March 2003

The Diaspora of Ethnic Economies: Beyond the Pale?

Lan Cao
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TABLE OF CONTENTS

INTRODUCTION ...................................... 1523
I. A COMPARATIVE LOOK AT GOVERNMENT-MANDATED PREFERENTIAL POLICIES ...................................... 1534
   A. Minority Preferences in Majority Economies ........ 1536
      1. The United States .................................. 1536
      2. India ........................................... 1542
   B. Majority Preferences in Minority Economies ........ 1549
      1. Malaysia ....................................... 1549
      2. Nigeria ....................................... 1557
II. PREFERENCES FOR “ONE’S OWN” .................... 1560
   A. The Ethnic Economy Generally ..................... 1564
      1. Introduction .................................... 1564

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Defining Characteristics</td>
<td>1569</td>
</tr>
<tr>
<td>3. The Ethnic Enclave Economy</td>
<td>1578</td>
</tr>
<tr>
<td>4. Ethnic Niches</td>
<td>1586</td>
</tr>
<tr>
<td>B. The Boundary: Disadvantage and Reactive Solidarity</td>
<td>1591</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>1591</td>
</tr>
<tr>
<td>2. Boundaries, Social Capital, and Ethnic Economies</td>
<td>1593</td>
</tr>
<tr>
<td>III. DIFFERENT APPROACHES: BEYOND THE PALE?</td>
<td>1599</td>
</tr>
<tr>
<td>A. Beyond the Pale: The Applicability of Antidiscrimination Laws</td>
<td>1600</td>
</tr>
<tr>
<td>B. Beyond the Pale: Government Action</td>
<td>1608</td>
</tr>
<tr>
<td>C. Beyond the Pale: Nongovernmental Actions</td>
<td>1609</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>1618</td>
</tr>
<tr>
<td>Category One Cases</td>
<td>1620</td>
</tr>
<tr>
<td>Category Two Cases</td>
<td>1622</td>
</tr>
<tr>
<td>Category Three Cases</td>
<td>1624</td>
</tr>
</tbody>
</table>
Governments around the world have at different times adopted various race-conscious policies for various reasons. These policies generally fall into three categories. First, in the United States, for example, the Jim Crow system was used systematically to reinforce racial preferences in social, political, and economic life, to favor the white majority and exclude the black minority. This system can be characterized as one designed to further *majority preferences in majority economies*,¹ that is, a system where the dominant majority not only controls the economic and political system but also has instituted racial preferences for its own majority members. Today, in the United States, governmental policies work in the reverse, as “compensatory preferences” to blacks and other designated minorities, to offset majority advantages and historical wrongs. India similarly pursues preferential policies for its untouchables. This second type of racial policy is aimed at implementing *minority preferences in majority economies*, to benefit minority groups in economies dominated by majority members. By contrast, in countries such as Malaysia and Nigeria, governments institute ethnic preferences to favor politically dominant (though economically weak) majority groups and to restrain minorities deemed by these governments to be “too” economically powerful. At various times in Europe, similar treatment was directed at the Jewish minority.² This third type of policy institutes *majority preferences in minority economies*, that is, economies “controlled” by minority groups.

What the United States calls “affirmative action” today is but one instance of similar actions undertaken historically and presently by governments around the world. In developing countries in particular, these forms of “affirmative action” to boost certain governmentally designated ethnic minority groups have been urged as crucial to the reduction of ethnic conflicts and consequently, to

². See, e.g., Robin Cohen, Global Diasporas 1-29 (1997) (discussing the imposition of quotas restricting the number of Jews in Tsarist Russia who could enter the professions or higher education).
the success of law and development projects—on the ground that
the institution of markets and democracy cannot be undertaken
without taking into account the distinctive environment of devel-
op ing countries, specifically the prevalence of ethnic divisions and
tensions.\(^3\) No doubt the rationale offered by the governments
involved whenever ethnically targeted preferences are adopted
varies depending on the objectives set by these governments, the
philosophical and political rationale behind these programs, and the
history of the countries themselves. There are, however, common
threads that run through the three categories of preferential
programs briefly mentioned. Whether called "discrimination" or
"white supremacy," "affirmative action," or "compensatory pre-
ferences," "Northernization" (as pursued in Nigeria) or Malaysia's
"sons of the soil" preferences, they are essentially designed to
achieve a governmentally designated objective. In other words, the
essence of these different programs is the institution of "govern-
ment-mandated preferences for government-designated groups"\(^4\) to
correct continuing group disparities and ethnic stratification.

With the abolition of Jim Crow preferences in the United States,
Category One preferential policy is no longer practiced by any
government in the world and has no serious scholars advocating on
its behalf in standard scholarly journals. Categories Two and Three
continue to be pursued in many countries and have provoked both
passionate support for and opposition to governments' use of race
or ethnicity as a basis for governmental objectives. Almost wholly
ignored in the debate on preferential policies, however, both in
developing and developed countries, is the type of preferential
policies practiced not by the government but by private groups to
favor members of their own ethnic or racial groups—"[t]he
spontaneous preferences of particular individuals and groups for
their own kind ...."\(^5\) The proliferation of ethnic economies in the

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5. *Id.*
United States and other countries, whereby disadvantaged groups that cannot compete successfully in the mainstream economy turn inward to leverage their group affinities and establish an economic base for the group, can be explained by reference not to government-mandated preferences but rather to their own preferences for members of their own groups in their pursuit of entrepreneurship. This particular sort of preferential policy is the focus of this Article.

Assume that a small Korean-owned cleaning business relies on word of mouth to find suitable employees in order to save on advertising and other search costs. This Korean-owned business may be located in a Korean ethnic enclave of Korean restaurants, groceries, laundries, wig stores, and other Korean-owned shops. As a small business, many of the company's employees are members of the owner's family. As part of the Korean ethnic economy, the cleaning business can also find, at low or no cost, Korean employees if the owner needs to hire from outside his or her own inner circle. The owner may also prefer to hire other Koreans, or engage in lending and other preferences favoring other Koreans, because of shared language, culture, kinship, community, or a sense of mutual trust. An ethnically homogenous work force thus is created. An ethnic economy thus is reinforced and perpetuated.

Assume also that a black-owned business in Harlem engages in similar business practices, hiring African-American workers from the neighborhood rather than those from other ethnic groups. Or that this black-owned business has successfully established linkages with other clusters of black-owned firms, buying from and

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6. The term "ethnic enclave economy" usually refers to a locational cluster of businesses owned by ethnic persons who hire other coethnics. See ALEJANDRO PORTES & ROBERT L. BACH, LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES 203-05 (1985); see also infra Part II.A.3.

7. The term "ethnic economy" usually means an economic sector consisting of "coethnic self-employed and employers and their coethnic employees. Whatever is not part of the ethnic economy belongs to the general labor market." IVAN LIGHT & STEVEN J. GOLD, ETHNIC ECONOMIES 4 (2000); see also EDNA BONACICH & JOHN MODELL, THE ECONOMIC BASIS OF ETHNIC SOLIDARITY (1980) (exploring the relationship between class and ethnic solidarity among Japanese Americans). One may have an ethnic economy that is not an ethnic enclave because the ethnic businesses are not spatially proximate to one another. See infra Part II.A.1.

8. African-American entrepreneurs once thrived in Tulsa, Oklahoma, and the city's
selling to one another and generating a positive ripple effect for the black community. Similar stories about ethnic solidarity and "fraternal and communal sentiments" abound throughout the United States and in many countries around the world; sometimes resulting in the establishment of a distinct type of ethnic economy, the ethnic niche—the clustering of ethnic entrepreneurs in the same occupations and industries. Indians and Pakistanis, for example, own a large proportion of gas stations and budget motels in the United States and newsstands in New York City. The diamond industry is dominated by Orthodox Jews who rely on ethnic networks to further economic exchanges. Cambodians and Vietnamese in California own a disproportionate number of doughnut shops and nail salons, respectively. Koreans own a large number of green groceries in New York City and wig stores nationwide. Arabs own grocery stores in Chicago, as do Lebanese Muslims in Detroit and Toledo. Soviet Jews operate half the taxicabs in Los Angeles. In the developing country context, the Chinese in Malaysia, Thailand, the Philippines, and other Southeast Asian countries dominate certain lines of commerce,
as money lenders, labor contractors, shopkeepers, and brokers, and like the Jews in Europe, became known as “middleman minorities,” because of their “middle,” “go-between” positions between producer and consumer, owner and renter, elite and masses, employer and employee. As noted, “[c]apital and labor are often organized along ethnic lines. Fukienese entrepreneurs in Hong Kong, Malayalee clerks in Bombay, and Ibo plantation laborers in Equatorial Guinea were all mobilized into their economic activity on the basis of ethnic affinity.”

These minority groups have established an ethnic economy in different countries, often by relying on group cohesiveness and homogeneous networks to create economic benefits for group members. To the extent that they are created by immigrants,}

19. Howard Paul Becker, Man in Reciprocity 225-37 (1966). The term “middleman minority” originally referred to ethnic minorities who were market traders in precapitalist societies. Middlemen are marginal people who specialize in trading and reside in global diasporas, for example, the overseas Chinese, Jews, and Lebanese. Cohen, supra note 2, at 101-04. Early works by a number of scholars study the role middleman minorities play in the economic structure of many countries and its impact on ethnic relations internationally. See, e.g., Abner Cohen, Customs and Politics in Urban Africa 14-25 (1969) (describing the mercantile activities of the Hausa of Nigeria). See generally Hubert M. Blalock, Jr., Toward a Theory of Minority-Group Relations (1967) (discussing various theories of minority group relations that can be empirically tested); R.A. Schermerhorn, Comparative and Ethnic Relations: A Framework for Theory and Research (1970) (analyzing intergroup relations at the societal level).

Although African Americans have not generally been viewed as part of the middleman minority tradition, some scholars have argued that this is due to neglect, rather than historical fact. According to John Sibley Butler, a professor of sociology at the University of Texas at Austin, the adjustment to America of the “black bourgeoisie, black Brahmins, black elite, and the black upper class... bears a striking resemblance to middleman minorities throughout history.” Butler, supra note 8, at 236. (defining the “Afro-American middleman group as consisting of those individuals who were entrepreneurs and professionals of the old segregated economy”); Joel Kotkin, The Reluctant Entrepreneurs, Inc., Sept. 1986, at 81, 82 (discussing the history of the black merchant class in the North and South of the United States, despite the fact that “by law or by tradition, black businesses were forced to operate within the narrow limits of an all-black economy” rather than “break out” to serve non-black clientele). West Indian blacks who came to the United States were particularly entrepreneurial, with a business tradition that was not destroyed by slavery because the West Indian slaves were not under the complete control of the masters but were able to tend their own private plots and sell their surplus in the market; by 1901, they owned twenty percent of Manhattan’s black businesses. Id.

20. Horowitz, supra note 3, at 8.

21. The term “ethnic economy” is a more general term than “ethnic enclave,” which refers to a type of ethnic economy with ethnic businesses that are spatially or geographically clustered, or “ethnic niche,” which is used to mean the concentration of ethnic business
some ethnic economies may also benefit from the diaspora's linkages that continue to be maintained, culturally and economically, with homeland institutions. Sociologists have noted the tendency to equate members of one's ethnic group with that "inbred group of near or distant kinsmen whom one knows as intimates and whom therefore one can trust. One intuitively expects fellow ethnics to behave at least somewhat benevolently toward one because of kin selection, reinforced by reciprocity.... Fellow ethnics are, in the deepest sense, 'our people.'"

The existence of the ethnic boundary, delineating insiders and outsiders, with preferential policies favoring "us" and excluding "them" has been and remains an established fact of life. To the extent that such old-fashioned preferences exist in developing countries, it is presumed that they are transitory and that the advancement of modern capitalism will make such practices obsolete. To the extent that such ethnic preferences are practiced by ethnically homogeneous groups in modern, economically developed countries such as the United States, they tend to be viewed as particularly anomalous; they are thus rarely acknowledged openly, overshadowed by the prevailing ideal of liberalism and its emphasis on diversity, universalism, and assimilation.

owners in certain lines of business.

22. See, e.g., Anupam Chander, Diaspora Bonds, 76 N.Y.U. L. REV. 1005, 1012-14 (2001). Professor Chander discusses how homeland governments appeal to their diasporas for financial, investment, and charitable support. This Article touches on the relationship between diasporas and the homeland institutions from the reverse angle—it looks at how homeland institutions have provided support for diasporic ethnic economies in the immigrants' adopted countries. See infra notes 116, 118, 289-92 and accompanying text.


24. H.H. GERTH & C. WRIGHT MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 189, 215 (1958); SOMBART, supra note 10, at 33; see also Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 HARV. L. REV. 1003, 1048 n.177 (1995). Max Weber, for example, remarked that modern capitalism required a radical break from traditionalism and ethnic capitalism. MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY 109, 251-52 (1969). To the extent that a group's preferences for its members have been studied by legal scholars at all (as opposed to sociologists), they have generally been viewed as a primitive, personalized mode of exchange that will disappear once institutional reforms are put in place. See Davis et al., supra note 3, at 332-33 for a discussion of this argument by proponents of New Institutional Economics.


Intrinsically, the ethnic group is a link with the past and a bulwark of stability.
the United States, in the case of African Americans in particular, "[t]o even admit that Afro-Americans have a business tradition was congruent with interfering with the process of integration."  

Indeed, although sociologists have long noted this phenomenon, legal scholars have more or less ignored this last form of preferential policy and have devoted their attention to studying government preferences instead. For example, in recent years, U.S. law and development scholars have expressed support for law reform initiatives, adopted by countries such as Malaysia, that favor ethnic majorities through government-instituted "ethnically conscious interventions into the market" in order to manage ethnic tensions by imposing restrictions on the economically dominant minorities and preferences for the politically dominant majority. There is also a vigorous body of scholarship among constitutional scholars that examines whether to support or to oppose government preferential policies for minorities in the United States. Indeed, to the extent that preferential policies are promoted and pursued in the United States, the liberal consensus among supporters dictates that they are to be pursued by the government, within the ambit of the law, whether instituted legislatively, administratively,
or judicially, and in furtherance of legitimate liberal objectives such as integration, assimilation, and equality.

As I argue in this Article, this emphasis has crowded out other forms of "affirmative action" or preferential practices engaged in by members of the disadvantaged groups themselves—a fourth category of preferential policy in addition to the three briefly mentioned at the beginning of the Article. The liberal consensus in modern, developed countries assumes, indeed expects, immigrants and/or ethnic minorities to uncluster and disperse in pursuit of individual economic opportunities offered by the mainstream labor market—where modern, contractual, and more "objective" criteria prevail over the pre-modern, ascriptive bases of affiliation that define the very essence of the separate ethnic economy. In the mainstream universe away from the ethnic economy are the promises of equal treatment, perhaps government-mandated preferences for certain government-designated ethnic groups, and perhaps even protection from other groups' more insular, efficient, and productive ethnic economies.

Accordingly, there are several reasons why ethnic economies have not been comprehensively addressed in U.S. legal scholarship. First, intellectual support for ethnic economies may be viewed as favoring segregation and interfering with the objectives of integration. Second, in this modern age, clannishness and tribalism have generally been viewed as taboos by the outside world. Third, even among supporters of ethnic economies, there is a degree of anxiety and perhaps embarrassment about projecting a sense of "separateness" or "foreignness" to the mainstream or native population. Fourth, a focus on ethnic economies might also highlight a more complex picture of race and ethnicity, especially in a country such as the United States, because it would force one to look beyond the black-white dichotomy—where whites are viewed as the group against which coalitions of united minority groups must struggle, or alternatively, the group to which minorities are expected to assimilate. Indeed, studying ethnic economies may mean studying intergroup relations and competition among minority ethnic groups as each constructs its own ethnic economy and prefers "its own."
There is a venerable corpus of scholarship that holds assimilation up as a liberal or constitutional value. But for some ethnic groups, minority status, especially if coupled with visible ethnic differences and hence the presumption of "foreignness," makes assimilation difficult, if not impossible, especially in the first few generations. Furthermore, from an economic standpoint, assimilation into the general labor market is unlikely to provide enough jobs for all seekers. Most likely then, in the United States, the "burden of scarcity falls most heavily upon the less assimilated or acceptable white groups, visible minorities, non-Christians, refugees, and immigrants." For members of these transitional or marginal groups especially, who may lack mainstream advantages, turning inward and utilizing available ethnic resources to engage in community ethnic preferences within the ethnic economy will be crucial for their economic well-being.


32. LIGHT & GOLD, supra note 7, at 52; see also John Sibley Butler, Myrdal Revisited: The Negro in Business, 124 DAEDALUS 199, 205-06 (1995) (describing the rival strategies that African Americans adopted following the Civil War: one, which recognized the reality of discrimination and segregation and focused on the development of independent black business enterprises, and the other, which emulated European ethnic groups by integrating with and joining the American workforce).

33. See SOWELL, supra note 1, at 90. This fourth type of preferential policy need not depend on governmental action, nor "await other people's conscience rather than group self-interest." Id. Indeed, an economic development strategy that focuses on a "jobs-only model will place residents in a situation where the jobs might once again leave their community.
Part I briefly surveys the wide range of government-mandated preferential schemes adopted by a number of countries in the world. Because Category One (majority preferences in majority economies) is no longer practiced as official policy by any country, I will limit my discussion to the other forms of government preferences still widely used today. First, I will describe minority preferences in majority economies as illustrated by examples drawn from the United States and India. Second, I will discuss majority preferences in minority economies with examples drawn from Malaysia and Nigeria. A comparative perspective is useful to contrast the preferential practices adopted by other countries with those in the United States, and to view them not singularly but comparatively, as part of an international continuum. The preferential policies described in this Part are those undertaken or promoted by the state to favor certain designated ethnic groups, whether ethnic majorities or ethnic minorities.

As a contrast to Part I, Part II examines preferential policies that are practiced by and among the ethnic groups themselves—outside the state’s formal framework. These group preferences underlie and essentially define the ethnically homogeneous economy and its subvariants—the ethnic enclave economy and the ethnic niche (the ethnic economy generally). Where appropriate, Part II also takes a comparative perspective and looks at such ethnic trading networks in the United States and other countries, developing and developed. Using theories developed in political science, sociology, and anthropology, and applying new institutional economics that examine the

Also, jobs are associated with a degree of credentials. Entrepreneurship, on the other hand, levels the playing field by placing an emphasis on the entrepreneurial spirit.” John Sibley Butler, Entrepreneurship and the Advantages of the Inner City, 24 REV. OF BLACK POL. ECON. 39, 40 (1996).

34. I have chosen India because it is the first country to have adopted minority preferences both under the British colonial government and upon independence, as explicitly provided for in its constitution. SOWELL, supra note 1, at 91.

35. Malaysia was chosen because the “Malaysian program is as extensive as any, and it has its roots, though not all of its branches, in the Malaysian constitution.” HOROWITZ, supra note 3, at 654. The claim for preference is based on “indigenousness.”

36. Nigeria was chosen because it is the most populous country in Africa. Its preferential policy is also worth studying because it is framed in territorial terms (Northernization), although the preference is really based on indigenousness and ethnicity. See SOWELL, supra note 1, at 69-76.
ways social network structures—the tribe, clan, or kin—facilitate economic exchanges, Part II explores how an ethnic group, as a "culture-bearing unit[]," and its members may create an efficient, self-governing economic order and produce cooperative outcomes despite their marginal status in the mainstream economy. To the extent that such group practices have led to the creation and maintenance of certain dominant entrepreneurial ethnic minorities, recent law and development scholarship has advocated the use by governments of ethnically conscious "corrective" measures to restrict their dominance. This Article critically questions the use of government-mandated preferences for government-designated groups to constrain the entrepreneurial tendencies of certain ethnic groups—either by destroying their ethnic economies (in the name of integration) or by restricting their entrepreneurial activities to achieve a semblance of economic parity.38

Although law and development scholars have argued in favor of government preferences for ethnic majorities in economies dominated by minorities, and although constitutional scholars have argued for and against the use of government preferences, neither has addressed the sort of private, intra-ethnic-group preferences examined in this Article. Part III asks how the law should deal with the preferential practices that inform and underlie the ethnic economy. The economic leverage that members of an ethnic group exert depends on the existence of the ethnic boundary dividing insiders from outsiders, with insiders being treated better, more specially than outsiders. Although the discussion in Part III and the


38. Although this Article does not directly address works that support the use of ethnically-targeted preferences in developing countries, for example, through government constraints against the Chinese and government preferences for the Malays, see Chua, supra note 3, this Article would not be in favor of such governmentally-imposed discrimination on the basis of ethnicity or race. A strong case may be made, on the other hand, for policies that work alongside the market to reduce ethnic disparities in wealth. These policies include general investment in education, health care, and progressive taxation. This is different from preferential policies that aim to restructure the market activities of certain groups because of their identity as members of an ethnic group. Additionally, when corruption or predatory collusion has resulted in the creation and perpetration of unfair monopolies, these practices may be addressed through ethnic neutral remedies, such as antibribery laws or antitrust laws.

39. See supra notes 28-29.
sketch of alternative approaches provided therein bear relevance generally to the issues that are common among other countries with ethnic minorities, I will focus for purposes of illustration on the laws of the United States for two reasons. First, it is not feasible for an Article of general scope to delve into the laws of many countries, each with different historical and cultural backgrounds. Second, a focus on the United States in Part III allows the Article to discuss economic development generally and ethnic capitalism particularly outside of its more conventional, developing-country context.

What may be termed "mutual self-help" might also be deemed "nepotism," "favoritism," or "communalism." Part III looks at a variety of approaches that a country may adopt in dealing with the ethnically-conscious practices of certain ethnic groups, ranging from holding that such practices are "beyond the pale" in the sense of being beyond acceptability, or alternatively, "beyond the pale" in a different sense—that such practices should be left alone, not necessarily supported by the law, but certainly beyond the reach of the law. Overall, the Article aims to demonstrate the following: (1) There is a wide range of ethnically-conscious preferential practices that currently exist in many countries, without government support and hence outside the framework of the law; and (2) these practices, engaged in by private groups, should, for the most part, be allowed to exist within the "pale" twilight of the law. Indeed, strictly applying the antidiscrimination laws that exist in many countries would break up such practices and erode the very ethnic economies that, historically and presently, have provided marginal groups with a degree of economic comfort and stability. On the other hand, explicitly legalizing such practices by bringing them within the protective jurisdiction of the law might also create its own set of problems, such as promoting ethnic rivalries and threatening ethnic balkanization of the country.

I. A COMPARATIVE LOOK AT GOVERNMENT-MANDATED PREFERENTIAL POLICIES

This Part briefly examines preferential policies such as those practiced in the United States and India to help minorities in majority economies, and those adopted by countries such as
Malaysia and Nigeria, to help majorities in minority economies. As history has shown, ethnicity and ethnic relations can all too easily become a problem politically and economically.

Even as the world has become economically integrated and more transnational, it has also become increasingly susceptible to the tug and pull of subnational forces, including those posed by ethnic conflicts and divisions. Countries with significant minorities have adopted a range of government policies to manage ethnic or racial relations. Certainly, the adopted policies—"affirmative action" in the United States, power-sharing and governmental set-asides in India, and various arrangements to achieve majority preferences and restrain minority-group economic dominance in Malaysia and Nigeria—are developed within the particular context of the countries involved. These policies may be based in part on economic and political factors, legal traditions, ethnic group aspirations and fears, and the country's historical legacy, including the presence or absence of slavery or colonialism. My purpose in including this discussion is to juxtapose and contrast the better-known preferential policies enacted by governments to benefit groups designated for

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40. The Article uses a broad definition of ethnicity. An ethnic group "is a human population that has a name and thinks of itself as a group; possesses a common ancestry, historical ties, and historical memories; and shares a culture, which can be based on a combination of race, language, religion, laws, customs, institutions, dress, music, crafts, and food." Michael E. Brown & Sumit Ganguly, Introduction to GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC 13 (Michael E. Brown & Sumit Ganguly eds., 1997). As used in the Article, "ethnic groups will include both majority and minority communities, ... immigrants and migrant workers." Id.; see also HOROWITZ, supra note 3, at 53 (describing ethnicity as embracing "groups differentiated by color, language, and religion; it covers 'tribes,' 'races,' 'nationalities,' and 'castes'").

41. By some estimates, there are as many as 9000 ethnic communities in the world. JAMES MINAHAN, NATIONS WITHOUT STATES: A HISTORICAL DICTIONARY OF CONTEMPORARY NATIONAL MOVEMENTS xvi (1996). Approximately ninety percent of the states in the international system are ethnically heterogeneous, that is, with ethnic minorities constituting more than five percent of the total population. David Welch, Domestic Politics and Ethnic Conflict, in ETHNIC CONFLICT AND INTERNATIONAL SECURITY 45 (Michael E. Brown ed., 1993). Of the 127 largest states, seventy-five percent contain significant minority groups within their borders. TED ROBERT GURR, MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICTS 10-11 (1993). This figure only includes groups with at least 100,000 members or whose members constitute more than one percent of the population of a country in which they reside. Id. at 8. It has been estimated that at least 200 minority groups are suffering systematic discriminatory treatment, demanding political self-determination, or both. Id. at 6-8; MINAHAN, supra, at xvi-xvii.
differential treatment with preferential policies maintained by some ethnic groups to benefit themselves, as described in Part III.

A. Minority Preferences in Majority Economies

1. The United States

In the United States, there is essentially an economically and politically dominant majority (whites) on the one hand, and less dominant ethnic minorities on the other. Although the United States is increasingly diverse ethnically, ethnic relations in the country are framed primarily in terms of blacks and whites. The emotionally powerful legacy of slavery and Jim Crow segregation has meant that the African-American experience has dominated the way ethnic relations are viewed, analyzed, and understood in the United States. Other ethnic groups that wish to have preferential policies also apply to them have usually analogized their situations to that of blacks. Further, affirmative action as understood today in the United States was designed to address the disadvantages and subordination of African Americans particularly, to counteract the long-lasting effects of the institution of slavery and the failure of Reconstruction.

42. Data provided by the U.S. Department of Commerce demonstrate that as of 1993, the median household income was $32,960 for whites, $19,533 for blacks, and $22,886 for Hispanics. The sole ethnic minority group whose median household income surpasses that of whites is Asian/Pacific Islanders with a median household income of $38,347. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 472; see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 85-86 (1995) (describing the disparity in income and personal wealth between blacks and whites in the United States).

