-based. Individualistic criteria focus on characteristics of individuals—whether or not they individually present a security risk, vulnerability to becoming a

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23.   *See* Miller, *supra* note 18, at 204.
24.   *Id.*
25.   *See* 8 U.S.C. § 1182 (2008).
26.   *See* JOPPKE, *supra* note 5, at 22–23, 220–24. Joppke rightly mentions that although positive and negative selectivity "are evidently made from starkly different moral cloth", this distinction "is not as clean and clear as it seems". Preferring *A* means discriminating against *B*—"the reverse side of prioritizing some is discriminating against all others." Joppke, however, refers to *group* selectivity. He gives Asians exclusion from the United States and German and Israel's Laws of Return as examples of negative and positive selectivity.

public charge, or suffering from physical or mental disorder. Group-based criteria treat individuals as part of collective groups; examples include policies that exclude Asians, or include ethnic Jews and Germans.[27] *Third*, in principle, different criteria exist for admission into the country and for admission into the citizenry. Criteria such as national security, public order and public health exist as part of the admission process, while other criteria—such as language proficiency, civic knowledge, and attachments to the Constitution—exist as part of the naturalization process.[28] These distinctions are often blurred. For instance, in some countries, a language requirement exists not only for naturalization but also for admission. *Fourth*, different criteria generally apply differently to different types of immigrants. Criteria for admitting family members are not identical with those applied to asylum seekers, economic migrants and seasonal workers. And *last*, immigration criteria can be observed directly from law reports, and indirectly by looking at impacts and effects. Thus, a facially-neutral criterion may hide, intentionally or accidentally, a suspect criterion.

A note on terminology: the term "immigration selection" refers in this Article to three fields: selecting people in entering a country (admission), joining a political community (naturalization), and deportation (removal). The Article leaves out other immigration issues, such as denaturalization or granting rights to immigrants. A difficult issue is defining race and ethnicity. There are many ways to define race and ethnicity—sociological, ethnological, geographical, historical, or a combination of these—while each definition may have different components, require a different discussion and lead to a different conclusion. We do not pretend to solve this puzzle here by suggesting a legal definition.[29] Instead, we use race and

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27. One could claim that even individualistic criteria are based on collective presumptions. *See* Liav Orgad, *Love and War: Family Migration in Time of National Emergency*, 23 GEO. IMMIGR. L.J. 85, 108–12 (2008).

28. For admission and naturalization criteria in 27 European countries, *see* COMPARATIVE STUDY OF THE LAWS IN THE 27 EU MEMBER STATES FOR LEGAL IMMIGRATION 473–93 (2008). For admission and naturalization criteria in the United States, *see* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 250–354, 420–62, 1305–08 (5th ed., 2009); THOMAS A. ALEINIKOFF, DAVID MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 63–82, 297–307, 507–77 (6th ed. 2008).

29. For a discussion of legal definitions of race, ethnicity, descent and ancestry, *see* Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. L.J. 1093

ethnicity in the subjective manner used by governments and the courts,[30] though we often use an umbrella category of "racial criteria" or "racial classifications" to describe race, ethnicity and religion together. As for nationality, we refer to nationality to include two concepts: the first refers to one's country of birth or of current citizenship. The second refers to one's national or ethnic origins, regardless of citizenship.[31]

II. RACE, RELIGION AND NATIONALITY: DO THEY STILL MATTER?

On May 1882, Congress passed the Chinese Exclusion Act. The Act authorized the executive branch to exclude persons of Chinese descent.[32] Chae Chan Ping was a Chinese-born laborer who lived in California for many years. Before he departed the United States for a brief visit to his native China, he had obtained a certificate that would entitle him to return to the United States. But during his absence, Congress amended the law to ban the reentry of Chinese, including those with validly-issued certificates. When Chae Chan Ping arrived at the Port of San Francisco, he was barred from reentering. He challenged his exclusion in a case that came before the Supreme Court in May 1889 and became known as the Chinese Exclusion Case. The Court sustained the Chinese Exclusion Act and set ground rules for plenary power of the political branches over immigration that reverberate some 120 years later.[33] Justice Field, writing for a unanimous Court, noted that Chinese are racially different. They "remained strangers in the land, residing apart by themselves and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[34] Justice Field went even further to stress a demographic concern—"as they grew in numbers each year," they would

(2004).

30. The focus is direct use of race and ethnicity as opposed to using indirect traits that may indicate one's race and ethnicity, such as language, accent, dress code, physical characteristics and surnames.

31. Some courts interpreted the term "national origin" more broadly to include the country from which one's ancestors came. *See, e.g.,* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

32. 22 Stat. 58, ch. 126. The Act was not based on citizenship but on descent. It applied to "all subjects of China and Chinese, whether subjects of China or any other foreign power," with the exception of scholars and merchants.

33. *See* The Chinese Exclusion Case, 130 U.S. at 581.

34. *Id.* at 595.

present "great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration."[35] The Court characterized the Chinese Exclusion Act as "protective legislation."[36]

The Chinese Exclusion Case spoke in very broad terms to build a structure of broad governmental powers to control immigration. Individual exclusion "is only an application of the same power to particular *classes* of persons, whose presence is deemed injurious."[37] The power to exclude aliens, and to prescribe terms for exclusion, is part of the nation's independence, the foreign affairs power, and the right to self-preservation.[38] This power "cannot be granted away or restrained" and is not a question "for judicial determination."[39] This seminal case established the so-called Plenary Power Doctrine, which gives Congress and the Executive an unfettered right to regulate immigration issues under a wide range of constitutional immunity.[40] Immigration has been established as a kind of extraconstitutional area.

120 years have passed since the Chinese Exclusion Case. Is this case a relic from another era or still good law? This Part

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35. *Id.*

36. *Id.*

37. *Id.* at 608 (emphasis added). Years later, the Court reaffirmed racial exclusion of Japanese and high-caste Hindus. *See* Morrison v. California, 291 U.S. 82, 86 (1934) ("The privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent): and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less"): United States v. Thind, 261 U.S. 204 (1923) (holding that a high-caste Hindu is not eligible for naturalization because he is not a "Caucasian"): Ozawa v. United States, 260 U.S. 178 (1922) (holding that people of Japanese descent are not "white" and hence are not an admissible race for naturalization).

38. *See* The Chinese Exclusion Case, 130 U.S. 581, 603–04: *see also* Mathews v. Diaz, 426 U.S. 67, 81 (1976); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); Boutilier v. INS, 387 U.S. 118, 123 (1967); Harisiades v. Shaughnessy, 342 U.S. 580, 588-90 (1952); Carlson v. Landon, 342 U.S. 524, 537 (1952); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–18 (1936); Fong Yue Ting v. United Stated, 149 U.S. 698, 707 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Guan Chow Tok v. INS, 456 F.2d 1239 (5th Cir. 1972).

39. *See* The Chinese Exclusion Case, 130 U.S. 581, 606–09.

40. The literature on the plenary power doctrine is vast. *See, e.g.,* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–222 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 6 SUP. CT. REV. 255 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L.J. 545 (1990); Cornelia T.L. Pillard & Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright,* 1998 SUP. CT. REV. 1 (1999).

shows how racial classifications remain central in immigration policy. True, they have become less direct and arbitrary, positive rather than negative, nationality-based more than race-based, but, in principle, they are still with us after all. The discussion starts with nationality-based restrictions, moves to religious distinctions, and concludes with racial and ethnic classifications.[41] It focuses on law and policy in the United States, though it provides some examples from other countries. It focuses on official policies and not on abuse of discretion by individual officers.

A. NATIONALITY-BASED RESTRICTIONS

Nationality-based distinctions have permeated the United States immigration policy for a long time. Tracing our path back to the National Origins Quota System of 1921, country of origin has played a significant role in defining U.S. immigration policy. Although the national origins quota system ended in 1965, nationality-based distinctions continue to be a foundation block of the U.S. system, as reflected in per-country quotas (based on country of birth), expedited treatment for temporary visitors coming from certain low-fraud countries, eligibility for the Diversity Visa Lottery based on country of birth, the designation of certain visa-issuing consulates for applications based on country of birth, and many other examples liberally sprinkled throughout the INA. There is nothing peculiarly 'American' in these policies. In a post-Westphalian world divided by nation-states, nationality plays a major role in defining international relations. Immigration agencies are often given a wide berth to favor certain nationals over others in the way visas are issued, their length and terms, exemptions from visas, setting of country quotas for immigrant visas and negotiated nonimmigrant statuses accorded to Australians, Canadians, Chileans and Singaporeans. Under U.S. law, for instance, Israelis can take

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41.   The focus of the Article is current and recent immigration policies. The Article thus avoids discussing race-based policies that were employed in the United States a long time ago. For past policies, *see* ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE (2002); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (2d ed. 1988); JOPPKE, *supra* note 5, at 36–43, 52–59; Ian F.H. López, *Racial Restrictions in the Law of Citizenship, in* CRITICAL RACE THEORY: RACIAL CLASSIFICATION AND HISTORY 109 (E. Nathaniel Gates ed., 1997); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001).

advantage of qualifying for the Treaty Trader nonimmigrant status, while Brazilians may not.[42]

Emphasis on nationality became more intense following the terrorist attacks of September 11, 2001.[43] Soon thereafter, the Department of Justice began an aggressive new program, the National Security Entry-Exit Registration System (NSEERS), imposing entry and exit special registration requirements on male nonimmigrants (temporary residents), aged sixteen and older, from twenty-five designated countries (twenty-four Arab and other predominantly Muslim states, plus North Korea). Citizens of a designated country were required to be interviewed and fingerprinted. The requirements applied on the basis of national origin, not on the basis of one's country of citizenship.[44] But while even Jews or Christians born in such countries as Morocco were subject to the registration requirements, the impact was felt overwhelmingly by Muslims born in those countries. In a constitutional challenge to the NSEERS regulations, a Moroccan citizen argued that this registration scheme violated the equal protection principles of the Fifth Amendment's Due Process Clause since it targeted only nationals of certain countries.[45] The U.S. Court of Appeals for the First Circuit applied intermediate scrutiny test and held that admission criteria solely based upon nationality are acceptable so long as they are "substantially related" to the achievement of important objectives, such as national security.[46] Other courts, however, applied a rational basis test, holding that "distinctions on basis of nationality may be drawn in the immigration field by

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42. *See* § 201(c) of the INA (for allocation of family-sponsored immigrants), §201(d) (for employment-based immigrants), § 217 (for Visa Waiver Program rules) and §101(a)(15)(E)(i) (for Treaty Trader nonimmigrant status).

43. *See* Stephen H. Legomsky. *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights.* 25 B.C. THIRD WORLD L.J. 161. 163–77 (2005).

44. *See* National Security Entry-Exit Registration System (NSEERS). Fed. Reg. 52584-93 (Aug. 12. 2002). The list includes "nationals *or* citizens"—it applies even in cases of dual nationals of a non-registrant country—of Afghanistan. Algeria. Bangladesh. Bahrain. Egypt. Eritrea. Indonesia. Iran. Iraq. Jordan. Kuwait. Lebanon. Libya. Morocco. North Korea. Oman. Pakistan. Qatar. Saudi Arabia Somalia. Sudan. Syria. Tunisia. United Arab Emirates and Yemen. Following criticism. the Department of Homeland Security suspended the NSEERS on December 2003. *See* 68 Fed. Reg. 67578 (Dec. 2. 2003).

45. *See* Kandamar v. Gonzales. 464 F.3d 65 (1st Cir. 2006).

46. *Id.* at 72–73 ("Congress may permissibly set immigration criteria based on an alien's nationality or place of origin . . . [for] monitoring nationals from certain countries to prevent terrorism.").

