

8-1-2011

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Recommended Citation

Rana, Aziz, "Settlers and Immigrants in the Formation of American Law" (2011). *Cornell Law Faculty Publications*. Paper 1075.
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SETTLERS AND IMMIGRANTS IN THE FORMATION OF AMERICAN LAW

Aziz Rana*

DRAFT

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ABSTRACT

This paper argues that the early American republic is best understood as a constitutional experiment in “settler empire,” and that related migration policies played a central role in shaping collective identity and structures of authority. Initial colonists, along with their 19th century descendants, viewed society as grounded in an ideal of freedom that emphasized continuous popular mobilization and direct economic and political decision-making. However, many settlers believed that this ideal required Indian dispossession and the coercive use of dependent groups, most prominently slaves, in order to ensure that they themselves had access to property and did not have to engage in menial but essential forms of work. Crucially, settlers recognized that in order to sustain such a project of republican freedom and territorial conquest, they would need new migrants beyond the flow of English colonists. This promoted strong commitments to open immigration – but only from ethnically appropriate communities – as a central engine of settler development and expansion. Thus, although we often think of immigration and settlerism as competing national identities, I contend that for centuries the idea of the United States as a European immigrant nation – as well as the constitutional structures supporting that vision – was directly bound to settler needs and institutions.

* Assistant Professor of Law, Cornell University Law School. 236 Myron Taylor Hall, Ithaca, NY 14853. Email: ar643@cornell.edu. Phone: (607) 255-5423. I recently published a book, *The Two Faces of American Freedom*, that depicts American constitutional development as a sustained practice in what I term ‘settler empire.’ As a follow-up to that project, I have been thinking about the relationship between immigrant and settler identities in American life. This draft is an initial and broad-brush effort to develop out of the book’s arguments an account of how immigration has structured notions of membership and belonging.

I. Introduction: Immigration and American Exceptionalism

American identity has long been linked to the idea of the United States as a nation of immigrants—a place uniquely hospitable to individuals seeking new economic opportunities or political possibilities. As French American farmer J. Hector St. John de Crèvecoeur wrote in 1793 in answer to the question, “What then is the American, this new man?”:

*He is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great *Alma Mater*. Here individuals of all nations are melted into a new race of men, whose labours and posterity will one day cause great changes in the world.*¹

Crèvecoeur’s words underscore how for centuries this immigrant identity has been viewed by domestic commentators as a foundational element of American exceptionalism, distinguishing the U.S. culturally and institutionally from its Old World precedents and rivals. In contrast to America’s relative openness, European monarchies and their successor regimes created systematic hierarchies between sovereign subjects and foreign aliens—for instance, by denying the benefits of inheritance and land ownership to non-subjects. According Edward Coke, famed seventeenth century English jurist, such restrictions were necessary to protect the king’s control over the realm and to ensure that foreign subjects (and with them a foreign sovereign) did not claim the wealth and power from the territory. Coke declared aliens to be like a “Trojan horse” who would “fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth.”²

Yet if American identity remains bound to Crèvecoeur’s vision of immigrant inclusiveness, today’s immigrants appear to face treatment far more in line with what Coke might have recommended. As one recent but telling illustration, in 1996 Congress passed legislation that dramatically restricted the basic rights of noncitizens. In the words of historian Mae Ngai, “The 1996 laws terminated welfare benefits for legal aliens, made removal mandatory for a broad range of offenses, and further curtailed judicial review and virtually eliminated administrative discretion in deportation cases.” The ultimate consequence has been to blur the boundary between legal and illegal immigrants, by creating new means for revoking legal status for long-term residents while further undermining the ability of undocumented workers to ever

¹ J. Hector St. John de Crèvecoeur, *Letters from an American Farmer* (Philadelphia: Matthew Carey, 1793), 46-47.

² Calvin’s Case, 77 Eng. Rep. 377, 399 (1608).

‘legalize’ their position.³ At present, even permanent residents live in the United States on “a condition of permanent probation,” since minor offenses can carry mandatory deportation irrespective of whether immigrants have served their sentences or have long-standing ties to the United States—including a history of military service.⁴

At the same time, the United States has pursued these policies by bringing the full force of the American penal system to bear on noncitizens. In the wake of the attacks of September 11, 2001, immigration laws were employed to contain the perceived threat posed by Arab and Muslim extremists, leading to the arrest and detention of some 5,000 immigrants.⁵ And as a more general matter, migrants seeking asylum or individuals contesting deportation are today routinely held in an elaborate network of deportation centers and county jails, in the latter case alongside criminal offenders. Highlighting the extent of the state’s coercive enforcement, in fiscal year 2007 the Department of Homeland Security reports that it detained 311,213 immigrants in total, for reasons that included minor violations or even administrative mistakes.⁶

How can we make sense of this gulf between national identity and contemporary practice and what does it suggest about the dramatic transformations over the course of American history in the role of immigrants in collective life? In the following pages I will explore the genesis and implications of today’s approach toward noncitizens by excavating a past paradigm that on first glance might seem remote and unrelated: namely the historical project of continental settlement. From the earliest period of colonization until the beginning of the twentieth century the U.S. was a constitutional experiment in settler colonialism.⁷ Initial colonists, along with their nineteenth century descendents, viewed society as grounded in an ideal of freedom that emphasized continuous popular mobilization and direct economic and political decision-making. However,

³ See Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004), 265–270 (quotation on 268).

⁴ Quotation in *ibid.*, 269. For more on the effects of mandatory deportation, see “Group Reports That 1996 Immigration Law Separated 1.6 Million from Families,” Associated Press, July 18, 2007, www.foxnews.com/story/0,2933,289734,00.html; and Serena Hoy, “The Other Detainees,” *Legal Affairs*, September/October 2004, www.legalaffairs.org. Offenses for which immigrants have been deported include “writing bad checks, selling \$10 worth of marijuana, or pulling someone’s hair during a fight at a party.” Hoy, “Other Detainees.”

⁵ See David Cole, “Are We Safer?” *New York Review of Books*, March 9, 2006, www.nybooks.com.

⁶ On the use of the penal system, see generally Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Berkeley: University of California Press, 2004). For statistics on immigrant detainees, see Nina Bernstein and Julia Preston, “Better Health Care Sought for Detained Immigrants,” *New York Times*, May 7, 2008, www.nytimes.com.

⁷ For a comprehensive account of the role of settler constitutionalism in American life, see Aziz Rana, *The Two Faces of American Freedom* (Cambridge, Mass.: Harvard University Press, 2010). The basic descriptions of settler institutions draw from this work.

many settlers believed that this ideal required Indian dispossession and the coercive use of dependent groups, most prominently slaves, in order to ensure that they themselves had access to property and did not have to engage in menial but essential forms of work.

Crucially, settlers recognized that in order to sustain such a project of republican freedom and territorial conquest, they would need new migrants beyond the flow of English colonists. But for these early Anglo settlers, who maintained sharp cultural distinctions between insiders and outsiders, migrants had to share key ethnic characteristics and thus be viewed as worthy of participating in settler growth and development. This need for the ‘right’ type of migrant promoted strong commitments to open European immigration while at the same time justified rigid limitations on non-white movement (such as the Chinese in the late nineteenth century). Thus, although we often think of immigration and settlerism as competing national identities, I contend that for centuries the idea of the United States as an immigrant nation—as well as the constitutional structures supporting that vision—was directly bound to settler needs and institutions. In fact, the harshness of current immigration policy has much to do both with the historic decline of settler frameworks and with fundamental shifts in where today’s migrants originate (overwhelming outside of the Global North).

In pursuing these arguments, Part Two will begin by articulating the guiding constitutional structure of American settlerism and its constitutive relationship to immigration. Part Three then will describe the genesis of migration policies in the North American colonies, focusing on their distinctiveness from existing European models and how they set the basic rubric for the early republic. Part Four will assess how immigration in the nineteenth century served both as a tool of settler expansion and as a method of establishing clear ethnic—and increasingly racial—divisions between full citizens and dependent groups. Finally, Part Five will present the steady collapse of settler constitutionalism and its implications for the status of noncitizens (European and non-European alike) in American life after the 1920s. By way of a conclusion, I will return to the contemporary moment, exploring how current practices increasingly reject the inclusive and liberating elements of settler immigration policies while retaining their exclusive and hierarchical edge.

