

The Diaspora of Ethnic Economies: Beyond the Pale?

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Introduction

Governments around the world have at different times adopted various race-conscious policies for various reasons. These policies generally fall into three categories. First, in the U.S., for example, the Jim Crow system was used systematically to reinforce racial preferences in social, political, and economic life, to favor the white majority and exclude the black minority. And so it was similarly under the apartheid system of South Africa. One could characterize this system as one designed to further *majority preferences in majority economies*,¹ that is, a system where the dominant majority not only controls the economic and political system but has also instituted racial preferences for its own majority members. Today, in the U.S. and South Africa, governmental policies work in the reverse, as “compensatory preferences” to blacks and other designated minorities, to offset majority advantages and historical wrongs. India too pursues preferential policies for its untouchables. This second type of racial policy is aimed at implementing *minority preferences in majority economies*, to benefit minority groups in economies dominated by majority members. By contrast, in countries such as Malaysia and Nigeria, governments institute ethnic preferences to favor politically dominant (though economically weak) majority groups and to restrain minorities deemed by these governments to be “too” economically powerful. At various times in Europe, similar treatment had been directed at the Jewish minority.² This third type of policy institutes *majority preferences in minority economies*, that is, economies “controlled” by minority groups.

What in the U.S. is called “affirmative action” today is but one instance of similar actions

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¹ THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 37 (1990).

² *See, e.g.* ROBIN COHEN, *GLOBAL DIASPORAS* 1-29 (1997) (discussing the imposition of quotas restricting the number of Jews who could enter the professions or higher education). *Id.* at 16.

undertaken historically and presently by governments around the world. In developing countries in particular, these forms of “affirmative action” to boost certain governmentally designated ethnic minority groups have been urged as crucial to the reduction of ethnic conflicts and consequently, to the success of law and development projects – on the ground that the institution of markets and democracy cannot be undertaken without taking into account the distinctive environment of developing countries, specifically the prevalence of ethnic divisions and tensions.³ No doubt the rationale offered by the governments involved, whenever ethnically targeted preferences are adopted, varies depending on the objectives set by these governments, the philosophical and political rationale behind these programs, and the history of the countries themselves. There are, however, common threads that run through the three categories of preferential programs briefly mentioned. Whether called “discrimination” or “white supremacy,” “affirmative action,” or “compensatory preferences,” “Northernization” (as pursued in Nigeria) or Malaysia’s “sons of the soil” preferences, they are essentially designed by the government to achieve a governmentally designated objective of advancing the interests of those the government wishes to be advanced. In other words, the essence of these different programs is the institution of “government-mandated preferences for government-designated groups,”⁴ to correct continuing group disparities and ethnic stratification.

With the abolition of apartheid in South Africa, category one preferential policy is no longer practiced by any government in the world and has no serious scholars advocating in its behalf in standard scholarly journals. Categories two and three continue to be pursued in many countries and have provoked both passionate support for and opposition to the governments’ use of race or ethnicity as a basis for governmental objectives. However, what has been almost wholly ignored in the debate on preferential policies, whether in developing or developed countries, is the type of preferential policies practiced *not* by the government but by *private groups* to favor members of

³ See, e.g. Kevin Davis, Michael J. Trebilcock & Bradley Heys, *Ethnically Homogeneous Commercial Elites in Developing Countries*, 32 LAW & POL’Y INT’L BUS. 331 (2001); Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT’L L. J. 287 (2000). Whether economic disparities or disparities in entrepreneurship are causes of ethnic conflicts are contested. See, e.g., Davis, Trebilcock & Heys, *supra* at 355-58; DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT 113-31 (2000).

⁴ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 14.

their own *ethnic* groups – “[t]he spontaneous preferences of particular individuals and groups for ‘their own kind.’”⁵ The proliferation of ethnic economies in the U.S. and other countries, whereby disadvantaged groups that cannot compete successfully in the mainstream economy turn inward to leverage their group affinities and establish an economic base for the group, can be explained by reference not to government-mandated preferences but rather to their own preferences for members of their own groups in their pursuit of entrepreneurship. This particular sort of preferential policy is the focus of the Article.

Assume that a small Korean-owned cleaning business relies on word of mouth to find suitable employees in order to save on advertising and other search costs. This Korean-owned business may be located in a Korean *ethnic enclave*⁶ of Korean restaurants, groceries, laundry, wigs and other Korean-owned shops. As a small business, many of the company’s employees are members of the owner’s family. As part of the Korean *ethnic economy*,⁷ the cleaning business can also find, at low or no cost, Korean employees if the owner needs to hire from outside his or her own inner circle. The owner may also prefer to hire other Koreans, or engage in lending and other preferences favoring other Koreans, whether because of shared language, culture, kinship, community, or a sense of mutual trust. An ethnically homogenous work force thus is replicated. An ethnic economy is thus reinforced and perpetuated.

Assume also that a black-owned business in Harlem engages in similar business practices, hiring African American workers from the neighborhood rather than those from other ethnic groups. Or that this black-owned business has successfully established linkages with other

⁵ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 14.

⁶ The term “ethnic enclave economy” usually means not just a business that is owned by an ethnic person hiring other coethnics. It also means the existence of a locational cluster of such businesses. *See generally* ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY* 370 (1985). *See also infra* section II.A.3.

⁷ The term “ethnic economy” usually means an economic sector consisting of “coethnic self-employed and employers and their coethnic employees. Whatever is not part of the ethnic economy belongs to the general labor market.” IVAN LIGHT & STEVEN GOLD, *ETHNIC ECONOMIES* 4 (2000). *See also* EDNA BONACICH & JOHN MODELL, *THE ECONOMIC BASIS OF ETHNIC SOLIDARITY* (1981) One may have an ethnic economy that is not an ethnic enclave because the ethnic businesses are not spatially proximate to one another. *See infra* Section II.A.1.

clusters of black-owned firms,⁸ buying from and selling to one another and generating a positive ripple effect for the black community.⁹ Similar stories about ethnic solidarity and “fraternal and communal sentiments”¹⁰ abound throughout the U.S. and in many countries around the world, sometimes resulting in the establishment of a distinct type of ethnic economy, the *ethnic niche* – the clustering of ethnic entrepreneurs in the same occupations and industries.¹¹ Indians and Pakistanis, for example, own a large proportion of gas stations and budget motels in the U.S. and newsstands in New York City. The diamond industry is dominated by Orthodox Jews who rely on ethnic networks to further economic exchanges. Cambodians and Vietnamese in California own a disproportionate number of doughnut shops and nail salons, respectively.¹² Koreans own a large number of green groceries in New York City and wig stores nationwide. Arabs own grocery stores in Chicago, as do Lebanese Muslims in Detroit and Toledo.¹³ Soviet Jews operated half the taxi cabs in Los Angeles.¹⁴ In the developing country context, the Chinese in Malaysia, Thailand, the Philippines and other Southeast Asian countries dominate certain lines of commerce, as money lenders, labor contractors, shopkeepers, brokers, and became known as “middleman minorities,” as were the Jews in Europe¹⁵ because of their “middle,” “go-between” positions

⁸ African American entrepreneurs once thrived in Tulsa, Oklahoma, and the city’s black community of Greenwood was a center of black businesses. JOHN SIBLEY BUTLER, SELF-HELP AND ENTREPRENEURSHIP AMONG BLACK AMERICANS 209-17 (1991). See *infra* notes 317-327.

⁹ Studies show that Cuban businesses in Miami, for example, buy inputs from other Cuban firms, work on the products, then sell them to other Cuban firms which then sell at retail. See generally Kenneth L. Wilson and Alejandro Portes, *Immigrant Enclaves: An Analysis of the Labor Market Experiences of Cubans in Miami*, 86 AMERICAN J. OF SOCIOLOGY 297 (1980).

¹⁰ WERNER SOMBART, THE JEWS AND MODERN CAPITALISM 33 (1953)

¹¹ LIGHT & GOLD, *supra* note 7, at 20.

¹² See generally Edwin McDowell, *Hospitality is Their Business*, N.Y. TIMES, May 21, 1996, at 1D.

¹³ IVAN LIGHT & EDNA BONACICH, IMMIGRANT ENTREPRENEURS 439 n.4 (1988).

¹⁴ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 439 n.4 (1988).

¹⁵ HOWARD PAUL BECKER, MAN IN RECIPROCITY 225-37 (1956). The term “middleman minority” originally referred to ethnic minorities who were market traders in precapitalist societies. Middlemen are marginal people who specialize in trading and reside in global diasporas, for example, the overseas Chinese, Jews, Lebanese. COHEN, GLOBAL DIASPORAS, *supra* note 2, at 101-04. Early works by a number of scholars study the role middleman minorities play in the economic structure of many countries and its impact on ethnic relations

between producer and consumer, owner and renter, elite and masses, employer and employee. As noted, “[c]apital and labor are often organized along ethnic lines. Fukienese entrepreneurs in Hong Kong, Malayalee clerks in Bombay, and Ibo plantation laborers in Equatorial Guinea were all mobilized into their economic activity on the basis of ethnic affinity.”¹⁶

These minority groups have established an ethnic economy¹⁷ in different countries, often by relying on group cohesiveness and homogeneous networks to create economic benefits for group members. To the extent that they are created by immigrants, some ethnic economies may also benefit from the diaspora’s linkages that continue to be maintained, culturally and economically, with homeland institutions.¹⁸ Sociologists have noted the tendency to equate members of one’s ethnic group with that “inbred group of near or distant kinsmen whom one knows as intimates and whom therefore one can trust. One intuitively expects fellow ethnics to behave at least somewhat benevolently toward one because of kin selection, reinforced by reciprocity. . . .

internationally. *See generally* HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY GROUP RELATIONS (1967); R.A. SCHERMERHORN, COMPARATIVE AND ETHNIC RELATIONS (1970). *See also* ABNER COHEN, CUSTOMS AND POLITICS IN URBAN AFRICA 14-25 (1969) (describing the mercantile activities of Armenians, overseas Chinese, Gypsies, Sikhs in East Africa, Hausa of Nigeria).

Although African Americans have not generally been viewed as part of the middleman minority tradition, this is due to neglect, some scholars have argued, rather than historical fact. According to John Sibley Butler, a professor of sociology at the University of Texas, at Austin, the adjustments to America of the “*black bourgeoisie, black Brahmins, black elite, and the black upper class*” (italics in original) “bears a striking resemblance to middleman minorities throughout history.” BUTLER, *supra* note 8, at 236 (defining the “Afro-American middleman group as consisting of those individuals who were entrepreneurs and professionals of the old segregated economy”); Joel Kotkin, *The Reluctant Entrepreneurs*, INC., Sept. 1986, at 81 (discussing the history of the black merchant class in the North and South of the U.S., despite the fact that “by law or by tradition, black businesses were forced to operate within the narrow limits of an all-black economy” rather than “break out” to serve non-black clientele; West Indian blacks who came to the U.S. were particularly entrepreneurial, with a business tradition that was not destroyed by slavery because the West Indian slaves were not under the complete control of the masters but were able to tend their own private plots and sell their surplus in the market; by 1901, they owned 20% of Manhattan’s black businesses).

¹⁶ HOROWITZ, *supra* note 3, at 8.

¹⁷ The term “ethnic economy” is a more general term than “ethnic enclave,” which refers to a type of ethnic economy with ethnic businesses that are spatially or geographically clustered, or “ethnic niche” which is used to mean the concentration of ethnic business owners in certain lines of business.

¹⁸ *See, e.g.*, Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1012-19 (2001). Professor Chander discusses how homeland governments appeal to their diasporas for financial, investment, and charitable support. This article touches on the relationship between diasporas and the homeland institutions from the reverse angle – it looks at how homeland institutions have provided support for diasporic ethnic economies in the immigrants’ adopted countries. *See infra* notes .

Fellow ethnics are, in the deepest sense, ‘our people.’”¹⁹

The existence of the ethnic boundary, delineating insiders and outsiders, with preferential policies favoring “us” and excluding “them” has been and remains an established fact of life. To the extent that such old-fashioned preferences exist in developing countries, it is presumed that they are transitory and that the advancement of modern capitalism would make such practices obsolete.²⁰ To the extent that such ethnic preferences are practiced by ethnically homogeneous groups in modern, economically developed countries such as the U.S., they tend to be viewed as particularly anomalous; they are thus rarely acknowledged openly, overshadowed by the prevailing ideal of liberalism and its emphasis on diversity, universalism, and assimilation.²¹ In the U.S., in the case of African Americans in particular, “[t]o even admit that Afro-Americans have a business tradition was congruent with interfering with the process of integration.”²²

Indeed, although sociologists have long noted this phenomenon,²³ legal scholars have more or less ignored this last form of preferential policy and have devoted their attention to studying *government preferences* instead. For example, there is, in recent years, among U.S. law and

¹⁹ PIERRE VAN DEN BERGHE, *THE ETHNIC PHENOMENON* 25 (1981)

²⁰ H.H. GERTH & C. WRIGHT MILLS, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 189, 215 (1958); WERNER SOMBART, *supra* note 10, at 33. *See also* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* 1003, n. 177 (1995). Max Weber, for example, had remarked that modern capitalism required a radical break from traditionalism and ethnic capitalism. MAX WEBER, *BASIC CONCEPTS IN SOCIOLOGY* 109, 251-52 (1969) To the extent that a group’s preferences for its members have been studied by legal scholars at all (as opposed to sociologists), they have generally been viewed as a primitive, personalized mode of exchange that will disappear once institutional reforms are put in place. *See* Davis, Trebilcock & Heys, *supra* note 3, at 332-33 for a discussion of this argument by proponents of New Institutional Economics.

²¹ *See* J. Higham, *Introduction: The Forms of Ethnic Leadership*, in *ETHNIC LEADERSHIP IN AMERICA* 14 (J. HIGHAM ED. 1979) (“Intrinsically, the ethnic group is a link with the past and a bulwark of stability. It depends on instinctive sympathies and ancestral loyalties of a wholly nonrational kind. Modernization, on the other hand, demands rationality, calculation, progress, and material incentives. It brings deracinating forces into the ethnic group and sets up an inner tension between ‘modern’ techniques and ethnic loyalty.”).

²² BUTLER, *supra* note 8, at 274. *See also* Joseph Perkins, *Creating a Climate for Black Business* (Heritage Foundation Reports, Jan. 1990), p 65 (describing the tradition of black enterprise in the U.S.).

²³ *See, e.g.*, Edna Bonacich, *A Theory of Middleman Minorities*, 38 *AMERICAN SOCIOLOGICAL REV.* 583 (1973); WALTER ZENNER, *MINORITIES IN THE MIDDLE* (1991); COHEN, *CUSTOM AND POLITICS IN URBAN AFRICA*, *supra* note 15; LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13; Howard Aldrich and Roger Waldinger, *Ethnicity and Entrepreneurship*, *ANNUAL REV. OF SOCIOLOGY* 16 (1990); BONACICH & MODELL, *supra* note 7.

development scholars, express support for law reform initiatives, adopted by countries such as Malaysia, that favor ethnic majorities through government-instituted “ethnically conscious interventions into the market” in order to manage ethnic tensions by imposing restrictions on the economically dominant minorities and preferences for the politically dominant majority.²⁴ There is also a vigorous body of scholarship among constitutional scholars that examines, whether to support or to oppose, *government* preferential policies for minorities in the U.S.²⁵ Indeed, to the extent that preferential policies are promoted and pursued in the U.S., the liberal consensus among supporters dictates that they are to be pursued by the government, within the ambit of the law, whether instituted legislatively, administratively, or judicially, and in furtherance of legitimate liberal objectives such as integration, assimilation, and equality.

As I argue in this Article, this emphasis has crowded out other forms of “affirmative action” or preferential practices engaged in by members of the disadvantaged groups themselves – a fourth category of preferential policy in addition to the three briefly mentioned at the beginning of the Article. The liberal consensus in modern, developed countries assumes, indeed expects, immigrants and/or ethnic minorities to uncluster and disperse in pursuit of individual economic opportunities offered by the mainstream labor market – where modern, contractual, and more “objective” criteria prevail over the pre-modern, ascriptive bases of affiliation that define the very essence of the separate ethnic economy. In the mainstream universe away from the ethnic economy are the promises of equal treatment, perhaps government-mandated preferences for certain government-designated ethnic groups, and perhaps even *protection from* other groups’ (more insular, efficient, and productive) ethnic economies.

Accordingly, there are several reasons why ethnic economies have not been comprehensively addressed in U.S. legal scholarship. First, intellectual support for ethnic economies may be viewed as favoring segregation and interfering with the objectives of integration. Second, in this

²⁴ See, e.g. Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L. J. 1, 47-56, 62-63 (1998).

²⁵ For examples of academics supporting affirmative action in the U.S., see, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Silas Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977). For examples of academics opposing affirmative action, see, e.g., William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (1975).

modern age, clannishness and tribalism have generally been viewed as taboos by the outside world. Third, even among supporters of ethnic economies, there is a degree of anxiety and perhaps embarrassment about projecting a sense of “separateness” or “foreignness” to the mainstream or native population. Fourth, a focus on ethnic economies might also highlight a more complex picture of race and ethnicity, especially in a country such as the U.S., because it would force one to look beyond the black-white dichotomy – where whites are viewed as the group against which coalitions of united minority groups must struggle, or alternatively, the group minorities are expected to assimilate into. Indeed, studying ethnic economies may mean studying inter-group relations and competition, among minority ethnic groups as each constructs its own ethnic economy and prefers “its own.”

There is a venerable corpus of scholarship that holds assimilation up to be a liberal or constitutional value.²⁶ But for some ethnic groups, minority status, especially if coupled with visible ethnic differences and hence the presumption of “foreignness,”²⁷ assimilation is not always possible and certainly not possible in the first few generations. Furthermore, from an economic standpoint, assimilation into the general labor market is unlikely to provide enough jobs for all seekers. Most likely then, in the U.S., for example, the “burden of scarcity falls most heavily upon the less assimilated or acceptable white groups, visible minorities, non-Christians,

²⁶ See, e.g., Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 87-88 (1996) (viewing assimilation as a constitutional value that reconciles pluralism with justice); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L. J. 485, 487 (1998) (describing the bias in favor of assimilation in equal protection jurisprudence); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) (favoring recognition of group identity as a way of assimilating cultural minorities into American society).

²⁷ See, e.g., Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People”*: A Review Essay on *Citizenship Without Consent*, 76 OR. L. REV. 233, 252 (1997) (describing the imposition of perpetual “foreignness” on Americans of certain ethnic groups); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is the Law the Way to Go?* 76 OR. L. REV. 347, 582-58 (1997) (describing the Latino and Asian American experiences as “foreigners” in the U.S.); Kevin R. Johnson, *Fear of an “Alien Nation”*: *Race, Immigration, and Immigrants*, STAN. L. & POL’Y REV., Summer 1996 at 111; Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism*, 81 CALIF. L. REV. 863, 869-876 (1993) (describing historical and current movements to limit immigration and exclude those considered racially and culturally “foreign.”).

refugees, and immigrants.²⁸ For members of these transitional or marginal groups especially, who may lack mainstream advantages, turning inward and utilizing available ethnic resources to engage in community ethnic preferences within the ethnic economy will be crucial for their economic well-being.²⁹

Part I briefly surveys the wide range of government-mandated preferential schemes adopted by a number of countries in the world. Because category one (majority preferences in majority economies) is no longer practiced as an official policy by any country, I will limit my discussion to the other forms of government preferences still widely used today – first, minority preferences in majority economies (as illustrated by examples drawn from the U.S. and India³⁰) and second, majority preferences in minority economies (with examples drawn from Malaysia³¹ and Nigeria³²). A comparative perspective is useful to contrast the preferential practices adopted by other countries with those in the U.S., and to view them not singularly but comparatively, as part of an international continuum. The preferential policies described in this section are those undertaken or promoted by the state to favor certain designated ethnic groups, whether ethnic

²⁸ LIGHT & GOLD, *supra* note 7, at 52. See also John Sibley Butler, *Myrdal Revisited: The Negro in Business*, DAEDALUS, Jan. 1995, at 124 (describing the rival strategies that African Americans adopted following the Civil War: one, which recognized the reality of discrimination and segregation and focused on the development of independent black business enterprises, and the other, which aspired to the tradition of European ethnic groups, that of integrating with and joining the American workforce).

²⁹ See SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 90. This fourth type of preferential policy need not depend on governmental action, nor “await other people’s conscience rather than group self-interest.” Indeed, an economic development strategy that focuses on a “jobs-only model will place residents in a situation where the jobs might once again leave their community. Also, jobs are associated with a degree of credentials. Entrepreneurship, on the other hand, levels the playing field by placing an emphasis on the entrepreneurial spirit.” John Sibley Butler, *Entrepreneurship and the Advantages of the Inner City*, REV. OF BLACK POLITICAL ECON., Sept. 22, 1995, at 39 (No. 2-3, Vol. 24).

³⁰ I have chosen India because it is the first country to have adopted minority preferences – under the British colonial government and upon independence, as explicitly provided for in its Constitution. SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 90.

³¹ Malaysia was chosen because the “Malaysian program is as extensive as any, and it has its roots, though not all of its branches, in the Malaysian constitution.” HOROWITZ, *supra* note 3, at 654. The claim for preference is based on “indigenusness.”

³² Nigeria was chosen because it is the most populous country in Africa. Its preferential policy is also worth studying because it is framed in territorial terms (northernization), although the preference is really based on indigenusness and ethnicity.

majorities or ethnic minorities.

As a contrast to Part I, Part II examines preferential policies that are practiced by and among the ethnic groups themselves – outside the state’s formal framework. These group preferences are those that underlie and essentially define the ethnically homogeneous economy and its subvariants – the ethnic enclave economy and the ethnic niche (the ethnic economy generally). Where appropriate, Part II also takes a comparative perspective and looks at such ethnic trading networks in the U.S. and other countries, developing and developed. Using theories developed in political science, sociology, anthropology and new institutional economics that examine the ways social network structures – the tribe, clan, or kin – facilitate economic exchanges, Part II explores how an ethnic group, as a “cultural-bearing unit”³³ and its members may, despite their marginal status in the mainstream economy, create an efficient, self-governing economic order and produce cooperative outcomes. To the extent that such group practices have led to the creation and maintenance of certain dominant entrepreneurial ethnic minorities, recent law and development scholarship has advocated the use by governments of ethnically conscious “corrective” measures to restrict their dominance. This Article critically questions the use of government-mandated preferences for government-designated groups to constrain the entrepreneurial tendencies of certain ethnic groups – either by destroying their ethnic economies (in the name of integration) or by restricting their entrepreneurial activities to achieve a semblance of economic parity.³⁴

Although law and development scholars have argued in favor of government preferences for ethnic majorities in economies dominated by minorities, and although constitutional scholars have argued for and against the use of government preferences,³⁵ neither has addressed the sort of private, intra-ethnic-group preferences examined in this Article. Part III asks how the law should deal with the preferential practices that inform and underlie the ethnic economy. The economic

³³ FREDRIK BARTH (ED), *ETHNIC GROUPS AND BOUNDARIES* 9 (1969)

³⁴ A strong case may be made, on the other hand, for policies that work alongside the market, for example, general investment in education, health care, progressive taxation – to reduce ethnic disparities in wealth. This is different from preferential policies that aim to restructure the market activities of certain groups because of their identity as members of an ethnic group.

³⁵ *See supra* notes 3, 24, 25.

leverage that exists favorably for members of an ethnic group depends on the existence of the ethnic boundary dividing insiders from outsiders, with insiders being treated better, more specially than outsiders. Although the discussion in Part III and the sketch of alternative approaches provided therein bear relevance generally to the issues that are common among other countries with ethnic minorities, I will focus for purposes of illustration on the laws of the U.S. for two reasons. First, it is not feasible for an Article of general scope such as this one to delve into the laws of many countries, each with different historical and cultural backgrounds. Second, a focus on the U.S. in Part III allows the Article to discuss economic development generally and ethnic capitalism particularly outside of its more conventional, developing-country context.

What may be termed “mutual self-help” might also be deemed “nepotism,” “favoritism,” or “communalism.” Part III looks at a variety of approaches that a country may adopt in dealing with the ethnically conscious practices of certain ethnic groups, ranging from holding that such practices are “beyond the pale” – in the sense of being beyond acceptability, or alternatively, “beyond the pale” in a different sense – that such practices should be left alone, not necessarily supported by the law, but certainly beyond the reach of the law. Overall, the Article aims to demonstrate the following: 1) that there is a wide range of ethnically-conscious preferential practices that currently exist in many countries, without government support and hence outside the framework of the law; and 2) that these practices, engaged in by private groups, should, for the most part, be allowed to exist within the “pale” twilight of the law. Indeed, strictly applying the antidiscrimination laws that exist in many countries would break up such practices and would erode the very ethnic economies that have, historically and presently, provided marginal groups with a degree of economic comfort and stability. On the other hand, explicitly legalizing such practices, by bringing them within the protective jurisdiction of the law, might also create its own sets of problems, such as promoting ethnic rivalries and threatening ethnic balkanization of the country.

I. A Comparative Look at Government-Mandated Preferential Policies

This section briefly examines preferential policies such as those practiced in the U.S. and India to help minorities in majority economies, and those adopted by Malaysia and Nigeria, for

example, to help majorities in minority economies. As history has shown, ethnicity³⁶ and ethnic relations can, all too easily, become a problem politically and economically.³⁷

Even as the world has become economically integrated and more transnational, it has also become increasingly susceptible to the tug and pull of subnational forces such as those posed by ethnic conflicts and divisions. Countries with significant minorities have adopted a range of government policies to manage ethnic or racial relations. Certainly the policies adopted – “affirmative action” in the U.S., power-sharing and governmental set-asides in India, and various arrangements to achieve majority preferences and restrain minority-group economic dominance in Malaysia and Nigeria – are developed within the particular context of the countries involved, such as historical legacy, precolonial and colonial, slavery, group aspirations and fears, economic and political factors, legal traditions. My purpose in including this discussion is to juxtapose and contrast the more well-known preferential policies enacted by governments to benefit groups designated for differential treatment with preferential policies maintained by some ethnic groups to benefit themselves, as described in Part III.

A. Minority Preferences in Majority Economies

1. The United States

In the U.S. there is essentially an economically and politically dominant majority (whites) on

³⁶ The Article uses a broad definition of ethnicity. An ethnic group “is a human population that has a name and thinks of itself as a group; possesses a common ancestry, historical ties, and historical memories; and shares a culture, which can be based on a combination of race, language, religion, laws, customs, institutions, dress, music, crafts, and food.” Michael E. Brown and Sumit Ganguly, *Introduction*, in MICHAEL E. BROWN & SUMIT GANGULY (EDS.) *GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC* 13 (1997). As used in the Article, “ethnic groups will include both majority and minority communities, . . . immigrants and migrant workers.” *Id.* See also HOROWITZ, *supra* note 3, at 53 (ethnicity embracing “groups differentiated by color, language, and religion; it covers ‘tribes,’ ‘races,’ ‘nationalities,’ and castes.”).

³⁷ There are an estimated 3000 to 9000 ethnic communities in the world. JAMES MINAHAN, *NATIONS WITHOUT STATES: A HISTORICAL DICTIONARY OF CONTEMPORARY NATIONAL MOVEMENTS* xvi (1996). Approximately 90 percent of the states in the international system are ethnically heterogeneous, with ethnic minorities constituting more than five percent of the total population. David Welsh, *Domestic Politics and Ethnic Conflict*, in MICHAEL E. BROWN, (ED.), *ETHNIC CONFLICT AND INTERNATIONAL SECURITY* 45 (1993). Of the 127 largest states, seventy-five percent contain significant minority groups within their borders (excluding groups with fewer than 100,000 members or constituting less than one percent of the population of the country at issue). TED ROBERT GURR, *MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICTS* 10-11. It has been estimated that at least 200 minority groups are suffering systematic discriminatory treatment and demanding political self-determination. GURR, *supra*; MINAHAN, *supra*, at xvi-xvii.

the one hand and other less dominant ethnic minorities on the other.³⁸ Although the U.S. is increasingly diverse ethnically, ethnic relations in the country is framed primarily in terms of blacks and whites.³⁹ The emotionally powerful legacy of slavery and Jim Crow segregation have meant that the African American experience has dominated the way ethnic relations are viewed, analyzed, and understood in the U.S. Other ethnic groups that wish to have preferential policies also apply to them have usually analogized their situations to that of blacks. And affirmative action as understood today in the U.S. was designed to address the disadvantages and subordination of African Americans particularly, given the institution of slavery and the failure of Reconstruction.⁴⁰

Perhaps because of long-established antidiscrimination norms,⁴¹ and “unlike the preferential policies in some other countries, which commence on a specific date for specific benefits in specific sectors, group preferences in the U.S. have emerged gradually and unevenly, and not

³⁸ Data provided by the US Department of Commerce demonstrate that as of 1995, the median household income was \$32,960 for whites, \$19,533 for blacks, and \$22,886 for Hispanics. The ethnic minority group whose median household income surpasses that of whites is Asian/Pacific Islanders with a median household income of \$38,347. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S.: 1995, at 472 (1995). See also MELVIN L. OLIVER & THOMAS M SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 85-86 (1995).

³⁹ As the Indian Trinidadian writer, Shiva Naipaul observed about race relations in Africa when he made his East African journey in 1978, the Indian presence there, though deeply rooted and significant, is more or less neglected by scholars and commentators: “The assumption has always been that it is only the relationship between black and white that really matters. . . . Marginality was thrust upon the Indian. Both black and white could regard him as an outsider intruding into *their* special relationship.” SHIVA NAIPAUL, NORTH OF SOUTH 109 (1979). And it is similarly so in the U.S.

⁴⁰ See OLIVER & SHAPIRO, *supra* note 38, at 12-15, 35-37. It was “common knowledge that the Reconstruction Amendments were designed to ameliorate the condition of Blacks” who were “a special object of protection.” Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287, 1295 (1982)

⁴¹ See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”); *Shaw v. Reno*, 113 S.Ct. 2816, 2824 (“Racial classifications threaten to stigmatize individuals by reason of their membership in a racial group”). Title VII of the Civil Rights Act as enacted in 1964, 42 U.S.C. section 2000e-(a)(1) provides that “No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in any program or activity receiving Federal financial assistance.” 42 U.S.C. section 2000(d).”

always openly.”⁴² In 1965, with Executive Order 11246, President Lyndon Johnson created the Office of Federal Contract Compliance Programs (“OFCCP”) to ensure that private firms doing work for the federal government comply with the principle of “nondiscrimination” and not engage in any racial discrimination. In addition, the Executive Order stated that “[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.”⁴³ Over time, however, the original use of the term “affirmative action” evolved to mean something rather different, not treatment without regard to race, but with full regard to and consciousness of race.⁴⁴

Over the years since Executive Order 11246, then, distinctions on the basis of race and preferential treatment on that basis have, in the U.S., been part of the understanding of affirmative action in various areas of life.⁴⁵ For example, identification and classification by race was undertaken in order to determine who would be eligible first for on-the-job training;⁴⁶

⁴² SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 103.

⁴³ See Executive Order No. 11126, 3 C.F.R. 339, 340 (1964-1965), *reprinted in* 42 U.S.C. section 2000(e) (1994).

⁴⁴ For an insightful discussion of the evolution of this original meaning of affirmative action to the current understanding, see William W. Van Alstyne, *Affirmative Actions*, 46 WAYNE LAW REV. 1517, 1527-30 & n.10 (2000). This position has many ardent supporters. Some believe that policies founded on race consciousness now are necessary to the attainment of color blindness in the future. See, e.g. *Regents of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part) (“in order to get beyond racism, we must first take account of race.”). See, e.g., Martin J. Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 YALE L.J. 1033, 1045-48 (1991); Reva B. Siegel, *In the Eyes of the Law: Reflections on the Authority of Legal Discourse*, in LAW’S STORIES 225, 330 (PETER BROOKS & PAUL GEWIRTZ, EDS. 1996); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 954 (1993).

