

# FOREWORD

## IMMIGRANTS IN THE ADMINISTRATIVE STATE AND THE POLITY FOLLOWING HURRICANE KATRINA

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This year's Frankel Lecture topic is appropriate for several important reasons. First, Hurricane Katrina stands as one of the most important and tragic events of our time, combining elements of natural disaster, human tragedy, governmental incompetence, private sector indifference, racism, and extraordinary spectacle, as well as countervailing communitarian impulses and humanitarian generosity. None of us are the same after this tragic event, most notably the people of New Orleans. The University of Houston Law Center was substantially involved in ameliorative efforts, hosting the entire Loyola University School of Law during its transitional recovery period. I have never been as proud of the Law Center as I was during this period, however taxing it was upon both institutions. Who would have known our own hard-learned lessons and recovery experience from Tropical Storm Allison would give us expertise that could be deployed to assist others?<sup>1</sup> Indeed, the City of Houston extended open arms to those fleeing Katrina, never flinching from the task; in stark contrast to the failure of federal,

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1. See Alexis Grant & Lori Rodriguez, *Allison Remembered: 5 Years Later, Is City Safer From Flooding?*, HOUSTON CHRON., June 5, 2006, at A1 (reporting on the recovery from Tropical Storm Allison, which dumped three feet of rain in less than three days in June, 2001, causing "a disaster unparalleled in the city's history"). The University of Houston Law Center suffered one of the worst flooding disasters in legal education, losing almost 350,000 volume equivalents, with a replacement value of \$28.5 million, in the O'Quinn Law Library, which is built entirely underground. See *UH Law Library to Get \$21 Million for Flood Damage*, CHRON.COM, Nov. 26, 2001, <http://www.chron.com/dispatch/story.mpl/storm2001/1146820.html>.

Louisiana, and New Orleans political and civic leadership, Houston resources were skillfully offered and delivered.<sup>2</sup>

Houston and New Orleans have many historical ties, uniting communities, economies, and families in the larger Gulf Coast Region. We share many attributes, including a tropical climate and fragile ecosystems that defy logic, exits off Interstate 10, and multiracial populations with long histories of mistrust and experiences with the Federal Emergency Management Administration (FEMA). Many Houstonians justifiably consider our communal response to Hurricane Katrina our finest hour, resettling and accommodating our fleeing New Orleans neighbors in their traumatic time of need.

Professor Kevin Johnson's work begins this explanation. Inasmuch as he is one of the country's leading analysts of immigration law and policy, his inquiry is grounded in the complex immigration ecosystem as well, and he finds a morass, one that has received very little attention at either the national level or in the academic literature. Professor Johnson tracks several of the more public as well as hidden immigration sagas that have emerged. The longstanding Honduran dockhand community is one of many Latino communities that toil in obscurity at the margins,<sup>3</sup> even as Mayor Nagin engaged in despicable race-baiting,<sup>4</sup> one of many politicians hoping to gain

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2. Eric Berger, *Hurricane Aftermath*, HOUSTON CHRON., Nov. 6, 2005, at A1 (reporting that Houston accepted the largest number of Katrina evacuees—an estimated 150,000 people); Matt Stiles, *Aiding Katrina Victims Makes Houston Area Top Newsmaker*, HOUSTON CHRON., Jan. 1, 2006, at B1 (recalling the outpouring of support shown by Houstonians toward displaced New Orleans residents); John M. Broder & Simon Romero, *Astrodome a Step Up From New Orleans Chaos*, N.Y. TIMES.COM, Sept. 2, 2005, <http://www.nytimes.com/2005/09/02/national/nationalspecial/02domes.html> (reporting on Houston's efforts to shelter Katrina evacuees); Mike Snyder, *Tiny Houston Agency Takes on National Job*, CHRON.COM, Feb. 5, 2008, <http://www.chron.com/dis/story.mpl/front/5516971.html> (reporting that the Harris County Housing Authority was chosen by the U.S. State Department to pay rent and provide social services to displaced New Orleans residents throughout the nation). There is an extraordinary journalistic record of this disaster and its aftermath. For a small sampling, see Adam Nossiter, *With Regrets, New Orleans Is Left Behind*, N.Y. TIMES, Dec. 18, 2007, at A1 (describing the aftermath of Katrina and the relocation of New Orleans residents along the Gulf Coast); Simon Romero, *Houston Finds Business Boon After Katrina*, N.Y. TIMES, Sept. 6, 2005, at A1 (discussing economic impacts in Houston after Katrina); Joseph B. Treaster & Deborah Sontag, *Despair and Lawlessness Grip New Orleans as Thousands Remain Stranded in Squalor*, N.Y. TIMES, Sept. 2, 2005, at A1 (citing New Orleans's "despair, privation and violent lawlessness").