43. When the Indian Trinidadian writer Shiva Naipaul made his East African journey in 1978, he observed the race relations there, and noted that the Indian presence, though deeply rooted and significant, is more or less neglected by scholars and commentators: "The assumption has always been that it is only the relationship between black and white that really matters.... Marginality was thrust upon the Asian. Both black and white could regard him as an outsider intruding into their special relationship." SHIVA NAIPAUL, NORTH OF SOUTH 109 (1979). And it is similarly so in the United States.

44. See OLIVER & SHAPIRO, supra note 42, at 12-15, 35-37. It was "common knowledge that the [Reconstruction] Amendments were designed to ameliorate the condition of Blacks" who were "a special object of protection." Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287, 1295 (1982).
Perhaps in part because of long-established antidiscrimination norms, and "unlike preferential policies in some other countries—commencing on a specific date for specific benefits in specific sectors—group preferences in the United States have emerged gradually and unevenly, and not always openly." In 1965, with Executive Order 11,246, President Lyndon Johnson created the Office of Federal Contract Compliance Programs (OFCCP) to ensure that private firms doing work for the federal government comply with the principle of "nondiscrimination" and not engage in any racial discrimination. In addition, the Executive Order stated that "[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Over time, however, the original use of the term "affirmative action" evolved to mean something different. It is no longer treatment without regard to race, but rather treatment with full regard to and consciousness of race.

45. See, e.g., Shaw v. Reno, 509 U.S. 630, 643 (1993) (declaring that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group ...."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). Title VI of the Civil Rights Act, enacted in 1964, provides that "[n]o person ... shall, on the ground of race, color, or national origin, be excluded from participation in ... any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (2000).

46. Sowell, supra note 1, at 103.


Over the years since Executive Order 11,246, distinctions and preferential treatment on the basis of race have been part of the understanding of affirmative action in various areas of life in the United States. For example, organizations have identified and classified by race to determine who is eligible first for on-the-job training; who can be promoted; who will be laid off first; who is eligible for public housing; and for admission to a state university medical school or a state university law school.

The federal government has used racial classifications to determine which firms would be entitled to participate in public works projects. One program in particular, struck down by the Supreme Court in Adarand Constructors, Inc. v. Pena, was

50. For a critique of this evolution, see Van Alstyne, supra note 29, at 809 ("We shall not now see racism disappear by employing its own ways of classifying people and measuring their rights.").

51. United Steelworkers v. Weber, 443 U.S. 193 (1979). The Supreme Court held that the employer had acted lawfully under Title VII of the Civil Rights Act in preferring black employees for admission to training programs, on the grounds that such preference was voluntary and benign—even if the employer's plan was in fact adopted by the employer only after a government agency had threatened to remove the employer from eligibility to bid for federal contracts if it did not increase its skilled minority representation. The Court interpreted Title VII to permit programs voluntarily adopted by employers because the statute only stated that it did not "require" such programs. Id. at 207. There was no constitutional issue because the case did not involve a challenge to an affirmative action program undertaken with state action. Id. at 200.

52. Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). The Court held that § 706(g) of Title VII did not preclude a federal court from entering a consent decree between the city and an organization of black and Hispanic firefighters requiring a city's fire department to divide promotions between minority and nonminority firefighters. Id. at 504, 515.

53. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (overturning lower court orders that had required a city to lay off white workers before black workers more recently hired and with less seniority and holding that Title VII allowed employers to use a seniority system that had an adverse impact on minority employees, absent proof of discriminatory intent).


55. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Four of the nine Justices held that the university's use of race resulting in Bakke's exclusion was forbidden. Id. at 417-21 (Stevens, J., concurring in part and dissenting in part).


57. 515 U.S. 200 (1995). The case was remanded to the lower court to decide whether the race-based component of the Department of Transportation's Disadvantaged Business Enterprise could meet the strict scrutiny standard of review. Id. at 237. The Court of Appeals for the Tenth Circuit had found that the program was constitutional under the Department's new regulatory framework. Id. at 210. In 2001, the Supreme Court again granted certiorari
established pursuant to section 520 of the Small Business Act (SBA), in which federal agencies are "to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals." The program involved the applicable Subcontracting Compensation Clause of the SBA, which provides that "[m]onetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals ...." If a contractor requests payment and furnishes evidence of the subcontractor's certification as a disadvantaged business enterprise, the contractor will be paid an amount equal to "10 percent of the final amount of the approved ... subcontract, not to exceed 1.5 percent of the original contract amount." The Supreme Court reversed the lower courts and required that strict scrutiny be used to evaluate race-based federal programs and ensure they are narrowly tailored measures that further compelling governmental interests.

Affirmative action programs, as Justice O'Connor noted in Adarand, "implicate a complex scheme of federal statutes and regulations." Indeed, in addition to the SBA at issue in Adarand, there are several other federal laws and regulations that use race or ethnicity as a basis for decision making.

58. Adarand, 515 U.S. at 206 (citing 15 U.S.C. § 644(g)(1)). The SBA "defines 'socially disadvantaged individuals' as 'those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.'" Id. (quoting 15 U.S.C. § 637(a)(5)). It defines "economically disadvantaged individuals' as 'those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.'" Id. (quoting 15 U.S.C. § 637(a)(6)(A)).

59. Id. at 209 (quoting 15 U.S.C. § 637(a)(6)(A)). Contracts awarded by Department of Transportation agencies are required to include the Subcontracting Compensation Clause and the following provision: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." Id. at 205 (quoting 15 U.S.C. § 637(d)(3)(C)(ii)).

60. Id. at 209.
61. Id. at 226.
62. Id. at 206.
63. The Federal Acquisitions Regulations (FAR), for example, are concerned with
Following *Adarand*, however, various branches of the federal government assessed the case's impact on existing preferential policies. The Department of Justice issued a memorandum to general counsels in June 1995 to reevaluate federal programs that use race or ethnicity as a basis for decision making to ensure compliance with the *Adarand* directive. In May 1996, the

providing small businesses and small businesses owned by "socially and economically disadvantaged individuals" (including women) the opportunity to participate in federal contracts. 48 C.F.R. § 52.219-8(a) (1995). Businesses that qualify as disadvantaged are those with at least fifty-one percent ownership and control by disadvantaged individuals, or an economically disadvantaged Indian tribe or Native Hawaiian Organization. Id. § 52.219-8(c).

The Department of Defense has also established a five percent annual contracting goal for disadvantaged concerns, such as historically black institutions of higher education and other minority institutions. Id. § 219.000. Other Department of Defense programs include the so-called "rule of two" set-aside policy for small, disadvantaged businesses which was suspended after *Adarand*. See Defense Federal Acquisition Regulation Supplement, 60 Fed. Reg. 54,954 (Oct. 27, 1995) (to be codified at 48 C.F.R. pts. 219, 252) (suspension of disadvantaged business set-asides effective October 23, 1995). The "rule of two" policy means that if two or more qualified disadvantaged businesses were available to bid for a defense prime contract, then that contract must be set aside for award to a disadvantaged business, as long as the price was not more than ten percent above fair market price. National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3973-74 (1986) (codified as amended at 10 U.S.C. § 2301 (2000)).


64. See Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to General Counsels (June 28, 1995), reprinted in Daily Lab. Rep. (BNA) No. 125, at E-1 (June 29, 1995). The Department of Justice sets forth six factors for agencies to consider: (1) whether the governmental entity considered race-neutral alternatives before deciding on using race-based criteria; (2) whether the program allows for a flexible waiver mechanism for individualized consideration of a minority contractor's bid; (3) whether the program uses race as just one factor among many to be considered; (4) the appropriate method used to compare numerically
Department of Justice followed with a comprehensive set of "Proposed Reforms to Affirmative Action in Federal Procurement" designed to tailor race-based affirmative actions to the requirements of *Adarand*. The Proposed Reforms state that even in a post-*Adarand* world, "[u]nder the reformed structure, the federal government will generally have authority ... to use several race-conscious contracting mechanisms ...." The Office of Federal Contract Compliance Programs (OFCCP) released its "Notice Reaffirming Affirmative Action Goals in Light of *Adarand* Decision," stating:

This Notice reaffirms the longstanding policy of the [OFCCP] that affirmative action program goals under Executive Order 11246 are to be used as a tool to aid in breaking down barriers to equal employment opportunity for women and minorities without impinging on the rights and expectations of other members of the workforce. Affirmative action program goals are not to be used as quotas which must be achieved through race-based and gender-based preferences.

Thus, race-based policies are alive and well in the United States. Although the Court in *Adarand* held that any law using a racial classification, including the benign use of racial classification in a federal affirmative action program, would be invalid under the Fifth
Amendment unless the government could show that the classification was narrowly tailored to promote a compelling interest, it expressly left open the possibility that certain race-based programs would be upheld. A strict scrutiny test, the majority wrote, is not "strict in theory, but fatal in fact," so that race-based policies undertaken within the constitutional constraints set out by the Court would survive strict scrutiny.

2. India

Unlike the U.S. Constitution, the Constitution of India explicitly allows an exception from the principle of equality "for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State." The Constitution of India continued the preferential policies begun under the British colonial government, in which reservations in public service posts for certain minorities, such as Muslims, Christians, Anglo-Indians, and other communal groups, were pursued by the British to achieve political balance among the different castes and religious groups, and to pacify Muslims. Critics viewed British policy as an extension of Britain's "divide and conquer" strategy, aimed at pitting different segments of India against one another.

Article 15 of the Indian Constitution prohibits discrimination on the basis of religion, race, caste, sex, or place of birth. Article

70. INDIA CONST. art. 16, § 4; see also id. arts. 341-42.
72. See PARMANAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 82 (1982).
73. See Witten, supra note 71, at 359.
74. SINGH, supra note 72, at 82.
75. Witten, supra note 71, at 359.
76. INDIA CONST. art. 15, § 1.
15(4), added to the Constitution in 1951 by the Constitution (First Amendment) Act, however, states that “[n]othing in this article ... shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.” The Constitution supports an extensive policy of minority preferences in education, civil service positions, and legislative seats for the designated Scheduled Castes and Tribes. India thus recognizes the notion of group rights and explicit affirmative action quotas known as “reservations.” Article 16(4) contains two requirements a person must meet to be included in the government’s reservation plan: the person must be from the “backward class” and must be part of a group “which, in the opinion of the State, is not adequately represented in the services under the State.” Among the divisions that mark Indian society historically, such as linguistic and religious divisions, caste divisions between the caste Hindus as a whole and the Scheduled Castes (outcastes or untouchables) remain severe. There is a long history of discrimination against the untouchables. Although untouchability has been officially

78. INDIA CONST. art. 15, § 4.
79. Article 332 of the Indian Constitution provides that “[s]eats shall be reserved for the Scheduled Castes and the Scheduled Tribes ... in the Legislative Assembly of every State.” Id. art. 332. Article 330 provides that “[s]eats shall be reserved in the House of the People for—a) the Scheduled Castes; b) the Scheduled Tribes.” Id. art. 330. The House of the People is the lower House of Parliament. Id. art. 79. Article 46, for example, provides that “[t]he State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” Id. art. 46.
80. Id. art. 16, § 4.
81. The caste system in India consists of four castes or “varnas”: Brahmīn (priests and scholars), Kṣatriya (rulers and warriors), Vaishya (merchants and farmers), and Sudra (menial and servant classes). In addition, there are also the outcastes (outside the four-tier caste system). GALANTER, supra note 71, at 7-17.
82. Untouchables are considered polluted and assigned menial tasks such as cleaning toilets. DECLAN QUIGLEY, THE INTERPRETATION OF CASTE 10 (1993).
83. At one point, questions were raised as to whether untouchables could even be considered Hindus, because many were in occupations that brought them into contact with animals slaughtered in violation of Hindu rules. GALANTER, supra note 71, at 26 n.24. During the independence movement, however, Hindu leaders, wary of the balance of power between Hindus and Muslims, chose to include the untouchables as Hindus. SOWELL, supra note 1, at 94-95.
outlawed by the Indian Constitution, social stigmatization remains acute in many parts of the country. The reservation system is designed to compensate for this through an elaborate quota regime for the untouchables along with other disadvantaged groups within Indian society. "Politically and administratively, the operative caste divisions are upper and middle castes, other backward classes, and scheduled castes and tribes," all administered by the Commission for the Scheduled Castes and Scheduled Tribes.

India's policy, referred to by scholars as compensatory discrimination, protective discrimination, progressive discrimination, or special treatment, is pursued to remedy historic injustices suffered by the lower castes and the outcastes. In accordance with the constitutional provision that the president may appoint commissions to investigate the conditions of the Backward

84. INDIA CONST. art. 17 ("'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.").

85. Local custom may prohibit an untouchable from commingling in any way with a caste Hindu, so that caste taboos persist. In certain places, untouchables must comply with certain social restrictions that keep them from, for example, dressing or behaving in any way that suggests a dignity beyond what others deem they are to be accorded or entitled, such as wearing sandals or riding horses. GALANTER, supra note 71, at 15. In 1979, according to the government's report, a riot was unleashed because "[w]hile taking water from a tap, a Scheduled Caste woman put her water pot on the pot of a caste Hindu woman." REPORT OF THE COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES SECOND REPORT 297 (Apr. 1979-Mar. 1980) (New Delhi, 1981).

86. To complicate matters, neither untouchables nor the castes are a homogeneous group. Within each caste there are several sub-castes, or pan-varnas. GALANTER, supra note 71, at 11, and some untouchables are deemed untouchables in some parts of India but not in other parts, and some subgroups of untouchables themselves practice "Untouchability" towards other subgroups of untouchables. Barbara R. Joshi, "Ex-Ultouchable": Problems, Progress, and Policies in Indian Social Change, 53 PAC. AFF. 193, 196-97 (1980). The latest data show that there were 104,755,000 persons deemed to be Scheduled Castes, making up 15.8% of the population. INDIA: OBSERVER STATISTICAL HANDBOOK 55 (B.N. Uniyal & Kumaresh Chakravarty eds., 1992).

87. Kanti Bajpai, Diversity, Democracy, and Devolution in India, in GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC, supra note 40, at 35; see also GALANTER, supra note 71, at 147-53. Scheduled Tribes are Indians who are spatially, socially, and culturally separate from the majority of the population. The designation of a group as a Scheduled Caste as well as a Scheduled Tribe eligible for reservations is made by presidential order. INDIA CONST. art. 341, 342.

The Other Backward Classes are those Indians who are neither of the Scheduled Castes nor Scheduled Tribes but are also disadvantaged. See George H. Gadbois, Jr., Affirmative Action in India: The Judiciary and Social Change, 8 LAW & POL'Y 329, 331 (1986).

88. See, e.g., GALANTER, supra note 71, at 2-3.
Classes, the Indian Central Government appointed the first Backward Classes Commission on January 29, 1953, which presented a list of 2399 groups it considered backward and offered various recommendations to improve their status. Subsequently, a second Backward Classes Commission, the Mandal Commission (Commission), was appointed in 1978. Finding that the 3000-year-old caste system remains deeply entrenched in Indian society, the Commission determined that equal treatment of the weak and strong would result in a "mock competition" that would only perpetuate inequality. The Commission also set forth its criteria for identifying the Other Backward Classes, based on a mix of social and economic indicators. The Commission recommended that in addition to the existing 22.5% of reservations for the Scheduled Castes and Scheduled Tribes already set aside by the Constitution, an additional 27% of federal government jobs should be reserved for the Other Backward Classes. The Commission had originally requested that 52% of government jobs be set aside for the Other Backward Classes, because they make up 52% of the population. However, due to a Supreme Court ruling holding that

89. INDIA CONST. art. 340.
90. See Sawhney v. Union of India, 80 A.I.R. 1993 S.C. 477, 506, for a discussion of the Commission. The Commission's recommendations were ultimately rejected by the Parliament on a variety of grounds. See GALANTER, supra note 71, at 173.
91. GALANTER, supra note 71, at 169.
93. Id. § 6.2, at 269.
94. These factors include: (1) whether most members of society considered the caste or class to be backward; (2) whether they came from a region generally considered to be backward; (3) whether the caste or class relied on manual labor for its livelihood; (4) whether twenty-five percent of the females and ten percent of the males were married by age seventeen; (5) whether the student drop-out rate was twenty-five percent above average; (6) whether total family assets were twenty-five percent below the state average; and (7) whether drinking water was more than half a kilometer from their homes. Id. § 11.23, at 296.
95. Id. § 13.10, at 280 (noting that the Scheduled Castes and Scheduled Tribes make up approximately 22.5% of India's population and hence 22.5% of government jobs had been reserved for them).
the total amount of reservations permissible under Article 15(4) of the Constitution must be less than 50%,98 the percentage that could be set legally must be a figure (27%) which, when combined with the 22.5% already reserved for the Schedule Castes and Tribes, would remain below the constitutional ceiling of 50%.99 The reservation policy would be applicable to not only the government but also to all private sector organizations that receive government financial assistance,100 including colleges and universities.101

For many years, the recommendations were ignored because they were too controversial.102 But in 1991, the government of Prime Minister P.V. Narasimha Rao's Congress Party announced its support of the reservation policy.103 In 1993, the Supreme Court held that the government's implementation of the Mandal Commission Report was indeed constitutional.104

98. Balaji v. Mysore, 50 A.I.R. 1963 S.C. 649, 663 (holding that the State of Mysore's order reserving sixty-eight percent of the admissions to the engineering and medical colleges and other technical institutions for the Backward Classes, Scheduled Castes, and Scheduled Tribes violated Article 15(4) of the Constitution); see also Rajkumar v. Gulbarga Univ., 77 A.I.R. 1990 (Kant.) 320, 332 (holding that reserving thirty-three of the thirty-five professor positions for the designated groups at a state university was excessive).


100. Id. § 13.15, at 281.

101. Id.; see Bajpai, supra note 87, at 56 (noting that the original proposals set forth by the Commission were later modified to exempt the defense, science, technology, and space sectors).


104. Sawhney v. Union of India, 80 A.I.R. 1993 S.C. 477, 578. Reservations, the Court held, may be supplemented by other means also available under the Constitution, such as concessions, exemptions, and other relaxations, to advance the Backward Classes. Id. at 540. Overall, the Indian Supreme Court has interpreted the Constitution to affirm preferential policies for the designated disadvantaged groups. In the landmark case, Kerala v. Thomas, 63 A.I.R. 1978 S.C. 490, the Court upheld the State of Kerala's order granting a two-year temporary exemption allowing certain disadvantaged employees to be promoted to higher positions even if they were unable to pass a promotion test. Id.; see Witten, supra note 71,
Outbursts of violence broke out all across India after the government announced its decision to implement the Mandal Commission Report. Waves of self-immolation by students were repeated as protest grew over the implementation of the Report.\textsuperscript{105} The protests were fueled further when Indian police fired tear gas into students surrounding the Indian Parliament building in New Delhi.\textsuperscript{106} The mass demonstrations were the worst to strike India since the assassination of Prime Minister Indira Gandhi in 1984,\textsuperscript{107} causing some to observe that the ensuing violence would prove to be the most formidable in India's history of epic struggles.\textsuperscript{108} After supporters of the government's policy set a train on fire, forty people were massacred on the same day, near the city of Hyderabad.\textsuperscript{109}

Caste cleavages and class divisions remain severe in India. It is not entirely clear whether the reservations policy has reduced group friction or even has had a significant positive impact on the disadvantaged groups. Indeed, as noted by the preeminent scholar on ethnic conflicts, "the way the preferred group is defined dictates the direction of what might be called the politics of preferential inclusion and exclusion."\textsuperscript{110} Hence, as preferences are reserved for Backward Classes, so have claims of backwardness increased. In the state of Karnataka, for example, every caste except Brahmin was officially designated Backward, including those from the


\textsuperscript{106}. Thomas, \textit{Job Quotas Scheme}, \textit{supra} note 105; see also Wigg, \textit{supra} note 96.

\textsuperscript{107}. Fineman, \textit{supra} note 105.


\textsuperscript{110}. HOROWITZ, \textit{supra} note 3, at 657.
wealthy landowning class, until that determination was struck down by the Supreme Court. More, rather than less, awareness of divisions and differences seems to result as each group elbows the other in order to make itself fit the governmentally set and defined preferences. In certain states, “employment preferences may also have aroused more ethnic conflict than they assuaged, particularly because proposals for preferences often emanate from ‘politicians not as a response to popular demands, but as a means of mobilizing political support.’”

Furthermore, the extent to which preferences have yielded benefits to the disadvantaged groups is unclear. Those who have in fact gained have been from a small elite within the Schedule Castes and Scheduled Tribes. This group has tended to reproduce itself because the children of those receiving benefits have gone on to claim reservations themselves. Moreover, those who have occupied reserved positions in the country’s legislative bodies have failed to represent effectively the interests of their groups, as those who favored the preferential policies had hoped.

The Mandal Commission recommended that the entire system of reservations be reevaluated after twenty years. Indeed, as noted, “virtually everywhere, policies of ethnic preference are regarded as exceptions, temporary expedients, often with a specified time

111. _Id._; see also SOWELL, _supra_ note 1, at 15-16 (“Fraudulent claims of belonging to the designated beneficiary groups have been widespread and have taken many forms in various countries.”). Where preferences were set for tribes, for example, non-Christian tribals in the State of Bihar insisted that Christians be excluded because the latter had been able to claim a disproportionate share of the reserved slots. HOROWITZ, _supra_ note 3, at 657.

112. HOROWITZ, _supra_ note 3, at 671 (quoting MYRON WEINER & MARY FAINSOD KATZENSTEIN, INDIA’S PREFERENTIAL POLICIES: MIGRANTS, THE MIDDLE CLASSES AND ETHNIC EQUALITY 134 (1981)). As noted, in the State of Andhra Pradesh, for example, preferences were reserved for Telanganas. These preferences, adopted as a political response to the rise of a separatist movement in Telanganas, have in turn provoked a reactive, separatist demand among the Coastal Andhras. _Id._ at 672.

113. _Id._ at 669.

114. Bajpai, _supra_ note 87, at 54. Thomas Sowell made the same observation about preferential policies around the world. SOWELL, _supra_ note 1, at 15 (“Within the groups designated by government as recipients of preferential treatment, the benefits have usually gone disproportionately to those members already more fortunate.”).


116. _Id._

But rarely have preferential programs in any country, including India, been truly temporary.\textsuperscript{119}

B. Majority Preferences in Minority Economies

1. Malaysia

As historians, economists, and sociologists have long observed, "[i]n a number of countries, neither the demographic majority nor the political majority is dominant in the economy, which is largely in the hands of one or more ethnic minorities ..."\textsuperscript{120} These minorities, unlike the Europeans in South Africa, for example, did not achieve economic dominance as colonizers or as part of any foreign conquest. Rather, many arrived in the new countries as "powerless or even persecuted minorities,"\textsuperscript{121} as coolies or indentured servants,\textsuperscript{122} or sometimes, as part of a phenomenon referred to as the "middleman minorities"\textsuperscript{123} and

\begin{itemize}
  \item \textsuperscript{118} Horowitz, supra note 3, at 657.
  \item \textsuperscript{119} Sowell, supra note 1, at 15. As Sowell stated: Preferential programs, even when explicitly and repeatedly defined as "temporary," have tended not only to persist but also to expand in scope, either embracing more groups or spreading to wider realms for the same groups, or both. Even preferential programs established with legally mandated cut-off dates, as in India and Pakistan, have continued far past those dates by subsequent extensions.
  \item \textsuperscript{120} Id. at 41; see also Janet Tai Landa, Trust, Ethnicity, and Identity: Beyond the New Institutional Economics of Ethnic Trading Networks, Contract Law, and Gift Exchange 112 (2001) (discussing the ethnically homogeneous middleman groups such as "the East Indians in East Africa, the Syrians in West Africa, the Lebanese in North Africa, the Jews in medieval Europe, and the Medici merchant-bankers in fifteenth-century Florence"); Thomas Sowell, Race and Culture: A World View 2 (1994) (noting the dominance of India's Gujaratis in the economy of the countries to which they migrated). See generally The Development of Indigenous Trade and Markets in West Africa (Claude Meillassoux ed., 1971) (discussing the emergence of minority trade diasporas in West Africa); Essential Outsiders (Daniel Chirot & Anthony Reid eds., 1997) (studying the role of the Chinese and Jews in Southeast Asia and Central Europe); Clifford Geertz, Peddlers and Princes: Social Change and Economic Modernization in Two Indonesian Towns (1953) (discussing Chinese traders and networks in Indonesia); Bonacich, supra note 27 (discussing middlemen minorities).
  \item \textsuperscript{121} Sowell, supra note 120, at 2.
  \item \textsuperscript{122} Cohen, supra note 2, at 59-62; Thomas Sowell, Migrations and Culture: A World View 310-14 (1996).
  \item \textsuperscript{123} See generally Sowell, supra note 120, at 27 ("[M]iddlemen facilitate the movement
“trade diasporas.”124 Historically, specialized, entrepreneurial minorities have established an important economic presence in their adopted countries, contributing to the “development of trade, money management, and capital accumulation in most of the Old World.”125 Though deemed pariah capitalists by kings and rulers, they were nonetheless tolerated and on occasion even encouraged to take on crucial “middleman” roles in “protocapitalist activities (moneyling, petty trade, tax farming) denounced by the guardians of social morality.”126 Although the Jews in Europe and the Chinese in Southeast Asia are two of the more well-known specialized minorities, many other ethnic groups have migrated from their homeland and through their newly established trading networks, grown to become economically significant in the host countries—for example, the Indians, especially the Gujaratis and Chettyars, as well as the Lebanese and Armenians.127

To counteract the economic dominance of these minorities, governments concerned about the “indigenous” majority have adopted majority preferential policies on the following grounds: they require little expenditure and are inexpensive alternatives to ethnic conflicts; they are necessary to achieve equality among different ethnic groups; and economic disparities constitute the underlying causes of ethnic conflict.128 In Malaysia, for example, the

of goods from the producer to the consumer, without necessarily physically producing anything themselves.”); Bonacich, supra note 27.

124. COHEN, supra note 2, at 83. Trade diasporas constitute
an interrelated net of commercial communities forming a trade network, or
trade diaspora—a term that comes from the Greek word for scattering, as in the
sowing of grain.... Trade communities of merchants living among aliens in
associated networks are to be found on every continent and back through time
to the very beginning of urban life.

Id. at 83-84 (quoting PHILIP D. CURTIN, CROSS-CULTURAL TRADE IN WORLD HISTORY 2-3
(1984)). Diasporic traders were also found in Africa, Anatolia, Mesopotamia, America before
Columbus, Armenia, and China. Id. at 84.

125. Anthony Reid, Entrepreneurial Minorities, Nationalism, and the State, in ESSENTIAL
OUTSIDERS, supra note 120, at 33, 34.

