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Constructing America: Mythmaking in U.S. Immigration Courts

ABSTRACT. This Note argues that immigration courts have served and continue to serve as important sites for the perpetuation of national identity myths. By focusing on a subset of cases called "cancellation of removal," I examine the functional criteria by which immigrants are granted exemption from deportation. Despite ostensibly neutral statutory standards, immigration courts give legal sanction and shape to nostalgic, idealized, and exclusionary images of American identity. I connect this modern trend to the historical role of immigration law in constructing and amplifying narratives of identity and subordination—a pattern which has been obscured in scholarship by an overemphasis on the civil rights achievements of mid-twentieth-century immigration reforms.

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INTRODUCTION

> *In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.*
> – Harry S. Truman[1]

On May 4, 2001, the Board of Immigration Appeals (BIA) affirmed an immigration judge's decision to deny Javier Monreal-Aguinaga cancellation of removal.[2] The thirty-four year old Mexican national had entered the country at the age of fourteen, married his wife, and was raising his three young U.S. citizen children in Texas.[3] After government officials identified him and placed him in deportation proceedings, Mr. Monreal-Aguinaga applied for relief from deportation under the cancellation of removal provisions of the Immigration and Naturalization Act.[4] Although Mr. Monreal-Aguinaga successfully demonstrated his good moral character and continuous physical presence in the United States, the Board of Immigration Appeals denied his appeal on the grounds that he had not proven that his legal permanent resident and U.S. citizen relatives would suffer the requisite "hardship" if he were deported to his native Mexico.[5]

In an impassioned dissent from the majority's holding, BIA member Lory Diana Rosenberg painted a portrait of the Monreal-Aguinagas as a happy, close-knit "American family," undeserving of the trauma of deportation and separation that denying immigration relief would cause.[6] Speculating on the "extraordinary nature of the ties that the children [would] be forced to sever," Rosenberg insisted that her colleagues had failed to recognize something essential about the family they were poised to disassemble: the family spoke English, the children attended local schools, they maintained no ties to their father's homeland.[7] Indeed, the Monreal-Aguinaga children "very likely lit sparklers on the Fourth of July, marched in the Columbus Day parade, and cheered as loudly as any other American during the World Series."[8] The court's

1. Ctr. for Immigration Studies, *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, Sept. 1995, http://www.cis.org/articles/1995/back395.html.
2. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56 (BIA 2001).
3. *Id.* at 57.
4. Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b (2006).
5. *Monreal-Aguinaga*, 23 I. & N. Dec. at 57-58.
6. *Id.* at 70.
7. *Id.* at 71-72.
8. *Id.*

holding, Rosenberg insisted, "completely ignores the fact that these children are *Americans*."[9]

The argument and the family portrait that accompanies it are clear: this family, on the brink of deportation, should be spared because it is an *American* family. Whatever condemnation is due undocumented immigrants and whatever fate the law imposes upon them as a consequence of their illegality, the Monreal-Aguinagas should be exempt—at least in part because of their Columbus Day marching and World Series cheering.

Rosenberg's voice is a dissenting one, of course, but her reasoning sheds light on the broader way in which American identity is articulated, performed, and evaluated in immigration courts. Contemporary legal guides and pro se manuals for immigrants in deportation proceedings consistently instruct them to demonstrate that they own their homes, attend church, and volunteer in their communities.[10] Appellate briefs describe applicants for cancellation of removal as hard working, dutiful, pious, faithful, and unwaveringly committed to their nuclear families.[11] Indeed, decisions issued by the BIA and courts of appeals overwhelmingly reflect the same values. When granting relief from deportation, judges heap praise upon immigrants for working seven days a week and marrying their high school sweethearts. Court decisions wax poetic about immigrants who attend church every Sunday, coach local little league teams, and raise their children speaking English.[12] These values and lifestyles are understood to be quintessentially American, and it is by proving one's American credentials that one may be exempted from imminent deportation. By granting and denying inclusion into the American polity on this basis, the legal process rewards immigrants who express their conformity to narrow and nostalgia-tinged ideas about what it means to be American. In so doing, the law perpetuates myths about the nature of America and American identity.

By looking at the historical structures and functions of U.S. immigration law, this Note sheds light on the way in which immigrants are called upon to express their allegiance to traditional values, gender roles, and family structures that are both implicitly and explicitly defined as "American." I argue that immigration courts function as a forum for the production and performance of American identity narratives and that this process of myth construction has deep roots in American legal history. Although the structure and language of American immigration and naturalization law have changed considerably since

9. *Id.* at 72 (emphasis added).

10. *See infra* notes 119-126 and accompanying text.

11. *See infra* notes 127-135 and accompanying text.

12. *See infra* notes 136-149 and accompanying text.

the early twentieth century when comprehensive national immigration policy first emerged, the legal process governing immigration has long expressed and fortified national identity myths. The subtle role that deportation laws play in generating ideas of "Americanness" today is part of a broader and longer trend in which immigration courts operate as tools for defining and policing the nation's ideals.

Part I examines the emergence of comprehensive immigration laws and argues that the early laws powerfully expressed romanticized notions of American history and identity. The two main pillars of immigration law—national origins quotas and racial prerequisites—articulated and enforced images of an exaggeratedly homogenous and hierarchical nation. The quota laws based immigration quotas on racial data from past decades—explicitly aiming to maintain the racial composition of the past as it was imagined and defined by census-takers and legislators. Racial prerequisite laws grounded eligibility for citizenship in determinations of race. In so doing, these laws created a public forum in which individuals could demonstrate their conformity to white American values and ideals in order to "earn" their citizenship. Together, by directly controlling the population and publicly articulating national identity myths, these laws formed a framework through which America's history and identity have been negotiated, expressed, and substantiated.

Part II considers the legacy of those laws and the subtle ways in which immigration law continues to perpetuate American identity narratives. The revocation of quotas and prerequisites was intended to signify the end of racialized and value-laden immigration laws. Proponents of the immigration reforms of 1952 and, particularly, those of 1965 claimed that the new laws would replace cultural hegemony and ethnocentrism with a veritable celebration of diversity. This Part argues that the progress narrative advanced in dominant scholarship overemphasizes the impact of mid-century immigration reform. In spite of dramatic legal restructuring and the sweeping claims of reformers, immigration courts continue to express and substantiate hierarchical and exclusionary myths about American identity. As evidence, I focus on immigrants who are on the brink of divesture from the polity and explore the conditions under which they are relieved from deportation and granted legal identity as Americans. Examining a subset of cases called cancellation of removal claims, I argue that, although the statutes are less explicit than those of the past, immigrants still must act out their conformity to antiquated notions of America. Through complex proxies and ongoing jurisdiction stripping, immigration law continues to actively produce and substantiate narratives of exclusion, privilege, and cultural hegemony.

The implications of this legal phenomenon span from individual to cultural. At one level, the process stifles and coerces the immigrants who come before the courts. It imposes upon vulnerable and legally marginalized individuals the burden of performing a collective fantasy. Immigrants who occupy the most precarious legal—and indeed physical—space are compelled to act out the nation's imagined identity at the cost of communicating their own motives, values, and identities. These legal processes constitute what Jerry Mashaw has called an "insult[] to authenticity": they "falsify our experience, and . . . challenge our conceptions of ourselves as autonomous moral agents."[13] The complex stories of historically underrepresented communities are reduced into relative caricatures as they are inscribed into the public record.

The homogeneity of stories and voices presented in the immigration legal forum furthermore raises concerns about the transparency and integrity of the statutory law. Legal realists have long decried the failure of the law to candidly articulate its criteria.[14] This critique has particular salience with respect to cancellation of removal, in which the narrow script that successful applicants rehearse contrasts sharply with the broad and apparently neutral language of the statute. Arguably, performances of a caricatured, 1950s-style Americana have come to substitute for the "good moral character" and "hardship" requirements set forth in the doctrine. Pro se guides, court transcripts, and appellate briefs reveal detailed criteria nowhere to be found in congressionally authorized statutes or regulations. Rather than setting forth and abiding by transparent criteria, the law operates through winks and nods.

Even still, this process does more than undermine the complexity of individual identity or expose the inaccessibility, or even irrelevance, of the statutory law. Importantly, the narratives articulated in immigration courts represent and perpetuate real status hierarchies and patterns of social subordination. Through changing terms and proxies, immigration law continues to generate images of a polity that is markedly less diverse, contested, and dynamic than its reality. The images produced and amplified in the courtroom distort the diversity of American life and mischaracterize the nation's dynamic and overlapping values and identities. They evoke directly and through imagery a world of relatively entrenched power structures. The America that immigrants are called upon to join—and indeed to construct in the process of submitting to it—is one that generally rejects non-nuclear, non-heterosexual families and lifestyles, largely confines wives and mothers to

13. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 30 (2001).

14. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

kitchens, repudiates secularity, and bows to the hegemony of white middle-class norms. The story is perpetuated through direct claims ("he married his high school sweetheart," "she volunteers in church," "the kids speak English better than Spanish") and also imagery. Calling upon immigrants to recount stories about coaching little league and doing yard work for their elderly neighbors may not be objectionable per se, but it evokes a social order and value system in which power structures are presupposed. It harkens to an exclusionary and whitewashed narrative that both denies and denigrates diversity.

In that sense, the progress narrative—in which mid-century reforms successfully democratized immigration law and rejected ethnocentrism—is not only an incomplete historical account, but also obscures the continuing complicity of contemporary immigration law in fortifying systems of marginalization. To that end, Professors Reva Siegel's and Kenji Yoshino's respective accounts of "preservation through transformation" are apt: although civil rights reforms represent gains in some respects, they may also render invisible and thereby justify the persistence of underlying status hierarchies.[15] Changes in political and social rhetoric may indeed serve to *protect* underlying status hierarchies and relationships of subordination. After all, Yoshino writes, "[s]waddled in a progress narrative, the new policy becomes less available for contestation."[16] Accordingly, this Note looks beyond formal legal reform to the *lived* experience and impact of immigration law over time—its cultural implications and the threads of historical continuity which have persisted despite, and perhaps because of, the changing legal forms and language.

I. EARLY COMPREHENSIVE IMMIGRATION LAWS: PREREQUISITES AND QUOTAS

Although restrictions and regulations on immigration date back to a 1798 act authorizing the wartime deportation of "alien enemies,"[17] the earliest comprehensive immigration law was adopted in 1917. Before that point, U.S. immigration law was a collection of exclusionary provisions intended to prohibit the immigration and authorize the deportation of convicts, lunatics,

15. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, *The Rule of Love*]; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) [hereinafter Siegel, *Equal Protection*]; Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

16. Yoshino, *supra* note 15, at 833.

17. Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24 (2006)).

imbeciles, professional beggars, anarchists, polygamists, and "women coming to the United States for immoral purposes," among others.[18] Immigration laws in the 1880s notoriously prohibited the immigration of Chinese laborers,[19] but the law provided no coherent framework to guide immigration policy.

By the first decade of the twentieth century, policymakers faced growing pressure to respond to rising nativism and alarm about America's changing racial and ethnic composition with broad, restrictive immigration laws. The period following World War I had spawned a breed of nationalism that was "distrustful of Europe, disillusioned with the aftermath of the war and the failure of the Americanization program, . . . and disdainful of all things foreign."[20] At the same time, the Ku Klux Klan experienced a "phenomenal rise" in membership,[21] anti-Catholic and anti-Semitic sentiment grew increasingly widespread,[22] and eugenics-based arguments about racial superiority took hold in universities and think tanks.[23] Consequently, calls for greater and more targeted immigration restriction reached a fever pitch.

The Immigration Act of 1917 took broad strides to limit immigration,[24] but in the context of intense and growing nationalism it simply did not go far enough. The Act codified existing exclusion and deportation grounds,[25] created a "barred" zone to halt immigration from Asia, and imposed a literacy test for new immigrants. Perceiving those controls to be insufficient, however, congressional representatives almost immediately began to call for the complete suspension of immigration.[26] A series of bills in the sixty-sixth

18. H.R. REP. NO. 82-1365, at 13-15 (1952) (enumerating the grounds of exclusion under acts passed in 1891, 1903, and 1907).

19. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

20. U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY 127 (Michael LeMay & Elliott Robert Barkan eds., 1999) [hereinafter U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES].

21. *See* Rory McVeigh, *Structural Incentives for Conservative Mobilization: Power Devaluation and the Rise of the Ku Klux Klan, 1915-1925*, 77 SOC. FORCES 1461, 1461 (1999); *see also* Michael Lewis & Jacqueline Serbu, *Kommemorating the Ku Klux Klan*, 40 SOC. Q. 139, 144 (1999) ("At its peak in the early 1920s the new Klan had recruited between three and six million members, roughly 8-10 percent of the eligible population.").

