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SELF-DEPORTATION NATION

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SELF-DEPORTATION NATION

K-Sue Park

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SELF-DEPORTATION NATION

K-Sue Park[*]

"Self-deportation" is a concept to explain the removal strategy of making life so unbearable for a group that its members will leave a place. The term is strongly associated with recent state and municipal attempts to "attack every aspect of an illegal alien's life," including the ability to find employment and housing, drive a vehicle, make contracts, and attend school. However, self-deportation has a longer history, one that predates and made possible the establishment of the United States. As this Article shows, American colonists pursued this indirect approach to remove native peoples as a prerequisite for establishing and growing their settlements. The new nation then adopted this approach to Indian removal and debated using self-deportation to remove freed slaves; later, states and municipalities embraced self-deportation to keep blacks out of their jurisdictions and drive out the Chinese. After the creation of the individual deportation system, the logic of self-deportation began to work through the threat of direct deportation. This threat burgeoned with Congress's expansion of the grounds of deportability during the twentieth century and affects the lives of an estimated 22 million unauthorized persons in the United States today.

This Article examines the mechanics of self-deportation and tracks the policy's development through its application to groups unwanted as members of the American polity. The approach works through a delegation of power to public and private entities who create subordinating conditions for a targeted group. Governments have long used preemption as a tool to limit the power they cede to these entities. In the United States, this pattern of preemption establishes federal supremacy in the arena of removal: Cyclically, courts have struck down state and municipal attempts to adopt independent self-deportation regimes, and each time, the executive and legislative branches have responded by building up the direct deportation system. The history of self-deportation shows that the specific property interests driving this approach to removal shifted after abolition, from taking control of lands to controlling labor by placing conditions upon presence.

This Article identifies subordination as a primary mode of regulating migration in America, which direct deportations both supplement and fuel. It highlights the role that this approach to removal has played in producing the landscape of uneven racial distributions of power and property that is the present context in which it works. It shows that recognizing self-deportation and its relationship to the direct deportation system is critical for understanding the dynamics of immigration law and policy as a whole.

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An incentive called misery.
— William Safire[1]

Yet for all of its influence, the Migration was so vast that, throughout history, it has most often been consigned to the landscape, rarely the foreground.
— Isabel Wilkerson[2]

INTRODUCTION

"Self-deportation" refers to an indirect method for removing from a jurisdiction a group not desired as part of the polity.[3] The term popularly attached to this removal method in 1994,[4] when satire artists Lalo Alcaraz and Esteban Zul used it in a fake press release responding to California's Proposition 187, which would have prohibited state-run hospitals and schools from serving undocumented immigrants.[5] Shortly

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[1] William Safire, *Self-Deportation?*, N.Y. TIMES, Nov. 21, 1994, at A15.

[2] ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 13 (2010).

[3] Indirect laws are laws designed to achieve one effect that in turn produces a second effect, which is the ultimate purpose of the law. The lawmaker who designs a self-deportation law presumes that controlling social situations through the law can engineer a person's behavior. Professor Hiroshi Motomura has observed that the subfederal legislation of the 2000s worked indirectly to influence migration. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 58–59, 69–76 (2014); *see also* Hiroshi Motomura, Hartman Hotz Lecture, *What Is "Comprehensive Immigration Reform"? Taking the Long View*, 63 ARK. L. REV. 225, 234 (2010) [hereinafter Motomura, *What Is "Comprehensive Immigration Reform"?*] ("'[I]mmigration law' is not just a set of laws on the books that regulate admission and deportation. It includes a broader array of ways in which we encourage or discourage population flows.").

