

REPORT TO THE GOVERNOR, SENATE, AND
HOUSE OF REPRESENTATIVES
OF THE STATE OF NEW MEXICO
RECOMMENDING REPEAL OF THE
RACIALLY DISCRIMINATORY ALIEN LAND
PROVISION OF THE NEW MEXICO CONSTITUTION

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Submitted by

The Immigration and Nationality Law Review Association
Alien Land Law Project
University of Cincinnati College of Law
P.O. Box 210040
Cincinnati, Ohio 45221-0040
inlr@law.uc.edu
www.law.uc.edu/inlr
(413) 254-1202

I. INTRODUCTION: A RACIALLY DISCRIMINATORY PROVISION OF NEW MEXICO LAW SHOULD BE REPEALED.

A provision intended to discriminate against Asians on the basis of race, passed in a different era, remains part of the New Mexico Constitution. It serves no useful purpose; it is unenforced, would be unconstitutional if enforced, and is contrary to the public policy and laws of this state which in many other contexts prohibit racial discrimination. Accordingly, it should be repealed.

As this report explains, in 1921, the legislature passed and the electors approved an amendment to the constitution prohibiting land ownership by "aliens ineligible to citizenship." This law was aimed at persons of Asian racial ancestry. Asian Americans not born in the United States then could not become naturalized citizens by virtue of their race. Accordingly, Asians were racially ineligible to citizenship. *See* Part II(A), post.

The Alien Land Laws were not aberrational or isolated. Instead, this body of law was part of a system of racial discrimination against Asian Americans during the Jim Crow era, similar to that experienced by members of other races. Discrimination in various states included school segregation, prohibition on interracial marriage, exclusion from desirable, affordable housing through racially restrictive covenants, and the well-known internment of Japanese Americans during World War II. *See* Part II(B), post.

The anti-Asian Alien Land Law is unconstitutional because it discriminates on the basis of race and status as an alien without the justifications required for such discrimination by the United States Constitution. It also interferes with federal regulation of immigration, and is therefore preempted by the Constitution. *See* Part III, post.

Because it is unconstitutional and unenforced, there is no particular reason to keep the anti-Asian land law. However, there are strong reasons to repeal it. First, it is contrary to the public policy of this state which opposes racial discrimination. Second, because it is a part of an unfortunate history of racial discrimination, keeping the law on the books sends the incorrect and offensive message that immigrants and non-whites are not welcome in this state. Accordingly, it should be repealed. *See* Part IV, post.

II. NEW MEXICO'S PROHIBITION ON LAND OWNERSHIP IS PART OF A LONG HISTORY OF RACIAL DISCRIMINATION AGAINST ASIAN AMERICANS ACROSS THE UNITED STATES

As is explained in Part II(A), laws aimed at "aliens ineligible to citizenship," such as New Mexico's prohibition on land ownership, were aimed at Asian Americans, in particular Japanese Americans. In addition, the discrimination it imposed was particularly harsh, including imprisonment or seizure of land of individuals solely because of race. Part II(B) points out that the anti-Asian land laws were part of a larger pattern of discrimination by law against Asian Americans.

A. Alien Land Laws Represented A Harsh Form Of Racial Discrimination Against Asian Americans.

1. Laws Disadvantaging "Aliens Ineligible To Citizenship" Were Racially Discriminatory Because Eligibility To Citizenship Turned On Race

In 1921, this state became one of more than a dozen to provide for the limitations on land ownership of aliens ineligible to citizenship by adopting Article II, Section 22 of the New Mexico Constitution. The section provides: "Until otherwise provided by law, no alien ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a

majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico."

In New Mexico, the "ultimate purpose in the interpretation of a statute is to ascertain and give effect to the intent of the legislature." *State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 243, 980 P.2d 23, 26 (1999) (citing *Roth v. Thompson*, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992)). The question is the intent at the time of enactment. *See, e.g., Swink v. Fingado*, 115 N.M. 275, 279, 850 P.2d 978, 982 (1993) (noting that question was "[d]id the 1984 legislature" have particular intent with respect to "1984 act").

At the time of enactment of this provision, the technical, obscure-sounding phrase "alien ineligible to citizenship" was a term of art referring primarily to Asians. It derives from the historical racial restrictions on access to United States citizenship by naturalization. This history is little known; as Cornell Law School Professor Milton Konvitz wrote in a ground-breaking study:

When Earl G. Harrison in 1944 resigned as United States Commissioner of Immigration and Naturalization, he said that the only country in the world, outside of the United States, that observes racial discrimination in matters relating to naturalization was Nazi Germany, "and all will agree that this is not very desirable company." It comes as a surprise to most Americans to learn that the United States has prohibited Japanese, Filipinos, the people of India, Burma, and others from becoming American citizens.

MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 80-81 (1946).

The first federal naturalization law passed in 1790 extended benefits only to "free white persons." Act of Mar. 26, 1790, ch. 3, 1 Statutes at Large 103. Naturalization was extended to persons of African nativity and descent in 1870. Act of July 14, 1870, ch. 254, § 7, 16 Statutes at Large 254, 256. Thus, aliens of all other races were ineligible to citizenship. The Immigration Act of 1924 made the racial definition explicit, stating that the "term 'ineligible to citizenship'

when used in reference to any individual means an individual who is debarred from becoming a citizen of the United States under section 2169 of the Revised Statutes" Immigration Act of 1924, 43 Statutes at Large 153, § 28(c). Section 2169, defining eligibility for naturalization, provided that "[t]he provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and persons of African descent."¹ Applying this statute, the Supreme Court explained: "Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not." *Terrace v. Thompson*, 263 U.S. 197, 220, 44 S. Ct. 15 (1923). See also *Morrison v. California*, 291 U.S. 82, 85-86, 54 S. Ct. 281 (1934) (listing the non-white races which were ineligible for citizenship).

