

# The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement

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Kevin R. Johnson\*  
Bill Ong Hing\*\*

For weeks in the spring of 2006, television and newspapers featured spectacular images of masses of humanity lined up for miles in marches across the United States. What was most startling about the marches was that they were overwhelmingly pro-immigrant. Hundreds of thousands of U.S. citizens and immigrants peacefully marched in Chicago and Los Angeles; thousands more took to the streets in other cities across the country.<sup>1</sup> Such mass demonstrations advocating for the rights of immigrants are unprecedented in American history.

Energy, enthusiasm, and a deep sense of urgency filled the air. Activists proclaimed that the marches represented “the new civil rights movement.”<sup>2</sup> The leaders of the National Immigrant Solidarity Network, for example, saw themselves as the vanguard of the first civil rights movement of the twenty-first century.<sup>3</sup> Emma Lozano, a community organizer from Chicago, proclaimed that “[Latina/os] need to transform [the movement] into political power so we can change these immigration laws.”<sup>4</sup> Yvette Felarca, the California coordinator of By Any Means Necessary, asserted that “[t]his is the birth of a new civil rights movement.”<sup>5</sup> Cindy Shee-

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\* Associate Dean for Academic Affairs and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California, Davis; J.D., Harvard University; B.A., University of California, Berkeley. Parts of this Article are adapted from a commentary published on Diverse Online. See Kevin Johnson, *Is a New Civil Rights Movement Emerging?*, May 4, 2006, [http://www.diverseeducation.com/artman/publish/article\\_5809.shtml](http://www.diverseeducation.com/artman/publish/article_5809.shtml). Stella Schmidl, Thalassa Kingsnorth, and Julia Mendoza provided much-appreciated research assistance on this Article. George A. Martínez and Ming H. Chen provided helpful comments on a draft of this Article.

\*\* Professor of Law and Asian American Studies, University of California, Davis.

<sup>1</sup> See Oscar Avila & Antonio Olivo, *A Show of Strength; Thousands March to Loop for Immigrants' Rights*, CHI. TRIB., Mar. 11, 2006, at A1; Nathaniel Hoffman, *Protest Supports Illegal Workers*, CONTRA COSTA TIMES, Mar. 22, 2006 at A1; Mark Johnson & Linda Spice, *Thousands March for Immigrants: "A Day Without Latinos" Seeks To Flex Political Muscle in Divisive Debate*, MILWAUKEE J. SENTINEL, Mar. 24, 2006, at A1; Teresa Watanabe & Hector Becerra, *500,000 Pack Streets To Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2005, at A1.

<sup>2</sup> Jessie Mangaliman, *Immigration Rights Backers Marching On: Counterprotest Also Set Monday as Both Sides Seek To Send Message to Congress*, SAN JOSE MERCURY NEWS, Sept. 2, 2006, at 1B.

<sup>3</sup> See *Border Games*, PITTSBURGH TRIB. REV., Aug. 20, 2006.

<sup>4</sup> Tyche Hendricks, *Latino Political Clout Grows; Convention a Step Toward Creating National Movement*, S.F. CHRON., Sept. 10, 2006, at A17.

<sup>5</sup> Michele R. Marcucci & Ryan Sholin, *Hundreds March for Immigration Rights*, OAKLAND TRIB., Sept. 4, 2006, available at <http://www.oaklandtribune.com> (search archive for

han, the well-known antiwar activist whose son died in Iraq, linked her actions with immigrant organizing and proclaimed that “immigrant rights are workers’ rights.”<sup>6</sup>

The first round of protests targeted a punitive bill, passed by the U.S. House of Representatives in December 2005, popularly known by the name of its sponsor Representative James Sensenbrenner. Among other things, the Sensenbrenner bill would have made the mere status of being an undocumented immigrant a felony subject to imprisonment as well as deportation from the United States. Arguably, it also would have imposed criminal sanctions on persons who provided humanitarian assistance to undocumented immigrants.<sup>7</sup>

The immigrant rights movement initially spread like wildfire. A second wave followed the initial protests in March. Instead of merely demanding the rejection of punitive immigration measures, the protesters sought nothing less than justice for immigrants and supported legislation allowing undocumented immigrants the opportunity to regularize their immigration status.<sup>8</sup> Many activists believed that the anti-immigrant tide that had dominated the national debate since the terrorist acts of September 11, 2001, might have turned. In the heady days following the marches, even positive immigration reform, including amnesty for millions of undocumented immigrants, appeared possible.

By the summer of 2006, however, there were signs that the immigrant rights movement had lost steam. A series of marches on and around Labor Day 2006 attracted far fewer people than those just a few months before.<sup>9</sup> Immigration policy proved to be too volatile an issue for Congress to address constructively in an election year. The headway made by the immigrant rights movement visibly slowed. Ultimately, after much skirmishing during the summer, Congress failed to enact any comprehensive

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headline).

<sup>6</sup> *Border Games*, *supra* note 3.

<sup>7</sup> See Border Protection, Antiterrorism, and Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 203, 205 (2005); see also Allen Thomas O’Rourke, Recent Development, *Good Samaritans Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Immigrants*, 9 HARV. LATINO L. REV. 195 (2006) (analyzing the possible impact of the Sensenbrenner bill on humanitarian workers). For a useful summary of the myriad immigration reform proposals floated in Congress during the last few years, see BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 17–38 (2006).

<sup>8</sup> See Anna Gorman, Marjorie Miller & Mitchell Landsberg, *The May Day Marches; Marchers Fill L.A.’s Streets*, L.A. TIMES, May 2, 2006, at A1.

<sup>9</sup> See Darryl Fears & N.C. Aizenman, *Immigration Rally’s Low Turnout Disappoints Advocates*, WASH. POST, Sept. 8, 2006, at A6; Daniel González & Monica Alonzo-Dunsmoor, *Few at Immigration Rally; Demonstrators Significantly Short of 10,000 Organizers Had Hoped For*, ARIZ. REPUBLIC, Sept. 5, 2006, Valley & State Section, at 1; Joe Rodriguez, *Low Tally at Immigration Rally: Complacency High, Turnout Low as Congress Stalled on Bill*, SAN JOSE MERCURY NEWS, Sept. 5, 2006, at 1A; see also Antonio Olivo, Oscar Avila & Ofelia Casillas, *Immigration Rally Draws 10,000*, CHI. TRIB., July 20, 2006, at C1 (noting that only 10,000 persons marched in Chicago in July, compared to nearly 500,000 in May).

immigration reform legislation.<sup>10</sup> Instead, Congress passed a law authorizing the extension of the fence along the U.S.-Mexico border.<sup>11</sup>

This Article focuses not on the substantive details of immigration reform, which we discuss at length elsewhere,<sup>12</sup> but on the efficacy of a new, multiracial civil rights movement seeking social justice. We discern decidedly mixed signals about the possibility of such a movement.<sup>13</sup> Despite signs of promise and potential, there are many formidable hurdles before the emergence of a new, multiracial civil rights movement.<sup>14</sup>

Among the first hurdles is defining the scope of the new movement. Who will participate if there is to be a new civil rights movement? Will it be a Latina/o civil rights movement or a broader one? Will it include African Americans? Will the movement address more than immigrant rights? And just who will be the leaders of the new movement for civil rights and social justice?

We take a first stab at addressing these questions in this Article. We fervently believe that any new, truly broad-based civil rights movement must not just be about immigration, but also must include African Americans. The civil rights movement in the 1960s was very much about civil rights for blacks, whose enslavement and segregation has a lasting legacy in modern America, but it also advocated for the civil rights of other minorities. Incorporating similarly broad civil rights concerns in a movement that also includes the goal of guaranteeing the rights of immigrants would build much-needed political support for change. We recognize, however, that such a strategy risks diluting the immigrant rights agenda and thus we offer suggestions about how to avoid this pitfall.

In our analysis, we incorporate important lessons from the successful civil rights movement of the 1950s and 1960s.<sup>15</sup> Unlike that era, today conservatives control the judicial branch and are not likely to support far-reaching social change.<sup>16</sup> Thus, change through the courts may be more difficult than in the past, and political movements will need to play a more central role and be more effective.

Part I of this Article outlines the context of the 2006 immigration marches and their meaning. It identifies the conspicuous absence of African Americans from the marches and notes that immigration historically has been an issue dividing African Americans, Latina/os, and Asian

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<sup>10</sup> See Editorial, *Immigration Reform Suffering Slow Death*, SAN ANTONIO EXPRESS-NEWS, Sept. 13, 2006, at 6B.

<sup>11</sup> See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

<sup>12</sup> For criticism of current U.S. border enforcement policies and suggestions for reform see, for example, HING, *supra* note 7; KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAW* (forthcoming 2007).

<sup>13</sup> See *infra* text accompanying notes 36–43, 101–112, 155–180.

<sup>14</sup> See *infra* text accompanying notes 45–57, 155–179.

<sup>15</sup> See *infra* text accompanying notes 62–100.

<sup>16</sup> See *infra* text accompanying notes 155–180.

Americans. Part II analyzes some central features of the civil rights movement of the 1950s and 1960s, the last relatively successful and broad-based mass social movement in America. Although African Americans were at the forefront, other groups, including Chicana/os, Native Americans, and Asian Americans, pressed for civil rights and social change. Partly in response to broad-based political activism, the courts and political branches of government assisted in bringing forth social transformation. Part III considers the potential for a new civil rights movement. We opine that much work will need to be done before a multiracial movement for social change can be created. Specifically, African American-Latina/o conflict will need to be addressed before meaningful social change can be secured. Ultimately, it is unclear whether the immigrant marches will morph into anything more. It is clear, however, that the marches will not become something greater without much hard work, the building of trust between minority communities, and the identification of common ground.

#### I. SPRING 2006: THE BEGINNING OF A MOVEMENT?

For many people, the mass marches of the spring of 2006 evoked proud memories of the civil rights movement of the 1960s, when African Americans, Latina/os, progressive whites, and others struggled for social justice.<sup>17</sup> In the last few years, there have been signs of a nascent mass political movement. However, times and circumstances have changed dramatically from the civil rights era. Those interested in social change must take these changed circumstances into account in attempting to fashion a multiracial movement.

This Part of the Article discusses the 2006 immigrant rights marches. Although masses of people participated, the marches were not as representative of different minority groups as might have been desired. Importantly, African Americans were not visible participants in the marches. Their absence in no small part flows from the fact that immigration has proven through much of U.S. history to divide Asian Americans and Latina/os from African Americans.

##### A. *The Marches*

After September 11, 2001, the U.S. government took aggressive action in the name of national security.<sup>18</sup> A loosely organized group of activists sporadically protested various steps in the so-called war on terror. For example, with the support of Japanese Americans, who saw historic parallels with the internment during World War II,<sup>19</sup> Arabs and Muslims marched

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<sup>17</sup> See *infra* text accompanying notes 62–89.

<sup>18</sup> See *infra* text accompanying notes 159–163.

<sup>19</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an exclusion order of persons of Japanese ancestry during World War II). See generally Symposium, *Judgments*

in protest against “special registration” of certain Arab and Muslim non-citizens.<sup>20</sup> In relatively small numbers, grassroots activists protested the wars in Afghanistan and Iraq,<sup>21</sup> as well as the USA PATRIOT Act’s intrusion on civil liberties.<sup>22</sup>

This early activism, however, paled in comparison to the huge—and largely unexpected—mass protests in the spring of 2006. The immigrant rights marches represented true grassroots activism, organically generated by a loose-knit group of community activists assisted by Spanish-language radio stations and the internet.<sup>23</sup> As in the 1960s, high school, college, and university students energized the protests, demonstrating a commitment and enthusiasm not seen on campuses for more than a generation.<sup>24</sup> It was not only undocumented immigrants who marched; many citizens also joined them in support of immigrant rights.<sup>25</sup>

The nascent movement, at least at the outset, represented a reaction to the Sensenbrenner bill, not a proactive movement seeking positive change. The harsh measures in the proposed bill initially unleashed calls to action and demands to halt punitive anti-immigrant measures. At least for a time, however, the movement later transformed itself into a quest for justice for immigrants that moved well beyond blocking the passage of one restrictionist bill.<sup>26</sup>

Importantly, the marches quickly tapped into a base of mainstream appeal. Cardinal Roger Mahony of Los Angeles condemned the Sensenbrenner bill and promised to instruct his flock of priests and parishioners to continue

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*Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, 68 LAW & CONTEMP. PROBS. 1 (2005); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (offering a variety of perspectives on the legacy of the internment of persons of Japanese ancestry during World War II).

<sup>20</sup> See Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 762 (2003); see also *infra* text accompanying notes 160–161 (discussing special registration).

<sup>21</sup> See, e.g., Cheryl L. Reed, Monifa Thomas & Dave Newbart, *7,000 March Against War on Mag Mile*, CHI. SUN TIMES, Mar. 19, 2006, at A3; *World Rallies Against Imperialist Warlords*, MORNING STAR (London), Mar. 20, 2006, at 1.