⁴⁵ For a critique of this evolution, see Van Alstyne, *supra* note 25, at 809 (“we shall not see racism disappear by employing its own ways of classifying people and measuring their rights.”).

⁴⁶ *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The Supreme Court held that the employer had acted lawfully under Title VII in preferring black employees for admission to training programs, on the grounds that such preference was voluntary and benign – even if the employer’s plan was in fact adopted by the employer only after a government agency had threatened to debar the employer from federal contracts if it did not increase its skilled minority representation. The Court interpreted Title VII to permit programs voluntarily adopted by employers because the statute only stated that it did not “require” such programs. There was no constitutional issue because the case did not involve a challenge to an affirmative action program undertaken with state action.

who would be promoted;⁴⁷ who would be laid off first;⁴⁸ who would be eligible for public housing;⁴⁹ for admission to a state university medical school;⁵⁰ or a state university law school.⁵¹

The federal government has used racial classifications to determine which firms would be entitled to participate in public works projects. One program in particular, struck down by the Supreme Court in *Adarand Constructors, Inc. v. Peña*,⁵² was established pursuant to section 520 of the Small Business Act (“SBA”), in which federal agencies are “to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals.”⁵³ The program involved the applicable Subcontracting Compensation Clause of the SBA, which provides that “[m]onetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged

⁴⁷ Local No. 93, *International Association of Firefighters v. Cleveland*, 478 U.S. 501 (1986). The Court held that section 706(g) of Title VII of the Civil Rights Act did not preclude a federal court from entering the consent decree between the city and an organization of black and hispanic firefighters requiring a city’s fire department to divide promotions between minority and nonminority firefighters.

⁴⁸ *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), on remand 762 F.2d 1011 (6th Cir. 1985) (overturning lower court orders that had required a city to lay off white before black workers more recently hired and with less seniority because the Court held that Title VII allowed employers to use a seniority system that had an adverse impact on minority employees, absent proof of discriminatory intent).

⁴⁹ *Otero v. New York State Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

⁵⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Four of the nine Justices held that the university’s use of race resulting in Bakke’s exclusion was forbidden.

⁵¹ *Hopwood v. Texas*, 78 F.2d 932 (5th Cir.), *cert. denied*, 518 U.S. 1083 (1996).

⁵² 515 U.S. 200 (1995). The case was remanded to the lower courts to decide whether the race-based component of the Department of Transportation’s Disadvantaged Business Enterprise could meet the strict scrutiny standard of review. The Court of Appeals for the 10th Circuit had found that the program was constitutional under the department’s new regulatory framework. The U.S. Supreme Court granted cert, but subsequently dismissed the case after argument. *See* 122 S.Ct.511 (Nov. 27, 2001), cert. dismissed as improvidently granted.

⁵³ *Adarand*, 115 S.Ct at 2101 (quoting 15 U.S.C. 644(g)(1)). The SBA “defines socially disadvantaged individuals as those individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities,” *Adarand*, 115 S.Ct at 2102 (quoting 15 U.S.C. 637(a)(5)), and “economically disadvantaged individuals as those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” *Adarand*, 115 S.Ct at 2102 (quoting 15 U.S.C. 637(a)(6)(A)).

individuals.”⁵⁴ If a contractor requests payment and furnishes evidence of the subcontractor’s certification as a disadvantaged business enterprise, the contractor will be paid an amount equal to “10 percent of the final amount of the approved . . . subcontract, not to exceed 1.5 percent of the original contract amount.”⁵⁵ The Supreme Court reversed the lower courts and required that strict scrutiny be used to evaluate race-based federal programs and ensure they are narrowly tailored measures that further compelling governmental interests.

Affirmative action programs, as Justice O’Connor noted in *Adarand*, “implicate a complex scheme of federal statutes and regulations.”⁵⁶ Indeed, in addition to the SBA at issue in *Adarand*, there are multiple other federal laws and regulations that use race or ethnicity as a basis for decisionmaking.⁵⁷ However, following *Adarand*, various branches of the federal government

⁵⁴ This portion is addressed by the *Adarand* Court at 115 S.Ct. , at 2103-04. Contracts awarded by the Department of Transportation agencies are required to include the Subcontracting Compensation Clause and the following provision: ““The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.” 115 S.Ct at 2102 (quoting 15 U.S.C. 637(d)(2), (3)).

⁵⁵ This portion is addressed by the *Adarand* Court at 115 S.Ct. , at 2103-04.

⁵⁶ 115 S.Ct. at 2118.

⁵⁷ The Federal Acquisition Regulation (“FAR”), for example, is concerned with providing small business concerns and small business concerns owned by “socially and economically disadvantaged individuals” (including women) the opportunity to participate in federal contracts. 48 C.F.R. 52.219-8(a) (1995). Business concerns that qualify as disadvantaged are those where at least fifty-one percent are owned and controlled by disadvantaged individuals, or an economically disadvantaged Indian tribe or Native Hawaiian Organization. 48 C.F.R. 52.219-8(c).

The Department of Defense has also established a five percent annual contracting goal for disadvantaged concerns, such as historically black institutions of higher education and other minority institutions. 48 C.F.R. 219.000. Other Department of Defense programs include the so-called “rule of two” set-aside policy for small, disadvantaged businesses (subsequently suspended after *Adarand*, *see* Defense Federal Acquisition Regulation Supplement, 60 Fed. Reg. 54,954 (Oct. 27, 1995) (to be codified at 48 C.F.R. pts. 218, 252) (suspension of disadvantaged business set-asides effective October 23, 1995). The “rule of two” policy means that if two or more qualified disadvantaged businesses were available to bid for a Defense prime contract, then that contract must be set aside for the disadvantaged business, as long as the price was not more than ten percent above fair market price. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 1207, 100 Stat. 3816, 3973-74 (1986) (codified as amended 10 U.S.C. 2301) (1994)).

The Department of Transportation’s Intermodal Surface Transportation Efficiency Act (“ISTEA”), Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified as amended in scattered sections of titles 23, 49, and other titles of U.S.C.), requires that ten percent of transportation contracts be allocated to disadvantaged enterprises. 49 C.F.R. pt 23 subpt. d; 23.61(a) (1995)

There are also specific preferences for Native American-owned businesses that have been incorporated into various federal regulations. Native Americans are presumed by the SBA to be socially disadvantaged and thus

reassessed its impact on existing preferential policies. The Department of Justice issued a Memorandum to General Counsels in June 1995 to reevaluate federal programs that use race or ethnicity as a basis for decisionmaking to ensure compliance with the Adarand directive.⁵⁸ In May 1996, the Department of Justice followed with a comprehensive set of “Proposed Reforms to Affirmative Action in Federal Procurement” designed to tailor race-based affirmative actions to the requirements of Adarand.⁵⁹ The Proposed Reforms state that even in a post-Adarand world, “under the reformed structure, the federal government will generally have authority . . . to use several race-conscious contracting mechanisms.”⁶⁰ The Office of Federal Contract Compliance Programs (“OFCCP”) released its Notice Reaffirming Affirmative Action Goals in Light of Adarand Decision,⁶¹ in which it “reaffirms longstanding policy . . . that affirmative action program goals under Executive Order 11, 246 are to be used as a tool to aid in breaking down barriers to equal employment opportunity for women and minorities without impinging on the rights and expectations of other members of the workforce. Affirmative action program goals are not to be used as quotas which must be achieved through race-based and gender-based

eligible for participation in the 8(a) Program. 13 C.F.R. 124.1005(b) (1995). Native Americans may also participate in the minority subcontracting programs set forth in FAR. 48 C.F.R. 19.703(b) (1995). The Indian Self-Determination and Education Assistance Act provides that any contract or grant made under the Act shall require that preferences in the award of subcontracts be given to Indian organizations and Indian-owned economic enterprises. 15 U.S.C. 450e(b). The Indian Incentive Program, 48 C.F.R. subpt. 26.1 (1995), provides additional compensation to federal contractors – an amount equal to five percent of its subcontractors’ cost if those subcontractors are Native American-owned. 48 C.F.R. subpt. 26.1 (implementing 25 U.S.C. 1544).

⁵⁸ See Memorandum from the Office of Legal Counsel, U.S. Dep’t of Justice, to General Counsels (June 28, 1995), reprinted in Daily Lab. Rep. (BNA) No. 125, at E-1 (June 29, 1995). The DOJ Memorandum sets forth six factors for agencies to consider: 1) whether the governmental entity considered race-neutral alternatives before deciding on using race-based criteria; 2) whether the program allows for a flexible waiver mechanism for individualized consideration of a minority contractor’s bid; 3) whether the program uses race as just one factor among many to be considered; 4) the appropriate method used to compare numerically the targeted objective with the number of minorities in the field; 5) the duration of the program; and 6) the degree and type of burden imposed on non-minority groups.

⁵⁹ 61 Fed. Reg. 26,042 (May 23, 1996).

⁶⁰ 61 Fed. Reg. 26,046.

⁶¹ Office of Federal Contract Compliance Programs, U.S. Dep’t Labor Employment Standards Administration, OFCCP Notice Reaffirming Affirmative Action Goals in Light of Adarand Decision, Administrative Review (Aug. 2, 1995), reprinted in Daily Lab. Rep. (BNA) No. 155, at E-1 (Aug. 11, 1995) (OFCCP Notice).

preferences.”⁶²

Thus, race-based policies are alive and well in the U.S. Although the Court in *Adarand* held that any law using a racial classification, including the benign use of racial classification in a federal affirmative action program, would be invalid under the Fifth Amendment unless the government could show that the classification was narrowly tailored to promote a compelling interest, it expressly left open the possibility that certain race-based programs would be upheld. A strict scrutiny test, the majority wrote, is not “strict in theory but fatal in fact,”⁶³ so that race-based policies undertaken within the constitutional constraints set out by the Court would survive strict scrutiny.

2. India

Unlike the Constitution of the U.S., the Constitution of India explicitly allows an exception from the principle of equality “for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the service under the State.”⁶⁴ The Indian Constitution continued the preferential policies begun under the British colonial government,⁶⁵ in which reservations in public service posts for certain

⁶² OFCCP Notice, at E-1. However, according to the OFCCP, the Office’s use of numerical goals in affirmative action programs under Executive Order 11,246 remains valid after *Adarand*. “*Adarand* established the judicial standard of review applicable to governmental programs that use racial and ethnic classifications as a basis for decisionmaking. Because the Executive Order program does not require decisionmaking based on race or ethnicity, the standards established in *Adarand* do not apply to the use of goals in Executive Order 11,246 affirmative action programs.” OFCCP Notice, at E-1. The OFCCP asserts that to the extent that numerical goals are used, they are “not designed to be . . . quotas,” OFCCP, at E-2, but rather, are only part of “the goal-setting process” OFCCP, at E-2.

⁶³ 515 U.S. at 239, 115 S.Ct at 2119.

⁶⁴ Constitution of India, Article 26, Section 4. *See also* Articles 341-42.

⁶⁵ *See* SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 91; MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA 18-40 (1984) (discussing British colonial policies and the extension of similar policies in the Indian Constitution); Samuel M. Witten, Comment, “*Compensatory Discrimination*” in *India: Affirmative Action as a Means of Combatting Class Inequality*, 21 COLUM. J. TRANSNAT’L L. 353, 359 (1983) (discussing preferential treatment based on group membership under British rule and the inclusion of various Constitutional provisions after independence to incorporate the goals of compensatory discrimination begun during colonial times).

minorities, such as Muslims, Christians, Anglo-Indians, and other communal groups,⁶⁶ were pursued by the British to achieve political balance among the different caste and religious groups⁶⁷ and to pacify Muslims.⁶⁸ Critics viewed British policy as an extension of Britain's divide-and-rule strategy, aimed at pitting different segments of India against one another.⁶⁹

Article 15 of the Indian Constitution prohibits discrimination on the basis of religion, race, caste, sex, or place of birth.⁷⁰ Article 15(4), added to the Constitution in 1951 by the Constitution (First Amendment) Act,⁷¹ however, states that “[n]othing in this article . . . shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.” The Constitution supports an extensive policy of minority preferences in education, civil service positions and legislative seats for the designated scheduled castes and tribes. India thus recognizes the notion of group rights and explicit affirmative action quotas known as “reservations.”⁷² Article 16(4) contains two requirements before a person may be included in the government's reservation plan: the person must be from the “backward class” and must be part of a group “which, in the opinion of the State, is not adequately represented in the services under

⁶⁶ See generally PARMANAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 82 (1985).

⁶⁷ Witten, *supra* note 65, at 359.

⁶⁸ PARMANAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 82.

⁶⁹ Witten, *supra* note 65, at 359.

⁷⁰ The Constitution of India, pt. III, art. 15.

⁷¹ THE CONSTITUTION OF INDIA 6 n. 1 (RAKESH BAGGA ED.) (1987).

⁷² Article 332 of the Constitution provides that “Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes . . . in the Legislative Assembly of every State.” The Constitution of India, pt. XVI, art. 332. Article 330 provides that “Seats shall be reserved in the House of the People for – a) the Scheduled Castes; b) the Scheduled Tribes.” The Constitution of India, pt. XVI, art. 330. The House of the People is the lower House of Parliament. *Id.* pt. V, ch. II, art. 79. Article 46, for example, provides that “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” The Constitution of India, pt. IV, art. 46.

the State.”⁷³

Among the divisions that mark Indian society historically, such as linguistic and religious divisions, caste divisions, between the caste Hindus as a whole⁷⁴ and the scheduled castes (outcastes or untouchables)⁷⁵ remain severe. There is a long history of discrimination against the untouchables.⁷⁶ Although untouchability has been officially outlawed by the Constitution,⁷⁷ social stigmatization remains acute in many parts of the country.⁷⁸ The reservation system is designed to compensate for this through an elaborate quota regime for the untouchables along with other disadvantaged groups within Indian society.⁷⁹ “Politically and administratively, the

⁷³ The Constitution of India, pt. III, art. 16(4).

⁷⁴ The caste system in India consists of four castes or “varnas”: brahmin (priests and scholars), kshatriya (rulers and warriors), vaishya (merchants and farmers), and sudra (menial and servant classes). In addition, there are also the outcastes (outside the four-tier caste system), GALANTER, *supra* note 65, at 7-17.

⁷⁵ Untouchables are considered polluted and assigned menial tasks such as cleaning toilets. GALANTER, *supra* note 65. DECLAN QUIGLEY, *THE INTERPRETATION OF CASTE* 6 (1993).

⁷⁶ At one point, questions were raised as to whether untouchables could even be considered Hindus, because many were in occupations that brought them into contact with animals slaughtered in violation of Hindu rules. GALANTER, *supra* note 65, at 26n. During the independence movement, however, Hindu leaders, wary of the balance of power between Hindus and Moslems, chose to include the untouchables as Hindus. SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 94-95.

⁷⁷ The Constitution of India, pt. III, art. 17. “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offense punishable in accordance with law.”

⁷⁸ Local custom may prohibit an untouchable from commingling in any way with a caste Hindu, so that caste taboos persist. In certain places, untouchables must comply with certain social restrictions that keep them from, for example, dressing or behaving in any way that suggests a dignity beyond what others deem they are to be accorded or entitled, for example, even wearing sandals or riding horses. GALANTER, *supra* note 65, at 15. In 1979, according to the government’s report, a riot was unleashed because “[w]hile taking water from a tap, a Scheduled Caste woman put her water pot on the pot of a caste Hindu woman.” REPORT OF THE COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES (April 1979-March 1980), Second Report (New Delhi, 1981), p. 297.

⁷⁹ To complicate matters, untouchables, as are other castes, are not themselves a homogeneous group because within each caste there are several sub-castes, or pan-varnas. GALANTER, *supra* note 65, at 11. Some untouchables are deemed untouchables in some parts of India but not in other parts, and some subgroups of untouchables themselves practice “untouchability” towards other subgroups of untouchables. Barbara R. Joshi, “*Ex-Untouchable*”: *Problems, Progress, and Policies in Indian Social Change*, PACIFIC AFFAIRS, at 196, 197 (Summer 1980). The latest data show that there were 104,755,000 persons deemed to be Scheduled Castes, making up 15.8% of the population. 1992 OBSERVER STATISTICAL HANDBOOK 55 (B.N. UNİYAL & KUMARESH CHAKRAVARTY EDS., 1992).

operative caste divisions are upper and middle castes, ‘other backward classes,’⁸⁰ and scheduled castes and tribes,⁸¹ all administered by the Commission for the Scheduled Castes and Scheduled Tribes.

India’s policy, referred to by scholars as compensatory discrimination, protective discrimination, progressive discrimination, or special treatment,⁸² is pursued to remedy historic injustices suffered by the lower castes and the outcastes. In accordance with the Constitutional provision that the President may appoint commissions to investigate the conditions of the backward classes,⁸³ the Indian Central Government appointed the first Backward Classes Commission on January 29, 1953,⁸⁴ which presented a list of 2,399 groups it considered backward and offered various recommendations to improve their status.⁸⁵ Subsequently a second Backward Classes Commission, the Mandal Commission (the “Commission”), was appointed in 1978.⁸⁶ Finding that the 3000-year-old caste system remains deeply entrenched in Indian society, the Commission determined that equal treatment of the weak and strong would result in a “mock competition” that would only perpetuate inequality.⁸⁷ The Commission also set forth its criteria

⁸⁰ The Other Backward Classes are those Indians who are neither of the Scheduled Castes nor Scheduled Tribes but are also disadvantaged. See George H. Gadbois, Jr., *Affirmative Action in India: The Judiciary and Social Change*, 8 L. & POL’Y 329, 331 (1986).

⁸¹ Kanti Bajpai, *Diversity, Democracy, and Devolution in India*, in BROWN & GANGULY, *supra* note 36, at 35. GALANTER, *supra* note 65, at 147-53. Scheduled Tribes are Indians who are spatially, socially, and culturally separate from the majority of the population. The designation of a group as a Scheduled Caste as well as a Scheduled Tribe eligible for reservations is made by presidential order. The Constitution of India, pt XVI, art. 341, 342.

⁸² See, e.g., GALANTER, *supra* note 65, at 2-3 (1984).

⁸³ The Constitution of India, pt. XVI, art. 340.

⁸⁴ See *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 506 for discussion of the Commission. The Commission’s recommendations were ultimately rejected by the Parliament on a variety of grounds. See GALANTER, *supra* note 65, at 173.

⁸⁵ GALANTER, *supra* note 65, at 169.

⁸⁶ MANDAL COMMISSION REPORT: MYTH AND REALITY 7 (K.L. CHANCHREEK & SAROJ PRASAD EDS.) (1991) (*hereinafter* REPORT OF THE MANDAL COMMISSION)

⁸⁷ REPORT OF THE MANDAL COMMISSION, *supra* note 86, section 6.2.

for identifying the Other Backward Classes, based on mix of social and economic indicators.⁸⁸

The Commission recommended that in addition to the existing twenty-two and a half percent of reservations for the Scheduled Castes and Scheduled Tribes already set aside by the Constitution,⁸⁹ an additional twenty-seven percent of federal government jobs should be reserved for the Other Backward Classes.⁹⁰ The Commission had originally requested that fifty-two percent of government jobs be set aside on the behalf of the Other Backward Classes, because they make up fifty-two percent of the population.⁹¹ But due to a Supreme Court ruling holding that the total amount of reservations permissible under Article 15(4) of the Constitution must be less than fifty percent,⁹² the percentage that could be legally set must be a figure (twenty seven percent) which, when combined with the twenty two and a half percent already reserved for the Schedule Castes and Tribes, would remain below the constitutional ceiling of fifty percent.⁹³ The reservation policy would be applicable to not just the government but also all private sector

⁸⁸ Factors include: whether most members of society considered the caste or class to be backward; whether they came from a region generally considered to be backward; whether the caste or class relied on manual labor for its livelihood; whether twenty-five percent of the females and ten percent of the males were married at age seventeen or below; where the student drop-out rate was twenty-five percent above average; whether total family assets were twenty-five percent below the state average; and whether drinking water was more than half a kilometer from their homes. REPORT OF THE MANDAL COMMISSION, *supra* note 86, at 296, section 11.23.

⁸⁹ REPORT OF THE MANDAL COMMISSION, *supra* note 86, section 13.10 (noting that the Scheduled Castes and Scheduled Tribes make up approximately 22.5% of India's population and hence 22.5% of government jobs had been reserved for them).

⁹⁰ REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.11. See Kanti Bajpai, *supra* note 81, at 53; Tim McGirk, *Indian Caste War That Made a Man Set Himself Afloat*, THE INDEPENDENT (LONDON), Sept. 28, 1990, at 14; David Wigg, *High-Caste Fury at Plan to Help "Untouchables,"* THE INDEPENDENT (LONDON), Aug. 17, 1990, at 9, available in LEXIS, NEWS LIBRARY, ARCNWS FILE.

⁹¹ REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.11.

⁹² REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.11; Balaji v. State of Mysore, 50 A.I.R. (S.C.) 649, 663 (1963) (holding that the State of Mysore's order reserving sixty-eight percent of the admissions to the engineering and medical colleges and other technical institutions for the Backward Classes, Scheduled Castes, and Scheduled Tribes violated Article 15(4) of the Constitution); Rajkumar v. Gulbarga Univ., 77 A.I.R. (Kant.) 320, 332 (1990) (holding that 33 of the 35 professor positions reserved for the designated groups at a state university was excessive).

⁹³ REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.11.

organization that receive government financial assistance,⁹⁴ including colleges and universities.⁹⁵

For many years, the recommendations were ignored because they were too controversial.⁹⁶ But in 1991, the government of Prime Minister P.V. Narasimha Rao's Congress Party announced its support of the reservation policy.⁹⁷ In 1993, the Supreme Court held that the government's implementation of the Mandal Commission Report was indeed constitutional.⁹⁸

Outbursts of violence broke out all across India after the government announced its decision to implement the Mandal Commission Report. Waves of self-immolation by students were repeated as protest grew over the implementation of the Report.⁹⁹ The protests were fueled

⁹⁴ REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.15.

⁹⁵ REPORT OF THE MANDAL COMMISSION, *supra* note 86, Section 13.16. The original proposals set forth by the Commission were later modified, to exempt the following sectors from reservation: defense, science, technology, and space. See Kanti Bajpai, *supra* note 81, at 56.

⁹⁶ Tim McGirk, *The Battle of the Haves and the Have-Nots: In a Bid to Win Favour Among India's Lower Classes, V.P. Singh Has Dragged the Country to the Brink of a Caste War*, THE INDEPENDENT (LONDON), Oct. 20, 1990, at 25. But in 1990, Prime Minister V.P. Singh announced his government's decision to implement the Commission's recommendation. Barbara Crossette, *A Question Unanswered: Where Is India Headed?*, N.Y. TIMES, Nov. 11, 1990, at 18. "[T]he emergence of the backward classes as an increasingly cohesive electoral bloc changed the government's political calculations." Kanti Bajpai, *supra* note 81, at 55. Singh was later removed from office by Parliament, following the rise of Hindu fundamentalism and widespread negative public reaction to the government's decision to implement the Commission's recommendations. Crossette, *supra*.

⁹⁷ See *Indian Government Increases Job Quotas for Poor*, AGENCE FRANCE PRESSE, Sept. 25, 1991, available in LEXIS, NEWS LIBRARY, ARCNWS FILE.

⁹⁸ *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 578 (1993). Reservations, the Court held, may be supplemented by other means also available under the Constitution, such as concessions, exemptions, and other relaxations, to advance the backward classes. *Id.*, at 540. Overall, the Indian Supreme Court has interpreted the Constitution to affirm preferential policies for the designated disadvantaged groups. In the landmark case in *State of Kerala v. Thomas*, for example, 63 A.I.R. (S.C.) 490 (1976), the Court upheld the State of Kerala's order granting a two-year temporary exemption allowing certain disadvantaged employees to be promoted to higher positions even if they were unable to pass a promotion test. See also Witten, *supra* note 65, at 382-83.

⁹⁹ Mark Fineman, *Students Sacrifice Selves to Protect Caste Privilege*, L.A. TIMES, Oct. 20, 1990, at A1; David Housego, *A Retreat from Modernisation*, FIN. TIMES (LONDON), Sept. 29, 1990, at 6; Michael Byrnes, *India: Government at Risk as Crisis Engulfs Country*, AUSTRALIAN FIN. REV., Oct. 15, 1990, at 1; Tim McGirk, *Indian Caste War That Made a Man Set Himself Alight*, THE INDEPENDENT (LONDON), Sept. 28, 1990, at 14; Christopher Thomas, *Job Quotas Scheme in India Stirs Caste Hatred*, THE TIMES (LONDON), Aug. 25, 1990, at 9, available in LEXIS, NEWS LIBRARY, NON-US FILE; Christopher Thomas, *Hindu Marchers Step Up Pressure on Prime Minister*, THE TIMES (LONDON), Oct. 15, 1990, available in LEXIS, NEWS LIBRARY, ARCNWS FILE; *Indian Government Increases Job Quotas for Poor*, AGENCE FRANCE PRESSE, Sept. 25, 1991, available in LEXIS, NEWS LIBRARY, ARCNWS FILE.

further when Indian police fired tear gas into students surrounding the Indian Parliament building in New Delhi.¹⁰⁰ The mass demonstrations were the worst to strike India since the assassination of Prime Minister Indira Gandhi in 1984,¹⁰¹ causing some to observe that the ensuing violence would prove to be the most formidable in India's history of epic struggles.¹⁰² After supporters of affirmative action set a train on fire, forty people were massacred on the same day, near the city of Hyderabad.¹⁰³

Caste cleavages and class divisions remain severe in India. It is not entirely clear, either, whether the reservations policy has reduced group friction or even has had a significant positive impact on the disadvantaged groups. Indeed, as noted by the preeminent scholar on ethnic conflicts, "[t]he way the preferred group is defined dictates the direction of what might be called the politics of preferential inclusion and exclusion."¹⁰⁴ Hence, as preferences are reserved for "backward classes," so have claims of backwardness increased. In the state of Karnataka, for example, every caste except Brahmins was officially designated "backward," including those from the wealthy landowning class, until that determination was struck down by the Supreme Court.¹⁰⁵ More, rather than less, awareness of divisions and differences seem to result as each group elbows the other in order to make itself fit the governmentally set and defined preferences. In certain states, "employment preferences may also have aroused more ethnic conflict than they assuaged, particularly because proposals for preferences often emanate from 'politicians not as a

¹⁰⁰ Christopher Thomas, *Job Quotas Scheme*, *supra* note 99; see also David Wigg, *High-Caste Fury at Plan to Help "Untouchables,"* THE INDEPENDENT (LONDON), Aug. 17, 1990, at 9, available in LEXIS, NEWS LIBRARY, ARCNEWS FILE.

¹⁰¹ Mark Fineman, *Students Sacrifice Selves to Protect Caste Privilege*, *supra* note 99.

¹⁰² Michael Byrnes, *India: Reeling Under a Wave of Violence, Nihilism and Bitter Fragmentation*, AUSTRALIAN FIN. REV., Oct. 19, 1990, available in LEXIS, NEWS LIBRARY, TXTNEWS FILE.

¹⁰³ Mark Fineman, *Students Sacrifice Selves to Protect Caste Privilege*, *supra* note 99.

¹⁰⁴ HOROWITZ, *supra* note 3, at 657.

¹⁰⁵ HOROWITZ, *supra* note 3, at 657. See also SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 15 ("Fraudulent claims of belonging to the designated beneficiary groups have been widespread and have taken many forms in various countries."). Where preferences were set for tribes, for example, non-Christian tribals in the state of Bihar insisted that Christians be excluded because the latter had been able to claim a disproportionate share of the reserved slots. HOROWITZ, *supra* note 3, at 657.

response to popular demands, but as a means of mobilizing political support.”¹⁰⁶

Furthermore, it is also unclear the extent to which preferences have yielded benefits to the disadvantaged groups.¹⁰⁷ Those who have in fact gained have been from a small elite within the schedule castes and scheduled tribes.¹⁰⁸ This group has tended to reproduce itself because the children of those receiving benefits have gone on to claim reservations themselves.¹⁰⁹ And those who have occupied reserved positions in the country’s legislative bodies have failed to represent effectively the interests of their groups, as those who favored the preferential policies had hoped.¹¹⁰

The Mandal Commission had recommended that the entire system of reservations be reevaluated after twenty years.¹¹¹ Indeed, as noted, “[v]irtually everywhere, policies of ethnic preference are regarded as exceptions, temporary expedients, often within a specified time limit.”¹¹² But rarely have preferential programs in any country, including India, been truly temporary.¹¹³

B. Majority Preferences in Minority Economies

¹⁰⁶ HOROWITZ, *supra* note 3, at 671 (quoting MYRON WEINER & MARY FAINSOD KATZENSTEIN, *INDIA’S PREFERENTIAL POLICIES: MIGRANTS, THE MIDDLE CLASSES AND ETHNIC EQUALITY* 134 (1981)). As noted, in the state of Andhra Pradesh, for example, preferences were reserved for Telanganas. These preferences, adopted as a political response to the rise of a separatist movement in Telangana, have in turn provoked a reactive, separatist demand among the Coastal Andhras. HOROWITZ, *supra* note 3, at 672.

¹⁰⁷ HOROWITZ, *supra* note 3, at 669.

¹⁰⁸ Kanti Bajpai, *supra* note 81, at 54. The same observation about preferential policies around the world was made in SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 15 (“Within the groups designated by government as recipients of preferential treatment, the benefits have usually gone disproportionately to those members already more fortunate.”).

¹⁰⁹ Kanti Bajpai, *supra* note 81, at 54.

¹¹⁰ Kanti Bajpai, *supra* note 81, at 54.

¹¹¹ REPORT OF THE MANDAL COMMISSION, *supra* note , section 13.40.

¹¹² HOROWITZ, *supra* note 3, at 657.

¹¹³ SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 15 (“Preferential programs, even when explicitly and repeatedly defined as ‘temporary,’ have tended not only to persist but also to expand in scope, either embracing more groups or spreading to wider realms for the same groups, or both. Even preferential programs established with legally mandated cut-off dates, as in India and Pakistan, have continued far past those dates by subsequent extensions.”).

1. Malaysia

As historians, economists, and sociologists have long observed, “[i]n a number of countries, neither the demographic majority nor the political majority is dominant in the economy, which is largely in the hands of one or more ethnic minorities”¹¹⁴ These minorities, unlike the Europeans in South Africa, for example, did not achieve economic dominance as colonizers or as part of any foreign conquest. Rather, many arrived in the new countries as “powerless or even persecuted minorities,”¹¹⁵ as coolies or indentured servants,¹¹⁶ or sometimes, as part of a phenomenon referred to as the “middleman minorities”¹¹⁷ and “trade diasporas.”¹¹⁸ Historically, specialized, entrepreneurial minorities have established an important economic presence in their adopted countries, contributing to the “development of trade, money management, and capital accumulation in most of the Old World.”¹¹⁹ Though deemed pariah capitalists by kings and

¹¹⁴ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 41. *See also* THOMAS SOWELL, RACE AND CULTURE 2 (1994) (noting the dominance of India’s Gujaratis in the economy of the countries they migrated to); JANET TAI LANDA, TRUST, ETHNICITY, AND IDENTITY 101-114, 112 (2001) (discussing the ethnically homogeneous middleman groups such as “the East Indians in East Africa, the Syrians in West Africa, the Lebanese in North Africa, the Jews in medieval Europe, and the Medici merchant-bankers in fifteenth-century Florence”; DANIEL CHIROT ANTHONY REID (EDS.) ESSENTIAL OUTSIDERS (1997) (studying the role of the Chinese and Jews in Southeast Asia and Central Europe); CLAUDE MEILLASSOUX (ED.) THE DEVELOPMENT OF INDIGENOUS TRADE AND MARKETS IN WEST AFRICA (1971) (discussing the emergence of minority trade diasporas in West Africa); CLIFFORD GEERTZ, PEDDLERS AND PRINCES: SOCIAL CHANGE AND ECONOMIC MODERNIZATION IN TWO INDONESIAN TOWNS (1963) (discussing Chinese traders and networks in Indonesia); Edna Bonacich, *A Theory of Middleman Minorities*, *supra* note 23 (discussing middlemen minorities).

