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**Unfit for the Constitution
Nativism and the Constitution, From the Founding
Fathers to Donald Trump**

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JARED A. GOLDSTEIN

ABSTRACT

The executive order on travel issued by President Donald Trump in January 2017 does not use the word Muslim but instead identifies the foreigners who should be barred from entry as those who “bear hostile attitudes” toward the United States “and its founding principles” and who “do not support the Constitution.” As this article shows, anti-immigrant movements have long used hostility-to-the-Constitution as the touchstone for identifying unwanted immigrants. In the 1840s, the Know-Nothings opposed Irish immigration based on a belief that Catholicism was incompatible with the Constitution. In 1882, when Congress enacted the Chinese Exclusion Act, it declared that the Chinese were too foreign to embrace constitutional principles. In 1924, Congress enacted the National Origins Act out of the belief that members of the so-called Nordics race alone were genetically disposed to embrace constitutional values, while Jews, Italians, Poles, and others would destroy the nation’s constitutional system. Congress repudiated these nativist beliefs in 1965 when it adopted the Immigration and Nationality Act, which declares that people of any race or nationality are equally capable of embracing the nation’s constitutional values.

The executive order, however, demonstrates the persistence of the nativist belief that foreigners who do not share traits considered prototypically American are likely to harbor hostility to constitutional values. The history of nativism and the Constitution explored in this article reveals that the belief that American identity is defined by devotion to a common creed embodied in the Constitution has long been intertwined with beliefs that American identity is also defined by race, religion, and ethnicity.

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INTRODUCTION

This article tells the story of an idea. It is an old idea, an ugly idea, a discredited idea. It is a nativist idea, the idea that the Constitution was made only for some people, while others must be excluded from the United States out of suspicion that they harbor hostility to the nation's constitutional principles.

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

The belief that constitutional devotion can only be expected by those who share the race or religion of native-born Americans goes back at least to the Naturalization Act of 1795, when Congress established that naturalized citizenship could only be bestowed upon someone who was a “free white person” and who was “attached to the principles of the constitution of the United States.”¹ Under that law, only persons identified as “white” were seen as capable of forming attachment to constitutional principles. A similar belief formed the basis for the anti-Catholic hostility of the Know-Nothing Party of the 1850s, which asserted that Catholicism was incompatible with the Constitution because Catholics would always owe allegiance to the Pope, not the Constitution.² When Congress enacted the Chinese Exclusion Act in 1882, it declared that Chinese people were too foreign to abide by the Constitution.³ At the peak of nativism, Congress enacted the National Origins Act of 1924

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¹ Act of Jan. 19, 1795, 1 Stat. 414; see *infra* notes 48-55 and accompanying text.

² See *infra* notes 63-66 and accompanying text.

³ Act of May 6, 1882, 22 Stat. 58; see *infra* notes 67-72 and accompanying text.

and declared that protecting the Constitution required excluding immigrants from all nations except those that contributed to the United States' colonial stock.⁴

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

The principle on which this country was founded and by which it has always governed is that Americanism is a matter of the mind and the heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy.⁵

Roosevelt expressed what has become the conventional understanding of American nationalism, that what unites the nation, and what makes America America, is a shared devotion to a common creed of liberty, equality, and democracy, a creed expressed most centrally in the Constitution. It is a universal creed open to anyone without regard to race, religion, or ancestry.

Nativist beliefs about the Constitution, however, are not dead. For decades, white nationalists and other extremists have kept alive the belief that people who share the racial, ethnic, and religious traits thought of as prototypically American are disposed to embrace the nation's constitutional principles, while others should be excluded to protect constitutional values. With the election of Donald Trump, adherents of constitutional nativism are back in power.⁶ On January 27, 2017, President Trump issued an executive order to bar citizens from seven predominately Muslim countries from entering the United States.⁷ The order does not use the word Muslim but instead identifies the foreigners who should be excluded as those who “bear hostile attitudes” toward the United States “and its founding principles” and who “do not support the Constitution.”⁸ The order appears to carry out the conviction,

⁴ The Immigration Act of 1924, Pub L No 68-139, ch. 190, 43 Stat 153; see *infra* notes 73-222 and accompanying text.

⁵ *Praises Army Plan for Japanese Unit*, New York Times (Feb. 5, 1943).

⁶ See *infra* notes 306-361 and accompanying text.

⁷ Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

⁸ *Id.* § 1; see *infra* notes 333-361 and accompanying text.

advanced by many on the conspiracy-minded right, including numerous officials in the new administration, that Islam is incompatible with the Constitution.⁹

As this article shows, nativist movements have long used hostility-to-the-Constitution as the touchstone for identifying unwanted immigrants. To provide a framework for understanding what is distinctive about nativist invocations of the Constitution, Part I looks at conventional understandings of American nationalism. As that part shows, American national identity is conventionally defined by devotion to the nation's fundamental commitments to liberty and equality, expressed in the Constitution. Nativist movements, in contrast, are typically understood to arise out of an aberrant conception of American nationalism that considers race, religion, and ethnicity to be core aspects of American identity, rather than devotion to constitutional ideals.

Part II explores the long history of nativist invocations of hostility-to-the-Constitution as a basis for excluding unwanted immigrants. As this history shows, nativists share the conventional belief that being American means believing in a common creed embodied in the Constitution. They do not believe, however, that everyone is capable of embracing that creed. Whenever anti-immigrant movements have sought to exclude a group of foreigners—whether it was Catholics, Chinese, Italians, Jews, or Muslims—they have claimed that the unwanted immigrants cannot be good Americans because they are hostile to the Constitution.

After discussing the Know-Nothings of the 1850s and the Chinese Exclusion Act of 1882, Part II focuses on the adoption of the National Origins Act of 1924, the high water mark of American nativism. As the history of that statute reveals, in the years leading up to 1924, two competing national movements sought to address the problems of immigration. On the one hand, an Americanization movement sought to educate immigrants on American values, principally the nation's civic values expressed in the Constitution, and thereby transform the immigrants into good citizens. On the other hand, an immigration restriction movement sought to exclude unwanted immigrants based on the conviction that they could never embrace American values. Both movements shared a common understanding that American national identity is defined by commitment to a creed expressed in the Constitution. Where the movements differed was over who was capable of embracing that creed. In enacting the National Origins Act, Congress sided with the nativists and concluded that maintaining constitutional government required maintaining

⁹ Id.

the nation's original ethnic stock and the exclusion of races that were deemed unfit for the Constitution.

Part III examines the persistence of the belief that people who differ in race, religion, or ethnicity from native-born Americans are likely to bear hostility to constitutional values. In 1965, Congress repudiated this belief when it adopted the Immigration and Nationality Act and declared that people of any race, religion, or nationality are equally capable of becoming citizens.¹⁰ Since then, the conviction that American identity is defined by commitment to the nation's constitutional principles has gained the status of conventional wisdom, and every President elected since 1965, has declared adherence to the now-orthodox view that anyone of any race, religion, or nationality can become American through commitment to the nation's constitutional ideals.¹¹ Since 1965, white nationalists have kept alive the belief that, at heart, the United States is really a white, European, Christian nation. They look on 1965 as the year that America opened the floodgates to immigrants from Latin America and Asia, who do not embrace American values. Today, Muslims are a principle target of anti-immigrant activists, who declare that Islam is incompatible with the Constitution. With the election of Donald Trump, nativism has moved from the margins back to the White House, and the United States seems poised to return to a policy of excluding some people, defined by religion and national origin, out of suspicion that they are hostile to the Constitution.¹²

¹⁰ 8 U.S.C. § 1152; see *infra* notes 223-253 and accompanying text.

¹¹ In his first inaugural address, President George W. Bush declared that “America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift us above our interests and teach us what it means to be citizens.” George W. Bush, *First Inaugural Address*, in SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, at 2, http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf. See Barack Obama, *Inaugural Address by President Barack Obama*, Washington, D.C. (Jan. 21, 2013), <http://www.whitehouse.gov/the-pressoffice/2013/01/21/inaugural-address-president-barack-obama> (“What binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea.”); Ronald Reagan, Labor Day Speech at Liberty State Park, Jersey City, New Jersey Sept. 1, 1980), <https://reaganlibrary.archives.gov/archives/reference/9.1.80.html> (Americans “came from different lands but they shared the same values, the same dream.”).

¹² See *infra* notes 333-361 and accompanying text.

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

Benedict Anderson has usefully described nations as “imagined communities.”¹³ A nation “is imagined,” Anderson wrote, “because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”¹⁴ As a result, members of a nation carry within their imaginations notions of what binds the community together and makes the community a nation, whether it is blood, language, or ideology. A central preoccupation of scholarship on nationalism has been to understand how different nations define national communities, that is, what common conceptions members of a community believe bind them together and justify their demands for sovereignty.¹⁵ Some political scientists have divided nationalist conceptions into two broad types—civic nationalism and ethnic nationalism.¹⁶ Ethnic nationalists identify members of the national community as those sharing a common ethnic, religious, or racial background.¹⁷ Civic nationalism, in contrast, identifies members of the nation by commitment to the nation’s political creed.¹⁸

Scholars almost uniformly characterize the United States as a civic rather than an ethnic nation. Writing in 1944, Gunnar Myrdal famously described the “American Creed” that binds the nation together:

Americans of all national origins, classes, regions,
creeds, and colors, have something in common: a

¹³ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS IN THE ORIGIN AND SPREAD OF NATIONALISM* 6 (1993); see also HANS KOHN, *THE IDEA OF NATIONALISM* 10 (1944) (“Nationalism is first and foremost a state of mind, an act of consciousness.”).

¹⁴ ANDERSON, *IMAGINED COMMUNITIES*, *supra* note 13, at 6.

¹⁵ See, e.g., Introduction, *NATIONALISM* 3-5 (eds. John Hutchinson & Anthony D. Smith) (1994).

¹⁶ See, e.g., MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993); ANTHONY D. SMITH, *NATIONALISM: THEORY, IDEOLOGY, HISTORY* 42-46 (2010); LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 11 (1992; see also JAMES G. KELLAS, *THE POLITICS OF NATIONALISM AND ETHNICITY* 66 (2d ed. 1998) (discussing possible middle ground between civil and ethnic nationalism)).

¹⁷ As David Ignatieff has put it, for ethnic nationalists, “[w]hat gave unity to the nation, what made it a home, a place of passionate attachment, was not the cold contrivance of shared rights but the people’s preexisting ethnic characteristics: their language, religion, customs, and traditions.” IGNATIEFF, *BLOOD AND BELONGING*, *supra* note 16, at 7.

¹⁸ *Id.* at 6.

social ethos, a political creed. It is difficult to avoid the judgment that this ‘American Creed’ is the cement in the structure of this great and disparate nation.¹⁹

The first book-length examination of the nature of American nationalism, Hans Kohn’s *AMERICAN NATIONALISM*, published in 1957, similarly described American nationalism in civic terms. As Kohn wrote, The United States “was not founded on the common attributes of nationhood—language, cultural tradition, historical territory or common descent—but on an idea which singled out the new nation among the nations of the earth.”²⁰ More recent scholars have expressed their agreement with this conclusion.²¹

For Kohn and others, the Constitution represents the central expression of the nation’s civic ideals that bind together the United States. As Hans Kohn wrote: “The American Constitution represents the lifeblood of the American nation, its supreme symbol and manifestation. It is so intimately welded with the national existence itself that the two have become inseparable.”²² Constitutional law professors have enthusiastically shared the view that what defines American identity is a commitment to constitutional ideals. As Laurence Tribe has written: “[The Constitution’s] text and invisible structure are part of the nation’s beating heart.”²³ This view is widely shared on both the left and right. Mark Tushnet and Akhil Amar have each explained that “[t]he Constitution constitutes the American people,” while Steven Calabresi has gushed that “Being an American is a function of what you believe and where your loyalties lie. It has nothing to do with your race, or where you were born,

¹⁹ GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 3-4 (1944).

²⁰ HANS KOHN, *AMERICAN NATIONALISM*, supra note 13, at 20.

²¹ See, e.g., SMITH, *NATIONALISM*, supra note 16, at 45; Kenneth L. Karst, *The Bonds of American Nationhood*, 21 *Cardozo L. Rev.* 1141, 1144 (2000) (“From the time of the earliest European arrivals, we have lacked the homogeneities of ancestry, language, and religion that have combined in other countries to unite a “people” and make a nation. The center of gravity for American identity has been the cluster of values that, together, constitute the American civic culture: individual liberty, egalitarianism, democracy, nationalism, and tolerance.”).

²² HANS KOHN, *AMERICAN NATIONALISM*, supra note 13, at 20.

²³ Laurence Tribe, *America’s Constitutional Narrative*, 141 *DAEDALUS* 18, 23 (2012); Justice Felix Frankfurter declared that “American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.” *DIARIES OF FELIX FRANKFURTER* 212 (Joseph P. Lash ed., 1975).

or who your parents or ancestors were.”²⁴ Jack Balkin has declared that democratic legitimacy requires viewing the Constitution as “our Constitution,” which “simultaneously constitutes us as the people to whom our Constitution belongs [and] accepts and endorses a constitutional story about who Americans are and what America is.”²⁵

Political scientists and constitutional law professors are far from alone in proclaiming that American national identity is based on commitment to the principles found in the Constitution. For decades, every American president has invoked this understanding of American identity. As George W. Bush declared in his first inaugural address, “America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift us above our interests and teach us what it means to be citizens.”²⁶ Presidents Reagan, Clinton, and Obama said the same thing in almost identical language.²⁷ In what Michael Billig has called banal nationalism—the daily and often unnoticed reminders that instill national identity—the common American Creed is invoked every day by millions of school children who pledge allegiance to the Republic and its constitutional ideals—“one Nation under God, indivisible, with liberty and justice for all.”²⁸ Before the start of sporting events, from high school football games to the Superbowl, millions of Americans sing of our constitutional ideals, declaring the United States “the land of the free and the home of the brave.”²⁹ Candidates for office

²⁴ Steven G. Calabresi, “A *Shining City On A Hill*”: American Exceptionalism And The Supreme Court’s Practice Of Relying On Foreign Law, 86 B.U. L. Rev. 1335, 1414 (2006).

²⁵ JACK M. BALKIN, LIVING ORIGINALISM 61 (2011).

²⁶ George W. Bush, *First Inaugural Address*, in SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, at 2, http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf (“America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift us above our interests and teach us what it means to be citizens.”).

²⁷ See Barack Obama, *Inaugural Address by President Barack Obama*, Washington, D.C. (Jan. 21, 2013), <http://www.whitehouse.gov/the-pressoffice/2013/01/21/inaugural-address-president-barack-obama> (“What binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea.”); Ronald Reagan, Labor Day Speech at Liberty State Park, Jersey City, New Jersey Sept. 1, 1980, <https://reaganlibrary.archives.gov/archives/reference/9.1.80.html> (Americans “came from different lands but they shared the same values, the same dream.”).

²⁸ See 4 U.S.C. § 4; MICHAEL BILLIG, BANAL NATIONALISM 6 (1995).

²⁹ See 36 U.S.C. § 301(a) (“The composition consisting of the words and music known as the Star Spangled Banner is the national anthem.”).

from small town mayors to President of the United States routinely remind us that what makes us American is devotion to the Constitution.³⁰ A large body of popular literature agrees that the Constitution makes us who we are.³¹ There is a museum devoted to it.³² Congress has declared a national holiday to remind Americans of it.³³

Outsiders also believe that national identity in the United States arises out of shared values expressed in the nation's constitution. In advocating for a stronger European Union, the German philosopher Jurgen Habermas argued that Europe should adopt what he called "constitutional patriotism," asserting that the United States' experience could serve as a model for an integrated Europe dedicated to a set of principles enshrined in a Europe-wide constitution.³⁴ Opponents of strengthening the EU countered that there is no common European identity, no feeling of commonality among Europeans that would justify the loyalty of citizens to a European state.³⁵ Habermas and others responded that national identity does not need to be based on common language or ethnicity, pointing to the example of the United States to argue

³⁰ See, e.g., VANESSA B. BEASLEY, *YOU, THE PEOPLE: AMERICAN NATIONAL IDENTITY IN PRESIDENTIAL RHETORIC* 6-67 (2011); MICHAEL G. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (2d ed. 2004).

³¹ See, e.g., ANDREW P. NAPOLITANO, *THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND* (2007); CHARLES KRAUT, *THE PATRIOT'S GUIDE TO TAKING AMERICA BACK* 159 (2010) ("Most of all, to support and defend the Constitution Americans must understand, appreciate, and love the principles put forth by this sacred document."); SARAH PALIN, *AMERICAN BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG* 63 (2010) (declaring that what makes the United States exceptional is a "unique set of beliefs and national qualities" established by the Founders).

³² See *About the Constitution Center*, <http://constitutioncenter.org/about> (describing the National Constitution Center, in Philadelphia, Pennsylvania, as the "Museum of We the People").

³³ See 36 U.S.C.A. § 106 (establishing September 17th as "Constitution Day and Citizenship Day").

³⁴ See JAN-WERNER MULLER, *CONSTITUTIONAL PATRIOTISM* 1 (2007) ("'Constitutional patriotism'—as understood by those who originally put forward the idea . . .—designates the idea that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution.").

³⁵ See, e.g., Jurgen Kaube, *Are We Reasonable?*, in *OLD EUROPE, NEW EUROPE, CORE EUROPE: TRANSATLANTIC RELATIONS AFTER THE IRAQ WAR* 53-58 (Daniel Levy et al., eds.) (2005).

that national identity can be based on values enshrined in a constitution alone.³⁶

The conventional understanding that American nationalism is defined by commitment to constitutional ideals provides a comforting, even inspiring ideal of national identity.³⁷ It is said to avoid the irrational hatred and bigotry associated with more primitive forms of ethnonationalism, identified by President Bush as nations “united by blood or birth or soil.” Instead of violent, sectarian, tribal, and Old World forms of nationalism, the creedal conception of American nationalism teaches that being American means being committed to universal ideals like individual liberty and human equality.

The belief that American nationalism is defined by commitment to a common creed is ahistorical. When Roosevelt declared that “A good American is one who is loyal to this country and to our creed of liberty and democracy,” he claimed that is how it has “always” been.³⁸ In his monumental work, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997), the American historian Rogers Smith has challenged the conventional understanding that American national identity has always been defined by commitment to ideology rather than by ascriptive attributes like race, religion, or gender. Smith advances a “multiple traditions” hypothesis, in which the United States has long had competing conceptions of nationalism.³⁹ As Smith argues, the “orthodoxy on American civic identity” has failed to give sufficient weight to inegalitarian traditions throughout American history.⁴⁰ If the conventional understanding is correct that American nationalism is based on commitment to the American Creed, then episodes in American history that conflict with the Creed—slavery and segregation, the conquest of Native

³⁶ To Habermas, the United States experience serves both as a model and as a foil for European constitutional patriotism. Habermas argues that the common European ideals for a European constitution must differ considerably from those of the American Creed, emphasizing collective responsibility, in contrast to the American emphasis on individual liberty. Yet so far, constitutional patriotism has not taken hold as a dominant European ideology.

³⁷ In earlier articles, I have explored some episodes in the history of constitutional nationalism. See Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 *Temple L. Rev.* 287 (2014); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 *Ariz. L. Rev.* 827 (2011); Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 *Nw. L. Rev.* 1807 (2011).

³⁸ See *Praises Army Plan for Japanese Unit*, *New York Times* (Feb. 5, 1943).

³⁹ ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)

⁴⁰ *Id.* at 15.