3. BRENDA MUNIZ, IN THE EYE OF THE STORM: HOW THE GOVERNMENT AND PRIVATE RESPONSE TO HURRICANE KATRINA FAILED LATINOS 1–8 (Nat'l Council of La Raza, 2006), available at <http://www.nclr.org/content/publications/download/36812>; Darryl Fears, *For Illegal Immigrants, Some Aid Is Too Risky*, WASH. POST, Sept. 20, 2005, at A6.

4. Peter Pae, *Immigrants Rush to New Orleans as Contractors Fight for Workers*, L.A. TIMES, Oct. 10, 2005, at C1 (quoting Mayor Nagin); see also James Dao, *In New*

traction by anti-immigrant public sentiment. The failure of comprehensive immigration reform in 2006 and 2007 will illustrate the near-total governmental breakdown in federal domestic policy, as well as the complete gridlock in federal–state–local governance in this vexing area. Even laudable programs, such as the bipartisan DREAM Act legislation<sup>5</sup> and the AgJOBS bill,<sup>6</sup> have been snared in the tar pit of public discourse, fueled by restrictionist demagoguery, the Lou Dobbs-effect of cable television, and the distrust between both political parties. In the public discussion of Hurricane Katrina’s impact on New Orleans, race was considered central to both the city’s past and its future identity.

Although a fascinating story in and of itself, the plight of immigrants following Hurricane Katrina teaches deeper lessons about society’s views of immigration and immigrants in the modern United States. First, despite their many contributions to U.S. society, immigrants historically have been deemed unworthy of public benefits whatever their personal circumstances. “Welfare” assumes an even worse name for immigrants than it does for citizens, one of the lessons taught by California’s infamous Proposition 187,<sup>7</sup> an initiative passed by the state’s voters that sought to deny undocumented immigrants virtually all public benefits, including an elementary and secondary public education mandated by the Supreme Court. The failure of government to provide relief to immigrants after Hurricane Katrina thus fits comfortably into an unfortunate American legacy.

Second, immigrants—especially undocumented ones—who seek gainful employment in the United States often are characterized as economic parasites who “take” jobs from Americans. Throughout its history, this nation at various times has narrowed the immigration laws, ratcheted up border enforcement, and engaged in mass deportation campaigns based

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*Orleans, Smaller May Mean Whiter*, N.Y. TIMES, Jan. 22, 2006, § 4, at 1 (same).

5. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007). See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. (forthcoming 2008) (reviewing failed 2007 immigration legislation).

6. Agricultural Job Opportunities, Benefits, and Security (AgJOBS) Act of 2007, S. 237, 110th Cong. (2007).

7. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (striking down virtually all of Proposition 187); see generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995).

on the unproven claim that immigrants displace American workers—a particularly pressing public concern in tough economic times. Time and time again, commentators and activists from a variety of political persuasions have contended that immigrant labor adversely affects African Americans in the job market.<sup>8</sup>

In sum, public opinion in the United States often poses a cruel Catch 22 to undocumented immigrants who are characterized as both abusers of public benefit programs and as job-takers who hurt U.S. citizens. Put simply, they either do not work and consume welfare or work and steal jobs; either way, undocumented immigrants are viewed as economically injuring true Americans.