Non-racial factors could prevent an individual alien from being eligible to citizenship, such as criminal convictions or lack of good moral character. However, "[w]hile any alien is ineligible to naturalization, whatever his race, if he lacks any one of several other qualifications required for naturalization, the [Alien Land Laws] have been interpreted as applying solely to those 'ineligible aliens' whose ineligibility is due to their race." Dudley O. McGoveney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIFORNIA LAW REVIEW 7, 7 n.1 (1947). The laws affected not only Japanese ineligible for citizenship, but also other Asian racial groups. See *California Delta Farms, Inc. v. Chinese American Farms*, 278 P. 227 (Cal.) (Chinese), *appeal dismissed*, 280 U.S. 520, 50 S. Ct. 67 (1929); *Carter v. Utley*, 231 P. 559, 559 (Cal. 1924) (Indian); *In re Fujimoto's Guardianship*, 226 P. 505 (Wash. 1924) (Japanese);

¹ American Indians were naturalized as a group in 1924; members of races native to the Western hemisphere were made eligible for naturalization by statute in 1940. Chinese were added to the list in 1943; Indians and Pilipinos in 1946. Naturalization was put on a wholly race-neutral basis in 1952. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA LAW REVIEW 1, 13-14 (1998), reprinted in 19 IMMIGRATION & NATIONALITY LAW REVIEW 3 (1999).

RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 272
(1989) (Koreans).

Because of the clarity of the relationship between the Alien Land Laws and the federal naturalization laws, modern courts without exception have recognized that the term "alien ineligible for citizenship" was used as a racial classification. For example, in *Sei Fujii v. State*, 242 P.2d 617, 625 (Cal. 1952), the California Supreme Court invalidating that state's Alien Land Law, explained: "By its terms the land law classifies persons on the basis of eligibility to citizenship, but in fact it classifies on the basis of race or nationality. This is a necessary consequence of the use of the express racial qualifications found in the federal code." *See also Takahashi v. Fish and Game Commission*, 334 U.S. 410, 412, 68 S. Ct. 1138 (1948) (noting that "[f]ederal laws, based on distinctions of 'color and race' have permitted Japanese and certain other nonwhite racial groups to enter and reside in the country but have made them ineligible for United States citizenship.") (citations omitted); *Oyama v. California*, 332 U.S. 633, 646, 68 S. Ct. 269 (1948) (striking down portion of California's law prohibiting ownership by aliens ineligible to citizenship, noting that it operated to "discriminat[e] . . . on the basis of . . . racial descent."); *State v. Oakland*, 287 P.2d 39, 42 (Mont. 1955) (declaring state's Alien Land Law unconstitutional for reasons set forth in *Sei Fujii* and *Namba*); *Namba v. McCourt*, 204 P.2d 569, 614 (Or. 1949) ("[O]ur Alien Land Law . . . must be deemed violative of the principles of law which protect from classifications based on race, color and creed.").

Scholars also unanimously recognize the racially discriminatory intent of the laws. In support of his conclusion that the laws were racially discriminatory, for example, Dean Kevin R. Johnson wrote: "While incorporating a facially neutral phrase from the immigration laws into the

land laws, the state effectively barred certain nonwhites from owning property." Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Non-persons*, 28 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 263, 281-82 (1997). Many other scholars agree. See, e.g., PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 19 (1951) ("The purpose of these laws is to prevent Chinese, Japanese and certain Oriental groups from acquiring land"); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 BOSTON COLLEGE LAW REVIEW 37, 38-39 (1998) ("The salient point of these laws was their strongly racialist basis--'aliens ineligible to citizenship' was a disingenuous euphemism designed to disguise the fact that the targets of such laws were [Japanese]"); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIFORNIA LAW REVIEW 61, 61-62 (1947) ("the alien land law was enacted and has been enforced solely as a discriminatory law directed against the Japanese"); McGoveney, *supra*, at 7 (Alien Land Laws apply to "aliens who are *racially* ineligible to naturalize") (emphasis in original); *The Alien Land Laws: A Reappraisal*, 56 YALE LAW JOURNAL 1017, 1017 n.3 (1947) ("The phrase 'ineligible for citizenship' initially operated to exclude all Asiatics").

California led the rest of the states in passing and enforcing anti-Asian land laws; after it passed its law in 1913, many others followed suit. FRANK CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS 76-77 (1981); TAKAKI, *supra*, at 206-07; McGoveney, *supra*, at 7-8. Many authorities recognize that New Mexico's constitutional amendment was part of this group. E.g., MURRAY, *supra*, at 19; McGoveney, *supra*, at 7-8 & n.7. Because of the similar history and language of the Alien Land Laws, it is appropriate to consider the meaning and purpose of the laws of sister states. See *Vulcraft v. Midtown Business Park*, 110 N.M. 761, 765, 800 P.2d 195, 199 (1990) (citing *Tabet v. Davenport*, 57 N.M. 540, 542, 260 P.2d 722, 723

(1953)); *Palmer v. Town of Farmington*, 25 N.M. 145, 179 P. 227, 230 (1919); 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 52.03, at 307-08 (6th ed. 2000) (statutes of other states relevant if it appears "through similarity of language that the act being construed was copied from another state or states.").

