

# Essay

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## Centering the Immigrant in the Inter/National Imagination (Part III):† Aoki, Rawls, and Immigration

Fifteen years ago, Keith Aoki and I published “Centering the Immigrant in the Inter/National Imagination” in an early LatCrit symposium.<sup>1</sup> The core idea animating that article is encapsulated in its opening sentence: “How a nation treats the immigrant speaks volumes about the nation.”<sup>2</sup> Our notion was that the immigrant, though invoked in phrases such as “We are a nation of immigrants,” was more typically placed at the periphery rather than the center. We sought, in that article, to place the immigrant at the center of the analysis.<sup>3</sup> We thought we were at a critical juncture with regard to U.S. immigration law and policy, and we felt there was a great need for a critical examination of the “project of national self-definition. . . [which] includes not only deciding whom to admit and expel, but

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† For Parts I and II, see Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395 (1997), 10 LA RAZA L.J. 309 (1998); Ibrahim J. Gassama, Robert S. Chang & Keith Aoki, *Foreword: Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. 207 (1997) [hereinafter Gassama et al.].

<sup>1</sup> See Chang & Aoki, *supra* note †.

<sup>2</sup> *Id.* at 1396.

<sup>3</sup> *Id.*

also providing for each alien's transition from outsider to citizen."<sup>4</sup> We found it odd that "borders [had] become increasingly porous to flows of information and capital" but were "constricting when it [came] to the movement of certain persons."<sup>5</sup> Our article was an attempt to draw attention to this phenomenon and to examine the ways that immigrant identities, immigrant communities, and the nation are constituted.

Joined by Ibrahim Gassama, we recognized that these questions were too large for a single article, and so we followed it up quickly with a symposium that further addressed these questions, *Citizenship and Its Discontents*, published in the *Oregon Law Review*.<sup>6</sup> This symposium spanned two issues of the *Review* and included contributions by Neil Gotanda,<sup>7</sup> Natsu Saito,<sup>8</sup> Kevin Johnson,<sup>9</sup> Enid Trucios-Haynes,<sup>10</sup> Victor Romero,<sup>11</sup> Anthony Farley,<sup>12</sup> Dennis Greene,<sup>13</sup> Hope Lewis,<sup>14</sup> Tayyab Mahmud,<sup>15</sup> Kunal Parker,<sup>16</sup> Tanya Hernández,<sup>17</sup> and Maggie Chon.<sup>18</sup> In the Foreword to the symposium we noted,

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<sup>4</sup> Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1944–45 (1996).

<sup>5</sup> Chang & Aoki, *supra* note †, at 1398.

<sup>6</sup> The symposium was published in volume 76 of the *Oregon Law Review*.

<sup>7</sup> Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People": A Review Essay on Citizenship Without Consent*, 76 OR. L. REV. 233 (1997).

<sup>8</sup> Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

<sup>9</sup> Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997).

<sup>10</sup> Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997).

<sup>11</sup> Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997).

<sup>12</sup> Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

<sup>13</sup> Frederick Dennis Greene, *Immigrants in Chains: Afrophobia in American Legal History—The Harlem Debates Part 3*, 76 OR. L. REV. 537 (1997).

<sup>14</sup> Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567 (1997).

<sup>15</sup> Tayyab Mahmud, *Migration, Identity, & the Colonial Encounter*, 76 OR. L. REV. 633 (1997).

<sup>16</sup> Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691 (1997).

<sup>17</sup> Tanya Katerí Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997).

<sup>18</sup> Margaret Chon, *Acting Upon Immigrant Acts: On Asian American Cultural Politics* by Lisa Lowe, 76 OR. L. REV. 765 (1997).

The symposium participants address three overlapping clusters of issues and ideas: (1) the interaction of citizenship, immigration, and race from a U.S. vantage point; (2) a reframing of race, slavery, and the colonial encounter both inside and outside of the U.S. context; and (3) the interrelationship of transnational flows of capital and information and the increasing flow of persons across national boundaries.

At the close of the twentieth century, increasing migrations of persons are straining traditional concepts of the imagined community of the nation-state as well as the imagined community among nation-states. Each piece in this Symposium attempts to center the immigrant by examining individual and group agency within these changing communities.<sup>19</sup>

An important part of our analysis then was to explore the way that the nation, following the end of the Cold War, underwent an identity crisis: “Without its ideological Other, against which it had defined itself, what role was the United States to take in the world?”<sup>20</sup> Our hypothesis was that the anxiety engendered by this national identity crisis was being managed through the renewed and reinvigorated attention paid to the enemy within—immigrants whose bodies were marked by difference—and the struggle over language, multiculturalism, and immigration.<sup>21</sup>

My sense is that the issues and controversies that raged during this time were managed, but not resolved, as our nation entered into a period of relative economic prosperity. But perhaps more importantly, the more general anxiety over immigration became displaced by the so-called “War on Terror.” I would suggest that with the killing of Osama Bin Laden and the planned departure of our primary military forces from Iraq and Afghanistan, attention has refocused on the “enemy within,” undocumented immigrants, and the “enemy without,” those who lurk outside our borders seeking to invade and overcome.