Congress or by the Executive" and "so long as such distinctions are not wholly irrational they must be sustained."[47]

In the wake of 9/11, Congress has banned the admission of nonimmigrant aliens from states sponsoring terrorism. Section 306 of the Enhanced Border Security and Visa Reform Act of 2002 provides that "no nonimmigrant visa . . . shall be issued to any alien from a country that is a state sponsor of international terrorism unless the Secretary of State determines . . . that such alien does not pose a threat to the safety or national security of the United States."[48] The justification for this rule relies on the fact that all of the nineteen hijackers legally entered the country as nonimmigrant visitors. Some people believe that this fact justifies extra scrutiny of nonimmigrant Middle Eastern Muslims.[49] But while the rule does not apply to countries such as Egypt or Saudi Arabia, it applies to Cuba.[50] In addition, the term "any alien from a country" has been interpreted broadly to include any person born in a designated country, whether or not the person is a resident of that country.[51]

Some twenty-three years earlier, American courts similarly accepted special registration requirements targeted solely

47. *See* Roudnahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003). In fact, all the Courts of Appeals that had considered the constitutional validity of the NSEERS held that special registration of aliens based on nationality did not violate the Equal Protection Clause. *See* Rajah v. Mukasey, 544 F.3d 427, 435 (2d Cir. 2008) ("Classifications on the basis of nationality are frequently unavoidable in immigration matters . . . such classifications is commonplace and almost inevitable. Indeed, the very concept of 'alien' is a nationality-based classification."); Malik v. Gonzales, 213 Fed. Appx. 173 (4th Cir. 2007) (explaining that courts have no jurisdiction to review equal protection challenges in immigration cases); Zerrei v. Gonzales, 471 F.3d 342, 347–48 (2d Cir. 2006) (rejecting the claim that the NSEERS violates the equal protection clause); Zafar v. U.S. Attorney General, 461 F.3d 1357, 1367 (11th Cir. 2006) ("Petitioners' equal protection rights were not violated by being required to be registered in the national Security Entry-Exit Registration System."); Sewani v. Gonzales, 162 Fed. Appx. 285, 287 (5th Cir. 2006) ("Due process does not require Congress to grant aliens from all nations with the same chances for admission to or remaining with the United States. Congress may permissibly set immigration criteria that are sensitive to an alien's nationality or place of origin."); Shaybob v. U.S. Attorney General, 189 Fed. Appx. 127, 129–30 (3d Cir. 2006) ("The Call-In Program does not violate the Equal Protection guarantee of the Fifth Amendment . . . the power to exclude or expel particular classes of aliens is historically within the province of the political branches."); Ali v. Gonzalez, 440 F.3d 678, 681 (5th Cir. 2006) ("Nationality classification has been repeatedly upheld by this Court and others against constitutional attack.").
48. 107 Pub. L. No. 107-173, 116 Stat. 543 (2002).
49. *See* Janice L. Kephart, *Immigration and Terrorism: Moving Beyond the 9/11 Staff Report on Terrorist Travel,* CENTER FOR IMMIGRATION STUDIES (Sept. 1, 2005).
50. This provision currently applies to Iran, Syria, Sudan and Cuba. *See* http://travel.state.gov/visa/temp/info/info_1300.html.
51. Legomsky, *supra* note 43, at 175.

against Iranian students present in the United States following the Iranian Revolution. In *Narenji v. Civiletti*,[52] the plaintiffs argued that nationality distinctions among nonimmigrant students violated the Equal Protection Clause. In a divided en banc ruling, the D.C. Circuit roundly rejected this position, saying that the Attorney General was permitted wide latitude to draw distinctions on the basis of nationality, having to meet only a rational basis test.[53] However, four dissenting judges took a different view, asserted that U.S. law has a "deep aversion to selective law enforcement against a group solely on the basis of their country of origin."[54] The dissent revealed the great divide in U.S. immigration law: special concerns for civil and criminal rights of immigrants present in the country against expansive executive power to decide who is admitted and under what terms.

Israel, too, presents an interesting case for nationality-based distinctions. Israeli law currently presumes that citizens or residents of Iran, Syria, Lebanon, Iraq and the Palestinian Authority pose a security risk.[55] Thus, they are inadmissible, en masse.[56] Israeli law is based on a "presumption of dangerousness" that is difficult to rebut in an individual case. In a constitutional challenge to the statute, *The Citizenship and Entry into Israel Act (Temporary Order) 2003*,[57] the petitioners claimed in the High Court of Justice (HCJ) that this policy discriminates against certain national groups. The petitioners, Palestinian citizens of Israel who asked for family reunification with Palestinians from the West Bank and Gaza, argued that the statute presents a case of disparate impact since its effects mostly Palestinian citizens and has a negligible impact on Jewish citizens. The Israeli Government contended that the statute is not discriminatory as it excludes only enemy aliens, regardless their national origin. Had Israel wished to exclude only

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52.   617 F.2d 745, 747–48 (D.C. Cir. 1979).
53.   *Id.* at 748.
54.   *Id.* at 754. The Court really meant national origin, not just country of citizenship.
55.   *See* The Citizenship and Entry into Israel Act (Temporary Order) 2007.
56.   *See* Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. LAW 184 (2008); Orgad, *supra* note 27, at 95–101.
57.   *See* S.H. 544.

Palestinians, it would have prohibited admission of Palestinians, irrespective of where they actually lived.[58]

In one of the most controversial decisions ever issued in Israel, the Supreme Court sitting as the HCJ sustained the statute.[59] Justice Mishael Cheshin, speaking for the majority, held that the statute is not discriminatory because the person's nationality is only a by-product of being an enemy alien. Israeli Arabs can marry Palestinians all over the world, excluding only those territories where an armed conflict is being conducted. "This ban does indeed harm a minority group of which the vast majority are Arabs, but this harm derives from the marriage to enemy nationals . . . and not from the fact that they are Arabs," Cheshin said.[60] Chief Justice Barak dissented. In Barak's view, the statute is discriminatory because the burden falls mostly on Israeli Arabs. Justice Barak was willing to assume that no intentional discrimination existed, yet the important element is not intent but effect. He held that "the question is not merely the motivation of the decision-makers; the question is also what is the outcome of the decision."[61] The case poses interesting questions: Should states measure intent or effect in evaluating nationality-based discrimination? Are criteria such as enmity or alienation the same as nationality?[62]

The United States and Israel have employed nationality-based restrictions as a counterterrorism measure. In both countries, the use of nationality as an immigration criterion is official and, in both, the justification of the criterion is presumably based on protecting national security. The right question, however, is whether nationality-based restrictions can be considered legitimate *criteria* to serve national security, which is generally considered a widely-accepted *justification* for limiting immigration. The answer depends, inter alia, on the degree to which the restrictions protect the nation's security, as

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58. The statute did not effect Palestinians all over the world exclusive of the Palestinian territories.

59. *See* HCJ 7052/03 Adalah, the Legal Center for Arab Minority Rights in Israel v. the Minister of the Interior (May 14, 2006).

60. *Id.* at ¶ 91–92 (Cheshin, J., majority opinion).

61. *Id.* at ¶ 50–51 (Barak, C.J., dissenting).

62. *See* Morton v. Mancari, 417 U.S. 535 (1974) (illustrating that preferences given to Indians in hiring employees for the Bureau of Indian Affairs are not racial but *political*). *But see* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

well as on their scope. Israel uses nationality to ban admission of immigrants designated countries with which it is at war. The rule applies to any immigrant, including family members, and it is generally impossible to rebut the presumption of dangerousness in individual cases. The United States uses nationality as an immigration criterion in a broader sense—in admission decisions, as in the case of nonimmigrant visitors from states sponsoring terrorism, and in immigration enforcement, as in the case of the NSEERS regulations. However, the U.S. policies do not apply to family members and allow individuals to present evidence that no real threat exists in their admission or stay in the country.[63]

B. RELIGIOUS DISTINCTIONS

The use of religious distinctions has increased following the September 11, 2001 attacks.[64] The 9/11 Commission found that the Immigration and Naturalization Service (INS) failed to see the nexus between immigration laws and national security and failed to prevent the attacks. It failed to understand the high stakes that were involved in admitting a foreign national without a careful review of that person's background. The Commission noted that "for terrorists, travel documents are as important as weapons."[65] In a challenge to post 9/11 detention policies aimed at Muslims of Middle Eastern origin, the plaintiffs asserted disparate treatment based on religion and national origin.[66] The U.S. District Court for the Eastern District of New York rejected the equal protection claim, holding that there is nothing constitutionally impermissible in singling out nationals of particular countries for increased enforcement. The Court pointed to the reasonableness of giving greater scrutiny to noncitizens "who shared characteristics with the hijackers, which included sharing the same religion, as well as the same national

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63. Orgad, *supra* note 27, at 95–101, 112–15.
64. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims,* 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Integration,* 91 MINN. L. REV. 1369 (2007); Legomsky, *supra* note 43, at 163–77.
65. *See* THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 384–85 (2004).
66. *See* Turkmen v. Ashcroft, 2006 WL 1662663 (E.D.N.Y. 2006).

origins . . . [t]his approach may have been crude, but it was not so irrational or outrageous."[67]

When the Department of Justice issued its NSEERS registration rules in the summer of 2002, it explained that the executive branches have to be given broad discretion to make these distinctions. In *Rajah v. Mukasey*, the Second Circuit upheld the registration requirement, aimed exclusively at citizens of certain Muslim-dominated countries, under the facially legitimate, bona fide standard.[68] The Court held that it is "plainly rational attempt to enhance national security" and added:

> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. Petitioners argue, without evidence other than that fact, that the Program was motivated by an improper animus toward Muslims. However, one major threat of terrorist attacks comes from radical Islamic groups . . . . [t]he Program was clearly tailored to those facts.[69]

The Court noted that not all Muslims were made subject to the registration requirements but only those from predominantly Muslim countries. The Program also required non-Muslims from designated countries to be subject to the registration. We thus have the irony that even Jews who were born in one of the designated countries, and who might well be subject to persecution if they were to return to those countries, are subject to the registration requirements. One could suggest that the inclusion of non-Muslims was designed primarily to fend-off criticism that the Program was directed solely against a certain religion—that is, Islam. Indeed, the inclusion of non-Muslims was a key factor in the Program being held constitutional. Therefore, one must ask whether a registration program that targeted *ONLY* Muslims would be acceptable under different factual circumstances.

In a recent case, the U.S. Supreme Court has taken a similar course. In this case, a Pakistani citizen of Muslim origin argued that he was detained and tortured based on his Muslim

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67. *Id.* at 132. The Second Circuit affirmed the decision. *See* Turkmen v. Ashcroft, 589 F.3d 542 (2nd Cir. 2009) ("Plaintiffs point to no authority clearly establishing an equal protection right to be free of selective enforcement of the immigration laws based on national origin. race. or religion.").

68. *See* Rajah v. Mukasey. 544 F.3d 427 (2d Cir. 2008).

69. *Id.* at 439.

background. In a five to four decision, the Supreme Court ruled that proving purposeful discrimination, the level needed under the liability standard, means showing "more than intent as volition or intent as awareness of consequences."[70] It requires that the decision maker adopted a policy "not for neutral, investigation reason," such as protecting national security, "but for the purpose of discriminating on account of race, religion, or national origin."[71] It means that a Muslim man must prove that he was intentionally discriminated against *because* of his religion; it is not considered unlawful discrimination if the religious traits are merely incidental to a neutral investigation. At the end of its opinion, the Court issued the following statement:[72]

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. *It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.*

Justice Kennedy held that the religion of the petitioners is merely an incidental impact of the War on Terror. In his view, the Attorney General did not purposefully target Muslims *because* of their religion, but because they "had potential connections to those who committed terrorist acts."[73] When one applies this precedent to immigration, where the power of the executive is plenary, it might be more difficult to exclude religion distinctions when the policy is not motivated by prejudice.

Religious distinctions are utilized in other countries as well. In September 2005, the Minister of the Interior of the German *Land* of Baden-Württemberg introduced a new citizenship test intended to assess the loyalty of immigrants into the German democratic basic order. Under this policy, such loyalty was assessed through an interview in which the immigrant was asked to reveal her personal beliefs on issues of equality, freedom of religion, conversion, homosexuality, and culture. At the

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70. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009).
71. *Id.* at 1949.
72. *Id.* at 1951 (emphasis added).
73. *Id.*

beginning, the test only applied to applicants from one of the fifty-seven Member States of the Organization of the Islamic Conference, or applicants "appearing to be Muslims."[74] Following criticism, the Muslims-only application had changed to any applicant "whose loyalty to the German Basic Law is doubted."[75] Religious criteria were also implemented at the German federal level. Following the 9/11 attacks, the Federal Government employed a data mining system to expose terrorist sleeper cells. About 300,000 persons were identified as potential terrorists required to go through a closer inspection. The system (*Rasterfahndung*) was founded on the screening of personal data held by public and private institutions of every:

> Male, aged 18 to 40, (ex-)student, Islamic religious affiliation, native country or nationality of certain countries, named in detail, with predominantly Islamic population.[76]

The German 'terrorist profile' thus contained factors such as age, gender and religion; being a Muslim was openly a relevant criterion based on an alleged correlation between Islamic religious affiliation and the tendency to terrorism. In a landmark 2006 decision, the German Constitutional Court invalidated the policy aimed predominantly against Muslims. The Court found the policy to be unconstitutional, having a stigmatizing impact against German Muslims, as long as religion is the sole or the decisive criterion. Nevertheless, the decision indicates that religious distinctions are not disqualified *per se*, but only when religion is the decisive factor.[77]

The religious background of immigrants was a sole criterion of immigrant selection in neither Germany nor the United States. But while in Germany religious criteria were explicit and formal, the United States has claimed that religion had never been an explicit immigration criterion but just an incidental impact of the War on Terror. Perhaps this is one of the reasons for its invalidation in Germany and approval in the United States. Another difference is rooted in the different test used: while the U.S. Supreme Court has examined intentions, the

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74. *See* Islamic Human Rights Commission, The Über-Citizen and German Kulturkampf – s.10 German Naturalisation Law: A Front? (2007).

75. *Id.*

76. *See* Gabriele Kett-Straub, *Data Screening of Muslim Sleepers Unconstitutional*, 7 GERMAN L.J. 967, 970 (2006).

77. *Id.* at 971–75.

German Constitutional Court has also emphasized the importance of the policy's disparate racial impact.