¹¹⁵ SOWELL, RACE AND CULTURE, *supra* note 117, at 2.

¹¹⁶ COHEN, GLOBAL DIASPORAS, *supra* note 2, at 59-61; THOMAS SOWELL, MIGRATIONS AND CULTURE: A WORLD VIEW 310-14 (1996).

¹¹⁷ Edna Bonacich, *A Theory of Middleman Minorities*, *supra* note 23; SOWELL, MIGRATION AND CULTURES, *supra* note 119, at 27 (“middlemen facilitate the movement of goods from the producer to the consumer, without necessarily physically producing anything themselves.”).

¹¹⁸ COHEN, GLOBAL DIASPORAS *supra* note 2, at 83. Trade diasporas constitute “an interrelated net of commercial communities forming a trade network, or trade diaspora – a term that comes from the Greek word for scattering, as in the sowing of grain. . . . Trade communities of merchants living among aliens in associated networks are to be found on every continent and back through time to the very beginning of urban life.” *Id.* at 83-84 (citation omitted). Diasporic traders were also found in Africa, Anatolia, Mesopotamia, America before Columbus, Armenia, and China. *Id.* at 84.

¹¹⁹ Anthony Reid, *Entrepreneurial Minorities, Nationalism, and the State*, in ESSENTIAL OUTSIDERS, *supra* note 114, at 34.

rulers, they were nonetheless tolerated and on occasion even encouraged to take on crucial “middleman” roles in “protocapitalist activities (moneylending, petty trade, tax farming) denounced by the guardians of social morality.”¹²⁰ Although the Jews in Europe and the Chinese in Southeast Asia are two of the more well-known specialized minorities, many other ethnic groups have migrated from their homeland and through their newly established trading networks, grown to become economically significant in the host countries – for example, the Indians, especially the Gujaratis and Chettyars, as well as the Lebanese and Armenians.¹²¹

To counteract the economic dominance of these minorities, governments concerned about the “indigenous” majority have adopted majority preferential policies on the following grounds: that they require little expenditure and are inexpensive alternatives to ethnic conflicts; that they are necessary to achieve equality among different ethnic groups; and that economic disparities constitute the underlying causes of ethnic conflict.¹²² In Malaysia, for example, the government has adopted a “national affirmative-action program” and “effectively segregated the economy between the indigenous majority, known as *bumiputras* or “sons of the soil” and non-*bumiputras*, primarily ethnic Chinese who have dominated the economy for generations”¹²³ and the Indians,¹²⁴ whose presence predated British colonialism to at least the fifteenth century.¹²⁵ The expansion of commercial activities during British colonialism brought laborers from southern China to work in

¹²⁰ Anthony Reid, *Entrepreneurial Minorities*, *supra* note 119, at 35..

¹²¹ HOROWITZ, *supra* note 3, at 117-18; FRANK H. GOLAY ET AL., UNDERDEVELOPMENT AND ECONOMIC NATIONALISM IN SOUTHEAST ASIA 210-11, 220-23, 251-54(1969); J.S. MANGAT, A HISTORY OF THE ASIAN IN EAST AFRICA 1-26 (1969); COHEN, CUSTOM AND POLITICS IN URBAN AFRICA, *supra* note 15, at 8-9, 14-25); SOWELL, RACE AND CULTURE, *supra* note 117, at 46-47.

¹²² HOROWITZ, *supra* note 3, at 659. “Beneath preferential policies lies a mind-set that sees ethnic conflict as the product of economic differences and ethnic harmony as the result of proportional distribution of all groups at all levels and in all functions of a society.”

¹²³ Steve Glain, *Malaysian Social Experiment Faces Threatening Ripples of Asian Crisis*, WALL ST. J., Apr. 23, 1998, at A15.

¹²⁴ Sumit Ganguly, *Ethnic Policies and Political Quiescence in Malaysia and Singapore*, in BROWN & GANGULY, *supra* note 36, at 233.

¹²⁵ K.S. Jomo, *A Specific Idiom of Chinese Capitalism in Southeast Asia*, in ESSENTIAL OUTSIDERS, *supra* note 114, at 238.

tin mines¹²⁶ and those from India to work on rubber plantations.¹²⁷ An ethnic division of labor developed, with particular ethnic groups overwhelmingly represented in certain occupational categories, as “[o]ccupational segregation . . . conspired with residential, cultural, religious, educational, and language differences to maintain strong ethnic identities that inevitably limited any deep sense of national identity.”¹²⁸ Over time, the success of the Chinese entrepreneurs¹²⁹ in particular provoked deep-seated resentment from the indigenous population.¹³⁰

At independence in 1957, the Malay Constitution, a product of the “grand bargain” with the British who had proposed citizenship for the Chinese and Indians, accorded citizenship to all residents born after Independence Day, but also enshrined the special position of the Malays.¹³¹ The Malays’ claim to legitimacy, like that of many other groups elsewhere, such as the Sinhalese in Sri Lanka, the Assamese in India, the Fijians in Fiji, the Muslims of Southern Thailand, the Kannadigas of Karnataka state in India, the Bakonjo and Baamba of Western Uganda, are based on assertions of indigenesness.¹³²

The Constitution authorizes reservations in public service, education, land, and business

¹²⁶ SOWELL, RACE AND CULTURE, *supra* note 117, at 36-37; K.S. Jomo, *supra* note , at 238-39. Sumit Ganguly, *supra* note 124, at 238.

¹²⁷ K.S. Jomo, *supra* note 125, at 238-39. Sumit Ganguly, *supra* note 124, at 239.

¹²⁸ K.S. Jomo, *supra* note 125, at 240 (“Ethnic identities were strengthened and shaped by colonial policies toward the various communities, and the identities were in turn reinforced by ethnic mobilizations.”). *Id.* Sumit Ganguly, *supra* note 124, at 239- 40.

¹²⁹ SOWELL, RACE AND CULTURE, *supra* note 117, at 83 (“The Chinese in colonial Malaya often began as unskilled laborers on the rubber plantations or in the tin mines. The savings from their earnings on such jobs later enabled them to begin small, precarious businesses which eventually prospered.”).

¹³⁰ SOWELL, MIGRATION AND CULTURES, *supra* note 119, at 182. It is not accurate to point to British preferences for the Chinese as an explanation for indigenous resentment against the Chinese. According to Professor Sowell, the Chinese “in fact had fewer rights and less government-provided education available than did the Malays.” SOWELL, RACE AND CULTURE, *supra* note 117, at 153. *See also* Sumit Ganguly, *supra* note 124, at 240-41 (noting that the Chinese and Indians, viewed by the British as transient, “received an even less beneficent dispensation from the British” who “felt little obligation to educate the members of these communities for professions other than those in which they were engaged.” *id.* at 241).

¹³¹ Sumit Ganguly, *supra* note 124, at 245-46. Constitution of Malaysia, Sections 89, 153.

¹³² HOROWITZ, *supra* note 3, at 202. In fact, however, the Malays are not quite indigenous, as the Orang Asli are the aboriginals who arrived before the Malays. *Id.* at 203..

permits for the Malays, because of their status as “bumiputras,” or “sons of the soil”¹³³ and in order to compensate for the economic backwardness of the Malays vis-a-vis the Chinese.¹³⁴ The basis for the Malays’ claim for preferences changed over time, so that by the late 1980s, with the growing Malay majority, due to higher fertility and lower emigration rates, preferences were based on the need to achieve “an equivalent share of the country’s economic wealth.”¹³⁵ Although “special rights” for Malays were incorporated into the 1957 Constitution, they were seen by many Malays as feeble and inadequate to correct economic inequality.¹³⁶ The government created a special Malay Bank, the Bank Bumiputra, to break Chinese control of the banking industry, and the Federal Agricultural Marketing Authority, to offset the power of rural middlemen,¹³⁷ but the Chinese continued to exercise dominance in different sectors, such as retail business,¹³⁸ capital investment,¹³⁹ and education.¹⁴⁰ The average household income of the Chinese remained approximately twice that of the Malay.¹⁴¹

The National Operations Council (“NOC”), formed to deal with the aftermath of an ethnic

¹³³ HOROWITZ, *supra* note 3, at 654; Sumit Ganguly, *supra* note , at 246.

¹³⁴ Sumit Ganguly, *supra* note 124, at 246; K.S. Jomo, *supra* note 125, at 241.

¹³⁵ K.S. Jomo, *supra* note 125, at 242. The Malays’ status as the majority was assured as well when Singapore, where the ethnic Chinese constituted the majority, was ousted from the Malaysian federation on August 9, 1965. Sumit Ganguly, *supra* note 124, at 251.

¹³⁶ Gordon P. Means, “*Special Rights*” as a Strategy for Development: The Case of Malaysia, *COMPARATIVE POLITICS* 5, no. 1 (October 1972), at 29-61.

¹³⁷ Sumit Ganguly, *supra* note 124, at 251

¹³⁸ The Chinese own more than four-fifths of all retail businesses in Malaysia. SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 46.

¹³⁹ Foreigners own three-fifths of the total corporate equity capital investment in Malaysia in 1970, and the Chinese own approximately three-fifths of the remaining domestically owned investment. SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 46.

¹⁴⁰ If determined on the basis of examination results alone, Malays constituted only 20 percent of those admitted, with the Chinese filling up the remaining 80 percent. The Chinese also received a disproportionate share of science and engineering degrees. During the 1960s, the Chinese received 1,488 Bachelor of Science degrees and 408 Bachelor of Engineering degrees, and the Malays 69 and 4, respectively. SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 46-47.

¹⁴¹ See DONALD R. SNODGRASS, *INEQUALITY AND ECONOMIC DEVELOPMENT IN MALAYSIA* 82 (1980).

riot in 1969,¹⁴² determined that the roots of the violence were to be found in the continuing economic backwardness of the Malays.¹⁴³ An ambitious New Economic Policy (“NEP”) was announced in 1971 with two objectives to be achieved over a twenty-year period¹⁴⁴ – first, “to reduce and eventually eradicate poverty” and second, “to accelerate the process of restructuring Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function.”¹⁴⁵ To achieve the second objective, employment had to be restructured by sector to eliminate the ethnic division of labor; ownership of wealth also had to be altered, so that Malays, who owned less than 1.5 percent of capital assets at the time,¹⁴⁶ were targeted by the government to increase its holdings to 30 percent of corporate sector assets by 1990, with the percentage owned by foreigners decreasing from 65 percent to 30 percent.¹⁴⁷

Under a mandatory corporate restructuring scheme, Malaysian Chinese companies had to set aside 30% of their equity for Malays – “on financial terms very generous to the new shareholders”¹⁴⁸ and usually with no choice about the identity of the Malay recipient of the set-aside.¹⁴⁹ This policy of compulsory corporate restructuring, part of the overall economic

¹⁴² Donald R. Snodgrass, *Successful Economic Development in a Multi-Ethnic Society: The Malaysian Case* 6 (1995), available at <http://www.salzburgseminar.org/index.cfm> and also on file with the author. One of the primary causes of the violence was resentment over Chinese support for opposition political parties such as the new DAP, that favored dismantling of preferential policies. Sumit Ganguly, *supra* note , at 253-57. Riots against the Chinese resulted in approximately eight hundred killed and six thousand homeless. Sumit Ganguly, *supra* note 124, at 254.

¹⁴³ Sumit Ganguly, *supra* note 124, at 255-56. HOROWITZ, *supra* note 3, at 659.

¹⁴⁴ As it was due to expire, the NEP was replaced by the National Development Plan (NDP) in 1990. Although the NDP is not significantly different from the NEP, it strategically emphasized privatization, with the benefits of privatization to be mainly distributed to the Malays. Sumit Ganguly, *supra* note 124, at 257 n. 70.

¹⁴⁵ SECOND MALAYSIA PLAN 1971-1975 1 (Kuala Lumpur: Government Press) (1971).

¹⁴⁶ HOROWITZ, *supra* note 3, at 667. Sumit Ganguly, *supra* note 124, at 261.

¹⁴⁷ SECOND MALAYSIA PLAN 1971-1975, *supra* note , at **PIN CITE**. See also Snodgrass, *Successful Economic Development*, *supra* note , at 7.

¹⁴⁸ HOROWITZ, *supra* note 3, at 667.

¹⁴⁹ JAMES V. JESUDASON, *ETHNICITY AND THE ECONOMY: THE STATE, CHINESE BUSINESS, AND MULTINATIONALS IN MALAYSIA* 137, 141 (1989).

affirmative action to favor the Malays, meant that any company that sought permission to expand or to apply for import or export licenses, must sell thirty percent of its existing shares to Bumiputera-controlled entities or in the alternative, issue new Bumiputera shares to ensure a thirty-percent Bumiputera share ownership.¹⁵⁰ Additionally, “[c]ompanies seeking a listing on the local stock exchange are required to have a bumiputra shareholding of at least 30%.”¹⁵¹

To accomplish the creation of a new business class, the government established several new government agencies. The “National Corporation,” or “Pernas,” were created to buy assets to be held in trust to distribute to Malays¹⁵² and the Urban Development Authority was created to grant Malays a share in development in cities.¹⁵³ In addition, the Ministry of Works and Public Utilities, the primary contractor for government construction, must reserve at least 30 percent of its contracts for Malay firms, defined as those with at least 51 percent Malay ownership.¹⁵⁴ Government-run banks, such as the Bank Bumiputera, and other newly created development banks, increased their lending to the Malay community, so that lending to Malays, which was at 4 percent in 1968, increased to 20.6 percent in 1980 and 28 percent in 1985.¹⁵⁵

The results have been mixed. While loans have increased to Malays, so have default rates. For example, the government organization created to provide credit to small businesses, the

¹⁵⁰ Donald L. Horowitz, *Cause and Consequence in Public Policy Theory: Ethnic Policy and System Transformation in Malaysia*, 22 POL’Y SCI. 249, 266-68 (1989).

¹⁵¹ Glain, *supra* note 123, at A15. CHRISTOPHER ADAM ET AL., ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES 228 (1992).

¹⁵² K.S. Jomo, *supra* note 125, at 242; Sumit Ganguly, *supra* note , at 261 (discussing government investment in public corporations operated and managed by Malays and government investment schemes to attract private Malay investment to such enterprises). *See also* JESUDASON, *supra*, note , at 72. But there are problems associated with this plan. First, lack of capital among Malays may result in only a few Malays being able to purchase the shares, resulting in a concentration of wealth among the Malays. Second, if the shares are distributed at a value below market, the likelihood that they will be quickly resold to non-Malays for capital gains is high. Consequently, “[s]ome state enterprises have transferred their holdings to a national equity corporation, which sells shares to individual Malays in a closely controlled national unit trust.” HOROWITZ, *supra* note 3, at 669. *See also* FONG C. ONN, THE MALAYSIAN ECONOMIC CHALLENGE IN THE 1990S: TRANSFORMATION FOR GROWTH 79 (1989).

¹⁵³ HOROWITZ, *supra* note 3, at 667.

¹⁵⁴ Sumit Ganguly, *supra* note 124, at 262.

¹⁵⁵ Sumit Ganguly, *supra* note 124, at 262.

Council of Trust for the Indigenous People, reported that of the 55,000 loans made to Malay businesses, only 6,000 had been repaid.¹⁵⁶ The bumiputera share of corporate stock at par values, for example, have also increased from 1.5 percent to 15.6 percent between 1969 and 1982, and 19.3 percent in 1990 and 20.6 percent in 1995.¹⁵⁷ At the same time, however, to bypass the requirement that Malays and Malay businesses be preferred, Malay front men, through “Ali Baba” schemes, have been used in license application, land conveyance, share issuance, and contract bids, although their primary involvement in the project is limited to the collection of a fee in exchange for the use of their name.¹⁵⁸ Indeed, the ethnic Chinese have found ways to adjust and at times even benefit from such ethnically targeted restructuring.¹⁵⁹

Preferential policies in areas other than corporate restructuring, such as in educational admissions and employment quotas, have had a serious impact.¹⁶⁰ Following the 1969 riots, the Malaysian Constitution was amended to allow the government control over university admission, resulting in an increase of 39.7 to 52.7 percent of Malay enrollment in degree-level courses from 1970 to 1973.¹⁶¹ To benefit Malays, English-language schools were converted into Malay-language schools, and to increase the number of Malays in higher education, different standards

¹⁵⁶ Sumit Ganguly, *supra* note 124, at 262. SOWELL, RACE AND CULTURE, *supra* note 117, at 110 (noting that the incidence of default is high for government loans made to indigenous Malays). Even a government bank created to lend to Malays in fact extended loans primarily to the Chinese, Indians, and foreigners. SOWELL, RACE AND CULTURE, *supra* note 117, at 110. Many of the loans extended by MARAs, the Indigenous People’s Trust, are also in default, as are many of the Urban Development Authority’s rents. HOROWITZ, *supra* note 3, at 668. Glain, *supra* note 123, at A15 (“Nonperforming loans are estimated by private economists at about 20% of total assets, well above the government’s official 8.7% figure.”).

¹⁵⁷ K.S. Jomo, *supra* note 125, at 244.

¹⁵⁸ HOROWITZ, *supra* note 3, at 666. SOWELL, RACE AND CULTURE, *supra* note 117, at 52. These are known as Ali Baba schemes – Ali standing for the bumiputera front man and Baba the Chinese businessman.

¹⁵⁹ For example, because the new Malay shareholders in Chinese firms are often politically influential, the firms have benefitted from their political connections. Similarly, participating in joint ventures with the Urban Development Authority, and Pernas have helped Chinese firms obtain approval for project they might not otherwise have received.

¹⁶⁰ HOROWITZ, *supra* note 3, at 667.

¹⁶¹ HOROWITZ, *supra* note 3, at 660.

for Malays and non-Malays were set.¹⁶² Educational preferential policies have indeed boosted the number of Malays in secondary and graduate schools,¹⁶³ but they have also resulted in a sharp increase in the number of Chinese students who departed for universities in the West.¹⁶⁴

As the NEP extended preferences in employment, once confined to the public sector, to the private sector as well,¹⁶⁵ quotas were established for Malay employment in commercial and industrial firms. Foreign corporations too must comply with such regulations because investment in Malaysia was conditioned on the creation of quotas for Malays.¹⁶⁶

Again, although these preferential policies were intended to be temporary, like those of India's, they have "become more and more permanent."¹⁶⁷ As "preferences for Malays were made a permanent part of the country's constitution . . . [, they] did not merely persist; they grew stronger in higher education and spread to other sectors of the society."¹⁶⁸ The Malaysian policy, however, had to be modified when the realities of an economic crisis hit the country in 1998 and forced it "to sacrifice programs and policies once considered unassailable."¹⁶⁹ Faced with a heavy debt burden, the government had to ease restrictions on Chinese equity ownership and allow the ethnic Chinese to acquire big stakes in companies with government ties.¹⁷⁰ In fact, the government announced in the midst of the crisis that "it may repeal the spirit, if not the letter, of affirmative action by permitting non-bumiputra companies to acquire a substantial or a

¹⁶² Sumit Ganguly, *supra* note 124, at 257-58. HOROWITZ, *supra* note 3, at 662 (for the Lower Certificate of Education examination for admission to technical high schools, 91.7 percent of non-Malays (Chinese and Indians) scored 3.4 or better in math; 37.1 percent of Malay students did).

¹⁶³ Sumit Ganguly, *supra* note 124, at 260.

¹⁶⁴ HOROWITZ, *supra* note 3, at 661. SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 50.

¹⁶⁵ Sumit Ganguly, *supra* note 124, at 260.

¹⁶⁶ Sumit Ganguly, *supra* note 124, at 260.

¹⁶⁷ HOROWITZ, *supra* note 3, at 678.

¹⁶⁸ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 51.

¹⁶⁹ Joseph Kahn, *Ethnic Chinese in Malaysia Can Buy Big Equity Stakes*, NEW YORK TIMES, Feb. 25, 1998.

¹⁷⁰ Kahn, *supra* note 169.

controlling interest in bumiputra companies.”¹⁷¹

2. Nigeria

Once deemed “Africa’s bastion of democracy and stability,”¹⁷² Nigeria has been marred by ethnic conflicts.¹⁷³ Although Nigeria has no national ethnic majority, the Muslim Hausa-Fulanis of the north are the largest group, making up approximately 30 percent of the population, with the Yoruba of the southwest and the Ibo of the southeast being the next largest.¹⁷⁴ The Hausas were bound by a common religion, Islam.¹⁷⁵ The Yorubas, who shared a common ancestry, prided themselves on their successful resistance to Fulani attempts at conquest, and were organized by chiefdoms.¹⁷⁶ The Ibos were made up of more than 200 subgroups of culturally and linguistically similar communities.¹⁷⁷ These were all disparate African groups who lived in the West African regions that the British consolidated into the colony of Nigeria.

The Muslim groups that controlled the north, the Hausa-Fulanis, had swept south to conquer and convert local people¹⁷⁸ until the arrival of the British halted their conquest.¹⁷⁹ Under British rule, the North and South were treated as two separate protectorates, each with different

¹⁷¹ Steve Glain, *supra* note 123, at A15.

¹⁷² ARTHUR A. NWANKWO & SAMUEL U. IFEJKA, *BIAFRA: THE MAKING OF A NATION* 125 (1972).

¹⁷³ *See generally* NNOLI OKWUDIBA, *ETHNIC POLITICS IN NIGERIA* (1978).

¹⁷⁴ SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 69.

¹⁷⁵ Islam was adopted at the beginning of the 19th century, during the holy war of 1804, when the Muslim Fulanis conquered the Hausa Kingdom. JAMES COLEMAN, *NIGERIA: BACKGROUND TO NATIONALISM* 39 (1958). The Muslim Fulanis were led by Usman Dan Fodio, who used the military machine at his disposal and Islam to establish a centralized administrative structure. The Emirs governed different parts of Northern Nigeria. *See also* E.D. MOREL, *NIGERIA: ITS PEOPLE AND PROBLEMS* 99-102 (1968).

¹⁷⁶ ROBERT SMITH, *KINGDOM OF THE YORUBAS* (3d ed. 1988); A. AKINLOYE, *REVOLUTION AND POWER POLITICS IN YORUBA LAND 1940-1983* 5-6 (1971).

¹⁷⁷ WILLIAM EVANS-SMITH, *NIGERIA: A COUNTRY STUDY* xvi (1982).

¹⁷⁸ Gwendolyn Mikell, *Ethnic Particularism and the Creation of State Legitimacy in West Africa*, 4 *TULA J. COMP. & INT’L L.* 99, 105-06 (1996).

¹⁷⁹ HOROWITZ, *supra* note 3, at 30 n.87.

administrative apparatus,¹⁸⁰ with indirect rule in the North and direct rule in the South. Because the British ruled the north only indirectly, through the Muslim Emirs, the north remained under Muslim control while the southern regions of the colony were subject to the influence of Christian missionaries.¹⁸¹ During British rule, many southern Yorubas became civil servants in the state bureaucracy, and the Ibo Christians merchants.¹⁸² The northern Hausa-Fulanis, contained within the separate Muslim community of the north, became increasingly marginalized.¹⁸³

Consequently, institutions established by the British, such as schools and hospitals, were overwhelmingly located in the south.¹⁸⁴ There were proportionately few children in primary or secondary schools¹⁸⁵ and few adults in universities in the North.¹⁸⁶ After independence in 1960, seventy-five percent of the army's riflemen were from the Hausa-Fulani region, and by 1965, half of the officer corps were of the Ibo group, as Ibos had the education needed to fill such positions.¹⁸⁷ Even in the north itself, there was a “near-monopoly by Ibos of clerical and semi-skilled jobs in the postal service, banks, and railway.”¹⁸⁸ Southerners, primarily Ibos, also dominate the private sector in the north, as merchants, traders, factory workers, and artisans.¹⁸⁹

¹⁸⁰ COLEMAN, *supra* note 175, at 54-56.

¹⁸¹ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 70-71.

¹⁸² Mikell, *supra* note 178, at 106-07.

¹⁸³ Mikell, *supra* note 178, at 106-07.

¹⁸⁴ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 71. By 1950, for example, among the 160 physicians in Nigeria, 76 were Yorubas, 49 were Ibos, and only one was Hausa-Fulani, although the latter was the largest group in Nigeria.

¹⁸⁵ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 72. As of 1926, there were only 5,210 children from the north among the 138,249 Nigerian children in primary school; among the secondary school students, none was in the north.

¹⁸⁶ NNOLI OKWUDIBA, *supra* note 173, at 117-18, 189. As late as 1951, of the 16 million people in the North, there was only one person with a full university degree, and almost all Nigerian students in colleges and universities overseas were southern Nigerians.

¹⁸⁷ HOROWITZ, *supra* note 3, at 448, 451.

¹⁸⁸ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 71.

¹⁸⁹ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 71.

The north and the Hausa-Fulanis thus were politically and demographically dominant, but economically and educationally far behind the south and the southern ethnic groups such as the Ibo and the Yoruba.

At the time of independence, northern political leaders pushed for a full-blown campaign to “Nigerianize” the country, which in reality, became a “Northernization” policy. Northern Nigerians feared that “in a self-governing Nigeria the north would in effect be a backward protectorate governed by southerners. . . . [T]he threat of southern domination, fancied or real, was the major stimulant in the northern awakening.”¹⁹⁰ In the First Nigerian Republic, the Public Service Commission of the Northern Region declared in 1957 that “[i]t is the policy of the Regional Government to Northernise the Public Service: if a qualified Northerner is available, he is given priority in recruitment; if no qualified Northerner is available, an Expatriate may be recruited or a non-Northerner on contract terms.”¹⁹¹ Regional quotas were also used to recruit the officers corps of the army and to give out scholarships in higher education.¹⁹² The policy meant in practice that European expatriates were preferred over southerners in the service of the northern government.¹⁹³ Indeed, “this fits a more general international pattern of modestly successful middleman minorities being hated more virulently than genuinely privileged nobility or multi-millionaires.”¹⁹⁴

“Northernization” has yielded dramatic results. In 1959, only one senior civil servant in eight in the north was a Northerner, but by 1965, Northerners outnumbered European expatriates and Southerners combined. Preferences also spread to the federal government, so that northerners were favored in appointments and promotions as well as in admission to federal schools and

¹⁹⁰ COLEMAN, *supra* note 175, at 188.

¹⁹¹ ROBERT O. TILMAN & TAYLOR COLE (EDS), *THE NIGERIAN POLITICAL SCENE* 108 (1962), quoted in SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 73. HOROWITZ, *supra* note 3, at 655. The objective of the program, which was vigorously supported by northern businessmen, was to sever Northern dependence on Southern civil servants and merchants by granting preferences in “employment, contracts, scholarships, land, and loans to Northerners.” HOROWITZ, *supra* note 3, at 116.

¹⁹² HOROWITZ, *supra* note 3, at 655.

¹⁹³ SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 73.

¹⁹⁴ SOWELL, *PREFERENTIAL POLICIES*, *supra* note 1, at 73.

universities.¹⁹⁵ In 1966, when Ibo military officers overthrew the government and announced the adoption of national norms for all applicants, without regard to ethnicity, they were in turn overthrown by northern Muslim military officers. These events were followed by the systematic massacres of Ibos in the north, the expulsion of Ibos from the region and their exodus to the south, followed by efforts to secede from Nigeria through the declaration of the independent nation of Biafra.¹⁹⁶

The ensuing civil war, in which one million people died, did result in the modification of preferential policies in Nigeria.¹⁹⁷ The military regime repealed state policies that granted preferences in employment to “indigenes of a state.”¹⁹⁸ Nonetheless, the constitution of the Second Republic provided generally that public-sector positions should “reflect the federal character of the country” so that “there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups” in central government agencies.¹⁹⁹ In other words, although no group is now singled out and systematically excluded, the policy is designed to “give something to every group or region, to have federal appointments and university admissions, for example, reflect ‘the federal character’ of Nigeria.”²⁰⁰

II. Preferences for “One’s Own.”

In contrast to Part I, which examined government ethnic preferences, this Part examines the sort of underlying in-group preferences that may explain the existence of different types of ethnic economic activities, that is, economic activities concentrated along ethnic lines. An international perspective that emphasizes comparative, multi-country analysis will show that throughout history, various groups “have become prominent or predominant in particular occupations in

¹⁹⁵ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 74.

¹⁹⁶ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 75.

¹⁹⁷ HOROWITZ, *supra* note 3, at 655.

¹⁹⁸ HOROWITZ, *supra* note 3, at 655.

¹⁹⁹ HOROWITZ, *supra* note 3, at 655 (quoting Constitution of Nigeria, sections 14(3), 157(5)).

²⁰⁰ SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 76.

countries all over the planet,²⁰¹ that is, established *ethnic economies*.

Some groups have also become predominant in certain *economic niches*.²⁰² For example, although the dominance of Jews in New York's garment industry might be explained by pointing to the influx of Jewish immigrants into the city during that period of U.S. history, an international perspective will reveal that "Jews have been prominent, if not predominant, in the apparel industry over a period longer than the entire history of the U.S., and in countries ranging from medieval Spain to modern Australia, from the Ottoman Empire to the Russian Empire, as well as in Argentina, Brazil, Germany, and Chile."²⁰³ Ethnic group predominance in certain economic sectors might be due to factors found in the host country, such as the concentration of Koreans in particular retail businesses in the U.S., for example, liquor and wig stores.²⁰⁴ Or perhaps such predominance "reflects their traditional positions in the occupational hierarchies of their homeland prior to migration," which explains why "[m]igrants from 'commercial cultures' . . . , like the Parsis, the Banyas, the money lending Bhatias, the Memons, the Bohras, the Khojas – all Gujarati groups – long dominated trade and commerce in West India and later in East Africa

²⁰¹ SOWELL, RACE AND CULTURE, *supra* note 117, at 2.

²⁰² Group differences, "disparities," or "imbalances," SOWELL, RACE AND CULTURE, *supra* note 117, at 3, have been the norm – despite claims that "there will be less ethnic conflict if all groups are proportionately represented at all levels in all sectors of the economy. One reason the truth of this proposition remains elusive is that few, if any, societies have ever approximated this description." HOROWITZ, *supra* note 3, at 677. The fact is that many ethnic groups have, in countries all over the world, produced, recreated and perpetuated certain "[g]roup occupational patterns," SOWELL, RACE AND CULTURE, *supra* note 117, at 3, or as some have charged, "taken over," "monopolized" or acquired a "stranglehold" in certain sectors, indeed, even under free market conditions.. See, e.g. Bonacich, *A Theory of Middleman Minority*, *supra* note 23, at 590. SOWELL, RACE AND CULTURE, *supra* note 117, at 17-18. To this extent, I agree with the claim that increased marketization may enhance the economic dominance of certain ethnic minorities, see Chua, *Markets, Democracy and Ethnicity*, *supra* note 24, at 29-33, and the entrenchment of certain ethnic economies. There are, of course, other explanations for this pattern – the imposition and assignment of certain niches to certain ethnic groups on the basis of societal stereotypes. See SOWELL, RACE AND CULTURE, *supra* note 117, at 11-12.

²⁰³ SOWELL, RACE AND CULTURE, *supra* note 117, at 2.