22. Paul L. Murphy, *Sources and Nature of Intolerance in the 1920s*, 51 J. AM. HIST. 60, 69 (1964).

23. *See generally* WENDY KLINE, BUILDING A BETTER RACE (2001) (tracing the emergence and growth of eugenics in the United States); ALEXANDRA MINNA STERN, EUGENIC NATION 86-92 (2005) (discussing the growth of scientific racism in the early twentieth century and its impact on U.S. immigration policy).

24. Ch. 29, 39 Stat. 874 (repealed 1952).

25. *See* H.R. REP. NO. 82-1365, at 15 (1952).

26. *See* E.P. HUTCHINSON, CURRENT PROBLEMS OF IMMIGRATION POLICY 20 (1949).

Congress proposed a total moratorium on immigration for periods ranging from two to five years, and other bills called for an up to fifty-year freeze on immigration from countries such as Germany, Austria-Hungary, and Turkey.[27] It was in that context that the first quota law emerged.

A. National Origins Quotas: Defining the Future by Imagining the Past

Relative to its alternatives, the Emergency Quota Act of 1921[28] was seen as moderate and passed with overwhelming congressional support.[29] Like many laws to follow, the Act admitted immigrants based on their national origins and explicitly restricted immigration in order to maintain the racial composition of past censuses. The law fixed annual quotas at three percent of the foreign-born population in 1910. Three years later, the Immigration Act of 1924, or the Johnson-Reed Act, was passed in response to concern that the Quota Act was too liberal and allowed for too great a departure from the original complexion of the nation.[30] Rather than basing quotas on the census of 1910, which reflected the presence of a substantial Southern and Eastern European population, the Johnson-Reed Act based quotas on the 1890 census and scaled back the percentage from three percent to two percent.[31]

27. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 171-76 (1981).

28. Ch. 8, 42 Stat. 5 (amended 1924).

29. *See* HUTCHINSON, *supra* note 27, at 176-80.

30. Ch. 190, 43 Stat. 153 (repealed 1952); *see, e.g.*, MICHAEL E. PARRISH, ANXIOUS DECADES: AMERICA IN PROSPERITY AND DEPRESSION, 1920-1941, at 113 (1992) (describing the Act as a reflection of "new pessimism about assimilation and the resilience of the social order").

31. The two percent quota was intended to stay in effect until 1927. In fact, it remained in place until 1929, when Congress approved the National Origins Plan. The shift from 1890 to 1910 was intentional and had a profound impact on immigrant flows.

> [S]ince 1890 and prior to the quota legislation in 1924 the great majority were members of the Mediterranean and Slavic races from Southern, Eastern and Southeastern Europe. The great bulk of this "new" immigration has its sources in Russia, Poland, Austria, Hungary, Greece, Turkey, Italy, and the Balkan countries. It is this 'new' immigration which constitutes *the* immigration problem of *today*.

ROY L. GARIS, IMMIGRATION RESTRICTION 204 (1927). "By using the census of 1890, 86 per cent of the quota was allotted to the countries of northwestern Europe, leaving only 14 per cent for all other quota countries." Helen F. Eckerson, *Immigration and National Origins*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 7 (1966); *see also Immigration: A New Deal*, TIME, Oct. 8, 1923, at 4, *available at* http://www.time.com/time/magazine/article/0,9171,727532,00.html ("The basing of quotas on the census of 1890 instead of on the census of 1910 will enlarge

Specific quotas and calculations changed over time, but the legal structure remained constant. The racial and ethnic composition of immigrant flows was designed to "mirror" a specific date in the nation's past. For example, the National Origins Plan of 1929 set an annual ceiling of 150,000 immigrants and provided that the quota for each nationality have "the same relation to 150,000 as the number of inhabitants in the continental United States in 1920 having that national origin had to the total number of inhabitants in the continental United States in 1920."[32]

Defense of the quota system took various forms and tones, but the underlying use of the immigration system to maintain the *America* and *Americans* of the past went largely unchallenged. To be certain, the quota laws were proposed by eugenicists and proponents of Nordic superiority, who believed that the "Nordic race" was "qualitatively superior" to all other races and "represented the last refuge of human civilization and progress."[33] These theories "gave a presumably scientific validation to immigration restriction; for how could a nation protect and improve its genes without keeping out 'degenerate breeding stock'?" [34] Likewise, radical political factions such as the Ku Klux Klan warned that "[u]nless we safeguard ourselves against the further influx of undesirables" with measures such as the quota laws, "there will no longer be an America for Americans."[35] They charged that "so-called hyphenated Americans" represented a grave threat to the "decent, loyal, patriotic, red-blooded, pure and unadulterated American citizen."[36]

Mainstream voices, however, also endorsed the goals of the quota system. For the most part, the political debate focused not on *whether* immigration law

relatively the quotas from northern Europe, as compared to southern, because immigration from the latter region has taken place mostly since 1890.").

32. U.S. CITIZENSHIP & IMMIGRATION SERVS., IMMIGRATION LEGAL HISTORY: LEGISLATION FROM 1901-1940, at 3, http://www.uscis.gov/files/nativedocuments/Legislation%20from%201901-1940.pdf (last visited Dec. 6, 2009).

33. Geoffrey G. Field, *Nordic Racism*, 38 J. HIST. IDEAS 523, 524, 526 (1977).

34. John Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213, 224 (1956).

35. The Regulation of Immigration—A Statement by the Grand Dragon of the Ku Klux Klan, South Carolina (1924) [hereinafter Statement by the Grand Dragon], *in* PAPERS READ AT THE MEETING OF GRAND DRAGONS, KNIGHTS OF THE KU KLUX KLAN 69 (1977), *reprinted in* U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES, *supra* note 20, at 141, 142. The Klan embraced the quota laws, but felt that they did not go far enough. "The present 3 per cent admission law on the basis of the 1910 census is the first attempt of Congress to restrict immigration. . . . This law substantially checked the alien flood, but it has not given the relief needed." *Id.* at 144.

36. *Id.* at 143.

should strive to create a nation that would mimic its past, but rather how far into the past it should reach. A 1950 report of the Senate Judiciary Committee found that "[w]ithout giving credence to any theory of Nordic superiority, the subcommittee believes that the adoption of the national origins formula was a rational and logical method of numerically restricting immigration . . . to best preserve the sociological and cultural balance in the population of the United States."[37] In defense of quota laws, Colorado Representative William Vaile argued on the floor of the U.S. Congress that "Congress might reasonably say . . . . '[W]e prefer to base our quotas on groups whose value has been established through several generations. We will therefore endeavor to distribute immigration in proportion to the elements of our population as they existed a generation ago.'"[38] A 1952 congressional report defended the quota system as "the best method" for controlling immigration because it "gives every national group as many immigrants to this country as that national-origins group has contributed to the population of the United States."[39]

Although the tone of arguments in favor of quotas varied, the objective did not. New immigrant groups were viewed as a threat. Southern and Eastern Europeans in particular were not part of the racially and ethnically homogenous America of the imagined past.[40] Consequently, the public viewed growing immigration from Italy, Germany, and Bulgaria as a threat to the nation's character and values, and policymakers employed immigration law as a tool to defend the "American" identity.

At one level, modeling immigration quotas on decades-old censuses reflects nostalgia for the past and an effort to actively recreate it. Importantly, however, the quota laws did not simply reflect longing for a time past, but rather for an *imagined* and *legally reconstituted* time past. The Quota Act did not, in fact, aim to replicate the actual 1920 census, but a highly revised *version* of the 1920 census. As historian Mae Ngai has aptly observed, the Act explicitly excluded

37. S. REP. NO. 81-1515, at 442-45 (1950).

38. U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES, *supra* note 20, at 146-47 (quoting Rep. William N. Vaile in April 1924).

39. OTIS L. GRAHAM, JR., UNGUARDED GATES 52 (2004) (quoting the Senate Judiciary Committee).

40. Between 1821 and 1880, Northern and Western Europeans constituted eighty-six percent of the immigrants to the United States. Southern and Eastern Europeans represented approximately three percent. Between 1881 and 1930, immigration from Southern and Eastern Europe surged. During that period, Southern and Eastern Europeans represented forty-nine percent of the total immigration to the United States. Northern and Western Europeans represented thirty-five percent. Jesse O. McKee, *Humanity on the Move*, *in* ETHNICITY IN CONTEMPORARY AMERICA: A GEOGRAPHICAL APPRAISAL, 19, 28 (Jesse O. McKee ed., 2d ed. 2000).

"nonwhite people residing in the United States in 1920 from the population universe governing the quotas."[41] In other words, national origins quotas were based on the specific racial and national origins groups that Congress recognized as having existed in 1920, not those that actually did. The Act held that, for the purposes of quota determination, "inhabitants in continental United States in 1920" did not include "(1) immigrants from the Western Hemisphere or their descendants, (2) aliens ineligible to citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of the American aborigines."[42] Ngai explains further:

> The Quota Board used census race categories to make its calculations. It subtracted from the total United States population all blacks and mulattoes . . . . It also discounted all Chinese, Japanese, and South Asians as persons 'ineligible to citizenship' . . . . Finally, it left out the populations of Hawaii, Puerto Rico, and Alaska . . . . In other words, to the extent that the 'inhabitants in continental United States in 1920' constituted a legal representation of the American nation, the law excised all nonwhite, non-European peoples from that vision, erasing them from the American nationality.[43]

41. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 26 (2004).

42. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 72 (1999). According to the law, immigrants "born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America" were considered "non-quota immigrants" and therefore not subject to the numerical limitations of the national origins quotas. Act of May 26, 1924, ch. 190, § 4, 43 Stat. 153, 155 (repealed 1952). Although a full analysis of the treatment of immigrants from the Americas exceeds the scope of this Note, Helen Eckerson's 1966 article offers insight into their nonquota classification:

> > When the white population of 1920 was distributed on a national-origins basis, the quota board found that 5.6 per cent of the 94 million white persons counted in the 1920 Census had their national origins in the countries of the Western Hemisphere. At the time the quotas were established, the volume of this immigration was not such as to cause great concern. In fact, so few nationals from countries of Central and South America had entered the United States prior to 1920 that placing these countries within the quota system . . . might very well have hampered the Good Neighbor policy with sister republics. Therefore, the 1924 Act exempted immigrants from independent countries of the Americas from quota restrictions.
>
> Eckerson, *supra* note 31, at 10-11.

43. Ngai, *supra* note 42, at 72.

It is in that sense that quota laws reflect more than defense of the lived past, but rather expression of a *romanticized* past—a nonexistent, glorified historical moment. Were the census data of 1920 to truly dictate immigration quotas, Ngai points out, African nations from which slaves originated "would have received 9 percent of the total immigration quota, resulting in 13,000 fewer slots for the European nations."[44] Instead, politicians made bold arguments about preserving the nation's ethnic composition and described the quota system as "a mirror reflecting the United States"[45] while simultaneously and systematically ignoring the existence of large swaths of the population.

In the process of negotiating the national origins quotas, immigration law constructed and, indeed, *codified* a historical fantasy. The legal redefinition of the "population of 1920," through the overt deletion of people from the past, became a powerful reality—both in terms of collective imagination and actual population control. Immigration law, after all, not only provides a forum for articulating visions of American identity, but also shapes the demographics of the polity. In this regard, Michel Foucault's concept of biopolitics is apt.[46] In their examination of *Lawrence v. Texas*[47] and its implications for the regulation of sexuality and gender, Craig Willse and Dean Spade consider Foucault's conceptions of *discipline* and *biopolitics*: "If discipline operates at the level of the body of the individual subject, biopolitics operates at the level of the mass of bodies or the population. Biopolitics is characterized by the production of a population with overall 'characteristics of birth, death, production, illness, and so on.'"[48] The distinction is critical: forms of societal regulation such as census categories not only inhibit the expression of personal and cultural identities, but also shape "the distribution of life chances across the population, the collection of data about this distribution and the regulation of resources at this general level."[49] To examine the impact of coercive immigration laws at the

44. *Id.*

45. GRAHAM, *supra* note 39, at 90 (quoting Senator Sam Ervin of North Carolina).

46. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 243 (David Macey trans., Picador 2003) (1997).

47. 539 U.S. 558 (2003).

48. Craig Willse & Dean Spade, *Freedom in a Regulatory State?:* Lawrence, *Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 320 (2005).

