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## Is the "Hire American" Executive Order a Suspect Classification?

Michael H. LeRoy

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## IS THE “HIRE AMERICAN” EXECUTIVE ORDER A SUSPECT CLASSIFICATION?

Michael H. LeRoy\*

### SUMMARY

President Trump’s Executive Order 13,788 declares a “Hire American” policy for H-1B visas.<sup>1</sup> This action discriminates against Indians to benefit white American workers. The technology workforce in the United States has 4.6 million jobs.<sup>2</sup> Most employees in this large workforce—about 76%—are U.S.-born.<sup>3</sup> In this domestic segment, 85% of employees are white.<sup>4</sup> Among foreign-born workers (11.6% of all workers), Asians make up 66%, with Indians predominating.<sup>5</sup>

“Hire American” renews a mostly forgotten history of discrimination against Indian workers. The Immigration Act of 1917 enacted an “Asiatic Barred Zone.”<sup>6</sup> Indian immigration was curtailed to 100 annual arrivals.<sup>7</sup> Typical of the period, the California State Board of Control stigmatized this group: “Hindu . . . is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals, and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people.”<sup>8</sup> The Supreme Court in *Bhagat Singh Thind* denied a citizenship petition, crudely theorizing: “It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.”<sup>9</sup>

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<sup>1</sup> Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 21, 2017).

<sup>2</sup> Julia Beckhusen, U.S. CENSUS BUREAU, OCCUPATIONS IN INFORMATION TECHNOLOGY: 2014 AMERICAN COMMUNITY SURVEY 2 fig.1 (2016).

<sup>3</sup> *Id.* at 14 fig.14.

<sup>4</sup> *See infra* Table 3.

<sup>5</sup> *See infra* Table 3.

<sup>6</sup> *See* Immigration Act of 1917, Pub. L. No. 301, 29 Stat. 874 (1917); *see also* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 80 (1999).

<sup>7</sup> *See infra* note 140 and accompanying text.

<sup>8</sup> CAL. STATE BD. OF CONTROL, CALIFORNIA AND ORIENTAL: JAPANESE, CHINESE, AND HINDUS, REPORT OF STATE BOARD OF CONTROL TO GOV. WM. D. STEPHENS 101–02 (1920).

<sup>9</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923).

The United States Citizenship and Immigration Services (USCIS), an agency charged with implementing the “Hire American” order, is already discriminating against Indian H-1B visa holders. In the first quarter of 2017, the agency issued Requests for Evidence (RFEs) for 18% of petitions for Indian workers, far below the 25% rate for all other petitions.<sup>10</sup> The “Hire American Order” was issued in the second quarter, and by the fourth quarter USCIS issued RFEs for 24% of petitions for Indian workers, while all others fell to 19.6%.<sup>11</sup> As a result, more Indians are being denied visa extensions and are deportable. I apply precedents from other facially neutral restrictions aimed at lawfully admitted aliens in *Takahashi v. Fish and Game Commission* and in *Dandamudi v. Tisch* to show that the “Hire American” order is a suspect classification. Using evidence in this study, courts should apply strict scrutiny to review Executive Order 13,788 and its related regulations.<sup>12</sup>

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<sup>10</sup> See *infra* Table 5.

<sup>11</sup> See *infra* Table 5.

<sup>12</sup> See discussion *infra* Section III.B.

This is a Government of the white race. The original legislation recognized that fact. All of the legislation since that time recognizes that fact.

—Ulysses S. Webb, California Attorney General<sup>13</sup>

Bill Whitaker (*CBS 60 Minutes* Reporter): “You really believe that the Indian workers are better educated, better skilled, have skills workers do not have?”

Mukesh Aghi (U.S.-India Business Council): “No. No. I’m not saying that. I have all the respect to the U.S. worker—“

Bill Whitaker: “So why are they getting the jobs and the Americans are losing them? Why are they not being done by American workers?”<sup>14</sup>

## INTRODUCTION

### A. Overview

What if President Trump literally said that his executive orders on immigration would protect white Americans by restricting lawful entry and residence of dark-skinned aliens? That was the gist of his “shithole countries” comment when he blocked a bipartisan agreement for immigration reform in 2018.<sup>15</sup> At the time, he referred to Haiti, a nation that is 95% black.<sup>16</sup> Norway’s population, his preferred immigration source, is 92% white.<sup>17</sup> His noxious scale of racial preferences motivates Executive

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<sup>13</sup> *Japanese Immigration Legislation: Hearing on S. 2576 Before the S. Comm. on Immigration*, 68th Cong. 41 (1924) [hereinafter *Japanese Immigration Legislation*] (statement of Gen. Ulysses S. Webb, Cal. Att’y Gen.).

<sup>14</sup> Bill Whitaker, *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?*, 60 MINUTES (CBS television broadcast Mar. 19, 2017), <https://www.cbsnews.com/news/are-u-s-jobs-vulnerable-to-workers-with-h-1b-visas/> [<https://perma.cc/W7BT-68XZ>] (interview available in text).

<sup>15</sup> See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), [https://www.washingtonpost.com/politics/trump-at-tacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-at-tacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) [<https://perma.cc/KE2X-44EH>]. Dawsey reported that President Trump said, “Why are we having all these people from shithole countries come here?” *Id.* He reportedly continued, “Why do we need more Haitians? . . . Take them out.” *Id.*

<sup>16</sup> CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK (Haiti), <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> [<https://perma.cc/2KAV-VPCQ>].

<sup>17</sup> See CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK (Norway), <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/no.html> [<https://perma.cc/DT3X-8BL8>] (combining Ethnic groups Norwegian and other European).

Order 13,788, particularly the “Hire American” element.<sup>18</sup> This order pertains to the H-1B visa.<sup>19</sup> Workers can be hired under an H-1B visa only after meeting specialty occupation standards and petitioning companies certify labor market protections for Americans.<sup>20</sup> U.S. employers—especially those with a strong presence in Silicon Valley—have long maintained that too few Americans are educated and trained to meet their hiring needs.<sup>21</sup> Critics of the H-1B visa point to fraud in the program.<sup>22</sup> More fundamentally, they contend that there is an ample supply of American workers but the H-1B visa program offers cheaper migrant labor.<sup>23</sup> Regardless of one’s viewpoint, 62% of these temporarily admitted employees come from Asian countries—and 50% alone come from India.<sup>24</sup>

A president has plenary powers over immigration.<sup>25</sup> However, does a president have constitutional authority to favor white American workers at the expense of Asian-born Indians (Indians)? My study poses this research question. More specifically, I ask whether the “Hire American” preference in Executive Order 13,788 is a suspect classification.<sup>26</sup> I answer in the affirmative. My conclusion is based on comprehensive evidence:

- (1) The U.S. has had a history of discriminating against Indian workers who are perceived as a labor market threat to white Americans.<sup>27</sup>
- (2) Discrimination against Indians has not only been due to alienage but their race and religions.<sup>28</sup>
- (3) The H-1B “Hire American” order relied on a *60 Minutes* show in March 2017 that blamed the hiring of Indians in the H-1B program for taking jobs from American technology workers.<sup>29</sup>

<sup>18</sup> See Exec. Order No. 13,788, *supra* note 1.

<sup>19</sup> *Id.*

<sup>20</sup> For a useful orientation to the H-1B program, see Vindu Goel, *How Trump’s ‘Hire American’ Order May Affect Tech Worker Visas*, N.Y. TIMES (Apr. 18, 2017), <https://nyti.ms/2pzefha>.

<sup>21</sup> U.S. GOV’T ACCT. OFFICE, H-1B VISA PROGRAM, *infra* note 190.

<sup>22</sup> See *infra* notes 193–96, 242.

<sup>23</sup> See, e.g., Hal Salzman, *What Shortage? The Real Evidence About the STEM Workforce*, ISSUES IN SCIENCE AND TECH. 58 (Summer 2013).

<sup>24</sup> *Infra* Table 2; see also Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/> [<https://perma.cc/TS5V-2QNG>].

<sup>25</sup> *E.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); see also William D. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 859–62 (2005); Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 448 (1999).

<sup>26</sup> See Exec. Order No. 13,788, *supra* note 1.

<sup>27</sup> See, e.g., *infra* notes 105–07 and accompanying text.

<sup>28</sup> See *infra* note 82 and accompanying text.

<sup>29</sup> See *infra* notes 240–50 and accompanying text.

- (4) The H-1B visa is predominantly assigned to Asians, and within this group most are from India.<sup>30</sup>
- (5) The technology labor market has 537,450 H-1B visa workers—only 12% of the 4.6 million people employed in technology jobs, where 85% of workers are white.<sup>31</sup>
- (6) In the short time following the “Hire American” order, USCIS has sharply increased the denial rate for H-1B petitions for Indian workers while decreasing the denial rate for all other nationality groups.<sup>32</sup>
- (7) The “Hire American” order is like other President Trump’s other work-related immigration orders that courts have enjoined due to discriminatory intent.<sup>33</sup>

The “Hire American” order thinly veils race discrimination aimed at Indians. For this reason, I conclude a court would subject it to strict scrutiny under the Fifth Amendment’s Due Process Clause, if presented with this evidence.<sup>34</sup>

### *B. Organization of This Article*

Section I.A sets the context for my analysis by reviewing the racial restrictions in the Constitution, early federal statutes, and the Supreme Court’s *Dred Scott* decision.<sup>35</sup> Although Reconstruction laws secured broad citizenship rights, judges often denied naturalization to Indians on racial grounds.<sup>36</sup> Public antipathy for Asians began with Chinese workers.<sup>37</sup> Section I.B explains how this prejudice translated into immigration restrictions, starting in 1862.<sup>38</sup> By the early 1900s the public feared Indian workers, too.<sup>39</sup> In response, as Section I.C explains, Congress legislated extreme restrictions against Indians.<sup>40</sup> The Supreme Court improvised a racial test to deny naturalization to an Indian.<sup>41</sup> These laws remained until 1965, even though Harry Truman and Dwight Eisenhower urged Congress to end racial discrimination against immigrants.<sup>42</sup>

Section II.A explains the H-1B visa and its regulatory framework.<sup>43</sup> Table 1 and Table 2 show the nationality and race of H-1B visa holders.<sup>44</sup> Section II.B analyzes the

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<sup>30</sup> *Infra* Table 1.

<sup>31</sup> *See infra* note 174 and Table 3.

<sup>32</sup> *See infra* Table 5.

<sup>33</sup> *E.g.*, *Ramos v. Nielson (Ramos I)*, 2018 WL 3109604, at \*1 (N.D. Cal. 2018).

<sup>34</sup> *See infra* Conclusion.

<sup>35</sup> *Infra* notes 64–89 and accompanying text.

<sup>36</sup> *In re Sadar Bhagwab Singh*, 246 F. 496, 498–99 (E.D. Pa. 1917).

<sup>37</sup> *Infra* notes 87–88.

<sup>38</sup> *Infra* notes 90–115.

<sup>39</sup> *Infra* note 111 and accompanying text.

<sup>40</sup> *Infra* notes 116–48 and accompanying text.

<sup>41</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923).

<sup>42</sup> *Infra* notes 64–89.

<sup>43</sup> *See infra* notes 154–217 and accompanying text.

<sup>44</sup> *Infra* Tables 1 and 2.

“Hire American” element of Executive Order 13,788.<sup>45</sup> A *60 Minutes* program, aired one month before the order was issued, blamed H-1B Indians for taking jobs from American workers.<sup>46</sup> The show’s message echoed the president’s campaign promises.<sup>47</sup>

Part III explores whether the “Hire American” order is a suspect classification.<sup>48</sup> Section III.A demonstrates that the “Hire American” order racially targets Indian workers.<sup>49</sup> Table 3 and Table 4 substantiate my assertion.<sup>50</sup> In contrast to the first set of tables for H-1B workers, Table 3 and Table 4 depict the race of workers in a broadly defined technology labor force.<sup>51</sup> This evidence suggests that the order discriminates in a zero-sum trade-off by reducing employment for Indian workers to benefit white workers.<sup>52</sup> Next, I present Table 5.<sup>53</sup> This shows that the USCIS has been selecting Indians in increasing numbers for adverse treatment in administering the H-1B.<sup>54</sup> This is discrimination on its face: even more, this means that the H-1B workers who are denied an extension must leave or face deportation, along with their spouses and children.<sup>55</sup> In time, this will advance the president’s desire to make America white again.

Section III.B turns to constitutional considerations.<sup>56</sup> I contend that strict scrutiny under the Fifth Amendment Due Process Clause applies to Executive Order 13,788. I demonstrate that this order is a suspect classification in Section III.B.1 by applying an analogous Supreme Court and appellate court precedent involving state discrimination against resident aliens.<sup>57</sup> Section III.B.2 shows that President Trump’s immigration orders based on religion and alienage have triggered strict scrutiny for resident foreign nationals.<sup>58</sup>

The Conclusion ties together these mosaic elements.<sup>59</sup> First, “Hire American” is connected to a history of racial discrimination against Indian immigrant workers.<sup>60</sup> Second, “Hire American” seeks to preserve a white majority in the United States by cutting off the path for H-1B visa workers and their families to become Lawful Permanent Residents—and eventually, naturalized citizens.<sup>61</sup> Third, the “Hire American”

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<sup>45</sup> *Infra* notes 220–55 and accompanying text.

<sup>46</sup> *Infra* notes 240–50.

<sup>47</sup> *Infra* note 237.

<sup>48</sup> *Infra* notes 256–396 and accompanying text.

<sup>49</sup> *Infra* notes 295–340 and accompanying text.

<sup>50</sup> *See infra* Tables 3 and 4.

<sup>51</sup> *Infra* Tables 3 and 4.

<sup>52</sup> *See infra* Tables 3 and 4 and accompanying text.

<sup>53</sup> *Infra* Table 5.

<sup>54</sup> *Infra* Table 5.

<sup>55</sup> *See infra* note 272 and accompanying text.

<sup>56</sup> *See infra* notes 341–96 and accompanying text.

<sup>57</sup> *See infra* notes 343–62 and accompanying text.

<sup>58</sup> *See infra* notes 363–96.

<sup>59</sup> *See infra* Conclusion.

<sup>60</sup> *See infra* notes 397–408.

<sup>61</sup> *See infra* notes 409–19.



slogan evinces discriminatory intent.<sup>62</sup> Fourth, and finally, I show that American workers and their wages can be protected by less discriminatory means, such as setting a higher wage floor for employing H-1B visa workers.<sup>63</sup>

## I. THE “ASIATIC BARRED ZONE” AND INDIAN BIAS

### A. “Hindoo Invasion” and “Tide of the Turbans”: Indian Discrimination

Indians migrated to the United States in a slow trickle after 1850.<sup>64</sup> The earliest migrants predominantly worked in California’s agricultural and lumber industries.<sup>65</sup> Initially, they may have avoided scrutiny from immigration authorities because of their legal status as British subjects who served as police or military officers.<sup>66</sup> During the second half of this turbulent century, the nation fought a Civil War, ended slavery, and conferred citizenship to blacks and a broader group of birthright citizens.<sup>67</sup> But America was far from peaceful. The Ku Klux Klan terrorized blacks.<sup>68</sup> American workers vilified Chinese laborers.<sup>69</sup> In Part I, I explain how racial animus led to severe legal disabilities and exclusion of Indians.<sup>70</sup>

Legal privilege for whites enabled discrimination against Indians. The United States Constitution, enacted in 1787, provided tinder for discrimination that engulfed Indians in the early 1900s.<sup>71</sup> This charter document embedded legal disabilities for racial groups—notably, African slaves and their American-born descendants, and

<sup>62</sup> See *infra* notes 420–24.

<sup>63</sup> See *infra* notes 425–34.

<sup>64</sup> See S. Chandrasekhar, *Indian Immigration in America*, 13 FAR EAST. SURV. 138, 138 (1944).

<sup>65</sup> *Id.* at 141.

<sup>66</sup> Gary Hess, *The Forgotten Asian Americans: The East Indian Community in the United States*, HIST. & IMMIGR. ASIAN AM. 576, 578 (1998) (discussing that some Indian immigrants to Canada and the U.S. had prior work experience as police officers or Army agents in Hong Kong).

<sup>67</sup> See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952); see also Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 9–19 (1949) (discussing congressional debates).

<sup>68</sup> A detailed account appears in Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L. J. 331, 332 n.10 (1966) (statement of President Grant) (“A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. . . . Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.”).

<sup>69</sup> See *infra* note 86 and accompanying text.

<sup>70</sup> See *infra* notes 64–148.

<sup>71</sup> See U.S. CONST. art. I, § 2.



Native Americans.<sup>72</sup> Three years after the Constitution was drafted, the Naturalization Act of 1790 restricted citizenship to “alien[s] being . . . free white person[s].”<sup>73</sup> This criterion remained until the Immigration and Nationality Act of 1952.<sup>74</sup> For 162 years, citizenship for foreigners was only available to one race.<sup>75</sup> *Dred Scott* cemented the connection between the white race and American citizenship.<sup>76</sup>

The Civil Rights Act of 1866,<sup>77</sup> and Thirteenth,<sup>78</sup> Fourteenth,<sup>79</sup> and Fifteenth Amendments,<sup>80</sup> created equal rights regarding race for all persons born in the United States.<sup>81</sup> At first, some Indians became naturalized citizens.<sup>82</sup> Courts, citing ethnological

<sup>72</sup> The Constitution counted three-fifths of all slaves and certain Indians toward each state’s population for purposes of apportioning seats in the House of Representatives. *Id.* (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”). Blacks did not become American citizens until passage of the Civil Rights Act of 1866. Pub. L. No. 39-26, 14 Stat. 27–30 (Apr. 9, 1866). It made blacks full U.S. citizens and also repealed the *Dred Scott* decision. *Id.* In 1868, the Fourteenth Amendment granted full U.S. citizenship to African Americans. *Id.*

<sup>73</sup> See Act of Mar. 26, 1790, ch. 3, 2 Stat. 103 (repealed 1795).

<sup>74</sup> See Pub. L. No. 82-414, 66 Stat. 163.

<sup>75</sup> See Act of Mar. 26, 1790, ch. 3, 2 Stat. 103.

<sup>76</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (defending imposing slavery on “that unfortunate race”).

<sup>77</sup> Ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (2012)).

<sup>78</sup> U.S. CONST. amend. XIII.

<sup>79</sup> *Id.* amend. XIV.

<sup>80</sup> *Id.* amend. XV.

<sup>81</sup> See E. Irving Smith, *The Legal Aspect of the Southern Question*, 2 HARV. L. REV. 358, 367 (1889); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 55 (1996) (discussing Reconstruction Era laws concerns for Chinese immigrants and others who did not have the same legal rights as white citizens); Michael P. Zuckert, *Congressional Power under the Fourteenth Amendment*, 3 CONST. COMMENT. 123, 147 (1986) (“The evil with which Congress was concerned was violence and intimidation by private individuals whom the states either would not or could not control.”).