Although Professor Johnson uses the measured and scholarly tone befitting the Frankel Lecture's academic discourse, he reveals the seething, understated tone of this confluence of events. The cascade of examples is riveting, and readers are in his debt for his excavation of the longstanding archeology of racial relations in the Crescent City. Further, as a longtime observer of administrative law, he notes the extraordinary deference given administrative decisionmaking after *Chevron*,<sup>9</sup> and convincingly notes that this pendulum sweep away from judicial oversight is particularly pernicious in its missing political check because of the inability of noncitizens, even longstanding permanent residents, to vote and serve as correctives in our political system.<sup>10</sup>

Professor Raquel Aldana, a relative newcomer to this subject, has a professional background in international human rights and comparative scholarship. She has written perceptively about the intersection of immigration and national security/terrorism threat, another important public policy strand. She reminds readers of the changing national demography and most usefully supplements Johnson's focus on the aftermath of Hurricane Katrina with the 2007 California fires, which have seemed eerily similar in governmental response.<sup>11</sup> Those similarities are especially acute with regards to the treatment of undocumented Latinos who were scapegoated and excluded from

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8. Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2516–17 & n.96 (2007).

9. *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

10. Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 *HOUS. L. REV.* 11, 40–42 (2008).

11. Racquel E. Aldana, *Silent Victims No More?: Moral Indignation and the Potential for Political Mobilization in Defense of Immigrants*, 45 *HOUS. L. REV.* 73, 74–77 (2008).

even the most basic services designed to ameliorate the devastation in Southern California.<sup>12</sup> I happened to travel in the Los Angeles area after the fires, when acrid smoke was still evident in the region, and listened to Spanish-language commentators rail against the many acts of cruelty allegedly perpetrated against the undocumented. I recall one in particular, originating from San Diego, who likened the events near Qualcomm Field to immigrant “baiting,” that is, using relief services as “bait” to trap the unwary immigrants.

Professor Aldana chronicles these events, and sees them, convincingly, as part of a whole-cloth of nativist and restrictionist sentiment. She affirms the views of Professor Johnson by noting:

An underlying basis for Johnson’s position appears to be a strong disillusionment with a political climate that is increasingly hostile to immigrants. The article’s description of the legal landscape plaguing immigrants includes Congress’s passage of laws that treat immigrants in “draconian fashion.” Additionally, Congress recently failed to pass legislation remedying the extreme vulnerability and uncertainty of approximately twelve million undocumented immigrants who live in the United States. In June of 2007, the comprehensive immigration reform bill that would have offered undocumented persons a path to legalization failed to get the sixty votes needed to end the debate in the Senate and have it pass for a vote. Then, in October 2007, came the more surprising defeat of the DREAM Act of 2007, which similarly fell short of receiving the votes needed. The DREAM Act would have provided a path to legalization to undocumented youth brought as children to the United States who pursued an education or joined the military in the United States.<sup>13</sup>

She then notes the political economy of this analysis:

Professor Johnson’s moral call upon the courts to protect immigrant rights seems obviously urgent in this climate of anti-immigrant political hostility. Yet, in this very same political climate, the judiciary is unlikely to respond to the plight of immigrants in the absence of substantial political backing of a pro-immigrant civil rights movement. Political scientists have time and again deemed courts as part of the national political coalition. Indeed, courts’ decisionmaking “is strongly influenced by national political majorities and national public opinion . . . .” This point has not escaped

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12. *Id.* at 75–76.

13. *Id.* at 78 (citation omitted).

consideration by Professor Johnson when writing about the struggle for Latino civil rights. Specifically on the role of courts in immigration, he has expressed reserved enthusiasm that judicial review can truly advance immigrant rights. While citing studies finding that judicial review of executive implementation of immigration laws in the 1980s overturned a significant number of cases in favor of immigrants, courts largely left intact the deep structural flaws in the immigration bureaucracy.<sup>14</sup>

Aldana then places these concerns in the context of the shifting norms of federalism and preemption, seeing the thermodynamics of terrorism intersecting immigration enforcement:

In a post-9/11 world, Professor Johnson is correct about the limited role courts are willing to take on behalf of immigrants. Prior to September 11, immigration scholars were predicting the demise of the plenary power doctrine, which grants Congress discretion to regulate immigration in the absence of meaningful constitutional scrutiny. This position changed radically after September 11, and that political tide remains. For example, the conflation of national security and immigration led the U.S. Supreme Court to issue rulings shortly after 9/11 that reaffirmed the strength of Congress's plenary power to control immigration. At the same time, political actors in the federal and local governments moved to solidify their unfettered power over immigrants. Congress legislated not only to further restrict judicial review over its immigration powers but also to expand these powers beyond the border into the regulation of the lives of ordinary citizens within the border. Additionally, the executive branch seized the opportunity to employ and expand its immigration powers to conduct law enforcement, while local police became immigration law enforcers. Finally, local governments passed hundreds of anti-immigrant measures restricting immigrants' access to basic necessities such as housing and drivers' licenses.<sup>15</sup>

This is a useful and important elaboration upon Johnson's points, which she has written about extensively in her own scholarship.<sup>16</sup>

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14. *Id.* at 79 (citation omitted).

