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Proposition 187: The Nativist Campaign, The Impact on
the Latino Community, and the Future

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I. Introduction

The topic of my presentation certainly has been in the spotlight over the last year. California's Proposition 187 was an initiative passed by the voters by a 59-41% margin. If implemented, the initiative would bar state and local governments in California from providing non-emergency health care and social services and public education to undocumented immigrants.

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It would further require California law enforcement, health and social service agencies, and public school officials to report persons suspected of being undocumented to the Immigration and Naturalization Service.

There was much media hoopla surrounding the Proposition 187 campaign in the fall of 1994. The initiative received national attention. The true test of this was that the New York Times ran an editorial on the subject. Even a couple of prominent national Republicans, Jack Kemp and Bill Bennett, publicly announced their opposition to the measure.

This national concern was justified. Many voters in California desired to "send a message" to the federal government. There apparently was a desire to get the federal government to deal with illegal immigration. Events in Congress over the last few weeks demonstrate that this message has had an impact.

I will attempt to analyze three discrete aspects of Proposition 187 in this report: (1) the racial undercurrent to the campaign; (2) the disparate impact that the measure may have on certain immigrant communities; and (3) the legal challenges to Proposition 187 that in all likelihood will ultimately be addressed by the United States Supreme Court.

II. Proposition 187: Its Genesis, Historical Antecedents, and the Campaign

The provisions of Proposition 187 are complex, confusing, and sometimes indecipherable. In part, this results from the fact that the initiative was drafted by committee. Political debate, as often is the case, was on an abstract plane with little time spent on the details of the

measure. In the debate of Proposition 187, the details of its provisions frequently were overlooked. Surprisingly enough, as the campaign wore on, the specific provisions of the initiative were discussed less and less. Rather, the Proposition 187 campaign became more a debate about illegal immigration.

One theme endorsed by initiative proponents was that passage of Proposition 187 would "send a message" to the federal government that it must address illegal immigration. A counter-theme often raised by opponents, particularly ethnic activist and immigration groups, was that Proposition 187 was racist. Such claims have not been raised only by minorities. Indeed, the President of the American Bar Association and Jack Kemp and Bill Bennett made similar claims.

I am not willing to state categorically that Prop 187 is or is not racist. Many factors in combination unquestionably led to passage of Proposition 187, including

- an ailing California economy
- an unprecedented state budget crunch extending over a number of years
- an incumbent governor searching for an issue on which to base his re-election campaign
- the growing pains of a changing multi-cultural society.
- some nativism and racism.

In analyzing these questions from a legal prospective, something struck me as curious. As I mentioned, one of the most vociferous, and serious, contentions made by Proposition 187 opponents in the heated

campaign was that the measure is racist. This often is a damning claim in our legal culture. For a variety of reasons, however, including the difficulties of proving claims of discrimination under the law, the numerous lawsuits challenging Proposition 187 do not squarely raise the issue. Indeed, a court of law in all likelihood never will address the issue that immediately jumps into the mind of many who condemn the initiative. Only in the court of history will it be decided whether Proposition 187 was passed for invidious reasons and thus whether it is properly classified as racist.

A. Historical Precedents for Proposition 187

There are historical antecedents for Proposition 187 in the state of California. Here are a couple of examples.

1. Chinese Immigration

It is well-known that California was a hotbed of anti-Chinese sentiment in the late 1800s. For example, in 1879, the California voters addressed the question of Chinese immigration on an advisory ballot measure. The results were 883 "For Chinese immigration" and 154,638 "Against Chinese immigration." California Governor George C. Perkins explained the need for the vote on the measure:

² Inaugural Address of His Excellency, George C. Perkins, Governor of California Jan. 8th 1880 at 35 in 5 Appendix to the Journals of the Senate and Assembly of the Twenty-Third Session of the Legislature of the State of California (1880) [hereinafter Perkins Inaugural Address].

[W]hy is it necessary or desirable that the position of the people of this State, or this Coast, on this question should be understood by the people on the other side of the continent? It is because we can obtain effectual relief from the evils of Chinese immigration only through the action of the Federal Government. And to secure such action, we will be compelled to get a preponderance of the public sentiment of the whole country into harmony with ourselves on this question. When it becomes definitely and authoritatively known, that the opposition to the Chinese in this State, and on this Coast, is not limited to a class -- and that class the least intelligent -- but embraces substantially the whole people, irrespective of classes, we may expect that this opposition will receive respectful consideration of the whole country.