<sup>82</sup> As early as 1887, an Asian Indian applied for American citizenship. THE WICHITA DAILY EAGLE, July 23, 1887 (“Meer Baboor Alliy, a Hindoo resident of San Francisco, has filed a declaration of his Intention to become a citizen of the United States. He is the first of his race, so far as known, who has ever done so.”); see also *Law Bars Hindoo from Citizenship*, S.F. CALL, Jan. 31, 1907 (“As the result of the publicity recently given to an episode at the County Clerk’s office in Oakland, when Veer Singh, a Hindoo, was denied the right to swear to a declaration of intention to become an American citizen because he refused to remove his turban owing to his worship of caste. Immigration Commissioner Hart North today notified County Clerk Cook that Hindus are not entitled to become American citizens under any circumstances. Subsequent to the refusal of Deputy County Clerk Ford to permit Veer Singh to take the oath to a declaration of intention, two Hindus who had no scruples about removing their headgear were administered the oaths to their declarations.”).

studies that demonstrated a link between Caucasian Europeans and people from western Asia, ruled that these immigrants were eligible for naturalization.<sup>83</sup> More often, however, judges denied these citizenship petitions.<sup>84</sup>

The whites-only naturalization statute signified a broader pattern of discrimination against people of color. By 1870, the Ku Klux Klan mounted a terror campaign against blacks and their supporters.<sup>85</sup> White workers resented the growing presence of Chinese workers.<sup>86</sup> They sought to ban immigration.<sup>87</sup> Their unions protested the Chinese.<sup>88</sup>

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<sup>83</sup> See, e.g., *In re Akhay Kumar Mozumdar*, 207 F. 115, 117–18 (E.D. Wash. 1913) (ruling that a high-caste, pure-blooded Hindu from Upper India qualified for naturalized citizenship). The court said that “it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. . . . It is likewise true that certain of the natives of India belong to that race . . . .” *Id.* at 117; see also *In re Ah Yup*, 1 F. Cas. 223, 223 (D. Cal. 1875) (dictum) (“Webster in his dictionary says, ‘The common classification is that of Blumenbach, who makes five. . . . The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia . . . .’”).

<sup>84</sup> *In re Sadar Bhagwab Singh*, 246 F. 496, 498–99 (E.D. Pa. 1917) (rejecting a naturalization petition from a Hindu) (“[T]he inhabitants of what was then the United States were a more or less homogeneous people who or whose immediate forbears had come from what has been termed ‘Northern Europe.’”). The court elaborated: “The present applicant belongs to the race of people commonly known as Hindus. Our view is that Congress, as already stated, has as yet made no provision for his naturalization, and we are without the legal power to naturalize him, as the present laws cannot be extended so as to include him without usurping the lawmaking powers of Congress.” *Id.* at 500; see also *Ex parte Shahid*, 205 F. 812, 891–94 (E.D.S.C. 1913) (commenting on Hindus while denying citizenship to a Syrian Christian on grounds that he did not meet the standard for “free white persons”). As so phrased, the language of the statute is about as open to many constructions as it possibly could be. *Id.* at 814 (“It would not mean ‘Indo-European’ races, as sometimes ethnologically at the present day defined as including the present mixed Indo-European, Hindu, Malay, and Dravidian inhabitants of East India and Ceylon; nor the mixed Indo-European, Dravidian, Semitic, and Mongolian peoples who inhabit Persia.”).

<sup>85</sup> See Torok, *supra* note 81, at 92–93.

<sup>86</sup> See generally MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION (1909); LUCILLE EAVES, A HISTORY OF CALIFORNIA LABOR LEGISLATION (1910); ELMER C. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1939).

<sup>87</sup> White workers reacted to the influx of Chinese laborers stating, “Successful competition with them was, therefore, impossible, for our laborers are not content, and never should be, with a bare livelihood for their work.” *Heong v. United States*, 112 U.S. 536, 566 (1884).

<sup>88</sup> SIDNEY ROGER DANIELS, THE POLITICS OF PREJUDICE 16–18 (1969). The Workingmen’s Party of California did much to advance racial caste in the workplace. After gaining control of the California constitutional convention, the organization proposed sweeping laws to bar employment of Chinese. *Id.* at 18 (Section 2 prohibited existing and future corporations from employing any Chinese); see also SANDMEYER, *supra* note 86, at 65 (reporting that a prominent labor leader, Denis Kearny, published a venomous attack on Chinese workers stating that “[b]efore you and before the world we declare that the Chinaman must leave our shores [, and] [w]e declare that white men, and women, and boys, and girls, cannot live as the people of the great republic should and compete with the single Chinese coolie in the labor market”).

The public's fury against Asians went beyond economic competition: their anger expressed racial grievances.<sup>89</sup>

### *B. Targeting Asian Workers for Immigration Restrictions*

These hot coals of animus eventually touched Indians, but in the early stages Chinese workers bore the brunt of attacks.<sup>90</sup> A series of laws against the Chinese set an unwelcoming pattern for Indians.<sup>91</sup> This sequence began with the Coolie Act,<sup>92</sup> an 1862 law that gave presidents power to inspect and seize passenger ships in U.S. ports.<sup>93</sup> The Page Act of 1875 barred entry to “cheap Chinese labor and immoral Chinese women.”<sup>94</sup> The Chinese Exclusion Act of 1882 marked a watershed, leading to a ten-year pause in the immigration of all Chinese laborers.<sup>95</sup> This failed to satisfy lawmakers.<sup>96</sup> They added more Chinese restrictions during the 1880s.<sup>97</sup>

As wrath built against the Chinese, Indians were initially spared.<sup>98</sup> Likely, this was because of their small numbers.<sup>99</sup> When they first arrived in the United States, Americans marveled at their appearance.<sup>100</sup> Before long, however, some immigrants

<sup>89</sup> See Herbert Hill, *Anti-Oriental Agitation and the Rise of Working-Class Racism*, 10 SOC'Y 43, 51 (1973). Published in 1901, the Gompers-Gutstadt pamphlet contended that “the racial differences between American whites and Asiatics would never be overcome. The superior whites had to exclude the inferior Asiatics by law, or if necessary, by force of arms” because the “Yellow Man found it natural to lie, cheat and murder . . .” *Id.* at 52 (citation omitted).

<sup>90</sup> See Chandrasekhar, *supra* note 64, at 141.

<sup>91</sup> See *id.*

<sup>92</sup> Act to Prohibit the “Coolie Trade” by American Citizens in American Vessels, ch. 27, § 1, 12 Stat. 340, 340 (1862) (regulating transportation of “inhabitants or subjects of China, known as ‘coolies’”) (repealed 1974).

<sup>93</sup> *Id.* § 6.

<sup>94</sup> George Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law 1874–1882*, 6 J. AM. ETHNIC HIST. 28, 28 (1986).

<sup>95</sup> Ch. 126, 22 Stat. 58, 58–59 (1882). While commonly referred to as the Chinese Exclusion Act of 1882, contemporaries called it the Chinese Restriction Act. See Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 26 (2014).

<sup>96</sup> See Lew-Williams, *supra* note 95, at 26.

<sup>97</sup> The Chinese Exclusion Act of 1884 prevented all Chinese from landing even those who had a right to be in the U.S. See ch. 20, § 1, 23 Stat. 115, 115. Congress also added restrictions for Chinese workers in the Alien Contract Labor Law ch. 164, § 1, 23 Stat. 332, 332 (1885) (prohibiting any entity or person from prepaying for passage of a foreigner to work in the United States and made exceptions for skilled workers to immigrate) (repealed 1952).

<sup>98</sup> See Chandrasekhar, *supra* note 64, at 141.

<sup>99</sup> *Id.*

<sup>100</sup> SACRAMENTO TRANSCRIPT (Sept. 2, 1850) (“Among the representatives of the various portions of the human family on our shores, two Bengalese have recently made their appearance. They are tall and erect, intensely black, and clad in cleanly white, with huge turbans. In apparent amazement they seem to observe the strange scenes around them.”).

faced the same legal disabilities as blacks and Native Americans.<sup>101</sup> Their work, often performed with other immigrants, attracted notice by the early 1870s.<sup>102</sup> By the turn of the twentieth century, Indians were perceived as another Asian threat to whites.<sup>103</sup> “The Tide of the Turbans,” published in a popular journal, warned that the “Hindoo Invasion is yet in its infancy.”<sup>104</sup> These immigrants were portrayed as a direct threat to American workers.<sup>105</sup> Economists lent credence to this prejudice.<sup>106</sup> Typical of this bigotry, the California State Board of Control stigmatized this group:

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<sup>101</sup> DAILY ALTA CALIFORNIA (Feb. 13, 1951) (“[In] the trial of a cause before the Superior Court, yesterday, the proceedings were brought to a stand by the introduction of a Hindoo witness. Under the statutes of this State, persons having one-eighth part or more of negro blood, blacks and Indians, are excluded from being witnesses in cases where white men are parties, and it was contended that under this law the Hindoo should not be allowed to testify. The cause was adjourned to this morning.”).

<sup>102</sup> Col. Alvin S. Evans, *À LA CALIFORNIA: SKETCH OF LIFE IN THE GOLDEN STATE* 273 (1873) (“Chinese porters or “coolies,” swinging heavy burdens on the ends of pliant bamboo poles balanced on their shoulders, . . . meet you at every turn. A couple of small, wiry, supple little fellows, with blacks skins, straight black hair, with little black eyes which twinkle like those of a snake, carrying huge baskets, filled with soiled clothing, on their heads, may attract your attention next; they are Lascar or Hindoo watermen from the *Laguna*, in the western part of the city, where they work.”).

<sup>103</sup> JONATHAN H. X. LEE, *THE HISTORY OF ASIAN AMERICANS: EXPLORING DIVERSE ROOTS*, at xxxiii, 71–86 (2015) (describing a demonstration was held in Everett, Washington, on Nov. 2, 1907, to scare off the “Hindus” and the demonstration succeeded in its aim).

<sup>104</sup> Herman Scheffauer, *Tide of the Turbans*, 43 *FORUM* 616, 617 (1910).

<sup>105</sup> *Id.* (“For miles their turbaned figures may be seen wielding crow-bar or shovel along the tracks. Hundreds of them are encountered in the mighty lumber-mills buried in the thick fir forests along the Columbia River. They live in camps and colonies, and their usual expenses amount to little more than three dollars a month—a sum that would scarcely support a white man for three days. . . . There are many Brahmins among them, humble workers in arduous conditions. The restrictions and regulations of caste naturally cannot be observed among the groups of men, for that would entail intolerable confusion. The camps usually have their own cooks and a strict vegetarian diet is maintained, as in their land.”).

<sup>106</sup> H.A. Millis, *East Indian Immigration to British Columbia and the Pacific Coast States*, 1 *AM. ECO. REV.* 72, 75 (1911) (estimating about 85% of the East Indians in the West are Hindus, and the remainder were “Mohammedans and Afghans”). Millis concluded:

Thus the East Indians do not occupy an important place in the labor supply of the West, their efficiency is low, their employment irregular, their competitive ability small, and their industrial position insecure. Their assimilative qualities are lower than those of any other race in the West. The strong influence of custom, caste, and tabu, as well as their religion, dark skins, filthy appearance, dress and mode of life have stood in the way of association with other races, and it is evident from the attitude of others that they will be given no opportunity to assimilate. It is certain that until many changes have been wrought the East Indians of the laboring class will find no place in American life save in the exploitation of our resources.

*Id.*

The Hindu . . . is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals, and his blind adherence to theories and teachings, so entirely repugnant to American principles make him unfit for association with American people.<sup>107</sup>

Migration of Indians to the U.S. accelerated in 1910 after Canada officially excluded these foreigners.<sup>108</sup> Congress voiced alarm a year earlier while Indians worked just over the U.S.-Canadian border in the lumber and shingle industry.<sup>109</sup> The willingness of these foreigners to work for lower wages created a competitive threat to American producers, who sought tariff protections.<sup>110</sup> A short time later, the appearance of Indians in San Francisco led to a smear.<sup>111</sup> Americans misperceived Indian migrants as a homogenous group of “Hindoos.” However, these newcomers came from various religions, regions, and labor markets.<sup>112</sup> Nonetheless, their ethnological

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<sup>107</sup> CAL. STATE BD. OF CONTROL, *supra* note 8, at 101–02.

<sup>108</sup> S. REP. NO. 761, at 45 (1911) (discussing Canadian laws and executive orders to exclude immigrants). It specifically reported “[t]he last two orders were in effect identical with orders promulgated under the law of 1906. Both of these orders were evidently intended to exclude Hindus.” *Id.* The report added: “A still more effective safeguard against the coming of Hindus, however, is found in the order which requires that immigrants come to Canada by a continuous journey. The peculiar efficiency of this provision is due to the fact that there is no means by which a continuous journey from India to Canada can be accomplished.” *Id.* It showed data immigration data for Canada from 1901–1909, including 3,890 Chinese; 5,185 Hindu; and 12,420 Japanese. *Id.* at 12 tbl.8.

<sup>109</sup> See 44 CONG. REC. 315 (1904).

<sup>110</sup> *Id.* (statement of Rep. Humphrey) (“Let me briefly restate for emphasis this proposition in regard to the use of oriental labor in the Pacific States of the Northwest in the lumber and shingle industry as compared with British Columbia. Fifty per cent of the men employed in the lumber and shingle mills of British Columbia are Japanese, Chinese, and Hindoos. Of the 110,000 men working in the timber mills of Washington all are white but 1,500, and nearly all are American citizens. White labor in Washington receives twice as much wages as oriental labor in British Columbia. The protection of this white labor from the deadly competition of this oriental labor is a responsibility that rests upon the Republican party, and it is a responsibility that the Republican party can not escape.”).

<sup>111</sup> PROCEEDINGS OF THE ASIATIC EXCLUSION LEAGUE 171–72 (1911) (“The Hindu problem is the Chinese and the Japanese problem over again. The Hindu is in several respects more objectionable than either of the other Oriental races. He keeps his person as dirty as his quarters, and at the base of the danger from the Hindu is the danger faced in other Oriental immigration—the danger of lowering our civilization. The Hindu can do what other Asiatics can. He can live and work on wages that will starve the white man. There are upward of 300,000,000 of his kind in India, and the growing population presses for an outlet. They could pour a million a year into our land and never miss them. Plainly we shall have to shut our doors on them and keep them shut, not only in continental America, but in our insular possessions.”).

<sup>112</sup> Karen Leonard, *Punjabi Pioneers in California: Political Skills on a New Frontier*, 12 S. ASIA 69, 70 (1989) (“The Punjabi setting had prepared the early immigrants well for their experiences on the frontier in rural California. The Punjab was itself a frontier area, with railway and road links and irrigation canals being developed under British rule from the 1860s. Most of the men who came to California were from the so-called martial races and from landowning,



similarity to Caucasians presented a threat unlike Chinese and Japanese. The Asiatic Exclusion League was particularly alarmed by the legal implications of this scientific view.<sup>113</sup> Newspapers and magazines portrayed Indians as a primitive race: for example, the inflammatory editorial, “Turn Back the Hindu Invasion.”<sup>114</sup> The Hindu faith was depicted as primitive.<sup>115</sup>

### *C. Official Discrimination Against Indians: Legislation and Court Rulings*

Even in very small numbers, Indian migrants set off alarms for entry restrictions.<sup>116</sup> Mounting public pressure resulted in the Immigration Act of 1917, a law enacted the Dillingham Commission’s policy idea to use a literacy test to discourage immigration.<sup>117</sup> The law also sought to limit entry of southern and eastern Europeans while severely restricting immigrants from the “Asiatic Barred Zone.”<sup>118</sup>

or farming, castes. 85 to 90% of those who came were Sikhs, almost all Jats, although there were a few Chuharas or untouchables. Among the Muslims, there were Rajputs, Arais (market gardeners), and Pathans, Pushtu or Pakhtun speakers from the border area with Afghanistan. The few Hindus who came were Brahmans or Khattris from urban areas of the Punjab.”)

<sup>113</sup> PROCEEDINGS OF THE ASIATIC EXCLUSION LEAGUE 8 (1910) (“Students of ethnological subjects all agree that the Hindus are members of the same family that we are, and consequently, all legislation based on racial distinction might fail so far as keeping them out of the United States in concerned. As a matter of fact, we, the people of the United States, far removed, of the Hindus of the northwest provinces, but our forefathers pressed to the west, in the everlasting march of conquest, progress, and civilization.”).

<sup>114</sup> *Turn Back the Hindu Invasion*, 103 S.F. CALL 63 (Feb. 1, 1910) (“The importation of Hindu coolies apparently proceeds in large volume. Every steamer from the orient brings a load of these highly undesirable people, most of whom are quite likely to become a public burden. They do not fit into the domestic or social economy of this country. As laborer they are inferior and any severity of climate incapacitates them from work.”).

<sup>115</sup> *E.g.*, *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49–50 (1890) (“The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.”).

<sup>116</sup> PROCEEDINGS OF THE ASIATIC EXCLUSION LEAGUE 276 (1912) (“Recently, thirteen Hindus, landed at Ensanada from a steamer from Mazatlan, arrived penniless and friendless at Tia Juana, Lower California, sixteen miles from San Diego. They had walked from Ensanada, a distance of ninety miles. It is anticipated that these Hindus will attempt to cross the line into the United States, claiming that they are subjects of Great Britain. . . . That the illegal entry of these coolies is a menace, that it presents an alarming condition to the United States, and that it proves a rigid Exclusion Law should be enacted at the earliest possible date, may be seen by the following: . . . Number of Hindu arrivals for sixteen months ending October 31, 1912 . . . 284 Departures (same period) . . . 237 Total increase 16 months ending October 31, 1912 . . . 47.”).

<sup>117</sup> See Henry Pratt Fairchild, *The Literacy Test and Its Making*, 31 Q.J. ECON. 447, 456 (1917).

<sup>118</sup> Immigration Act of 1917, Pub. L. No. 309, § 3, 29 Stat. 874 (1917). A common brief for the law is reflected in JEREMIAH W. JENKS & W. JETT LAUCK, *THE IMMIGRATION*

The 1920s capped decades of escalating immigration restrictions by targeting almost all non-white migrants.<sup>119</sup> Immigrants threatened American identity.<sup>120</sup> Experts warned Americans that permissive immigration diluted their Nordic breeding stock.<sup>121</sup> The eugenics movement painted all people of color as a threat to whites.<sup>122</sup> As a result, Congress used retrogressive quotas—limits derived from census figures of nationality groups in the United States to calculate tiny percentages of allowable new immigration.<sup>123</sup> The Emergency Quota Act of 1921 put this harsh idea into effect.<sup>124</sup> The law acted on hysteria against non-white immigrants.<sup>125</sup> The federal government, narrowly

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PROBLEM 25 (1912) (complaining that before 1883, 95% of immigrants came from England, Ireland, Scotland, Wales, Belgium, Denmark, France Germany, Norway, Sweden, the Netherlands, and Switzerland). From 1883 to 1904, 81% came from Austria-Hungary, Bulgaria, Greece, Italy, Montenegro, Poland, Portugal, Rumania, Russia, Serbia, Spain, Syria and Turkey. *Id.* at 25–26. Entry was denied to all immigrants from India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands. Immigration Act of 1917 § 3 (phrased in terms of map coordinates defining the “Continent of Asia”).