<sup>22</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001). Among others, librarians protested various provisions of the Act. See Alison Leigh Cowan, *Connecticut Librarians See Lack of Oversight as Biggest Danger in Antiterror Law*, N.Y. TIMES, Sept. 3, 2005, at B5. Due to political pressures based on civil liberties concerns, Congress amended the law before its renewal. See *USA PATRIOT Improvement and Reauthorization Act*, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>23</sup> See Matthew Obernauer, *Technology Fueling Growth of Youths’ Migration Rallies*, AUSTIN AM.-STATSMAN, Apr. 1, 2006, at A1; Krissah Williams & Paul Farhi, *Spanish Language Radio’s Big Voice*, WASH. POST, July 3, 2006, at D1.

<sup>24</sup> See Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1036 (2005).

<sup>25</sup> See Esther J. Cepeda, *UIC Study: May Marchers Mostly U.S. Citizens*, CHI. SUN TIMES, July 18, 2006, at 17. A general survey of the UIC study is available at <http://texasedequity.blogspot.com/2006/07/uic-immigrant-mobilization.html>.

<sup>26</sup> See *supra* text accompanying note 8.

providing humanitarian assistance to all people in need whatever the legal prohibitions.<sup>27</sup> Politicians, including Los Angeles Mayor Antonio Villaraigosa and Illinois Governor Rod Blagojevich, addressed the protesters, praised the contributions of immigrants to U.S. society, and called for the just and fair treatment of noncitizens. By so doing, these and other influential leaders offered the marchers' cause an official stamp of approval.<sup>28</sup>

Without question, the marches influenced the national debate over immigration. By the summer of 2006, the more controversial parts of the Sensenbrenner bill appeared to have lost support. Indeed, in June 2006 the Senate passed a compromise immigration reform bill that lacked the toughest provisions of the Sensenbrenner bill and offered relief for undocumented immigrants.<sup>29</sup> Some of the last reform proposals on the table, although flawed in many respects, would have extended certain benefits to many undocumented immigrants.<sup>30</sup>

In the end, however, comprehensive reform efforts fell by the wayside. Congress could only reach consensus on additional border security. As Congress recessed in the fall of 2006, the only immigration legislation passed was directed at erecting an additional seven hundred miles of fence along the southern border.<sup>31</sup>

Election-year politics made true immigration reform an issue that many politicians scurried to avoid. Nonetheless, in future debates over immigration, lawmakers will not soon be able to forget the power, emotion, and sheer size of the spring of 2006 mass marches. Nor will they forget the firestorm of anger, controversy, and resistance created by the punitive immigration measures in the Sensenbrenner bill.

### *B. The Meaning of the Marches*

Is a broad-based civil rights movement emerging, or was the spring of 2006 simply a one-time phenomenon? At this time, it is difficult to tell. Nonetheless, spontaneous combustion will not bring forth a sustained multi-racial civil rights movement.<sup>32</sup> Cleavages in the movement exist and, unless addressed, are ready to divide various communities of color.

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<sup>27</sup> See Roger Mahony, *Called by God to Help*, N.Y. TIMES, Mar. 22, 2006, at A25.

<sup>28</sup> See *Fight for Rights; Tens of Thousands March for Immigration Reform*, CHI. TRIB., RedEye Edition, Mar. 13, 2006, at 8; James Sterngold, *500,000 Throng L.A. To Protest Immigrant Legislation*, S.F. CHRON., Mar. 26, 2006, at A1.

<sup>29</sup> Comprehensive Immigration Reform Act of 2006, S.B. 2611, 109th Cong. (2006).

<sup>30</sup> See, e.g., Nicole Gaouette, *Border Bill Takes a Detour: The Senate Moves To Vote on a 700-Mile Fence, But a Farmworker Program Is Now at Issue*, L.A. TIMES, Sept. 29, 2006, at A1.

<sup>31</sup> See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006); Miguel Perez, *Election Will Be Vote on Immigration*, CHI. SUN TIMES, Oct. 10, 2006, at 29.

<sup>32</sup> Of course, under the right circumstances, outbursts of violence protesting social conditions can emerge quickly. Many examples come to mind, including the May 1992 uprising in Los Angeles.

Although the precise issue that animated the spring 2006 marches represents one of the social-justice challenges of our generation,<sup>33</sup> there is still one significant issue that could divide minority communities. Latina/os and Asian Americans generally are more concerned with the excesses of immigration law and its enforcement than African Americans, who may at times demand greater enforcement of the immigration laws.<sup>34</sup> This may explain why African Americans, generally speaking, were conspicuously absent from the 2006 mass marches, even though some black leaders expressed support for the immigrant cause.<sup>35</sup>

### 1. Hurricane Katrina

Consider the lessons of an event that at first glance may seem unrelated to immigration and immigrants: the Hurricane Katrina disaster in the fall of 2005.<sup>36</sup> Social stress often brings out the worst in people, and at times of such stress U.S. society has often lashed out at immigrants.<sup>37</sup> Unfortunately, the aftermath of Hurricane Katrina fit comfortably into that history.

As all levels of government appeared paralyzed by ineptitude or indifference after the hurricane hit, African Americans suffered in misery for what seemed like an eternity while the nation watched.<sup>38</sup> Meanwhile,

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<sup>33</sup> See generally Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002) (contending that, because of demographic and other changes brought by immigration to the United States, the reconceptualization of the civil rights needs of minority communities is necessary).

<sup>34</sup> See Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 357–63 (2003) [hereinafter Johnson, *African American and Latina/o Cooperation*]; see also Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 57–63 (1995) (analyzing immigration as a possible dividing line between Latina/os and African Americans).

<sup>35</sup> See Teresa Watanabe, *Immigrant Crusade Enlists Few Blacks*, L.A. TIMES, Apr. 10, 2006, at A1.

<sup>36</sup> See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Modern Administrative State*, 45 HOUS. L. REV. (forthcoming 2008). For a thoughtful analysis of the attribution of blame for the federal government's response to Hurricane Katrina, see Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 447–78 (2006).

<sup>37</sup> See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* (3d ed. 1994) (analyzing the nativist outburst following World War I); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (rev. ed. 1998) (analyzing harsh treatment afforded various Asian immigrants by the U.S. government); Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) (reviewing the exclusion and removal of political dissidents by the U.S. government, which has historically worsened in times of social stress).

<sup>38</sup> See John M. Broder, *Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, N.Y. TIMES, Sept. 5, 2005, at A9; Elisabeth Bumiller, *Gulf Coast Isn't the Only Thing Left in Tatters; Bush's Status with Blacks Takes a Hit*, N.Y. TIMES, Sept. 12, 2005, at A17; Laura Washington, Editorial, *When Legitimate Questions About Race and Class*

many immigrants, including sizeable Latina/o and Vietnamese communities in the Gulf region, suffered largely in silence.<sup>39</sup> Rather than seek shelter or benefits, immigrants quickly went underground to avoid deportation. The Department of Homeland Security promised that it would continue to enforce the immigration laws, unlike its practice following past disasters such as the devastation in New York City after September 11, 2001.<sup>40</sup> African Americans and immigrants failed to work in tandem to improve the treatment of all Gulf Coast residents—immigrants as well as citizens—who were devastated by the hurricane.<sup>41</sup>

Understandably focused on the plight of the devastated black community, the African American leadership took umbrage at the media's characterization of blacks who fled the Gulf region as "refugees," thereby seeking to distance themselves from foreign citizens.<sup>42</sup> As immigrants, many of them Latina/o, streamed into town to assist in the rebuilding efforts, New Orleans Mayor Ray Nagin, an African American, expressed fears that the city would be "overrun by Mexican workers."<sup>43</sup> Such statements unfortunately tap into a long history of nativist sentiment in the United States.

## 2. *Immigration as a Dividing Line*

The aftermath of Hurricane Katrina highlights some of the longstanding tensions between African Americans and Latina/os. Some African Americans, who are disproportionately represented among poor and working people in U.S. society,<sup>44</sup> have long feared economic and political competition from Latina/os, especially Latina/o immigrants.<sup>45</sup> At times, economic competition contributes to tension and conflict between blacks and Latina/os.<sup>46</sup> Conflict over jobs—particularly the competition between immi-

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*Arise, They Are Dismissed as Irrelevant*, CHI. SUN TIMES, Sept. 12, 2005, at 57.

<sup>39</sup> See Grace Kao, *Where Are the Asian and Hispanic Victims of Katrina?: A Metaphor for Invisible Minorities in Contemporary Racial Discourse*, 3 DU BOIS REV. 223 (2006).

<sup>40</sup> See *id.* at 225–26.

<sup>41</sup> See Johnson, *supra* note 36.

<sup>42</sup> See Dick Rogers, Editorial, "Refugees" Kicks Up a Storm, S.F. CHRON., Sept. 12, 2005, at B7; Ruth Walker, *Coming to Terms with Katrina's Diaspora*, CHRISTIAN SCI. MONITOR, Sept. 21, 2005, The Home Forum Section, at 18; Mike Pesca, *Are Katrina's Victims 'Refugees' or 'Evacuees?'*, NAT'L PUB. RADIO, Sept. 5, 2005, <http://www.npr.org/templates/story/story.php?storyId=4833613>.

<sup>43</sup> Peter Pae, *Immigrants Rush to New Orleans as Contractors Fight for Workers*, L.A. TIMES, Oct. 10, 2005, at C1 (quoting Mayor Ray Nagin).

<sup>44</sup> See *Census Report: Broad Racial Disparities Persist: Differences in Income, Education, Homeownership Continue, Data Finds*, MSNBC.COM, Nov. 14, 2006, <http://www.msnbc.msn.com/id/15704759/>.

<sup>45</sup> See Aurelio Rojas, *Blacks, Latinos Try To Find Unity in L.A.*, SACRAMENTO BEE, July 23, 2006, at A1.

<sup>46</sup> See NICOLÁS C. VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* (2004); see also NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS (Anani Dzidzienyo & Suzanne Oboler eds., 2005) (collecting essays on relationship between African Americans and Latina/os).



grants and African Americans in the unskilled job market—has always been a lingering concern.<sup>47</sup> In recent years, African Americans and Latina/os have increasingly competed for political power in cities across the country.<sup>48</sup> Simmering black/brown tensions have at times escalated into violence. Black and Latina/o youth gangs fight on city streets and in prisons throughout the United States.<sup>49</sup>

Although not often discussed, racism exists between the African American and Latina/o communities. Anti-black sentiment unquestionably exists among certain segments of the Latina/o community.<sup>50</sup> Sadly, some Latina/os discriminate against blacks.<sup>51</sup> An extreme and sickening example resulted in the August 2006 federal hate-crime conviction of Latina/o gang members who brutalized African Americans seeking to move into their predominantly Latina/o neighborhood in Los Angeles.<sup>52</sup> Toni Morrison has written eloquently about how immigrant assimilation often translates into immigrants' adoption of racist views of African Americans.<sup>53</sup> This occurs to a certain extent among Latina/o immigrants who embrace dominant U.S. society's views on issues of race.<sup>54</sup>

Similarly, nativism directed at Latina/os and other immigrant groups afflicts the black community.<sup>55</sup> Consider a tragic recent example. In Houston in 2006, an undocumented immigrant from Mexico allegedly killed an African American police officer, who left behind five orphaned children.<sup>56</sup> In response, many politicians unfortunately tried to move their political agenda

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<sup>47</sup> See, e.g., VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST: POLICY DIRECTIONS FOR THE NEW CENTURY* (3d ed. 2003) (evaluating U.S. immigration from an economic policy perspective); Jack Miles, *Blacks vs. Browns*, *THE ATLANTIC*, Oct. 1992, at 41.

<sup>48</sup> See VACA, *supra* note 46, at 85–168; Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 *STAN. L. REV.* 957, 969–71 (1995).

<sup>49</sup> See, e.g., Megan Garvey, *L.A. County Targets Racial Gang War*, *L.A. TIMES*, Dec. 17, 2005, at B4; Charles Ornstein, *Another Inmate Dies in Racial Fighting*, *L.A. TIMES*, Feb. 13, 2006, at A1.

<sup>50</sup> See Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, There Is No Blackness*, 15 *S. CAL. INTERDISC. L.J.* 199 (2006); see also Tanya Kateri Hernández, *'Too Black to Be Latino/a: Blackness and Blacks as Foreigners in Latino Studies*, 1 *LATINO STUD.* 152, 157 (2003) (contending that coalitional politics cannot work until scholars discuss racism of Latina/os toward African Americans).

<sup>51</sup> See Banks, *supra* note 50, at 227.

<sup>52</sup> See Joe Mozingo, *4 Latino Gang Members Are Convicted of Anti-Black Plot*, *L.A. TIMES*, Aug. 2, 2006, at B1.

<sup>53</sup> Toni Morrison, *On the Backs of Blacks*, in *ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA* 97 (Nicolaus Mills ed., 1994); see also Devon W. Carbado, *Racial Naturalization*, 57 *AM. Q.* 633 (2005) (analyzing how immigrants learn and acclimate to racism in the United States).

<sup>54</sup> See generally Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 *CAL. L. REV.* 1259 (1997) (analyzing assimilation of Mexican Americans into mainstream U.S. society).

