The Double Movement of National Origin Discrimination

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INTRODUCTION

Jose Figueroa's case presented "little out of the ordinary" for the federal courts.[1] His was a "multimillion-dollar" drug operation run out of Wisconsin that fell apart when a dealer and a partner flipped and gave testimony for the government.[2] Only in the closing moments of sentencing[3] did Figueroa's case take an unusual turn, one that would in due course elicit an unusual opinion from Judge Diane Wood of the Seventh Circuit Court of Appeals. In the process of assigning Figueroa to the "low end of Figueroa's advisory guidelines range,"[4] District Court Judge Rudolph T. Randa also offered, sua sponte, a "lengthy and disconnected lecture" that "sap[ped]" the appellate court's "confidence" in the sentencing's integrity.[5] Central to Judge Randa's *ex tempore* peroration was the observation that "Figueroa [was] of Mexican descent."[6] This led him to "comment[ ] about Mexico and . . . Mexico's contribution to drug and immigration issues in the United States. 'The southwest is being overwhelmed,' the judge remarked," before "lash[ing] out at illegal immigration, occasionally referring to 'you people' or 'those people.'"[7] Exercising a characteristic measure of delicacy and tact, Judge Wood characterized these remarks by Judge Randa's comments as showing "an odd focus on nation-states and national characteristics"[8] and as falling short of the

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1 *United States v Figueroa*, 622 F3d 739, 740 (7th Cir 2010).

2 Id at 740–41.

3 Figueroa was convicted of two counts under the Controlled Substances Act: one for conspiracy to possess cocaine with intent to distribute, and one for distribution of cocaine. Id at 741.

4 Id at 740.

5 *Figueroa*, 622 F3d at 743.

6 Id.

7 Id. There's more, but you get the idea.

8 Id.

rule that a sentencing court "adequately explain" its judgment.[9] Her majority opinion held back, though, from determining whether mere invocation of Figueroa's "national origin, standing alone, would require reversal."[10]

Judge Wood's opinion in *United States v Figueroa*[11] passes through a sort of double movement in relation to the idea of national origin discrimination. On the one hand, it toys with the possibility that the sentencing judge's invocation of Figueroa's Mexican origin—as distinct, apparently, from his race, his ethnicity, or his citizenship or immigration status—played a motivating role in the analysis. But it was not an adequate or rational explanation, Judge Wood implied, to invoke a person's nationality as a ground for imposing a sentence upon them. Indeed, it is not hard to infer that reliance on nationality would not just be irrational, but also a distinctly constitutional wrong—a "suspect classification" in the argot of equal protection law.[12]

But on the other hand, there is a pulling back in Judge Wood's opinion from the implications of this position. At the cusp of giving a constitutional analysis, she veers abruptly away from characterizing Judge Randa as animated by animosity toward Figueroa because of his national origin. The opinion also holds back from elucidating what, exactly, is problematic about the invocation of a defendant's national origin, or indeed the predicate step of explaining what counts as a national origin in the first instance. (Would different legal or normative concerns have been raised had the district court labeled Figueroa "Latino" or "Central American"? "Hispanic"? "Of a distinct race?" Does it matter that, in common parlance, these labels might be imprecisely used in an interchangeable way with national origin?) The result of this double movement is a published opinion gesturing toward, without substantiating or explaining, a distinctive moral and legal harm from national origin discrimination.

Perhaps this explanatory lacuna is inconsequential; perhaps the harm of national origin discrimination is obvious. I think not. To the contrary, I think we should not rush to assume either that national origin discrimination is either conceptually clear or

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9 *Figueroa*, 622 F3d at 744, quoting *Gall v United States*, 552 US 38, 50 (2007).

10 *Figueroa*, 622 F3d at 744. Concurring, Judge Terence Evans suggested that Judge Randa's actions may have been a "no harm-no foul situation" because the sentence imposed was at the low end of the guidelines range. Id at 745 (Evans concurring).

11 622 F3d 739 (7th Cir 2010).

12 See note 16 (collecting sources).

clearly unwarranted. To see this, take up once again the facts of Figueroa's case. Glossing his sentencing speech with a surfeit of (probably unearned) interpretive generosity, we might characterize Judge Randa as offering a view about the expected distribution of narcotics dealers by formal nationality as indexed by one's passport. With a charity verging on inculpating complicity, we might even understand him to be saying that the expected general deterrent effect of a sentence would be greater because Figueroa's punishment would have special communicative value for his cohort as defined by national origin rather than by criminality.[13]

The argument for this interpretation might run as follows: The epistemic and moral functions of national origin are distinct from their analogs in the race and gender context. Punishing one individual has a general deterrence effect on his or her cohort as defined by nationality; no such general deterrence effect when race is in play. Moreover, it might be argued, while certain nationality groups have been subject to persistent patterns of historical discrimination,[14] not every one has been an object of calumny in the past.[15] No national-identity category, indeed, has played the shaping role in US society and law associated with either racial or gender identities. It's not obvious, the argument would go, that we should view national origin discrimination as a distinctive kind of moral or legal wrong akin to racial or gender discrimination. Instead, it is more akin to "merely" irrational preferences such as a dislike of people with green eyes, large ears, or precisely beveled mannerisms. As a result, it is not obvious—whether as a matter of originalist method, doctrinal casuistry, or ordinary moral logic—that we should utter national origin in the same condemnatory breath as race or gender given its distinctive historical specificity, phenomenological heterogeneity, and conceptual ambiguity. On this view, Judge Randa did nothing wrong invoking Figueroa's national origin. And so there was no cause for the

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13 For an argument that this form of "collective sanction" can be defended independent of any entanglement with race or ethnicity, see Daryl J. Levinson, *Collective Sanctions*, 56 Stan L Rev 345, 348, 376–86 (2003) ("Group members might be punished not because they are deemed collectively responsible for wrongdoing but simply because they are in an advantageous position to identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so.").

14 See, for example, Erika Lee, *The Making of Asian America: A History* 89–108 (Simon & Schuster 2015) (charting discrimination against Chinese Americans back to the 1800s).