<sup>119</sup> Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, in *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* 255 (Claudia Goldin & Gary D. Libecap eds., 1994).

<sup>120</sup> See President Calvin Coolidge, First Annual Message (Dec. 6, 1923) (“New arrivals should be limited to our capacity to absorb them into the ranks of good citizenship. America must be kept American. For this purpose, it is necessary to continue a policy of restricted immigration.”).

<sup>121</sup> Madison Grant promoted the view that the nation’s “blood” was over 93% Nordic in 1790 but was diminishing since that time in quantity and quality as a superior breeding stock. See Madison Grant, *The Racial Transformation of America*, 219 N. AM. REV. 343, 351 (1924). Grant was especially concerned about the lower intelligence of immigrants from eastern and southwestern Europe. *Id.* at 351–52; see also Madison Grant, *The Passing of the Great Race*, 2 GEOGRAPHICAL REV. 354, 354–60 (1916).

<sup>122</sup> See *Restriction of Immigration: Hearing on H.R. 5, H.R. 101 561 and H.R. 6540 Before the H. Comm. On Immigration and Naturalization*, 68th Cong. 1295–96 (1925) (testimony of Harry H. Laughlin) (“There was an American race and an American culture of 1860, and this race and culture is being modified to some degree by the changed racial character of the immigration of the last two generations. . . . [U]nlimited immigration of races and types which have contributed very small percentages to the making of the original American people would supplant our fundamental race complex, and with the new race would come other cultures, languages, and traditions for the country.”).

<sup>123</sup> *Percentage Plans for Restriction of Immigration: Hearing Before H. Comm. On Immigration and Naturalization*, 66th Cong. 6–7 (1919) (testimony of Rev. Sidney L. Gulick) (“We ought to admit no more than we can Americanize.”). Rev. Gulick, Secretary, Executive Committee of the National Committee for Constructive Immigration Legislation, therefore proposed that new entrants be limited 3–10% “of those who have become American citizens of that particular group.” *Id.* at 7.

<sup>124</sup> Ch. 8, § 2(a), 42 Stat. 5, 5 (1921) (using the 1910 census as a baseline for nationality quotas). Based on those numbers, the total number of immigrants admitted could not exceed 3% of the number of residents from that same country living in the United States. See *id.*

<sup>125</sup> See *LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY*, at xii–xiii, xv (1920) (portraying a world dominated by rapidly multiplying



enforcing the term “free white persons” in the naturalization act, limited entry to people from “England, Ireland, Scotland, Wales, Germany, Sweden, France, and Holland,” while excluding “Russians, Poles, Italians, Greeks, and others . . . .”<sup>126</sup>

Congress made these temporary measures permanent in the National Origins Formula in 1924, and further capped immigration from 3% of the nationality group’s presence in the 1910 census to 2% of that group’s presence in 1890.<sup>127</sup> While the 1924 law focused primarily on Europeans, Congress held special hearings for additional restrictions on Japanese.<sup>128</sup> The laws also gave detailed instructions to the executive branch for enforcement.<sup>129</sup>

President Calvin Coolidge implemented these racially motivated policies.<sup>130</sup> The Supreme Court went along. *Ozawa v. United States* involved a citizenship petition from an immigrant who was literate and fully assimilated—in other words, living proof that non-white immigrants could successfully assimilate.<sup>131</sup> Ozawa was denied

yellow, brown, and black people that threatened to end the white race’s domination of civilization). Stoddard hinted at a race war when he said: “Peopled as they are wholly or largely by whites, they have become parts of the race-heritage, which should be defended to the last extremity no matter if the costs involved are greater than their mere economic value . . . .” *Id.* at 226.

<sup>126</sup> *E.g.*, *United States v. Balsara*, 180 F. 694, 695–96 (2d Cir. 1920) (“Doubtless Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term ‘Caucasian race’ mentioned in some of the foregoing decisions. . . . The Congressmen certainly knew that there were white, yellow, black, red, and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we cannot believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then just as the Circuit Court did in this case, whether the words used in the act did or did not cover him.”).

<sup>127</sup> Immigration Act of 1924, ch. 190, § 11(a) 43 Stat. 153, 159 (setting the annual quota at 2% of that group’s presence in the 1890 census).

<sup>128</sup> *See Japanese Immigration Legislation, supra* note 13, at 76; *see also id.* at 74 (testimony of Rev. Sidney Gulick) (“California is now suddenly awakening to the situation thus developing. For years it enjoyed and greatly benefited by the advantages of cheap, docile, efficient Asiatic labor. No small part of her prosperity has been made possible by Chinese and Japanese labor on railroads, roads, and ranches. California is now discovering that Japanese labor is no longer cheap or servile.”). V.S. McClatchy also testified: “Of all the races ineligible to citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country.” *Id.* at 5. He continued: “They do not come to this country with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese.” *Id.*

<sup>129</sup> *See, e.g.*, Emergency Quota Act of 1921, § 3 (requiring the Secretary of Labor to publish each month the number of arriving immigrants by nationality and publishing monthly reports).

<sup>130</sup> *See Coolidge, supra* note 120 (“New arrivals should be limited to our capacity to absorb them into the ranks of good citizenship. America must be kept American. For this purpose, it is necessary to continue a policy of restricted immigration.”).

<sup>131</sup> *Ozawa v. United States*, 260 U.S. 178, 189 (1922) (stating Ozawa lived in the U.S. for twenty years, graduated from the high school at Berkeley, California, attended the University

naturalization, however, because he was not white.<sup>132</sup> *United States v. Bhagat Singh Thind* yielded a similar result for a Hindu from Punjab who sought naturalization.<sup>133</sup> The Court endorsed the legislative policy that “a white person within the meaning of this section . . . is entitled to naturalization; otherwise not.”<sup>134</sup> Justice Sutherland expounded this racial theory: “It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.”<sup>135</sup> In other cases, judges decided immigration cases with their personal racial theories.<sup>136</sup>

Because of the 1924 law, 85% of quotas were allocated to northern and western European nations through 1927.<sup>137</sup> Quota laws aligned Congress and the co-ordinate branches in hostility toward Asians.<sup>138</sup> President Herbert Hoover set annual quotas by

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of California for three years, educated his children in the U.S., attended American churches, and spoke English in his home).

<sup>132</sup> Justice Sutherland ruled that Japanese were ineligible for citizenship because they were not “free white persons” within the meaning of the Naturalization Act of 1906: “The appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.” *Id.* at 198.

<sup>133</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923).

<sup>134</sup> *Id.* at 207.

<sup>135</sup> *Id.* at 209.

<sup>136</sup> *E.g.*, *In re Ahmed Hassan*, 48 F. Supp. 843, 845–46 (E.D. Mich. 1942) (“Of course, when an individual applying for citizenship has a skin of a different color than is usual for the members of the group from which he claims to come, a strong burden of proof then rests upon him to show by the usual methods of proving genealogy that he is in fact a member of that group. After the individual has been traced into his group, the second question which the court must answer is whether the members of the group as a whole are white persons as Congress understood the term in 1790 when it first enacted the statute. In deciding this latter question, the test is . . . what groups of peoples then living in 1790 with characteristics then existing were intended by Congress to be classified as ‘white persons.’ Applying these principles the court finds that petitioner is an Arab and that Arabs are not white persons within the meaning of the act.”); *see also* *United States v. Balsara*, 180 F. 694, 696 (1910); *Ozawa v. United States*, 260 U.S. 178 (1922); *In re Saito*, 62 F. 126 (D. Mass. 1894) (denying naturalization to Japanese, Chinese, Mongolians, and other Asians); *In re Ah Yup*, 1 F. Cas. 223 (D. Cal. 1878); Comment, *Constitutional Law—Naturalization—Japanese Not Eligible to Citizenship*, 16 HARV. L. REV. 302, 302 (1903).

<sup>137</sup> *See* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Re-examination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 67 n.1 (1999).

<sup>138</sup> *See* *Toyota v. United States*, 268 U.S. 402 (1925); *Bhagat Singh Thind*, 269 U.S. at 295; Exec. Order No. 4359-A, 22 C.F.R. 79,141 (1925). Thus, naturalization of aliens as citizens of the United States was limited to “free white persons, and to aliens of African nativity, and to persons of African descent.” *Bhagat Singh Thind*, 269 U.S. at 205. Therefore, Coolidge’s executive order codified the *Bhagat Singh Thind* Court’s deeply flawed test for race:

The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the

nationality in Proclamation No. 1872, preferring United Kingdom immigrants while excluding almost all people from non-white nations.<sup>139</sup> Indian immigrants were capped at 100 per year.<sup>140</sup>

President Truman laid the foundation for today’s H-1B visa. Executive Order 10,129 created a Commission on Migratory Labor,<sup>141</sup> linking immigration policy to labor market conditions. The Commission’s report tried to shake America from its hostile view of foreigners.<sup>142</sup> Congress created the H-2 visa a year later.<sup>143</sup> Truman’s Executive Order 10,392 authorized a commission to overhaul the nation’s racial approach to immigration.<sup>144</sup> By 1953, the group issued *Whom Shall We Welcome*, a report that advocated more open immigration.<sup>145</sup>

President Eisenhower urged Congress to end racial quotas and open America to certain refugees.<sup>146</sup> He rejected racial limits: “The immigration laws presently require

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British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to “any alien being a free white person,” it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.

*Id.* at 213.

<sup>139</sup> Proclamation No. 1872 (Mar. 22, 1929) (setting annual quota limits of 100 for Afghanistan, Albania, Andorra, Arabian peninsula, Armenia, Australia, Bhutan, Bulgaria, Cameroon (British), Cameroon (French), China, Danzig, Egypt, Ethiopia, Iceland, India, Iraq, Japan, Liberia, Liechtenstein, Luxemburg, Monaco, Morocco (French and Spanish Zones and Tangier), Muscat (Oman), Nauru, Nepal, New Zealand, New Guinea, Palestine, Persia, Ruanda and Urundi, Samoa, San Marino, Siam, South Africa, South West Africa, Tanganyika, Togoland, Togoland (French mandate), and Yap and other Pacific Islands).

<sup>140</sup> *Id.*

<sup>141</sup> Exec. Order No. 10,129, 16 Fed. Reg. 3607 (June 3, 1950) (directing the Commission to investigate the “social, economic, health, and educational conditions among migratory workers, both alien and domestic, in the United States”).

<sup>142</sup> MIGRATORY LABOR IN AMERICAN AGRICULTURE: PRESIDENT’S COMMISSION ON MIGRATORY LABOR 24 (1951) (“There is nothing wrong or immoral in employing foreign workers in American agriculture when there are mutual advantages in doing so.”).

<sup>143</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 176 (1952).

<sup>144</sup> Exec. Order No. 10,392, 3 Fed. Reg. 896 (Sept. 4, 1952) (establishing the President’s Commission on Immigration and Naturalization).

<sup>145</sup> WHOM SHALL WE WELCOME: THE PRESIDENT’S COMMISSION ON IMMIGRATION & NATURALIZATION, at xii–xiii (1953) (“1. America was founded on the principle that all men are created equal, that differences of race, color, religion, or national origin should not be used to deny equal treatment or equal opportunity. . . . 2. America has historically been the haven for the oppressed of other lands. . . . 3. American national unity has been achieved without national uniformity. 4. Americans have believed in fair treatment for all. . . . 5. America’s philosophy has always been one of faith in our future and belief in progress. . . . 6. American foreign policy seeks peace and freedom, mutual understanding and a high standard of living for ourselves and our world neighbors. . . .”).

<sup>146</sup> DWIGHT EISENHOWER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO OUR IMMIGRATION AND NATIONALITY

aliens to specify race and ethnic classification in visa applications. These provisions are unnecessary and should be repealed.”<sup>147</sup> His plea was ignored. President Lyndon Johnson sent Congress a stronger message, with specific ideas that now appear in immigration laws.<sup>148</sup>

## II. THE H-1B VISA AND EXECUTIVE ORDER 13,788

The Immigration and Nationality Act, passed in 1965, completely transformed the nation’s approach to admitting foreigners.<sup>149</sup> The INA phased out biased immigration laws.<sup>150</sup> It eliminated national origins quotas.<sup>151</sup> By abolishing racial barriers, the INA changed America’s demographics.<sup>152</sup> The law created visa preference categories for skills and family relationships with citizens or U.S. residents.<sup>153</sup> I focus now on a specific employment permit—the H-1B visa.

### A. *The H-1B Visa*

Congress enacted legislation in 1990 for the H-1B visa.<sup>154</sup> This permits foreign nationals in specialty occupations to enter the U.S. for three years of continuous

LAWS, H.R. Doc. No. 329, at 2 (Feb. 8, 1956) (urging modification of the 1924 and 1952 immigration laws and suggesting higher quota limits).

<sup>147</sup> *Id.* (“The inequitable provisions relating to Asian spouses and adopted children should be repealed.”).

<sup>148</sup> President Lyndon B. Johnson, Special Message to the Congress on Immigration (1965) (proposing a bill that would allocate visas unfilled by countries to be filled where they are needed, thereby eliminating the discriminatory “Asia-Pacific Triangle,” broadening admission to include nonquota visas to parents of citizens, and allowing a visa preference for workers with lesser skills who can fill specific needs in short supply).

<sup>149</sup> Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911, 911 (1965). *See generally* David M. Reimers, *An Unintended Reform: The 1965 Immigration Act and Third World Immigration to the United States*, 3 J. AM. ETHNIC HIST. 9 (1983) (discussing the history of the Hart-Celler Act).

<sup>150</sup> Hart-Celler Act, *supra* note 149, at 911.

<sup>151</sup> *See* 111 CONG. REC. 24,501 (1965) (statement of Sen. Joseph Clark) (“National origins quotas and the Asian-Pacific [sic] triangle provisions are irrational, arrogantly intolerant, and immoral”); 111 CONG. REC. 21,768 (1965) (statement of Rep. Joseph Addabbo) (“The national origins system is discriminatory, and it gives a bad image to our friends overseas.”); 111 CONG. REC. 21,792 (1965) (statement of Rep. John Brademas) (“[The bill] will repeal the Asia-Pacific triangle which has too long been an insult to those of oriental ancestry.”).

<sup>152</sup> Roger Waldinger, *Immigration and Urban Change*, 1989 ANN. REV. SOC. 211, 212 (1989). Twenty years after the law was enacted, new immigrants were disproportionately concentrated in cities—particularly in New York, Los Angeles, Chicago, San Francisco, and Miami, where 46% of this new population settled. *See* Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894–1930, 1965–2000*, 21 J. AM. ETHNIC HIST. 50, 67 (2001). By the late 1970s, petitions from Asians for naturalization outpaced all other groups. *Id.*

<sup>153</sup> Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 L & CONTEMP. PROBS. 401, 413–16 (1956).

<sup>154</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5027 (1990); *see also* Warren

employment.<sup>155</sup> These occupations require specialized knowledge in science, engineering, computer, accounting, and other disciplines that award degrees.<sup>156</sup>

H-1B workers are concentrated in technology but also hold jobs in different industries.<sup>157</sup> They work as software developers, computer and information scientists, network analysts, database administrators, information system managers, web developers, and security analysts.<sup>158</sup>

Before the federal government issues an H-1B visa, an employer must apply to sponsor a foreign national.<sup>159</sup> In other words, a firm must assure the U.S. government that it will employ the visa holder.<sup>160</sup> A few firms specialize in the H-1B recruitment and application process.<sup>161</sup> H-1B regulations allow for job portability.<sup>162</sup> An H-1B visa holder can “port” from a recruiting firm to another corporation.<sup>163</sup>

While H-1B workers are employed, they often apply to adjust status—usually by applying for a green card as a lawful permanent resident (LPR).<sup>164</sup> Also, H-1B workers may petition to extend their temporary status for three more years.<sup>165</sup> Even when they exhaust their visa period, they can remain in the U.S. while their petitions for status adjustment are queued.<sup>166</sup> This line is slow.<sup>167</sup> To remain lawfully admitted

R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 FORDHAM INT’L L.J. 328, 332–33 (1991).

<sup>155</sup> See 8 C.F.R. § 214.2(h) (2019) (defining a specialty occupation as “an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States”). Courts approve of USCIS’s consultation with the Department of Labor’s *Occupational Outlook Handbook* to resolve questions about specialty occupations. See, e.g., *Blacher v. Ridge*, 436 F. Supp. 2d 602, 609 (S.D.N.Y. 2006); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999); *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1101 n.2 (S.D.N.Y. 1989).

<sup>156</sup> See 8 C.F.R. § 214.2(h)(4)(ii); see also U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H1B SPECIALTY OCCUPATION WORKERS 2 (2013).

<sup>157</sup> See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

<sup>158</sup> Beckhusen, *supra* note 2, at 14 fig.14 (graphing the percentage of foreign-born information technology (IT) workers in 2014).

<sup>159</sup> *Infra* notes 392–429.

<sup>160</sup> *Infra* notes 392–429.

<sup>161</sup> Goel, *supra* note 20 (listing top H-1B employers); see also 8 C.F.R. § 214.2(h)(2)(i)(G) (2019) (noting multiple H-1B petitions).

<sup>162</sup> 8 C.F.R. § 214.2(h)(2)(i)(H) (2019).

<sup>163</sup> *Id.* § 214.2(h)(2)(ii).

<sup>164</sup> E.g., *Musunuru v. Lynch*, 831 F.3d 880, 882–83 (7th Cir. 2016).

<sup>165</sup> 8 C.F.R. § 214.2(h)(2)(i)(D) (2019).

<sup>166</sup> See, e.g., *Musunuru*, 831 F.3d at 882–83.