<sup>55</sup> See, e.g., VACA, *supra* note 46, at 140 (quoting the African American mayor of a town in the greater Los Angeles area, claiming that Latina/os could not be given political representation because noncitizens cannot vote).

<sup>56</sup> For background, see Matt Stiles & Mike Glenn, *Debate Flares Anew on HPD's Immigrant Policy*, *HOUS. CHRON.*, Sept. 26, 2006, at B1.

forward by capitalizing on this tragedy and demanded that police crack down on immigrants. In the midst of this turmoil, however, there was a glimmer of hope: the local NAACP expressed support for the League of Latin American Citizens, which had suffered a barrage of hate mail and criticism.<sup>57</sup>

For a variety of reasons, minority leaders more frequently ignore rather than address these simmering animosities between minority groups. Any future civil rights movement, therefore, will require much hard work between and among communities of color. Racism between minority communities must be addressed. A healthy and frank dialogue on this subject, along with constructive action, is long overdue. Only after such a dialogue will the trust between the groups rise to the level necessary for effective concerted action.

### 3. Possible Common Ground

The gulf between African Americans and Latina/os on immigration is not insurmountable. African Americans can appreciate that immigration enforcement—like racial profiling by local police in ordinary law enforcement—is often based on race and physical appearance. Importantly, many African American leaders saw race as central to the harsh treatment of Haitians seeking asylum in the United States during the 1980s and 1990s.<sup>58</sup> Perhaps a visionary leader like Senator Barack Obama, who at times has voiced support for immigrants and traditional civil rights issues, could be a bridge between the communities on this potentially explosive issue.<sup>59</sup>

A truly multiracial civil rights movement will need to identify common ground. It seems likely most minorities would support wage and labor protections in the workplace, safe and affordable housing, equal access to education, and fair treatment by government. Freedom from racial discrimination also is something that immigrants and African Americans have in

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<sup>57</sup> See Rosanna Ruiz, *Widow Speaks Out Against Reprisal: She Says Slain Officer Would Not Want Retaliation Against Hispanics*, HOUS. CHRON., Sept. 27, 2006, at B5.

<sup>58</sup> See *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993) (upholding the U.S. government's policy of interdicting Haitians on high seas and repatriating them to Haiti); Brief for the National Association for the Advancement of Colored People, TransAfrica, and the Congressional Black Caucus as Amici Curiae in Support of Respondents at 6, *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993) (No. 92-344) (arguing that the U.S. government had a "separate and unequal asylum program" for Haitians). See generally Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993) (analyzing, among other factors, the role of race in the U.S. government's treatment of Haitian asylum-seekers); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755 (2000).

<sup>59</sup> See Antonio Olivo & Oscar Avila, *United They March; Hundreds of Thousands Rally for Immigration Rights*, CHI. TRIB., May 2, 2006, at C1 (reporting that Senator Obama spoke to marchers).

common.<sup>60</sup> The congruence of interests among many segments of the African American, Asian American, and Latina/o communities on these bread-and-butter issues is clear. As a concrete matter, minorities stand to benefit financially if the billions of dollars currently wasted on border enforcement<sup>61</sup> were spent instead on enforcing wage and labor protections for all workers.

After years of a presidency that is at best indifferent to the calls for racial equality, anger and urgency were in the air during the spring 2006 marches. The energy of the people is waiting to be tapped in the struggle for civil rights. To build a mass movement like that of the 1960s, however, minority communities will need to build community and common ground. Otherwise, we may see a Latina/o civil rights movement or an immigrant rights movement that soon disappears from the national scene.

## II. A BRIEF LOOK AT THE 1960s CIVIL RIGHTS MOVEMENT AND ITS LESSONS FOR SOCIAL CHANGE

In considering the building of common ground among minority groups, it may be instructive to analyze the last successful civil rights movement in the United States and the lessons it offers for the times in which we live. The 1960s saw the emergence of a mass civil rights movement that brought about meaningful social change. However, favorable political conditions during that period facilitated change in ways that are unlikely to be successful today. Courts also played a substantial role in the movement for social change.

This Part of the Article analyzes the civil rights activism of the 1950s and 1960s and attempts to identify the ingredients for its success. It further considers what, if anything, history and experience suggest about the

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<sup>60</sup> See William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 *ASIAN L.J.* 1 (1995) (contending that the traditional civil rights community should embrace the struggle of immigrants because of their common experience with racial discrimination).

<sup>61</sup> For criticism of the border enforcement operations, which have resulted in thousands of deaths but have failed to put much of a dent into undocumented immigration, see TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (1996). See also JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 *POPULATION & DEV. REV.* 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 *INT'L MIGRATION REV.* 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 *U.C. DAVIS J. INT'L L. & POL'Y* 121, 123 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 *UCLA L. REV.* 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 *SAN DIEGO INT'L L.J.* 1 (2001); Karl Eschbach, Jacqueline Hagan & Nestor Rodriguez, *Causes and Trends in Migrant Deaths Along the U.S./Mexico Border, 1985-1998* (Univ. of Houston, Ctr. for Immigration Research, Working Paper No. 01-4, 2001), available at [http://www.uh.edu/cir/Causes\\_and\\_Trends.pdf](http://www.uh.edu/cir/Causes_and_Trends.pdf) (analyzing the effects of the intensification of border enforcement).

necessary strategies for change and what will become of the spring 2006 immigrant marches.

### A. *A Mass Social Movement*

The civil rights movement of the 1950s and 1960s is generally viewed as a successful movement for social change.<sup>62</sup> Many groups worked together to bring about the end of de jure segregation that flourished in the United States.<sup>63</sup> While improvements in civil rights arose from the grassroots and gained support in political institutions, a long-term litigation strategy facilitated change through the courts.<sup>64</sup> Although critical race theorists complain of the legacy of discrimination that continues in the United States,<sup>65</sup> they cannot dispute that the demise of Jim Crow represented a major transformation of U.S. social life.

Unfortunately, the civil rights movement of the 1960s is often viewed simplistically through a black-white paradigm.<sup>66</sup> It is true that the civil rights grievances of African Americans received more attention than those of other communities. In addition, the blanket demand for the end of segregation was not accompanied by a sufficient focus on the steps necessary to secure substantive racial equality after the end of de jure segregation. Nonetheless, many different groups, including whites, participated in the larger quest for social justice.<sup>67</sup> Civil rights victories also impacted communities far beyond just African Americans. For example, the movement led

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<sup>62</sup> See, e.g., ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984) (lauding the development of the civil rights movement and its success in the 1950s and early 1960s).

<sup>63</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (rev. & expanded ed. 2004); MARK V. TUSHNET, *THE NAACP'S STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (rev. ed. 2006). For discussion of the role of whites in the civil rights movement, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 285-98 (1994).

<sup>64</sup> See, e.g., KLUGER, *supra* note 63; see also Johnson, *supra* note 34, at 55-56 (analyzing a mix of political and legal strategies necessary for achieving social change); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer To Do?*, 5 MICH. J. RACE & L. 201 (1999) (outlining the attorney's role in seeking social change).

<sup>65</sup> See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

<sup>66</sup> See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) (discussing the view of minority groups outside of the black-white paradigm); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (book review).

<sup>67</sup> Japanese Americans, victims of internment during World War II, embraced the civil rights movement. For example, Yuri Kochiyama and her husband moved to Harlem to aid in the movement. She was in the Audubon Ballroom the day Malcolm X was assassinated and held him in her arms as he lay dying. See *Yuri Kochiyama: With Justice in Her Heart*, REVOLUTIONARY WORKER, Dec. 13, 1998, available at <http://revcom.us/a/v20/980-89/986/yuri.htm>.

to the Immigration Act of 1965,<sup>68</sup> which removed a racially discriminatory quota system from the immigration laws. Passed initially with African Americans in mind, the Voting Rights Act of 1965<sup>69</sup> has come to protect a broad range of minority groups.<sup>70</sup> Other groups, such as Mexican Americans in the Southwest, also sought to vindicate their rights during this time of unrest.<sup>71</sup> Although the civil rights movement was neither fully successful nor a purely egalitarian enterprise, it has a richer history than the familiar story of black-white struggle.

As the 1960s exemplified, many social problems require political as well as legal solutions.<sup>72</sup> The success of political movements, in turn, depends on numbers. In the heyday of our last great civil rights movement, coalitions of groups—including whites—pursued public protests, marches, voting rights drives, and other strategies for change.<sup>73</sup>

Understanding the fundamental maxim of strength in numbers, some critical race theorists have advocated coalitions among minority groups as a strategy for political action.<sup>74</sup> Of course, coalition building faces formidable barriers.<sup>75</sup> As Angela Harris has emphasized, “solidarity is the product

<sup>68</sup> Immigration and Nationality Act of 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965); see also Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (analyzing impact of the Act).

<sup>69</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965).

<sup>70</sup> See League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (addressing voting rights claims of Mexican Americans in Texas); Georgia v. Ashcroft, 539 U.S. 461 (2003) (holding that spreading black voters across several congressional districts does not violate Section 5 of the Voting Rights Act); see also Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31 (2004) (analyzing how language provisions of Voting Rights Act protect language minorities, including Asian Americans).

<sup>71</sup> See RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 307–62 (3d ed. 1988); F. ARTURO ROSALES, ¡CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (1996).

<sup>72</sup> See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1993).

<sup>73</sup> For analysis of the complexities of coalition politics in the passage of the Civil Rights Act of 1964 and the need for multiracial coalitions to secure social change today, see Cashin, *supra* note 24.

<sup>74</sup> See LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002); see also ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA (1999); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995); George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 UCLA CHICANO-LATINO L. REV. 213 (1998) (contending that an intellectual coalition was necessary to consider racial subordination of all minority groups); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823 (2005) (offering thoughts on the efficacy of multiracial coalitions); Francisco Valdes, *Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1094 (1997); Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994).

<sup>75</sup> See Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7 (1998); Cheryl I. Harris, *Min-*

of struggle, not wishful thinking; and struggle means not only political struggle, but moral and ethical struggle as well.<sup>76</sup> Other critical theorists eschew efforts to build multiracial coalitions altogether in the quest for racial justice.<sup>77</sup> They instead call for independent groups to pursue their own self-interest.<sup>78</sup> These theorists fear diffusion of focus and dilution of the power and force of each distinct group's individual message.

Although coalitions may prove helpful, it is also important that different groups press for civil rights simultaneously. Timing is important. Coordination tends to maintain the pressure for change and resembles the activism of the 1960s. Under this scenario, a monolithic multiracial movement may not be necessary, but a series of synchronized actions requiring cooperation and coordinated efforts is.

In the 1950s and 1960s, a convergence of interests, including the interests of whites, facilitated civil rights gains.<sup>79</sup> United States foreign policy interests militated in favor of extending civil rights to African Americans and other minorities to avoid adverse propaganda in the ongoing Cold War.<sup>80</sup> The concrete images of the American apartheid, Southern police busting up protests, and Ku Klux Klan members terrorizing African Americans are what many Americans remember today about that period in our history. People coalesced around the moral imperatives of equality and justice for African Americans and participated in the quest to end legally enforced racial segregation.

At the time, there was a common conception of civil rights that included, at a minimum, the absence of invidious discrimination on the basis of race. The evil was clear, as was the immediate cure. Times have changed,

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ing in *Hard Ground*, 116 HARV. L. REV. 2487 (2003) (book review).

<sup>76</sup> Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 784 (1994).

<sup>77</sup> See Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197 (1991) (questioning broad-based coalitions between minorities and whites); Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 856 (2003) (book review) (criticizing the "preoccupation with interracial coalition"); see also STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 58–84 (1967) (questioning the efficacy of black/white coalitions in the civil rights movement); VACA, *supra* note 46 (questioning the "presumed alliance" between Latina/os and African Americans). Although today he is unquestionably in the anticoalition camp, influential Critical Race Theorist Richard Delgado previously appeared more open to the pursuit of political coalitions. See Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 302–06 (2000) (recognizing the success of past multiracial coalitions but seeing various impediments to future coalition building); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1746–47 (1995) (mentioning a possible coalition of poor whites and racial minorities in support of affirmative action).

<sup>78</sup> See Delgado, *Linking Arms*, *supra* note 77, at 884.

<sup>79</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>80</sup> See generally MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (analyzing the foreign-relations impetus for ending the segregation of African Americans in the United States).

however, and a future broad-based civil rights movement will need to retool and reconceptualize the idea of “civil rights” to address modern discriminatory realities.<sup>81</sup> De jure segregation is not the primary mode of discrimination today. Rather, discrimination through proxies—such as language, immigration status, and conceptions of merit—are the civil rights problems of the twenty-first century.<sup>82</sup> The new racial demographics of the United States have necessarily transformed the civil rights agenda. Latina/os now constitute the largest minority group in the country, numbering over 38 million and making up more than 13% of the overall population.<sup>83</sup> Largely due to the end of the limitation on migration from Asia in 1965,<sup>84</sup> Asian Americans have also seen an increase of their population, now totaling 11.6 million people, or 4% of the total U.S. population.<sup>85</sup> Our national vision of “civil rights” must change to comport with the modern racial realities of the United States.<sup>86</sup>

Importantly, the civil rights movement occupied the high moral ground in the 1960s and, as such, enjoyed the support of many religious and political leaders. Reverend Martin Luther King, Jr., of course, was one of the most prominent African American civil rights leaders. Similarly, César Chávez, the leader of the United Farm Workers, tapped into the Catholic Church in efforts to fight for the rights of farmworkers.<sup>87</sup>

The moral outrage over segregation, sporadic lynchings of African Americans,<sup>88</sup> and African Americans’ second-class citizenship in the United

<sup>81</sup> See Johnson, *supra* note 20, at 771–76.