49. *Id.* at 321. Professor David Eng has also explored the constitutive nature of the nation-state's information gathering and classifying functions. "Nation-states . . . 'still track and manage their own denizens through an official time line, effectively shaping the contours of a meaningful life by registering some events like birth, marriages, and death, refusing to record others . . . .'" David L. Eng with Judith Halberstam & Jose Esteban Muñoz, *Introduction: What's Queer About Queer Studies Now?*, 23 SOC. TEXT 1, 4-5 (2005) (quoting Elizabeth Freeman, *Time Binds, or Erotohistiography*, 23 SOC. TEXT 57, 58 (2005)).

individual level without considering the way that their categories and imperatives shape the population itself is to overlook one of the most powerful dimensions of immigration law.

In racially reconstructing America, the quota laws simultaneously reimagined the nation's political and civic identity. By erasing the very existence of minorities, the law likewise minimized their claims to recognition and entitlement. The legal distortion of the population bolstered arguments about the dominance of "white America." Modeling the present on a fantastical past served as a justification for the perpetuation of political, economic, and social hierarchies.

The quota system and its incumbent political discourse provided an opportunity not just to construct homogeneity, but also to reassert its superiority. The public and political discussion surrounding national origins quotas relied upon and glorified the language, logic, and assumptions of eugenics and race-based social theories. Arguments about immigration quotas linked the reproduction of the census to the preservation of fundamental and cherished political ideals, social norms, and moral values. The nostalgia animating the quota laws was not simply for the complexion of an America past, but for the characteristics attributed to that racial composition.

"New" immigrants were not part of the nation's history and—emphatically—did not deserve to be. The post-1890 immigrants were a threat precisely because they were "so different" from Americans "in character, thought, and ideals."[50] A 1924 editorial in the *Washington Post* argued that new immigrants were "stoutly resist[ant] to Americanism," and that their "ideas and notions and languages and concepts and traits and characteristics and tendencies of thought" represented a threat to America's very existence.[51]

The logic underlying the quota system was therefore circular. The ostensible purpose for restricting immigration was to honor the nation's history and celebrate its social, civic, and cultural institutions. The law's champions insisted that their primary concern was for maintaining "'similarity

50. Statement by the Grand Dragon, *supra* note 35, at 141. In this way, immigration laws constructed and perpetuated "Americanism" through exclusion. To borrow Ian Haney López's incisive terminology, America and its people viewed themselves as "the superior opposite" of all things non-American. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 20 (10th anniversary ed. 2006) (emphasis omitted). In this way, the quotas gave substance and force to America's imagined past and sanctioned the civic and moral dimensions attributed to that historical construction.

51. Editorial, *Speed Immigration Legislation*, WASH. POST, Mar. 12, 1924, at 6.

of cultural background'" among Americans of the past, present, and future.[52] And yet the cultural background that restrictionists claimed to maintain was itself invented through the process of "defending" it. To "honor" the past was to obscure and redefine it.

Thus, champions of national origins quotas produced the very identities and hierarchies they purported to defend. Yoshino describes this phenomenon as the *constative fallacy*–"the misperception that actions are describing an identity they are actually creating."[53] In other words, descriptive claims may actually be constructive claims, producing in the articulation that which they claim merely to recount.[54] In light of this important insight, immigration law warrants scrutiny as a powerful force creating, articulating, and perpetuating the very realities it purports to regulate.

B. Racial Prerequisite Laws: Performing America

Racial prerequisite laws constituted the second pillar of immigration law in the early 1900s. These laws, like the quota laws, regulated immigration through racial categories designed to maintain the country's racial complexion and identity (imagined or otherwise). Unlike quota laws, however, the prerequisite laws provided a specific and public forum for the performance of race and "American" virtue.

Racial prerequisite laws predate the quota laws and even the emergence of comprehensive U.S. immigration policy. In 1790, the fledgling U.S. Congress passed the Nationality Act, which granted eligibility for citizenship exclusively to "free white person[s]."[55] The law was amended after the ratification of the Fourteenth Amendment in 1868 such that eligibility for citizenship was extended to "aliens of African nativity and to persons of African descent."[56] For

52. NGAI, *supra* note 41, at 237 (quoting ROBERT A. DUNNE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 167 (1972)).

53. Yoshino, *supra* note 15, at 901. In other words, "signs that appear to *describe* referents can at times . . . *create* them." *Id.* at 870 (emphases added).

54. In a particularly thoughtful contemporary application of the constative fallacy, Dean Spade has examined the impact of gender classification and documentation in the context of expanded surveillance and growing political emphasis on identity verification regimes. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008) ("[T]erms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories, often to the point where those categories are taken for granted by most people and appear ahistorical and apolitical.").

55. Ch. 3, 1 Stat. 103, 103 (1970).

56. Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870).

eight decades following the Naturalization Act of 1870, the prerequisite laws restricted citizenship to those individuals whom the law defined as white and those whom the law defined as black. In the 1920s, the quota acts lent even greater authority to the prerequisite laws by specifying that all aliens who were "ineligible for citizenship" would be prohibited from immigration. In so doing, the acts incorporated into *immigration law* the racial prerequisites for naturalization that had been in effect for more than a century.

Consequently, in order to adjudicate naturalization claims and determine eligibility for immigration, courts were charged with articulating the meanings, applications, and boundaries of racial categories. Unlike quota laws, which left little space for the contestation of national origins classifications,[57] prerequisite laws compelled individuals who wished to dispute their racial assignations to publicly perform their identity claims. As such, the racial prerequisite cases provide rich evidence of the way America came to be associated with particular cultural and moral ideals through evidentiary hearings and judicial deliberation.

In a body of cases now known as the *Racial Prerequisite Cases*, U.S. courts deliberated extensively upon the definitions, applications, and contours of racial identity. Between 1878 and 1952, fifty-two cases were reported in which individuals appealed their denial of citizenship due to racial ineligibility.[58] Petitioners from Japan, Mexico, the Philippines, and Syria, among other places, turned to the courts to claim that they were "white persons" for the purposes of naturalization.[59] The ensuing decisions, which have drawn scholarly attention in recent years, demonstrate the courts' active role in constructing racial identity.

Professor Ian Haney López has argued powerfully that the Supreme Court's adoption of a "common knowledge" test to determine "whiteness" in the 1920s reflects society's active production of race through the exercise of legal power.[60] In *White by Law*, Haney López focuses particularly on two

57. Importantly, Ngai notes that the national origins categories were not themselves natural or objective, but rather the result of larger political and social processes of racialization underway in early twentieth-century America. *See, e.g.*, Ngai, *supra* note 42, at 73 ("Few, if any, doubted the Census Bureau's categories of race were objective divisions of objective reality . . . . Census data gave the quotas an imprimatur that was nearly unimpeachable . . . [and] was invoked with remarkable authority . . . .").

58. HANEY LÓPEZ, *supra* note 50, at 35.

59. *Id.* at 1, 35.

60. *Id*. at 3-7.

Supreme Court cases, *Ozawa v. United States*[61] and *United States v. Thind*,[62] in which the Court rejected scientific theories of race in favor of "common knowledge" tests.[63] In *Thind*, for example, the Court dismissed the Indian-born Hindu respondent's claim that he was "white" on the basis of scientific evidence. Conceding that "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity," the Court nonetheless rejected the contention that Thind was legally white.[64] After all, the Court noted, "the average man knows perfectly well that there are unmistakable and profound differences between them today."[65] *Thind* declared that "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man."[66] Hence, race became conflated with its social interpretations and associations—no more or less than what people perceived it to be.

As these cases negotiated the boundaries of race, so too did they explore and express the dimensions of American identity and social relations. In the context of racial prerequisites, evaluating "whiteness" became another way to determine suitability for "Americanness."[67] The prerequisite laws, by design, sought to exclude from citizenship and, later, immigration those races that were inherently unfit to be American. In so doing, they cemented a social structure in which whiteness was relatively interchangeable with social, political, and moral superiority.

At their core, the prerequisite laws reified racial status hierarchies. Becoming an American required one to be white, and being deemed legally white required one to be educated, entitled, and socially superior. Indeed, the cases focused on the trappings and status indicators of race. The briefs, arguments, and opinions revolved primarily around character, behavior, social class, and civic values, not skin color or ancestry.[68] Naturalization claims were

61. 260 U.S. 178 (1922).

62. 261 U.S. 204 (1923).

63. HANEY LÓPEZ, *supra* note 50, at 56-77.

64. *Thind*, 261 U.S. at 209, 211.

65. *Id.* at 209.

66. *Id.* at 214.

67. Blacks, too, were eligible for citizenship at this time. However, in every prerequisite case on record but one, the petitioner contended that he was white. HANEY LÓPEZ, *supra* note 50, at 35. As a result, Haney López and subsequent scholars have focused largely on the legal construction of whiteness.

68. John Tehranian has written cogently about the performative dimension of the racial prerequisite cases: "[W]hiteness was determined through performance. . . . Successful litigants demonstrated evidence of whiteness in their character, religious practices and

predicated on the supremacy of whiteness. In 1909, for example the court remarked with respect to Bhicaji Balsara, an East Indian native, that "*since* the applicant appears to be a gentleman of high character and exceptional intelligence, such an order [granting citizenship] may be entered upon his application."[69]

Obtaining citizenship on the basis of whiteness was, above all, a matter of proving one's compliance with idealized notions of American "character, integrity, [and] habits." [70] As such, a "dramaturgy" emerged from this line of cases, in which participants professed and performed their "American" credentials.[71] In deliberating upon Japanese national Takao Ozawa's racial eligibility for naturalization, for example, the Supreme Court noted approvingly that he "had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home."[72] The traditional identity myths endured: church, English, and American values.

Thus, the prerequisite laws produced and perpetuated legally powerful stories about America and Americans. The laws provided a public forum for imagining the American past and present; they created and amplified narratives about who Americans were and who they were not. The laws and their judicial application fortified status hierarchies by creating narratives about whiteness that were inextricably bound with educational access, privilege, and social acceptance. Once again, the legal stories are constitutive. The petitioners' stories created and buttressed the white America they sought to join. Yoshino's

beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping. Thus, a dramaturgy of whiteness emerged . . . ." John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 820-21 (2000). Similarly, Ariela Gross has examined the way race was discussed, performed, and evaluated in trials in local courts during the antebellum period. She argues that race was defined by "civic performances." Whiteness was "not only something [the petitioners] *were*, it was something they *did*." Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 162, 164 (1998).

69. *In re* Balsara, 171 F. 294, 295 (S.D.N.Y. 1909) (emphasis added).

70. United States v. Dolla, 177 F. 101, 102 (5th Cir. 1910).

71. Tehranian, *supra* note 68, at 821. To be deemed American was to have survived exacting legal scrutiny of one's "educational attainment, occupational dispersal, language choice, residential location, and intercultural marriage." *Id.* at 823.

72. Ozawa v. United States, 260 U.S. 178, 189 (1922).

constative fallacy takes shape. We see here, again, the "misperception that actions are describing an identity they are actually creating."[73]

II. ERA OF REFORM AND THE PERSISTENCE OF MYTHMAKING

A. *"The Progress Narrative": Reform and the Immigration Acts of 1952 and 1965*

Contemporary immigration law took shape in no small part through the legislative reforms of 1952 and 1965. By the middle of the twentieth century, the end of World War II and the onset of the Cold War drew increased attention to immigration law and policy. Policymakers agreed that immigration reform was in order, but differed widely about the substance of the new immigration law. One faction viewed immigration policy primarily as a diplomatic tool and argued for the cessation of national origins quotas and bars to immigration from Asia in order to reflect America's increasingly complex understanding of Asia and its role in foreign policy.[74] Another faction framed immigration policy in terms of national security, vehemently resisting changes to the quota system and calling for greater restrictions and deportation authority in order to defend against the infiltration of subversive elements from abroad.

The resulting law, the Immigration and Nationality Act (INA) of 1952,[75] reflected these deep ideological divisions. The law eliminated race as a bar to immigration, officially ending the period of racial prerequisites to citizenship, but it maintained the quota system and affirmed the use of the 1920 census to determine quotas.[76] Although the law no longer barred Asians from

73. Yoshino, *supra* note 15, at 901; *see also supra* notes 52-54 and accompanying text (examining Yoshino's concept of the constative fallacy as it applies to the constitutive nature of immigration law).

74. *See, e.g.*, CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990, at 171 (2001) ("The cold war's emphasis on hearts and minds magnified the importance of symbolic politics."); Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, 45 LAW & CONTEMP. PROBS. 137, 156 (1982) (discussing the impact of "Cold War concerns about world opinion" on the immigration acts of 1952 and 1965).

75. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

76. The law set quotas at one-sixth of one percent of each nationality's population in the United States in 1920. Accordingly, approximately seventy percent of the available spots were reserved for nationals of the United Kingdom, Ireland, and Germany. ALICIA J. CAMPI, IMMIGRATION POLICY CTR., THE MCCARRAN-WALTER ACT: A CONTRADICTORY LEGACY ON

immigration or naturalization, it imposed an extremely low ceiling for natives of the "Asian Pacific Triangle." Furthermore, the definition of "Asian" for the purposes of the quota system was uniquely racialized: "An individual with one or more Asian parent, born anywhere in the world and possessing the citizenship of any nation, would be counted under the national quota of the Asian nation of his or her ethnicity or against a generic quota for the 'Asian Pacific Triangle.'"[77]

In short, the law was fragmented, and policymakers diverged sharply on its various provisions. So loudly did the public clamor for immigration reform, however, that the bill passed through the contentious Congress over President Truman's veto. For his part, Truman described the bill as "a mass of legislation which would perpetuate injustices of long standing against many other nations of the world."[78] He called for the abolishment of the national quota system, which "was false and unworthy in 1924" and "even worse now."[79]

It was not until thirteen years later that Congress dismantled the national origins quota system that had characterized immigration law for more than four decades. The Immigration and Nationality Act of 1965 replaced the quota system with a first come, first served system that gave preference to individuals with special occupational skills and relatives of U.S. citizens and legal permanent residents.[80] The Act, signed into law by President Lyndon Johnson, set numerical limits on immigration from the Eastern Hemisphere,[81] and, for the first time, from Latin America and the Caribbean as well.[82]

In so doing, the 1965 law reinvented the basic structure by which immigrants would be admitted to or denied access to the United States. Admission to the United States would no longer be contingent on race or

RACE, QUOTAS, AND IDEOLOGY (2004), *available at* http://immigrationpolicy.pairsite.com/sites/default/files/docs/Brief21%20-%20McCarran-Walter.pdf.

77. Office of the Historian, U.S. Dep't of State, The Immigration and Nationality Act of 1952 (The McCarran-Walter Act), http://www.state.gov/r/pa/ho/time/cwr/87719.htm (last visited Dec. 6, 2009).

78. President Harry S. Truman, Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), *available at* http://trumanlibrary.org/publicpapers/viewpapers.php?pid=2389.

79. *Id*.

80. Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

81. *See* Ctr. for Immigration Studies, *supra* note 1. The law also implemented an annual cap of 20,000 immigrants per country that applied exclusively to the Eastern Hemisphere. NGAI, *supra* note 41, at 258.

82. For a more detailed discussion of the shifting policy toward immigrants from the Latin America and the Caribbean, see NGAI, *supra* note 41, at 50-55; and SHANKS, *supra* note 74, at 176-78.

national origin. Accordingly, the reforms were proclaimed as a major victory against racism and xenophobia. The 1965 law was said to be heavily influenced by the civil rights movement underway in the country. Scholars and politicians have characterized the Act as one of the three "major civil rights reforms of the mid-1960s," alongside the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[83] Celebrating the law's passage, Democratic Representative Philip Burton pronounced: "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 descendents of immigrants."[84] Commentators to this day describe the Act's "[d]iversification of the immigrant stream [as] . . . a civil rights triumph."[85]

The Act was seen as a renunciation of the ethnocentric immigration laws of the past. Its champions called the new framework "noble" and "revolutionary."[86] Senator Edward Kennedy heaped praise upon the new law, writing that "[a] measure of greatness for any nation is its ability to recognize past errors in judgment and its willingness to reform . . . ."[87] Scholars note that the 1965 Act "has . . . been interpreted as a breakthrough for liberalism, revolutionizing the way that the country thought of, and treated, potential immigrants."[88]

The claims were bold and sweeping; the Act was viewed as the endpoint in a classic progress narrative. The Act's champions believed it would fundamentally alter the way the United States approached foreignness. The Act's sponsor, Senator Philip Hart, proclaimed, "A newcomer should not arrive at our nation's door, hat in hand, apologizing for his parentage or

83. *See, e.g.*, Hugh Davis Graham, *Affirmative Action for Immigrants?: The Unintended Consequences of Reform*, *in* COLOR LINES 53, 66 (John David Skrentny ed., 2001); Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 138 (1966) ("It [the Immigration Act of 1965] stands with legislation in other fields – civil rights, poverty, education, and health – to reaffirm in the 1960's our nation's continuing pursuit of justice, equality, and freedom."); Seller, *supra* note 74, at 156 (linking the Act with "the civil rights movement's campaign against racism [and] the pluralistic views of John F. Kennedy").

84. 89 CONG. REC. 21,783 (1965).

85. 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, 276 (1996).

86. *Id.* (quoting THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980, at 363 (1982)).

87. Kennedy, *supra* note 83, at 149.

88. SHANKS, *supra* note 74, at 182.

birthplace."[89] The new law, he rhapsodized, would abandon past practices and assess immigrants "on the grounds of security and economic and scientific benefit; on the principles of family unity and asylum to the homeless and the oppressed."[90]

B. Continuing Mythmaking: Linking the Past and the Present

To the extent that existing literature has considered the hierarchy-maintaining and identity-generating role of immigration law—generally in the context of the social construction of race—the analysis focuses largely on racial prerequisites and presents the issues in the *past tense*. Although the reforms of 1952 and 1965 were indeed dramatic, scholars tend to treat the laws' implementation as an endpoint in their critical analyses. As such, the characterization of immigration reform as a civil rights victory has obscured the recognition of the underlying themes and generative functions of American immigration law.[91]

In spite of substantial procedural and substantive changes over time, immigration law continues to generate legally and culturally powerful narratives about American identity. The legal process surrounding immigration still articulates a narrow and exclusionary vision of the nation's values and character and exercises the coercive power to admit or exclude immigrants based on their compliance with that vision. Indeed, immigration courts around the country regularly deliberate upon and enforce national identity myths—and, as I shall demonstrate, they do so with decreasing judicial review and oversight. Although race has been stripped from the statute, the process and the performances the statute generates are not race-neutral or culture-neutral in the vision of the "good" family and the "good" citizen that they both contemplate and demand. The highly normative legal processes of

89. Kennedy, *supra* note 83, at 141 (quoting Senator Hart's statements to the Senate Immigration Subcommittee on January 13, 1964).

90. *Id.*

91. *See supra* notes 15-16 and accompanying text. The tendency to celebrate the appearance of progress without interrogating the continuation of injustice and inequality is the central contribution of Siegel's "preservation-through-transformation" account. *See generally* Siegel, *The Rule of Love*, *supra* note 15, at 2180 ("[I]t is possible to modify the rules and reasons by which the legal system distributes social goods so as to produce a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups . . . ."). Or, as articulated by Yoshino, "The old policy 'was as bad as it looked,' and came under fire on that ground. The new policy accomplishes the same end under a much more benign guise. Swaddled in a progress narrative, the new policy becomes less available for contestation." Yoshino, *supra* note 15, at 833 (citation omitted).

the past provide a lens into a subtle, but similar (if far less explicit) function of immigration law today.

C. Cancellation of Removal: Exemption from Deportation

As evidence of the continuing construction of American identity myths, I focus primarily on "cancellation of removal," one of few legal options available to immigrants in deportation proceedings who do not qualify for a handful of narrow legal categories such as political asylum or family-based adjustment of status.[92] Unlike many forms of relief that are available to all immigrants seeking to gain permanent legal status, cancellation of removal is exclusively defensive. That is, only immigrants whom the government has already placed in deportation proceedings are eligible to apply. By definition, cancellation of removal is an avenue through which the law pardons some immigrants from deportation and denies that exemption to others.

To be certain, other forms of relief exist for immigrants in deportation proceedings. Some qualify for asylum or for relief under the Convention Against Torture; others seek waivers of specific grounds of inadmissibility.[93] However, cancellation of removal is something of a last resort—widely available as a matter of statutory eligibility, but rather sparingly granted. Furthermore, the process takes place out loud and publicly in immigration courts. As such, it yields compelling evidence of some of the circumstances under which individuals are relieved from deportation and granted permanent recognition by the state.

Statutory requirements govern basic eligibility for cancellation of removal, but the determination primarily hinges upon judicial determinations about an immigrant's "good moral character" and the "hardship" that would be visited upon his or her U.S. citizen or legal permanent resident spouse, parents, or children ("qualifying relatives") if the immigrant were deported.[94] These

92. Pursuant to legal changes enacted in 1997, "deportation proceedings" are now known as "removal proceedings." *See, e.g.*, United States v. Pantin, 155 F.3d 91, 92 (2d Cir. 1998) ("The IIRIRA made a number of significant changes to the immigration laws. One of these did away with the previous legal distinction among deportation, removal, and exclusion proceedings."). This Note, however, uses the common-knowledge term "deportation" to describe both removal and exclusion.

93. INA § 212, 8 U.S.C. § 1182 (2006) enumerates the grounds of inadmissibility and provides limited options for immigration officials to waive some of those grounds. *See generally* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 8-1 (5th ed. 2005).

94. 8 U.S.C. § 1229b.

determinations are discretionary, and the trend over the last several decades has been to increasingly shield discretionary decisions by immigration judges (IJs) and the BIA from judicial review. As a result, courts have latitude to insert normative views and construe the language of the law so as to incorporate unarticulated, implicit standards and expectations.

Unlike immigrants applying affirmatively for status in the United States, individuals applying for cancellation of removal have necessarily broken the law; some have violated the terms of their admission and face expulsion, and others have been identified as unlawfully present. The immigration court becomes a forum in which immigrants repent for their transgression of the law and seek redemption by performing their conformity with "American" values, lifestyles, and social norms. Much as national origins quotas harkened to an imaginary American history and racial prerequisites demanded that individuals perform their compliance with "white" norms, cancellation of removal hearings perpetuate and enforce idealized and subordinating notions of American values and identities. "Hardship" and "good moral character," though facially neutral, have been used as proxies to determine whether an immigrant is *worthy* of relief from deportation. In so doing, courts conduct a highly intrusive inquiry into the immigrant's "Americanness"—thereby reflecting not only the particular content of a powerful national identity myth, but also a source of its reification and active perpetuation.

1. "Administrative Grace" and Shrinking Appellate Jurisdiction

Cancellation of removal traces back to the nation's early immigration laws. Although the language of the law and standards for judicial review have shifted over time, cancellation has always been a highly discretionary form of relief, open to a wide range of judicial interpretations and applications. Furthermore, cancellation of removal grows increasingly relevant as avenues for admission and regularization of status narrow or close entirely.[95]

The earliest incarnation of cancellation of removal was enacted as part of the Immigration Act of 1917, which enumerated extensive grounds for deporting non-nationals and simultaneously authorized the courts to "make a recommendation to the Secretary of Labor that [certain] alien[s] shall *not* be deported in pursuance of this Act . . . ."[96] The law did not set forth specific

95. *See, e.g.*, Rob Paral, *No Way in: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, IMMIGR. POL'Y FOCUS, July 2005, at 1.

96. Pub. L. No. 301, § 19, 39 Stat. 874, 890 (repealed 1952) (emphasis added).

standards according to which courts were to base their recommendations, but rather left the decision to the courts' broad discretion.

The INA of 1952 established the basic legal structure for "suspension of deportation," as it was called until the mid-1990s. The law authorized the Attorney General to "suspend deportation and adjust the status" of immigrants who faced deportation on a wide range of grounds, including failure to comply with entry and exit requirements, mental and physical disease, criminal history, subversive political activities, and drug addiction.[97] Eligibility for this form of discretionary immigration relief required non-nationals to demonstrate continuous physical presence in the United States, good moral character, and that their deportation would result in hardship to themselves or their qualifying relatives.[98]

For more than four decades, that framework governed the primary options for immigrants in deportation proceedings. Undocumented immigrants could seek relief under suspension of deportation, and legal permanent residents who had been placed in deportation proceedings could apply for a related form of relief under INA section 212(c). The statute explicitly enumerated the good moral character and hardship requirements for suspension of deportation.[99] The statutory language of section 212(c) was silent with respect to hardship and good moral character, but the judiciary incorporated both elements in establishing standards for the favorable exercise of discretion.[100]

97. Pub. L. No. 414, § 244(a), 66 Stat. 163, 214-16.

98. *Id.* § 244(a)(1), 66 Stat. at 214.

99. The degree of hardship required to warrant suspension of deportation has shifted over time. The INA of 1962 streamlined the suspension of deportation provisions set forth in the 1952 Act and clarified the basic statutory requirements under INA § 244. Pub. L. No. 87-885, 76 Stat. 1247. The 1962 amendments created two distinct hardship standards, to be applied depending on the grounds of deportation: "extreme hardship" to the alien or qualifying relatives, on the one hand, and "exceptional and extremely unusual hardship" to the alien or qualifying relatives on the other. *See In re* Hwang, 10 I. & N. Dec. 448 (BIA 1964) (discussing the meaning and application of the extreme hardship standard as imposed by the INA of 1962); *see also infra* note 106 (reviewing the hardship standards currently governing cancellation of removal).