126. Id. at 35.

127. See COHEN, supra note 2, at 8-9, 14-25; FRANK H. GOLAY ET AL., UNDERDEVELOPMENT
AND ECONOMIC NATIONALISM IN SOUTHEAST ASIA 210-11, 220-23, 251-54 (1969); HOROWITZ, 
supra note 3, at 117-18; J.S. MANGAT, A HISTORY OF THE ASIANS IN EAST AFRICA 1-26 (1969);
SOWELL, supra note 120, at 46-47.

128. HOROWITZ, supra note 3, at 659 (“Beneath preferential policies lies a mind-set that
sees ethnic conflict as the product of economic differences and ethnic harmony as the result
of proportional distribution of all groups at all levels and in all functions of a society.”).
government has adopted a "national affirmative-action program" and "effectively segregated the economy between the indigenous majority, known as bumiputras or ‘sons of the soil’ and non-bumiputras, primarily ethnic Chinese who dominated the economy for generations" and the Indians, whose presence predated British colonialism to at least the fifteenth century. The expansion of commercial activities during British colonialism brought laborers from southern China to work in tin mines and those from India to work on rubber plantations. An ethnic division of labor developed, with particular ethnic groups overwhelmingly represented in certain occupational categories, as “[o]ccupational segregation ... conspired with residential, cultural, religious, educational, and language differences to maintain strong ethnic identities that inevitably limited any deep sense of national identity.” Over time, the success of the Chinese entrepreneurs in particular provoked deep-seated resentment from the indigenous population.

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132. Sowell, supra note 120, at 36-37; Ganguly, supra note 130, at 238; Jomo, supra note 131, at 238-39.
133. Ganguly, supra note 130, at 239; Jomo, supra note 131, at 238-39.
134. Jomo, supra note 131, at 240. “Ethnic identities were strengthened and shaped by colonial policies toward the various communities, and the identities were in turn reinforced by ethnic mobilizations.” Id.; see also Ganguly, supra note 130, at 239-40 (discussing the impact of British colonial education policies).
135. See Sowell, supra note 120, at 83 (“The Chinese in colonial Malaya often began as unskilled laborers on the rubber plantations or in the tin mines. The savings from their earnings on such jobs later enabled them to begin small, precarious businesses which eventually prospered.”).
136. Sowell, supra note 122, at 182. It is not accurate to point to British preferences for the Chinese as an explanation for indigenous resentment against the Chinese. According to Professor Sowell, the Chinese “in fact had fewer rights and less government-provided education available than did the Malays.” Sowell, supra note 120, at 153; see also Ganguly, supra note 130, at 240-41 (noting that the Chinese and Indians, viewed by the British as transient, “received an even less beneficent dispensation from the British” who “felt little obligation to educate the members of these communities for professions other than those in which they were engaged”).
At independence in 1957, the Malay Constitution, a product of the "grand bargain" with the British who had proposed citizenship for the Chinese and Indians, accorded citizenship to all residents born after Independence Day, but "also enshrined the special position of the Malays." The Malays' claim to legitimacy is based on assertions of indigenousness, like that of other groups, such as the Sinhalese in Sri Lanka, the Assamese in India, the Fijians in Fiji, the Muslims of Southern Thailand, the Kannadigas of Karnataka state in India, and the Bakonjo and Baamba of Western Uganda.

The Malay Constitution authorizes reservations in public service, education, land, and business permits for the Malays, because of their status as Bumiputras and in order to compensate for the economic backwardness of the Malays vis-a-vis the Chinese. The basis for the Malays' claim for preferences changed over time, so that by the late 1980s, with the growing Malay majority, due to higher fertility and lower emigration rates, preferences were based on the need to achieve "an equivalent share of the country's economic wealth." Although "special rights" for Malays were incorporated into the 1957 Constitution, they were seen by many Malays as feeble and inadequate to correct economic inequality. The government created a special Malay Bank, the Bank Bumiputra, to break Chinese control of the banking industry, and the Federal Agricultural Marketing Authority, to offset the power of rural middlemen, but the Chinese continued to exercise dominance in different sectors, such as retail business, capital

137. Independence Day was August 31, 1957. Ganguly, supra note 130, at 246.
138. Id. at 245-46; see MALAY. CONST. art. 89 (reserving Malay land rights); id. art. 153 (safeguarding special positions for Malays).
139. HOROWITZ, supra note 3, at 202. In fact, however, the Malays are not quite indigenous. The Orang Asli are the aboriginals who arrived before the Malays. Id. at 203.
140. HOROWITZ, supra note 3, at 654; Ganguly, supra note 130, at 246.
141. Ganguly, supra note 130, at 246; Jomo, supra note 131, at 241.
142. Jomo, supra note 131, at 242. The Malays' status as the majority was assured as well when Singapore, where ethnic Chinese constituted the majority, was ousted from the Malaysian federation on August 9, 1965. Ganguly, supra note 130, at 251.
144. Ganguly, supra note 130, at 251.
145. The Chinese own more than four-fifths of all retail businesses in Malaysia. SOWELL, supra note 1, at 46.
investment, and education. The average household income of the Chinese remained approximately twice that of the Malay.

The National Operations Council (NOC), formed to deal with the aftermath of an ethnic riot in 1969, determined that the roots of the violence were to be found in the continuing economic backwardness of the Malays. An ambitious New Economic Policy (NEP) was announced in 1971 with two objectives to be achieved over a twenty-year period—first, “to reduce and eventually eradicate poverty,” and second, to “accelerate the process of restructuring Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function.” To achieve the second objective, employment had to be restructured by sector to eliminate the ethnic division of labor; ownership of wealth also had to be altered, so that Malays, who owned less than 1.5% of capital assets at the time, were targeted by the government to increase its holdings to 30% of corporate sector assets by 1990, with the percentage owned by foreigners decreasing from 65 to 30%.

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146. Foreigners owned three-fifths of the total corporate equity capital investment in Malaysia in 1970, and the Chinese owned approximately three-fifths of the remaining domestically owned investment. Id.

147. If determined on the basis of examination results alone, Malays constituted only twenty percent of those admitted, with the Chinese filling up the remaining eighty percent. The Chinese also received a disproportionate share of science and engineering degrees. During the 1960s, the Chinese received 1488 Bachelor of Science degrees and 408 Bachelor of Engineering degrees, and the Malays and 4, respectively. Id. at 46-47.

148. See DONALD R. SNODGRASS, INEQUALITY AND ECONOMIC DEVELOPMENT IN MALAYSIA 82 (1980).

149. Donald R. Snodgrass, Successful Economic Development in a Multi-Ethnic Society: The Malaysian Case 6 (1995), at http://www.hiid.harvard.edu/pub/pdfs/503.pdf. One of the primary causes of the violence was resentment over Chinese support for opposition political parties, such as the new DAP, that favored dismantling of preferential policies. Ganguly, supra note 130, at 253-57. Riots against the Chinese resulted in approximately 800 killed and 6000 homeless. Id. at 254.

150. HOROWITZ, supra note 3, at 659; Ganguly, supra note 130, at 255-56.

151. As it was due to expire, the NEP was replaced by the National Development Plan (NDP) in 1990. Although the NDP is not significantly different from the NEP, it strategically emphasized privatization, with the benefits of privatization to be mainly distributed to the Malays. Ganguly, supra note 130, at 257 n.70.


153. HOROWITZ, supra note 3, at 657; Ganguly, supra note 130, at 261.

154. SECOND MALAYSIA PLAN, supra note 152, at 40-42; see Snodgrass, supra note 149, at 7.
Under a mandatory corporate restructuring scheme, Malaysian Chinese companies had to set aside 30% of their equity for Malays—"on financial terms very generous to the new shareholders" and usually with no choice about the identity of the Malay recipient of the set-aside. This policy of compulsory corporate restructuring, part of the overall economic "affirmative action" to favor the Malays, meant that any company that sought permission to expand or to apply for import or export licenses must sell 30% of its existing shares to Bumiputra-controlled entities or in the alternative, issue new Bumiputra shares to ensure a 30% Bumiputra share ownership. Additionally, "companies seeking a listing on the local stock exchange are required to have a bumiputra shareholding of at least 30%.”

To accomplish the creation of a new business class, the government established several new government agencies. The National Corporation, or Pernas, was created to buy assets to be held in trust to distribute to Malays, and the Urban Development Authority was created to grant Malays a share in development in cities. In addition, the Ministry of Works and Public Utilities, the primary contractor for government construction, must reserve at least 30% of its contracts for Malay firms, defined as those with at least 51% ownership.

155. Horowitz, supra note 3, at 667.
158. Christopher Adam et al., Adjusting Privatization: Case Studies from Developing Countries 228 (1992); see also Glain, supra note 129.
159. Ganguly, supra note 130, at 261 (discussing government investment in public corporations operated and managed by Malays and government investment schemes to attract private Malay investment to such enterprises); Jomo, supra note 131, at 242; see also Jesudason, supra note 156, at 72 (discussing the role of the state in increasing "the economic capacity of the Malay group"). But there are problems associated with this plan. First, lack of capital among Malays may result in only a few Malays being able to purchase the shares, resulting in a concentration of wealth among the Malays. Second, if the shares are distributed at a price below market, the likelihood that they will be quickly resold to non-Malays for capital gains is high. Consequently, "some state enterprises have transferred their holdings to a national equity corporation, which sells shares to individual Malays in a closely controlled national unit trust." Horowitz, supra note 3, at 668-69; see also Fong C. Onn, The Malaysian Economic Challenge in the 1990s: Transformation for Growth 79 (1989) (describing various government agencies created to bolster economic participation of Bumiputras).
160. Horowitz, supra note 3, at 667.
Malay ownership.\textsuperscript{161} Government-run banks, such as the Bank Bumiputra, and other newly created development banks, increased their lending to the Malay community, so that lending to Malays, which was at 4% in 1968, increased to 20.6% in 1980 and 28% in 1985.\textsuperscript{162}

The results have been mixed. While loans have increased to Malays, so have default rates. For example, the government organization created to provide credit to small businesses, the Council of Trust for the Indigenous People, reported that of the 55,000 loans made to Malay businesses, only 6000 had been repaid.\textsuperscript{163} The Bumiputra share of corporate stock at par values, for example, have also increased, from 1.5 to 15.6% between 1969 and 1982, to 19.3% in 1990 and 20.6% in 1995.\textsuperscript{164} At the same time, however, to bypass the requirement that Malays and Malay businesses be preferred, Malay front men, through "Ali Baba" schemes, have been used in license application, land conveyance, share issuance, and contract bids, although their primary involvement in the project is limited to the collection of a fee in exchange for the use of their name.\textsuperscript{165} Indeed, the ethnic Chinese have found ways to adjust and at times even benefit from such ethnically targeted restructuring.\textsuperscript{166}

Preferential policies in areas other than corporate restructuring, such as educational admissions and employment quotas, have had

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\textsuperscript{161} Ganguly, supra note 130, at 261-62.
\textsuperscript{162} Id. at 282.
\textsuperscript{163} Id.; Sowell, supra note 120, at 110 (noting that the incidence of default is high for government loans made to indigenous Malays). Even a government bank created to lend to Malays in fact extended loans primarily to the Chinese, Indians, and foreigners. Id. Many of the loans extended by MARAs, the Indigenous People's Trust, are also in default, as are many of the Urban Development Authority's rents. Horowitz, supra note 3, at 668; Glain, supra note 129 ("Nonperforming loans are estimated by private economists at about 20% of total assets, well above the government's official 8.7% figure.").
\textsuperscript{164} Jomo, supra note 131, at 244.
\textsuperscript{165} Horowitz, supra note 3, at 666; Sowell, supra note 120, at 52 (explaining Ali Baba schemes as Ali standing for the Bumiputra front man and Baba the Chinese businessman).
\textsuperscript{166} For example, because the new Malay shareholders in Chinese firms are often politically influential, the firms have benefitted from their political connections. Similarly, participating in joint ventures with the Urban Development Authority and Pernas have helped Chinese firms obtain approval for projects they might not otherwise have received. Horowitz, supra note 3, at 667-68; see also Jomo, supra note 131, at 250 (hinting at a Chinese-Malay collaboration).
\end{flushright}
a significant impact.\textsuperscript{167} Following the 1969 riots, the legislature amended the Malaysian Constitution to allow government control over university admission, resulting in an increase of 39.7\%, to 52.7\% Malay enrollment in degree-level courses from 1970 to 1973.\textsuperscript{168} To benefit Malays, English-language schools were converted into Malay-language schools, and to increase the number of Malays in higher education, different standards for Malays and non-Malays were set.\textsuperscript{169} Educational preferential policies have indeed boosted the number of Malay enrollment by 39.7\% to 52.7\% from 1970 to 1973.\textsuperscript{170} To benefit Malays, English-language schools were converted into Malay-language schools, and to increase the number of Malays in higher education, different standards for Malays and non-Malays were set.\textsuperscript{169} Educational preferential policies have indeed boosted the number of Malays in secondary and graduate schools,\textsuperscript{170} but they have also resulted in a sharp increase in the number of Chinese students who departed for universities in the West.\textsuperscript{171}

As the NEP extended preferences in employment, once confined to the public sector, to the private sector as well, the government established a quota system for Malay employment in commercial and industrial firms.\textsuperscript{172} Foreign corporations too must comply with such regulations because investment in Malaysia was conditioned on the creation of quotas for Malays.\textsuperscript{173}

Again, although these preferential policies were intended to be temporary, like those of India, they have “become more and more permanent.”\textsuperscript{174} As “preferences for Malays were made a permanent part of the country’s constitution ... [a], they did not merely persist; they grew stronger in higher education and spread to other sectors of the society.”\textsuperscript{175} The Malaysian policy, however, had to be modified when the realities of an economic crisis hit the country in 1998 and forced it “to sacrifice programs and policies once considered unassailable.”\textsuperscript{176} Faced with a heavy debt burden, the government

\begin{itemize}
\item \textsuperscript{167} HOROWITZ, supra note 3, at 660.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Ganguly, supra note 130, at 257-58; see also HOROWITZ, supra note 3, at 662 (showing that for the Lower Certificate of Education examination for admission to technical high schools, 91.7\% of non-Malays (Chinese and Indians) scored 3.4 or better in math compared to 37.1\% of Malay students).
\item \textsuperscript{170} Ganguly, supra note 130, at 260.
\item \textsuperscript{171} HOROWITZ, supra note 3, at 661; SOWELL, supra note 1, at 50.
\item \textsuperscript{172} Ganguly, supra note 130, at 260.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} HOROWITZ, supra note 3, at 678.
\item \textsuperscript{175} SOWELL, supra note 1, at 51.
\item \textsuperscript{176} Joseph Kahn, Ethnic Chinese in Malaysia Can Buy Big Equity Stakes, N.Y. TIMES, Feb. 25, 1998, at D4.
\end{itemize}
eased restrictions on Chinese equity ownership and allowed the ethnic Chinese to acquire big stakes in companies with government ties. In fact, the government announced in the midst of the crisis that "it may repeal the spirit, if not the letter, of affirmative action by permitting nonbumiputra companies to acquire a substantial or a controlling interest in bumiputra companies."  

2. Nigeria

Once deemed "Africa's bastion of democracy and stability," Nigeria has been marred by ethnic conflicts. Although Nigeria has no national ethnic majority, the Muslim Hausa-Fulanis of the north are the largest group, making up approximately thirty percent of the population, with the Yoruba of the southwest and the Ibo of the southeast being the next largest. The Hausas were bound by a common religion, Islam. The Yorubas, who shared a common ancestry, prided themselves on their successful resistance to Fulani attempts at conquest, and were organized by chiefdoms. The Ibos were made up of more than 200 subgroups of culturally and linguistically similar communities. These were all disparate African groups who lived in the West African regions that the British consolidated into the colony of Nigeria.

The Muslim groups that controlled the North, the Hausa-Fulanis, had swept south to conquer and convert local people until the

177. Id.
178. Glain, supra note 129.
180. See generally NNOLI OKWUDIBA, ETHNIC POLITICS IN NIGERIA (1978) (analyzing ethnic tension in Nigeria and the link between ethnicity and class systems).
181. See generally Sowell, supra note 1, at 69.
182. Islam was adopted at the beginning of the nineteenth century, during the holy war of 1804, when the Muslim Fulanis conquered the Haussa Kingdom. JAMES COLEMAN, NIGERIA: BACKGROUND TO NATIONALISM 39 (1958). The Muslim Fulanis were led by Usman Dan Fodio, who used the military machine at his disposal and Islam to establish a centralized administrative structure. The Emirs governed different parts of northern Nigeria. See E.D. Morel, NIGERIA: ITS PEOPLE AND PROBLEMS 99-102 (1968).
arrival of the British halted their conquest.\textsuperscript{186} Under British rule, the North and South were treated as two separate protectorates, each with different administrative apparatuses, with indirect rule in the North and direct rule in the South.\textsuperscript{187} Because the British ruled the North only indirectly through the Muslim Emirs, the North remained under Muslim control while the southern regions of the colony were subject to the influence of Christian missionaries.\textsuperscript{188} During British rule, many southern Yorubas became civil servants in the state bureaucracy, and the Ibo Christians became merchants.\textsuperscript{189} The northern Hausa-Fulanis, contained within the separate Muslim community of the North, became increasingly marginalized.\textsuperscript{190}

Consequently, institutions established by the British, such as schools and hospitals, were overwhelmingly located in the South.\textsuperscript{191} There were proportionately few children in primary or secondary schools\textsuperscript{192} and few adults in universities in the North.\textsuperscript{193} After independence in 1960, seventy-five percent of the army's riflemen were from the Hausa-Fulani region, and by 1965, half of the officer corps were of the Ibo group, as Ibos had the education needed to fill such positions.\textsuperscript{194} Even in the North itself, there was a "near-monopoly by Ibo of clerical and semi-skilled jobs in the postal service, banks, and railway."\textsuperscript{195} Southerners, primarily Ibos, also dominated the private sector in the North, as merchants, traders,

\textsuperscript{186} HOROWITZ, supra note 3, at 30 n.87.
\textsuperscript{187} COLEMAN, supra note 182, at 54-56.
\textsuperscript{188} SOWELL, supra note 1, at 70-71.
\textsuperscript{189} Mikell, supra note 185, at 106-07.
\textsuperscript{190} Id.
\textsuperscript{191} SOWELL, supra note 1, at 71-72. By 1950, for example, among the 160 physicians in Nigeria, seventy-six were Yorubas, forty-nine were Ibos, and only one was Hausa-Fulani, although the latter was the largest group in Nigeria.
\textsuperscript{192} Id. at 72. As of 1926, there were only 5210 children from the North among the 138,249 Nigerian children in primary school; among the secondary school students, none were in the North.
\textsuperscript{193} OKWUDIBA, supra note 180, at 117-18, 189. As late as 1951, of the sixteen million people in the North, there was only one person with a full university degree, and almost all Nigerian students in colleges and universities overseas were southern Nigerians. \textit{Id.} at 117-18.
\textsuperscript{194} HOROWITZ, supra note 3, at 448, 451.
\textsuperscript{195} SOWELL, supra note 1, at 71 (quoting ROBERT MELSON & HOWARD WOLPE, NIGERIA: MODERNIZATION AND THE POLITICS OF COMMunalISM 127 (1971)).
factory workers, and artisans. The North and the Hausa-Fulanis thus were politically and demographically dominant, but economically and educationally far behind the South and the southern ethnic groups such as the Ibo and the Yoruba.

At the time of independence, northern political leaders pushed for a full-blown campaign to “Nigerianize” the country, which in reality, became a “Northernization” policy. Northern Nigerians feared that “in a self-governing Nigeria the north would in effect be a backward protectorate governed by southerners.... [T]he threat of southern domination, fancied or real, was the major stimulant in the northern awakening.” In the First Nigerian Republic, the Public Service Commission of the Northern Region declared in 1957 that “it is the policy of the Regional Government to Northernise the Public Service: if a qualified Northerner is available, he is given priority in recruitment; if no qualified Northerner is available, an Expatriate may be recruited or a non-Northerner on contract terms.” Regional quotas were also used to recruit the officers corps of the army and to give out scholarships in higher education. The policy meant in practice that European expatriates were preferred over southerners in the service of the northern government. Indeed, “this fits a more general international pattern of modestly successful middleman minorities being hated more virulently than genuinely privileged nobility or multi-millionaires.”

“Northernization” has yielded dramatic results. In 1959, only one senior civil servant in eight in the North was a Northerner, but by 1965, Northerners outnumbered European expatriates and Southerners combined. Preferences also spread to the federal

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196. Id.
197. Id. at 73.
198. COLEMAN, supra note 182, at 188.
199. SOWELL, supra note 1, at 73 (quoting THE NIGERIAN POLITICAL SCENE 108 (Robert O. Tilman & Taylor Cole eds., 1962)); see also HOROWITZ, supra note 3, at 655. The objective of the program, which was vigorously supported by northern businessmen, was to sever northern dependence on southern civil servants and merchants by granting preferences in “employment, contracts, scholarships, land, and loans to Northerners.” Id. at 116.
200. HOROWITZ, supra note 3, at 655.
201. SOWELL, supra note 1, at 73.
202. Id. at 74.
203. HOROWITZ, supra note 3, at 655.
government, so that Northerners were favored in appointments and promotions as well as in admission to federal schools and universities. 204 In 1966, when Ibo military officers overthrew the government and announced the adoption of national norms for all applicants without regard to ethnicity, they were in turn overthrown by northern Muslim military officers. 205 These events were followed by the systematic massacres of Ibos in the North, the expulsion of Ibos from the region and their exodus to the South, followed by efforts to secede from Nigeria through the declaration of the independent nation of Biafra. 206

The ensuing civil war, in which one million people died, did result in the modification of preferential policies in Nigeria. 207 The military regime repealed state policies that granted preferences in employment to “indigenes of a state.” 208 Nonetheless, the constitution of the Second Republic provided generally that public-sector positions should “reflect the federal character of the country” so that “there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups” in central government agencies. 209 In other words, although no group is now singled out and systematically excluded, the policy is designed to “give something to every group or region, to have federal appointments and university admissions, for example, reflect ‘the federal character’ of Nigeria.” 210

II. PREFERENCES FOR “ONE’S OWN”

In contrast to Part I, which examined government ethnic preferences, this Part examines the sort of underlying in-group preferences that may explain the existence of different types of ethnic economic activities, that is, economic activities concentrated along ethnic lines. An international perspective that emphasizes comparative, multi-country analysis will show that throughout

204. Id.
205. Sowell, supra note 1, at 75.
206. Id.
207. Horowitz, supra note 3, at 655.
208. Id.
209. Id. (quoting Nig. Const., §§ 14(3), 157(5)).
210. Sowell, supra note 1, at 76.
history, various groups “have become prominent or predominant in particular occupations in countries all over the planet,” that is, established ethnic economies. Some groups have also become predominant in certain economic niches. For example, although the dominance of Jews in New York’s garment industry might be explained by pointing to the influx of Jewish immigrants into the city during that period of U.S. history, an international perspective will reveal that Jews have been prominent, if not predominant, in the apparel industry over a period longer than the entire history of the United States, and in countries ranging from medieval Spain to modern Australia, from the Ottoman Empire to the Russian Empire, as well as in Argentina, Brazil, Germany, and Chile.

Ethnic group predominance in certain economic sectors—for example, the concentration of Koreans in particular retail businesses in the United States, such as liquor and wig stores—might be due to factors found in the host country. Or perhaps such predominance “reflects their traditional positions in the occupational hierarchies of their homeland prior to migration,” which explains why “[m]igrants from ‘commercial cultures’ ... like

211. SOWELL, supra note 120, at 2.
212. See supra note 7.
213. See supra text accompanying note 11. Group differences, “disparities,” or “imbalances,” SOWELL, supra note 120, at 3, have been the norm despite claims that “there will be less ethnic conflict if all groups are proportionately represented at all levels in all sectors of the economy. One reason the truth of this proposition remains elusive is that few, if any, societies have ever approximated this description.” HOROWITZ, supra note 3, at 577. The fact is that many ethnic groups, in countries all over the world, have produced, recreated, and perpetuated certain “[g]roup occupational patterns,” or as some have charged, “taken over,” “monopolized,” or acquired a “stranglehold” in certain sectors, even under free market conditions. SOWELL, supra note 120, at 3; see also id. at 17-18; Bonacich, supra note 27, at 590. To this extent, I agree with the claim that increased marketization may enhance the economic dominance of certain ethnic minorities and the entrenchment of certain ethnic economies, although my proposal to “solve” this problem would differ from Chua’s. See supra note 38; cf. Chua, supra note 28, at 29-33. There are, of course, other explanations for this pattern—the imposition and assignment of certain niches to certain ethnic groups on the basis of societal stereotypes. See SOWELL, supra note 120, at 11-12.
214. SOWELL, supra note 120, at 2.
the Parsis, the Banyas, the money lending Bhatias, the Memons, the Bohras, the Khojas—all Gujarati groups—long dominated trade and commerce in West India and later in East Africa as well. Similar observations may be made about Chinese retailers, India's Gujarati merchants, German farmers, Jewish middlemen, and Lebanese peddlers in numerous diverse countries.

Besides the establishment of occupational niches, other group patterns span across countries: the clustering of newcomers and, consequently, the creation of ethnic economies and ethnic enclaves. In all three instances (ethnic economies generally, ethnic enclaves, and ethnic niches), the ethnic group generally exhibits certain basic characteristics, such as a tendency towards "clannishness," adherence to group norms and hence the maintenance of group boundaries separating insiders from outsiders, allowing the group to leverage its reserve of social capital into economic capital for group members. Again, examples of such insular proclivities abound among widely varying ethnic groups in different countries: the Hasidic Jews in New York City's jewelry industry, Lebanese traders in the interiors of Sierra Leone, the Chinese across Southeast Asia, the Indians in Uganda, the ethnic Marwari in India's state of Assam, the ethnic Chettys from India in rural Burma, and more recently, the Koreans and Indians in the United States, the Turks in the garment industry of Paris and...
Berlin, the Algerians, Moroccans, and Tunisians in retail commerce in France, and so on.

It is important to note, as the discussion above reveals, that this pattern is not limited to developing countries only, where the absence of formal institutions, the rule of law, a credible judiciary, and competitive markets, it is often assumed, explain the existence of ethnic economies and ethnic networks.

Even in advanced, industrialized economies like the United States, there are parallel pockets of economic activities that lie outside the scope of formal laws as well as activities within ethnic economies that rely more on common ethnicity than on the universal law of contract. The tendency of certain minority groups to be dominant in certain economic activities prevails in both developing and developed countries.