<sup>82</sup> See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing the use of facially neutral characteristics, such as language and immigration status, to effectively discriminate on the basis of race and national origin); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (making a similar argument under Title VII); see also Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1285–86, 1297–1312 (claiming that “in many instances, employers rely on proxies for race, national origin, sex, religion, or age” in employment decisions and reviewing examples of discrimination based on name and voice as proxies for minority status).

<sup>83</sup> *Hispanic Population Reaches All-Time High of 38.8 Million*, *New Census Bureau Estimates Show*, U.S. Census Bureau News, June 18, 2003, [http://www.census.gov/Press-Release/www/releases/archives/hispanic\\_origin\\_population/001130.html](http://www.census.gov/Press-Release/www/releases/archives/hispanic_origin_population/001130.html).

<sup>84</sup> For analysis of how immigration reform led to an increase in immigration from Asia, see BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993); Chin, *supra* note 68.

<sup>85</sup> *Hispanic Population Reaches All-Time High of 38.8 Million*, *New Census Bureau Estimates Show*, *supra* note 83.

<sup>86</sup> See Johnson, *supra* note 33, at 1491–1510.

<sup>87</sup> See generally MARCO G. PROUTY, *CÉSAR CHÁVEZ, THE CATHOLIC BISHOPS, AND THE FARMWORKERS’ STRUGGLE FOR SOCIAL JUSTICE* (2006) (documenting the role of the Catholic Church in the farmworkers’ quest for justice).

<sup>88</sup> See generally JAMES ALLEN, *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (2000) (collecting photographs of lynchings in the United States); *Lynching, Racial Violence, and Law*, in 9 *RACE, LAW, AND AMERICAN HISTORY 1700–1990: LYNCHING, RACIAL VIOLENCE, AND LAW* (Paul Finkelman ed., 1992) (analyzing the history of

States were at the forefront of the minds of many Americans. The American system of racial apartheid ultimately proved to be morally indefensible. *Brown v. Board of Education*,<sup>89</sup> with its message of equality for all people, was much more in keeping with the concept of America embraced by many, if not most, Americans.

*B. A Favorable Climate Existed for Social Change in the Courts and in the Political Arenas*

Effective political action is a critical ingredient of any agenda for social change, and can even assist in achieving success in the courts. As Jack Balkin has written, courts can be politically responsive to and, as such, affected by social movements:

[W]hen litigation is one part of a larger strategy that includes direct action and legislative reform, the reform movement is more likely to be successful and to make progress more quickly. *Brown v. Board of Education* helps us see why this is so. Although we naturally focus on the decision in *Brown* as a central event in the struggle for civil rights and the abolition of Jim Crow, it is important to remember that *Brown* was only one moment in that struggle. *The NAACP's litigation strategy that led up to Brown is widely known and justly praised. But it is likely that it would not have succeeded as well as it did without the help of social and political changes outside the courts.*<sup>90</sup>

Consequently, a political movement is important to any effort to secure social change, as it affects both efforts for change in the courts and in political bodies.

In the 1950s and 1960s, courts often decided cases in a way that helped to promote social change.<sup>91</sup> *Brown* is the paradigmatic example. In the days

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lynching); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793 (2005) (analyzing the history of public lynchings in communities across the United States).

<sup>89</sup> 347 U.S. 483 (1954).

<sup>90</sup> Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 *VA. L. REV.* 1537, 1546–47 (2004) (emphasis added); see Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27 (2005); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *CAL. L. REV.* 1323, 1323 (2006) (contending that “[s]ocial movements change the ways Americans understand the Constitution”).

<sup>91</sup> See, e.g., KLUGER, *supra* note 63; see also JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (discussing the courts and social change); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); ROSENBERG, *supra* note 72; SPANN, *supra* note 72; Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *CAL. L. REV.* 751, 765–69 (1991) (criticizing over-reliance on the courts as



of the Warren Court,<sup>92</sup> litigators such as Thurgood Marshall could go to court seeking social change and frequently find a sympathetic ear.<sup>93</sup>

Although often forgotten, Mexican Americans played an important role in the litigation strategy that culminated in *Brown v. Board of Education*.<sup>94</sup> Chicano activist George I. Sánchez worked for decades with Thurgood Marshall on civil rights issues, including efforts to desegregate the public schools, an issue affecting both Chicana/os and African Americans.<sup>95</sup> For example, the court of appeals in *Westminster School District v. Mendez* held that Mexican Americans could not legally be segregated in public schools.<sup>96</sup> Appreciating the importance of the case, Thurgood Marshall filed an amicus brief on behalf of the NAACP.<sup>97</sup>

In the 1960s, the political arena also offered substantial opportunities for social change. The civil rights movement produced much energy, great enthusiasm, and heavy pressure for change in the political process. Although change did not come without significant struggle, Congress enacted the Civil Rights Act of 1964,<sup>98</sup> the Voting Rights Act of 1965,<sup>99</sup> the Fair Housing Act of 1968,<sup>100</sup> and many other laws that sought to eliminate the scourge of racial discrimination from various aspects of American social life.

### C. Conclusion

The successful civil rights movement of the 1950s and 1960s teaches important lessons relevant to modern times. A political movement was essential to the quest for social change. Society and its political representatives were cautious but often supportive of positive change. Often, the courts were also favorably disposed. The political movement helped sus-

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agents for change).

<sup>92</sup> See generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); MARK V. TUSHNET, *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (1993); Symposium, *The Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1055 (2002).

<sup>93</sup> See MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997) (analyzing Thurgood Marshall's impact on the evolution of constitutional law).

<sup>94</sup> See VACA, *supra* note 46, at 62–84.

<sup>95</sup> See Carlos K. Blanton, *George I. Sánchez, Ideology, and Whiteness in the Making of the Mexican American Civil Rights Movement, 1930–1960*, 72 J. S. HIST. 569, 571–603 (2006).

<sup>96</sup> 161 F.2d 774 (9th Cir. 1947).

<sup>97</sup> See *id.* at 780 (considering the arguments made in amicus curiae briefs). For a description of *Mendez*'s impact, see George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 577–78 (1994).

<sup>98</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>99</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965).

<sup>100</sup> Pub. L. No. 90-284, 82 Stat. 81 (1968).

tain judicial action, and together the political and judicial branches fueled meaningful social change in U.S. society.

### III. THE PROSPECTS FOR A NEW MASS CIVIL RIGHTS MOVEMENT

In light of the events discussed in Parts I and II, this Part analyzes the possibilities for a new civil rights movement emerging from the 2006 immigrant rights marches. We can only conclude that the future possibility for mass collective action for social justice is far from certain. We proceed to outline a strategy for bringing about collective action and social change. This Part calls for multiracial unity in a mass movement for civil rights that should include immigration as one of many social justice issues and African Americans as one critically important component of a multiracial coalition. It further outlines impediments to coalitions as well as strategies to overcome them.

The development of common ground will be essential for the future creation of any mass movement for social justice. Blacks, Asian Americans, and Latina/os should be able to agree on the need to eliminate racism from the criminal justice system as well as law enforcement generally.<sup>101</sup> In addition, African Americans should be persuaded of the need to enforce wage and labor protections for all workers. Only by doing so will employers seeking unskilled laborers be discouraged from hiring undocumented and relatively inexpensive workers. In these and other instances, concrete benefits might accrue to African Americans, Asian Americans and Latina/os by working together in the struggle for immigrants' civil rights.

#### A. *The Need for Unity in Spite of a Fractious Social Movement*

The massive immigrant rights marches in the spring of 2006 were relatively narrow in focus. Throngs of demonstrators, including many Latina/os, marched for immigrant rights, specifically opposing the Sensenbrenner bill and demanding amnesty for undocumented immigrants.<sup>102</sup> Immigration reform failed to create instant appeal among non-Latina/o minority groups. For example, Asian Americans were not initially attracted to support immigrants. In an effort to draw Asian Americans to the marches, Asian American civil rights organizations engaged in community education efforts to draw parallels between immigrant rights in their communities and those in Latina/o communities.<sup>103</sup> Similarly, African Americans

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<sup>101</sup> See Johnson, *African American and Latina/o Cooperation*, *supra* note 34, at 353–57.

<sup>102</sup> See *supra* text accompanying notes 25–28.

<sup>103</sup> See Vanessa Hua, *Amnesty Touches Home for Bay Area Asians*, S.F. CHRON., May 18, 2006, at A1.

were not visibly involved in the immigration marches,<sup>104</sup> and some even protested against immigration and the alleged impact of immigrants on the black community.<sup>105</sup>

Tension between various groups creates a formidable obstacle to a new multiracial civil rights movement. Consider some examples:

- Frank Morris, the chairman of Choose Black America, a national coalition of business professionals who support enforcement of U.S. immigration laws, charged that “[m]ass illegal immigration has been a major impediment to black advancement in this country over the past 25 years . . . . An illegal-alien amnesty program . . . will set black Americans back a hundred years. Mass illegal immigration is not a victimless crime. There are real people who lose their jobs or the chance to earn a better living.”<sup>106</sup>
- Mexican President Vicente Fox told a group of Texas businessmen in May 2005, “There is no doubt that Mexicans, filled with dignity, willingness and ability to work, are doing jobs that not even blacks want to do there in the United States.”<sup>107</sup>
- Immigrant marchers made comments like “It’s now our turn at political power” and wielded signs proclaiming, “We came here to work,” “We’re not criminals,” and “We’re not on welfare.” Such statements “may be perceived as invoking negative black stereotypes”<sup>108</sup> and suggest that the success of immigrants depends on African American failure.<sup>109</sup>
- In August 2006, African American civil rights leader and former Atlanta Mayor Andrew Young proclaimed that Wal-Mart should displace small stores in urban neighborhoods: “You see those [small storekeepers] are the people who have been overcharging us . . . and they sold out and moved to Florida. I think they’ve ripped off our communities enough. First it was Jews, then it was Koreans and now it’s Arabs.”<sup>110</sup>

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<sup>104</sup> See Watanabe, *supra* note 35. Immigrant activists have reached out to African Americans in an attempt to forge a common agenda. See Jennifer Ludden, *Immigrant Rights Advocates Prod U.S. Blacks*, NAT’L PUB. RADIO, Apr. 13, 2006, <http://www.npr.org/templates/story.php?storyID=5341040>.

<sup>105</sup> See Teresa Watanabe, *Immigration Forum Gets Intense; A Discussion at L.A.’s Leimert Park About Illegal Migrants and Their Impact on Blacks Escalates into a Shouting Match over Jobs, Housing and Schools*, L.A. TIMES, Apr. 24, 2006, at B3.

<sup>106</sup> Thelma Guerrero, *African-American Groups Join Immigration Debate; Some Argue that Illegal Immigrants Steal Opportunities*, STATESMAN J. (Salem, Or.), July 24, 2006, at 2C.

<sup>107</sup> See *Mexican Leader Criticized for Comment on Blacks*, CNN.COM, May 15, 2005, <http://www.cnn.com/2005/US/05/14/fox.jackson/index.html>.

<sup>108</sup> Rene P. Ciria-Cruz, *Activists Must Avoid Cultural Tripwires over Immigration*, NEW AMERICAN MEDIA, June 1, 2006, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=c18d2713fa49471adc89cdb7cb0fb3b8](http://news.newamericamedia.org/news/view_article.html?article_id=c18d2713fa49471adc89cdb7cb0fb3b8).

<sup>109</sup> See Emmett D. Carson, *The Black and Brown Divide: What Is It, What’s Causing It and What Can Philanthropy Do About It*, 2 PERSPECTIVES 1 (Grantmakers Concerned with Immigrants and Refugees, Sebastopol, Ca.), Spring 2006, at 5–6.

<sup>110</sup> See *Young Still Under Fire*, JAMAICA GLEANER, Aug. 23, 2006, available at <http://>

Such beliefs pose substantial challenges to the formation of a broad-based, multi-issue civil rights movement. In the aftermath of the 2006 immigration marches, however, many knowledgeable observers urged activists to reach out to Asian Americans and African Americans to embrace the immigrant rights agenda.<sup>111</sup> The themes advanced by the proponents of unity focused on common concerns, such as the experience of racial discrimination and the quest for full membership in U.S. society.

In a similar vein, we advocate a broad-based civil rights movement. It would include antidiscrimination as well as immigrant-rights planks. It would also be multiracial, with different minority groups, including African Americans, working together to secure broad social change. The unifying goal would be social justice for all groups in U.S. society, which would increase the coalition-building potential of the movement and would help place its goals on a high moral plane. To do so, we must address some common issues that arise in the debates about immigrants and African Americans.