100. Specifically, the BIA held that an immigrant applying for 212(c) relief

> bears the burden of demonstrating that his application merits favorable consideration. . . . Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country . . . , evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other

Both forms of relief were discretionary from the outset. The 1952 statute specified that the Attorney General "*may*, in his discretion," suspend deportation proceedings against an immigrant.[101] Judicial interpretations of both suspension and section 212(c) also emphasized the discretionary nature of relief. As early as 1957, the Supreme Court held that "[s]uspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met."[102] The BIA granted IJs broad authority to construe the law: "We realize, of course, the difficulty, if not impossibility, of defining any standard in discretionary matters of this character . . . ."[103]

In recent years, the legal standards have changed dramatically, and judges now possess even greater latitude in interpreting and applying the law of cancellation of removal. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[104] revamped the INA and redrew the landscape for immigrants facing deportation. IIRIRA essentially discarded both section 212(c) relief and suspension of deportation and, in their place, authorized the Attorney General to "cancel" the "removal" proceedings against non-nationals pursuant to section 240A of the new INA.[105] Cancellation of removal provisions are now more restrictive, available to a narrower category of non-nationals, and impose more stringent hardship requirements than their predecessors.[106]

evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

In re Marin, 16 I. & N. Dec. 581, 583-85 (BIA 1978).

101. Pub. L. No. 414, § 244(a)(1) (emphasis added).

102. United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

103. *In re* L., 3 I. & N. Dec. 767, 770 (BIA 1949). The Supreme Court affirmed the highly discretionary nature of hardship determinations in a 1981 suspension case, *INS v. Wang*, 450 U.S. 139, 145 (1981), which affirmed the BIA's denial due to insufficient demonstration of hardship.

104. Pub. L. No. 104-208, 110 Stat. 3009-546.

105. 8 U.S.C. § 1229b (2006).

106. Cancellation of removal provisions are available to two categories of non-nationals facing deportation: permanent residents and nonpermanent (or undocumented) residents. To be eligible, nonpermanent residents must show ten years of physical presence in the United States, good moral character, and that their removal "would result in exceptional and extremely unusual hardship to" their qualifying relatives. *Id.* § 1229b(b)(1)(D). The cancellation statute does not explicitly require that permanent residents demonstrate hardship or good moral character, but both of those elements have been incorporated through judicial interpretation. For example, echoing its construction of section 212(c), the BIA held that evidence of good character and hardship is critical to the favorable exercise of discretion for permanent residents. *In re* C.V.T., 22 I. & N. Dec. 7, 11 (BIA 1998); *see also*

The twin pillars of hardship and good moral character have persisted, but the 1996 laws dramatically limited judicial review of those determinations.[107] Until 1996, there were avenues for guidance and oversight by the courts of appeals. Immigrants who were denied cancellation of removal before an IJ could appeal to the BIA, which reviewed IJ decisions de novo. If the Board affirmed the denial of cancellation, immigrants could then appeal to the courts of appeals. The courts of appeals reviewed BIA decisions for abuse of discretion and, in so doing, provided independent guidance on the meaning of the law and its appropriate applications.

Individuals who are denied cancellation on discretionary grounds can no longer appeal to the circuit courts, but rather only to the BIA, pursuant to IIRIRA and the REAL ID Act,[108] which followed in 2005. This change is particularly meaningful in light of recent regulatory changes that weaken the extent of BIA review. "Streamlining regulations" enacted in 2002 allow a single BIA member, rather than the traditional panel of three, to review nonprecedential cases.[109] The 2002 regulations also direct the BIA to employ a

Romero-Torres v. Ashcroft, 327 F.3d 887, 889 (9th Cir. 2003) ("Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General."). The Antiterrorism and Effective Death Penalty Act (AEDPA) also winnowed away at suspension of deportation by disqualifying non-nationals who had been convicted of aggravated felonies, controlled substance offenses, some firearms offenses, and several other crimes. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 42, and 50 U.S.C.).

107. For a discussion of the jurisdiction-stripping provisions of IIRIRA, see Jeffrey S. Lubbers, *Closing the Courthouse to Immigrants*, ADMIN. & REG. L. NEWS, Winter 1999, at 1, *available at* http://www.abanet.org/adminlaw/news/vol24no2/immigration.html.

108. Pub. L. No. 109-13, 119 Stat. 303 (amending 8 U.S.C. § 1252(a)(2)(B), which now states: "Notwithstanding any other provision of law . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, *no court shall have jurisdiction to review* (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." (emphasis added)).

109. Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002); *see also* U.S. DEP'T OF JUSTICE, FACT SHEET: BOARD OF IMMIGRATION APPEALS: FINAL RULE (2002), *available at* http://www.justice.gov/eoir/press/02/BIARulefactsheet.pdf (describing the circumstances under which the three-member BIA review can be circumvented). These streamlining regulations were designed to "address extensive backlogs and lengthy delays" at the BIA level, U.S. DEP'T OF JUSTICE, FACT SHEET: BIA STREAMLINING (2004), *available at* http://65.36.162.162/files/BIAStreamlining.pdf, but have been widely criticized, *see, e.g.*, Pamela A. MacLean, *Immigration Bench Plagued by Flaws*, NAT'L L.J., Feb. 6, 2006, at 1 (quoting a Ninth Circuit

less rigorous "clearly erroneous" standard to review factual determinations by immigration judges, rather than undertaking a full de novo review.[110] Subject to regulatory criteria, the Board can also affirm an IJ decision without explanation. This process, called affirmance without opinion (AWO), is increasingly common.[111] AWO may take place even if a BIA member disagrees with the IJ's holding but believes the error was without prejudice.[112] In total, "approximately 93 percent of appeals are decided by only a single Board member."[113]

The effect of these laws has been to further insulate judicial constructions of hardship and good moral character and to create an even more protected sphere in which these concepts are performed and evaluated.[114] As far back as 1925, scholars argued that the discretionary nature of suspension of deportation

judge describing the BIA as "neutered by streamlining" and quoting a former BIA member characterizing BIA review as a "rubber stamp" of IJ decisions). A 2004 decision by the Third Circuit, for example, accused the BIA of "shirk[ing] its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound" and argued that "the regulations are . . . subject to misuse and even abuse." Berishaj v. Ashcroft, 378 F.3d 314, 331 (3d Cir. 2004).

110. For a more extensive analysis of BIA standards of review, see Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3). The historical trajectory of cancellation of removal is toward less and less guidance and oversight by the courts of appeals and increasingly restricted options for immigrants who wish to appeal discretionary determinations. *See, e.g.*, De La Vega v. Gonzales, 436 F.3d 141, 144 (2d Cir. 2006) ("[W]e join five sister circuits that have concluded that [the statute] deprives courts of the power to review discretionary determinations concerning cancellation of removal.").

111. MARY KENNEY, HOW TO CHALLENGE AN AFFIRMANCE WITHOUT OPINION BY A BIA MEMBER 2 (2002), http://www.legalactioncenter.org/sites/default/files/lac_pa_100102.pdf ("Even before the new regulations were issued, the Board had accelerated its use of the AWO procedure . . . . Thousands of these decisions have already been issued in all types of cases . . . . [The American Immigration Law Foundation's] informal study of last summer's decisions indicates that half of the decisions issues by the Board were AWO decisions; this means that there may have been over 100 AWO decisions on any given day.").

112. *See 1st Circuit Overturns BIA "Affirmance Without Opinion,"* IMMIGRANTS' RTS. UPDATE (Nat'l Immigration Law Ctr., L.A., Cal.), Dec. 18, 2003, http://www.nilc.org/immlawpolicy/removpsds/removpsds133.htm.

113. PETER J. LEVINSON, THE DEMISE OF COLLECTIVE DECISION-MAKING IN IMMIGRATION APPEALS 2 (2005), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/0/4/2/0/6/pages42064/p42064-1.php.

114. With respect to good moral character determination, the court similarly lacks jurisdiction to review BIA determinations. *See, e.g.*, Lopez-Castellanos v. Gonzales, 437 F.3d 848, 854 (9th Cir. 2006). The courts of appeals generally do retain the limited jurisdiction to review whether or not an applicant is *statutorily* precluded from establishing good moral character. *See, e.g.*, Moran v. Ashcroft, 395 F.3d 1089, 1091 (9th Cir. 2005).

"thr[ew] the adjudication of particular cases into the hands of administrative tribunals, with broad powers checked only by very limited judicial supervision."[115] Since 2005, when the REAL ID Act dramatically expanded immigration judges' discretionary authority, the law all but bars immigrants from obtaining review of discretionary determinations about hardship and good moral character in cancellation cases.[116] Whereas courts of appeals still actively review other aspects of immigration law and its application, the BIA has the last word on all discretionary matters related to cancellation of removal.

Cancellation of removal is a fascinating subject of examination precisely because the starting point for all proceedings is that the applicant is deportable.[117] He or she has transgressed the law and, as such, has no *entitlement* to relief from deportation. To the contrary, cancellation of removal is explicitly a matter of "administrative grace."[118] Very few procedures or safeguards exist to ensure that relief is granted consistently or with reference to specific, enumerated criteria. In the absence of clear guidelines, this Section seeks to uncover and examine the circumstances under which—and gauges by which—courts choose to exercise their discretion and relieve immigrants from imminent deportation.

2. *Cancellation of Removal in Action*

a. *Pro Se Materials*

Among the most revealing ways to explore the unstated requirements and implications of cancellation of removal is to examine manuals, brochures, and leaflets designed to guide immigrants through the process. These materials represent the efforts of lawyers, advocates, and social service organizations to distill statutory requirements and vague language about discretionary determinations into clear guidelines and practical suggestions for immigrants seeking relief from deportation. As such, the simplicity of the language and directness of the advice set forth in these pro se materials provide an unusually

115. *Current Legislation: Outstanding Features of the Immigration Act of 1924*, 25 COLUM. L. REV. 90, 94 (1925).

116. For a more detailed review of the jurisdiction-stripping effects of REAL ID, see MARY KENNEY, FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW, AMERICAN IMMIGRATION LAW FOUNDATION (2006), http://www.aila.org/content/default.aspx?docid=17559.

117. Kalaw v. INS, 133 F.3d 1147, 1152 (9th Cir. 1997).

118. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

frank description of the gauges by which applicants for cancellation of removal are evaluated.

Standard "Do It Yourself" cancellation guides and manuals include checklists for immigrants preparing their cases. Immigrants are encouraged to demonstrate that they obey the law conscientiously, work long hours, earn a living, live in monogamous relationships, and raise studious, principled, law-abiding children. The manuals remind immigrants to compile and submit their pay stubs and housing deeds.[119] They urge applicants to gather proof of their English language studies, records of their vocational training, and copies of their "Certificates of Achievement."[120]

In addition to demonstrating their fiscal responsibility and unwavering respect for the law, immigrants are encouraged to reflect broadly upon their moral character, religious practices, and personal relationships. One manual instructs cancellation applicants to consider: "What kind of ties do I have to my community?" [121] More specifically, "What groups do I belong to?"; "Are there friends or neighbors that I have helped out?"; "Do I attend religious services in my community?"; and "How else have I participated in my community?"[122] A manual from the Florence Immigrant and Refugee Rights Project calls upon immigrants to collect "[l]etters from religious organizations I belong to" and "[l]etters showing participation in my community," such as "any help that [I] have given to neighbors, such as yard work, rides, etc."[123]

The statutory language underlying cancellation of removal is spare, but the manuals do not mince words: "Specifically, if you belong to a church, *we recommend that you become active in the church*. Someday if you need to apply for cancellation of removal, it would help if the pastor could testify for you. Also,

119. Florence Immigrant & Refugee Rights Project, Inc., Cancellation of Removal Document Checklist (Apr. 7, 2003), http://www.firrp.org/publications/prose/en/LPRCdocumentchecklistEN.doc [hereinafter Cancellation of Removal Checklist]; Florence Immigrant & Refugee Rights Project, Inc., Cancellation of Removal for Non-Permanent Residents: How Can I Prove That I Meet the Requirements for Cancellation of Removal? (Apr. 7, 2003), http://www.firrp.org/publications/prose/en/10YearDocumentationEN.doc [hereinafter Requirements for Cancellation of Removal].

120. Cancellation of Removal Checklist, *supra* note 119.

121. Florence Immigrant & Refugee Rights Project, Inc., Cancellation of Removal: Thinking About My Case (Apr. 6, 2003), http://www.firrp.org/publications/prose/en/LPRCmycaseEN.doc [hereinafter Thinking About My Case].