Thus, to the extent that minority ethnic economic dominance is not due merely to legal or institutional underdevelopment, but may be correlated to some other factors, such as the prevalence and resilience of informal, personalized exchanges and in-group preferences, the relevant policy prescriptions would need to expand beyond the standard proposal for legal and institutional reform. Indeed, the law and development movement would need to confront directly whether minority ethnic economies are a positive or negative phenomenon and determine what the response of the legal system should be. As I discussed above, some have been concerned that there is undue “overrepresentation” of certain minority groups in certain entrepreneurial activities and consequently disparities in wealth among ethnic groups, especially in developing countries.

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224. Mirjana Morokvasic, Immigrants in Garment Production in Paris and in Berlin, in IMMIGRATION AND ENTREPRENEURSHIP, supra note 216, at 75, 76-82.

225. Gildas Simon, Immigrant Entrepreneurs in France, in IMMIGRATION AND ENTREPRENEURSHIP, supra note 216, at 125, 132-34.

226. Davis et al., supra note 3, at 332 (describing the claim by some that “low quality institutions play a large role in explaining reliance on truncated intra-ethnic group contracting networks ...”); see also DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 67 (1990) (demonstrating that ethnic occupational patterns or segregation, and the entrenchment of ethnic minorities in certain entrepreneurial activities, are causally related to institutional underdevelopment).


228. Cf. Davis et al., supra note 3, at 350 (discussing disparities in various ethnic groups’ economic performance).
resulting in an exacerbation of ethnic conflicts. The proposed
solution is governmental “affirmative action” policies, through eth-
nically targeted corrective measures aimed at favoring economically
weak ethnic majorities.\textsuperscript{229} Others have argued the opposite, that
“disproportionate representation of minorities in entrepreneurial
activities is not an appropriate index of those disparities.”\textsuperscript{230}
However, neither has studied how ethnic economies work, whether
in economically developing or developed countries, and neither has
confronted head-on the role of law in facilitating, accommodating or
breaking up private, intra-group preferences that underlie ethnic
economies.

A. The Ethnic Economy Generally

1. Introduction

Ethnic economies, like traditional capitalism, are based on
personal relationships or ethnic ties. For Max Weber, certain
groups, such as Jews and the outcaste, are ethnically insular and
segregated from the majority by their observance of “taboos, [and] hereditary religious obligations in the conduct of life,”\textsuperscript{231}
and therefore, not sufficiently rational or free of communal sentiments
to engage in bourgeois capitalism. Instead, according to Weber,
“Jewish capitalism was speculative pariah-capitalism, while the
Puritan was bourgeois organization of labour.”\textsuperscript{232} The pariah status
of Jews also instilled in them a “dual ethic,” that is, the adoption of
one set of ethics for dealing with other Jews and a separate set for

\textsuperscript{229} See, e.g., Chua, \textit{supra} note 3, at 347-62; Chua, \textit{supra} note 28, at 62-63 (arguing that
market development will create distributional conflicts along ethnic lines and should thus
be tempered by government restrictions on market activities of economically dominant ethnic
minorities); \textit{see also} Albert O. Hirschman, \textit{The Changing Tolerance for Income Inequality in
the Course of Economic Development}, 87 \textit{Q. J. Econ.} 544, 544-65 (1973) (arguing generally
along the same line).

\textsuperscript{230} Davis et al., \textit{supra} note 3, at 360 (emphasis added). The remedy is not ethnic
targeting, but public investment in education, health care, and other social and legal
institutions “that are likely to broaden the economic opportunity set for most members of the
population, without pre-judging the kinds of economic activities the population or sub-groups
should be encouraged or induced to pursue.” \textit{Id.}

\textsuperscript{231} \textit{MAX WEBER, THE SOCIOLOGY OF RELIGION} 109 (E. Fischoff trans., 1963).

\textsuperscript{232} \textit{MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM} 245 (Talcott
Parsons trans., 1930).
dealing with non-Jews—a sharp contrast to modern capitalism, which requires rational treatment of others according to objective standards rather than irrational attachment to or preference for one's own.\textsuperscript{233} For Weber, pariah capitalism was inferior to the rationality of modern capitalism and would be replaced by the latter.

Other theorists, following the trajectory set by Weber, expanded on Weber's theory with a wealth of literature on middleman minorities and trade diasporas.\textsuperscript{234} Like pariah minorities, middleman minorities and trade diasporas are marginal peoples with "caste-like attributes"\textsuperscript{235} and shared loyalties\textsuperscript{236} who continue the traditions developed in precapitalist societies to engage in trade and commerce. As outsiders, diasporic traders develop an "aptitude for economic specialization" because the diaspora's "psychological self-isolation would prove impossible if those who practised it did not, at the same time, develop on the economic plane a special efficiency in the exploitation of such economic opportunities as had been left open to them."\textsuperscript{237} Similarly, middleman minorities are viewed as uncomfortably "lodged between ... any two ethnic groups that stand in a classlike relation of superordination and subordination. The dominant elite of the dominant group uses the middleman minority to foster economic development, but turns it into a scapegoat when things go wrong."\textsuperscript{238}


\textsuperscript{234} See supra note 19.

\textsuperscript{235} COHEN, supra note 2, at 101.

\textsuperscript{236} For members of diasporas,

\textsuperscript{237} COHEN, supra note 2, at 103.

\textsuperscript{238} Id.
The sociology of middleman minorities, however, has tended to emphasize the role of the middleman in developing economies, whose presence would predictably no longer be needed once modernization and appropriate institutional reforms were adopted. The literature's emphasis on the Third World context also implies that ethnic capitalism does not exist in developed economies, although many studies have shown otherwise. Similarly, the focus in middleman minority scholarship on historic trading peoples and sojourning minorities such as Jews, Chinese, Armenians and Lebanese, makes the theory not wholly applicable to African Americans in the United States, or more recent merchant groups, such as the Koreans and Cubans who have had no trading tradition.

In recent years, a new literature that emphasizes the sociology of ethnic entrepreneurship and the ethnic economy has flourished, focusing on the study of different types of ethnic economies, how they emerge, and their social capital foundation. An ethnic economy is a general concept used to include any ethnic group's self-employed, its employers, coethnic employees, if any, and their unpaid family workers. An ethnic economy may be created by immigrant entrepreneurship or ethnic entrepreneurship, that is, "ethnic minority specialization in self-employment without ... imposing the requirement of foreign-born origin."

Ethnic entrepreneurship may be viewed as "a set of connections and regular patterns of interaction among people sharing common national background or migration experiences." The ethnic

239. LIGHT & BONACICH, supra note 17, at 17-20.
241. LIGHT & GOLD, supra note 7, at 9.
242. LIGHT & BONACICH, supra note 17, at 18.
243. ROGER WALDINGER ET AL., ETHNIC ENTREPRENEURS: IMMIGRANT BUSINESS IN
economy is thus a product created by ethnic minorities themselves, as distinct from the jobs generated by the mainstream labor market, and does not include coethnics who work for wages in the general economy.\textsuperscript{244} In cases where an ethnic group is an outcast or a pariah, its ethnic economy becomes all the more important to the group's economic survival. This was the case, for example, of Japanese Americans during World War II and free blacks in the South.\textsuperscript{245} After the U.S. Civil War, for example, as increased segregation in southern cities severed ties that had once linked whites to black businesses, blacks made a concerted effort to develop what W.E.B. Du Bois called the group economy—"a cooperative arrangement of industries and services within the Negro group such that the group tends to be a closed economic circle largely independent of the surrounding white world."\textsuperscript{246}

In the same way that ethnic economies contributed to the economic progress of immigrant and minority groups in early U.S. history,\textsuperscript{247} the creation of ethnic economies is particularly crucial for marginal groups now because of recent economic trends. There is

\textsuperscript{Industrial Societies 33 (1990).}

\textsuperscript{244.} LIGHT & GOLD, \textit{supra} note 7, at 19.

\textsuperscript{245.} In 1941, the year Pearl Harbor was attacked, 56.2\% of Japanese-American men and 44.4\% of the women worked in the Japanese ethnic economy, although those numbers are considered low because among those Japanese listed as wage workers, some had Japanese-American employers and could have been classified as ethnic economy employees. LIGHT & GOLD, \textit{supra} note 7, at 28-29; \textit{see also} Butler, \textit{supra} note 32, at 203-04 (describing the Japanese-American ethnic economy as one steeped in self-help and ethnic solidarity).

Even relatively small ethnic economies contribute to coethnic employment in significant ways. For African Americans, nearly one million workers worked in the black American ethnic economy in 1992. LIGHT & GOLD, \textit{supra} note 7, at 69. If that ethnic economy were to disappear, one would have to wonder whether those workers would find jobs in the general labor market or would become unemployed. \textit{Id.; see also} Butler, \textit{supra} note 32, at 204-05 (discussing how African Americans before the Civil War in particular also had a vibrant self-help tradition that emphasized economic development and independence).

Before the abolition of slavery in the United States, small bases of businesses owned by free blacks existed, especially in southern cities, such as New Orleans, where black entrepreneurs had property and businesses valued at more than $9 million. WALDINGER \textit{et al.}, \textit{supra} note 243, at 58-59.

\textsuperscript{246.} WALDINGER \textit{et al.}, \textit{supra} note 243, at 59 (quoting W.E.B. DU BOIS, \textit{ECONOMIC CO-OPERATION AMONG NEGRO AMERICANS} 179 (1907)); \textit{see also} W.E.B. DU BOIS, \textit{THE SOULS OF BLACK FOLK} 43 (Bedford Books 1997) (1903) (encouraging the Negro people to develop skills and to strive towards brotherhood).

\textsuperscript{247.} SALO W. BARON \textit{et al.}, \textit{ECONOMIC HISTORY OF THE JEWS} 86-89 (1975); BONACICH & MODELL, \textit{supra} note 7, at 3-4; IVAN LIGHT, \textit{ETHNIC ENTERPRISE IN AMERICA} 4-6 (1972).
evidence that marginal groups with strong ethnic economies may be more buffered from economic hardship than those without.\footnote{248} With the economy of the current industrialized countries shifting from “high-volume” manufacturing to “high-value” information-oriented and technology-driven services, the mismatch in skills for low-skilled groups is likely to intensify.\footnote{249} Ethnic economies will be necessary for those groups whose skills are in declining demand from the standpoint of the international economic system because they will be an important avenue, against the backdrop of changing economic conditions, for the economic mobility of marginal groups.\footnote{250} Economic data show that small businesses employ substantial proportions of the population of the United States as well as Europe, a trend accompanied by the growth of ethnic entrepreneurship in both regions.\footnote{251}

The main characteristics that underlie ethnic economies and their particular subvariants—the ethnic enclave and the ethnic niche—are described more thoroughly as the Article progresses, and particularly in Part II.B below. This Part will briefly introduce and highlight some of the key concepts associated with ethnic economies generally.

\footnote{248. The importance of an ethnic economy for coethnics may be illustrated by comparing the Cuban-Mariel refugee experience with the Haitian refugee experience in Miami. The Cuban Mariels who fled to the United States in 1979 were for the most part black and working-class, as were the Haitians. Light et al., supra note 216, at 34. For Haitians, 58.5% were unemployed, 0.7% were employed in the Haitian ethnic economy, and 40.8% were employed in the general economy. \textit{Id.} By contrast, for the Cuban-Mariel refugees, 26.8% were unemployed, 46.1% were employed in the Cuban ethnic economy, and 27.1% were employed in the general economy. \textit{Id.} Thus, although Haitians had a 13.7% higher employment rate in the general economy than Cuban Mariels, they also had a 31.7% higher unemployment rate than the Cubans. \textit{Id.} at 34-35. For the Mariels in Miami, “86 percent lived in Cuban neighborhoods, 75 percent patronized mostly stores owned by co-nationals, and 82 percent read exclusively Spanish-language newspapers.” WALDINGER ET AL., supra note 243, at 77 (quoting Alejandro Portes, The Social Origins of the Cuban Enclave Economy of Miami, 30 SOC. PERSPS. 340, 351 (1987)). At the same time, however, it is worthwhile to note that the employment numbers might not be accurate for the Haitians, primarily because “Haitians in Miami operated a very extensive informal economy that these official statistics did not and could not measure.” Light et al., supra note 216, at 35.}

\footnote{249. WALDINGER ET AL., supra note 243, at 17.}

\footnote{250. \textit{Id.}}

\footnote{251. \textit{Id.} at 17-19, 50-51.
2. Defining Characteristics

In the United States, certain ethnic groups, such as the Israelis in Los Angeles, the Iranians, and the Koreans, have developed significant ethnic economies. In the United Kingdom, Indians and Pakistanis have achieved high rates of self-employment, as have Moroccans, Tunisians, and Chinese in France.

Depending on market conditions, some ethnic economies serve the ethnic community's needs (where opportunities for expansion may be more limited), whereas others "break out" to serve the greater nonethnic populations (where opportunities tend to be greater). Businesses that cater to their ethnic consumers tend to be those that deal with ethnic consumer products, such as tropical goods and "exotic" specialties among Hispanics and Asians in the United States, Surinamese fruits or vegetables in the tropica shops in Amsterdam, or ethnic-focused services, such as immigrant-owned travel agencies, law firms, and realty and accountant businesses that ethnic clients tend to prefer because of the personalistic ties that characterize such relationships. The potential for growth for ethnic economies that are restricted to the ethnic market is likely to be circumscribed because the ethnic market itself will be smaller than the general market, and the business conditions will tend

252. For example, data from 1994 show that the Israelis in Los Angeles had a self-employment rate of 80%; from 1987 to 1988, about 56.7% of Iranians were self-employed, with another 4.6% of Iranians working for them while 47.5% of Koreans were self-employed, with another 27.6% working as their employees in 1989. LIGHT & GOLD, supra note 7, at 29-30. Most of these firms were small, falling in a category between proprietorships and big businesses in terms of gross receipts. LIGHT & BONACICH, supra note 17, at 165. As early as the 1980s, 22.5% of Koreans in Los Angeles were self-employed or were unpaid family workers—an impressive figure given the fact that only 8.5% of the Los Angeles County labor force was similarly situated. Id. at 3. For Koreans, 2.2% were unpaid family workers compared with 0.4% of non-Koreans. Id. at 163.

253. WALDINGER ET AL., supra note 243, at 40.

254. Id. at 21.

255. Id. at 22. In recent years the phone card business has become increasingly "ethnicized." There is a proliferation of ethnic businesses that specialize in selling prepaid phone cards to homesick immigrants who use them to place overseas calls to relatives back home. Generally, Indian-owned companies acting as wholesalers buy minutes from carriers and "resell them through middlemen to customers in the form of a phone card." Susan Sachs, Immigrants See Path to Riches in Phone Cards, N.Y. TIMES, Aug. 11, 2002, at A1.
toward overcompetition, often resulting in a high failure rate or low returns for owners.256

By contrast, those ethnic economies with access to nonethnic customers often exploit the opportunity by discovering or creating niches in markets or sectors that are underserved, for example, those in urban centers where "techniques of mass production or mass distribution do not prevail."257 Examples include street peddling in the informal sectors in the United States or Paris and French towns bordering Italy and Germany, by Senegalese traders selling toys and art negre; or immigrant retailers who have carved out a niche in the food retail industry because the urban corner grocery business tends to be neglected by large suburban supermarket chains in Paris, London, and cities in the United States.258 Where certain industries, for example, the garment industry, are characterized by stable and unstable demands, larger firms handle staple products, which allows smaller firms to respond to the "fluctuating portion of demand"259 by leveraging their high labor-to-capital ratios260 and taking advantage of low-

256. WALDINGER ET AL., supra note 243, at 23. Some ethnic economies, such as that of the Cubans in Miami, might begin in a limited way, serving the ethnic market, and then break out to serve nonethnic clientele. Id. at 24, 57. Other examples include Chinatowns in cities such as New York City, San Francisco, and Los Angeles. Id. at 68, 107. Black businesses, which are generally small and concentrated in the personal service sector, such as hair care, have remained "closed markets" with less growth potential. Id. at 60. For a discussion of the underdevelopment of black businesses, see id. at 62-65.

257. Id. at 25.

258. Id. at 25, 103; see also Linda J. Wong, The Role of Immigrant Entrepreneurs in Urban Economic Development, 7 STAN. L. & POLYREV. 75, 76 (1996) (discussing the growth of ethnic food products). In the predominantly black North Lawndale section of Chicago, for example, there was, as of 1988, only one supermarket for 60,000 people; North Lawndale has since attracted Korean and Arab grocers occupying the quintessential "middleman minority" position. For a discussion of the conflicts between African Americans and Koreans in inner cities, see Reginald Leamon Robinson, "The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans, 67 S. CAL. L. REV. 15 (1993).

259. WALDINGER ET AL., supra note 243, at 26; Wong, supra note 258, at 77, 80.

260. Reliance by owners on high labor-to-capital ratios for economic viability is one of the primary defining characteristics of ethnic economies. For example, Korean-owned businesses, like others in ethnic economies, rely extensively on unpaid family labor and/or coethnics who work long hours, often for wages lower than the standard wages in the industry. LIGHT & BONACICH, supra note 17, at 170, 175-76. According to the 1980 U.S. Census, Korean proprietors worked 16% longer than did non-Koreans and also had approximately 2.7 times more unpaid family labor than did non-Korean entrepreneurs. Id. at 172-73. About 56% of Korean firms surveyed reported relying on nuclear or extended kin at work. Id. at 179. For those who used nonkin employees, the average number of such employees was 3.6. Id. Among
entry costs. This means that ethnic economies that have at their disposal only a small capital base but a large family and kin labor reservoir have managed to enter the garment trade. Chinatown in Paris, for example, has become a production center for textiles.

Whether ethnic economies operate in restrictive ethnic markets or open markets, they are generally characterized by a common tendency to hire other coethnics, as is the case, for example, with Koreans and Cubans in the United States. This tendency of ethnic entrepreneurs as a whole (especially immigrants) to “employ coethnics at rates vastly above chance levels” and in settings where their native tongue is predominantly used, is repeated among many ethnic groups in many countries; such indeed is the

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firms that used paid workers, 37.4% said that the workers were all Korean, 20.6% said that they were “American,” 19.6% said that they were Mexican, and the rest reported other Asians and blacks. Id.

Korean garment contractors, specializing in products that larger firms cannot supply efficiently, were among the largest employers of Korean workers in Los Angeles, employing 5400 Korean workers in 1979. Id. at 150; see also Pyong Gap Min, Korean Immigrants in Los Angeles, in Immigration and Entrepreneurship, supra note 216, at 197.


262. Id. at 68. Recent Korean immigrants come in “complete family units” and hence have the advantages of access to a trusted and cheap source of labor. Id. at 72.

263. Id. at 103.

264. Koreans in Los Angeles not only had, even in the early 1980s, a 22.5% self-employment rate but also employed an additional 40% of coethnics; thus, approximately 62% of Koreans in the county were either self-employed or worked in Korean-owned firms—most in the service and retail sectors. These sectors are in low income, non-white neighborhoods neglected by big corporations. ILLSOO KIM, New Urban Immigrants 258 (1981); LIGHT & BONACICH, supra note 17, at 3-4, 161, 318-19; SOWELL, supra note 120, at 12; Austin Scott, Shopping Center Hit by Delay, L.A. TIMES, Dec. 8, 1981, pt. II, at 1; Austin Scott, Watts Shopping for a Supermarket, Can’t Find Any Takers, L.A. TIMES, June 6, 1983, pt. II, at 1. Nationwide, 13.5% of employed Koreans in the United States were self-employed or unpaid family workers, compared with 7.3% of all employed persons being so situated. LIGHT & BONACICH, supra note 17, at 7.

265. Along with Koreatown in Los Angeles, Little Havana in Miami too has a significant, fast-growing ethnic economy. Min, supra note 260, at 190. In 1967, there were 919 Cuban-owned enterprises in Miami, and by 1976, there were 8000. Wilson & Portes, supra note 9, at 303.

Twenty percent of Cubans in Miami were self-employed in 1979, and forty-nine percent worked in Spanish-speaking firms owned by coethnics. Alejandro Portes et al., Six Years Later: The Process of Incorporation of Cuban Exiles in the United States: 1973-1979, 11-12 CUBAN STUDS. 1, 1-24 (1981-82). Returns, based on their respective human capital level, were substantially equivalent to those in the mainstream economy. Wilson & Portes, supra note 9, at 314.

266. Light et al., supra note 216, at 37.
case for one-third of the South Europeans and Chinese in Toronto, for example.  

Here too, it was found that "[f]or members of minority groups with low levels of education, work in settings controlled by their own group is quite attractive from the standpoint of income opportunity."  

Mexican immigrant employers, followed by U.S.-born Mexicans, for example, were most likely to hire other Mexicans, including undocumented Mexican workers.  

In Paris, in 1990 among small garment firms, 22.45% were owned by Turks and 8.32% owned by Yugoslavs.  

There too, ethnic owners hired illegal coethnic immigrants as part of the industry's informal sector as well as coethnic legal or documented workers to work in the ethnic economy.  

In France, the economic success of the Maghrebians (Algerians, Moroccans, and Tunisians) in a variety of trades—"[r]outine neighborhood trade" primarily with French customers, "[i]ntracommunity' trade" with coethnic customers, and "[e]xotic' trade" selling specific products to French customers—can be similarly explained by their reliance on the ethnic system: family labor and coethnic workers.  

Tunisians in Paris, whether Jewish or Muslim, are concentrated in the doughnut making business and run shops that "traditionally employ[] members of the same family or the same ethnic group exclusively, and outsiders are rare."  

The Asian Indian ethnic economy, in the United States and elsewhere, has "clustered in businesses that employ new immigrants from India, relatives and nonrelatives, and that cater to the needs and tastes of South Asians."  

For many groups, the existence of the ethnic economy allows group members to evade unemployment.

268. Id. at 164.
269. Light et al., supra note 216, at 38.
270. Morokvasic, supra note 224, at 81.
271. Id. at 76, 85. To the extent that the ethnic or immigrant economy is partially or wholly informal, it shares certain characteristics with informal economies generally: lack of long-term job security for workers, lack of health and pension insurance, and labor law violations, including health and safety regulations. Id. at 88. See generally Symposium, The Informal Economy, 103 YALE L.J. 2119 (1994) (describing characteristics of the informal economy and its political legal and social implications for minority groups).
272. Simon, supra note 225, at 133-34.
273. WALDINGER ET AL., supra note 243, at 102.
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because they have an alternative to wage employment in the general labor market.

Consequently, ethnic firms tend to be tightly knit and homogeneous “at the core,” with family members and kin, either by blood or marriage, in the inner circle and unrelated coethnics beyond that. For example, among the Iranian firms in Los Angeles, 2.7% of paid employees were related to the owners; 35.7% were Iranians and shared the religion of the owner; 19.5% were Iranians who did not share the religion of the owner; and 42% were non-Iranians. Generally, when ethnic businesses mature, however, labor shortages will usually compel a change in hiring policy. In the London garment industry, for example, Greek Cypriot firms had to employ more Asian and Afro-Caribbean workers when they expanded and as more Greek Cypriots became business owners.

Thus, generally speaking, the tendency to hire coethnics is itself part of the defining characteristic of having an ethnic economy. One of the main ingredients that provides ethnic economies with their comparative advantage is the coethnic labor force (whether kin or non-kin) and its direct connections and attachments to the ethnic community. In addition, ethnic economies exist to create, to perpetuate, and hence, to capture jobs for coethnics. But preference for one’s coethnics, however, also means non-preference for non-coethnics. Thus, “[t]he Chinese in Southeast Asia, Indians and Lebanese in Africa, and Vietnamese and Koreans in America’s black ghettos, are often accused of not hiring local

275. As a result, the bind of ethnicity, clan, and kinship may also mean that the workforce is very loyal and identifies with the ethnic labor force rather than the host labor force. To the extent that wages are lower in the ethnic economy, a conflict may arise between the general labor force and ethnic labor force. For example, when the Retail Food Clerks, Local 770 in Los Angeles attempted to organize sales workers in the grocery business in 1937, appeals to Japanese workers to unionize and fight for an American living standard were rejected handily. Bonacich, supra note 27, at 591. Ethnic employers, however, also incur certain reciprocal obligations that go beyond the conventional employer/employee context. WALDINGER ET AL., supra note 243, at 39-47.

276. LIGHT & GOLD, supra note 7, at 38.

277. Id. at 39.

278. WALDINGER ET AL., supra note 243, at 37-38.

279. Studies show “group members consciously build upon ethnic social networks to find jobs, to attempt to control access to those jobs ... and to do all the other things that affect success or failure in the economy.” LIGHT & GOLD, supra note 7, at 76 (alteration in original) (citation omitted).
people for responsible positions. Such complaints against middle-
man minorities are long standing, as well as widespread."^{280}

Although such preferences may be purely personal, or part of a
tradition of "high ethnic attachment,"^{281} there is also an economic
basis for them. The cost of sorting and screening coethnic workers
may be lower when they are of the same group, "either because of
specific knowledge of the individual or his family available within
the group or because of a greater facility in reading cultural cues
peculiar to the group."^{282} The ethnic workforce can be replicated
cheaply in the ethnic economy because both the employers and
employees rely on "the use of networks for finding work, for
obtaining a cheap and cohesive work force, for financial support,
and for market transactions."^{283} To overcome the obstacles en-
countered in the general labor market, ethnic workers rely on
informal networks for a competitive edge over other workers—
connections, for example, made through word of mouth or ethnic
and immigrant newspapers^{284} with an established "information
system that channel[s] them into those industrial niches already
dominated by coethnics."^{285}

Besides coethnic recruitment and hiring, ethnic economies may
rely on other forms of economic preferences as well. In nonretail
transactions, for example, in the sale and purchase of liquor
licenses, coethnics also tend to buy and sell to one another. Korean

280. Sowell, supra note 120, at 51. The Young Baganda Association in 1919 complained
that Indian firms in Uganda did not hire enough Baganda employees; Assamese in India
complained that Marawari businesses did not hire enough Assamese in the state of Assam;
in Senegal, Senagalese complained that the Lebanese businessmen did not hire Africans;
Nigerians complained that certain ethnic Nigerians from certain regions tended to hire
others like them and not the locals. Id.; see also Light & Gold, supra note 7, at 3-4
(describing mob attacks on African-American businesses in Tulsa, Oklahoma in 1921;
Jewish-owned businesses in Germany in the 1930s to punish "Jews for economic crimes";
Korean-owned businesses in South Central Los Angeles in 1992; Chinese shops in Indonesia
in 1998).