15 For an analysis of how different ethnic and national origin groups have navigated the color line after emigration, see generally David Roediger, *Working Toward Whiteness: How America's Immigrants Became White; The Strange Journey from Ellis Island to the Suburbs* (Basic 2005).

Seventh Circuit Court of Appeals to reverse his actions—and nothing that court said suggests otherwise. Or so the argument would go.

The aim of this short Essay—part of a Festschrift to celebrate Judge Diane Wood—is to explore the role that national origin discrimination plays in the US jurisprudence of equality. The double movement of the *Figueroa* opinion, I will suggest, provides a clue that this role is not a well-defined or closely theorized one. Although my argument is at points critical of the doctrine's structure and application, I should be clear up front that the inspiration for the Essay—Judge Wood's opinion—is not the object of any of that criticism. To the contrary, that opinion is exemplary of a sensitive and mindful jurisprudence that accounts carefully for the complex effects that pejorative stereotypes and structural dynamics of stratification can play in constraining life choices. The ambivalence of the *Figueroa* opinion is instead productive. It invites inquiry into questions close to the heart of one of the Constitution's central moral commitments: Why should discrimination of a given sort contravene the equal protection commitments lodged in the Fifth and Fourteenth Amendments? How fungible are the suspect classifications? And when should courts enforce a rule of strict scrutiny beyond the usual suspects? Again, to be clear up front, I do think that national origin discrimination is constitutionally problematic. But I also think we have no clear explanation why from the courts. Exploring the flaws in the defense of Judge Randa's sentencing—and filling the gaps in Judge Wood's opinion—helps us fill in some of the larger dynamics of our constitutional commitment to equality.

I.

At first glance, the impermissibility of national origin discrimination seems firmly ensconced in the law across a range of jurisprudential settings. Justices of both the right and the left on the Supreme Court have repeatedly enumerated national origin among the criteria triggering strict scrutiny pursuant to the Equal Protection Clause without a hint of protest or controversy.[16] It is also among the forbidden grounds included in Title VII of the 1964 Civil Rights Act's prohibition on private employment

[16] For statements to this effect, see *Peña-Rodriguez v Colorado*, 137 S Ct 855, 883 (2017) (Alito dissenting); *City of Cleburne v Cleburne Living Center*, 473 US 432, 440 (1985); *United States Railroad Retirement Board v Fritz*, 449 US 166, 174 (1980).

discrimination.[17] The Equal Employment Opportunity Commission (EEOC) has promulgated regulations defining its antidiscrimination mandate in broad terms to cover "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[18] And at the international level, the bar on national origin discrimination is confirmed in the leading international human rights instrument.[19]

Yet even within this seemingly solid carapace of legal authorities, strains show. Seeming consensus masks practical difficulties and conceptual confusion. Firm prohibitions yield because of exceptions and obvious pathways for circumvention. The actual justifications for and force of the initial legal prohibitions remain tenebrous. Across all these domains of law, the concept of national origin stands in uneasy relation to other prohibited grounds in ways that render its independent force uncertain. It simply isn't clear whether and how it is akin to or subsumed by other protected grounds.

Take first the example of international law. The idea of national origin discrimination in international law was initially proposed by a Soviet delegation to the United Nations. Likely, the Soviets acted out of a concern with their own domestic travails with national minorities. Their suggestion, though, prompted largely "misunderstanding" and "confusion" from the get-go.[20] Other delegates, a touch baffled, understood the term to be synonymous with citizenship, and so not demarcating any new category.[21] Recent commentary on national origin discrimination in international law confirms the ambiguity. It suggests that the term can be understood in two different ways—either as "equivalent to citizenship [in which case] discrimination is of course not illegal," or alternatively "in a sociological sense [that] overlaps with race," which is illegal.[22] National origin discrimination would

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17 42 USC § 2000e-2(a)(1).

18 29 CFR § 1606.1.

19 See International Covenant on Civil and Political Rights, Art 26, 999 UNTS 171, TIAS No 92-908 (Dec 19, 1966, entered into force for the United States Sept 8, 1992) (prohibiting discrimination on the basis of "national or social origin").

20 Egbert Willem Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* 100–01, 101 n 81 (Cambridge 2012).

21 Id at 99.

22 Natan Lerner, *Group Rights and Discrimination in International Law* 37–38 (Martinus Nijhoff 2003).

thus be impermissible only when it operated as a substitute for race discrimination. On this view, it is hardly clear that national origin supplies a separate prohibited term, rather than merely a prophylactic supplement to mitigate circumvention of the racial discrimination bar.

International law's protection against national origin discrimination is further complicated (although hardly neutered) by the absence of any positive right to a nationality in international law.[23] That is, while the latter body of law constrains denaturalization and prohibits certain discriminatory terms in citizenship access, states still maintain extensive control over whether and when to recognize persons as citizens under international law.[24] A state's largely unfettered power to decline to recognize a person's membership in the polity is obviously a potent substitute for its inability to discriminate on the basis of citizenship.[25] If national origin is subsumed within the category of citizenship, it will thus have little independent effect.

Next, consider the inclusion of national origin in the crown jewel of US antidiscrimination law, Title VII of the Civil Rights Act. Again, this inclusion has not produced certainty or clarity. The legislative history of the statute is "unilluminating," and suggests that "[t]he national origin term ended up in Title VII because it was part of the 'boilerplate' [ ] language" contained in earlier regulations and statutes.[26] Confusingly, legislators appear to have intended to capture both the idea of ancestry and also country of origin by the use of that term.[27] In light of this origin, perhaps it is unsurprising that courts have interpreted the term inconsistently. Some courts have construed it to extend to groups, such as Acadians and Roma, who are not traditionally defined in terms of an origin nation-*state*.[28] Their approach instead has been consistent with the view that "national origin" and "ancestry" are synonymous for statutory purposes.[29]

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[23] See Selya Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* 112 (Princeton 2018).

[24] See Peter J. Spiro, *A New International Law of Citizenship*, 105 Am J Intl L 694, 695–96, 714–16 (2011).