Fifteen years after “Centering the Immigrant,” we find ourselves wrestling with the same questions. We find our nation at another key juncture with regard to the issue of immigration, the rights of immigrants, and what is to be our national self-conception. Instead of books like Arthur M. Schlesinger’s *The Disuniting of America:*

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<sup>19</sup> Gassama et al., *supra* note †, at 209.

<sup>20</sup> Chang & Aoki, *supra* note †, at 1406.

<sup>21</sup> *Id.* at 1407–08; *see also* ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 13 (1999).

*Reflections on a Multicultural Society*<sup>22</sup> or Peter Brimelow's *Alien Nation: Common Sense About America's Immigration Disaster*<sup>23</sup> from the 1990s, we have Patrick Buchanan's *State of Emergency: The Third World Invasion and the Conquest of America*<sup>24</sup> and J.D. Hayworth's *Whatever It Takes: Illegal Immigration, Border Security, and the War on Terror*.<sup>25</sup> Instead of Proposition 187 in California, we have Arizona's SB 1070<sup>26</sup> and similar laws in Utah,<sup>27</sup> Indiana,<sup>28</sup> South Carolina,<sup>29</sup> Georgia,<sup>30</sup> and Alabama.<sup>31</sup>

One of the things that Keith and I talked about fifteen years ago was the role that political theory might play in helping to think through what appeared to be an intractable political problem. He suggested that I apply our methodology of centering the immigrant to political theory. We had several conversations about social contract theory and how that would apply to immigrants. I started an article, and though Keith encouraged me to complete it, I never did.

I will use the occasion of this Symposium to revisit those conversations with Keith about centering the immigrant in political theory.<sup>32</sup> What follows is a sketch that shows how centering the

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<sup>22</sup> ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992).

<sup>23</sup> PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995).

<sup>24</sup> PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006).

<sup>25</sup> J.D. HAYWORTH, *WHATEVER IT TAKES: ILLEGAL IMMIGRATION, BORDER SECURITY, AND THE WAR ON TERROR* (2006).

<sup>26</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *modified*, H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Part of SB 1070 is now codified at ARIZ. REV. STAT. § 11-1051(B) (LexisNexis 2012).

<sup>27</sup> Illegal Immigration Enforcement Act, 2011 Utah Adv. Legis. Serv. 21 (LexisNexis) (to be codified in scattered sections of UTAH CODE ANN. titles 76, 77), *amended by* Act of Mar. 15, 2011, 2011 Utah Adv. Legis. Serv. 18 (LexisNexis).

<sup>28</sup> Act of May 10, 2011, 2011 Ind. Stat. Ann. Adv. Legis. Serv. 171 (LexisNexis) (to be codified in scattered sections of IND. CODE titles 4, 5, 6, 11, 12, 22, 34, & 35).

<sup>29</sup> S.B. 20, 119th Gen. Assemb., Reg. Sess. (S.C. 2011).

<sup>30</sup> Illegal Immigration Reform and Enforcement Act of 2011, 2011-252 Ga. Code Ann. Adv. Legis. Serv. 252 (LexisNexis) (to be codified in scattered sections of GA. CODE ANN. titles 13, 16, 17, 35, 36, 42, 45, & 50).

<sup>31</sup> Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Adv. Legis. Serv. 535 (LexisNexis).

<sup>32</sup> Keith, in the year before his passing, had returned to the question of centering the immigrant in two pieces. See Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and the Myth(s) of the "Asian Century"*, 44 U.C. DAVIS L. REV. 897 (2011); Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and*

immigrant exposes the inattention paid to the immigrant and the issue of immigration in social contract theory. It focuses on how the immigrant might be brought into the conversation within John Rawls's notion of the original position and the veil of ignorance.<sup>33</sup> This Essay does not seek to determine the content of the conversation nor what principles might be agreed upon by those in the original position.

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Persons of Asian descent have been heavily impacted by legislation affecting immigration. I use “persons of Asian descent” here to remind us that laws affecting immigration by their very nature affect persons and communities on both sides of the border. The strong impact of immigration laws in shaping communities has prompted one commentator to state that Asian America has been made and remade through immigration policy.<sup>34</sup>

Examination of the historical reveals the often not-so-hidden prejudices of lawmakers in enacting legislation that would have a very strong impact on persons of Asian descent.<sup>35</sup> While this historical inquiry is crucial in helping us to remain vigilant against a resurgence of what I have called “nativistic racism” directed against Asians and other immigrants of color, my project is a slightly different one. My question is one regarding theory. What is the political theory that will support a coherent theory of immigration law given the exclusion in the past of Asian Americans from full political participation?<sup>36</sup> I pay particular attention to social contract theory because in some ways, voluntary immigrants present or permit the

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*Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come*, 38 *FORDHAM URB. L.J.* 1 (2010).