Proponents of the California Alien Land Law, the first and model for those in the other states, made no secret of its racially discriminatory aims. Professor Konvitz wrote that the California law was designed "to drive the Japanese from the land (and ultimately from California.)" KONVITZ, *supra*, at 158. California Attorney General U.S. Webb explained:

The fundamental basis of all legislation upon this subject State and Federal, has been, and is, race undesirability. The simple and single question is, is the race desirable. . . . [The law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land.

Id. at 159.

2. The Alien Land Laws Were Enforced By Punitive Measures Including Imprisonment And "Escheat"--Forfeiture To The State

The Alien Land Laws in many states were enforced through punitive legal measures. These laws and their enforcement "deeply demoralized the community" at the time, DAVID J. O'BRIEN & STEPHEN S. FUGITA, THE JAPANESE AMERICAN EXPERIENCE 24 (1991), and represent a bitter memory for Asian Americans today. Accordingly, this law cannot be overlooked as trivial or insignificant.

As might be expected of laws motivated by racial prejudice, they were sometimes enforced by harsh measures, including criminal prosecution and "escheat," forfeiture of the property without compensation. *Cf. Dutton v. Donohue*, 44 Wyo. 52, 8 P.2d 90 (1932)

(discussing escheat). As the Arizona Supreme Court explained, interpreting its fairly representative land law:

The state may take the real property of an ineligible alien, or any interest he may acquire therein, from him by a proceeding to escheat it. It may also prosecute an ineligible alien who has conspired with another to effect a transfer of realty, or an interest in realty, to him, criminally and punish him severely. And these remedies may be used concurrently. . . . Our law has real teeth in it, and persons who violate it may suffer very severe penalties, that is, they may have their lands escheated to the state besides being made to suffer criminal punishment -- as much as two years in the State Penitentiary or a \$5,000 fine, or both.

Takiguchi v. State, 55 P.2d 802, 803, 805 (Ariz. 1936) (citations omitted).

Many individuals, white and Asian, were successfully prosecuted criminally for engaging in land transactions. *See, e.g., People v. Osaki*, 286 P. 1025 (Cal. 1930); *People v. Entriken*, 288 P. 788 (Cal. App. 1930); *People v. Cockrill*, 216 P. 78 (Cal. App. 1923), *aff'd*, 268 U.S. 258, 45 S. Ct. 490 (1925); *see also Ex Parte Nose*, 231 P. 561 (Cal. 1924) (denying habeas corpus), *app. dismissed*, 273 U.S. 772, 47 S. Ct. 102 (1926).

Historical documentation of the Alien Land Law cases does not reveal the "scope of financial hardship and emotional trauma which the statutes created. We do know, however, the financial losses were real." Thomas E. Stuen, *Asian Americans and their Rights for Land Ownership* 620, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* (Hyung-Chan Kim ed., 1992). After California strengthened its statute in 1921, "more than 30,000 Japanese farmers [prepared] to abandon nearly 500,000 acres of California's richest crop lands." *Japanese Exodus from California*, *THE LITERARY DIGEST*, Jan. 12, 1924, at 14. This had a permanent effect on the position of the Japanese Americans in the community. "Had the [aliens ineligible for citizenship] been able to consolidate a larger agricultural base, their power potential could have been far more substantial." JERE TAKAHASHI, *NISEI/SANSEI: SHIFTING JAPANESE*

AMERICAN IDENTITIES AND POLITICS 24 (1997). The consequence of the discriminatory laws was a "heightened sense of alienation from American life and intensified . . . feelings of subordination." *Id.*

B. *Historical Racial Discrimination Against Asian Americans Included School Segregation, Prohibitions On Interracial Marriage, Racially Restrictive Covenants Preventing Home Purchases, Racial Violence, Internment During World War II, And Racial Restrictions On Immigration.*

The significance of the Alien Land Laws can only be fully understood by examining the larger legal regime of which they were a part. During the Jim Crow era, and in other periods, Asian Americans, like members of other non-white racial groups, were subject to systematic discrimination on the basis of race. This discrimination made it more difficult to interact with the wider community, to learn, to obtain housing, employment and economic opportunities.

School Segregation. In several states, children of Asian racial ancestry were forced to attend segregated schools; indeed, the first Supreme Court decision to uphold segregation in education involved an Asian American child in Mississippi. *Gong Lum v. Rice*, 275 U.S. 78, 48 S. Ct. 91 (1927). *See also, e.g., Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902) (upholding California statute segregating students of Chinese descent). The Supreme Court declared segregated schools unconstitutional in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 693 (1954), and in *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693 (1947).

Anti-Miscegenation Laws. Many states prohibited persons of Asian ancestry from marrying persons of other races. As Professor Pauli Murray wrote in 1951:

One of the most widespread racial restrictions is found in the field of marriage. Thirty states forbid marriages between white persons and Negroes or mullatoes. Fifteen of those statutes also prohibit marriages between white persons and persons of Mongolian or Oriental descent and five states bar marriages between whites and American Indians.

MURRAY, *supra*, at 18. Several courts upheld that restrictions on Asian American marriage. *See, e.g., Naim v. Naim*, 87 S.E.2d 749 (Va.), *remanded*, 350 U.S. 891, 76 S. Ct. 151 (1955), *adhered to*, 90 S.E.2d 849 (Va. 1956); *In re Shun Takahashi's Estate*, 129 P.2d 217 (Mont. 1942). The Supreme Court invalidated laws prohibiting interracial marriage in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967).