122. *Id.*

123. Cancellation of Removal Checklist, *supra* note 119.

we recommend that you join community or cultural organizations."[124] Generally, the practice manuals do not suffer for lack of detail: "You need to show that you and your family are valuable and productive members of the community in which you live."[125] The measures of "value" and "productivity" are supplied: "For example, if you or your family members are active in a religious organization, if any of you do volunteer work or if you are active in a sports team in your community, you should get proof of this and present it to the judge."[126]

b. Appellate Briefs

Whereas pro se materials are framed in terms of tips and checklists, appellate briefs weave together names, narratives, and life stories.[127] These briefs, written by advocates in order to dispute IJ denials of cancellation of removal, frequently seize upon the same gauges and criteria to make their cases. But rather than simply listing the importance of tax-paying, church-going, property-owning, and baseball-coaching, the briefs craft coherent biographies of "worthy" applicants.

Again and again, the briefs offer up aspiring Americans who are industrious, family oriented, and community minded. A BIA brief on behalf of Gelasio and Analilia DeGarcia, Mexican nationals applying for cancellation of removal after eighteen years of residence in the United States, provides a case in point. Gelasio, the brief emphasizes, "dutifully pa[ys] his taxes."[128] Analilia "volunteer[s] at her local church, at Headstart, and her children's school."[129] The couple lead a "model lifestyle," and their children "are taught entirely in English, which is their best language . . . ."[130]

124. IND. LEGAL SERVS. INC., OBTAINING LEGAL RESIDENCE THROUGH CANCELLATION OF REMOVAL (2002), *available at* http://www.indianajustice.org/Data/DocumentLibrary/Documents/1053371359.71/0105cancellation%20of%20removal.pdf (emphasis added).

125. Requirements for Cancellation of Removal, *supra* note 119.

126. *Id.*

127. My intention in this Note is not to gauge the precise occurrence of this discourse, but rather to call attention to a prevalent undertone in cancellation of removal proceedings. Although my Note does not make quantitative claims, it is based on analysis of decisions from both the Executive Office of Immigration Review (issued by IJs) and the BIA. The cases I examine arise from various IJs and distinct regions of the country, and the immigrants in proceedings are from various nations of origin.

128. Brief of Petitioner at 3, De Garcia v. Gonzales, No. 07-71182 (9th Cir. Dec. 20, 2007).

129. *Id.*

130. *Id.* at 3-4.

A brief on behalf of a married couple from Mexico, Efren Perez Mendez and Sara Lidia Gutierrez, evokes similarly traditional images of the family: "Ms. Gutierrez volunteers in her children's schools and church children's education programs, and over the years has been awarded certificates of appreciation from both. Mr. Perez works as a carpenter. He has paid taxes every year since 1990. He and his wife have strong social ties with the community of Hayward, where the family has lived ever since they came to the United States."[131]

The briefs are replete with gendered language, and they praise traditional nuclear families unabashedly. Mr. Emisael Loya married "his childhood sweetheart, Rachel Loya," with whom he has "a newly born baby."[132] Mr. Duran Jurado is the "primary provider for his family," and has been married "to his high school sweetheart, a native-born U.S. citizen," and the mother of their three U.S. citizen children "for nearly 12 years."[133] Mr. Rodriguez, "a hardworking father," juggles two jobs, which "bring him happiness" because they provide for his family's "health and well being."[134]

Indeed, appellate briefs on behalf of the government often seize on the same criteria. Arguing *against* the grant of cancellation of removal to Fernando Arturo Martinez-Galvan, a government brief does not mince words in its censure: Martinez-Galvan "is an unmarried father of a seven-year old son, Arturo, and as of August 2005, was expecting another child with his girlfriend, Rachel." The brief continues with thinly veiled scorn: "Martinez could not remember his son's birthday 'exactly.'"[135]

c. *Judicial Decisions*

Judicial actors such as IJs and the BIA are no less explicit in these normative assessments. Granting cancellation of removal to Bing Chih Kao and Mei Tsui Lin, husband and wife from Taiwan, the Board depicted the family as model Americans: pious, hard working, industrious, and deferential to American ways. The Board noted approvingly that the respondents own their home, "obey[] the laws of the United States," and raise their children primarily

131. Petitioners' Consolidated Opening Brief at 7, Mendez v. Gonzales, 291 F. App'x 13 (9th Cir. 2008) (No. 05-70412), 2007 WL 2801201.

132. *In re* Ramirez-Medrano, No. A90 793537, 2007 WL 926773 (BIA Feb. 6, 2007).

133. Brief for Petitioner Jesus Javier Duran Jurado at 6, 7, Duran-Jurado v. Keisler, 250 F. App'x 213 (9th Cir. 2007) (No. 06-73258), 2006 WL 3888467.

134. Opening Brief at 38, 40, Rodriguez v. Mukasey, No. 07-71727 (9th Cir. Nov. 14, 2007), 2007 WL 4589753.

135. Brief for Respondent at 5, Martinez-Galvan v. Mukasey, 329 F. App'x 171 (9th Cir. 2009) (No. 07-71814), 2007 WL 4807111.

speaking English.[136] Mr. Kao "works 7 days a week and attends church on Sundays."[137] Ms. Lin "volunteer[s] at Thanksgiving to cook for the homeless."[138] The children "have clearly been integrated into *the* American lifestyle."[139]

The decisions exalt individuals who own their homes, work long hours, and pay taxes dutifully. "[T]he Immigration Judge noted the respondent's steady employment history, that he and his wife purchased a house in 2005, and that he volunteered as the coach of his son's baseball team."[140] Mr. Kao and Ms. Lin "own their house in Texas, which they bought in 1992."[141] Asencion Rubio Jacobo is the "sole financial provider" for his family, the BIA noted approvingly, and "has been employed consistently since becoming a lawful permanent resident and paid taxes."[142]

By the same token, courts rebuke those who depart from the profile of the dutiful American. Overturning an IJ's decision to grant cancellation of removal to Philippines national Clef Ramos Pacheco, the Board noted that "the record is devoid of any evidence that the respondent owns any real property."[143]

136. *In re* Kao, 23 I. & N. Dec. 45, 49 (BIA 2001).

137. *Id.* at 48.

138. *Id.* at 47.

139. *Id.* at 51 (emphasis added). This Note does not claim that "American credentials" are determinative of the grant or denial of cancellation. Statutory requirements and precedential rulings do constrain judges. For example, in the case of Lina Lopez-Morales, the IJ stated on the record that "this is the kind of case that I certainly would grant if I had the authority to grant it. Ms. Lopez has a nice family. She's fully employed. She pays taxes. She attends religious services with her family." Petitioner's Opening Brief at 26, Lopez-Morales v. Gonzales, 229 F. App'x 576 (9th Cir. 2007) (No. 06-72504), 2006 WL 3901473. However, the IJ had "'a lot of problems distinguishing the factual pattern . . .' [from the] Board precedent decisions which govern the non-LPR cancellation inquiry." *Id.* Even still, the judge's criteria—"nice family," "full[]" employment, attendance at religious services—advance this Note's central contention. After all, law is not just powerful with respect to the outcomes it produces, but also the stories it tells and the iconography it perpetuates. *See, e.g.*, Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009) (exploring the legal genesis and underpinnings of the post-September 11 terrorist narrative, which Ahmad terms the "iconography of terror").

140. *In re* Valverde-Magallanes, A34 692 247, 2006 WL 3088869 (BIA Sept. 29, 2006). Similar language can be found in appellate briefs. *See, e.g.*, Petitioners' Opening Brief at 6, Valente v. Ashcroft, No. 04-74956 (9th Cir. June 13, 2005), 2005 WL 2703780 ("Petitioners were gainfully employed and pay their taxes regularly. Petitioners own a home and automobile. They have worked productively in this country.").

141. *Kao*, 23 I. & N. Dec. at 47.

142. *In re* Jacobo, A92 727 874, 2007 WL 1430774 (BIA Apr. 17, 2007).

143. *In re* Ramos Pacheco, A43 000 312, 2007 WL 4182352 (BIA Oct. 19, 2007).

Furthermore, the respondent had not "performed any service to the community, except where he has been ordered to perform such service."[144] Considering Luis Felipe Cervantes-Gonzalez's application for cancellation of removal, the Board chastised the Mexican national for pursuing his unsuccessful music career instead of a more "lucrative" alternative: "Although the respondent is a musician in a band, he provided no evidence to prove that it had experienced success such that deportation would cause him to relinquish a lucrative career . . . ."[145] The decisions are highly normative; IJs are empowered to classify a broad range of conduct and qualities as demonstrative of "bad character or undesirability as a permanent resident of this country."[146]

In some cases, the language is even starker. The dissent in a 2002 BIA decision contested the majority's denial of cancellation of removal because "[t]his respondent and her family exhibit many of *the values that we, as a society, purport to value*." Specifically, it continues, "[t]hey are hardworking, law-abiding people with strong family values. They pay taxes, are active in their schools and churches, own their own homes, and do not depend on public assistance."[147] A brief on behalf of Emisael and Rachel Loya echoes this appeal: "Petitioners were all persons of good moral character, who exemplif[y] family values, strong religious faith, high regard for law and government, and a generous, kind, giving nature. Such hope and promise *humbly lived out in furtherance of this nation's highest ideals* should not now conclude in deportation."[148]

The notion that immigrants bear the burden of embodying the American identity myth is all but explicit. The stories that emerge from briefs and decisions to grant cancellation of removal echo broader cultural themes. They reflect an idealized, mythologized image of American values and American families. Fathers coach children's baseball leagues;[149] mothers volunteer in

144. *Id.*; *see also In re* Ramirez-Medrano, No. A90 793537, 2007 WL 926773 (BIA Feb. 6, 2007) ("[T]he respondent's failure to pay income tax, particularly in light of her family's use of public services is significant.").

145. *In re* Cervantes-Gonzalez, 22 I. & N. Dec. 560, 568 (BIA 1999).

146. *In re* Lopez-Romero, No. A36 902 778, 2007 WL 1430692 (BIA Apr. 19, 2007).

147. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 334 n.3 (BIA 2002) (Osuna, Bd. Member, dissenting) (emphasis added).

148. Petitioner's Opening Brief, *supra* note 140, at 25 (emphasis added).

149. *See, e.g.*, *In re* Valencia-Rodriguez, No. A34 642 164, 2008 WL 762679 (BIA Mar. 3, 2008); *In re* Valverde-Magallanes, No. A34 692 247, 2006 WL 3088869 (BIA Sept. 29, 2006); *cf.* Urzua-Covarrubias v. Gonzales, 487 F.3d 742, 749 (9th Cir. 2007) (Pregerson, J., dissenting) (praising a father for coaching a soccer team); Brief for Petitioner Jesus Javier Duran Jurado, *supra* note 133, at 6 (noting that Mr. Jurado coaches flag football).

schools; families speak English, attend church together, and celebrate American holidays. The portraits are a virtual ode to the type of traditional, nuclear family values and structures famously celebrated in 1950s Americana.

3. *Nostalgia and Reinvention*

That the law both creates and reflects broader cultural narratives is not itself novel. Scholars have long noted the capacity of the law to craft powerful stories and influence the way individuals communicate, perceive, and value their own identities.[150] That immigrants seeking entry to the country would mold their behavior to the contours of the law, then, is not surprising.

Rather, it is the *content* of the performance that demands attention. One might expect this uniformity of performance if the statute itself dictated that women volunteer in church, men work two jobs and coach Little League, and children speak English. But, to the contrary, the text of the law is strikingly vague; the performances described above are interpretations of "good moral character" and "hardship." The law carves out space in which judges have broad discretion, and elaborate performances take shape within that space.

a. *Nostalgia for a Time Past*

The portraits of immigrants painted through the cancellation of removal process echo familiar narratives of 1950s Americana and "traditional American values." Indeed, contemporary political and popular culture is replete with romanticized images of times past. In her study of the American "nostalgia trap,"[151] Professor Stephanie Coontz has theorized that "[o]ur most powerful visions of traditional families derive from images that are still delivered to our

150. Indeed, I have previously written about the complex impact of labor and immigration laws on the subjective experiences, relationships, and identities of undocumented immigrant women. Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 149 (2004) (considering how "'undocumented' identities have been created and conferred through specific laws and how political and social discourses have filtered into the daily realities of these immigrants' lives"). Professor Robert Gordon has written eloquently on the subject: "[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live." Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

151. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (2000).

homes in countless reruns of 1950s television sit-coms."[152] These images, and the normative values they reflect, have become fixtures in our national consciousness.[153]

This identity narrative focuses heavily on family values, gender roles, and religious faith—what Professor David Eng has described as the "idealization of the heteropatriarchal family unit."[154] Professor Wendy Brown describes America's identity myth as inherently conservative, recurring to "an imagined idyllic, unfettered, and uncorrupted historical moment (implicitly located around 1955) when life was good—housing was affordable, [and] men supported families on single incomes."[155] Likewise, Professor Karen Pyke describes the "Normal American Family," which is "pervasive in the dominant culture" and "glorified in the popular culture, as in television shows like . . . *Leave It to Beaver, The Brady Bunch, Family Ties,* and *The Cosby Show*."[156] The images, she observes, "serve as powerful symbols of the 'normal' family or the 'good' parent."[157]

According to this account, the "true American" family was "a restricted, exclusive nuclear unit in which women and children were divorced from the world of work."[158] Men were "protectors,"[159] characterized by "'ambitio[n],'"[160] "authority,"[161] and "independen[ce]."[162] Women, whose identity was largely subsumed by motherhood, were "the moral guardians of civilization itself."[163] In the "successful 1950s family," the wife "was expected to subordinate her

152. *Id.* at 23.