American peoples, the Chinese Exclusion and Japanese internment, to name a few prominent examples—must be aberrations, mistakes the nation made while it was on its way to a more complete commitment to its true national identity. Smith rejects this view and argues that “hierarchical racial theories,” among other ascriptive beliefs, “have had great prestige through most of American history.”⁴¹ Smith argues that the conviction that American identity is reserved for white Protestant men has not been a mere “inconsistent afterthought” in American history but should instead be acknowledged as a traditional conception of American identity.⁴²

Smith has performed an invaluable service by demonstrating that American history has long had competing traditions of nationalism and that the liberal republican tradition has not always had hegemony. Several scholars have criticized Smith’s work because it divides traditions of national belonging into two neat categories, the liberal republican tradition and an illiberal undemocratic ascriptive tradition.⁴³ Political scientist James Morone has summarized this critique:

[A]scriptive theorists like Smith portray the two visions of community locked in a continual dialectic. Generous American visions of equality and inclusion face off against prejudice and exclusion. For Smith, the liberal interpretation of American history is merely the angel of America’s better nature. In every era, it confronts an entirely different impulse: the equally American urge to reject groups and repress rights on the basis of ascriptive traits.⁴⁴

That is, Smith identifies two competing traditions – a civic nationalist traditional, which identifies American nationalism with the American creed embodied in the Constitution, and an ethnonationalist tradition, that defines what it means to be American by race, religion, and sex—and he suggests that the two traditions are independent and distinct.

⁴¹ Id. at 23.

⁴² Id. at 28.

⁴³ See BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 12 (2001); Karen Orren, Structure, Sequence, and Subordination in American Political Culture: What’s Traditions Got to Do With It?, 8 *J. Pol’y Hist.* 470 (1996).

⁴⁴ James A. Morone, Political Culture: Consensus, Conflict, and Culture War, in Richard Valelly et al., eds., *THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT* 132, 140 (2016).

This Article seeks to show that America’s competing civic republican and ethnonationalist traditions of have long been intertwined in that each side in the nation’s many disputes over national identity have rallied around the Constitution as the source and expression of their understanding of what it means to be American. Beliefs in racial, religious, and ethnic supremacy have often been embedded in claims about what it means to embrace the Constitution. In particular, as the history of American nativism discussed in the next part shows, adherents of both ascriptive and civic nationalist conceptions of American nationalism have long agreed that commitment to constitutional principles is central to American identity. They have disagreed, however, over who is capable of making that commitment. Thus, when Know Nothings sought to exclude Catholics, when Congress excluded Chinese immigrants, and when Congress adopted the National Origins Act of 1924, nativists declared that restricting immigration to people who shared the nation’s ethnic, racial, or religions heritage was justified, not in spite of the nation’s constitutional traditions, but in order to preserve them.

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

As the American historian John Higham has explained, nativism should be understood as “as intense opposition to an internal minority on the ground of its foreign (i.e. ‘un-American’) connections.”⁴⁵ The basis for rejecting different groups has varied over time—some were singled out because of their religion, others for their race, others for their ethnicity, and others for their political views.⁴⁶ As Higham has noted, however, “While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.”⁴⁷

This Part provides a history of nativist use of constitutional commitment as a touchstone for dividing good Americans from dangerous foreigners. As this history shows, nativists have long employed the patriotic language of constitutional devotion to argue that some peoples must be excluded from the nation. Part A discusses nativist movements from the founding era to the Chinese Exclusion Act. As that section shows, throughout the nineteenth century, American political movements asserted that only people of British

⁴⁵ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* at 4 (2d ed. 1977).

⁴⁶ *Id.*

⁴⁷ *Id.*

descent were capable of embracing America's constitutional system, and this belief repeatedly formed the basis for immigration and naturalization policies. Part B focuses on the crowning achievement of American nativism, the adoption of the National Origins Act of 1924. The history of the National Origins Act reveals a clash between competing conceptions of American national identity, between those who believed that anyone could embrace America's national values and those who believed that only America's longstanding ethnic core were suited to become American citizens. In enacting the National Origins Act, Congress sided with the nativists and declared that the preservation of the Constitution and American national identity required closing the doors to all immigrants except those who shared the racial background of the nation's original ethnic stock.

A. Nativism and the Constitution from the Founding Era to the Chinese Exclusion

Traditions of American nativism predate the establishment of the United States.⁴⁸ In 1751, Benjamin Franklin expressed his belief that immigration to the American Colonies should be limited to “the lovely white” and should exclude “all blacks and tawneys.”⁴⁹ Franklin conceded that his racial preferences arose because he was “partial to the complexion of my Country,” but he insisted that “such kind of partiality is natural to Mankind.”⁵⁰ Franklin further argued that it was not merely whites who should be preferred, but British subjects alone should be allowed to immigrate, while Germans (whom he referred to as “Palatines”) should be excluded:

Why should the Palatine boors be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a Colony of *Aliens*, who will shortly be so numerous as to Germanize us instead of us Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion.⁵¹

⁴⁸ The history of American nativism is traced most authoritatively in HIGHAM, STRANGERS IN THE LAND, *supra* note 45.

⁴⁹ Benjamin Franklin, Observations Concerning the Increase of Mankind (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN 227-34 (Leonard W. Labaree et al. eds., 1961).

⁵⁰ Id.

⁵¹ Id.

Franklin's argument expresses many familiar nativist themes: immigration should be restricted to those who share the traits of the native-born population—their complexion, culture, national origin, and language. Foreigners who do not share these traits are inherently suspect; they are “boors” who “herd together” instead of assimilating, maintaining their “Language and Manners” instead of adopting British ones. As with many subsequent nativists, Franklin described unwanted immigrants in animal metaphors, as a “swarm” and as a “herd,” and their arrival in military metaphors, as an “invasion.”⁵² Admitting these foreigners, Franklin warned, would undermine and ultimately destroy the predominant culture of the American colonies.

After the nation's founding, nativist beliefs were often expressed in constitutional terms, and unwanted foreigners were often described as incapable of participating in America's constitutional republic. Members of the new American nation had long identified the values enshrined in the Constitution as uniquely British. As John Higham has written, Americans “had always proclaimed orderly self-government as the chief glory of Anglo-Saxons—an inherited capacity so unique that the future of human freedom surely rested in their hands.”⁵³ As Rogers Smith has similarly written, the American revolutionary leaders believed that their “Anglo-Saxon heritage . . . bestow[ed] a special awareness of men's natural liberties and also unique capacities for self-government.”⁵⁴ Indeed, the colonists cited the conviction that men of British descent were uniquely qualified for republican self-government as a justification for the Revolution because colonial subjugation thwarted their natural inclination as Englishmen toward freedom.⁵⁵

The newly created Congress quickly linked membership in the nation's predominant race with the capacity for embracing the nation's constitutional values. The Naturalization Act of 1795 provided that naturalized citizenship could only be bestowed upon someone who was a “free white person” who was “attached to the principles of the constitution of the United States.”⁵⁶ Congress

⁵² For a discussion of how the same metaphors are often used to describe unwanted immigration and unwanted insects, see Jared A. Goldstein, *Aliens in the Garden*, 80 U. Colo. L. Rev. 685 (2009).

⁵³ See HIGHAM, *STRANGERS IN THE LAND*, *supra* note 45, at 137.

⁵⁴ SMITH, *CIVIC IDEALS*, *supra* note 39, at 86.

⁵⁵ *Id.*

⁵⁶ Act of Jan. 19, 1795, 1 Stat. 414. The 1795 Act replaced a 1790 naturalization law that similarly limited naturalization to “free white persons” who swore an oath to “support the Constitution of the United States.” An act to establish an uniform Rule of Naturalization, 1 Stat. 103 (March 26, 1790).

thus declared that only people of the native-born race were capable of forming an attachment to the nation's fundamental principles. These dual requirements for naturalized citizenship—commitment to constitutional principles and membership in the white race—persisted, with relatively few changes, until 1952, when Congress finally repealed any racial criteria for citizenship.⁵⁷

Beliefs in the unique capacity of the British for self-government also served to justify the enslavement of Africans and the conquest and displacement of Native Americans, because those peoples were considered incapable of self-government.⁵⁸ The Supreme Court in *Dred Scott v. Sandford* expressed this nativist view of the Constitution, concluding that the Constitution was written by and for white people, while persons of African descent could not be considered any part of “We the People” for whom the Constitution was written.⁵⁹ The Court further explained that American Indians could not be considered part of the American people because they too were not “capable of enjoying[] the privileges of an American citizen.”⁶⁰ The belief that the Constitution was uniquely suited to persons of certain ethnicities was broadly shared. In his debates with Abraham Lincoln, Senator Stephen Douglas, the leader of the Democratic Party, defended *Dred Scott* by saying that “this Government was made by our fathers on the white basis. It was made by white men for the benefit of white men and their posterity forever, and was intended to be administered by white men in all time to come.”⁶¹ Lincoln disagreed with *Dred Scott* but agreed with Douglas that persons of African descent were not capable of participating in American democracy and should not be allowed to vote, a position he later moderated to some degree.⁶²

Around the same time as *Dred Scott*, the Know Nothing movement sought to exclude Irish Catholic immigrants based on the same nativist principle—

⁵⁷ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

⁵⁸ *Id.* at 64.

⁵⁹ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

⁶⁰ *Id.* at 420.

⁶¹ Stephen Douglas, First Joint Debate, at Ottawa, Illinois (Aug. 21, 1858), in 3 COMPLETE WORKS OF ABRAHAM LINCOLN 216 (John G. Nicolay & John Hay eds., 1894); see also Speech of Stephen A. Douglas at Jonesboro (Sept. 15, 1858) (“I hold that a Negro is not and never ought to be a citizen of the United States. . . . I do not believe that the Almighty made the negro capable of self-government.”).

⁶² Speech of Abraham Lincoln at Charleston (Sept. 18, 1858), in THE LINCOLN-DOUGLAS DEBATES 136 (“I will say then that I am not, nor ever have been, in favor of bringing about in any way social and political equality of the white and black races—that I am not nor ever have been in favor of making voters . . . of Negroes . . .”); *id.* at 156 (“I am not in favor of negro citizenship.”).

that the Constitution was intended solely to protect persons of English descent, who had a unique capacity for self-government. The Know-Nothings argued that the Irish were illiterates and criminals, who could not assimilate into American life.⁶³ In 1856, the American Party (the official name of the “Know-Nothing” Party) adopted a platform that expressed its opposition to Catholic immigration in constitutional terms.⁶⁴ Irish Catholics brought disease and stole American jobs, the Know-Nothings charged, but, even worse, Catholics would always be loyal to a foreign despot and could never embrace the principles of the American Constitution. As one Know Nothing tract warned: “The strange, cruel monster of Rome can never amalgamate with the beautiful form of America. Liberty and Despotism are two eternal opposites.”⁶⁵ In order to protect the Constitution and the American way of life, the Know Nothings argued, Catholics must be excluded from immigration and barred from positions of power.⁶⁶

Although the Know Nothings achieved limited success in stopping Irish immigration, nativists succeeded in restricting immigration from China. In 1876, the Democratic Party adopted a platform that denounced all “Mongolian” immigration.⁶⁷ As the party’s platform declared, such immigration should be barred because it amounted to “the incursions of a race not sprung from the same great parent stock, and in fact now by law denied citizenship through naturalization.”⁶⁸ In particular, the Democrats charged, Chinese were unsuitable to immigration because they could not participate in constitutional self-government: they were “unaccustomed to the traditions of a progressive civilization, one exercised in liberty under equal laws.”⁶⁹ The Republican Party

⁶³ See KEVIN PHILLIPS, *THE COUSINS' WARS* 483 (1999) (“The huge midcentury Catholic wave, however, stirred Protestant fury at a population that seemed to equal squalor, drunkenness, crime, and unthinking support for big-city political machines.”); DANIELS, *GUARDING THE GOLDEN DOOR*, *supra* note 63, at 10-11.

⁶⁴ See *American Platform Of Principles Adopted At Philadelphia*, Par. 2 (Feb. 21, 1856), available at <http://www.yale.edu/glc/archive/974.htm> (“The perpetuation of the Federal Union and Constitution, as the palladium of our civil and religious liberties, and the only sure bulwarks of American Independence.”).

⁶⁵ PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: NATIVISM AND IMMIGRATION* 31-32 (2010) (quoting “Rome and America Eternal Opposites,” *The True American’s Almanac and Politician’s Manual for 1857*).

⁶⁶ *American Platform*, *supra* note 65, at Par. 3 (“Americans must rule America, and to this end native-born citizens should be selected for all State, Federal, and municipal offices of government employment, in preference to all others.”).

⁶⁷ 1876 Democratic Party Platform, <http://www.presidency.ucsb.edu/ws/?pid=29581>.

⁶⁸ *Id.*.

⁶⁹ *Id.*

soon adopted a similar policy, and in 1882, Congress enacted the Chinese Exclusion Act.⁷⁰ It did so based on the widespread belief that the Chinese were simply incapable of participating in the nation's constitutional system of government. As one Senator said:

Free institutions are only possible with the favored races. It is not because they are a monopoly of the favored races, but because no other race is capable of creating them; no other race is capable of perpetuating them; no other race is capable of treading freedom's heights with firm and unwavering step.⁷¹

Only the white race could create and sustain a free government, Congress concluded, while the presence of people who were incapable of participating in the American political system would destroy that system. As one Congressman put it: “[I]f the Republic endures it must be a homogeneous population,” while another declared that “unrestricted Mongolian immigration means ultimate destruction.”⁷²

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

B. Americanizers and Immigration Restrictionists: The Fight Over Who Is Fit for the Constitution and the Adoption of the National Origins Act of 1924

Immigration to the United States greatly increased during the last quarter of the nineteenth century. In the 1850s, 2.6 million immigrants came to the U.S., and in the 1880s, that number increased to 5.2 million, and in the first decade of the twentieth century 8.8 million people immigrated to the U.S.⁷³ During that period, the percentage of U.S. residents who were foreign-born rose from 9.7% in 1850 to 14.7% in 1890 and stayed around that number

⁷⁰ Act of May 6, 1882, 22 Stat. 58.

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

⁷² 13 Cong. Rec. 2223 (statement of Rep. Cannon); *id.* at 1978 (statement of Rep. Cassidy).

⁷³ DANIELS, *GUARDING THE GOLDEN DOOR*, *supra* note 63, at 5, Table 1.2

through 1920.⁷⁴ The national origins of the immigrants also changed. While most immigrants before 1860 had come from England, Ireland, and Germany, beginning in the 1880s, immigration from southern and eastern Europe increased, with millions of Italians, Russians, Greeks, Hungarians, and Poles, arriving in the United States.⁷⁵ A majority of the immigrants during this period were Catholics and Jews.⁷⁶

Many native-born Americans looked on the increase in immigration with alarm, believing that the new immigrants brought crime, disease, poverty, and dangerously foreign ideas.⁷⁷ There were widespread fears over the ability of the new immigrants to assimilate and participate in American public life. Two popular movements arose to address the increased immigration. On the one hand, a movement arose to “Americanize” the immigrants by teaching them English and inculcating American values. On the other hand, an immigration restriction movement arose that declared that the new classes of immigrants were incapable of becoming good citizens and must be excluded.

Although the two movements advocated very different responses to immigration, they shared a similar understanding of what it means to be American. Both movements identified being American with adherence to a set of values, including individual autonomy, commitment to individual liberty, and ability to participate in self-government, and both movements identified the U.S. Constitution as the embodiment of those values. Where they disagreed was over who was capable of embracing these values. Americanizers believed in the “melting pot” idea, that with the right kind of education and persuasion, the new immigrants could learn to embrace the Constitution and become good Americans. Immigration restrictionists, in contrast, embraced eugenics and scientific racism and believed that immigrants from southern and eastern Europe had evolved in cultural systems that did not breed appreciation for liberty and self-government, and no education or persuasion could change that.

⁷⁴ Id.

⁷⁵ Helen F. Eckerson, Immigration and National Origins, *The Annals of the American Academy of Political and Social Science*, Vol. 367, (Sep., 1966), pp. 4-14, at 6 Table 1.

⁷⁶ DAVID GOLDFIELD, *ENCYCLOPEDIA OF AMERICAN URBAN HISTORY* 122 (2007).

⁷⁷ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 159-175; see also James S. Pula, The Progressives, the Immigrant, and the Workplace: Defining Public Perceptions, 1900-1914, *Polish American Studies*, Vol. 52, No. 2 (Autumn, 1995), pp. 57-69.

As one popular immigration restriction tract put it, “We cannot make a well-bred dog out of a mongrel by teaching him tricks.”⁷⁸

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

1. The Americanization Movement

Despite substantial concerns about the new immigrants, the primary public response to increased immigration until 1921 was attempt to help the immigrants assimilate. The belief that immigrants would soon acculturate was frequently expressed through the metaphor of the “melting pot” that had become part of the national vocabulary after the production of Israel Zangwill’s play of that name in 1908. The idea was considerable older. In 1782, Hector St. John de Crèvecoeur, published his *Letters from an American Farmer*, which declared that in the United States various nationalities were “melting” together to create a new nation:

What then is the American, this new man? . . . I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. . . . Here individuals of all nations are melted into a new race of men . . .⁷⁹

Until World War I, conservatives, centrists, and progressives generally shared a conception of the United States as a melting pot, in which differences associated with nationalities, ethnicity, race, and religion, would melt away to form a new homogenous, American culture.⁸⁰

Although no organized program to educate new immigrants in American ways had developed over the nineteenth century, one of the central purposes

⁷⁸ Robert DeC Ward, *Fallacies of the Melting-Pot Idea and America’s Traditional Immigration Policy*, in *THE ALIEN IN OUR MIDST* 230-231 (Madison Grant and Charles Stewart Davison, eds.) (1930).

⁷⁹ H. DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 69-70 (Penguin American Library ed. 1981) (1st ed. 1782).

⁸⁰ MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 237 (1995) (“[T]he then-new and progressive ideal of melting-pot nationalism . . . was centrist or liberal in a time when the right was still strongly racist and nativist.”).

of the public school system was to inculcate republican values to children, foreign and native born.⁸¹ As Steven Green has written, nineteenth century educators “worked tirelessly to create an education system that would acculturate children from diverse social, religious, and national backgrounds and assimilate them into the unfolding republican experience.”⁸² Public schools were dedicated to teaching morality in order to help children become good citizens. As Green has explained, public schools were created out of a “widespread belief that instilling moral virtue in children was indispensable for perpetuating the nation and its republican system of government.”⁸³

In response to increasing concerns that the new immigrants needed additional training to assimilate, patriotic organizations representing the nation’s established elites began to provide programs specifically to educate immigrants on American values. In 1898, the Daughters of the American Revolution launched a lecture series on American history and government, given in several foreign languages, to teach immigrants the “spirit of true Americanism.”⁸⁴ Other patriotic societies, like the Sons of the American Revolution, followed the D.A.R.’s lead, as did the YMCA, which began offering evening classes for immigrants that combined English language instruction and lessons on American civics.⁸⁵ By 1914, YMCA programs involved 30,000 students.⁸⁶

In 1914, Henry Ford began requiring foreign-born workers to attend Americanization classes at his factories, which like other programs combined language training and civics lessons.⁸⁷ Ford’s program culminated in an elaborate graduation ceremony, held on the Fourth of July and referred to as “Americanization Day.”⁸⁸ In the ceremony, immigrants wearing their “native dress” would descend from a model boat into a large pot labeled “Melting Pot,”

⁸¹ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 234.

⁸² STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* 11 (2012).

⁸³ *Id.*

⁸⁴ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 237.

⁸⁵ *Id.* at 238.

⁸⁶ *Id.* at 239.

⁸⁷ See Henry Ford Museum, <https://www.thehenryford.org/collections-and-research/digital-collections/artifact/254569>.

⁸⁸ Industrial Teachers, Address of Mr. Clinton C. DeWitt, director of Americanization, Ford Motor Co., in *PROCEEDINGS, AMERICANIZATION CONFERENCE, HELD UNDER THE AUSPICES OF THE AMERICANIZATION DIVISION, BUREAU OF EDUCATION, DEPARTMENT OF THE INTERIOR* 114, 119 (May 1919) [hereinafter “*PROCEEDINGS, AMERICANIZATION CONFERENCE*”].

which the school's teachers would stir with ten-foot ladles.⁸⁹ The immigrants would then emerge from the pot wearing typically American clothes and waving American flags.⁹⁰ As the director of the program explained, "Into the pot 52 nationalities with their foreign clothes and baggage go and out of the pot after a vigorous stirring by the teachers comes one nationality, viz, American."⁹¹ The graduation ceremony perfectly captured the widespread notion that, through education in the common American culture, immigrants would lose their backward foreign ways and become patriotic Americans.