[25] See, for example, Joseph Allchin, *Why Hindu Nationalists Trialed India's Citizenship Law in Assam* (NY Rev Books, Jan 6, 2020), archived at https://perma.cc/QJ8E-CS2C.

[26] Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 Wm & Mary L Rev 805, 807, 817–21 (1994).

[27] Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law* 807 (2d ed 1983)

[28] See Perea, *Ethnicity and Prejudice* at 825–26 (cited in note 26).

[29] *Espinoza v Farah Manufacturing Co*, 414 US 86, 89 (1973).

Pressing the statute in a different direction, challenges to "English-only" policies have become a staple of Title VII national origin litigation.[30] This approach treats national origin as a proxy for ethnicity or perhaps citizenship. In response to these challenges, some judges have criticized the EEOC's gloss on the statute to extend to language-based discrimination as going beyond the law's outer perimeter.[31] It is likely that adverse action on the basis of language (or linguistic competence) will often be the only available action on the basis of national origin. A narrowing construction of the statutory prohibition that eliminates these theories of liability will thus be tantamount to an excision of national origin discrimination from the statute. In short, the statutory law of national origin discrimination is just as conceptually underpowered and confused as its international-law counterpart.

Finally, let us take a broad view of the constitutional jurisprudence developed under the Equal Protection Clause, reserving a more intensive look at the case law for a moment. This allows us to flag yet more ambiguities and confusions. As a threshold matter, there is no clear account in the Court's jurisprudence of why national origin is included in the list of suspect classifications. There is not one case in which the Court has explained why national origin is a salient trait for equal protection purposes analogous to race or gender. Cases from the late nineteenth century that implicate the concept often involve Chinese litigants, but do not explain how animus against the latter is properly characterized.[32] The result is, again, confusion. The Court that had recently characterized anti-Chinese discrimination in terms of national origin will then turn around and frame the same kind of

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30 See Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 Nw U L Rev 1689, 1699–1700 (2006) ("From 1996 to 2000, complaints lodged with the EEOC concerning English-only rules quintupled. National origin–related complaints, which often include a challenge to an English-only rule, today represent the fastest growing source of complaints to the EEOC.") (citation omitted).

31 See *Reyes v Pharma Chemie, Inc*, 890 F Supp 2d 1147, 1158 (D Neb 2012) ("Even under Title VII, language itself is not a protected class. Nor are language and national origin interchangeable.").

32 See, for example, *Lau v Nichols*, 414 US 563, 569 (1974) (resolving a challenge to a municipality's failure to provide Chinese-origin students with sufficient resources on statutory grounds); *Yick Wo v Hopkins*, 118 US 356, 373–74 (1886) (finding selective enforcement of a criminal statute against "Chinese subjects" to be "unjust and illegal"). See also *United States v Wong Kim Ark*, 169 US 649, 705 (1898) (finding that Chinese persons born in the United States are natural-born citizens under the Fourteenth Amendment); *Wong Wing v United States*, 163 US 228, 238 (1896) (invalidating, on due process grounds, a statute that subjected only Chinese nationals amenable to deportation to a regime of hard labor).

discrimination in terms of race.[33] If the terms are synonymous, though, why muddy the waters by deploying both? I am reminded of a colleague who, after almost a decade, still confuses me with the other South Asian member of my faculty. Moreover, most of these cases predate modern formulations of equal protection doctrine with its infrastructure of suspect classes and strict scrutiny. So it is perhaps unrealistic to expect a fully formed theoretical account of national origin as a category of unconstitutional discrimination that is clearly separate from or overlapping with race discrimination.

But matters do not become clearer once the contemporary doctrinal apparatus is in place. Rather than being carefully analyzed in more modern cases, national origin is simply offered as one item in a formulaic tally of suspect classifications.[34] It is stipulated, not deduced, as constitutional law.

Perhaps the closest the Court has come to considering the basis for national origin discrimination is a case involving a challenge to preemptory challenges exercised against "Latino" jurors on the basis of their bilingual ability.[35] The Court's opinion there is not illuminating. It does say in passing that "it may well be that for certain ethnic groups and in some communities, [ ] proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[36] It is hard to read this, though, as a decisive gloss on national origin discrimination, especially since "Latino" is not even a nationality.

Worse, when the Court does address the normative grounds for including national origin as a suspect class, it does so in a way that invites yet more confusion. For instance, an early invocation of national origin as an impermissible ground in a concurring opinion cites back to an earlier precedent concerning a *racial* category—as if the latter were synonymous with the former.[37]

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[33] *Ah Sin v Wittman*, 198 US 500, 507 (1905) (characterizing such discrimination as a matter of "race or class prejudice").

[34] It is perhaps telling that the leading casebook on constitutional law does not address national origin discrimination at all. See generally Geoffrey Stone, Louis Seidman, Cass Sunstein, Mark Tushnet, and Pamela Karlan, *Constitutional Law* (Aspen 8th ed 2019).

[35] *Hernandez v New York*, 500 US 352, 355 (1991). For a discussion of *Hernandez* as a national origin discrimination case, see Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 Wash L Rev 897, 913–14 (2007).

[36] *Hernandez*, 500 US at 371.

[37] *San Antonio Independent School District v Rodriguez*, 411 US 1, 61 (1973) (Stewart concurring), citing *Oyama v California*, 332 US 633, 644–46 (1948). *Oyama* framed the

Across a range of different jurisdictional levels, in short, the law of national origin discrimination is characterized by yet another sort of double movement—albeit one that is distinct and different from the double movement I traced in Judge Wood's *Figueroa* opinion. On the one hand, national origin is enumerated among the well-established and durably impermissible bases for state or private action. On the other hand, once one scratches the surface, there is a puzzling lack of content to the concept. It was apparently not clear to the drafters of legal texts (be they treaties, statutes, or judicial opinions) exactly why they were including national origin among the enumeration of forbidden grounds. In application, a tendency manifests to assimilate impermissible national origin discrimination into the putatively distinct categories of racial discrimination or citizenship bias. It's hard to avoid the sense that "national origin" is a legacy term, included in antidiscrimination measures through a mechanical borrowing of earlier texts.