When it comes to immigrant rights, proponents of collective action feel that African Americans warrant particular attention because they strongly value fair treatment and human rights.<sup>112</sup> Nonetheless, it is entirely fair to ask the following:

*Immigrants and African Americans have always shared a common destiny in our country, and have a common interest in advancing opportunity for everyone . . . . Why should African Americans support the inclusion of immigrants in our society when we have not yet been fully included in the American Dream ourselves? Because demanding opportunity and human rights for all is central to who we are.*<sup>113</sup>

The writer, Alan Jenkins, argues elsewhere that “as a matter of conscience and a matter of progress, supporting the inclusion of undocumented immigrants as part of a broader agenda for opportunity makes sense for African-Americans—and for America.”<sup>114</sup> Jenkins also argues that “[d]emanding respect for the dignity, equality and human rights of all

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[www.jamaicagleaner.com/gleaner/20060823/business/business12.html](http://www.jamaicagleaner.com/gleaner/20060823/business/business12.html).

<sup>111</sup> In the words of Bishop Edward Turner, an African American minister and founder of Power of Love Christian Fellowship: “We need to sit down and come up with a plan that supports African Americans and Latinos.” Rojas, *supra* note 45.

<sup>112</sup> See Alan Jenkins, *African Americans Have a Stake in Supporting Immigrants’ Rights*, THE OPPORTUNITY AGENDA, <http://www.opportunityagenda.org/site/c.mwL5KkN0LvH/b.1406079/apps/s/content.asp?ct=2195541> (last visited Nov. 29, 2006).

<sup>113</sup> Alan Jenkins, *Natural Allies on Immigration*, PHILA. INQUIRER, Apr. 19, 2006, at A15 (emphasis added).

<sup>114</sup> Jenkins, *supra* note 112.

people is central to African-Americans' history and consciousness, as well as to our own advancement."<sup>115</sup> Jenkins further asks,

Would giving undocumented immigrants lawful pathways to employment and citizenship be good or bad for black Americans? . . . The stake African Americans have in the immigration debate is not just a matter of economic quid pro quo [although there are concrete benefits to be gained], but of national values, shared destiny and the kind of country we want to be."<sup>116</sup>

Calling for stronger bonds between immigrants and African Americans, Keeanga-Yamahtta Taylor has asserted:

The focus on undocumented immigrants as the source of Black unemployment and Black poverty is a diversion and distraction of gigantic proportions. The main impediments to progress for Black workers . . . remain racial discrimination in hiring and firing, the "restructuring" in manufacturing in the American economy, the decline of trade union jobs, the diminished remnants of the American welfare state and a minimum wage that locks workers into poverty permanently.<sup>117</sup>

Influential African American intellectual Cornel West sees U.S. society through a similar lens. When asked how poor blacks should view the burgeoning immigrant rights movement, he answered that blacks and browns "both fail to recognize that the source of their divides (whether ethnic/racial prejudices or economic competition), was the same—a capitalist white power structure."<sup>118</sup> According to Chris Zepeda-Millan:

[W]hile complaining about the effects of black migration, many poor whites supported Jim Crow laws, a dual wage system, lack of worker rights, and the exclusion of blacks from unions. They failed to realize that their support for these policies only served to further deepen racial and class divisions that if bridged, could serve as the basis for a movement that could bring the economically exploitive system they both toiled under to its knees. Unfortunately, both working-class black and white Americans have

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Keeanga-Yamahtta Taylor, *Blacks, Latinos and the New Civil Rights Movement*, COUNTERPUNCH, May 9, 2006, <http://counterpunch.org/taylor05082006.html>.

<sup>118</sup> Chris Zepeda-Millan, *Black Civil Rights, Immigrant Human Rights, and the Next Great American Social Movement*, CÉSAR E. CHÁVEZ FOUND., <http://www.chavezfoundation.org/ir-l.html> (last visited Nov. 29, 2006) (paraphrasing a speech by Cornell West at Cornell University in March 2006).

been bamboozled . . . into . . . supporting politicians who promote policies that they perceive to take their interests into account, but that in reality actually produce the main source of their discontents.<sup>119</sup>

Before embracing the restrictionist agenda, African Americans should also be wary of who many of the rabid anti-immigrant advocates are. Even though they claim that immigration should be restricted because of its harms on African Americans, Samuel Huntington,<sup>120</sup> Patrick Buchanan,<sup>121</sup> and Peter Brimelow<sup>122</sup> are unquestionably not friends of African Americans and civil rights.

Consider specifically popular CNN commentator Lou Dobbs, whose harsh anti-immigrant rhetoric has helped shape the national debate over immigration reform. Zepeda-Millan has raised doubts about Lou Dobbs's true motives:

The fact that [this] upper-middle class conservative older white man has taken on the role of the protector of black jobs should send red flags to all of us. While on various occasions stating that race is not a major issue, Dobbs attempted to reveal his love and concern for black and brown youth when reporting on the massive student walkouts over the "Senseless-brenner Bill." He declared that since half of black and brown kids drop out of high school in Los Angeles, instead of marching in the streets they should be responsible and make the most out of their school time by not leaving. *Yet Dobbs never speaks out about the thousands of predominantly black schools across the nation with no immigrant students that suffer from the same dropout rates, and lack of funding and resources. Hence, his "passion" for the education of inner-city students of color seems to be selectively applied and aimed at inflaming racial tensions.*<sup>123</sup>

Put simply, Lou Dobbs and other restrictionists are using the black community to pursue their own restrictionist ends.

Offering a contrary perspective, Andre Banks is disappointed that African Americans have been "rendered invisible by the current delibera-

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<sup>119</sup> *Id.*

<sup>120</sup> See SAMUEL P. HUNTINGTON, WHO ARE WE?: CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2005). *But see* Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005) (book review).

<sup>121</sup> See PATRICK J. BUCHANAN, STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA (2006).

<sup>122</sup> See PETER BRIMELOW, ALIEN NATION (1995). For a scathing critique, see Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963 (1996) (book review).

<sup>123</sup> Zepeda-Millan, *supra* note 118 (emphasis added).

tion on immigrant civil rights,” because slave labor created the “market brimming with wealth and economic opportunity.”<sup>124</sup> He feels that “*without Blacks, and a commitment to challenge racism beyond the reach of immigration policy alone, [the immigrant] movement will lose both its moral authority and the practical victory it hopes to achieve.*”<sup>125</sup>

The fight for civil rights in the 1960s, with African Americans as the vanguard, held the moral high ground.<sup>126</sup> There are good reasons for immigrants from diverse nations, immigrant rights advocates, and African Americans to work together on a number of fronts, including immigration policy, civil rights, economic justice, workers rights, and antidiscrimination efforts. These groups and individuals have much in common. They can gain more political strength by combining their numbers and developing a common agenda. These groups are diverse as well, however, and the prospect of a consistent, unified, mass movement faces many challenges.

### B. *Understanding the Continued Discrimination Against African Americans*

Much of the call for African Americans to support immigrant rights is based on an appeal to African Americans to understand and sympathize with the plight of immigrants. Of course, it helps to understand the similarities that African Americans have with immigrants. But in reaching out to African Americans, immigrant rights advocates would do well to understand the perspectives of African Americans.

In the aggregate, the entire economic system may benefit from the presence of immigrants; but do low-income African Americans suffer in the process? It is difficult to confront stories of African American job displacement, especially when faced with the individual story of an African American whose old job is now filled by an immigrant who is working for lower pay. Arguing that we should be interested in aggregate outcomes for the entire black community is plainly inadequate. By so doing, one ignores that certain individuals at the bottom or at the margin are the ones most vulnerable to hard times and the most likely victims. Keeping the true causes of African American job loss in perspective is critical, but this may prove unsatisfying—especially to those who appear to be victims of displacement by immigrants.

Although it is simplistic for anti-immigrant groups to make sweeping claims that immigrants take jobs away from native workers, the claims of pro-immigrant groups that immigrants take only jobs that native work-

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<sup>124</sup> Andre Banks, *The Price of the Ticket*, APPLIED RESEARCH CTR., <http://www.arc.org/content/view/432> (last visited Nov. 29, 2006); see also Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996) (analyzing the legal history of slave migration to the United States).

<sup>125</sup> Banks, *supra* note 124 (emphasis added).

<sup>126</sup> See PROUTY, *supra* note 87.

ers do not want are equally simplistic. The pro-immigrant claim may be true generally, but willingness to take a job also depends on the wage, a person's age, stage in life, attitude, opinion of the job, work conditions, and the like. Moreover, native workers' willingness to take certain jobs could change drastically if job conditions changed even minimally, such as by raising the pay or improving work conditions. Differences of opinion exist within the African American community over whether or not blacks should or would take low-paying jobs, and commentators and policymakers should not overgeneralize about who might or might not take a low-paying job.

Native workers who have been displaced because of the recession or structural adjustments in major industries are generally not in competition with immigrants. Thus the low-wage, unstable, menial jobs held by most immigrants are not long-term solutions for the natives who have lost jobs. Certainly, some displaced workers might be willing to take such jobs temporarily, but few would accept the humiliation of the small income and permanent drop in social status. Ultimately, they need retraining and relocation assistance.

Twenty years ago, Michael Piore argued that social status is critically important to understanding African American youth:

Employers perceived a change in black attitudes toward the work which made them difficult to manage, and recruited migrants to replace them. Black attitudes changed because an older generation, raised in the rural south with a background and motivations similar to the immigrants of today, was replaced by a new generation who grew up in northern urban areas. These younger workers associated the jobs with the inferior social status to which their race had been condemned in the United States and feared that they would be confined in them permanently through prejudice and discrimination.<sup>127</sup>

Piore's argument continues to be relevant today. The popular view that immigration restrictions serve to help disadvantaged native workers by freeing up low-wage, low-skilled (dead-end) jobs for African Americans is offensive.<sup>128</sup> Anti-immigrant forces that toe this line appear to be unconcerned with broader social goals, such as achieving equal opportunity for socioeconomic advancement for African Americans. Certainly some blacks might, and do, take these jobs, but many understandably would not. Because immigrants are concentrated in the secondary labor market, reducing immigration might increase the numbers of native workers in the secondary sector. Although access to secondary sector jobs may pro-

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<sup>127</sup> Michael J. Piore, *Can International Migration Be Controlled?*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 21, 39 (Susan Pozo ed., 1986).

<sup>128</sup> See Guerrero, *supra* note 106.



vide a basis for social mobility among the disadvantaged, social pressures that isolate that sector from primary sector jobs persist.<sup>129</sup>

When we view immigrants' impact on African American unemployment in the aggregate, little evidence surfaces of any significant impact on black unemployment resulting from immigration. Blacks still face severe unemployment and poverty in parts of the country, including areas relatively untouched by immigration. In places with large numbers of immigrants such as New York and Los Angeles, African Americans have not lost jobs in the aggregate but instead have moved into the public sector.<sup>130</sup>

Economic studies confirm that African American job prospects are not affected much by immigration levels. In 1980, about 125,000 migrants from Cuba arrived in the United States as part of the "Mariel Boatlift."<sup>131</sup> About half of these migrants settled in Miami, creating an overnight increase of 7% in the city's labor force. The influx, however, had no detectable effect on the wages or unemployment rates of low-skilled native workers or earlier Cuban immigrants. The unemployment rate in Miami increased from 5% in April 1980 to 7.1% in July, the same as the increase in state and national unemployment rates over these months.<sup>132</sup> Although unemployment rates fluctuated between 1982 and 1984, the rates returned to pre-1980 lows by 1985; the Cuban unemployment rate followed the same pattern. Real wages for whites between 1979 and 1985 remained constant in Miami and comparable cities. Wages for African Americans in Miami were constant from 1979–81, dropped in 1982–83, but then increased to previous levels by 1984; in comparable cities, African American wages steadily declined during this period.<sup>133</sup> Thus, in the long run, the influx of low-wage workers may have helped blacks in Miami by stimulating the local economy.

In Los Angeles, young African Americans and those with limited education have experienced a small increase in unemployment due to the influx

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<sup>129</sup> See ROBERT T. AVERITT, *THE DUAL ECONOMY: THE DYNAMICS OF AMERICAN INDUSTRY STRUCTURE* (1968). The labor market is divided into primary jobs and secondary jobs. The first group is largely populated by native workers, the latter by migrants. Primary sector jobs are situated in so-called "core" industries, in which investments and financing of production are relatively high, which are mainly large scale and unionized, and in which market features, such as a lack of competition, have minimized instability. Workers who fill such jobs must have relatively high skills. They are well paid and work under generally desirable conditions. In contrast, secondary jobs are found in smaller firms where production is not as highly financed and products face highly competitive markets. Positions tend to be unstable, low- or unskilled, relatively low paying, and generally marked by undesirable working conditions. See MICHAEL J. PIORE, *BIRDS OF PASSAGE* 15–49 (1979).

<sup>130</sup> See BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 54–56 (1997).