Although Americanization began as a private movement, local and state governments soon started organizing Americanization programs. In the first decade of the twentieth century, many cities with large immigrant populations, including New York, Chicago, Detroit, Cleveland, and Boston, began offering night classes for immigrants to learn English and civics.⁹² In 1907, New Jersey became the first state to support immigrant education classes, a program followed the next year by New York, which declared the goal of "making of new races into Americans."⁹³ At the same time, states increased their efforts to Americanize immigrant children in public schools and began to mandate civics classes, the display of the American flag, and daily recitation of the newly composed Pledge of Allegiance.⁹⁴

Demand for Americanization programs soon became a national issue. The Progressive Party platform condemned "the fatal policy of indifference and neglect which has left our enormous immigrant population to become the prey of chance and cupidity" and proposed action "to promote their assimilation, education and advancement."⁹⁵ Conservatives too called for Americanization programs as a way to fight against radical alien ideas and to create a homogenous American culture.⁹⁶

⁸⁹ Id.

⁹⁰ A photograph and description of the ceremony can be found at the website of the Henry Ford Museum, <https://www.thehenryford.org/collections-and-research/digital-collections/artifact/254569>.

⁹¹ PROCEEDINGS, AMERICANIZATION CONFERENCE, *supra* note 88, at 119.

⁹² EDWARD GEORGE HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT* 20 (1948).

⁹³ CHRISTINA A. ZIEGLER-MCPHERSON, *AMERICANIZATION IN THE STATES: IMMIGRANT SOCIAL WELFARE POLICY, CITIZENSHIP, & NATIONAL IDENTITY IN THE UNITED STATES, 1908-1929*, at 20, 25 (2009).

⁹⁴ Id.

⁹⁵ Id. at 238; see also ZIEGLER-MCPHERSON, *AMERICANIZATION IN THE STATES*, *supra* note 93, at 10 (2009).

⁹⁶ Id. at 237 (discussing the "two sides of the Americanization movement").

World War I led to a surge in interest in Americanization programs. The military discovered that illiteracy was especially common among foreign-born draftees.⁹⁷ Wartime also brought an increase in xenophobia, which increased pressure for programs to encourage rapid assimilation.⁹⁸ The nativist surge that targeted German-Americans also focused on all immigrants—so called “hyphenated Americans”—who were suspected of remaining loyal to their countries of birth.⁹⁹ Teddy Roosevelt denounced the “hyphenated Americanism” of those “who spiritually remain foreigners in whole or in part” and declared that all Americans should adhere to “the simple and loyal motto, AMERICA FOR AMERICANS.”¹⁰⁰ As Roosevelt put it, “unless the immigrant becomes in good faith an American and nothing else, then he is out of place in this country, and the sooner he leaves it the better.”¹⁰¹ Failure by immigrants to assimilate, the President warned, “will spell ruin to this nation.”¹⁰²

The federal government responded to demands for increased Americanization efforts through the bureaus of Naturalization and Education.¹⁰³ In 1916, the Bureau of Naturalization distributed materials for a course on citizenship, which was widely used in Americanization efforts.¹⁰⁴ The U.S. Bureau of Education also created a Division of Immigrant Education.¹⁰⁵ These agencies encouraged states to adopt Americanization programs and sought to coordinate state programs.¹⁰⁶ In 1920, the Bureau of Naturalization distributed nearly 100,000 textbooks on citizenship to help immigrants assimilate as rapidly as possible and to protect American culture

⁹⁷ PROCEEDINGS, AMERICANIZATION CONFERENCE, *supra* note 88, at 74.

⁹⁸ As John Higham has written, World War I led to “the most pervasive nativism that the United States has ever known.” HIGHAM, STRANGERS IN THE LAND, *supra* note 45, at 195. See Address of S.E. Weber, PROCEEDINGS, AMERICANIZATION CONFERENCE, *supra* note 88, at 150 (“The Great War has made the problem of Americanization nation wide. Literacy and loyalty are its symbols”).

⁹⁹ HIGHAM, STRANGERS IN THE LAND, *supra* note 45, at 198.

¹⁰⁰ Theodore Roosevelt, America for Americans, speech delivered in St. Louis, May 31, 1916, <http://www.theodore-roosevelt.com/images/research/txtspeeches/672.pdf>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 86.

¹⁰⁴ U.S. Dept. of Labor, Bureau of Naturalization, AN OUTLINE COURSE IN CITIZENSHIP TO BE USED IN THE PUBLIC SCHOOLS FOR THE INSTRUCTION OF THE FOREIGN AND NATIVE BORN CANDIDATE FOR ADULT-CITIZENSHIP RESPONSIBILITIES (1916),

¹⁰⁵ PROCEEDINGS, AMERICANIZATION CONFERENCE, *supra* note 88, at 22.

¹⁰⁶ *Id.* at 24.

from foreign infiltration.¹⁰⁷ In the midst of the post-war Red Scare, Americanization was seen as key to the fight communism and anarchism.¹⁰⁸ The U.S. Senate declared that a program of Americanization was the best way to avert industrial strikes.¹⁰⁹

These widespread Americanization efforts sought to transform immigrants into Americans by “preaching the gospel of Americanism,” as one enthusiast put it.¹¹⁰ Yet there was little consensus on what it took to transform immigrants into Americans. California adopted a program that sought to help new immigrants Americanize their homes by making them more sanitary and tidy, declaring: “[B]efore a man should be asked to become a good American by being worthy of his surroundings, those surroundings should be made worthy of a good American.”¹¹¹ Other Americanization programs focused on increasing

¹⁰⁷ DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY* 88 (2000).

¹⁰⁸ The National Security League, for instance, argued that patriotic Americans must “preach Americanism” and accelerate Americanization as key to “the fighting of Bolshevism and other un-American tendencies.” HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT*, supra note 92, at 218, 220.

¹⁰⁹ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 255; see also Fred H. Ringe, Jr., Promotion of Work for Foreigners and Illiterates in the Lumber Camps, in *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at 165, 166 (noting the efforts of socialists to organize lumbermen and arguing that “these facts and the growing industrial unrest emphasize the special need for education in English, citizenship, and the real meaning of American democracy.”).

¹¹⁰ See Address of Felix J. Streyckmans, Securing Interest of and Cooperation with National and Local Racial Organizations, in *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at 204; see also Grover C. Huebner, The Americanization of the Immigrant, *The Annals of the American Academy of Political and Social Science*, Vol. 27 (May 1906), pp. 191-213 at 191 (defining Americanization as “the process by which immigrants are transformed into Americans. . . . [A]n immigrant has been Americanized only when his mind and will have been united, with the mind and will of the American so that the two act and think together.”); see also Address of John J. Mahoney, in *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at 126 (“[Americanization] is the business of instilling into the hearts of everyone who inhabits American soil those ideas and ideals, those attitudes, convictions and points of view that the real American believes in and swears by and reveres.”); Address of S. E. Weber, in *id.*, at 151 (“[W]e believe that adequate provision should first be made for the instruction of American youth in the American language, in American traditions, customs, and ideals, and then their permanent assimilation in American life is assured.”).

¹¹¹ *Id.* at 68. The National Americanization Committee—a private effort led by the former director of New York’s Americanization program—included an “American Standards of Living Campaign,” designed to teach immigrants how to live like Americans. As the Americanization program adopted in Ipswich, Massachusetts, explained, immigrants were encouraged to adopt “American standards of living, and make the homes

wages and living standards for immigrants in the belief, expressed by one Americanization activists, that, unless immigrants were provided a higher standard of living, they would continue to live in the “foreign quarters where the native language only is spoken, where the foreign news is printed in the mother tongue, and where the anarchist is reared.”¹¹²

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

America is the expression of a spirit, an attitude toward men and material things, an outlook and a faith. . . Now, this can not be taught out of a book. It is a matter of touch, of feeling, like the growth of friendship. Each man is approachable in a different way, appealed to by very contradictory things. One man reaches America through a baseball game, another through a church, a saloon, a political meeting, a woman, a labor union, a picture gallery, or something to eat.¹¹³

With the belief that Americanization could occur through any contact by immigrants with anything authentically American, the Department of the Interior organized an Americanization conference in which advocates recommended programs to Americanize immigrants through public schools, movies, records, dances, and sports; through infiltration of the foreign press; through improved hygiene and housing; through improved working conditions; through participation in unions; and through programs in lumber camps, factories, and farms.¹¹⁴

Although Americanization efforts encompassed a wide range of activities, a central focus of Americanization programs was educating immigrants on American political ideals.¹¹⁵ English language instruction, always understood

of these Ipswich Greeks and Poles American and not Southern European homes." HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT*, supra note 92, at 125-26.

¹¹² William Lamkie, *Americanizing the Immigrant Through Industrial Employment*, in *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at 178.

¹¹³ Lane, in *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at 18.

¹¹⁴ See *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88.

¹¹⁵ See P.P. Claxton, *Commissioner of Education, Education in Americanization*, *PROCEEDINGS, AMERICANIZATION CONFERENCE*, supra note 88, at (“[E]ducation is the fundamental thing in Americanization.”).

as a central component of Americanization programs, was seen as important principally as a means to teach American values. As one speaker at a federal Americanization conference explained, “The fundamental idea has been very largely the idea of giving the newcomer a working knowledge of the English language in the hope that he would, somehow or other, gradually assimilate the American spirit of freedom and gradually conform to the American ideal.”¹¹⁶ Americanization programs thus emphasized the founding of the nation and the philosophy and culture of the Founding Fathers. As another speaker at the Americanization conference explained:

We need harbor no hazy notions as to what the original Americans conceived Americanism to be. . . You find it in the Declaration of 1776; you find it in the preamble of the Constitution—liberty, freedom, equality, abolition of destructions that divide us into castes, fraternity, brotherhood, union, cooperation, public welfare. No perusal of the speeches, papers, or letters of the fathers of the Republic is possible without apprehending their distinct and earnest prophecies of a new and better race arising upon these shores.¹¹⁷

Americanization efforts thus centered on inculcating the nation’s founding political principles, as can be seen in a widely used handbook on Americanization, which focused on teaching about early American history and the founding of the nation, with lengthy excerpts and explanations of the Declaration of Independence, stories of the founding fathers, and the Constitution.¹¹⁸

The Americanization movement thus focused on inculcating devotion to the Constitution and other founding ideals as the central representation of Americanism. As Secretary of the Interior Lane declared: “We know that there are principles enunciated in the Declaration of Independence and in the

¹¹⁶ See Address of H.D. Rickard, in PROCEEDINGS, AMERICANIZATION CONFERENCE, supra note 88, at 60-61.

¹¹⁷ Address of William McAndrews, in PROCEEDINGS, AMERICANIZATION CONFERENCE, supra note 88, at 242.

¹¹⁸ ELSWOOD GRISCOM, JR., AMERICANIZATION: A SCHOOL READER AND SPEAKER (1920). To be sure, another less widely distributed Americanization handbook presented more varied and contemporary materials, including excerpts from John Dewey, W.E.B. DuBois, and Walt Whitman. AMERICANIZATION: PRINCIPALS OF AMERICANISM, ESSENTIALS OF AMERICANIZATION, TECHNIC OF RACE-ASSIMILATION (Winthrop Talbot and Julia E. Johnsen, eds., 2d ed. 1920).

Constitution of the United States which are necessary to get into one's system before [an immigrant] can thoroughly understand the United States."¹¹⁹ While naturalization law had required attachment to the Constitution as a prerequisite to citizenship since 1795, it was only during the fervor of the Americanization movement that the government became involved in trying to teach devotion to the Constitution.¹²⁰

Although the Americanization movement sought to welcome rather than exclude foreigners, it should be recognized that it had a substantial nativist element, in that it sought to eradicate foreign cultures from the midst of the United States.¹²¹ As historian Benjamin Schwarz has written, "Americanization' was a process of coercive conformity [whereby] various nationalities were made into American as ore is refined into gold. 'Americanization' purified them, eliminating the dross."¹²² The idealized American presented by Americanization efforts was, of course, a white, Anglo-

¹¹⁹ Address of Franklin, Lane, in PROCEEDINGS, AMERICANIZATION CONFERENCE, supra note 88, at 295; see also Address of Louis Post, in Proceedings of First Citizenship Conference 14 (July 1916) (Asst. Sec. of Labor Louis Post) ("If our citizens native or alien born are to become real citizens it is the ideals of our country that must be put before them. Its Constitution of course and reading and writing the English language."). Writing in 1948, historian Edward George Hartmann stated that Americanizers rarely defined the content of "Americanism" and "American ideals" with any precision but "What they had in mind by these terms was what was generally believed at that time to constitute a proper 'American' orientation, namely, a staunch belief in and support of the ideals expressed by the founding fathers in the great American documents, the Declaration of Independence and the Constitution . . ." HARTMANN, THE MOVEMENT TO AMERICANIZE THE IMMIGRANT, supra note 92, at 269-270.

¹²⁰ In its coursebook for citizenship, the Bureau of Naturalization declared: "The matter most intimately concerning the naturalization of aliens is such an understanding of the principles of the Constitution as to make credible the declaration that he is 'attached' to those principles." BUREAU OF NATURALIZATION, AN OUTLINE COURSE ON CITIZENSHIP, supra note 104, at 3; see also HARTMANN, THE MOVEMENT TO AMERICANIZE THE IMMIGRANT, supra note 92, at 220 ("They must tell the immigrant population our living faith in American doctrines of law, liberty, progress and justice, as explained by the Constitution and our representative form of government.") (quoting National Security League pamphlet).

¹²¹ See, e.g., Address of Mrs. J.E. Owen Phillips, in PROCEEDINGS, AMERICANIZATION CONFERENCE, supra note 88, at 102 ("[W]e have to eliminate in ourselves, as Americans, in our system, in our whole community life, everything and anything that is un-American . . .")

¹²² Benjamin Schwarz, Exporting the myth of a liberal America, *World Policy Journal*, 15:3, Autumn 69-77 (1998); see also Harry H. Laughlin, "Analysis of the Metal and Dross in America's Melting Pot," Hearings, House immigration Comm., Nov. 21, 1923, 67th Cong., 3d sess.

Saxon Protestant. As Michael Olneck has written:

Not only did the content of the Americanizers' rhetoric, texts, and rituals symbolically assign status to those adhering most closely to the culture of native-born Americans. The activity of Americanizing the immigrants also assigned to native-born Americans the roles of tutor, interpreter, and gatekeeper, while rendering immigrants the subjects of tutelage and judgment.¹²³

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

2. The Immigration Restriction League

At the same time that the Americanization movement worked to transform the new immigrants into Constitution-loving Americans, a movement arose to exclude them. In 1894, three graduates of Harvard College, Charles Warren, Robert DeCourcy Ward, and Prescott Farnsworth Hall, formed the Immigration Restriction League and declared that the group's purpose was to advocate for the "exclusion of elements undesirable for citizenship or injurious to our national character."¹²⁴

Members of the Immigration Restriction League were alarmed by the ethnic, racial, and cultural composition of the recent immigrants.¹²⁵ The IRL called the immigrants from southern and eastern Europe "new immigrants" and declared that they compared unfavorably with the "old immigrants" from

¹²³ Michael R. Olneck, *Americanization and the Education of Immigrants, 1900-1925: An Analysis of Symbolic Action*, *American Journal of Education*, Vol. 97, No. 4 (Aug., 1989), at 400.

¹²⁴ See *Constitution of the Immigration Restriction League* 1, [https://iiif.lib.harvard.edu/manifests/view/drs:5233215\\$1i](https://iiif.lib.harvard.edu/manifests/view/drs:5233215$1i). Although other groups joined with the IRL in urging immigration restriction, I focus on the IRL because it has been well-recognized as the leading anti-immigrant group of the era, whose advocacy led directly to the enactment of the 1924 Immigration Act. See DANIELS, *GUARDING THE DOOR*, *supra* note 63, at 31.

¹²⁵ See, e.g., *Study These Figures and Draw Your Own Conclusions: Recent Changes in the Nationality of Immigrants*, Immigration Restriction League, Pub. No. 2, [https://iiif.lib.harvard.edu/manifests/view/drs:6523542\\$1i](https://iiif.lib.harvard.edu/manifests/view/drs:6523542$1i).

northwestern Europe.¹²⁶ The League charged that the new immigrants contributed a disproportionate number of the nation's illiterates, criminals, and the insane.¹²⁷ In fact, the League argued, foreign governments were intentionally dumping their criminals and paupers on the United States.¹²⁸ The League further said that, unlike earlier groups of immigrants, the new immigrants did not assimilate into American culture and chose instead to live together in ethnic enclaves, where they continued to speak their native languages and did not adopt American ways.¹²⁹

Although the IRL relied on various allegations about the new immigrants—that they harmed the economy, that they were culturally backwards and disposed to crime and insanity—its central charge was that they were not suited to participate in American political life. The League claimed that the new immigrants did not make good citizens because, by virtue of their races and cultures, they were not adapted to participate in self-government in a nation committed to individual liberty.¹³⁰ As one IRL pamphlet declared in 1896: “the immigration of recent years is largely composed of elements unfitted to absorb democratic ideas of government, or to take part in the duties and responsibilities of citizenship under such a form of government.”¹³¹ The new immigrants were not merely unsuited to become

¹²⁶ Immigration Restriction League, *The Present Aspect of the Immigration Problem* 4 (1894) (“Our immigration has, until lately, been chiefly made up of the most intelligent and of the most desirable races of Europe, but recently the numbers have greatly increased of those who are without question the most illiterate and the most depraved people of that continent.”).

¹²⁷ See, e.g., *id.* at 4; *Twenty Reasons Why Immigration Should Be Further Restricted Now*, at ¶¶ 6-8, Immigration Restriction League, Pub. No. 4, [https://iif.harvard.edu/manifests/view/drs:6523551\\$1i..](https://iif.harvard.edu/manifests/view/drs:6523551$1i..)

¹²⁸ *Twenty Reasons Why Immigration Should Be Further Restricted Now*, *supra* note 127.

¹²⁹ Robert DeC. Ward, *The Restriction of Immigration*, *North American Review* (1904); see also *Twenty Reasons Why Immigration Should Be Further Restricted Now*, *supra* note 127, at ¶ 8 (“Because the undesirable classes of immigrants have come in upon us in such numbers of late years that they have neither been assimilated nor Americanized, the result being that many of them remain a menace to our institutions by reason of their foreign language, habits, custom and political beliefs.”).

¹³⁰ See Prescott F. Hall, *The Future of American Ideals*, *North American Review*, Vol. 195, No. 674 (Jan., 1912), pp. 94-102 (“These races have an entirely different mental make-up from the Baltic race; they bring with them an inheritance of widely differing political and social ideals, and a training under social and political institutions very different from ours.”).

¹³¹ *Twenty Reasons Why Immigration Should Be Further Restricted Now*, *supra* note 127, at ¶ 19.

citizens, the IRL warned, but they brought over dangerous ideas, and their increasing presence threatened to undermine the American constitutional system.¹³²

Leaders of the IRL supported their positions with the new science of eugenics, which asserted that many human traits—including intelligence, criminality, and morality—were heritable.¹³³ The IRL believed that science had demonstrated that Americanization could never succeed in assimilating the new immigrants.¹³⁴ As Prescott Hall, one of the founders of the IRL, explained, the American character was defined by “energy, initiative, and self-reliance” and this made Americans “[i]mpatient of much government, relying upon self-help rather than the paternalism of the State.”¹³⁵ These traits, Hall asserted, were racial and belonged to people who were “mainly Teutonic, belonging to what is now called the Baltic race, from northern Europe.”¹³⁶ The immigrants arriving since 1880, in contrast, were people “of entirely different races of Alpine, Mediterranean, Asiatic, and African stocks” and “[t]hese races have an entirely different mental make-up from the Baltic race; they bring with them an inheritance of widely differing political and social ideals, and a training under social and political institutions very different from ours.”¹³⁷

Hall recognized that many Americans believed that the new immigrants

¹³² Hall, *The Future of American Ideals*, supra note 130, at 9, 11 (asserting that “we have already begun to despotize our institutions in order to deal with large masses of citizens not capable of intelligently supporting representative government” and arguing that immigration restriction is necessary so that “the United States may continue strong to uphold the cause of democracy and liberty throughout the world”).