<sup>33</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999).

<sup>34</sup> See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990* (1993).

<sup>35</sup> See, e.g., *id.*; HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS, 1790–1990* (1994); ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943 (Sucheng Chan ed., 1991).

<sup>36</sup> Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 *UCLA ASIAN PAC. AM. L.J.* 1 (2002); Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 *CAL. W. L. REV.* 185 (1997); Keith Aoki & Robert S. Chang, *Half-Full, Half-Empty? Asian American Electoral “Presence” in 2008*, 86 *DENV. U. L. REV.* 565 (2009); Kathay Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latina/os and Post-2000 Redistricting in California*, 81 *OR. L. REV.* 849 (2002).

strongest case for the application of social contract theory because it can be said that they have placed themselves voluntarily under the sovereign authority of their new country. Yet social contract theory appears to have a blind spot when it comes to immigration or the movement of peoples between sovereign nation-states. This Essay offers a diagnosis of a problem—the present incoherence of immigration law and policy—and suggests that political theory might offer a useful way to think through these issues.

Before I proceed further, I should probably confess that I am an immigrant. I say this in part to problematize my enterprise. Can I, as a naturalized citizen, contribute meaningfully to the discussion of immigration in a way that is somehow not tainted by my perspective? Elsewhere, I have discussed the importance of perspective, that everyone exists within and speaks from a context. Thus, my thoughts about immigration are affected by the fact that I was once an alien; but this does not mean that the thoughts of a native-born citizen who writes about immigration are objective or unaffected by her perspective. They are colored—differently, perhaps, but colored all the same. So rather than cloak what I am about to say in a false notion of objectivity, I will reveal my perspective from the outset.

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*“This may be true in theory, but it does not apply in practice.”*

Kant once commented on this common saying, “This may be true in theory, but it does not apply in practice,”<sup>37</sup> and every theoretician encounters this concern in some form during her work.<sup>38</sup> For myself, the relevance of political theory in the context of immigration law<sup>39</sup> comes from my beginning premise—that immigration law in this country is in shambles.<sup>40</sup> The following example, though a little dated, highlights some of the problems:

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<sup>37</sup> IMMANUEL KANT, *On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice,’* in POLITICAL WRITINGS 61, 61 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

<sup>38</sup> I do not mean to embroil myself in the praxis/theory debate. I hold to the view that engaging in theory is its own (separate) practice. See generally Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

<sup>39</sup> I am using immigration in an expansive manner to encompass not just entry into the country but rights once within this country, including, but not limited to rights regarding deportation. This would then also include rights regarding status such as work authorization, legal permanent residence, and naturalization.

<sup>40</sup> For the purpose of this Essay, I will not set about proving this premise; others have done so in a more able fashion. See, e.g., Louis Henkin, *The Constitution and United*

Maria and Carlos are wife and husband. Carlos, a citizen of Cuba, has lived in the United States for twenty-five years as a permanent resident alien. Maria, a Colombian national, currently resides in Peru, although she would like to join her husband in the United States. Carlos desires to bring his illegitimate daughter, Juanita, from Cuba to the United States.

. . . [S]hould the lawmakers conclude that noncitizen Hispanics are no longer desirable residents, Carlos could face expulsion. He could also face deportation for his membership in any political party, if Congress were to make membership a deportable offense. Should Maria attempt to immigrate to the United States, she could be denied entry without any explanation or hearing . . . . She can then be imprisoned in this country indefinitely, “pending deportation.” United States government agents can search Maria’s home in Peru without probable cause or a warrant. Those agents could also kidnap Maria and bring her to the United States to face criminal charges. Juanita can be constitutionally denied the opportunity to reunite with her father in the United States solely on the basis of gender and illegitimacy.<sup>41</sup>

It is not governed by reasoned principles, and as a result, justice is not even being approximated, let alone served.

Additional evidence of the incoherence of immigration law can be seen through the example of Chinese and Haitian asylum seekers. Under the first Bush administration, generally, all that was needed for asylum rights to be granted to Chinese asylum seekers was a claim that they were fleeing the harsh population control policies of mainland China.<sup>42</sup> While one might agree that this should serve as a basis for granting asylum rights, it is not clear that this policy was based on humanitarian concerns but rather on the Bush administration’s pro-life stance.<sup>43</sup> With the changing of the guard, we saw that the Clinton administration, without a pro-life agenda, decided that fear of forced sterilization was not a basis on which to gain asylum rights.<sup>44</sup>

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*States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

<sup>41</sup> Scaperlanda, *supra* note 40, at 967–69 (footnotes omitted).