<sup>131</sup> See generally DAVID W. ENGSTROM, *PRESIDENTIAL DECISION MAKING ADRIFT: THE CARTER ADMINISTRATION AND THE MARIEL BOATLIFT* (1997) (analyzing the decision of the United States to admit Cuban migrants in 1980).

<sup>132</sup> See David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 *INDUS. & LAB. REL. REV.* 245, 245–46 (1990).

<sup>133</sup> *Id.* at 249–50.

of Latina/o immigrants with limited education. However, that increase may have resulted from racial discrimination by employers. When low-skilled Latina/o workers became available employers hired them and rejected African American job applicants.<sup>134</sup>

In a study of poverty and employment rates in Chicago, economist Robert Aponte sought explanations for why persons of Mexican ancestry had lower poverty rates than Puerto Ricans and African Americans and higher employment rates than those groups as well as whites. He found that this success was achieved despite conventional predictors of poverty and unemployment: Mexican Americans were the group with the least education, English proficiency, skills, work experience, and access to automobiles for commuting. About half of the African Americans surveyed held low-wage, low-skill jobs with poor working conditions. About the same proportion of Mexicans had similar jobs. However, unlike African Americans, Mexican Americans were not “mired in prototypically ‘secondary’ jobs”: Median wages for Mexicans were about the same as for Puerto Ricans but higher than for African Americans, contradicting the theory that Mexican Americans are favored by employers because of a willingness to work for lower wages.<sup>135</sup> The discriminatory predispositions of Chicago employers were examined, and the study found that they consistently preferred immigrant workers—whether of Mexican, Asian, or Eastern European descent. Employers conspicuously discriminated against African American workers.<sup>136</sup>

These studies confirm that, in certain instances, employers discriminate against African Americans in favor of immigrant workers. Thus, in areas of the country such as Los Angeles and Chicago where a ready supply of low-wage immigrant workers exists, employers with discriminatory instincts against African Americans can be expected to choose immigrants over low-skilled, less-educated blacks. One might argue that employers would hire more African Americans if immigrants were absent from the employment market. But do we honestly believe that this would be the case? At the very least, we should think carefully about whether excluding immigrants, if it were possible,<sup>137</sup> is the best option for improv-

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<sup>134</sup> See Paul Ong & Abel Valenzuela, Jr., *Job Competition Between Immigrants and African Americans*, in *DOUBLE EXPOSURE: POVERTY & RACE IN AMERICA* 117 (Chester Hartman ed., 1996).

<sup>135</sup> See Robert Aponte, *Ethnicity and Male Employment in the Inner City: A Test of Two Theories*, 8, 20–21, 25, 27, 34–35 (The Julian Samora Research Inst., Mich. State Univ., Working Paper No. 14, 1992), available at <http://www.jsri.msu.edu/RandS/research/wps/wp14.pdf>.

<sup>136</sup> *Id.* at 40–42.

<sup>137</sup> Others have contended that it is nearly impossible to close the borders at this time in U.S. history. See generally JOHNSON, *supra* note 12 (outlining arguments for more open borders based on the economic, social, and political factors that contribute to immigration).

ing the status of African Americans. Alternatively, policy efforts and resources could be devoted to ending racial discrimination in the workplace.

Claims of job loss must, however, be considered in light of other findings that support the hypothesis that immigrants are *not* taking jobs from African Americans. An analysis of hotel and restaurant sectors suggests that African Americans have opted out of the service sectors. For example, some employers perceive that African American employees “just expected more.” One employer noted, “They either have an attitude you owe them a job because they’re black male, or they kick back and say if you fire them they’ll sue for discrimination and you can’t do anything about it.”<sup>138</sup> But does all this only mean that employers think immigrants are more “flexible” and have better attitudes, while African Americans have become too “uppity”? Undoubtedly, employers who view African Americans in this discriminatory fashion have exacerbated black unemployment.

In Chicago and Los Angeles, employers have relied on word-of-mouth for hiring, which reproduces the characteristics of the existing work force and systematically narrows opportunities for many African Americans. Employers operate with a hierarchy of ethnic preferences, with native whites at the top, followed by immigrant whites, immigrant Latina/os, and native African Americans at the bottom.<sup>139</sup>

Unequal numbers of African Americans and immigrants in particular industries reduce the likelihood of direct competition between the groups. For example, poor blacks generally work in fast-food outlets and chains, while immigrants work in ethnic restaurants.<sup>140</sup> Likewise, African Americans are concentrated in public sector jobs in many cities while immigrants are found in low-wage private sector employment.<sup>141</sup>

Of course, the occupational division is far from complete, so there is likely some competition. For example, with fewer immigrants and ethnic restaurants, other restaurants would presumably pick up most of this business. Similarly, were it not for nonunion immigrant construction, unionized businesses that employ large numbers of African Americans would presumably have more opportunities.<sup>142</sup> In addition, relatively heavy immigrant employment in hotel cleaning and landscaping could represent

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<sup>138</sup> Roger Waldinger, *Who Makes the Beds? Who Washes the Dishes? Black/Immigrant Competition Reassessed*, in *IMMIGRANTS AND IMMIGRATION POLICY: INDIVIDUAL SKILLS, FAMILY TIES, AND GROUP IDENTITIES* 265, 280 (Harriet Orcutt Duleep & Phanindra V. Wunnavala eds., 1996).

<sup>139</sup> *Id.* at 266 (citing Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them, But . . .*”: *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS* 203–34 (Christopher Jencks & Paul E. Peterson eds., 1991)).

<sup>140</sup> See U.S. DEP’T OF LABOR, *THE EFFECTS OF IMMIGRATION ON THE U.S. ECONOMY AND LABOR MARKET* 131–36 (1989).

<sup>141</sup> See *id.* at 6, 76–77; see also Ong & Valenzuela, *supra* note 134.

<sup>142</sup> We are, of course, well aware of the long history of exclusion of African Americans from unions. See, e.g., David Bernstein, *The Davis-Bacon Act: Let’s Bring Jim Crow to an End* (Cato Institute, Briefing Paper No. 17, 1993), available at [http://cato.org/pub\\_display.php?pub\\_id=1458&print=Y&full=1](http://cato.org/pub_display.php?pub_id=1458&print=Y&full=1).

jobs that would be filled at higher wages were immigrants not available. Thus, African Americans may feel the effects, even though immigrant workers in certain instances are not directly competing with them.

On the other hand, if they were unable to use immigrant labor, many businesses would simply dissolve, move abroad, or substitute technology for labor. In these cases, immigrants do not directly displace native workers. That phenomenon has been demonstrated in Los Angeles automotive parts firms, the garment industry, other light manufacturing, and assembly jobs.<sup>143</sup> As a result, immigrants who are employed as transitional workers or who comprise certain industries' disposable labor forces are probably not hurting African Americans.

Such an argument raises two questions. First, what is the extent of this capital flight threat? If it is less than one hundred percent, one could at least argue that substitution is taking place, and that wages are being pushed downward. Second, where do these businesses obtain their capital? If banks and other investors would otherwise place part of their capital in investments that paid higher wages and employed native African Americans, then there may be a tangible effect on the economic life of blacks. If we look primarily at the effect that immigration has on African Americans, instead of the total economic activity due to immigration, the argument that "nearly all" or "most" or even "much" immigrant employment displaces native workers might have less persuasive power.

In order to get a better idea of the nuances involved, we need to know about other employment options available to African American workers. We also need to know the other ramifications of the higher wages that would result if they were part of the workforce. In downtown Los Angeles buildings, higher maintenance fees would result in higher rents. If so, might some business tenants at the margin move their operations or go out of business as a result? A similar set of possibilities can be envisioned in other industries. The preceding considerations illustrate that we cannot assume that a manager's decision to hire low-wage immigrant workers is unhealthy for the overall economy or that firm survival is at stake.

In essence, the tension over current immigration policy and its impact on African Americans yields a combination of questions. Do we have faith in some of the economic theories developed about immigrants in the economy (for example, that their presence and participation create jobs, stimulate the economy, and serve to complement natives in the work force)? Do the empirical studies showing that immigrants have not hurt the labor market status of African Americans reveal enough to justify holding that belief across the board? In other words, do we know enough to believe that immigrants stimulate the economy and create jobs? If so, are the jobs that are created, maintained, or complemented the types of jobs from which African Americans benefit, or are they the types of primary sector jobs that

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<sup>143</sup> See HING, *supra* note 130, at 59–64.

benefit mostly non-African Americans? Might African Americans actually be worse off without low-wage immigrant workers, mired in low-end jobs, with little pressure on primary sectors to open up? Or would African Americans be better off without low-wage immigrant workers because employers would have to deal with their own discrimination due to fewer options?

These questions raise many issues: discrimination against African Americans; employer “preference” for immigrants; the so-called “immigrant work ethic” and willingness to take jobs under bad work conditions; whether or not the higher job expectations of all natives, including African Americans, are justifiable or reasonable; the exclusion of blacks from primary-sector jobs; and the constantly changing nature of the economy and labor market.

If one’s goal is full and fair employment of African American workers, one must demand the hiring of more blacks at all levels of the labor market, particularly in the primary sector. Better public schools and job training for all workers must be a top priority. To guard against managerial decisions to exploit low-wage workers, insisting on better wages and work conditions in the secondary sector and organizing immigrant workers (as exemplified by the Justice for Janitors campaign)<sup>144</sup> must be high on the agenda as well.

### C. Practical Political Reasons Justify Multiracial Coalitions

The benefits of a new, broad-based civil rights movement begin with an appreciation of an expansive vision of a meaningful political life. Although the power of the ballot box cannot be underrated, we also have to recognize the importance of nonelectoral activities. Political culture involves more than voting and registration rates, a point especially worth noting because noncitizens are ineligible to vote.

Mass protest is often viewed as an important form of nonelectoral political activity; prime examples include the protest movements of the 1930s and 1960s.<sup>145</sup> National in scope, each demonstrated that mass mobilization can be an effective exercise of power to change law and policy. Each movement revealed a complicated relationship between mobilized mass defiance and electoral politics.

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<sup>144</sup> See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1091, 1111–14 (1999) (discussing successful efforts to organize immigrant workers, including the Janitors for Justice campaign in Los Angeles); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 525–30 (2003) (same).

<sup>145</sup> See generally FRANCIS FOX PIVENS & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (analyzing the success of social movements by the poor).

An almost boundless range of nonelectoral activities may qualify as meaningfully political. In focusing on national movements, we must not neglect regional, state, and local mobilizations; overlook smaller popular uprisings; or pass over mobilization that may not cut across class, race, or ethnic lines. Centering so much attention on mass mobilizations slights the more subtle ways in which people cope with, and challenge, conventional power.

The call of activists for a multiracial movement is perceived as a means to progressive social change. Activists believe that a unified effort would at the very least increase the size of the constituency but also establish the moral high ground. Mobilizing separately—as immigrants, Latina/os, Asian Americans, African Americans—results in diluted political strength. To attain greater political, social, and economic influence, diverse communities should rally their numbers and limited resources around common issues and goals. Through unity, progress can be made.

Although the civil rights movement of the 1960s may have been viewed primarily as an African American civil rights movement,<sup>146</sup> examples of collaboration and unity across various ethnic groups are easy to find.<sup>147</sup> For example, the movement for ethnic studies programs on college and university campuses in the 1960s and 1970s brought African American students together with Latina/o and Asian American students in certain parts of the country. They worked toward common goals, sharing a vision of ethnic unity that was fostered by ethnic studies programs.<sup>148</sup> Today, Asian Americans, Latina/os, and African Americans collaborate, particularly through the Leadership Conference on Civil Rights, on many issues such as voting rights, disaster relief, and other matters.<sup>149</sup>

There was also a moral and religious dimension to the spring 2006 immigration demonstrations;<sup>150</sup> this dimension was also critical to the 1960s civil rights movement.<sup>151</sup> The Catholic Church helped spur the 1960s Chicana/o movement and, in recent years, has been a force for progressive social change in the United States.<sup>152</sup> In addition to Cardinal Mahony's condemnation of the Sensenbrenner bill,<sup>153</sup> other religious leaders also criticized punitive immigration legislation.<sup>154</sup> Such a moral imperative brings

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<sup>146</sup> See *supra* text accompanying note 66.

<sup>147</sup> See *supra* text accompanying notes 67, 73.

<sup>148</sup> See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 181 (1991).

<sup>149</sup> See E-mail from Cecilia Muñoz, Vice President, Office of Research, Advocacy, & Legislation, Nat'l Council of La Raza, to Bill Ong Hing, Professor of Law & Asian Am. Studies, Univ. of Ca. Davis (Sept. 25, 2006, 09:01:38 EST) (on file with author).

<sup>150</sup> See *supra* text accompanying notes 24–25.

<sup>151</sup> See *supra* text accompanying notes 87–89.

<sup>152</sup> See ACUÑA, *supra* note 71, at 430–37.

<sup>153</sup> See Mahony, *supra* note 27.

<sup>154</sup> See Tal Abbady, *Bill Would Punish Those Who Help Immigrants: Religious Leaders Outraged by Proposal*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 23, 2006, at 1A.

energy, enthusiasm, and commitment to the common cause and helps bring diverse groups together.

