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# The Indigenous As Alien

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Immigration law, as it is taught, studied, and researched in the United States, imagines away the fact of preexisting indigenous peoples. Why is this the case? I argue, first, that this elision reflects and reproduces how the field of immigration law narrates space, time, and national membership. But despite their disappearance from the field, Indians have figured in immigration law, and thus I describe the neglected legal history of the treatment of Indians under U.S. immigration and citizenship law.<sup>1</sup> The Article then returns to explain why indigenous people have disappeared from immigration law through an investigation of the relationship between “We the People,” the “settler contract,” and the “nation of immigrants.”

The story of the field of U.S. immigration law is typically a narrative of the assertion of national sovereign power that begins in the late 1880s with a trilogy of

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1. At times this Article uses the term Indian, at others indigenous persons or people(s), and at times Native American. I recognize these are all imperfect terms. I primarily use the term Indian when describing indigenous people as an object of legal imagining by the United States. When possible, I refer to specific tribes by name.

U.S. Supreme Court cases. These cases—*Chae Chan Ping*,<sup>2</sup> *Ekiu*,<sup>3</sup> and *Fong Yue Ting*<sup>4</sup>—established what is called “plenary power” over the regulation of immigration.<sup>5</sup> This has meant that the political branches of the U.S. nation-state have the power to exclude aliens, admit them on such terms as they see fit, and deport them with little or no constraint from the judicial branch, as a legitimate exercise of the powers inherent in nation-state sovereignty. This trilogy of cases responded to the exclusion and deportation of Chinese and Japanese noncitizens. In two of these cases the Court upheld explicitly race-based immigration restrictions, excluding Chinese laborers who were previously residents in the United States but whose reentry certificates were nullified,<sup>6</sup> and deporting Chinese laborers who could not find white witnesses to testify to the laborers’ residence in the United States as of a particular date.<sup>7</sup>

The fact that the federal power to regulate immigration was initially asserted in cases involving the exclusion or deportation of Asian immigrants has not escaped scholars.<sup>8</sup> The research showing how these racial bars limited the lives and possibilities of particular communities casts an important critique to the distinctively prevalent narrative of the United States of America as a nation of immigrants. This narrative promises lawful immigrants a purportedly equal opportunity of arrival and the subsequent full incorporation into a presumptively universal citizenship.<sup>9</sup> This promise of course has not been equally available, belied by race-based exclusion laws, racial restrictions on naturalization, gendered divestments of citizenship, de jure and de facto violations of the rights one might correlate with full citizenship,

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2. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

3. *Ekiu v. United States*, 142 U.S. 651 (1892).

4. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

5. *See id.* at 698; *Ekiu*, 142 U.S. at 659–60; *Chae Chan Ping*, 130 U.S. at 581, 600–02, 609–10.

6. *Chae Chan Ping*, 130 U.S. at 582.

7. *Fong Yue Ting*, 149 U.S. at 702–05. The third case concerned Nishimura Ekiu, excluded as “liable to become a public charge,” meaning that she was suspected of having to rely in the future upon the financial support of the government. *Ekiu*, 142 U.S. at 656. She appeared with twenty-two dollars in her possession and told the inspector that her husband had been living in the United States for one year, and that he would call for her at a prearranged hotel. *Id.* at 652. She was not believed by the inspector. The historian Yuji Ichioka has written that Ekiu, in fact, was a prostitute, bought by a notorious procurer in San Francisco who had paid for her to contest her detention through the Supreme Court decision. Yuji Ichioka, *Ameyuki-san: Japanese Prostitutes in Nineteenth-Century America*, 4 AMERASIA 1, 5–6, 19 n.24 (1977); *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 466, n.284 (discussing this case as a submerged story of prostitution in immigration law).

8. *See, e.g.*, ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION-STATE* (1999); ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* (2003); LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

9. *See* Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595 (2005) (reviewing MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)).

and, importantly as well, the inadequacy of the liberal vision of full citizenship in addressing various inequalities.

Such a critique of the exclusions concealed within liberalism and of the discrimination masked by the promise of America is an important one. Yet at the same time, this critique, as long as it remains trapped within the frame of membership in the nation-state and the desire for full inclusion, erases other stories.<sup>10</sup>

In particular, as Kēhaulani Kaunui tells us, for indigenous peoples in the United States, the political project of civil rights has been “burdened, due to the history of U.S. settler colonialism, with distinctly different relationships to the nation-state.”<sup>11</sup> As she writes, the political project of civil rights, which is fundamentally about equality under the law, and which is confined within the nation-state, is insufficient for indigenous and other colonized peoples in addressing ongoing questions of sovereignty.<sup>12</sup> This is starkly visible in the Supreme Court’s decision in *Rice v. Cayetano*. The case concerned an electoral limitation by which only Native Hawaiians were allowed to vote for trustees of the state’s Office of Hawaiian Affairs. The Court read this limitation to be the special privilege of a racial minority (Native Hawaiians) and thus held the exclusion of white Hawaiian resident Harold Rice to be an abridgement of his right to vote under the Fifteenth Amendment.<sup>13</sup>

10. Thus, we could perhaps understand this Article as pointing to the way in which the Asian American critique has occluded the indigenous critique. Thank you to Karen Shimikawa for helping articulate this point. This observation raises the question of how we might characterize the relation of migrants, and in particular migrants of color, to settler colonialism. For contrasting views, see Bonita Lawrence & Enakshi Dua, *Decolonizing Antiracism*, 32 SOC. JUST., no. 4, 2005, at 120, and the response to Lawrence and Dua by Nandita Sharma & Cynthia Wright, *Decolonizing Resistance, Challenging Colonial States*, 35 SOC. JUST., no. 3, 2008, at 120, as well as ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAII (Candace Fujikane & Jonathan Y. Okamura eds., 2008). For important responses to this debate see Andrea Smith, *Indigeneity, Settler Colonialism, White Supremacy, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 66 (Daniel Martinez HoSang et al. eds., 2012), and Dean Itsuji Saranillio, *Why Asian Settler Colonialism Matters: A Thought Piece on Critiques, Debates, and Indigenous Difference*, 3 SETTLER COLONIAL STUD. 280 (2013). Smith suggests that those engaged in this debate should understand Native identity as spatially rather than as temporally based, so that claims to land are based not solely on prior occupancy (a temporal framework) but based also on “radical relationality to land.” Smith, *supra*, at 82–83. Saranillio responds to critiques of the conceptual use of settler colonialism in the context of Asian settler colonialism in Hawai‘i through the frame provided by Scott Lauria Morgensen’s query: “Who, under what conditions, inherits the power to represent or enact settler colonialism?” See Saranillio, *supra*, at 283 (quoting SCOTT LAURIA MORGENSEN, SPACES BETWEEN US: QUEER SETTLER COLONIALISM AND INDIGENOUS DECOLONIZATION 20 (2011)).

11. J. Kēhaulani Kauanui, Reflections prepared for the Fifth Annual Critical Race Studies Symposium: Race and Sovereignty, UCLA Law School, April, 2011 (unpublished manuscript) (on file with author).

12. J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 12–16, 31–32 (2008). Put slightly differently, “America is a constitutional democracy built through the legalized coercion of colonialism.” Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 434 (2005).

13. *Rice v. Cayetano*, 528 U.S. 495, 515 (2000).

Indigeneity was thereby framed as a civil rights question rather than as a matter of Native sovereignty.<sup>14</sup>

There are at least two additional ways in which one could articulate why a demand for civil rights and inclusion within a national project is inadequate for indigenous people. First, the framework of civil rights and the desire for inclusion into full membership cannot address how “democracy’s intolerance of difference has operated through inclusion as much as through exclusion.”<sup>15</sup> While inclusion can be a valued good, it can also mean assimilation, absorption, and loss. In the context of indigenous peoples in North America, governmental policies were adopted to putatively absorb indigenous subjects as indistinct from others into the national body. In order to elevate individual indigenous persons from federal wards to citizens, both the United States and Canada engaged in the regulation of marriage, kinship, and sexuality; in the forced removal of children from families to government-funded boarding schools; and in land severalty.<sup>16</sup> Land severalty mandated the breaking up of tribes as both political entities and as the holders of land in common, turning indigenous peoples into individual holders of private property, thus eviscerating the tribal land base, and opening the way for nonindigenous persons to buy land rights within the historical boundaries of tribal territory.<sup>17</sup> As Audra Simpson writes, “This process of equality cum absorption required a vanquishing of an alternative or existing political order, . . . which raises questions about how and why citizenship then might be a utilitarian good, when it requires or initiates a disappearance of prior governance.”<sup>18</sup>

Second, the critique of exclusion fails to note how the nation-state in which an immigrant seeks membership relies tacitly on the dispossession of already existing populations. This then is the willing amnesia of settler colonialism. My focus in this Article is the nonrecognition of settler colonialism underpinning immigration law scholarship. This scholarship’s focus is the migrant, whose position already assumes the resolution of a fundamental conflict between indigeneity and settler colonialism.<sup>19</sup>

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14. See Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815, 1831–33 (2000) (responding to Sharon K. Hom and Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000)).

15. Patrick Wolfe, Reflections prepared for the Fifth Annual Critical Race Studies Symposium: Race and Sovereignty, UCLA School of Law, April 2011 (unpublished manuscript) (on file with author). See generally PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT* (1999).

16. Beth H. Piatote, *Domestic Trials: Indian Rights and National Belonging in Works by E. Pauline Johnson and John M. Oskison*, 63 AM. Q. 95, 97–98 (2011).

17. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 628 (2009).

18. Audra Simpson, *Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia*, 25 WICAZO SA REV. no. 2, Fall 2010, at 107, 116. The problem with this inclusion is not only a historical one; as Jodi Byrd points out, contemporary multicultural liberal democracy “rationalize[s] the originary historical traumas that birthed settler colonialism through inclusion.” JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM*, at xii (2011).

19. I am indebted to Sora Han for this wording.

As scholars have noted, the doctrine of plenary power developed and was expressed simultaneously in cases involving Indians, aliens, and territories, all concerning individuals who were noncitizens and were “racially, culturally, and religiously distinct” from the majority.<sup>20</sup> My interest here is not to chart how these groups were treated similarly under U.S. constitutional doctrine, but to tease out how one of these groups—“Indians”—was understood within the laws created to govern another—“aliens.”<sup>21</sup> Thus, my project is not to examine parallel discourses but rather to discern how a legal field developed to govern one group of individuals understood—and understands—another.<sup>22</sup>

### I. SPACE, TIME, MEMBERSHIP

The absence of indigenous people in immigration law is apparent in the fact that the key concepts in the field—citizen, alien, borders, migration, and birthright citizenship—cannot address the actual relationship between the nation-state and indigenous peoples. Indians have been considered citizen and alien, as well as neither citizen nor alien; they have been described as simultaneously foreign and

20. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 82 TEX. L. REV. 1, 11 (2002); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 182–96* (2002).

21. Another important, but different, project is the examination of indigenous migrants. See, e.g., Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1 (2010). An estimated thirty percent of farmworkers in California are indigenous migrants from Mexico and Guatemala. See Marisol León, Note, *Silenced by Bureaucratic Adjudication: Mesoamerican Indigenous Language Speakers and Their Right to Due Process of Law*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 339, 340 (2014).

22. I see this Article as also responding to the way in which different communities are defined through parallel and divergent experiences in the United States (namely, African Americans experienced slavery, Mexicans experienced conquest, Native Americans experienced genocide, and Asians experienced immigration exclusion). This story of parallel and divergent experiences assumes that each group was shaped only by one particular relationship to the U.S. nation-state.

This assumption segments these communities in isolation from one another, without attending to comparative racialization that asks us to think about how, for example, Justice Harlan in his dissent in *Plessy v. Ferguson* simultaneously racialized blacks as socially inferior to whites and as belonging more to the nation than Chinese through his statement:

There is 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. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race [cannot] . . . .

*Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). In other words, Chinese are not just racialized as foreign and (relatively) socially elevated in a binary relationship with whites, but in a triangulated relationship with both whites and blacks. Claire Jean Kim calls this comparative racialization “racial triangulation.” See generally Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105 (1999).