<sup>42</sup> See Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747, 784 (1993).

<sup>43</sup> *Id.*

<sup>44</sup> Cf. Wesley L. Hsu, Comment, *The Tragedy of the Golden Venture: Politics Trumps the Administrative Procedures Act and the Rule of Law*, 10 GEO. IMMIGR. L.J. 317, 355 (1996).

Another example of the incoherence of immigration policy comes from the treatment of Haitian asylum seekers in comparison to Cuban asylum seekers.<sup>45</sup> Joyce Hughes and Linda Crane note, “The prevailing norm . . . to provide protection to refugees from countries that are hostile to the United States, but to deny similar protection to ‘equally worthy refugees from friendly countries.’”<sup>46</sup> One result is asylum seekers from Cuba are favored in comparison to those from Haiti: “Haitians are often denied refugee status because Haitian regimes have historically been anti-communist and staunchly supportive of the United States’ attempts to end communist rule in Cuba.”<sup>47</sup> This is the case “[d]espite the fact that it is widely known that the Haitian government practices systematic and pervasive oppression of political opposition.”<sup>48</sup> My point here is to ask if any sense can be made of immigration law with an eye toward reform.

There are of course many different ways to view immigration law. For example, one could see it as a purely political arena in which immigration law is determined solely by political forces or motivations. Thus immigration law might be thought to serve the political ends required by our foreign policy. Under this view, “progress” from the perspective of immigrant-rights advocates might come about when the interests of immigrants converged with those of the citizenry (or by proxy, those representing the citizenry).<sup>49</sup> In a different context, Professor Mary Dudziak developed Derrick Bell’s interest-convergence hypothesis by placing the move toward desegregation in broader historical context and showed how *Brown v. Board of Education* served U.S. foreign policy interests.<sup>50</sup> An historical examination of immigration law reveals that it has served U.S. foreign policy interests in a more naked fashion. An obvious example comes during World War II when Japan played the race card in trying to elicit aid and sympathy from other Asian countries by

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<sup>45</sup> See Hughes & Crane, *supra* note 42, at 763.

<sup>46</sup> *Id.* (quoting Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 872 (1982)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (suggesting that the consensus against school segregation when *Brown* was decided resulted from the convergence of interests of whites and blacks). That interest convergence might motivate change in the context of immigration is not a new idea. See David Resnick, *John Locke and the Problem of Naturalization*, 49 REV. POL. 368, 381 (1987).

<sup>50</sup> Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).



describing the unequal treatment that persons of Asian descent received in the United States. Ronald Takaki recounts,

Japan had been appealing to Asia to unite in a race war against white America. Japanese propaganda had been condemning the United States for its discriminatory laws and for the segregation of the Chinese in ghettos where they had been relegated to “the most menial of occupations, despised and mistreated and at best patronizingly tolerated with a contemptuous humor.”<sup>51</sup>

Japan tried to re-characterize the war as white versus yellow.<sup>52</sup> The United States, in response, hastily adopted a new law in 1943 permitting the naturalization of persons from China.<sup>53</sup>

Although it is rational to limit immigration law to serve necessary foreign policy interests, it need not be limited in this fashion. Nor should it be. Earlier, I said that there did not seem to be reasoned principles guiding or underlying immigration law. If you agree that is a problem, the question becomes this: what reasoned principles should inform immigration law?

The first temptation is to consult the U.S. Constitution. Unfortunately, that document has little to tell us regarding immigration. One result has been that the judiciary has generally abdicated its responsibility by refusing to oversee most disputes regarding immigration matters, leaving the matter largely in the hands of the other branches of government. This idea of plenary power in the context of immigration begins with the *Chinese Exclusion Case*.<sup>54</sup> The Court held that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”<sup>55</sup> Over the next few years, the Court clarified its position, essentially holding “that the political branches

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<sup>51</sup> RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 377 (1989); see also Neil Gotanda, *Towards Repeal of Asian Exclusion*, in *ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* 309 (Hyung-chan Kim ed., 1996); John Hayakawa Torok, “*Interest Convergence*” and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943–1965, in *CHINESE AMERICA: HISTORY & PERSPECTIVES* 1 (Marlon K. Hom et al. eds., 1995).

<sup>52</sup> TAKAKI, *supra* note 51, at 378 (quoting a Congressman as saying, “The Japanese have been carrying on a propaganda campaign seeking to align the entire oriental world behind Japanese leadership, seeking to set the oriental world against the occidental world.”).