²⁰⁴ See *infra* notes [277, 325-361]. See also Jen McCaffery, *Rapunzel's Offspring Are Cashing In*, N.Y. TIMES, Feb. 20, 2000, section 14, at 4. Nancy Rivera Brooks, *The Trouble with Big Wigs*, L.A. TIMES, Oct. 6, 1988, Part 4, at 1.

as well.”²⁰⁵ Similar observations may be made about Chinese retailers, India’s Gujarati merchants, German farmers, Jewish middlemen, Lebanese peddlers in numerous diverse countries.²⁰⁶

Besides the establishment of occupational niches, there are other group patterns that span across countries: the clustering of newcomers²⁰⁷ and consequently, the creation of not just ethnic economies but also *ethnic enclaves*.²⁰⁸ In all three instances (ethnic economies generally, ethnic enclaves, and ethnic niches), the ethnic group generally exhibits certain basic characteristics, such as a tendency towards “clannishness;”²⁰⁹ adherence to group norms and hence the maintenance of group boundaries separating insiders from outsiders, allowing the group to leverage its reserve of social capital²¹⁰ into economic capital for group members.²¹¹ Again, examples of such insular proclivities abound among widely varying ethnic groups in different countries: the Hasidic Jews in New York City’s jewelry industry, Lebanese traders in the interiors of Sierra Leone, the Chinese across Southeast Asia, the Indians in Uganda, the ethnic Marwari in India’s state of Assam, the ethnic Chettyars from India in rural Burma, and more recently, the Koreans and Indians in the U.S.,²¹² the Turks in the garment industry of Paris and

²⁰⁵ Ivan Light, Parminder Bhachu, and Stavros Karageorgis, *Migration Networks and Immigrant Entrepreneurship* 25, 40, in IVAN LIGHT AND PARMINDER BHACHU (EDS.), IMMIGRATION AND ENTREPRENEURSHIP: CULTURE, CAPITAL, AND ETHNIC NETWORKS (1993).

²⁰⁶ SOWELL, RACE AND CULTURE, *supra* note 117, at 2, 11, 12, 47. *See also* COHEN, GLOBAL DIASPORAS, *supra* note 2, at 170.

²⁰⁷ SOWELL, RACE AND CULTURE, *supra* note 117, at 39.

²⁰⁸ *See supra* note 6.

²⁰⁹ SOWELL, RACE AND CULTURE, *supra* note 117, at 49.

²¹⁰ The concept of social capital, long been studied by sociologists, and involves an inquiry into a group’s social and cultural characteristics and how these characteristics influence the group’s economic performance. *See, e.g.* James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S97-101 (Supp. 1988). *See infra* notes [368, 393-396].

²¹¹ SOWELL, RACE AND CULTURE, *supra* note 117, at 49-55

²¹² SOWELL, RACE AND CULTURE, *supra* note 117, at 50-52. For a discussion of the economic role played by the ethnic Marwaris in Assam, see SOWELL, PREFERENTIAL POLICIES, *supra* note 1, at 54-59.

Berlin,²¹³ the Algerians, Moroccans, and Tunisians in retail commerce in France, and so on.²¹⁴

It is important to note, as the discussion above reveals, that this pattern is not limited to developing countries only, where the absence of formal institutions, the rule of law, a credible judiciary, and competitive markets, it is often assumed, explain the existence of ethnic economies and ethnic networks.²¹⁵ Even in advanced, industrialized economies like the U.S., there are parallel pockets of economic activities that lie outside the scope of formal laws²¹⁶ as well as activities within ethnic economies that rely more on common ethnicity than on the universal law of contract. The tendency of certain minority groups to be dominant in certain economic activities prevails in both developing and developed countries.²¹⁷

Thus, to the extent that minority ethnic economic dominance is not due merely to legal or institutional underdevelopment, but may instead be correlated to some other factors, such as the prevalence and resilience of informal, personalized exchanges and in-group preferences – then the relevant policy prescriptions would need to expand beyond the standard proposal for legal and institutional reform. Indeed, the law and development movement would need to confront directly whether minority ethnic economies are a positive or negative phenomenon and determine what the response of the legal system should be. As I discussed above, some have been concerned that there is undue “overrepresentation” of certain minority groups in certain entrepreneurial activities and consequently disparities in wealth among ethnic groups, especially in developing countries, resulting in an exacerbation of ethnic conflicts. The proposed solution is

²¹³ Mirjana Morokvasic, *Immigrants in Garment Production in Paris and in Berlin 75-95*, in LIGHT & BHACHU (EDS.), *supra* note 205.

²¹⁴ Gildas Simon, *Immigrant Entrepreneurs in France* 125, 132-34 in LIGHT & BHACHU (EDS.), *supra* note 205 .

²¹⁵ Davis, Trebilcock & Heys, *supra* note 3, at 332 (describing the claim by some that “low quality institutions play a large role in explaining reliance on truncated intra-ethnic group contracting networks . . .”). DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 67 (1990) (ethnic occupational patterns or segregation, and the entrenchment of ethnic minorities in certain entrepreneurial activities being causally related to institutional underdevelopment).

²¹⁶ In 1994, the Yale Law Journal sponsored a symposium issue on the informal economy. 103 *YALE L. J.* June 1994 symposium issue.

²¹⁷ Cf. Davis, Trebilcock & Heys, *supra* note 3, at 350.

governmental affirmative action policies, through ethnically targeted corrective measures aimed at favoring economically weak ethnic majorities.²¹⁸ Others have argued the opposite, that “disproportionate representation of minorities in *entrepreneurial activities* is not an appropriate index of those disparities.”²¹⁹ However, neither has studied how ethnic economies work, whether in economically developing or developed countries, and neither has confronted head-on the role of law in facilitating, accommodating or breaking up private, intra-group preferences that underlie ethnic economies.

A. The Ethnic Economy Generally

1. Introduction

Ethnic economies, like traditional capitalism, is based on personal relationships or ethnic ties. For Weber, certain groups, such as Jews, outcaste, ethnically insular and segregated from the majority by their observance of “taboos, [and] hereditary religious obligations in the conduct of life,”²²⁰ are not sufficiently rational or free of communal sentiments to engage in bourgeois capitalism. Instead, according to Weber, “Jewish capitalism was speculative pariah-capitalism, while the Puritan was bourgeois organization of labour.”²²¹ The pariah status of Jews also instilled in them a “dual ethic,” that is, the adoption of one set of ethics for dealing with other Jews and a separate set for dealing with non-Jews – a sharp contrast to modern capitalism, which requires rational treatment of others according to objective standards rather than irrational

²¹⁸ See, e.g., Amy L. Chua, *The Paradox of Free Market Democracy*, *supra* note 3, at 347-62; Chua, *Markets, Democracy and Ethnicity*, *supra* note 24, at 62-63 (arguing that market development will create distributional conflicts along ethnic lines and should thus be tempered by government restrictions on market activities of economically dominant ethnic minorities). See also Albert O. Hirschman, *The Changing Tolerance for Income Inequality in the Course of Economic Development*, 87 Q. J. ECON. 544, 544-65 (1973) (arguing along generally the same line).

²¹⁹ Davis, Trebilcock & Heys, *supra* note 3, at 360 (emphasis added). The remedy is not ethnic targeting, but public investment in education, health care, and other social and legal institutions “that are likely to broaden the economic opportunity set for most members of the population, without pre-judging the kinds of economic activities the population or sub-groups should be encouraged or induced to pursue.” *Id.*

²²⁰ MAX WEBER, *THE SOCIOLOGY OF RELIGION* (translated by E. FISCHOFF) 109 (1963).

²²¹ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (translated by Talcott Parsons) 271 (1930).

attachment to or preference for one's own.²²² For Weber, pariah capitalism was inferior to the rationality of modern capitalism and would be replaced by the latter.

Other theorists, following the trajectory set by Weber, expanded on Weber's theory with a wealth of literature on middleman minorities and trade diasporas.²²³ Like pariah minorities, middleman minorities and trade diasporas are marginal peoples with "caste-like attributes"²²⁴ and shared loyalties²²⁵ who continue the traditions developed in precapitalist societies to engage in trade and commerce. As outsiders, diasporic traders develop an "aptitude for economic specialization" because the diaspora's "psychological self-isolation would prove impossible if those who practiced it did not, at the same time, develop on the economic plane a special efficiency in the exploitation of such economic opportunities as had been left open to them."²²⁶ Similarly, middlemen minorities are viewed as uncomfortably "lodged between . . . any two ethnic groups that stand in a classlike relation of superordination and subordination. The dominant elite of the dominant group uses the middleman minority to foster economic development, but turns it into a scapegoat when things go wrong."²²⁷

The sociology of middleman minorities, however, has tended to emphasize the role of the middleman in developing economies,²²⁸ whose presence would predictably no longer be needed

²²² MAX WEBER, *ECONOMY AND SOCIETY* 614 (GUENTHER ROTH AND CLAUS WITTICH, EDs) (1968). Jews thus are associated with the primitive, ethnic capitalism of pariah minorities; similar charges have been thrown at the Chinese. Gary Hamilton, *Pariah Capitalism: A Paradox of Power and Dependence*, "ETHNIC GROUPS, Vol. 2 (Spring 1978), at 1-15. Allen J. Chun, *Pariah Capitalism and the Overseas Chinese of Southeast Asia: Problems in the Definition of the Problem*, ETHNIC AND RACIAL STUDIES, Vol. 12, Issue 2 (April 1989), at 233-56.

²²³ See *supra* note 15.

²²⁴ COHEN, GLOBAL DIASPORAS, *supra* note 2, at 101.

²²⁵ For members of diasporas, "[t]he powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on myths of shared history and kinship has a capacity to endure that may be the envy of a state with the most liberal civil society and patriotic citizenry." Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 A. J. INT'L L. 359, 374 (1996).

²²⁶ COHEN, GLOBAL DIASPORAS, *supra* note 2, at 103.

²²⁷ COHEN, GLOBAL DIASPORAS, *supra* note 2, at 103.

²²⁸ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 17-20.

once modernization and appropriate institutional reforms are adopted. The literature's emphasis on the Third World context also implies that ethnic capitalism does not exist in developed economies, although many studies have shown otherwise. Similarly, the focus in middleman minority scholarship on historic trading peoples and sojourning minorities such as the Jews and the Chinese, the Armenians and Lebanese, makes the theory not wholly applicable to African Americans in the U.S.,²²⁹ or more recent merchant groups, such as the Korean and Cubans who have had no trading tradition.

In recent years, a new literature that emphasizes the sociology of ethnic entrepreneurship and the ethnic economy has flourished, focusing on the study of different types of ethnic economies, how they emerge, and their social capital foundation. An ethnic economy is a general concept used to include any ethnic group's self-employed, its employers, coethnic employees, if any, and their unpaid family workers.²³⁰ An ethnic economy may be created by immigrant entrepreneurship or ethnic entrepreneurship, that is, "ethnic minority specialization in self-employment without . . . imposing the requirement of foreign-born origin."²³¹

Ethnic entrepreneurship may be viewed as "[a] set of connections and regular patterns of interaction among people sharing common national background or migration experiences."²³² The ethnic economy is thus a product created by ethnic minorities themselves, as distinct from the jobs generated by the mainstream labor market, and does not include coethnics who work for

²²⁹ In the U.S., early proponents of an ethnic market as a solution to segregation and disenfranchisement included Booker T. Washington, who emphasized economic independence and stability as an avenue for black progress. For a discussion of Washington's emphasis on economic empowerment as compared to W.E.B. Dubois' alternative strategy of civil rights, see Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millenium – Revisiting the Washington-Du Bois Dialectic*, 42 HOW. L. J. 391 (1999). "No race that has anything to contribute to the markets of the world is long in any degree ostracized." Booker T. Washington, *The Atlanta Exposition Address*, in JOHN HOPE FRANKLIN AND ISIDORE STARR, *THE NEGRO IN TWENTIETH CENTURY AMERICA: A READER ON THE STRUGGLE FOR CIVIL RIGHTS* 88 (1967). Washington advocated the development of an ethnic economy for blacks. BOOKER T. WASHINGTON, *THE NEGRO IN BUSINESS* 14-15 (1907). See also *supra* notes [15, 28, 29] and *infra* notes [234, 237, 314, 320-324].

²³⁰ LIGHT & GOLD, *supra* note 7, at 9.

²³¹ LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 18.

²³² ROGER WALDINGER, HOWARD ALDRICH, AND ROBIN WARD, *ETHNIC ENTREPRENEURS: IMMIGRANT BUSINESS IN INDUSTRIAL SOCIETIES* 33 (1990).

wages in the general economy.²³³ In cases where an ethnic group is an outcast or a pariah, its ethnic economy becomes all the more important to the group's economic survival. This was the case, for example, of Japanese Americans during World War II and free blacks in the south.²³⁴ After the U.S. Civil War, for example, as increased segregation in southern cities severed ties that had once linked whites to black businesses, blacks made a concerted effort to develop what W.E.B. Dubois called the group economy – “a cooperative arrangement of industries and services within the Negro group such that the group tends to be a closed economic circle largely independent of the surrounding white world.”²³⁵

In the same way that ethnic economies contributed to the economic progress of immigrant and minority groups in early U.S. history,²³⁶ the creation of ethnic economies is particularly crucial for marginal groups now because of recent economic trends. There is evidence that marginal groups with strong ethnic economies may be more buffered from economic hardship

²³³ LIGHT & GOLD, *supra* note 7, at 19.

²³⁴ In 1941, the year Pearl Harbor was attacked, 56.2 percent of Japanese American men and 44.4 percent of the women worked in the Japanese ethnic economy, although those numbers are considered low because among those Japanese listed as wage workers, some had Japanese American employers and could have been classified as ethnic economy employees. LIGHT & GOLD, *supra* note 7, at 29. *See also* John Sibley Butler, *Myrdal Revisited*, *supra* note 28, at 199 (describing the Japanese American ethnic economy as one steeped in self-help and ethnic solidarity).

Even relatively small ethnic economies contribute to coethnic employment in significant ways. For African Americans, nearly one million workers worked in the black American ethnic economy in 1992. If that ethnic economy were to disappear, one would have to wonder whether those workers would find jobs in the general labor market or would have become unemployed. LIGHT & GOLD, *supra* note 7, at 69. *See also* John Sibley Butler, *Myrdal Revisited*, *supra* note 28 (discussing how African Americans before the Civil War in particular also had a vibrant self-help tradition that emphasized economic development and independence).

Before the abolition of slavery in the U.S., small bases of businesses owned by free blacks existed, especially in southern cities, such as New Orleans, where black entrepreneurs had property and businesses valued at over \$9 million. WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 58-59.

²³⁵ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 59 (citing W.E.B. DUBOIS, *ECONOMIC CO-OPERATION AMONG NEGRO AMERICANS* 179 (1907)). *See also* W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (Penguin Books 1989) (1903).

²³⁶ BONACHICH & MODELL, *supra* note 7; IVAN LIGHT, *ETHNIC ENTERPRISE IN AMERICA* (1972); SALO W. BARON, ET. AL., *ECONOMIC HISTORY OF THE JEWS* (1975).

than those without.²³⁷ With the economy of the current industrialized countries shifting from “high-volume” manufacturing to “high-value,” information-oriented and technology-driven services, the mismatch in skills for low-skilled groups is likely to intensify. Ethnic economies will be necessary for those groups whose skills are in declining demand from the standpoint of the international economic system because they will be an important avenue, against the backdrop of changing economic conditions, for the economic mobility of marginal groups.²³⁸ Economic data show that small businesses employ substantial proportions of the population of the U.S. as well as in Europe, a trend accompanied by the growth of ethnic entrepreneurship in both regions.²³⁹

The main characteristics that underlie ethnic economies and their particular subvariants – the ethnic enclave and the ethnic niche – are described more thoroughly as the Article progresses, and particularly in section B of Part II below. This section will briefly introduce and highlight some of the key concepts associated with ethnic economies generally.

2. Defining Characteristics

In the U.S., for example, certain ethnic groups, such as the Israelis in Los Angeles, the

²³⁷ The importance of an ethnic economy for coethnics may be illustrated by comparing the Cuban Mariel refugee experience with the Haitian refugee experience in Miami. The Cuban Mariels who fled to the U.S. in 1979 were for the most part black and working-class, as were the Haitians. For Haitians, 58.5 percent were unemployed; .7 percent employed in the Haitian ethnic economy; and 40.8 percent employed in the general economy. By contrast, for the Cuban Mariel refugees, 26.8 percent were unemployed, 46.1 percent employed in the Cuban ethnic economy, and 27.1 percent employed in the general economy. Ivan Light, Parminder Bhachu, and Stavros Karageorgis, *supra* note 205, at 25, 34. Thus, although Haitians had a 13.7 percent higher employment in the general economy than Cuban Mariels, they also had a 31.7 percent higher unemployment rate than the Cubans’. Light, Bhachu, and Karageorgis, *supra* note 205, at 34-35. For the Mariels in Miami, “‘86 percent lived in Cuban neighborhoods, 75 percent patronized mostly stores owned by co-nationals, and 82 percent read exclusively Spanish-language newspapers.’” WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 77.

At the same time, however, it is worthwhile to note that the employment numbers might not be accurate for the Haitians, primarily because “Haitians in Miami operated a very extensive informal economy that these official statistics did not and could not measure.” Light, Bhachu, and Karageorgis, *supra* note 205, at 35.

²³⁸ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 16.

²³⁹ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 17-19, 50-51.

Iranians, and Koreans, among others, have developed significant ethnic economies.²⁴⁰ In the United Kingdom, Indians and Pakistanis have achieved high rates of self-employment; so have Moroccans, Tunisians and Chinese in France.²⁴¹

Depending on market conditions, some ethnic economies serve the ethnic community's needs (where opportunities for expansion may be more limited), and others "break out" to serve the greater non-ethnic populations (where opportunities tend to be greater). Businesses that cater to their ethnic consumers tend to be those that deal with ethnic consumer products, such as tropical goods and "exotic" specialties among Hispanics and Asians in the U.S., Surinamese fruits or vegetables in the tropica shops in Amsterdam, or ethnic-focused services, such as immigrant-owned travel agencies and law firms, realty and accountant businesses that ethnic clients tend to prefer because of the personalistic ties that characterize such relationships.²⁴² The potential for growth for ethnic economies that are restricted to the ethnic market are likely to be circumscribed because the ethnic market itself will be smaller than the general market and the business conditions will tend towards overcompetition, often resulting in a high failure rate or low returns for owners.²⁴³

By contrast, those ethnic economies that have access to non-ethnic customers often do so

²⁴⁰ Data from 1994 show that the Israelis in Los Angeles, for example, had a self-employment of 80 percent; from 1987 to 1988, about 56.7 percent of Iranians were self-employed, with another 4.6 percent of Iranians working for them; 47.5 percent of Koreans were self-employed, with another 27.6 percent working as their employees in 1989. LIGHT & GOLD, *supra* note 7, at 27-30. Most of these firms were small, falling in a category between proprietorships and big businesses in terms of gross receipts. LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 165. As early as the 1980s, 22.5 percent of Koreans in Los Angeles were self-employed or were unpaid family workers – an impressive figure given the fact that only 8.5 percent of the Los Angeles County labor force was similarly situated. LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 3, 163. For Koreans, 2.2 percent were unpaid family workers compared with .4 percent of non-Koreans. *Id.* at 163.

²⁴¹ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 40.

²⁴² WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 22-23, 96.

²⁴³ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 23. Some ethnic economies, such as that of the Cubans in Miami, might begin in a limited way, serving the ethnic market, and then breaking out to serve non-ethnic clientele. *Id.*, at 24, 57. Others examples include Chinatowns in cities such as New York City, San Francisco, and Los Angeles. Black businesses, which are generally small and concentrated in the personal service sector, such as hair care, have remained as "closed markets" with less growth potential. *Id.* at 60. For a discussion of the underdevelopment of black businesses, see *id.* at 62-65.

by discovering or creating niches in markets or sectors that are underserved, for example, those in urban centers, where “techniques of mass production or mass distribution do not prevail.”²⁴⁴ Examples include street peddling in the informal sectors in the U.S. or in Paris and other French border towns near Italy and Germany, by Senegalese traders selling toys and *art negre*; or immigrant retailers who have carved out a niche in the food retailing industry because the urban corner grocery business tends to be neglected by large suburban supermarket chains in Paris, London, and other cities in the U.S.²⁴⁵ Where certain industries, for example, the garment industry, are characterized by stable and unstable demands, larger firms handle staple products, which allows smaller firms to respond to the “fluctuating portion of demand”²⁴⁶ by leveraging their high labor-to-capital ratios²⁴⁷ and taking advantage of low-entry costs. This means that ethnic economies that have at their disposal only a small capital base but a large family and kin

²⁴⁴ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 25.

²⁴⁵ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 25, 103. *See also* Linda J. Wong, *The Role of Immigrant Entrepreneurs in Urban Economic Development*, 7 *STAN. L. & POL’Y REV.* 75, 76 (1996) (discussing the growth of ethnic food products). In the predominantly black North Lawndale section of Chicago, for example, there was, as of 1988, only one supermarket for 60,000 people; North Lawndale has since attracted Korean and Arab grocers occupying the quintessential “middleman minority” position. For a discussion of the black-Korean conflicts in inner cities, see Reginald Leamon Robinson, “*The Other Against Itself*” *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 *S. CAL. L. REV.* 15 (1993).

²⁴⁶ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 26. Linda J. Wong, *supra* note , at 77, 80.

²⁴⁷ Reliance by owners on high labor-to-capital ratios for economic viability is one of the primary defining characteristics of ethnic economies. For example, Korean-owned businesses, like others in ethnic economies, rely extensively on unpaid family labor and/or co-ethnics who work long hours, often for wages lower than the standard wages in the industry. LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 170, 175-76. According to the 1980 U.S. Bureau of the Census, Korean proprietors worked 16 percent longer than did non-Koreans and also had greater access to unpaid family workers, approximately 2.7 times more unpaid family labor than did non-Korean entrepreneurs. LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 172-73. About 56 percent of Korean firms surveyed reported relying on nuclear or extended kin at work. LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 179. For those who used nonkin employees, the average number of such employees was 3.6. Among firms that used paid workers, 37.4 said the workers were all Korean, 20.6 said they were “American,” 19.6 Mexican and the rest reported other Asians and blacks. *Id.*

Korean garment contractors, specializing in products that larger firms cannot supply effectively, were among the largest employers of Korean workers in Los Angeles, employing 5400 Korean workers in 1979. LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 150; Pyong Gap Min, *Korean Immigrants in Los Angeles*, 197 in LIGHT & BHACHU (EDS.), *supra* note 205.

labor reservoir have managed to enter the garment trade.²⁴⁸ Chinatown in Paris, for example, has become a production center for textiles.²⁴⁹

Whether ethnic economies operate in restrictive ethnic markets or open markets, they are generally characterized by a common tendency to hire other coethnics, as is the case, for example, with Koreans²⁵⁰ and Cubans in the U.S.²⁵¹ This tendency of ethnic entrepreneurs as a whole (especially immigrants) to “employ coethnics at rates vastly above chance levels”²⁵² and in settings where their native tongue is predominantly used, is repeated among many ethnic groups in many countries; such indeed is the case for one-third of the South Europeans and Chinese in Toronto, for example.²⁵³ Here too, it was found that “[f]or members of minority groups with low levels of education, work in settings controlled by their own group is quite attractive from the

²⁴⁸ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 68. Recent Korean immigrants come in “complete family units” and hence have the advantages of access to a trusted and cheap source of labor. *Id.* at 72.

²⁴⁹ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 103.

²⁵⁰ Koreans in Los Angeles not only had, even in the early 1980s, a 22.5% self-employment rate but also employed an additional 40 percent of coethnics; thus, approximately 62 percent of Koreans in the County were either self-employed or worked in Korean-owned firms – most in the service and retail sectors, LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 3-4, 161, in low income, nonwhite neighborhoods neglected by big corporations. Austin Scott, *Shopping Center Hit by Delay*, LOS ANGELES TIMES, Dec. 8, 1981, pt. II, at 1; Austin Scott, *Watts Shopping for a Supermarket: Can't Find Any Takers*, LOS ANGELES TIMES, June 6, 1983, pt. II, at 1. SOWELL, RACE AND CULTURE, *supra* note 117, at 12; LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 318-19. ILLSOO KIM, *NEW URBAN IMMIGRANTS* 258 (1981). Nationwide, 13.5 percent of employed Koreans in the U.S. were self-employed or unpaid family workers, compared with 7.3 percent of all employed persons being so situated. LIGHT & BONACICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 7.

²⁵¹ Along with Koreatown in Los Angeles, Little Havana in Miami too has a significant, fast-growing ethnic economy. Pyong Gap Min, *Korean Immigrants in Los Angeles*, 201, *supra* note 247, in LIGHT & BHACHU (EDS.), *supra* note 205. In 1967, there were 919 Cuban-owned enterprises in Miami, and by 1976, there were 8000. Wilson and Portes, *Immigrant Enclaves*, *supra* note 9, at 303.

Twenty percent of Cubans in Miami were self-employed in 1979, and 49 percent worked in Spanish-speaking firms owned by co-ethnics, Alejandro Portes, Juan M. Clark, and Manuel M. Lopez, *Six Years Later: The Process of Incorporation of Cuban Exiles in the United States: 1973-1979*, CUBAN STUDIES, Vol 11-12, 1-24 (1981-82), with returns, based on their respective human capital level, substantially equivalent to those in the mainstream economy. Wilson and Portes, *Immigrant Enclaves*, *supra*, at 314.

²⁵² Light, Bhachu, and Karageorgis, *supra* note 205, at 37-38.

²⁵³ JEFFREY G. REITZ, *THE SURVIVAL OF ETHNIC GROUPS* 154-55 (1980).

standpoint of income opportunity.”²⁵⁴ Mexican immigrant employers, followed by U.S.-born Mexicans, for example, were most likely to hire other Mexicans, including undocumented Mexican workers.²⁵⁵ In Paris, in 1990 among small garment firms, 22.45 percent were owned by Turks and 8.32 percent owned by Yugoslavs.²⁵⁶ There too, ethnic owners hired illegal coethnic immigrants as part of the industry’s informal sector as well as coethnic legal or documented workers to work in the ethnic economy.²⁵⁷ In France, the economic success of the Maghrebians (Algerians, Moroccans, and Tunisians) in a variety of trade – “routine neighborhood trade” primarily with French customers, “[i]ntracommunity trade” with coethnic customers, and “exotic trade” selling specific products with French customers – can be similarly explained by their reliance on the ethnic system: family labor and coethnic workers.²⁵⁸ Tunisians in Paris, whether Jewish or Muslim, are concentrated in the doughnut making business and run shops that “traditionally employ[] members of the same family or the same ethnic group exclusively, and outsiders are rare.”²⁵⁹ The Asian Indian ethnic economy, whether in the U.S. or elsewhere, have “clustered in businesses that employ new immigrants from India, relatives and nonrelatives, and that cater to the needs and tastes of South Asians.”²⁶⁰ For many groups, the existence of the ethnic economy allows group members to evade unemployment because they have an alternative option besides wage employment in the general labor market.

Consequently, ethnic firms tend to be tightly knit and homogeneous “at the core,” with family members and kin, either by blood or marriage, in the inner circle and unrelated coethnics

²⁵⁴ REITZ, *THE SURVIVAL OF ETHNIC GROUPS*, *supra* note 253, at 164 (1980).

²⁵⁵ Light, Bhachu, and Karageorgis, *supra* note 205, at 38.

²⁵⁶ Morokvasic, *supra* note 213, at 81.

²⁵⁷ Morokvasic, *supra* note 213, at 76, 85. To the extent that the ethnic or immigrant economy is partially or wholly informal, it shares certain characteristics with informal economies generally: lack of long-term job security for workers, lack of health and pension insurance, labor law violations, including health and safety regulations. *Id.* at 88. *See* 103 *YALE L. J.* June 1994 symposium issue.

²⁵⁸ Gildas Simon, *supra* note 214, at 133-134, *in* LIGHT & BHACHU (EDS.), *supra* note 205.

²⁵⁹ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 102.

²⁶⁰ Karen B. Leonard and Chandra S. Tibrewal, *Asian Indians in Southern California: Occupations and Ethnicity* 143 *in* LIGHT & BHACHU (EDS.), *supra* note 205.

beyond that.²⁶¹ For example, among the Iranian firms in Los Angeles, 2.7 percent of paid employees were related to the owners; 35.7 percent were Iranians and shared the religion of the owner; 19.5 were Iranians who did not share the religion of the owner; and 42 percent were non-Iranians.²⁶² Generally, when ethnic businesses mature, however, labor shortages will usually compel a change in hiring policy. In the London garment industry, for example, Greek Cypriot firms had to employ more Asian and Afro-Caribbean workers when they expanded and as more Greek Cypriots became business owners.²⁶³

Thus, generally speaking, the tendency to hire coethnics is itself part of the defining characteristic of having an ethnic economy. One of the main ingredients that provides ethnic economies with their comparative advantage is the coethnic labor force (whether kin or non-kin) and its direct connections and attachments to the ethnic community.²⁶⁴ In addition, ethnic economies exist in order to engage in job creation for coethnics, the perpetuation of such jobs for coethnics, and hence job capture for coethnics.²⁶⁵ But preference for one's coethnics, however, also means non-preference for non-coethnics. Thus, "[t]he Chinese in Southeast Asia, Indians and Lebanese in Africa, and Vietnamese and Koreans in America's black ghettos, are often accused of not hiring local people for responsible positions. Such complaints against middleman

²⁶¹ As a result, the bond of ethnicity, clan, and kinship may also mean that the workforce is very loyal and identifies with the ethnic labor force rather than the host labor force. To the extent that wages are lower in the ethnic economy, a conflict may arise between the general labor force and ethnic labor force. For example, when the Retail Food Clerks, Local 770 in Los Angeles attempted to organize sales workers in the grocery business in 1973, appeals to Japanese workers to unionize and fight for an American living standard was handily rejected. Bonacich, *A Theory of Middleman Minorities*, *supra* note 23, at 591. Ethnic employers, however, also incur certain reciprocal obligations that go beyond the conventional employer/employee context. WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 39-47.

²⁶² LIGHT & GOLD, *supra* note 7, at 38.

²⁶³ LIGHT & GOLD, *supra* note 7, at 39.

²⁶⁴ WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 37-38.

²⁶⁵ Studies show "'group members consciously build upon ethnic social networks to find jobs, to attempt to control access to those jobs . . . and to do all the other things that affect success or failure in the economy.'" LIGHT & GOLD, *supra* note 7, at 76 (citation omitted).

minorities are historically longstanding, as well as widespread.”²⁶⁶

While such preferences may simply be “purely personal” preferences, or part of a tradition of “high ethnic attachment,”²⁶⁷ there is also an economic basis for them. The cost of sorting out, or screening, workers may be lower when they are of the same group, “either because of specific knowledge of the individual or his family available within the group or because of a greater facility in reading cultural cues peculiar to the group.”²⁶⁸ The ethnic workforce can be cheaply replicated in the ethnic economy because both the employers and employees rely on “the use of networks for finding work, for obtaining a cheap and cohesive work force, for financial support, and for market transactions.”²⁶⁹ To overcome the obstacles encountered in the general labor market, ethnic workers rely on informal networks for a competitive edge over other workers – connections, for example, made through word of mouth or ethnic and immigrant newspapers²⁷⁰ with an established “information system that channeled them into those industrial niches already dominated by coethnics.”²⁷¹

Besides co-ethnic recruitment and hiring, ethnic economies may rely on other forms of economic preferences as well. In non-retail transactions, for example, in the sale and purchase of

²⁶⁶ SOWELL, RACE AND CULTURE, *supra* note 117, at 51. The Young Baganda Association in 1919 complained that Indian firms in Uganda did not hire enough Baganda employees; Assamese in India complained that Marawari businesses did not hire enough Assamese in the state of Assam; in Senegal, Senagalese complained that the Lebanese businessmen did not hire Africans. Nigerians complained that certain ethnic Nigerians from certain regions tended to hire others like them and not the locals. *Id.* See also LIGHT & GOLD, *supra* note 7, at 3-4 (describing mob attacks on African American businesses in Tulsa, Oklahoma in 1921; Jewish-owned businesses in Germany in the 1930s to punish “jews for economic crimes;” Korean-owned businesses in South Central Los Angeles in 1992; Chinese shops in Indonesia in 1998).