Compounding the problem is an absence of scholarship on national origin discrimination as such (rather than, say, many excellent studies on discrimination against Latinx or Asian Americans).[38] An element of the central working structures of equality law, in sum, is characterized not only by a puzzling internal tension but also by a startling lack of scrutiny from the academy.

II.

This gap would be uninteresting, of course, if it were the case that national origin discrimination—however that term is defined—were not a persistent phenomenon, resurfacing with some regularity as a moral and legal problem for the polity. But the situation is rather different. A review of even the unrepresentative body of Supreme Court cases suggests that something akin to national origin discrimination has been a persistent feature of our law. More troublingly, the ambivalences described above have allowed the Court to obscure or avoid its significance. Read critically, the fugitive and fragmentary jurisprudence of national origin discrimination is a history of silences, evasions, and even moral catastrophes. Doctrinal ambiguity, as critical race scholars

question then presented as "whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable." *Oyama*, 332 US at 646.

[38] See generally, for example, Angelo N. Ancheta, *Race, Rights and the Asian American Experience* (Rutgers 2006) (arguing that framing discrimination in the US according to the Black-white model ignores the experience of Asian Americans).

have noted, can facilitate a jurisprudence in which relatively vulnerable and socially marginalized minorities persistently lose out. Their claims fail because of courts' ability to opportunistically (re)characterize their claims in multiple ways—each time assigning the label that ensures a loss.[39] Hence, the absence of clarity about national origin discrimination that I've documented above translates fairly effectively into an absence of clear regressive or otherwise troubling effects.

To begin with, I should be clear that I am not positing that all claims of national origin discrimination will fail or have failed. A powerful counterexample, located at the beginning of the equal protection tradition, concerned a challenge to the discriminatory enforcement of a San Francisco laundry ordinance against "Chinese subjects," which the Court held to be both "unjust and illegal."[40] Yet even in this case, the Court characterized the municipality's distinction as a "hostility to the *race and nationality* to which the petitioners belong, and which in the eye of the law is not justified."[41] Race and nationality, that is, stood side by side as seemingly close substitutes. This statement must also be read against its contemporary context. The Court had recently identified discrimination against "the newly emancipated negroes [sic] . . . [as] the evil to be remedied" by the Fourteenth Amendment's Equal Protection Clause and had refused to extend that provision's reach beyond that class (although it would subsequently do so).[42] Subsequent cases treated the San Francisco laundry case as one concerning "race-based decisionmaking,"[43] thus omitting or suppressing its attention to national origin. To the extent that national origin discrimination can be found in the early days of Fourteenth Amendment jurisprudence, then, it was easily

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39 The seminal version of this argument is Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U Chi Legal F 139. Professor Crenshaw noted "the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women," and demonstrated ways in which those in an intersecting class found themselves without remedies in specific cases. Id at 152.

40 *Yick Wo v Hopkins*, 118 US 356, 374 (1886).

41 Id (emphasis added).

42 *The Slaughter-House Cases*, 83 US (16 Wall) 36, 81 (1872).

43 *Miller v Johnson*, 515 US 900, 914 (1995). Other recent citations of the laundry case cite it for its peroration to the franchise, and do not mention the race/nationality distinction. See, for example, *Abbott v Perez*, 138 S Ct 2305, 2360 (2018) (Sotomayor dissenting).

conflated with (or assimilated into) the more familiar class of race-based measures.

In the larger span of potential applications of the Equal Protection Clause, the Court has continued to oscillate between treating instances of state action picking out individuals based on some theory of national origin as race cases or alternatively as national origin cases. On most occasions, the Court's formal or informal taxonomical choice has disadvantaged the minority litigant seeking protection from aversive state action. I say "formal or informal" because in some instances the force of "national origin" as a classificatory scheme can be discerned even though the case is formally labeled as one turning on a racial classification.

Rather than being comprehensive, I highlight here three lines of legal precedent, as well as one phenomenon that lies outside the reach of constitutional equality law. All of these features of the legal landscape are noteworthy for their immediate practical salience and their historical resonance. The common thread tying them together is an ambiguous entangling of race and nationality to the persistent detriment of the minority claimants.

First, in a pair of early twentieth-century cases, the Court explained that an amendment to the Naturalization Act of 1870[44] clarified that "the Naturalization Act 'shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent.'"[45] In the first of the cases, the Court held that "white person" comprised "only a person of what is popularly known as the Caucasian race," and so excluded Japanese nationals.[46] In the second case, it held that an Indian national, while indisputably "Caucasian," nonetheless fell beyond the Act as read "in accordance with the understanding of the common man."[47] This second decision has received attention principally for its rejection of "scientific" conceptions of race.[48] Despite this rejection, the Court still allowed some of the normative implications of turn-of-the-eighteenth-century racial hierarchies to seep back

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44 Act of July 14, 1870, ch 254 § 7, 16 Stat 254, 256, as amended by Act of Feb 18, 1875, 18 Stat 316, 318, formerly codified at 8 USC § 359.

45 *United States v Thind*, 261 US 204, 207 (1923).

46 *Ozawa v United States*, 260 US 178, 197 (1922).

47 *Thind*, 261 US at 214–15.

48 Id at 210 ("The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology."). See also Donald Braman, *Of Race and Immutability*, 46 UCLA L Rev 1375, 1406 (1999) (arguing that in *Thind*, "the Court dismissed racial science"); Ian F. Haney López, *White by Law: The Legal Construction of Race* 6 (NYU 1997).

into the analysis.[49] The Indian national in that case lost his bid for citizenship because a "scientific" conception of "race" was superseded by a demotic taxonomy grounded in a loose conception of national origin:

> The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively *from the British Isles and Northwestern Europe*, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien, being a free white person" it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. . . . It was the descendants of these, *and other immigrants of like origin*, [i.e., from the same nation] who constituted the white population of the country when § 2169, reenacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.[50]

A reasonable interpretation of this passage is that national origin, filtered through a demotic perspective, is being called on to do the (literally) exclusionary work that "scientific" conceptions of race have failed to perform given the facts at bar.[51] It is also consistent with historical analysis of early twentieth-century US "racialism" as an ideology that construed "race [ ] as an indivisible essence that included not only biology but also culture, morality, and intelligence."[52] This rather baggy conception of race is capacious enough to be implemented though the invocation of national origin. The latter becomes in short order a ready-to-hand substitute for race in the larger project of maintaining social stratification.