<sup>53</sup> See *id.*

<sup>54</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>55</sup> *Id.* at 606.

could regulate immigration, immune from judicial review unless provided for by Congress.”<sup>56</sup>

The plenary power doctrine has been heavily criticized.<sup>57</sup> Professor Motomura comments, “Critics expressed deep concern over the continuing isolation of an entire body of law from the mainstream of American public law—isolation not only from the process of constitutional judicial review, but also from the constitutional norms and principles developed through that process over the years.”<sup>58</sup> Motomura then addresses this problem through the idea of what he calls “phantom constitutional norms” that have been sneaking their way into some immigration decisions. He argues that these phantom norms should be openly acknowledged and that constitutional norms that exist in other bodies of law should also apply generally to immigration.<sup>59</sup>

Although I find this approach to reforming immigration law persuasive, my approach to this problem is different and is in some ways more expansive. In searching for reasoned principles to inform immigration law, I focus on more basic questions in the arena of political theory about what it means to be a nation-state, how our conception of the nation-state affects our attitude toward the movement of persons between nation-states, and how the fortuity of birthplace should affect such things as a person’s right/privilege<sup>60</sup> in deciding to which nation-state she belongs. These questions which explore the intersection of law and political theory are not new, but as we can see from the ongoing debate surrounding immigration, no

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<sup>56</sup> Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 552–53 (1990) (discussing *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). The source of this notion of plenary power over immigration is unclear. As indicated above, the Constitution says little about immigration. It mentions the word “citizen” eleven times, but never in the context of immigration. The only oblique reference to immigration is a provision authorizing Congress to “establish a uniform Rule of Naturalization.” See U.S. CONST. art. I, § 8, cl. 4.

<sup>57</sup> See, e.g., Henkin, *supra* note 40; Motomura, *supra* note 56; Scaperlanda, *supra* note 40. A more recent critique highlights the way that the plenary power doctrine was fashioned to deal with Asian immigrants, American Indians, and the colonies it acquired following the Spanish-American War. See Saito, *supra* note 8.

<sup>58</sup> Motomura, *supra* note 56, at 547.

<sup>59</sup> See *id.* at 549.

<sup>60</sup> I am using right/privilege in a Hohfeldian sense. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

satisfactory solutions have surfaced.<sup>61</sup> Hence my questions. But perhaps the real question is whether political theory has anything useful to say about this matter.

One immediate barrier to my inquiry is the general lack of attention given by political philosophers to immigration or the movement of persons between nation-states.<sup>62</sup> This silence does not mean that the work of those political philosophers is useless. Instead, we are left with the unenviable task of trying to deduce from their political theory what they would say if they did talk about immigration. I analogize the task as akin to when a federal district court has to decide what a state supreme court would say regarding a state-law matter when the state court has said nothing.

This methodology is not new. For example, Susan Moller Okin observed a similar silence of John Rawls with regard to gender and family issues;<sup>63</sup> she then went on to fill the gaps using his theory of justice in her own work.<sup>64</sup> My mission is to do a similar thing with regard to immigration that tries to carry forward the inquiry that Keith and I asked in our first coauthored piece—what would it mean if we centered the immigrant in the way that we conceive of the nation-state—and what we carried forward the following year in the *Oregon Law Review* symposium entitled *Citizenship and Its Discontents*.<sup>65</sup>

Around the time when Keith, Ibrahim, and I were thinking about these questions, two commentators noted the “explosion of interest in the concept of citizenship among political theorists.”<sup>66</sup> They provide a number of reasons for this renewed interest in citizenship:

At the level of theory, it is a natural evolution in political discourse because the concept of citizenship seems to integrate the demands of justice and community membership—the central concepts of

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<sup>61</sup> See generally Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 357–76 (2008).

<sup>62</sup> For example, one commentator points out that among mainstream liberal political theorists, “[n]either Robert Nozick, John Rawls, nor Ronald Dworkin has raised the issue of the rights of aliens” and that “Bruce Ackerman is probably the most influential of those who have examined the transnational aspects of liberalism.” Donald Galloway, *Liberalism, Globalism, and Immigration*, 18 QUEEN'S L.J. 266, 269 n.4 (1993).

<sup>63</sup> See generally RAWLS, *supra* note 33.

<sup>64</sup> SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

<sup>65</sup> Gassama et al., *supra* note †.