Racially Restrictive Covenants. Asians have also been subjected to racially restrictive covenants in deeds preventing them from purchasing or occupying residential real estate. The frequency with which these covenants were once employed is suggested by their prevalence in court cases involving deeds but having nothing to do with the covenants themselves. *See, e.g., McRae v. Lois Grunow Memorial Clinic*, 14 P.2d 478, 479 (Ariz. 1932) ("no part of said premises shall ever be conveyed, transferred, let or demised to any person or persons of African, Mexican, Mongolian or Indian descent"); *Gamble v. Fierman*, 255 P. 269, 270 (Cal. App. 1927) ("Said land shall never be rented to any person of African or Oriental descent"); *Guyton v. Yancey*, 125 So.2d 365, 367 (La. 1960) (property could not "be sold to any person of the Negro, Mexican or Mongolian races"); *Ringgold v. Denhardt*, 110 A. 321, 322 (Md. 1920) (house "shall not be given, sold, rented or subleased to a negro or person of African or Mongolian descent"); *Gillingham v. Timmins*, 104 S.W.2d 115, 118 (Tex. Civ. App. 1937) (prohibition on "ownership or leasing by African or Mongolian races"). Racially restrictive covenants were held invalid in *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948).

Racial Violence. Persons of Asian descent have also been subjected to violence on the basis of race. When the Chinese first immigrated to this country, they were met with violent resistance. As noted historian Roger Daniels wrote: "The late nineteenth century American West

was a violent region; with the exception of the American Indians, no group there suffered as much from violence as did the Chinese. No one can ever know how many Chinese were murdered and brutalized . . ." ROGER DANIELS, *ASIAN AMERICANS: JAPANESE AND CHINESE IN THE UNITED STATES SINCE 1850*, at 58-59 (1988). However, he identified "major anti-Chinese riots" in California, Idaho, Colorado and Wyoming, among other places. *Id.* at 58-66.

In the contemporary period, the record reflects organized and random racial violence against Asians. *See* ANTI-ASIAN VIOLENCE: OVERSIGHT HEARING BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES 100th Cong. (Serial No. 116, 1987); Jerry Kang, *Racial Violence Against Asian Americans*, 106 *HARVARD LAW REVIEW* 1926 (1993). The trouble Vietnamese refugees had with the Ku Klux Klan in Texas was widely publicized. *Vietnamese Fishermen's Association v. The Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981).

Even more recently, Benjamin Nathaniel Smith, a member of a group that opposed "Christianity, Judaism, blacks and immigrants with equal vehemence' and has declared a 'holy war' on minorities" shot at a number of African Americans, Jewish persons and Asian Americans, during a three day rampage in Illinois and Indiana, killing Ricky Byrdsong, an African American who had been the coach of Northwestern's basketball team, and a Korean graduate student, Won Joon Yoon. *Suspect in Racial Shootings Kills Self*, *PALM BEACH POST*, July 5, 1999, at 1A. *See also* Robin Mitchell, *Hate Group Tied to Slayings Got its Start in Florida*, *ST. PETERSBURG TIMES*, July 7, 1999, at 1A; *Supremacists Distributing Literature*, *ALBUQUERQUE JOURNAL*, Jan. 11, 2000, at 1. This year, in Pittsburgh, Richard Baumhammers, in "a racially motivated shooting spree" killed "a Jewish woman, an Indian man, a Chinese man,

a Vietnamese man and a black man." *Suspect in Pa. Killings Called Incompetent*, PALM BEACH POST, May 10, 2000, at 13A.

Internment of Japanese Americans. Perhaps the best known race-based action against Asian Americans was the internment of United States citizens of Japanese ancestry during World War II. The Supreme Court upheld a race-based curfew in *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375 (1943), and race-based exclusion from the West Coast in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944). See generally PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); ROGER DANIELS, CONCENTRATION CAMPS NORTH AMERICA; JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II (1981). In 1988, the U.S. Congress voted to pay reparations to Japanese Americans, and issued a formal apology:

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

50 App. U.S.C. § 1989a(a).

Race-Based Immigration Laws. Asians were a particular target of race-based federal immigration laws. Although there were no numerical limitations or other racial or national restrictions at that time, Congress banned Chinese immigration in 1882. Act of May 6, 1882, ch.

126, 22 Statutes at Large 58 (repealed 1943). *See Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S. Ct. 623 (1889). As other Asian racial groups began to immigrate, they were excluded as well. In 1907, the "Gentleman's Agreement", a series of diplomatic notes between Japan and the United States, stopped the issuance of passports to Japanese laborers. In 1917, Congress created the Asiatic Barred Zone; this provision excluded persons whose race was native to India, Southeast Asia, and the Pacific Islands from entering the United States. Act of Feb. 5, 1917, ch. 29, § 3, 39 Statutes at Large 874, 876. The Immigration Act of 1924 barred all aliens that were not eligible for citizenship from coming into the United States. Immigration Act of 1924, ch. 190, § 28(c), 43 Statutes at Large 153, 168. Because Asians were ineligible to be naturalized under the immigration laws, virtually all persons of Asian racial background could not immigrate.

Although the rules were liberalized over time, it was not until the Immigration and Nationality Act Amendments of 1965 that anti-Asian racial bias was fully eliminated from immigration law. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 NORTH CAROLINA LAW REVIEW 273 (1996), *reprinted in* 17 IMMIGRATION AND NATIONALITY LAW REVIEW 87 (1995-96) (discussing Pub. L. No. 89-263, 79 Stat. 911). *See also* 8 U.S. Code § 1152(a)(1)(A) (prohibiting discrimination in issuance of visas); 8 U.S. Code § 1422 (prohibiting discrimination in naturalization). U.S. immigration law was designed to limit the immigration of those of African ancestry, and indirectly discriminated against Mexicans, and Southern and Eastern Europeans, among others, as well. However, only Asians were explicitly discriminated against on the basis of race.