<sup>167</sup> *Id.*

under the H-1B visa, a person must remain employed by, and also work for, the sponsoring organization.<sup>168</sup>

Every year, the U.S. caps new H-1B visas.<sup>169</sup> The cap has fluctuated: the limit was 65,000 from 1990 through 1998; increased through 2003; and returned to 65,000 in 2004.<sup>170</sup> The 65,000 limit, however, is misleading. Due to industry slumps, quotas were not filled in some years.<sup>171</sup> But in other ways, H-1B visa holders are much more numerous than these caps suggest. That is because the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) increased H-1B visas to 115,000, beginning in 1999; and in 2001, the American Competitiveness in the Twenty-First Century Act (AC21) bumped the annual entry cap to 195,000.<sup>172</sup>

These numbers are simply entrance statistics. Many years after a cohort is admitted, H-1B visa holders remain in their jobs.<sup>173</sup> This explains why the H-1B population, as measured by the USCIS, is much larger than the annual caps. This group totaled 494,565 in 2011; 473,015 in 2012; 474,355 in 2013; 511,773 in 2014; and 537,450 in 2015.<sup>174</sup> In short, the H-1B visa functions as a semi-permanent residence visa: once H-1B workers are admitted, they often put down roots.<sup>175</sup>

These aggregate numbers are large but have not kept pace with the explosion of IT and related jobs.<sup>176</sup> U.S. Census Bureau data show there were 450,000 of these

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<sup>168</sup> See *Ali v. Mukasey*, 542 F.3d 1180, 1181–82 (7th Cir. 2008).

<sup>169</sup> Christine Chester & Amanda Cully, Note, *Putting a Plug in America's Brain Drain: A Proposal to Increase U.S. Retention of Foreign Students Post-Graduation*, 28 HOFSTRA LAB. & EMP. L.J. 385, 409 (2011).

<sup>170</sup> *Id.* at 399, 409–10 (discussing changes in the H-1B visa cap); see also 8 U.S.C.A. § 1184(g)(1)(A) (2015).

<sup>171</sup> Philip Martin, *Policies for Admitting Highly Skilled Workers into the United States*, in OECD, INTERNATIONAL MOBILITY OF THE HIGHLY SKILLED 271 tbl.1 (2001), [http://www.keepeek.com/Digital-Asset-Management/oecd/employment/international-mobility-of-the-highly-skilled\\_9789264196087-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/employment/international-mobility-of-the-highly-skilled_9789264196087-en#page1) [<https://perma.cc/PD2W-TBAL>].

<sup>172</sup> U.S. GOV'T ACCT. OFFICE, H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS 2 (2003). Currently, there is an OPT-STEM extension. See U.S. CITIZENSHIP & IMMIGRATION SERVS., OPTIONAL PRACTICAL TRAINING FOR F-1 STUDENTS (2019), <https://www.uscis.gov/opt> [<https://perma.cc/4V27-NCY9>]. This creates a Master's Degree annual increment of 20,000 people who earn an advanced STEM degree in the U.S. *Id.*

<sup>173</sup> See B. Lindsay Lowell, *H-1B Temporary Workers: Estimating the Population*, 13 fig.2 (Ctr. Comp. Immigration Stud., Working Paper No. 12, 2000) (estimating the H-1B population for 2000 is about 425,000).

<sup>174</sup> U.S. DEP'T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS 65 tbl.25 (2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015/table25> [<https://perma.cc/YL83-3CK8>] (“Temporary workers in specialty occupations (H1B)”).

<sup>175</sup> See, e.g., *Dandamudi v. Tisch*, 686 F.3d 66, 70–71 (2d Cir. 2012).

<sup>176</sup> Not all H-1B jobs are in IT or computer-related fields. E.g., *Royal Siam Corp., v. Chertoff*, 484 F.3d 139, 141 (1st Cir. 2007) (discussing a Thai citizen with a business degree who was hired under H-1B as a restaurant manager).



jobs in 1970; by 1990, when the H-1B visa was created, this figure grew to 1.5 million.<sup>177</sup> IT occupations have continued to grow.<sup>178</sup> In 2010, employment rose to 4 million and grew to 4.6 million in 2014.<sup>179</sup> In other words, even if every H-1B job is in the IT sector,<sup>180</sup> these foreign workers amount to no more than about 12% of that labor force.<sup>181</sup> Based on these figures, the rate of growth in H-1B employment from 2011 to 2015—about 9%—was less than the 15% growth rate in overall IT jobs.<sup>182</sup> The bottom line is that the IT workforce has been rapidly expanding.

H-1B regulations protect American workers from unfair wage competition.<sup>183</sup> These rules are circumvented with unknown frequency.<sup>184</sup> An H-1B visa cannot be issued without a signed and certified Department of Labor Certification Application (LCA) from a sponsoring employer.<sup>185</sup> LCAs specifically classify the occupation for which the sponsoring employer is hiring, and the prevailing wage rate in that employer’s labor market for that job.<sup>186</sup>

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<sup>177</sup> Beckhusen, *supra* note 2.

<sup>178</sup> In 1970, three occupations comprised the field: computer specialists, computer systems analysts, and computer programmers. *Id.* at 3 fig.2. In 2014, the list included computer and information research scientists; information security analysts; computer network architects; database administrators; web developers; network and computer systems administrators; computer programmers; computer systems analysts; computer and information systems managers; computer occupations, all other; computer support specialists; and software developers. *Id.*

<sup>179</sup> *Id.* at 2 fig.1.

<sup>180</sup> Some H-1B jobs are not in the IT sector. *E.g.*, Royal Siam Corp., 484 F.3d at 149.

<sup>181</sup> *See* Beckhusen, *supra* note 2, at 14 fig.14.

<sup>182</sup> *See id.*

<sup>183</sup> *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) (defining a specialty occupation and procedures for determining a prevailing wage in the appropriate U.S. labor market); *see also* U.S. DEP’T OF LABOR, OFLC PERFORMANCE DATA (2019), <https://www.foreignlaborcert.doleta.gov/performance/cfm> [<https://perma.cc/Z5EG-5FUV>]. *But see* Preston, *infra* note 196 (reporting on H-1B fraud).

<sup>184</sup> *E.g.*, Patel v. Boghra, 369 Fed. App’x. 722, 722 (7th Cir. 2010) (discussing an H-1B employer that paid the government-approved salary but demanded that the employee pay back \$12,000 a year to the employer to remain employed in the U.S.).

<sup>185</sup> 8 C.F.R. § 214.2(h)(ii)(D) (2019) (requiring a petitioning employer to complete and file a Form I-129, Petition for Nonimmigrant Worker, with the USCIS Service Center which has jurisdiction in the area where the alien will perform services and that the petitioner files a Form I-140, which provides for the mandatory filing of a Department of Labor approved Labor Certification); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., PETITION FILING AND PROCESSING PROCEDURES FOR FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER (2018), <https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker> [<https://perma.cc/B9GN-5CMP>].

<sup>186</sup> *E.g.*, STATE OF UTAH, FOREIGN LABOR CERTIFICATION DATA CENTER (2019), <https://www.flcdatcenter.com> [<https://perma.cc/NM8S-GJUJ>] (detailing the State of Utah’s labor market criteria in conjunction with the U.S. Department of Labor).



The H-1B visa program has generated controversies.<sup>187</sup> A common complaint is that H-1B workers undercut earnings by Americans.<sup>188</sup> Employers complain that the application process is slow, burdensome, and costly.<sup>189</sup> They also fault annual caps as too low.<sup>190</sup> They contend that caps hold back innovation and make American firms less competitive.<sup>191</sup> The cap is reached early in April, days after the annual process opens for awarding visas.<sup>192</sup>

On the other hand, domestic workers believe that foreign workers take their jobs.<sup>193</sup> Some American students, graduating in fields where H-1B visa workers weigh on their job market, contend that the visa hurts their employment prospects and lowers their pay.<sup>194</sup> Some government officials believe that the H-1B program harms domestic workers.<sup>195</sup>

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<sup>187</sup> See Christopher Fulmer, Note, *A Critical Look at the H-1B Visa Program and Its Effects on U.S. and Foreign Workers—A Controversial Program Unhinged from Its Original Intent*, 13 LEWIS & CLARK L. REV. 823, 823–25 (2009).

<sup>188</sup> See, e.g., *Santiglia v. Sun Microsystems, Inc.*, 2003-LCA-2, ALJ Recommended Decision and Order (Dep't of Labor Feb. 19, 2003) (alleging that Sun discriminated against American workers by paying them off and hiring H-1B workers to replace them).

<sup>189</sup> See *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 6–7 (2001) (statement of Warren R. Leiden on behalf of the American Immigration Lawyers Association, San Francisco, California) (“Labor certification has been substantially streamlined by the Labor Department. However, there are tens of thousands of cases that have been backlogged and awaiting adjudication for 3, 4 and 5 years. The employment-based petition, which is the second stage of an employment-based case . . . is not adjudicated on a first-in/first-out basis, so that you will have some cases that are approved in 90 days, some that have been sitting for 18 months unapproved.”).

<sup>190</sup> U.S. GOV'T ACCT. OFFICE, GAO-11-26, H-1B VISA PROGRAM: REFORMS ARE NEEDED TO MINIMIZE THE RISKS AND COSTS OF CURRENT PROGRAM 10 (2011) [hereinafter U.S. GOV'T ACCT. OFFICE, H-1B VISA PROGRAM] (noting the “demand for H-1B workers [tended] to exceed the cap” in most years).

<sup>191</sup> See Deb Notkin, *H-1B Cap Slows U.S. Innovation*, THINK IMMIGRATION (June 16, 2015), <https://thinkimmigration.org/blog/2015/06/16/h-1b-cap-slows-u-s-innovation/> [<https://perma.cc/QPT2-L5ML>].

<sup>192</sup> George Avalos, *H-1B Visa Program Maxed Out After Four Days*, MERCURY NEWS: SILICONBEAT (Apr. 7, 2017, 11:15 AM), <http://www.siliconbeat.com/2017/04/07/h-1b-visa-program-maxed-out-after-four-days/> [<https://perma.cc/WXS2-39D9>].

<sup>193</sup> See Judy Frankel, *Insourcing: American Lose Jobs to H-1B Visa Workers*, HUFFPOST (July 26, 2016, 6:57 PM) (reporting Disney laid off 850 workers who were required to train their H-1B replacements).

<sup>194</sup> See, e.g., *Programmers Guild, Inc. v. Chertoff*, 338 Fed. App'x. 239, 249 (3d Cir. 2009); see also Hal Salzman et al., *Guestworkers in the High-Skill U.S. Labor Market* (Econ. Pol'y Inst., Briefing Paper #359 Apr. 24, 2013), <https://www.epi.org/files/2013/bp359-guest-workers-high-skill-labor-market-analysis.pdf> [<https://perma.cc/THV9-JVW6>].

<sup>195</sup> H.R. REP. NO. 104-469, at 146 (1996) (statement Secretary of Labor Robert Reich) (“Some employers . . . seek the admission of scores, even hundreds of [H-1Bs], especially for work in relatively low-level computer-related and health care occupations. These employers include ‘job contractors,’ some of which have a workforce composed predominantly or even

Fraud has been a persistent problem for the H-1B program.<sup>196</sup> Some placing companies file false applications with the intent of finding a person later who fits the application’s description.<sup>197</sup> Other times, H-1B employers pressure workers to kick back part of their salary in violation of the wage floor of the labor certification requirement.<sup>198</sup> The United States government has difficulty tracking entries, departures, and changes in visa status for H-1B workers.<sup>199</sup>

Nonetheless, the H-1B program benefits the American economy. These workers own a growing percentage of U.S. patents.<sup>200</sup> In addition, employment of H-1B science, technology, engineering, and mathematics (STEM) workers in cities increases wages for native-born American workers.<sup>201</sup> The rapid economic growth of Silicon Valley, and more generally California, is attributable to H-1B jobs and employment of other highly skilled foreign nationals.<sup>202</sup>

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entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid-off U.S. workers.”).

<sup>196</sup> See Julia Preston, *Outsourcers Are Criticized on Visa Use*, N.Y. TIMES (Mar. 31, 2001), <https://www.nytimes.com/2011/04/01/us/01immigration.html> [<https://nyti.ms/34KvfWI>] (reporting that Congress heard testimony from a USCIS official that auditors find that about 7% of H-1B visas are fraudulent).

<sup>197</sup> *United States v. Mir*, 525 F.3d 351, 353–55 (4th Cir. 2008) (exemplifying the problem). Maqsood Hamid Mir, a lawyer, was convicted on several counts of immigration fraud. *Id.* He had assisted employers in completing various immigration forms, including Labor Certifications. *Id.* Between 1998 and 2002, Mir filed close to 2,000 of these forms. Evidence at his criminal trial showed Mir organized a massive fraud involving certain employers and aliens. *Id.* One employer testified that Mir filed Labor Certifications on behalf of aliens whom his employer did not know. *Id.* The employer had no opening for a qualified alien. Mir used this willing employer to stockpile Labor Certifications for future use. *Id.* The plan was to sell approved Labor Certifications to “substitute aliens” for up to \$40,000. *Id.*

<sup>198</sup> See *Patel v. Boghra*, 369 Fed. App’x. 722, 723–24 (7th Cir. 2010).

<sup>199</sup> U.S. GEN. ACC’T. OFFICE, GAO 03-883, H-1B FOREIGN WORKERS: BETTER TRACKING NEEDED TO HELP DETERMINE H-1B PROGRAM’S EFFECTS ON U.S. WORKFORCE (2003) (explaining how the Department of Homeland Security has incomplete information on H-1B worker entries, departures, and changes in visa status).

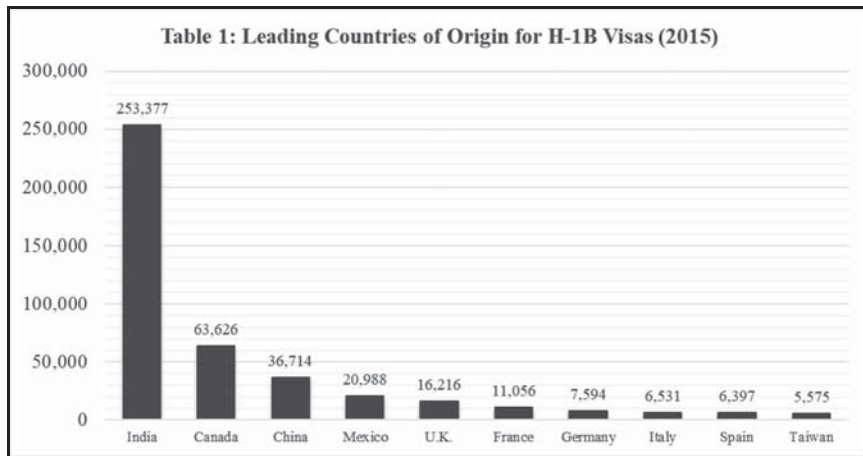
<sup>200</sup> William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and US Ethnic Invention* 2, 3, 5, 23 (Nat’l Bureau of Econ. Research, Working Paper No. 15768, 2008) (“As immigrants are especially important for US innovation and technology commercialization, this makes the H-1B program a matter of significant policy importance. We find that fluctuations in H-1B admissions levels significantly influenced the rate of Indian and Chinese patenting in cities and firms dependent upon the program relative to their peers.”).

<sup>201</sup> Giovanni Peri et al., *STEM Workers, H-1B Visas, and Productivity in US Cities*, 33 J. LAB. ECON. 225, 252 (2015) (finding that for every one percentage point increase in the foreign STEM share of a city’s total employment, wages grew by seven to eight percentage points for college-educated Americans, and three to four percentage points for non-college-educated natives).

<sup>202</sup> AnnaLee Saxenian, *Silicon Valley’s New Immigrant High-Growth Entrepreneurs*, 16 ECON. DEV. Q. 20, 29–30 (2002).

The H-1B visa is also racially identified. In the IT sector, Indian nationals hold most of the jobs that are staffed with foreign nationals.<sup>203</sup> Nonetheless, American workers resent being displaced by Indians.<sup>204</sup> Indians complain that they are racially segregated and marginalized.<sup>205</sup>

Two government sources add statistical evidence that the H-1B labor force has distinctive racial characteristics. The *Yearbook of Immigration Statistics* (hereafter *Yearbook*), published by the Department of Homeland Security, gathers data on the country of origin for H-1B workers.<sup>206</sup> Its report shows that the U.S. had 537,450 H-1B workers in 2015.<sup>207</sup> India comprised half of this total (253,377, or 47.1%).<sup>208</sup>



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<sup>203</sup> Lowell, *supra* note 173, at 10–12; *see also* *Watson v. Bank of Am.*, 196 Fed. App'x. 306, 307–08 (5th Cir. 2006) (hearing a Tennessee resident's argument that his former employer, Electronic Data Systems, terminated him improperly in favor of H-1B nonimmigrant visa workers).

<sup>204</sup> *See, e.g., Watson*, 196 Fed. App'x. at 307–08; *see also* Whitaker, *supra* note 14.

<sup>205</sup> For an interview with H-1B workers talking about their experiences, see Payal Banerjee, *Indian Information Technology Workers in the United States: The H-1B Visa, Flexible Production, and the Racialization of Labor*, 32 *CRITICAL SOCIOLOGY* 425, 436 (2006) (“Every building is stuffed with Indians! Except for the managers, who are US people and also direct employees at these companies, the rest of the people are Indians . . . You see, these large well-known American consulting companies have this reputation of being your all-American company and they want to keep this white image. But their resource pool is all Indian. So, in reality, if you go to the buildings and offices where they are executing projects, you will see that these buildings are filled with Indians. The whole building has only desis [Indians] working. Except, the bosses are white and American.”).

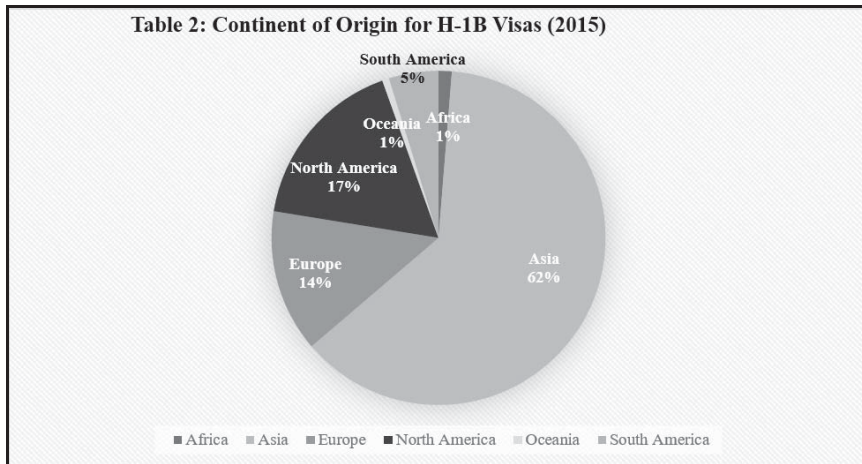
<sup>206</sup> U.S. DEP'T OF HOMELAND SEC., *supra* note 174, at 63–90.

<sup>207</sup> *Id.* at 65 tbl.25.

<sup>208</sup> *Id.* at 84–87 tbl.32 (listing H-1B workers in speciality occupations by region and country of citizenship). I extracted figures for leading sending nations. The total of H-1B visas for 2015 includes other sending nations.