Furthermore, this segmentation centers only on one group in each of these historical experiences, and excludes other groups. Excluding these other groups shapes presumptions about what these experiences were. To give just one example, making the experience of African Americans central within the study of migration would shift and question some fundamental presumptions about immigration as voluntary and unidirectional, when one considers the fact of slavery or the Back to Africa movement.

domestic; and they have been categorized in terms unfamiliar to immigration law: as quasi-sovereign nations, as domestic dependent nations, and as “wards ‘in a state of pupillage’” of the federal government.<sup>23</sup>

This nonrecognition reflects how immigration scholarship thinks about space. The field unreflectively reflects the tradition of Westphalian territorial sovereignty, whereby a single sovereign controls absolutely a defined territory and its associated population. Under this system, the legal jurisdiction of the sovereign is entirely congruent with its territorial borders in a way that would correlate with how maps are drawn, maps that are usually imagined to resemble a Mondrian painting, with dark borders absolutely separating brightly colored nation states.<sup>24</sup> Such a map envisions no “fuzzy spaces,” transitional zones or bleeding boundaries, and suggests a world of nations “territorialized in the segmentary fashion of the multicolored school atlas.”<sup>25</sup> This model of territorial sovereignty accords with what Kal Raustiala calls “legal spatiality”: the “supposition that law and legal remedies are connected to, or limited by, territorial location.”<sup>26</sup>

In legal scholarship generally, we find concern about fragmenting nation-states in an age of global migration and security risks, or about “extraterritorial” reaches of sovereign power; see, for example, the location of prisoners on Guantánamo, sited deliberately “offshore” in an unsuccessful attempt by the Bush administration to escape the purview of constitutional restraint.<sup>27</sup> This fragmentation raises what some consider the novel problem of the attenuation between territorial space and governance.<sup>28</sup> Raustiala notes that, despite this supposition, there have always been specific exceptions to this system in the form of territorial spaces where the territorial sovereign’s power did not reach, with sanctuaries and ambassadors’ residences, as well as exceptions in the form of sovereigns that controlled territory outside its own, with colonial governance and extraterritorial jurisdiction.<sup>29</sup> And Teemu Ruskola argues that we need to move beyond understanding these practices as “exception[s]”—in particular, through a focus upon extraterritorial jurisdiction, whereby nation states exercised jurisdiction “outside” of their autochthonous

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23. See BYRD, *supra* note 18, at xxii (describing Indian tribes as neither foreign nations external to the United States nor “the several states” internal to and subject to U.S. federalism).

24. Rainer Bauböck, *Citizenship and National Identities in the European Union*, in INTEGRATION DURCH DEMOKRATIE: NEUE IMPULSE FÜR DIE EUROPÄISCHE UNION [INTEGRATION THROUGH DEMOCRACY: A NEW IMPETUS FOR THE EUROPEAN UNION] 297, 297–98 (Eugen Antalovsky et al. eds., 1997) (Ger.).

25. Liisa Malkki, *National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees*, 7 CULTURAL ANTHROPOLOGY 24, 26 (1992).

26. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2503 (2005); see also KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 23–25 (2009).

27. See Leti Volpp, Commentary, *Imaginations of Space in Immigration Law*, 9 LAW, CULTURE & HUMAN. 456, 458–61 (2013).

28. *Id.* at 460–61.

29. Raustiala, *supra* note 26, at 2510–11.

sovereignty.<sup>30</sup> Extraterritorial jurisdiction allowed Westerners to be treated as if they remained in the sovereign territory of their home states, safe from having their civil or criminal cases adjudicated by the courts of a less-civilized state. By the magic of a legal fiction, each Western individual became a floating island of sovereignty. This practice was not exceptional; extraterritorial jurisdiction was the rule for much of the world outside Europe prior to the post-World War II decolonization movements.<sup>31</sup>

Nonetheless, the nation-state's governance outside its territory is imagined away via the presumption that the legal jurisdiction of the sovereign is entirely congruent with its territorial borders. That presumption also shapes how the nation-state's governance inside its territory is conceived. As Mark Rifkin observes, U.S.-Indian relations are repeatedly portrayed as peculiar, or anomalous.<sup>32</sup> Non-national entities with claims to land ostensibly "inside the nation" produce a tension, one that is "sutured over" by proclaiming a sovereignty which codes Native peoples and lands as an exception.<sup>33</sup>

But ambiguous spaces, neither entirely foreign nor domestic, have characterized the building of the American nation-state, both in its relation to empire<sup>34</sup> and in negotiating the relationship between settler colonialism and indigenous people. The spatial model of territorial sovereignty—which suggests a single sovereign that governs its associated population, negotiates with "foreign nations" that form its outside, relies upon the doctrine of federalism to parse out how power is divided with its internal "several states,"<sup>35</sup> and either "includes" or "excludes" outsiders—does not capture a model of layered sovereignty that would more accurately describe the relationship between indigenous sovereignty and the sovereignty of settler society. We could think of this as "spatial governmentality," in the words of Richard Perry, emerging from the inherited "layered mappings of spatial difference";<sup>36</sup> or as a "third space of sovereignty," in the words of Kevin

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30. Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217, 234 (2008).

31. *Id.*

32. Mark Rifkin, *Indigenizing Agamben: Rethinking Sovereignty in Light of the "Peculiar" Status of Native Peoples*, 73 CULTURAL CRITIQUE 89 (2009).

33. *Id.* at 96.

34. Amy Kaplan, *Where is Guantánamo?*, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 239, 240–41 (Mary Dudziak & Leti Volpp eds., 2006).

35. See BYRD, *supra* note 18, at xxii (discussing the Commerce Clause and Justice Marshall's opinion in *Cherokee Nation v. Georgia*). See Byrd's discussion of the prepositional slip between "with" and "among"—"with foreign nations," "with Indian tribes," and "among the several states"—which she asserts both reduces Indian tribes to a status below a sovereign recognized in international law, and aligns conquest over Indian tribes with the possibility of asserting extraterritorial sovereignty over foreign nations as the needs arises. *Id.*

36. Richard Warren Perry, *Native American Tribal Gaming as Crime Against Nature: Environment, Sovereignty, Globalization*, 29 POL. & LEGAL ANTHROPOLOGY REV. 110, 110 (2006).



Bruyneel, residing neither inside nor outside the American political system, but on those very boundaries.<sup>37</sup>

The erasure of indigeneity also reflects how immigration scholarship conceptualizes time. Immigration scholarship generally presumes not only that borders are spatially fixed, but also that they are fixed over time; states seem to have always existed within their current territorial borders. The focus of inquiry is the lawfulness of the already-existing state's deployment of sovereignty to keep out or kick out noncitizens. Largely forgotten are how states came to be, with the notable exception of Rainer Bauböck's work, which focuses on the impact of shifting borders in Europe, and the phenomena of annexation, unification, partition, separation, or secession.<sup>38</sup> Immigration law assumes that people cross borders. But it is also the case that borders cross people—and peoples.<sup>39</sup> As Carole Pateman suggests, this tendency to presume borders are fixed over time is common to political theory: “discussions of the legitimacy of the modern state ([which is] always taken for granted) have said nothing about the land on which the state is created.”<sup>40</sup> In immigration law, states are fixed, and people are in motion.

The implicit temporality of immigration law is the present and the future. Immigration law presumes narratives of modernity; both in the positive valence of the mobility of the cosmopolitan and the diasporic and in the apocalyptic valence of the debased third-world migrant, the third-country national, the illegal alien, the irregular migrant, the anchor baby, and the terrorist sleeper cell, whose presence in the nation-state promises future trouble. In contrast, the time of indigenous persons is the time of the past. Immigration law's erasure of how the state came into being places indigenous persons within anachronistic space<sup>41</sup> and as temporally too far

37. KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS*, at xvii (2007).

38. Rainer Bauböck, *Boundaries and Birthright: Bosniak's and Shachar's Critique of Liberal Citizenship*, ISSUES IN LEGAL SCHOLARSHIP, Sept. 2011, at 1, 2.

39. These are distinct propositions. The term “peoples” is “fundamentally collective” and is “neutralized” when replaced by a term “based on individual subjects” such as “populations” or “people.” ANDREW GRAY, *INDIGENOUS RIGHTS AND DEVELOPMENT: SELF-DETERMINATION IN AN AMAZONIAN COMMUNITY* 129 (1997). Since “peoples” are thought to have the right to self-determination, there has been significant energy devoted in various arenas to the question whether to use the term “indigenous people” or “indigenous peoples,” in what has been termed the “-s debate.” See Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141 (2011). See generally GRAY, *supra*.

Thus, the idea that “borders cross people” functions as a corrective to the presumption that borders are static, while people are in motion. The idea that “borders cross peoples” reminds us that when borders are created, they can partition already existing political collectives with their own sovereignty. See generally JOSUE DAVID CISNEROS, *THE BORDER CROSSED US: RHETORICS OF BORDERS, CITIZENSHIP, AND LATINA/O IDENTITY* (2013) (on borders crossing people).

40. Carole Pateman, *The Settler Contract*, in *CONTRACT & DOMINATION* 35, 36 (Carol Pateman & Charles W. Mills eds., 2007).

41. ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEST* 40–42 (1995). See generally JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (2d ed. 2002) (1983).

behind to be active agents within the space of modern life, as stuck in time.<sup>42</sup> Symptomatic of the still pervasive myth of Indians as the “vanishing race” is the fact that many school children think that Indians are “extinct.”<sup>43</sup> Indigenous people are also considered stuck in place and stuck to place—except when their insufficient attachment to place renders them “nomads,” who move too much and who fail to cultivate agricultural property, a relationship to land that was used to justify settler colonialism.<sup>44</sup> Thus, the movement of indigenous people across space is either too much or not enough; either reading places them temporally at a prehistorical stage of human development.

Their contemporary expressions of sovereignty in the form of tribal casino gaming are seen thus as atavistic<sup>45</sup> and “out of time.”<sup>46</sup> That indigenous people are imagined away from the contemporary moment reflects that, in the words of Elizabeth Povinelli, the settler state “projected the previous inhabitants as spatially, socially and temporally *before* it as the ultimate horizon of its own legitimacy.”<sup>47</sup>

The nonrecognition of indigeneity also reflects how the field thinks about membership in the national community. Immigration law presumes the relevant legal entity who bears legal subjectivity and rights to be an individual, not a collective subject (as an Indian tribe or nation).<sup>48</sup> Immigration law presumes an all-powerful national sovereign regime regulating the movement of individual aliens, some of whom are excluded, some of whom are allowed in on a temporary basis, and some of whom may someday be recognized as part of a collective “We, the People.” We thus have immigration law regulating “the people who are not the People,” who are simultaneously “excluded from meaningful participation while remaining the objects of state control.”<sup>49</sup> Yet, as Mark Rifkin points out, reflecting on the relation

42. See generally John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37 (1997) (analyzing Canadian decisions that freeze indigenous peoples and Aboriginal rights in the past).

43. On the myth of the vanishing race, see BRIAN W. DIPPPIE, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* (1991); on what schoolchildren believe, see Naomi Caldwell-Wood & Lisa A. Mitten, “*T* Is Not for Indian: The Portrayal of Native Americans in Books for Young People” (June 29, 1991), available at <http://www.nativeculturelinks.com/ailabib.htm>; Carol Otis Hurst, *Native Americans*, CAROL HURST’S CHILDREN’S LITERATURE SITE, <http://www.carolhurst.com/subjects/nativeamericans.html> (last visited Nov. 11, 2014).

44. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. McIntosh*, 19 LAW & HIST. REV. 67, 72 (2001) (describing how early settlers, in justifying taking land from indigenous people, analogized Indians to “wild beasts in the forest” who “range and wander up and down the country without any law or government” and who did not appropriately cultivate the land).

45. Perry, *supra* note 36, at 112.

46. BRUYNEEL, *supra* note 37, at 2, 201–05.

47. Elizabeth A. Povinelli, *The Governance of the Prior*, 13 INTERVENTIONS: INT’L J. POSTCOLONIAL STUD. 13, 19 (2011); see Renisa Mawani, *Law As Temporality: Colonial Politics and Indian Settlers*, 4 UC IRVINE L. REV. 65, 77 (2014) (describing how the future was often envisioned in settler colonies through relegating indigenous peoples to the past and to history); see also *Specters of Indigeneity in British-Indian Migration, 1914*, 46 LAW & SOC’Y REV. 369, 373 (2012) (seeking to unsettle the presumed linearity of colonial time in historiographies that depict encounters in successive spatiotemporal terms).

48. I am indebted to Beth Piatote for this point.

49. Rifkin, *supra* note 32, at 93. In this quoted text, Rifkin is reading Agamben in describing the

of indigenous persons to the settler-state raises a third category beyond the People and the people: peoples, whose claims to “older/other political formations” are displaced by the circular logic of the overriding sovereignty of the United States.<sup>50</sup>

To understand how immigration law conceives membership, we could look to writing in political philosophy and, in particular, the work of Michael Walzer, author of the most influential theoretical defense of immigration sovereignty in his book, *Spheres of Justice*.<sup>51</sup> His core thesis is that nation-states, like families and clubs, are normatively justified in seeking closure against outsiders to their community in order to promote their mutual affinity.<sup>52</sup>

Given that Walzer claims to be developing a theory of the right of nation-states to control immigration, what does he say about indigenous inhabitants? Walzer’s writing includes, in fact, a little noticed passage that speaks to persons who are already in a territory when a state seeks to assert its sovereignty. Interestingly, Walzer casts this only as a problem created in the present day. He writes:

Though the recognition of national affinity is a reason for permitting immigration, nonrecognition is not a reason for expulsion. This is a major issue in the modern world, for many newly independent states find themselves in control of territory into which alien groups have been admitted under the auspices of the old imperial regime. Sometimes these people are forced to leave, the victims of a popular hostility that the new government cannot restrain. More often the government itself fosters such hostility, and takes positive action to drive out the “alien elements,” invoking when it does so some version of the club or the family analogy. Here, however, neither analogy applies: for though no “alien” has a right to be a member of a club or a family, it is possible, I think, to describe a kind of territorial or locational right.

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People who will be recognized as citizens while the rest of the resident population is consigned to bare life. *Id.* I am thus putting Rifkin’s take on Agamben in a different context by suggesting its applicability to the control of immigration law.