Governor Perkins denied that race influenced the vote.

2. The Alien Land Laws

Perhaps the most well-known anti-alien measures were the alien land laws. California, as well as a number of other Western states, earlier this century enacted laws that barred the ownership of certain real property by noncitizens ineligible for citizenship. Although the history and the context make it clear that the measures were directed at the Japanese, one of the groups of Asian immigrants ineligible for citizenship at this time,⁵ the Supreme Court refused to intervene⁶ in blatantly anti-Japanese

³ Id., at 36; see also Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* 62-63 (1991) (describing election and how it fit into broader anti-Chinese sentiment in state).

⁴ See Perkins Inaugural Address, supra note 2, at 9.

⁵ See Oyama v. California, 322 U.S. 633, 635 n.3 (1948); Sei Fujii

campaign was waged in support of the alien land law passed by initiative in California. Justice Murphy of the United States Supreme Court described its essence:

The Japanese were depicted as degenerate mongrels and the voters were urged to save "California -- the White Man's Paradise" from the "yellow peril" Claims were made that the birth rate of the Japanese was so high that the white people would eventually be replaced and dire warnings were made that the low standard of living of the Japanese endangered the economic and social health of the community.

B. Racial Undertones to the Proposition 187 Campaign

The Proposition 187 campaign bore striking similarities to the campaign culminating in the passage of the alien land laws in California. I recognize, however, that the question whether Proposition 187 might properly be classified as "racist" is deeply complicated. Part of the Proposition 187 support may have been directed at the perceived fiscal and consequences of undocumented immigration. ~~Still~~ At least some voters were unabashedly anti-Mexican, regardless of the immigration status of the individuals. It is difficult to contend that ethnic ~~is~~ is of the typical

v. California, 38 Cal. 2d 718, 735, 242 P.2d 617 (1952).

⁶ See Cockrill v. California, 268 U.S. 258 (1925) (upholding California law); Frick v. Webb, 263 U.S. 326 (1923) (same); Webb v. O'Brien, 263 U.S. 313 (1923) (same); Porterfield v. Webb, 263 U.S. 225 (1923) (same); Terrace v. Thompson, 263 U.S. 197 (1923) (upholding Washington law).

⁷ Oyama 332 U.S. at 658-59 (Murphy, concurring) (footnote omitted).

illegal immigrant issue did not play at least a role in the passage of Proposition 187.

1. The Drafters of the Initiative

Governor Pete Wilson, in seeking re-election, capitalized on the public dissatisfaction with immigration by supporting Proposition 187. Some of his television advertisements emphasizing his unqualified support for the initiative showed shadowy Mexicans crossing the border in large numbers. As the initiative's "Save Our State" moniker suggests, frequent claims were made that undocumented citizens were responsible for California's fiscal and other woes.⁸ The fact that Proposition 187 placed in jeopardy federal funding of \$15 billion, which greatly outweighed any potential savings, was virtually ignored in the campaign,⁹ suggesting that other factors besides a desire to save money were at work.

One of the initiative sponsors baldly asserted that "[i]llegal aliens are killing us in California Those who support illegal immigration are, in

⁸ See, e.g., Tony Miller, Acting Secretary of State, California Ballot Pamphlet: General Election Nov. 8, 1994, at 54 [hereinafter California Ballot Pamphlet] (Argument in Favor of Proposition 187) ("It has been estimated that ILLEGALALIENS are costing taxpayers in excess of 5 billiondollars a year. . . . While our own citizens and legal residents go wanting, those who choose to enter the country ILLEGALLY get royal treatment at the expense of the California taxpayer. . . . IT IS TIME THIS STOPS!) (capitals in original).

⁹ See California Ballot Pamphlet, supra note 8, at 50-53

effect, anti-American.¹⁰ One of the pro-187 arguments in the voters' pamphlet suggests the deeply negative feelings about immigration and immigrants: "Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion." The Proposition 187 media director for southern California expressed similar concerns in a letter printed by the New York Times

Proposition 187 is . . . a logical step toward saving California from economic ruin. . . . By flooding the state with 2 million illegal aliens to date, and increasing that figure each of the following 10 years, Mexicans in California would number 15 million to 20 million by 2004. During those 10 years about 5 million to 8 million Californians would have emigrated to other states. If these trends continued, a Mexico-controlled California could vote to establish Spanish as the sole language of California, 10 million more English-speaking Californians could flee, and there could be a statewide vote to leave the Union and annex California to Mexico.¹²

Consider the positions of the committee of persons who drafted Proposition 187.

a. Ron Prince

¹⁰ See Patrick J. McDonnell, Prop. 187 Turns Up Heat in U.S. Immigration Debate, L.A. Times, Aug. 10, 1994, at A1 (quoting Ronald Prince, co-sponsor of Proposition 187).