<sup>209</sup> Table 1 is the work of the author, but based on data from the U.S. Department of Homeland Security. *See id.*

The *Yearbook* also categorizes H-1B workers by continent of origin.<sup>210</sup> Table 2 shows that most H-1B visas were issued to Asians (62%).<sup>211</sup> Adding other non-Caucasian continents, South America (5%) and Africa (1%) raised non-white H-1B visa holders to about 68%.<sup>212</sup>



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The *Yearbook* underestimates the composition of non-white H-1B visa holders. The U.S. admitted 20,988 H-1B workers from Mexico.<sup>214</sup> They were 23% of the North American total (91,221).<sup>215</sup> Only a tiny fraction from Mexico is white.<sup>216</sup> If that nationality group were counted with 25,776 South Americans, the approximate total of Hispanic H-1B workers would increase to 46,764.<sup>217</sup> This adjustment would raise the South American share of H-1B workers from 5% to 8.7%.<sup>218</sup> Thus, using the *Yearbook* (and adding 3.7%), about 72% of H-1B workers came from non-white regions.<sup>219</sup> In sum, H-1B is a permit for dark-skinned workers.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* I count Oceania as an approximately Caucasian continent because Australia is its largest country of origin, with 2,285 H-1B visas. Oceania, as a whole, had 3,555 H-1B visas.

<sup>213</sup> Table 2 is the work of the author, but based on data from the U.S. Department of Homeland Security. *See id.* at 84 tbl.32.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Mexico does not collect census data by ethnicity, but one source reports this estimate from 2012: 62% Mestizo (Amerindian-Spanish), 21% predominantly Amerindian, 7% Amerindian, and 10% other (mostly European). MEXICO DEMOGRAPHICS PROFILE 2018, INDEXMUNDI, [https://www.indexmundi.com/mexico/demographics\\_profile.html](https://www.indexmundi.com/mexico/demographics_profile.html) [<https://perma.cc/6NTL-QGYD>] (last visited Oct. 16, 2019).

<sup>217</sup> U.S. DEP'T OF HOMELAND SEC., *supra* note 174, at 84 tbl.32.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

*B. Executive Order 13,788*

Executive Order 13,788, titled “Buy American and Hire American,”<sup>220</sup> is a by-product of President Trump’s campaign promise to “Make America Great Again.”<sup>221</sup> It has a narrow government procurement element, “Buy American,” to protect steel and related industries.<sup>222</sup> This aspect is like President Bill Clinton’s Executive Order 12,954,<sup>223</sup> which was a sop to labor.<sup>224</sup> Although courts rarely strike down executive orders, the D.C. Circuit did just this by ruling that Clinton’s order conflicted with the National Labor Relations Act.<sup>225</sup>

The second element of Trump’s order, “Hire American,” targets a different U.S. industry—the technology sector, particularly the IT workforce.<sup>226</sup> It directs the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to implement reforms of the H-1B visa program.<sup>227</sup>

Executive Order 13,788 states a policy to “ensure that H-1B visas are awarded to the *most-skilled* or *highest-paid* petition beneficiaries.”<sup>228</sup> I emphasize these terms because they signify a highly restrictive approach to implementing the statute that regulates H-1B visas. Entrance requirements for the H-1B visa already set a high bar for skills and prevailing wage protections.<sup>229</sup> President Trump’s emphasis on the *most-skilled* or *highest-paid* beneficiaries means that H-1B applications for new entrants, and for extensions, will not be reviewed by statutory criteria but by his more stringent standards.<sup>230</sup> This usurps Congress’s power to legislate.

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<sup>220</sup> Exec. Order No. 13,788, *supra* note 1.

<sup>221</sup> Donald J. Trump, *Donald Trump’s Contract with the American Voter*, DONALDJTRUMP.COM, [https://assets.donaldjtrump.com/\\_landings/contract/O-TRU-102316-Contractv02.pdf](https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf) [<https://perma.cc/68NJ-HYQU>] (last visited Oct. 16, 2019).

<sup>222</sup> Exec. Order No. 13,788, *supra* note 1, § 2(a).

<sup>223</sup> Exec. Order No. 12,954, 60 Fed. Reg. 13023, 13023 (Mar. 10, 1995) (titled “Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts”).

<sup>224</sup> See Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 280–81 (1996).

<sup>225</sup> Chamber of Commerce v. Reich, 74 F.3d 1322, 1324–25 (D.C. Cir. 1996).

<sup>226</sup> See Exec. Order No. 13,788, *supra* note 1. Although the order does not expressly mention the technology sector, this is clearly indicated in section 1(c) relating “petition beneficiaries” specifically to employers who use the H-1B visa program. *Id.* § 1(c).

<sup>227</sup> See *id.* § 5(a).

<sup>228</sup> *Id.* § 5(b) (emphasis added).

<sup>229</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVS., H-1B SPECIALTY OCCUPATIONS, DoD COOPERATIVE RESEARCH AND DEVELOPMENT PROJECT WORKERS, AND FASHION MODELS (2019), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> [<https://perma.cc/7L8M-PSUU>] (last visited Oct. 16, 2019).

<sup>230</sup> See Exec. Order No. 13,788, *supra* note 1, § 5(b).



The Trump administration has spelled out what Executive Order 13,788 means for H-1B employers.<sup>231</sup> Two types of firms are selected for increased enforcement: H-1B-dependent employers (those who have a high ratio of H-1B workers compared to U.S. workers, as defined by statute) and employers who petition for their H-1B workers to work off-site at another company’s location.<sup>232</sup> These firms, and all other H-1B employers, are the focus of “[t]argeted site visits.”<sup>233</sup> The executive branch will police these workplaces for fraud and abuses.<sup>234</sup> Site visits will be random and unannounced.<sup>235</sup> Employers are alarmed by this enforcement initiative.<sup>236</sup>

I turn now to the circumstances leading up to the announcement of Executive Order 13,788. This background is important because it provides evidence of President Trump’s subjective intent. This executive order is premised on the grossly exaggerated perception that Indian H-1B workers take jobs from Americans. As a candidate, the president promised to reform the H-1B visa program: “Companies are importing low-wage workers on H-1B visas to take jobs from young college-trained Americans,” he said at an Ohio rally.<sup>237</sup> While he shared the stage with displaced tech workers who blamed foreigners for taking their jobs, some industry experts interpreted “foreign” to implicate India.<sup>238</sup> The putative architect of the “Hire American” order, Stephen Miller, has a history of anti-immigrant bias.<sup>239</sup>

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<sup>231</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVS., PUTTING AMERICAN WORKERS FIRST: USCIS ANNOUNCES FURTHER MEASURES TO DETECT H-1B VISA FRAUD AND ABUSE (2017), <https://www.uscis.gov/news/news-releases/putting-american-workers-first-uscis-announces-further-measures-detect-h-1b-visa-fraud-and-abuse> [<https://perma.cc/9USG-UR5X>] [hereinafter PUTTING AMERICAN WORKERS FIRST].

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*; see Samuel Newbold, *Protecting Your Business in an Age of Aggressive Immigration Enforcement*, CORP. COUNSEL (Jan. 17, 2018, 5:30 PM), <http://www.law.com/corp-counsel/2019/01/29/protecting-your-business-in-an-age-of-aggressive-immigration-enforcement/> [<https://perma.cc/D53A-NJPF>] (reporting that since 2018, USCIS has significantly increased its on-site fraud investigations for H-1B employers).

<sup>236</sup> See Ethan Barron, *H-1B: Foreign Citizens Make Up Nearly Three-Quarters of Silicon Valley Tech Workforce, Report Says*, MERCURY NEWS (Jan. 18, 2018), <https://www.mercurynews.com/2018/01/17/h-1b-foreign-citizens-make-up-nearly-three-quarters-of-silicon-valley-tech-workforce-report-says/> [<https://perma.cc/Y6KF-VC3F>]; Miriam Jordan, *Without New Laws or Walls, Trump Presses the Brake on Legal Immigration*, N.Y. TIMES (Dec. 20, 2017), <https://nyti.ms/2DaPEWZ>.

<sup>237</sup> Patrick Thibodeau, *Trump Tapped Viral Anger Over H-1B Use*, COMPUTERWORLD (Nov. 9, 2016, 4:55 PM), <https://www.computerworld.com/article/3140166/trump-trapped-the-viral-anger-over-h-1b-use.html> [<https://perma.cc/H58Z-7JTN>].

<sup>238</sup> *Id.* (“A President Trump will be in a powerful position to restrict temporary visa use, raising alarms in Silicon Valley and India.”).

<sup>239</sup> See Maggie Haberman, *A Familiar Force Nurtures Trump’s Instincts on Immigration: Stephen Miller*, N.Y. TIMES (Nov. 4, 2018), <https://nyti.ms/2yOLq6M> (reporting that Miller shaped President Trump’s immigration policies, beginning with the Republican Party platform in 2016). A National Security Council adviser informed a news outlet that Miller said

The timing of the order is telling: April 18, 2017.<sup>240</sup> On March 19, 2017 CBS's *60 Minutes* ran a segment titled "You're Fired."<sup>241</sup> The gist of the program was that employers in technology industries abuse the H-1B program by substituting cheap Indian labor for American workers.<sup>242</sup> The "you" in the title clearly meant Americans.<sup>243</sup> My textual analysis of the show's transcript shows that the term "American" or "Americans" was used 27 times.<sup>244</sup> The term "India" and "Indian" was used 16 times.<sup>245</sup> "H-1B" was mentioned 20 times.<sup>246</sup> *60 Minutes*' title, "You're Fired," suggestively borrowed from President Trump's widely viewed TV show, *The Apprentice*, where each episode ended with Trump dramatically telling an apprentice, "You're fired."<sup>247</sup> *60 Minutes*' message was clear: Americans IT workers are victims.<sup>248</sup> Indians are to blame—as well as the H-1B program that enables Indians to hurt Americans.<sup>249</sup> The heavy-handed accusations in the *60 Minutes* program dovetailed with the "Hire American" presidential targeting of Indian IT workers: The press briefing for this executive order specifically referenced the *60 Minutes* program.<sup>250</sup>

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in a meeting, "We must save Americans from these immigrant criminals!" Nahal Toosi, *Inside Stephen Miller's Hostile Takeover of Immigration Policy*, POLITICO (Aug. 29, 2018, 5:13 AM), <https://www.politico.com/story/2018/08/29/stephen-miller-immigration-policy-white-house-trump-799199> [<https://perma.cc/8PHJ-4KVR>]. In high school, Miller had a history of confronting and challenging Spanish-speaking students: "He tended to make some of the Spanish language stuff very personal," said Moises Castillo, a classmate who described the exchanges as hurtful to this day. Matt Flegenheimer, *Stephen Miller, the Powerful Survivor on the President's Right Flank*, N.Y. TIMES (Oct. 19, 2017), <https://nyti.ms/2ySXjpF>. "There was a 'if you're not speaking English, perhaps you should go somewhere else.'" *Id.*; see also Rafia Zakaria, *Stephen Miller is Making America Hostile to Immigrants*, CNN (Jan. 9, 2019), <https://www.cnn.com/2019/01/09/opinions/stephen-miller-destroying-immigration-system-zakaria/index.html> [<https://perma.cc/VB8H-JD84>].

<sup>240</sup> Exec. Order No. 13,788, *supra* note 1.

<sup>241</sup> Whitaker, *supra* note 14.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*; see Jamie Goodwin-White, *Emerging U.S. Immigrant Geographies: Racial Wages and Migration Selectivity*, 93 SOC. SCI. Q. 779, 779 (2012) (explaining the term "racialized labor market" for immigrants); see also Seiko Ishikawa, *The Radicalization and Exploitation of Foreign Workers by the Law*, CUNY ACAD. WORKS (2017) (Masters Thesis), [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=3361&context=gc\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=3361&context=gc_etds) [<https://perma.cc/D9CD-TJQR>].

<sup>244</sup> Whitaker, *supra* note 14.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See Emily Nussbaum, *The TV That Created Donald Trump*, NEW YORKER (July 24, 2017), <https://www.newyorker.com/magazine/2017/07/31/the-tv-that-created-donald-trump> [<https://perma.cc/FZ4H-UHUR>].

<sup>248</sup> See Whitaker, *supra* note 14.

<sup>249</sup> See *id.*

<sup>250</sup> The White House held a press briefing on April 17, 2017, just one month after the *60 Minutes* segment aired, where unidentified "Senior Administration Official" cited this TV show as a major talking point:



To sum up, the IT workforce has grown at a rapid clip since 1990, when the H-1B visa was introduced.<sup>251</sup> More than half-a-million H-1B workers are employed in the U.S., most in IT and related fields.<sup>252</sup> This large number is put in context by the fact that nearly five million IT workers are employed in the U.S.<sup>253</sup> The IT labor force is racially stratified by nativity.<sup>254</sup> U.S.-born workers are white; foreign-born workers are Asians—and most Asian workers are Indians.<sup>255</sup>

### III. DOES “HIRE AMERICAN” CREATE A SUSPECT CLASSIFICATION?

The United States Chamber of Commerce successfully sued to overturn President Clinton’s Executive Order 12,954, a regulation that aimed to protect striking workers from being permanently replaced.<sup>256</sup> President Trump’s Executive Order 13,788 can be successfully challenged, too, as violating the statutory framework that Congress has set forth for the H-1B visa.<sup>257</sup> The “Hire American” order conflicts with Congress’s deliberately calibrated—and recalibrated—H-1B quota by arbitrarily limiting this labor pool to “the *most*-skilled or *highest*-paid beneficiaries.”<sup>258</sup> Read with these emphasized

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So 80 percent receive less than the median wage, and only 10 percent receive the median wage. And so only 5 percent were categorized at the highest wage tier of the four wage tiers that are in place for the H1B guest worker visa. The result of that is that workers are often brought in well below market rates to replace American workers, again, sort of violating the principle of the program, which is supposed to be a means for bringing in skilled labor, and instead you’re bringing in a lot of times workers who are actually less skilled and lower paid than the workers that they’re replacing.

And we’ve all seen high-profile examples of this, and I’m sure that many of you are aware—we’re seeing this “60 Minutes” special that was aired recently on this very topic—and President Trump has been a leader in calling attention to this effort. And I don’t think anyone would dispute that he’s done more to bring a national spotlight onto the abuses in the H1B guest worker program than anybody in the country has at any point in recent history.

Press Briefing, White House, Background Briefing on Buy American, Hire American Executive Order (Apr. 17, 2017, 4:07 PM), <https://www.whitehouse.gov/briefings-statements/background-briefing-buy-american-hire-american-executive-order/> [<https://perma.cc/A8WM-TDXP>].

<sup>251</sup> See Salzman et al., *supra* note 194.

<sup>252</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 174, at 65 tbl.25; Salzman et al., *supra* note 194, at 9–15.

<sup>253</sup> Beckhusen, *supra* note 2.

<sup>254</sup> See generally Banerjee, *supra* note 205.

<sup>255</sup> *Id.* at 426.

<sup>256</sup> Chamber of Commerce v. Reich, 74 F.3d 1322, 1324–35 (D.C. Cir. 1996).

<sup>257</sup> See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101 (2)(15)(H), 66 Stat. 168.

<sup>258</sup> Exec. Order No. 13,788, *supra* note 1, at 18,839 (emphasis added).

limitations, the order aims to reduce H-1B visa entrants and visa renewals to a trickle of what Congress envisioned.

I go further in this analysis: I suggest that the “Hire American” order violates the Fifth Amendment’s Due Process Clause by creating a suspect racial classification.<sup>259</sup> To support my thesis, I borrow the fact pattern from a recently filed complaint in *MG2 Corp. v. Baran*.<sup>260</sup> The lawsuit alleges that USCIS denied an employer’s petition for an H-1B visa for an Indian national, Bharath Raj Kumanan.<sup>261</sup> He was a database manager for MG2 who had been promoted to a more senior role as a computer systems analyst.<sup>262</sup> Kumanan was approved for an H-1B visa on October 1, 2015 (valid until August 15, 2018).<sup>263</sup> His wife and child accompanied him on H-4 visas.<sup>264</sup> In January 2018, MG2 filed a three-year extension of the visa and submitted all required documents.<sup>265</sup> On April 27th, USCIS issued a Request for Evidence to show how Kumanan’s new job met at least one of the criteria for a renewed H-1B visa.<sup>266</sup>

USCIS denied the petition on November 15th.<sup>267</sup> The agency determined that the position did not require a baccalaureate degree, stating:

As discussed in the OOH [Occupational Outlook Handbook], a bachelor’s level of training in a specific specialty is not required for the Computer Systems Analyst occupation. Many Computer System Analysts have liberal arts degrees and gained experience

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<sup>259</sup> See *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (striking down a New York statute that excluded lawfully admitted aliens from all state civil service jobs as a violation of the Equal Protection Clause). In other cases, the Court struck down laws that discriminate against permanent resident aliens; see also *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977) (Burger, C.J., dissenting); *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976) (“[T]he governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.”); *In re Griffiths*, 413 U.S. 717, 718 (1973); *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

<sup>260</sup> See generally Complaint For Declaratory and Injunctive Relief, *MG2 Corp. et al. v. Baran et al.* (W.D. Wash. Dec. 14, 2018) (No. 2:18-cv-01801-JLR) [hereinafter *MG2 Complaint*]. USCIS denied an employer’s petition for an H-1B visa for an Indian citizen of Bharath Raj Kumanan. He was a database manager for MG2 who had been promoted to a more senior role. *Id.* ¶ 1. The plaintiff-company alleges that the agency violate the Administrative Procedure Act—specifically, the four statutory criteria for the H-1B visa under the Immigration and Nationality Act—when it denied the petition for not qualifying as a specialty occupation. *Id.* ¶ 2. The Indian worker’s, and his wife’s, applications for an extension of stay were also denied, leaving them both without legal immigration status. *Id.* ¶ 22.

<sup>261</sup> *Id.* ¶ 1:6–9.

<sup>262</sup> *Id.* ¶ 18:4–9.

<sup>263</sup> *Id.* ¶ 16:22–23.

<sup>264</sup> *Id.* ¶ 17:2.

<sup>265</sup> *Id.* ¶ 18:4–6.

<sup>266</sup> *Id.* ¶ 19:11–13.