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[49] See Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 Fordham L Rev 21, 44 (2013) ("Given the fact that the belief that races were biologically distinct entities was a widely held, infrequently disputed position when *Thind* was decided, the ordinary conception of race incorporated biological race."). See also Devon W. Carbado, *Yellow by Law*, 97 Cal L Rev 633, 637, 687–88 (2009) (arguing that "science and common knowledge are codependent: common-knowledge understandings of race often have their foundation in science").

[50] *Thind*, 261 US at 213–14 (emphases added).

[51] Indeed, in a more recent case, the Court examined the legislative history of 42 USC § 1981 and concluded that understandings of "race" overlapped with a sense of national origins. *Saint Francis College v Al-Khazraji*, 481 US 604, 612–13 (1987).

[52] Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J Am Hist 44, 48 (1996).

The second line of cases concerns the mass internment of Japanese-American citizens and noncitizens in 1942 in the wake of the Pearl Harbor bombing.[53] President Franklin D. Roosevelt's pivotal executive order targeted persons of "Japanese ancestry" for a regime of curfews, forced evacuations, and finally internment in distant and dismaying camps.[54] The internment produced three cases, the most notorious of which is *Korematsu v United States*.[55] *Korematsu*, of course, is also well known to lawyers as the doctrinal origin of strict scrutiny for racial classifications.[56]

It is a rather striking irony that this doctrinal source for strict scrutiny of racial classifications arises in a context polluted by a deep confusion between the categories of race and nation. Relevant here, *Korematsu* concerned a government classification predicated on the threat from certain nationalities—and yet the term "national origin" simply does not appear in the course of Justice Hugo Black's majority opinion. The obvious centrality of national origin to a government policy of interning *Japanese* Americans (but not other Asian Americans such as Chinese Americans, Korean Americans, etc., to say nothing of German Americans or Italian Americans) is registered only fleetingly in the opinion. But it receives no analytic attention, and there is no careful consideration of whether or how national origin might be different from race.

To the contrary, the slippage between race and national origin proved pivotal to the Court's ability to uphold the internment policy. Writing for the majority, Justice Black argued that the existence of "members of the group who retained loyalties to Japan" justified the undifferentiated aggregation and adverse treatment of all "those of Japanese origin."[57] In other words, the military was entitled to rely on the category of "Japanese Americans" because of the putative influence of loyalties to a specific nation. In the absence of this logic of shared national origin—or at least on the basis of an imputed shared national origin on the basis of ethnicity—the challenged internment policy would not have been sufficiently tailored to survive strict scrutiny. And yet at the same time that it relied on the internees' shared national

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53 For an account of that internment, see Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 Mich L Rev 47, 57–61 (2019).

54 7 Fed Reg 3964–69 (May 28, 1942).

55 323 US 214 (1944).

56 Id at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] . . . subject [ ] to the most rigid scrutiny.").

57 Id at 218–19.

origin, *Korematsu* framed the legal question before the Court as a matter of "legal restrictions which curtail the civil rights of a single *racial* group."[58] Race and nationality are used as *almost* interchangeable terms in Justice Black's analysis—and the small gap between them provided the Court with the rhetorical basis for its holding: No racial discrimination obtained because of the logical force of a nationality classification. In practical effect, differences in national origin provided the Court with a *justification* for and an authorization of racial discrimination, putatively within the operation of strict scrutiny.[59]

A premise of the opinion is thus that national origin is a narrowly tailored instrument for achieving the government's legitimate goal. In this logic, national origin cannot be merely a synonym for race in the manner it was in the citizenship cases. If national origin was a mere synonym for race, then it could not serve as a *justification* for racial discrimination. National origin rather could operate as a conceptual instrument to mitigate the constitutional problem catalyzed by racial classification only because "Japanese origin" was taken by the Court to provide a meaningful proxy for security risk in a way that (presumably) race would not. This deft dance between race and national origin barely registers in the Court's opinion. All the same, it is key to its outcome.

We know now, of course, that the key government decisionmakers in the White House and the Armed Forces well understood that national origin was no such thing. We know that it instead worked as a normatively freighted lever for social stratification and official subordination.[60] In a doctrinal context, however, strategic invocation of national origin at the justificatory axis of the argument provided a way to suppress that

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58 Id at 216 (emphasis added).

59 It is only fair to observe that *Korematsu*'s majority opinion can be powerfully critiqued for the frailty of its narrow tailoring analysis. Its moral and legal flaw, that is, abides in its deference to military judgments—and not in the conflation of race and nation. Perhaps a reason that this critique is not more common today is that so many judges are so eager to show deference to security-related judgments precisely in the way that *Korematsu* did.

Also, consider why *Korematsu* did not simply deny that *any* race-based classification was at issue, such that strict scrutiny would not apply. It is hard to know, but perhaps the Court's appetite for euphemism only went so far.

60 See Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* 108, 110–24, 238 (Harvard 2001) (documenting Roosevelt's motivations regarding internment and his racist views about the Japanese generally); Richard Reeves, *Infamy: The Shocking Story of the Japanese Internment in World War II* 32–38 (Picador 2015).

dynamic, and to launder invidious preferences into state-sponsored coercion.