The ineligibility of Asians to immigrate and become citizens had a number of consequences. A major one was that they were unable to take advantage of privileges reserved for citizens, such as the ability to practice licensed professions. *See, e.g., In re Takuji Yamashita*, 70 P. 482 (Wash. 1902) (Japanese person could not practice law, in spite of his naturalization and training); *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890). Additionally, states passed many laws specifically targeting aliens ineligible to citizenship, such as the Alien Land Laws discussed earlier.

III. NEW MEXICO'S ALIEN LAND LAW IS NOW UNCONSTITUTIONAL

New Mexico's Alien Land Law violates the principles of the United States Constitution for three independent reasons. First, it violates the equal protection guarantee because it is designed to discriminate on the basis of race without any valid justification. Second, it violates equal protection because it discriminates on the basis of alienage without any justification. Third, it violates the supremacy clause of the United States Constitution because it interferes with the paramount immigration policy established by federal law. In any event, the provision may have been suspended by action of the legislature, which provides another justification for repealing it.

A. The Alien Land Provision Violates Equal Protection Because It Discriminates On The Basis Of Race And Alienage Without A Compelling Justification

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1. As every modern court faced with the issue of the constitutionality of state laws prohibiting ownership and use of land by "aliens ineligible to citizenship" has held,

state Alien Land Laws are an unconstitutional violation of the Fourteenth Amendment's equal protection clause because they discriminate based on race and alienage. *Sei Fujii v. State*, 242 P.2d 617, 630 (Cal. 1952) (holding California's Alien Land Law unconstitutional); *Montana v. Oakland*, 287 P.2d 39, 42 (Mont. 1955) (holding Montana's Alien Land Law unconstitutional); *Kenji Namba v. McCourt*, 204 P.2d 569, 614-15 (Or. 1949) (holding Oregon's Alien Land Law unconstitutional). *See also Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S. Ct. 1138 (1948) (invalidating discrimination against "aliens ineligible to citizenship"); *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269 (1948) (holding California Alien Land Law unconstitutional as applied to facts).

1. A Law Classifying On The Basis Of Race Is Void Unless Narrowly Tailored To Meet A Compelling State Interest

New Mexico's Alien Land Law is an unconstitutional violation of equal protection because it is racially discriminatory. As previously explained, the language with which the New Mexico Alien Land Law classifies those unable to own real property in New Mexico, "alien ineligible to citizenship," was intended to apply to aliens who were racially ineligible to citizenship, in particular, Asians. The law thus creates a classification based on race as the basis for different legal treatment and rights.

The equal protection clause of the Fourteenth Amendment to the U.S. Constitution provides all persons within United States jurisdiction equal protection of the laws. U.S. CONST. Amend. XIV, § 1. It places substantial limitations on a state's ability to classify on the basis of race because the "clear and central purpose of the Fourteenth Amendment was to eliminate all

official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10, 87 S. Ct. 1817 (1967) (citations omitted).

In 1954, the Supreme Court enforced the equal protection clause by prohibiting separate educational facilities for blacks. *Brown v. Board of Education* 347 U.S. 483, 74 S. Ct. 686 (1954); *Bolling v. Sharpe* 347 U.S. 497, 74 S. Ct. 693 (1954). In *Bolling*, the Court held that "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." 347 U.S. at 499.

Laws discriminating on the basis of race create "suspect classifications" and are therefore subject to the "strict scrutiny" standard of judicial analysis. *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817 (1967); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193 (1944). "The use of these classifications will be invalid unless they are necessary to promote a 'compelling' or 'overriding' interest of government." 3 JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.6, at 294-95 (3d ed. 1999). "To legitimate such a classification the end of the government action would have to outweigh the basic values of the Fourteenth Amendment. For this reason no such classification has been upheld since 1945 . . ." *Id.* Because the New Mexico Alien Land Law discriminates on the basis of race, it is constitutional only if it is necessary to advance a compelling state interest.

2. A Law Classifying On The Basis Of Alienage Is Void Unless Narrowly Tailored to Meet a Compelling State Interest

The New Mexico Alien Land Law violates equal protection because it discriminates on the basis of alienage. In *Yick Wo v. Hopkins*, the Supreme Court invalidated discrimination against Chinese aliens, holding that the protections of the equal protection clause of the Fourteenth Amendment are "universal in their application, to all persons within the territorial

jurisdiction, without regard to any differences of race, color or of nationality." 118 U.S. 356, 369, 6 S. Ct. 1064 (1886). Since *Yick Wo*, the Supreme Court has consistently held that the equal protection clause of the Fourteenth Amendment applies to aliens as well as citizens. As the New Mexico Supreme Court explained:

The strict-scrutiny standard of constitutional review involves the closest analysis and imposes the highest evidentiary burdens. Challenged legislation merits strict scrutiny if it affects the exercise of a fundamental right or discriminates against a suspect classification, "such as race, ancestry, and alienage." *Meyer v. Jones*, 106 N.M. 708, 711, 749 P.2d 93, 96 (1988). When a statute involving such rights or classifications is challenged, the burden is on the defendant-government to demonstrate that the law is "necessary to serve a compelling interest." *Illinois St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L.Ed.2d 230 (1979).

Pinnell v. Board of County Commissioners, 127 N.M. 452, 457, 982 P.2d 503, 508 (1999). See also *Leger v. Sailer*, 321 F. Supp. 250, 252 (E.D. Pa. 1970) (three judge court) (citing *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948)), *aff'd sub nom. Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971).