C. RACIAL AND ETHNIC CLASSIFICATIONS

Is race a criterion for immigrant selection? In *Jean v. Nelson,*[78] the U.S. Supreme Court was confronted with the question of whether the Government could deny parole to Haitians fleeing their country, if the denials were race-based.[79] The plaintiffs had argued that black Haitians were being denied entry while predominantly white Cubans were allowed to be paroled into the United States. The majority declined to answer that question, holding that the regulations governing grants of parole were facially neutral. The majority remanded the case to the lower court to decide whether the "race-neutral" regulations were being implemented without regard to race or nationality.[80] But what if the regulations were explicitly race-based? Would they have passed constitutional muster? To judge from a decision of the Second Circuit, race-based regulations can survive judicial review. In *Bertrand v. Sava*, the court examined the question whether an exclusion of Haitians without parole constituted racial discrimination against blacks and Haitians. Judge Cabranes recognized the power of the government to exercise an unrestricted right to regulate admission criteria, noting that "no one disputes [that] Congress may employ race or national origin as criteria in determining which aliens to exclude."[81] That is because "the wide latitude historically afforded to the political branches of our national government in immigration matters permits them to adopt even wholly irrational policies."[82] The Second Circuit cited with approval the lower court's very sweeping pronouncement that "constitutionally suspect or impermissible [criteria] in the context of domestic policy, namely, race, physical condition,

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78. 472 U.S. 846 (1985).
79. Parole is a term of art used in U.S. immigration law that refers to the government's action in allowing an alien seeking entry to remain at liberty during the adjudication of his case, as opposed to being detained while the case is decided.
80. The dissenting opinion refused to avoid the constitutional question of equal protection and ruled that even though "national origin can sometimes be a permissible consideration in immigration policy . . . national origin (let alone race) cannot control every decision in any way related to immigration." *Id.* at 881 (Marshall & Brennan JJ., dissenting).
81. *See* Bertrand v. Sava, 684 F.2d 204, 213 (2d Cir. 1982).
82. *Id.*

political beliefs, sexual proclivities, age, and national origin," can be permissible in immigration policy.[83]

Although it is possible to find examples for using ethnic criteria in U.S. immigration law, such as the NSEERS that predominantly applied to citizens of Arab states, the use of ethnicity is more common in other countries. One of its forms is ethnic inclusion. Under Israeli law, people of Jewish ancestry have an automatic right to enter Israel and become citizens. While admission is possible in other cases as well—e.g., foreign workers and asylum seekers—naturalization of non-Jews is rarely granted, with the exception of non-Jewish family members. Citizenship is generally granted only to ethnic Jews, that is, persons with a Jewish grandparent.[84] Ethnicity is a common criterion in Eastern Europe too. It is used for making immigration preferences to noncitizens of certain ethnic groups.[85]

Ethnicity plays a highly controversial role in the practice of certain European countries. The British policy toward nationals of Romani ethnic origin is an example. The Home Office employed a policy aimed at stopping people seeking asylum from boarding planes to Britain from the Czech Republic. But while only 0.2 percent of non-Roma was denied entry, ninety percent of Roma was barred. In addition, about eighty percent of Roma were targeted for a secondary immigration interview compared to less than one percent of non-Roma. Roma, thus, were four hundred times more likely to be refused entry to Britain than non-Roma. The British immigration authorities officially employed discriminatory regulations under which:

> The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination — without reference to additional statistical or intelligence

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83. *Id.* The court overruled the district court's decision, finding that the Attorney General impermissibly discriminated on the basis of race and national origins. *See* Vigile v. Sava, 535 F. Supp 1002 (S.D.N.Y. 1982). But even the lower court noted that while it is impermissible for a district director to apply racial criteria, "Congress may employ race or national origin as criteria in determining which aliens to exclude." *Id.* at 1016. This decision has never been explicitly overruled.

84. *See generally* SHLOMO AVINERI, LIAV ORGAD & AMNON RUBINSTEIN, MANAGING GLOBAL MIGRATION: A STRATEGY FOR ISRAELI IMMIGRATION POLICY (Ruth Gavison ed., 2010).

85. *See* ALEXANDER YAKOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS 126–33 (2010).

information—if an immigration officer considers such discrimination is warranted.[86]

The House of Lords held that U.K. immigration officers were discriminating against Roma only because they were Roma. Lord Steyn ruled that Roma were "discriminated on the grounds of race" and, further, that the motive for this discrimination is "irrelevant."[87] The House of Lords noted that "the law reports are full of examples of obviously discriminatory treatment which was in no way motivated by racism."[88] The decisive factor is therefore not intents, but effects.

Different types of racial and ethnic classifications appear not only in law reports but also in official census. Some countries record statistics according to ethnic origin (Caucasians, Asians, Hispanic, etc.) and national origin (Cubans, Mexicans, etc.); others apply different rules for different ethnic immigrants. In Israel, for example, immigrants of Jewish origin are not considered "immigrants"—they are returners (*olim*) who return to their land. The rules that govern their entry are embodied in *The Law of Return*, which grants them an almost automatic admission. A separate ministry, the Ministry of Immigrant Absorption, exists to provide them with generous financial and social benefits. Unlike ethnic Jews, non-Jewish immigrants need to go through a burdensome process, governed by *the Entry into Israeli Law* and administered by the Ministry of the Interior. In the Netherlands, official statistics distinguish between native Dutch (*allochtoon*) and foreigners (*allochtonen*) and, unlike other countries, also differentiate between Western and non-Western foreigners.[89] People of Dutch descent are *Nederlanders* or *autochthonous*. In Germany, article 116 of the Constitution embraces an ethnic definition of being German. It includes ethnic Germans living outside Germany in Eastern Europe—if coming to Germany they are resettlers—and Jews deprived their citizenship under the Third Reich.[90] In the United States, such distinctions do not exist, though one's race could be defined,

86. *See* Regina v. Immigration Officer at Prague Airport [2004] UKHL 55.

87. *Id.* at 36. Roma are actually an ethnic rather than a racial group. *See* Janko v. Illinois State Toll Highway Auth., 704 F. Supp. 1531 (N.D. Ill. 1989).

88. *Id.* at 82.

89. *See* Evelyn Ersanilli, *Netherlands, Country Profile* 1-2 FOCUS MIGRATION (2007) ("Western allochtonen are people from Europe (excluding Turkey), North America, Oceania, Indonesia and Japan; non-Western allochtonen are defined as people from Turkey, Africa, Latin American and the rest of Asia.").

90. JOPPKE, *supra* note 5, at 182–88.

albeit non-legally, by the "hyphen", that is, *African*-Americans, *Asian*-Americans and *Jewish*-Americans.

So do race, religion and nationality matter in immigrant selection? They surely do. In his compelling book, Joppke maps out different types of ethnic selection in liberal democracies. He shows how ethnic selection becomes more indirect than straightforward, more peripheral than central, and more positive than negative.[91] Joppke's observations are well-established. One will have a difficult time to find an openly racist policy of excluding certain kinds of immigrants, such as the Chinese Exclusion Act. It is also true that while ethnic criteria were dominant in the past in one country's immigration policy, they are generally subordinate today. The British policy toward Roma and the German policy toward persons of Muslim descent are the exceptions to the generally non-ethnic immigration policies of those countries. Nevertheless, one should not think that ethnic immigration classifications have disappeared.[92] As this Part shows, they are still used in different contexts (admission, enforcement, naturalization, removal), serve different purposes (border security, cultural preservation), and apply to different types of law enforcement strategies for different time periods[93] and regarding different types of aliens (family immigrants, permanent residents, visitors).

The use of racial immigration criteria is strengthened by three reasons. *First*, the War on Terror has revived immigrant selection based on nationality and religion. Nationality-based restrictions are increasingly considered to be a counter-terrorism measure.[94] *Second*, cultural tensions and theories about "clash of civilizations" have accelerated the use of culture as a criterion of immigrant selection. In his controversial book, *Who Are We?*, Samuel Huntington called on Congress to adopt immigration criteria aimed at preserving the so-called "Anglo-Protestant culture."[95] Criteria of religion and culture have increasingly been

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91.   *Id.* at 219–50.

92.   *Id.* at 219 (finding that the role of ethnicity in Western immigration policies during the last decades "has shrunk" but not disappeared).

93.   For the importance role of the time-limit of discriminatory immigration provisions, *see* Daphne Barak-Erez, *Terrorism and Profiling: Shifting the Focus from Criteria to Effects,* 29 CAR. L. REV. 1, 7 (2007).

94.   THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 65, at 385–90.

95.   *See generally* SAMUEL HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004).

used as gatekeepers to oversee the quantity and quality of immigrants, especially in Europe.[96] This raises a question: is cultural exclusion the same as racial exclusion? Culture, very often, is not "race-blind"; it has a disparate racial impact. *Third*, countries use ethnicity as a means of immigrant inclusion more than they used before. In Eastern Europe in particular, there is a process of re-ethnicization under which nation-states grant privileges to ethnic diaspora in admission and eligibility to citizenship.

III. RACE, RELIGION AND NATIONALITY: ARE THEY LEGALLY PERMITTED?

Part II describes how, as a matter of policy, race, religion and nationality still matter in the process of immigration selection. Part III is normative: It explores whether the use of such criteria is legally permitted. The question of what criteria are permitted in immigrant selection depends not only on the justification they serve—for the sake of the discussion, this Part assumes that they serve a legitimate aim—but also on the normative perspective. The question is whether race, religion and nationality can ever be legitimate criteria provided that they serve a legitimate purpose. This Part briefly discusses three normative perspectives to analyze legitimate and illegitimate immigration criteria: constitutional law, international human rights law, and moral philosophy. Each approach imposes a different set of constraints on states' power to decide who to let in and keep out.[97]

A. CONSTITUTIONAL LAW

In theory, the power to regulate immigration criteria is restrained by the Constitution. In reality, however, the possibility of applying constitutional standards to disqualifying criteria of immigrant selection is either unavailable or available to a lesser degree. Some reasons for this reality are rooted in U.S. constitutional law: The limited application of the Constitution outside the U.S. territory, the focus on intent rather than effect, and the implied permission to use race-based criteria. Other reasons relate to U.S. immigration law—a field

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96. *See* Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe*. 58 AM. J. COMP. L. 53, 63–83 (2010).

97. The described normative perspectives feed each other and often overlap.

related to foreign affairs powers, in which judicial deference to the executive is likely due to the plenary power doctrine. Immigration rules, more than any other field, have been seen as an "extraconstitutional area."[98]

First, the Constitution does not regularly apply to persons located outside the territory. In an instructive book, with an insightful title, *Strangers to the Constitution*,[99] Gerald Neuman shows how aliens outside the sovereign territory have usually been considered outside the protections of the Constitution. They may have claims under international or statutory law, but the Constitution does not generally apply extraterritorially to noncitizens and, therefore, does not provide substantive constitutional protection to aliens outside the sovereign territory.[100]

Second, constitutional law may provide little help to immigrants even when the Constitution does apply to immigration decisions, as in the cases of immigration enforcement, naturalization or removal. In these cases, the Constitution does apply within the U.S. territory yet its protection is limited since the use of group-based criteria is generally permissible in U.S. constitutional law. It usually occurs when law enforcement agencies know enough data, based on statistical patterns, about characteristics of a class of crimes. They use deductive profiles to target potential offenders by relying on a set of characteristics,[101] which, although not a suspect-specific description, are considered a good indicator for the tendency to commit certain crimes.[102] The American NSEERS regulations, the Israeli statute on family reunification, the German data mining system, and the British immigration policy toward Roma were all based on generalizations in which ethnicity, religion or nationality were a

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98. *See* Legomsky. Immigration Law and the Principle of Plenary Power, *supra* note 40. at 255.

99. *See generally* GERALD L. NEUMAN. STRANGERS TO THE CONSTITUTION: IMMIGRANTS. BORDERS AND FUNDAMENTAL LAW (1996).

100. A consular denial of a visa is generally not judicially reviewable. *See* Bruno v. Albright. 197 F.3d 1153. 1159–60 (D.C. Cir. 1999). Ventura Escamilla v. INS. 647 F.2d 28. 30 (9th Cir. 1981): Li Hing of Hong Kong. Inc. v. Levin. 800 F.2d 970. 971 (9th Cir. 1986): Kleindienst v. Mandel. 408 U.S. 753 (1972).

101. *See* Wayne Petherick. *The Role of Profiling in American Society: Criminal Profiling: What's in a Name? Comparing Applied Profiling Methodologies.* 5 J. L. & SOC. CHALLENGES 173 (2003).

102. *See generally* FREDERICK SCHAUER. PROFILES. PROBABILITIES. AND STEREOTYPES (2003).

proxy for predicting future behavior. But while the Israeli High Court of Justice, the German Constitutional Court and the British House of Lords found these policies to be racially discriminatory, the U.S. Supreme Court declined to consider such policies a Fourth Amendment violation. In *Whren v. United States*, the U.S. Supreme Court held that race can legitimately be used as long as other independent reasonable factors exist.[103] The Court affirmed that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[104] It noted that race claims must be addressed to the Equal Protection Clause[105] and, as a result, set the stage for a permissible use of race to predict crimes—as long as race is only one among other suspicion factors.[106] During the 1970s, the U.S. Supreme Court sustained the use of "Mexican appearance" in law enforcement along the Mexican border inasmuch as it was not the sole factor for the decision. The Court noted that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[107] These cases indicate that the use of racial immigration criteria, even in the U.S. territory, is a matter of degree; it is not constitutionally forbidden in principle.