The use of "national origin" as an analytic tool in *Korematsu* must also be viewed in light of the Court's earlier statements in the *Hirabayashi v United States*[61] case.[62] In the latter, the Court underscored at length Japanese Americans' "solidarity" with each other, the failure of their "assimilation as an integral part of the white population," their teaching of "Japanese nationalistic propaganda" to their children, and (most remarkably) the "irritation" of legalized discrimination, which "may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions."[63] National origin had thus already been infused by the Court with negative judgments about the moral and social inferiority of Japanese Americans. It was thus ready to be deployed as a racialized marker of alterity. But for the context and the outcome, one can almost admire the supple judicial legerdemain whereby this same concept is flipped to serve as a balm to mitigate the grievance of a racial classification in *Korematsu*.

The third line of cases involves instances in which the Court has treated a national origin classification as a racial classification. Although this would superficially seem to repudiate the moral error of the *Korematsu* judgment, in fact its effect is to warrant a similar (although far less iniquitous) imposition of disproportionate harms on a vulnerable, socially stratified minority. As critical race scholars might have predicted, the subordinated minority class loses when national origin is used to hide race effects (as in the internment cases), when it is used to explain race (as in the naturalization cases), and also when national origin is recognized as race's substitute. If the first two lines of cases demonstrate the ways in which the very idea of "racial animus" is a slippery and porous one[64]—especially when placed in juxtaposition with the idea of national origin—then the third line of cases shows how the idea of national origin can be pressed to collapse into race to vulnerable minorities' detriment.

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61 320 US 81 (1943).

62 See Huq, 118 Mich L Rev at 59 (cited in note 53) (describing *Hirabayashi* as providing pivotal context for the *Korematsu* decision).

63 *Hirabayashi*, 320 US at 96–98.

64 This is a theme explored in Aziz Z. Huq, *What is Discriminatory Intent?*, 103 Cornell L Rev 1211, 1240–65 (2018).

In a number of recent cases, the Court has been confronted by minorities arguing that a classification should be upheld because it was not on racial grounds but rather legitimately tracked the contours of a political community. In *Rice v Cayetano*,[65] for example, the Court held that, in using a Hawaiians-only voting qualification for electing the trustee positions of the Office of Hawaiian Affairs, the state used ancestry as a proxy for race, and therefore violated the Fifteenth Amendment.[66] The Court explained that this measure "treat[ed] the early Hawaiians as a distinct people" and so "used ancestry as a racial definition and for a racial purpose."[67] *Rice* is not directly concerned with national origin. It is instructive rather as an instance in which political efforts to recognize a distinct political community—defined in reference to a point in time when it could be ranked as a distinct nation—collapses into a racial classification. This in turn allegedly fails to show the constitutionally necessary "respect" to all persons.[68]

A similar logic can be glimpsed briefly in Justice Samuel Alito's opinion for the Court in the recent case of *Adoptive Couple v Baby Girl*,[69] which suggested that the Indian Child Welfare Act's provisions protecting the children of enrolled tribal members "would raise equal protection concerns" if applied to a child with a "remote" Native "ancestor."[70] As perceptive commentators immediately noted, treating federal-law distinctions between Natives and non-Natives as constitutionally suspect would "almost completely eliminate existing Indian law."[71] It would also run athwart the historical evidence of "multiple historical meanings of 'nation,' 'tribe,' and 'Indian,'" which show that "race and political status are inextricably entangled in defining Indian status."[72] Again, were the Court to take the step that Justice Alito gestured toward, it would treat a category characterized by overlapping

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65 528 US 495 (2000).

66 Id at 514–25. Under state law, a "Hawaiian" was "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Hawaii Rev Stat § 10-2.

67 *Rice*, 528 US at 515.

68 Id at 517.

69 570 US 637 (2013).

70 Id at 655–56.

71 Marcia Zug, Adoptive Couple v. Baby Girl*: Two-and-a-Half Ways to Destroy Indian Law*, 111 Mich L Rev First Impressions 46, 49–50 (2013).

72 Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan L Rev 1025, 1034 (2018).

understandings of national origin and race as dominated by the latter. So doing, it would predictably and substantially retard the interests of a vulnerable and socially marginalized minority group.[73]

Fourth and finally, I want to draw attention to a way in which national origin discrimination plays a large role in American public life essentially without any meaningful constitutional limitation. The continued force of national origin categories in this way gives the lie to the notion that such discrimination is beyond the constitutional pale in this first instance. To the contrary, it turns out to be constitutive of becoming an American.

Since 1924, the immigration statutes of the United States have employed national origin as a criterion for selecting among potential new residents (and, by implication, new citizens). The 1924 law itself installed a system of national origin quotas.[74] This supplemented the racial criterion for citizenship that had been in place since 1790.[75] Because the quotas were calibrated in terms of the 1920 demographic composition of the United States, they worked to preserve then-existing ratios of racial and ethnic groups.[76] The use of national origin as a criterion for sorting among applications for entrance to the nation had already been upheld in challenges[77] to the Chinese Exclusion Acts of 1882[78] and 1884.[79] Such quotas persisted as a central, architectural element of federal immigration law until 1965.[80] There is nothing obvious or necessary about their role in immigration law, however. Look

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73 Id at 1074 (characterizing the effect of Justice Alito's suggestion as "not [ ] to repudiate the past but to revive it, reinstating the assimilationist imperative at the root of much disastrous federal policy").

74 Immigration Act of 1924, Pub L No 68-139, 43 Stat 153, 155–56, 159–60 (prescribing rights of immigrants to United States visas). The effective date for the national origin system for determining immigration quotas was delayed until 1929. Edward P. Hutchinson, *Legislative History of American Immigration Policy 1798–1965* 470 (U Pa 1981).

75 Act of Mar 26, 1790, § 1, 1 Stat 103–04 (establishing conditions and procedures for naturalization).

76 Helen F. Eckerson, *Immigration and National Origins*, 367 Annals Am Acad Pol & Soc Sci 4, 7–8 (1966).

77 See *Chae Chan Ping v United States*, 130 US 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); *Fong Yue Ting v United States*, 149 US 698, 705 (1893), quoting *Chae Chan Ping*, 130 US at 603–04.