281. Min, supra note 260, at 199.

282. Sowell, supra note 120, at 90; see also Lan Cao, Looking at Communities and
Markets, 74 Notre Dame L. Rev. 841, 863-92 (1999) (discussing how community norms
emerging from cohesive groups lower the transaction costs of intra-group lending, allowing
members who could not get bank loans to form rotating credit associations).

283. Morokvasic, supra note 224, at 87.

284. Id.; see also Chris Spolar, New Working Class in the Making, Wash. Post, Dec. 15,
1987, at A1 (describing the informal recruitment methods used by immigrants).

sellers, often relying on information provided by Korean newspapers, found Korean buyers in 80.4% of license transfer transactions, although Koreans were only 17.6% of all buyers. A similarly startling degree of ethnic homogeneity can also be seen in business sales among Indians and Pakistanis in Britain and in business co-ownership among Cubans in Puerto Rico.

Linkages also exist between the ethnic diasporas of the adopted country on the one hand and the homeland institutions on the other. For example, there is a tendency among Korean-owned firms in the United States for the Korean buying entities to rely on Korean suppliers from Korea. This is especially common in the import businesses established by Koreans who deal in Korean exports, where Korean importers distribute Korean-made products to coethnic wholesalers, who in turn distribute them to coethnic retailers for sale, most likely, to non-Korean customers. In the retail wig business in particular, ninety-five percent of those who participated in a study on Korean entrepreneurship depended on Korean suppliers for wigs made in South Korea.

286. *Id.* at 239. In fact, liquor stores, grocery stores, restaurants, and bars (businesses with a predominant Korean presence) constituted 21.2% of firms advertised for sale in the *Korea Times* but only 11.9% of those for sale in the *Los Angeles Times*; this source of information, however, is only available to potential buyers who can read Korean. *Id.* at 240.


288. José A. Cobas, *Ethnic Enclaves and Middleman Minorities: Alternative Strategies of Immigrant Adaptation?*, 30 SOC. PERSP. 143, 150 (1987). Although Cubans were less than 1% of Puerto Rico’s population, Cuban entrepreneurs had other Cuban entrepreneurs as partners in 70% of co-owned businesses. *Id.* at 148, 150.

289. MIN, supra note 260, at 196; *see also LIGHT & GOLD, supra* note 7, at 121.

290. WALDINGER ET AL., supra note 243, at 71; *see also* WONG, supra note 258, at 79 (describing how “immigrant consumers and entrepreneurs maintain cultural, social, and economic ties with their homelands that dramatically increase export opportunities”). Korean owners in Los Angeles indicated that between sixty-six and one hundred percent of their suppliers were Koreans and that a significant portion of the Korean owners were part of “a vertical distribution network that might originate in South Korea.” LIGHT & BONACICH, supra note 17, at 151.

When Korean immigrants start new businesses dealing in wigs, handbags and other Korean-imported merchandise, they have easy access to information and can very often purchase merchandise on a credit basis. In operating such businesses, they receive preferential treatments from Korean wholesalers in item selections, prices, speed of delivery and credits.  

Aside from the import-export sector, which is dependent on linkages forged between the diaspora and the homeland, ethnic vertical integration may also be found between ethnic retailers and wholesalers. For many Korean business owners, between sixty-six and one hundred percent of their suppliers were also Koreans. Approximately 82 percent of inner-city Korean merchants buy from Korean wholesalers, who have traditionally helped the merchants by providing loans, financing, and goods to Korean merchants at cheaper prices than to non-Korean merchants either because the Korean buyers tend to order in large quantities, or merely because of a tradition of mutual aid and ethnic economic solidarity. Indian hotel and motel owners also deal with each other on a preferential basis, providing each other with loans without charging interest or demanding collateral. Other groups such as black merchants who have vertical links to African-American suppliers have also used them to their advantage—hence the success of black-owned barber shops and beauty parlors with links to the large, black-owned beauty products firm of Johnson Products, Inc. of Chicago.

Group solidarity and preferences extend beyond hiring decisions and preferential sales and purchases to include general social and economic assistance as well. A study of Ismaili-Pakistani

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292. WALDINGER ET AL., supra note 243, at 71 (citation omitted).
293. LIGHT & BONACICH, supra note 17, at 151. The study found that in the service sector, there was no dependence on Korean suppliers.
296. Longworth, supra note 294. Johnson Products, the first black-owned firm to be listed on the American Stock Exchange, has had a tradition of promoting black businesses by hiring black models and other black enterprises, such as advertising agencies, and by advertising in black avenues such as Soul Train. Karen Springern, So Much for Family Ties, NEWSWEEK, Mar. 23, 1992, at 49.
immigrants in the southwestern United States revealed that within this community, differentiated not only by its ethnicity but also by its religion of Ismaili, a Muslim sect, a new immigrant will usually contact a community coordinator or sponsor, often a business owner, who will provide the new arrival with a full-time job, training, and financing help as part of his sponsorship activities. Similarly, the development of Greek business activities, especially in the restaurant business, also rests on the sponsorship model. It is this very affinity for members of one's group as well as the reliance on ethnic connections to lower the cost of doing business that have allowed a disesteemed minority group to overcome its labor market disadvantage and build up the group's ethnic network so necessary to the maintenance of an ethnic economy.

There is some evidence that ethnic economies pay lower wages than the general labor market. For example, at one end, the Puerto Rican ethnic economy, though small in size, paid high wages, reaching 96.5% of the expected level; at the other end, the African-American ethnic economy's payroll was 72.8% of what it would have been had the African-American ethnic economy paid wages at the average level of the mainstream labor market. The comparison with the general market may not be wholly accurate unless it takes into account the possibility that employees in ethnic economies may be among the least skilled and educated of coethnics. But even if the wage comparison is undertaken after adjusting for productivity differentials, an argument could still be made that "the low wages

297. The immigrant works as an apprentice for about two years, during which time he is expected to set aside funds for the purpose of eventual business development. The Ismaili community assists the immigrant in the search for a business opportunity, and the immigrant is also eligible to borrow from a community investment fund raised from local sources. Patricia G. Greene, A Resource-Based Approach to Ethnic Business Sponsorship: A Consideration of Ismaili-Pakistani Immigrants, 35 J. SMALL BUS. MGMT. 58, 64-65 (1997).

298. Greek immigrants with relatives are sponsored into the United States. "The sibling tie ... becomes the primary relationship by which various nuclear families are united into clans. Moreover, ... the sibling tie also becomes the most important kinship bond within which Greeks fashion their economic adaptation." Lawrence A. Lovell-Troy, Clan Structure and Economic Activity: The Case of Greeks in Small Business Enterprise, in SELF-HELP IN URBAN AMERICA: PATTERNS OF MINORITY BUSINESS ENTERPRISE 58, 63 (Scott Cummings ed., 1980). The collective, clan-based entrepreneurial pattern is even stronger for the Chinese and Japanese who "operate[] businesses which [are] tied together by a strong network of collective, ethnically based morality." Id. at 85.

299. LIGHT & GOLD, supra note 7, at 70.
and the job itself represent contributions of the ethnic economy to employment of coethnics, and the low wage exceeds the general labor market's counteroffer, zero.\textsuperscript{300} It is conceivable that the choice for many of those from marginal or transitional groups may be between unemployment or employment in their groups' ethnic economies, even if not under the most optimal of conditions.

3. The Ethnic Enclave Economy

The term "ethnic economy," with intellectual linkages to the literature on middleman minorities, generally carries no assumption about the location or clustering of the ethnic-owned firms, or about whether the customers are coethnics.\textsuperscript{301} The term "ethnic enclave economy" or "immigrant enclave economy" has a different intellectual tradition; it is derived from dual labor market theories developed in the 1960s, which explored how and why certain disadvantaged groups were segregated into a lesser, secondary labor market separate from the superior, primary labor market.\textsuperscript{302}

Even as the world's economy has become increasingly globalized, transcending the boundaries of the nation-state,\textsuperscript{303} a parallel shift has also occurred, leading to "the revival of the small-business economy"\textsuperscript{304} and the importance of the local—whereby "local social networks associated with family, community, or ethnic tradition of skills, are particularly central in revitalized craft production complexes" such as those that have emerged in central and northeastern Italy.\textsuperscript{305} The enclave economy is characterized by spatial or locational clustering of business firms that tend to employ coethnic workers\textsuperscript{306} linked by an "ethnic entrepreneurial network,

\textsuperscript{300} \textit{Id.} at 70-71.
\textsuperscript{301} \textit{Id.} at 10.
\textsuperscript{302} \textit{Id.} at 11-12. For an examination of labor market analysis, which focuses on the idea of market segmentation and dual economies to explain persistent poverty and income inequality, see ROBERT T. AVERITT, \textit{THE DUAL ECONOMY: THE DYNAMICS OF AMERICAN INDUSTRY STRUCTURE} (1968).
\textsuperscript{304} Eran Razin, \textit{Immigrant Entrepreneurs in Israel, Canada, and California, in IMMIGRATION AND ENTREPRENEURSHIP}, supra note 216, at 97, 100.
\textsuperscript{305} \textit{Id.} at 100.
\textsuperscript{306} Alejandro Portes, \textit{Modes of Structural Incorporation and Present Theories of Labor Immigration}, in \textit{GLOBAL TRENDS IN MIGRATION} 279, 290-91 (Mary M. Kritz et al. eds., 1981);
reflecting both ethnic attributes and location characteristics.\textsuperscript{307} It usually arises as a result of "[c]hain migration[,]" whereby newcomers tend to congregate in the same areas where the ethnic group is already present.\textsuperscript{308}

Ethnic neighborhoods have been part of the immigrant landscape of countries all over the world: Germantowns, Little Italys, Chinatowns.\textsuperscript{309} In the late nineteenth and early twentieth centuries, the Jewish quarter in Manhattan was served by ethnic trade on the Jewish East Side, and New York City's clothing industry developed alongside the Jewish immigrant workers and owners clustered there, kept close to the factories due to the lack of mass transit. South Asians in Britain occupy certain geographical clusters; migrants from Northwest Africa and southern Europe are concentrated in the older quarters of cities such as Berlin, Frankfurt, Rotterdam, Brussels, and Paris. Opportunities to create ethnic economies arise in such ethnic neighborhoods with a critical mass of consumers with distinctive ethnic tastes and needs that ethnic businesses can serve.\textsuperscript{310} In recent years, immigrants from

\textbf{PORTES \& BACH, supra note 6, at 203.}

\textbf{307. Razin, supra note 304, at 101.}

\textbf{308. LIGHT \& BONACICH, supra note 17, at 153-54; Razin, supra note 304, at 101. Despite the attempt of the U.S. government to disperse Southeast-Asian refugees in the 1970s, the refugees themselves gravitated towards each other, resulting in concentrations of various ethnic groups in certain states. Edna Bonacich, Asian and Latino Immigrants in the Los Angeles Garment Industry: An Exploration of the Relationship between Capitalism and Racial Oppression, in IMMIGRATION AND ENTREPRENEURSHIP, supra note 216, at 51, 59-62. The Vietnamese, for example, clustered in Orange County, California. Id. at 62.}

\textbf{309. The existence of ethnic enclaves, whether residential or business, is common in many countries all over the world. German congregation in certain locations resulted in the creation of whole towns overseas, for example, Hermann, Missouri, in the United States, Blumenau in Brazil, and Hahndorf in Australia. The Welsh have done the same in Bryn Mawr, Pennsylvania, and Scots in Dunedin, New Zealand. The Chinese have founded Chinatowns in places ranging from Melbourne to Toronto, New York, and San Francisco. Italians congregate in Little Italys in Buenos Aires, New York, and Toronto. SOWELL, supra note 120, at 103-04. One of the more recent immigrant groups, the Koreans, have created Koreatowns not only in Los Angeles, but also in North Jersey, with approximately 130 churches, real estate markets, thirty restaurants, 270 dry cleaners, nail salons, groceries, thirty fraternal and business groups, and five newspapers. Lisa Rein, Immigrants Move Warily Across Cultural Barriers, THE RECORD, Nov. 24, 1991, at A1; see also LIGHT \& GOLD, supra note 7, at 184-85.}

\textbf{310. WALDINGER ET AL., supra note 243, at 108, 115. This linkage between work and residence can be seen currently in the Chinatown garment industry of New York City. In Providence, Rhode Island, where Italian immigrants made up fourteen percent of the city population by 1914, a local retail enclave provided employment to more than ten percent of}
Liberia, Nigeria, and other West African countries have carved an ethnic enclave in Staten Island, New York City, "bringing new merchants, vendors, a church and other institutions that cater to their tastes and needs."\textsuperscript{311}

Often reinforced by residential segregation,\textsuperscript{312} "ethnic neighborhoods were the spatial anchor of the communities," often part of, or close to, coethnic economic enclaves.\textsuperscript{313} Historically, for some ethnic groups such as the Chinese, the existence of an ethnic enclave such as Chinatown was reinforced by repressive laws mandating segregation of the Chinese.\textsuperscript{314} Chinatowns across the United States thus became residential as well as an economic enclaves, where the Chinese established homes, businesses, associations, and schools based on common geographic origins and clans.\textsuperscript{315} Indeed, small businesses were particularly vital to the development of San Francisco's Chinatown because although some Chinese searched for jobs as laborers or domestics outside of Chinatown, most stayed

\textsuperscript{311} Raymond Hernandez, \textit{The Feel of Africa is Transplanted to Staten Island}, N.Y. TIMES, June 20, 1993, at A30.

\textsuperscript{312} See generally Richard Thompson Ford, \textit{The Boundaries of Race: Political Geography in Legal Analysis}, 107 HARV. L. REV. 1843, 1845 (1994) (describing how political geography promotes "racially identified space" and racial segregation).

\textsuperscript{313} LIGHT & GOLD, supra note 7, at 184 (citation omitted). In contrast to West Indian business activities in the United States, some suggest West Indians business activities in Britain are not as numerous precisely because the West Indian in Britain is not segregated. WALDINGER ET AL., supra note 343, at 110.

\textsuperscript{314} Though later declared unconstitutional, the California legislature, for example, enacted a law in 1879 requiring towns and cities to remove the Chinese from city limits. BILL ONG HING, \textit{MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY}, 1850-1990, at 49-50 (1993). Landlords and realtors refused to rent and sell to Chinese outside the boundaries of Chinatown. \textit{Id.} at 50. In Tucson, a widespread campaign was begun in 1885 urging that the Chinese be forced into a Chinatown so they could be monitored. \textit{Id.} at 50, 186, 283 n.55.

\textsuperscript{315} \textit{Id.} at 50, 77, 84. In response to increasing demands by Chinese parents for their U.S.-born children to attend public school, the San Francisco School Board allowed the Chinese School to be officially opened as a "separate but equal" public school in San Francisco Chinatown in 1859. Joyce Kuo, \textit{Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools}, 5 ASIAN L.J. 181, 191 (1998). When the Chinese School was closed in 1871, Chinese Language Schools were organized and run by the Chinese Six Companies, an organization of Chinatown merchants. As the violence against the Chinese increased systematically by the 1870s, the California legislature revised the School Law of 1860, which had established separate public schools for the Chinese, along with other minority groups. The Chinese were excluded from the all-white public school as well as the separate schools until 1883. \textit{Id.} at 192-94.
BEYOND THE PALE

within to avoid racial antagonism and found employment in family-run enterprises.\textsuperscript{316} For many recent Asian immigrants to the United States who either face English language barriers or possess few marketable skills, Chinatowns constitute one of the few places where work can be found. Reciprocally, newcomers have reinvigorated Chinatown, replacing declining industries such as the hand-laundry business—developed in Chinatown “bachelor societies” due to anti-Chinese exclusionary laws which prevented Chinese males from bringing wives\textsuperscript{317}—with the burgeoning restaurant business that caters to both the Chinatown market and the nonethnic market.\textsuperscript{318}

As the Chinatown experience shows, the existence of an ethnic neighborhood with proximity to a coethnic economy has allowed group members who are lesser-skilled, less educated, and those lacking job-seeking connections to gain access to group resources to achieve upward mobility, often within the ethnic enclave economy.\textsuperscript{319} Ethnic businesses that are an integral part of the ethnic community play a vital role in community development—for example, an ethnic enclave economy “can make a poor but active area safer and more attractive than a more affluent but less trafficked neighborhood.”\textsuperscript{320} Business concentration within an economic enclave in proximity to ethnic neighborhoods produces a synergistic relationship between the businesses and the residences in at least three ways. First, the “agglomeration of economies” is likely to encourage the proliferation of ethnic businesses and attract additional customers, drawn by the size and diversity of the enclave. Second, it is also likely to further the cultural presence of the area, and thus promote its visibility as an ethnic market that ethnic shoppers wish to frequent both for the products and services available as well as for the cultural symbol that the enclave represents. Third, the agglomeration effect may also create an “export” base from which ethnic firms can expand beyond the ethnic customer base.

\textsuperscript{316} HING, supra note 314, at 52.
\textsuperscript{317} HIMILCE NOVAS & LAN CAO, WHAT YOU NEED TO KNOW ABOUT ASIAN AMERICANS 27-28, 30-32 (1996).
\textsuperscript{318} WALDINGER ET AL., supra note 243, at 68-69.
\textsuperscript{319} Id. at 66; see also LIGHT & GOLD, supra note 7, at 186.
\textsuperscript{320} LIGHT & GOLD, supra note 7, at 187.
Locational aggregation also gives the ethnic enclave economy certain added benefits that a general ethnic economy might not have. The authors of a comprehensive study of ethnic enclave economies observe that "[e]nclaves can be composed of a group of relatively independent firms which compete with each other for supplies and minority consumers, or minority firms can theoretically be arranged in a fairly unified system of vertical and horizontal integration ...." In the latter case, the ethnic enclave, though a competitive sector, may nevertheless confer some of the economic advantages of a "monopoly sector." For example, because of vertical and horizontal integration of businesses along ethnic lines, coethnic firms manage to keep their business exchanges, whether with suppliers or customers, within the ethnic enclave, allowing such firms to "suck value out of each stage of a product's movement toward the market, losing little or no value to noncoethnic firms." Thus, territorial clusters allow the ethnic economy to capture a higher proportion of sales than it otherwise would. When an ethnic firm buys from other neighborhood coethnic firms, the flow of money recirculates within the ethnic enclave economy. These "localized ethnic entrepreneurial enclaves" also provide an easy setting "for recruiting labor, gathering information, transmitting entrepreneurial skills, and in some cases also forming input and output linkages."

322. Added benefits include "the ability of the enclave economy to generate more money for participants than the participants would have been able to obtain without that enclave structure to support them." LIGHT & GOLD, supra note 7, at 15.
324. Wilson & Portes, supra note 9, at 306-07.
325. As Light and Gold stated:
   Horizontal integration involves ethnic business owners cooperating to choose store location, avoid competitive pricing, pool information, and engage in collective buying. Vertical integration occurs when a whole package of business services—ranging from credit, wholesale goods, and maintenance to parking, transportation, real estate, manufacturing, and import-export concessions—are provided by coethnics.
LIGHT & GOLD, supra note 7, at 122.
326. Id. at 12-13.
327. Razin, supra note 304, at 99. The Maghrebian merchants of Algeria, Morocco, and Tunisia who have settled in enclaves in France have also maximized the benefits to be derived from the ethnic system—"resale of establishments into the co-ethnic circuit." Simon,
Although the tradition of promoting economic independence for African Americans is overlooked today, there has been, historically in the United States, black businesses in African-American economic enclaves, in northern cities such as Chicago's South Side, New York's Harlem, and Cleveland's Hough District, and in southern cities such as Durham, North Carolina and Tulsa, Oklahoma. As blacks from the South moved north in the 1900s, black-owned businesses were formed to cater to the tastes and needs of the southern newcomers. In the late 1930s, two-thirds of businesses in Harlem were black-owned; by 1915, Chicago had a "black market." From Cleveland's segregated neighborhoods, a base of economic ventures, of newspaper publishers, realtors, undertakers and other business owners, was launched.

During the Jim Crow era, African Americans were forced to create a "self-sustaining support apparatus" consisting of hospitals, banks, insurance companies, restaurants, inns, hotels, and

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supra note 225, at 134.

Along Calle Ocho, the main commercial street of the Cuban enclave economy in Miami, for example, Cuban-owned firms bought semifinished products from other Cuban-owned firms, added value to the products, and passed the transformed products to other Cuban retail businesses for sale. LIGHT & GOLD, supra note 7, at 13. Indeed, several studies found that the Cuban enclave economy's "hyperefficiency" is derived from vertical and horizontal integration and preferences for ethnic self-dealing between suppliers and consumers. Wilson & Martin, supra note 323; Wilson & Portes, supra note 9, at 301-02. In some instances, shared ethnic identity, plus the "agglomeration effects of the ... ethnic enclave," LIGHT & GOLD, supra note 7, at 15, may result in "the likelihood of cartelization in defiance of market competition." IVAN LIGHT & CAROLYN ROSENSTEIN, RACE, ETHNICITY, AND ENTREPRENEURSHIP IN URBAN AMERICA 20 (1995). Of course, if these arrangements cause antitrust concerns or violations, then antitrust laws should be applied. See supra note 291.

Analogous scenarios can be found in San Francisco, when Italian fishermen sell their catch to the Italian restaurants on Fisherman's Wharf. LIGHT & GOLD, supra note 7, at 13 ("In this manner, San Francisco's Italian ethnic economy monopolizes the whole value of the restaurant business even though the tourist industry has a competitive, small business structure.").

328. See Butler, supra note 33, at 41 ("The fact that business enterprise once stood at the center of black communities is an historical fact that has been lost and neglected by scholars and commentators."). In fact, some studies found that "in 1910 African-Americans were more likely than white Americans to be employers, and almost as likely as Whites to be self-employed." Id. (citing Margaret Levenstein, African American Entrepreneurship: The View from the 1910 Census, 24 BUS. & ECON. HIST. 107 (1995)).


330. Id. at 110.

other enterprises.\textsuperscript{332} "Segregation gave to the black professional a virtually protected market .... If they profited economically by avoiding intense competition from their white counterparts, ... they also suffered from being unable to practice their professions in the best institutions and in the best atmosphere."\textsuperscript{333} As some have observed, "[u]ntil the mid-1960s, black businesses operated in sheltered markets, spatially isolated and relegated to the black community by the white community. Black businesses were protected in those markets by the same racial animus that excluded them from the mainstream."

Durham, for example, was a thriving black economic enclave around the turn of the twentieth century.\textsuperscript{335} The central business

\begin{itemize}
  \item \textsuperscript{332} Indeed, blacks had had a history of entrepreneurship before the American Revolution and before the Civil War. See \textit{Butler}, supra note 8, at 34-78; \textit{Woodson}, supra note 331, at 1021, 1031.
  \item \textsuperscript{333} \textit{Butler}, supra note 8, at 203 (citation omitted).
  \item \textsuperscript{334} Robert E. Suggs, \textit{Economic Justice in America's Cities: Visions and Revisions of a Movement: Bringing Small Business Development to Urban Neighborhoods}, 30 \textit{Harv. C.R.-C.L. Rev.} 487, 490 (1995). Desegregation mandated by the 1964 Civil Rights Act destroyed the protected markets of black firms and forced them to compete with national chains with extensive economic resources because black customers had greater access to goods and services provided by the mainstream economy. \textit{Id.} at 491. In the meantime, "black-owned firms were still inconveniently located, under-capitalized, and overpriced. Thus, at the high-water mark of the civil rights revolution, the small retail and personal service firms that had been the mainstay of black business activity began a sustained and inexorable decline." \textit{Id.}
  \item \textsuperscript{335} Additionally, the Fair Housing Act of 1968 made it possible for blacks and the black middle class in particular to leave segregated neighborhoods for better housing. Title VII of the 1964 Civil Rights Act, which bars employment discrimination, allowed blacks greater access to jobs outside black economies. "These twin factors eliminated whatever advantages had accrued to black firms from their location in black neighborhoods and accelerated their decline. With this decline of black business and the dispersal of the black middle class, the black community's former central city neighborhoods deteriorated." \textit{Id.} at 492; see also \textit{Butler}, supra note 32 (describing how the segregated market protected black jobs, which were destroyed when integration resulted in whites replacing blacks in the public school systems throughout the South); \textit{Woodson}, supra note 331, at 1022; Joel Kotkin, \textit{The Color of Freedom is Green}, \textit{The Record}, Oct. 5, 1986, at O1; \textit{Kotkin}, \textit{supra} note 19, at 81.
\end{itemize}
section of the African-American community in Durham, Hayti, was fully developed, with a vibrant business section along Fayetteville Street. By the 1940s, more than 150 businesses flourished—cafes, movie theaters, barber shops, groceries, boarding houses—and Parish Street, referred to as the Negro Wall Street, attracted an impressive concentration of successful black-owned businesses.

Tulsa too was once an economic enclave dominated by African Americans. Although slavery was abolished when the Confederacy was defeated, it continued until 1866 in the Indian Territory (land west of the Mississippi set aside for Eastern Indian tribes forced westward) when the U.S. government entered into treaties with the slave-owning Indian tribes. From 1866 to 1886, the government entertained the possibility of setting aside central Oklahoma as a permanent home for former slaves of the Indian tribes. Although this idea was never formally instituted, African Americans nonetheless migrated to Oklahoma and settled several all-black towns. Tulsa, in particular the Greenwood section, became a center of black economic development and was sometimes called “Little Africa.” “Deep Greenwood,” the heart of Tulsa’s black business community, was home to an array of commercial establishments, ranging from groceries, restaurants, rooming houses, and hotels to law offices, medical establishments, and other professional groups.

In his efforts to promote African-American ethnic economies, Fred Moore, one of the organizers of Booker T. Washington’s Negro Business League, once remarked:

Although an expressway now goes through the center of what was once Hayti—as one commentator noted, a “testimony to the destructive program of urban renewal, brought in by politicians, that hit Durham during the decade of the 1960s”—the city itself is being revitalized. Id. at 193, 195.