¹³³ Eugenists dreamed of improving the human race through social control of breeding. As Francis Galton, founder of the eugenics movement, pronounced: “If talented men were mated with talented women . . . generation after generation, we might produce a highly bred human race.” Francis Galton, *Galton, Hereditary Talent and Character*, *Macmillan's Magazine* (1865), vol. 12, 157-166 (quoted in JONATHAN SPIRO, *DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT* 120 (2009)).

¹³⁴ See Hall, *The Future of American Ideals*, supra note 130, at 101 (“Recent investigations in eugenics show that heredity is a much more important factor than environment as regards social conditions.”)

¹³⁵ *Id.* at 94.

¹³⁶ *Id.*; see also Hall, *The Future of American Ideals*, supra note 130, at 606 (“Before the Civil War the population was almost entirely Nordic, and our political and social institutions were developed along the lines of the Nordic spirit.”).

¹³⁷ *Id.* at 95; see also Prescott F. Hall, *The Present and Future of Immigration*, *North American Review*, Vol. 213, No. 786 (May, 1921), pp. 598-607, 605 (“I doubt if [Americanization] will be very successful in the case of aliens whose habits, ideals and historical background are different from ours.”).

could be Americanized, that “we can continue, as we have in the past, to assimilate all this material and turn it into good American citizens.”¹³⁸ Hall, however, argued that educating the new immigrants in American ideals could not “appreciably alter[] their characters.”¹³⁹ In short, “You cannot change the leopard's spots, and you cannot change bad stock to good.”¹⁴⁰

In 1916, Madison Grant published the enormously influential *THE PASSING OF THE GREAT RACE*, which made a eugenics-based case for immigration restriction.¹⁴¹ In the book, Grant, founder of the Bronx Zoo, famed conservationist, and a long-time vice president of the IRL, argued that race was the single explanation for the development of European and American civilization “The progress of civilization becomes evident only when immense periods are studied and compared, but the lesson is always the same, namely, that race is everything.”¹⁴² In Grant’s typology, there were three European races—“Alpines,” who were “always and everywhere a race of peasants”¹⁴³; “Mediterraneans,” who are superior artists but poor athletes;¹⁴⁴ and Nordics,” who are “a race of soldiers, sailors, adventurers and explorers but above all, of rulers, organizers and aristocrats,”¹⁴⁵ Grant attributed all of the key advances in Western civilization, from the Roman Empire to the Renaissance, to the Nordic race, who he described as having blond hair, blue eyes, pale skin, and tall stature. To Grant, the Nordics constituted a distinct and distinctly superior subspecies of humanity: “*Homo europaeus*, the white man par excellence.”¹⁴⁶

Eugenics had a great deal to say about who was capable of embracing

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ It has been referred to as the “bible of scientific racism” and Adolf Hitler is said to have called the German edition: “my bible.” SPIRO, *DEFENDING THE MASTER RACE*, supra note 133, at xi, 140; see also HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 271 (“Intellectually the resurgent racism of the early twenties drew its central inspiration from Madison Grant’s *The Passing of the Great Race*.”).

¹⁴² MADISON Grant, *The Passing of the Great Race* 100 (1918); see also Henry Fairfield Osborn, Preface, in MADISON GRANT, *THE PASSING OF THE GREAT RACE* vii (“European history has been written in terms of nationality and of language but never before in terms of race; yet race has played a far larger part than either language or nationality in moulding the destinies of men; race implies heredity, and heredity implies all the moral, social, and intellectual characteristics and traits, which are the springs of politics and government.”).

¹⁴³ Id. at 227.

¹⁴⁴ Id. at 229.

¹⁴⁵ Id. at 228.

¹⁴⁶ Id. at 167, 214-215.

America's constitutional values and who would forever be hostile to it. As Grant asserted, members of the Nordic race were self-reliant, fiercely individualistic, and "jealous of their personal freedom both in political and religious systems."¹⁴⁷ With their extreme devotion to extreme individualism and autonomy, the Nordics developed the concept of individual liberty that forms the basis of the United States Constitution and core American values. Grant contended that western European principles of government, which he believed had its apotheosis in the American Constitution, were the unique product and property of white Europeans of northwest Europe. As one of Grant's disciples later wrote: "Americanism is actually the racial thought of the Nordic race evolved after a thousand years of experience, which includes such epoch making documents as the Magna Charta and the Declaration of Independence."¹⁴⁸

Grant's book purports to tell a racial history of Europe and the United States. As he saw it, the colonists and founders of the nation were almost entirely comprised of pureblooded members of the Nordic race.¹⁴⁹ It was this race that developed the Constitution and which had evolved to have an inborn capacity for self-government. Until the middle of the nineteenth century the race remained pure, Grant asserted, but the Civil War destroyed the nation's racial purity. It led to the deaths of large numbers of the nation's "best breeding stock."¹⁵⁰ Even worse, the war led the nation to grant citizenship "to Negroes and to ever increasing numbers of immigrants of plebeian, servile or Oriental races, who throughout history have shown little capacity to create, organize or even to comprehend Republican institutions."¹⁵¹ In the latter part of the nineteenth century, the nation allowed unchecked immigration by members of lower races, and as a result, "Our jails, insane asylums, and almshouses are filled with this human flotsam, and the whole tone of American life, social, moral and political, has been lowered and vulgarized by them."¹⁵²

Grant argued that the new immigrants should be excluded because they lacked the fundamental American capacity for self-government:

Instead of retaining political control and making citizenship an honorable and valued privilege, [the American] intrusted the government of his country and the maintenance of his ideals to

¹⁴⁷ Id. at 228.

¹⁴⁸ CLINTON STODDARD BURR, *AMERICAN RACE HERITAGE* 208 (1922).

¹⁴⁹ GRANT, *THE PASSING OF THE GREAT RACE*, *supra* note 142, at 83.

¹⁵⁰ Id. at 88.

¹⁵¹ Id. at 218.

¹⁵² Id. at 88-89.

races who have never yet succeeded in governing themselves, much less any one else.¹⁵³

Instead of sharing American values, Grant argued, the foreign races immigrating to the nation brought socialism and Catholicism, two value systems that he saw as contrary to the quintessential American value of individualism.¹⁵⁴

Immigration restrictionists thus argued that science had disproven the melting pot ideology of the Americanization movement.¹⁵⁵ Robert DeCourcy Ward, a Harvard climatology professor and one of the founders of the IRL, said that Americanizers had deceived themselves into believing that “we could change inferior beings into superior ones”:

We thought that sending alien children to school, teaching them English, giving them flag drills, and making them read the Declaration of Independence and recite the Gettysburg Address, would make them Americans almost over night. Yet the laws of heredity are at work. . . We cannot make a well-bred dog out of a mongrel by teaching him tricks. Nor can we make a race true to the American type by any process of Americanization.¹⁵⁶

The IRL thus argued that the problems associated with the new immigrants—crime, unemployment, immorality, and the spread of radical ideas—could not be addressed through education.¹⁵⁷ Instead of continuing to attempt the impossible task of transforming dangerous immigrants into good Americans, the IRL argued for a much simpler solution: keeping unwanted immigrants out

¹⁵³ Id. at 12.

¹⁵⁴ Id. at 12 (“Although these phenomena appear to be contradictory, they are in reality closely related since both represent reactions from the intense individualism which a century ago was eminently characteristic of Americans.”).

¹⁵⁵ See GRANT, *THE PASSING OF THE GREAT RACE*, supra note 142, at 17 (“What the Melting Pot actually does in practice can be seen in Mexico, where the absorption of the blood of the original Spanish conquerors by the native Indian population has produced the racial mixture which we call Mexican and which is now engaged in demonstrating its incapacity for self-government.”).

¹⁵⁶ Robert DeC Ward, *Fallacies of the Melting-Pot Idea and America’s Traditional Immigration Policy*, in *THE ALIEN IN OUR MIDST* 230-231 (Madison Grant and Charles Stewart Davison, eds.) (1930).

¹⁵⁷ Id. at 55-56.

of the United States.¹⁵⁸

3. The Push for a Literacy Test

Initially, the IRL's legislative agenda focused on the adoption of a literacy test.¹⁵⁹ As originally proposed, the literacy test would have barred admission to immigrants unless they could demonstrate an ability to read and understand portions of the Constitution.¹⁶⁰ The IRL believed that such a test would effectively exclude members of undesirable races and ethnicities who were incapable of reading the Constitution, let alone embracing its principles.¹⁶¹

In March 1896, Senator Henry Cabot Lodge, a longtime IRL supporter, introduced a bill to create a literacy test.¹⁶² Lodge made no effort to hide the fact that the purpose of the test was to exclude ethnicities and nationalities deemed too foreign to assimilate into American life:

[T]he illiteracy test will bear most heavily upon the Italians, Russians, Poles, Hungarians, Greeks, and Asiatics, and very lightly, or not at all, upon English-speaking emigrants or Germans, Scandinavians, and French. In other words, the races most affected by the illiteracy test are those whose emigration to this country has begun within the last twenty years and swelled rapidly to enormous proportions, races with which the English-speaking people have never hitherto assimilated, and who are most alien to the great body of the people of the United States.¹⁶³

Lodge asserted that immigration from these exotic lands had led to an increase in “the slum population, with criminals, paupers, and juvenile delinquents.”¹⁶⁴ Although Lodge claimed that the new immigrants hurt wages and damaged the economy, he argued that “the danger which this immigration threatens to

¹⁵⁸ Id.

¹⁵⁹ JOHN HIGHAM, *STRANGERS IN THE LAND*, *supra* note 45, at 103.

¹⁶⁰ § 2, Cong. Rec. 28th, 2nd sess., Jan. 21, 1897, 1126.

¹⁶¹ The Present Italian Influx, Its Striking Illiteracy, Immigration Restriction League Pub. No. 14; The Case for the Literacy Test, Immigration Restriction League Pub. No. 66 (1916).

¹⁶² HIGHAM, *STRANGERS IN THE LAND*, *supra* note 45, at 103.

¹⁶³ 28 Cong. Rec. 2817 (Mar. 16, 1896).

¹⁶⁴ HIGHAM, *STRANGERS IN THE LAND*, *supra* note 45, at 103.

the quality of our citizenship is far worse.”¹⁶⁵ To fully understand the threat to American citizenship posed by the new immigrants, Lodge argued, “we must look into the history of our race.”¹⁶⁶ Lodge claimed that the history of the Anglo-Saxon race demonstrated that national greatness resulted from the nation’s racial composition, which gave the American people its distinctive qualities: independence, initiative, and a strong sense of morality.¹⁶⁷ The racial qualities of native-born Americans kept socialism at bay, but the new immigrants came from races that were disposed to embrace radical politics.¹⁶⁸

With the support of progressives and organized labor, the literacy bill passed both Houses of Congress, but it was vetoed by President Grover Cleveland, who rejected the argument that the recent immigrants were “undesirable.” “The time is quite within recent memory,” Cleveland’s veto message explained, “when the same thing was said of immigrants who, with their descendants, are now numbered among our best citizens.”¹⁶⁹ Cleveland also rejected the idea that limiting immigration to those who could read the Constitution would somehow protect the American way of life.¹⁷⁰

Although Congress was unable to override Cleveland’s veto, in 1907 Congress created a commission to study the immigration situation. Known as the Dillingham Commission after its chairman, Senator William Dillingham of Vermont, the Commission included Senator Henry Cabot Lodge, a longtime supporter of the IRL.¹⁷¹ Its conclusions, issued in forty-two volumes over four years and backed up by voluminous data, set the stage for decades of debate over immigration restrictions.¹⁷²

¹⁶⁵ Id.; id. at 2818.

¹⁶⁶ Id.

¹⁶⁷ Id. at 2819.

¹⁶⁸ Id. The bill’s supporters in the House agreed. See, e.g., 28 Cong. Rec 5475 (May 20, 1896) (declaring that from the Germanic race “we draw . . . those democratic ideas which are the historic foundation of this very House now deliberating on this question”) (Rep. Wilson); id. at 5472 (Rep. Mahany) (declaring that Italians and others should be excluded for the same reason that Chinese are excluded, “that by the very nature of their blood and instincts, they are unfitted to assimilate with our civilization”).

¹⁶⁹ Grover Cleveland, Veto Message (Mar. 2, 1897), <http://www.presidency.ucsb.edu/ws/?pid=70845>.

¹⁷⁰ Id. (“I can not believe that we would be protected against these evils by limiting immigration to those who can read and write in any language twenty-five words of our Constitution.”).

¹⁷¹ John M. Lund, *Boundaries of Restriction: The Dillingham Commission*, *History Review* vol. 6, (Dec. 1994).

¹⁷² James S. Pula, *American Immigration Policy and the Dillingham Commission*, *Polish American Studies*, Vol. 37, No. 1 (Spring, 1980), 5-31, 14 (“While the emotional

The Commission focused on race as the central factor in regulating immigration was the racial composition of immigrants. To help policymakers sort through the races of the nation's immigrants, the Commission issued a 150-page "Dictionary of Races and Peoples," which meticulously attempted to define and describe the races and sub-racial groups of the world's peoples.¹⁷³ The dictionary gave detailed descriptions of the physical traits said to characterize each race, as well as the unique character of each race. Albanians, for instance, were said to be "brave, but turbulent in spirit—warriors rather than workers," while Serbo-Croatians were said to be "well-adapted to hard labor."¹⁷⁴

The Commission concluded that, due to the racial composition of the new immigrants, immigration from southern and eastern Europe posed a severe threat to the United States. It agreed with the IRL that the "old and the new immigration differ in many essentials."¹⁷⁵ While previous waves of immigrants had been settlers who sought to work the land and assimilated with native-born Americans, the new immigrants were unskilled laborers who sought industrial jobs and kept to themselves.¹⁷⁶ The Commission reported that, "as a class," the new immigrant "is far less intelligent than the old," and "[r]acially they are for the most part essentially unlike the British, German, and other peoples who came during the period prior to 1880."¹⁷⁷

The Commission agreed that the literacy test was "the most feasible way of single method of restricting undesirable immigration."¹⁷⁸ As the Commission noted, the level of literacy represented one of the most striking differences between the immigrants from northwest Europe who share the same racial traits as the nation's original racial stock and those from southern and eastern

bases for the long period of immigration restriction were many and varied, the authoritative foundation was clearly the United States Immigration Commission.").

¹⁷³ Dictionary of Races or Peoples, Reports of the Immigration Commission, 61st Cong., 3d sess., Doc. No. 662 (1911).

¹⁷⁴ *Id.* at 5, 13, 15, 47.

¹⁷⁵ *Id.* 13; see also Dictionary of Races, *supra* note 173, at 32 ("The most interesting fact in immigration is the sudden and astounding recent change in the character of the immigration. While up to 1880 it was almost entirely from northwestern Europe, or, in other words, was composed of races or peoples which now constitute the older American stock, immigration comes mainly at the present time from southern and southeastern Europe; that is, chiefly from Italian, Hebrew, and Slavic stocks that differ widely from the American in language, character, and political institutions.").

¹⁷⁶ *Id.* at 13-14.

¹⁷⁷ *Id.* at 14.

¹⁷⁸ Immigration Commission, Brief Statement of the Conclusions and Recommendations of the Immigration Commission, with Views of the Minority 40 (1910).

Europe, making literacy a straightforward way to exclude members of unwanted races.¹⁷⁹ The Commission said it could not determine whether differences in literacy resulted from environmental factors or “racial tendencies,” but it suggested that genetics was the likely cause because “races living under practically the same material and political conditions show widely varying results.”¹⁸⁰

With the backing of the Dillingham Commission, Congress renewed its push for a literacy test, and in 1912 Congress once again passed a literacy test bill.¹⁸¹ President Taft once again vetoed it, as did President Wilson when it was re-enacted in 1915.¹⁸² Finally in February 1917, the literacy test was enacted over President Wilson’s veto.¹⁸³

To the disappointment of immigration restrictionists, the literacy test did little to restrict the flow of large number of immigrants from southern and eastern Europe. While literacy rates in eastern and southern Europe had been low in the 1896 when Senator Lodge first introduced a bill for a literacy test, literacy had increased considerably by 1917.¹⁸⁴ Requiring immigrants to demonstrate an ability to read the Constitution failed to keep out undesirable and unassimilable races, as its supporters had hoped.

4. The Demise of the Americanization Movement

Although Americanization efforts had increased during World War I, once the war was over these efforts quickly faded as the country entered a period of increased nativism and hostility to immigrants. The war and the Russian Revolution increased the concerns many Americans had about immigrants, who were suspected of disloyalty and spreading radical political ideas.¹⁸⁵ The war had convinced many Americans of the urgency of national unity, which they believed was threatened by ethnic diversity, a conviction captured by the slogan of “100-percent American.”¹⁸⁶ Although immigration greatly diminished during the war, once the war ended it began to increase again, and nativists

¹⁷⁹ See *Emigration Conditions in Europe*, Reports of the Immigration Commission, vol. 4, 61st Cong., 3d sess., doc. 748, at 29 (1911).

¹⁸⁰ *Id.* at 31.

¹⁸¹ GEORGE M. STEPHENSON, *A HISTORY OF AMERICAN IMMIGRATION: 1820-1924*, at 161 (1926)

¹⁸² *Id.*

¹⁸³ 39 Stat. 874 (1917).

¹⁸⁴ HIGHAM, *STRANGERS IN THE LAND*, *supra* note 45, at 308.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 301.

began to fear that a flood of undesirable immigrants would soon arrive.¹⁸⁷

By 1920, Americanization stopped being seen as a workable solution to the problems associated with immigration.¹⁸⁸ Congress stopped appropriating money to the Americanization efforts of the Federal Bureau of Education, leaving the Bureau of Naturalization as the only federal agency participating in Americanization efforts.¹⁸⁹ State programs for Americanization continued to be funded through the 1920s, as did private efforts, but the movement for Americanization ebbed.¹⁹⁰

Even many supporters of Americanization deemed the movement a failure.¹⁹¹ Frances Kellor, Director of the National Americanization Committee, believed that the programs had provoked resistance from immigrants by pushing “more and more toward repression and intolerance of differences.”¹⁹² Immigrants also complained that Americanizers demanded more from them than native-born Americans. As one immigrant worker put it, “There is a mistaken notion among some well-meaning people that the foreign-born would be better Americans if they understood the Constitution. We do not agree with this because the average American native does not know it either . . .”¹⁹³ Others argued that Americanization efforts failed because they did not demand complete assimilation. Henry Pratt Fairchild, author of *The Melting Pot Mistake*, argued: “The traits of foreign nationalities can neither be merged [into American culture] nor interwoven. They must be *abandoned*. . . . The whole idea of assimilation is that there should be one body, bringing other elements into conformity with its own character, and that body in this

¹⁸⁷ See Emergency Immigration Legislation, Hearings Before the Committee on Immigration and Naturalization, House of Reps., 67th Cong., 1st sess. at 23 (Apr. 15, 26, 1921).

¹⁸⁸ HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT*, supra note 92, at 269 (identifying 1920-1921 as the time when “Americanization as a drive or crusade was over”).

¹⁸⁹ *Id.* at 225, 236.

¹⁹⁰ *Id.* at 237-253 (detailing state post-war Americanization programs).

¹⁹¹ See CONSTANTINE PANUNZIO, *IMMIGRATION CROSSROADS* 254 (1927) (“When the war and postwar scares were spent, however, it became clear that all this Americanization agitation was worse than futile.”)