153. *See* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 1-2 (1992) ("On both a personal and a social level, when things are going well, we credit our successful adherence to the family ideal, forgetting the conflicts, ambivalences, and departures from the 'norm.' When things are going poorly, we look for the 'dysfunctional' elements of our family life, blaming our problems on 'abnormal' experiences or innovations.").

154. Eng, *supra* note 49, at 9.

155. WENDY BROWN, STATES OF INJURY 61 (1995).

156. Karen Pyke, *"The Normal American Family" as an Interpretive Structure of Family Life Among Grown Children of Korean and Vietnamese Immigrants*, 62 J. MARRIAGE & FAM. 240, 240-41 (2000).

157. *Id.* at 241.

158. COONTZ, *supra* note 151, at 13.

159. *Id.* at 43.

160. *Id.* at 42 (citation omitted).

161. *Id.* at 43.

162. *Id.* at 64.

163. *Id.* at 43.

own needs and aspirations to those of both her husband and her children"[164] and "seek fulfillment in motherhood."[165] The enduring image of the American family "glorifies and presents as normative that family headed by a breadwinning husband with a wife who, even if she works for pay, is devoted primarily to the care of the home and children."[166]

As a unit, families were expected above all to be self-sufficient. Indeed, "the self-reliant family was the standard social unit of . . . society."[167] In that sense, the markers of independence and financial success assumed value of their own. Purchasing a home was not merely a financial endeavor, but rather a *moral act*. As Coontz explains, owning a house made one "more honorable and honest and pure."[168]

These traditional conceptions of the family play out vividly in cancellation of removal proceedings. The nostalgic characterizations of America could well be drawn from the pages of Mr. Duran Jurado's brief or the Board's opinion in the case of Mr. Kao and Ms. Lin. Indeed, men are depicted as hard-working—laboring long hours, even juggling two jobs.[169] Women are repeatedly and explicitly associated with service and volunteer work.[170] They receive disproportionate praise for helping out in the church, volunteering at their children's schools, and serving food to the homeless. Many women applying for cancellation have paying jobs, of course, but the briefs and opinions take pains to preserve the association with selfless service to the home, church, and community. Thus, women, even when not completely sheltered from the professional world, continue to be linked with notions of purity, piety, and domesticity.

Likewise, the conviction that "the healthiest families 'stand on their own two feet'" permeates cancellation of removal proceedings.[171] Pro se checklists remind immigrants to show that they file taxes, pay their utility bills on time,

164. *Id.* at 36.

165. *Id.* at 32.

166. Pyke, *supra* note 156, at 241.

167. COONTZ, *supra* note 151, at 69.

168. *Id.* at 109 (citation omitted).

169. *See, e.g.*, Urzua-Covarrubias v. Gonzales, 487 F.3d 742, 749-50 (9th Cir. 2007) (Pregerson, J., dissenting); *In re* Valverde-Magallanes, No. A34 692 247, 2006 WL 3088869 (BIA Sept. 29, 2006); *In re* Kao, 23 I. & N. Dec. 45, 49 (BIA 2001); Petitioners' Consolidated Opening Brief, *supra* note 131; Opening Brief, *supra* note 134, at 35-36; Brief for Petitioner Jesus Javier Duran Jurado, *supra* note 133.

170. *See, e.g.*, *In re* Ramirez-Medrano, A90 793 537, 2007 WL 926773 (BIA Feb. 6, 2007); *Kao*, 23 I. & N. Dec. at 49; Petitioners' Consolidated Opening Brief, *supra* note 131.

171. *See* COONTZ, *supra* note 151, at 69 (citation omitted).

and secure health insurance for their families.[172] To own real estate is a great virtue, and immigrants are encouraged to include copies of housing deeds along with their vital documents submitted to court. Again and again, judges remark approvingly about home ownership.[173]

In that sense, immigrants seeking relief through cancellation of removal become super-Americans in the mold of the 1950s sitcom family, embodying cherished memories of "suburban ranch houses and family barbecues."[174] Their testimony revalorizes Thanksgiving and appeals to our collective fondness for little league. It resurrects "the model of the white heterobiological nuclear family as the standard against which all social orderings must be measured."[175]

b. Reinventing History

Importantly, nostalgia is not merely yearning for the past, but rather yearning for an *imagined* past. "Nostalgia (from *nostos*—return home, and *algia*—longing) is a longing for a home that no longer exists *or has never existed*. Nostalgia is a sentiment of loss and displacement, but it is also a romance with one's own fantasy."[176] Indeed, this is the distinctive nature of the world to which applicants for cancellation of removal are expected to aspire. It reflects a persistent, even stubborn, romance with a *myth* of America.

That America is not presently a nation of married, churchgoing parents raising English-speaking children in split-level homes is uncontroversial. The number of single mothers in the United States tripled between 1970 and 1995 and remained constant through 2002.[177] According to *USA Today*, the United States has the lowest percentage among Western nations of children who grow

172. Cancellation of Removal Checklist, *supra* note 119; Requirements for Cancellation of Removal, *supra* note 119.

173. *See, e.g.*, *Urzua-Covarrubias*, 487 F.3d at 749 (Pregerson, J., dissenting); *In re* Ramos Pacheco, No. A43 000 312, 2007 WL 4182352 (BIA Oct. 19, 2007); *In re* Jacobo, No. A92 727 874, 2007 WL 1430774 (BIA Apr. 17, 2007); *Valverde-Magallanes*, 2006 WL 3088869; *Kao*, 23 I. & N. Dec. at 50; Petitioners' Opening Brief, *supra* note 140, at 6.

174. COONTZ, *supra* note 151, at 31. Bonnie Honig has described the stylization of immigrants as "supercitizen[s]." BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 78 (2001).

175. David L. Eng, *Transnational Adoption and Queer Diasporas*, *in* LOVE'S RETURN: PSYCHOANALYTIC ESSAYS ON CHILDHOOD, TEACHING, AND LEARNING 113, 137 (Gail M. Boldt & Paula M. Salvio eds., 2006).

176. SVETLANA BOYM, THE FUTURE OF NOSTALGIA, at xiii (2001) (emphasis added).

177. JEFFREY SCOTT TURNER, FAMILIES IN AMERICA 64 (2002).

up with both biological parents.[178] Fewer couples marry in the first place: "The number of couples who live together without marrying has increased tenfold since 1960 . . . [and] the marriage rate has dropped by nearly 30% in [the] past 25 years . . . ."[179] Far from being sheltered from professional life, women today constitute forty-six percent of the total labor force.[180] As to the churchgoing myth, only twenty-six percent of Americans attend religious services weekly.[181] And, according to the Associated Press, "[n]early one in five U.S. residents speaks a language other than English at home . . . ."[182]

As Coontz and others have demonstrated, these images do not merely stand at odds with the nation we know today. Rather, they *never* captured the reality of American life—instead representing a collective fantasy to which these nostalgic images refer. "[M]any of our 'memories' of traditional family life . . . [are] myths," Coontz writes.[183] "The actual complexity of our history . . . gets buried under the weight of an idealized image."[184] The myth is enduring: in spite of "ever mounting evidence that families of the past were not as idyllic . . . as they are often portrayed, . . . our changing family experiences and trends" continue to be filtered through "the distorted lens of historical mythologizing about past family life.[185]

But to view these narratives as solely inaccurate would be to overlook the powerful inequalities and patterns of subordination that they perpetuate and reflect. Insofar as the images reflect anyone's reality, it is largely the reality of a wealthy, suburban, native-born, heterosexual, nuclear family. These icons represent a projection of "white middle-class experience into universal 'trends'

178. Sharon Jayson, *Divorce Declining, but So Is Marriage*, USA TODAY, July 18, 2005, at 3A, *available at* http://www.usatoday.com/news/nation/2005-07-18-cohabit-divorce_x.htm.

179. *Divorce Rate Drops to Lowest Since 1970*, USA TODAY, May 11, 2007, http://www.usatoday.com/news/nation/2007-05-11-divorce-decline_N.htm.

180. U.S. Dep't of Labor Women's Bureau, Frequently Asked Questions, http://www.dol.gov/wb/faq38.htm (last visited Nov. 18, 2009). Fifty-nine percent of women in the United States participate in the labor force. *Id.*

181. F. Gillum, *Frequency of Attendance at Religious Services and Mortality from Multiple Causes in a U.S. National Cohort*, 7 INTERNET J. FAM. PRAC. (2009), http://www.ispub.com/journal/the_internet_journal_of_family_practice/volume_7_number_1_19/article/frequency_of_attendance_at_religious_services_and_mortality_from_multiple_causes_in_a_u_s_national_cohort.html.

182. *Non-English Speaking Households on Rise*, ST. PETERSBURG TIMES, Oct. 9, 2003, at 16A, *available at* http://www.saintpetersburgtimes.com/2003/10/09/news_pf/Worldandnation/Non_English_speaking_.shtml.

183. COONTZ, *supra* note 153, at 2.

184. *Id.* at 1.

185. COONTZ, *supra* note 151, at xi.

or 'facts.'"[186] The "America" they conjure is, arguably, premised on the exclusion, even subordination, of those whose lives and values are not represented in the myth.

4. *Threads of Continuity: Myth Construction and Immigration Law*

Once again, then, immigration law reaches back to the imagined and exclusionary past. As demonstrated, this process of myth construction through immigration law has deep roots. As the quota laws harkened back to an imagined historical moment, so too does the cancellation process exalt a narrow, backward-gazing, exclusionary idea of America's identity. Quota laws modeled U.S. immigration on a nonexistent America of the past; cancellation of removal calls upon immigrants to perform a collective projection of America's lost virtue and values. Both legal frameworks adopt an incomplete and idealized image of the nation's past as a gauge against which to evaluate prospective immigrants. Furthermore, both the quota system and the cancellation of removal process lend coercive force to the myth they adopt; the capacity of an immigrant to embody the American myth determines, at least in part, whether he or she becomes *part* of America.

Like the racial prerequisites, cancellation of removal establishes a public forum through which courts assess individuals' compliance with broader identity narratives and thereby articulate the contours of that identity. Racial prerequisites defined and reified a "white" identity by excluding those who did not conform to its strictures. In a similar, if more complex, manner, cancellation of removal excludes from America those whose values and conduct are not deemed sufficiently "American," thereby perpetuating the concept of an essential Americanness.

Cancellation of removal laws, of course, do not explicitly adopt the past as a standard to be maintained and reproduced. Immigration judges do not evaluate Americanness directly, as courts assessed "whiteness" under the prerequisite laws. Likewise, the cancellation statute does not explicitly call upon judges to admit immigrants in order to maintain a specific moment in U.S. history, as the quota laws did.

In fact, it is precisely for those reasons that cancellation of removal cases warrant greater scrutiny. The process continues to take place, but it does so under complex proxies and largely sheltered from judicial review. Whereas past laws were more explicit about their objectives, the cancellation statute is ostensibly neutral. It is, therefore, not available for public contestation or

186. COONTZ, *supra* note 153, at 6.

democratic scrutiny. The process generates narratives and stories that are culturally consequential, even legally binding, but it is largely hidden from appraisal, dispute, and negotiation by the public or even the judicial infrastructure.