336. The discussion on the development of Tulsa as a black economic enclave is drawn from id. at 197-226.

337. In 1921, riots broke out after a black man was rumored to have engaged in attempted rape of a white woman. The Tulsa riots resulted in the destruction of the Greenwood business and residential district, with 18,000 homes and businesses burned, $2 to $3 million in damage, and 300 people dead. Id. This incident, indeed, may be understood as part of the unfortunate tradition of middleman groups who face hostility precisely because of host country or third party resentment of their economic success. Since 1979, there have been efforts to reconstruct the Greenwood section; black businesspeople have proposed a number of financing packages to the city. Id. at 209-25.
We must ... require every person who joins a local league to pledge himself to support all worthy enterprises managed by men and women of the race .... How can we otherwise succeed? Some would say that this was drawing the color line. I do not believe it. Jews support Jews; Germans support Germans; Italians support Italians until they get strong enough to compete with their brother in the professions and trades; Negroes should now begin to support Negroes.338

4. Ethnic Niches

As mentioned briefly above, an ethnic occupational pattern is common among different ethnic groups in different countries. This has been referred to as "ethnic hegemonization," "industrial clustering," or the creation of "entrepreneurial niches."339 where "a certain ethnic group becomes entrenched in a clearly identifiable economic sector, working at jobs for which it has no evident cultural, geographical or even racial affinity."340 In Los Angeles, Korean merchants whose businesses were inside Koreatown had the benefit of an ethnic enclave—"an institutionally complete business environment in which Koreans could buy a wide range of goods and services from coethnics."341 Those with businesses outside the Koreatown enclave and thus more dependent on non-Korean customers were more likely to be niche-centered in order to receive the benefits of industrial specialization.342 Koreans were heavily represented in Los Angeles County’s retail liquor industry—representing 3.5% of firms although they were only 0.8% of the population in 1980.343 Ensconced in the informal sector of New York

338. Id. at 70 (citation omitted).
341. LIGHT & BONACICH, supra note 17, at 209.
342. According to Los Angeles Times estimates, "70 percent of customers in Koreatown’s Korean stores were Korean, 10 percent were other Asians, and 20 percent were non-Asian." Id.
343. Id. at 227.
City are Senegalese merchants who sell knockoff or counterfeit designer watches\(^3\)\(^4\) and other Africans who form an "efficient ethnic network" of street vendors.\(^3\)\(^4\) Koreans have become a dominant presence in the fruit and vegetable business in New York City.\(^3\)\(^4\) The Guyanese congregate in the city's pharmacies and machinery repair shops,\(^3\)\(^4\) and Afghans in the fast-food chicken restaurants where even their carpenters and chicken suppliers are Afghans.\(^3\)\(^4\) Thais dominate the city's hand-rolled bagel stores, many of whom follow the example of a Thai pioneer bagel roller who owned a store in Queens.\(^3\)\(^4\) In New York City and New Jersey, Colombians and Dominicans have captured the discount phone parlors or calling centers business first started by Dominicans for immigrants to call home.\(^3\)\(^5\) In Seattle and cities in Orange County, California, nail salons are predominantly owned and run by Vietnamese,\(^3\)\(^5\) who also dominate the shrimping industry on the Texas coast.\(^3\)\(^5\) Palestinians in San Francisco have a strong presence in the small groceries business.\(^3\)\(^5\) South Asians have a "virtual ethnic monop-
ol"\(^3\)\(^4\) in the newsstand business\(^3\)\(^5\) and gas stations in New York City\(^3\)\(^5\) and have developed a powerful national presence in the


\(^3\)\(^5\) Lorch, *supra* note 15.

\(^3\)\(^4\) *Id.* (noting also that Afghans own more than 200 fast-food chicken restaurants).

\(^3\)\(^4\) Goetz, *supra* note 344, at 59.

\(^3\)\(^5\) *Id.*


\(^3\)\(^5\) *Id.*


\(^3\)\(^5\) Indians operate an estimated 300 of the city's 330 street newsstands. Foreman, *supra* note 354.

\(^3\)\(^5\) An estimated forty percent of gas stations in New York City are owned by South Asians, particularly Indians. Lorch, *supra* note 15. According to estimates by the New York City Department of Consumer Affairs, Sikhs from India own nearly half of New York's gas stations. Foreman, *supra* note 354.
diamond industry, as diamond cutters, polishers, and importers,\textsuperscript{357} and the hotel/motel business.\textsuperscript{358}

In other countries, Britain, for example, Chinese and Cypriot immigrants have created an economic niche in the traditionally English fish and chips business.\textsuperscript{359} Indians and Pakistanis are concentrated in certain distinct sectors in retail trade, such as chemist shops, small groceries, and discount airline tickets. Cypriots and Asians dominate what was once a dying clothing trade in the East End of London. In Amsterdam, Hindustani, and Turkish entrepreneurs have revived the garment manufacturing business.

The niche, once occupied by an ethnic group, tends to perpetuate itself, due to path dependency—a type of "chain migration,"\textsuperscript{360} involving those who pioneered an economic path and those coethnics who followed, whether they are Indian motel owners, Korean green grocers, Chinese laundromat operators,\textsuperscript{361} or historically, German beer makers and Jewish tailors.\textsuperscript{362} Additionally, access to businesses in a particular niche often "depended upon ethnic homogeneity in business transfers, which tended to advantage coethnics while excluding outsiders."\textsuperscript{363} In

\begin{itemize}
\item \textsuperscript{357} This sector is dominated by the Hasidic Jews and the Jains, members of an Indian religion noted for vegetarianism and nonviolence. Foreman, \textit{supra} note 354.
\item \textsuperscript{358} Gujaratis from northwestern India are predominant in the neighborhood store business. They have also dominated the hotel/motel business. \textit{Id.} According to the Asian-American Hotel Owners Association, more than half of all motels in the United States are owned by Asian Indians, seventy percent of whom are of Gujarati Hindu subcaste, although Indians are less than one percent of the U.S. population. Varadarajan, \textit{supra} note 340, at 36; see also McDowell, \textit{supra} note 12.
\item \textsuperscript{359} The examples in this paragraph are taken from WALDINGER ET AL., \textit{supra} note 243, at 19-20.
\item \textsuperscript{360} LIGHT & BONACICH, \textit{supra} note 17, at 153-54.
\item \textsuperscript{361} Varadarajan, \textit{supra} note 340, at 36.
\item \textsuperscript{362} Greenwald, \textit{supra} note 392, at 72.
\item \textsuperscript{363} LIGHT & BONACICH, \textit{supra} note 17, at 242; see \textit{supra} notes 289-92 and accompanying text. Ethnic niches provide an "insider's edge on the profession" so that "once a niche is found, it creates a snowball effect, gathering in labor from that ethnic group and expanding exponentially." Lorch, \textit{supra} note 15.
\end{itemize}
other words, ethnics tend to sell their businesses to other coethnics and thus reproduce the ethnic character of a niche. Information about potential sales and purchases is passed along an ethnic exchange, as in the case of the Korean liquor stores for sale advertised in Korean language newspapers or the "network of Indian moteliers [that] often relays breaking news of properties for sale to other members of the same community ..." Often newcomers who are trained by coethnics in the business perpetuate the niche by starting their own enterprises, as in the case of Indians in the newsstand business and Afghans in the fried chicken business.365

In some instances, control of a niche may allow the minority group to exercise a significant degree of market power. The Japanese in California, for example, were able "to hegemonize an entire economic area, both horizontally and vertically,"366 because they were clustered in agriculture. As a result of their membership in farmers' organizations and prefectural associations, the Japanese farmers ensured that resources were distributed primarily within the Japanese niche through informal preferential purchasing and credit arrangements—hence "the tendency to spend one's money on goods and services provided by the ethnic economy; in exchange, the consumer would receive a favorable credit arrangement"367 not

364. Varadarajan, supra note 340, at 36; see supra note 290 and accompanying text.

365. The Indians and Pakistanis who control an estimated seventy percent of the newsstand kiosks in New York City regularly employ fellow coethnics or help them get jobs in other newsstand companies; many of these employees go on to start their own newsstand businesses. Greenwald, supra note 352, at 73. The Afghan fried chicken niche began in 1979, when an Afghan student from Kandahar, Afghanistan got his first job at Kansas Fried Chicken and subsequently opened the first Kennedy's Fried Chicken; there are now approximately forty unfranchised restaurants in New York City, all with that name and all owned by Afghans who got their start through an informal apprenticeship with other established Afghan fast-food restaurant owners. Lorch, supra note 15; see supra notes 297-98 and accompanying text.

366. JIOBU, supra note 339, at 224. In this respect, being part of an ethnic niche may confer similar economic advantages as being part of an ethnic enclave—the ethnic niche providing market power through industrial clustering and the ethnic enclave through locational clustering and linkages. Vertical integration within the ethnic niche, similar to that within the ethnic enclave, see supra notes 321-27 and accompanying text, meant that Japanese produce growers would sell to wholesalers who in turn sold to Japanese retailers. The Japanese growers would turn to the wholesalers for financing, in exchange for a promise that they would sell their produce to the wholesalers, thus assuring the wholesalers of reliable supply sources. BONACICH & MODELL, supra note 7, at 56.

367. BONACICH & MODELL, supra note 7, at 56.
available to non-coethnics. By vertically integrating and restricting competition\textsuperscript{368} within the ethnic niche,

Japanese entrepreneurs were able to charge lower prices on the open market and offer higher bids on purchases and rentals of such assets as farmland. Consequently, Issei [first generation Japanese] business was able to expand rapidly and even to move into a "monopolistic" position in certain spheres of the economy.\textsuperscript{369}

Interestingly, this quasi-monopolistic power is conferred on an ethnic group by virtue of its niche occupation whether the group dominates the niche as owners of business or as workers. Where coethnic employees (as opposed to coethnic business owners), through "their numerical clustering, their numerical preponderance, their organization, government mandates, or all four," are able to exert economic influence or power to secure preferences for coethnics, this has been referred to as an "ethnic-controlled economy."\textsuperscript{370} Italian, Irish, and Jewish immigrants in New York City had long relied on coethnic hiring networks to obtain municipal employment.\textsuperscript{371} These immigrants created ethnic niches in certain industries, sectors, or occupations within the government—the Irish had the construction niche, Italians the sanitation niche, and Jews the school teaching niche. Craft unions had once required that employers hire only union members, and membership was limited to applicants related by blood or marriage to current or past union members.\textsuperscript{372} In the government sector currently, African Americans

\begin{itemize}

\item\textsuperscript{368} Prewar Japanese-American organizations ensured that Japanese small businesses “did not underbid each other or unnecessarily push up purchase or rent prices ... [or] impinge on each others’ territories.” \textit{Id.} at 57.

\item\textsuperscript{369} \textit{Id.} at 58. Korean business owners cooperated in much the same way. \textsc{Light \\ & Bonacich, supra note 17, at 192-203 (discussing “industrial cooperation” among Korean entrepreneurs). These practices may be deemed antitrust violations. \textit{See supra} notes 291, 327.

\item\textsuperscript{370} \textsc{Light \\ & Gold, supra} note 7, at 25.

\item\textsuperscript{371} \textit{Id.} at 21; see also \textsc{Roger Waldinger, Still the Promised City?: African-\

\item\textsuperscript{372} \textsc{Light \\ & Gold} note 7, at 74. An Irish contractor in Boston routinely found workers in Irish pubs. \textit{Id.} at 21. Or, as the leader of a predominantly black clerical workers’ union remarked, “My people have an excellent communications system: they know that jobs are available; they refer cousins, sons, daughters. People walk into personnel and drop off resumes like there’s no tomorrow.” \textsc{Waldinger, supra} note 371, at 234 (quoting a labor

\end{itemize}
have become a formidable presence. Studies have shown that Asians and Hispanics, many of whom are immigrants and without political influence, have a much smaller share of government jobs in Los Angeles than do non-Hispanic whites, whose share of government employment is only half that of blacks. At this point, business ownership and job control become equivalent in respect to the hiring advantage they convey. Preferential policies adopted by the government to build African-American clusters in the public sector could be viewed as an attempt to correct the absence of strong ethnic niches among African Americans.

B. The Boundary: Disadvantage and Reactive Solidarity

1. Introduction

The emergence of an ethnic economy is based on both external and internal factors and the interaction of supply and demand. Disadvantage is the oldest explanation for minority entrepreneurship. Although Max Weber emphasized the connection between bourgeois capitalism and the Protestant ethic, he also acknowledged that Protestants, excluded from the civil service and the armed forces because of religious tests, turned to entrepreneurship partly because of a labor force disadvantage caused by religious discrimination. Werner Sombart similarly attributed Jewish dominance in business to their exclusion from medieval
trade guilds. Subsequently, scholars who have studied ethnic economies have advanced disadvantage—an external factor—as the reason for high rates of entrepreneurship among minorities denied “access to majority-controlled paths of economic advancement.” Disadvantages include being subject to de jure or de facto segregation, being undocumented, lacking English skills, having little formal education, and not knowing American or mainstream work practices.

Other scholars studying ethnic entrepreneurship have looked at group characteristics—an internal factor—consisting of ethnic resources and ethnic social capital. These may include personal

378. Sombart, supra note 10, at 300-01.


380. Greene, supra note 297, at 59.

381. Light & Gold, supra note 7, at 211.

382. Light & Rosenstein, supra note 327, at 22. Light and Rosenstein define ethnic resources as:

sociocultural and demographic features of the whole group that coethnic entrepreneurs actively utilize in business or from which their business passively benefits .... Typical ethnic resources include entrepreneurial heritages, entrepreneurial values and attitudes, low transaction costs, rotating credit associations, relative satisfaction arising from nonacculturation to prevailing labor standards, social capital, reactive solidarities, multiplex social networks, and a generous pool of underemployed and disadvantaged coethnic workers.

Id. For a study of the efficiencies of rotating credit associations as a community market for
and class resources, for example, money or advanced degrees, but need not, because ethnic resources emphasize instead sociocultural factors that allow groups to “convert social characteristics of their group into economic resources, thus creating employment and income independent of class resources.” This intellectual tradition emphasizes collectivism rather than individualism and studies the role ethnic resources and institutions have contributed to the economic stability of certain ethnic groups.

Other scholars use an interactive model, emphasizing both cultural analysis and the structural economic environment, and focusing on the “congruence between the demands of the economic environment and the informal resources of the ethnic population.”

For example, in an effort to understand why, despite discrimination and hostility, certain groups have been able “to create success out of hatred,” some scholars have focused on the interaction between host hostility and the reactive solidarity such hostility provokes, which produces in turn group boundaries that distinguish minority insiders from nonminority outsiders.

2. Boundaries, Social Capital, and Ethnic Economies

Thus, ethnic economies emerge when ethnic minorities face “labor market disadvantage,” receiving “below-expected returns on their human capital for reasons unrelated to productivity,” and are able to tap into their reservoir of ethnic resources and social capital to create alternatives to mainstream employment, or “compensatory entrepreneurship.” Generally, scholars have

savings among ethnic minorities, see Cao, supra note 282.
383. LIGHT & ROSENSTEIN, supra note 327, at 24.
384. Waldinger et al., supra note 376, at 589.
385. Bonacich, supra note 27, at 584.
386. LIGHT & GOLD, supra note 7, at 200 (explaining that labor market disadvantages under such circumstances means that “qualified workers get no job at all or they do not get a job commensurate with their experience and education”).
387. Factors of an economic environment that may facilitate entrepreneurship includes: “coethnic consumer products, underserved or abandoned markets, markets with low returns to economies of scale, markets with unstable or uncertain demand, and markets for exotic goods.” LIGHT & ROSENSTEIN, supra note 327, at 74.
388. Id. at 160.
emphasized two interactive factors to explain how ethnic group membership produces economic resources.

The first perspective stresses the unique skills and resources shared by members of an ethnic group—the "tool kit" of symbols, stories, rituals, and worldviews that people may use in varying configurations to direct action and solve different kinds of problems.\textsuperscript{389} If there is a market demand for these unique cultural resources, those who possess such resources will be competitively advantaged. For example, the Chinese are more likely to possess unique skills in cooking Chinese food than non-Chinese, Mexican-origin entrepreneurs may have unique resources to supply Mexican demand in southwestern towns,\textsuperscript{390} and Israelis may be better equipped to teach Hebrew.\textsuperscript{391} Historically, for a certain period before the Civil War, black artisan businesses thrived, partly because "as a result of almost two and a half centuries of slavery, up to the outbreak of the Civil War, the knowledge of [certain] skills was concentrated almost exclusively in the hands of the Negroes, free and slave."\textsuperscript{392} Blacks also possessed unique skills such as barbering, which was originally developed on plantations,\textsuperscript{393} blacksmithing, and carpentry.\textsuperscript{394}

The second perspective stresses the ways in which ethnic minorities establish boundaries (or have had boundaries established against them), producing cooperation and solidarity among members. Historically, ethnic groups that have resisted assimilation or have been deemed "unassimilable" have been viewed with suspicion.\textsuperscript{395} In response, groups that encounter external

\begin{itemize}
\item \textsuperscript{389} LIGHT & GOLD, supra note 7, at 107.
\item \textsuperscript{390} LIGHT & ROSENSTEIN, supra note 327, at 85, 123.
\item \textsuperscript{391} LIGHT & GOLD, supra note 7, at 107.
\item \textsuperscript{392} BUTLER, supra note 8, at 44 (citation omitted).
\item \textsuperscript{393} WALDINGER ET AL., supra note 243, at 58.
\item \textsuperscript{394} STERLING D. SPERO & ABRAM L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT 16-17 (1931) (discussing the concentration of blacks in certain occupations, such as blacksmithing, gunsmithing, cabinetmaking, shipbuilding, brickmasonry, and engineering).
\item \textsuperscript{395} In the United States, for example, during the congressional debates on the Fifteenth Amendment, Senator George H. Williams of Oregon made the following remarks about the Chinese: "They are a people who ... will not adopt our manners or customs and modes of life; they do not amalgamate with our people; they constitute a distinct and separate nationality ...." ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS’ DEBATES 358 (1967). The apparent separateness and distinctiveness of the Japanese Americans contributed to the perception
\end{itemize}
hostility or anti-immigrant sentiments\textsuperscript{396} have sought to turn ethnic boundaries into an advantage.

As sociologists have long noted:

[T]he ethnic boundary canalizes social life—it entails a frequently quite complex organization of behaviour and social relations. The identification of another person as a fellow member of an ethnic group implies a sharing of criteria for evaluation and judgement.... On the other hand, a dichotomization of others as strangers, as members of another ethnic group, implies a recognition of limitations on shared understandings, differences in criteria for judgement of value and performance, and a restriction of interaction to sectors of assumed common understanding and mutual interest.\textsuperscript{397}

Although there may be other criteria on which boundaries could be drawn,\textsuperscript{398} ethnicity is an especially potent basis for boundary drawing.\textsuperscript{399}

Those two dimensions of culture—providing specific ethnic resources and delineating bonds of mutual identification and identity—are crucial to the creation and maintenance of ethnic economies. Outside the ethnic economy boundary, the “law of indifference” might very well prevail—it may be a matter of indifference to the seller and buyer the identity of the other, if the same commodity is obtained at the same price,\textsuperscript{400} as “transactors interact in markets on the basis of most favorable price and in so

\textsuperscript{396} For an examination of anti-immigrant periods that have recurred in U.S. history, see Johnson, \textit{Alien Nation}, supra note 31, at 111.

\textsuperscript{397} This is because ethnicity “is regarded as biological in origin, is reflected in social stratification, shapes numerous elements of social life, is frequently institutionalized (in religious practice, language, nationality, residential location, group myths, and government policy), and often constitutes a basis of personal identity.” Light & Gold, \textit{supra} note 7, at 108.

\textsuperscript{398} Research has shown that even when a group is formed on a purely random basis or on trivial criterion, members identify with and prefer their own groups. See Henry Tajfel & John C. Turner, \textit{The Social Identity Theory of Intergroup Behavior}, in \textit{Psychology of Intergroup Relations} 13-14 (Stephen Worchel & William G. Austin eds., 1986).

\textsuperscript{399} This is because ethnicity “is regarded as biological in origin, is reflected in social stratification, shapes numerous elements of social life, is frequently institutionalized (in religious practice, language, nationality, residential location, group myths, and government policy), and often constitutes a basis of personal identity.” Light & Gold, \textit{supra} note 7, at 108.

\textsuperscript{400} See generally William Stanley Jevons, \textit{Theory of Political Economy} (1871).
doing, ignore relationships of status, kinship, caste, and so on. Nepotism is not a significant determinant of transaction-prices....401 Within the boundary of common ethnicity, however, is a different set of rules altogether. Price is still relevant, of course, but other factors are brought to the foreground—identity and cooperation, in fact, identity as an essential coordinating device for cooperation itself. Conversely, “discrimination of others may be among the most important ... because it allows one to handle interactions with any individuals without having to treat them all the same ....”402

This explains the prevalence and strength of ethnically homogeneous trading groups, for example, the East Indians in East Africa, the Syrians in West Africa, the Chinese in Southeast Asia, the Jews in Europe, and the pockets of ethnic economies in the United States and other countries.403 A central component of such groups is “the idea that a trader will discriminate among potential partners in order to economize on the cost of enforcing contracts.”404 Along the same lines, some have suggested that members of groups that share easily observable traits, such as language, race, or other physical characteristics, will use their common observable characteristics as cost-effective proxies for inferring other potentially relevant information.405

There is a large body of scholarship exploring the ways that group solidarity promotes cooperation, minimizes defection, and solves collective action problems.406 Social science scholarship has

404. Id.
405. McAdams, supra note 24, at 1021.
406. See Jon Elster, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 126 (1989). A collective action problem exists thus: “Suppose that each member of a group has the choice between engaging in a certain activity and not engaging in it. The group has a collective action problem if it is better for all if some do it than if nobody does it, but better for each not to do it.” Id. For scholarly sources that study how decentralized groups utilize group norms to produce efficiency and order, see Cao, supra note 282, at 863-74.

Early works by Emile Durkheim and Talcott Parsons studied how humans, embedded in social institutions such as the family, clan, ethnic, tribal, religious and other groups, internalized the norms of their respective groups. See, e.g., EMILE DURKHEIM, THE DIVISION
also in recent years recognized the role of social capital in enhancing order. Groups with a "social capital" base of "networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit" are well-equipped to achieve a certain level of economic productivity. Social capital, however, exists in the relations among persons, not in the individuals themselves or in the physical elements of production. Members of the group must be interconnected for the group's social capital to function in three crucial areas: obligations and expectations, information channels, and norms accompanied by effective sanctions.

Trust is integral to these interactions, and without the members' common ethnic ties, "elaborate and expensive bonding and insurance devices would be necessary—or else the transaction could not take place." Indeed, the level of trust which is based on a commonality of external and internal circumstances, such as labor force disadvantage and a shared cultural foundation of values and beliefs, "[is] not easily duplicated in any artificial community, and indeed, [is] rarely found in communities united by geographic proximity or other demographic characteristics. Trust tends to

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408. For a discussion of the distinction between human capital and social capital, see FRANCIS FUKUYAMA, *Trust* 26-27 (1996). Social capital consists of group-based factors that enhance group members to work together in groups and organizations, and is usually created and transmitted through cultural mechanisms like religion, tradition, or historical habits. Human capital consists of knowledge and skills, and may be acquired through education or training.

409. JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-21 (1990); Coleman, *supra* note 221, at 95.


be strongest among transactors of the same household, lineage, village, subtribe, or tribe, and decreases as the circle of social distance expands, so that at the edge of the ethnic or tribal boundary, transactions might even be "consummated by force and guile." Thus, a group must have boundaries and closure in its social structure in order to achieve and maintain an effective social capital base of norms such as trust, cooperation, and solidarity.

Increasingly, research has focused on the relationship between group size and group conduct, and has found that "there are opposing behavioral implications involved in any extension in the membership of a community." A person's moral-ethical principles and constraints against self-aggrandizement and interests are stronger in a small, bounded community than a large, diffuse one. Once "an individual recognizes himself to be a member of a group of others more or less like himself," he is more likely to be subject, not just to the external constraints—"economic, geological, legal, political, social, technological"—on possible behavior, but also to internal limits. Although one cannot draw broad categorical boundaries to distinguish those a person considers to be "members of the tribe," and those deemed "outsiders," the point is that "there is a difference in an individual's behavior toward members and nonmembers, and that the membership lists are drawn up in his own psyche." 

412. Marshall D. Sahlins, On the Sociology of Primitive Exchange, in THE RELEVANCE OF MODELS FOR SOCIAL ANTHROPOLOGY 154 (Michael Banton ed., 1969); see also ELIZABETH COLSON, TRADITION AND CONTRACT: THE PROBLEM OF ORDER 25 (1974) ("If you know a person's clan, you have a good chance of being able to find out an appropriate kinship term to signal the etiquette to be used between the two of you and to define the moral imperative that ought to govern your relationships.").


414. Id. at 366.

415. Id. This phenomenon explains why in many instances, as nonexclusion or nondiscrimination rules are introduced to override an individual's personal selectivity and to increase the size of the sharing group beyond the individual's own narrow universe of preferences (opening up the club to everyone, for example), the new rules have had unintended effects, for example, spurring "the formation of smaller clubs." Robert D. Tollison, Consumption Sharing and Non-Exclusion Rules, 39 ECONOMICA 276, 283 (1972). When nondiscrimination rules were applied to public facilities in the United States, for example, in public schools, this led to a "movement out of public schools to the formation of more exclusive ... private educational facilities." Id. at 289.

For most individuals, there are moral-ethical boundaries and limits, and they may be
In that case, as a “repository of trust which reduces the probability of breach on a contract between insiders,” the size and boundaries of a trading group, such as that found in ethnic economies, would matter. On one hand, if the group expands, members may have the advantage of being part of a larger internal market, allowing greater possibilities of trade, sponsorship activities, and preferential purchases among group members. On the other hand, the larger the group becomes, the greater the probability of breach becomes as the ability of the group collectively to sanction violators is itself proportionately weakened.

In sum, ethnic economies are embedded in the networks of ethnic relations and interactions. Economic behavior is explained not by reference to individualistic behaviors but by reference to embedded relationships—“value introjection, reciprocity transactions, bounded solidarity, and enforceable trust.” The ethnic economy’s ethnic resources, which are not available to non-group members, provide the group with a “sustainable competitive advantage.”

There are positive implications for ethnic economies, but potentially negative ones as well, which I discuss in Part III.