¹⁹² HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT*, supra note 92, at 259-260. As one Italian-language newspaper declared, “Americanization is an ugly word. Today it means to proselytize by making the foreign-born forget his mother country and mother tongue.” *Id.* at 257 (quoting *L’Aurora*, Reading, Pa., June 12, 1920).

¹⁹³ *Id.* at 257-258.

particular case of assimilation is and must be America.”¹⁹⁴

To immigration restrictionists, however, the failure of Americanization efforts proved that the new immigrants could not be transformed into Americans.¹⁹⁵ They believed that Americanization efforts were bound to fail because the American national character resulted from racial traits that could never be taught. With the demise of the Americanization movement, demands to severely restrict immigration, rather than trying to make immigrants into good Americans, rapidly became the dominant answer to the immigration problem.

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

In the election of 1920, advocates of strict immigration control gained control of Congress, and the chairman of the House Immigration Committee became Albert Johnson, an enthusiastic nativist and member of the IRL-backed Eugenics Research Association.¹⁹⁶ Johnson was convinced that the nation’s immigration laws should be based principally on eugenics and the need to preserve the nation’s racial heritage.¹⁹⁷ Johnson consulted frequently with the leadership of the IRL and met often with Madison Grant, author of *THE PASSING OF THE GREAT RACE*.¹⁹⁸ Johnson’s committee heard testimony from leading eugenicists and in 1920 appointed its own “expert eugenics expert.”¹⁹⁹

In 1921, with Representative Johnson’s support, Congress acted to protect the nation’s traditional ethnic mix by enacting an emergency measure to restrict immigration. The Emergency Quota Act restricted annual immigration to three percent of the number of foreign-born persons of each nationality present in the nation.²⁰⁰ The quota operated on a country-by-country basis, which had the effect of greatly limiting immigration from southern and eastern

¹⁹⁴ Henry Pratt Fairchild, *The Melting-Pot Mistake* 431 (1926) (emphasis in original).

¹⁹⁵ See HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 263 (the failure of the Americanization movement served to “prove the incorrigibly unassimilable nature of the material on which they worked.”).

¹⁹⁶ *Id.* at 307; SPIRO, *DEFENDING THE MASTER RACE*, supra note 133, at 203

¹⁹⁷ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 313-314; SPIRO, *DEFENDING THE MASTER RACE*, supra note 133.

¹⁹⁸ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 313.

¹⁹⁹ *Id.* at 314.

²⁰⁰ Immigration Act of May 19, 1921, 42 Stat. 5; see also HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 308-311.

Europe.²⁰¹

In 1924, Congress enacted the National Origins Act, also known as the Johnson-Reed Act, which extended and made permanent the national origins system it had begun to construct in 1921.²⁰² The 1924 Act sought to freeze the nation's racial and ethnic mix as of 1920 by allocating the annual number of immigrants based on the national origins of the nation's white population as of 1920.²⁰³ As a presidential commission later determined, 79% of the white population in 1920 were descended from the countries of northern and western Europe, and as a result, those countries were allocated 79% of the annual immigration quotas.²⁰⁴ In contrast, because only 15% of the white population was estimated to be descended from the countries of southern and eastern Europe, countries in those areas were allocated 15% of the annual immigration quotas.²⁰⁵ In addition, the National Origins Act prohibited immigration of any people who were ineligible for naturalization, which effectively eliminated all immigration from Asia because the Naturalization Act of 1795 continued to bar naturalization by persons who were not white.²⁰⁶

Proponents of the national origins system made no secret that the law was intended to maintain white rule—and in particular, control by what supporters referred to as the “Nordic” and Anglo-Saxon sub-categories of the white race.²⁰⁷ Although the law's proponents made many arguments about the harms from Asian, Jewish, Italian, and other immigrants, they emphasized that their primary concern was that these immigrants were unfit to become true Americans. As Representative Johnson said, “we must pick and choose our future immigrants, and admit only such as show some signs as being the stuff of which good Americans can eventually be made.”²⁰⁸ Organized labor, which had supported immigration restriction to avoid economic competition, began to argue, as the president of the American Federation of Labor declared, that immigration restriction was also necessary to protect “American character and

²⁰¹ Id. at 311.

²⁰² The Immigration Act of 1924, Pub L No 68-139, ch, 190, 43 Stat 153.

²⁰³ Id. § 11(a).

²⁰⁴ Eckerson, *Immigration and National Origins*, supra note 75, at 9 Table 2.

²⁰⁵ Id.

²⁰⁶ Immigration Act of 1924, supra note 202, § 3.

²⁰⁷ See, e.g., Cong. Rec. 11744 (June 24, 1924) (“Mr. Speaker, with this new immigration act the United States is undertaking to regulate and control the great problem of the commingling of races. Our hope is in a homogeneous Nation.”) (Rep. Johnson).

²⁰⁸ 1921 Hearings, supra note 187, at 23.

national unity.”²⁰⁹

President Calvin Coolidge, who signed the National Origins Act into law, made it clear that he supported race-based restrictions precisely to preserve the nation’s constitutional values. Coolidge had declared that, in identifying those immigrants who are “temperamentally keyed for our national background, . . . [t]here are racial considerations too grave to be brushed aside for any sentimental reasons.”²¹⁰ As Coolidge explained to Congress in his State of the Union message of 1923, the racial groups with the temperament to become American were those that had created the nation because America had been “created by people who had a background of self-government.”²¹¹ As a result, preservation of the nation’s constitutional values required that the nation must stay white. Or as Coolidge succinctly put it: “America must be kept American.”²¹²

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

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

²⁰⁹ Id. at 306.

²¹⁰ Calvin Coolidge, *Whose Country Is This?*, *Good Housekeeping* (Feb. 1921), pp-13-14.

²¹¹ Calvin Coolidge, *First Annual Message* (Dec. 6, 1923), <http://www.presidency.ucsb.edu/ws/?pid=29564>.

²¹² Id.

hour of distress and need.²¹³

Stengle argued that continued immigration by foreigners hostile to constitutional values would “mean the absolute destruction of our form of government and our institutions.”²¹⁴

In recommending passage of the National Origins Act, the House Committee on Immigration and Naturalization made explicit the connection between the preservation of the nation’s constitutional ideals and the preservation of the nation’s racial composition. After declaring that a nation’s government inevitably reflects the character and composition of the people, the Committee report proclaims: “If, therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained . . .”²¹⁵ The Committee thus declared that preserving the Constitution required excluding unwanted immigrants and maintaining the nation’s racial composition and the preservation of “the basic strain of our population.”²¹⁶

²¹³ 65 Cong. Rec. 5848; see also *id.* at 5847 (Rep. Stengle) (“[W]e should thoroughly realize that one of the greatest menaces to the proper development of our cherished ideals lies in the invasion of our country by that class of foreign Immigrants who have no conception of nor Interest In those ideals and principles for which we stand but have been taught and trained in antagonistic principles for many generations in the countries of their nativity.”); *Id.* at 5852 (Rep. Reynolds) (declaring that foreigners were flooding into the country who “have never drawn the breath of freedom; they have never lived under a republic” and they are “spreading their doctrines in this country and undertaking to force the same upon us.”).

²¹⁴ *Id.*; see also *id.* at 5865 (Rep. Tillman) (“We have admitted the dregs of Europe until America has been orientalized, Europeanized, Africanized, and mongrelized to that Insidious degree that our genius, stability, greatness, and promise of advancement and achievement are actually menaced.”); see also *id.* at 5849 (“what we are here and now trying to do is to protect America and prevent her dissolution . . . to preserve our inherited birthright of life, liberty, and the pursuit of happiness.”).

²¹⁵ Restriction of Immigration, House of Reps. 68th Cong., 1st sess., Report no. 350 (March 24, 1924) at 13.

²¹⁶ John Trevor, a prominent eugenicist and adviser to the House Immigration committee, put it even more bluntly: from the time of the founding, Trevor wrote, “citizenship in the United States is limited, with one exception, arising from the suppression of slavery within the States, to those races of mankind who by tradition, ideals and habits of life would tend to support and perpetuate the principles of Republican Government in this nation . . .” John B. Trevor, *An Analysis of the American Immigration Act of 1924*, International Conciliation (Sept. 1924) at 4-5; [https://iif.harvard.edu/manifests/view/drs:4907177\\$1i](https://iif.harvard.edu/manifests/view/drs:4907177$1i)

6. The National Origins Act's Codification of Nativism

As the history recounted in this part shows, for decades leading up to the passage of the 1924 National Origins Act, the United States was divided over the ability of immigrants to embrace American values. On one side, the Americanization movement sought to help make the immigrants into good Americans through educational programs focused on teaching civics and inculcating respect for the American creed. On the other side, an immigration restriction movement argued that only people who shared the racial background of prototypical Americans had the temperament and capacity to embrace America's constitutional values, and all others should be excluded.

In adopting the National Origins Act, Congress made nativism the nation's official policy. As its proponents hoped, the law succeeded in greatly reducing immigrants they deemed undesirable. From 1924 to 1929, the annual quota for immigrants from Italy was set at less than 4,000 per year, while Russia and Poland were allotted slightly more than 10,000.²¹⁷ In contrast, in the first decade of the 20th century, around 200,000 immigration immigrants had arrived from Italy each year. Northwest Europe—England, Germany, and Ireland—were each allotted 100,000 immigrants per year, though in practice immigration from these countries remained far lower.²¹⁸ Immigration from Japan was eliminated altogether.²¹⁹ After 1929, 79% of the available immigration quota was allocated to northern and western Europe, while southern and eastern Europe received only 15%.²²⁰

The National Origins Act carried out the principle that the United States is and should remain a white nation. In calculating the nations that would receive immigration quotas, the Act required the Census Bureau to determine the national origins of the American population. In doing so, the Act solely counted the national origins of white Americans, that is, Americans who could trace their ancestry to Europe. The Act explicitly excluded (1) immigrants from the Western Hemisphere—thus excluding all Americans whose families came from Latin America, (2) aliens ineligible for naturalized citizenship, as well as their descendants—thus excluding all Americans of Asian descent, (3) the descendants of slaves—thus excluding all African Americans, and (4) all American Indians.²²¹ As Letti Volp has explained, under the 1924 Act “the

²¹⁷ STATISTICAL ABSTRACT OF THE UNITED STATES 100 (Washington, D.C. Government Printing Office 1929).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Eckerson, *Immigration and National Origins*, *supra* note 75, at 9 Table 2.

²²¹ Letti Volp, *Book Review*, Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, 103 *Mich. L. Rev.* 1595, 1599 (2005).

‘colored races’ were erased from the history of national origins of America.”²²²

Only European nations counted in determining national origins under the National Origins Act. Others—African Americans, Asian Americans, Mexican Americans, and Native American—simply and literally did not count in determining who the American people are. And, within the group of white Americans whose national origins made them count as authentic Americans, the Act established an unmistakable hierarchy. At the top stood so-called Nordics, descendants of the race credited with founding the nation and establishing its constitutional principles. To protect the Constitution, Congress declared, the population of this group must be protected, while others must be excluded.

III. THE PERSISTENCE OF NATIVIST CONCEPTIONS OF CONSTITUTIONAL FITNESS

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

Although many Americans may well think of national identity in terms of race, religion, and national origin, since 1965 it has become conventional to describe American identity as solely involving commitment to the American creed. Every President elected since 1965 has public declared devotion to this race-neutral conception of American identity. As Part B discusses, however, white nationalists and other extremists continue to keep alive the idea that only some people are capable of embracing American ideals, while others should be excluded from the United States. They consider the Immigration and

²²² Id.

Nationality Act of 1965 to be an act of national betrayal, when America stopped being America and opened the floodgates to immigrants from Latin America and Asia. Although the nativist conception of constitutional fitness remained on the margins, it was pushed back to the mainstream through the presidential campaigns of Patrick Buchanan in the 1990s and the Tea Party movement of the Obama years.

With the election of Donald Trump, discussed in Part C, old-time nativist beliefs on who is fit to become American, long believed to be discredited, have moved from the margins to the White House.

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

American notions of national identity have long emphasized dedication to self-government, liberty, and other constitutional values, but during World War II American political leaders proclaimed that national identity meant dedication to those principles without regard to race or ethnicity.²²³ In doing so, they sought to contrast the nation's universalistic creed with the Nazi blood-and-soil ideology of Aryan supremacy. In the fight against fascism, the United States' long-established system of hierarchies based on race, religion, and national origin was recognized to be an embarrassment that had to be ignored. Although racism and anti-Semitism remained pervasive in American life, wartime propaganda declared that prejudice was un-American.²²⁴

In 1943, in dedicating the creation of a Japanese-American army unit, President Franklin Roosevelt declared that national identity was, and always had been, defined by creed, not race:

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

²²³ Aziz Rana traces back the now-conventional universalistic conception of America's civic identity to the closing of the frontier and the Spanish-American War. Aziz Rana, *Colonialism and Constitutional Memory*, 5 UC Irvine L. Rev. 263, 268 (2015). While Rana may well be correct that this conception of national identity took root at that time, it was not a dominant conception among American policymakers at the time of the 1924 Immigration Act and did not become a dominant conception among policymaker until the middle of the twentieth century with the passage of the civil rights laws and the adoption of the 1965 Immigration Act.

²²⁴ See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61, 69-70 (1988).

democracy.²²⁵

The speech sought to rouse the American people by reminding them of the inspiring ideals for which the nation was fighting and to distinguish the United States' national principles from the ideologies of the nations it was fighting. In Roosevelt's version, devotion to constitutional principles, "our creed of liberty and democracy," and not "race or ancestry," characterized who a "good American" is. These were not new values, Roosevelt claimed, but had "always" been the nation's guiding ideals, from the time of its founding to the present.²²⁶

There were multiple ironies in the timing of Roosevelt's assertion that American identity has nothing to do with race or ancestry. The speech was made to commemorate the creation of an all-Japanese-American army unit, whose members were selected solely by race and ancestry, at a time when Japanese and most other non-white immigrants were barred from becoming naturalized citizens and when his own administration had put thousands of Japanese-Americans in internment camps solely because of their national origin. Roosevelt's speech engages in a familiar sort of national mythmaking, which ignored past and present inconsistencies and refashioned history to suit present-day purposes.²²⁷

The next year, in *AN AMERICAN DILEMMA*, Gunnar Myrdal coined the term the "American Creed" and argued that the nation's identity was defined by commitment to that creed. As Myrdal wrote, "Americans of all national origins, classes, regions, creeds, and colors, have something in common: a social ethos, a political creed," which is "the cement in the structure of this great and disparate nation."²²⁸ The dilemma addressed in Myrdal's study was the inconsistency between the nation's system of racial segregation and the nation's constitutional ideals. Myrdal portrayed the nation's history of racism as an aberration, a mistake that conflicted with the nation's true

²²⁵ *Praises Army Plan for Japanese Unit*, New York Times (Feb. 5, 1943).

²²⁶ As historian Eric Foner has noted, Roosevelt's statement was "more attuned to mobilizing support for the war than to accurately describing the American past." ERIC FONER, *WHO OWNS HISTORY? RETHINKING THE PAST IN A CHANGING WORLD* 165 (2002).

²²⁷ Citing Benedict Anderson, Jack Balkin has written of the importance of the stories in constructing a national identity: "Constitutional stories construct a collective subject existing over many generations, whose constitution the Constitution is. The constitutional story is based on imagination, on the fiction of a collective subject that extends back into the past and forward into the future." JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 2 (2011).

²²⁸ MYRDAL, *AN AMERICAN DILEMMA*, *supra* note 19, at 3-4; see also Rana, *supra* note 223 (describing how devotion to the Constitution achieved the status of orthodoxy by the mid-twentieth century).

commitments.²²⁹ In the end, Myrdal argued, Americans would rally around the nation's fundamental principles, and the nation's true self would overcome its unfortunate racism.²³⁰

Although the wartime propaganda declaring prejudice un-American and the widespread praise for *AN AMERICAN DILEMMA* may suggest a growing acceptance of a race-neutral conception of American national identity, in 1952 a supermajority in Congress remained committed to restricting immigration to maintain the nation's white Anglo-Saxon racial core. That year, Congress overrode President Truman's veto to enact a new immigration law that maintained the national origins principle adopted in 1924.²³¹

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

The idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Baits or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that "all men are created equal."²³²

In contrast, Senator Pat McCarran, the chief sponsor of the 1952 bill, defended the national origins principle, which he said served "to preserve best the sociological and cultural balance in the population of the United States."²³³ If the nation did not maintain its ethnic balance, McCarran warned, it would

²²⁹ MYRDAL, *AN AMERICAN DILEMMA*, supra note 19, at lxxi-lxxiii, 6-9.

²³⁰ Id.; see also SMITH, *CIVIC IDEALS*, supra note 39, at 19 ("Myrdal offered hope that this inequality, too, would soon be overcome").

²³¹ McCarran-Walter Act, Pub. L. No. 82-414, §211(c), 66 Stat. 163, 181 (1952).

²³² Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), <http://www.presidency.ucsb.edu/ws/?pid=14175>.

²³³ 99 Cong. Rec. 1517 (Mar 2, 1953).

cease to be America.²³⁴

After Congress overrode Truman's veto, Truman set up a commission to recommend new immigration legislation. Its 1953 report, "Whom We Shall Welcome," argued that the national origin system conflicted with America's fundamental commitment to equality: "America was founded upon the principle that all men are created equal, that differences of race, color, religion, or national origin should not be used to deny equal treatment or equal opportunity."²³⁵ Embracing the nation's cultural diversity, the commission denounced the principle that white Europeans make better citizens and declared that "all peoples are inherently capable of acquiring or adapting to our civilization."²³⁶ Far from protecting America's constitutional values, the Commission argued, the national origins system conflicted with those values.²³⁷ The Commission further noted that the nation's discriminatory immigration laws harmed its foreign policy interests because those laws had long been used by the nation's enemies to arouse anti-American sentiments.²³⁸

²³⁴ Id. at 1518 ("I believe that this nation is the last hope of Western civilization and if this oasis of the world shall be overrun, perverted, contaminated or destroyed, then the last flickering light of humanity will be extinguished."). Indeed, McCarran believed that, even with restrictive immigration laws, dangerous aliens had already infiltrated the nation. Id. ("[W]e have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life, but which, on the contrary are its deadly enemies.").

²³⁵ Whom We Shall Welcome, Report of the President's Commission on Immigration and Naturalization at xii (1953), <https://archive.org/stream/whomweshallwelco00unit#page/n5/mode/2up>; see Edward M. Kennedy, The Immigration Act of 1965, *The Immigration Act of 1965*, *Annals of the American Academy*, 137, 138 (stating that "a truly concerted effort was made to eliminate the quota system. It began with the work of President Truman's Commission on Immigration and Naturalization and its historic report, *Whom We Shall Welcome*").

²³⁶ Id. at 93 (quoting Ralph L. Beals, former president of the American Anthropological Association); see also id. at xiv ("The Commission believes that an outstanding characteristic of the United States is its great cultural diversity within an overriding national unity."); id. at 15 (rejecting the "unfounded belief that people of western and northern Europe and their descendants make better citizens than immigrants from other areas.").

²³⁷ Id. at 13 (stating that the national origins approach "embodies principles inconsistent with the Declaration of Independence, the Bill of Rights of the Constitution of the United States, and the institutions of government which have made our nation strong and great and the hope of free peoples everywhere."). For additional history of the propaganda problems resulting from the national origins system see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. Rev.* 273, 288-297 (1996).

²³⁸ Id. at 53, 55.