II. Early America as a Constitutional Project in Settler Colonialism

What does it mean to describe the American constitutional past as an embodiment of settler colonialism? Today, while the image of the pioneer settler has become a staple of American popular culture, this image is largely presented as a specifically American story about the frontier—one that either praises the heroism of the rugged pioneer or denounces the expropriation and removal of indigenous peoples. However these prevailing accounts by and large neglect the striking continuities between the American experience and that of similar experiments in imperial conquest and European settlement. Like the French in Algeria, the English in Ireland, Australia, and South Africa, or even the Chinese in Taiwan, the United States' earliest beginnings and political founding were first and foremost as a settler society. This settler framework generated its own ideology and practices, which established profound interconnections between internal liberty and external subordination. Such national origins embody more than a distant period of conquest and exclusion—that while reprehensible have little to say about current institutions. Rather, they provided the basic account of political sovereignty and constitutional authority for American life for over three centuries.

Technically, settler societies are characterized by substantial and long-lasting imperial populations, which seek to transplant home country ways to the new environment. As Ronald Weitzer writes, colonies of settlement generally produce extensive political and economic institutions that “achieve[] de facto or de jure political independence from [the imperial] metropole.”⁸ This de facto autonomy tends to promote decentralized and less hierarchical modes of internal political authority. Just as important, in such communities the descendants of colonists also wrest political supremacy from indigenous groups; they maintain this supremacy permanently or for many generations and develop complex ideologies to legitimate such enforced inequality.⁹

⁸ Ronald Weitzer, *Transforming Settler States: Communal Conflict and Internal Security in Northern Ireland and Zimbabwe* (Berkeley: University of California Press, 1990), 26.

⁹ Efforts by historians and social scientists to make comparative assessments about settler institutions have often focused on how labor regimes influence political arrangements. For instance, D.K. Fieldhouse in the 1960s developed a typology to delineate various forms of settlerism, which he divides into three basic categories: mixed, plantation, and pure settlement. See D.K. Fieldhouse, *The Colonial Empires: A Comparative Survey of the Eighteenth Century* (New York: Delacorte Press, 1967), 11-12. George Fredrickson also employs this typology, which he views as providing ideal types, and ties settler modes of racial exclusion and control to the metropole's economic goals and labor practices. See George M. Fredrickson, “Colonialism and Racism: The United States and South Africa in Comparative Perspective,” in *The Arrogance of Race: Historical Perspectives on Slavery, Racism, and Social Inequality* (Middletown, Conn.: Wesleyan University Press, 1988), 216-235, especially 220-221.

In the history of imperial expansion, there were two distinct modern periods of settler colonialism. The first wave included what Caroline Elkins and Susan Pedersen call the “new world colonies,” exemplified by European settlement in the United States, South Africa, Australia, and elsewhere.¹⁰ These colonies were typified by efforts to claim indigenous territory exclusively for settler communities, territory that was repeatedly described as virgin or empty. Moreover, the primary approach to the local population was driven less by the desire “to govern indigenous peoples or to enlist them in their economic ventures than to seize their land and push them beyond an ever-expanding frontier of settlement.”¹¹ New World colonies consistently sought to weaken metropolitan authority over settler life, and to employ *de facto* relationships of autonomy to press both for full independence and for the complete removal of indigenous groups.

The second wave took place during the late nineteenth and early to mid-twentieth centuries and included European and Japanese settlements across parts of Africa and Asia. In contrast to the New World colonies, these later efforts generally confronted indigenous populations whose size and strength on the ground left settlers as a distinct numerical minority. This resulted in a central difference with the earlier wave of colonization. Both settlers and metropolitan officials were unable simply to depopulate the territory. Rather, they engaged in “protracted negotiations or struggles with always more numerous indigenous populations.”¹² These realities meant that while colonists may have sought greater autonomy from their home countries, in the final analysis they remained politically—and especially militarily—dependent on metropolitan authority for their continued social supremacy and privilege. Without home country support, colonists faced the persistent danger of becoming small minorities in a hostile political community.

¹⁰ Caroline Elkins and Susan Pedersen, “Settler Colonialism: A Concept and Its Uses,” *Settler Colonialism in the Twentieth Century*, eds. Caroline Elkins and Susan Pedersen (New York: Routledge, 2005), 1-20 (quotation on 2). See also James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783-1939* (New York: Oxford University Press, 2009) for a recent account of how new world settler colonies spread English customs and language across the globe, focusing particularly on how migration patterns and the onset of industrialization combined to produce booming Anglo settler economies. Another new study, Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, Mass.: Harvard University Press, 2010), offers an excellent comparative assessment of how settler-native relations operated in practice in both Georgia and New South Wales.

¹¹ Elkins and Pedersen, “Settler Colonialism,” 2.

¹² *Ibid.*, 3.

In a sense, the key distinctions between twentieth century settlerism and its earlier form in the New World help to explain why Americans today rarely conceive of themselves as ‘settlers.’ As Patrick Wolfe notes, the basic logic of the early settler wave was not the exploitation of indigenous groups but rather that of native elimination. This elimination took the form not merely of violence against local communities or the dissolution of indigenous political and economic practices. It also meant that settlers sought to replace native society as such and to “erect a new colonial society on the expropriated land base.”¹³ Thus, the vision of indigenous territory as empty land was part and parcel of settler efforts to transform themselves into ‘natives’ and to escape the very category of colonialism. In keeping with this, the desire to see the U.S. as an exceptional nation was partially built on the need to distance the country from its European origins, and to assert an authentically local American character or way of life.

These shared settler features suggest that what makes the American experience distinctive must be read in light of its comparative continuities. American commentators often view aspects of national history to be uniquely homegrown, when in fact they are present to varying degrees in numerous settler societies. Among others, these qualities include greater equality within the settler colony than in the imperial metropole or home country; a cultural sense of being ‘chosen’ as a racial, ethnic, or religious community for a historical mission; a greater emphasis on militarism due to perceived threats from indigenous and foreign populations; and, finally, a wariness of metropolitan social and political customs which are depicted at times as corrupt or decadent.

Nonetheless, the success of the revolt by the thirteen British colonies spawned a unique settler ideology. This ideology fused ethnic nationalism, Protestant theology, and republicanism to combine freedom as self-rule with a commitment to territorial empire. Such self-rule involved the elimination of all modes of arbitrary authority and required individuals to assert actual decision-making power over economic and political relations, through productive control and democratic participation. As a consequence, I argue that American settlerism was organized around four basic components. *First*, in radicalizing seventeenth century republican ideas increasingly prevalent in England, settlers came to view economic independence as the ethical basis of free citizenship. Centuries of Americans saw control over the instruments and conditions

¹³ See Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8 (2006): 387-409 (quotation on 388).

of work as providing insiders with a collective experience in autonomy and moral independence. Primarily through land ownership and individual proprietorship, settlers sought to create an internally egalitarian and participatory political community. *Second*, Americans viewed the basic engine of republican freedom to be conquest. Without new territory for settlers, the ethical benefits of ‘free labor’ could not be made generally accessible. In other words, as a political necessity, settlers viewed republicanism as constitutively bound to empire and expansion.

Third, settler society presumed that republican principles at root were not universally inclusive. In other words, most settlers believed that not everyone could enjoy the benefits of economic independence. They argued that the nature of agricultural life meant that for some to engage in the dignified work marked by productive control, there would have to be others that participated in forms of labor long perceived to be degraded—such as tenancy, wage labor, and domestic service. Thus, for settlers, there existed at the heart of republican notions of economic independence a basic divide between free and unfree work. Over time, Americans solved this problem by employing subordinated external groups, particularly African slaves, to engage in the most oppressive modes of production. And they justified both the expropriation of native land and the control of dependent laboring communities through arguments about ethnic and religious superiority.

Fourth, settlers recognized that continual expansion rested on a burgeoning population, beyond what natural demographic growth and migration from England could provide. As a result, they created remarkably open immigration policies for Europeans deemed co-ethnics and thus co-participants in the republican project. This meant that for most of the American experience, the U.S. border was essentially a port of entry for European immigrants who were quickly incorporated into the political community. This incorporation included practices that today would be quite surprising, such as the prevalence of noncitizen voting and noncitizen access to federal land out west. On the one hand, the territorial need for immigrants checked the most xenophobic tendencies within settler society over the course of the nineteenth century, by expanding the ethnic and religious categories for who could count as American. On the other hand, it also hardened the divide between social insiders and subordinated outsiders. Thus, while many new European immigrants may have had immediate access to the conditions necessary for free citizenship and equal political participation, Indians, blacks, or Mexicans who had long lived on the land were denied these basic rights. In essence, they existed as colonized populations

within the territory of the United States, in ways akin to twentieth century settler structures of indigenous control, in which “a caste division . . . [was] built into the economy, political system, and the law, with particular economic activities and political privileges . . . reserved for members of the settler population.”¹⁴ Thus, American political identity was intricately tied to imperial assumptions about both the need for new immigrant settlers and for external control over dependent communities.