²⁶⁷ Pyong Gap Min, *Korean Immigrants in Los Angeles* 199, *supra* note 247, in LIGHT & BHACHU, (EDS.) *supra* note 205.

²⁶⁸ SOWELL, RACE AND CULTURE, *supra* note 117, at 90. See also Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 863-92 (1999) (discussing how community norms emerging from cohesive groups lower the transaction costs of intra-group lending, allowing members who could not get bank loans to form rotating credit associations for their credit needs).

²⁶⁹ Morokvasic, *supra* note 213, at 87.

²⁷⁰ Morokvasic, *supra* note 213, at 87. See also Chris Spolar, *New Working Class in the Making*, WASH. POST, Dec. 15, 1987 (describing the informal recruitment methods used by immigrants).

²⁷¹ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 187.

liquor license, coethnics also tend to buy and sell to one another. Korean sellers, often relying on information provided by Korean newspapers, found Korean buyers in 80.4 percent of license transfer transactions, although Koreans were only 17.6 percent of all buyers.²⁷² A similarly startling degree of ethnic homogeneity can also be seen in business sales among Indians and Pakistanis in Britain²⁷³ and in business co-ownership among Cubans in Puerto Rico.²⁷⁴

Linkages also exist between the ethnic diasporas of the adopted country on the one hand and the homeland institutions on the other. For example, there is a tendency among Korean-owned firms in the U.S. for the Korean buying entities to rely on Korean suppliers from Korea. This is especially common in the import businesses established by Koreans who deal in Korean exports from Korea, where Korean importers distribute Korean-made products to coethnic wholesalers, who in turn distribute them to coethnic retailers²⁷⁵ for sale, most likely, to non-Korean customers.²⁷⁶ In the retail wig business in particular, 95 percent of those who participated in a study on Korean entrepreneurship depended on Korean suppliers for wigs made in South

²⁷² LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 239. In fact, liquor stores, grocery stores, restaurants, and bars (businesses with a predominant Korean presence) constituted 21.2 percent of firms advertised for sale in the Korean Times but only 11.9 percent of those for sale in the Los Angeles Times; this source of information, however, is only available to potential buyers who could read Korean. LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 240.

²⁷³ Cathrine Zimmer and Howard Aldrich, *Resource Mobilization Through Ethnic Networks: Kinship and Friendship Ties of Shopkeepers in England*, 30 SOCIOLOGICAL PERSPECTIVES 439 (1987).

²⁷⁴ Jose A. Cobas, *Ethnic Enclaves and Middleman Minorities: Alternative Strategies of Immigrant Adaptation?* 30 SOCIOLOGICAL PERSPECTIVES 150 (1987). Although Cubans were less than 1 percent of Puerto Rico's population, Cuban entrepreneurs had other Cuban entrepreneurs as partners in 70 percent of co-owned businesses.

²⁷⁵ Pyong Gap Min, *Korean Immigrants in Los Angeles*, *supra* note 247, at 196. LIGHT & GOLD, *supra* note 7, at 121.

²⁷⁶ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 71. *See also* Linda J. Wong, *supra* note , at 79 (describing how "immigrant consumers and entrepreneurs maintain cultural, social, and economic ties with their homeland that dramatically increase export opportunities."). Korean owners in Los Angeles indicated that between 66 and 100 percent of their suppliers were Koreans and that a significant portion of the Korean owners were part of a "vertical distribution network that might originate in South Korea." LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 151.

Korea.²⁷⁷ ““When Korean immigrants start new businesses dealing in wigs, handbags and other Korean-imported merchandise, they have easy access to information and can very often purchase merchandise on a credit basis. In operating such businesses, they receive preferential treatments from Korean wholesalers in item selections, prices, speed of delivery and credits.””²⁷⁸

Aside from the import-export sector, which is dependent on linkages forged between the diaspora and the homeland, ethnic vertical integration may also be found between ethnic retailers and wholesalers. For many Korean business owners, between 66 and 100 percent of their suppliers were also Koreans.²⁷⁹ Approximately “82 percent of inner-city Korean merchants buy from Korean wholesalers,” who have traditionally helped the merchants not just by providing loans and financing but also by providing goods to Korean merchants at cheaper prices than to other non-Korean merchants either because the Korean buyers tend to order in large quantities²⁸⁰ – or merely because of a tradition of mutual aid and ethnic economic solidarity. Indian hotel/motel owners also deal with each other on a preferential basis, providing each other with loans without charging interest or demanding collateral.²⁸¹ Other groups such as black merchants who have vertical links to African-American suppliers have also used them to their advantage – hence the success of black-owned barber shops and beauty parlors with links to the large, black-owned beauty products firm of Johnson Products, Inc. of Chicago.²⁸²

²⁷⁷ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 151, 37. Charging Korean monopoly of the wig business, resulting in Korean exclusion of non-Koreans from the wig industry and the raising of prices to consumers, federal prosecutors initiated suit under the Sherman Antitrust Act. LIGHT & GOLD, *supra* note 7, at 21. *See* U.S. v. Korean Hair Goods Association of America, Inc., 1976 U.S. Dist. LEXIS 16497; 1976-1 Trade Cas. (CCH) P60,773 (Feb. 24, 1976).

²⁷⁸ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 71 (citation omitted).

²⁷⁹ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 151. The study found that in the service sector, there was no dependence on Korean suppliers.

²⁸⁰ R.C. Longworth, *On One Street, Two Different Paths of Success*, CHICAGO TRIB., Sept. 17, 1992, at C1.

²⁸¹ Edwin McDowell, *Hospitality is Their Business*, N.Y. TIMES, March 21, 1996, at D1.

²⁸² R.C. Longworth, *supra* note 280. Johnson Products, the first black-owned firm to be listed on the American Stock Exchange, has had a tradition of promoting black businesses by hiring black models and other black enterprises, such as advertising agencies, and advertising in black avenues such as *Essence* and *Soul Train*. *See*

Group solidarity and preferences extend beyond hiring decisions and preferential sales and purchases to include general social and economic assistance as well. A study of Ismaili/Pakistani immigrants in the southwestern U.S. revealed that within this community, differentiated not only by its ethnicity but also by its religion of Ismaili, a Muslim sect, a new immigrant will usually contact a community coordinator or sponsor, often a business owner, who will provide the new arrival with a full-time job, training, and financing help as part of his sponsorship activities.²⁸³ Similarly, the development of Greek business activities, especially in the restaurant business, also rested on the sponsorship model.²⁸⁴ It is this very affinity for members of one's group as well as the reliance on ethnic connections to lower the cost of doing business that have allowed a disesteemed minority group to overcome its labor market disadvantage and build up the group's ethnic network so necessary to the maintenance of an ethnic economy.

There is some evidence that ethnic economies pay lower wages than the general labor market. For example, at one end, the Puerto Rican ethnic economy, though small in size, paid high wages, reaching 96.5 percent of the expected level; at the other end, the African American ethnic economy's payroll was 72.8 percent of what it would have been had the African American ethnic economy paid wages at the average level of the mainstream labor market.²⁸⁵ On the other hand, the comparison with the general market may not be wholly accurate unless it takes into account the possibility that employees in ethnic economies may be among the least skilled and

WDAS BUSINESS & INDUSTRY, available at www.wdasfm.amfmi.com/community/mn_blackhistory_business.html

²⁸³ The immigrant works as an apprentice for about two years, during which time he or she is expected to set aside funds for the purpose of eventual business development. The Ismaili community assists the immigrant in the search of a business opportunity, and the immigrant is also eligible to borrow from a community investment fund raised from local sources. Patricia G. Greene, *A Resource-Based Approach to Ethnic Business Sponsorship: A Consideration of Ismaili-Pakistani Immigrants*, J. SMALL BUS. MANAGEMENT 58 (Oct. 1997) (available in lexis).

²⁸⁴ Greek immigrants with relatives are sponsored into the U.S. "[T]he sibling tie . . . becomes the primary relationship by which various nuclear families are united into clans. Moreover, . . . the sibling tie also becomes the most important kinship bond by which Greeks fashion their economic adaptation." Lawrence A. Lovell-Troy, *Clan Structure and Economic Activity: The Case of Greeks in Small Business Enterprise*, in SCOTT CUMMINGS (ED.), SELF-HELP IN URBAN AMERICA: PATTERNS OF MINORITY BUSINESS ENTERPRISE 63. The collective, clan-based entrepreneurial pattern is even stronger for the Chinese and Japanese who "operated businesses which were tied together by a strong network of collective, ethnically based morality." *Id.* at 85.

²⁸⁵ LIGHT & GOLD, *supra* note 7, at 70.

educated of coethnics. But even if the wage comparison is undertaken after adjusting for productivity differentials, an argument could still be made that “the low wages and the job itself represent contributions of the ethnic economy to employment of coethnics, and the low wage exceeds the general labor market’s counter offer, zero.”²⁸⁶ It is conceivable, thus, that the choice for many of those from marginal or transitional groups may be unemployment or employment, even if not under the most optimal of conditions, in their groups’ ethnic economies.

3. The Ethnic Enclave Economy

The term “ethnic economy,” with intellectual linkages to the literature on middleman minorities, generally carries no assumption about the location or clustering of the ethnic-owned firms, or about whether the customers are coethnics.²⁸⁷ The term “ethnic enclave economy” or “immigrant enclave economy” has a different intellectual tradition, as it is derived from dual labor market theories developed in the 1960s, which explored how and why certain disadvantaged groups were segregated into a lesser, secondary labor market separate from the superior, primary labor market.²⁸⁸

Even as the world’s economy has become increasingly globalized, transcending the boundaries of the nation-state,²⁸⁹ a parallel shift has also occurred, leading to the “revival of the small-business economy”²⁹⁰ and the importance of the local – whereby “local social networks associated with family, community, or ethnic tradition of skills, are particularly central in revitalized craft production complexes” such as those that have emerged in central and

²⁸⁶ LIGHT & GOLD, *supra* note 7, at 70-71.

²⁸⁷ LIGHT & GOLD, *supra* note 7, at 10, 11.

²⁸⁸ LIGHT & GOLD, *supra* note 7, at 12. For an examination of labor market analysis, which focuses on the idea of market segmentation and dual economies to explain persistent poverty and income inequality, see ROBERT T. AVERITT, *THE DUAL ECONOMY: THE DYNAMICS OF AMERICAN INDUSTRY STRUCTURE* (1968).

²⁸⁹ See generally Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. ___ (2002) (forthcoming).

²⁹⁰ Eran Razin, *Immigrant Entrepreneurs in Israel, Canada, and California* 100, in LIGHT & BHACHU, (EDS.), *supra* note 205, at 99.

northeastern Italy.²⁹¹ The enclave economy is characterized by spatial or locational clustering of business firms that tend to employ coethnic workers²⁹² linked by “ethnic entrepreneurial network, reflecting both ethnic attributes and location characteristics.”²⁹³ It usually arises as a result of “[c]hain migration,” whereby newcomers tend to congregate in the same areas where the ethnic group is already present.²⁹⁴

Ethnic neighborhoods have been part of the immigrant landscape of countries all over the world: Germantowns, Little Italys, Chinatowns.²⁹⁵ In the late nineteenth century and early twentieth century, the Jewish quarter in Manhattan was served by ethnic trade on the Jewish East Side, and New York City’s clothing industry developed alongside the Jewish immigrant workers and owners clustered there, kept close to the factories due to the lack of mass transit. South Asians in Britain occupy certain geographical clusters; migrants from Northwest Africa and southern Europe are concentrated in the older quarters of cities such as Berlin, Frankfurt, Rotterdam, Brussels, Paris. Opportunities to create ethnic economies arise in such ethnic neighborhoods with a critical mass of consumers with distinctive ethnic tastes and needs that

²⁹¹ Razin, *Immigrant Entrepreneurs in Israel, Canada, and California*, *supra* note 290, at 100.

²⁹² Alejandro Portes, *Modes of Incorporation and Theories of Labor Immigration*, 290-91 in MARY KRITZ, CHARLES KEELY & SILVANO TOMASI (EDS.) *GLOBAL TRENDS IN MIGRATION* (1981); PORTES AND BACH, *LATIN JOURNEY*, *supra* note 6, at 370.

²⁹³ Razin, *Immigrant Entrepreneurs in Israel, Canada, and California*, *supra* note 290, at 101.

²⁹⁴ LIGHT & BONACHICH, *IMMIGRANT ENTREPRENEURS*, *supra* note 13, at 153-54; Razin, *Immigrant Entrepreneurs in Israel, Canada, and California*, *supra* note 290, at 101. Despite the attempt of the U.S. government to disperse Southeast Asian refugees in the 1970s, the refugees themselves gravitated towards each other, resulting in concentrations of various ethnic groups in certain states. *Id.* The Vietnamese, for example, clustered in Orange County, California.

²⁹⁵ The existence of ethnic enclaves, whether residential or business, is common in many countries all over the world. German congregation in certain locations resulted in the creation of whole towns overseas, for example, Hermann, Missouri, in the U.S., Blumenau in Brazil, and Hahndorf in Australia; The Welsh have done the same in Bryn Mawr, Pennsylvania, and Scots in Dunedin, New Zealand. The Chinese have founded Chinatowns in places ranging from Melbourne to Toronto, New York and San Francisco. So have Italians living in Buenos Aires, New York, Toronto. SOWELL, *RACE & CULTURE*, *supra* note 117, at 103-04. One of the more recent immigrant group, the Koreans, have created Koreatown not only in Los Angeles but also in North Jersey, with approximately 130 churches, real estate markets, 30 restaurants, 270 dry cleaners, nail salons, groceries, 30 fraternal and business groups, five newspapers. Lisa Rein, *Immigrants Move Warily Across Cultural Barriers*, *THE RECORD*, Nov. 24, 1991, at A1. *See also* LIGHT & GOLD, *supra* note 7, at 184-85.

ethnic businesses could serve.²⁹⁶ In recent years, immigrants from Liberia, Nigeria, and other West African countries have carved an ethnic enclave in Staten Island, New York City, “bringing new merchants, vendors, a church and other institutions that cater to their tastes and needs.”²⁹⁷

Often reinforced by residential segregation,²⁹⁸ “ethnic neighborhoods were the spatial anchor of the communities,” often part of, or close to, coethnic economic enclaves.²⁹⁹

Historically, for some ethnic groups such as the Chinese, the existence of an ethnic enclave such as Chinatown was reinforced by repressive laws mandating segregation of the Chinese.³⁰⁰

Chinatowns across the U.S. thus became a residential as well as economic enclave, where the Chinese established homes, businesses, associations, and schools based on common geographic origins and clans.³⁰¹ Indeed, small businesses were particularly vital to the development of San

²⁹⁶ Roger Waldinger, David McEvoy & Howard Aldrich, *Spatial Dimensions of Opportunity Structures*, in WALDINGER, ALDRICH & WARD, *ETHNIC ENTREPRENEURS*, *supra* note 232, at 108, 115. This linkage between work and residence can be seen currently in the Chinatown garment industry of New York City. In Providence, Rhode Island, where Italian immigrants made up 14% of the city population by 1914, a local retail enclave provided employment to more than a tenth of the Italian male immigrants. Waldinger, McEvoy & Aldrich, *supra*, at 109.

²⁹⁷ Raymond Hernandez, *The Feel of Africa is Transplanted to Staten Island*, *THE NEW YORK TIMES*, June 20, 1993, at 30.

²⁹⁸ See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1843, 1845 (1994) (describing how political geography promotes “racially identified space” and racial segregation).

²⁹⁹ LIGHT & GOLD, *supra* note 7, at 184 (citation omitted). It has been suggested that in contrast to West Indian business activities in the U.S., West Indians business activities in Britain are not as numerous precisely because the West Indian in Britain is not segregated. Waldinger, McEvoy & Aldrich, *supra* note 296, at 110.

³⁰⁰ Though later declared unconstitutional, the California legislature, for example, enacted a law in 1879 requiring towns and cities to remove the Chinese from city limits. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* 49-50 (1993). Landlords and realtors refused to rent and sell to Chinese outside the boundaries of Chinatown. BILL ONG HING, *supra*, at 50. In Tucson, a widespread campaign was begun in 1885 urging that the Chinese be forced into a Chinatown so they could be monitored. BILL ONG HING, *supra*, at 50, 186, 283 n.55.

³⁰¹ BILL ONG HING, *supra* note 300, at 50, 77, 84. In response to increasing demands by Chinese parents for their U.S. born children to attend public school, the San Francisco School Board allowed the Chinese School to be officially opened as a “separate but equal” public school in San Francisco Chinatown in 1859. Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 *ASIAN L. J.* 181, 191 (1998). When the Chinese School was closed in 1871, Chinese Language Schools were organized and run by the Chinese Six Companies, an organization of Chinatown merchants. As the violence against the Chinese increased systematically by the 1870s, the California Legislature revised the School Law of 1860, which had established separate public schools for the Chinese, along with other minority groups. The Chinese

Francisco Chinatown because although some Chinese searched for jobs as laborers or domestics outside of Chinatown, most stayed within to avoid racial antagonism and found employment in family-run enterprises.³⁰² For many recent Asian immigrants to the U.S. who either face English language barriers or possess few marketable skills, Chinatowns constitute one of the few places where work could be found. Reciprocally, newcomers have reinvigorated Chinatown, replacing declining industries such as the hand-laundry business – developed in Chinatown “bachelor societies” due to anti-Chinese exclusionary laws which prevented Chinese males from bringing wives³⁰³ – with the burgeoning restaurant business that caters to both the Chinatown market and the nonethnic market.³⁰⁴

As the Chinatown experience shows, the existence of an ethnic neighborhood with proximity to a coethnic economy has allowed the lesser skilled, educated and connected members of the group to gain access to group resources to achieve upward mobility, often within the ethnic enclave economy.³⁰⁵ Ethnic businesses that are an integral part of the ethnic community play a vital role in community development – for example, an ethnic enclave economy “can make a poor but active area safer and more attractive than a more affluent but less trafficked neighborhood.”³⁰⁶ Business concentration within an economic enclave in proximity to ethnic neighborhoods produces a synergistic relationship between the businesses and the residences in at least three ways. First, the “agglomeration of economies” is likely to encourage the proliferation of ethnic businesses and attract additional customers, drawn by the size and diversity of the enclave. Second, it is also likely to further the cultural presence of the area,

School was closed in 1871, and from then until 1885, the Chinese were excluded from the all-white public school as well as the separate schools. Joyce Kuo, *supra*, at 193, 194.

³⁰² BILL ONG HING, *supra* note 300, at 52.

³⁰³ HIMILCE NOVAS & LAN CAO, WHAT YOU NEED TO KNOW ABOUT ASIAN AMERICANS 27-28, 30-32 (1996).

³⁰⁴ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 68-69.

³⁰⁵ LIGHT & GOLD, *supra* note 7, at 186. WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 66

³⁰⁶ LIGHT & GOLD, *supra* note 7, at 187.

hence promote its visibility as an ethnic market that ethnic shoppers wish to frequent both for the products and services available as well as for the cultural symbol that the enclave represents. Third, the agglomeration effect may also create an “export” base from which ethnic firms can expand beyond the ethnic customer base.

Locational aggregation also gives the ethnic enclave economy certain added benefits³⁰⁷ that a general ethnic economy might not have.³⁰⁸ The authors of a comprehensive study of the ethnic enclave economy observe that “[e]nclaves can be composed of a group of relatively independent firms which compete with each other for supplies and minority consumers, or minority firms can theoretically be arranged in a fairly unified system of vertical and horizontal integration”³⁰⁹ In the latter case, the ethnic enclave, though a competitive sector, may nevertheless confer some of the economic advantages of a “monopoly sector.”³¹⁰ For example, because of vertical and horizontal integration³¹¹ of businesses along ethnic lines, coethnic firms manage to keep their business exchanges, whether with suppliers or customers, within the ethnic enclave, allowing such firms to “suck value out of each stage of a product’s movement toward the market, losing little or no value to noncoethnic firms.”³¹² Thus territorial clusters allow the ethnic economy to capture a higher proportion of sales than it otherwise would. When an ethnic firm buys from other neighborhood co-ethnic firms, the flow of money recirculates within the ethnic enclave economy. These “localized ethnic entrepreneurial enclaves” also provide an easy

³⁰⁷ Waldinger, McEvoy, Aldrich *supra* note 296, at 113-15.

³⁰⁸ Added benefits include “the ability of the enclave economy to generate more money for participants than the participants would have been able to obtain without that enclave structure to support them.” LIGHT & GOLD, *supra* note 7, at 15.

³⁰⁹ Kenneth Wilson and W. Allen Martin, *Ethnic Enclaves: A Comparison of the Cuban and Black Economies in Miami*, 88 AM. J. SOCIOLOGY 138, 139 (1982).

³¹⁰ Wilson and Portes, *Immigrant Enclaves*, *supra* note 9, at 306-07.

³¹¹ “Horizontal integration involves ethnic business owners cooperating to choose store location, avoid competitive pricing, pool information, and engage in collective buying. Vertical integration occurs when a whole package of business services – ranging from credit, wholesale goods, and maintenance to parking, transportation, real estate, manufacturing, and import-export concessions – are provided by coethnics.” LIGHT & GOLD, *supra* note 7, at 122.

³¹² LIGHT & GOLD, *supra* note 7, at 12.

setting “for recruiting labor, gathering information, transmitting entrepreneurial skills, and in some cases also forming input and output linkages.”³¹³

Although the tradition of promoting economic independence for African Americans is overlooked today,³¹⁴ there has been, historically in the U.S., black businesses in African American economic enclaves, in northern cities such as Chicago’s South Side, New York’s Harlem, and Cleveland’s Hough District, and in southern cities such as Durham, North Carolina and Tulsa, Oklahoma. As blacks from the south moved north in the 1900s, black-owned businesses were formed to cater to the tastes and needs of the southern newcomers.³¹⁵ In the late 1930s, two-thirds of businesses in Harlem were black-owned; by 1915, Chicago had a “black market.” From Cleveland’s segregated neighborhoods, a base of economic ventures, of

³¹³ Eran Razin, *Immigrant Entrepreneurs in Israel, Canada, and California*, *supra* note 290, in LIGHT & BHACHU, (EDS.), *supra* note 205, at 99. The Maghrebian merchants of Algeria, Morocco, and Tunisia who have settled in enclaves in France have also maximized the benefits to be derived from the ethnic system – “resale of establishments into the co-ethnic circuit.” Gildas Simon, *supra* note 214, at 134, in LIGHT & BHACHU (EDS.), *supra* note 205 .

Along Calle Ocho, the main commercial street of the Cuban enclave economy in Miami, for example, Cuban-owned firms bought semifinished products from other Cuban-owned firms, added value to the products, and passed on the transformed products to other Cuban retail businesses for sale. Wilson and Portes, *Immigrant Enclaves*, *supra* note 9, at 306-07. Indeed, several studies found that the Cuban enclave economy’s “hyperefficiency” is derived from vertical and horizontal integration and preferences for ethnic self-dealing between suppliers and consumers. Wilson and Portes, *Immigrant Enclaves*, *supra* note 9, at 301-02. Wilson and Martin, *Ethnic Enclaves*, *supra* note 309. In some instances, shared ethnic identity, plus the “agglomeration effects of . . . the ethnic enclave,” LIGHT & GOLD, *supra* note 7, at 15, may result in “the likelihood of cartelization in defiance of market competition.” IVAN LIGHT AND CAROLYN ROSENSTEIN, RACE, ETHNICITY, AND ENTREPRENEURSHIP IN URBAN AMERICA 20 (1995). Of course, if these arrangements cause antitrust concerns or violations, then antitrust laws should be applied. *See supra* note [277].

Analogous scenarios can be found in San Francisco, when Italian fishermen sell their catch to the Italian restaurants on Fisherman’s Wharf. LIGHT & GOLD, *supra* note 7, at 13. “In this manner, San Francisco’s Italian ethnic economy monopolizes the whole value of the restaurant business even though the tourist industry has a competitive, small business structure.”

³¹⁴ *See* John Sibley Butler, *Entrepreneurship and the Advantages of the Inner City*, REV. OF BLACK POLITICAL ECONOMY, Sept. 22, 1995, Vol. 24, p 39 (on line Lexis) (“The fact that business enterprise once stood at the center of black communities is an historical fact that has been lost and neglected by scholars and commentators.”). In fact, some studies found that “in 1910 African-Americans were more likely than white Americans to be employers, and almost as likely as Whites to be self-employed.” *Id.*, citing Margaret Levenstein, *African American Entrepreneurship: The View from the 1910 Census*, BUS. AND ECON. HISTORY, Vol. 24, no. 1, Fall 1995.

³¹⁵ Waldinger, McEvoy & Aldrich, *supra* note 296, at 109.

newspaper publishers, realtors, undertakers and other business owners, were launched.³¹⁶

During the Jim Crow era, African Americans were forced to create a “self-sustaining support apparatus”³¹⁷ consisting of hospitals, banks, insurance companies, restaurants, inns, hotels and other enterprises.³¹⁸ On the one hand, “[s]egregation gave to the black professional a virtually protected market. . . . If they profited economically by avoiding intense competition from their white counterparts, . . . they also suffered from being unable to practice their professions in the best institutions and in the best atmosphere.”³¹⁹ As some have observed, “[u]ntil the mid-1960s, black businesses operated in sheltered markets, spatially isolated and relegated to the black community by the white community. Black businesses were protected in those markets by the same racial animus that excluded them from the mainstream.”³²⁰

Durham, for example, was a thriving black economic enclave around the turn of the

³¹⁶ Waldinger, McEvoy & Aldrich, *supra* note 296, at 110.

³¹⁷ Robert L. Woodson, *The State of the Union: Civil Rights: Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1020 (1989).

³¹⁸ Indeed, blacks had had a history of entrepreneurship before the American Revolution and before the Civil War. *See generally* BUTLER, *supra* note 8, at 34-78; Robert L. Woodson, *supra* note 317, at 1021, 1031.

³¹⁹ BUTLER, *supra* note 8, at 203 (citation omitted).

³²⁰ Robert E. Suggs, *Economic Justice in America's Cities: Visions and Revisions of a Movement: Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487, 490 (1995). Desegregation mandated by the 1964 Civil Rights Act destroyed the protected markets of black firms and forced them to compete with national chains with extensive economic resources, *id.* at 491, because black customers had greater access to goods and services provided by the mainstream economy. In the meantime, “black-owned firms were still inconveniently located, under-capitalized, and overpriced. Thus, at the high-water mark of the civil rights revolution, the small retail and personal service firms that had been the mainstay of black business activity began a sustained and inexorable decline.” *Id.* Additionally, the Fair Housing Act of 1968 made it possible for blacks and the black middle class in particular to leave segregated neighborhoods for better housing. Title VII of the 1964 Civil Rights Act, which bars employment discrimination, allowed blacks greater access to jobs outside black economies. “These twin factors eliminated whatever advantages had accrued to black firms from their location in black neighborhoods and accelerated their decline. With this decline of black business and the dispersal of the black middle class, the black community’s former central city neighborhoods deteriorated.” *Id.* at 492. *See also* Woodson, *supra* note 317, at 1022. John Sibley Butler, *Myrdal Revisited*, *supra* note 28 (describing how the segregated market protected black jobs, which were destroyed when integration resulted in whites replacing blacks in the public school systems throughout the South); Joel Kotkin, *The Color of Freedom is Green*, THE BERGEN RECORD, Oct. 5, 1986, at 1; Joel Kotkin, *The Reluctant Entrepreneurs*, INC., Sept. 1986, at 81.

twentieth century.³²¹ The central business section of the African American community in Durham, Hayti, was fully developed, with a vibrant business section along Fayetteville Street. By the 1940s, more than one hundred and fifty businesses flourished – cafes, movie theaters, barber shops, groceries, boarding houses – and Parish Street, referred to as the Negro Wall Street, attracted an impressive concentration of successful black-owned businesses.

Tulsa too was once an economic enclave dominated by African Americans. Although slavery was abolished when the Confederacy was defeated, it continued until 1866 in the Indian Territory (land west of the Mississippi set aside for Eastern Indian tribes forced westward) when the U.S. government entered into treaties with the slave-owning Indian tribes.³²² From 1866 to 1886, the government entertained the possibility of setting aside central Oklahoma as a permanent home for former slaves of the Indian tribes. Although this idea was never formally instituted, African Americans nonetheless migrated to Oklahoma and settled several all-black towns. Tulsa, in particular the Greenwood section, became a center of black economic development and was sometimes called Little Africa. “Deep Greenwood,” the heart of Tulsa’s black business community, was home to an array of commercial establishments, ranging from groceries, restaurants, rooming houses, and hotels to law offices, medical establishments and other professional groups.³²³

³²¹ The discussion below about Durham as a black economic enclave is drawn from BUTLER, *supra* note 8, at 165-196. With its array of economic and financial institutions owned by African Americans, Durham became known as a “City of Enterprise” for blacks, with major black enterprises such as the Durham Textile Mill, the Durham Commercial and Security Company, the National Negro Finance Corporation, and the North Carolina Mutual Life Insurance Company, one of the largest African American companies in the U.S. and one of the most historically celebrated. Formed in 1898, the company had become, by 1939, the largest African American insurance company in the world. The Mechanics and Farmers Bank, established in 1907, was instrumental in the development of a black middle class in Durham.

Although an expressway now goes through the center of what was once Hayti – as one commentator noted, a “testimony to the destructive program of urban renewal, brought in by politicians, that hit Durham during the decade of the 1960s” BUTLER, *supra* note 8, at 193, the city itself is being revitalized. BUTLER, *supra* note 8, at 195.

³²² BUTLER, *supra* note 8, at 202. The discussion on the development of Tulsa as a black economic enclave is drawn from *id.*, at 197-226.

³²³ In 1921, riots broke out after a black man was rumored to have engaged in attempted rape of a white woman. The Tulsa riots resulted in the destruction of the Greenwood business and residential district, with 18,000 homes and businesses burned and \$2 to \$3 million in damage, and 300 people dead. This incident, indeed, may be understood as part of the unfortunate tradition of middleman groups who face hostility precisely because of host country or third party resentment of their economic success. BUTLER, *supra* note 8, at 217-22. Since 1979, there have been efforts to reconstruct the Greenwood section; black businesspeople have proposed a number of financing

In his efforts to promote African American ethnic economies, Fred Moore, one of the organizers of Booker T. Washington's Negro Business League, had once remarked, "[W]e must . . . require every person who joins a local league to pledge himself to support all worthy enterprises managed by men and women of the race How can we otherwise succeed? Some would say this was drawing the color line. I do not believe it. Jews support Jews; Germans support Germans; Italians support Italians until they get strong enough to compete with their brother in the professions and trades; Negroes should now begin to support Negroes."³²⁴

4. Ethnic Niches

As mentioned briefly above, ethnic occupational pattern is common among different ethnic groups in different countries. This has been referred to as "ethnic hegemonization," "industrial clustering," or "entrepreneurial niches,"³²⁵ where "a certain ethnic group becomes entrenched in a clearly identifiable economic sector, working at jobs for which it has no evident cultural, geographical or even racial affinity."³²⁶ In Los Angeles, Korean merchants whose businesses were *inside* Koreatown had the benefit of an ethnic enclave – "an institutionally complete business environment in which Koreans could buy a wide range of goods and services from coethnics."³²⁷ Those with businesses *outside* the Koreatown enclave and thus more dependent on non-Korean customers were more likely to be niche-centered in order to receive the benefits of industrial specialization.³²⁸ Koreans were heavily represented in Los Angeles County's retail liquor industry – representing 3.5 percent of firms although they were only .8

packages to the city.