¹¹ California Ballot Pamphlet, supra note 8, at 54 (capitals in original).

¹² Letter to Editor by Linda B. Hayes, N.Y. Times, Oct. 15, 1994, at sec. 1, p. 18 (emphasis added).

Prince's anti-immigrant animus apparently grew out of a business dispute with a legal immigrant whom Prince alleged was an "illegal." Prince conjured up disturbing imagery from another era in advocating passage of 187: "[y]ou are the posse . . . and SOS [Prop 187] is¹³the rope."

b. Harold Ezell

Well before the advent of Proposition 187, Harold Ezell, Western Regional Commissioner of the Immigration and Naturalization Service in the 1980s, was infamous for comments made about "illegal aliens" -- that they should be "caught, skinned and fried."¹⁴ Senator Dennis DeConcini reportedly complained to Ezell's superior, Alan Nelson, that Ezell used the term "wets," apparently a shortened version of the pejorative term "wetbacks," to refer to undocumented immigrants seeking to cross the Rio Grande.¹⁵ During the campaign, Ezell mentioned that support for Proposition 187 was great because "[t]he people are tired of watching their state run wild and become a third world country."¹⁶

¹³ Patrick J. McDonnell, Prop. 187 Turns Up Heat in U.S. Immigration Debate, L.A. Times, Aug. 10, 1994, at A1 (quoting Prince).

¹⁴ See Olga Briseno, Mister Migra, Harold Ezell, San Diego Union-Trib., Aug. 23, 1989, at F1 (quoting Ezell).

¹⁵ See Jay Mathews, Tough-Talking INS Official Raises Profile, Ire in the West, Wash. Post, Mar. 24, 1986, at A1.

¹⁶ Daniel B. Wood, Ballot Vote on Illegal Immigrants Set for Fall in California, Christian Sci. Mon., June 1, 1994, at 1 (quoting Ezell).

c. Barbara Coe

The public statements of one drafter of Proposition 187, Barbara Coe, are worthy of special attention. Coe has contended that undocumented immigrants "are endangering, not only our financial system, but they repeatedly illustrate that they hold, not only our laws, . . . but our language, our culture, and our very history in contempt. She has expressed fear of the " militant arm of the pro-illegal activists, who have vowed to take over first California, then the Western states and then the rest of the nation.¹⁸"

Coe further has linked immigrants and crime:

"You get illegal alien children, Third World children, out of the schools and you will reduce the violence. That is a fact You're not dealing with a lot of shiny face, little kiddies You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system. And we're paying them to do¹⁹ it."

In an op/ed piece USA Today Coe complained of bilingual education and emphasized that "[v]iolent crime is rampant. . . . Illegal-alien gangs roam our streets, dealing drugs and searching for innocent victims to rob, rape

¹⁷ CNN Show: Sonya Live, Feb. 16, 1994 (talk show with Barbara Coe answering questions).

¹⁸ Carol Byrne, Proposition 187's Uproar Star Trib., Oct. 20, 1994, at 7A (quoting Coe).

¹⁹ Pamela J. Podger & Michael Dowler, War of Words Fresno Bee, Jan. 9, 1994, at A1 (quoting Coe) (emphasis added).

and, in many cases, murder those who dare violate their `turf'
[N]early 90% of all illicit drugs are brought here by illegals"

Consistent with that view, one of the immigration organizations with which Coe heads, placed the following ad National Review

WANTED: TESTIMONY FROM U.S. citizens who have been victims of crimes either financial (welfare, unemployment, food stamps, etc.) educational (overcrowding, forced bilingual classes, etc.) or physical (rape, robbery, assault, infectious disease, etc.) committed by illegal aliens. Legal advice welcome -- possible lawsuit pending.

2. Election Results

The landslide victory of Proposition 187 was somewhat of a surprise. Polls near the time of the election showed that the race was a dead-heat and that the initiative might well fail. Political scientists have observed that polls are often inaccurate in racially polarized elections. White voters often will lie to pollsters to avoid being labeled as racist. Exit polls suggest that the vote on Proposition 187 was polarized along racial lines.