The civil rights movement of the 1950s and 1960s made the race-neutral conception of American identity articulated by Roosevelt and Myrdal central to its message and demanded that the United States live up to its creed. Invoking the nation's founding principles, Martin Luther King described the United States as a nation that failed to live up to its stated ideals: "America is essentially a dream, a dream as yet unfulfilled. It is a dream of a land where men of all races, of all nationalities and of all creeds can live together as brothers."²³⁹ Embracing the belief that American national identity is defined by commitment to the American Creed, civil rights activists and fought to overcome competing conceptions of nationalism based on race, ethnicity, and religion.²⁴⁰ Civil rights activists depicted the fight for black freedom as a fight to carry out America's unfulfilled national ideals, which were embodied in the Constitution.²⁴¹

By 1960, creedal nationalism had gained the status of orthodoxy, embraced by the elites of both major political parties, and the national origins system was recognized as inconsistent with national values. The GOP's 1960 platform called for doubling the annual number of immigrants and insisted that admission should be based on individual merit and not race or national origin.²⁴² The Democratic Party platform agreed that the national origins system should be abandoned as "a policy of deliberate discrimination" that

²³⁹ Martin Luther King, *The Speeches of Martin Luther King*; see also Aziz Rana, *Race and the American Creed*, *N+1* (Winter 2016), <https://nplusonemag.com/issue-24/politics/race-and-the-american-creed/>.

²⁴⁰ As Walter Jackson wrote, *An American Dilemma* "established a liberal orthodoxy on black-white relations and remained the most important study of the race issue until the middle of the 1960s. . . . Activists, educators, ministers, and social workers referred to *An American Dilemma* in campaigns against segregation and discrimination. . . . Most significantly, Chief Justice Earl Warren cited *An American Dilemma* in the Supreme Court's *Brown v. Board of Education* decision to support the view that segregated schools were inherently unequal.") Walter A. Jackson, Gunnar Myrdal and America's Conscience xi (1990).

²⁴¹ See also Rana, *Colonialism and Constitutional Memory*, *supra* note 223, at 278. During the Cold War, the fight for civil rights and a race-neutral understanding of American identity was also recognized to serve important foreign policy goals by countering communist propaganda that focused on racism in the United States. Defining American nationalism solely by commitment to creed served to cleanse the nation's character from the stains of racism. See generally, Dudziak, *Desegregation as a Cold War Imperative*, *supra* note 224; Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 *Cal. L. Rev.* 335 (2015).

²⁴² Republican Party Platform of 1960 (July 25, 1960), <http://www.presidency.ucsb.edu/ws/?pid=25839>; see also DANIELS, *GUARDING THE GOLDEN DOOR*, *supra* note 63, at 128.

“contradicts the founding principles of this nation.”²⁴³ President Kennedy made immigration reform a priority, and President Johnson continued the push for reform after Kennedy’s assassination.

In January 1965, President Johnson urged Congress to overturn the national origins system because it was incompatible with the nation’s core commitment to liberty and equality.²⁴⁴ As Johnson put it, “The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities.”²⁴⁵ Like Roosevelt, Johnson claimed the American national character he described had always been true, even though for many decades American policy had determined who could become an American precisely by asking where potential immigrants came from. Nonetheless, the national origins system conflicted with America’s longstanding commitment to equality, Johnson declared, because it deemed some people more fit for citizenship than others.²⁴⁶

During the summer of 1965, Congress debated a bill to adopt an immigration law that would overturn the national origins system. As with earlier debates over immigration policy, the 1965 debate centered on competing conceptions of national identity. They argued that the national origins system was “contrary to our basic principles as a nation” and “repugnant to our national traditions.”²⁴⁷ The bill’s proponents considered the adoption of an immigration system that did not take into account race or national origins to be the natural extension of civil rights principles. As Representative Laurence Burton argued: “Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this Nation composed of the descendants of immigrants.”²⁴⁸

Defenders of the national origins system continued to argue that

²⁴³ 1960 Democratic Party Platform (July 11, 1960), <http://www.presidency.ucsb.edu/ws/?pid=29602>; DANIELS, *GUARDING THE GOLDEN DOOR*, supra note 63, at 128.

²⁴⁴ Proposed Legislation on American Immigration Policy, President Johnson’s January 13, 1965 Message to the Congress Submitting Proposed Immigration Legislation.

²⁴⁵ Id.

²⁴⁶ Id. (arguing that the national origins approach is based on the false belief “that men and women from some countries are, just because of where they come from, more desirable citizens than others.”).

²⁴⁷ 111 Cong. Rec. 24,225 (1965) (Sen. Edward Kennedy); id. at 21,778 (Rep. Paul Krebs).

²⁴⁸ 111 Cong. Rec. 21,783 (1965); see also Chin, *The Civil Rights Revolution Comes to Immigration Law*, supra note 237, at 302 n.120 (listing similar remarks).

constitutional government would be threatened by admitting immigrants who did not share the background of prototypical Americans. Senator Robert Byrd, for instance, argued that it was “just and wise” to restrict immigration to maintain the nation’s ethnic balance, considering that the peoples of the world differ widely in “their inherited ability and intelligence, their moral traditions, and their capacities for maintaining stable governments.”²⁴⁹ Byrd criticized supporters of the bill as employing “sentimental slogans” and called on his colleagues to “resist the pressures for sharply increased immigration of persons with cultures, customs, and concepts of government altogether at variance with those of the basic American stocks.”²⁵⁰ Byrd believed that constitutional government itself was at risk if the nation allowed immigration from exotic far-flung lands like “Jamaica, Trinidad, Tobago, Indonesia, India, Nigeria, and so forth” because an influx of immigrants from those countries “can profoundly affect the character of the American population, and, in the long run, can critically influence our concepts of government.”²⁵¹ Byrd was not alone in arguing that non-European immigrants should be excluded in order to protect the nation’s constitutional system.²⁵²

The bill’s supporters sought to assure race-nervous Americans that opening the doors to immigrants from around the world would not lead to radical changes.²⁵³ Senator Edward Kennedy declared that the “ethnic pattern of immigration under the proposed measure is not expected to change as sharply as the critics seem to think.”²⁵⁴ President Johnson agreed that the proposal “is not a revolutionary bill. It does not affect the lives of millions. It will not reshape the structure of our daily lives . . .”²⁵⁵

²⁴⁹ 111 Cong. Rec. 23793 (Sept. 14, 1965).

²⁵⁰ *Id.* at 23,794.

²⁵¹ *Id.*

²⁵² For instance, Marion Moncure Duncan, President of the Daughters of the American Revolution, testified that the national origins system represents “a first line of defense in perpetuating and maintaining our institutions of freedom and the American way of life.” Statement of Mrs. Robert V.H. Duncan, National Origins Quotas Should Be Retained (1964), in IMMIGRATION: DEBATING THE ISSUES 117, 118 (1997).

²⁵³ Chin, *The Civil Rights Revolution Comes to Immigration Law*, *supra* note 237, at 311-312 & nn.165-169.

²⁵⁴ Immigration: Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary, 89th Cong. 2 (1965). For a discussion of the context of Kennedy’s remarks, see Chin, *The Civil Rights Revolution Comes to Immigration Law*, *supra* note 237, at 334-335.

²⁵⁵ President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp> (Oct. 3, 1965).

In September 1965, Congress enacted the Immigration and Nationality Act with large bipartisan majorities.²⁵⁶ For the first time, American law prohibited discrimination “in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.”²⁵⁷ Signing the bill into law at the foot of the Statue of Liberty, President Johnson declared that the law would help the nation become true to its values. As he said, the law would “repair a very deep and painful flaw in the fabric of American justice” and would “make us truer to ourselves both as a country and as a people.”²⁵⁸

B. White Nationalist Views on Constitutional Fitness

Although the Immigration and Nationality Act of 1965 repudiated the nativist belief that people of European descent are naturally suited to embrace America's constitutional values while others must be excluded as dangerous to the Constitution, the nativist constitutional idea has persisted. Nativists look on 1965 as the year of national betrayal, when America stopped being America and opened the floodgates of immigration by Asians and Latin Americans, whose presence is destroying constitutional values. For decades, however, white nationalists have kept alive the belief that the Constitution was made for them and not others, although it was quietly suggested by mainstream politicians and organizations.

1. Radical Anti-Immigrant Nativism

Since 1979, the leading advocate for immigration restriction has been the Federation for American Immigration Reform (FAIR).²⁵⁹ It has pushed a nativist agenda, arguing that Latin American and Asian immigrants were fundamentally transforming American culture. Although it has sought to keep its nativist sentiments quiet, FAIR and its many associated organizations have often allied with white nationalists who have openly advanced the view that the United States is a fundamentally white nation, its Constitution made

²⁵⁶ Immigration and Nationality Act (Act of Oct. 3, 1965), 79 Stat. 911(1965).

²⁵⁷ 8 U.S.C. § 1152.

²⁵⁸ President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp> (Oct. 3, 1965).

²⁵⁹ Devin Burghart & Leonard Zeskind, Report, *Beyond FAIR: The Decline of the Nativist Establishment and the Rise of Tea Party Nativism*, Institute for Research & Education on Human Rights (2012) (“Within the parameters of the mainstream conservative universe, nativism owed its re-emergence largely, but not exclusively, to the Federation for American Immigration Reform (hereinafter FAIR) and the many organizations it helped spin off.”). At its peak, FAIR and associated organizations had as many as 1.2 million members and over 400 local groups. *Id.* at 3.

solely to protect white people.²⁶⁰

To be sure, FAIR's official position has been that immigration should not be restricted based on race or ethnicity, but it has nonetheless advanced a nativist agenda, sometimes quietly and sometimes openly.²⁶¹ FAIR received over a million dollars in funding from the Pioneer Fund, a eugenicist organization that has worked since 1937 to support white supremacy.²⁶² FAIR has frequently argued that immigrants from Asia and Latin America undermine American culture and destroy the American political system. As FAIR's founder John Tanton has written, American immigration policy should seek to preserve a homogeneous society because "[t]oo much diversity leads to divisiveness and conflict."²⁶³ Tanton privately declared his belief that "for European-American society and culture to persist requires a European-American majority, and a clear one at that."²⁶⁴ Tanton has been especially concerned that immigration from Latin America undermines American political culture, telling FAIR employees that Latinos make poor citizens because they "bring with them the tradition of the mordida [bribe], the lack of involvement in public affairs."²⁶⁵

FAIR's skepticism of the ability of Latin American immigrants to embrace America's constitutional values has not been limited to private comments by Tanton but has long been asserted publicly. In testimony before Congress in 1996, Dan Stein, director of FAIR, testified that immigrants should only be allowed to become naturalized citizens if they can demonstrate that they share America's fundamental values—which he defined to include ambition, hard work, patriotism, and "a commitment to understand and support our republican form of government, and a commitment to participate and vote in it," and "a willingness to recognize and support the Constitution and the nation's boundaries."²⁶⁶ Yet Stein told Congress that he doubted the ability of

²⁶⁰ Id. at 3.

²⁶¹ See e.g., Federation for American Immigration Reform President Dan Stein, <https://www.youtube.com/watch?v=cY6t2ckpb5g>.

²⁶² Federation for American Immigration Reform, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>; Race Science and the Pioneer Fund, Searchlight No. 277 (July 7, 1998), <http://faculty.ferris.edu/ISAR/Institut/pioneer/search.htm>.

²⁶³ John H. Tanton, End of the migration epoch? Time for a new paradigm, in IMMIGRATION AND THE SOCIAL CONTRACT: THE IMPLOSION OF WESTERN SOCIETIES 3, 17 (1996)

²⁶⁴ Heidi Beirich, The Nativist Lobby: Three Faces of Intolerance, Report from the Southern Poverty Law Center 5 (Feb. 2009).

²⁶⁵ Id. at 10.

²⁶⁶ Testimony of Dan Stein, Executive Director, Federation for American Immigration

Mexicans to meet those standards because he believed that they would remain loyal to Mexico, not the United States.²⁶⁷

Although FAIR has worked to keep its nativist agenda coded, it has worked frequently with members of the radical right who openly espouse race-based nativism. FAIR has frequently publicized the work of Peter Brimelow, one of the leading voice of white nationalism and anti-immigrant nativism.²⁶⁸ Brimelow is the author of *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* and founder of VDARE.com, a website "dedicated to preserving our historical unity as Americans into the 21st Century" and which has been identified by the Southern Poverty Law Center as "an anti-immigration hate website."²⁶⁹ *ALIEN NATION* argues that the United States is fundamentally a white nation, but liberal elites and multiculturalists are seeking to destroy it.²⁷⁰ Brimelow longs for the days when America was whiter and therefore more truly American:

As late as 1950, somewhere up to nine out ten Americans looked like me. That is, they were of European stock. And in those days, they had another name for this thing dismissed so contemptuously as the "racial hegemony of white Americans." They called it America.²⁷¹

Reform, Concerning Naturalization Practices and American Citizenship, Before the Senate Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs (Oct. 22, 1996), 1996 WL 603202.

²⁶⁷ Id. In a video program produced by FAIR, Stein spoke more bluntly, asking: "How can we preserve America if it becomes 50 percent Latin American?" Federation For American Immigration Reform, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>.

²⁶⁸ Brimelow appeared on a television show produced by FAIR and was interviewed by FAIR's president, Dan Stein. <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>.

²⁶⁹ In *ALIEN NATION*, Brimelow expanded his essay "Time to Rethink Immigration," which appeared in *National Review* in June 1992 and has been called "a sort of ur-text for today's alt-right." Robert Draper, *National Revolt*, *New York Times Sunday Magazine* MM36 (Oct. 2, 2016). VDARE, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/group/vdare>.

²⁷⁰ PETER BRIMELOW, *ALIEN NATION* 10 (1995) ("[T]he American nation has always had a specific ethnic core. And that core has been white.").

²⁷¹ In depicting the authentic America to be white, Brimelow embraces ethnonationalism, defining a nation as an "ethno-cultural community." Id. at 203. For ethnonationalists, an influx of immigrants from outside the nation's defining ethnic

Brimelow characterizes the 1965 Immigration and Nationality Act as an act of revenge by America's ethnic minorities and an expression of hatred for the nation's native core, a point on which FAIR's President Dan Stein has agreed.²⁷²

Brimelow has expressly praised earlier generations of nativists, including the anti-Catholic Know Nothings of the 1850s, describing them as patriots who were primarily concerned about preserving constitutional liberty.²⁷³ Like earlier generations of nativists, Brimelow argues that today's immigrants are genetically inferior to white Americans, bring crime and disease, steal jobs, destroy the environment, and drain government resources.²⁷⁴ What most concerns Brimelow, however, is that today's immigrants are radically undermining America's national character, turning the United States into what he calls an "Alien Nation," unrecognizable from what he understands to be the real, authentic America.²⁷⁵ Immigrants from Asia and Latin America, Brimelow argues, "are from completely different, and arguably incompatible, cultural traditions."²⁷⁶ Brimelow claims that the influx of these transformative foreigners results from a deliberate policy decision by ruling elites who hate

identity necessarily undermines the nation, and Brimelow thus argues that the influx of non-white immigrants since the 1965 Immigration Act threatens the nation's identity. BRIMELOW, *ALIEN NATION*, supra note 269, at. at 57 ("There is no precedent for a sovereign nation undergoing such a rapid and radial transformation of its ethnic character in the entire history of the world.").

²⁷² Id. at 100-102, 105-107; "Oral History of the Federation for American Immigration Reform," interview of Dan Stein by John Tanton, August 1994, quoted in <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> (describing that the 1965 Act as an attempt by liberal elites "to retaliate against Anglo-Saxon dominance.").

²⁷³ Id. at 13.

²⁷⁴ Id. at 56 n.* (asserting that today's immigrants have "an average IQ of 95, at least 5 points below the white American mean") (citing RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE*); id. at 184 ("[R]andom street crime, the great scandal of American cities since the 1960s, is related to impulsiveness and what sociologists call 'present-orientation,' i.e., the inability to reckon with consequences. And this turns out to be a key cultural variable, differing significantly between ethnic groups.").

²⁷⁵ Id. at xix (asserting that mass immigration is "making America an *alien nation* . . . in the sense that Americans will no longer share in common what Abraham Lincoln called in his First Inaugural Address 'the mystic chords of memory, stretching from every battle field and patriot grave, to every living heart and hearth stone, all over this broad land . . .").

²⁷⁶ Id. at 56.

American values and desire to change it fundamentally.²⁷⁷

Like earlier nativists, Brimelow reads the Constitution as addressed solely to the protection of the nation's white ethnic core. Brimelow thus quotes the Constitution's Preamble, which declares the nation's purpose is to "form a more perfect Union . . . [for] ourselves and our posterity." As Brimelow argues, this refers to "the Founders' posterity, not posterity in general."²⁷⁸ That is, the Constitution was written by the founders of a white ethnic republic to establish liberty for themselves and their white descendants.²⁷⁹

Other leading white nationalists have worked in FAIR's orbit, including Jared Taylor and the late Sam Francis. Taylor, founder of the white nationalist journal *AMERICAN RENAISSANCE*, has asserted that "the Constitution was written for white men, and that its protections were not intended for blacks."²⁸⁰ In a 2012 essay, *What the Founders Really Thought About Race*, Taylor argues the United States can become a nation with a common creed only by becoming a white nation again.²⁸¹ Francis, who was described as the "philosopher-general" of the radical right, articulated the belief that the United States is, at heart, a white nation, its Constitution an expression of its white heritage.²⁸²

²⁷⁷ Id. at 105-107.

²⁷⁸ Id. at 209-210.

²⁷⁹ Brimelow argues that the Founders themselves shared his conception that the American people are defined by their common ancestry and the Constitution speaks only to those within the ethnic fold. Id. at 210 (quoting John Jay).

²⁸⁰ JARED TAYLOR, *WHITE IDENTITY: RACIAL CONSCIOUSNESS IN THE 21ST CENTURY* 223 (2011). Taylor has explained that the name "American Renaissance" refers to the goal of making America great again by making it white again. Jared Taylor, *Twelve Years of American Renaissance*, *AM. RENAISSANCE* 1, 3 (Nov. 2002), <http://www.amren.com/ar/pdfs/2002/200211ar.pdf> ("[The] conviction of the essential "whiteness" of America was central to American thought from colonial times until only 50 or 60 years ago. . . . It is only by rekindling this sense of solidarity, loyalty, and pride that we can hope to see a real American renaissance, and it is from this vision that AR takes its name.").

²⁸¹ Jared Taylor, *What the Founders Really Thought About Race*, National Policy Institution (Jan. 17, 2012), <http://www.npiamerica.org/research/category/what-the-founders-really-thought-about-race#fn:59> ("Today's egalitarians are therefore radical dissenters from traditional American thinking. A conception of America as a nation of people with common values, culture, and heritage is far more faithful to vision of the founders.").

²⁸² LEONARD ZESKIND, *BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM* 288 (2009). Francis had worked for the Heritage Foundation in the 1970s and 1980s and became a columnist for the conservative *WASHINGTON TIMES* in the 1990s until he was fired when his calls for white nationalism became too explicit. Id. at 288, 424-425. Afterwards, Francis published

Francis expressly embraced eugenics and argued that non-whites were incapable of adapting to America's constitutional values.²⁸³ In a 1995 article in *American Renaissance*, Francis argued that the "white European character of the United States" was under attack by nation's growing non-white population and by multiculturalism, affirmative action, and the nation's civil rights policies.²⁸⁴ Francis called for greater racial consciousness among whites to counter the attack.²⁸⁵ Whites must rally around the longstanding historical conception of the United States as a white nation, Francis argued, or America will cease to be America.²⁸⁶ Thus, like other white nationalists, Francis connects the nation's racial identity with the Constitution and argued that only by acting to reassert white supremacy could the nation's constitutional values be protected.²⁸⁷

Extremists like Brimelow, Taylor, and Francis kept alive constitutional nativism, which was pushed to the mainstream by the anti-immigrant activism of FAIR. Explicitly race-based nativism, however, remained largely outside the realm of acceptable public discourse until 1992 when Patrick Buchanan launched his first campaign for the Republican presidential nomination.

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

The nativism suggested by FAIR and espoused more openly by its radical partners Brimelow, Taylor, and Francis found its way into mainstream politics in 1992 and 1996 when Patrick Buchanan challenged President George H.W.

frequently in Jared Taylor's *AMERICAN RENAISSANCE* and on Peter Brimelow's *VDare.com*. Francis worked with FAIR on numerous projects and also served as chairman of the American Immigration Control Foundation, a virulently anti-immigrant group, which like FAIR was funded by the eugenicist Pioneer Foundation. Anti-Immigration Groups, *The Intelligence Report* (Mar. 21 2001), <https://www.splcenter.org/fighting-hate/intelligence-report/2001/anti-immigration-groups>.