Third, in principle, U.S. constitutional law focuses more on intent than effect.[108] Disparate impact alone is not determinative. It is hard to prove a prima facie case of discrimination relying solely on disproportionate statistic patterns. In *Bertrand v. Sava*, the Second Circuit dismissed Haitians' claim of racial discrimination based on highly disproportionate impact. The Court noted that even if the test of disparate impact can be applied in "employment and housing," immigration is a different

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103. 517 U.S. 806, 813 (1996).

104. *Id.*

105. *Id.* ("The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment").

106. *Id.: see also* United States v. Weaver, 966 F.2d 391 (8th Cir. 1992).

107. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975): *see also* United States v. Martinez-Fuente, 428 U.S. 543 (1976). This conclusion, however, is not clear-cut. *See* Chavez v. Illinois State Police, 251 F.3d 612, 635 (7th Cir. 2001): United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000): United States v. Avery 137 F.3d 343, 354–55 (6th Cir. 1997).

108. For the test of purposeful discrimination, *see* United States v Armstrong, 517 US 456, 465 (1996): McCleskey v Kemp, 481 US 279, 291–99 (1987): Washington v Davis, 426 US 229, 239–41 (1976).

field.[109] Thus, as Professor Neuman notes, if there is neither racial motivation nor racial terminology in an immigration statute, the statute might be constitutionally defensible.[110]

Focusing on intent to discriminate instead of disparate racial impact is meaningful when nationality is used as a proxy for racial exclusion. In *Jean v. Nelson*, Justice Marshall held that it is generally unlawful to use race or national origin in immigration discrimination yet supported nationality-based restrictions. "For better or worse," he declared, "nationality classifications have played an important role in our immigration policy."[111] Indeed, scholars like David Martin and Gerald Neuman recognize the use of nationality-based criteria in admission of noncitizens. Martin argues that nationality is "closely related to genuine foreign policy decisions,"[112] while Neuman asserts that "distinctions in federal law among aliens on the basis of their country of current nationality are not constitutionally suspect . . . if these distinctions are not defined in terms of race and are not motivated by racial prejudice."[113] Yet, national origin discrimination is sometimes akin to racial discrimination. Including Cubans while excluding Haitians is an example of a policy, which, although grounded on nationality, is not racially-neutral. U.S. constitutional law does not distinguish between immigration criteria of race, ethnicity, religion, and nationality. Nonetheless, citizens of countries such as China, Japan, Israel, Mexico, Egypt, and Ireland do not share only nationality but also a religion and ethnic origin. And yet, although nationality-based discrimination may be permissible in immigrant selection, the question of whether nationality can be used as a proxy for racial discrimination in immigrant selection remains open.

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109. *Bertrand*, 684 F.2d 204, 218 (2d Cir. 1982).

110. *See* Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 340 (2000).

111. *See Nelson*, 472 U.S. 846, 864; *see also* Reno v. America-Arab Anti-Discrimination Committee, 525 U.S. 471, 491 (1999) ("The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat . . . even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy."); Romero v. INS, 399 F.3d 109 (2d Cir. 2005) (upholding a program that awarded legal status to nationals of certain Central American countries, but not to Mexican nationals, by pointing to broad plenary power to regulate matters of immigration).

112. *See* David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363, 364 (2000).

113. *See* Neuman, *supra* note 110, at 340.

Proving intentional discrimination can be a more difficult task in light of the case of *Ashcroft v. Iqbal*. In this case, as we have seen in Part II, the U.S. Supreme Court upheld religious-based discrimination as long as the policy does not purposefully target against a specific religious group. Justice Kennedy ruled that a law enforcement policy that produces a disparate impact against Muslims is legitimate unless it has targeted Muslims because, and only because, they are Muslims.[114]

Fourth, the plenary power doctrine has largely removed the immigration issue from U.S. constitutional law, especially on entry decisions. The time-tested proposition is that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[115] This is due to the uniqueness of the immigration field and its being interwoven with political questions and foreign affairs powers. In principle, the use of race, religion and nationality is more common in the context of persons seeking admission. In this context, U.S. courts have usually upheld the Government's broad scope of permissible authority to base decisions on race. As Kevin Johnson has written, race is central to the enforcement of U.S. immigration law, particularly near the borders.[116] Administrative policies are entitled to deference, although courts may require a rational basis showing to justify them. But when Congress passes an immigration law, courts grant a wider degree of deference and are inclined to find these laws constitutional. Nevertheless, one must ask whether courts would uphold the constitutionality of an immigration statute that clearly discriminates on the basis of race or religion. Some critics of U.S. immigration policy, such as Peter Brimelow, trace our woes to the 1965 Act that ended the national origins quota system.[117] Brimelow and like-minded restrictionists openly call on Congress to pass laws that would favor white Anglo-Saxon immigrants, and would bar the world's unwashed from being able to enter the United States. Although no court has explicitly held such discrimination to be a violation of the equal protection principles, it is significant that at least

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114. *See Iqbal*, 129 S. Ct. 1937, 1940, 1949–51 (2009).
115. *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).
116. *See* Kevin J. Johnson, *The Case Against Race Profiling In Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).
117. *See generally* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1996).

eight Supreme Court Justices have suggested that such legislation would be impermissible (although never in one opinion, and always in dissent).[118] As no such legislation has recently passed Congress, the closest we have come to a definitive answer is the question posed by Justice Marshall in his dissent in *Jean v. Nelson*. Justice Marshall rejected the possibility that the government may discriminate on the basis of race "in the absence of any reasons closely related to immigration concerns."[119] He admitted that a constitutional claim would fail when it "lie[s] at the heart of immigration policy," and added that "the individuality of the alien" is a factor only when "central immigration concerns are not at stake."[120] Yet, even Marshall's dissent is far more modest than the absolute prohibition under British law. In the Roma case, the House of Lords has ruled that "if a person acts on racial grounds, the reason why he does so is irrelevant."[121]

As a policy matter, the Constitution may impose some base-line protections in admission cases. This may be the case if one examines immigration issues through the lens of citizens' rights. One example is the case of family migration, an issue that touches upon not only interests of noncitizens, but also constitutional rights of citizens, such as equal protection and family life. One could argue, for example, that a regulation that excludes family members on the basis of race or religion would not pass constitutional muster due to its discriminatory effect on American citizens.[122] As positive law, this route is not clear-cut. U.S. courts have failed to recognize a fundamental right of

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118. *See* Gabriel J. Chin. *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*. 46 UCLA L. REV. 1 (1998). Chin points out that at least nine federal circuit courts have suggested that racial classifications are "lawful per se." *Id.* at 33.

119. 472 U.S. 846, 882.

120. *Id.* at 881.

121. *Regina*, UKHL 55 at 82.

122. *See* Kevin R. Johnson. *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*. 73 IND. L.J. 1111, 1150–53 (1998); Linda Kelly. *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*. 41 VILL. L. REV. 725 (1996); Hiroshi Motomura. *Whose Alien Nation?: Two Models of Constitutional Immigration Law*. 94 MICH. L. REV. 1927, 1947 (1996); Hiroshi Motomura. *Whose Immigration Law?: Citizens, Aliens, and the Constitution*. 97 COLUM. L. REV. 1567. 1572–73 (1997); Gerald M. Rosberg. *The Protection of Aliens from Discriminatory Treatment by the National Government*. SUP. CT. REV. 275. 326–27 (1977).

American citizens to live together with noncitizen family members.[123]

B. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law asks whether a policy violates a protected right under international law and whether this violation, if exists, is unlawful. At first glance, international law seems to ban racial criteria. Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination provides that:

> "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[124]

This clause is perhaps the broadest existing definition of racial discrimination. It defines "race" broadly to include color, descent, ethnic and national origin—although *not* religion or country of birth; it forbids any "distinction, exclusion, restriction or preference" based on "race"; it outlaws any policy that has racial purpose *or* effect; and it bans the use of "race" to deprive *rights*, but also to "impair the recognition, enjoyment, or exercise, on an equal footing" of *freedoms*.

Applying international human rights law to an immigration context is not an easy task.[125] *First*, international law norms are not always enforceable in domestic law. In the United States, for example, individuals do not have self-executing rights not to be discriminated against based on international conventions.[126]

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123. *See, e.g.,* Fiallo v. Bell, 430 U.S. 787, 800 (1977). For a review, *see* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11,* 38 U.C. DAVIS L. REV. 701, 706–11 (2005).

124. *See* The International Convention on the Elimination of all Forms of Racial Discrimination, 1965 60 U.N.T.S. 195 (1965) (henceforth: "CERD").

125. This Part does not discuss rights derived from specific treaties, such as the Convention on the Rights of the Child, or regional treaties, such as the African Charter of Human and Peoples' Rights.

126. The United States ratified the CERD with several reservations. One is that the CERD is not self-executing. *See generally* Lori F. Damrosch, *The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties,* 67 CHI.-KENT L. REV. 515 (1991).

Second, article 1(2) to the CERD makes clear that it does not apply to distinctions between "citizens and non-citizens." *Third*, article 1(3) to the CERD provides that it should not be interpreted in any way to deprive States Parties' power on issues of "nationality" and "citizenship or naturalization," provided that the policies "do not discriminate against any particular nationality." In interpreting this clause, the U.N. Committee on the Elimination of Racial Discrimination has recalled that discrimination occurs only if the criteria "are not applied pursuant to a *legitimate aim*, and are not *proportional* to the achievement of this aim."[127] That is, racial discrimination may be permissible under the CERD after fulfilling some conditions. Indeed, the International Court of Justice held that "international law leaves it to each State to lay down the rules governing the grant of its nationality."[128] *Fourth*, article 1(1) to the CERD defines racial discrimination only when it comes to discrimination of "human rights and fundamental freedoms." As Professor Legomsky noted, the question whether entry and access to citizenship have become "human rights and fundamental freedoms," which fall under the CERD's definition, is at least controversial.[129] And *last*, it is doubtful whether admission criteria fall under the protection of the CERD. International treaties usually apply within the state territory, or to people subjecting to its jurisdiction.[130] The European Court of Human Rights ruled that under "international law, the jurisdictional competence of a State is primarily territorial," and that treaties are not "designed to be applied throughout the world."[131]

While the use of racial immigration classifications is not clearly impermissible under international law, the use of nationality-based restrictions seems to be permissible. This proposition is well-established. For example, in 1984, the Inter-

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127. *See* Consideration of Reports Submitted by States Parties under Article 9 of the Convention, UNITED NATION. CERD/C/DEN/CO/17 (Oct. 19. 2006) (emphasis added).

128. *See* Liechtenstein v. Guatemala 1955 I.C.J. 4.

129. Legomsky, *supra* note 43, at 193–96.

130. *See, e.g.*, art. 2(1) of the International Covenant on Civil and Political Rights. 1966, 999 U.N.T.S. 171; art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. art. 8, *opened for signature* Apr. 11. 1950. 213 U.N.T.S. 222.

131. *See* Bankovi v. Belgium. 11 BHRC 435 (2001). *But see* Ilascu v. Moldova. Eur. Ct. H.R. 48787/99 (2004) (holding that international treaties apply wherever the state has jurisdiction). It can be claimed. however. that the prohibition of racial discrimination is part of customary international law.

American Court of Human Rights ruled that preferences in naturalization criteria issued by Costa Rica for nationals of Central American countries, Spaniards and Ibero-Americans is compatible with the American Convention on Human Rights and presents no case of discrimination.[132] The Court ruled that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things."[133] The Court justified granting preferences for Central American nationals by noting that they are "closer historical, cultural and spiritual bonds with the people of Costa Rica ... [Central American nationals will] identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve."[134] Similarly, the European Court of Human Rights upheld nationality-based distinctions when there is "an objective and reasonable justification" in such a policy.[135]

International human rights law limits states' power to regulate immigration criteria. States' capacity to set up immigration terms is more limited today than it was a few decades ago. Yet, within the current international law regime, states can still find new ways to restrict immigration based on invidious distinctions. International human rights law rarely interferes in regulation of immigration policy.[136] And it does not contain an explicit prohibition against racial discrimination in immigration; on the contrary: it contains specific exemptions.

C. MORAL PHILOSOPHY: DISTRIBUTIVE AND CORRECTIVE JUSTICE

States' power to regulate immigration can also be restrained by the principle of justice, if not as a matter of positive law at least on the basis of moral grounds. One element of justice derives from the theory of distribute justice. A proponent of *domestic* distributive justice asks to allocate goods in a well-bounded political community; it presupposes a

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132. *See* Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC-4/84).
133. *Id.* para 57–60.
134. *Id.*
135. *See* C. v. Belgium, Eur. Ct. H.R. (1996).
136. Augustine-Adams, *supra* note 123, at 721–34.

community.[137] The decisive question is "what is good for us" (whatever the definition of "us" means). A proponent of *global* distributive justice challenges the idea of domestic justice and takes the view that goods are generally to be distributed globally. In *The Case for Open Borders*, Carens makes a case for global application of a Rawlsian theory of distributive justice.[138] But while Rawls's theory is limited to a defined state, Carens has doubts whether that is (or can be) morally justified.