According to the exit polls, the breakdown was as follows:

white -- 63-37

Latino -- 23-77

African-American -- 47-53

²⁰ Barbara Coe Keep Illegals Out of State USA Today, Oct. 12, 1994, at 12A.

²¹ National Review, July 5, 1993, at 60.

In addition, though the evidence is somewhat conflicting, the most racially mixed counties in California tended to be anti, 187 (San Francisco and Alameda counties) while the least mixed tended to be the most heavily in favor of the measure.

C. A "Motivating Factor": Immigrants from Mexico

Similar to the alien land laws, it is clear that Proposition 187, though facially neutral, was directed at undocumented immigrants from a certain country. Although there are many other undocumented persons in the United States other than Mexican²³, this never figured prominently in the debate over the initiative. Moreover, Proposition 187 unquestionably will have -- and its passage has had -- impacts on discrete ethnic communities. Undocumented Mexicans, Mexican-American citizens, and citizens of other minority groups viewed as foreign, including Asian-Americans, are the groups most likely to feel the sting of Proposition 187²⁴surprisingly,

²² See Times Poll/A Look at the Electorate, L.A. Times, Nov. 10, 1994, at B2 (describing exit poll results).

²³ See Immigration and Naturalization Service, Estimates of the Unauthorized Immigrant Population Residing in the United States, By Country of Origin and State of Residence: October 1992 14 (Apr. 29, 1992) (estimating that, as of October 1992, only 39% (1.3 million) of approximately 3.4 million undocumented persons were from Mexico).

²⁴ At least two deaths -- an elderly Chinese women and a Mexican child -- have been attributed to fear of persons to seek medical care because of Proposition 187's passage. See Lee Romney,

these are the groups that voiced the strongest opposition to 187 in the campaign.

III. The Effects of Proposition 187

Before analyzing the potential effects on Proposition 187, consider some of its provisions.

A. Some Nuts-and-Bolts

Proposition 187 was designed to restrict the public benefits and services available to undocumented immigrants. As previously discussed, the arguments in favor of the measure in the voters pamphlet reveal the much deeper negative feelings that it reflected about immigration and immigrants.

Generalized dissatisfaction with immigration is expressed in Section 1 of the initiative, which states that the people of California, among other things, declare

[t]hat they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state. (emphasis added).

Boy In Prop. 187 Controversy Mourned L.A. Times, Nov. 29, 1994, at A22; Pamela Burdman Woman Who Feared Prop. 187 Deportation Dies at S.F. General Nov. 26, 1994, at A14; Fearful Aliens in California Staying Away from Clinics N.Y. Times, Nov. 12, 1994, at 9.

[t]hat they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state. (emphasis added).

Proposition 187 would require state and local law enforcement officers to "[a]ttempt to verify the legal status" of every person "arrested, and suspected of being" in the United States in violation of the immigration laws and to notify the INS of the person's apparent illegal status.

Proposition 187 also would require public health and social service providers to verify that a potential recipient is a U.S. citizen or otherwise lawfully in the country. If the agency reasonably suspects . that the person is" unlawfully in the country, it cannot provide benefits or services to that person and must notify the Immigration and Naturalization Service.

The details of the education provisions of Proposition 187 deserve careful attention. Section 7 states categorically that "[n]o public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States" or in the country unlawfully.

Keep in mind that this is harsher than the Texas law at issue in the Supreme Court case Ryler v. Doe²⁵ which would have allowed undocumented children at least to pay tuition.

Proposition 187 would require each school district to verify the immigration status of each student attending as well as the immigration status of each parent or guardian. Again, this goes further

²⁵

457 U.S. 202 (1982).

than the Texas law at issue in Plyler. As with Proposition 187's other provisions, a suspected undocumented parent must be reported to the INS. The result may be that an undocumented parent may not send his or her citizen child to school because of a fear of deportation.

The initiative's prohibition of the education of undocumented children direct conflicts with the Supreme Court's decision in Plyler v. Doe. Plyler relied upon the equal protection clause of the Fourteenth Amendment to invalidate a Texas statute that authorized school districts to deny public school enrollment to undocumented children.