Applying these principles, the Supreme Court has invalidated a number of laws denying aliens equal rights. Courts have invalidated discrimination in issuance of commercial fishing licenses to aliens ineligible to citizenship, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S. Ct. 1138 (1948), in granting welfare benefits, *Graham v. Richardson*, 403 U.S. 365, 378, 91 S. Ct. 1848 (1971), in eligibility for civil service employment, *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842 (1973), in eligibility to practice law, *In re Griffiths*, 413 U.S. 717, 93 S. Ct. 2581 (1973), and in eligibility for state financial assistance for higher education programs. *Nyquist v. Mauclet*, 432 U.S. 1, 97 S. Ct. 2120 (1977). See also Opinion No. 89-16, 1988 N.M. AG Lexis 81 (May 4, 1988) ("any attempt to impose a citizenship requirement [on notaries public] would be unconstitutional"); Opinion No. 80-20 (May 19, 1980), 1979-1982

OPINIONS OF THE ATTORNEY GENERAL OF NEW MEXICO 150 ("[i]t is our opinion that the citizenship requirements imposed by the Dental Act cannot be enforced consistent with constitutional guarantees of equal protection.").

The Supreme Court has recognized an exception to the close analysis of state alienage classifications for classifications involving political functions or self-governance. 3 NOWAK & ROTUNDA, § 18.12, at 478. Thus, a state can allow only citizens to become police officers. But "[i]f the classification does not relate to the self-governance process, and, therefore, does not come under the political function exception, it will be subjected to strict scrutiny and invalidated unless it is narrowly tailored to promote a compelling state interest." *Id.* § 18.12, at 483.

3. The Alien Land Law Does Not Further Any Legitimate State Interest And Therefore Violates Equal Protection.

"Statutes rarely overcome the rigid requirements of strict scrutiny." Note, *Constitutional Law--Challenging Proposition 187's Constitutionality: League of United Latin Citizens v. Wilson*, 27 NEW MEXICO LAW REVIEW 241, 259-60 (1997)) (citations omitted). The Supreme Court has virtually never found justifications for discrimination on the basis of race or alienage compelling enough to pass strict scrutiny. In order to survive strict scrutiny analysis, a state bears the very heavy burden of presenting an interest so compelling that the nature of the interest justifies the classification. *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969). We respectfully submit that there is no justifiable reason to discriminate in land ownership on the basis of race, or against particular categories of aliens, and so the cases have held.

In 1949, Oregon became the first state to hold its Alien Land Law unconstitutional. The law limited the rights of aliens ineligible to citizenship. *Namba v. McCourt*, 204 P.2d 569, 571 (Or. 1949). Oregon's Supreme Court noted that "state legislation which regulates alien land

ownership is subject to the equal protection and due process clauses of the Fourteenth Amendment." *Id.* at 581. Under the Fourteenth Amendment, "color, as well as race and creed, is an unacceptable distinguishing characteristic." *Id.* at 583. The court concluded that "our Alien Land Law . . . must be deemed violative of the principles of law which protect from classifications based upon color, race and creed." *Id.*

In *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952), the California Supreme Court invalidated that state's Alien Land Law because it violated the Fourteenth Amendment. The Court explained that "[t]he California alien land law is obviously designed for and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. . . . Accordingly we hold that the alien land law is invalid as in violation of the Fourteenth Amendment." *Id.* at 630.

The Montana Supreme Court held that state's Alien Land Law unconstitutional in *State v. Oakland*, 287 P.2d 39 (Mont. 1955). The Court held that the law was

unconstitutional and void as being in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for the reasons given . . . by the Supreme Courts of the State of California and of the State of Oregon in their very learned and extensive opinions wherein they found their respective Alien Land Laws, similar to those of Montana, invalid as infringements upon the equal protection clause of the Fourteenth Amendment.

Id. at 42.

Decisions of the United States Supreme Court also suggest that the anti-Asian land laws are unconstitutional. In *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S. Ct. 1138 (1948), the Supreme Court held that a state statute discriminating against aliens ineligible to citizenship violated equal protection. In *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269 (1948), the Supreme Court held California's Alien Land Law unconstitutional as applied, so there

was no need to decide whether the statute was unconstitutional as a whole. However, four concurring justices concluded that Alien Land Laws were unconstitutional. In his concurrence, Justice Murphy, joined by Justice Rutledge, noted that the California Alien Land Law was "spawned of the great anti-Oriental virus which, at an early date, infected many persons in that state." *Id.* at 651. Accordingly, such laws were invalid because of the "uncompromising opposition of the Constitution to racism, whatever cloak or disguise it may assume." *Id.* at 650. Justices Black and Douglas believed that Alien Land Laws were invalid under the Fourteenth Amendment, which "was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups." *Id.* at 649.

The Attorney General of New Mexico recognized in an opinion in 1963 that "the constitutionality of alien land laws, such as Article II, Section 22 of our State constitution, is open to certain doubts. . . . the court decisions indicate a trend toward holding that alien land laws, such as ours, do violate the equal protection clause of the United States Constitution." Op. No. 63-120 (Sep. 20, 1963), 1963 OPINIONS OF THE ATTORNEY GENERAL OF NEW MEXICO 273.