15. *Id.* at 80–81 (citation omitted).

16. See Raquel E. Aldana, *Of Katz and "Aliens": Privacy and the Immigration Raids*, 41 U.C. DAVIS L. REV. (forthcoming 2008); Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263 (2007); Raquel E. Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S.

Professor Anna Shavers has emerged as one of the more astute and nuanced observers of the Katrina legal story and has already contributed to the ongoing scholarly attention brought to the larger subject by participating in an earlier University of Houston Law Center conference involving the children of Katrina.<sup>17</sup> While she acknowledges that Professor Johnson has raised an important critique,<sup>18</sup> she is skeptical of his reasoning. For example, she writes:

By comparing the two groups, Professor Johnson presents a situation where the reader can come away thinking black Americans are acting to subordinate immigrants. I do not think this is his intent, and he ultimately does urge coalition building between these and other subordinated groups. But he does not raise this point in the passionate way in which he has raised it elsewhere.<sup>19</sup>

As one concrete example, she says of his emphasis upon the strong, negative reaction by African Americans to the use of the “refugee” characterization:

The rejection of the term was not a way of distancing themselves from immigrants or vilifying immigrants but rather a recognition of the choices made by the government when dealing with people in distress. A plausible explanation of the rejection of the term “refugees,” and one that I accept, is that their was no focus at all on immigrants themselves but rather a focus on the relationship between black Americans and the U.S. government that had often rejected black Americans who had a claim to all rights that accompany citizenship.<sup>20</sup>

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ILL. U. L.J. 5 (2004); Raquel Aldana and Sylvia Lazos, “Aliens” in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

17. Anna Williams Shavers, *Katrina’s Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499 (2006); Anna Williams Shavers, *Providing an Adequate and Equitable Education for the Children of Katrina and Other Victims of Disaster*, in *CHILDREN, LAW, AND DISASTERS: WHAT HAVE WE LEARNED FROM THE HURRICANES OF 2005* (Howard Davidson, Ellen Marrus, & Laura Oren, eds., 2008).

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[I]t was not until reading Professor Johnson’s salient piece that I turned my attention in any serious way to the inequities revealed by Katrina with respect to noncitizens. By addressing the black–white paradigm as it was manifested in the Katrina aftermath, Professor Johnson forces us, as do many LatCrit scholars, to consider other inequalities.

Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99, 100 (2008).

19. *Id.* at 108.

20. *Id.* at 108.

She then likens the admixture of immigration and poverty metaphors to justifiable skepticism by black Americans concerning refugee policy concerning Africans and Haitians, and accounts for the poor treatment accorded these predominantly black groups with other refugee populations, particularly the relaxed policies towards Cubans who make it to U.S. soil.<sup>21</sup> To be sure, there are many anomalies and inconsistencies in immigration and refugee policy about which Professor Johnson has written. And it is demonstrably clear that these affect racial and racialized groups differently, but it is not clear to me that this feature cuts against Johnson's point in the New Orleans context. When the black mayor of New Orleans—whom I heard campaign in Houston several times to the many New Orleans voters temporarily domiciled here—refers to New Orleans as a “Chocolate City”<sup>22</sup> and urges that immigration sweeps be employed to rid the city of undocumented (and resident alien) Latino workers,<sup>23</sup> this is not putting too fine a point on the issue.

Professor Shavers does raise one point that was particularly striking to me, one that follows from a recent book project of my own on the 1954 case of *Hernandez v. Texas*.<sup>24</sup> She uses remarks by the novelist Toni Morrison concerning what Morrison considers the “bonus of whiteness” that Morrison believes “Hispanics” have sought, essentially characterizing Latinos as free-riders on civil rights issues.<sup>25</sup> Professor Shavers refers, approvingly, to this strain of scholarship:

[Many scholars have] observed that Hispanics and Asians, on occasion, both in the context of law generally and immigration more specifically, were classified as white and thus able to benefit from white privilege in a way that black Americans could not. For example, in Texas, a black American challenged the University of Texas's adherence to the “separate but equal” policy of offering him a legal education at the University of Texas School of Law for Negroes, while Mexican Americans were allowed to attend the University of Texas.<sup>26</sup>

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21. *Id.* at 117–18.