Proponents of Proposition 187 voiced hopes that its passage would force the Supreme Court to reverse Plyler v. Doe. In some ways, the measure is the culmination of years of efforts to close the public schools in California to undocumented children. Costs of providing education mandated by the U.S. Constitution, which were borne for the most part by the states, added fuel to the fire. In Governor Wilson's words, "[w]e cannot educate every child from here to Tierra del Fuego."²⁶

Whether Plyler v. Doe was correctly decided is something that constitutional law professors have debated. It nonetheless is critical to recall that, although the Supreme Court was sharply divided on the difficult constitutional question, it was unanimous about the lack of wisdom of the Texas law. The five-Justice majority emphasized that the law might well create a permanent caste of undocumented resident aliens,

²⁶ Daniel M. Weintraub & Bill Stall, Wilson Should Expel Illegal Immigrants From Schools, L.A. Times, Sept. 16, 1994, at A1 (quoting Wilson).

encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.²⁷ The Court recognized that children should not be punished because their parents had broken the immigration laws and emphasized that it was "difficult to conceive of a rational justification for penalizing these children for their presence in the United States."²⁸

Justice Powell concurred, emphasizing that even if denied an education some undocumented children would remain in the United States, "adding to the problems and costs of both State and National Governments [due to] unemployment, welfare, and crime."²⁹

Though rejecting the majority's constitutional arguments, Chief Justice Burger's dissent characterized the Texas law as "senseless" and "folly."³⁰

B. Proposition 187: Immigration Status, Ethnicity, Class, and Gender

Consider the impacts of Proposition 187, if it is ever implemented.

An important aspect of Proposition 187 is that its costs might well outweigh any benefits. California's nonpartisan Legislative Analyst

²⁷ Plyler v. Doe, 457 U.S. at 218-19 (emphasis added) (footnotes omitted).

²⁸ Id. at 220 (emphasis added).

²⁹ Id. at 237-38 (Powell, J., concurring).

³⁰ Id. at 242 (Burger, C.J., dissenting).

projected that annual savings of benefits and services provided to undocumented persons might be as great as \$1.2 billion for education and \$200 million in benefits and services.³¹ However, the potential costs overwhelmed those savings. More significantly, the Legislative Analyst estimated that, if implemented, the state stood to lose as much as \$15 billion in federal funding each year.³² Needless to say, a potential loss of \$15 billion is substantial, particularly when the state is in the throes of a long-running and severe budget crisis.

The fact that the potential savings promised by Proposition 187 were dwarfed by the potential costs suggests that factors other than simply economic ones influenced the political support for the measure. Although the California Ballot Pamphlet distributed to registered voters included the Legislative Analyst's cost/benefit analysis, and opponents in the election campaign attempted to highlight the potential fiscal downside, this argument never touched the hearts and minds of the electorate. Rather, the issue was transformed into one about the propriety of illegal immigration.

Now consider what may be at the heart of the matter. Proposition 187 obviously focused on the immigration status of the recipients of public benefits and services. It sought to discriminate against "illegal aliens." It, however, disparately affects those of particular ethnicities, classes, and women. The impact on particular ethnic communities are the clearest. One

³¹ See California Ballot Pamphlet, supranote 8, at 52.

³² See id. at 52-53.

might logically ask which communities are likely to bear the burdens associated with the efforts of state and local agencies to uncover undocumented persons. It is inevitable that Latino and Asian citizens and immigrants, as well as other groups with characteristics perceived to be "foreign," are the most likely to suffer the direct impact. As a lobbyist for the California Organization of Police and Sheriffs observed about the law enforcement provisions or Proposition 187:

There are many people who speak with accents. A police officer would have to spend hours every time he makes an arrest of somebody who doesn't speak perfect English or who is dark-skinned or Asian, trying to check out that status with the INS. I don't think the INS would be available from midnight to 9 a.m. So there are high costs to police officers on the job. . . . It would discourage people of ethnic backgrounds not only from reporting crimes, it would discourage witnesses and anybody who would be involved in any kind of crime situation.

Concerns over discriminatory enforcement are heightened by the fact that Proposition 187 completely lacks any explanation of how its verification requirements are to be implemented.

While ethnic minorities voiced concern with the spillover effects of the measure on minority citizens, other potential impacts went largely unnoticed. As with other benefit programs, poor immigrants will be affected disparately if Proposition 187's provisions go into effect. Women will as well. Indeed, women, often primary child-care providers in a

³³ California State Office of Research, Analysis of State Propositions on the November 1994 Ballot 87-88 (1994) (quoting Bill Hemby, lobbyist for California Organization of Police and Sherriffs).

household, are the most directly affected by reductions in public benefits. Prenatal care and battered women services is a clear example. Education may be a less obvious one. If undocumented children are barred from the schools, their mothers, many of whom are responsible for child care, will be disparately impacted. Consequently, Proposition 187 might be attacked as anti-poor and anti-women as well as anti-immigrant and anti-Mexican.