Until its steady disintegration in the first half of the twentieth century, this settler ideology generated a constitutional politics built on two distinct accounts of sovereign power—one of democratic consent and internal checks and another of external discretion. In fact, generations of settler insiders linked the very act of an energetic federal government to the project of empire building, a project that presupposed an unlimited imperial authority deriving from British royal prerogative. Aggressive federal activity thus became synonymous with the internal application of a coercive authority properly applied only to those outside the bounds of social inclusion, such as natives, Mexicans, and blacks. Under these circumstances, any internal appearance of the dreaded imperial prerogative was viewed as a dangerous threat to liberty and an attempt to reduce settlers to the condition of heathens or savages—by treating *free* citizens as if they were colonial subjects. Particularly xenophobic, this dualist vision of political sovereignty upheld the necessity of empire and simultaneously remained ever vigilant about the possibility of imperial power seeping into settler society. It also underscored the dynamics of American social membership, in which ethnically-defined status as a settler was more important than being accorded *formal* citizenship. In other words, the framework of duality separated insiders—immigrant and native-born alike—from all nonsettlers, who found themselves subject to a complicated and stratified structure of overlapping hierarchies.

III. European Migration during the Colonial Period

In order to illustrate how this constitutional structure emerged and operated in political life, let me begin by exploring migration policies during the colonial period. By the mid-eighteenth century, the British project of decentralized imperial expansion produced a remarkable state of affairs in the North American colonies: land ownership by and large was widely dispersed and colonists enjoyed extensive political and legal rights. Even more so than

¹⁴ Elkins and Pederson, “Settler Colonialism,” 4.

the Crown intended, its settlers created uniquely self-governing polities in which—for those included as full members—republican liberty was a tangible experience. For instance, in the chartered colonies of New England, the Crown possessed virtually no direct power, as the governor and the executive council were both elected. Even in royal colonies like Virginia where these positions were Crown appointments, the colonies maintained representative legislative bodies with the plenary power to make colonial law so long as it coincided with imperial statutes and received metropolitan consent. The colonies also organized local government, with settlers providing the justices of peace and even establishing municipalities with powers analogous to English chartered boroughs. Moreover, settlers possessed the same basic rights as fellow Englishmen, and, in particular, trial by jury and habeas corpus were guaranteed to all Anglo colonists and their descendents.¹⁵

However, the political autonomy that developed went hand in hand with deep insularity within settler society. Despite the religious and cultural differences between the various colonies, settlers in general saw their ancestry as foundational for their status as privileged subjects. They viewed this ancestry as grounding specific and cherished liberties, as emblazoned in the Magna Carta.¹⁶ For many settlers, this specific cultural history of liberty made them exceptionally suited for free political life. Thus, while a native could become civilized and Christian through sedentary agriculture and religious conversion, the absence of any link to Britain's ancestral past would always make his complete inclusion impossible. The capacity for liberty, developed over generations, made settlers—as opposed to subjugated communities—distinctively qualified for political, economic, and social power. As a result, and in a manner similar to numerous other settler societies, political self-government in the colonies was premised on an organic notion of belonging that linked ancestry and land to membership.

Yet Anglo settlers nonetheless confronted a basic predicament that cut against the most intense forms of insularity. For English colonies to be economically sustainable and militarily secure from indigenous threat—let alone to expand—they required a larger population. By the eighteenth century, industrialization and changes in economic production in England led metropolitan officials to be deeply ambivalent toward increasing Anglo emigration; these officials sought instead to maintain a sizeable workforce for factories on the island. Since

¹⁵ See Fieldhouse, *The Colonial Empires*, 59-63.

¹⁶ See generally David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989), 810-816.

England alone could not supply the necessary numbers, settlers promoted emigration by other European communities, efforts that led to a substantial non-English population by the mid-eighteenth century.

In order to attract these newcomers, colonists developed practices for easy naturalization, which were far more open and simplified than those at home. James Kettner writes that “neither the royal charters, nor parliamentary statutes, nor common law principles explicitly conferred upon colonial authorities the right to adopt aliens as subjects.”¹⁷ Nonetheless, almost immediately colonies aggressively asserted their local colonial authority to naturalize European foreigners, regardless of whether these powers were recognized in London. Settlers employed a variety of tools to aid quick naturalization. The most common method was the passage of special naturalization acts by local assemblies to incorporate new European subjects. Other means included the use of enrollment procedures and group naturalizations. In New York, settlers naturalized all resident foreigners “professing Christianity” who pledged an oath of allegiance by November 1, 1683.¹⁸ Under John Locke’s *Fundamental Constitutions of Carolina*, foreigners simply had to appear at any precinct register, and if they pledged on a copy of the *Constitutions* that they would “bear faith and true allegiance” to the king and “to the Palatine and Lords Proprietors,” they would be immediately naturalized.¹⁹

Along with creating lax naturalization policies, settlers also expanded the provision of rights traditionally offered naturalized European subjects. While in England the established policy was to exclude these subjects from holding high political office, in North America practices were more flexible. In Pennsylvania, a 1706 election law permitted naturalized subjects to vote as well as to stand for elected positions. Even more distinctively, settlers began extending rights to European foreigners, in ways that contradicted the classic divide between subjects and aliens and that broke decisively from practices in England. In 1704 the South Carolina legislature passed a suffrage law providing voting rights to new immigrants as long as they met residency and property requirements. The law simply formalized practices occurring on the ground, as widespread alien voting had taken place in the colony’s 1701 election, particularly by French Huguenots. In 1761 Georgia, too, enacted an equivalent measure allowing for alien voting. And

¹⁷ James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978), 78.

¹⁸ Quoted in *ibid.*, 86.

¹⁹ John Locke, “The Fundamental Constitutions of Carolina (1669),” in *Political Writings*, ed. David Wootton (Indianapolis: Hackett Publishing, 2003), 210–232, 231–232.

in Pennsylvania, even without such laws on the books, by the 1740s it had become commonplace for German Protestants to vote and hold office, with or without the benefit of naturalization.²⁰

Crucially, these practices were fundamentally grounded in ethnic and religious judgments about cultural similarity. While goals of expansion may have pressed Anglo settlers to open the colonies to heightened immigration, only specific foreigners were welcome. In particular, settlers came to view colonial inclusion as appropriate for European Protestants, whose religious practices made them particularly suitable for republican values and English liberties. For instance, groups such as the French Huguenots, who faced suppression under Louis XIV, were treated as co-participants in the project of settlement and found a ready welcome in the colonies. While Catholics or Indian tribes were depicted as culturally dissimilar and ill equipped for freedom, Western European Protestants were seen as having their own parallel history with free institutions and thus assimilable within the settler project.

This cultural approach to who properly counted as a worthy immigrant was further reinforced when the English Parliament finally moved in 1740 to standardize naturalization procedures in the colonies. For nearly half a century, settlers had argued for the Crown to provide legal certainty to practices emerging on the ground. The 1740 law did so by creating an inexpensive and clear administrative process for incorporating new subjects. Yet, along with a seven-year residency provision, the bill also required foreigners to profess their Christian faith and to submit a certificate swearing to have taken the sacrament in a Protestant church in the previous three months.²¹ While exemptions were provided for groups such as the Quakers,²² these rules pointedly disqualified Catholics from membership. In essence, easy naturalization for co-ethnic and co-religious foreigners went hand in hand with the continuing exclusion of outsiders deemed too culturally heterodox.

In this way, immigration became a critical means of replenishing and sustaining settler commitments to land conquest and republican self-rule. This meant the development of lax

²⁰ For practices in South Carolina and Pennsylvania, see Jamin Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage," *University of Pennsylvania Law Review* 141 (1993): 1391–1470, 1399, 1400; and for the Georgia law, see Kettner, *American Citizenship*, 102.

²¹ Kettner, *American Citizenship*, 74–75.