50. *Id.* at 94.

51. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

52. *Id.* at 35–41. In his chapter on membership, Walzer also makes the less noticed argument to which Linda Bosniak has drawn attention—that once inside, any strangers should be recognized as members as quickly as possible to avoid the democratic crisis posed by guest workers, the present day version of the Athenian metic. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 41–42 (2006). As she points out, there is a deep contradiction between these two arguments, a contradiction generally unacknowledged and managed through what she calls a splitting strategy, with the simultaneous allowing for the hard outside of border regulation, and on the other hand insisting on the soft inside, given that the hard border follows the alien inside in the form of the threat of deportation. In other words, the rights the alien might enjoy on the soft inside as a matter on paper, as a “person” protected by the due process and equal protection clause, or under various statutes guaranteeing, for example, the right to minimum wage and overtime regardless of immigration status, may not exist as a matter of reality if the alien fears deportation. *Id.* at 46–47.

[Thus, while an “alien” cannot claim membership in a club or family, the “alien” does have some “kind of territorial or locational right.” But how far does Walzer believe this right to extend?]

... The right is not, indeed, to a particular place, but it is enforceable against the state, which exists to protect it; the state’s claim to territorial jurisdiction derives ultimately from this individual right to place. Hence the right has a collective as well as an individual form, and these two can come into conflict. But it can’t be said that the first always or necessarily supercedes the second, for the first came into existence for the sake of the second. The state owes something to its inhabitants simply, without reference to their collective or national identity. And the first place to which the inhabitants are entitled is surely the place where they and their families have lived and made a life. The attachments and expectations they have formed argue against a forced transfer to another country. If they can’t have this particular piece of land (or house or apartment), then some other must be found for them within the same general “place.”<sup>53</sup>

Let me make two observations, both of which I think are important: the first is that while Walzer does think that there is something wrong about deporting original inhabitants to another country altogether, he promotes an idea that “some other [piece of land] must be found for them within the same general ‘place.’”<sup>54</sup>

This sounds strikingly like nothing so much as the nineteenth and twentieth-century regimes of removal and reservation. And it is not evident why a removal from one particular piece of land does not wreak the same kind of violation of justice that a transfer to another country might when these first inhabitants might not have any particular attachment to the nation-state boundary that has been created by this new state. Second, Walzer casts the original inhabitants in this narrative as “aliens,” sometimes but not always in scare quotes.

Let us note that Walzer’s description of an old imperial regime admitting alien groups and newly independent states might well describe former British colonies in sub-Saharan Africa<sup>55</sup> or elsewhere; he does not specify which cases he is considering. In other passages of *Spheres of Justice*, where he describes a state’s right to engage in “closure” for purposes of mutual affinity,<sup>56</sup> some scholars have suggested he is referencing Israel.<sup>57</sup> Regardless, as this is the only portion of the text in *Spheres of Justice* attending to the question of persons already there when a new state is formed, we can read this as Walzer’s prescription for how a new state ought to address indigeneity.<sup>58</sup> This is why there is something curious about the term

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53. WALZER, *supra* note 51, at 42–43.

54. *Id.*

55. I am indebted to Aziz Rana and Christopher Tomlins for this suggestion. Thus, Walzer may have been thinking about Idi Amin’s 1972 expulsion of Asians from Uganda.

56. WALZER, *supra* note 51, at 61–63.

57. See NORMAN FINKELSTEIN, *IMAGE AND REALITY OF THE ISRAELI-PALESTINIAN CONFLICT* 2–3 (2003).

58. The one other mention Walzer makes of indigenous populations in the context of migration

“alien” to describe those already there, as the common sense of “alien” suggests a person arriving anew at the borders of an already formed nation-state, not a person already dwelling on that land.

But here then we must note that, in fact, settler states have transformed indigenous persons into aliens. The root sense of the word alien means someone other, foreign, or strange, and also unfamiliar, disturbing, and perhaps distasteful. Indigenous people have been from the onset of colonization considered alien, as foreign, and also as disturbing and strange.<sup>59</sup> In addition, and more surprisingly, indigenous people were also understood as aliens within the meaning of immigration law. Even though the “nation of immigrants” and the core of the field of immigration law elide the question of indigeneity, immigration law and citizenship law have, in fact, struggled with the particular relationship of these doctrines to indigenous persons.

## II. INDIANS AS ALIENS AND CITIZENS

The first U.S. immigration legislation that referred to Indians, albeit by stipulating their exclusion from a definition, was the Immigration Act of 1917.<sup>60</sup> This Act defined the term alien as follows: “any person not a native-born or naturalized citizen of the United States; but this definition shall not be held to include Indians of the United States not taxed or citizens of the islands under the jurisdiction of the United States.”<sup>61</sup>

With this definition, “Indians of the United States” who were “not taxed” were clarified to be simultaneously neither aliens nor citizens of the United States. This phrase, Indians not taxed, comes from Article I, Section 2 of the Constitution, which requires a census to be taken every ten years so that seats in the House of Representatives can be apportioned among the states.<sup>62</sup> Section 2, in addition to including the infamous three-fifths of persons other than “free persons,” excluded Indians not taxed, namely those Indians living on reservations or those who were

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in SPHERES comes in the section of the Membership chapter on “White Australia.” Here, in examining the morality of the country’s “White Australia policy,” which barred non-Europeans from migrating to Australia for the first half of the twentieth century, Walzer writes,

The right of white Australians to the great empty spaces of the subcontinent rested on nothing more than the claim they had staked, and enforced against the aboriginal population, before anyone else. That does not seem a right that one would readily defend in the face of necessitous men and women, clamoring for entry.

WALZER, *supra* note 51, at 46. Walzer is here, thus, not measuring the claim of the indigenous versus the white settler, but the claim of the white settler against the Asian migrant. Whatever claim the indigenous might have is not addressed.

59. For a discussion of Justice Taney’s depiction of Indians as foreign within the Dred Scott decision, see CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 528 (2010).

60. Marian L. Smith, *The INS and the Singular Status of North American Indians*, 21 AM. INDIAN CULTURE & RES. J., no. 1, 1997, at 131, 132.

61. Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874 (codified as amended at 8 U.S.C. § 156 (2012)) (repealed June 27, 1952) (emphasis added).

62. U.S. CONST. art. I, § 2.

roaming individually in unsettled areas of the country.<sup>63</sup> Those to be taxed and enumerated were those who had renounced tribal rule and who under state or territorial laws, at least in theory, exercised the rights of citizens.<sup>64</sup>

As Kevin Bruyneel notes, people who have been excluded from American politics usually view the codification of their citizenship status as an unambiguously positive political development.<sup>65</sup> This has not been the case for many indigenous peoples, who refused the submersion of their political identities into the U.S. nation-state. The history of what happened reflects the ambiguous position of indigenous peoples to the U.S. state, as simultaneously both inside and outside.

For many years, treaties or special acts of Congress were the only avenue available for indigenous people to gain U.S. citizen status. As the United States concluded treaties with Indian tribes, it often used such treaties to promote assimilation in the form of the relinquishment of tribal allegiance and the imposition of an individual property rights regime. Collective membership, identity, and rights were thus ceded in exchange for legal recognition by the state as a citizen.<sup>66</sup> Acts of Congress included the Dawes Severalty Act of 1887, which promised citizenship to individual Indian property owners who severed all tribal relations, as well as a 1919 Act providing U.S. citizenship as a benefit of military service to those Indians who had served in the U.S. Armed Forces during World War I.<sup>67</sup>

While the Supreme Court in the 1857 *Dred Scott* decision restricted the definition of citizen in the United States to white persons (blacks being of an “inferior order”),<sup>68</sup> after the Civil War the definition was expanded. The Civil Rights Act of 1866 created a general rule of birthright citizenship, stating that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>69</sup> The framers of the Fourteenth Amendment then added similar language to the Constitution to

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63. Kristy Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. IND. L. REV. 243, 260 (2008).

64. The existence of the provision “Indians not taxed” has led to a persistent belief that Indians are immune from any form of federal taxation. M. Christian Clark, *Analytical Research Guide to Federal Indian Tax Law*, 105 LAW LIBR. J. 505, 507 (2013) (“Contrary to popular belief, individual Indians are ‘subject to federal income tax just like every other American.’” (citation omitted)).

65. BRUYNEEL, *supra* note 37, at 97.

66. As Bethany Berger writes, “Although some native people sincerely did seek citizenship, in U.S. history calls to provide citizenship to American Indians were repeatedly linked to efforts to deny them self-determination.” Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217, 217 (Shareen Hertel & Kathryn Libal eds., 2011).

67. Dawes Severalty (General Allotment) Act of 1887, ch. 119, 24 Stat 388, 390 (repealed 2000); Act of November 6, 1919, ch. 95, 41 Stat. 350 (granting citizenship to certain honorably discharged Indians who served during the World War); Smith, *supra* note 60, at 133, 151 n.7 (describing treaties).

68. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

69. Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)); see Bethany Berger, *Citizenship in Red and Yellow: Elk v. Wilkins and United States v. Wong Kim Ark* 9 (unpublished manuscript) (on file with author) (explaining that Indians not taxed were excluded based on the belief that tribal Indians were not “subject to the jurisdiction” of the United States).

ensure that the Civil Rights Act would have its intended power. In the Fourteenth Amendment, the guarantee of citizenship is stated as follows: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>70</sup>

Note the phrase “subject to the jurisdiction thereof.” This is the same phrase that is being used today to attack birthright citizenship for children of undocumented immigrants<sup>71</sup>—as well as to undermine the principle of birthright citizenship for children of temporary visitors.<sup>72</sup> The rhetoric against the rollback of birthright citizenship for the children of undocumented immigrants typically analogizes these children to the children born of Chinese migrants, whose birthright citizenship was recognized in the 1898 Supreme Court decision *Wong Kim Ark*.<sup>73</sup> In this fashion, the children of undocumented immigrants are folded into a civil rights narrative of increasing expansion of inclusion and membership.

But, in contrast, what if a person had been born a member of one of the Indian tribes still recognized as having its own sovereignty?<sup>74</sup> In *Wong Kim Ark*, the Court described such Indians as “standing in a peculiar relation to the national government.”<sup>75</sup> The majority scholarly consensus is that “subject to the jurisdiction thereof” was intended to refer to those who are subject to the enforcement of U.S. laws.<sup>76</sup> This would mean that the clause applied to everyone territorially present in the United States with a few exceptions, namely foreign diplomats who receive diplomatic immunity, children of invading armies, and Indians born to tribes with

70. U.S. CONST. amend. XIV.

71. See Mae Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2523 (2007).

72. The attempt to restrict birthright citizenship for children of temporary visitors (known technically in immigration law as nonimmigrants) is motivated by concern about U.S. citizens whose presence is “accidental” and whose U.S. citizenship may later pose issues for the U.S. government. See JOHN C. EASTMAN, *FROM FEUDALISM TO CONSENT: RETHINKING BIRTHRIGHT CITIZENSHIP* (2006); Katrina Trinko, *The New Immigration Debate*, *NAT’L REV. ONLINE* (January 27, 2011), <http://www.nationalreview.com/articles/257647/new-immigration-debate-katrina-trinko>. Examples of U.S. citizens born to nonimmigrant parents who cause concern include Yaser Hamdi, whose father was working in Louisiana for an oil company when Hamdi was born, and Anwar Al Awlaki, whose father, Nasser al-Awlaki, the founder of Ibb University and former president of Sana University, studied in the United States as a Fulbright Scholar and worked as a researcher and assistant professor in Minnesota, Nebraska, and New Mexico, where Al Awlaki was born. See Jere Van Dyk, *Who Were the 4 U.S. Citizens Killed in Drone Strikes?*, *CBSNEWS* (May 23, 2013), <http://www.cbsnews.com/news/who-were-the-4-us-citizens-killed-in-drone-strikes/>; Howard Sutherland, *Citizen Hamdi*, *AM. CONSERVATIVE* (Sept. 27, 2004), <http://www.theamericanconservative.com/articles/citizen-hamdi>.

73. *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898); see, e.g., James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 *GREEN BAG* 367 (2006).

74. For a discussion of the debates preceding the adoption of the Fourteenth Amendment, see D. Carolina Núñez, *Beyond Blood and Borders: Finding Meaning in Birthright Citizenship*, 78 *BROOK. L. REV.* 835 (2013).

75. *Wong Kim Ark*, 169 U.S. at 682.

76. See Gerald L. Neuman, *Back to Dred Scott?*, 24 *SAN DIEGO L. REV.* 485, 494–95 (1987) (book review); Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 *U. PENN. J. CONST. L.* 1363 (2009).

their own sovereignty.<sup>77</sup> And in the 1885 Supreme Court decision *Elk v. Wilkins*, the Court had held that an Indian who had voluntarily separated from his tribe and taken residence among the white citizens in a state, but had not been naturalized or subject to taxation, was not a citizen of the United States under the Fourteenth Amendment.<sup>78</sup> John Elk had sought to vote in the Omaha general election and was refused.<sup>79</sup> According to Bethany Berger, Elk was Winnebago. She suggests that Elk's plea for U.S. citizenship was likely an attempt to escape the whims of federal control, given the likelihood that he had experienced a lifetime of forced removals.<sup>80</sup> The Court held that Elk was not deprived of his right to vote, since he was not a U.S. citizen.<sup>81</sup> To be a citizen of the United States, noted the Court, is a political privilege that no one, not born to this privilege, can assume without the government's consent in some form.<sup>82</sup> Thus, Indians such as Elk were neither aliens nor citizens.