Further exacerbating the invisibility of this process, the dominant discourse around U.S. immigration history has drawn too stark a divide between pre-1952 and post-1965 immigration law and policy by focusing narrowly on legal process and statutory language. The Act of 1965 has been celebrated as "radically new" for renouncing the ethnocentric, highly normative policies of the past.[187] Its champions argue that the Act was a recognition of the country's "past errors in judgment" and an indication of "its willingness to reform."[188] Supporters claimed not only that the law would modify the process of immigration, but also that newcomers would no longer "arrive at our nation's door, hat in hand, apologizing for [their] parentage or birthplace."[189] These sweeping claims about tolerance and diversification, although perhaps accurate as a matter of statutory analysis, stand at odds with the tales of cookie-baking mothers and baseball-coaching fathers that emerge in virtual unanimity from the cancellation of removal process. Although the statute may be neutral to race, culture, and social values, its enforcement is anything but.

Understanding the full impact of the law, then, demands an approach that recognizes the coercive power of the law and also its symbolic and narrative power—both at the individual (disciplinary) and the broader societal (biopolitical) level.[190] Laws, here, must be conceptualized as "a complex repertoire of discursive strategies and symbolic frameworks that structure ongoing social intercourse and meaning-making activity among citizens."[191]

187. GRAHAM, *supra* note 39, at 93.

188. Kennedy, *supra* note 83, at 149.

189. *Id.* at 141 (quoting Senator Hart's statements to the Senate Immigration Subcommittee on January 13, 1964).

190. *See supra* notes 46-49 and accompanying text.

191. MICHAEL W. MCCANN, RIGHTS AT WORK 282 (1994).

Law both reflects the culture in which it is steeped[192] and shapes that culture through its application.[193]

Consequently, the stories told during cancellation of removal proceedings reveal unspoken norms and also reinforce them. The legal discourse that unfolds in immigration court not only determines the physical location of immigrants' lives, but also the way their stories and experiences perpetuate, embody, or resist broader narratives about the country and its people.

In the case of cancellation of removal, good moral character and hardship frequently act as proxies for unspoken standards by which the nation evaluates immigrants. Indeterminacy and vagueness in the statutory language, coupled with jurisdiction-stripping and withering appellate review, permit a wide range of culturally consequential performances to take place largely unacknowledged within the legal sphere. Cancellation of removal cases not only reveal the salience of traditional American iconography, but also account for some of its perpetuation.

To that end, the narratives generated within the cancellation of removal process must be located within a broader normative world. Ostensibly neutral language assumes new meaning when considered in the context of historical patterns of mythmaking in immigration law and competing ideals of national identity.[194] Stories of home ownership and church attendance are more than benign expressions of good moral character when understood as codes for specific, contested representations of American identity.

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192. Laws are "artifacts that reveal a culture, not just policies that shape the culture." Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES 2, 3 (Peter Brooks & Paul Gewirtz eds., 1996); *see also* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 886 (1988) (describing law as "a species of social imagination" and "a hermeneutic project" in which "the words are keys to understanding social institutions and cultural formulations that surround them and give them meaning").

193. By the same token, laws do more than reflect norms; they instantiate them. *See, e.g.*, CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 215 (2000) ("[Laws] do not just regulate behavior, they construe it.").

194. Ahmad, *supra* note 139, at 11 ("To understand legal dispute, one must comprehend the narrative contest it inhabits. And to understand legal victory, one must recognize the triumph of one narrative vision over another."). In that sense, my approach has been informed by the tradition of critical legal studies and critical race studies, which seek to interrogate legal language and standards that are presented as neutral or objective. *See, e.g.*, David Kairys, *Introduction* to THE POLITICS OF LAW 1, 14-15 (David Kairys ed., 3d ed. 1998) ("This is the great source of the law's power: It enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality . . . .").

CONCLUSION

To some extent, the perpetuation and reification of national identity narratives through immigration may be inevitable. Homi Bhabha writes of the nation's ongoing struggle to achieve coherence in spite of shifting demographics, imperfect borders, and contested values. The history of the nation, he writes, is constantly "in the process of being made," and "foundational fictions" take on great value in the effort to incorporate "new 'people' in relation to the body politic."[195] Nations struggle to "give permanence and solidity to a transient political form" through invented traditions.[196] Likewise, Bonnie Honig writes incisively about America's ambivalence towards foreigners—both the threat posed by their difference and the opportunity they offer the nation to reinstall unanimity and "return . . . to its first principles."[197] Incorporating new individuals and communities, Honig argues, presents both an occasion and an imperative for the nation to rearticulate and fortify its imagined identity.[198]

The cancellation of removal process throws into sharp relief this tangled relationship between immigration and national identity. The process can be understood to possess a logic of its own—taking the shape, for example, of a conversion ritual, in which the immigration court serves as a forum for immigrants to proclaim new, "American" values and repudiate old, "foreign" ones. The testimonials are individual, personal, and self-reflective. The rites and roles are standardized. The judge, the lawyers, and the convert each play a role in questioning, challenging, and officiating the conversion to "Americanness." If the tropes, even the specific images and words, reappear throughout different petitioners, and courtrooms, it is because they constitute part of the ritual itself. Like any conversion ritual, the practice recognizes and reinforces the distinct identity of the tradition being adopted.

In this sense, difference is both accentuated and neutered. Insofar as difference—cultural, linguistic, material, and moral—is presented, it is

195. Homi K. Bhabha, *Introduction: Narrating the Nation*, *in* NATION AND NARRATION 1, 3-5 (Homi K. Bhabha ed., 1990).

196. Timothy Brennan, *The National Longing for Form*, *in* NATION AND NARRATION, *supra* note 195, at 44, 47.

197. HONIG, *supra* note 174, at 32, 74.

198. Foreignness can be "a device that gives shape to . . . political communities by marking negatively what 'we' are not." *Id.* at 3. The immigrant, Honig explains, *chooses us*. In so doing, immigrants implicitly recognize our national coherence, our existence, and our claim to superiority. *Id.* at 47-48; *see also id.* at 12 (exploring the question: "What problems does foreignness solve for us?").

rendered harmless as it enters the public record. As immigrants who are outside the law come within its confines, they disclaim their difference, or at a minimum, minimize and neutralize it. Here we see what Eng has observed in the context of transnational adoption: the "production of . . . difference, accompanied by a simultaneous reinscription—an effacing and a whitewashing—of this difference."[199]

Likewise, and perhaps more cynically, the cancellation of removal process can be seen as a way of placing immigrants on notice of the American identity myth, if not demanding, or even expecting, their compliance. In this sense, the process is undertaken with a wink; immigrants recite the familiar myth, recognizing at some level that it is both false and essential. The stories and testimonials do not communicate promises about future behavior, but rather deference to the *existence* of the national mythology. The process serves, if not to enforce American ideals, to ensure the salience of the narrative. By telling the court that he works two jobs, then, Mr. Rodriguez is not necessarily communicating that he intends to *keep* working two jobs or that he places particular *value* on having two jobs, but rather that he understands America's fondness for hard-working fathers who provide for their wives and children.

Irrespective of the appropriate metaphor, immigration rituals may play such a significant role in the nation's sense of coherence and unity that it is virtually impossible—and perhaps undesirable—to eradicate the normative and identity-based dimensions of the legal process. As we have seen, comprehensive U.S. immigration law has generated national identity narratives since its very emergence.

Even still, the stark contrast between the complex reality of American life and the tidy images, values, and lifestyles celebrated in the legal process presents cause for concern. Whether church attendance is an appropriate proxy for good moral character is, at least, a matter of divergent opinion. Likewise, one wonders whether owning a home and marching in Columbus Day parades are relevant considerations for determining the cancellation of an individual's imminent deportation. The ubiquity of narrow, ethnocentric images of Americana raises questions about whether the law calls for the appropriate performances.

My intention is not to evaluate the specific criteria by which immigrants are assessed, but rather to shed light upon them. Cancellation of removal decisions unfold without meaningful judicial guidance or oversight with respect to appropriate criteria or their applications. The statute itself is so vague as to provide no external indication of the cultural performance taking place under

199. Eng, *supra* note 175, at 125.

its authority. Precedent exists with respect to the exercise of discretion, but BIA and judicial review are insufficient to ensure adherence to the precedent. IJ decisions are not published; the public cannot access transcripts of proceedings. Culturally consequential performances take place in relative black holes of the judicial system.

To some extent, restoring appellate review would increase the regularity, predictability, and public scrutiny over cancellation determinations. The withering of BIA review has clearly contributed to the opacity of the cancellation process. Rejecting recent BIA streamlining regulations, curbing the practice of affirmance without opinion, and requiring the BIA to publish more of its decisions would be affirmative steps toward greater transparency and accessibility to the public.[200] Likewise, this analysis suggests that jurisdiction-stripping statutes like the REAL ID Act and AEDPA, which restrict appellate review of discretionary cancellation determinations,[201] entail a broader range of consequences than generally recognized. These measures have been critiqued on many grounds, but generally with respect to their immediate legal and doctrinal implications and outcomes. I have argued that jurisdiction stripping has important cultural, narrative, and identity-based implications that are frequently overlooked. Awareness of these implications should inform our evaluation of laws that restrict appellate jurisdiction over immigration proceedings.

These, of course, are intermediate steps intended to regularize cancellation of removal somewhat, perhaps even to curtail the use of particularly inappropriate or outdated proxies for good moral character. To view discretion over cancellation of removal as a problem that must be solved, however, is to overlook some of the most fundamental implications of these findings. Broad judicial discretion over cancellation is not incidental to our immigration legal structure, but rather symptomatic of its underlying limitations.

Judicial discretion to "pardon" immigrants can be likened to a steam valve used to release pressure from the rest of the system. At its core, cancellation of removal provisions reflect unease about U.S. immigration laws and the

200. *See supra* text accompanying notes 104-113.

201. *See, e.g.*, Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 162 (2006-2007) (noting that AEDPA and IIRIRA "contained a severe limitation on judicial review" and that "[t]hese laws were, in effect, an assertion that much of immigration law was outside the mainstream of the United States rule of law"); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006-2007); Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr, 113 YALE L.J. 2007 (2004).

consequences of fully enforcing them. Contemporary immigration laws provide very few avenues for legal immigration or regularization of immigration status. The INA offers little reprieve, even for individuals with highly sympathetic biographies and circumstances. The present legal structure allows judges to circumvent the law's rigid strictures, but only in exceptional cases. The judge who chooses to exercise that discretion, then, bears the burden of justifying the exception. Hence, the narrative of Americana enters as a *justification*. Demonstrating that an immigrant is "American enough" may be a way to assuage our collective anxiety about carving out exceptions in the first place.

In sum, discretion functions as a double-edged sword—clearing a small path through which some immigrants can gain status, but lining the way with hypernormative vocabulary and imagery that both caricature the immigrant and shape the broader culture. At the same time that discretion reflects longing for greater humanity in the immigration process, it has also amplified a narrow notion of our polity. Consequently, dramatically restricting discretion over cancellation of removal or underestimating its centrality to the present legal framework would be inadvisable without more extensive reform to relieve the pressure on decisionmakers to craft these narratives of exception.

Above all, it is imperative to recognize the generative and constitutive role of immigration law and the threads that link the present immigration law to the past. These identity generative processes are more than superficial or idiosyncratic relics of former policies and practices. Rather, this Note points to a real and relevant trend taking place in immigration courts around the country. Indeed, this recognition is particularly relevant and timely given the surge of immigration cases following 9/11[202] and the growing discourse around immigration law and immigrant identity.[203] As the nation looks toward

202. *See, e.g.*, *Financial Services and General Government Appropriations for Fiscal Year 2009: Hearings on H.R. 732 and S. 3260 Before the Subcomm. on Financial Services and General Government of the S. Comm. on Appropriations*, 110th Cong. 44 (2009) (statement of Hon. Julia S. Gibbons, J., U.S. Court of Appeals, Sixth Circuit; Chair, Comm. on the Budget of the Judicial Conference) (noting the impact on federal courts of the recent "infusion of resources" to immigration enforcement); Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 ("Immigration cases . . . accounted for about 17 percent of all federal appeals cases last year, up from just 3 percent in 2001. In the courts in New York and California, nearly 40 percent of federal appeals involved immigration cases.").

203. *See, e.g.*, Ahmad, *supra* note 139; R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2007); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

another round of immigration reform,[204] it is essential to break out of the tendency to view immigration law exclusively doctrinally and to consider the endurance of cultural myths and the complex and persistent role of immigration law in shaping national self-perception.

204. *See, e.g.*, Muzaffar Chishti & Claire Bergeron, *Obama's Homeland Security Selection Viewed as Focused on Immigration*, MIGRATION POL'Y INST., Dec. 15, 2008, http://www.migrationinformation.org/Usfocus/display.cfm?ID=715; Daphne Eviatar, *New Picks for DHS Raise Hopes for Immigration Reform*, WASH. INDEP., Feb. 24, 2009, http://washingtonindependent.com/31326/new-picks-for-dhs-raise-hopes-for-immigration-reform.