The principle of justice may serve as a justification for inclusion or exclusion of immigrants. Avoiding the questions of what are the goods needed to be distributed and how,[139] the theory of justice says little about the *criteria* to distributive justice. It indicates that immigration criteria may serve as a device to mitigate global injustice and promote moral duties. In this view, people should be allowed entry not because they have a constitutional right, or a protected right under international law, but due to a moral obligation. As long as one believes in global distributive justice, ethnic criteria seem to be arbitrary because everybody has an equal moral right to enter.[140] But as long as global justice means utilizing immigration criteria as a device for mitigate global inequalities—and inasmuch as one believes that this is a justified purpose—one might argue that ethnic criteria should play a role when one can identify certain ethnic classes in need. True, justice should usually be blind to one's class and be race-neutral. Justice is about individuals: "from each, according to his ability, to each, according to his need," to quote Marx. Nonetheless, in deciding one's ability and needs, countries may use one's status. Some societies have more goods while others have more needs, and these societies frequently have ethnic characteristics. The justification of the criterion derives here from the justification of the end it serves.

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137. *See* Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice*, *in* DEBATING IMMIGRATION 63 (Carol M. Swain ed., 2007); RAWLS, *supra* note 13, at 18; WALZER, *supra* note 22, at 31, 61–62.

138. *See* Carens, *supra* note 16, at 234.

139. A great contribution on the question of who owes whom what has been made by Stephen Macedo. *See* Macedo, *supra* note 137, at 70, 75-76; Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of the Peoples*, 72 FORD. L. REV. 1721 (2004).

140. An open door policy might, on the other hand, impoverish sending countries and might cause serious brain-drain problems there. *See* MEETING THE CHALLENGES OF GLOBAL DEVELOPMENT: A LONG-TERM STRATEGIC EXERCISE FOR THE WORLD BANK GROUP 22 (2007).

Another element of justice stems from one of the principles underlying tort law—corrective justice. Under this view, states need to take into account past wrongs in deciding what policy to adopt. Corrective justice emphasizes past behavior of the parties in order to impose future liability. In the immigration context, one example is the pattern of European states in granting preferential treatment by issuing visas, residence permits and citizenship status to people from former colonies: Algerians in France; Indonesians, Moluccans and Surinamés in the Netherlands; and Sub-Saharan Africans in the UK.[141] True, there were selfish economic reasons for these privileges, but one justification was a redress for past wrongs.[142] Another example is the German welcoming treatment of Jewish immigrants from the Former Soviet Union during the 1990s, and the preferential treatment given to Samoans to settle in New Zealand under the Samoan Quota Scheme. In these cases, special ethnic immigration treatment is given partly or wholly as reparation for past exploitation.

Countries sometimes grant preferential treatment to their ethnic diaspora. Both the Finnish preferential immigration treatment toward Karelians and the Turkish policy toward Ahisha Turks from the F.S.U. have been justified on the basis of past sufferings under the communist regime.[143] Redress for past injustice is one of the justifications of the Israeli *Law of Return*, granting automatic entry to every Jewish immigrant. Asa Kasher justifies this law by invoking the doctrine of affirmative action. In his view, ethnic groups deprived of their right to self-determination are entitled, as a temporary remedial policy, to favor ethnic diaspora.[144] Here, again, the justification of the criterion derives from the justification of the end. Yet, a justified end should not lead to an automatic conclusion that the criterion is justified. The justification of the criterion stems from other sources as well. The use of racial criteria may have direct or indirect influence on other people. For example, favoring Jewish immigrants in Israel may be a justified end in light of Jewish history, nonetheless the justification of the criterion of Jewish

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141. For the French and British postcolonial policies. *see* JOPPKE. *supra* note 5. at 93–111. 144–56.

142. *Id.*

143. For a detailed review. *see* YAKOBSON & RUBINSTEIN. *supra* note 85. at 126–33.

144. *See* Asa Kasher. *Justice and Affirmative Action: Naturalization and the Law of Return.* 15 ISR. Y.B. HUM. RTS. 101 (1985).

descent is influenced by other factors. Chaim Gans explains that ethnic preferences in immigration selection in Israel are not morally wrong *as long as* they do not cause injustice to other ethnic group residing in Israel.[145] This view distinguishes between criteria and ends. Still, one may challenge these arguments: the Israeli *Law of Return*—and, to a certain extent, the German preferential policy toward ethnic German repatriates from Eastern Europe—is not a classic case of corrective justice. Neither Israel nor Germany can compensate for wrongs done by another party. Yet corrective justice theories indicate that immigration criteria can often depart from the past. As past wrongs are often collective in nature and were aimed against specific ethnic groups, immigration criteria may reflect such criteria as well.

A long time has passed since the Chinese Exclusion Case yet racial classifications are still with us, not just as a matter of policy but also as good law. True, there are more barriers and strict conditions to fulfill, but, as a general rule, racial immigration criteria have not yet been excluded per se. The key question is whether this law can be justified. This question is complex. The conclusion surely depends on the justification the criteria serve. Unlike other scholars, we do not offer a 'black-and-white' answer of clearly permissible and clearly impermissible criteria.[146] Rather, we offer a *context-based approach*.

IV. RACE, RELIGION AND NATIONALITY: ARE THEY COST EFFECTIVE?

This Part discusses the use of racial immigration criteria in a specific context as a case study. It challenges the use of race, ethnicity and religion in the process of immigrant selection and in the context of the U.S. War on Terror. The discussion is limited to that context. The argument is based on utilitarian grounds. It is neither because other grounds do not support our case nor because they are less important or weaker, but merely because the strongest justification for the use of racial classifications in this context has been based on utilitarian

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145. *See* CHAIM GANS, THE LIMITS OF NATIONALISM 138–39 (2003). Gans, however, supports ethnic-based inclusion (and exclusion) mainly under a concept of what he calls "sub-state's self-determination."

146. *See* Carens. *supra* note 11. at 104–05 (race. religion and ethnicity are always impermissible criteria).

grounds. Although effectiveness is not the only or the most important factor in the legal analysis, it is surely a preliminary one. The use of race is premised on its being an effective method to serve a legitimate end, such as protecting public safety. If this proposition is false, than the justification for using the criterion becomes weaker. This Part argues that racial immigration selection often lacks statistical validity, is not cost effective, and is likely to be over-inclusive and far in excess of its potential contribution due to cognitive biases and heuristic judgments.

A. STATISTICAL CORRELATION

In a recent article, Professor Legomsky asserts that any race-based immigration use must meet two requirements: rationality and justifiability.[147] Legomsky argues that the relevant inquiry under the rationality requirement should not be what percentage of the targeted group are terrorists. Rather, it should be what percentage of the terrorists are members of the targeted group.[148] If the percentage is higher compared to other groups — it is less clear how higher it must be — the policy is rational due to its correlation between the traits and terrorism.[149]

Legomsky makes a policy argument yet rationality is a legal requirement as well. Under international human rights law, racial discrimination occurs whenever racial immigration criteria do not serve a legitimate aim, or are not proportional to the achievement of this aim — that is, among others, do not rationally serve the aim.[150] In U.S. constitutional law, at least two perspectives exist. On the one hand, if one believes that the Executive Branch should have plenary power when it comes to immigration, especially in admission cases where the Constitution generally does not apply abroad, one may conclude that no correlation is needed. On the other hand, if one believes that the Executive owes some obligations in the field of immigration — if not to immigrants, at least to citizens whose interests may be harmed in cases of immigration restrictions — then one may conclude that some correlation is needed. As positive law, there is a circuit split on the required degree of

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147. Legomsky, *supra* note 43, at 177–79.
148. *Id.* at 180–81.
149. *Id.*
150. *See supra* note 127 and accompanying text.

correlation: Some courts have applied a rational basis test while others asked for intermediate scrutiny.[151]

Does a correlation between racial traits and terrorism exist? The government's strongest case for using racial classifications in immigration policy is premised on efficiency. However, a closer look reveals some empirically false propositions. On the statistical level, proving a statistical correlation between racial criteria and certain crimes is far from simple. When the U.S. government issued the NSEERS registration rules, the justification was the alleged statistical relationship between certain criteria and terrorism (the hijackers were all Muslim Arab men from the Middle East). Harvard Law Professor Alan Dershowitz stated that it would be foolish to fight against terrorism "by devoting equal attention to interrogating an eighty-year-old Christian woman from Maine and a twenty-two-year-old Muslim man from Saudi Arabia."[152] Dershowitz's argument is based upon the assumption that terrorists are more likely to be found in specific groups sharing similar characteristics. However, in order not to be spurious, the assumption requires more than just showing that all the hijackers shared certain characteristics. One needs to present a statistical relevance between these characteristics and terrorism.

In many of the cases discussed in this Article, it is doubtful whether the U.S. government was able to justify its policies on statistical grounds. The profile was at least over-inclusive. For example, the NSEERS scheme listed twenty-four Muslim-majority countries with no correlation between the nationality of *each* of the listed nationalities—Algerian, Eritrean, Jordanian, etc.—and the propensity to engage in terrorism. It is also unclear whether the government's contention was to demonstrate a correlation between terrorism and certain nationalities, or between terrorism and a specific religion—with nationality only used as a pretext. To judge from the list of the designated countries, the focus was one's religion. Excluding North Korea, the list included twenty-four predominantly Muslim countries. Yet, the fact the list excluded other predominantly Muslim countries—the Organization of the Islamic Conference enumerates fifty-seven member states—may indicate that the

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151. *See supra* notes 45–47 and accompanying text.
152. *See* Ken Gewertz, *Balancing Act: Civil Liberties and Security*, HARV. GAZETTE NEWS. Dec. 13, 2001.

targeted group was a mix-and-match of religion and nationality. It pretended to be a quasi-scientific list of high-risk groups. But the claim that specific groups are more likely to become terrorists is an empirical proposition that requires establishing a correlation between the criteria and terrorism at a level that justifies inadmissibility.

If history teaches anything about race-based statistics, it is a duty to be skeptical of their credibility. One example from a long list is the "list of races and peoples," issued by the U.S. Government on July 1, 1898. The story of the list is described by Patrick Weil.[153] The list divided immigrants into forty-two races, organized by five categories: Teutonic division from Northern Europe, Celtic division from Western Europe, Iberic division from Southern Europe, Slavic division from Eastern Europe, and Mongolic division. Its aim was to determine the capacity of different racial groups to integrate into the American society. All immigrants had to indicate their race and nationality and these factors served to decide their eligibility. The list was finally proven to be statistically erroneous,[154] but it is one illustration of a long history of hysteria and panic directed at some immigrant groups (Chinese, Germans, Irish, etc.), which proved to be fallacious, though these groups were initially seen by some to represent a threat.

The question of correlation between racial immigration criteria and terrorism is context-based. In the 1970s, the U.S. Supreme Court upheld the use of "Mexican appearance" in immigration enforcement along the Mexican border. To support its conclusion, the Court referred to the statistic according to which "85% of the aliens illegally in the country are from Mexico."[155] This percentage was doubtful even in the 1970s (it is surely doubtful today),[156] but the question is what correlation the Court was trying to prove: was it between "Mexican appearance" and being an "illegal alien"? Was "Mexican appearance" an indicator of being a "Mexican national"? How

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153. Weil, *supra* note 41, at 627–38.
154. *Id.* at 647–48. The list was completely abandoned in 1952. *Id.* at 638.
155. United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975). More accurately, the Court's conclusion was a combination of a general and a specific correlation. The Court found a *general* correlation, regardless of the circumstances, between "Mexican appearance" and being an "illegal alien." But it also referred to a *circumstantial* correlation because the person was stopped "near to the Mexican border." *Id.* at 873, 877.
156. Johnson, *supra* note 116, at 694–95.

much correlation is required to establish a statistical relationship between religion and terrorism in an immigration context? These questions remain open though they are crucial to the legal analysis.

The use of appearance as a criterion in immigration enforcement requires a double correlation. In a recent case, involved ethnic profiling at JFK airport, the government asserted that "Middle Eastern appearance" is a relevant factor in a probable cause calculus because "all of the persons who participated in the 9/11 terrorist attacks were Middle Eastern males."[157] This reasoning requires proving a correlation between "Middle Eastern appearance" and being an Arab or a Muslim, and between the latter and terrorism. It may even require a triple correlation since the term "Middle Eastern appearance" is vague and law enforcement officials often use other criteria— such as language, accent or dress code—to identify one's appearance. In the realm of likelihoods and probabilities, agents are not always familiar with the nuances of different religions and sects, and there is an inherent tendency toward confusion. Proving such correlation is not an easy task. As the Court held in this decision: "no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct other than immigration violations."[158] In phrasing its conclusion by using the exception of "other than immigration violations," the Court asked to isolate immigration from other fields. However, even the *Brignoni-Ponce* case about Mexican appearance is context-based and not a carte-blanche invitation to use racial criteria.