This only shifted in 1924 when Congress unilaterally conferred U.S. citizenship on indigenous people born in the United States via statute.<sup>83</sup> Thus, today, the Immigration and Nationality Act clarifies that nationals and citizens of the United States at birth includes

[1] a person born in the United States, and subject to the jurisdiction thereof; [or 2] a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

Recall that John Elk was also not a citizen of the United States because he had not naturalized. For Indians born within the United States, naturalization became possible two years after *Elk v. Wilkins* under the Dawes Act, also known as the General Allotment Act, which created a system for the destruction of communal reservation lands and the individualized assimilation of Native Americans.<sup>84</sup> In the words of Teddy Roosevelt, this law was “a mighty pulverizing engine to break up

77. Neuman, *supra* note 76.

78. *Elk v. Wilkins*, 112 U.S. 94, 109 (1885).

79. *Id.* at 94–96.

80. Berger, *supra* note 69, at 282–83.

81. *Elk*, 112 U.S. at 109.

82. *Id.* at 109 (quoting *United States v. Osborne*, 2 F. 58, 61 (D. Or. 1880)).

83. Act of June 2, 1924, ch. 233, 43 Stat. 253 (granting citizenship to noncitizen Indians). An addendum was added in 1940 to clarify that the recognition of U.S. citizenship was not to impair the person's right to tribal property. Immigration and Nationality (McCarran-Walter) Act, ch. 477, § 301 (a)(1)–(2), 66 Stat. 163, 235 (1952) (codified as amended at 8 U.S.C. § 1401(a)–(b) (2012)). Bethany Berger notes, “a careful history speculates that the Indian Citizenship Act did not reflect specifically Indian concerns, but was a last gasp of the Progressive movement trying to reduce the power of the notoriously inefficient Indian Bureau by removing its authority to grant or deny citizenship.” Berger, *supra* note 69, at 48 (referring to Gary C. Stein, *The Indian Citizenship Act of 1924*, 47 N.M. HIST. REV. 257, 258 (1972)).

84. Dawes Severalty (General Allotment) Act of 1887, ch. 119, 24 Stat. 388, 390 (repealed 2000). Bethany Berger indicates that the Dawes Act was passed in the wake of the decision in *Elk*, spurred by reformers who sought to assimilate Indians into citizenship. Berger, *supra* note 69, at 21, 43.



the tribal mass.”<sup>85</sup> Under the act, parcels between 40 and 160 acres were allotted to individual Indians, and title was held in trust by the federal government for twenty-five years.<sup>86</sup> At the conclusion of the trust period, after the allottee had established “competency” as a private property holder and as a member of American society, the individual Indian would receive title to the land in fee simple and become a U.S. citizen.<sup>87</sup> Competency was correlated with industry, which was correlated with having some modicum of white blood.<sup>88</sup> Full-blood Indians were considered legally incompetent. The allotment process opened the way for nonindigenous persons to buy property within the historical boundaries of tribal territory, amounting to a divestment of two-thirds of the reservation land base.<sup>89</sup>

For Indians born outside the United States, naturalization was not a possibility for many decades still. The U.S. Constitution empowers Congress to come up with a uniform rule of naturalization; Congress chose to enact a racial bar so that from 1790 to 1870 only white persons could naturalize.<sup>90</sup> In 1870, Congress added the provision also allowing aliens of African nativity and persons of African descent to naturalize.<sup>91</sup> Subsequently there were three cases of North American Indians seeking to naturalize; all were barred.

The first case involved Frank Camille, born in British Columbia to a white father and an Indian mother and residing since the age of seventeen in Oregon. The court in 1880 decided that he was not a white person and therefore was ineligible to naturalize.<sup>92</sup> As the court said, meditating upon the meaning of whiteness, the 1870 proffering of citizenship to those from the “dark continent,” and the status of Frank Camille:

Words . . . have . . . a well settled meaning in common . . . speech . . . [I]t appears that the words “white person” do not, and were not intended to, include the red race of America.

. . . .

From the first our naturalization laws only applied to the people who had settled the country—the Europeans or white race—and so they remained until in 1870 . . . when, under the pro-negro feeling, generated and inflamed by the war with the southern states, and its political consequences, congress was driven at once to the other extreme, and opened the door, not only to persons of African descent, but to all those

85. BRUYNEEL, *supra* note 37, at 94.

86. Dawes Severalty (General Allotment) Act § 5.

87. BRUYNEEL, *supra* note 37, at 94–95; *see also* Dawes Severalty (General Allotment) Act § 6.

88. BRUYNEEL, *supra* note 37, at 81.

89. For a discussion, *see id.*; Berger, *supra* note 69, at 44–46; and Piatote, *supra* note 16, at 107.

90. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed Jan. 29, 1975).

91. Naturalization Act of 1870, ch. 255, § 7, 16 Stat. 254, 256; Chinese Exclusion Act, ch. 126, §1, 22 Stat. 58, 58–59 (1882) (repealed Dec. 17, 1943). For a discussion of the litigation that ensued, *see* IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 35–55, 163–67 (10th ed. 2006).

92. *In re Camille*, 6 F. 256, 259 (C.C.D. Or. 1880).

“of African nativity”—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the “dark continent,” while withholding it from the intermediate and much-better-qualified red and yellow races.

However, there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

. . . [W]hat is the status in this respect of the petitioner, who is a person of one-half Indian blood?

. . . .

. . . [T]he petitioner is not entitled to be considered a white man. As a matter of fact, he is as much an Indian as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither.<sup>93</sup>

Ten years later, Samuel Burton, described as an “Indian” and a “native of British Columbia, now and for many years a resident of Alaska,” sought to naturalize.<sup>94</sup> This naturalization was denied by the court, noting that the treaty of cession between the United States and Russia allowed that “the uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country,” and that there appeared no law of the United States whereby Burton might be admitted to citizenship.<sup>95</sup>

Lastly, in the 1938 case *In re Cruz*, a man whose father was Indian and whose mother was half African and half Indian presented the sole published case of a litigant arguing that he should be considered of African descent or nativity, rather than white, for purposes of surmounting the racial bar to naturalization.<sup>96</sup> In an inverse relationship to the law of hypodescent or one drop rule, which the court acknowledged in many contexts recognized persons with only one-eighth negro blood to be a person of color, the court held that “[i]t would therefore seem entirely incongruous to reason that the words ‘African descent’ should be construed to be less exacting in denoting eligibility for naturalization, than the term ‘white persons,’”

93. *Id.* at 257–59 (citations omitted).

94. *In re Burton*, 1 Alaska 111, 111 (1900).

95. *Id.* at 112, 114.

96. *In re Cruz*, 23 F. Supp. 774, 774–75 (E.D.N.Y. 1938). This is the only information about the applicant provided in the opinion: “This application for naturalization embodies an affidavit containing the following: ‘My mother is half African and half Indian and my father is a full blooded Indian. I learned this information from them when I was a small child. I believe that my father’s ancestors were all full blooded Indians.’” *Id.* at 774.

For a list of all published cases involving the racial prerequisite to naturalization, see HANEY LÓPEZ, *supra* note 91, at 163–67.

when white persons had to be more than one-half white to be considered white. Cruz was thus not sufficiently African to claim American citizenship.<sup>97</sup>

At the same time these racial bars were in effect the laws of citizenship were also gendered, reflecting both the idea of forced inclusion and assimilation, as well as the concept of a gendered dependent citizenship, so that a married woman's national citizenship tracked that of her husband's via a logic of coverture.<sup>98</sup> In 1888, Congress passed a statute titled "marriage between white men and Indian women," specifying that even though Indian women were themselves racially ineligible to naturalize,

every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman.<sup>99</sup>

This statute can be seen as reflecting the rationale of husbands standing in for the nation-state, so that married women experienced dependent citizenship—"as a woman, I have no country."<sup>100</sup> The law of dependent citizenship also extended to U.S. citizen women married to foreign-born men between 1907 and 1931.<sup>101</sup> As Beth Piatote describes:

In literature, white men served as symbolic representations of the settler colonial society, and Indian women emblemized a sacrificial love that would resolve the settler-native conflict. But in the laws that regulated Indian political subjectivity, these metaphors gained materiality: white men as patriarchal heads of households became the stable center through which Indian political rights could be defined . . . .

. . . .

. . . [I]n both the United States and Canada, [laws] worked through the intimate bond of marriage to break down indigenous national polity and serve the domestication goals of the settler nations.<sup>102</sup>

Thus, during a period when Indians were considered racially ineligible to naturalize, Indian women married to white men were incorporated into citizenship, turning them into "domestic subjects" in two senses of the term.<sup>103</sup>

97. *In re Cruz*, at 775.

98. See Act of August 9, 1888, ch. 818, §§ 1–2, 25 Stat. 392, 392 (codified as amended at 25 U.S.C. § 182 (2012)).

99. *Id.* For further discussion of this statute, see Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103 (2004); and Piatote, *supra* note 16, at 97–104.

100. We find Virginia Woolf writing in *Three Guineas*, responding in part to dependent citizenship: "[A]s a woman, I have no country. As a woman I want no country. As a woman my country is the whole world." VIRGINIA WOOLF, *THREE GUINEAS* 125 (2d ed. 1986) (1938).

101. See Volpp, *supra* note 9, at 425, 445–46.

102. Piatote, *supra* note 16, at 96.

103. For a discussion, see generally BETH PIATOTE, *DOMESTIC SUBJECTS: GENDER, CITIZENSHIP AND LAW IN NATIVE AMERICAN LITERATURE* (2013).

The 1924 law creating a statutory grant of citizenship settled the immigration status of U.S.-born Indians, but not that of indigenous peoples born outside the United States.<sup>104</sup> That very same year, Congress passed the National Origins Quotas Act, the law that, in Mae Ngai's words, "raised the border," denying entry to any immigrant considered to be an alien ineligible to citizenship.<sup>105</sup> Immigration inspectors began to deny entry to Canadian-born indigenous people who had previously been freely crossing the border between the United States and Canada.<sup>106</sup>

Canadian-born indigenous people crossed freely because they had free passage rights. At the end of Revolutionary War, the United States and Great Britain signed the Treaty of Paris, establishing the boundary line of Canada and the United States, drawing it in the process through the territories of several Indian nations.<sup>107</sup> In 1794, the Jay Treaty guaranteed the right of British subjects, American citizens, and "also to the Indians dwelling on either side of the said boundary line" to freely cross and recross the U.S.-Canadian border by land or inland navigation.<sup>108</sup> While the right of British (Canadian) and American citizens to freely pass ended with the War of 1812, Indians' rights to freely pass the U.S.-Canadian border were not extinguished.<sup>109</sup>

Thus, when immigration inspectors began to deny entry to Canadian-born indigenous people in 1924, letters of protest began to appear, pointing out that this was in violation of the Jay Treaty.<sup>110</sup> The U.S. government first argued that these persons were excludable from the country as racially ineligible immigrants, but suggested that they could enter as nonimmigrants (temporary visitors).<sup>111</sup> (This practice was followed with Chinese immigrants, who were racially excludable since 1882 as Chinese laborers but admissible as of 1888 as exempt categories of nonimmigrants.)<sup>112</sup>

In 1926 the Indian Defense League of America was formed to defend Jay Treaty rights, sponsoring as an exercise of these rights a border crossing at Niagara

104. Immigration Act of 1924, ch. 190, § 28, 41 Stat. 153, 168.

105. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 68 (2004) (using this phrase to describe the effect of the formation of the Border Patrol).

106. Smith, *supra* note 60, at 149.

107. The Definitive Treaty of Peace and Friendship Between His Britannick Majesty, and the United States of America, U.S.-Gr. Brit., Sept. 3, 1783, *reprinted in* 3 A COLLECTION OF ALL THE TREATIES OF PEACE, ALLIANCE, AND COMMERCE, BETWEEN GREAT-BRITAIN AND OTHER POWERS 410, 410–19 (Gregg Int'l Publishers Ltd. 1968) (1785) [hereinafter Treaty of Paris].

108. Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., art. III, Nov. 19, 1794, 8 Stat. 116.

109. The question of how these passage rights are guaranteed is contested. For the view that free passage rights were reaffirmed in the Treaty of Ghent, see Dan Lewerenz, *Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug*, 27 ARIZ. J. INT'L & COMP. L. 193 (2010). For the view that free passage rights now exist only as a matter of statutory law, see Marcia Yablon-Zug, *Gone But Not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEEN'S L.J. 565 (2008).

110. Smith, *supra* note 60, at 149.

111. *Id.* at 136.

112. Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 58–59 (1882) (repealed Dec. 17, 1943).