<sup>66</sup> Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 352 (1994). They note that in the late 1970s, the concept of citizenship was out of fashion, but that now, citizenship has become the “buzz word.” *Id.*

political philosophy in the 1970s and 1980s, respectively. Citizenship is intimately linked to ideas of individual entitlement on the one hand and of attachment to a particular community on the other.<sup>67</sup>

From this, we see that citizenship provides an important point of intersection between the competing interests of liberalism's autonomous individuated self and communitarianism's community.<sup>68</sup> Civic republicanism enters the conversation through "two different concepts [of citizenship] which are sometimes conflated in these discussions: citizenship-as-legal-status, that is, as full membership in a particular political community; and citizenship-as-desirable-activity, where the extent and quality of one's citizenship is a function of one's participation in that community."<sup>69</sup> While the latter's conception seems to embody the civic republican line, they do not have a monopoly on civic virtue. Indeed, "some of the most interesting work on the importance of civic virtue is in fact being done by liberals such as Amy Gutmann, Stephen Macedo, and William Galston."<sup>70</sup>

One major difference between the two conceptions of citizenship is in their treatment of persons as objects or subjects. The trend seems to be toward treating persons as subjects with regard to citizenship matters.<sup>71</sup> Given this trend, what is the effect on immigration, which for the most part seems status-driven? And as a corollary, how does an object (immigrant) become a subject (citizen)? What transformative process occurs? If there is none, then it should provide one point on which to push immigration. Perhaps immigration, as status-driven, is not reconcilable with a citizenship theory that is activity-driven.

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<sup>67</sup> *Id.* They also note,

Interest in citizenship has also been sparked by a number of recent political events and trends throughout the world—increasing voter apathy and long-term welfare dependency in the United States, the resurgence of nationalist movements in Eastern Europe, the stresses created by an increasingly multicultural and multiracial population in Western Europe, the backlash against the welfare state in Thatcher's England, the failure of environmental policies that rely on voluntary citizen cooperation, and so forth.

*Id.*

<sup>68</sup> One task then that Kymlicka and Norman set out to do is to "help clarify what is really at stake in the debate between liberals and communitarians." *Id.*

<sup>69</sup> *Id.* at 353.

<sup>70</sup> *Id.* at 365.

<sup>71</sup> *Id.* at 368 ("There is increasing support, however, from all points of the political spectrum, for the view that citizenship must play an independent normative role in any plausible political theory and that the promotion of responsible citizenship is an urgent aim of public policy.").

In the next Part, I turn to how the issue of immigration might be addressed within social contract theory. The primary tool I want to use is Rawls's idea of the original position and the veil of ignorance. One thing to keep in mind about this enterprise is that the end product will not be decisions as to what immigration quotas should be. Rawls, early in *A Theory of Justice*, says, "In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement."<sup>72</sup> In the next paragraph, he says that "those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits."<sup>73</sup> So in the context of immigration, the idea is to set out reasoned principles from which such decisions can be made.

It seems that the problem with any social contract theory lies in its concept of the original position. Most social contract theorists operate from the premise that if a social contract were "signed onto" by real persons through agreement, that it would be tainted by their illegitimate self-interests.<sup>74</sup> Rawls's innovation was the introduction of the veil of ignorance to the original position. Persons participating would step behind the veil of ignorance and would then be unaware of their position in life; this would then prevent them from acting in a self-interested fashion.<sup>75</sup>

In applying the idea of the original position and the veil of ignorance with regard to immigration matters, some of the relevant positions in life are the following:

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<sup>72</sup> RAWLS, *supra* note 33, at 10.

<sup>73</sup> *Id.*

<sup>74</sup> David Gauthier's social contract theory is a notable exception. See DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); DAVID GAUTHIER, *MORAL DEALING: CONTRACT, ETHICS, AND REASON* (1990). Gauthier differs from Rawls in that he "avoid[s] injecting moral premisses into his conception of rationality, as writers in the Kantian tradition might be said to do, and as Rawls does when he requires that principles of justice are to be agreed by 'contracting parties' who do not know their own identities or interests." Robert Sugden, *The Contractarian Enterprise*, in *RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT* 1, 2 (David Gauthier & Robert Sugden eds., 1993). Instead, "[Gauthier] claims to derive moral principles from a theory of rational choice in which each individual pursues his or her own interests." *Id.*

<sup>75</sup> Rawls's notion of the original position and the veil of ignorance is not without its critics. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998).

1. Native-born citizen,
2. Naturalized citizen,
3. Statutory citizen,
4. Permanent resident alien (those who have not yet met the minimum residency requirement for naturalization),
5. Those who have met minimum residency requirements but either (a) have not filed for naturalization but plan to, or (b) have consciously decided not to file,
6. Transients (this could also be subdivided),
7. Undocumented persons, and
8. Pre-immigrants.

Of these groups, the pre-immigrants are those persons outside our borders who potentially would enter the nation-state given the opportunity. The other groups would presumably be represented in the original position not in a literal sense, but in the sense that those operating behind the veil of ignorance would know that those are the groups of which they could potentially be members. Presumably, pre-immigrants would not be “represented” because a party to the original position could not imagine an outcome where that party would be outside the borders—that is, not a party to the original position.

What would the parties to the original position agree to with regard to immigration matters? What principles would they put into place for the resolution of disputes or for the setting of policy? Where does power reside, and what constraints ought there to be on the exercise of power?