78 Pub L No 47-126, 22 Stat 58.

79 Pub L No 48-220, 23 Stat 115.

80 Act of Oct 3, 1965, Pub L No 89-236, 79 Stat 911, codified as amended in various sections of Title 8 (abolishing national origin quotas).

north and one sees a country that has long employed a points-based system that emphasizes skills—a system that pays scant attention to nationality.[81]

Instead, the role of immigration quotas has always been inward facing: They formed the nation first in literal demographic terms and then in more subtle psychological terms by reflecting and confirming shared senses of racial (white) identity. Enacted with the support of a "network of influential white nationalists,"[82] they were crafted "to maintain the America and Americans of the past."[83] According to the authoritative account of historian Mae M. Ngai, national origin quotas reflected not just "race-based nativism, which favored the 'Nordics' of northern and western Europe over the 'undesirable races' of eastern and southern Europe," they also nurtured "a constellation of reconstructed racial categories, in which race and nationality—concepts that had been loosely conflated since the nineteenth century—disaggregated and realigned in new and uneven ways."[84] National origin quotas in immigration law, Ngai argues, inflected the racial self-understandings of Americans by confirming the existence of a "consanguine white race" of Americans.[85] Consistent with this account, immigrant groups such as Italian Americans campaigned through the 1940s and 1950s to abolish a national origin quota system precisely because it expressed a public judgment of them as "culturally, and perhaps racially, undesirable."[86] National origin discrimination against the foreigner, we see, plainly and painfully rebounds into the domestic quarter.

National origin discrimination remains part of the immigration laws today. Indeed, it plays much the same purifying,

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81 See Charles M. Beach, Alan G. Green, and Christopher Worswick, *Impacts of the Point System and Immigration Policy Levers on Skill Characteristics of Canadian Immigrants*, 27 Rsrch Labor Econ 349, 349–51 (2007).

82 Elizabeth F. Cohen, *Illegal: How America's Lawless Immigration Regime Threatens Us All* 91 (Basic 2020). For a more nuanced account, see Son-Thierry Ly and Patrick Weil, *The Antiracist Origin of the Quota System*, 77 Soc Rsrch 45, 47, 48–53 (2010) (arguing that the "goal for the quota system was to restrict immigration efficiently and mathematically but to end racial discrimination against Asiatics [sic] by establishing a system that would include all foreign countries") (emphasis omitted).

83 Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 Yale L J 1012, 1021 (2010) (emphasis omitted).

84 Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J Am Hist 67, 69 (1999).

85 Id at 70 (quotation marks omitted), quoting Matthew Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Harvard 1998).

86 Danielle Battisti, *The American Committee on Italian Migration, Anti-Communism, and Immigration Reform*, 31 J Am Ethnic Hist 11, 19 (2012).

expressive function that it did until 1965. Perhaps the leading example is the so-called "travel ban" installed in January 2017 against nationals of largely Muslim-majority nations by President Donald Trump.[87] The ban was challenged as a violation of religious neutrality,[88] but upheld by the Supreme Court.[89] I have criticized that judgment as legally flawed and morally execrable elsewhere, and will not rehash those points here.[90] Its relevance here is for what was off the page rather than its manifold errors on the page: nowhere in the challenges to the ban and the various judicial opinions that it produced is there even a scintilla of reflection on the constitutional permissibility of national origin discrimination in immigration law. Even though equal protection law has been applied with full rigor to the citizenship-acquisition elements of the immigration code,[91] the prohibition of national origin discrimination that obtains in other policy domains simply finds no purchase at the border.[92] By force of brute assumption, it is deemed constitutional.

No explanation is needed or has yet been tendered for this constitutional caesura. *A fortiori*, the more subtle (yet likely more numerically consequential) disparate impacts of enforcement-related changes raise no legal red flag.[93] The jurisprudential legacy of the Chinese Exclusion Acts in this regard is so overwhelming that it can travel onward through doctrinal time without even casual mention or explanation.[94]

In summary, national origin discrimination continues unabated in immigration law, where it has the longest and most powerful pedigree in shaping US demographics and attitudes toward race and ethnicity to conform with white ethnonationalist norms.[95] More plainly stated, it is race's alter ego at the border.

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87 See Huq, 118 Mich L Rev at 61–68 (cited in note 53) (providing an extensive account of the various iterations of the ban).

88 See, for example, *Hawaii v Trump*, 241 F Supp 3d 1119, 1136 (D Hawaii 2017) (noting "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order").

89 *Trump v Hawaii*, 138 S Ct 2392, 2423 (2018).

90 See generally Huq, 118 Mich L Rev 47 (cited in note 53).

91 See *Sessions v Morales-Santana*, 137 S Ct 1678, 1692–93 (2017) (invalidating provision on the basis of gender equality jurisprudence).

92 The leading case is *Narenji v Civiletti*, 617 F2d 745, 748 (DC Cir 1979).

93 See Sabrina Tavernese, *Immigrant Population Growth in the U.S. Slows to a Trickle* (NY Times, Sept 26, 2019), archived at https://perma.cc/H9SC-5ZJT.

94 See text accompanying note 81.

95 In a similar vein, see Daniel Denvir, *All-American Nativism: How the Bipartisan War on Immigrants Explains Politics as We Know It* 11–12 (Verso 2020) ("Nativism is . . .

At the same time, ameliorative programs aimed at protecting vulnerable minorities previously organized on national grounds falter or fall on the ground that they disrespect individual citizens. Laced more deeply into the historical roots of equal protection doctrine, we find not judicial scrutiny of such distinctions but instead the judicial deployment of national origin as a rhetorical tool for whittling away the constitutional barriers against racial distinctions. Rather than race's alter ego, it is here racism's enabling escutcheon.

In sum, by considering the Court's jurisprudence in the large, we can see yet another sort of double movement of national origin discrimination—one that is quite distinct from the double movement in the *Figueroa* decision described at the threshold. It is at once a sword against the diverse immigrant, plaintively seeking aid at the threshold, and also a shield against the redistributive claims of the colonized indigene.