Falls, which continues annually today.<sup>113</sup> The League defended Paul Diabo, a Canadian-born Mohawk who was engaged in a court challenge of the 1924 Immigration Act as a violation of his Jay Treaty rights as a member of the Rotinohsionni (Iroquois) Confederacy.<sup>114</sup> Diabo had made trips back and forth over the border until 1925, working as a structural ironworker, when he was arrested for an alleged violation of law for entering the United States without inspection.<sup>115</sup> After a hearing, he was ordered deported and responded by filing a writ of habeas corpus. As the district court noted, there was no question of contagion, moral unfitness, or pauperism; he was not excludable on any ground other than the idea that he was considered an alien ineligible to naturalize.<sup>116</sup>

Let me quote the 1927 district court decision at some length, as it indicates the complexity of the status of Indians vis-à-vis the U.S. government:

The Indians have always been recognized by us as a nation and as a race independent of our governmental control in the ordinary sense of that phrase. In this sense they are an alien people, but at the same time we have likewise, from our point of view, felt toward them the relation of wardship. Territorially as a nation they have always been an imperium in imperio, although we have from time to time negotiated treaties with them for the surrender to us of the exclusive occupancy of described parts of what they claimed to be their territory, but which was otherwise always regarded by us as our territory. In like manner, we have from time to time allotted territory to them, and protected them in its occupancy. . . .

The turning point of the [case] is thus to be sought in the answer to the question of whether the Indians are included among the members of the alien nations whose admission to our country is controlled and regulated by the existing immigration laws. The answer, it seems to us, is a negative one. From the Indian viewpoint, he crosses no boundary line. For him this does not exist. . . . This does not mean that the United States could not exclude him, but it does mean that the United States, having recognized his right to go from one part of his country to another unobstructed by a boundary line, which as to him does not exist, will not be taken to have denied this right, unless the clear intention so to do appears. We do not find such denial in any of the cited exclusion acts of Congress.<sup>117</sup>

As the court stated: “From the Indian viewpoint, he crosses no boundary line. For

113. See *Native American Resource Program: Border Crossing Celebration*, NATIVE AM. RESOURCE PROGRAM, [http://www.buffaloschools.org/native\\_american.cfm?subpage=27840](http://www.buffaloschools.org/native_american.cfm?subpage=27840) (last visited Nov. 23, 2014); Advertisement from the Indian Defense League of America (2012), available at [https://sni.org/media/34592/85th\\_annual\\_free\\_boarder\\_crossing.pdf](https://sni.org/media/34592/85th_annual_free_boarder_crossing.pdf).

114. See Gerald F. Reid, *Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo*, 151 PROC. AM. PHIL. SOC’Y 61, 73 (2007); Audra Simpson, *Subjects of Sovereignty: Indigeneity, The Revenue Rule, and Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS., Summer 2008, at 191, 204.

115. Reid, *supra* note 114, at 63.

116. United States *ex rel.* Diabo v. McCandless, 18 F.2d. 282, 283 (E.D. Pa. 1927), *aff’d*, 25 F.2d 71 (3d Cir. 1928).

117. *Id.* at 283.

him this does not exist.”<sup>118</sup> The government appealed the decision, but it was upheld by the Third Circuit in 1928.<sup>119</sup> Aware of this ruling, Congress passed legislation, 8 U.S.C. § 226a, less than one month later, which stated: “The Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.”<sup>120</sup>

But a problem soon arose. Congress had not defined the term “Indian” in the statute. Should “Indian” be defined by Canadian law or U.S. law? In Canada, to be Indian was a political status.<sup>121</sup> Following the gendered logic of dependent citizenship, non-Indian women who married Indian men were considered Indian and children born from such marriages were Indian.<sup>122</sup> Indian women who married non-Indian men lost their Indian status, and children born from such marriages were not Indian.<sup>123</sup> Canada had also created a status called “enfranchisement” via the Act to Encourage the Gradual Civilization of Indian Tribes, which meant that Indians could (voluntarily or involuntarily) be enfranchised as British subjects and Canadians citizens upon the condition that they lost their Indian identity and thus would no longer enjoy Jay Treaty rights.<sup>124</sup> (In fact, Canada did not allow Indians to vote in federal elections without first relinquishing their Indian status until 1960.)<sup>125</sup>

In 1942, the Board of Immigration Appeals, faced with two white women married to Canadian Indians, thus deemed by Canadian law members of an Indian tribe, who were seeking to pass the borders of the United States without documents

118. *Id.*

119. *McCandless v. United States ex rel. Diabo* 25 F.2d. 71, 73 (3d Cir. 1928).

120. Act of April 2, 1928, ch. 308, 45 Stat. 401. Marian Smith notes that Southern Europeans seeking to enter the United States “frequently posed as North American Indians” in order to avoid national origins quotas and take advantage of border crossing rights. Smith, *supra* note 60, at 137. By 1934 at the port of Buffalo, “such cases arose two or three times a month. Despite ‘coaching’ about Canadian Indian tribes and customs, Immigrant Inspectors easily exposed imposters with ‘trick questions’ or by uttering Indian salutations.” *Id.*

121. Smith, *supra* note 60, at 144–47.

122. S., 1 I. & N. Dec. 309, 310 (B.I.A. 1942). The Canadian Indian Act at that point defined “Indian” as:

- (i) Any male person of Indian blood reputed to belong to a particular band.
- (ii) Any child of such person.
- (iii) Any woman who is or was lawfully married to such person (ch. 98, Rev. Stat. of Canada, 1927).

*Id.*

123. Smith, *supra* note 60, at 145.

124. S., 1 I. & N. Dec. at 311. Those who were involuntarily enfranchised included Indians who graduated from a university, became a lawyer, entered holy orders, or became ministers. See Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301, 209 n.57 (citing BRIAN A. CRANE ET AL., FIRST NATIONS GOVERNANCE LAW 133 (2006)).

125. See Mary Eberts, *Still Colonizing After All These Years*, 64 U.N. BRUNSWICK L.J. 123, 149 (2013); Val Napoleon, *Extinction by Number: Colonialism Made Easy*, 16 CAN. J.L. & SOC’Y, 113, 117 (2001).

under section 226a, chose to follow the political status definition and allowed them to freely enter.<sup>126</sup> In 1947, Dorothy Karnuth, an Upper Cayuga woman from the Six Nations Reserve in Ontario, Canada, who had lost her Indian status in Canada by marriage to a white man, was taken into custody by the INS and told she faced deportation from the United States to Canada.<sup>127</sup> The United States claimed that section 226a did not apply to her, as it did not apply to Indians who are not members of a tribe and she was “tribeless.”<sup>128</sup> The district court chose to respond by using a “racial” versus “political” definition of being Indian.<sup>129</sup> Obviously, these are inexact terms, as a “racial” definition is still a political one. The fact that section 226a exempted persons who had been adopted from being allowed to freely pass suggested to the court that the meaning of section 226a should be understood as being about “blood”—as “racial”—rather than “political,” with the court noting “‘American Indians born in Canada’ . . . must be given a racial connotation. . . . One whom nature has not made an American Indian cannot be made one by adoption in some Indian tribe or family.”<sup>130</sup>

This notion that “to be Indian” was “racial” rather than “political” was sedimented in an amendment to section 226a in the 1952 McCarran-Walter Act, creating legislation that still exists as section 289 of the Immigration and Nationality Act.<sup>131</sup> Today, the right to freely pass the border into the United States from Canada is allowed to “American Indians born in Canada” if they possess “at least 50 per

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126. *S.*, 1 I. & N. Dec. at 313. In choosing to follow Canada’s political definition, the Board sought to defer to a comprehensive definition of tribal governance, which it assumed was “acceptable to the Indians as a recognition of their tribal customs and way of life.” *Id.* at 312; *see also* Spruhan, *supra* note 124, at 310–11 nn.67–69 (discussing the internal agency discussion about this case).

127. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 660 (W.D.N.Y. 1947); *see also* MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION AND CITIZENSHIP, 1870–1965*, at 150 (2005); Simpson, *supra* note 114, at 207.

128. *Karnuth*, 74 F. Supp. at 661.

129. *Id.* at 663.

130. *Id.* This approach was subsequently followed by the Board of Immigration Appeals in *B.*, 3 I. & N. Dec. 191 (B.I.A. 1948), in which a woman born on an Indian reserve of the Abenakis of Pierreville, who had married a white man and lost her status as a North American Indian born in Canada, was nonetheless accorded free passage rights even though she would otherwise face exclusion because of a conviction of the crime of adultery. *Id.* at 192. The blood quantum required was specified as “more than one-half Indian blood” in a case involving *M.*, who was born in Canada of a mother who was thought to be a full-blooded Indian and a father who was “a member of the white race” who left when the respondent was an infant. *M.*, 4 I. & N. Dec. 458 (B.I.A. 1951). *M.* and his mother never lived on an Indian reservation, received no treaty money from the Canadian government, and were never members of any tribes of Indians. *Id.* Looking to how the status of an “American Indian of mixed blood” had been determined in other contexts, including naturalization cases, the Board held that the respondent was not to be regarded as a Canadian Indian within the meaning of free passage rights, and was therefore found to be deportable. *Id.*

131. Immigration and Nationality (McCarran-Walter) Act, ch. 477, § 289, 66 Stat. 234, 234 (1952) (codified as amended at 8 U.S.C. § 1359 (2012)). Paul Spruhan notes that legislative history provides no clues as to why Congress defined the free passage right by blood quantum; the INS’s general counsel stated in 1954 that he “had no idea why the blood quantum requirement was added.” Spruhan, *supra* note 124, at 314–15.

centum of blood of the American Indian race.”<sup>132</sup> Canada, as it turns out, does not keep blood quantum records, and while United States Citizenship and Immigration Services (USCIS) accepts blood quantum letters from Indian band officials, this has led to various problems, such as the recent case of a blond man named Peter Roberts being denied entry after being told he had insufficient Indian blood to cross despite his tribal documents indicating his membership in the Campbell River Band of Canadian Indians.<sup>133</sup>

Those with sufficient blood quantum have the right to pass, which is understood to include the right to visit, live, and work in the United States without obtaining a work permit or legal permanent residence. The right is unidirectional; U.S.-born Indians do not have Jay Treaty rights to enter Canada.<sup>134</sup> There is significant confusion about what Jay Treaty rights provide. Greg Boos and Greg McLawsen note, as just one example, that in 2003 U.S. Armed Forces recruiters seeking military personnel for U.S. wars in Iraq and Afghanistan visited Canadian reservations under the impression residents were dual citizens.<sup>135</sup>

Free passage rights initially only meant exemption from exclusion proceedings, which determine whether aliens may be lawfully admitted, and not immunity from deportation proceedings, which determine whether aliens may be expelled. The Board of Immigration Appeals in *Matter of A.* held in 1943 that just because “an Indian is not subject to exclusion, it does not necessarily follow that he is immune from deportation,” in response to the case of a man attached to the Chemainus Band.<sup>136</sup> While the United States sought to deport him on grounds both arising

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132. Immigration and Nationality Act § 289.

133. Spruhan, *supra* note 124, at 301, 317.

134. At the same time, Canada recognizes other grounds upon which Indians can freely pass the border. The Canadian Immigration Act states that “every person registered as an Indian under the Indian Act has the right to enter and remain in Canada in accordance with this act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a . . . registered Indian.” Immigration and Refugee Protection Act, S.C. 2001, c. 27, Div. 3, sec. 19(1) (Can.). Canadian courts also recognize an aboriginal right to freely pass the border, rooted not in the Jay Treaty but in Canada’s Constitution. See GREG BOOS & GREG MCLAWSEN, AMERICAN INDIANS BORN IN CANADA AND THE RIGHT OF FREE ACCESS TO THE UNITED STATES (2013), *updated and expanded as* Greg Boos et al., *Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENVTL. L. 343 (2014) (definitive explanation of Jay Treaty rights).

135. BOOS & MCLAWSEN, *supra* note 134, at 19. Caitlin C.M. Smith conducted significant research attempting to determine what government agencies communicated about Jay Treaty rights, in an investigation of “desk-clerk law”; she found significant misinformation communicated at border crossing points, on federal information lines and in Social Security offices. Caitlin C.M. Smith, *The Jay Treaty Free Passage Right in Theory and Practice*, 1 AM. IND. L.J. 161, 171–72 (2012).