III. DIFFERENT APPROACHES: BEYOND THE PALE?

I have discussed in Parts I and II two broad categories of ethnic preferences. Part I surveyed preferences pursued by governments, either to favor certain designated minority groups in majority-dominated economies, or to favor designated majority groups in

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416. Cooter & Landa, supra note 403, at 15.
417. Group sanctions of norm violators include withholding future business from the violator, disseminating the violator’s negative reputation groupwide, ostracizing the violator, or banishing the violator from the group. Cao, supra note 282, at 872. A group that is too large and not close-knit is less likely to succeed in meting out effective sanctions against violators.
419. Greene, supra note 297, at 60.
420. Id. at 61.
minority-dominated economies. Part II studied preferences pursued by ethnic groups themselves as they construct ethnic economies that engage in preferential practices favoring group members and, by implication, excluding nonmembers in a wide range of economic arrangements, such as sales and purchases, in wholesale and retail, access to and terms of credit, and hiring decisions. In this Part, I offer a number of approaches that a society, whether developing or developed, might consider as it examines the preferential practices that underlie ethnic economies. For reasons stated above, where specific examples are used for purposes of illustration, this section will focus on the laws of the United States.421

Essentially, I think we have roughly three choices to consider regarding notions and uses of “affirmative action” and various ethnic sets or subsets of persons. Interestingly, each of these choices plays off from a single expression, but with quite a different variety of possible meanings. The expression is that of “beyond the pale,” and the options are: (1) striking down as “beyond the pale” of acceptability all preferential practices, even those of the intra-group type adopted by marginal groups as described in Part II; (2) striking down only certain preferential practices, because they are “beyond the pale” in the above sense, if they are undertaken by the state to favor or discriminate against an ethnic group as described in Part I; or (3) alternatively, accommodating intra-group preferential practices because these practices, under certain circumstances, are “beyond the pale,” that is, beyond the reach of the law.

A. Beyond the Pale: The Applicability of Antidiscrimination Laws

One may suggest, as a first cut, it might always be regarded as “beyond the pale”422—and therefore illegal—wherever it is shown that B was favored over A because of his or her ethnic characteristics. This could be the first, strong position to take, absolute

421. See supra text following note 39.

422. I refer to “beyond the pale” in the strong dictionary meaning of “irrevocably unacceptable,” i.e., that it is never acceptable, and that the conduct in question is always appropriately subject to legal sanction. See WEBSTER’S NEW COLLEGIATE DICTIONARY (9th ed. 1990), where “pale” is defined, in the fourth of four identified senses of the word, as “an area or the limits within which one is privileged or protected (as from censure).” Id. at 847. Hence, to be beyond the pale is to be beyond the area of privilege and protection, and hence subject to censure.
in respect to all commercial arrangements, if not in respect to those of a merely highly personal and/or merely social nature.

The basic proposition in support of this strong view is simply that no individual should be regarded as less qualified or less deserving per se than another by the adventitious characteristics of ethnic origins, and, accordingly, that "it is wrong to regard another as more qualified or more deserving per se by either characteristic merely as such." To take B over A, for example, when it is just the ethnic origin of A that left him or her regarded as less worthwhile than B, and nothing else at all, is wrong.

One may add a cautionary qualification to this first proposition. Insofar as intensely personal choices such as marriage are involved, the king's writ (i.e., the reach of the law) may not extend so far as to subject these to legal sanction.423 As to all commercial relations

423. Associations of an intimate or even merely of a social nature would thus be "beyond the pale" in quite a different sense, namely: "beyond the pale of the law," in the sense of "beyond the reach of the law" (i.e., outside the area enclosed by a boundary or fence—and thus "beyond the pale"). See id. Another meaning of "pale" is: "a territory or district within certain bounds or under a particular jurisdiction." Id. "Beyond the pale" under this meaning would mean "beyond the jurisdiction of the law." This sense of the phrase likely originated with the English Pale, "the confines or dominion of England, the pale of English law." 11 THE OXFORD ENGLISH DICTIONARY 91 (2d. ed., 1989). At different times and to varying extents, the English Pale referred to the territory of Calais in France, and to the reach of English jurisdiction in Ireland and Scotland. Id. The Pale in Russia, "[i]from 1791 to 1917, specified provinces and districts within which Russian Jews were required to reside." Id.; see also Robert Hendrickson, THE FACTS ON FILE ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS 69 (rev. ed. 1997).

Pale or picket fences (we call them palings today) were erected all over Europe from Roman times to designate territory belonging to a certain country. Later the 'pale' came to be used figuratively, as in the famous 15th century 'English pale' portion of Ireland that the English dominated before Cromwell conquered the whole island. Beyond the Pale first meant simply to be outside the boundaries or jurisdiction of a nation but by extension, and with the aid of Kipling's 'Beyond the Pale,' it came to describe a dismal place to which we assign social outcasts, those regarded as beyond the bounds of moral or social decency.

Id.

In elaborating this plausible distinction between the merely "social" or "personal" relations, and relations more conventionally treated as sufficiently "commercial" such that strict antidiscrimination civil rights laws will apply to forbid discriminatory preferences, it may be useful to compare three Supreme Court decisions involving the Junior Chamber of Commerce, the Rotarians, and the Boy Scouts, respectively. See Boy Scouts of America v. Dale, 530 U.S. 640, 661 (2000) (5-4 decision) (sustaining a First Amendment "right of expressive association" objection to a state public accommodations statute applied to forbid the Boy Scouts from excluding adult homosexual men in mentoring roles); Bd. of Dirs. of
(e.g., buying, selling, borrowing, lending, and hiring), however, the law would discountenance the practice of ethnic discrimination, whatever label of convenience (e.g., self-help "affirmative action," "intra-ethnic" measures of "mutual assistance," etc.) its practitioners presume to give it, and regardless of who they are. The consequence of taking this view simpliciter, however, would be to effectively foreclose most of the varieties of intra-ethnic economic networks and arrangements previously reviewed in this Article.

Indeed, in recent years, in response to the claim made by some that antidiscrimination laws are unnecessary because the operation of market forces is sufficient to eliminate discrimination, a

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Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987) (allowing state antidiscrimination laws to be applied to such large scale, quasi-business fraternal organizations); Roberts v. United States Jaycees, 468 U.S. 609, 628-29 (1984) (upholding the state's right to apply its antidiscrimination laws to the Jaycees whose membership policies excluded women).

Possibly noteworthy too, are cases and discussions involving 42 U.S.C. § 1981 (2000). This statute, dating from the Reconstruction, provides that "all persons" in the United States "shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens ...." Id. (emphasis added). It has been held by the Supreme Court to apply to contracts between or among private parties and not merely those involving the government in some fashion. Thus, as construed, section 1981 has been interpreted to forbid private parties from refusing to enter into contracts with an offeror or offeree just because of the refused party's race or ethnic origin, and applied also to forbid offering less favorable contract conditions or terms based on the "race" of the other party. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976). Additionally, the statute applies to preclude refusals to deal on the same terms as one would be willing to extend to another when the distinction turns on differences of any "ethnically and physiognomically distinctive sub-grouping." St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 607 (1987). And this also includes "whites." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Still, far-reaching as 42 U.S.C. § 1981 is (as well as is the companion statute, 42 U.S.C. § 1982 (2002), which applies to rights to acquire, hold, and dispose of "property"), the Supreme Court has never suggested that this act of Congress or any equivalent state antidiscrimination act could be validly applied to "intimate" contracts such as offers of marriage, as distinct from more recognizably "commercial" contracts. Section 1981 has been applied to forbid private, state-accredited schools from restricting their admissions to some preferred race or ethnic group. Runyon, 427 U.S. at 160.

424. See, e.g., GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 43-45 (2d ed. 1971) (arguing that employers who have a taste for discrimination will suffer because minority employees will find employment with unprejudiced employers who will use the cost advantage—assuming minority employee wages are depressed—to drive discriminatory employers from the market); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 29-30, 35-37 (1992) (describing race discrimination as a refusal to deal with members of other races and arguing that because market competition will drive out discrimination, Title VII infringes on free, competitive markets); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 715 (5th ed. 1998) (describing racial discrimination as a refusal to associate with members of racial, religious, or ethnic groups different from their
substantial body of scholarship has emerged that argues the opposite. This argument would favor strict application of the laws to eradicate discrimination,\textsuperscript{425} whether this discrimination is due to hostility by the dominant group against minorities or to preferences extended by minority group members to one another. This approach would erode intra-ethnic preferences and the ethnic economies that emerge therefrom.

Proponents of this approach rely on noneconomic factors to explain the resilience of discrimination and the need for stringent interpretations of the antidiscrimination laws—hence the claim that an economics-based analysis fails to “take into account the intentional, interest-serving dimension of white-over-black prejudice.”\textsuperscript{426} Others have noted that group cooperation and solidarity may result in competition and conflict between and among groups.\textsuperscript{427} Thus, in the context of race discrimination by whites against blacks, group cooperation and mutual investment in status production on the part of whites may produce discrimination against non-whites.\textsuperscript{428} Because this type of in-group cooperation creates spontaneous orders of discriminatory economic regimes that survive market competition, the government should destroy these forms of cooperation through the maintenance and application of laws that prohibit race discrimination.\textsuperscript{429} Furthermore, under this view, because discrimination of any kind is difficult to prove and in-

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\item own; however, “by increasing the contact between members of the two races [blacks and whites] such trade imposes nonpecuniary, but real, costs on those members of either race who dislike association with members of the other race”). For arguments that antidiscrimination laws are not efficient and not necessary, see BECKER, supra, at 35-37; Richard A. Posner, The Efficiency and the Efficacy of Title VII, 136 U. PA. L. REV. 513, 514 (1987).
\item 425. But not necessarily to eradicate “affirmative action,” as the term is conventionally used in the United States, to mean actions designed to favor certain out-group minorities over the dominant white groups.
\item 427. McAdams, supra note 24, at 1007. McAdams proposes to understand race discrimination (particularly by whites against blacks), as “an especially virulent and pathological form of status production,” as group preferences are expressions of status production for group members at the expense of nonmembers. Id. at 1036, 1044.
\item 428. Id. at 1083-84. Although his focus is on discrimination by whites against blacks, McAdams believes out-group discrimination (discrimination against those outside the group) in order to achieve in-group status production has wider implications. Id. at 1036.
\item 429. Id. at 1034.
\end{itemize}
group sympathy particularly difficult to detect, the government should continue to engage in “affirmative action” (and not “merely” antidiscrimination) in order to counteract in-group favoritism.\(^3\)

Under these views, in-group sympathy is too easily converted to, or a mask for, out-group hostility and prejudice, and should be critically evaluated.\(^4\) This is especially so in cases where different groups compete for scarce resources, particularly in the economic realm,\(^4\) in which case in-group sympathy may have the same effect as out-group hostility\(^4\) because “[p]referential treatment of those who share a common category membership produces biases that

\(\text{\textsuperscript{430.}}\) Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 CAL. L. REV. 1251, 1326 (1998) (“Ingroup favoritism manifests itself gradually in subtle ways. It is unlikely to trigger mobilization of civil rights remedies because instances of this form of discrimination tend to go unnoticed.”); see also id. at 1327-29. For proponents of this view, in-group sympathy (preferences for one’s own) should be subject to critical evaluation because doing so would allow generalized discrimination to be more recognizable than focusing simply on out-group hostility (antagonism against others). Clark Freshman, Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities, 85 CORNELL L. REV. 313, 363 (2000). For a different view of affirmative actions without the institution of race-based government preferences, see Van Alstyne, supra note 49.


[O]ne reason why it is difficult to disentangle special concern for “one’s own” from beliefs in others’ moral inferiority is because in humankind’s primitive past, these two attitudes were inextricably linked. When we roamed the earth in small kinship groups, and every tribe but one’s own was a deadly enemy, love of one’s kin and hatred and/or suspicion of everyone else were traits necessary for survival.

\(\text{\textsuperscript{432.}}\) Id. at 372 (distinguishing between bias in the choice of one’s spouse and “biased economic choices,” but acknowledging that even if one limits the inquiry to economic choices, “in practice it will be very difficult to distinguish immorally biased economic choices from choices that are not immorally biased and not intrinsically wrong, such as choices to favor one’s family or friends or ethnic group members, or choices based on negative stereotypes”).

\(\text{\textsuperscript{433.}}\) Susan T. Fiske, Stereotyping, Prejudice, and Discrimination, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 370 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (noting that interethnic relation “revolves around ingroup favoritism more than outgroup derogation, although the net effect may be the same in practical terms”).
benefit the ingroup over noningroup members even without any negative prejudices against outgroups. These arguments, however, have tended to focus on in-group solidarity by dominant majorities such as whites and its effect on minorities, rather than in-group solidarity by minority groups themselves—precisely the type of solidarity that produces ethnic economies described in Part II. For proponents of this approach, antidiscrimination laws should be strictly applied and “affirmative action” favoring blacks and other minorities should be continued.

Antidiscrimination laws in the United States currently forbid preferences based on race and other protected criteria, regardless of whether the preferences are for or against historically disadvantaged minority groups. Courts have thus viewed evidence of race- and ethnicity-based preference as a violation of Title VII, for example, where Italian Americans favor other Italian Americans over non-Italians. But even business practices that are not

434. MARILYN B. BREWER & NORMAN MILLER, INTERGROUP RELATIONS 48 (1996); see also Marilyn B. Brewer & Rupert J. Brown, Intergroup Relations, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, supra note 433, at 554, 575 (“Many forms of discrimination and bias may develop not because outgroups are hated, but because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup and withheld from outgroups.”).

435. Freshman, supra note 430, at 351 (“Ingroup sympathy for historically advantaged groups, such as relatively privileged white, Protestant males, causes great harm to disadvantaged minorities.”). Freshman notes:

Individuals praise the behavior by ingroup members, such as “frugality” by a Protestant, but condemn the same behavior by outgroup members, such as Jewish “cheapness.” Likewise when outgroup members like Korean Americans favor their own, they are “clannish,” but when members of ingroups, like white males, prefer their own, this behavior remains invisible and sometimes even draws praise as “sticking together.”

Id.; see John F. Dovidio & Samuel L. Gaertner, The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 79-80 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (“It is important to note that both the anti-outgroup bias of high authoritarian subjects and the pro-ingroup orientation of low authoritarians disadvantage blacks relative to whites.”); McAdams, supra note 24, at 1083-84.


438. See, e.g., Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302-04 (9th Cir. 1982)
themselves forbidden, but that result in the perpetuation of ethnic preferences, may also be subject to judicial scrutiny. These include practices that are commonly relied upon by ethnic employers in ethnic economies, for example, nepotism and word-of-mouth hiring. Courts in a number of circuits have regularly warned that such seemingly neutral hiring practices may in fact be deemed discriminatory.

In *EEOC v. O&G Spring & Wire Forms Specialty Co.*, for example, O&G, a small company owned by a Polish immigrant, relied mainly on word-of-mouth recruiting or walk-ins during certain hiring windows. The court allowed the use of statistical evidence in the EEOC's case against O&G and found that the preference for Italian Americans in the company's stockholder preference plan is a violation of Title VII.

389. See, e.g., *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 655 n.9 (1989) ("This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities."); *Holder v. City of Raleigh*, 867 F.2d 823, 827 (4th Cir. 1989) ("The presence of family preferences as a factor in a promotion might be part of the evidence upon which an inference of invidious motive may be drawn ...."); *Gibson v. Local 40, Supercargoes*, 543 F.2d 1259, 1268 (9th Cir. 1976) ("Since the relatives being preferred were disproportionately white, the nepotism discriminated against blacks whether or not appellees acted with a discriminatory purpose.").

440. In *EEOC v. Metal Service Co.*, 892 F.2d 341 (3d Cir. 1990), the court found that word-of-mouth hiring practices are "strong circumstantial evidence of discrimination." *Id.* at 350; see also *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975) (holding that word-of-mouth hiring practices are discriminatory because of the tendency of such practices to perpetuate an all-white work force); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975) ("The practice of relying on referrals by a predominantly white work force rather than seeking new employees in the marketplace for jobs was found to be discriminatory."); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426-27 (8th Cir. 1970) ("With an almost completely white work force, it is hardly surprising that such a system of recruitment produced few, if any, black applicants.").

441. 38 F.3d 872 (7th Cir. 1994).

442. *Id.* at 876; see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977). As the Supreme Court stated:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

*Id.*

For a critique of statistical evidence in EEOC actions, see James Bovard, *Job-Breakers, the EEOC's Assault on the Workplace*, AM. SPECTATOR, Mar. 1994, at 32 (describing the ordeal of the Daniel Lamp Co. on Chicago's southwest side when it was sued by the EEOC for having twenty-one Hispanic employees and five blacks; according to the EEOC, the
company intentionally discriminated against African Americans in recruitment and hiring. The majority rejected the company's claim that the relevant labor market was disproportionately composed of recent Polish immigrants and Hispanics because the company could only offer poor working conditions and low pay, but in return, did not require the ability to speak and understand English as a condition to employment. Accordingly, the majority held that the "inexorable zero"—no black workers among the thirty-five positions in the company's "secondary department" operating kick and punch presses—was sufficient to support a finding of intentional discrimination.

Thus, there are a number of facially neutral practices, used by employers in ethnic economies, such as word-of-mouth hiring, or perhaps advertising job openings in ethnic community newspapers, that may run afoul of existing antidiscrimination laws as deemed by certain circuit courts. If these practices produce an ethnic workforce that is statistically skewed when compared to the relevant labor market, this may be sufficient to prove discrimination.

business should have had more black employees, 8.4 blacks, to be precise, because of the area's population); Mike Royko, Update on Businessman and its Downside, HOUSTON CHRON., Oct. 10, 1993, at 6 (same).

443. The court found that "even the use of the most forgiving variables could not reduce the calculation of African Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African Americans." O&G, 38 F.3d at 878. From 1979 to 1985, O&G hired eighty-seven people for the low-skilled "secondary department" operating kick and punch presses. None were African American. Id. at 874. The court held that the company must pay some 451 persons who might have applied to the company more than $378,000 in back pay. Id. at 879.

444. Id. at 877. But as the dissent remarked, the statistical model used to support a finding of intentional discrimination was flawed because it failed to account for the fact that the "lack of an English fluency requirement increases the interest of non-English speaking Polish and Hispanic job-seekers to work at O&G." Id. at 887 (Manion, J., dissenting).

445. Id. at 879.

446. Under Title VII, discrimination may also be proven through disparate impact analysis. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Disparate impact theory involves employment practices that (1) are facially neutral but in fact affect one group of people more harshly than another group, and (2) cannot be justified by business necessity. Disparate impact theory "focuses on the result of, rather than the motivation for, an employment practice." Maurice E.R. Munro, The EEOC: Pattern and Practice Imperfect, 13 YALE L. & POLY REV. 219, 224 (1995). By contrast, disparate treatment, or intentional discrimination, requires proof of discriminatory motive.

Such proof may be established through a variety of methods, such as "individual
B. Beyond the Pale: Government Action

The first approach of striking down as “beyond the pale” of acceptability all preferential practices seems much too unyielding. It would seem to eliminate virtually all of the economically uplifting forms of mutual support reviewed in the earlier sections of this Article. As a less draconian approach, one may propose that it should be “beyond the pale” in the strong sense for government to draw distinctions among citizens by race, or for government to favor some more than others by classifications of race, though not necessarily for particular persons or groups to do so, in response to felt common needs.

One may deem this the appropriate universal rule in respect to government even as a constitutional matter. This rule would apply not merely in respect to economic or commercial matters and opportunities, but equally in respect to every other kind of opportunity as well (e.g., one’s eligibility to adopt a child and one’s freedom to marry). This position would correspond with the view reflected in the Justice Harlan’s dissent in Plessy v. Ferguson,447 that the government of all is not to “know” the race(s) of its citizens in presuming to divide, classify, and dispense on any such distinction as these.448 That kind of treatment by government is constitutionally simply “beyond the pale.”

inferential proof cases; ... group (or systemic) inferential proof cases, using statistics to establish that the employer engages in a system-wide ‘pattern and practice’ of discrimination; ... direct evidence cases, in which an individual or group plaintiff establishes discriminatory intent through direct evidence.” Susan S. Grover, The Business Necessity Defense in Disparate Impact Discrimination Cases, 30 GA. L. Rev. 387, 402 (1996).

447. 163 U.S. 537 (1896).

448. Id. at 555-56 (Harlan, J., dissenting). “These notable additions to the fundamental law [the Reconstruction Amendments] ... removed the race line from our governmental systems. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law ....” Id. at 559 (Harlan, J., dissenting) (emphasis added). “[Our] destinies ... in this country are indissolubly linked together, and the interests of [all] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.” Id. at 560 (Harlan, J., dissenting). “The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.” Id. (Harlan, J., dissenting); see also Adarand
What private persons may presume to do on their own, on the other hand, might be “beyond the pale” in the quite different sense of being beyond the notice of the law: that here, again, the writ of the king does not presume to run. Only insofar as one would attempt to impose his own practice upon another (thus to make the other also engage in the same practice) would the law then draw the line and disallow the attempt.

C. Beyond the Pale: Nongovernmental Actions Beyond the Reach of Law

A third approach is to hold that there are concerns “beyond the pale” that may be appropriate for racial amelioration when the aim is to befriend and to try to bring within the community of full and equal citizenship those who, by race or ethnicity, have hitherto been

Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“[U]nder our Constitution, the government may not make distinctions on the basis of race.... Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.”); DeFunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting) (“So far as race is concerned, any state-sponsored preference to one race over another... is in my view 'invidious' and violative of the Equal Protection Clause.”) (emphasis added). This position has recently been enacted into the state constitutions of California and Washington by popular referenda. See, e.g., CAL. CONST. art. 1, § 31 (enacting Proposition 209).

449. See Peter H. Schuck, Affirmative Action: Past, Present, and Future, 20 YALE L. & POL'Y REV. 1, 85-86 (2002). Professor Schuck makes a distinction between a preference mandated by the government and one pursued voluntarily by private entities. Id. at 86-89.

450. For example, if a lender imposed as a condition to making a loan that the borrower prefer persons of X ethnic origin in conducting the enterprise, the law would draw the line at the lender's imposition of his preference on others. Here, one might reasonably maintain, though the law might not forbid the lender to lend preferentially (i.e., to do so consistent with acknowledged ties within his or her ethnic community, to be of assistance to coethnics), it would not necessarily also accept as part of his prerogative a legal right to bargain so to compel the borrower to carry into execution the lender's own ethnic preference in the employment practices of the borrower's business. There are close analogies for this suggested distinction. See Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (holding that the Fourteenth Amendment forbids state courts from granting enforcement sanctions to racially-restrictive covenants "running with the land"). Also, certain Commerce Clause cases may be helpful by way of analogy, such as those holding that although a state may provide a preferred status for its own citizens in state government lending and procurement the state may not extend that preference to require that those to whom it lends or with whom it trades shall likewise grant such a preference with respect to those it employs or to those to whom it resells. See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
The concerns "beyond the pale" are not those of the dominant (white or "pale") race(s), however, or of the dominant, white ("pale") ethnic nationalities, but rather of all those others: those "beyond the pale," i.e., persons of color, of various hues and shades, hitherto unfairly left behind. This application of our informative phrase would correspond to the dictionary definition and meaning of "pale" as a person or object of whitish complexion, thus the claim that all appropriate ethnicity-based affirmative action is itself concerned with those "beyond"—i.e., other than—"the pale."{452}

Still, the difficulty to explore here is the presumption that it is only persons other than those of "pale" complexion who may appropriately be permitted affirmative self-help measures, no matter the circumstances. This proposition seems doubtful and may itself reflect a narrow and particular "racist" view. For example, Poles from Eastern Europe, as a newly-arrived immigrant group, though not "persons of color" by literal skin tone, may nonetheless be reasonably characterized with reference to a relevant time of U.S. history by their immigrant and outsider status, economic hardship, and language and culture differences. There is no easy way to distinguish why the law should tolerate informal networks of Koreans or Haitians created by way of intra-ethnic mutual support, but should not permit such arrangements for Poles.

Ethnic economies and the underlying preferences would be viewed more benignly under this third approach. Here, a distinction may be made between "categorical racial preference" and "contextual racial preference."{453} To the extent that discrimination is a reflection of one's biases for or against certain types of people, categorical preferences are intrinsically problematic because they are expressed regardless of context. For example, a categorical racial preference may involve a Nazi who prefers to associate with Aryans

451. This approach would allow the "affirmative actions" of the nongovernmental, privately-conducted kind recounted in Part II. Here, "beyond the pale" signals the sense of being "beyond the reach or jurisdiction of the law," or, in accordance with yet another distinctive sense of the word "pale," in the twilight of the law. See WEBSTER'S NEW COLLEGIATE DICTIONARY, supra note 422, at 847 (defining "pale" as "feeble or faint").

452. See id. (defining "pale" as "deficient in color or intensity of color"); THE OXFORD ENGLISH DICTIONARY, supra note 223, at 91 (defining "pale" as "[o]f persons, their complexions, etc.: Of a Whitish or ashen appearance").

453. Alexander, supra note 431, at 158.
and to not associate with Jews in all contexts, whether in marriage or employment.\textsuperscript{454} By contrast, certain preferences, such as a sense of greater “concern for the welfare of kin, tribe, community, or nation than for the welfare of others” is generally less offensive in some contexts or even laudatory in others.\textsuperscript{455} This is especially so if the group that is preferred is relatively small and the preference at issue reflects personalistic ties and commitments.\textsuperscript{456} In other words, “morally favoring a small group and (relatively) morally disfavoring the rest of humanity has a different moral quality from morally disfavoring a small group,”\textsuperscript{457} especially if such favoring is undertaken by “a member of a previously victimized group” for one of its members.\textsuperscript{458} Accordingly, under these circumscribed circumstances, favoring “one’s own” through in-group preferences does not have to mean hostility towards out-group members, though the distinction may become blurry.

In-group preferences or group solidarity may be much less about biases against others and much more about group identity and one’s sense of self.\textsuperscript{459} Primordial bonds and affinities to family, religion, and ethnic group are a significant component of the process of self-definition.\textsuperscript{460} They “not only provide a tie to other people, but also offer us our very selves.”\textsuperscript{461} Historically, these ties are reinforced when new groups in the United States are faced with nativist desire to exclude and/or segregate those the nativists deemed unassimilable, ranging from the Irish and Italian, Chinese and Japanese to Jews, Mexicans, and others; Jim Crow laws imposed segregation on blacks in virtually all areas of life in the American South.\textsuperscript{462}

\textsuperscript{454} Id.
\textsuperscript{455} Id. at 159.
\textsuperscript{456} Id. at 160.
\textsuperscript{457} Id. “This is so primarily because the disfavoring of a small group is less likely to be the logical corollary of positive personal commitments and ties to others than it is to be the manifestation of an ideology that proclaims erroneously that members of the small group are morally unworthy.” Id.
\textsuperscript{458} Id. at 175.
\textsuperscript{459} Karst, supra note 30, at 306-10 & nn.15-21.
\textsuperscript{460} Id. at 307.
\textsuperscript{461} Id. at 308.
\textsuperscript{462} Id. at 303-26. “Virtually every cultural minority in America has had to face exclusion, forced conformity, and subordination.” Id. at 325. These include coercive Americanization, such as congressional attempts to deport aliens who failed to apply for citizenship or learn
For non-English speakers especially, the barriers to entering the general labor force are often quite high. Throughout the United States, there have been attempts at both the state and federal level to elevate English to "official" status as the language of government. Private employers have also adopted regulations that mandate English at the workplace, requiring English regardless of whether the conversation includes customers, supervisors, or other employees. Courts have rejected plaintiffs' assertions that workplace English requirements are burdensome and presumptively violate Title VII. As a result, some commentators have argued that legislatures should be able to mandate English within a period of time.