At minimum, as Professor Legomsky noted, the required degree of correlation has to be rational.[159] The point is not that it is entirely irrational to employ racial immigration classification, but rather that the picture is more complex than seen at first glance. We lack sufficient evidence to provide

157. *See* Farag v. United States, 587 F. Supp. 2d. 436 (E.D.N.Y. 2008).

158. *Id.; see also Avery*, 137 F.3d 343, 354 ("[A]lthough the Court in *Brignoni-Ponce* stated 'the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,' we refuse to adopt, by analogy, the concept that 'the likelihood that any given person of African ancestry is involved in drug trafficking is high enough to make African ancestry a relevant fact' in investigating drug trafficking.").

159. The test of rationality may apply differently to different immigration contexts. The level of rationality might be stricter, for example, in cases of removal compared to admission.

clear-cut conclusions, but from the available data it is at least possible to question whether such a correlation exists.[160] Furthermore, just because two things are correlated, does not mean that one causes the other. A correlation simply means that a relationship exists between two factors, but tells us nothing about the direction of this relationship. For instance, one may find that the 9/11 hijackers were all thin: Will someone seriously consider taking immigrants' weight into account in targeting future terrorists based on statistical correlation between weight and terrorism?

B. COST EFFECTIVENESS

A statistical relation, in itself, does not indicate that using certain criteria is also effective. To be cost effective, the overall benefits of the criteria should outweigh their overall costs. On the benefit side, one needs to prove that race effectively serves a legitimate interest to a degree that justifies its use. What must be assessed is not the efficiency of the system as a whole, but the *incremental* benefit derived from the additional use of race to the process of immigration selection. On the cost side, using racial criteria may yield some costs: human rights violations along with social costs, such as stigmatization of racial groups and creating hostility.[161] Imposing costs on certain groups may be seen as stigmatization of citizens who belong to such groups.[162] What must be assessed, again, is the *incremental* cost derived from the use of race in immigrant selection.[163] As Legomsky noted in referring to the second requirement of justifiability, any gain in law enforcement efficiency have to be balanced against the serious   harms   inherent   in   government-sponsored

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160. *See, e.g.,* Leti Volpp, *The Citizen and the Terrorist,* 49 UCLA L. REV. 1575 (2002).

161. *See* PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 106–07 (2005) (the costs of nationality profiling "will keep members of families apart . . . individuals [and] employers may mimic what the government is doing, justifying their own profiles based on the lessons of government conduct. even if the government's profiling is limited in scope and context . . . it will engender serious rifts between persons who could provide helpful information . . . [it] may have serious consequences for our relations abroad . . . [it] would be both unfair and likely unhelpful.'").

162. *See* Johnson, *supra* note 122, at 1150–53; Legomsky, *supra* note 43. at 183; Motomura, *supra* note 122, at 1572–73; Rosberg, *supra* note 122, at 326–27; Volpp, *supra* note 160, at 1592–98.

163. *See* Mathias Risse & Richard Zeckhauser, *Racial Profiling,* 32 PHIL. & PUB. AFF. 131 (2004).

discrimination.[164] It does not mean that cost effectiveness is sufficient in order to justify the policy, only that it is a preliminary requirement.

Making a cost-benefit analysis of using immigration criteria is a lofty goal and, without reliable data, an almost impossible task. It is hard to gauge how effective the NSEERS registration rules were, or to assess their costs. Are racial criteria a preemptive means, aimed at maximizing 'hit rates' of putative terrorists, or deterrence-based? We have no data on both aspects, but it is worth mentioning that the NSEERS regulations yielded not even one arrest from among thousands of targeted persons.[165] In addition, one needs to take into account the displacement effect. Terrorists often change methods and techniques and accommodate changes in immigration policies. They may declare a different religion, or use a different passport, or recruit non-profiled group members. Timothy McVeigh, who bombed the building in Oklahoma City, was a Catholic American. John Walker Lindh, Eric Rudolph, José Padilla— were all Americans. Richard Reid, the "shoe bomber," was British. Moreover, targeting only specific groups may even be counterproductive. To learn from a different case, the U.S. Customs Service published a study that compares the results of searches at airports using a group-based method to the results of searches at the same airports using a random method. The study reveals that conducting a random search yields a substantially higher "hit rate."[166] Although African American women were more frequently searched, they were by far less likely than white American women or men to carry contraband.

The questions needed to be asked are how effective is the use of the criterion, and for what price. The state must balance potential benefit with cost as a preliminary legal requirement, though it may be reasonable to require a different level of efficiency for different immigration contexts and regarding different infringed rights and trade-offs.[167] Yet in the empirical debate, it is not only hard to find reliable data to evaluate the

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164. Legomsky, *supra* note 43, at 178.

165. Similarly, the German *Rasterfahndung* yielded not even one arrest from among 300,000 targeted people. *See* Kett-Straub, *supra* note 76, at 971.

166. *See* U.S. General Accounting Office, Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results (2000).

167. *See Nelson,* 472 U.S. 846, 881 ("That the Executive might properly admit into this country many Cubans but relatively few Haitians does not imply that, when dealing with aliens in detention, it can feed Cubans but not feed Haitians.").

right trade-off, but even based on the same data it is possible to reach different empirical conclusions.

C. HEURISTIC JUDGMENT

A third issue stems from the psychological human tendency to use racial criteria beyond what their actual predictive contribution justifies. Amos Tversky and Nobel Prize winner Daniel Kahneman present three cognitive biases that stem from the phenomenon of heuristic judgment: representativeness heuristic, availability heuristic, and adjustment heuristic.[168] The first bias describes situations in which people assume that individual *A* belongs to group *B* by assessing similarity between *A* to *B* based on how closely they resemble each other. The judgment is often based on stereotypes that ignore what the authors call "base-rate frequency," or "prior probability."[169] For instance, a description according to which "Steve is very shy and withdrawn, invariably helpful, but with little interest in people" leads some to believe that Steve is a librarian and not a salesman, a pilot or a farmer. The description of Steve fits the stereotype of librarians more than the other occupations; people use the "most-likely-strategy" to attach *A* (Steve) to group *B* (librarians). This conclusion, however, is a statistical error. It ignores the prior probability under which there are more salesmen, farmers and pilots than librarians in the population and, hence, it is statistically more likely that Steve is not a librarian.[170]

In the wake of the 9/11 attacks, U.S. Attorney General John Ashcroft ordered questioning 5,000 Muslim Middle Eastern young men who legally resided in the United States. Ashcroft explained the policy by noting that this group is likely to be thinking about committing a crime.[171] When one incorporates base-rate frequency, this observation can be seen differently. Even if eighty percent of terrorism was committed by members of group *Z*, the likelihood that a member of group *Z* is a terrorist

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168.   *See* Amos Tversky & Daniel Kahneman. *Judgment Under Uncertainly: Heuristics and Biases, in* JUDGMENT UNDER UNCERTAINLY: HEURISTICS AND BIASES 3 (Daniel Kahneman, et al. eds., 1982). Tversky and Kahneman show how judgment of probability leads to errors since it ignores considerations of base-rate frequency that must influence the outcome.

169.   *Id.* at 4–11.

170.   *Id.*

171.   *See* Memorandum from the Deputy Attorney General to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9. 2001).

should consider group Z's percentage of the population and the percentage of terrorists among the population. If group Z constitutes 5 percent of the population, and terrorists constitute 0.1 percent of the population, the likelihood that a member among group Z would be a terrorist is 0.8 x 0.001/0.05 (=0.016). This probability is higher than the probability that a non-member of group Z is a terrorist, which in our example is 0.001—some would say significantly higher because it is sixteen times more likely to be a terrorist—but is still a very small percentage. Therefore, the Attorney General's conclusion was wrong as long as it indicated that Muslim Middle Eastern men are *likely* to become involved in terror, but right as long as it indicated that a member of this group is *more likely* than a non-group member to become involved in terror.

In a recent article, Kip Viscusi and Richard Zeckauser present an interesting view of how people psychologically evaluate risks. Viscusi and Zeckauser surveyed students at Harvard Law School, Harvard Kennedy School of Government and Wharton Business School on their risk beliefs.[172] One of the findings indicates that risk assessment is far from being an objective process. People (even educated students) are prone to evaluate risks less on probabilities and more based on personal preferences and subjective perceptions. They tend to put the focus on the "severity of the outcome than on the probability that it will occur."[173] People tend to think on the catastrophic result of a mistake rather than on its probability. Viscusi and Zeckauser referred to another important point: the psychological interweaving of values and probabilities. "Values and probability assessments are often linked" and, hence, "those who think capital punishment is immoral also tend to think of it ineffective."[174] They concluded that in risk assessments people often rely on biases and irrational judgments that eventually might cause empirical errors.

Even before analyzing legal and moral issues involved, it is possible to challenge some race-based immigration criteria on utilitarian grounds. This Part demonstrates that what might seem to be a cost-effective policy is not necessarily so in the context of the War on Terror because the use of race tends to be over-

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172. *See* W. Kip Viscusi & Richard J. Zeckauser. *Recollection Bias and the Combat of Terrorism.* 34 J. LEG. STUD. 27 (2005).

173. *Id.* at 47.

174. *Id.*

inclusive, disregards costs, and involves psychological biases. The question that we will briefly discuss in the next section is whether other alternative methods for immigrant selection exist. We present four such methods: universal selection, positive selection, random selection and racial selection with just compensation.

V. ALTERNATIVE METHODS OF IMMIGRANT SELECTION

As a policy matter, as Part II shows, the power of Congress and the Executive to decide whom to admit, and under which terms, has largely remained plenary. In certain circumstances, as Part III demonstrates, racial immigration classifications may be legally permitted under different perspectives. Yet. as Part IV presents, there are some utilitarian grounds to challenge this reality in the context of the U.S. War on Terror. Part V focuses now on alternative methods. It presents four alternatives of how to select immigrants. The purpose is not to make a case for one of them but rather to stimulate a debate on other methods of immigrant selection. Part V also shows why, in spite of some salient differences, none of these methods is racially-neutral.

A. TOWARDS A TYPOLOGY OF IMMIGRATION SELECTION

It is possible to distinguish between four cases of immigrant selection. The first case occurs when an immigration policy seeks to achieve a *racial purpose* by using *racial criteria*.[175] An example is the Chinese Exclusion Act aimed at excluding Chinese by using Chinese descent as a criterion.[176] Another example is the National Origin Quota System, which governed U.S. immigration law from 1921 to 1965, whose purpose was, *inter alia*, to maintain the ethnic status quo of the U.S. population by using nationality-based criteria. In a way, one can consider the ethnic immigration preferences under German and Israeli law as fall within this category, as long as the purpose is keeping Germany for "Germans" and preserving Israel as a Jewish state.

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175. The term "race" is used in this Part as an umbrella category to describe race. ethnicity and religion.

176. A note of limitation: One might claim that Chinese exclusion was not aimed at achieving a racial purpose but a non-racial purpose of better integration: racial hegemony was only a means to an end. such as promoting the social cohesion. This Part does not deal with historical aspects of such claims. or with their normative aspects that relate stable societies to racial hegemony.

The second case occurs when an immigration policy seeks to achieve a *racial purpose* by using some *facially-neutral criteria.* States may use non-racial criteria—such as culture, skills, education or income—in order to exclude certain nationals. Because nationality is sometimes tied with race[177]—exclusion of Chinese citizens is also exclusion of Asians; excluding Israelis may result in excluding some Palestinians, but the vast majority of people excluded will be Jews—the outcome may have racial implications.[178] In this case, non-racial criteria are strategically designed to achieve a racial purpose, though they may also end up with the exclusion of other groups who share similar characteristic. Thus, states might be willing to "lose" inclusion of some groups in order to "gain" exclusion of some other groups.

The third case occurs when an immigration policy seeks to achieve a *non-racial purpose* by using *racial criteria.* An example is when states impose nationality-based restrictions during war. The criterion of nationality here is not driven by, or aimed at, a racial purpose, but rather is intended to achieve a non-racial purpose of protecting national security. The assumption here is that there is a connection between enmity and nationality. Another example is temporal exclusion of Asian citizens due to fear of SARS. The goal here is protecting the public health, not excluding Asians. As Stephen Macedo asserts, immigration rules that used racial criteria, did not always ask to achieve a racial purpose; for example, "while the animus against Irish Catholics was indeed based partly on race prejudice, there were more substantial and honorable grounds for worrying that the teachings of the Roman Catholic Church before Vatican II were inconsistent with liberalism."[179]

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177.   *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613–14 (1987) (Brennan, J., concurring) ("The line between discrimination based on ancestry or ethnic characteristics... and discrimination based on 'place or nation of [origin]' . . . is not a bright one . . . often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group.").

178.   A report released by Yale Law School found that although the DHS had used nationality as a criterion, seventy-nine percent of the foreign nationals investigated came from Muslim-majority countries. Citizens from Muslim-majority countries were in fact 1,280 times more likely to be targeted than other nationals. *See* Eric Lichtblau, *Inquiry Targeted 2,000 Foreign Muslims in 2004,* N.Y. TIMES, Oct. 30, 2008.