With regard to immigration, the plenary power doctrine places unchecked power in the hands of the legislature. Though legislators are subject to the democratic process, the plenary power doctrine insulates the bulk of their decisions regarding immigration matters from judicial review. Even though pre-immigrants might not be part of the conversation in setting forth baseline principles, those behind the veil of ignorance would have to consider the possibility that they might have family and friends who seek entry into the country, or that they might be immigrants, legal or not. Operating with perfect knowledge of the way that the plenary power doctrine has operated to insulate from judicial review decisions that have discriminated based on race, ethnicity, and national origin, those in the original position would reject the plenary power doctrine.

CODA<sup>76</sup>

As this is a Symposium remembering Keith Aoki, I will close on a personal note. I had the opportunity to introduce Keith as the recipient of the Society of American Law Teachers Great Teacher Award.

In some ways, it's easy to list his accomplishments. He was a brilliant, prolific scholar.

He wrote about the urban planning and how our policies shape the construction of race and space;<sup>77</sup> he wrote about intellectual property, exploring and critiquing western notions of originary romantic authorship that become inscribed upon the entire world through intellectual property regimes that know no borders;<sup>78</sup> he wrote further about the operation of law and borders and how it constructs and contains immigrant identity and immigrant communities; more recently he extended this work to explore the rise of regionalism in U.S. immigration politics and practice as it has played out in Arizona. He wrote a book about bio-piracy, where agrochemical companies would take the plant genetic resources from indigenous cultures, map their DNA, modify them slightly, and claim ownership over the seed's genetic code. The modifications were sometimes of the sort that were particularly well-suited to work with that company's pesticides, or included a technology protection system dubbed the Terminator that would produce only one crop that would have sterile seeds, necessitating the purchase of new seeds every year, creating insidious dependence where previously farmers would have been able to share seeds from the previous crop to grow the next year's. He wrote about minority group electoral politics. He wrote about the Alien Land Laws. He made major contributions that deepened our knowledge of the operation of power in its multifarious forms. This brief description doesn't even begin to do justice to the scope and depth of Keith's work.

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<sup>76</sup> This Part incorporates much of what I intended to say during the University of Oregon's commemorative event honoring Keith in the fall of 2011. Unable to attend that event, I subsequently incorporated these remarks for the Society of American Law Teachers annual dinner in Washington, D.C., in January 2012 to introduce Keith as the recipient of SALT's Great Teacher Award.

<sup>77</sup> Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699 (1993).

<sup>78</sup> Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293 (1996).

In addition to being an amazing scholar, Keith was a mentor to so many of us—both peer to peer and to junior folks. There are so many in this room who can tell stories about how Keith helped them in some way.

He was somebody who, instead of taking up room, created space for others. He did this by organizing conferences and organizing symposia. I remember the fights he had with the *Oregon Law Review* to ensure the publication of massive issues running several hundred pages because he wanted to make sure that the work of junior scholars was included. For many of us, getting published in a mainline journal helped us get tenure in our institutions.

He was an institution builder—to name just a few—CAPALF—the Conference of Asian Pacific American Law Faculty; LatCrit; Western Law Teachers of Color. He worked hard to organize and build these virtual spaces because he knew how vital they were to preserve our souls as most of us toiled in majority white institutions and encountered on a daily basis micro and sometimes macro aggressions.

He was a builder within his institutions. Steve Bender and Ibrahim Gassama can tell you of his work at Oregon; Kevin Johnson, Anupam Chander, and Lisa Ikemoto can tell you about Davis.

He was an innovator who brought the comic book form to law reviews. With Jamie Boyle and Jennifer Jenkins, Keith did a comic book on copyright law and fair use which has sold thousands of copies and has been downloaded—for free—by more than 500,000 people worldwide. Their next book, which Keith was working on until his passing, is entitled *Theft! A History of Music from Plato to Hip Hop* and will be coming out soon.

He was fiercely loyal. I had the good fortune of being the beneficiary of his loyalty when early in my career, another scholar critiqued my first article, labeling me a racial fundamentalist for making a call for the development of an Asian American jurisprudence. Keith was concerned for two reasons—for my career because this person was teaching at a top twenty school while I had just started my first tenure track job at a fourth tier school; and for the chilling effect it might have on this kind of scholarship. He organized a group of scholars who defended my work in print. Several years later, this would help me with tenure as my tenure committee acknowledged the critique of my work but emphasized the strong defense of my work by Keith and the group of scholars he organized.

He helped countless others at various points in their tenure process, including people with whom he did not have strong personal



connections. I'm sure part of what motivated him was that he wanted to make sure that we got a more fair shake in a game where the deck is often stacked against us. But I think the deeper motivation came from his faith in us, the words that we would speak and write, the students we would teach, the better world, that with him, we would strive to make.