It is true that when *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138 (1896), upholding racial segregation, was the governing law of the land, the Supreme Court upheld state laws prohibiting ownership of land by aliens ineligible to citizenship. *See Cockrill v. California*, 268 U.S. 258, 45 S. Ct. 490 (1925); *Frick v. Webb*, 263 U.S. 326, 44 S. Ct. 115 (1923); *Webb v. O'Brien*, 263 U.S. 313, 44 S. Ct. 112 (1923); *Porterfield v. Webb*, 263 U.S. 225, 44 S. Ct. 21 (1923); *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923). However, since *Brown v. Board of Education* and *Bolling v. Sharpe* invalidated racial segregation, these cases can no longer be regarded as good law; "constitutional principles declared in recent years are irreconcilable with the reasoning of the earlier cases." *Sei Fujii v. State*, 242 P.2d 617, 624 (Cal.

1952) (refusing to follow *Plessy*-era Alien Land Law case). *See also Namba v. McCourt*, 204 P.2d 569, 581-82 (Or. 1949) (declining to follow old cases in light of recent developments in the law).

In summary, laws classifying on the basis of alienage or race are impermissible under the equal protection clause of the Fourteenth Amendment. Such classifications are analyzed under strict judicial scrutiny which requires a state interest compelling enough to justify the discrimination. Since developing the strict scrutiny test, the Court has never found a state interest compelling enough to justify discriminatory classifications against minorities based on race or alienage (other than those related to self-governance). The New Mexico Alien Land Law, which discriminates on both alienage and race, is thus unconstitutional under the equal protection clause of the Fourteenth Amendment.

B. *The Alien Land Law Is Unconstitutional Under The Supremacy Clause Of The U.S. Constitution Because It Interferes With Federal Immigration Policy*

Laws promulgated by states prohibiting land ownership and use by "aliens ineligible to citizenship" are preempted by federal law and therefore invalid. The federal government possesses exclusive power to create laws controlling the process and terms of immigration. *See De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976); *Fong Yue Ting v. United States* 149 U.S. 698, 13 S. Ct. 1016 (1893). The supremacy clause of the United States Constitution establishes that Federal law is "the supreme Law of the Land." U.S. CONST. Art. VI, cl. 2. "[T]he supremacy clause mandates that federal law overrides, i.e., preempts, any state regulation where there is an actual conflict between the two sets of legislation." 2 NOWAK & ROTUNDA, § 12.1, at 199-200.

The Supreme Court set forth the basic analytical standards for determination of preemption cases in *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941), and *Pennsylvania v.*

Nelson, 350 U.S. 497, 76 S. Ct. 477 (1956). In *Hines*, the Court invalidated the Pennsylvania Alien Registration Act as preempted by federal law because the federal statute establishing regulations affecting the rights of aliens "is the supreme law of the land, and no state can add to or take from the force and effect . . . thereof." 312 U.S. at 63. The test set forth in *Hines* is whether under the particular circumstances, the state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id.* at 67. "The progeny of *Hines* and *Nelson* have continually narrowed the scope of judicial inquiry to a determination of whether, under the particular facts of the case, the existence of the state regulatory scheme is facilitative or detrimental to the purposes and objectives of the federal statute." 2 NOWAK & ROTUNDA, § 12.2, at 213.

Many courts have held that state laws discriminating against aliens are preempted by federal laws controlling immigration. In *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419, 68 S. Ct. 1138 (1948), the Supreme Court held that "State laws which impose discriminatory burdens upon entrance of residence of aliens lawfully within the United States conflict with constitutionally derived federal power to regulate immigration and are invalid." Accordingly, it struck down discrimination in the issuance of fishing licenses against aliens ineligible to citizenship. Similarly, the Court held that "State laws restricting eligibility of aliens for welfare benefits merely because of alienage conflict with overriding national policies in an area constitutionally entrusted to federal government." *Graham v. Richardson*, 403 U.S. 365, 378, 91 S. Ct. 1848 (1971). "Read together, *Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to this country is impermissible if it imposes additional burdens not contemplated by Congress.'" *Toll v. Moreno*, 458 U.S. 1, 12-13, 102 S. Ct. 2977 (1982) (quoting *De Canas v.*

Bica, 424 U.S. 351, 358 n.6, 96 S. Ct. 933 (1976)). See also *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982). State laws aimed at discouraging immigration by aliens of a particular race are impermissible because, as the Court concluded in *Takahashi*, they impose an additional burden on aliens whom Congress has determined may reside here.

In sum, the United States maintains a policy of admitting particular categories of aliens to this country, including certain aliens who were and are ineligible to citizenship. State laws inconsistent with that--attempting to encourage such aliens to leave by making their lives more difficult--necessarily frustrate federal policy in the area. The New Mexico Alien Land Law is thus an unconstitutional violation of the supremacy clause due to preemption by federal law.

C. The Alien Land Law May Have Been Suspended By Legislation.

Article II, Section 22 provides that aliens ineligible to citizenship may not own land "until otherwise provided by law." In 1975, the New Mexico legislature passed a law allowing aliens to own real property, codified at § 45-2-112 NMSA 1978. The Attorney General issued an opinion in 1981 that this statute "operates to suspend the prohibition against ownership of real property." Op. No. 81-6 (Apr. 20, 1981), 1979-82 OPINIONS OF THE ATTORNEY GENERAL OF NEW MEXICO 215. It certainly is to be hoped that this is correct. However, the statute does not specifically provide that aliens ineligible to citizenship are included, so perhaps it could be questioned whether the legislature, by providing that aliens may own land, has provided that aliens ineligible to citizenship may own land so as to satisfy the constitution. A 1930 opinion of the attorney general stated that the prohibition would be in effect "unless and until such privilege is conferred upon such ineligible aliens by statute," suggesting that a law must cover ineligible aliens specifically to satisfy the terms of the Constitution. 1929-30 OPINIONS OF THE ATTORNEY

GENERAL OF NEW MEXICO 11 (June 25, 1930). However, if the statute does in fact suspend the Alien Land Law, then it provides an additional reason to repeal an obsolete provision which is no longer of any force or effect.