²² In a real expression of toleration, Jewish emigrants also received an exemption. *Ibid.*, 74–76. The limited size of the Jewish population in the colonies certainly facilitated this move. Still, despite the 1740 exemption, one should note that throughout the period and well into the nineteenth century Jews, as non-Christians, faced various legal restrictions, including on holding public office and on voting. See generally Howard M. Sachar, *A History of the Jews in America* (New York: Knopf, 1992), 9–37 (especially 17–20, 27–28).

naturalization rules and the extension of rights (including suffrage) to aliens in ways that differed dramatically from metropolitan practices. Unlike colonized or dependent groups, new Protestants were often viewed as worthy of full membership and therefore deserving of swift economic and political inclusion. Of course, these immigration policies were not applied everywhere, either during the colonial period or following the Revolution. In the seventeenth and eighteenth centuries, Rogers Smith notes that New England tended to be “the most exclusionary” with Massachusetts and New Hampshire limiting freeman status to Englishmen alone.²³ Still the basic thrust of colonial practices was strikingly distinct from that throughout Europe; such practices underscored the emerging centrality of immigration to settler life. They also set the stage for how migration policies in independent America would both facilitate settler expansion and sustain colonial dichotomies between insiders and outsiders.

IV. Settler Exclusivity and Expansion through the Prism of Immigration

One can best appreciate both sides of migration policy in the nineteenth century—as the engine of settler development and as a tool for maintaining an ethnically-derived account of membership—by juxtaposing the treatment of European and non-European communities. In particular, the profound disparities between the legal frameworks according white as opposed to Chinese migrants highlight the role of immigration in preserving settler identity and institutions. As the following sections explore, while Europeans often enjoyed full political and social rights well before formal nationality, Chinese in the second half of the century found themselves subject to a regime of exclusion and deportation—one at the time that was deemed appropriate only for ethnic outsiders.

A. European Migration as the Engine of Settler Society

As with the old colonial approach, following American independence European arrivals largely enjoyed a system of quick incorporation based on assumptions about assimilability and shared ethnic heritage. The United States not only maintained earlier practices of encouraging immigration; it extended these practices to create a remarkably inclusive community for new Europeans. As Hiroshi Motomura has demonstrated through his arguments about “intending citizenship,” immigrants, even before becoming citizens officially, were integrated into the

²³ Rogers Smith, *Civil Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale University Press, 1997), 57.

republican projects of self-rule and expansion in ways that were unimaginable on the Continent.²⁴ Recall that under the European model of statecraft the legal distinction between aliens and subjects was of central importance. Extensive rights for aliens were believed to subvert the king's dominion and allow other sovereigns to infiltrate the polity. In the United States, however, the European monarchical distinction between aliens and subjects became far less important than whether one possessed the right ethnic and cultural background to be incorporated into settler society.

As a result, whether an individual was a formal citizen did not necessarily correlate with real social membership, or what might be termed *free citizenship*. Free citizens enjoyed all the prerequisites for republican liberty, including complete rights to land ownership and political participation (such as through suffrage). As the nineteenth century unfolded, a European 'alien' could often live as a free citizen in the United States even before naturalization, while dependent groups such as nonslave blacks may have been formally defined as citizens but were legally denied the basic conditions for self-rule. In essence, free citizenship was extended on the basis of ethnicity to co-participants in a settler project of expansion, while colonized groups—regardless of their legal status as 'citizens'—were organized through long-standing modes of imperial authority.

Immigrant inclusiveness was most evident in the simplicity and ease of the United States' new naturalization process. Under the 1802 Naturalization Act, which remained in force for most of the nineteenth century, to gain formal citizenship foreigners merely had to reside in the country for five years, declare their intent to be naturalized at least three years before admission to citizenship (but at any point after residence), pledge an oath of allegiance to the federal Constitution, and give minimal proof of good character. Critically, this process was available only to 'free white persons,' a stipulation established by the very first naturalization law in 1790 and which remained in effect until after the Civil War.²⁵ But prior to formal admission, many immigrants who were still aliens enjoyed political and economic privileges that emphasized their full standing within settler society. For instance, European aliens who had declared their intent to become naturalized were eligible for western land grants, such as those under the 1850 Oregon

²⁴ See generally Hiroshi Motomura's essential account of the analytical shifts from the nineteenth century through today in the relationship between immigration and citizenship, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (New York: Oxford University Press, 2006).

²⁵ See James H. Kettner, *American Citizenship*, 246; and Motomura, *Americans in Waiting*, 71, 9.

Donation Land Act, aimed at settling the Oregon Territory, and the more encompassing 1862 Homestead Act.²⁶

Throughout the nineteenth century, European noncitizens possessed the right to vote in numerous states, particularly on the frontier. In the years after independence, Congress explicitly included European aliens as voting members in the Northwest Territories.²⁷ Vermont's first constitution provided for the naturalization and enfranchisement of aliens, and Virginia enacted similar policies through statute. Formalizing its colonial practices, Pennsylvania also followed suit, although it added a two-year residency requirement.²⁸ These efforts ebbed in the early decades of the nineteenth century but quickly multiplied with a new phase of western expansion during the 1840s and 1850s. In 1840, the Illinois Supreme Court asserted that the state's constitution provided "the right of suffrage to those who, having by habitation and residence, identified their interests and feelings with the citizenry . . . although they may be neither native nor adopted citizens."²⁹ In 1848, Wisconsin passed a suffrage law granting the vote to immigrants who under the naturalization process had declared their intent to become citizens. Remarkably, the right persisted regardless of whether immigrants ever actually completed the naturalization process. Over the next ten years, Kansas, Minnesota, Oregon, and Michigan all adopted similar alien suffrage laws, and after the Civil War more than a dozen additional states in the south and west followed the same path.³⁰ Especially on the frontier, alien voting, which had first emerged during the colonial era, became routine.

The rationale driving this openness to European immigration was the same as had long operated in the colonies. If the republican goals of economic independence and freedom as self-rule necessitated territorial expansion, they also required enough people to work the land and to participate in projects of conquest. Again, for an ethnically defined settler society, not all immigrants were uniformly welcome, only those seen as culturally assimilable and thus

²⁶ For an account of the use of property law to induce white settlement, see Kerry Abrams, "The Hidden Dimension of Nineteenth-Century Immigration Law," *Vanderbilt Law Review* 62 (2009): 1353–1418 (especially 1403–1414). Abrams powerfully demonstrates how property, marriage, and voting laws in frontier territories were employed to construct the right ethnic demographic. For example, alongside passing anti-miscegenation statutes, territorial governments after the Civil War began the steady process of extended voting rights to white women. Such practices jointly aimed at inducing European female migration and at preventing racial mixing—the latter a fundamental threat to settler identity.

²⁷ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 32.

²⁸ Jamin Raskin, "Legal Aliens, Local Citizens," 1400.

²⁹ *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 408 (1840), quoted in Keyssar, *Right to Vote*, 33.

³⁰ Keyssar, *Right to Vote*, 33.

prospective co-participants in activities of settlement. But, over the long term, the driving focus on the needs of territorial and economic growth increasingly relaxed the idea of who counted as a potential free settler citizen—a fact underscored by the consistent provision of naturalization to all ‘free white persons.’

Most strikingly, these demographic and material interests meant that even Catholics came to be seen as capable of privileged membership, although after an appropriate period of tutelage in Anglo-Protestant institutions and liberty. This development was dictated in part by the simple facts of which communities were emigrating from Europe to the United States. Between 1846 and 1855, over 70 percent of new arrivals to the country (2,265,018 out of 3,031,339 persons) were either Irish or German, a large percentage of whom were not Protestant. No doubt Catholic immigrants (and the Irish in particular) confronted various forms of informal and formal discrimination, especially at the workplace. In fact, the far greater tendency of frontier states to allow for alien voting was due both to their specific population needs and to the fact that the vast majority of immigrants out west were Germans—whom English settlers viewed as Teutons, the very ancestors of the Anglo-Saxons.³¹

By contrast, Irish immigrants tended to congregate in already densely populated cities back east, where they became the focal point for Anglo fears about the cultural dissolution of settler society and with it republican freedom. Particularly during economic downturns, these fears produced backlashes against Catholic groups and generated more exclusive definitions of settler identity. Yet despite local electoral success, nativist parties and organizations like the 1850s Know Nothings ultimately never succeeded in undermining existing naturalization or suffrage frameworks. Calls to place quotas on immigration, particularly from Catholic countries, or to extend the waiting period before naturalization, such as to twenty-one years, would have to wait for over half a century to be seriously contemplated or enacted.³² In fact, as the nineteenth

³¹ See generally Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Mass.: Harvard University Press, 1998), 39–90 (immigration numbers quoted on 43).