²⁸³ Samuel Francis, "Race and the American Prospect: An Introduction," *VDARE.com* (Sept. 5, 2006), <http://www.vdare.com/articles/race-and-the-american-prospect-an-introduction>. Among other things, Francis declared, "racial differences in intelligence and behavior patterns significantly affect such societal differences as levels of technological achievement, political stability and freedom, criminal violence, and standards of living." *Id.*

²⁸⁴ Samuel Francis, "Prospects for Racial and Cultural Survival," *American Renaissance* (Mar. 1995), https://www.amren.com/news/2011/06/prospects_for_r/.

²⁸⁵ Francis, *Race and the American Prospect*, *supra* note ____.

²⁸⁶ *Id.* ("If you reject race, then you reject America as it has really existed throughout its history, and whatever you mean by 'America' has to come from something other than its real past.")

²⁸⁷ *Id.*

Bush for the Republican presidential nomination. Buchanan had been a speechwriter for President Richard Nixon and a syndicated columnist, who appeared frequently on political talks on cable TV.²⁸⁸ In the 1980s, Buchanan's columns began to express white nationalist themes, such as asking whether the United States should "remain a white nation."²⁸⁹

In his presidential campaigns, Buchanan made what he described as "economic nationalism" the centerpiece of his campaign, arguing against free trade deals like NAFTA and against legal and illegal immigration. He frequently articulated these positions through blunt appeals to white nativism. "Who speaks for the Euro-Americans, who founded the U.S.A.?" Buchanan asked. "Is it not time to take America back?"²⁹⁰ He declared that America would be better off accepting one million English immigrants than "a million Zulus."²⁹¹ He called for a moratorium on immigration and proposed the construction of a border fence.²⁹² He depicted the global situation as a battle between "Christian truths" and "Western Civilization," on the one hand, and "barbarians" such as multiculturalists, on the other.²⁹³

Mainstream conservatives denounced Buchanan's explicit bigotry. William F. Buckley, editor of the *National Review*, rejected Buchanan because of his thinly veiled anti-Semitism.²⁹⁴ Columnist George Will accused Buchanan of peddling a brand of nativism that conflicted with the true nature of American identity, that being an American is "not a matter of membership in any

²⁸⁸ ZESKIND, *BLOOD AND POLITICS*, supra note 282, at 236.

²⁸⁹ *Id.* at 237.

²⁹⁰ The 1992 Campaign: Candidates Records; White House Hopes to Trip Buchanan on His Paper Trail, *New York Times* (Mar. 1., 1992) (quoting *NY Post*, June 20, 1990).

²⁹¹ *This Week With David Brinkley* (Dec. 8, 1991) ("I think God made all people good. But if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, which group would be easier to assimilate and would cause less problems for the people of Virginia?")

²⁹² Patrick J. Buchanan, *Mexico: Who Was Right?*, *New York Times* (Aug. 25, 1995)

²⁹³ *Id.* At the 1992 Republican National Convention, Buchanan gave a vitriolic address that described the presidential election as part of a "religious war going on in this country for the soul of America . . . a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself." Patrick Buchanan, 1992 Republican National Convention Speech, <http://buchanan.org/blog/1992-republican-national-convention-speech-148>. On one side in this war for America's soul, Buchanan said, stood the Clintons and the rioters in Los Angeles. On the other side were traditional Americans, who he said were fighting to "take back our cities, and take back our culture, and take back our country." *Id.*

²⁹⁴ "Is 'Pat' Buchanan anti-semitic?", *Newsweek* (Dec. 23, 1991), <http://www.newsweek.com/pat-buchanan-anti-semitic-201176>.

inherently privileged or especially appropriate group, Caucasian or otherwise” but requires commitment to the nation’s creed.²⁹⁵ Rejected by establishment conservatives, Buchanan was embraced by the extreme right.²⁹⁶

The influence of the radical right on Buchanan can be seen readily by the fact that Buchanan’s friend Sam Francis served as a campaign adviser him during his 1996 campaign. Francis urged Buchanan to focus on trade and immigration because these issues directly address the “racial dispossession of the historic American people,” advice that Buchanan heartily accepted.²⁹⁷ Buchanan made clear that he shares the same white nativist worldview as Francis, Brimelow, and Taylor.²⁹⁸ Buchanan has described the United States as essentially a white, European nation and has described 1965 as a turning point in American history, when the United States began to lose its white majority.²⁹⁹ For Buchanan, as for Brimelow, Taylor, and Francis, the Constitution can only be understood as created by and for a white nation.³⁰⁰

In his campaigns, Buchanan evoked many of the nativist themes raised by the Immigration Restriction League in the first decades of the twentieth century, but there was a crucial difference. The nativists of the 1920s represented American elites. They were Harvard men, Boston Brahmins, Senators, and Ivy League scientists, who were alarmed because they believed that the constitutional order, if not the natural order, which placed them at

²⁹⁵ George Will, *Protest! What the Buchanan Candidacy Is All About*, *Baltimore Sun* (Dec. 12, 1991), http://articles.baltimoresun.com/1991-12-12/news/1991346117_1_president-buchanan-david-duke-confetti.

²⁹⁶ For instance, Buchanan was endorsed by former Klansman David Duke, and the *Spotlight*, published by Willis Carto’s Liberty Lobby, recognized Buchanan as the new voice of white nationalism. *ZESKIND, BLOOD AND POLITICS*, *supra* note 282, at 281.

²⁹⁷ *Id.* at 428.

²⁹⁸ In his book *STATE OF EMERGENCY: THIRD WORLD INVASION AND CONQUEST OF AMERICA*, Buchanan refers to both Francis and Brimelow as his friends and cites their work repeatedly. Buchanan, *State of Emergency*, *supra* note ___, at vii.

²⁹⁹ Buchanan, *State of Emergency*, *supra* note ___, at 151. Buchanan finds support for his view in the work of Samuel Huntington, who argued that the American Creed can only be understood as an expression of “Anglo-Protestant culture” and that “Anglo-Protestant culture has been central to American identity for three centuries.” Samuel Huntington, *Foreword, Who Are We? The Challenges to America’s National Identity*, at xv-xvi (2004). Huntington, however, has made clear that he believes that Anglo-American culture, not race, is the basis for the American Creed, including its Constitution. Thus, for Huntington, people of any race or ethnicity could become authentic Americans by embracing Anglo-American culture. *Id.* at xvii (“This is, let me make clear, an argument for the importance of Anglo-Protestant culture, not the importance of Anglo-Protestant people.”).

³⁰⁰ *Id.* at 151 (“The Constitution did not create the nation; the nation adopted the Constitution.”).

the top, was threatened by the arrival of crass, dirty uneducated, foreign rabble.³⁰¹ Buchanan, in contrast, spoke on behalf of working-class whites and attacked what he described as the elitism of American institutions that he accused of deserting America's ethnic core. Buchanan embraced an ideology that Sam Francis described as Middle American Radicalism. Francis argued that the nation had been taken over by wealthy liberal elites, who used their power to steal money from the middle class to give to the poor.³⁰² Middle American Radicals resent both the elite establishment that governs the country and the poor, who they see as the undeserving beneficiaries of government largesse paid for by the taxes they pay. According to Francis, Middle American Radicals are the natural constituency for a white nationalist movement.³⁰³

Although President Bush handily won renomination in 1992 with over 70% of the Republican primary votes, Buchanan received nearly 3 million votes, roughly a quarter of the votes cast in the Republican primaries.³⁰⁴ Four years later, when Buchanan ran again, he won three primaries and received over 3 million votes.³⁰⁵ Although he never came close to winning the Republican nomination, Buchanan tapped into a constituency of Middle American Radicals, who saw themselves as prototypical Americans, who considered their traits and values to be prototypically American, and who believed that their rightful place as the core of American cultural and political life was under attack. Identifying their core values with the nation's Constitution, Buchanan's supporters believed that the Constitution itself was under attack.

³⁰¹ HIGHAM, *STRANGERS IN THE LAND*, supra note 45, at 102-103; see also Bluford Adams, *World Conquerors or a Dying People? Racial Theory, Regional Anxiety, and the Brahmin Anglo-Saxonists*, *The Journal of the Gilded Age and Progressive Era*, Vol. 8, No. 2 (Apr., 2009), pp. 189-215; Barbara Miller Solomon, *The Intellectual Background of the Immigration Restriction Movement in New England*, *The New England Quarterly*, Vol. 25, No. 1 (Mar., 1952), pp. 47-59.

³⁰² Samuel Francis, *Life on MARs* (Sept. 1990) ("The rich give in to the demands of the poor, and the middle income people have to pay the bill."), reprinted in Samuel T. Francis, *Beautiful Losers* (1994)

³⁰³ In fact, empirical studies confirmed that many middle class whites felt alienated from American institutions and considered themselves a victimized minority, with a distinct racial consciousness. ZESKIND, *BLOOD AND POLITICS*, supra note 282, at 290 (discussing Donald Warren, *The Radical Center: Middle Americans and the Politics of Alienation* (1976)).

³⁰⁴ 1992 Presidential Campaign & Elections, <https://presidentialcampaignselectionsreference.wordpress.com/overviews/20th-century/1992-overview/>.

³⁰⁵ 1996 Presidential Republican Primary Election Result, <http://uselectionatlas.org/RESULTS/index.html>.

While these views had flourished among extremists for decades, Buchanan succeeded like no recent candidate in bringing radical nativism into the mainstream.

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

With the surprising result of the 2016 presidential election, the United States elected the first president in decades who espouses bluntly nativist views and who has given every indication that he plans to implement a nativist agenda. It is a dramatic reversal after the presidency of Barack Obama, who, perhaps more than any other president, placed creedal nationalism at the center of his national vision.³⁰⁶ In his second inaugural address, President Obama articulated what since 1965 has become the orthodox view that American national identity is defined by commitment to the American Creed:

What binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea.³⁰⁷

Obama often argued that key moments in American history—the Revolution, the Civil War, Reconstruction, the New Deal, the civil rights movement, the women’s rights movement, and the gay rights movement, among others—were all animated by an attempt to put into practice the central American values embodied in the Declaration of Independence and the Constitution. Speaking at the foot of the Edmund J. Pettis Bridge on the fiftieth anniversary of the March on Selma, Obama declared that the march was the “the manifestation of a creed written into our founding documents.”³⁰⁸ In Obama’s conception, American history has been marked by political and social movements that have demanded that America fulfill the principles of the American Creed for all Americans, regardless whether they share the traits of supposedly prototypical Americans.³⁰⁹

³⁰⁶ See Rana, *Decolonizing Obama*, N+1 (Winter 2017), <https://nplusonemag.com/issue-27/politics/decolonizing-obama/> (Obama’s invocation of the Creed was the most persistent feature of his rhetoric.”)

³⁰⁷ See Barack Obama, *Inaugural Address by President Barack Obama*, Washington, D.C. (Jan. 21, 2013), <http://www.whitehouse.gov/the-pressoffice/2013/01/21/inaugural-address-president-barack-obama>.

³⁰⁸ Transcript: Read Full Text of President Barack Obama's Speech in Selma, *Time* (Mar. 7, 2015), <http://time.com/3736357/barack-obama-selma-speech-transcript/>.

³⁰⁹ *Id.* (“Because of what [the marchers on Selma] did, the doors of opportunity swung open not just for African-Americans, but for every American. Women marched through

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

1. The Nativist Constitutional Positions of the Trump Campaign

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

The Tea Party’s central target was President Obama, who it routinely depicted as foreign.³¹⁰ He was sometimes described as foreign *by birth*, by so-called “birthers,” who claimed that he was not born in the United States and therefore was constitutionally ineligible to be President.³¹¹ He was sometimes described as *religiously* foreign by those who believed he was secretly a Muslim

those doors. Latinos marched through those doors. Asian-Americans, gay Americans, and Americans with disabilities came through those doors.”).

³¹⁰. See, e.g., Kevin Drum, *Recycled: The Tea Party Is a Revolutionary Force. Just not in the Way You’ve Been Led to Believe*, MOTHER JONES, Sept. 1, 2010, available at http://findarticles.com/p/articles/mi_m1329/is_5_35/ai_n56345646/ (“‘Obama isn’t a US socialist,’ thundered Fox News commentator, Steven Milloy at a tea party convention earlier this year, ‘he’s an international socialist!’”).

³¹¹. See, e.g., Joseph Farah, *Keynote Address to National Tea Party Convention* (Feb. 5, 2010), available at <http://www.c-spanvideo.org/program/291955-1>; Judson Phillips, *The Eligibility Issue*, TEA PARTY NATION (Feb. 20, 2011, 7:52 AM) (requires email address and free membership to view content), <http://www.teapartynation.com/forum/topics/the-eligibility-issue>. On April 27, 2011, President Obama released a copy of his long-form birth certificate, see Dan Pfeiffer, *President Obama’s Long Form Birth Certificate*, THE WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), <http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate>, but many Tea Partiers reject this evidence as a forgery. See, e.g., Alan Caruba, *Pageantry, History and Change*, TEA PARTY NATION (May 1, 2011, 7:33 AM) (requires e-mail address and free membership to view content), <http://www.teapartynation.com/profiles/blogs/pageantry-history-and-change> (referring to the obviously fraudulent “birth certificate”); *Is Obama’s Birth Certificate a Fake?*, THE PATRIOT UPDATE (Apr. 27, 2011), <http://patriotupdate.com/6137/is-obama%E2%80%99s-birth-certificate-a-fake>.

living in a Christian nation.³¹² He was sometimes described as *racially* foreign by those who hold race-based ideas of what it means to be a true American.³¹³ Most often, he was described as *ideologically* foreign because he did not adhere to the Tea Party's notions of the true American creed of American exceptionalism, limited government, individual liberty, and free markets.³¹⁴

Donald Trump first came to the attention of Tea Party supporters in March 2011 as a proponent of birtherism.³¹⁵ Trump gained attention by repeatedly claiming that Obama was not born in the United States, that Kenya was his true homeland, that he might be Muslim, that he faked his birth certificate, and that he was not legitimately President.³¹⁶ The birther charge arises out of the nativist suspicion that the President was of foreign-birth and therefore was constitutionally unfit for office. The birther charge thus combines the key elements of the nativist conception of the Constitution explored in this article, that the Constitution is made only for some people, defined by race and ethnicity, and directs that charges against the legitimacy of the President himself.

When he ran for President in 2016, Trump's presidential campaign was built on the nativist themes apparent in the birther charge. His central campaign promises—building a wall on the Mexican border and barring Muslim immigration—invoke nativism by playing off fears of foreign infiltration and the need to exclude dangerous foreigners. He denigrated

³¹². See, e.g., Alex Altman, *Racism Rift Highlights Dilemma: Who Speaks for the Tea Party?*, TIME (July 22, 2010), <http://www.time.com/time/politics/article/0,8599,2005371,00.html> (quoting Tea Party Express founder Mark Williams describing President Obama as “Indonesian Muslim turned welfare thug and a racist in chief”).

³¹³ See DEVIN BURGHART & LEONARD ZESKIND, TEA PARTY NATIONALISM: A CRITICAL EXAMINATION OF THE TEA PARTY MOVEMENT AND THE SIZE, SCOPE, AND FOCUS OF ITS NATIONAL FACTIONS 57-67 (2010).

³¹⁴ In various permutations, the meme that Obama is foreign is widespread among conservatives. See, e.g., Steven G. Calabresi, *The Teleprompter Presidency? Justice DeLayed or Denied?*, POLITICO (Aug. 17, 2010), http://www.politico.com/arena/perm/Steven_G_Calabresi_A5D4F886-1279-48D4-96B9-D176A986A416.html (asserting that “at some level [Obama] does not really know America very well nor does he thoroughly identify with it”); DINESH D’SOUZA, THE ROOTS OF OBAMA’S RAGE 1–15 (2010) (claiming that the Obama is attempting to carry out the socialist, anti-colonial dreams of his Kenyan father).

³¹⁵ Ashley Parker and Steve Eder, *Inside the Six Weeks Donald Trump Was a Nonstop ‘Birther,’* New York Times A1 (July 2, 2016), https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html?_r=0.

³¹⁶ See All of Donald Trump's Birther Tweets, Slate (Sept. 16, 2016), http://www.slate.com/blogs/the_slatest/2016/09/16/donald_trump_s_birther_tweets_in_order.html.

Mexican immigrants, saying they were rapists and murders.³¹⁷ He faulted them for speaking Spanish and failing to assimilate.³¹⁸ He argued that a Mexican-American judge was unable to be unbiased against him because Trump had proposed to build a wall with Mexico: his Mexican ancestry, Trump asserted, created an “inherent conflict of interest.”³¹⁹ He argued that Muslims should be barred from immigrating to the United States because of the dangers of terrorism they posed.³²⁰

The Trump’s campaign employed many of the themes used by the Buchanan campaigns, as Buchanan himself has repeatedly said.³²¹ He adopted the same policy agenda that was the core of the Buchanan campaigns: opposition to free trade and immigration, which tapped into the resentments of Middle American Radicals, who believe that the nation’s elites give away their tax money to the undeserving poor. Middle American Radicals believe that their rightful place in America has been usurped by increased immigration and cultural diversity. Trump promised to reverse their fortunes and to Make America Great Again.

Trump surrounded himself with advisors with long histories of nativism. Steve Bannon, Trump’s campaign manager and now senior White House adviser, was the editor-in-chief of the Breitbart News, which Bannon described

³¹⁷ Here's Donald Trump's Presidential Announcement Speech, *Time Magazine* (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

³¹⁸ Matt Flegenheimer, *Habla Español? Tim Kaine Is Latest Candidate to Use Spanish*, *New York Times* (July 28, 2016) (“In America, we speak English.”) (quoting Donald Trump).

³¹⁹ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* *Wall St. Journal* (June 3, 2016).

³²⁰ Dr. Ben Carson, who supported Trump during the campaign and is now Secretary of Housing and Urban Development-nominee, has argued that Islam is inherently incompatible with American constitutional values. Eric Bradner, *Ben Carson again explains concerns with a Muslim president*, *CNN* (Sept. 27, 2015), <http://www.cnn.com/2015/09/27/politics/ben-carson-muslim-president-sharia-law/> (“I’m assuming that if you accept all the tenets of Islam that you would have a very difficult time abiding under the Constitution of the United States.”).

³²¹ Chris Cillizza, *Pat Buchanan says Donald Trump is the future of the Republican Party*, *Washington Post* (Jan. 12, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/12/pat-buchanan-believes-donald-trump-is-the-future-of-the-republican-party/?utm_term=.6492ca57436c (Buchanan: the issues Trump is running on “are the issues I ran on in 1992 and 1996”); see also Jeff Greenfield, *Trump Is Pat Buchanan With Better Timing*, *Politico Magazine* (Sept./Oct. 2016), <http://www.politico.com/magazine/story/2016/09/donald-trump-pat-buchanan-republican-america-first-nativist-214221>.

as “the platform for the alt-right.”³²² Breitbart has explained that what it calls the alt-right (and which most others call white nationalism) derives from the thinking of Sam Francis and the Patrick Buchanan presidential campaigns, among other sources.³²³ Breitbart has heaped praise on Peter Brimelow’s VDARE.com and Jared Taylor American Renaissance, describing these sources as “gathering point[s] for an eclectic mix of renegades who objected to the established political consensus in some form or another.”³²⁴ Brimelow, in turn, heaped praise on Trump, writing on VDARE.com that Trump is “the clear choice of the founding stock of the Historic American Nation.”³²⁵ Jared Taylor, in turn, recorded a robocall encouraging whites to vote for Trump, saying that he is the only candidate who recognized that the nation should only accept immigrants who are “who are good for America. We don't need Muslims. We need smart, well-educated white people who will assimilate to our culture.”³²⁶

Although Taylor does not claim that Trump is a fellow white nationalist—he is “not a racially conscious white man,” as Taylor put it—he points to “men close to him — Steve Bannon, Jeff Sessions, Stephen Miller — who may have a clearer understanding of race.”³²⁷ Sessions, who drafted Trump’s immigration policy during the campaign and who now serves as Trump’s Attorney General, has longstanding ties with the nativist establishment. Sessions has long worked with FAIR to advance their anti-immigrant

³²² Sarah Posner, How Donald Trump's New Campaign Chief Created an Online Haven for White Nationalists, *Mother Jones* (Aug. 22, 2016), <http://www.motherjones.com/politics/2016/08/stephen-bannon-donald-trump-alt-right-breitbart-news>.