179.   *See* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN MULTICULTURAL DEMOCRACY 130 (2000). Macedo asserts that "it would be wrong to attribute the civic anxieties of this period to racism alone . . . there were also civic, secular reasons for fearing that an education in orthodox Catholicism could be hostile to republican attitudes and aspirations." *Id.* at 63.

The fourth case occurs when an immigration policy seeks to achieve a *non-racial purpose* by using *facially-neutral criteria*. States may use criteria such as education or income or skills for civic purposes, such as increasing economic efficiency. The policy here is intended to serve some facially-neutral national interests.

The challenge in this typology is to separate the legitimate from the illegitimate immigration policies. At first glance, one might think that it is generally illegitimate to use racial criteria to achieve a racial purpose, and that it is generally legitimate to use facially-neutral criteria to achieve a non-racial purpose. As Part III shows, this is not always the case. The question of legitimate and illegitimate criteria depends on the perspective, the context, and the purpose it serves. On the one hand, there are cases in which ethnic preferences in immigration inclusion may be considered as a legitimate policy, even if they serve, to some extent, an ethnic purpose. On the other hand, facially-neutral criteria that are employed to achieve a non-racial purpose may have racial disparate impact that can violate human rights. At the end, the justification of the criteria derives, first and foremost, from the justification of the end they intended to serve.

Two possible tests exist to distinguish between legitimate and illegitimate criteria. The first test focuses on motivation. A policy that is racially-motivated (whatever the procedure to explore motivation is) would be generally considered as illegitimate, whereas a policy that has non-racial motivation would be generally considered as legitimate. This is the test of intentional discrimination. As articulated by Justice Scalia: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is."[180]

The second test focuses on impact. A policy that has a racially disparate impact on a state's members (or, under a cosmopolitan view, on any group) would be generally considered illegitimate, whereas a policy that does not have disproportionate racial effect would be generally considered

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180.   *See* Hernandez v. New York, 500 U.S. 352, 377 (1991) (Scalia J., concurring).

legitimate. This test was implemented by the British House of Lords and the Israeli Supreme Court.[181] It is also a well-established test under international human rights law, which distinguishes between direct racial discrimination—that is, differential treatment based on racial criteria—to indirect racial discrimination—differential treatment based on non-racial criteria that puts some racial groups at a disadvantage compared to other groups.[182] To be clear, differentiation does not mean discrimination let alone unlawful discrimination. The criterion might be seen as illegitimate because of racial motivation or racial effect, but can still be lawful due to other legitimate interests involved.

In the next sections, we analyze four methods of how to select immigrants—universal selection, positive selection, random selection and racial selection with just compensation—in light of the above two tests distinguishing between legitimate and illegitimate immigration criteria.

B. UNIVERSAL SELECTION

A first option is to select immigrants based on "universal" criteria, i.e., criteria that do not directly discriminate on the basis of race. These may be ascribed characteristics, such as one's gender, or achieved characteristics, such as one's education, occupation or wealth. Almost every liberal democracy has such a system. The United States, for example, gives priorities to family immigrants over other immigrants and to immediate relatives over other family members. These preferences rely on the importance of family unity. Similarly, there are preferences in employment visas according to one's occupation, age, skills or investment.[183] These criteria are aimed at achieving a non-racial purpose closely related to the labor market.

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181. *See* Regina, UKHL 55 at para 75; HCJ 7052/03, *supra* note 59.

182. *See, e.g.,* Giovanni Maria Sotgiu v. Deutsche Bundespost [1974] E.C.R. 153 at para 11 ("The rules regarding equality of treatment . . . forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."); Regina v. Secretary of State for Employment [1997] E.C.R. at para 51 ("The existence of statistically significant evidence is enough to establish disproportionate impact and pass the onus to the author of the allegedly discriminatory measure."); Case of D.H. and Others v. the Czech Republic [2007] E.C.R. at para 175, 183 ("A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.").

183. *See* §201(b) of the INA (for preferences of family-sponsored immigrants).

Another example is the points-based system. The system, which Congress considered adopting in the 2007 failed immigration reform,[184] has recently been adopted in Britain. The system is an attempt to make the process of selecting immigrants quasi-mathematical. It divides immigrants into five tiers: Tier I focuses on highly-skilled workers; Tier II focuses on skilled workers with a job offer; Tier III focuses on temporary low-skilled workers; Tier IV focuses on students; and Tier V focuses on temporary workers needed to satisfy non-economic goals.[185] Each tier has different conditions and entitlements.[186] One's classification is determined by the points one scores. For instance, in order to be part of Tier I for highly-skilled workers, the applicant must score at least ninety-five points in total. The points are distributed based on non-racial criteria: age, previous earnings, experience in Britain, language proficiency and funds. This distribution has its own preferences. Take age: the system clearly prefers young applicants. A person under twenty-eight years of old will earn twenty points, while a person over thirty will only earn five points. The system also prefers educated people: an applicant will score fifty points for holding a Ph.D., thirty-five points for a master degree and thirty points for a bachelor degree.

Universal criteria appear in our typology in cases two and four: using facially-neutral criteria to achieve a racial purpose, and using facially-neutral criteria to achieve a non-racial purpose. One way to judge the legitimacy of universal criteria is to implement the test of policy motivation. Take the criterion of age. Several European states have recently fixed a minimum age for marriage migration. In Denmark, marriage migration is only possible if both parties are above twenty-four years of age. One motivation for the policy can be protecting young adults from forced and arranged marriages. The assumption is that people below a certain age have less capacity to resist an arranged marriage. A second motivation can be related to the immigration scale, that is, age is just another criterion used in the general enterprise to limit migration. In this context, states may come to

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§201(d) (for preferences of employment-based immigrants).

184. *See* Draft Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007.

185. For details, *see* http://www.ukba.homeoffice.gov.uk/workingintheuk/.

186. Tiers 3 and 5, *e.g.*, are temporary. Immigrants in these tiers cannot switch out once they are in the UK.

the conclusion that raising the age of marriage migration can reduce the number of immigrants. But there might be a third motivation. It is possible that states do not want a certain kind of immigrants and age is just a pretext to exclude them. One could argue that Danish citizens of Muslim origin tend to marry at a younger age than non-Muslim Danes and, therefore, outlawing marriage migration below twenty-four years of age may end up excluding a high percentage of Muslim immigrants, even if non-Muslim immigrants will also pay the price of such a policy.[187]

Another way to judge the legitimacy of universal criteria is to implement the test of disparate impact. This test does not explore intent but effect. If the burden of using a specific criterion falls on a certain racial group, then the criterion may be regarded as illegitimate even if it is not-racially motivated. One problem with applying this test to the context of universal criteria is that it is hard to find criteria that have no racial implications. Criteria such as "education" and "income" give preferences to people from developed countries—the same with "merits," "qualifications" and "skills." Even height and weight are not universal, as Koreans are shorter on average than Swedes, and Europeans weigh more on average than sub-Saharan Africans.[188] Applying a disparate impact test to the Danish example can lead to the conclusion that age is an illegitimate criterion as long as it leads to a racially disparate impact. Unlike the policy motivation test, age may still be an illegitimate criterion even if its motivation is racially-neutral.

C. POSITIVE SELECTION

A second option is positive selection. This method is designed to identify immigrants who are most likely to contribute to the national interests. It is premised on the same rationale of universal selection with two differences. The first difference is that while universal selection does not contain racial criteria, positive selection does permit taking them into account. Race can be one among other factors, such as skills

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187. *See* Report by Mr. Alvaro Gil-Robles. Commissioner for Human Rights. on his Visit to Denmark. Council of Europe 8, 22 (2004).

188. For selected data of heights and weights by countries. *see* the Food and Agriculture Organization of the U.N. *at* http://www.fao.org/docrep/meeting/004/M2846E/M2846E07.htm. This is not just a theoretical issue. New Zealand has banned family migration when the foreign member fails a body mass index test. The presumption is that overweight immigrants might become a burden on the health care services. *See* Aida Edemariam. *Are You too Fat to Emigrate?*. THE GUARDIAN. Nov. 20. 2007.

training or work experience, to score points. Race will not be the sole factor to determine one's eligibility for admission, but can be one among other factors.

Positive selection appears in our typology in cases one and three: using racial criteria to achieve a racial purpose, and using racial criteria to achieve a non-racial purpose. The use of racial criteria to achieve a racial purpose occurs, for instance, when an immigrant of German ancestry gets more points in Germany, and a Jewish immigrant gets more points in Israel, as long as the purpose of the preferences is preserving racial hegemony (if the preferences have a non-racial purpose, the classification falls under case three). While race serves in these situations as a factor giving fast-track admission to ethnic diaspora, it can also serve as a kind of "affirmative action." The state can decide that a specific racial group is underrepresented in its immigration system, such as the case of African immigrants in the United States.[189] It can further decide that being an African would give the applicant more points. In this case, although the applicant may not have the required level of education or wealth, she may still be able to reach the total required points by using her African descent.

A second difference between positive and universal selection is that positive selection does not include criteria for inadmissibility. In a typical points-based system, the applicant is admissible when she earns the required points *unless* some grounds for inadmissibly exist, such as health, criminal or security-related grounds. Positive selection includes no exclusionary criteria. Everyone is admissible—even people with criminal record, student visa abusers, etc.—as long as the applicant earns the total scores required. The process is flexible and takes into account a wide range of factors. On the one hand, the applicant can gain points for family ties with citizens, skills and being a national of specific countries. On the other hand, the applicant can lose points because of a criminal conviction, or being a citizen of a less-favored country. Hence, one can lose points for having prior convictions, but earn points because of education, personal net worth, or a particular more-favored country.

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189.   *See infra* notes 202–205 and accompanying text.

A similar system has recently been adopted in Britain as an upgrade to the recently-launched points-based system.[190] On August 2009, the Home Office announced that in addition to the points-based entry criteria, would-be citizens need to earn points to become British citizens. The novelty of the new plan is to extend the logic of points-based selection from immigration policy to citizenship law. It sets up three stages needed to become a British citizen: temporary residence, probationary citizenship, and citizenship.[191] The path to citizenship has been extended from five to ten years, yet applicants can shorten this period by becoming active members of political parties or trade unions, or performing socially-beneficial volunteer work. Extra points are also granted for working in areas in-need of immigration, such as Scotland, and for fast integrating, e.g., by learning English.[192] The applicant, however, can lose points for "bad behavior." Points will be deducted for engaging in generally-legal activities such as taking part in anti-war demonstrations,[193] failures to integrate into the British way of life, anti-social behaviors, criminal activities or showing disregard for British values. The system is flexible; it raises or lowers the threshold for settlement according to Britain's changing circumstances.

D. RANDOM SELECTION

A third option is to select immigrants randomly. The United States has had a lottery selection in place in various versions since 1986. Each year some 55,000 persons are randomly

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190. *See Citizenship Points Plan Launched,* BBC, Aug. 3 2009; Richard Edwards, *Immigrants Denied Citizenship for Demonstrating against British Troops,* DAILY TELEGRAPH, Aug. 3, 2009; Alistair Macdonald, *U.K. to Review and Tighten Requirements for Citizenship,* WALL ST. J., Aug. 3, 2009; Alan Travis, *New Migrants to Britain Face 'Points Test for Citizenship,'* THE GUARDIAN, Aug. 3, 2009.

191. *See* The Borders, Citizenship and Immigration Act 2009, *available at* http://www.england-legislation.hmso.gov.uk/acts/acts2009/pdf/ukpga_20090011_en.pdf. For a detailed discussion, *see* Analysis of the Points Based System (August 2009), *available at* http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/pbsanalysis-09/0809/mac-august-09?view=Binary. The Act is expected to go into effect in 2011.

192. *See* Earning to Right to Stay, A New Points Test for Citizenship, Home Office: UK Border Agency (July 2009), *available at* http://www.hmg.gov.uk/buildingbritainsfuture/immigration-citizenship.aspx.

193. The 'anti-war demonstration' clause is bizarre because it reduces points for engaging in legally-permitted activities. *See* Richard Ford, *Anti-War Migrants Could Damage Citizenship Hopes,* THE TIMES, Aug. 4, 2009; James Slack, *Immigrants Who Jeer at British Troops in the Street to be Barred from Gaining Citizenship,* DAILY MAIL, Aug. 3 2009.

selected for permanent residence by a computer-generated lottery selection.[194] The lottery's qualifications are having a high school diploma (or its equivalent) or having at least two years of work experience in an occupation requiring two years of training or experience, and having been born in a country that has a low admission rate in the previous five years. The visas are distributed among six regions: Africa, Asia, Europe, North America (other than Mexico), Oceania and South America (including Mexico, Central America and the Caribbean).[195] The stated objective of the lottery visas is to increase diversity.[196]

Lottery visas look neutral. Nevertheless, a closer look reveals a fiery debate on their motivation and impact. In an insightful article, Stephen Legomsky asserts that diversity lottery is "merely the latest in a series of congressional attempts, spanning more than a century, to influence the ethnic composition of the United States immigrant stream. . . [it] is new in form, but not in spirit."[197] Critics of the lottery have two arguments in supporting this position. To begin with, historical evidence indicates a discriminatory *purpose*. The calls for the lottery were initiated by interest groups (principally Irish-Americans) who sought to increase Irish and Western European immigration.[198] One unforeseen effect of the 1965 Immigration Act was to shift the ethnic composition of immigrants from Western Europe to those from Asia. Some of the architects of the 1965 legislation expected that Western Europeans would continue to predominate.[199] However, the number of Western European immigrants significantly declined, while the number of

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194.   *See* §§ 201(e), 203(c) of the INA.