Sometimes, in this profession, we can forget what the end is. James Douglas, the former dean of the Thurgood Marshall School of Law at Texas Southern, reminded us of this yesterday when he commented following a wonderful panel that remembered and explored the late Derrick Bell's legacy. Dean Douglas reminded us that for his generation of people of color who became law professors, becoming a law professor was a means, not an end. In our profession, and especially at this conference, it is easy to become seduced into believing that the brass ring is tenure, a job at a more prestigious institution, a chaired professorship. Let us remember, though, what the real ends are. I know that Keith always did.

He was courageous. To protest actions taken by the University of Oregon, at great personal cost which included uprooting his family's comfortable existence there, he left a chaired professorship at Oregon.

He was a beloved classroom teacher.

He was a talented musician and artist.

It goes on and on. When invited to give this introduction, I hesitated because this is an impossible task. I can't, in words, capture Keith. And I realize that that's what I'm trying to do—I'm trying to capture Keith, I need to capture Keith—because I'm trying to hold on to him, because I can't believe that he is gone.

Keith passed away in April of last year after battling a particularly aggressive form of cancer. He chose to hide his illness from most of his friends and colleagues. For most of us, one moment, he's teaching classes, writing articles, being his usual brilliant, wonderful self. The next moment, he is in the hospital in intensive care, about to be released home for hospice care. Less than a week later, he was gone.

I've wondered a lot about his decision to hide his illness. As I mentioned before, one of his wonderful qualities was that he was one of those great people whose greatness didn't fill the room in a way that left less space for others. Instead, he was one of those great people who created space for others. I have to think that that's part of what led him to hide his illness.

I can imagine the parade of people—colleagues, students, friends—who would have made their way to see him during the several months between the initial diagnosis and his passing.

I was fortunate to have been able to say goodbye to him, to sit with him and tell him some stories. I also find myself haunted by the image, Keith lying in the hospital bed in the middle of his living room. The pain in his eyes. But even with that, he still had his grin.

Because I can't capture Keith in words, and maybe I shouldn't have even tried, I'm going to invite folks who knew him to close your eyes, to construct a slide show or movie in your heads of your encounters with Keith over the years. Please take a minute to do this.

If we had more time, I'd invite folks to come up and share their stories. I encourage you, after the program, to share with people at your table, your stories, your remembrances of Keith.

I'm going to share with you snippets from my slide show:

I met Keith at AALS in Orlando in 1994. I wasn't doing well on the teaching market, having had only two interviews at the faculty recruitment conference, and by January, no callbacks. Though he had just started at Oregon, he offered to help in any way he could.

The slide show shifts now to the second Asian American Legal Theory Workshop in Marin County in 1998. Keith and Neil Gotanda shucking oysters. Peter Kwan had driven to a nearby oyster farm and returned with an ice chest filled with at least a hundred oysters. Oysters, cold beer, and Asian American jurisprudence. Does it get any better than this?

I remember sneaking out with Keith and other junior folks during a Western Law Teachers of Color Conference to ride a roller coaster on the Santa Cruz boardwalk. I recall the dirty looks from the senior folks when we not so quietly returned to the sessions.

I see Keith singing "Secret Asian Man" to the tune of Secret Agent Man on Lisa Ikemoto's back patio after a CAPALF conference—Keith was playing my Martin guitar, banging it up on the arms of the Adirondack chair on which he was sitting. Those scuff marks on my guitar used to make me mad whenever I saw them. Now they bring a bittersweet smile.

The images flash by. I remember Keith.

As we come together to remember and honor Keith, I see a community bound together by love—Keith was a key part of the love that binds us. Pat Williams, during yesterday's panel on Derrick Bell's legacy, talked about love. We don't talk enough about love.

We need to remember and hold onto love, which fosters hope and will sustain us as we struggle to make things better in small and big ways.

There have been commemorations of Keith at Davis, Oregon, at the Conference of Asian Pacific American Law Faculty and the Northeast People of Color Legal Scholarship Conference, during the Minority Groups Section lunch a couple days ago, and now here.

They have provided an opportunity for us to say goodbye to him, because most of us didn't get the chance to. In saying goodbye, we are brought together—he has brought us together, once again.

In one of his last articles, *Pictures Within Pictures*, in comic book form in the *Ohio Northern University Law Review*, the last frames have Keith, flying away on a jetpack, with the words, “You can't avoid the void” on his T-shirt.<sup>79</sup> His corporeal body is gone—but he is here in all of us. Share your stories. Fill the emptiness that his passing has left. Be inspired by Keith Aoki.

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<sup>79</sup> Keith Aoki, *Pictures Within Pictures*, 36 OHIO N.U. L. REV. 805, 818 (2010).