22. Johnson, *supra* note 10, at 16 (citing Mayor Nagin).

23. *Id.*

24. Shavers, *supra* note 18, at 111–13; see “COLORED MEN” AND “HOMBRES AQUÍ”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (MICHAEL A. OLIVAS, ed., 2006).

25. Shavers, *supra* note 18, at 111–12 (citing Toni Morrison).

26. *Id.* at 114–15 (citation omitted).

This vastly oversimplifies a complex history, especially that of Jim Crow, Texas-style. *Hernandez v. Texas*,<sup>27</sup> the U.S. Supreme Court case decided immediately before *Brown v. Board of Education*,<sup>28</sup> stands for a very different proposition: the State of Texas argued that all-Anglo juries trying Mexican-origin defendants were “juries of peers,” as Mexican Americans were, in this setting, legally “white.”<sup>29</sup> This is the opposite of white privilege or the “whiteness bonus,” and was used to marginalize and exclude Mexicans from juries and civic life in post-World War II Texas, even after disproportionate numbers of Mexicans served in the military. Three of the Mexican American lawyers who tried *Hernandez* in the U.S. Supreme Court had graduated from the University of Texas Law School, but they were three of fewer than twenty.<sup>30</sup> And one of them, who later became a federal judge, made it clear that he had attended UT because his name sounded Italian and because he was “guero,” or light skinned.<sup>31</sup> The trial record of *Hernandez* shows that Mexicans in Jackson County, Texas, were segregated and marginalized in exactly the same way as African Americans were, and the putative “privilege” was no such thing. Homer Plessy, a light-skinned Creole, sought a seat in the white-only section of public transportation,<sup>32</sup> but no one would characterize him as seeking white privilege. The iconic bathroom door in the *Hernandez* case was marked for “Colored Men and Hombres Aqui,” forever linking these marginalized groups in the public courthouse.<sup>33</sup>

Professor Shavers displays a nuanced approach to these issues elsewhere, and her own careful work corroborates the major points made by Professor Johnson. This exchange among scholars of color is likely to lead to much more detailed and comprehensive history.

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27. *Hernandez v. Texas*, 347 U.S. 475 (1954).

28. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. See *Hernandez*, 347 U.S. at 477–78 (“The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment.”). See generally Michael A. Olivas, *Hernandez v. Texas: A Litigation History*, in “COLORED MEN” AND “HOMBRES AQUI”, *supra* note 24, at 209 (chronicling *Hernandez v. Texas*).

30. See Liza Lizette Barrera, Note, *Minorities and the University of Texas Law School (1950–1980)*, 4 TEX J. OF L. & POL. 99, 99 n.3 (1998).

31. For his own personal experiences in trying the *Hernandez* case and other civil rights cases, see James DeAnda, *Hernandez at Fifty, a Personal History*, in “COLORED MEN” AND “HOMBRES AQUI”, *supra* note 24, 199–208.

32. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

33. “On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked ‘Colored Men’ and ‘Hombres Aqui’ (‘Men Here’).” *Hernandez v. Texas*, 347 U.S. 475, 480 (1954).

All scholarship on this unprecedented American story improves the likelihood that leadership will be better prepared the next time such a disaster occurs, as it surely will. I admire the ambition of public administration and planning scholar Peter Hall, whose excellent work *Great Planning Disasters* has helped me think through the extraordinary incompetence and suffering occasioned by this foreseeable disaster. In his 1979 work, Hall noted, "I do not want to seem to promise more than this book can deliver. There will be no grand overarching model which will explain all previous disasters and guarantee how to avoid new ones. The object is to begin an explanation, not to end one."<sup>34</sup> These papers begin an explanation, in the tradition of earlier Frankel Lectures. Read them and weep.

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34. PETER HALL, *GREAT PLANNING DISASTERS* 12 (1980).