³²³ Allum Bokhari & Milo Yiannopoulos, An Establishment Conservative’s Guide To The Alt-Right, *Breitbart News* (Mar. 29, 2016), <http://www.breitbart.com/tech/2016/03/29/an-establishment-conservatives-guide-to-the-alt-right/>.

³²⁴ *Id.*

³²⁵ Peter Brimelow, “It Will Come To Blood”—Reflections On The Left’s Anti-Trump Inauguration Tantrum (Jan. 23, 2017), <http://www.vdare.com/articles/it-will-come-to-blood-reflections-on-the-lefts-anti-trump-inauguration-tantrum>.

³²⁶ Allegra Kirkland, White Nationalist PAC Blankets Iowa With Robocalls For Trump, *Talking Points Memo* (Jan. 9, 2016), <http://talkingpointsmemo.com/muckraker/trump-robocalls-white-nationalists-iowa>.

³²⁷ Rosalind S. Helderman, Stephen Miller: A key engineer for Trump’s ‘America first’ agenda, *Washington Post* (Feb. 10, 2017), https://www.washingtonpost.com/politics/stephen-miller-a-key-engineer-for-trumps-america-first-agenda/2017/02/11/a70cb3f0-e809-11e6-bf6f-301b6b443624_story.html?utm_term=.fdb2ffc2b719.

agenda.³²⁸ Sessions has praised the National Origins Act of 1924 and has worried that the United States has too high a percent of foreign-born residents.³²⁹ Repeatedly criticized for his nativist advocacy, Sessions embraces the nativist term, asking, “What’s wrong with that? ... What's wrong with putting America first?”³³⁰

Trump’s nativist appeals were enthusiastically cheered by his supporters in the conservative press. Ann Coulter quickly published a book *IN TRUMP WE TRUST*, which praises Trump for recognizing that America’s constitutional identity is only possible because of its ethnic core:

There’s a reason the Magna Carta and the Glorious Revolution happened where they happened and that the Declaration of Independence was written in a British colony. It’s not in the Anglo-Saxon character either to take orders or to give them. That’s why the socialist left finally gave up on traditional Americans and pinned their hopes on immigrants, who bring their socialism with them.³³¹

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

³²⁸ In September 2007, Sessions received an award from FAIR and was the keynote speaker at FAIR’s board of advisors dinner. According to FAIR’s newsletter, Sessions praised FAIR’s “critical” role in protecting “American interests” and attacked the then-proposed immigration reform “grand bargain” and said that it had been drafted with the help of “cheap labor interests and ethnic interest groups” while “the American public was unrepresented in the negotiations,” suggesting that “ethnic groups” (Latinos) are separate from and not part of “the American public.” http://www.fairus.org/DocServer/Nov07_NL.pdf?docID=6021.

³²⁹ Adam Serwer, Jeff Sessions's Unqualified Praise for a 1924 Immigration Law, *The Atlantic* (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.

³³⁰ Id.; Steven T. Dennis, “Sessions Feels Vindicated by Trump's Nativist, Roll Call (Sept. 15, 2015), <http://www.rollcall.com/news/jeff-sessions-sees-agenda-heart-trump-appeal>.

³³¹ ANN COULTER, *IN TRUMP WE TRUST: E PLURIBUS AWESOME!* 10 (2016).

and the white nationalism espoused by Francis, Brimelow, and Taylor.

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

Once in office, Trump signaled his intent to implement a nativist agenda. In his first week in office, Trump signed an executive order that bars entry into the country from citizens of seven predominately Muslim countries.³³² Trump’s adviser Rudy Giuliani explained that the executive order attempted to implement the promised Muslim ban.³³³ As the government’s lawyers have argued, however, the order does not target Muslims because it never uses the word Muslim and says nothing about excluding Muslims.³³⁴ By its terms, the order uses hostility to the Constitution, not religion, as the touchstone for identifying dangerous foreigners who must be kept out of the United States. Section 1 of the order declares that it seeks to protect national security by excluding those who “bear hostile attitudes” toward the United States “and its founding principles” and who “do not support the Constitution.”³³⁵ Protecting the nation against those who oppose its most fundamental principles, the President and his lawyers have said, is the definition of patriotism, not bigotry.³³⁶

Without using the word Muslim, the order casts suspicions on citizens of predominately Muslim countries and suggests that Muslims are uniquely likely to be hostile to the Constitution and must be subject to “extreme vetting” to prove otherwise. The order creates an exemption for refugees who are members of minority religions, an exemption that protects Christians and other non-Muslims.³³⁷ By its terms, the order thus targets Muslims, and

³³² Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

³³³ Amy B Wang, Trump asked for a ‘Muslim ban,’ Giuliani says — and ordered a commission to do it ‘legally,’ Washington Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.4e7a865c9743.

³³⁴ Reply in Support of Emergency Motion Pending Appeal, *State of Washington v. Trump*, No. 17-35105 (9th Cir., filed Feb. 6, 2017) at 6 (arguing the order is “neutral with respect to religion”).

³³⁵ Executive Order, *supra* note 332.

³³⁶ Andy Newman, Highlights: Reaction to Trump’s Travel Ban, *New York Times* (Jan. 29, 2017).

³³⁷ Executive Order, *supra* note 332, § 5(b), (e).

Muslims alone, out of suspicion that they are hostile to America's constitutional values.

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

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

...

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

When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that's made brothers and sisters out of every race—out of every race.³³⁸

In the last ten years, however, a group of anti-Muslim activists, who bill themselves as experts on Islam, have tried to show that Bush was wrong and that Islam is dedicated to violence and global domination. The primary purveyors of this claim include most centrally Frank Gaffney at the Center for Security Policy, David Yerushalmi at the Society of Americans for National Existence, Daniel Pipes at the Middle East Forum, Robert Spencer of Jihad Watch and Stop Islamization of America, and Steven Emerson of the Investigative Project.³³⁹ They claim that Islam demands that believers strive to replace Western democracies with Islamic theocratic states. As Robert Spencer declared: Islam is “the only religion in the world that has a developed

³³⁸ “Islam is Peace” Says President, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001), <https://georgewbush.whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>.

³³⁹ Wajahat Ali et al, *Fear, Inc.: The Roots of the Islamophobia Network in America*, Center for American Progress (Aug. 2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf>.

doctrine, theology and legal system that mandates violence against unbelievers and mandates that Muslims must wage war in order to establish the hegemony of the Islamic social order all over the world.”³⁴⁰

The anti-Muslim campaign has focused especially on Islamic law, known as sharia, which campaigners describe as a “totalitarian ideology” and “legal-political-military doctrine” that is fundamentally inconsistent with the American Constitution. The Center for Security Policy, headed by Frank Gaffney, has been one of the most ardent proponents of the view that Islam seeks to destroy the Constitution. CSP claims that Islam—not just Islamic extremists, or “radical Islamic terrorists,” but “mainstream” Islam—seeks “to supplant our Constitution with its own totalitarian framework.”³⁴¹ In 2010, CSP issued a 372-page report, *Sharia: The Threat to America*, principally devoted to demonstrating that Islam “rejects fundamental premises of American society and values.”³⁴² CSP claims that Islam rejects the principles of democracy and liberty and demands mindless obedience to the Quran and sharia. CSP argues that Islam is really an international political movement, not a religion.³⁴³ CSP further claims that “many of the most prominent Muslim organizations in America are front groups for, or derivatives of, the Muslim Brotherhood.”³⁴⁴

Following the lead of the anti-Muslim activists, other groups on the fringes of national politics soon began repeating these claims. By 2011, Tea Party groups began to argue that Muslims seek to infiltrate the United States and replace the Constitution with sharia law.³⁴⁵ National Tea Party groups soon

³⁴⁰ Frank Gaffney, “Can This Possibly Be True? New Obama Missile Defense Logo Includes A Crescent,” *Big Government* (Feb. 24, 2010), <http://biggovernment.com/fgaffney/2010/02/24/can-this-possibly-be-true-new-obama-missile-defense-logicincludes-a-crescent/>.

³⁴¹ Center for Security Policy, *Shariah: The Threat to America* (2010), [https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20\(Team%20B%20Report\)%20Web%2009292010.pdf](https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20(Team%20B%20Report)%20Web%2009292010.pdf); see also William Wagner, *Islam, Shariah Law, and The American Constitution* 5, Family Research Council (May 2011), <http://www.frc.org/issueanalysis/islam-shariah-law-and-the-american-constitution> (“Do the Islamic authorities mean what they say? If so, their doctrines seek nothing less than to replace the American constitutional republic, grounded in deeply rooted Greco-Roman / Judeo-Christian traditions, with the formal establishment of Islamic government, birthed in jihad and grounded in the Shariah.”).

³⁴² Center for Security Policy, *supra* note ___, at 6.

³⁴³ *Id.* at 2.

³⁴⁴ *Id.* at 18.

³⁴⁵ NJ Tea Party Coalition, *Sharia Law vs. The Constitution*, <https://www.youtube.com/watch?v=O2f5m-mI8I0>.

began to argue that Islam poses a threat to the Constitution.³⁴⁶ As TeaParty.Org, one of the leading national Tea Party groups, asserted, Muslims can never be loyal to the United States because Islam teaches that supreme loyalty is owed to the Quran.³⁴⁷ Many other conservative groups have echoed this position, including the Family Research Council, which warned that Muslims were infiltrating the United States for the purpose of establishing an Islamic theocracy.³⁴⁸

It was not long before mainstream political figures began arguing that Islam poses a threat to American values. Andrew McCarthy of the National Review began warning of “creeping sharia,” the concern that American Muslims were slowly finding ways to subvert American democracy in preparation for a theocratic state.³⁴⁹ In 2010, former Speaker of the House Newt Gingrich warned an audience at the American Enterprise Institute that sharia represents “a mortal threat to the survival of freedom in the United States and in the world as we know it.”³⁵⁰ It was not only radical Islamists that concerned Gingrich but instead he made clear that Islam itself is incompatible with American values: “Sharia in its natural form has principles and punishments totally abhorrent to the Western world.”³⁵¹ During the 2016 presidential campaign, Republican candidate Ben Carson, now the Secretary of Housing and Urban Development, agreed that Islam is incompatible with the Constitution and argued that a Muslim must never become President

³⁴⁶ Here Are The 10 Ways Islam Is Incompatible With The Constitution (Jan. 10, 2016), <http://www.teaparty.org/10-ways-islam-incompatible-constitution-140410/>.

³⁴⁷ Id. (“The Constitution itself serves as the supreme law of the land in the U.S., while the Quran serves as the supreme law of the land for devout Muslims.”)

³⁴⁸ Wagner, Islam, Shariah Law, and The American Constitution, *supra* note 341 (“Immigrants from Muslim countries are moving in increasingly greater numbers to Europe and the Americas, many with the specific purpose of extending the ‘Abode of Islam.’”).

³⁴⁹ R. James Woolsey, Andrew C. McCarthy, and Harry E. Soyster, Second opinion needed on Shariah, *Washington Times* (Sept. 14, 2010), <http://www.washingtontimes.com/news/2010/sep/14/needed-a-second-opinion-on-shariah/>.

³⁵⁰ Newt Gingrich, “America at Risk: Camus, National Security and Afghanistan,” Speech to the American Enterprise Institute (July 29, 2010), <http://www.aei.org/docLib/Address%20by%20Newt%20Gingrich07292010.pdf>.

³⁵¹ Id.; see also Carol Kuruvilla, 5 Things You Need To Know About Sharia Law, http://www.huffingtonpost.com/entry/5-facts-you-need-to-know-about-sharia-law_us_5788f567e4b03fc3ee507c01 (Jan. 31, 2017) (quoting Gingrich) (“Western civilization is in a war. . . . Sharia is incompatible with Western civilization.”).

because he would be loyal to Islam, not the Constitution.³⁵² The hysteria launched by anti-Muslim activists that Islam seeks global domination propelled a far reaching campaign to ban sharia in several states, including in Oklahoma, which adopted an anti-sharia law that was later struck down as a violation of the constitutional separation of church and state.³⁵³

The American Muslim community has tried to get their message out that the claims made against by them are baseless. As the Center for American Progress explained, description of sharia law from anti-Muslim activists is “unrecognizable to the overwhelming majority of Muslims here and abroad. . . . [I]t is, for Muslims, the ideal law of God as interpreted by Muslim scholars over centuries to achieve justice, fairness, and mercy through personal religious observance such as prayer and fasting.”³⁵⁴ American Muslims recognize that, at heart, the fight is over competing visions of American nationalism, as reflected in differing understandings of the American Constitution. On one side, anti-Muslim crusaders argue that Muslims should be excluded because they pose a threat to the Constitution and American values. On the other side, defenders of American Muslims argue for an inclusive understanding of who can be an American and who is entitled to protection by the Constitution. In 2011, the Center for American Progress, a progressive think tank, issued a report on the network of anti-Islamic activists and explained that the fight ultimate addressing the meaning of American identity and the nation’s fundamental values: “Contending that some religions are not part of the promise of American freedoms established by our founders directly challenges who we are as a nation.”³⁵⁵

With the election of President Trump, the belief that Islam threatens constitutional values has moved from the margins to the White House. Steve Bannon mocked President Bush’s suggestion that Islam is a religion of peace: “Islam is not a religion of peace. Islam is a religion of submission.”³⁵⁶ Bannon believes that Islam and Christianity are engaged in a global war and Muslims

³⁵² Here Are The 10 Ways Islam Is Incompatible With The Constitution, *supra* note 346; Meet the Press Transcript (Sept. 20, 2015), <http://www.nbcnews.com/meet-the-press/meet-press-transcript-september-20-2015-n430581>.

³⁵³ *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (upholding preliminary injunction against anti-sharia law).

³⁵⁴ *Ali, Fear, Inc.*, *supra* note 339, at 28.

³⁵⁵ *Id.*

³⁵⁶ Andrew Kaczynski, Steve Bannon in 2010: 'Islam is not a religion of peace. Islam is a religion of submission,' CNN (Jan. 31, 2017), <http://www.cnn.com/2017/01/31/politics/kfile-bannon-on-islam/>.

are temperamentally opposed to democratic values.³⁵⁷ Echoing the eugenicists' claim that some people are not bred for self-government, Bannon said that Western democracies should not accept Syrian refugees: "These are not Jeffersonian democrats. These are not people with thousands of years of democracy in their DNA."³⁵⁸

Under Bannon, Breitbart News gave a platform to the most vocal advocates of the claim that Islam is un-American and anti-constitutional. Frank Gaffney, director of the CSP, has been a frequent Breitbart contributor and appeared as a guest on Bannon's radio show 29 times. During the presidential campaign, Donald Trump repeatedly cited Gaffney and CSP to support the proposed Muslim ban and said that CSP's staff are "very highly respected people, who I know, actually." Agreeing with Bannon and Gaffney that Islam is fundamentally hostile to American values, Trump declared, "Islam hates us."³⁵⁹ At a rally before thousands of cheering supporters, Trump later explained that the entire point of the immigration order was to exclude people like that: "We want people to come into our country, but we want people that love us. We want people that can cherish us and the traditions of our country. We want people that are going to be great for our country. We don't want people with bad, bad ideas. We don't want that."³⁶⁰

Although few others understood it, the anti-Muslim activists frequently cited by Breitbart News immediately recognized that the President's immigration order put the force of law behind their longstanding view that Islam is incompatible with the Constitution. Robert Spencer, founder of Jihad Watch and a frequent Breitbart contributor, was exultant. The immigration order confirms that the Trump administration has decided "to treat Islam as a hostile political ideology," Spencer explained. "That is what has been needed for decades."³⁶¹

³⁵⁷ Uri Friedman, 'The Coming War on Radical Islam,' *The Atlantic* (Nov. 29, 2016), <https://www.theatlantic.com/international/archive/2016/11/trump-radical-islam/508331/>.

³⁵⁸ Breitbart News Daily (Apr. 7, 2016), <https://soundcloud.com/breitbart/breitbart-news-daily-dr-thomas-d-williams-april-7-2016>.

³⁵⁹ Theodore Schleifer, 'Donald Trump: 'I think Islam hates us,' CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

³⁶⁰ Transcript: President Donald Trump's rally in Melbourne, Florida, *Vox* (Feb. 18, 2017), <http://www.vox.com/2017/2/18/14659952/trump-transcript-rally-melbourne-florida>.

³⁶¹ Neil Munro, 'Left Protests While Trump Junks Obama's Global Immigration Plan,' *Breitbart News* (Jan. 30, 2017), <http://www.breitbart.com/big-government/2017/01/30/trump-changes-immigration-favor-american-values/>.

The President's immigration order follows a long history of American nativism. As that history shows, nativists have routinely claimed that unwanted foreigners are hostile to the Constitution. With the issuance of the immigration order, the United States has adopted as an official policy that Muslims are strongly suspected of harboring hostility to the Constitution and therefore should be barred from the country. Like nativists of old, the President has tried to justify the exclusion in patriotic terms, claiming that the order does not target Muslims because of their religion but because they hate our constitutional ideals. Once again, hostility to the Constitution has served as a justification for excluding people based on race and religion.

CONCLUSION

Over the last century, it has become the orthodox conception of American nationalism that being American means believing in a common creed expressed in the Constitution. The creedal understanding of American nationalism is thought of as an especially benign form of civic nationalism, in contrast to more primitive and hateful forms of ethnonationalism that define national membership by race, religion, or ethnicity.³⁶² Belief in this orthodoxy is so deeply entrenched that many prominent leaders and academics discuss it as if has always been so, as if American identity has always been understood in these terms.³⁶³ Rogers Smith has offered a useful correction to this mythology by showing that conceptions of American nationalism have long been contested, and civic and republican conceptions of nationalism have competed with ascriptive versions based on race, religion, and ethnicity.³⁶⁴

This article has tried to further correct the mythology of American nationalism by showing that the creedal conception of nationalism has long

³⁶² See, e.g., "America has never been united by blood or birth or soil. We are bound by ideals that move us beyond backgrounds, lift us above our interests and teach us what it means to be citizens." George W. Bush, *First Inaugural Address*, in *SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH*, at 2, http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.

³⁶³ See, e.g., *Praises Army Plan for Japanese Unit*, *New York Times* (Feb. 5, 1943) (quoting Franklin D. Roosevelt) ("The principle on which this country was founded and by which it has always governed is that Americanism is a matter of the mind and the heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy."); Proposed Legislation on American Immigration Policy, President Johnson's January 13, 1965 Message to the Congress Submitting Proposed Immigration Legislation ("The fundamental, longtime American attitude has been to ask not where a person comes from but what are his personal qualities.").

³⁶⁴ See *supra* notes 38-42 and accompanying text.

been embraced by Americans who also believe that American identity involves race, religion, and ethnicity. It may be that being American means embracing the American creed, but many Americans have also believed that only some people are capable of embracing that creed.

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

All of these movements invoked allegations of hostility to the Constitution as the touchstone for identifying dangerous foreigners. In these movements “the Constitution” functions principally as a symbol of the United States, rather than a concrete legal document. To say that some people are hostile to the Constitution is simply a code for saying that they are hostile to the United States, that they are un-American. This way of speaking about the Constitution comes naturally to Americans as a result of the long tradition of identifying what it means to be American by reference to the Constitution, of saying that being American means believing in a set of values embodied in the Constitution.

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