³² For more on nativism and the Know Nothing Party, see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York: Oxford University Press, 1970), 226–260; and Tyler Anbinder, *Nativism and Slavery: The Northern Know Nothing Party and the Politics of the 1850s* (New York: Oxford University Press, 1992). Both Foner and Anbinder discuss how the failure of nativists to address the question of slavery during a time of deep sectional conflict undermined their ability to sustain national political support. Anbinder quotes one anti-slavery activist as saying, “neither the Pope nor the foreigners ever can govern the country or endanger its liberties, but the slavebreeders and slavetraders *do* govern it, and threaten to put an end to all government but theirs. There is something tangible to go upon, an issue which . . . will . . . surely succeed in the long run.” Anbinder, *Nativism and Slavery*, 278.

century wore on, the overarching need for new immigrants meant that one's status as white became far more significant for free citizenship than whether immigrants were English or even Protestant.

This background thus produced an extraordinary state of affairs, in which the American shore was more a port of entry than a closed border for Europeans coming from abroad. While laws existed (mostly at the state level) for the exclusion of immigrants, these were primarily due to public health concerns with contagious disease or to prevent paupers from landing—the latter as part of general measures drawn from English poor laws to restrict the movement of indigent persons. As a result, states established regulations, in keeping with republican concerns about the dependent poor, under which foreign ships were required to pay taxes for their passengers or to provide a bond ensuring that they would not become public charges. And some states and local authorities engaged in out-of-county or out-of-state removal of 'paupers,' immigrant or otherwise, who were deemed economically undesirable. But no federal deportations from the United States of any immigrants took place during the entire antebellum period and for the first two decades after the Civil War. Even at the state level, Gerald Neuman tells us that in many locales removal provisions were left unenforced, and where occasional enforcement took place during the early nineteenth century, like in New York or in Massachusetts (long a center of anti-immigrant sentiment), the tendency over time was to replace removal with workhouses for the indigent. Therefore, while the myth of a legally open border may never have fully existed, for European immigrants the reality very nearly approximated the myth—given strong presumptions in favor of entry and the fact that one's post-entry ability to remain in the United States and participate in its political life was by and large unquestioned.³³

Although the desire to encourage immigration west may have expanded who counted as a republican settler and generated a de facto open border for Europeans, it went hand in hand with the entrenchment of discretionary forms of authority over nonsettlers. If most European

³³ For a comprehensive assessment of nineteenth-century federal and state immigration laws, see Gerald Neuman, "The Lost Century of American Immigration Law (1776–1875)," *Columbia Law Review* 93 (1993): 1833–1901, esp. at 1846–1865; and generally Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, N.J.: Princeton University Press, 1996), 19–94. On the issue of the lack of federal deportations, see Roger Daniels, *Not Like Us: Immigrants and Minorities in America, 1890–1924* (Chicago: Ivan R. Dee, 1997), 17. In fact, the only federal deportation statute during the period was 1798's Alien Enemies Act, passed as part of the Alien and Sedition Acts, which excluded entry by political radicals and provided for their removal. However, no individuals were actually formally deported. See also Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass.: Harvard University Press, 2007), 60–63.

immigrants, who were steadily incorporated into settler life, were free from deportation and enjoyed complete freedom of movement, dependent groups benefited from no similar privilege. Indian tribes, such as the Cherokee during the Trail of Tears, faced wholesale removal and expulsion. Fugitive slave laws, passed by Congress in 1793 and again in 1850, created administrative proceedings (with minimal judicial oversight) to forcibly return slaves to their owners.³⁴ As for nonslave or free blacks, despite being formal citizens they too faced extensive restrictions on their movement. Slave states generally barred the admission of free blacks who were not already residents.³⁵ As for newly opened land out west, Indiana, Illinois, Iowa, and Oregon prohibited altogether the entrance of the black population into their territory.³⁶

Under the emerging framework, newly arrived immigrants (even prior to naturalization) had greater privileges than communities with long histories in the United States. Not only were free blacks denied entrance to some frontier states; they were explicitly barred from claiming property through western land grants. If the frontier was considered a national reserve for the benefit of all social members, including noncitizen Europeans, federal law denied blacks access to the public domain and thus to economic independence and republican standing. In other words, formal citizens who had been on American soil for generations had fewer practical rights than alien immigrants who may have only recently arrived in the country. The treatment of Mexicans out west after the Mexican-American War powerfully underscored this feature of settler society. With the annexation of wide swaths of land through the Treaty of Guadalupe-Hidalgo, 80,000 Mexicans now found themselves subjects of American congressional power. Under the treaty, those who chose to remain on their land were accorded formal status as citizens as well as property rights and suffrage.³⁷ Yet, as Richard Griswold del Castillo writes, although Mexican proponents of the treaty assumed that the rights of these new U.S. citizens would be respected, “They were wrong: American local, state, and national courts later ruled that the provisions of the treaty could be superseded by local laws.”³⁸ California’s very first state

³⁴ Kanstroom, *Deportation Nation*, 77–90.

³⁵ Neuman, “Lost Century,” 1868.

³⁶ Eric Foner, *The Story of American Freedom* (New York: Norton, 1998), 76–77.

³⁷ Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life* (New York: HarperCollins, 1990), 308.

³⁸ Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (Norman: University of Oklahoma Press, 1990), 51.

constitution denied voting rights for most Mexicans, stipulating that only white Mexicans were entitled to suffrage.³⁹

Moreover, Congress's 1851 California Land Settlement Act forced Mexicans to prove their land title in court. Since many had no formal titles or did not have the financial means for long-term litigation, they were either stripped of their property or forced to sell. The result was the nullification of most Mexican landholding and the transfer of property to white settlers, immigrant and native-born.⁴⁰ Akin to the importation of Africans to the New World, such transfer also strengthened internal settler egalitarianism by expanding property ownership among whites and by providing a dependent workforce of nonwhite tenant farmers. Thus formal citizenship for Mexicans, just as for nonslave blacks, did not entail republican inclusion. And as with Indian tribes, it made them legal, political, and economic outsiders on land they had long possessed while at the same time providing extensive rights and opportunities to new immigrants with no ties to that land and only limited ties to the United States.

In essence, slaves, Indians, free blacks, and Mexicans all persisted as subjects of a discretionary and imperial prerogative power, one considered inappropriate for free settlers—immigrant or native born. This prerogative power reduced each subordinated group to the status of a colonized subject, whose rights were carefully correlated and stratified based on settler economic interests and the necessities of maintaining control. For slaves, these requirements entailed the denial of any meaningful protections. As for free blacks and nonwhite Mexicans, such groups enjoyed formal citizenship but were excluded from the political and economic conditions essential for republican liberty. And with respect to Indian tribes, a system of what might be described as 'indirect rule'⁴¹—after analogous European imperial practices in India and Africa—limited federal responsibility for their welfare while ensuring that settlers possessed an overriding authority to claim indigenous land or to reconstruct tribal institutions if necessary.

But the place of newly arrived Europeans in collective life, along with illustrating the basic structural divide between free citizens and this patchwork and stratified structure of rule

³⁹ Keyssar, *Right to Vote*, 337, table A.4.

⁴⁰ See David J. Weber, ed., *Foreigners in Their Native Land: Historical Roots of the Mexican Americans* (Albuquerque: University of New Mexico Press, 2004), 156–157.

⁴¹ Regarding the idea of indirect rule and its entrenchment in late nineteenth century imperial thought and practice, see generally Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, N.J.: Princeton University Press, 2010). See also Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J.: Princeton University Press, 1996), 62–108.

over dependent groups, also makes evident the essential linkages in the national experience between settlement and immigration. Rather than immigrant and settler serving as opposing categories, the settler period in American history was the heyday of both open immigration and extensive immigrant rights. In fact, the growth and development of settler society rested fundamentally on a continual supply of Europeans coming from abroad. As I will return to in Part Five, the move toward the restriction of white immigration—and with it modern immigration policies—emerged only with the closing of the frontier, transformations in economic production, and the larger demise of settler frameworks. Before these developments, republican interests in economic independence intertwined settler and immigrant identities and created a distinctive political community, one holding out both the promise of free citizenship and the specter of imperial control.