<sup>267</sup> *Id.* ¶ 21:17–18.

elsewhere. As a result, the proffered position cannot be considered to have met this criterion.<sup>268</sup>

The lawsuit contends that USCIS’s denial decision was arbitrary and capricious, noting in part that the OOH states that “most computer systems analysts have a bachelor’s degree in a computer-related field.”<sup>269</sup> The plaintiff-company alleged that the agency violated the Administrative Procedure Act—specifically the four statutory criteria for the H-1B visa under the Immigration and Nationality Act<sup>270</sup>—when it denied the petition for not qualifying as a specialty occupation.<sup>271</sup> The applications for the Indian worker and his wife, and applications for an extension of stay, were also denied, exposing them to deportation.<sup>272</sup>

In the following discussion, I explain how Executive Order 13,788 creates a suspect classification. To frame this analysis, I return to a key statistical finding from Part II, where I analyzed statistics related to the H-1B visa.<sup>273</sup> I found that 537,450 H-1B visa workers were employed in the U.S.—a small part of the 4.6 million people employed in the American IT workforce.<sup>274</sup> In other words, my analysis focused on a subset of 11.6% of this labor market.<sup>275</sup> My analysis in Part III did not show, however, the racial composition of the IT workforce—it only showed the geographic origin of H-1B workers by nationality and continent.<sup>276</sup>

In Section III.A, I provide a finer-grain picture of this workforce by focusing on its racial composition.<sup>277</sup> In Table 3, I use a U.S. Census Bureau breakdown of the IT workforce by race and nativity.<sup>278</sup> To provide context, consider this hypothetical

<sup>268</sup> *Id.* ¶ 29:23–25. Interesting to note, the agency’s approach undermines studies that conclude that there is a surplus of American-born graduates with STEM degrees who are harmed by the H-1B program. *See generally* Salzman et al., *supra* note 194; Salzman, *supra* note 23. In effect, USCIS implies that these American degree-recipients are facing tough job prospects because they are over-educated and over-qualified for these jobs.

<sup>269</sup> MG2 Complaint, *supra* note 260, ¶ 30:2–3.

<sup>270</sup> The statutory criteria are set forth in 8 CFR § 214.2(h)(4)(iii)(A)(1)–(4) (“(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; (3) The employer normally requires a degree or its equivalent for the position; or (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.”).

<sup>271</sup> MG2 Complaint, *supra* note 260.

<sup>272</sup> *Id.* ¶ 22:21–25.

<sup>273</sup> *See* discussion *supra* Section II.A.

<sup>274</sup> *Infra* Table 3.

<sup>275</sup> *See infra* Table 3.

<sup>276</sup> *See supra* notes 206–11 and accompanying text.

<sup>277</sup> *See* discussion *infra* Section III.A.

<sup>278</sup> *See infra* Table 3.

proposition: IT workers in the U.S.—comprised of native-born and foreign workers—are mostly Asians (a highly inaccurate proposition). If this were so, an executive order that curbed the number of Asian workers who were granted H-1B visas would not necessarily imply that the order had any racial bias. Limits on Asian foreign workers would appear to benefit Asian Americans.

Table 3 shows, however, an IT labor market that is starkly bifurcated by race *and* nativity.<sup>279</sup> American-born workers are overwhelmingly white (85%).<sup>280</sup> Again, this is 85% of a workforce that is estimated to be 4.6 million employees.<sup>281</sup> Table 3 also shows that among the foreign-born group—about 11.6% of 4.6 million employees—66% of those workers are Asians.<sup>282</sup> In short, I show that any action to reduce the inflow of H-1B visa workers will necessarily diminish Asian workers while increasing vacancies for white Americans who already dominate that labor market.

Table 4 provides a supplemental description—again, by race—but instead of focusing on the IT workforce, it looks more broadly at science and engineering occupations.<sup>283</sup> This picture is important because the H-1B visa is not only comprised of the IT workforce—it is a “specialty occupation” visa.<sup>284</sup> Thus, the science and engineering workforce offers a related context for this work visa.<sup>285</sup> This snapshot is consistent with Table 3, showing that 70% of science and engineering jobs are held by whites and 19% by Asians.<sup>286</sup>

Table 5 adds to this analysis by showing the early effects of the “Hire American” executive order.<sup>287</sup> The Trump administration has significantly increased enforcement efforts against Indian H-1B visa holders—workers who are like the individual in the *MG2* case.<sup>288</sup> The data in Table 5 relate to H-1B petitions for visa extensions.<sup>289</sup> Table 5 also shows that the denial rate for petitions filed for Indian workers has escalated from 18% in the first quarter of 2017 to 24% in the fourth quarter.<sup>290</sup> Section III.A concludes that the “Hire American” executive order is a racial classification.<sup>291</sup>

Section III.B.1 explores two streams of precedent that apply to Executive Order 13,788: (1) decisions that struck down state bans on work-related permits for Japanese fishermen and H-1B pharmacists who were lawfully admitted resident aliens, and (2) court rulings against President Trump involving regulations that discriminate

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<sup>279</sup> See *infra* Table 3.

<sup>280</sup> See *infra* Table 3.

<sup>281</sup> See *infra* Table 3.

<sup>282</sup> See *infra* Table 3.

<sup>283</sup> See *infra* Table 4.

<sup>284</sup> See *supra* note 156 and accompanying text.

<sup>285</sup> See *supra* note 156 and accompanying text.

<sup>286</sup> Compare *infra* Table 4, with *infra* Table 3.

<sup>287</sup> See *infra* Table 5.

<sup>288</sup> See discussion *infra* Section III.B.

<sup>289</sup> See *infra* Table 5.

<sup>290</sup> See *infra* Table 5.

<sup>291</sup> See discussion *infra* Section III.A.

against aliens.<sup>292</sup> Both lines of precedent suggest that Executive Order 13,788 is unconstitutional. Section III.B.2 analyzes court rulings on President Trump’s executive orders that have classifications by religion or alienage.<sup>293</sup> Courts have mostly enjoined these actions; some have based their rulings on strict scrutiny.<sup>294</sup>

### A. The “Hire American” Order Racially Targets H-1B Indian Workers

#### 1. Asians Are the Largest Group of Foreign-Born Workers in the IT Labor Market

Why does Executive Order 13,788 exclusively focus on the H-1B visa? In Section II.A, I presented demographic data for H-1B visa workers.<sup>295</sup> Asians comprise most of this group.<sup>296</sup> Indians predominate within this group.<sup>297</sup> These data imply that the H-1B program is connected to race: they do not, however, measure directly the racial characteristics of the IT—or related—workplaces. Here, I add more evidence to this point: survey data that specifically measures for race—white and Asian, as well as all others.

Evidence that the “Hire American” order is a racial classification begins with U.S. Census Bureau data about IT workers. These figures differ somewhat from the USCIS *Yearbook* in Table 1 and Table 2.<sup>298</sup> The *Census Report* is from 2014, not 2015; and it counts IT workers, both native-born and foreign-born, but not H-1B visa holders.<sup>299</sup> These elements make the *Census Report* less useful than the *Yearbook* because it is a year older. In addition, when the *Census Report* counts “foreign-born workers” this group appears to include H-1B visa holders, *plus* Lawful Permanent Residents (LPRs) and naturalized citizens who are employed in these labor markets.<sup>300</sup>

However, some Asian IT workers were born in the U.S. and others were born in another country.<sup>301</sup> Important to my analysis, the *Census Report* sifts through the share of native-born and foreign-born Asian IT workers.<sup>302</sup> This improves on the *Yearbook*, where the race of H-1B workers can only be inferred from country and continent of origin.<sup>303</sup> Stating this more concretely, one might assume that all Indian visa holders

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<sup>292</sup> See discussion *infra* Section III.B.1.

<sup>293</sup> See discussion *infra* Section III.B.2.

<sup>294</sup> See discussion *infra* Section III.B.2.

<sup>295</sup> See discussion *supra* Section II.A.

<sup>296</sup> See *supra* note 210 and accompanying text.

<sup>297</sup> See *supra* note 208 and accompanying text.

<sup>298</sup> See *supra* note 208, Tables 1 and 2.

<sup>299</sup> U.S. CENSUS BUREAU, OCCUPATIONS IN INFORMATION TECHNOLOGY (2014), <https://www.census.gov/content/dam/Census/library/publications/2016/acs/acs-35.pdf> [<https://perma.cc/TV6D-T6D2>] [hereinafter CENSUS REPORT].

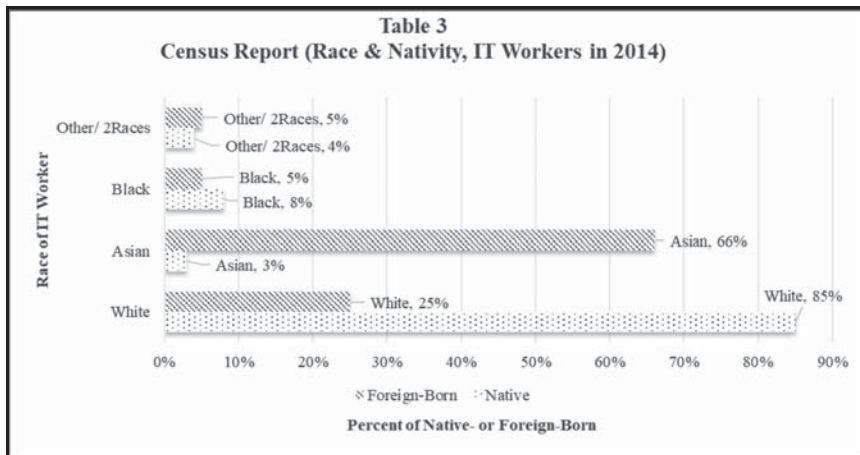
<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> See *supra* note 208 and accompanying text.

in the USCIS *Yearbook* are Asian, but the *Census Report*'s survey of IT workers by race and nativity removes supposition and provides a specific measurement of the racial character of this labor force.



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Table 3 divides IT workers by native-born (light bars) and foreign-born (dark bars).<sup>305</sup> The racial characteristics of these two populations are strikingly different. Consider the native-born first: among native-born IT workers, 85% are white (light horizontal bar) but only 3% are Asian.<sup>306</sup> Blacks comprise 8% of the native-born workforce.<sup>307</sup> The remaining 4% are other races.<sup>308</sup> In short, the native-born IT workforce is overwhelmingly white.<sup>309</sup>

The foreign-born workforce is shown in dark bars. Among this group, the lopsided distribution for native-born workers is reversed. Asians make up 66% of the foreign group while whites comprise just 25%.<sup>310</sup> Thus, the IT labor force is racially bifurcated: American-born workers are white; foreign-born workers are Asian.<sup>311</sup>

Viewing data from the *Yearbook* and *Census Report*, there is a consistent picture. The *Yearbook* figure for H-1B Asians is 62% compared to 66% of Asian IT foreign-born workers in the *Census Report*.<sup>312</sup> A likely source of the small percentage

<sup>304</sup> Table 3 is the work of the author, but based on data from the U.S. Census Bureau. See CENSUS REPORT, *supra* note 299, at 14 tbl.15.

<sup>305</sup> See Table 3.

<sup>306</sup> See Table 3.

<sup>307</sup> See Table 3.

<sup>308</sup> See Table 3.

<sup>309</sup> See Table 3.

<sup>310</sup> See Table 3.

<sup>311</sup> See Table 3.

<sup>312</sup> U.S. DEP'T OF HOMELAND SEC., *supra* note 174, at 84–87 tbl.32.



difference is the *Census Report*'s aggregation of H-1B and LPR workers in the IT workforce. It looks like LPRs—H-1B workers who have slowly plodded through the status-adjustment process while seeking a green card during their employment—add about four percentage points to the IT workforce. The *Census Report* specifically isolates for whites in the IT workforce.<sup>313</sup> The native-born segment is 85% white.<sup>314</sup> The foreign-born group is 66% Asian.<sup>315</sup>

I conclude that when Executive Order 13,788 says “Hire American,” it seeks to increase the 85% white population on the native-born side of the workforce ledger, while at the same time debiting the 66% Asian component of the foreign-born side of the IT workforce.<sup>316</sup> This highly skewed profile suggests the possibility that Asian IT workers already face employment discrimination—and, in fact, this idea is supported by empirical research showing that first-generation Asian Americans earn less than whites.<sup>317</sup> More generally, skin color adversely affects career tracks.<sup>318</sup> Executive

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<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> Jamie Goodwin-White, *Emerging U.S. Immigrant Geographies: Racial Wages and Migration Selectivity*, 93 SOC. SCI. Q. 779, 780 (2012) (exploring the concept of a racialized labor market for immigrants in the U.S., explaining by the 1990s geographers had observed “deleterious effects of high levels of inequality and segregation alongside highly concentrated immigrant settlement”).

<sup>317</sup> Chang Hwan Kim & Arthur Sakamoto, *Have Asian American Men Achieved Labor Market Parity with White Men?*, 75 AM. SOC. REV. 934, 934, 943 (2010) (comparing earnings, education, country of birth, and other demographic features among whites and Asian-American men).

They made three key findings. First, native-born Asian American men have 8% lower earnings than white men with comparable demographics, including educational attainment. *Id.* at 947. Second, first-generation Asian Americans have the largest earnings disadvantage compared to white men, even when educational attainment is taken into account. *Id.* at 951. Lastly, for men with a bachelor's degree, there is a discernibly lower mean for earnings of first-generation Asian Americans [AA-1.0] compared to white men. *Id.* at 944. Overall, the study concluded that labor market discrimination for men was most observable for first-generation Asian-Americans: “First-generation Asian Americans’ large disadvantage might also be illuminated by the racialized hierarchy view if statistical discrimination processes operate for particular, readily-perceived ethnic groups.” *Id.* at 953.

<sup>318</sup> See Jacob C. Day, *Transitions to the Top: Race, Segregation, and Promotions to Executive Positions in the College Football Coaching Profession*, 42 WORK & OCCUPATIONS 408, 416 (2015) (discussing that blacks hired more into non-central than central coaching jobs, and face structural career barriers for promotion); Jacqueline McDowell et al., *The Supply and Demand Side of Occupational Segregation: The Case of an Intercollegiate Athletic Department*, 13 J. AFR. AM. STUD. 431, 432 (2009); see also Sharon M. Collins, *Blacks on the Bubble: The Vulnerability of Black Executives in White Corporations*, 34 SOC. Q. 429, 442 (1993) (discussing that blacks managers tend to be hired into career tracks such as EEO compliance that inhibit their upward mobility relative to whites with similar qualifications).

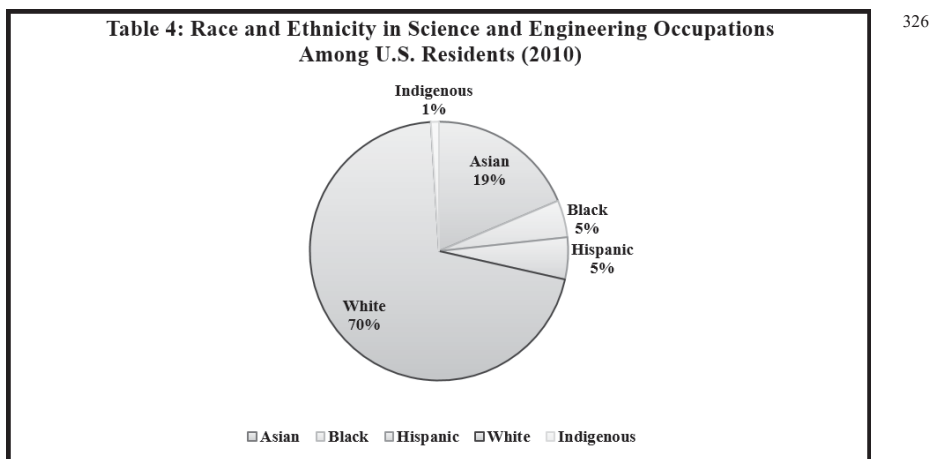


Order 13,788 aims to widen these racial disparities when it says “Hire American” in this labor market.<sup>319</sup>

## 2. White Americans Dominate the IT Labor Market but Face Competition from Foreign-Born Asians

The *Census Report* examined the IT workforce.<sup>320</sup> Data from a related workforce adds confirmatory evidence that the “Hire American” order is a suspect classification. Table 4 measures the racial composition of science and engineering occupations.<sup>321</sup> These statistics are from a 2010 Census Bureau survey of U.S. residents—a term that includes citizens and aliens.<sup>322</sup>

The data reveal an implicit white-hiring preference in the “Hire American” order.<sup>323</sup> Table 4 shows a stark dichotomy by race and ethnicity of people employed in science and engineering occupations: 70% of this labor force are white, and 19% are Asian.<sup>324</sup> The remaining 11% are spread over other races.<sup>325</sup>



In sum, Table 3 and Table 4 are similar to Table 1 and Table 2.<sup>327</sup> They add data specifically on the racial composition of major labor markets where H-1B employees

<sup>319</sup> See Exec. Order No. 13,788, *supra* note 1.

<sup>320</sup> See generally Beckhusen, *supra* note 2.

<sup>321</sup> See *supra* Table 4.

<sup>322</sup> NATIONAL SCIENCE BOARD, REVISITING THE STEM WORKFORCE: A COMPANION TO SCIENCE AND ENGINEERING INDICATORS 23 tbl.5 (2014).

<sup>323</sup> *Supra* Table 4.

<sup>324</sup> *Supra* Table 4.

<sup>325</sup> *Supra* Table 4.

<sup>326</sup> Table 4 is the work of the author, but based on data from the National Science Board. See NATIONAL SCIENCE BOARD, *supra* note 322.

<sup>327</sup> Compare *supra* Table 3, and Table 4, with *supra* Table 1, and Table 2.

work.<sup>328</sup> The first two tables specifically count H-1B visa holders, country of origin and continent—but not race.<sup>329</sup> Viewed as a whole, statistics show that the H-1B labor market is racially identified.<sup>330</sup> Thus, President Trump’s order, labeled “Hire American,” intended to limit visas only to the most-skilled or highest-paid workers is, in effect, a racial classification. If foreign-born Asians are taken out of the entire science and engineering and IT workforces by removing large numbers of H-1B workers—as the order aims to accomplish—the white share of jobs will grow by about 8% (by erasing the employment of Indian H-1B workers who comprise about two-thirds of the 11.6% of foreign-born workers in the IT sector, or about 8% of the total).

### 3. The Trump Administration Adversely Selecting Indians

The National Foundation for American Policy analyzed data for USCIS Requests for Evidence for the H-1B visa.<sup>331</sup> These data correspond to the factual scenario in the MG2 lawsuit, involving an employer attempt to renew an Indian worker’s H-1B visa for three years.<sup>332</sup> The petitioning company claimed that the agency’s petition denial was arbitrary and capricious.<sup>333</sup> I use USCIS data for 2017 to show that the agency implemented the president’s executive order by targeting Indians for adverse treatment. Recall that the executive order did not specifically mention Indians: It pledged “to rigorously enforce and administer the laws governing entry into the United States of workers from abroad.”<sup>334</sup>

Table 5 shows a distinct and obvious change in enforcement practices surrounding USCIS Requests for Evidence.<sup>335</sup> In the first quarter of 2017, RFEs were issued in 18% of petitions involving Indian workers, far below the 25% rate for all petitions for workers from other nations.<sup>336</sup> The “Hire American Order” was issued about two weeks into the second quarter of 2017.<sup>337</sup> By the fourth quarter, the rate for Indians and all other nations flipped—by a margin that reversed the pattern for the first quarter—USCIS issued RFEs for 24% of petitions for Indian workers, while all others fell to 19.6%.<sup>338</sup>

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<sup>328</sup> See *supra* Tables 3 and 4.