IV. The Litigation

The day after its passage, immigrants' rights advocates brought many actions challenging the legality of Proposition 187.

The many lawsuits have been combined into two consolidated lawsuits. One suit, which relates primarily to the education provisions of Proposition 187, is in California state court. The other suit, which more generally challenges the various provisions of Proposition 187, is in federal court in Los Angeles.

The district court in Los Angeles last fall entered a permanent injunction barring implementation of most of Proposition 187.³⁴ In large part, the court relied on what constitutional law scholars call a federal supremacy argument: that the federal government had the exclusive authority to regulate immigration and that many of the provisions of Proposition 187, a state law, impermissibly encroached on that power. The

³⁴ See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

State of California will soon be appealing that decision. Ultimately, the matter probably will be decided by the United States Supreme Court. The final outcome, at least in my view, is highly uncertain.

There is one issue of importance to the Latino community that is for the most part absent from this litigation. As I mentioned before, a number of Proposition 187 opponents claimed that the measure was racist. Racial discrimination generally is unconstitutional under the Fourteenth Amendment, which guarantees all persons equal protection under the laws. A challenge to Proposition 187 on equal protection grounds might claim that, though facially neutral, it will have a discriminatory impact on immigrants and citizens of particular ethnicities and national origin groups. As we have seen, a fair amount of evidence could be adduced to support this position. However, a major obstacle to any such claim would be a series of Supreme Court decisions. The Court has made it clear that the showing of a racially disproportionate impact alone is insufficient to establish that a facially neutral law violates the equal protection clause. Rather, even for legislation adopted through initiative, the aggrieved party must establish that the law was passed with discriminatory intent³⁵. Proving such "intent" is very difficult.

Intent analysis raises a variety of problems that are especially acute in evaluating lawmaking by initiative. Obviously, the larger the institution making the challenged decision, the more difficult it is to establish an invidious intent. The difficulties of establishing a discriminatory intent are

³⁵ See Washington v. Davis, 426 U.S. 229 (1976).

most extreme when the electorate of thousands, perhaps hundreds of thousands, of voters made an allegedly discriminatory decision. It is important to note ~~that~~ about 8.5 million votes were cast on Proposition 187. Even if a significant portion of the electorate voted for the challenged measure for invidious reasons, it is next to impossible to establish the true intent of such a diffuse decisionmaking body.

To avoid engaging in an inquiry into the electorate's intent, lower courts have emphasized the sanctity of the secret ballot and have been reluctant to invalidate an initiative even if it appeared that at least part of the electorate had a discriminatory purpose in voting for the law. Such an approach makes the invalidation of an initiative likely only if discriminatory on its face.

In effect, voters therefore may freely rely on invidious motives in supporting measures that have a disproportionate impact on discrete and insular minorities. This obviously poses a clear threat to minority interest in the initiative process. Individual voters are much less likely than lawmakers and policymakers to be held accountable for discriminatory decisions. Because basing a law on blatantly racist motives generally is not fashionable or legally permissible, representative bodies at least at some level tend to moderate discriminatory sentiment. Perhaps all of these factors help explain why the potentially explosive issues of race and class are more likely to be addressed by the electorate than by legislative bodies.

Put simply, the initiative process may permit the adoption of laws with discriminatory impact by a politically unaccountable electorate that a

legislature would be less likely to accomplish. Because of the discriminatory intent requirement, such a decision is less likely to be successfully challenged than that of an elected body.

To make matters more complex, alienage classifications, though presumptively lawful, may veil an invidious purpose to discriminate against certain ethnicities, which would presumptively be³⁶ ~~invalid~~. A link exists between national origin and immigration status in the United States. Indeed, the link has become more pronounced in recent years with increasing immigration from developing nations. A recurring problem that may grow exponentially in the future will be determining when facially neutral immigration restrictions, such as reduction of benefits to lawful permanent residents, masks an invidious purpose to discriminate against certain national origin groups. This is the precise problem raised by Proposition 187 and by the alien land laws earlier in the century.

Conclusion

The campaign culminating in the passage of Proposition 187 in California contained an anti-Mexican tilt that threatened the Latino community. If the measure is implemented, the Latino community stands to be disparately affected. Because the result of many legal challenges are highly uncertain, Latinos would do well to consider political strategies to avoid the enactment of laws like Proposition 187 in the future.

³⁶ See Yick Wo v. Hopkins, 118 U.S. 356 (1886).