195.   The visas are divided between high and low admission regions, with a higher number of visas allocated to low-admissions regions, and no visas allocated to states sending more than 50,000 immigrants in the previous five years. In addition, no state receives more than seven percent of the total number of visas. Winning the lottery does not guarantee a visa but merely establishes eligibility to receive a visa.

196.   *See* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 75–133 (2003).

197.   *See* Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321, 326 (1993).

198.   *See* Anna O. Law, *The Diversity Visa Lottery: A Cycle of Unintended Consequences in United States Immigration Policy*, 21 J. AM. ETHNIC HIS. 3 (2002). The original version of the diversity lottery, known as the Donnelly-Kennedy Lottery, reserved 40 percent of the visas for Irish nationals. The INA even grants Ireland a double status by saying that "only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state." *See* §203(c)(f) of the INA.

199.   SCHUCK, *supra* note 196, at 87.

Asian and Hispanic immigrants dramatically increased. The lottery system was intended to correct this reality.[200] Next, some critics indicate that the congressional definition of a "region" has been strategically designed to benefit European countries. They argue that the region definitions adopted by Congress are not geographical but cultural. By grouping "Mexico, Central America and the Caribbean" to the South American region, Congress has limited the access to lottery visas from this region.[201]

Another debate surrounds the *impact* of lottery visas. The 2008 data show that only two percent of diversity visas were allocated to South and Central Americans while nineteen percent were allocated to Europeans.[202] Critics claim that this shows a disparate impact favoring Europeans. They argue that inasmuch as diversity is the goal justifying the lottery, the program has failed to achieve its goal. Legomsky states that the lottery program is "anti-diversity" because it "makes the resulting United States population less diverse—not more diverse—than it would otherwise be."[203] Even lottery proponents are critical of certain aspects of the program. Some procedures of the lottery seem, in their view, to have a negative impact against Africans. For example, the requirement of high school diploma is harder to fulfill in African states, as is the requirement to complete an application electronically, which requires internet access and an ability to manage a computer.[204]

Random immigration selection has not taken away the controversy about racial selection. One explanation might be the claim that one's nationality still determines one's eligibility for participation in the lottery and one's chances of winning. What really is random are the individual names chosen among non-random, or partially-random, collectives. This is why Legomsky terms lottery visas "geographic priorities," which randomly

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200. For the legislative history of the diversity lottery, *see* JOPPKE, *supra* note 5, at 74–80; SCHUCK. *supra* note 196, at 87–94; Jonathan H. Wardle, Note: *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963. 1974–83 (2005); Walter P. Jacob, Note: *Visas: Muddled Thinking and Pork Barrel Politics*. 6 GEO. IMMIGR. L.J. 297 (1992).

201. Wardle. *supra* note 200. at 1987.

202. The other visas were allocated to Asian (38 percent) and African (41 percent). *See* Diversity Lottery Visa 2008 Results. *available at* http://travel.state.gov/visa/immigrants/types/types_1317.html.

203. Legomsky. *supra* note 197. at 334.

204. *Id.* at 1069–70.

assign individuals but on the basis of their collective belonging. However, in testing motivation and impact, one needs to see the whole picture of immigrant selection. The other coin of the negative impact of lottery visas on Hispanic immigrants is their positive impact on African immigrants. Data show that the lottery program provides the only viable way for Africans seeking to immigrate to the United States who do not have pre-existing family or business ties to qualify.[205] The lottery positively affects a group that is still underrepresented in U.S. immigration law. Hence, lottery visas may not diversify the *U.S.* population, but it greatly diversifies the composition of *immigrant* population to the United States.[206] The diversity lottery may have a disparate impact against Asians and Latinos, but *taken as a whole*, U.S. immigration law actually favors Asian and Latin Americans.[207]

The critique of lottery visas does not focus on the *principle* of random selection but on its being badly managed.[208] What is not clear is whether the critique is about the lottery's criteria *or* purposes. The criteria used by the lottery are not really race-based: a high school diploma, two years of work experience, etc.[209] It is possible to cast doubt whether the criterion of "region" has been strategically designed to have nationality-based or racial impact, but this argument focuses on the purposes and not on the criteria. It may be the case that diversity visas were somehow racially motivated, or have racial implication, but this is a different argument. It still allows

205. *See* Bill O. Hing, *Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994).

206. *Id.* at 1064–65 ("Overall, the diversity visa program has increased opportunities for African immigration to the United States by 64% between FY 1994 and FY 1997."); Andowah A. Newton, Note: *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on its Impact on African Immigration to the United States*, 38 CORNELL INT'L L.J. 1049 (2005) ("The diversity visa program presents an opportunity to reduce some of the effects of the past exclusion of Africans and to increase their representation in the U.S. immigrant population.").

207. *Id.* Diversity visas constitute only six percent of the total immigrant visas and thus their impact on the immigration system is negligible.

208. But *see* SCHUCK, *supra* note 196, at 128 ("A visa to the United States is the most valuable resource that mobile foreigners can ever hope to obtain . . . no convincing conception of justice demands . . . that this precious asset should simply be given away at random and without reference to any benefits for American society . . . no other country allocates its valuable visas by lottery.").

209. *Id.* at 127 ("Although the system, like any complex practice. affects different states differently. the important point is that its disparate impacts result not from invidious discrimination but from the differential effects of the per-country ceilings. the timing of earlier migrations, their demographic mix. and other such factors.").

classifying the lottery system, in our typology, in cases two and four: using facially-neutral criteria in order to achieve a racial purpose, or a non-racial purpose.

E. RACIAL SELECTION WITH JUST COMPENSATION

A fourth option is to sustain some forms of racial selection while compensating for the discriminatory effect. This is intended to ensure that states do not just racially discriminate, but do so based on just interests for which they are willing to pay. This idea requires an in depth discussion: Who will compensate and who will be compensated (is the compensation between nations, or between nations and individuals?), how will the compensation be distributed, what kind of compensation is appropriate, what is the compensation about, and why should states compensate for immigration decisions to begin with? We do not deal with these issues here but rather present three examples of this kind of reasoning from Europe, Israel and the United States.

In recent years, some European governments have started to pay immigrants to leave. This development started in Spain and spread like a virus across Europe. The idea is simple: No immigrant is forced to leave, but there is a tempting incentive for voluntary departure. A person who chooses to leave and promises not to come back will be paid. The sums are not insubstantial: Sweden pays 30,000 kronor (about $4,000), Denmark 100,000 krone (about $20,000), France almost $8,000, and the Czech Republic just under $1,000. Spain is offering an amount equals to six months of benefits, which is about $18,500.[210] The payment is not a compensation for inadmissibility or denying access to citizenship, but instead represents an indirect compensation for voluntary leaving. In some countries, a pilot program offers immigrants additional help in returning to their home countries, such as a payment of a few thousand

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210. *See And Don't Come Back*, THE ECONOMIST, July 2, 2009; *Foreigners to Get 100,000 Kroner Incentive to Leave Denmark*, THE COPENHAGEN POST ONLINE, Nov. 9, 2009; *France to Pay Immigrants to Return Home*, SPIEGEL ONLINE, May 24, 2007; Henry McDonald, *Irish Government to Pay Immigrants to Go Home*, THE GUARDIAN, Nov. 15, 2009; Christian Peregin, *New Incentive to Help Immigrants Return Home*, TIMES OF MALTA, Nov. 8, 2009; Joellen Perry, *The Czech Republic Pays for Immigrants to Go Home*, WALL ST. J., Apr. 28, 2009; *Spain: Immigrants Shun Plan to Take Money, Go Home*, THE BOSTON HERALD, Nov. 13, 2009; *Spain to Pay Immigrants to Leave*, THE GUARDIAN, July 21, 2008; Tom Whitehead, *Foreign Prisoners Handed £500 Cash Cards to Go Home*, THE TELEGRAPH, Dec. 22, 2009.

dollars to set up a business. Indeed, thousands of immigrants left Europe following a resettlement package to resettle in their home country.[211]

The European policy uses non-racial criteria to encourage people to leave. Immigrants of all races are entitled to take the money and go away. What is unclear is the policy purpose. There can be many reasons for such policies; among others is the economic downturn, but also failures of integration. It may be cheaper to pay people to leave than to invest in their integration or provide them with unemployment benefits. But there might be another purpose. It is possible that some states seek by such payments to encourage immigrants who share a specific ethnic descent to leave. In that case, using the test of policy motivation, the practice may be illegitimate. A similar conclusion applies if the policy affects immigrants having certain ethnic origins.

Suppose the United States uses non-racial criteria to achieve a non-racial purpose. The government can decide, for example, that one possible step to reduce the number of unauthorized immigrants is to pay them to leave. Assume that the policy is not motivated by xenophobia, but is intended to achieve a legitimate economic purpose. Under the test of intentional discrimination, such policy can be legitimate, even if it mainly impacts Mexican immigrants. One might ask: Will it be permissible to use a racial criterion to achieve a non-racial purpose? And what about using a non-racial criterion that intends to achieve a racial purpose?

A version of this last idea was promoted by the Israeli right-wing former Knesset Member Michael Kleiner. Kleiner presented a bill to "encourage people who do not identify with Israel as a Jewish State" to leave. The bill stated that "any resident or citizen who emigrates to an Arab country shall be entitled to a special payment."[212] The bill was a mix match of racial and non-racial criteria. In principle, every Israeli citizen could have participated in the program. However, the program only applied to citizens who were willing to leave to an Arab state, usually Israeli Arab citizens. Indeed, Kleiner's purpose was to encourage *Palestinian* citizens, whom he saw as a threat to Israel's right to self-determination, to leave the country. The bill

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211. *See* Lisa Abend, *Spain Tries to Buy Out Immigrants*, TIME. Oct. 20. 2008.

212. *See* Chaim Gans, *Nationalist Priorities and Restrictions in Immigration: The Case of Zionist and Israel*, 2 L. & ETHICS OF HUM. RTS. (2008).

was thus a combination of racial and non-racial criteria, designed to achieve a racial purpose. Unlike the European practice, which applies to aliens, Kleiner's bill sought to encourage citizens to leave the country.[213] Eventually, the bill was labeled as racist by the Speaker of the Knesset and has never been discussed. It combined racial motivations with a racial purpose by using a racial criterion. It was an illegitimate policy under the tests of policy motivation and policy impact.

While the European and Israeli policies are a form of compensation between nations and individuals, another option can be having a mechanism of compensation between nations. States might decide to limit a certain kind of immigration by reaching a mutual agreement. For example, State X might enhance its border enforcement in return for some economic or other benefits from State Z. In this case, State Z provides 'subsidies' for State X's actions. These arrangements can work on the opposite side: State Z might impose sanctions on State X for not cooperating over border infiltration. One example may be a recent bill promoted by Pennsylvania Senator Arlen Specter. The bill provides that the United States would impose sanctions on states that refuse to take back their illegal immigrants.[214] Among the suggested sanctions is denial of immigrant visa or denial of foreign aid. Spencer notes that some countries refuse to take back their citizens—illegal immigrants who are waiting for deportation. Giving some flexibility to diplomatic considerations, he suggests punishing countries that do not cooperate.[215]

This Part presents some alternative methods of selecting immigrants. None of them is completely race-blind, though some are less race-based. One lesson is that not every race-based policy is racist and xenophobic, the same as not every merits-based system is to be celebrated as racially-neutral. The picture, as this Part presents, is much more complicated.

CONCLUSION

Some twenty-two years ago, Columbia Law Professor Louis Henkin indicated that even one hundred years after it was

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213. *Id.*
214. *See* The Accountability in Immigrant Repatriation Act of 2008. HR 5761.
215. *See* Eunice Moscoso. *Bill Would Punish Nations that Reject Own Emigrants.* COX NEWS. May 4. 2008.

decided, the Chinese Exclusion Case was "still very much with us."[216] As long as the Chinese Exclusion Case is read to permit racial, religious, and nationality-based classifications, Henkin's observation is still valid today. To a surprisingly large extent, the power of Congress to regulate immigrant selection based on invidious distinctions continues to exist and, even more so, continues to be legally permitted to an extent not matched in any other avenue of American jurisprudence.

Liberal democracies will continue in the foreseeable future to select immigrants into their societies. Borders will most probably be left neither completely closed nor completely open. The challenge is how to manage immigrant selection. This Article seeks to fill the gap in a theoretical question that has far-reaching practical implications.

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216. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*. 100 HARV. L. REV. 853. 854 (1987).