B. Nonsettler Immigrants and the Predicament of the Chinese

That specter was vividly illustrated by the treatment of Chinese workers in the nineteenth century, a new immigrant community which did not fit settler judgments about ethnic assimilability. Chinese immigration to the west expanded dramatically in the period following the California Gold Rush of 1849, with approximately 250,000 people making the trek to America. Of the 105,000 who resided in the country during the 1880 census, two-thirds lived in California and 90 percent in the ten western-most states. Chinese immigrants generally came in search of better wages and worked in the mines or building the transcontinental railroad. For many whites, they were the quintessential ‘industrial reserve army,’ a permanent body of poorly paid workers who were used by employers to depress white earning and to check labor activism. Drawing from the traditional language of ethnic membership, settlers depicted these new immigrants as not only damaging white economic well-being but also as inappropriate culturally for inclusion.⁴²

This sentiment led to the emergence of a new federal immigration system for the Chinese, one that emphasized their ineradicable ethnic difference and incompatibility with American ideals of free labor and republican independence. In 1870 during Reconstruction, Congress finally extended the right of naturalization beyond ‘free white persons,’ but it did so solely for “aliens of African nativity and to persons of African descent.” Although Radical

⁴² See Roger Daniels, *Not Like Us: Immigrants and Minorities in America, 1890–1924* (Chicago: Ivan R. Dee, 1997), 5–6; Hiroshi Motomura, *Americans in Waiting*, 16; and Ronald Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* (New York: Knopf, 1979), 236–240.

Republicans like Senator Charles Sumner sought to break with settler dichotomies and make naturalization universal, anti-Chinese sentiment was too strong. As a result, Chinese immigrants were explicitly barred by the bill and found themselves subject to a new legal category: ‘aliens ineligible for citizenship.’ In essence, the naturalization law, despite attempting to incorporate blacks as free citizens, embraced elements of social membership consistent with long-standing practices. Although European immigrants could be naturalized and were accorded extensive rights even before formal inclusion, this was because they were ultimately co-participants in settler society. By contrast, Chinese immigrants were cultural outsiders, to a degree qualitatively different from newly freed blacks. They were thus incapable of free citizenship and had to be controlled through discretionary forms of authority.⁴³

Such authority was most immediately and directly expressed by Congress’s use of its immigration power to limit Chinese movement from abroad. The overwhelming aim of the new legislation was to curtail dramatically—if not eliminate—competition for white settlers from Chinese labor. Such power had long been understood to derive from sovereignty itself and to be plenary and near limitless.⁴⁴ In fact, for Jacksonians like Chief Justice Roger Taney, a discretionary immigration power was essential to the capacity of state governments to control nonsettler populations, particularly free blacks and slaves, and if need be to restrict their entry entirely. It existed as one of the basic means by which political authorities protected the internal composition of settler society and policed the movement of subject groups. And for this very reason, European immigrants, as settler insiders, largely avoided the coercive brunt of such prerogatives.

As a result, much like other dependent communities—Indians, slaves, and free blacks—Asian immigrants now found their freedom of movement curtailed and subject to government’s discretionary power. In 1875 Congress passed the Page Act, the first federal bill in American history restricting nonslave immigration. Although it was written in general language to bar

⁴³ For the naturalization law, see Act of July 14, 1870, ch. 254, §7, 16 Stat. 254 (quotation on 256); and for more on anti-Chinese sentiment during the congressional debates and the idea of ‘aliens ineligible for citizenship,’ see Motomura, *Americans in Waiting*, 70–75.

⁴⁴ See especially *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). Although Taney dissented from the ruling, like the majority he also argued that all political communities enjoyed a plenary immigration authority that came from an inherent “power of self-preservation” and was “paramount and absolute in the sovereignty that possesses it.” *Passenger Cases*, 48 U.S. at 470, 467 (1849) (J. Taney, dissenting). While the Court ruled that the national government possessed this plenary power, Taney, in classic Jacksonian terms, disagreed and believed that it was held by the various states.

entrance of convicted criminals and prostitutes, the bill was understood by legislative drafters and the public at large as aimed to keep out Chinese women—who, it was argued, may contaminate settler society through race mixing. The effect was the maintenance of an overwhelmingly male Chinese population, with a male-to-female ratio of twenty-seven to one by 1890. Congress then passed the Chinese Exclusion Act of 1882, prohibiting Chinese labor from entering the United States for ten years and declaring that no court, state or federal, “shall admit Chinese to citizenship.” A decade later, in the Geary Act, Congress extended this ban and made Chinese laborers deportable unless they had a certificate proving residence in the United States prior to 1892. Those without certificates would have to show good cause for failing to acquire one and to provide “at least one credible white witness” to establish pre-1892 habitation.⁴⁵

Taken together these bills are often viewed as ushering in a new era of immigration policy, which over time would dramatically narrow the ‘golden door’ and produce a general system of restrictiveness. They also highlighted the historic move from state to federal control regarding issues of entry and removal. Chinese deportations present the very first examples in U.S. history of the federal government’s legal deportation of aliens, a practice that in the twentieth century extended far beyond Asian laborers. Therefore, historians like Roger Daniels argue that Chinese exclusion and deportation acts “became the hinge on which all American immigration policy turned.”⁴⁶ But while the Chinese case would later be emulated in new modes of federal border control, during the Gilded Age immigration policies were still meant for dependent groups such as Asians, who were viewed as ethnically unfit for social membership. It was because the Chinese were considered to be unassimilable threats to settler identity that they found themselves subject to the same forms of discretionary and—indeed—imperial prerogative power that had long governed other dependent subjects. Thus it was perfectly compatible to maintain a parallel system—one that mirrored the basic colonial duality of settler life—which maintained a de facto open door for Europeans while imposing exclusion and forced removal on Chinese.

In other words, even as the end of slavery began to dissolve the classic boundaries of settler society, a commitment remained to protecting the divide between free republican citizens

⁴⁵ For a discussion of the legal and historical continuities between Chinese treatment and previous migration policies toward Indians and blacks, see Kanstroom, *Deportation Nation*, 21–23. On the Page Act and its demographic impact, see Daniels, *Not Like Us*, 12, 6; Motomura, *Americans in Waiting*, 25. For the exclusion laws, see Act of May 6, 1882, ch. 126, §14, 22 Stat. 58, 61; Act of May 5, 1892, ch. 60, §6, 27 Stat. 25, 26.

⁴⁶ Daniels, *Not Like Us*, 17.

and internally colonized groups. With respect to Chinese immigrants, this was most powerfully expressed in Justice John Marshall Harlan's famed dissent from the Supreme Court's ruling in *Plessy v. Ferguson* (1896), which through the doctrine of 'separate but equal' upheld the constitutionality of racial segregation in public accommodations. Harlan maintained that as a consequence of the Civil War and the Reconstruction Amendments, blacks should now be thought of as free republican citizens and therefore incorporated fully into the political community. Yet this inclusiveness did not mean the end of subject status for those who remained ethnically distinct and a danger to settler ideals. For Harlan, the Chinese persisted as just such an outsider community, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country." Harlan viewed it as a profound injustice that blacks, "who risked their lives for the preservation of the union," would be barred from riding in coach cars while "a Chinaman can ride in the same passenger coach with white citizens of the United States." In essence, he sought to maintain settler narratives of identity and membership under radically shifted circumstances. In classic settler terms, the problem with 'separate but equal' was that it provided subordinated outsiders (the Chinese) greater rights than it did to appropriately privileged insiders (newly incorporated blacks).⁴⁷

Harlan reaffirmed his wariness of Chinese inclusion by concurring in Chief Justice Melville Fuller's dissent in *U.S. v. Wong Kim Ark* two years later. There, the Court provided a limited constitutional constraint on efforts aimed at restricting the rights of the Chinese population; it held that although Chinese immigrants may be unable to naturalize as 'aliens ineligible for citizenship' the U.S.-born children of Chinese parents enjoyed birthright citizenship under the Fourteenth Amendment. According to the dissent, the majority opinion was fundamentally "injurious to the public interest," because it served to incorporate into settler society "large numbers of Chinese laborers, of a distinct race and religion, [who] remain[ed] strangers in the land, . . . unfamiliar with our institutions, and apparently incapable of assimilating with our people."⁴⁸ Moreover, the dissent buttressed these arguments with depictions of China as a threatening empire, depictions that had been prevalent among politicians and laborers even during the earliest days of Chinese immigration. Such accounts presented

⁴⁷ See *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (J. Harlan, dissenting).

⁴⁸ *U.S. v. Wong Kim Ark*, 169 U.S. 649, 731(1898) (J. Fuller, dissenting) quoting *Fong Yue Ting v. U.S.*, 149 U.S. 698, 717 (1893).