<sup>329</sup> See *supra* Tables 1 and 2.

<sup>330</sup> See *supra* Tables 1–4.

<sup>331</sup> NAT’L FOUND. FOR AM. POL’Y, H-1B DENIALS AND REQUESTS FOR EVIDENCE INCREASE UNDER THE TRUMP ADMINISTRATION 1 (2018).

<sup>332</sup> MG2 Complaint, *supra* note 260, ¶¶ 16–22.

<sup>333</sup> *Id.* ¶ 3.

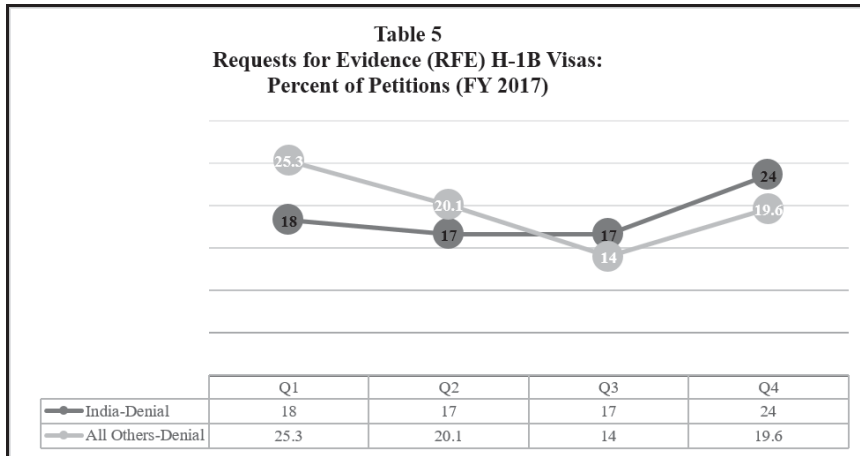
<sup>334</sup> EXEC. ORDER NO. 13,788, *supra* note 1, at 18,839.

<sup>335</sup> See *infra* Table 5.

<sup>336</sup> See *infra* Table 5.

<sup>337</sup> NAT’L FOUND. FOR AM. POL’Y, *supra* note 331.

<sup>338</sup> See *infra* Table 5.



The National Foundation for American Policy summarized its data analysis:

H-1B denials and Requests for Evidence (RFEs) increased significantly in the 4th quarter of FY 2017, likely due to new Trump administration policies, according to data obtained from U.S. Citizenship and Immigration Services (USCIS) by the National Foundation for American Policy. The proportion of H-1B petitions denied for foreign-born professionals increased by 41% increase from the 3rd to the 4th quarter of FY 2017, rising from a denial rate of 15.9% in the 3rd quarter to 22.4% in the 4th quarter. The number of Requests for Evidence in the 4th quarter of FY 2017 *almost equaled* the total number issued by USCIS adjudicators for the first three quarters of FY 2017 combined (63,184 vs. 63,599).<sup>340</sup>

*B. Strict Scrutiny Under the Fifth Amendment Due Process Clause Applies to Executive Order 13,788*

I now show that the “Hire American” order is subject to strict scrutiny under the Fifth Amendment’s Due Process Clause. I rely on two historical precedents. Both

<sup>339</sup> Table 5 is the work of the author, but based on data from the National Foundation for American Policy. See NAT’L FOUND. FOR AM. POL’Y, *supra* note 331.

<sup>340</sup> *Id.* (“The significant increase in denials and Requests for Evidence in the 4th quarter of 2017, which started July 1, 2017, came shortly after Donald Trump issued his restrictive ‘Buy American and Hire American’ executive order on April 18, 2017.”). The report added: “A recent USCIS memo on Notices to Appear could place high-skilled applicants whose applications are denied into deportation proceedings, while another new policy allows adjudicators to deny applications without even providing an opportunity for an employer to respond to a Request for Evidence.” *Id.*

involve state employment regulations that affected foreign-born Asians who needed permits to work—Japanese fishermen and H-1B workers.<sup>341</sup> These cases are part of a series of significant precedents that prohibit government from certain types of discrimination based on alienage.<sup>342</sup>

### 1. Alienage as a Suspect Classification

Executive Order 13,788 resembles the discriminatory state regulation in *Takahashi v. Fish and Game Commission*, where the Supreme Court struck down California’s fishing restriction that was facially neutral but acted on racial animus toward Japanese.<sup>343</sup> Similar to H-1B workers, Takahashi was a longtime U.S. resident who practiced a single occupation—in this case, commercial fishing.<sup>344</sup> Also like H-1B workers, Takahashi was not a citizen but had legal status to reside in the U.S.<sup>345</sup>

Due to “anti-Japanese fever”<sup>346</sup> and a “racial storm,”<sup>347</sup> California lawmakers amended its Fish and Game Code to allow a commercial fishing license to be issued to “any person other than an alien Japanese.”<sup>348</sup> Two years later, California removed its direct reference to Japanese aliens, broadening the license restriction to any “person ineligible to citizenship.”<sup>349</sup>

Under the guise of this more neutral term, the California Fish and Game Commission denied Takahashi’s request for a commercial license in 1945.<sup>350</sup> The Supreme Court saw through this guise. On narrow grounds, the majority opinion rejected the state’s argument that it had a special interest in preserving fish for California citizens, and found that the law violated the Equal Protection Clause.<sup>351</sup> Justice Murphy’s

<sup>341</sup> See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 410 (1948); *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012).

<sup>342</sup> Exec. Order No. 13,788, *supra* note 1, at 18,839.

<sup>343</sup> 334 U.S. at 418.

<sup>344</sup> *Id.* at 412–13.

<sup>345</sup> *Id.* at 412.

<sup>346</sup> *Id.* at 422.

<sup>347</sup> *Id.* at 424 (describing “[t]he winds of racial animosity”).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 413.

<sup>350</sup> *Id.* at 413–14. Takahashi had been evacuated from the state in 1942 under President Roosevelt’s internment order, and remained out of the state for three years. *Id.* at 413. Although California amended its commercial code to omit its glaring reference to “alien Japanese,” the Court ruled that even its more neutral occupational restriction violated equal protection under the 14th Amendment. *Id.* On narrow grounds, the majority opinion rejected the state’s argument that it had a special interest in preserving fish for California citizens. *Id.* at 420–21.

<sup>351</sup> See *id.* at 420 (“All of the foregoing emphasizes the tenuousness of the state’s claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization.”).

concurring opinion spoke more directly about racial animus in the occupational restriction.<sup>352</sup> *Takahashi* means that resident aliens have a constitutionally protected right to earn a living in the U.S., free from a government-imposed racial classification.<sup>353</sup>

More recently, H-1B pharmacists faced a complete occupational ban after New York barred them from holding professional licenses in *Dandamudi v. Tisch*.<sup>354</sup> They had settled lives—they worked in New York for a long time, owned property in the state, and paid state and federal income taxes.<sup>355</sup> The Second Circuit, finding that this employment ban was a suspect classification, invoked strict scrutiny.<sup>356</sup> The court ruled that the New York restriction violated the Equal Protection Clause.<sup>357</sup>

In sum, the Constitution provides lawfully admitted aliens protection against discrimination based on their immigration status.<sup>358</sup> A long line of precedents beginning in 1948 with *Takahashi* look past the facially neutral phrasing of laws for evidence of discrimination.<sup>359</sup> These include situations similar to the “Hire American” executive order, where animus directed at a particular nationality group resulted in work regulations that were aimed to remove foreigners in a particular labor market.<sup>360</sup> The “Hire American” executive order differs from these cases insofar as those precedents involved state regulations.<sup>361</sup> Federal regulation of immigration is treated by courts with more deference.<sup>362</sup> But as I show in the next section, the president’s authority to enact unilateral alienage restrictions has constitutional limits.

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<sup>352</sup> *Id.* at 427 (Murphy, J. concurring) (“We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests. We need but unbutton the seemingly innocent words of § 990 to discover beneath them the very negation of all the ideals of the equal protection clause.”).

<sup>353</sup> *Id.* at 415–16.

<sup>354</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 71–72 (2d Cir. 2012).

<sup>355</sup> *Id.* at 71.

<sup>356</sup> *Id.* at 72. *Dandamudi* argued that New York’s H-1B bar discriminated on the basis of alienage. The Second Circuit determined that while H-1B visa workers had temporary permits, in reality their visa functioned as a long-term work permit. *Id.* at 78 (“This focus on transience is overly formalistic and wholly unpersuasive. The aliens at issue here are ‘transient’ in name only.”).

<sup>357</sup> *Id.* at 79.

<sup>358</sup> *Id.* at 77–78.

<sup>359</sup> *Id.* at 72–73.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (holding “deference [is] traditionally accorded the President in this sphere”); *Fiallo v. Bell*, 430 U.S. 787, 787 (1977) (citations

## 2. President Trump’s Executive Orders Based on Religion and Alienage Have Triggered Strict Scrutiny for Resident Foreign Nationals

State employment regulations that discriminate by race and nationality are rare. Federal cases seem rarer. Nonetheless, aliens have due process rights under the Fifth Amendment—even in employment.<sup>363</sup> President Trump’s naked prejudice against Muslims and aliens have led courts to enjoin unilateral actions.<sup>364</sup> Some cases explicitly mention the impact of these orders on employment relationships.<sup>365</sup> Overall, these cases show that when President Trump acts against insular minorities, courts enjoin these measures.<sup>366</sup>

Executive Order 13,769 banned entry of virtually all persons from seven Muslim countries.<sup>367</sup> Among its effects, the order affected prospective employment relationships.<sup>368</sup> After the order was enjoined,<sup>369</sup> the President revised it.<sup>370</sup> The new order had many of the same effects, including impairment of employment relationships.<sup>371</sup> The Supreme Court partially denied its enforcement in *Trump v. International Refugee Assistance Project*.<sup>372</sup> On his third attempt at barring entry to millions of Middle

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omitted) (noting exclusion of aliens is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (noting judicial review of visa denials is limited to whether the action was supported by a “facially legitimate and bona fide” reason); *see also* *Wong Wing v. U.S.* 228, 235 (1896) (“[I]t is within the constitutional power of Congress to deport . . . [Chinese laborers] and to commit the enforcement of the law to executive officers.”); *Lem Moon Sing v. United States*, 158 U.S. 538, 545 (1895) (“[P]ower of congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . . .”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (discussing that “no other tribunal, unless expressly authorized, can review an immigration officer’s fact findings); *Chae Chan Ping v. United States*, 130 U.S. 581, 606–07 (1889) (“[P]ower of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive . . . .”).

<sup>363</sup> *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 88 (1976) (federal civil service system could not bar employment of all aliens).

<sup>364</sup> *See Trump*, 138 S. Ct. at 2436–37.

<sup>365</sup> *See Washington v. Trump (Washington II)*, 847 F.3d 1151, 1169 (9th Cir. 2017); *Washington v. Trump (Washington I)*, 2017 WL 462040, at \*2 (W.D. Wash. 2017).

<sup>366</sup> *See Trump*, 138 S. Ct. at 2436–37.

<sup>367</sup> *See generally* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>368</sup> *Washington II*, 847 F.3d at 1159–60 (University of Washington’s sponsorship of medical and science interns affected by entry-bar).

<sup>369</sup> *Washington I*, 2017 WL 462040, at \*2–3.

<sup>370</sup> *See generally* Exec. Order No. 13,780, 82 Fed. Reg. 45 (Mar. 9, 2017) [hereinafter EO-2].

<sup>371</sup> *Trump v. International Refugee Assistance Project (Trump I)*, 137 S. Ct. 2080, 2088 (2017) (ruling on EO-2 by narrowing district court’s injunction to apply, *inter alia*, to “a worker who accepted an offer of employment from an American company”).

<sup>372</sup> *Id.* (denying enforcement to Section 2(c) of the order insofar as it applied to foreign



Easterners, the President prevailed in *Trump v. Hawaii*.<sup>373</sup> Narrower than the others, this ban was issued as a proclamation.<sup>374</sup> It had no employment effects nor any other impairment of bona fide relationships.<sup>375</sup> While the ruling upheld the ban, the Court overruled *Korematsu v. United States*.<sup>376</sup>

The Trump administration has tried to terminate President Barack Obama's Deferred Action for Childhood Arrivals (DACA) policy.<sup>377</sup> One aspect would eliminate work authorization.<sup>378</sup> After *Batalla Vidal v. Duke* ruled that DACA recipients and states have standing,<sup>379</sup> the same court enjoined the policy because it likely violated the Administrative Procedure Act (APA) and Fifth Amendment Due Process Clause.<sup>380</sup> In a subsequent ruling on equal protection, the court found that Secretary of Homeland Security had no racial animus but said the president may have directed the policy with a "constitutionally suspect" purpose.<sup>381</sup> The rescission policy led to other lawsuits.<sup>382</sup>

nationals who had a credible claim of a bona fide relationship with a person or entity in the United States, including an employment relationship).

<sup>373</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018).

<sup>374</sup> *Id.* at 2404–06 (discussing the President's suspension of entry under Proclamation No. 9645).

<sup>375</sup> *Id.* at 2422–23.

<sup>376</sup> *Id.* at 2423 (referring to Roosevelt's EO 9066 as a "morally repugnant order"). The majority opinion stated: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." *Id.*

<sup>377</sup> Memorandum from Elaine C. Duke, Acting Sec'y, Dep't Homeland Sec., Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA) to James W. McCament et al. (Sept. 5, 2017).

<sup>378</sup> *Id.* (stating that DHS will "reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum").

<sup>379</sup> See *Batalla Vidal v. Duke (Vidal I)*, 295 F. Supp. 3d 127, 127–28 (E.D.N.Y. 2017).

<sup>380</sup> See *Batalla Vidal v. Nielsen (Vidal II)*, 291 F. Supp. 3d 260, 261 (E.D.N.Y. 2018).

<sup>381</sup> *Id.* at 278 ("[W]hether—and, if so, for how long—any Executive action disproportionately affecting a group the President has slandered may be considered constitutionally suspect.").

<sup>382</sup> *Cf. In re United States*, 138 S. Ct. 443, 443 (2017) (granting government's motion to stay order); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (Regents IV)*, 908 F.3d 476, 520 (9th Cir. 2018) (holding DHS enjoined from using DACA-recipient personal information); *In re United States (Regents II)*, 875 F.3d 1200, 1209 (9th Cir. 2017) (denying government's motion to stay district court order); *Inland Empire—Immigrant Youth Collective v. Duke*, 2017 WL 5900061 at \*10 (C.D. Cal. 2018) (enjoining revocation of EAD and DACA status); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (Regents III)*, 279 F. Supp. 3d 1011, 1098 (N.D. Cal. 2018) (holding court had jurisdiction to enjoin rescission policy); *Nat'l Ass'n for Advancement of Colored People v. Trump (NAACP III)*, 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (holding DHS rescission of DACA "was both subject to judicial review and arbitrary and capricious"); *Nat'l Ass'n for Advancement of Colored People v. Trump (NAACP II)*, 298 F. Supp. 3d 209, 215 (D.D.C. 2018); *Nat'l Ass'n for Advancement of Colored People v. Trump (NAACP I)*, 321 F. Supp. 3d 143, 147 (D.D.C. 2018) (explaining DACA rescission affecting 689,800 enrollees was a major policy decision and therefore reviewable); *CASA de Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 758 (D. Md. 2018)

DHS terminated temporary status for 300,000 migrants from Haiti, Sudan, Nicaragua, and El Salvador.<sup>383</sup> A district court in *Ramos v. Nielsen*, after dismissing the agency’s jurisdiction argument,<sup>384</sup> enjoined these actions.<sup>385</sup> In a subsequent ruling that imposed a preliminary injunction, the *Ramos III* court noted that the “information sought by the Secretary coincides with racial stereotypes—i.e., that non-whites commit crimes and are on the public dole.”<sup>386</sup> The court based its injunction partly on a finding of the president’s racial animus.<sup>387</sup>

Plaintiffs from El Salvador, Haiti, and Guatemala prevailed in *Centro Presente v. United States Department of Homeland Security*.<sup>388</sup> In denying the agency’s motion

(holding federal government estopped from using information provided by participants for immigration enforcement); *Texas v. United States*, 328 F. Supp. 3d 662, 742, 745 (S.D. Tex. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec. (Regents I)*, 2017 WL 4642324 at \*8 (N.D. Cal. 2017) (ordering DHS to complete record under ADA for DACA-rescission); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1341 (N.D. Ga. 2017) (noting jurisdiction-stripping provisions of federal law do not inhibit the court’s ability to review nondiscretionary procedures); *Medina v. U.S. Dep’t of Homeland Sec. (Medina I)*, 2017 WL 2954719 at \*8 (W.D. Wash. 2017) (explaining DACA-recipient’s arrest and detention did not preclude jurisdiction).

<sup>383</sup> See *Termination of the Designation of Haiti for Temporary Protected Status*, 83 Fed. Reg. 2648-01 (Jan. 18, 2018); *Termination of the Designation of El Salvador for Temporary Protected Status*, 83 Fed. Reg. 2654-01 (Jan. 18, 2018); *Termination of the Designation of Nicaragua for Temporary Protected Status*, 82 Fed. Reg. 59636-01 (Dec. 15, 2017); *Termination of the Designation of Sudan for Temporary Protected Status*, 82 Fed. Reg. 47228-02 (Oct. 11, 2017). TPS rescission status means, in part, that these individuals cannot secure work authorization in the U.S. See *Ramos v. Nielsen (Ramos III)*, 336 F. Supp. 3d 1075, 1080 (N.D. Cal. 2018).

<sup>384</sup> *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991) (stating that jurisdiction-stripping applies to “a single act rather than a group of decisions or a practice or procedure employed in making decisions”). The court also ruled to allow plaintiffs to proceed with proof President Trump’s statements could be construed “as evidence of racial bias animus against non-white immigrants, and that he thereafter influenced and tainted DHS’s decision-making process with regard to TPS.” *Ramos I*, 2018 WL 3109604, at \*2. Also, the court found that the “prohibition on racial animus under the Due Process clause’s Equal Protection guarantee applies to executive action in the immigration context.” *Id.*

<sup>385</sup> *Ramos III*, 336 F. Supp. 3d at 1108–09 (holding judicial review of these rescission memoranda is not precluded).

<sup>386</sup> *Id.* at 1105; see also *Ramos II*, 321 F. Supp. 3d, at 1124 (“[T]he claim of President Trump’s influence is plausible; as explained in more detail below, for example, President Trump described Haiti as a ‘shithole’ in a meeting with Secretary Nielsen where he expressed desire not to welcome Haitians in the United States, just days before DHS announced it would terminate Haiti’s status.”).