³²⁴ BUTLER, *supra* note 8, at 70.

³²⁵ ROBERT M. JOBU, ETHNICITY AND ASSIMILATION 223 (1988). LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 183. Eran Razin and Ivan Light, *Ethnic Entrepreneurs in America's Largest Metropolitan Areas*, 33 URBAN AFFAIRS REV. 332-60 (1998).

³²⁶ Tunku Varadarajan, *A Patel Motel Cartel*, NEW YORK TIMES, July 4, 1999, at 36.

³²⁷ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 209.

³²⁸ According to Los Angeles Times estimates, 70 percent of customers in Koreatown stores were Korean, 10 percent were other Asians, and 20 percent were non-Asians. LIGHT & BONACICH, ETHNIC ENTREPRENEURS, *supra* note 13, at 209.

percent of the County population in 1980.³²⁹ Ensclosed in the informal sector of New York City are Senegalese merchants who sell knockoff or counterfeit designer watches³³⁰ and other Africans who form an “efficient ethnic network” of street vendors.³³¹ Koreans have become a dominant presence in the fruit and vegetable business in New York City.³³² The Guyanese congregate in the city’s pharmacies and machinery repair shops;³³³ Afghans in the fast-food chicken restaurants where even their carpenters and chicken suppliers are Afghans.³³⁴ Thais dominate the city’s hand-rolled bagel stores, many of whom follow the example of a Thai pioneer bagel roller who owned a store in Queens to open up their own stores.³³⁵ In New York City and New Jersey, Colombians and Dominicans have captured the discount phone parlors or calling centers business first started by Dominicans for immigrants to call home.³³⁶ In Seattle and cities in Orange County, California, nail salons are predominantly owned and run by Vietnamese,³³⁷ who also dominate the shrimping industry on the Texas coast.³³⁸ Palestinians in San Francisco have a strong presence in the small

³²⁹ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 227.

³³⁰ Thomas Goetz, *New York’s Parallel Lives*, THE NEW YORK TIMES, Oct. 19, 1997, at 59. Donatella Lorch, *An Ethnic Road to Riches: The Immigrant Job Specialty*, THE NEW YORK TIMES, Jan. 12, 1992, Section 1, Part 1, P. 1.

³³¹ Deborah Sontag, *Unlicensed Peddlers, Unfettered Dreams*, THE NEW YORK TIMES, June 14, 1993, at A1.

³³² Robert Reinhold, *Flow of 3d World Immigrants Alters Weave of U.S. Society*, THE NEW YORK TIMES, June. 30, 1986, at A1. Richard Levine, *The New Arrivals: Immigrants Reshape New York*, THE NEW YORK TIMES, July 30, 1990, at A1 (describing how Koreans have replaced Italians and Jews as owners of neighborhood fruit stands).

³³³ Lorch, *supra* note 330.

³³⁴ Lorch, *supra* note 330 (Afghans own more than 200 fast-food chicken restaurants).

³³⁵ Goetz, *New York’s Parallel Lives*, *supra* note 330.

³³⁶ Goetz, *New York’s Parallel Lives*, *supra* note 330 .

³³⁷ Ferdinand M. De Leon, *Entrepreneurs from Southeast Asia Finding Success in the Art of Acrylics*, SEATTLE TIMES, Aug. 13, 1995, at L1.

³³⁸ Goetz, *New York’s Parallel Lives*, *supra* note 330.

groceries business.³³⁹ South Asians have a “virtual ethnic monopoly”³⁴⁰ in the newsstand business³⁴¹ and gas stations in New York City³⁴² and have developed a powerful national presence in the diamond industry, as diamond cutters, polishers, and importers,³⁴³ and the hotel/motel business.³⁴⁴

In other countries, Britain, for example, Chinese and Cypriot immigrants have created an economic niche in the traditionally English fish and chips business. Indians and Pakistanis are concentrated in certain distinct sectors in retail trade, such as chemist shops, small groceries, discount airline tickets. Cypriots and Asians dominate what was once a dying clothing trade in the East End of London. In Amsterdam, Hindustani and Turkish entrepreneurs have revived the garment manufacturing business.³⁴⁵

The niche, once occupied by an ethnic group, tends to perpetuate itself, due to path

³³⁹ Goetz, *New York's Parallel Lives*, *supra* note 330 .

³⁴⁰ Jonathan Foreman, *Bombay on the Hudson*, CITY JOURNAL, Vol. 7, No. 3, Summer 1997, at 14-28. *See also* Reinhold, *supra* note 332, at A1.

³⁴¹ Indians operate an estimated 300 of the city's 330 street newsstands. Foreman, *Bombay on the Hudson*, *supra* note 340. Unless otherwise noted, the discussion in the remainder of the paragraph on Indian entrepreneurs is drawn from *id.*

³⁴² An estimated forty percent of gas stations in New York City are owned by South Asians, particularly Indians. Lorch, *supra* note 330. According to estimates by the New York City Department of Consumer Affairs, Sikhs from India own nearly half of New York's gas stations. Foreman, *Bombay on the Hudson*, *supra* note 340.

³⁴³ This sector is dominated by the Hasidic Jews and the Jains, members of an Indian religion noted for vegetarianism and nonviolence.

³⁴⁴ Gujaratis from northwestern India are predominant in the neighborhood store business. They have also dominated the hotel/motel business. According to the Asian American Hotel Owners Association, more than 50 percent of all motels in the U.S. are owned by Asian Indians, 70 percent of whom are of Gujarati Hindu subcaste, although Indians are less than one percent of the population in the U.S. Varadarajan, *A Patel Motel Cartel*, *supra* note 326; *see also* Edwin McDowell, *Hospitality is their Business*, N.Y. TIMES, March 21, 1996, at D1.

How the Indians came to occupy the motel niche is in many ways similar to how other ethnic groups made their niches. Some have explained their domination in terms of cultural affinity – that is, their inclination towards being hospitable, as reflected in the ancient Sanskrit phrase, “The Guest is God,” Varadarajan, *supra*, combined with opportunity provided by white motel owners who were looking to sell or retire. One of the Indians interviewed noted that he got into the hotel business when he saw how “‘our people’ were buying motels.” Varadarajan, *supra*.

³⁴⁵ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 19-20.

dependency – a type of “chain migration,”³⁴⁶ involving those who pioneered an economic path and those coethnics who followed, whether they are Indian motel owners, Korean green grocers, Chinese laundromat operators,³⁴⁷ or historically, German beer makers and Jewish tailors.³⁴⁸ Additionally, access to businesses in a particular niche often “depended upon ethnic homogeneity in business transfers, which tended to advantage coethnics while excluding outsiders.”³⁴⁹ In other words, ethnics tend to sell their businesses to other coethnics and thus reproduce the ethnic character of a niche. Information about potential sales and purchases is passed along an ethnic exchange, as in the case of the Korean liquor sales advertised in Korean language newspapers or the “network of Indian moteliers [that] often relays breaking news of properties for sale to other members of the same community.”³⁵⁰ And it is not uncommon for newcomers who are trained by co-ethnics in the business to perpetuate the niche by starting their own enterprises, as in the case of Indians in the newsstand business and Afghans in the fried chicken business.³⁵¹

In some instances, control of a niche may allow the minority group to exercise a non-trivial degree of market power. The Japanese in California, for example, were able “to hegemonize an entire economic area, both horizontally and vertically”³⁵² because they were

³⁴⁶ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 153-54.

³⁴⁷ Varadarajan, *A Patel Motel Cartel*, *supra* note 326.

³⁴⁸ John Greenwald, *Finding Niches in a New Land*, TIME, July 8, 1985, at 72.

³⁴⁹ LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 242. *See also supra* notes [272-274]. Ethnic niches provide an “insider’s edge on the profession” so that “once a niche is found, it creates a snowball effect, gathering in labor from that ethnic group and expanding exponentially.” Lorch, *supra* note 330.

³⁵⁰ Varadarajan, *A Patel Motel Cartel*, *supra* note 326. *See supra* note 272 and accompanying text.

³⁵¹ The Indians and Pakistanis who control an estimated 70% of the newsstand kiosks in New York City regularly employ fellow coethnics or help them get jobs in other newsstand companies; many of these employees go on to start their own newsstand businesses. John Greenwald, *Finding Niches in a New Land*, *supra* note . The Afghan fried chicken niche began in 1979, when an Afghan student from Kandahar, Afghanistan got his first job at Kansas Fried Chicken and subsequently opened the first Kennedy’s Fried Chicken; there are now approximately forty unfranchised restaurants in New York City all with that name and all owned by Afghans, who got their start through an informal apprenticeship with other established Afghan fast-food restaurant owners. Lorch, *supra* note 330. *See also supra* notes [283-284] and accompanying text.

³⁵² JIOBU, ETHNICITY AND ASSIMILATION, *supra* note 325, at 223. In this respect, being part of an ethnic niche may confer similar economic advantages as being part of an ethnic enclave – the ethnic niche providing market power through industrial clustering, and the ethnic enclave through locational clustering and linkages.

clustered in agriculture. As a result of their membership in farmers' organizations and prefectural associations, the Japanese farmers ensured that resources were distributed primarily within the Japanese niche through informal preferential purchasing and credit arrangements – hence “the tendency to spend one’s money on goods and services provided by the ethnic economy: in exchange, the consumer would receive a favorable credit arrangement”³⁵³ not available to non-coethnics. By vertically integrating and restricting competition³⁵⁴ within the ethnic niche, “Japanese entrepreneurs were able to charge lower prices on the open market and offer higher bids on purchases and rentals of such assets as farmland. Consequently Issei [first generation Japanese] business was able to expand rapidly and even to move into a ‘monopolistic’ position in certain spheres of the economy.”³⁵⁵

Interestingly, this quasi-monopolistic power is conferred on an ethnic group by virtue of its niche occupation whether the group dominates the niche as owners of business or as workers. Where coethnic employees (as opposed to coethnic business owners), through “their numerical clustering, their numerical preponderance, their organization, government mandates or all four,” are able to exert economic influence or power to secure preferences for coethnics, this has been referred to as an “ethnic-controlled economy.”³⁵⁶ Italian, Irish, and Jewish immigrants in New York City had long relied on coethnic hiring networks to obtain municipal employment.³⁵⁷ These immigrants created ethnic niches in certain industries, sectors, or occupations within the government – the Irish had the construction niche, the Italian the sanitation niche, and Jews the

Vertical integration within the ethnic niche, similar to that within the ethnic enclave, *supra* notes [312-316], meant that Japanese produce growers would sell to wholesalers who in turn sold to Japanese retailers. The Japanese growers would turn to the wholesalers for financing, in exchange for a promise that they would sell their produce to the wholesalers, thus assuring the wholesalers of reliable supply sources. BONACICH & MODELL, *supra* note 7, at 56.

³⁵³ BONACICH & MODELL, *supra* note 7, at 56.

³⁵⁴ Prewar Japanese American organizations ensured that Japanese small businesses did not underbid each other or jack up purchase or rent prices or infringe on each others' territories. BONACICH & MODELL, *supra* note 7, at 57.

³⁵⁵ BONACICH & MODELL, *supra* note 7, at 58; LIGHT & BONACICH, IMMIGRANT ENTREPRENEURS, *supra* note 13, at 266. These practices may be deemed antitrust violations. *See also supra* notes [277 and 313].

³⁵⁶ LIGHT & GOLD, *supra* note 7, at 25.

³⁵⁷ LIGHT & GOLD, *supra* note 7, at 21. ROGER WALDINGER, STILL THE PROMISED CITY? 302 (1996).

school teaching niche. Craft unions had once required that employers hire only union members, and membership was limited to applicants related by blood or marriage to current or past union members.³⁵⁸ In the government sector currently, African Americans have become a formidable presence. Studies have shown that Asians and Hispanics, many of whom are immigrants and without political influence, have a much smaller share of government jobs in Los Angeles than do non-Hispanic whites, whose share of government employment is only half that of blacks.³⁵⁹ “At this point, business ownership and job control *become equivalent* in respect to the hiring advantage they convey.”³⁶⁰ Preferential policies adopted by the government to build African American clusters in the public sector could be viewed as an attempt to correct the absence of strong ethnic niches among African Americans.³⁶¹

B. The Boundary: Disadvantage and Reactive Solidarity

1. Introduction

The emergence of an ethnic economy is based on both external and internal factors and the interaction of supply and demand.³⁶² Disadvantage is the oldest explanation for minority entrepreneurship. Although Weber emphasized the connection between bourgeois capitalism and the Protestant ethics, he also acknowledged that Protestants, excluded from the civil service and the armed forces because of religious tests, turned to entrepreneurship partly because of a labor

³⁵⁸ LIGHT & GOLD, *supra* note 7, at 74. An Irish contractor in Boston routinely found workers in Irish pubs. LIGHT & GOLD, *supra* note 7, at 21. Or, as the leader of a predominantly black clerical workers’ union remarked, “My people have an excellent communications system: they know that jobs are available; they refer cousins, sons, daughters. People walk into personnel and drop off resumes like there’s no tomorrow.” WALDINGER, *STILL THE PROMISED CITY?*, *supra* note 357, at 234.

³⁵⁹ LIGHT & GOLD, *supra* note 7, at 22, 123.

³⁶⁰ LIGHT & GOLD, *supra* note 7, at 22. (italics in original). “An ethnic-owned firm that employs 99 coethnics provides the same employment to coethnics as a state agency that employs 100 coethnics even though the employees do not own the state agency.” *Id.* at 23.

³⁶¹ LIGHT & GOLD, *supra* note 7, at 75. WALDINGER, *STILL THE PROMISED CITY?*, *supra* note 357, at 234.

³⁶² Roger Waldinger, Robin Ward and Howard Aldrich, *Trend Report: Ethnic Business and Occupational Mobility in Advanced Societies*, 19 *SOCIOLOGY* 589 (1985).

force disadvantage caused by religious discrimination.³⁶³ Werner Sombart similarly attributed Jewish dominance in business to their exclusion from medieval trade guilds.³⁶⁴ Subsequently, scholars who have studied ethnic economies have advanced disadvantage – an external factor – as the reason for high rates of entrepreneurship³⁶⁵ among minorities denied “access to majority-controlled paths of economic advancement.”³⁶⁶ Disadvantage include being subject to de jure or de facto segregation, being undocumented, lacking English skills, having little formal education, not knowing American or mainstream work practices.³⁶⁷

Other scholars studying ethnic entrepreneurship have looked at group characteristics – an internal factor – consisting of ethnic resources and ethnic social capital.³⁶⁸ These may include

³⁶³ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM*, *supra* note 221, at 37-39. Weber thus was perplexed by the fact that Catholics, a traditionally oppressed religious group, did not have a strong tradition of business enterprises. “National or religious minorities which are in a position of subordination to a group of rulers are likely, through their voluntary or involuntary exclusion from positions of political influence, to be driven with peculiar force into economic activity.” *Id.* at 43. Karl Marx explained that Jews were disliked because they were not Christians and because their propensity towards “huckstering” gave them an economic advantage, causing them to be further despised. Karl Marx, *On the Jewish Question*, 26-52, in ROBERT TUCKER (ED.), *THE MARX-ENGELS READER* (1978).

³⁶⁴ SOMBART, *supra* note 10, at 300-01.

³⁶⁵ See, e.g. Howard Aldrich, John Cater, Trevor Jones, and David McEvoy, *From Periphery to Peripheral: The South Asian Petit Bourgeoisie in England*, *RESEARCH IN SOCIOLOGY OF WORK* 2, 8 (1983) (explaining that “because of natives whites’ prejudice and hostility,” Asians in Britain must “seek employment below their skill level or else create their own employment opportunity by forming a small business.”); Lloyd L. Wong and Michele Ng, *Chinese Immigrant Entrepreneurs in Vancouver: A Case Study of Ethnic Business Development*, 30 *CANADIAN ETHNIC STUDIES* (March 1998), at 64-85 (available in Lexis) (reporting that racial discrimination caused many Chinese immigrants to open a business in the Chinese ethnic enclave); Pyong-Gap Min, *From White Collar Occupations to Small Business: Korean Immigrants’ Occupational Adjustment*, *THE SOCIOLOGICAL QUARTERLY* 335 (1984) (attributing “disadvantage in the America job market” as a principal cause of Korean entrepreneurship in Atlanta); LIGHT & ROSENSTEIN, *supra* note 313, at 161 (explaining that labor market abuses caused middleman minorities to turn to “defensive self-employment.”); Annie Phizacklea, *Entrepreneurship, Ethnicity, and Gender*, 21 in SALLIE WESTWOOD AND PARMINDER BHACHU (EDS.), *ENTERPRISING WOMEN* (1988) (viewing entrepreneurship as an escape route for minority men confined by racism to dead-end jobs); Chua Lee Hoong, *The Business of Race in the Race for Business*, *THE STRAITS TIMES*, June 29, 1996, at 34 (describing how ethnic networks were formed as a reaction against discrimination; in the case of the Chinese, banks refused to lend to “Chinamen.”).

³⁶⁶ Greene, *supra* note 283.

³⁶⁷ LIGHT & GOLD, *supra* note 7, at 211.

³⁶⁸ LIGHT & ROSENSTEIN, *supra* note 313, at 22 (defining ethnic resources as “sociocultural and demographic features of the whole group that coethnic entrepreneurs actively utilize in business or from which their business passively benefits. . . . Typical ethnic resources include entrepreneurial heritages, entrepreneurial values and attitudes, low transaction costs, rotating credit associations, relative satisfaction arising from nonacculturation to

personal and class resources, for example, money or advanced degree, but need not, because ethnic resources emphasize instead sociocultural factors that allow groups to “convert social characteristics of their group into economic resources, thus creating employment and income independent of class resources.”³⁶⁹ This intellectual tradition emphasizes collectivism rather than individualism and studies the role ethnic resources and institutions have contributed to the economic stability of certain ethnic groups.

There are also scholars who use an interactive model, which emphasizes both cultural analysis and the structural economic environment, focusing on the “congruence between the demands of the economic environment and the informal resources of the ethnic population.”³⁷⁰ For example, in an effort to understand why despite discrimination and hostility, certain groups have been able “to create success out of hatred,”³⁷¹ some scholars who have focused on the interaction between host hostility and the reactive solidarity such hostility provokes, producing in turn group boundaries that distinguish minority insiders from non-minority outsiders.

2. Boundaries, Social Capital and Ethnic Economies

Thus, ethnic economies emerge when ethnic minorities face “labor market disadvantage,” receiving “below-expected returns on their human capital for reasons unrelated to productivity,”³⁷² and are able to tap into their reservoir of ethnic resources and social capital to

prevailing labor standards, social capital, reactive solidarities, multiplex social networks, and a generous pool of underemployed and disadvantaged coethnic workers.”). For a study of the efficiencies of rotating credit associations as a community market for savings among ethnic minorities, see Cao, *Looking at Communities and Markets*, *supra* note 268.

³⁶⁹ LIGHT & ROSENSTEIN, *supra* note 313, at 24.

³⁷⁰ Waldinger, Ward, & Aldrich, *Trend Report*, *supra* note , at 589.

³⁷¹ Bonacich, *A Theory of Middleman Minorities*, *supra* note 23, at 584.

³⁷² LIGHT & GOLD, *supra* note 7, at 200 (explaining that the term means that “qualified workers get no job at all or they do not get a job commensurate with their experience and education.”).

create alternatives to mainstream employment,³⁷³ or “compensatory entrepreneurship.”³⁷⁴ Generally, scholars have emphasized two interactive factors to explain how ethnic group membership produces economic resources.

The first perspective stresses the unique skills and resources shared by members of an ethnic group – the “‘tool kit’ of symbols, stories, rituals, and worldviews that people may use in varying configurations to direct action and solve different kinds of problems.”³⁷⁵ If there is a market demand for these unique cultural resources, those who possess such resources will be competitively advantaged. For example, the Chinese are more likely to possess unique skills in cooking Chinese food than non-Chinese, Mexican-origin entrepreneurs may have unique resources to supply Mexican demand in southwestern towns,³⁷⁶ and Israelis better equipped to teach Hebrew.³⁷⁷ Historically, for a certain period before the Civil War in the U.S., black artisan businesses thrived, partly because “‘as a result of almost two and a half centuries of slavery, up to the outbreak of the Civil War, the knowledge of [certain] skills was concentrated almost exclusively in the hands of the Negroes, free and slave.’”³⁷⁸ Blacks also possessed unique skills such as barbering, which was originally developed on plantations,³⁷⁹ and blacksmithing and carpentry.³⁸⁰

The second perspective stresses the ways in which out groups in particular establishes

³⁷³ Research on the types of economic environment that may facilitate entrepreneurship include: “coethnic consumer products, underserved or abandoned markets, markets with low returns to economies of scale, markets with unstable or uncertain demand, and markets for exotic goods.” LIGHT & ROSENSTEIN, *supra* note 313, at 74.

³⁷⁴ LIGHT & ROSENSTEIN, *supra* note 313, at 160.

³⁷⁵ LIGHT & GOLD, *supra* note , at 107.

³⁷⁶ LIGHT & ROSENSTEIN, *supra* note 313, at 85, 123.

³⁷⁷ LIGHT & GOLD, *supra* note 7, at 107.

³⁷⁸ BUTLER, *supra* note 8, at 44 (citation omitted).

³⁷⁹ WALDINGER, ALDRICH & WARD, ETHNIC ENTREPRENEURS, *supra* note 232, at 58.

³⁸⁰ STERLING D. SPERO & ABRAM L. HARRIS, THE BLACK WORKER 16-17 (1931) (discussing the concentration of blacks in certain occupations, such as blacksmiths, gunsmiths, cabinetmakers, shipbuilders, brickmasons, engineers.).

boundaries (or have had boundaries established against them), producing cooperation and solidarity among members. Historically, ethnic groups that have resisted assimilation or have been deemed “unassimilable” have been viewed with suspicion.³⁸¹ In response, groups that encounter external hostility or anti-immigrant sentiments³⁸² have sought to turn ethnic boundaries into an advantage.

As sociologists have long noted, “the ethnic boundary canalizes social life – it entails a frequently quite complex organization of behaviour and social relations. The identification of another person as a fellow member of an ethnic group implies a sharing of criteria for evaluation and judgement. . . . On the other hand, a dichotomization of others as strangers, as members of another ethnic group, implies a recognition of limitations on shared understandings, differences in criteria for judgement of value and performance, and a restriction of interaction to sectors of assumed common understanding and mutual interest.”³⁸³ Although there may be other criteria on which boundaries could be drawn,³⁸⁴ ethnicity is an especially potent basis for boundary drawing.³⁸⁵

Those two dimensions of culture – providing specific ethnic resources and delineating

³⁸¹ In the U.S., for example, during the Congressional debates on the Fifteenth Amendment, Senator George H. Williams of Oregon made the following remarks about the Chinese: “They are a people who . . . will not adopt our manners or customs and modes of life; they do not amalgamate with our people; they constitute a distinct and separate nationality” ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 358 (1967). The apparent separateness and distinctiveness of the Japanese Americans contributed to the perception that they are, as Justice Frank Murphy noted in his dissent in *Korematsu v. United States*, an “‘enemy race’ whose ‘racial strains are undiluted.’” 323 U.S. 214, 236 (1944) (Murphy, J., dissenting) (quoting the Commanding General’s Final Report on the internment of Japanese Americans).

³⁸² For an examination of anti-immigrant periods that have recurred in U.S. history, see Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, *STAN. L. & POL’Y REV.*, Summer 1996, at 11.

³⁸³ BARTH, *supra* note 33, at 15.

³⁸⁴ Research has shown that even when a group is formed on a purely random basis or on trivial criterion, members identify with and prefer their own groups. See Henry Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 13-14 (STEPHEN WORCHEL & William G. AUSTIN EDS., 1986).

³⁸⁵ This is because “it is regarded as biological in origin, is reflected in social stratification, shapes numerous elements of social life, is frequently institutionalized (in religious practice, language, nationality, residential location, group myths, and government policy), and often constitutes a basis of personal identity.” LIGHT & GOLD, *supra* note 7, at 108.

bonds of mutual identification and identity – are crucial to the creation and maintenance of ethnic economies. Outside the ethnic economy boundary, the “law of indifference” might very well prevail – it may be a matter of indifference to the seller and buyer the identity of the other, if the same commodity is obtained at the same price,³⁸⁶ as “transactors interact in markets on the basis of most favorable price and in so doing, ignore relationships of status, kinship, caste, and so on. Nepotism is not a significant determinant of transaction-prices”³⁸⁷ Within the boundary of common ethnicity, however, is a different set of rules altogether. Price is still relevant, of course, but other factors are brought to the foreground – identity and cooperation, in fact, identity as an essential coordinating device for cooperation itself.

Conversely, “discrimination of others may be among the most important . . . because it allows one to handle interactions with any individuals without having to treat them all the same”³⁸⁸ This explains the prevalence and strength of the ethnically homogeneous trading groups, for example, the East Indians in East Africa, the Syrians in West Africa, the Chinese in Southeast Asia, the Jews in Europe, and the pockets of ethnic economies in the U.S. and other countries.³⁸⁹ A central component of such groups is “the idea that a trader will discriminate among potential partners in order to economize on the cost of enforcing contracts.”³⁹⁰ Along the same line, some have suggested that members of groups that share easily observable traits, such as language, race, or other physical characteristics, will use their common observable characteristics as cost-effective proxies for inferring other potentially relevant information.³⁹¹

There is a large body of scholarship exploring the ways that group solidarity promotes

³⁸⁶ WILLIAM STANLEY JEVONS, *THEORY OF POLITICAL ECONOMY* (1871).

³⁸⁷ Axel Leijonhufvud, *Schools, “Revolutions”, and Research Programmes in Economic Theory*, 75 n. 17, in SPIRO J. LATSIS, (EDS.), *METHODS AND APPRAISAL IN ECONOMICS* (1976).

³⁸⁸ Robert Axelrod and William D. Hamilton, *The Evolution of Cooperation in Biological Systems*, 211 *SCIENCE* 1382 (1981).

³⁸⁹ Robert Cooter and Janet Landa, *Personal versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 *INT’L REV. OF L. & ECON.* 15, 15 (June 1984).

³⁹⁰ Cooter & Landa, *supra* note 389, at 15.

³⁹¹ McAdams, *Cooperation and Conflict*, *supra* note 20, at 1021.

cooperation, minimizes defection, and solves collective action problems.³⁹² Social science scholarship has also in recent years recognized the role of social capital in enhancing order. Groups with a “social capital” base of “networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit”³⁹³ are well-equipped to achieve a certain level of economic productivity. Social capital, however, exists in the relations among persons, not in the individuals themselves or in the physical elements of production.³⁹⁴ Members of the group must be interconnected for the group’s social capital to function in three crucial areas: obligations and expectations, information channels, and norms accompanied by effective sanctions.³⁹⁵

Trust is integral to these interactions, and without the members’ common ethnic ties, “elaborate and expensive bonding and insurance devices would be necessary – or else the

³⁹² See JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 126 (1989). A collective action problem exists thus: “Suppose that each member of a group has the choice between engaging in a certain activity and not engaging in it. The group has a collective action problem if it is better for all if some do it than if nobody does it, but better for each not to do it.” For scholarly sources that study how decentralized groups utilize group norms to produce efficiency and order, see Cao, *Looking at Communities and Markets*, *supra* note 268, at 863-874.

Early works by Emile Durkheim and Talcott Parsons studied how humans, embedded in social institutions such as the family, clan, ethnic, tribal, religious and other groups, internalized the norms of their respective groups. See generally EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893); EMILE DURKHEIM, *ELEMENTARY FORMS OF RELIGIOUS LIFE* (1912); TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* (1937). Later theories rely on law-and-economics studies on externalities and transaction costs to explain that norms arise from social interactions when an actor’s actions impose externalities on others, but high transaction costs prevent a market in rights from being established. According to James Coleman, “norms arise as attempts to limit negative external effects or encourage positive ones. But, in many social structures where these conditions exist, norms do not come into existence” because the social structure lacks closure. The members of the group must be interconnected; otherwise, punishment and sanctions are not available to penalize a member’s wrongdoing. Without closure in the social structure, a broken obligation can only be enforced, if at all, by the individual to whom the obligation was owed. Collective sanctions from a community cannot be effectively applied. Coleman, *Social Capital*, *supra* note 210, at S105-08.

³⁹³ Robert Putnam, *Bowling Alone: America’s Declining Social Capital*, 6.1 *J. OF DEMOCRACY* 67 (1995).

³⁹⁴ For a discussion of the distinction between human capital and social capital, see FRANCIS FUKUYAMA, *TRUST* 26-27 (1996). Social capital consists of group-based factors that enhance group members to work together in groups and organizations, and is usually created and transmitted through cultural mechanisms like religion, tradition, or historical habits. Human capital consists of knowledge and skills, and may be acquired through education or training.

³⁹⁵ Coleman, *Social Capital*, *supra* note 210, at 95; JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-21 (1990).

transaction could not take place.”³⁹⁶ Indeed, the level of trust which is based on a commonality of external and internal circumstances, such as labor force disadvantage and a shared cultural foundation of values and beliefs, “are not easily duplicated in any artificial community, and indeed, are rarely found in communities united by geographic proximity or other demographic characteristics.”³⁹⁷ Trust tends to be strongest among transactors of the same household, lineage, village, subtribe, tribe, and decreases as the circle of social distance expands, so that at the edge of the ethnic or tribal boundary, transactions might even be “consummated by force and guile.”³⁹⁸ A group, thus, must have boundaries and closure in its social structure in order to achieve and maintain an effective social capital base of norms such as trust, cooperation, solidarity.

Increasingly, research has focused on the relationship between group size and group conduct, and has found that “there are opposing behavioral implications involved in any extension in the membership of a community.”³⁹⁹ A person’s moral-ethical principles and constraints against self-aggrandizement and interests are stronger in a small, bounded community than a large, diffuse one. Once “an individual recognizes himself to be a member of a group of others more or less like himself,” he is more likely to be subject, not just to the *external* constraints – “economic, geological, legal, political, social, technological” – on possible behavior but also to *internal* limits.⁴⁰⁰ While one cannot draw broad categorical boundaries to distinguish those a person considers to be “members of the tribe,” and those deemed “outsiders,” the point is that “there is a difference in an individual’s behavior toward members

³⁹⁶ Coleman, *Social Capital*, *supra* note 210, at 99.

³⁹⁷ Greene, *supra* note 283.

³⁹⁸ Marshall D. Sahlins, *On the Sociology of Primitive Exchange*, in MICHAEL BANTON (ED.), *THE RELEVANCE OF MODELS OR SOCIAL ANTHROPOLOGY* 154 (1969). *See also* ELIZABETH COLSON, *TRADITION AND CONTRACT: THE PROBLEM OF ORDER* 25 (1974) (“if you know a persons’s clan, you have a good chance of being able to find out an appropriate kinship term to signal the etiquette to be used between the two of you and to define the moral imperative that ought to govern your relationships.”).

³⁹⁹ James M. Buchanan, *Markets, States, and the Extent of Morals*, 68 *AMERICAN ECON. REV.* 364, 364 (1978).