China as seeking to use an endless supply of workers to expand culturally and politically into the U.S. As Fuller and Harlan argued, “subjects of the emperor of China . . . [remained] bound to him by every conception of duty and by every principle of their religion” such that even those born in the U.S. were still “pilgrims and sojourners as all their fathers were.” In their view, only by asserting discretionary power over new immigrants would the danger imposed by imperial China be surmounted and republican institutions survive.⁴⁹

In both *Plessy* and *Wong Kim Ark*, Harlan’s concerns about the relative treatment of blacks and Chinese and about Asian inclusion, respectively, were considered irrelevant by the Court’s majority. This was precisely because neither emancipated blacks nor U.S. born Chinese had been elevated by the Court to the status of free settlers. In both instances, formal citizenship was seen as perfectly compatible with structures of subordination, as highlighted by the idea of ‘separate but equal.’ Moreover, the very precondition for providing small numbers of Chinese with birthright citizenship had been exclusion laws that overwhelmingly curtailed the growth of the Asian population and protected white settlers from both economic competition and the ethnic threat posed by a large non-white immigrant community. Moreover, for the *Wong Kim Ark* Court the central benefit of birthright citizenship had little to do with the Chinese community, and rather concerned how it facilitated the swift inclusion of European immigrants. As Gray’s majority opinion argued, the problem with rejecting the principle was that Congress could in the future deny nationality “to thousands of persons of English, Scotch, Irish, German, or other European parentage who have always been considered and treated as citizens of the United States.”⁵⁰ If anything, the treatment of Chinese in the late nineteenth century—even when granted birthright citizenship—emphasized how legal and political decision-makers in the U.S. developed differential migration policies so as both to facilitate settler growth and to maintain an ethnically-defined internal community.

V. Settler Decline and the Transformation in Immigrant Standing

If essentially free European immigration was at the center of nineteenth century American practices regarding social membership and territorial expansion, when did these

⁴⁹ *Ibid.*, 725. See also Kerry Abrams’s discussion of how politicians depicted Chinese immigrants during legislative debates about the Page Act. Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” *Columbia Law Review* 105: 641–716, 692–694.

⁵⁰ *Wong Kim Ark*, 169 U.S. at 694.

policies collapse and why are they so removed from the contemporary approach? In effect, by the first two decades of the twentieth century all the basic elements of settler life faced profound strain—highlighted by the closing of the frontier as well as dramatic shifts in the economy that greatly expanded industrial and wage labor. Certainly settlerism as an organizing constitutional system disintegrated slowly and in stages, and in a profound sense continued to animate political life well after an ongoing project of actual ‘settlement’ had largely disappeared. Therefore it would be difficult to pinpoint a single moment that marked its final end. But the clearest legal and political means by which one could perceive the demise of the old framework was in the treatment of European immigrants, the historic engine of conquest and territorial expansion.

With the frontier project principally over, the place for white immigrants in collective life became increasingly uncertain. Without a demographic need to populate new territories and given heightened industrialization and factory production, more and more European immigrants were viewed as economic threats to native-born Americans rather than co-participants in a shared political enterprise. In this context, the national commitment to de facto open borders waned. Thus the first sign of a retreating settler politics was the gradual elimination of alien suffrage laws, which had promoted immigration and fostered the quick inclusion of Europeans as free republican citizens. In the final years of the nineteenth century, states overwhelmingly rejected new proposals to enfranchise foreigners, with the last such proposal going down in defeat in Massachusetts’s 1917 constitutional convention. Even more strikingly, the Idaho territory in 1874 became the first state or territory during the era to repeal its declarant alien voting law. These efforts snowballed in the initial decades of the twentieth century, after McKinley’s assassination in 1901 by Leon Czolgosz (an American-born citizen with a ‘foreign’ sounding name) and concerns during World War I with national loyalty. In 1926 Arkansas, the last state in the union to allow noncitizen voting, repealed its alien suffrage law.⁵¹ As a result, the United States had begun to approximate Coke’s old approach to the relationship between aliens and sovereign subjects. Rather than being co-participants, white foreigners—at least prior to naturalization—were outsiders properly governed through a legal regime distinct from that for full members.

This increasing American conformity to the European model was further brought home in immigration border policy, which emphasized the federal government’s near absolute power

⁵¹ Keyssar, *Right to Vote*, 138, 426n34.

over the entrance and movement of all noncitizens, regardless of race. In *Oceanic Steam Navigation Co. v. Stranahan* (1909), involving a federal statute that authorized officials to prevent the entry of individuals carrying contagious diseases, the Supreme Court went well beyond the specific facts of the case. In matters of immigrant entrance, the justices rejected as a general matter a meaningful role for judicial review of congressional action. As Justice Edward White declared in his opinion for the Court, “over no conceivable subject is the legislative power of Congress more complete than it is over . . . the right to bring aliens into the United States.” In fact, according to White this power “embrace[ed] every conceivable aspect of that subject” and suggested the legitimacy of wide-ranging controls vis-à-vis noncitizen aliens.⁵² In the past, Chinese exclusion had been premised on their inherent unfitness for republican citizenship and had gone hand in hand with the persistence of an open door for white immigrants as well as the avoidance of exercising such plenary authority over them. However, by 1917, with the premise of territorial expansion gone, the public increasingly came to view all new immigrants, irrespective of ethnicity, as labor competition. That year the U.S. government finally established a literacy test for new arrivals which supporters hoped would limit entrance especially by southern and eastern Europeans.⁵³

In 1921 Congress then passed its first numerical quotas, restricting annual immigration from each country to 3 percent of “the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.” Three years later Congress passed the National Origins Act, further limiting entrance to 2 percent of the numbers already residing in the United States according to the 1890 census. The law’s central purpose and effect was to purify ethnically the population of new immigrants by reducing the quota for southern and eastern Europeans. The law also explicitly excluded from the quota system Asian immigrants—“aliens ineligible to citizenship and their descendents” and blacks—“the descendents of slave immigrants.” As a result, it boosted the share of entrants from northern and western Europe to 84 percent and essentially ended the legal immigration of many nonwhite groups.⁵⁴

The racially discriminatory elements of the 1924 National Origins Act, which have been discussed at length by historians, certainly helped to perpetuate the idea of whiteness as essential

⁵² *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 340 (1909).

⁵³ Motomura, *Americans in Waiting*, 125.

⁵⁴ *Ibid.*, 126–128 (quotations on 126, 128).

to full American inclusion.⁵⁵ Yet taken together the two quota provisions carried with them another key implication. Even if American inclusion would continue to be defined in racial terms, the limitation and control of European migrants suggested that such racial hierarchies were embedded in a very different institutional framework. In effect, all immigrants were now subject to the discretionary and prerogative power of the federal government. Europeans too, while at the top of this stratified hierarchy, found their free movement curtailed and their presence in the United States managed by an increasingly intrusive state authority. In asserting the legitimacy of prerogative rights over European aliens, such restrictions organized previous settler insiders under the same rubric of control that applied toward Indians, blacks, Chinese, and Mexicans.

This rubric was most evident in the extension of a post-entry deportation system for all immigrants, which emerged during the 1920s. As Daniel Kanstroom writes:

Deportation of “aliens” without proper documents became a major component of an increasingly large, bureaucratized deportation system. The total number of deportees rose from 2,762 in 1920 to 38,796 in 1929. From 1921 to 1930, of the more than 92,000 people deported, more than 36,000 were found to have entered without proper documents, without inspection, or by fraud.⁵⁶

In fact, this broad-based use of prerogative powers to remove large numbers of migrants created a new category of ‘illegal aliens.’ Again, the idea of who counted as illegal was clearly racialized in American politics, focusing particularly on Mexican laborers recruited to work in the fields of the Southwest.⁵⁷ But even with the racial nature of deportation efforts, these policies made apparent that all immigrants were under a plenary regime. Like previous subject populations, recent arrivals from Europe found not only their right to vote denied but their life before naturalization supervised by state authorities with powers of exclusion and removal. Taken as a whole, government efforts—marked by the end of alien voting, quota restrictions, and deportation procedures—highlighted a remarkable break with practices that had been pervasive since the seventeenth century. They emphasized the profound alteration in the status and role of

⁵⁵ See in particular Ngai, *Impossible Subjects*, on the act’s role in sustaining the idea of a white American race and in creating a new category of ‘illegal’ immigrants among nonwhite communities.