English within a period of time, id. at 314; the ban on teaching foreign languages, id.; Jim Crow-type measures such as the disenfranchisement of Jews in some states until the mid-nineteenth century, school segregation of blacks, Asians, Italians, Mexicans, id. at 322; and private discrimination by unions, employers and landlords, id.


464. Cornell & Bratton, supra note 463, at 611-17 (describing attempts to introduce an English Language Amendment to the Constitution in 1981 and periodically thereafter); id. at 614-15 (describing attempts to introduce, through Congress, proposals mandating English for federal government services and repealing federal laws that require Spanish-language election ballots and encourage Spanish-language education).


467. Cornell & Bratton, supra note 463, at 618-19; see, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (rejecting EEOC Guideline that presumes an "English-only policy has a disparate impact" on an employee); Long v. First Union Corp., 894 F. Supp. 933,
have characterized states with official English legislation as “the functional equivalent of Jim Crow legislation” whereby a privileged and dominant group uses the law to achieve two objectives: first, to “retard the operation of market forces” toward an integrated labor market in order to ensure its continued dominance; and second, to erect entry barriers designed to discourage the in-migration of minority language speakers (primarily Latinos).468

Under these circumstances, newcomers lacking English language skills and facing “occupational segregation”469 will rationally resort to enclave communities470 and will move into the mainstream economy only if it offers better economic opportunities than those that are available for them in enclaves.471 In this context, it is not inaccurate to characterize “[p]ersonalism and nepotism ... as ways of surviving in a hostile environment.”472 As discussed in Part II, the proximity of ethnic businesses in enclaves generates additional opportunities for conducting business in the enclave’s language, “creating both employment and trade opportunities for which a relative disability with English presents no barrier.”473 These preferences could also be viewed as a vehicle through which out-groups could achieve a degree of economic security necessary for equal citizenship.474 Group solidarity, in other words, “is likely to be seen as a practical necessity for a group that is just emerging from severe conditions of domination,”475 one of the necessary first steps

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471. Id. at 620.
472. Karst, supra note 30, at 326 n.149.
473. Cornell & Bratton, supra note 463, at 630.
474. Karst, supra note 30, at 329 (“Equal citizenship includes both a measure of substantive equality and formal equality before the law.... In the long run, a cultural minority’s status goals will be secured only when large numbers of its members have advanced into the middle class.”).
475. Id. at 330.
leading toward a sense of belonging to the Nation, economic empowerment, and eventually assimilation.

Under this approach, existing antidiscrimination laws could be interpreted in a way that recognizes the special circumstances surrounding ethnic economies created by historically non-dominant out-groups. For example, in *EEOC v. Consolidated Service Systems*, Judge Posner of the Seventh Circuit concurred with the district court's finding that statistical data showing eighty-one percent of the company's hires were Korean in a geographical area where less than one percent of the work force is Korean was not due to discrimination. As a small company with annual sales of only $400,000, it relied primarily on word of mouth for its employees because "[i]t is the cheapest method of recruitment. Indeed, it is practically costless." According to Judge Posner:

476. *Id.* at 342-43 ("A group that has been subordinated in the past is unlikely to find that acceptance until individual members of the group have moved into the middle class in large numbers.").

477. *Id.* at 332, 334 (asserting that assimilation is "closely associated with economic class"); cf. Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998) (arguing that the right of communities to disassociate themselves from general society in favor of self-governance is consonant with liberalism).

478. 989 F.2d 233 (7th Cir. 1993).

479. *Id.* at 235 (finding that in the first quarter of 1987, seventy-three percent of the applicants for jobs with the company and eighty-one percent of the hires were Korean, although less than one percent of the work force in Cook County, Chicago, was Korean and no more than three percent of the janitorial and cleaner work force was Korean). The company, Consolidated, was owned by a Korean, who had bought it from a previous owner who was also Korean. *Id.* at 235. Although the court acknowledged that the difference cannot be attributed to mere chance, it also found that there was neither direct evidence of discrimination nor circumstantial evidence that would compel an inference of intentional discrimination or disparate treatment. *Id.* at 235-37. The EEOC's witness list contained the names of ninety-nine persons. *Id.* at 237. Four witnesses were produced at trial to support the EEOC's position that the owner had refused to hire them because they were not Korean. The judge did not find them credible. *Id.* at 235-37.

480. *Id.* at 235. The owner or current employees were usually approached by people at work or at social events. *Id.* The owner advertised once in a Korean-language newspaper and twice in the *Chicago Tribune*, but these efforts resulted in no hires. *Id.* The owner had placed an ad in the *Chicago Tribune* in anticipation of a contract which he never got and thus there was no positions to fill. *Id.* at 237.
It is not discrimination ... for an employer to sit back and wait for people willing to work for low wages to apply to him. The fact that they are ethnically or racially uniform does not impose upon him a duty to spend money advertising in the help-wanted columns of the *Chicago Tribune.*

Low-cost word-of-mouth recruiting may indeed be an important device for companies in highly competitive businesses. But as Judge Posner also recognized, such hiring practices adopted by employers in ethnic economies will likely result in an ethnically homogeneous work force. "The social and business network of an immigrant community racially and culturally distinct from the majority of Americans is bound to be largely confined to that community, making it inevitable that when the network is used for job recruitment the recruits will be drawn disproportionately from...

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481. Id. at 237.
482. Id. at 236. Judge Posner found that word-of-mouth hiring is effective in producing a good work force for two reasons. The first is that an applicant referred by an existing employee is likely to get a franker, more accurate, more relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor.... The result is a higher probability of a good match, and a lower probability that the new hire will be disappointed or disgruntled, perform badly, and quit. Second, an employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud; so word of mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously.

Id. at 236.
the community." 483 No inference of intentional discrimination 484 may be drawn, however, based on the pattern just described. 485

Furthermore, if an employer has no English fluency requirement, this will be an additional factor that makes the employer especially attractive to members of different ethnic groups. 486 In EEOC v. Chicago Miniature Lamp Works, the Seventh Circuit found that "[c]ommon sense dictates that a nondiscriminatory employer with no English fluency requirement will receive a disproportionate amount of applications from non-English speaking persons." 487 Thus a company's passive reliance on "the natural flow of applicants" with a preference for a work environment that does not require

483. Id. at 235. Judge Posner continued:

No inference of intentional discrimination can be drawn from the pattern we have described, even if the employer would prefer to employ people drawn predominantly or even entirely from his own ethnic or, here, national-origin community. Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted because it is the most efficient (not defended because it is efficient—the statute does not allow an employer to justify intentional discrimination by reference to efficiency, 42 U.S.C. § 2000e-2(k)(2)), just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.

Id.

484. At the outset, the case was also a disparate impact case, but the EEOC abandoned its claim of disparate impact. Id. at 236. The court noted that if this were still a disparate impact case, and if contrary to EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 304-05 [(7th Cir. 1991)], word of mouth recruitment were deemed an employment practice and hence was subject to review for disparate impact ... then the advantages of word of mouth recruitment would have to be balanced against its possibly discriminatory effect when the employer's current work force is already skewed along racial or other disfavored lines.

Id. at 236.

Controlling case law for the Seventh Circuit, as enunciated in EEOC v. Chicago Miniature Lamp Works, does not find passive reliance by an employer on employee word-of-mouth recruiting to be an employment practice for purposes of disparate impact analysis. Chi. Miniature Lamp Works, 947 F.2d at 304-05. To prove disparate impact, "a more affirmative act by the employer must be shown in order to establish causation." Id. at 305.

485. Additionally, Judge Posner held that even if the motives behind certain hiring practices were a "mixture of discrimination and efficiency," there would still be no liability for discrimination if the owner would have adopted the same practices "even if he had no interest in the national origin of his employees." Consol. Sys., 989 F.2d at 236.


487. Id. at 303 n.9.
English fluency would not amount to discriminatory intent. The Seventh Circuit held that a determination of the relevant labor market should take into account factors such as commuting time and "the relative attractiveness of [certain] jobs to different ethnic groups," especially those with limited English fluency. Jobs in ethnic enclaves, especially those that are geographically close to residential enclaves and do not require English fluency, would in all likelihood be especially attractive to those coethnics who reside in nearby ethnic residential enclaves.

The context in which these cases arise is most aptly described thus:

The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses ... have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent.

It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring. There is equal danger to small black-run businesses in our central cities. Must such businesses

488. Id.
489. "Low-paying, unskilled jobs are more likely to be filled by those living closer to the site of the job, simply because the cost (including the opportunity cost of time lost) of commuting cannot be justified.... Commuting time is thus especially important in this case." Id. at 302.
490. Id. at 302-03. In his dissent in EEOC v. O&G Spring & Wire Forms Specialty Co., Judge Manion found the EEOC's statistical model to be flawed because it failed to identify the interested segment of the labor market:

The lack of an English fluency requirement increases the interest of non-English speaking Polish and Hispanic job-seekers.... The statistical model also failed to account for the fact that Polish and Spanish were routinely spoken at O&G. This would reduce the interest of the English speaking black (and white) labor market to work at O&G.

38 F.3d at 886 & n.2 (Manion, J., dissenting).
undertake in the name of nondiscrimination costly measures to recruit nonblack employees? 491

CONCLUSION

The Article aims to lay out the various categories of ethnically based preferential policies that have been pursued in different countries by government and nongovernment actors. Part I examined government policies clearly designed to prefer a government-mandated ethnic group, as opposed to government policies designed to prohibit discrimination on the basis of ethnicity. Part II studied preferential policies that exist wholly outside the government’s mandate and that form the basis for the existence and proliferation of ethnic economies, and their subvariants, ethnic enclaves and niches, in many developed as well as developing countries.

In asking how a legal regime may respond to these types of nongovernmental preferential policies, it is useful to set up a comprehensive framework to parse the different types of nongovernment preferences. The challenge that confronts us is to restrict the reach of the law to allow some forms of intra-ethnic mutual support delineated in Part II, and thus preserve their obvious good, both for the larger society and for the uplifting of spirits of those struggling to gain some fair footing these networks and varieties of ethnic energy so frequently provide. The challenge also extends to how best to reflect a degree of reasonable care and prudence in measuring the fair scope of such self-referential ethnic-economic arrangements.

Clearly, antidiscrimination laws are appropriate, even needed, to open up opportunities for those against whom nongovernmental,

491. Chi. Miniature Lamp Works, 989 F.2d at 237-38. Note that the court is not saying that hiring on the basis of preferences for or discrimination against a person on the basis of race or ethnicity is valid because it is efficient to do so. Id. at 236 (“The statute does not allow an employer to justify intentional discrimination by reference to efficiency ....”). It is saying that no inference of intentional discrimination may be drawn from a pattern of behavior that arises from a particular context—the clustering of ethnic communities, bound by common culture, language, and background, which in turn encourages the formation of ethnic economies with similar characteristics. Word-of-mouth hiring and relying on family members, relatives, and friends in this context should not, without more, constitute proof of intentional discrimination.
private discrimination is commonly practiced. The "paradigm" cases are those of business establishments excluding, or segregating, certain persons altogether; and of employers declining to employ them, or to employ them only in certain positions, or on less favorable terms; or of banks "redlining" zones identified by race and declining to lend for enterprises or homes so located. The wide range of civil rights legislation—in housing, employment, insurance, banking, and public accommodations—governing refusals to deal with some on the same terms as one's willingness to deal with others who differ by race and ethnicity is a regime of law to approve and strongly defend.

At the same time, such a regime of law may also reach refusals to deal of the various kinds recounted in Part II, and it appears to reach such practices whether the objected-to-conduct, or the refusal to deal, is framed in terms of:

1. discrimination against those who are of X ethnicity, rather than, for example, in terms of;
2. a preference for those of Z ethnicity, or;
3. a preference for others who are merely like oneself, specifically, like oneself in respect to being of the same ethnicity, plus, possibly, additional "likeness" characteristics such as immigrant status, language, customs, a history of shared hardships.

These forms of Category One "refusals to deal" on the one hand, and forms of Category Two and Category Three "special preference" or mutual help on the other, seem to reflect clearly distinguishable states of mind and policy by those engaged in these practices. Insofar as they do reflect different states of mind and policy, they may also tend to cover different practices, albeit with a considerable field of overlap in terms of certain specific effects.

The differences as well as the overlaps are easily illustrated. The preliminary listings of practices one through three provided above may also lend themselves to a kind of "lexical ordering." The first category ("discrimination against") may constitute the most exclusionary (and least defensible) practice; Category Two may be less exclusionary (and perhaps somewhat defensible); the third category may seem to be least exclusionary (and most defensible).

492. And not merely government discrimination.
Category One Cases

In a stipulated instance of Category One, the employer Y, (or banker, public accommodation owner, etc.) simply does not want to deal with X, perhaps from an animus toward persons of X’s ethnicity. Accordingly, she will refuse to deal with X to an extent exactly reflecting the intensity of that animus, subject only to duress of law.\textsuperscript{493} This is a paradigm case for the application of a typical antidiscrimination law. As long as one is engaged in what is essentially a commercial or economic activity, one will not be permitted to turn away or discriminate against otherwise eligible, ready, able, and willing persons merely because of their ethnicity. Laws reaching just these cases may be of the most strongly justified sort. They aim to prevent flat-out refusals to deal with a given person just because of that person’s ethnicity. In reaching only these cases, the law would leave relatively less-exclusionary private-sector practices alone. Moreover, in respect to those practices, at least some may strike one as not warranting any strong legal sanction to discourage the practice; indeed, the practice itself may be seen as not necessarily even constituting a “wrong” at all, but, instead, even as representing a constructive kind of “positive good.”

A variation of Category One effectively with the same outcome may involve an employer’s refusal to deal which does not spring from any animus toward persons of X’s ethnicity, per se. Y would readily transact with X and not treat X on any less favorable terms than she would treat anyone else. Yet, she will routinely turn X away, and in that respect the case is still within the general framework of Category One. Rather, Y’s refusal to transact with X is strictly impersonal. It is derived only from impersonal, straightforward considerations of profit and loss, from an ordinary concern that engaging in the proposed transaction with X may lose her more than she can reasonably expect to gain from that transaction due to

\textsuperscript{493} Y will refuse transacting with X except to the extent that an antidiscrimination law compels her otherwise. Cases within Category One would seem to have the harshest discriminatory impact and effect. This would be the case because in all Category One cases, X will always be turned away by Y on account of X’s ethnicity, or at least accepted by Y only on more onerous conditions than Y would exact from anyone not of X’s ethnicity.
ungovernable third-party responses. For example, if restaurateur Y employs Latinos not only as kitchen help but also as maîtres d' or wait persons, Y may stand to lose more business than she will gain, if non-Latinos will gradually stray off to take their business elsewhere. This is still a refusal to deal because of X's ethnicity case, however, in that it is X's ethnicity per se that at once ignites Y's exclusionary decision not to transact with him.

Still, this case may be different in that the "refusal to deal," based solely on third-party concerns, will be somewhat less frequent than when based on personal animus. That ought to be so because in the "animus" case, Y will always decline to deal with X unless compelled to do so by force of law. Y will decline to deal only when Y is herself vulnerable to third-party reactions adversely affecting her, in a substantial and material way, and that she is effectively helpless to avoid.

Typically, however, in neither of these cases of discrimination against X will Y be excused from liability to X under most anti-discrimination laws in the United States. And this is generally so, whether in respect to actions brought by the individual in X's position or in respect to an enforcement action brought instead, or additionally, by some public agency. This Article is not proposing

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494. Nonetheless, the effect on persons in X's position may be insignificant. It will be so if Ys are few, or if the opportunities commanded by Ys are few or command only a small fraction of transactional opportunities of a kind readily within X's reach. Even so, the Article does not propose to "excuse" Y from the law operative in Category One cases.

495. This is so although one could argue that compelling Y to transact with X in this circumstance is no different in effect from compelling Y to "subsidize" X. Even if X will perform as well as anyone else with whom Y would transact, Y's "costs" associated with the transaction will be higher, even if due to the reactions of others whose behavior is beyond Y's (and X's) control.

In theory, there may be a straightforward legal way of dealing with this problem of "aversive reactions" by third parties to the nondiscriminatory practices of Y. Under a properly comprehensive antidiscrimination civil rights act, the "switch" by third parties away from transacting with Y may itself be made to constitute an actionable wrong by them against Y (and perhaps against X as well). The problem with such cases, of racially "reactive boycott," is generally not with the theory of the cause of action, but with applying it as a practical matter. "Running down" those who "switched" away from Y is simply not practical.

496. In this regard, there is no serious possibility that Y could successfully claim that X's ethnicity disqualifies X for the particular position for which he applied by arguing that being of some other race (some race to which Y's customers are not averse) should be regarded as a bona fide occupational qualification (BFOQ) for employment. Asserted as a defense, the claim will fail.

Many state and federal antidiscrimination statutes in the United States, including Title
to make any change in this regard, so as to excuse Y in either kind of case, despite the distinctions already noted.

**Category Two Cases**

In a different scenario, Y, the employer, has no aversion to X or persons of X's ethnicity. She does, however, have a preference for persons of some particular ethnicity, ethnicity Z. And here, Y's preference is not just for Y's own ethnicity. X will thus gain the

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VII of the 1964 Civil Rights Act, simply exclude race from ever constituting a BFOQ. Title VII, for example, provides a bfoq in respect to sex, religion, and even national origin, but not for race. 42 U.S.C. § 2000(e)(2) (2000). Additionally, the requirement for establishing a characteristic as a BFOQ generally goes to the relevance of the qualifying characteristic to the essential job skills and tasks as such, and ordinarily to nothing more.

For example, the fact that white customers, constituting even ninety percent or more of a restaurant's trade, would abandon the restaurant were the restaurant to employ a person of X's ethnicity as hostess, may be true. Their averse reaction has nothing to do with such a person's talents, skill, personability, etc., to be superb in the performance of the position, and may not, therefore, be taken into account in assessing X's suitability for the position. Accordingly, that X's employment by Y may induce a gradual boycott of the restaurant which may then fail in business (at which point X, too, will be out of a job once again), will not permit Y to treat race as a BFOQ. Some have argued that it should, on the grounds that the 1964 Civil Rights Act was cruelly indifferent to the plight of the small businessperson unable to control customer flight. See Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

Some antidiscrimination laws, including Title VII itself, have a "small business" cutoff—the act may not apply to an employer with fewer than fifteen employees. See 42 U.S.C. § 2000(e). Indirectly, this exclusion from the reach of the law may recognize the unfairness of subjecting small enterprises to the full rigor of an antidiscrimination law. But if so, it is only indirect, since the exemption equally shelters the same business entity that merely wants to discriminate, even perhaps to maximize profits by discriminating, in exactly the way it chooses to do so, by refusing to employ some persons just on account of their ethnicity or race.

497. Relief or exemption from antidiscrimination laws on the basis of adverse third-party reaction has generally not been provided because it is seen as inviting, or as conferring, upon such third parties a virtual "heckler's veto" over antidiscrimination laws. Thus, if there were such an exemption, and one wanted to maintain an unfair ethnic commercial borrowing advantage as a white person, one would need merely to combine with, or even act in conscious parallelism with, others of a like desire to signal to a target bank one's resolve to boycott that bank should it presume to lend on equal terms to non-whites. Currently, under U.S. law, neither the threat nor the reality of that kind of action may relieve the bank of its legal obligation under a straightforward antidiscrimination law. Perhaps the correct response is not to consider relieving the adversely affected bank, employer, or place of public accommodation, of its obligation of strict nondiscrimination, but to vest a cause of action in the bank to recover against its ethnically-motivated reactive boycotters. See supra note 495.
transaction except in the circumstance where a person of the favored Z ethnicity also applies.\(^4\)

This scenario might well be one in which Y, a white person, harbors no animus toward other whites, Latinos, Chinese, Malays, etc. Y nonetheless has an affirmative preference for African Americans. And it is solely the opportunity presented to Y to exhibit that preference that will bring it into play. This inclination by Y may arise just from Y's special liking and admiration of Zs, or it may have arisen partly from a sense of felt moral obligation to help Zs in particular.\(^5\) Of course, it might also be "preference" arising merely from a business motive, that to be seen as hiring more people like Z and/or of extending credit to more people like Z will itself impress others, and in doing so, redound to the business advantage for Y herself.\(^6\)

In this second category of cases, both the government itself, as described in Part I, as well as private individuals and institutions, have acted to prefer Zs over non-Zs, whether out of genuine desire or in response to economic motives and incentives.\(^7\) This Article

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\(^4\) Whether this will have a significantly detrimental impact on persons not of Z ethnicity depends on the circumstances. If all or nearly all Y primary contractors have a subcontracting preference for Zs, and there is a sufficient supply of Zs to meet the needs of the primary contractors in respect to a given type of subcontract, then it is highly likely that a non-Z will lose not just one subcontract, but the next, and after that the next as well. So, likewise, if all "elite" private universities mimic each other, in having a preference for Zs, then X, a student characterized by two characteristics (one, that he is an excellent student, and two, that by ethnicity, he is not-Z), then it is not the case he merely loses the opportunity to enroll in a particular elite institution. Rather he is excluded (by ethnicity) from all such institutions.

\(^5\) Just this kind of explanation has been offered in defense of one limited kind of affirmative action, namely, the kind involving setting aside, preferring, specially encouraging, or subsidizing, "places" for African Americans. The idea rests on the claim and observation that persons of that description (blacks in America) have borne uniquely terrible burdens of a disgraceful history within this country, and thus the case for preference here is exceedingly strong as a matter of historical justice.

\(^6\) Thus, and interestingly, this is the reverse side of the case considered earlier (the reverse of the case wherein Y will be made to suffer—by third party reaction—should she not turn away Z); here, the circumstances are such that she may expect specially to prosper—by third party reaction—should she transact with Z. See supra notes 496-99; infra note 502.

\(^7\) For example, the government has acted to provide economic incentives for Zs to be preferred, by paying a bonus to primary contractors who bypass lower bids by some subcontractors (usually white) to accept higher bids by others (usually non-white). Or, it may be that a private university establishes a "preferential" admission policy in respect to Zs, partly because it has learned that it will not be seen as desirable an institution by others insofar as it enrolls few, if any, Zs. Such an institution's "preferential" policies may be a
WILLIAM AND MARY LAW REVIEW

has not examined Category Two preferences for Zs, but this preference is mentioned here merely to show the complex continuum of preferences and the array of possible responses from a legal system. A legal regime could either strike down Category Two preferences, whether government-mandated or privately pursued, or it could tailor its responses and distinguish between government-mandated programs and non-government, voluntary ones, finding the latter to be more defensible and less problematic.  

Category Three Cases

This third category which has been the focus of this Article is distinguishable and different still. Here, if X is unable to secure the particular transaction, it will be only in such instances as someone of the seller's (or lender's or employer's) own ethnicity was available and interested as well. Here, again, there is no animus toward X or reluctance to transact with X at all; rather, Y merely prefers someone close within his "own community." This preference proceeds from an exceptional sense of recognition and more immediate identification, as it might be in respect to one's own "kin."

It may even be the case that Y is a person who would not otherwise be making a loan at all, or selling a particular item at all in the circumstances, but Y is moved to do so because of this special sense of kinship. On a more general level, it is difficult

502. Some have suggested that nongovernmental, voluntary programs may be acceptable as an approach that would minimize some of the objections to current government-mandated programs. See Schuck, supra note 449, at 85-86. Professor Schuck distinguishes between government-mandated preferences and ones pursued voluntarily by private entities. Id. at 86-89 (discussing reasons why "[a] racial preference mandated by public law is much more objectionable than one that a private entity decides to establish to reflect its own values and for its own purposes."). Even in the case of voluntary and private preferences, however, some may be problematic, "especially when they are used as the basis for allocating valuable social resources whose principle of distributive justice is and should be merit, properly defined." Id. at 85.

This Article does not address the issues raised by Category Two, but does on the whole agree with the distinctions raised by Professor Schuck concerning mandatory government preferences and private, voluntary preferences. To the extent the preference described in Category Two, practiced by X in favor of Z, is one practiced by X voluntarily as a private person or entity, a more in-depth analysis of this type of preference is provided in the article by Professor Schuck.

503. An analogy may be drawn to the case where Y is only moved to provide a loan

compound of overlapping motives, thus of mutually-reinforcing strength.
conceptually to separate the very existence of ethnic economies themselves from the intra-group preferential practices that support them because it is the preferential practices, arising out of the need and call to help each other, that gave rise to the creation of an ethnic economy to begin with. In this sense, ethnic economies are intrinsically and by definition self-generative, and the practices, whether they be hiring, or apprenticeship, or in-group loans, would not take place but for the common ethnicity and community ties that gave rise to the practices. In other words, the existence of ethnic economies and the intra-group preferences are mutually reinforcing, and one would not exist without the other.

It is largely within the framework of this category that the major portions of this Article are focused and elaborated in describing how networks of identified types of ethnic kinship work overall, and evidently, on balance, with highly constructive consequences both for the participants and the economic well-being of the larger societies or cultures within which they abide.

Nonetheless, it is important to repeat a word of caution sounded elsewhere in the Article. There is a point at which any ethnic community may so advance its networking, cohesion, size, structure, and inwardly-looking economic and political characteristics as to take on a different character than it once possessed—a character itself more of intolerance than of tolerance. This different character would consist of a set of self-preferring practices discriminatory toward nonmembers, and would virtually force others to fashion their own response, ultimately stimulating rivalries and threatening an ethnic balkanization of the community or country. And just that kind of development may itself place the group once more ... beyond the pale. That is, beyond the tolerance of the law.

because of a special sense of kinship in respect to a nephew who needs such a loan. The case presents an interesting issue, in testing an antidiscrimination law, when another person is then refused the same treatment as that which Y’s nephew just received. From one point of view, X is refused a loan Y provided to another person, thus he is the “victim” of “discrimination” in that respect. Looking at the matter in this way, X could have a case. From this nepotistic example, all we need to make the case realistic so that X may assert an ethnic discrimination complaint is to suppose that Y has made such a “special accommodation” to someone who, though not his nephew, is still one to whom he felt a similar, quite comparable closeness (a newly arrived fellow Chinese, fellow Thai, or fellow West Indian from Jamaica).