⁴⁰⁰ Buchanan, *supra* note 399, at 366.

and nonmembers, and that the membership lists are drawn up in his own psyche.”⁴⁰¹

In that case, as a “repository of trust which reduces the probability of breach on a contract between insiders,” the size and boundaries of a trading group, such as that found in ethnic economies, would matter.⁴⁰² On the one hand, if the group expands, members may have the advantage of being part of a larger internal market, allowing greater possibilities of trade, sponsorship activities, and preferential purchases among group members. On the other hand, the larger the group becomes, the greater the probability of breach even as the ability of the group collectively to sanction violators is itself proportionately weakened.⁴⁰³

In sum, ethnic economies are embedded in the networks of ethnic relations and interactions.⁴⁰⁴ Economic behavior is explained not by reference to individualistic behaviors but by reference to embedded relationships – “value introjection, reciprocity transactions, bounded solidarity, and enforceable trust.”⁴⁰⁵ The ethnic economy’s ethnic resources, which are not available to non-group members, provide the group with a “sustainable competitive advantage”⁴⁰⁶

⁴⁰¹ Buchanan, *supra* note 399, at 366. This phenomenon explains why in many instances, as non-exclusion or non-discrimination rules are introduced to override an individual’s personal selectivity and to increase the size of the sharing group beyond the individual’s own narrow universe of preferences (opening up the club to everyone, for example), the new rules have had unintended effects, for example, spurring “the formation of smaller clubs,” Robert D. Tollison, *Consumption Sharing and Non-Exclusion Rules*, *ECONOMICA* 276, 283 (Aug. 1972). When non-discrimination rules were applied to public facilities in the U.S., for example, in public schools, this led to a “movement out of public schools to the formation of more exclusive . . . private educational facilities.” *Id.*, at 289.

For most individuals, there are moral-ethical boundaries and limits, and they may be reached at any of these levels – the nation-state, the provincial or regional states, the local community, extended family, clan, race, ethnicity, church, etc. The tension between individual self-interests and community may be kept within tolerable limits only if “there is some proximate correspondence between the external institutional and the internal moral constraints on behavior.” Buchanan, *supra* note 399, at 367.

⁴⁰² Cooter & Landa, *supra* note 389, at 15.

⁴⁰³ Group sanctions of norm violators include withholding future business from the violator, disseminating the violator’s negative reputation groupwide, ostracizing the violator, or banishing the violator from the group. Cao, *Looking at Communities and Markets*, *supra* note 268, at 872. A group that is too large and not close-knit is less likely to succeed in meting out effective sanctions against violators.

⁴⁰⁴ See Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *AM. J. SOC.* 481 (1985).

⁴⁰⁵ Greene, *supra* note 283.

⁴⁰⁶ Greene, *supra* note 283.

There are positive implications for ethnic economies, but potentially negative ones as well, which I will discuss in Part III below.

III. Different Approaches: Beyond the Pale?

I have discussed in Parts I and II two broad categories of ethnic preferences. Part I surveyed preferences pursued by governments, either to favor certain designated minority groups in majority-dominated economies, or to favor designated majority groups in minority-dominated economies. Part II studied preferences pursued by ethnic groups themselves as they construct ethnic economies that engage in preferential practices favoring group members and by implication, excluding non-members in a wide range of economic arrangements, such as sales and purchases, in wholesale and retail, access to and terms of credit, and hiring decisions. In this section, I offer a number of approaches that a society, whether developing or developed, might consider as it examines the preferential practices that underlie ethnic economies. For reasons stated already elsewhere,⁴⁰⁷ where specific examples are used for purposes of illustration, this section will focus on the laws of the U.S.

Essentially, I think we have roughly three choices to consider regarding notions and uses of “affirmative action” and various ethnic sets or subsets of persons. Interestingly, each of these choices plays off from a single expression, but with quite a different variety of possible meanings. The expression is that of “beyond the pale,” and the options are: 1) striking down as “beyond the pale” of acceptability all preferential practices, even those of the intra-group type adopted by marginal groups as described in Part II; 2) striking down only certain preferential practices, because they are “beyond the pale” in the above sense, if they are undertaken by the state to favor or discriminate against an ethnic group as described in Part I; or 3) alternatively, accommodating intra-group preferential practices because these practices, under certain circumstances, are “beyond the pale,” that is, beyond the reach of the law.

A. Beyond the Pale: The Applicability of Antidiscrimination Laws

⁴⁰⁷ See *supra* text following note [34].

One may suggest, as a first cut, it might *always* be regarded as “beyond the pale”⁴⁰⁸ – and therefore illegal – wherever it is shown that “B was favored over A because of his or her ethnic characteristics. This *could* be the first, strong position to take, absolutely in respect to all commercial arrangements, if not in respect to those of a merely highly personal and/or merely social nature.

The basic proposition in support of this strong view is simply that “no individual should be regarded as less qualified or less deserving per se than another by the adventitious characteristics of ethnic origins.” And, accordingly, that “it is wrong to regard another as *more* qualified or *more* deserving per se by either characteristic *merely as such*.” To take “B” over “A,” for example, when it is just the ethnic origin of A that left him or her regarded as less worthwhile than B, and nothing else at all, is wrong.

Perhaps, to be sure, one may add a cautionary qualification to this first proposition, namely, that insofar as intensely personal choices (e.g., as in marriage) are involved, the king’s writ (i.e., the reach of the law) may not extend so far as to subject these to legal sanction.⁴⁰⁹ As

⁴⁰⁸ “Beyond the pale” in the strong dictionary meaning of “irrevocably unacceptable,” i.e., that it is never acceptable, and that the conduct in question is always appropriately subject to legal sanction. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1984) where “pale” is defined, in the fourth of four identified senses of the word, as “an area or the limits within which one is privileged or protected (as from censure).” Hence, to be beyond the pale is to be beyond the area of privilege and protection, and hence subject to censure.

⁴⁰⁹ These arrangements (i.e., those associations of an intimate or even merely of a social nature) would thus be “beyond the pale” in quite a *different* sense, namely: “beyond the pale of the law,” in the sense of “beyond the reach of the law” (i.e., *outside* the area enclosed by a boundary or fence – and thus “beyond the pale”). See WEBSTER’S, *supra* note 408. Another meaning of “pale” is thus: “a territory or district within certain bounds or under a particular jurisdiction.” “Beyond the pale” under this meaning would mean beyond the jurisdiction (of the law).

In elaborating this plausible distinction between the merely “social” or “personal” relations, and relations more conventionally treated as sufficiently “commercial” such that strict anti-discrimination civil rights laws *will* apply to forbid discriminatory preferences, it may be useful to compare three Supreme Court decisions respectively involving the Junior Chamber of Commerce, the Rotarians, and the Boy Scouts. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (the Supreme Court upholding the state’s right to apply its antidiscrimination laws to the Jaycees whose membership policies excluded women); *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 538 (1987) (state anti-discrimination laws may validly be applied to such large scale, quasi-business fraternal organizations); and *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000) (a five/four decision by the Court in favor of the Boy Scouts, sustaining a First Amendment “right of expressive association” objection to a state public accommodations statute applied to forbid the Boy Scouts from excluding adult homosexual men in mentoring roles).

Possibly noteworthy here, too, are cases and discussions involving 42 U.S.C. § 1981. This statute, dating from Reconstruction, provides that “all persons” in the United States “shall *have the same right...to make and enforce contracts...as is enjoyed by white citizens...*” (Emphasis added.) It has been held by the Supreme Court to apply to private contracts, i.e., contracts between or among private parties, and not merely those involving government in some fashion. Thus, as construed, it has been interpreted to forbid private parties to *refuse* to enter into contracts with an

to all commercial relations (e.g., buying, selling, borrowing, lending, hiring), however, and all other standard marketplace transactions, whether large or small, the law would extend a full measure of protection and likewise discountenance the practice of ethnic discrimination *whatever* label of convenience (e.g., self-help “affirmative” action, “intra-ethnic” measures of “mutual assistance,” etc.) its practitioners presume to give it, and *regardless* of who they are.

Necessarily, however, the consequence of taking this view simpliciter, would effectively foreclose most of the varieties of intra-ethnic economic networks and arrangements previously reviewed in this Article.

Indeed, in recent years, in response to the claim made by some that antidiscrimination laws are unnecessary because the operation of market forces is sufficient to eliminate discrimination,⁴¹⁰ a substantial body of scholarship has emerged that argues the opposite; this argument would favor strict application of the laws to eradicate discrimination,⁴¹¹ whether this

offeror or offeree just because of the refused party’s race or ethnic origin, and applied also to forbid offering less favorable contract conditions or terms based on the “race” of the other party. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976). Additionally, the statute applies to preclude refusals to deal on the same terms as one would be willing to extend to another when the distinction turns on differences of any “ethnically and physiognomically distinctive sub-grouping.” *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). And this also includes “whites.” *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Still, far reaching as 42 U.S.C. § 1981 (as well as is the companion statute, § 1982—the next section in the U.S. Code—that applies to rights to acquire, hold, and dispose of “property”), the Supreme Court has never suggested that this act of Congress or any equivalent state anti-discrimination act could be validly applied to “intimate” contracts such as offers (or refusals of offers) of marriage, as distinct from more recognizably “commercial” contracts (albeit it has been applied to forbid private, state-accredited schools, from restricting their admissions to some preferred race or ethnic group) (*Runyon v. McCrary*, *supra*.)

⁴¹⁰ See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 43-45 (2d ed. 1971) (arguing that employers who have a taste for discrimination will suffer because minority employees will find employment with unprejudiced employers who will use the cost advantage – assuming minority employee wages are depressed – to drive discriminatory employers from the market); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 651 (5th ed. 1998) (describing racial discrimination as a refusal to associate with members of racial, religious, or ethnic groups different from their own; however, “by increasing the contact between members of the two races [blacks and whites] such trade imposes nonpecuniary, but real, costs on those members of either race who dislike association with members of the other race.”); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 29-30, 35-37, 9, 12 (1992) (describing race discrimination as a refusal to deal with members of other races and arguing that because market competition will drive out discrimination, that Title VII infringes on free, competitive markets) For arguments that antidiscrimination laws are not efficient and not necessary, see BECKER, *supra*, at 35-37; Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987).

⁴¹¹ But not necessarily to eradicate “affirmative action,” as the term is conventionally used in the U.S., to mean actions designed to favor certain out-group minorities over the dominant white groups.

discrimination is due to hostility by the dominant group against minorities or to preferences extended by minority group members to one another. This approach would, in effect, most certainly result in the erosion of intra-ethnic preferences and the ethnic economies that emerge therefrom.

Briefly, proponents of this approach rely on non-economic factors to explain the resilience of discrimination and the need for a stringent interpretations of the antidiscrimination laws – hence the claim that an economics-based analysis fails to “take into account the intentional, interest-serving dimension of white-over-black prejudice.”⁴¹² Others have noted that group cooperation and solidarity may result in competition and conflict between and among groups.⁴¹³ Thus, in the context of race discrimination by whites against blacks,⁴¹⁴ it has been argued that group cooperation and mutual investment in status production on the part of whites produce discrimination against non-whites. Because this type of in-group cooperation creates spontaneous orders of discriminatory economic regimes that survive market competition, the government should destroy these forms of cooperation, through the maintenance and application of laws that prohibit race discrimination.⁴¹⁵ Furthermore, under this view, because discrimination of any kind is difficult to prove and in-group sympathy particularly difficult to detect, the government should continue to engage in “affirmative action”⁴¹⁶ (and not “merely”

⁴¹² See, e.g., Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1189 (1993).

⁴¹³ McAdams, *Cooperation and Conflict*, *supra* note 20, at 1007. McAdams proposes to understand race discrimination (particularly by whites against blacks, *id.*, at 1036), as “an especially virulent and pathological form of status production,” *id.*, at 1044, as group preferences are expressions of status production for group members at the expense of non-members.

⁴¹⁴ McAdams, *Cooperation and Conflict*, *supra* note 20, at 1083-84. The author also believes, however, that although his focus is on discrimination by whites against blacks, in general, out-group discrimination (discrimination against those outside the group) in order to achieve in-group status production has wider implications. *Id.* at 1036.

⁴¹⁵ McAdams, *Cooperation and Conflict*, *supra* note 20, at 1034.

⁴¹⁶ Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1326 (1998) “Ingroup favoritism manifests itself gradually in subtle ways. It is unlikely to trigger mobilization of civil rights remedies because instances of this form of discrimination tend to go unnoticed.” See also *id.* at 1327-29. For proponents of this view, in-group sympathy (preferences for one’s own) should be subject to critical evaluation because doing so would allow generalized discrimination to be more recognizable than

antidiscrimination) in order to counteract in-group favoritism. Under these views, in-group sympathy is too easily converted to, or a mask for, outgroup hostility and prejudice, and should be critically evaluated.⁴¹⁷ This is especially so in cases where different groups compete for scarce resources, particularly in the economic realm,⁴¹⁸ in which case in-group sympathy may have the same effect as out-group hostility⁴¹⁹ because “[p]referential treatment of those who share a common category membership produces biases that benefit the ingroup over noningroup members even without any negative prejudices against outgroups.”⁴²⁰ These arguments, however, has tended to focus essentially on in-group solidarity by dominant majorities such as whites and its effect on minorities,⁴²¹ rather than in-group solidarity by minority groups themselves –

focusing simply on outgroup hostility (antagonism against others). Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 363 (2000). For a different view of affirmative actions without the institution of government preferences, see Van Alstyne, *Affirmative Actions*, *supra* note 44.

⁴¹⁷ Freshman, *supra* note 416, at 364-402. Relying on psychological literature, proponents fear that ingroup sympathy constitutes ethnocentrism whereby outgroups are viewed as “antithetical to the ingroups,” and subject to “negative opinions and hostile attitudes.” *Id.*, at 387 (quoting Daniel J. Levinson, *The Study of Ethnocentric Ideology*, in T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 104 (1950)). See generally T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950). Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 160 (1992) (noting that one reason why it is difficult to disentangle special concern for ‘one’s own’ from beliefs in others’ moral inferiority is because in humankind’s primitive past, these two attitudes were inextricably linked. When we roamed the earth in small kinship groups, and every tribe but one’s own was a deadly enemy, love of one’s kin and hatred and/or suspicion of everyone else were traits necessary for survival.”).

⁴¹⁸ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 163 (distinguishing between bias in the choice of one’s spouse and “biased economic choices” but acknowledging that even if one limits the inquiry to economic choices, “in practice it will be very difficult to distinguish immorally biased economic choices from choices that are not immorally biased and not intrinsically wrong, such as choices to favor one’s family or friends or ethnic group members, or choices based on negative stereotypes.”).

⁴¹⁹ Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 370 (DANIEL T. GILBERT ET AL. EDS., 4TH ED. 1998) (noting that interethnic relation “revolves around ingroup favoritism more than outgroup derogation, although the net effect may be the same in practical terms.”).

⁴²⁰ MARILYN B. BREWER & NORMAN MILLER, *INTERGROUP RELATIONS* 48 (1996). Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY*, *supra* note , at 554, 575 (“many forms of discrimination and bias may develop not because outgroups are hated, but because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup and withheld from outgroups.”)..

⁴²¹ Freshman, *supra* note 416, at 351 (“ingroup sympathy for historically advantaged groups, such as relatively privileged white, Protestant males, causes great harm to disadvantaged minorities.”). *Id.*, at 348 (“Individuals praise the behavior by ingroup members, such as ‘frugality’ by a Protestant, but condemn the same

precisely the type of solidarity that produces ethnic economies described in Part II. For proponents of this approach, antidiscrimination laws should be strictly applied.

Antidiscrimination laws in the U.S. currently forbid preferences based on race and other protected criteria,⁴²² regardless of whether the preferences are for or against historically disadvantaged minority groups.⁴²³ Courts have thus viewed evidence of race- and ethnicity-based preference as a violation of Title VII, for example, where Italian Americans favor other Italian Americans over non-Italians.⁴²⁴ But even business practices that are not themselves forbidden, but that result in the perpetuation of ethnic preferences, may also be subject to judicial scrutiny. These include practices that are commonly relied upon by ethnic employers in ethnic economies, for example, nepotism⁴²⁵ and word-of-mouth hiring. Courts in a number of circuits have regularly

behavior by outgroup members, such as Jewish ‘cheapness.’ Likewise when outgroup members like Korean Americans favor their own, they are ‘clannish,’ but when members of ingroups, like white males, prefer their own, this behavior remains invisible and sometimes even draws praise as ‘sticking together.’”). McAdams, *Cooperation and Conflict*, *supra* note 20, at 1083-84. John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION, AND RACISM 79-80 (JOHN F. DOVIDIO & SAMUEL L. GAERTNER EDS., 1986) (“It is important to note that both the anti-outgroup bias of high authoritarian subjects and the pro-ingroup orientation of low authoritarians disadvantage blacks relative to whites.”) .

⁴²² See, e.g., Civil Rights Act of 1964, tit. VII, 42 U.S.C. 2000e-2 (1994). *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (forbidding treatment where the “employer simply treats some people less favorably than others because of their race, color, religion . . .”).

⁴²³ See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976) (holding that a white person has a cause of action under section 1981 for discrimination in favor of an African American); *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1178 (7th Cir. 1998) (holding that a business division that is “managed by minorities” could violate the civil rights laws).

⁴²⁴ See, e.g., *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1302-04 (9th Cir. 1982) (holding that a preference for Italian Americans in the company’s stockholder preference plan is a violation of Title VII).

⁴²⁵ See, e.g., *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 655 n. 9 (1989) (“This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities.”); *Holder v. City of Raleigh*, 867 F.2d 823, 827 (4th Cir. 1989) (“The presence of family preferences as a factor in a promotion might be part of the evidence upon which an inference of invidious motive may be drawn. . . .”); *Gibson v. Local 40, Supercargoes*, 543 F.2d 1259, 1268 (9th Cir. 1976) (“Since the relatives being preferred were disproportionately white, the nepotism discriminated against blacks whether or not appellees acted with a discriminatory purpose.”)

warned that such seemingly neutral hiring practices may in fact be deemed discriminatory.⁴²⁶

In *EEOC v. O&G Spring & Wire Forms Specialty Co.*,⁴²⁷ for example, O&G, a small company owned by a Polish immigrant, relied mainly on word-of-mouth recruiting or walk-ins off the street during certain hiring windows. The Court allowed the use of statistical evidence⁴²⁸ in the EEOC's case against O&G and found that the company intentionally discriminated against African Americans in recruitment and hiring.⁴²⁹ The majority rejected the company's claim that the relevant labor market was disproportionately composed of recent Polish immigrants and Hispanics because the company could only offer poor working conditions and low pay, but in return, did not require the ability to speak and understand English as a condition to employment.⁴³⁰ Accordingly, the majority held that the "inexorable zero" – no black workers

⁴²⁶ In *EEOC v. Metal Service Co.*, 892 F.2d 341, 350 (3d Cir. 1990), the court found that word-of-mouth hiring practices are "strong circumstantial evidence of discrimination." *See also*, *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 117 (E.D. Mich. 1973), *rev'd on other grounds sub nom*; *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975) (holding that word-of-mouth hiring practices are discriminatory because of the tendency of such practices to perpetuate an all-white work force); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426-27 (8th Cir. 1970) ("With an almost completely white work force, it is hardly surprising that such a system of recruitment produced few, if any, black applicants."); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) ("The practice of relying on referrals by a predominantly white work force rather than seeking new employees in the marketplace for jobs was found to be discriminatory.").

⁴²⁷ 38 F.2d 872 (7th Cir. 1994).

⁴²⁸ 38 F.3d at 876; *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.")

For a critique of statistical evidence in EEOC actions, see Mike Royko, *Update on Businessman and its Downside*, HOUSTON CHRONICLE, Oct. 10, 1993, at 6 (describing the ordeal of the Daniel Lamp Co. on Chicago's southwest side when it was sued by the EEOC for having 21 Hispanic employees and 5 blacks; according to the EEOC, the business should have had more black employees, 8.45 blacks, to be precise, because of the area's population); James Bovard, *Job-Breakers, the EEOC's Assault on the Workplace*, THE AMERICAN SPECTATOR, March 1994 (same).

⁴²⁹ The court found that "even the use of the most forgiving variables could not reduce the calculation of African-Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African Americans." 38 F.3d at 878. From 1979 to 1985, O&G hired 87 people for the low-skilled "secondary department" operating kick and punch presses. None was African American. The Court held that the company must pay some 451 persons who might have applied to the company more than \$378,000 in back pay.

⁴³⁰ 38 F.3d at 877. But as the dissent remarked, the statistical model used to support a finding of intentional discrimination was flawed because it failed to account for the fact that the "lack of an English fluency requirement increases the interest of non-English speaking Polish and Hispanic job-seekers to work at O&G." 38

among the 35 positions in the company’s “secondary department” operating kick and punch presses – was sufficient to support a finding of intentional discrimination.⁴³¹

Thus, there are a number of facially neutral practices, among employers in ethnic economies, such as word-of-mouth hiring, or perhaps advertising in ethnic community newspapers for employees, that may run afoul of existing antidiscrimination laws as deemed by certain circuit courts. If these practices produce an ethnic workforce that is statistically skewed, when compared to the relevant labor market, it is possible that such statistical disparities are sufficient to prove discrimination.⁴³²

B. Beyond the Pale: Government Action

That first approach, applied without exception and across-the-board, seems much too unyielding, however, especially insofar as it would seem to (and would, if rigorously enforced) cut down – even eliminate – virtually all of the economically uplifting forms of mutual support reviewed in the earlier sections of this Article. As a less draconian approach than this may represent, one may instead propose that it should be “beyond the pale” in the same strong sense as defined under Part I of the Article for *government* to draw distinctions among citizens by race, or for *government* to favor some more than others by classifications of race, though not necessarily for particular persons or groups to do so, in response to felt common needs.

And, indeed, one may deem that this is the appropriate universal rule to be understood in respect to government as such even as a constitutional matter, not merely in respect to economic or commercial matters and opportunities, but equally in respect to every other kind of

F.3d at 887.

⁴³¹ 38 F.3d at 879. For a discussion of disparate impact, see *infra* notes .

⁴³² Under Title VII, discrimination may also be proven through disparate impact analysis. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact theory involves employment practices that 1) are facially neutral but in fact affect one group of people more harshly than another group and 2) cannot be justified by business necessity. Disparate impact theory “focuses on the result of, rather than the motivation for, an employment practice.” Maurice E.R. Munro, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 224 (1995). By contrast, disparate treatment, or intentional discrimination, requires proof of discriminatory motive.

Such proof may be established through a variety of methods, such as “individual inferential proof cases; group (or systemic) inferential proof cases, using statistics to establish employer engages in system-wide ‘pattern and practice’ of discrimination; direct evidence cases, in which an individual or group plaintiff establishes the discriminatory intent through direct evidence.” Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 402 (1996).

opportunity as well (e.g., one's eligibility to adopt a child, so, likewise, one's freedom to marry, and each of these fully as much as one's eligibility for hiring or advancement, for borrowing or lending, or for selling, contracting, or receiving grants in aid). This position would merely correspond quite closely with the strong view reflected in the original Harlan dissent, in *Plessy v. Ferguson*, that the government of all is not to "know" the race(s) of its citizens in presuming to divide, classify, and dispense on any such distinction as these.⁴³³ That kind of treatment by government is constitutionally simply "beyond the pale."

What private persons may presume to do, or not to do, on their own, on the other hand, might be merely be "beyond the pale" in the quite different sense of merely being beyond the notice (i.e., restrictions) of the law: that here, again the writ of the king does not presume to run.⁴³⁴ Only insofar as one would attempt to impose his own practice upon another (thus to make him or her also engage in the same practice) would the law then draw the line and disallow the attempt.⁴³⁵

⁴³³ *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (emphasis added) ("These notable additions to the fundamental law [i.e., the thirteenth, fourteenth, and fifteenth amendments] removed the race line from our governmental systems. *** *There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law.* *** [Our] destinies... in this country are indissolubly linked together, and the interests of [all] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. *** The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.") See also *DeFunis v. Odegaard*, 416 U.D. 312, 343 (1974) (Douglas, J., dissenting) (emphasis added) ("So far as race is concerned, any state-sponsored preference of one race over another... is in my view 'invidious' and violative of the Equal Protection Clause."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("[U]nder the Constitution, the government may not make distinctions on the basis of race... Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.") (This position has also recently been enacted in two U.S. states – Washington and California – by popular referenda, into the constitutions of these states (cite to the Proposition 209 enactments).)

⁴³⁴ See generally Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 85-86 (2002). Professor Schuck makes a distinction between a preference mandated by the government and one pursued voluntarily by private entities. *Id.* at 86-89.

⁴³⁵ For example, by way of illustrating this distinction, to require that another to whom one may lend money shall, as a condition of receiving that loan, agree as part of the condition or enforceable consideration of the loan to grant a hiring preference for persons of "X" ethnic origin in the operation of the enterprise thus to be sustained by this loan. Here, one might reasonably maintain, though the law might not forbid the lender to lend preferentially (i.e., to do so consistent with acknowledged ties within his or her ethnic community, to be of assistance to "co-ethnic" persons), it would not necessarily also accept as part of his prerogative a legal right to bargain so to compel the borrower to carry

C. Beyond the Pale: Non-governmental Actions Beyond the Reach of Law

A third way of regarding matters is to hold that there are concerns “beyond the pale” that may be appropriate for racial amelioration (and thus for “affirmative” actions of the nongovernmental, privately-conducted kind, just accounted for in Part II) when – but only when – the aim is to befriend and to try to bring within the community of full and equal citizenship, those who, by race or ethnicity, have hitherto been left out.⁴³⁶ Not those of the dominant (white or “pale”) race(s), however, or of the dominant, white (“pale”) ethnic nationalities. Not these, but rather all those others: those “*beyond the pale*,” i.e., *persons of color*, of various hues and shades, hitherto left unfairly behind. This application of our informative phrase thus would correspond to the dictionary definition and meaning of “pale” as “a person or object of whitish complexion” (thus the claim that all appropriate ethnicity-based affirmative action is itself concerned with those “beyond” – other than – the pale).⁴³⁷

Still, the difficulty to explore here is the presumption that it is just persons, and only persons, other than those of “pale” complexion that may appropriately be permitted affirmative self-help measures, no matter the circumstances. But this seems to be utterly doubtful and, indeed, may itself reflect a narrow and particular “racist” view. For example, Poles from eastern Europe, as a newly-arrived immigrant group though not “persons of color” by literal skin tone, may nonetheless be quite reasonably characterized with reference to a relevant time of U.S. history by the same elements of immigrant and of outsider status, of economic hardship, of

into execution the lender’s own ethnic preference in the employment practices of the borrower’s business. There are close analogies for this suggested distinction. *See Shelley v. Kramer et. al*, holding that the fourteenth amendment forbids state courts from granting enforcement sanctions to racially-restrictive covenants “running with the land.” Also, certain commerce clause cases may be helpful by way of analogy (i.e., cases holding that while a state may, for example, provide a preferred status for its own citizen-residents when it—the state—lends funds, or sells (or buys) goods, or is otherwise a market participant (Reeves), it may not extend that preference to require that those to whom it thus lends, or sells, or from whom it buys shall likewise grant such a preference in turn (i.e., with respect to those it employs or to those to whom it resells).

⁴³⁶ Here, beyond the pale in the sense of beyond the reach or jurisdiction of the law, *see supra* note . . . Or perhaps also, in accordance with yet another distinctive sense of the word “pale,” in the twilight of the law. *See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY*, *supra* note 408 (pale defined as “feeble or faint.”).

⁴³⁷ *See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY*, *supra* note 408 (pale defined as “deficient in color or intensity of color.”).

language differences, and culture difference; no easy distinction can be suggested as to why whatever informal networks of Koreans or of Haitians, by way of intra-ethnic mutual support one concludes to be suitable – constructive, helpful, productive (such that “the law” will not be deployed to destroy them) – will nonetheless “not be tolerated for Poles.” But why should that be so? There is no obvious answer. And, indeed, I can think of none sufficient to explain any such policy distinction such as this.

Ethnic economies and the underlying preferences would be viewed more benignly under this third approach. Here, a distinction may be made between “categorical racial preference” and “contextual racial preference.”⁴³⁸ To the extent that discrimination is a reflection of one’s biases for or against certain types of people, categorical preferences are intrinsically problematic because they are so expressed regardless of context; for example, a categorical racial preference may involve a Nazi who prefers to associate with Aryans and to not associate with Jews in all contexts, whether in marriage or employment.⁴³⁹ By contrast, certain preferences in other contexts, such as a sense of greater “concern for the welfare of kin, tribe, community, or nation than for the welfare of others” is generally less offensive for some or even laudatory for others.⁴⁴⁰ This is especially so if the group that is preferred is relatively small and the preference at issue reflects personalistic ties and commitments.⁴⁴¹ In other words, “morally favoring a small group and (relatively) morally disfavoring the rest of humanity has a different moral quality from morally disfavoring a small group,”⁴⁴² especially if such favoring is undertaken by “a member of a previously victimized group” for one of its members.⁴⁴³ Accordingly, under these

⁴³⁸ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 158.

⁴³⁹ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 158.

⁴⁴⁰ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 159.

⁴⁴¹ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 160.

⁴⁴² Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 160. “This is so primarily because the disfavoring of a small group is less likely to be the logical corollary of positive personal commitments and ties to others than it is to be the manifestation of an ideology that proclaims erroneously that members of the small group are morally unworthy.” *Id.*

⁴⁴³ Alexander, *What Makes Wrongful Discrimination Wrong?* *supra* note 417, at 175.

circumscribed circumstances, favoring “one’s own” through in-group preferences does not have to mean hostility towards out-group members, though the distinction may indeed become blurry.

In-group preferences or group solidarity may be much less about biases against others and much more about group identity and one’s sense of self.⁴⁴⁴ Primordial bonds and affinities to family, religion, ethnic group are a significant component of the process of self-definition.⁴⁴⁵ They “not only provide a tie to other people, but also offer us our very selves.”⁴⁴⁶ Historically, these ties are reinforced when new groups in the U.S. are faced with nativist desire to exclude and/or segregate those the nativists deemed unassimilable, ranging from the Irish and Italian, Chinese and Japanese, Jews, Mexicans and others; Jim Crow laws imposed segregation on blacks in virtually all areas of life in the American South.⁴⁴⁷

For non-English speakers especially, the barriers to entering the general labor force are often quite high. Throughout the U.S., there have been attempts at both the state⁴⁴⁸ and federal level⁴⁴⁹ to elevate English to “official” status as the language of government. Private employers

⁴⁴⁴ Karst, *Paths to Belonging*, *supra* note 26, at 306-10 and n.15-21.

⁴⁴⁵ Karst, *Paths to Belonging*, *supra* note 26, at 307.

⁴⁴⁶ Karst, *Paths to Belonging*, *supra* note 26, at 308.

⁴⁴⁷ Karst, *Paths to Belonging*, *supra* note 26, at 303-326. “Virtually every cultural minority in America has had to face exclusion, forced conformity, and subordination.” *Id.* at 325. These include coercive Americanization, such as Congressional attempts to deport aliens who failed to apply for citizenship or learn English within a period of time, *id.* at 314; the ban on teaching foreign languages, *id.*; Jim Crow-type measures such as the disenfranchisement of Jews in some states until the mid-nineteenth century, school segregation of blacks, Asians, Italians, Mexicans, *id.* at 322; private discrimination by unions, employers and landlords, *id.*

⁴⁴⁸ Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285 (1996). Arizona, for example, had mandated English as the exclusive language of public services; the law was struck down by the Ninth Circuit as overbroad and violative of the First Amendment. Drucilla Cornell & William W. Bratton, 84 CORNELL L. REV. 595, 616 n. 71 (1999).