136. A., I. & N. Dec. 600, 603 (B.I.A. 1943). The only basis on which he could not be deported, according to the Board, was a ground arising before entry. *Id.* The distinction here is whether deportation functions as a corrective to exclusion (catching those who were mistakenly admitted), or whether it functions as a response to issues that arise postadmission. For a discussion of the distinction, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 534–35 (6th ed. 2015). See generally DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (differentiating deportation as extended border control versus deportation as post-entry social control).



before his admission (that at the time of entry he was afflicted with a contagious disease and been likely to become a public charge), the Board held that he was deportable only upon a ground that had arisen since his admission (that he had in fact become a public charge). In so ruling, the Board expressed concern about “the burdening of this country with Indians who are deemed unworthy residents of the United States,” and asserted that “[t]he right of the Indian freely to enter this country does not presuppose a right to remain here at his sufferance with license to engage in conduct that would subject the ordinary alien to deportation.”<sup>137</sup> By 1978, the view that free passage only had relevance for exclusion, and not for deportation, had shifted. In 1974, in *Akins v. Saxbe*, a federal district court expressed a rule of lenity to be applied in statutory construction of the Jay Treaty.<sup>138</sup> Thus, when, in *Matter of Yellowquill*, an American Indian woman born in Canada was arrested in Texas for possession of heroin and ordered deported on criminal grounds, the Board consulted with the Immigration and Naturalization Service Central Office as to how to proceed.<sup>139</sup> The Service indicated it considered *Akins* correct and recommended that *Matter of A.* be overruled. The Board thus held that American Indians born in Canada who are within the protection of section 289 of the Immigration and Nationality Act are “not subject to deportation on any ground.”<sup>140</sup>

While there was a shift to “blood” for the guarantee of free passage, the idea that blood or race determines access to naturalization began to erode with the Nationality Act of October 14, 1940, extending the right of naturalization to “descendants of races indigenous to the Western Hemisphere.”<sup>141</sup> This lifting of the ban on naturalization for indigenous persons was followed by additional piecemeal legislation allowing other groups to naturalize, with Chinese being added in 1943,

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137. *A.*, I. & N. Dec. at 603. In defining *A.* as not “a particularly desirable person,” the Board cited his lack of family ties in the United States, no fixed domicile or any occupation, a history of gonorrhea for which he received no treatment, and various arrests for drunkenness in Canada and the United States. *Id.* at 604–05. The Board followed a similar logic as to free passage rights solely affecting immunity from exclusion in another case holding that *D.*, a member of the Eel River Band of Micmac Indians, was not deportable for offenses (grand larceny) that had existed prior to *D.*’s last entry into the United States. *D.*, 3 I. & N. Dec. 300 (B.I.A. 1948).

138. In this case, the court, in considering the principles of statutory construction that (1) “the language of statutes and treaties affecting Indians must be construed in a nontechnical sense, as the Indians themselves would have understood it and in a manner reflecting the conditions prompting its adoption,” and (2) “ambiguities in statutes and treaties conferring benefits on Indians are to be resolved in favor of the Indians,” held that the words “to pass” in section 289 exempt American Indians born in Canada from the alien registration requirements otherwise imposed on aliens by immigration laws. *Akins v. Saxbe*, 380 F. Supp. 1210, 1221 (D. Maine 1974).

139. *Yellowquill*, 16 I. & N. Dec. 576, 578 (B.I.A. 1978).

140. *Id.* In addition to functioning as a defense to deportation, Jay Treaty rights may also provide a defense against a criminal charge of illegal entry or reentry, and may provide for civil damages if someone entitled to Jay Treaty rights is removed. *See* BOOS & MCLAWSEN, *supra* note 134, at 25–27; *see also* MacDonald v. United States, No. 11-cv-1088-IEG, 2011 WL 6783327 (S.D. Cal. Dec. 23, 2011) (claiming civil damages for immigration detention of a member of the Squamish Nation with free passage rights).

141. Nationality Act of 1940, ch. 3, § 303, 54 Stat. 1137, 1140 (codified as amended at 8 U.S.C. § 1421 (2012)).

Filipinos and Indians in 1946, and persons from Guam in 1950. Two years later racial criteria for naturalization were removed altogether. This abandonment of racial restrictions on naturalization was followed by a similar shift away from a racial preference for whites in immigration admission with the passage of the 1965 amendment to the Immigration and Nationality Act.<sup>142</sup>

The blood quantum requirement for free passage thus appears today as an anomalous holdover from an archaic past, as an exception to an otherwise race-neutral regime. But it is perhaps better understood as emblematic of the way in which the political difference of indigenous communities is managed through the differentiation of race. The move to blood quantum, notes Audra Simpson, shifted Indian tribes away from the semisovereign status of “domestic and dependent nations,” to be conceptually and legally treated as racialized minorities.<sup>143</sup> This move, she notes, correlates with the “diminution of [the] separate status [of Indians]” and the reduction of their “concomitant political authority and recognition.”<sup>144</sup> As Joanne Barker writes, “The erasure of the sovereign is the racialization of the ‘Indian.’”<sup>145</sup>

Today, the question of what documentation is required to pass the United States border is sharply posed by national security and the new Western Hemisphere Travel Initiative, with negotiations between Homeland Security and transborder tribes as to what will constitute Initiative-compliant travel documents.<sup>146</sup> These negotiations have been conducted with transborder tribes along the U.S. borders with Canada and Mexico.<sup>147</sup> Previous documentation requirements that transborder

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142. Gabriel “Jack” Chin names 1965 as the moment when the “Civil Rights Revolution [Came] to Immigration Law.” See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996). For a discussion of the myriad impacts of the 1965 Act, see LEGISLATING A NEW AMERICA (Gabriel J. Chin & Rose Cuison Villazor eds., forthcoming 2015). For the argument that the 1965 Act, in replacing national origins quotas with formally equal per-country quotas that newly applied to the Western Hemisphere, drastically reduced legal opportunities for Mexicans to immigrate to the United States, helping to construct the conflation of “Mexican” and “illegal alien,” see NGAI, *supra* note 105.

143. Simpson, *supra* note 114, at 208.

144. *Id.*

145. Joanne Barker, *For Whom Sovereignty Matters*, in SOVEREIGNTY MATTERS 1, 17 (Joanne Barker ed., 2005); see also Bethany R. Berger, “Power Over this Unfortunate Race”: Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1959 (2004) (arguing that the U.S. federal government, by redefining Indians as individuals joined not by politics but by race, asserted the power to breach tribal boundaries).

146. See U.S. Customs & Border Protection, *Travel Documents for Native Americans, Including U.S., Canadian and Mexican Born Members of U.S. Tribes*, CPB INFO. CENTER, [https://help.cbp.gov/app/answers/detail/a\\_id/998/~/~travel-documents-for-native-americans,-including-u.s.-canadian-and-mexican](https://help.cbp.gov/app/answers/detail/a_id/998/~/~travel-documents-for-native-americans,-including-u.s.-canadian-and-mexican) (last updated Sept. 9, 2014).

147. Transborder tribes that straddle the U.S.-Mexico border do not benefit from the Jay Treaty or section 289 of the INA. However, Mexican nationals who are members of the Texas band of the Kickapoo Indians or the Kickapoo Tribe of Oklahoma do have a migratory right to freely pass and repass the borders of the United States and to live and work in the United States. This right is derived from the migratory, social, and cultural ties that initially led the Immigration and Naturalization Service to issue the Kickapoo immigration cards granting the tribe the right to cross the border, in one-year increments. In 1983, Congress passed the Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat.

tribes fought included the 1940 national security measure under the Alien Registration Act requiring all non-U.S. citizens resident in or entering the United States to register with and be fingerprinted by the United States.<sup>148</sup>

The Indians' widespread complaint about Alien Registration was, as Chief Clinton Rickard, founder of the Indian Defense League of America, put it, that "the real Americans are paradoxically called aliens."<sup>149</sup> It was in Clinton Rickard's home that Chief Deskaheh, also known as Levi General, passed away in 1925, after crossing the Atlantic using his own Haudenosaunee Confederate passport in an effort to persuade the League of Nations to recognize Indian sovereignty.<sup>150</sup> He was refused reentry to Canada because he was traveling on his tribal passport and died in the United States.<sup>151</sup> His insistence on the right to travel on a tribal passport echoes in the efforts of the Iroquois Lacrosse team who were refused entry to the United Kingdom in 2010 since they planned to travel on their tribal passports; passports used, points out Audra Simpson, for the past thirty years by a government that predates the United States and the United Kingdom by 300 years, and by the people who also invented lacrosse.<sup>152</sup>

This history, of the treatment of indigenous people by U.S. immigration and citizenship law, shows us a legal regime grappling with incommensurability. We see in this history that immigration law's conventional narration of space, time, and membership fails to capture the complex relationship of indigenous people and the U.S. nation-state. We also see, as part of this story, the indigenous made into aliens. The turning of the indigenous into aliens is not a unique historical practice.

2269 (1983) (codified as amended at 25 U.S.C. § 1300b-11 to -16 (2012)), making this right permanent and exercisable so long as members possess an I-1872 American Indian Card. This is a Western Hemisphere Travel Initiative-compliant card only available to Texas and Oklahoma Kickapoo. Other transborder tribes whose communities straddle the U.S.-Mexico border, such as the Tohono O'odham, do not have a similar right to enter the United States. *See* BOOS & MCLAWSEN, *supra* note 134, at 17–19, 35–36. For further discussion of transborder tribes straddling the U.S.-Mexico border, see Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97 (1991); Leah Castella, Note, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. J. C.L. & C.R. 191 (2000); Joshua J. Tonra, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221 (2006). On the Western Hemisphere Travel Initiative's impact on passage rights, see Brian Kolva, *Lacrosse Players, Not Terrorists: The Effects of the Western Hemisphere Travel Initiative on Native American International Travel and Sovereignty*, 40 WASH. U. J.L. & POL'Y 307 (2012).

148. *See* Smith, *supra* note 60, at 142.

149. *Id.* at 150 (quoting Clinton Rickard to Attorney General Robert H. Jackson (Oct. 15, 1940) (INS file 55853/734)).

150. Simpson, *supra* note 114, at 205–06.

151. *Id.* at 206.

152. AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 25 (2014); *see also* Kolva, *supra* note 147; Thomas Kaplan, *Bid for Trophy Becomes a Test of Iroquois Identity*, N.Y. TIMES, July 13, 2010, at A16; Michelle Chen, *Passport Flap Keeps Iroquois Out of World Lacrosse Championships*, COLORLINES (July 17, 2010, 6:31 AM EST), [http://colorlines.com/archives/2010/07/grounded\\_iroquois\\_lacrosse\\_team\\_bows\\_out\\_but\\_upholds\\_dignity.html](http://colorlines.com/archives/2010/07/grounded_iroquois_lacrosse_team_bows_out_but_upholds_dignity.html); Suzanne Merkelson, *Why the Iroquois Lacrosse Team Couldn't Travel Abroad*, FOREIGN POL'Y (July 19, 2010, 2:07 PM), [http://blog.foreignpolicy.com/posts/2010/07/18/iroquois\\_lacrosse\\_team\\_gives\\_up\\_on\\_bid\\_to\\_attend\\_uk\\_tournament](http://blog.foreignpolicy.com/posts/2010/07/18/iroquois_lacrosse_team_gives_up_on_bid_to_attend_uk_tournament).

Two additional examples are instructive. Leila Kavar has argued that we can see this transformation in another context, writing of the Israeli attempt to deport Palestinian residents of East Jerusalem. She writes: after the Israeli assertion of sovereignty over East Jerusalem in 1967, Palestinian residents were given the “choice” to register for Israeli citizenship, which Palestinians who chose not to recognize Israeli sovereignty refused to do.<sup>153</sup> But this meant that the status of “resident alien” became seen as a freely exercised individual choice leading to what has been called a “quiet deportation.”<sup>154</sup> As Kavar asserts, in the aftermath of a territorial conflict that defines or redefines the bounds of the state, racially marked indigenous populations are vulnerable to being legally recast as aliens or virtual immigrants.<sup>155</sup>

The making of already present populations into aliens is also shown by Kunal Parker in his study of African Americans and poor relief in late eighteenth-century Massachusetts.<sup>156</sup> Deportation in the United States was not initially a federal practice; rather it originated on the local level, following the principle derived from English poor laws, through the deportation of paupers.<sup>157</sup> Thus, the system of poor relief regulated what we understand as immigration—it “sought to secure territorial communities against the claims of outsiders.”<sup>158</sup> Within this system—the law of settlement—legal responsibility for the individual’s claims lay with the town from which he came. Accordingly, a person could be denied relief because he was not from here, but from there.

After slavery was ended in Massachusetts, African Americans threw the system of poor relief into crisis. When enslaved, African Americans were the fiscal responsibility of their masters. When they emerged from slavery, they suddenly were the subjects making claims but they had not come from another town—they were here, without having a there to belong to. What Parker found was that town communities assigned African Americans who were elderly or sick and needed financial help to geographic origins outside of Massachusetts, to a place called “Africa,” to represent them as foreigners who were the legal responsibility of somewhere else.<sup>159</sup>

As he asserts, towns invented immigrant origins to justify refusing these claims upon the community.<sup>160</sup> He argues that this shows that actual territorial movement

153. Leila Kavar, *Legality and (Dis)membership: Removal of Citizenship and the Creation of ‘Virtual Immigrants’ in the 1967 Israeli Occupied Territories*, 14 CITIZENSHIP STUD. 573, 582 (2010).

154. *Id.*

155. *Id.* at 573.

156. Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75, 77. In her article, Kavar also links her analysis both to Parker’s history and to the conquest and expulsion of American Indians, in showing how racially marked populations can be marked as foreigners. See generally Kavar, *supra* note 153.

157. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1846 (1993).

158. Parker, *supra* note 156, at 80.

159. *Id.* at 103–04.

160. *Id.*

of a body may not be the critical marker of an immigrant, and that we should not let it be so, because otherwise it allows the presumption that there is always a “there,” to where a person can return, as a community to which it truly belongs, on which it can rely.<sup>161</sup> Instead, we should see, in his historical study as well as in Kawar’s work and in the case of Paul Diabo, that persons—regardless of their spatial movement or lack thereof—“became aliens,” that the relationship between citizenship and territory emerges as a tactic.