⁵⁶ Kanstroom, *Deportation Nation*, 158.

⁵⁷ See Ngai, *Impossible Subjects*, 56–90 on the construction of “illegality” in immigration policy and its racial implications; and Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* (New York: Routledge, 1992), 4–7, 18–41.

immigrants in collective and laid the groundwork for our current system, one built on rigid boundaries between the rights afforded citizens and noncitizens.

VI. Conclusion: Immigration Today as the Return of the ‘Periphery’

What does this historical narrative suggest about the contemporary predicament of immigrants and their place in American economic and political life? To begin with, today’s migration flows are at root the product of sharp divergences in opportunity between those in the global north and the global south. Within this international framework, the United States enjoys tremendous and perhaps historically unparalleled economic, military, and political power. And despite fears of decline, by virtually any barometer America’s position as sole global superpower remains firm. Its output amounts to 20 percent of the world’s total and nearly doubles that of China, the next closest country.⁵⁸ In terms of sheer military might, the United States accounts for almost half of global defense expenditures, a number equal to the following twenty nations combined.⁵⁹ Given this global standing, it is hardly surprising that the country continues to attract migrants from abroad seeking to improve their social and economic position. It is also not surprising that the overwhelming majority of current immigrant communities are originally from regions in the global south (parts of Asia, Africa, the Caribbean, and Central and South America)—precisely those regions that face the brunt of vast disparities in international wealth and practical power. Above all, this means that migration to the United States should not be viewed as simply an arbitrary occurrence; it is a product of both international structures of inequality and U.S. status within the global order as ‘the first among equals.’

Thus a remarkable feature of today’s immigration is the manner in which it reverses the classic settler paradigm. Recall that throughout the eighteenth and nineteenth centuries, European immigrants were by and large viewed as co-participants in an ethnically defined project of expansion, one that secured for white settlers the precondition of republican freedom—economic independence through land ownership. As such, white noncitizens were often immediately included as social equals, with the federal government granting them access to property out west and with many states providing them with voting rights. This inclusion in the shared settler enterprise meant that immigrants during the high tide of territorial conquest were

⁵⁸ Central Intelligence Agency, “The World Factbook 2009,” www.cia.gov.

⁵⁹ Stockholm International Peace Research Institute, “SIPRI Yearbook 2009: Appendix 5A. Military Expenditure Data, 1999–2008,” www.sipri.org.

treated as worthy of free labor and free citizenship, while other subordinated communities (most obviously African slaves) were consigned to degraded forms of work.

Now in place of European co-ethnics, immigrants to the United States are overwhelmingly nonwhite, the very individuals that settlers once deemed ‘unfit’ for full membership. And instead of extending settler projects into the frontier or ‘periphery’ as nineteenth-century immigrants did, today’s new arrivals in essence represent the movement of this periphery into the very center of metropolitan power. To a large extent, this movement was made possible by the elimination in 1965, during the height of the civil rights movement, of national origins quotas. But while such policy shifts challenged the country’s racial identity, present-day immigrants have not enjoyed anything approaching the swift and full inclusion of their predecessors. By contrast, they often find themselves playing a similar economic function to classic subordinated groups. As the cheap labor at the bottom rung of the American economy, immigration perpetuates new stratifications that distinguish between those engaged in high-status work and those confined to low-skill employment.⁶⁰ Moreover, confronted by extensive social disabilities and facing the constant possibility of detention and forced removal, these immigrants’ status at the edges of collective life replicates not only the economic function but also the very political dependence that historically linked excluded communities to settler society.

Nothing better underscores the emergence of these dynamics than the symbiotic relationship between the United States and Mexico. Over the last century, the American government has repeatedly employed its immigration powers to provide business interests with a permanent supply of inexpensive Mexican labor that could be terminated whenever employers saw fit or deported during periods of economic downturn. The most famous of these efforts was the Bracero Program, which between the 1940s and the 1960s brought 200,000 temporary workers annually as agricultural laborers into the U.S. Southwest. The program helped entrench the social and family networks between the two countries that today sustain the flow of new migrants north. It also went hand in hand with mass deportation of Mexican laborers when employers no longer needed the workforce. Earlier, during the Great Depression, such deportation took the form of a large-scale ‘repatriation’ campaign that sent over 400,000 people,

⁶⁰ See Kevin Johnson, “The End of Civil Rights as We Know It? Immigration and Civil Rights in the New Millennium,” *U.C.L.A. Law Review* 49 (2002): 1481–1512.

including many formal American citizens, back to Mexico. And at the height of the Bracero Program, ‘Operation Wetback’ in 1954 apprehended 170,000 undocumented workers over the course of three months and forcibly removed them by bus, train, and boat.⁶¹

Today there are more immigrants from Mexico than from any other country in the world, including over 100,000 lawful permanent residents who entered every year between 1988 and 1998. Alongside this population are over 6.5 million undocumented Mexican laborers, many of whom have worked in the United States for decades.⁶² Although these numbers are the direct product of a long-standing symbiotic tie between the two countries, Mexican immigrants find themselves on the receiving end of strict border enforcement efforts and deportation schemes. This treatment ignores the role played by express government programs, as well as tacit state support for corporate employers, in creating and sustaining the Mexican community in the United States.

Such migration patterns are also illustrative of a deeper fact about contemporary American economic life, hinted at above. At present, those from the global south, particularly the 11 million undocumented immigrants,⁶³ often provide the labor that settlers long viewed as inconsistent with self-rule—from women engaged in domestic service for professional elites to unskilled factory employees in what remains of the manufacturing sector. Alongside poor white and minority citizens, immigrant non-nationals today, in ever-expanding numbers, play the part of softening the intensity of the division of labor between high and low status work. Indeed, many middle-class Americans have avoided finding themselves on the wrong side of the productive divide precisely because of immigrant workers.

In the case of household activities, women in professional and managerial jobs increasingly maintain their positions by relying on a domestic service industry often, although by no means solely, staffed by transnational women from the global south. Rather than having household labor equally shared by all and therefore losing its gendered status, such labor is carried out in a way that still casts it almost exclusively as women’s work while reinforcing the separation between privileged and dependent forms of employment. At a broader level, instead

⁶¹ See generally Ngai, *Impossible Subjects*, 127–166 (statistics about Bracero Program and deportation efforts on 139, 135, 156); Calavita, *Inside the State*, 18–112; and Kevin Johnson, “Open Borders?” *U.C.L.A. Law Review* 51 (2003–2004): 230–232.

⁶² See Johnson, “Open Borders?” 231 for statistics on permanent residents; and Michael Hoefer, Nancy Rytina, and Bryan C. Baker, Department of Homeland Security Office of Immigration Statistics, “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009,” 4 (January 2010)

⁶³ See Hoefer, Rytina, and Baker, “Estimates of the Unauthorized Immigrant Population,” 1.

of challenging the productive divide—one that distinguishes elevated from degraded labor—contemporary arrangements have allowed this divide to grow ever more extreme. In a sense, the end of settlerism has not meant the end of using subordinated groups to engage in the most menial and unfree practices. Thus although explicit settler frameworks may have receded, old structures of economic hierarchy continue in mutated form, with insider privilege sustaining outsider exclusion. As in the past, a central mechanism for preserving these hierarchies is the old discretionary prerogative. As highlighted in the introduction, this prerogative is evident in the 1996 congressional reforms as well as in the rise of a massive detention apparatus for noncitizens, one unleashed on the documented and undocumented alike.

In a sense, immigrants have gone from being the engine of settler expansion and thus worthy of full incorporation to one key and identifiable component of the dependent labor at the base of collective life—labor that both embodies and perpetuates conditions of inequality and privilege. In the past, the settler approach to European immigration, which viewed such groups as presumptive citizens, embodied both the best and worst of settler ideals. On the one hand, such openness rested on maintaining the exclusion of those culturally unfit for membership and thus sustaining and reproducing relationships of subordination. On the other hand, it nonetheless meant seeing a rich account of free citizenship as bound to the full incorporation of outsiders. At present, reversing current immigration practices should begin by reviving and, more importantly, universalizing the settler approach. Such a politics would entail employing the logic of inclusion to see the emancipatory potential of the American experience as relevant for the present, but crucially as bound neither to the subordinated labor of outsiders nor to projects of expansion. Over time, such efforts may finally begin to fulfill the real exceptionalism of the American project: a commitment to stripping republican ideals of their oppressive roots and to making free citizenship broadly accessible to all.