IV. THE ALIEN LAND LAW IS INCONSISTENT WITH THE PUBLIC POLICY OF RACIAL EQUALITY EXPRESSED IN THE CONSTITUTION AND LAWS OF THIS STATE

A. Laws On The Books Send A Message Even If Unenforced

The law at issue, though on the books, is apparently not now enforced on the basis of race or any other basis. It evidently serves no positive function or provides any benefit to the people of New Mexico. Its disuse is strong evidence that its importance, if any, is entirely symbolic. Yet, by remaining in force as a part of New Mexico's fundamental law, it creates the misleading suggestion that New Mexico endorses the racial attitudes of a bygone era. Even if the provision has been suspended, its existence purports to allow the legislature to impose discrimination against aliens ineligible to citizenship. There is no reason to gratuitously insult the citizens of New Mexico and her sister states who, because of their race, may once have themselves been affected by the law, or have parents or grandparents who were.

There is ample precedent for repealing obsolete, racially discriminatory laws. During this election, the people of Alabama voted to remove an old provision of their constitution banning interracial marriages; South Carolina did the same in 1998. Idaho recently amended a provision of its constitution banning "Chinese, or persons of Mongolian descent, not born in the United States" from voting or serving as jurors. 1998 Idaho Session Laws 1361, amending Idaho Const. Art. VI, § 3. The U.S. Congress repealed laws regulating Asian "coolies" in 1974. Pub. L. 93-461, 88 Statutes at Large 1387. Similarly, a number of states approved the Fourteenth Amendment years after its official ratification in 1868, even though such action was merely

symbolic. *See* U.S. CODE ANNOTATED, CONSTITUTION: AMENDMENTS 14 TO END at 7 (West 1987) (listing states).

B. *The Public Policy Of This State Opposes Racial Discrimination*

The Constitution's authorization for discrimination against Asian aliens who wish to purchase real property is wholly inconsistent with the principles of non-discrimination which are pervasive in New Mexico law. For example, the Constitution provides that "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property and seeking and obtaining safety and happiness." New Mexico Const. Art. 2, § 4. In addition, Art. 2, § 18 provides: "no person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under the law shall not be denied on account of the sex of any person." New Mexico Const. Art. 2, § 18.

A number of statutes also prohibit discrimination. Chapter 28 of the New Mexico Statutes is titled "Human Rights." Article 1 prohibits discrimination in employment on the basis of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition. § 28-1-7 NMSA (1978). Other articles prohibit discrimination in public accommodations and housing. § 28-1-7(f) & (g) NMSA (1978).

In sum, the alien land provision of the New Mexico constitution does not express a vital public policy of the State. To the contrary, it is inconsistent with the strong and clear public policy against racial discrimination.

V. CONCLUSION: NEW MEXICO'S ALIEN LAND LAW SHOULD BE REPEALED.

For all of the foregoing reasons, Article II, Section 22 of the New Mexico Constitution should be repealed.

Respectfully submitted,

The Immigration and Nationality Law Review Association
Alien Land Law Project
University of Cincinnati College of Law
P.O. Box 210040
Cincinnati, OH 45221-0040
<http://www.law.uc.edu/inlr>
(413) 254-1202

NOTE ABOUT THIS PROJECT AND ITS STAFF

The *Immigration and Nationality Law Review (INLR)* is a student-staffed academic journal at the University of Cincinnati College of Law which has been published for over twenty years. Students selected as members of the *INLR* are expected to perform significant research on legal topics, generally for publication. This project originated when, in the course of exploring potential research topics, *INLR* staff discovered that not all of the old anti-Asian land laws had been repealed. Consistent with the public mission of the College of Law, a state-supported institution, and the desire of the *INLR* staff to use their work to contribute to improvement of the legal system, the *INLR* staff decided to share its research findings with the decisionmakers who had authority to reform the law rather than simply writing an academic paper about the topic.

INLR staff members working on this project include:

Lashonda Bourgeois. Book Review Editor, *Immigration and Nationality Law Review*. J.D. candidate (2001), University of Cincinnati College of Law, B.A., Oakland University.

Gabriel J. Chin. National Editor, *Immigration and Nationality Law Review*. Professor of Law, University of Cincinnati College of Law. LL.M., Yale Law School, J.D. *cum laude*, Michigan Law School, B.A., Wesleyan University.

Megan Matsumura. Staff Member, *Immigration and Nationality Law Review*. J.D. candidate (2002), University of Cincinnati College of Law, B.A., Purdue University.

Makiedah Messam. Note Editor, Immigration and Nationality Law Review. J.D. candidate (2001), University of Cincinnati College of Law, B.A., Kenyon College.

James Muetzel. Editor-in-Chief, Immigration and Nationality Law Review. J.D. candidate (2001), University of Cincinnati College of Law, B.A. *cum laude*, Cleveland State University.

Elizabeth Mulcahy. Staff Member, Immigration and Nationality Law Review. J.D. candidate (2002), University of Cincinnati College of Law, B.A. *magna cum laude*, University of Dayton.

Kristina Sawyer. Staff Member, Immigration and Nationality Law Review. J.D. candidate (2002), University of Cincinnati College of Law, B.A., George Washington University.

Mark Zylka. E.Text Editor, Immigration and Nationality Law Review. J.D. candidate (2001), University of Cincinnati College of Law, B.S., University of Michigan-Dearborn.