Kawar writes that Israel has been juridically formulated into a state with immigration problems rather than a state engaged in a project of conquest and settlement.<sup>162</sup> One could say the same of the United States. To understand why there is utter amnesia about this fact, not only within immigration law but in general discourse about America, let us turn once again to political theory.

### III. THE POLITICAL THEORY OF FORGETTING—THE SETTLER’S ALIBI

Here we must point to the convergence of the liberal social contract with the logic of settlement as well as the confluence of settlerism with immigration, both literally and metaphorically. As a number of scholars have recently pointed out, John Locke—involved simultaneously in his development of social contract theory and his engagement in colonial administration in the Americas—was pivotal in articulating North America as in a state of nature.<sup>163</sup> As Locke put it, “[I]n the beginning, all the world was *America*.”<sup>164</sup> Native Americans had no social contract, and as purported hunter gatherers, could not own property in land, which came only from husbandry (agricultural improvement).

As Ayosha Goldstein notes, Lockean ideas were crucial to Justice John Marshall, who authored the trilogy of Supreme Court cases *Johnson & Graham’s Lessee v. M’Intosh* (Indians can have no absolute title over property but only a right of occupancy);<sup>165</sup> *Cherokee Nation v. Georgia* (Indians were neither states or foreign nations, but rather domestic dependent nations; their relationship to the United States was as ward to guardian, leading to the creation of the “trust relation” between tribes and the U.S. federal government);<sup>166</sup> and *Worcester v. Georgia* (state laws had no force in Indian country as only the federal government has plenary power over Indian tribes).<sup>167</sup> Goldstein suggests that, for Locke, “natural men” served two purposes. They were evidence that “freedom was the natural condition

161. *Id.* at 121–22.

162. Kawar, *supra* note 153, at 586.

163. *See, e.g.*, LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836, at 15 (2010); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 33–34 (2010); TOMLINS, *supra* note 59, at 178–79; Alyosha Goldstein, *Where the Nation Takes Place: Proprietary Regimes, Antistatism, and U.S. Settler Colonialism*, 107 S. ATL. Q. 833, 839 (2008).

164. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 30 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1689).

165. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

166. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

167. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

of humankind.”<sup>168</sup> At the same time, that Indians appeared to Locke to not engage in settled agricultural labor allowed the justification of settler colonialism.<sup>169</sup>

The purported lack of agricultural development provided an opportunity not only for the propagation of new crops but of a new society.<sup>170</sup> Carole Pateman, in analyzing the logic of the original contract in the form of what she names the “settler contract” notes:

When colonists are planted in a *terra nullius*, an empty state of nature, the aim is not merely to dominate, govern, and use but to create a civil society. Therefore, the settlers have to make an original—settler—contract.

Colonial planting was more than cultivation and development of land. The seeds of new societies, governments, and states, i.e. new sovereignties, were planted in both New Worlds. States of nature—the wilderness and the wild woods of Locke’s *Second Treatise*—were replaced by civil societies.<sup>171</sup>

Here we might note the term “plantation.” Known colloquially today as a farm or estate (and often associated with servitude or slavery), the term plantation has an earlier meaning, which was “settlement,” or “colony.”<sup>172</sup> Plantation was a form of colonization in which settlers were planted to establish a colonial base. That both seeds and settlers can be planted shows how the “political and natural worlds [are] analogous and inextricably linked.”<sup>173</sup> Seeds, settlers, and a new sovereignty were planted in the New World.

Seeds of a new society are planted; a new society is born. There is an “original” moment that marks the founding of the “United States”—think of the founding documents, the July 4th national “birthday,” the founding fathers who created a government by which “We, the People” would govern ourselves. The original contract governing this new political community was created at this founding moment. Pateman writes: “In a *terra nullius* the original contract takes the form of a *settler contract*. The settlers alone (can be said to) conclude the original pact. It is a

168. Goldstein, *supra* note 163, at 839.

169. *Id.*

170. See generally JAMES SCOTT, SEEING LIKE A STATE (1999) (on conceptions of nature and space, the application of utilitarian logic to nature, and the resulting rhetorical choices (nature versus natural resources, crops versus weeds, etc.) that are made).

171. Pateman, *supra* note 40, at 38–39.

172. *English Definitions of the Word Plantation*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english/plantation> (last visited Nov. 26, 2014). We could think here of Plymouth Plantation, founded by the Pilgrims in 1620. That the term plantation has these multiple valences underlay the ballot initiative to change Rhode Island’s official name from “Rhode Island and Providence Plantations” in 2010 (the initiative failed). See Abby Goodnough, *Rhode Island, Hoping to Shed Unsavory Past, Weighs Shorter Name*, N.Y. TIMES, June 30, 2009, at A10; see also *Rhode Island Name Change Amendment, Question 1 (2010)*, BALLOTPEDIA, [http://ballotpedia.org/Rhode\\_Island\\_Name\\_Change\\_Amendment,\\_Question\\_1\\_%282010%29](http://ballotpedia.org/Rhode_Island_Name_Change_Amendment,_Question_1_%282010%29) (last visited Mar. 24, 2015).

173. Siobhan Somerville, *Towards a Queer History of Naturalization*, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 67, 77 (Mary L. Dudziak & Leti Volpp eds., 2006).

racial as well as a social contract.”<sup>174</sup> “[This] original contract simultaneously presupposes, extinguishes, and replaces a state of nature.”<sup>175</sup>

While Pateman does not say this, we could argue that, logically, putting this work on the settler contract together with her earlier work on the sexual contract, the settler contract must also be a sexual contract.<sup>176</sup> As she writes, the original contract constitutes both freedom and domination: freedom for men, and domination over women.<sup>177</sup> If the social contract in a terra nullius is a settler contract, that settler contract is a story of freedom for settlers and subjection for the indigenous, freedom for men and subjection for women. This is vividly apparent in Andrea Smith’s *Conquest*, where she writes that both Native men and women have been subjected to a reign of sexualized terror, although sexual violence does not affect Indian men and women in the same way.<sup>178</sup> “The issues of colonial, race, and gender oppression cannot be separated. This fact [says Smith] explains why in my experience as a rape crisis counselor, every Native survivor I ever counseled said to me at one point, ‘I wish I was no longer Indian.’”<sup>179</sup>

That the settler contract is a sexual contract is also a product of the fact that the settler state assumes reproductive futurity, solely on the part of those who are considered fit to be citizens of the settler state. As Lorenzo Veracini asserts, both the permanent movement of communities and the reproduction of communities are necessarily involved in settler colonialism. The cover of his book, *Settler Colonialism*, is a picture titled “Wives for the Settlers at Jamestown,” which he describes as the moment when colonialism turns into settler colonialism.<sup>180</sup> He is referring here to a drawing by William Craft of the 1608 arrival of women in Jamestown. As asserted by Lord Bacon, the Attorney General and Lord Chancellor of England, and a member of His Majesty’s Council for Virginia in 1620: “When the plantation grows to strength, then it is time to plant with women, as well as with men; that the plantation may spread into generations, and not be ever pieced from without.”<sup>181</sup>

What might be the relationship of the settler contract with immigration? Aziz Rana, arguing that settler empire lay at the heart of American freedom, suggests that the unique settler ideology of the United States required migration, under a system that constituted economic independence as the basis of free citizenship; made

174. Pateman, *supra* note 40, at 56.

175. *Id.* at 67.

176. Thank you to Melissa Murray for suggesting I integrate Pateman’s work on the sexual contract into this argument.

177. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988).

178. ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 8 (2005).

179. *Id.*

180. LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW*, at vii (2010).

181. FRANCIS BACON, *Of Plantations*, in *THE ESSAYS OF FRANCIS BACON* 106 (Clark Sutherland Northup ed., Houghton Mifflin Co. 1908) (1620), available at <http://www.authorama.com/essays-of-francis-bacon-34.html>.

conquest the basic engine of republican freedom, needing new territory for settlers so the ethical benefits of free labor could be made generally accessible; and acknowledged the idea that republican principles at root were not universally inclusive, as some needed to engage in the dignified work marked by productive control, with others in unfree work.<sup>182</sup> In order to sustain this project, new migrants were needed, creating remarkably open immigration policies for Europeans.<sup>183</sup> Thus, Rana asserts, settlerism and immigration existed not as two distinct accounts of the American experience, but were bound up together.<sup>184</sup>

In extending this line of inquiry, we might think about the relationship of the settler contract with immigration, not just in terms of bodies needed for the settler project but also in terms of the metaphorical relationship between immigration and settlerism. Immigration functions as an alibi for settlerism. Of course, for many, settlerism requires no alibi; that it does not can be explained through how settlerism is naturalized via both foundational texts (*Little House on the Prairie*) and myths (the Western frontier) central to the shaping of American national identity.<sup>185</sup> Settlement is considered inevitable and is segmented from what is understood as immigration.<sup>186</sup> But the natural-seeming common sense of settlement can be unpacked by pointing out the feats of grammatical, temporal, and spatial gymnastics required in its construction. Think of the articulation of James Belich: “An emigrant joined someone else’s society, a settler or colonist remade his own.”<sup>187</sup> This empirical claim highlights the constitutive paradox of moving to one’s own country.

If we parse the terms settler, migrant, and immigrant, some distinctions emerge. The settler belongs to his land, and the land belongs to him. His relationship to his country could be conceptualized as fee simple title. In contrast, the migrant is moving to a country not his own. He has only a fragile interest in that land. If he has been lawfully admitted, he merely possesses a revocable license, suggesting that he can be removed from this land to which he does not belong. If he has not been

182. RANA, *supra* note 163, at 12.

183. On these open immigration policies, see generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (discussing both admission policies and remarkably favorable policies for immigrants who had declared their intent to naturalize—including the ability to obtain land grants under the Homestead Act and to vote in many states).

184. RANA, *supra* note 163, at 13.

185. See Frances W. Kaye, *Little Squatter on the Osage Diminished Reserve: Reading Laura Ingalls Wilder’s Kansas Indians*, 20 *GREAT PLAINS Q.* 123 (2000); Waziyatawin Angela Cavender Wilson, *Burning Down the House: Laura Ingalls Wilder and American Colonialism*, in *UNLEARNING THE LANGUAGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA* (Wahinkpe Topa (Four Arrows) ed., 2006).

186. As Kerry Abrams describes, pre-Chinese exclusion era immigration history is treated as settlement history. She writes, “We do not see settlement as a part of immigration history because, in hindsight, it seems inevitable that the western territories became a part of the United States.” Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 *VAND. L. REV.* 1354, 1356 (2009).

187. James Belich, *The Rise of the Angloworld: Settlement in North America and Australasia, 1794–1918*, in *REDISCOVERING THE BRITISH WORLD* 39, 53 (Philip Buckner & R. Douglas Francis eds., 2005). For an explanation of the term emigrant, see *infra* note 192 and accompanying text.



lawfully admitted, his relationship to the land is even more tenuous—he is conceived as a trespasser. The term immigrant is used more often in the United States today than either the term settler or migrant. It is a capacious term, with both positive and negative valences. Its positive valence can capture the settler, its negative valence, the migrant. The positive valence is the immigrant who shores up America’s democracy; the negative valence is the illegal, the unworthy, the ungrateful, the threatening. The term “nation of immigrants” embraces only the former.

As the notion of settlerism becomes unsavory, settlers portray themselves as immigrants, particularly as forming a “nation of immigrants.”<sup>188</sup> Donna Gabaccia notes that the United States is almost alone among 193 nations in calling itself a nation of immigrants, though she points out Canada and Australia do, occasionally, as well.<sup>189</sup> (She does not mention what else these three nation-states have in common—these are all settler-colonial states.)

But the United States in particular most naturalizes the history of its immigration exceptionalism.<sup>190</sup> Gabaccia writes that any idea underlying the concept of the United States as a nation of immigrants may be challenged: foreigners do not compose a more significant portion of the U.S. population or play a larger role in national life than in other nations; the United States is not unique in amalgamating persons of diverse cultures or origins into a single nation; and migrants have not found greater success and happiness in the United States than elsewhere.<sup>191</sup> Thus, she suggests we must ask why and how the United States began understanding itself as a nation of immigrants. In researching digitized texts, she finds that the popularity of the phrase as a celebration of American inclusiveness came only in the 1960s, with the nation of immigrants a metaphor for American nation building during the Cold War.<sup>192</sup> Not coincidentally, John F. Kennedy penned in 1958 an essay for the Anti-Defamation League titled *A Nation of Immigrants*, which he used, in part, to advocate in favor of eliminating the national-origins quotas applied to the Eastern

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188. Of course, for some, settlerism remains a positive notion. See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004) (rejecting the notion of the United States as a nation of immigrants, in favor of the notion of the United States as a nation with an Anglo Protestant core, founded by settlers, not immigrants).

189. Donna R. Gabaccia, *Nations of Immigrants: Do Words Matter?*, 5 PLURALIST, Fall 2010, at 5, 6.

190. *Id.* at 7.

191. *Id.* at 6.