This Janus-faced doctrine of national origin discrimination is, in other words, not one that has redounded to the benefit of the vulnerable racial and ethnic minorities—those, one might once have supposed, who ought to receive the "special care" of equality under the Fifth and Fourteenth Amendments.[96] Its facility for delighting other, more powerful, interest groups needs little elaboration.

III.

National origin is not what it seems, then, so far as the constitutional law of equality is concerned. But then what is it, and what should it be? An Essay of this form is no place for articulating a theory of nationality for constitutional law. But I would be equally awry in honoring the robust and rich intellectual legacy of Judge Wood if I had nothing positive to say on this score, and if there was no ground on which her own distinctive double movement in *Figueroa*, which involved gesturing toward the possibility of discrimination without the need to condemn the district court judge, could not be glossed.[97]

To think about "national origin," it is useful to have in mind a sense of what a "nation" might be. So let's start there, even if the analysis must be almost comically brief. (Consider this a

a concept that allows us to rethink racism itself as a bedrock nationalist population politics that functions to control the movement and status of racialized others.").

[96] *The Slaughter-House Cases*, 83 US at 78.

[97] See text accompanying notes 1–10.

promissory note for future work, if you must). On the standard view in political theory, a nation is a kind of community, albeit a necessarily "imagined" one, to take up a much-abused yet perennially useful phrase.[98] It is almost never formed through "spontaneous processes of ethnic self-definition," but rather via the "exigencies of power."[99] Central to such processes is often the creation and propagation of an "'ideological' myth of origins and descent."[100] The role of ideology can be understood in more or less purposive ways. Professor Ernest Gellner, for example, famously distinguished between a "cultural" definition of the nation in which people are united by "a system of ideas and signs and associations and ways of behaving and communicating," and a "voluntaristic" one in which "nations are artefacts of men's [sic] convictions and loyalties and solidarities."[101] This reflects a distinction between an inherited and a consciously assumed ideology of national origin.

I am not sure we need here to choose between Gellner's options. Whichever view we take, it seems likely that the sense of belonging to a nation (that is, having a national origin) involves both a historical and also a dynamic, ongoing process of affirmation and reflection among the national group, and in particular between the group and the state. The nation is a matter of ongoing, active, and inexorably political self-conception, as much as it is a historical object. As such, its basic terms can never be settled finally as beyond reformulation and debate. The idea of the nation is instead mutative, dialogic, never as fixed as its participants like and need to imagine.[102] Such a dynamic can over time yield different arcs. In comparison to some historical baseline, we might see moments of generosity resting on the recognition of widely shared

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98 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 4–7 (Verso rev ed 2006) (emphasizing the cultural roots of nationalism). To be clear, Professor Anderson's account—which places stress on the role of print cultures—has been forcefully challenged as a covering law. See, for example, Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* 19–22, 50–51 (Minnesota 1993).

99 David Miller, *The Ethical Significance of Nationality*, 98 Ethics 647, 654 (1988).

100 Anthony D. Smith, *The Ethnic Origins of Nations* 147 (Oxford 1986).

101 Ernest Gellner, *Nations and Nationalism* 7 (Cornell 1983). See also id at 53–58.

102 Hence the perpetual possibility of imagining the nation's absence. See, for example, John Lennon, *Imagine*, on Imagine (Apple Records 1971) ("Imagine there's no countries . . . .").

human commonalities.[103] Or else we might perceive a rebarbative and atavistic gaze, looking out to find only barbarians beyond the gates.

To understand the role that national origin discrimination can and should play in our constitutional law, therefore, we should start by looking at our own conception of American national identity, and the contrastive function of other nationalities in its rhetorical logic. To understand the normative force of aversive assignment of "Mexican" or "Japanese" as a label, we must start by understanding how these terms are used through subtle counterpoint to define the American.

A theme running through the examples canvassed in this Essay has been the role that constitutional law, and in particular the constitutional law of equality, has played in this dynamic, specifically through its distinction between an American national origin and its alien alternatives. Constitutional law here has been an engine of, not a friction upon, social subordination.

Let me offer in closing a possible lesson, which can be extracted from these examples and the various criticisms that I have made: the idea of national origin as a suspect class is a salutary recognition of the possibility that a dominant social group, commanding the reins of federal government in general and the immigration power in particular, will employ that power in ways that either narrow the gyre of national belonging, or else re-enact domestic prejudices nurtured in the belly of racial or ethnic ferments. Often, this exercise will use the rhetorical terms of national origin discrimination. The latter's inclusion in the enumeration of suspect classes embodies a salutary recognition that fashioning an American nation is a task that can be furthered (and often has been furthered) by the maligning and suppression of "other" nations. These can often be crisply discerned in rhetorical juxtaposition to the American nation.

A worthwhile project of equal protection might plausibly be to guard against the tendency toward subordination in the process of constructing and revising the latter. National origin discrimination, on such an account, would be understood as a pernicious spillover from the fashioning of an American nation. Foremost among the continuing presupposition conducive to such spillovers is the misguided assumption that national origin

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[103] Consider Miller, 98 Ethics at 661 (cited in note 99) ("The universalist case for nationality . . . is that it creates communities with the widest feasible membership, and therefore with the greatest scope for redistribution in favor of the needy.").

discrimination is a logical and innocuous means of organizing immigration law. Simply said, it is neither.

To be sure, our jurisprudence now reads from a different score. Its melodies suggest that federal courts, as instruments of some dominant national political coalition,[104] are more well-tuned to campaigns that abet the hatred of others than campaigns that abate exclusionary nation-making projects. At least if history or present practice is any guide, they are institutionally maladapted to this task of equal protection when it comes to minorities defined by perceived or actual national origin. At best, they can nibble at the edges of the problem—as the *Figueroa* opinion valiantly did—but they are not well oriented for wholesale course-correction. For that purpose, another form of political mobilization and change is required.[105] In 1924, it took forty-one years to happen. This time, I hope the wait is shorter.

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[104] See generally Aziz Z. Huq, *Why Judicial Independence Fails*, 115 Nw U L Rev (forthcoming 2021).

[105] See Cohen, *Illegal* at 191–92 (cited in note 82) (underscoring the need for ideological change).