In the short run, we may not see the creation of a unified mass mobilization effort on a day-to-day basis. However, we are likely to see occasional political collaborations that can be productive, as diverse communities strive to establish a social justice agenda with which all can identify. A moral compass to the movement cannot help but facilitate joint action.

#### *D. Unfavorable Climate in the Courts and Political Institutions*

The 1960s civil rights movement found support in the courts and legislatures.<sup>155</sup> However, the Burger, Rehnquist, and Roberts Courts are simply not the same as the Warren Court.<sup>156</sup> While there have been a few surprise civil rights victories in recent years,<sup>157</sup> generally speaking, litigators seeking social change today go to court only as a last resort.<sup>158</sup>

Needless to say, Congress over the last decade has been similarly unsympathetic to civil rights. The November 2006 elections tipped Congress to the Democrats, but the divisions are still deep, with the possibility of a successful progressive movement far from certain. Neither has the presidential administration of George W. Bush been sympathetic, especially considering the Executive Branch's willingness to push the envelope in sacrificing civil rights in the name of national security after September 11, 2001.<sup>159</sup> Specifically, the government took a variety of immigration-related measures in the "war on terror" that targeted Arab and Muslim nonciti-

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<sup>155</sup> See *supra* text accompanying notes 91–93.

<sup>156</sup> As one commentator observed:

It used to be easy. Liberals generally liked the U.S. Supreme Court. Conservatives were skeptical. Liberals liked the Court because of decisions under Chief Justice Earl Warren such as *Brown v. Board of Education* . . . [H]owever, . . . as Bob Dylan sang, "The times they are a-changin'." Indeed the political stereotypes . . . have not held true for some time.

Mark S. Kende, Foreword, *Constitutional Law Symposium: The Role of Courts in Social Change*, 54 *DRAKE L. REV.* 791 (2006) (footnotes omitted).

<sup>157</sup> See *infra* note 159 (citing cases rejecting Bush administration's "war on terror" measures); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating as unconstitutional the Texas sodomy statute); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan Law School's race-conscious admissions program).

<sup>158</sup> See *infra* text accompanying notes 162–171 (discussing President Bush's conservative judicial nominations).

<sup>159</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that military tribunals created by the Bush administration were not expressly authorized by any congressional act, violated the Uniform Code of Military Justice, and did not satisfy the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a U.S. citizen held as an "enemy combatant" had the right to a hearing to challenge that classification); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (finding that the court in which the action was filed lacked jurisdiction to entertain a challenge to the detention of a U.S. citizen classified as an "enemy combatant").

zens and sacrificed their civil rights.<sup>160</sup> The federal government directed arrests, detentions, interrogations, and various immigration measures at Arabs and Muslims. Immigration law served as ground zero in a new civil rights struggle, with Arab and Muslim noncitizens becoming the focal point for many enforcement measures that have dramatically affected all immigrant communities.<sup>161</sup>

In fact, given the unfavorable climate toward progressive social change in the courts and political institutions, a new grassroots civil rights movement may be necessary. To be effective, the initial focus will need to be more on political action and community activism than on traditional electoral politics.

### 1. *The Courts*

Although the courts at times have facilitated social change, today's courts are not especially prone to do so. For example, social reformers and politicians have balked at many of President George W. Bush's nominees to the federal courts. Leading Democrats and civil rights advocates have expressed distress and pessimism about the future of a conservative judiciary. The conservatism goes well beyond traditional civil rights and immigration concerns to include the environment and the rights of women, gays and lesbians, and workers. Such a judiciary will make legal change more difficult but may simultaneously open the door to a broad-based political coalition of progressive forces.

Consider a few examples. As the Judiciary Committee considered the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit, Senator Charles Schumer revealed his disappointment with the nomination:

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<sup>160</sup> See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002); Victor C. Romero, *Decoupling "Terrorist" From "Immigrant": An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002). Many reports document the civil and human rights abuses in the "war on terror." See, e.g., MIGRATION POL'Y INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003); U.S. OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), available at <http://www.usdoj.gov/oig/special/0306/full/pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003), available at <http://www.usdoj.gov/oig/special/0312/final.pdf>.

<sup>161</sup> See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003) (analyzing the impact of the immigration measures adopted in the "war on terror" on Mexican immigrants).



We have offered time and time and time again to work with the Administration to identify well-qualified mainstream conservatives for these judgeships, especially on the D.C. Circuit. Instead, the White House insists on giving us extreme ideological picks. In this instance, the nomination seems to be as much about politics as it is about ideology.

While the nominations of William Pryor, Janice Rogers Brown, and Priscilla Owen may be among the most ideological we've ever seen, the nomination of Brett Kavanaugh is among the most political in history.<sup>162</sup>

In a similar vein, Ralph G. Neas, the President of People for the American Way, referred to Janice Rogers Brown, an African American Associate Justice on the California Supreme Court, as "the far right's dream judge"; he added that "[s]he embodies Clarence Thomas's ideological extremism and Antonin Scalia's abrasiveness and right-wing activism. Giving her a powerful seat on the D.C. Circuit Court would be a disaster."<sup>163</sup> The Senate confirmed the appointment.

The gay and lesbian community's reaction to court of appeals nominee William Pryor was equally disapproving. Human Rights Campaign President Joe Solmonese noted that "William Pryor actively sought opportunities to marginalize gay, lesbian, bisexual and transgender Americans throughout his career. It is very unlikely that he would set aside his personal views and make fair decisions as a federal judge."<sup>164</sup> Matt Foreman, Executive Director of the National Gay and Lesbian Task Force, also lamented the nomination: "Pryor has repeatedly proven he is an ideological tyrant of the highest order. Pryor's extremist views may resonate with the outer fringes, but they have no place on the federal bench. This is an Ameri-

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<sup>162</sup> *Judicial Nominations: Hearing on Brett Kavanaugh to the D.C. Circuit Court of Appeals Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Sen. Schumer, Member, S. Comm. on the Judiciary), available at [http://www.judiciary.senate.gov/member\\_statement.cfm?id=1158&wit\\_id=86](http://www.judiciary.senate.gov/member_statement.cfm?id=1158&wit_id=86).

<sup>163</sup> Press Release, People for the Am. Way & NAACP, 'Far Right Dream Judge' Janice Rogers Brown Joins Lineup of Extremist Appeals Court Nominees (Aug. 28, 2003), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=11895&print=yes&units=all>. As a California Supreme Court justice, Justice Brown penned the decision upholding Proposition 209, which banned affirmative action for women and minorities in public contracts, hiring, and college admissions. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 541–542 (2000). She also partially dissented from a California decision recognizing the parental rights of adoptive same-sex couples, accusing the majority of "trivializ[ing] family bonds." *Sharon S. v. Superior Court*, 31 Cal. 4th 417, 463 (2003) (Brown, J., concurring in part, dissenting in part).

<sup>164</sup> Press Release, Human Rights Campaign, HRC: Judge Pryor Would Undermine Fairness in the Judiciary (May 12, 2005), available at <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=26828&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

can travesty.”<sup>165</sup> Foreman stated that Pryor “may be the most demonstrably anti-gay judge ever nominated to a federal appeals court.”<sup>166</sup>

The Planned Parenthood Federation of America expressed its deep concern about the appointment of Judge Priscilla Owen to a federal court of appeals. Interim President Karen Pearl said, “This extremist nominee shows that the Bush administration is willing to play Texas Hold ‘Em with women’s health, their safety and their rights.”<sup>167</sup>

In sum, President Bush’s nominations do not bode well for the future of progressive social change in the federal judicial system. The recent Supreme Court confirmations of Chief Justice John Roberts and Justice Samuel Alito have solidified the conservative bent of the Supreme Court. If it is to come in the future, change is likely to be the result of political action, with limited assistance from the courts.

## 2. *The Political Branches*

Traditional politics fail to provide much more hope for social change than the judicial system. In recent years, we have seen harsh treatment of immigrants by Congress and the President.<sup>168</sup> A new Democratic Congress may change matters, although immigrants have been treated harshly by both Democrats and Republicans, and a Republican remains in the White House. During the last five years President Bush, with the help of Congress, has significantly eroded women’s rights both nationally and internationally. On his first day as President, he restored the “global gag rule” on international family planning assistance and stopped federal funding of groups providing abortion counseling or services overseas.<sup>169</sup> Two months later, he shut down the White House Office for Women’s Initiatives and Outreach, which was responsible for reviewing legislation and proposals to gauge their impact on women.<sup>170</sup>

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<sup>165</sup> Press Release, The Task Force, The Task Force Denounces U.S. Senate Confirmation of William Pryor Jr. to the Federal Bench (June 9, 2005), *available at* <http://www.thetaskforce.org/media/release.cfm?releaseID=837>.

<sup>166</sup> *Id.*

<sup>167</sup> Press Release, Planned Parenthood Fed’n of Am., Inc., “Compromise” Paves Way for Vote on Extremist Nominee Owen (May 24, 2005), *available at* <http://www4.plannedparenthood.org/pp2/portal/media/pressreleases/pr-050524-supreme-court.xml>. Pearl also noted that:

Justice Owen has a shameful record of placing harsh burdens on teens seeking judicial bypass of laws that mandate parental involvement in a teen’s abortion decision, and even denying judicial bypass to teens who feared that physical abuse would result if their parents became aware of their pregnancy.

*Id.*

<sup>168</sup> *See supra* text accompanying notes 159–161.

<sup>169</sup> *See* Laurie Casey, *A Reality Check on Abortion*, CHI. TRIB., Jan. 31, 2001, at 3.

<sup>170</sup> *See* Amy Goldstein & Mike Allen, *Women’s Outreach Office Closed; Feminist Leaders Decry Bush’s Shuttering of Clinton Creation*, WASH. POST, Mar. 29, 2001, at A21.

In 2002, the Department of Health and Human Services proposed a new regulation that extended the Children's Health Insurance Program to cover unborn children,<sup>171</sup> effectively elevating the fetus to the status of "person." In 2003, President Bush signed the Partial Birth Abortion Ban, which limited women's access to certain abortion procedures.<sup>172</sup> In 2004 he signed the Unborn Victims of Violence Act,<sup>173</sup> which again elevated the legal status of a fetus, this time by making it a crime to hurt or kill a fetus during the commission of another federal crime.<sup>174</sup>

In recent years laborers also have fared poorly in the political process. For example, although the federal minimum wage has not been increased since 1997,<sup>175</sup> Congress has repeatedly rejected efforts to increase it.<sup>176</sup> In a similar vein, the House of Representatives in 2005 passed a series of bills that weakened safety standards for workers.<sup>177</sup> Put simply, the Bush administration and Congress have significantly eroded the rights of women and workers.

Today, unlike the 1960s,<sup>178</sup> Congress does not appear to be the answer for social change advocates. This suggests that mass political activism, rather than traditional political means, will be necessary to secure meaningful social change.

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<sup>171</sup> See 42 C.F.R. 457.622; State Children's Health Insurance Program; Eligibility for Prenatal Care and Other Health Services for Unborn Children, 67 Fed. Reg. 61,956 (Oct. 2, 2002).

<sup>172</sup> Pub. L. No. 108-105, 117 Stat. 1201 (2003); see *Bush Signs Late-Term Abortion Law*, CHI. TRIB., Nov. 6, 2003, RedEye Edition, at 3.

<sup>173</sup> Pub. L. No. 108-212, 118 Stat. 568 (2004).

<sup>174</sup> See Amy Goldstein, *Bush Signs Unborn Victims Act; Federal Law Establishes 2 Crimes Against Pregnant Women*, WASH. POST, Apr. 2, 2004, at A4. Most recently, the Senate passed the Child Custody Protection Act, which would criminalize assisting a minor to cross state lines in order to obtain an abortion without parental notification. See Carl Hulse, *Senate Removes Abortion Option for Young Girls*, N.Y. TIMES, July 26, 2006, at A1. The House passed a similar measure in 2005, and President Bush indicated that he would sign the bill if the two Houses can agree on the content. *Id.*

<sup>175</sup> See AFL-CIO News: Republicans in Senate Vote against Minimum Wage Workers—Again (Oct. 19, 2005), <http://www.aflcio.org/issues/jobseconomy/livingwages/ns10182005b.cfm>.

<sup>176</sup> In 2005, the Senate defeated a proposal that would have raised the federal minimum wage from \$5.15 to \$7.25 per hour. See *Status Report*, LEGIS. UPDATE, (AFL-CIO, Wash., D.C.), Mar. 18, 2005, available at <http://www.aflcio.org/issues/legislativealert/toolkit/upload/03-18-2005.pdf>. Senator Kennedy introduced another bill in 2005 to increase the minimum wage; Senate Republicans again defeated the bill. See *id.* In 2006, the Senate defeated the Estate Tax and Extension of Tax Relief Act, which would have raised the federal minimum wage. See Bob Herbert, *Deceit Beyond Bounds*, N.Y. TIMES, Aug. 10, 2006, at 23. The issue is not dead, however: immediately after the November 2006 elections, the incoming Speaker of the House, Nancy Pelosi, identified raising the minimum wage as a top priority for 2007. Sheryl Gay Stolberg and Jim Rutenberg, *Rumsfeld Resigns; Bush Vows 'to Find Common Ground'; Focus Is on Virginia*, N.Y. TIMES, Nov. 9, 2006, at A1.