192. *Id.* at 23. Gabaccia found that the invention of the United States as a nation of immigrants began significantly earlier, in the decades of the Civil War, as Americans began to label newcomers not as emigrants, but as immigrants. *Id.* at 7. Emigrant had been the most popularly used term for a foreigner entering or living in the U.S., in the first half of the nineteenth century, and was associated with the retention of European civilization and Protestantism. *Id.* at 13. Californians began to use the term immigrants in the context of hostility towards Chinese laborers. *Id.* at 15–16. Immigrant became the preferred terminology of restrictionists. *Id.* at 17. There is thus a counterintuitive relationship between the historical context in which the term emerged and the positive valence of the term “nation of immigrants” which appeared later. See generally *id.* at 5–31.

Hemisphere.<sup>193</sup> His book, which was enormously popular, helped push through the lifting of the national-origins quotas in 1965 (a change that has largely been represented as a civil rights victory, but one that also has arguably led to the correlation of illegal immigration with “Mexican”).<sup>194</sup>

Kennedy begins with Toqueville’s *Democracy in America*, considered a foundational text on American democracy. We might note that Toqueville casts the political founding in a wilderness—“One could still properly call North America an empty continent, a deserted land waiting for inhabitants”<sup>195</sup>—a vision key to subsequent notions of the open frontier.<sup>196</sup> Kennedy writes that what Toqueville saw in America was “a society of immigrants, each of whom had begun life anew, on an equal footing.”<sup>197</sup> Who are these immigrants? According to Kennedy, “every American who ever lived, with the exception of one group, was either an immigrant himself or a descendant of immigrants. . . . And some anthropologists believe that the Indians themselves were immigrants from another continent who displaced the original Americans—the aborigines.”<sup>198</sup> And here we see, again, the indigenous transformed into an alien.

What is the link between the founding and immigrants? As Bonnie Honig writes, “immigrants [are treated] as the agents of founding and renewal for a regime in which membership is supposed to be uniquely consent based, individualist, rational, and voluntarist rather than inherited and organic.”<sup>199</sup> The liberal consenting immigrant of the nation of immigrants obscures the nonconsensual bases of American democracy<sup>200</sup>—if American is a product of free choice, there is no slavery, colonial possession, conquest, and genocide; the violent sources of the republic are recentered on the idea of voluntary choice continually reaffirmed by the figure of the immigrant consenting to membership in the regime.<sup>201</sup> As she writes, “The people who live here are people who once chose to come here, and, in this, America

193. JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964).

194. NGAI, *supra* note 9, at 227–64; *see also* LEGISLATING A NEW AMERICA, *supra* note 142.

195. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 25 (1990).

196. On the concept of the American frontier, *see generally* Erik Altenbernd & Alex Trimble Young, *Introduction: The Significance of the Frontier in an Age of Transnational History*, 4 *SETTLER COLONIAL STUD.* 127 (2014).

197. KENNEDY, *supra* note 193, at 2.

198. *Id.* at 2–3.

199. BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 73–74 (2001). Honig’s focus is the symbolic politics of foreignness, and stories in which the origins or revitalization of a people depend upon the energy of a foreigner. There is an interesting resonance here to explore with the concept of the “stranger king”—the “conception that political authority in pre-modern politics is conceived of as foreign or alien.” Mateo Taussig-Rubbo, *From the ‘Stranger King’ to the ‘Stranger Constitution’: Domesticating Sovereignty in Kenya*, 19 *CONSTELLATIONS* 248, 250 (2012).

200. HONIG, *supra* note 199, at 75.

201. *See generally* BYRD, *supra* note 18; CHANDAN REDDY, *FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE* (2011); Lisa Lowe, *The Intimacies of Four Continents*, in *HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY* 191 (Ann Laura Stoler ed., 2006).

is supposedly unique.”<sup>202</sup> Lauren Berlant also notes that “the immigrant is defined as *someone who desires America*,” providing “symbolic evidence for the ongoing power of American democratic ideals”—the immigrant “provides an energy of desire and labor that perpetually turns American into itself.”<sup>203</sup> The reiteration of the immigrant choosing to join suggests the repeated agreeing to of the social contract, from the founding to now, eliding the violent originary dispossession. The desiring of America eclipses the dispossession by America. This dispossession disappears, “buried underneath” the vision of America as a land of equality and liberty.<sup>204</sup> The nation thus appears as an ethical community, rather than as the product of violence, or as an accident.<sup>205</sup>

The naturalization ceremony itself functions as a ritualized public performance of this consent. We are familiar with the contemporary form of naturalization ceremonies, staged ceremonies that function as a kind of “feel-good advertisement for the possibilities of a multiracial democracy, freely chosen by a global cadre of prospective U.S. citizens,”<sup>206</sup> that Siobhan Somerville describes as the product of a deliberate federal effort to tell a story about naturalization as “the culmination of a romance between immigrants and the federal state.”<sup>207</sup> Yet before these naturalization ceremonies for immigrants were developed, the United States conducted naturalization ceremonies for Indians becoming citizens through the Dawes Act. Starting in 1916, a competency commission simultaneously determined whether individual Indians would be assigned title to property allotments and U.S. citizenship. The commission began to stage citizenship ceremonies. Indian men were handed a bow and arrow and told to shoot a final arrow to mark the end of their resistance to the United States, and then place their hands upon a plow and vow to take up agriculture. Indian women received sewing kits.<sup>208</sup> Somerville has found archival evidence that is suggestive of a link between these Dawes Act ceremonies and the first naturalization ceremonies staged for immigrants; it is possible that this ritual performance of naturalization of Indians inspired naturalization ceremonies for immigrants, whose naturalization at the time was

202. HONIG, *supra* note 199, at 75.

203. LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP* 195, 198–99 (1997).

204. As Philip Frickey put it, in America colonization has been “buried underneath” a constitutional democracy, with the rule of law doing “double work,” providing the glue to both hold the republic together while “legitimizing the displacement of indigenous institutions to make room for it.” Frickey, *supra* note 12, at 434.

205. Thank you to Anya Bernstein for the articulation of this point, which helpfully tracks the dueling notions of political community as based on either ascription or consent that appears in PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

206. Siobhan Somerville, *A Queer Genealogy of Naturalization in the United States* 16 (July 25, 2014) (unpublished manuscript) (on file with author).

207. *Id.* at 4.

208. PIATOTE, *supra* note 103, at 113; *see also* JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934* (1991). *See generally* Somerville, *supra* note 206, ch. 4.

conducted as an individual bureaucratic procedure, with little theatricality.<sup>209</sup> This history of Dawes Act naturalization is forgotten in the presumption that only immigrants are naturalized and in the concomitant vision of the desiring immigrant.<sup>210</sup>

So the settler becomes an immigrant. The settler even becomes a refugee. Think of the story of Exodus, the journey to the Promised Land, the good ship *Arabella*, and John Winthrop declaring a divine mission, a “city upon a hill.”<sup>211</sup> This vision of American exceptionalism and its presumption of a divinely ordained mandate has been evoked by numerous political figures, including John F. Kennedy,<sup>212</sup> Ronald Reagan,<sup>213</sup> and recently Mitt Romney,<sup>214</sup> as well as Arnold Schwarzenegger who, hosting a forum on immigration reform, linked bodybuilding to the Puritans, placing himself within this historical trajectory—saying, “The life I’ve lived, the careers that I’ve had, and the successes I’ve had were possible only because I immigrated to the one place [where] nothing is impossible. . . . To me, President Ronald Reagan’s shining city on a hill was never just a beautiful metaphor.”<sup>215</sup>

And, foundationally, in yet another metaphorical and rhetorical inversion, settlers portray themselves as natives, to indigenize themselves.<sup>216</sup> Colonization meant “the indigenous alienated, the newcomers domesticated.”<sup>217</sup> As Patrick Wolfe writes:

Settler colonies were (are) premised on the elimination of native societies. The split tensing reflects a determinate feature of settler colonization. The colonizers come to stay—invasion is a structure not an event. . . . [T]he romance of extinction, for instance (the dying race, the last of his tribe, etc.), encodes a settler-colonial imperative . . . . In the settler-colonial economy, it is not the colonist but the native who is superfluous.<sup>218</sup>

Thus, the native familial identity of the settlers (founding father, daughters of the

209. Somerville, *supra* note 206, at ch. 4, 9–10, 33–35.

210. Somerville’s book focuses on collective naturalization without individual consent, including the Civil Rights Act, and the Treaty of Guadalupe Hidalgo. *See id.*; *see also supra* Introduction.

211. SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD*, at xxiv (2d ed. 2012).

212. *See* John F. Kennedy, “City Upon a Hill” Speech (Jan. 9, 1961), *available at* <http://millercenter.org/president/speeches/speech-3364>.

213. *See* Ronald Reagan, *We Will Be a City Upon a Hill* (Jan. 25, 1974), *available at* [http://reagan2020.us/speeches/City\\_Upon\\_A\\_Hill.asp](http://reagan2020.us/speeches/City_Upon_A_Hill.asp).

214. Byron York, *Why Gingrich Won – Why Romney Lost*, *WASH. EXAMINER* (Jan. 22, 2012, 1:18 AM), <http://www.washingtonexaminer.com/why-gingrich-won-why-romney-lost/article/1078266#null>.

215. Arnold Schwarzenegger, Former Governor of Cal., Opening Remarks at the University of Southern California Schwarzenegger Institute Forum on Immigration Reform (Apr. 30, 2013).

216. Kauanui, *supra* note 11. One way this manifests is through “going native,” which Shari Huhndorf describes as a means of constructing white identities, naturalizing the conquest, and inscribing various power relations within American culture. SHARI M. HUHDORF, *GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION* 6 (2001).

217. TOMLINS, *supra* note 59, at 6.

218. WOLFE, *supra* note 15, at 2–3.

American Revolution, native sons) is both proclaimed and premised on the disappearance of the actual native inhabitants, a disappearance that is both metaphorical and literal. This imagining away “banishes existing inhabitants to the margins of its consciousness.”<sup>219</sup> “Imagining North America as ‘settled’ did not merely reject indigenous property claims; it presupposed a fundamental erasure of Indian presence.”<sup>220</sup> This is the “Vanishing Indian,” as seen in the Edward Curtis portraits frequently offered for sale on the back of the *New York Times*.<sup>221</sup>

In turning settler into native, the settler must show some relationship to the soil, suggesting an autochthonous relationship that would justify the idea that “this land was made for you and me.” This allows settler society to “spring organically from the local soil,” and this is accomplished through appropriating “the symbolism of the very Aboriginality that it has historically effaced.”<sup>222</sup> As Wolfe suggests, “It should, by now, be no surprise that the precontact stereotypes of repressive authenticity should figure on the money, postage stamps and related imprints of the settler-colonial state, even though that state is predicated on the elimination of those stereotypes’ empirical counterparts.” We could think here of the Indian head-buffalo nickel.

Yet these facts are effaced and forgotten. Because we understand the United States to be an ideal political body, its violent foundations must be disavowed.<sup>223</sup> When, as Lorenzo Veracini writes, violence by settler-colonial narratives against the indigenous is acknowledged, it can only be explained as “self-defense,” self-defense of this ideal political body.<sup>224</sup>

The nation of immigrants metaphor suggests that immigrants to the United States are the heirs of their forefathers, who made the settler contract in brotherhood among themselves in relationship to virgin land. This contract was founded in a purported right of inherited descent and providential destiny from the founding fathers—fathers whose alien status goes unrecognized, even while indigenous populations are made aliens.<sup>225</sup> This turning of indigenous populations into aliens, this folding of settler society into the nation of immigrants happens when it is expedient. When the indigenous experience is collapsed with the immigrant experience this is, notes Jodi Byrd, a “reordering of their temporal arrival into a ‘post-conquest’” America.<sup>226</sup> This temporal reordering is also visible in the

219. TOMLINS, *supra* note 59, at 132.

220. RANA, *supra* note 163, at 49.

221. See TIMOTHY EGAN, *SHORT NIGHTS OF THE SHADOW CATCHER: THE EPIC LIFE AND IMMORTAL PHOTOGRAPHS OF EDWARD CURTIS* (2012).

222. WOLFE, *supra* note 15, at 207.

223. VERACINI, *supra* note 180, at 77–78.

224. *Id.*

225. This story of the vertical relationships imagined within the nation is accompanied by a story about the horizontal relationships necessary for the “imagined community” of the nation, as well. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (3d ed. 2006) (1983) (“[T]he nation is always conceived as a deep, horizontal comradeship.”).

226. BYRD, *supra* note 18, at 52.

idea that the settler is moving to his destined country, to create an immanent society to come.<sup>227</sup>

If one searches for visual representations of the nation of immigrants, one finds images of the borders of the continental United States filled by people, by smiling multicultural faces. What this does is remove the focus from the role of the state and the function of the state in establishing a “gatekeeping nation,”<sup>228</sup> a “deportation nation,”<sup>229</sup> or a settler colonial state. The nation-state appears as if magically constructed through the migration of peoples inside. The nation of immigrants suggests that the American nation is made up solely of persons each here as a matter of individual voluntary choice, moving through space, reiterating the legitimacy of this as a nation-state formation.

Immigration is responsible for indigenous dispossession. But it also provides the alibi. Thus, immigration functions as both the reason for—and basis of—denial. The settler state is naturalized as the nation of immigrants.

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227. VERACINI, *supra* note 180, at 23.

228. LEE, *supra* note 8, at 6.

229. KANSTROOM, *supra* note 136.