⁴⁴⁹ Cornell & Bratton, *supra* note 448, at 611- 17 (describing attempts to introduce an English Language Amendment to the Constitution in 1981 and periodically thereafter); *Id.* at 614-15 (describing attempts to introduce, through Congress, proposals mandating English for federal government services and repealing federal laws that require Spanish-language election ballots and encourage Spanish-language education).

have also adopted regulations that mandate English at the workplace,⁴⁵⁰ requiring English regardless of whether the conversation includes customers, supervisors or other employees.⁴⁵¹ Courts have rejected plaintiffs' assertions that workplace English requirements are burdensome and presumptively violate Title VII.⁴⁵² As a result, some commentators have characterized states with official English legislation as “the functional equivalent of Jim Crow legislation” whereby a privileged and dominant group uses the law to achieve two objectives: first, to “retard the operation of market forces” towards an integrated labor market in order to ensure its continued dominance; and second, to erect entry barriers designed to discourage the in-migration of minority language speakers (primarily Latinos).⁴⁵³

Under these circumstances, newcomers lacking English language skills and facing “occupational segregation”⁴⁵⁴ will rationally resort to enclave communities⁴⁵⁵ and will move into the mainstream economy only if the latter offers better economic opportunities than those that are available for them in enclaves.⁴⁵⁶ In this context, it is not inaccurate to characterize

⁴⁵⁰ Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849 (1995); Cara D. Helper, Comment, *Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak Co.*, 79 MINN. L. REV. 391 (1994).

⁴⁵¹ Carol Kleiman, *Learning English Opens Doors for Employees*, CHI. TRIB., July 9, 1995, 8 (Jobs), at 1; David Poppe, *Batchelor Defends English-Only Rule*, MIAMI HERALD, Mar. 29, 1997, at B3. Employers claim, for example, that Spanish at the workplace among some employees exclude other employees and could create a disruptive atmosphere. See, e.g., *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989); *Dimaranan v. Pomona Valley Hosp. Med. Ctr.*, 775 F. Supp. 338, 342 (1991), *withdrawn* No. 89 4289 ER (JRX), 1993 WL 326559 (C.D. Cal. Mar. 17, 1993). Employers also claim that Spanish at the workplace interferes with the ability of non-Spanish-speaking supervisors to supervise employees. *Gutierrez v. Municipal Court*, *supra*, 838 F.2d at 1043; *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). Similarly, Spanish at the workplace, it is claimed, bothers customers who cannot understand Spanish. *Garcia v. Gloor*, *supra* 618 F.2d at 267.

⁴⁵² Cornell & Bratton, *supra* note 448, at 618-19; see, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (Title VII does not protect language and ethnic expressions at the workplace); *Long v. First Union Corp.*, 894 F. Supp. 933, 943-44 (E.D.Va. 1995), *aff'd* 86 F.3d 1151 (4th Cir. 1996).

⁴⁵³ Cornell & Bratton, *supra* note 448, at 631-32.

⁴⁵⁴ Kevin Lang, *A Language Theory of Discrimination*, 101 Q. J. ECON. 363, 370 (1986) (explaining that minority-language speakers tend to be faced with occupational segregation).

⁴⁵⁵ Cornell & Bratton, *supra* note 448, at 609, 620.

⁴⁵⁶ Cornell & Bratton, *supra* note 448, at 620.

“[p]ersonalism and nepotism . . . as ways of surviving in a hostile environment.”⁴⁵⁷ As discussed in Part II, the proximity of ethnic businesses in enclaves generate additional opportunities for conducting business in the enclave’s language, “creating both employment and trade opportunities for which a relative disability with English presents no barrier.”⁴⁵⁸ These preferences could also be viewed as a vehicle through which out-groups could achieve a degree of economic base necessary for equal citizenship.⁴⁵⁹ Group solidarity, in other words, “is . . . a practical necessity for a group that is just emerging from severe conditions of domination,”⁴⁶⁰ one of the necessary first steps leading towards a sense of belonging to the Nation, economic empowerment⁴⁶¹ and eventually assimilation.⁴⁶²

Under this approach, the existing antidiscrimination laws could be interpreted in a way that recognizes the special circumstances surrounding ethnic economies created by historically non-dominant out-groups. For example, in *EEOC v. Consolidated Service Systems*,⁴⁶³ Judge Posner of the Seventh Circuit concurred with the district court’s finding that statistical data showing 81 percent of the company’s hires were Korean in a geographical area where less than

⁴⁵⁷ Karst, *Paths to Belonging*, *supra* note 26, at 326 n. 149..

⁴⁵⁸ Cornell & Bratton, *supra* note 448, at 630.

⁴⁵⁹ Karst, *Paths to Belonging*, *supra* note 26, at 329 (“equal citizenship includes both a measure of substantive equality and formal equality before the law. . . . In the long run, a cultural minority’s statu’s goals will be secured only when large numbers of its members have advanced into the middle class.”).

⁴⁶⁰ Karst, *Paths to Belonging*, *supra* note 26, at 330.

⁴⁶¹ Karst, *Paths to Belonging*, *supra* note 26, at 342-43 (“A group that has been subordinated in the past is unlikely to find that acceptance until individual members of the group have moved into the middle class in large numbers.”).

⁴⁶² Karst, *Paths to Belonging*, *supra* note 26, at 332, 334 (asserting that assimilation is “closely associated with economic class”). *Cf.* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998) (arguing that the right of communities to disassociate themselves from general society in favor of self-governance is consonant with liberalism).

⁴⁶³ 989 F.2d 233 (7th Cir. 1993).

one percent of the work force is Korean was not due to discrimination.⁴⁶⁴ As a small company with annual sales of only \$400,000, it relies primarily on word of mouth for its employees because “[i]t is the cheapest method of recruitment. Indeed, it is practically costless.”⁴⁶⁵ According to Judge Posner, “[i]t is not discrimination . . . for an employer to sit back and wait for people willing to work for low wages to apply to him. The fact that they are ethnically or racially uniform does not impose upon him a duty to spend money advertising in the help-wanted columns of the Chicago Tribune.”⁴⁶⁶

Low-cost word of mouth recruiting may indeed be an important device for companies in highly competitive businesses.⁴⁶⁷ But as Judge Posner also recognized, such hiring practices adopted by employers in ethnic economies will likely result in an ethnically homogeneous work force. “The social and business network of an immigrant community racially and culturally distinct from the majority of Americans is bound to be largely confined to that community, making it inevitable that when the network is used for job recruitment the recruits will be drawn

⁴⁶⁴ 989 F.2d at 234 (finding that in the first quarter of 1987, 73 percent of the applicants for jobs with the company and 81 percent of the hires were Korean, although less than 1 percent of the work force in Cook County, Chicago, was Korean and no more than 3 percent of the janitorial and cleaner work force was Korean). The company, Consolidated, was owned by a Korean, who had bought it from a previous owner who was also a Korean. Although the court acknowledged that the difference cannot be attributed to mere chance, it also found that there was neither direct evidence of discrimination nor circumstantial evidence that would compel an inference of intentional discrimination or disparate treatment. The EEOC’s witness list contained the names of 99 persons. Four witnesses were produced at trial to support the EEOC’s position that the owner had refused to hire them because they were not Korean. The judge did not find them credible. 989 F.2d at 237.

⁴⁶⁵ 989 F.2d at 235. The owner or current employees were usually approached by people at work or at social events. On several occasions, the owner advertised, once in a Korean-language newspaper and twice in the Chicago Tribune, but these efforts resulted in no hires. The owner had placed an ad in the Chicago Tribune in anticipation of a contract which he never got and thus there was no position to fill. 989 F.2d at 237.

⁴⁶⁶ 989 F..2d at 237.

⁴⁶⁷ 989 F.2d at 236. Judge Posner found that word-of-mouth hiring is effective in producing a good work force for two reasons. “The first is that an applicant referred by an existing employee is likely to get a franker, more accurate, ore relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor. . . . The result is a higher probability of a good match, and a lower probability hat the new hire will be disappointed or disgruntled, perform badly, and quit. Second, an employee who refers someone for employment may get in trouble with his employer if the person he refers is a dud; so word of mouth recruitment in effect enlists existing employees to help screen new applicants conscientiously.” *Id.* at 236.

disproportionately from the community.”⁴⁶⁸ No inference of intentional discrimination⁴⁶⁹ may be drawn, however, based on the pattern just described.⁴⁷⁰

Furthermore, if an employer has no English fluency requirement, this will be an additional factor that makes the employer especially attractive to members of different ethnic groups.⁴⁷¹ In *EEOC v. Chicago Miniature Lamp Works*, the Seventh Circuit found that “[co]mmon sense dictates that a nondiscriminatory employer with no English fluency requirement will receive a disproportionate amount of applications from non-English speaking persons.”⁴⁷² Thus a company’s passive reliance on “the natural flow of applicants” with a preference for a work environment that does not require English fluency would not amount to discriminatory intent.⁴⁷³ The Seventh Circuit held that a determination of the relevant labor

⁴⁶⁸ 989 F.2d at 235. “No inference of intentional discrimination can be drawn from the pattern we have described, even if the employer would prefer to employ people drawn predominantly or even entirely from his own ethnic or, here, national-origin community. Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted because it is the most efficient (not defended because it is efficient – the statute does not allow an employer to justify intentional discrimination by reference to efficiency, 42 U.S.C. § 2000e-2(k)(2)), just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.”).

⁴⁶⁹ At the outset, the case was also disparate impact case, but the EEOC abandoned its claim of disparate impact. The Court noted that *if* this were still a disparate impact case, and *if*, contrary to *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 304-05 (7th Cir. 1991), word of mouth recruitment were deemed an employment practice and thus subject to disparate impact review, “then the advantages of word of mouth recruitment would have to be balanced against its possibly discriminatory effect when the employer’s current work force is already skewed along racial or other disfavored lines.” 989 F.2d at 236. Controlling case law for the Seventh Circuit, as enunciated in *EEOC v. Chicago Miniature Lamp Works*, *supra*, 947 F.2d at 304-05, does not find passive reliance by an employer on employee word of mouth recruiting to be an employment practice for purposes of disparate impact analysis. For disparate impact, “a more affirmative act by the employer must be shown in order to establish causation.” 497 F.2d at 305.

⁴⁷⁰ Additionally, the judge held that even if the motives behind certain hiring practices were a “mixture of discrimination and efficiency,” there would still be no liability for discrimination if the owner would have adopted the same practices “even if he had no interest in the national origin of his employees.” 989 F.2d at 236.

⁴⁷¹ *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 301-03 (7th Cir. 1991).

⁴⁷² 947 F.2d at 303 & n. 9.

⁴⁷³ 947 F.2d 292, 302 (7th Cir. 1991).

market should take into account factors such as commuting time⁴⁷⁴ and “the relative attractiveness of [certain] jobs to different ethnic groups,”⁴⁷⁵ especially those with limited English fluency. Jobs in ethnic enclaves, especially those that are geographically close to residential enclaves and do not require English fluency, would in all likelihood be especially attractive to those co-ethnics who reside in nearby ethnic residential enclaves.

The context in which these cases arise is most aptly described thus:

“The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses . . . have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated and despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring. There is equal danger to black-run businesses in our central cities. Must such businesses undertake in the name of non-discrimination costly measures to recruit nonblack employees?”⁴⁷⁶

⁴⁷⁴ “Low-paying, unskilled jobs are more likely to be filled by those living closer to the site of the job, simply because the cost (including the opportunity cost of time lost) of commuting cannot be justified. . . . Commuting time is thus especially important in this case.” 947 F.2d at 302.

⁴⁷⁵ 947 F.2d at 302-03. In his dissent in *EEOC v. O&G Spring and Wire Forms Specialty Co.*, *supra* note , 38 F.2d at 886 & n.2, Judge Manion found the EEOC’s statistical model to be flawed because it failed to identify the interested segment of the labor market. “The lack of an English fluency requirement increases the interest of non-English speaking Polish and Hispanic job-seekers. . . . The statistical model also failed to account for the fact that Polish and Spanish were routinely spoken at O&G. This would reduce the interest of the English speaking black (and white) labor market to work at O&G.”

⁴⁷⁶ 989 F.2d at 237-38. Note that the court is not saying that hiring on the basis of preferences for or discrimination against a person on the basis of race or ethnicity is valid because it is efficient to do so. 989 F.2d at 236 (“the statute does not allow an employer to justify intentional discrimination by reference to efficiency”). It is saying merely that no inference of intentional discrimination may be drawn from a pattern of behavior that arises from a particular context – the clustering of ethnic communities, bound by common culture, language, and background, which in turn encourage the formation of ethnic economies with similar characteristics. Word of mouth hiring and relying on family members, relatives and friends, in this context, should not, without more, constitute proof of intentional discrimination.

IV. Conclusion

The Article aims to lay out the various categories of ethnically based preferential policies that have been pursued in different countries, by government and non-government actors. Part I examined government policies designed clearly to prefer a government-mandated ethnic group (as opposed to government policies designed to prohibit discrimination on the basis of ethnicity). Part II studied preferential policies that exist wholly outside the government's mandate and that form the basis for the existence and proliferation of ethnic economies, and their subvariants, the ethnic enclaves and niches, in many developed as well as developing countries.

In asking how a legal regime may respond to these types of non-governmental preferential policies, it is useful to set up a comprehensive framework to parse through the different types of non-government preferences. The challenge that confronts us in the end comes down to something roughly like this. Not whether the law should be so harshly extended as to destroy (by forbidding) all intra-ethnic forms of mutual support⁴⁷⁷ delineated in Part II and thus deny the obvious good, both for the larger society and for the greater uplifting of spirits of those struggling to gain some fair footing these networks and varieties of ethnic energy so frequently can and do provide, but how best merely to reflect a degree of reasonable care and prudence in measuring the fair – and fairly-permitted – scope of such self-referential ongoing ethnic-economic arrangements.

Clearly, anti-discrimination laws are appropriate, even needed to open up opportunities for those against whom non-governmental, private discrimination⁴⁷⁸ is commonly practiced – the “paradigm” cases being those of business establishments excluding, or segregating, certain persons altogether; and of employers declining to employ them (or to employ them only in certain positions, or on less favorable terms); or of banks “redlining” zones identified by race (declining to lend for enterprises or homes so located). In brief, in general, the wide range of civil

⁴⁷⁷ That is, effectively to “forbid” by outlawing them—all such practices – by treating them as just one more kind of “unlawful discrimination” such that civil and/or criminal sanctions will at once be applicable to bring to bear through public or private law suits by suitably “aggrieved” parties.

⁴⁷⁸ And not merely government discrimination.

rights legislation, in housing, employment, insurance, banking, or public accommodations reaching refusals to deal with some on the same terms as one's willingness to deal with others who differ by race and ethnicity is a regime of law to approve and strongly defend.

At the same time, however, such a regime of law, or at least a great deal of it, may also reach such refusals to deal of the various kinds just recounted in Part II, and it appears to reach such practices whether the objected-to-conduct, or the refusal to deal, is framed in terms of:

- 1) "discrimination against" those who are of "X" ethnicity, rather than, for example, in terms of;
- 2) a "preference for" those of "Z" ethnicity, or;
- 3) a "preference for" others who are merely "like oneself," specifically, "like oneself" in respect to being of the same ethnicity, plus, possibly, additional "likeness" characteristics as well, for example, immigrant status, language, customs, a common history of shared hardships.

These forms of category 1 "refusals to deal" on the one hand, and forms of category 2 "special preference" or of mutual help on the other hand, seem to reflect clearly distinguishable states of mind and of policy, by those engaged in these practices. And insofar as they do reflect quite different states of mind and of policy, they may also tend to cover quite different practices, albeit with a considerable field of overlap in terms of certain specific effects.

The differences as well as the overlaps are easily illustrated. The preliminary listings of different practices 1 through 3 provided above may also lend themselves to a kind of "lexical ordering," for example, from the first category ("discrimination against") which may constitute the *most exclusionary* (and least defensible) practice; to another that is *less exclusionary* (and perhaps somewhat defensible?); to another that may seem to be *least exclusionary* (and most defensible?).

1. In a stipulated instance of category 1), the seller (or banker, or public accommodation owner, or employer) who is hereby designated Y, simply does not want to "deal with" X, perhaps from an animus toward persons of X's ethnicity. She will accordingly never do so to an extent exactly reflecting the intensity of that animus, whatever the extent of it may be, subject only to

duress of law.⁴⁷⁹ This is a paradigm case for the application of a typical anti-discrimination law. As long as one is engaged in what is essentially a commercial or economic activity, one will not be permitted to turn away or “discriminate against” otherwise eligible, ready, able, and willing persons merely because of their ethnicity. Laws reaching *just* these cases may well appear to be of the most strongly justified sort – in order to prevent “flat out” refusals to deal with a given person just because of that person’s ethnicity condemning him or her by exclusion just for being who they are. In reaching only these cases (if that is the approach to be adopted by a country), the law would merely leave the remaining relatively less-exclusionary private-sector practices alone. And, in respect to those practices, moreover, at least some may strike one as not warranting any strong legal sanction to discourage the practice; indeed, the practice itself may be seen as not necessarily even constituting a “wrong” at all, but, instead, even as representing a constructive kind of “positive good.”

A variation of category 1 that might be put provisionally as a different case, but effectively with the same outcome as in the case just examined, may involve a case where the lender’s (or seller’s, or employer’s) refusal to deal springs not from any “animus” towards persons of X’s ethnicity, *per se*. As an original proposition, Y would readily transact with X and assuredly not treat X on any less favorable terms that she would treat anyone else. Yet, she will routinely turn X away, and in that respect the case is still within the general framework of category 1. Rather, Y’s refusal to transact with X is strictly impersonal. It is derived only from impersonal, straightforward considerations of profit and of loss: from an ordinary concern that engaging in the proposed transaction with X may lose her more than she can reasonably expect to gain from that transaction, because of ungovernable third-party responses. For example, if restaurateur Y employs “Latinos” not as kitchen help but also as maitre d’ or wait persons, Y will at once stand to lose more customers and more business than she will gain, if just because non-Latinos in this location where her restaurant is located will gradually stray off to take their

⁴⁷⁹ Y will refuse transacting with X except to the extent that the law (an “antidiscrimination” law) compels her otherwise. Cases within this category 1 would seem to have the harshest “discriminatory” impact and effect. This would be the case because in all type-1 cases, X will always be turned away by Y, and just on account of X’s ethnicity *per se*. Or, if not literally turned away, accepted by Y only on more onerous conditions than Y would exact from anyone else, anyone not of X’s ethnicity.

business elsewhere. This is still a “refusal to deal *because of X’s ethnicity*” case, however, in that it is X’s ethnicity per se that at once ignites Y’s exclusionary decision not to transact with him, neither more nor less, just as in case 1.

Still, there may also be this difference, namely that the “refusals to deal” when based solely on this concern, will also be somewhat less frequent than when based on the kind of reason examined in category 1. That ought to be so because in the “animus” case, Y will always decline to deal with X,⁴⁸⁰ unless virtually compelled to do so by force of law. In the instance now under consideration, Y will never decline to deal save only where Y is herself vulnerable to third-party reaction, and such reaction is of a kind adversely affecting her in a substantial and material way, and that she is effectively helpless to avoid.

Typically, however, in neither of these cases of discrimination against X will Y be excused from liability to X under most anti-discrimination laws in the U.S.⁴⁸¹ And this is generally so, whether in respect to actions brought by the individual in X’s position or in respect to an enforcement action brought instead, or additionally, by some public agency.⁴⁸² The Article

⁴⁸⁰ Nonetheless, the effect on persons in X’s position may be insignificant, rather than serious. It will be so if Y is the exception, if it is merely Y alone, or if there are merely a “few” also like Y, and/or if the opportunities commanded by Y (for employment or for loans, etc) are themselves far from numerous or far from commanding any significant fraction of transactional opportunities of a kind still readily within X’s reach. Even so, the Article does not propose to “excuse” Y from the law operative in type 1 cases. *See also infra* notes .

⁴⁸¹ This is so although one could argue that compelling Y to transact with X in this circumstance is not materially different in effect from compelling Y to “subsidize” X, for even fully granting that X will perform as well as anyone else with whom Y would transact, still, it is plain that Y’s “costs” associated with the transaction will be higher, even if made so just because of the reactions of others whose behavior is beyond Y’s (as well as X’s) control.

In theory, there may be a straightforward legal way of dealing with this problem – the problem of “aversive reactions” by third parties to the nondiscriminatory practices of Y. That straightforward legal answer is to note that, under a properly comprehensive anti-discrimination civil rights act, the “switch” by such third parties (in now taking their business elsewhere, in thus diverting it from Y) may itself be made to constitute an actionable wrong by them: an “actionable wrong” against Y (and perhaps equally an actionable wrong against X as well). The problem with such cases, of racially “reactive boycott,” is generally not with the theory of the cause of action, but solely with applying it as a practical matter, though this is indeed a very real problem in point of fact. “Running down” those who “ran away from Y, the equal opportunity party, is simply not generally practical for those in Y’s position.

⁴⁸² For example, there is in this regard, no serious possibility that Y could successfully claim that X’s ethnicity disqualifies X for the particular position for which he applied, by arguing that, under the circumstances, being of some other race (some race to which Y’s customers are not averse) should be regarded as a “bona fide occupational qualification (or bfoq) for employment. Asserted as a defense, the claim will fail.

First, many state and federal anti-discrimination statutes in the U.S. (including Title VII of the 1964 Civil Rights Act) simply exclude race from ever constituting a bfoq. Title VII, for example, provides a bfoq in respect to

is not proposing to make any change in this regard,⁴⁸³ so as to excuse Y in either kind of case, despite the (arguably significant) distinctions already noted.

2. In a different scenario, Y, the employer, has no aversion to X or persons of X's ethnicity. She does, however, nonetheless have a preference for persons of some particular ethnicity, ethnicity Z. And here, Y's preference is not just, or even particularly of Y's own ethnicity. X will thus gain the transaction except in the circumstance where a person of the favored Z ethnicity also applies.⁴⁸⁴

sex, and in respect to religion, and even national origin, but not for race). But second, in any event, the requirement for establishing some characteristic as a bfoq, whether it is race or something else, under nearly all current anti-discrimination laws, generally goes to the relevance of the qualifying characteristic to the essential job skills and tasks as such, and ordinarily to nothing more.

So for example, the fact that white customers, constituting even 90% or more of a restaurant's trade, would abandon the restaurant were the restaurant to employ a person of X's ethnicity as hostess, may be true. Their aversive reaction has nothing to do with such a person's talents, skill, personability, etc., to be superb in the performance of every aspect of the position, on the merits, however, and may not, therefore, be taken into account in assessing X's suitability for the position sought. Accordingly, that X's employment by Y, either as cashier or as hostess, may induce a gradual boycott of the restaurant, which, given its location, may then even fail in business (at which point X, too, will be out of a job once again), will not permit Y to treat race as a bfoq. Some have argued that it should, on the grounds that the 1964 Civil Rights Act was cruelly indifferent to the plight of the small businessperson unable to control customer flight. *See* Robert Bork, *Civil Rights, A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

Some antidiscrimination acts, including Title VII itself (on employment discrimination) have a "small business" cutoff – the act may not apply to an employer with fewer than fifteen employees. Indirectly, this exclusion from the reach of the law may recognize the "unfairness" of subjecting *small* enterprises, those with no market power (to keep customers from "punishing" them by switching their patronage to others), to the full rigor of an antidiscrimination law. But if so, it is only "indirect," since the exemption equally shelters the same business entity that merely wants to discriminate, even perhaps to maximize profits by discriminating, in exactly the way it chooses to do so, by refusing to employ some persons just on account of their ethnicity or race.

⁴⁸³ Relief from, or exemption from, antidiscrimination laws on the basis of feared or actual adverse third-party reaction (whether it be from customers, clients, or suppliers, etc.) has generally not been provided because it is seen as inviting, or as conferring, upon such third parties a virtual "heckler's veto" over antidiscrimination laws as such. Thus, if there were such an exemption, and one were opposed to having non-whites enjoy the same banking privileges as oneself, and wanted thus to maintain an unfair ethnic commercial borrowing advantage as a white person, one would need merely to combine with, or even act in conscious parallelism with, others of a like desire to signal to a target bank one's resolve to boycott that bank should it presume to lend on equal terms to non-whites. Currently, under U.S. law, neither the threat, nor the reality, of that kind of action, whether by individuals or by groups, may relieve the bank of its legal obligation under a straightforward antidiscrimination law. Perhaps, the correct response is not to consider relieving the adversely affected bank, or employer, or place of public accommodation, of its obligation of strict nondiscrimination but to vest a cause of action in the bank to recover against its ethnically-motivated reactive boycotters. *See supra* note .

⁴⁸⁴ Whether this will have a significantly detrimental impact on persons not of the Z ethnicity depends on the circumstances. If all or nearly all Y "primary contractors" have a subcontracting "preference" for Zs, and there is a sufficient supply of Zs to meet the needs of the primary contractors in respect to a given type of subcontract, then, it is highly likely that a nonZ will lose not just "a" subcontract, but the next, and after that the next

This scenario might well be one in which Y, a white person, harbors no animus toward other whites, Latinos, Chinese, Malays, etc. Y does nonetheless have an affirmative preference, not for persons “like” herself but instead for persons who are African or African American. And it is solely the opportunity presented to Y, to exhibit that preference, therefore, that will bring it into play.

This inclination by Y may well arise just from Y’s own personal experience – hers is an acquired and nonetheless genuine, special liking, and special admiration, of Zs. Or it may have arisen partly from a sense of felt moral obligation to help such persons in particular.⁴⁸⁵ Of course it might also be “preference” arising merely from a business motive, that to be seen as hiring more people “like Z” and/or of lending credit to more people like Z will itself impress others, and in doing so, redound in fact to the overall greater business advantage for Y herself.⁴⁸⁶

In this second category of cases, both the government itself, as described in Part I, as well as private individuals and institutions have acted to prefer Zs over other non-Zs, whether out of genuine desire or in response to economic motives and incentives.⁴⁸⁷ This Article has not examined category 2 preferences for Zs, but this preference is mentioned here merely to show the

as well. So, likewise, if all “elite” private universities mimic each other, in having a “preference” for Zs, then X, a student characterized by two characteristics (one, that he or she is an “excellent” student, and two, that by ethnicity, he or she is “not-Z”), then it is not the case he or she merely loses “an opportunity to enroll in an “elite” institution. Rather he or she is excluded (by ethnicity) from all such institutions.

⁴⁸⁵ Just this kind of explanation has been offered in defense of one, limited, kind of “affirmative” action, namely, the kind involving setting aside, or preferring, or specially encouraging, or subsidizing, etc. “places” for “African Americans.” The idea rests on the claim and observation that persons of that description (blacks in America) have borne uniquely terrible burdens of a disgraceful history within this country itself, and thus the case for preference here is exceedingly strong, as a matter of historical justice as such.

⁴⁸⁶ Thus, and interestingly, this is the “reverse” side of the case considered earlier (the reverse of the case wherein Y will be made to suffer – by third party reaction – should she not turn away Z); here, the circumstances are such that she may expect specially to prosper – by third party reaction – should she transact with Z. *See infra* note [487] and *supra* notes [481-483].

⁴⁸⁷ So, for example, the government has acted to provide economic incentives for Zs to be preferred, by paying a bonus to primary contractors who bypass lower bids by some subcontractors (usually white subcontractors) to accept higher bids by others (usually nonwhite). Or to take a different case, it may well be the case that a given educational institution (for example, a private university) establishes a “preferential” admission policy in respect to Zs, partly, if not wholly, because it has learned that it will not be seen as desirable an institution by others, in which to seek to enroll, insofar as it enrolls few, if any, Zs. No doubt, moreover, such an institution’s “preferential” policies (preferential toward Zs) may be a compound of overlapping motives, thus of mutually-reinforcing strength.

complex continuum of preferences and the array of possible responses from a legal system. A legal regime could either strike down category 2 preferences, whether government-mandated or privately pursued, or it could tailor its responses and distinguish between government-mandated programs and non-government, voluntary ones, finding the latter to be more defensible and less problematic.⁴⁸⁸

3. This third category which has been the focus of this Article may be somewhat distinguishable and different still. Here, if X is unable to secure the particular transaction, it will be only in such instances as someone of the seller's (or lender's or employer's) own ethnicity was available and interested as well. For here, again, by stipulation, there is no animus toward X or reluctance to transact with X at all; rather, merely a particular preference for another, namely, someone close within one's "own community." This preference proceeds from an exceptional sense of recognition and of more immediate identification, as it might be in respect to one's own "kin," in making a loan.

Indeed, in the kind of case under consideration here, it may even be the case that Y is a person who wouldn't otherwise be making a loan *at all*, or selling a particular item *at all* in the circumstances, but Y is moved to do so on this occasion just because of this special sense of kinship.⁴⁸⁹ On a more general level, it is difficult conceptually to separate the very existence of

⁴⁸⁸ Some have suggested that non-government, voluntary programs may be acceptable as an approach that would minimize some of the objections to current government-mandated programs. Schuck, *supra* note 434, at 85-86. Professor Schuck makes a distinction between a preference mandated by the government and one pursued voluntarily by private entities. *Id.* at 86-89 (discussing reasons why "[a] racial preference mandated by public law is much more objectionable than one that a private entity decides to establish to reflect its own values and for its own purposes." *Id.* at 86-87). Even in the case of voluntary and private preferences, however, some may be problematic, "especially when they are used as the basis for allocating valuable social resources whose principle of distributive justice is and should be merit, properly defined." *Id.* at 85. *See supra* note .

This Article does not address the issues raised by category 2, but does on the whole agree with the distinctions raised by Professor Schuck concerning mandatory government preferences and private, voluntary preferences. To the extent the preference described in category 2, practiced by X in favor of Z, is one practiced by X voluntarily as a private person or entity, a more in-depth analysis of this type of preference is provided in the article by Professor Schuck.

⁴⁸⁹ An analogy may be drawn to the case where Y is only moved to engage in an arrangement (provide a loan) because of a special sense of kinship in respect to a family relative, a nephew, who needs such a loan. Insofar as this may be so, the case presents an interesting issue, in testing an anti-discrimination law, when another person is then refused "the same" treatment as that which Y's nephew just received. From one point of view, X is refused an accommodation (a loan) Y provided to another person, thus he is the "victim" of "discrimination" in exactly that respect. Looking at the matter in this way, X could have a case. And from here, from this "nepotistic" example, all

ethnic economies themselves from the intra-group preferential practices that support them because it is the preferential practices, arising out of the need to and call for helping each other, that gave rise to the creation of an ethnic economy to begin with. In this sense, ethnic economies are intrinsically and by their very definition self-generative, and the practices, whether they be hiring, or apprenticeship, or in-group loans, would not take place *but for* the common ethnicity and community ties that pre-existed the practices (and vice versa.) In other words, the existence of ethnic economies and the intra-group preferences are mutually reinforcing and one would not exist without the other.

It is largely within the framework of this category that the major portions of this Article are focused and elaborated in describing globally how networks of identified types of ethnic kinship work overall, and evidently, on balance, with highly constructive consequences both for the participants and the economic well-being of the larger society or culture within which they abide.

Nonetheless, it is important to repeat in the conclusion a word of caution already sounded elsewhere in the Article. There is obviously a point at which *any* ethnic “community” may, over time, in any country, so advance in its networking, cohesion, size, structure, “inwardly-looking” economic and political characteristics as to take on a different character than once it possessed. A character itself more of intolerance than of tolerance, and a set of self-preferring practices discriminatory toward “nonmembers” (by race, by ethnicity, culture, etc.), virtually forcing others to fashion their own response, and ultimately stimulating rivalries, and threatening an ethnic balkanization of a community or country overall. And just that kind of development, one may say, if it comes, then, when it comes, may itself place the group once more . . . beyond the pale. That is, beyond the tolerance of the law.

we need to make the case “realistic” so that X may assert an ethnic discrimination complaint is to suppose that Y would make and has made such a “special accommodation” to someone who, thought not his nephew, is still one in respect to whom he felt a similar, “quite comparable” closeness (a newly arrived “fellow Chinese,” or “fellow Thai,” or “fellow West Indian” from Jamaica.