<sup>387</sup> *Ramos II*, 321 F. Supp. 3d, at 1132.

<sup>388</sup> *Centro Presente v. U.S. Dep’t of Homeland Sec.*, 332 F. Supp. 393, 402–03 (D. Mass. 2018). The court ruled on three separate but related policy decisions made by the Secretary of Homeland Security: the (1) decision of January 18, 2018 to terminate El Salvador’s TPS designation, effective September 9, 2019; (2) decision of November 20, 2017 to terminate Haiti’s TPS designation, effective July 22, 2019; and (3) decision of May 4, 2018 to terminate Honduras’ TPS designation, effective January 5, 2020. *Id.*

to dismiss, the court found enough evidence of racial animus behind the rescission decisions to apply strict scrutiny: “[T]he combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision.”<sup>389</sup> These actions were found, in the alternative, to lack a rational basis.<sup>390</sup> The court also denied the motion to dismiss President Trump as a defendant.<sup>391</sup>

Executive Order 13,788 is a suspect classification because it targets Indians on the basis of alienage and race. Evidence shows that when the order’s “Hire American” imperative is broken down to the demographic characteristics of the H-1B labor market, it aims to increase the 85% share of that market held by U.S.-born white workers.<sup>392</sup> The enforcement data for RFEs in 2017 clearly shows a sharp increase in USCIS adverse actions directed at Indian visa holders.<sup>393</sup> This exposes lawfully admitted Indians and their H-4 dependents to deportation, as the *MG2* case illustrates.<sup>394</sup> While executive power over immigration is plenary, it does not allow the federal government to violate equal protection rights.<sup>395</sup> Recently, the Supreme Court applied heightened

<sup>389</sup> *Id.* at 415.

<sup>390</sup> *Id.* at 416 (“In this case, by contrast [to *Trump v. Hawaii*], there is no justification, explicit or otherwise, for Defendants’ switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees.”).

<sup>391</sup> *Id.* at 419.

<sup>392</sup> *See supra* Table 3.

<sup>393</sup> *See supra* note 327 and Table 5.

<sup>394</sup> *See supra* notes 257–70.

<sup>395</sup> *See Yick Wo v. Hopkins*, 118 U.S. 356, 373, 374 (1886) (holding aliens are entitled to the benefits of equal protection). The Court posited a right to equal treatment in the context of America’s foundational constitutional principles:

[T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and *equal laws*, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth “may be a government of laws and not of men.” For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

*Id.* at 370 (emphasis added). Numerous courts have ruled on the merits of an alien’s equal protection claim. Usually, they apply a rational basis test and uphold the government’s removal order or other adverse action. *See Spina v. Dep’t of Homeland Sec.*, 470 F.3d 116, 131 (2d Cir. 2006); *Camacho-Salinas v. U.S. Atty. Gen.*, 460 F.3d 1343, 1348–49 (11th Cir. 2006) (applying equal protection under the Fifth Amendment to uphold removal order); *Jankowski-Burczyk v. INS*, 291 F.3d 172, 180–81 (2d Cir. 2002) (applying rational basis to LPRs and

scrutiny to federal immigration restrictions that are suspect.<sup>396</sup> These constitutional limits apply to the “Hire American” sections and regulations of Executive Order 13,788.

#### CONCLUSION: THE “HIRE AMERICAN” EXECUTIVE ORDER AND DUE PROCESS

When President George H.W. Bush signed the H-1B visa law and related amendments to the INA, he proclaimed: “Immigration is not just a link to America’s past; it’s also a bridge to America’s future. This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas.”<sup>397</sup> President Trump has a very different view. His “Hire American” executive order has telltale characteristics of a suspect classification.

This executive order is rooted in a history of prejudice against Indians.<sup>398</sup> These immigrants were perceived as a wage threat to Americans a century ago.<sup>399</sup> Americans

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Non-LPRs); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 640 (3d Cir. 2002) (residency requirement of § 1152(h) also passes rational basis review); *Lukowski v. INS*, 279 F.3d 644, 647 (8th Cir. 2002) (applying rational basis standard); *Taniguchi v. Schultz*, 303 F.3d 950, 956–58 (9th Cir. 2002) (allowing Attorney General to waive deportation for LPRs but not granting that discretion for nonimmigrants did not violate equal protection); *Lara-Ruiz v. INS*, 241 F.3d 934, 947 (7th Cir. 2001) (applying rational basis); *Moore v. Ashcroft*, 251 F.3d 919, 926 (11th Cir. 2001) (applying rational basis to an equal protection claim by an alien and upholding a removal order); *cf. Sicar v. Chertoff*, 541 F.3d 1055, 1056 (11th Cir. 2008) (holding jurisdiction lacking to review constitutional claims from Haitians under the Haitian Refugee Immigration Fairness Act of 1998).

<sup>396</sup> *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1679, 1682–83 (2017) (denying enforcement of a removal order of a person born in the Dominican Republic to an American-born father and a Dominican mother). The Immigration and Nationality Act imposed differential standards by gender in creating a higher residency hurdle for unwed fathers than for mothers. *Id.* at 1686–87. An unwed mother legally transmits citizenship to a child born abroad if she has lived continuously in the U.S. for just one year prior to the child’s birth. *Id.* at 1686. In contrast, an unwed father was required to live in the U.S. for five continuous years after attaining the age of fourteen. *Id.* at 1687. The Court applied heightened scrutiny to the law:

Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an “exceedingly persuasive justification.”

*Id.* at 1690 (citation omitted). Applying this standard the Court found that the gender provision in the INA violated equal protection that is implicit in the Fifth Amendment. *Id.* at 1694–98. Specifically, the Court said: “We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons ‘the equal protection of the laws.’” *Id.* at 1686.

<sup>397</sup> *Bush on Immigration Act*, C-SPAN (Nov. 29, 1990), <https://www.c-span.org/video/?c4679693/bush-immigration-act> [<https://perma.cc/T52G-3KA7>].

<sup>398</sup> See *supra* Part III.

<sup>399</sup> S. REP. NO. 761, *supra* note 108, at 45.

viewed these foreign nationals as unsuitable to live among them because of cultural and racial differences.<sup>400</sup> This bias culminated in a ban on Indian immigration, except for 100 newcomers each year.<sup>401</sup> *Bhagat Singh Thind* mirrored *Dred Scott* by depicting dark-skinned Indians as legally inferior to whites.<sup>402</sup> In short, the U.S. built a legal wall to keep out Indians.

Official discrimination against Indians was mostly disguised. Even a century ago, lawmakers realized that an explicit ban on Indians would be problematical.<sup>403</sup> Thus, the Immigration Act of 1917 avoided racial classifications.<sup>404</sup> Instead, the law created the “Asiatic Barred Zone,” substituting neutral sounding boundaries on a map, with longitude and latitude coordinates that walled off Indians.<sup>405</sup> This was not because Congress believed that map makers were immigration experts. Even in 1917, Congress likely realized that any legislative reference to Indians posed a threat to relations with Britain because these dark-skinned people were British subjects.<sup>406</sup> The map built prevented brown and yellow people from immigrating—people loathed by popular writers of the day.<sup>407</sup> Political leaders matter-of-factly stated that the United States was a government instituted to benefit white people: “This is a Government of the white race. The original legislation recognized that fact. All of the legislation since that time recognizes that fact.”<sup>408</sup> The “Hire American” order is of the same official ilk.

The H-1B visa is widely understood to be a gateway for eventual Lawful Permanent Resident status.<sup>409</sup> In time, H-1B workers and their families are often eligible for citizenship.<sup>410</sup> “Hire American” is not an isolated policy: It is connected to President Trump’s rescission of H-4 visas related to these workers.<sup>411</sup> By preventing spouses

<sup>400</sup> Millis, *supra* note 106, at 75.

<sup>401</sup> Proclamation No. 1872, *supra* note 139.

<sup>402</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204, 207, 209–10, 215 (1923).

<sup>403</sup> *See* S. REP. NO. 761, *supra* note 108, at 45 (describing a Canadian immigration law that regulated immigration in such a way as to surreptitiously bar immigration by Indians. California took a similarly disguised approach by limiting commercial licenses to citizens, thereby barring resident-alien Japanese. *Compare* *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), *with* S. REP. NO. 761, *supra* note 108, at 45.

<sup>404</sup> *See generally* Immigration Act of 1917, Pub. L. No. 321, 29 Stat. 874 (1917).

<sup>405</sup> *See id.* at 881 (referring to Section 3, which phrased immigration restrictions by reference to map coordinates of the “Continent of Asia”).

<sup>406</sup> Hess, *supra* note 66, at 589.

<sup>407</sup> *See* STODDARD, *supra* note 125, at xi–xv.

<sup>408</sup> *Japanese Immigration Legislation*, *supra* note 13, at 51.

<sup>409</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 70–71 (2d Cir. 2012).

<sup>410</sup> *Id.* at 71 (explaining that “nonimmigrant aliens are . . . often eligible to apply for LPR status. This process is typically quite slow, and the federal government therefore regularly issues Employment Authorization Documents . . . which extend the time period during which these aliens are eligible to work in the United States while they await their green cards”).

<sup>411</sup> Under certain conditions, a person who is a Lawful Permanent Resident may adjust status to become a naturalized citizen. *See* USCIS POLICY MANUAL, U.S. CITIZENSHIP & IMMIGR.



and age-eligible children from lawful employment,<sup>412</sup> the new H-4 policy discourages Indian workers who are here for three or more years from bringing their family—or, if they accompany the worker, the rescission imposes opportunity costs by idling them.<sup>413</sup> At root, “Hire American” addresses a perceived demographic threat that is on track to make white Americans a minority: When Baby Boomers were young, 72% of the U.S. population was white, but the American population encountered by Millennials is only 56% white.<sup>414</sup> “Hire American” begins to arrest this demographic trend by limiting the number of Indians who can routinely extend a three-year visa for an additional three years, as provided by law.

Recent statistics bear this out<sup>415</sup>—but so, too, does the experience of MG2 in trying to extend Bharath Raj Kumanan’s visa.<sup>416</sup> His petition was not denied because of suspected fraud or failure of MG2 to hire an American: USCIS interpreted the *Occupational Outlook Handbook* in a way that contradicts the practice of hiring people with a bachelor’s degree for that job.<sup>417</sup> Nor was this petition denied because his pay was undercutting wages for Americans.<sup>418</sup> Nonetheless, the Kumanan family is accruing an unlawful presence and is subject to deportation. With Hire American’s promise for stepping up rigorous enforcement,<sup>419</sup> the clear implication is that Indian workers and their families will gradually be forced leave the United States. If sustained, this scenario projects to preserve white Americans as a majority race.

The Supreme Court declined to interpret the president’s tweets, slogans, and campaign promises as evidence of discriminatory intent in the travel ban/Muslim ban case.<sup>420</sup> However, the *Trump* Court’s avoidance of probing presidential intent was not

SERVS. (May 3, 2019), <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2> [https://perma.cc/PR2X-7BMW].

<sup>412</sup> *DHS Reaffirms Commitment to Rescind H-4 Work Authorization*, NAT’L L. REV. (Aug. 27, 2018), <https://www.natlawreview.com/article/dhs-reaffirms-commitment-to-rescind-h-4-work-authorization> [https://perma.cc/7AU3-SKG2].

<sup>413</sup> See generally MG2 Complaint, *supra* note 260.

<sup>414</sup> Richard Fry et al., *How Millennials Today Compare with Their Grandparents 50 Years Ago*, PEW RES. CTR. (Mar. 16, 2018), <https://www.pewresearch.org/fact-tank/2018/03/16/how-millennials-compare-with-their-grandparents/> [https://perma.cc/TVE7-ZJK7].

<sup>415</sup> Sarah Pierce & Julia Gelatt, *Evolution of the H-1B: Latest Trends in a Program on the Brink of Reform*, MIGRATION POL’Y INST. (Mar. 2018).

<sup>416</sup> See discussion *supra* Part III.

<sup>417</sup> See MG2 Complaint, *supra* note 260, ¶ 29.

<sup>418</sup> See generally Kim & Sakamoto, *supra* note 317 (demonstrating wage disparities by comparing earnings, education, country of birth and other demographic factors).

<sup>419</sup> PUTTING AMERICAN WORKERS FIRST, *supra* note 231.

<sup>420</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (“The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office.”). The majority opinion meekly concluded that “‘when it comes to collecting evidence and drawing inferences’ on questions of national security, ‘the lack of competence on the part of the courts is marked.’” *Id.* at 2419 (citation omitted).



a ruling; and other courts have concluded that the president's political messages reveal discriminatory animus.<sup>421</sup> "Hire American" is a slogan connected to a pattern of animus—particularly "Build the Wall," directed at Mexican and Central American migrants, and "Make America Great Again," connected with a rise in white nationalism.

While these examples are debatable as proof of racial animus, historical context adds clarity. Presidential candidate George Wallace ran on a slogan of "Stand Up for America," a political cue to resist racial integration.<sup>422</sup> In the 1892 presidential election, Grover Cleveland and Democrats campaigned on the slogan "No Force Bill," widely perceived as a racial cue to whites who were concerned about legislation to strengthen voter rights for blacks in southern states.<sup>423</sup> Supporters of Republican presidential nominee James G. Blaine used the campaign slogan "Rum, Romanism, and Rebellion" in 1884 to whip up long-simmering prejudice against Irish Catholics.<sup>424</sup> All of these racially coded slogans relate to President Trump's anti-immigrant messaging: "Hire American" is part of the president's vitriolic campaign to protect the white working class. Many voters, over the past century, have understood these presidential messages: Courts have been slower, but not entirely tone-deaf, in hearing these racial cues.

The basis for the "Hire American" order is "to create higher wages and employment rates for workers in the United States, and to protect their economic interests."<sup>425</sup> The H-1B visa requirement of a labor certification process that is tied to labor market wage and salary floor has the same goal.<sup>426</sup> If, however, those wage and salary rates are set too low, and thereby injuring American workers, the president has authority to use the procurement powers of the executive branch to require federal contractors who use H-1B workers to pay those individuals above the labor certification floor.<sup>427</sup> As an alternative, the administration can raise the processing fee for H-1B employers

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<sup>421</sup> *Ramos I*, 2018 WL 3109604, \*2 (N.D. Cal. 2018); *Centro Presente v. U.S. Dept. of Homeland Sec.* 332 F. Supp. 393, 401–02, 415 (D. Mass. 2018).

<sup>422</sup> See Seymour Martin Lipset & Earl Raab, *The Wallace Whitelash*, 7 TRANS-ACTION 23, 32–33 (Dec. 1969) (Wallace appealed strongly to people who identified their distress with changes in race relations).

<sup>423</sup> *A Silly Bugaboo*, HARPER'S WEEKLY (July 16, 1892), <https://elections.harpweek.com/1892/cartoon-1892-Medium.asp?UniqueID=24&Year=1892> [<https://perma.cc/7MG7-JFUR>]; see also Christopher Brian Booker, *THE BLACK PRESIDENTIAL NIGHTMARE: AFRICAN-AMERICANS AND PRESIDENTS, 1789–2016* (2017) ("Democrats skillfully used the virulent racism of the era . . . 'No Force Bill! No Negro Domination in the South!' became the battle cry of Cleveland and the Democrats . . ."); Henry Cabot Lodge & T.V. Powderly, *The Federal Election Bill*, 151 N. AM. REV. 257, 258–59, 266–68 (1890).

<sup>424</sup> ROBERT NORTH ROBERTS ET AL., *PRESIDENTIAL CAMPAIGNS, SLOGANS, ISSUES, AND PLATFORMS* 420 (2012) (the slogan backfired by mobilizing large numbers of Irish Catholics in New York).

<sup>425</sup> Executive Order No. 13,788, *supra* note 1, § 2(b).

<sup>426</sup> *Id.* at 17.

<sup>427</sup> *E.g.*, Executive Order No. 13,658, 83 Fed. Reg. 44,906 (Feb. 12, 2014) (raising the minimum wage for work performed on federal contracts to \$10.10 per hour).

with more than twenty-five employees from \$1,500.<sup>428</sup> The visa beneficiary would not bear that cost because USCIS would treat that as an unlawful wage offset.<sup>429</sup> By raising the processing costs sharply, employers would either search longer for an especially qualified foreign worker in order to justify the added expense, or be willing to pay more for American workers. The H-1B visa quota would not necessarily fill in the first week of April, as it does now.<sup>430</sup> Raising the fee substantially would obviate the apparent need to discriminate against Indian H-1B workers, who are subjected to disparate levels of enforcement that Table 5 reports.<sup>431</sup>

In sum, the “Hire American” order has broad ramifications for the American economy. America’s IT workforce has 4.6 million jobs—larger than the population of twenty-five states.<sup>432</sup> Most of this workforce employs U.S.-born workers.<sup>433</sup> H-1B visas are mostly held by Indians, but most IT jobs are held by white Americans.<sup>434</sup>

Executive Order 13,877 traffics in an immigration conspiracy theory: Indians are stealing lots of jobs from white Americans. Faceless government bureaucrats, cranking out work visas in an overly permissive immigration system, have hurt American workers. Neither proposition stands up to scrutiny: they are based on anecdote, supposition, and a misguided *60 Minutes* show—but not data or analysis.

To deny that this order is a suspect classification ignores the White House press conference announcing it; disregards the “Indians hurt Americans” *60 Minutes* program that supports it; overlooks labor market data in recent Census Bureau and USCIS reports; denies first-hand accounts of America’s racially stratified IT workplace, where Indians sit at the bottom of a corporate caste system; and whitewashes President Trump’s equivalence of skin color and country of origin as a basis for his immigration preferences. “Hire American” is a suspect classification under the Fifth Amendment. As such, the order is subject to strict scrutiny.

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<sup>428</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVS., H AND L FILING FEES FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER (2019), <https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker> [<https://perma.cc/9ELF-ERTB>].

<sup>429</sup> *Id.* (“The beneficiary is not permitted to pay the ACWIA fee. That would be considered an offset against wages and/or benefits paid as stated on the Labor Condition Application.”).

<sup>430</sup> Avalos, *supra* note 192.

<sup>431</sup> *See supra* Table 5.

<sup>432</sup> *State Population Census Estimates: 2013 Births, Deaths, Migration Totals* (2013), <https://www.governing.com/gov-data/census/census-state-population-estimates-births-deaths-migration-totals-2013.html> [<https://perma.cc/7MH2-M3Z7>]. Louisiana is ranked 25th with 4,625,470 and Kentucky is ranked 26th with 4,395,295. *Id.*

<sup>433</sup> *See supra* Table 3.

<sup>434</sup> *See supra* Table 3.