<sup>177</sup> See *OSHA Attacks*, LEGIS. UPDATE (AFL-CIO, Wash., D.C.), July 19, 2005, available at <http://www.aflcio.org/issues/legislativealert/toolkit/upload/07-19-05.pdf>.

<sup>178</sup> See *supra* text accompanying notes 98–100.

*E. Situational Collaborations*

Ethnic mobilization efforts can and do occur. However, the diversity of interests among Latina/os, Asian Americans, and African Americans presents challenges to a unified political mobilization effort. In considering when coalitions can be built, four overlapping categories of ethnic political mobilization are helpful: (1) common background; (2) utilitarian; (3) shaped-by-the-mainstream; and (4) situational. These concepts provide a framework for understanding whether unified mobilization is possible or likely.

The common background model applies to persons with a common origin or a common culture who are more likely to work together to achieve political goals.<sup>179</sup> The utilitarian view is that ethnic politics is motivated by pragmatism—the perceived strategic utility of concerted ethnic action. A common interest in political and socioeconomic power keeps the group together.<sup>180</sup> In the shaped-by-the-mainstream category, societal recognition of certain ethnic groups enhances identification and group formation.<sup>181</sup> Finally, in the situational model, ethnicity is fluid and volitional, activated by the competition and oppression the group is experiencing.<sup>182</sup> The categories of ethnic political mobilization provide a basis for understanding issues affecting the development of a unified movement.

At first glance, the common background premise does not apply to a coalition of Latina/os, African Americans, and Asian Americans. Yet a definite sense of commonality can be developed on issues such as education, discrimination, prison work, and employment. Racial minority status in a society marred by racial caste can serve as a shared common background.

From a utilitarian perspective, mass mobilization owes something to the recognition that collective activism has tactical utility in seeking particular goals. Working on the same issues relating to education, discrimination, prison work, and employment is very much a utilitarian effort, in which strength comes from unified effort and concerted action.

The shaped-by-the-mainstream model sees mainstream institutions as mistreating affected parties similarly or as one. The parties tend to resist

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<sup>179</sup> See MILTON J. ESMAN, *ETHNIC CONFLICT IN THE WESTERN WORLD* (1977) (offering a series of case studies of communal and ethnic solidarities from around the world); PARATMA SARAN, *THE ASIAN INDIAN EXPERIENCE IN THE UNITED STATES* 7 (1985); John M. Yinger, *Ethnicity in Complex Societies: Structural, Cultural and Characterological Factors*, in *THE USES OF CONTROVERSY IN SOCIOLOGY* (L.A. Coser & O.N. Larsen eds., 1976).

<sup>180</sup> See John A. Garcia, *The Political Integration of Mexican Immigrants: Examining Some Political Orientations*, 21 *INT'L MIGRATION REV.* 372, 376–77 (1987); Joane Nagel & Susan Olzak, *Ethnic Mobilization in New and Old States: An Extension of the Competition Model*, 30 *SOC. PROBS.* 127 (1982).

<sup>181</sup> See SARAN, *supra* note 179, at 4–5; Donald L. Horowitz, *Ethnic Identity*, in *ETHNICITY* 121–24, 128–32 (Nathan Glazer & Daniel Moynihan eds., 1975).

<sup>182</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S* 84 (1st ed. 1986); SARAN, *supra* note 179, at 5.

or strike back collectively. Although this type of stereotypical treatment of African Americans, Latina/os, and Asian Americans does occur, their ethnic differences resist being shaped into a single nonwhite minority by the mainstream. If they respond together, it is probably due more to some other phenomenon.

The situational model can be helpful in foreseeing a collective, unified effort. Mobilization can be triggered by a policy, event, or condition. This model assumes that identity is fluid because class, religion, language, nationality, race, age, or gender may become more prominent depending on the context. Because individual or group identity can be flexible,<sup>183</sup> a certain amount of identity switching can occur. Depending on the challenge or problem presented, a common identity can be assumed for a short period, a long period, or perhaps permanently.<sup>184</sup> However, sometimes ethnicity, nationality, language, and residential factors spark independent rather than collaborative mobilization. The situational model recognizes that diverse groups can sometimes work together, but that other times they will operate independently.

Divergent group interests pose challenges to the ability to forge a unified political agenda. Although the various communities share elements of common oppression, their individual histories, demographics, and experiences are unique. The current demographic, cultural, social, political, and economic diversity within and among groups would appear to create too many obstacles to form a single coordinated mass movement. Yet shared experiences of racism, discrimination, and economic hardship, stereotyping by the mainstream, and common political values have drawn some African Americans, Latina/os, and Asian Americans together.

Coalescing into a new, unified civil rights movement would be one means of achieving political integration for African Americans, Latina/os, and Asian Americans. It may also be a means for pursuing a change in their second-class citizenship status in the United States. For most, this may simply be situational political mobilization. For others, it could involve a more permanent process of developing a political identity or platform while maintaining separate ethnic identities for nonpolitical purposes. In that sense, a new civic identity would evolve, transcending single situations and becoming more lasting.

A permanent coalition among minority groups is likely a long way off. Thus, situational mobilization is an attractive alternative. Although independent community mobilization may damage prospects for pan-ethnic efforts, intra-community organizing should be encouraged. The persistence of Latina/o, African American, and Asian American neighborhoods and business pockets promotes intra-community mobilization. The flexibility of the situational model permits more than one mobilization response

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<sup>183</sup> See OMI & WINANT, *supra* note 182.

<sup>184</sup> Nagel & Olzak, *supra* note 180, at 129.

without foreclosing the possibility of others in different contexts and on different issues.

A less flexible view of collaborative mobilization can actually be dangerous. Rudimentary calls for unity or uninformed claims of an emerging uniform civil rights movement involve many interrelated risks. First among them is exclusivity. Those who do not find themselves in the description of the new movement are likely to be turned off or alienated, and that would be counterproductive. Smaller subgroups may also fear a loss of identity or voice as they are incorporated into a larger movement. In a similar vein, dominance by a particular cross-section of African Americans, Latina/os, and Asian Americans risks distorting the group's goals or essentializing information about each group or subgroup.

Maintaining a flexible vision of organizing also is consistent with the goals of promoting cultural pluralism. In coalition work, varied interests must be respected and understood; time to caucus independently from the larger coalition must be honored. Even as the coalition moves to develop a common social justice agenda, diversity defines the coalition that is being sought in a new, mass civil rights movement.

#### *F. What Is the New Common Ground?*

A truly multiracial civil rights movement will need to identify common ground. For obvious reasons, Latina/os and Asian Americans generally are more concerned with the excesses of immigration law and enforcement than African Americans who, as we have seen, at times demand greater enforcement of the immigration laws. To find common ground, minority groups have to go beyond immigrant rights.

Minorities want wage and labor protections in the workplace, safe and affordable housing, equal access to education, and fair treatment by government and employers. The congruence of social and economic justice interests among African Americans, Asian Americans, and Latina/os is clear. They seek full membership in American society. A quest for full social membership is the type of moral high ground that is conducive to more lasting collaborations.

Good faith and inclusion will need to be demonstrated by each group, and racism between communities will need to be addressed. For example, through efforts of immigrant labor leaders, union negotiators have successfully bargained to ensure that a substantial percentage of employees hired in certain industries, such as janitors, are African American.<sup>185</sup> At the same time, African American leaders such as Jesse Jackson, Barack Obama,

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<sup>185</sup> See Roger Vincent & Joe Matthews, *Owners Let Guards Unionize*, L.A. TIMES, Nov. 16, 2006, at C2; Erin Aubry Kaplan, *They're Our Jobs Too; A New Union in L.A. Recognizes that Hotels Have to Hire More African Americans*, L.A. TIMES, Oct. 25, 2006, at A17.

and Cornel West have spoken out on behalf of immigrant rights.<sup>186</sup> In fact, a number of African American leaders joined immigrant rights leaders in denouncing immigrant bashing during the demonstrations in 2006.<sup>187</sup>

The National Latino Congress convened in September 2006 and considered the possibility of building a national Latina/o political movement. Although the most burning issue was to persuade Congress to pass comprehensive immigration reform,<sup>188</sup> the conference delegates also passed resolutions backing a broad range of issues that provide a basis for collaboration with other subordinated communities: voting rights reforms, universal health care, and environmental protection.<sup>189</sup> This is a good start toward a broad-based agenda embraced by a variety of different minority groups.

#### IV. CONCLUSION

The prospect for a mass social movement supporting social change emerging from the immigrant rights movement and the mass marches of 2006 is uncertain. The 1950s and 1960s saw a mass movement that achieved much and transformed the racial landscape of the United States.<sup>190</sup> The legal and political climate was right to facilitate the change advocated by activists. Political and judicial institutions played important roles in that change.<sup>191</sup>

The demographics of the country have changed dramatically over the last fifty years. Consequently, to form an effective and lasting civil rights movement, the issues must stretch beyond immigrant rights and must include African Americans, Asian Americans, and other minority groups. We are all in this together, and together we have a better chance of bringing about change.

Of course, we cannot foresee or control what lies ahead. After all, immigrant rights activists did not envision the size and magnitude of the 2006 marches. For a time, the movement took on a life of its own. Assuming the emergence of a new civil rights movement, will it include African Americans? We believe that an effective movement will not happen without concerted efforts by many people. As we have pointed out in this Article, there are good arguments why immigrant activists ought to reach out to African Americans. And there are good reasons for African Americans to take to the streets in support of immigrants. If initial steps are taken, opportunities for interaction can take place. This may be one way

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<sup>186</sup> See *supra* notes 59, 107, 118–119 and accompanying text.

<sup>187</sup> See Shannon McCaffrey, *Hispanic and Black Groups Demand Georgia Governor Retract Statements on Immigration*, ASSOCIATED PRESS WORLDSTREAM, Sept. 18, 2006, available at [http://www.iht.com/articles/ap/2006/09/18/america/NA\\_GEN\\_US\\_Immigration\\_Rally.php](http://www.iht.com/articles/ap/2006/09/18/america/NA_GEN_US_Immigration_Rally.php).

<sup>188</sup> See Hendricks, *supra* note 4.

<sup>189</sup> *Id.*

<sup>190</sup> See *supra* text accompanying notes 62–65.

<sup>191</sup> See *supra* text accompanying notes 64, 72, 91–93.

for these diverse groups to develop and sustain important conversations about their common challenges and goals and the political strength that would come from working together.

Until these collaborations occur, however, the impact that an immigrant rights movement will have is difficult to foretell. Although the marches were powerful and moving to many people, nothing positive was finalized.

There are barriers between the immigrant rights marches of 2006 and a modern-day multiracial civil rights movement. Black-brown tensions are one issue, with constructive dialogue necessary between and among the affected communities.<sup>192</sup> Moreover, the courts and political branches are not what they were in the 1960s. Neither the current Supreme Court nor the political branches can be relied upon to protect the rights of immigrants and racial minorities. Politicians occasionally play the immigration card to curry nativist support and play off of tensions between African Americans and Latina/os.<sup>193</sup>

More political action will be necessary to secure social change. In the modern United States, change most likely will first occur through grassroots political activism.<sup>194</sup> Change occurs slowly and the current mass movement, if it amounts to anything, will be just the beginning. Representative political institutions may change and can be expected to respond. Courts, which change slowly, will be the last to respond. Today's Supreme Court, headed by Chief Justice John Roberts, will likely serve as a bastion of conservatism for at least a generation.

Although we can dream of a new civil rights movement, it is easy to be skeptical. Latina/os, African Americans, and Asian Americans have too many different and at times competing agendas. The mass activism of the spring of 2006, however, offered a glimmer of hope. We saw what true grassroots organizing can do and the immediate impact it can have. Increasing rates of naturalization among immigrants in recent years have resulted in increased political power for Latina/os and Asian Americans.<sup>195</sup> Only time will tell what the future holds. One thing is certain—nothing will just happen. Just as Thurgood Marshall spent decades implementing the litigation strategy leading to *Brown v. Board of Education*, and Martin Luther King, Jr., and César Chávez orchestrated political activism at the community level in the 1960s, new visionaries will need to strategize and work to build coalitions, foster cooperation between different communities, and successfully bring about social change.

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<sup>192</sup> See *supra* text accompanying notes 34–35, 45–59.

<sup>193</sup> See *supra* text accompanying notes 42–43, 56, 107, 110, 120–123.

<sup>194</sup> For thoughtful analysis of a successful community-based organization, see Julissa Reynoso, *Putting Out Fires Before They Start: Community Organizing and Collaborative Governance in the Bronx, U.S.A.*, 24 *LAW & INEQ.* 213 (2006).

<sup>195</sup> See Sylvia R. Lazos Vargas, *The Latina/o and APIA Vote Post-2000: What Does It Mean To Move Beyond “Black and White” Politics?*, 81 *OR. L. REV.* 783, 799–800 (2002).