[4] The term only recently came to describe the state policy that is the subject of this Article. Before that, news media employed it occasionally and inconsistently to describe a variety of situations, including migration to the United States from Ireland in the nineteenth century, black migration out of the United States in the late nineteenth century, and the failure of a deportee to leave the country at the prescribed time in the mid-twentieth century. *See, e.g.*, *Deportation Case Ruling is Promised*, WASH. POST, Apr. 23, 1957, at A2 (reporting on the case *Heikkinen v. United States*, 355 U.S. 273 (1958)); *Our Foreign Population*, DET. FREE PRESS, Aug. 28, 1883, at 4; *Self Deportation*, WICHITA DAILY EAGLE, Mar. 6, 1894, at 2 (describing the departure of thirty black people from Atlanta for Africa).

[5] Robert Mackey, *The Deep Comic Roots of "Self-Deportation,"* N.Y. TIMES: THE LEDE (Feb. 1, 2012, 8:53 AM), http://thelede.blogs.nytimes.com/2012/02/01/the-deep-comic-roots-of-self-deportation/ [https://perma.cc/4SH5-XNW8]. In the press release, the group "Hispanics Against Liberal Takeover" called for the creation of "Self Deportation Centers." *Id.*; Lalo Alcaraz, *Hispanics for Wilson's First Press Release Touted "Self-Deportation*," POCHO ÑEWS Y SATIRE (Jan. 31, 2012), http://pocho.com/hispanics-for-wilsons-first-press-release-touting-self-deportation/ [https://perma.cc/D6M4-MPY4]. After Mitt Romney declared during a presidential primary debate in 2012 that "the answer is self-deportation," *see* Lucy Madison, *Romney on Immigration: I'm for "Self-Deportation*," CBS NEWS (Jan. 24, 2012), https://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation/ [https://perma.cc/4H5S-M3QK], an *Atlantic* columnist commented that the proposal "seems like some kind of political joke taken too far." Adam Martin, *"Self-Deportation" Really Is a Joke*, THE ATLANTIC (Feb. 1, 2012), https://www.theatlantic.com/politics/archive/2012/02/self-deportation-really-joke/332370/ [https://perma.cc/4YWV-FZM9].

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thereafter, their fictional press contact, the "militant self-deportationist" Daniel D. Portado, praised the law's self-deportation strategy first in a mock interview, and then when he appeared in real news.[6] Within months, the term made its way into public political discourse: California Governor Pete Wilson, champion of Proposition 187, explained to *New York Times* columnist William Safire that "[i]f it's clear to you that you cannot be employed, and that you and your family are ineligible for services, you will self-deport."[7] In the 2000s, states and municipalities introduced a stream of legislation[8] that, often in a single bill, attempted to make it impossible for unauthorized individuals to find shelter or employment, make contracts, or access public benefits, resident tuition rates, and drivers' licenses; they levied increased state-level criminal sanctions against unauthorized persons, allowed local police officers to enforce federal immigration laws, and otherwise targeted immigrants' lives, such as by banning the display of foreign flags and the use of languages other than English in public institutions.[9] Legislators willingly explained that self-deportation was the purpose of the bills.

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[6] Mackey, *supra* note 5; Martin, *supra* note 5; Ira Glass, *Losers*, THIS AMERICAN LIFE (Nov. 8, 1996), https://www.thisamericanlife.org/41/politics/act-three [https://perma.cc/MLA2-TVPK].

[7] Safire, *supra* note 1.

[8] Between 2005 and 2007 alone, the number of such bills that states introduced grew by more than 420% a year. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION: JANUARY 1–JUNE 30, 2008, at 1 (2008), http://www.ncsl.org/print/immig/immigreportjuly2008.pdf [http://perma.cc/HM5B-SLHE].

[9] *See, e.g.*, H.R. 56, 2011 Leg., Reg. Sess. § 9, 2011 Ala. Laws 888, 901 (contracting provisions); ALASKA STAT. §§ 44.12.300–390 (2017); S. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41); H.R. 2779, 48th Leg., Reg. Sess. § 8(a) (Ariz. 2007); H.R. 1024, 86th Gen. Assemb., Reg. Sess. (Ark. 2007); COLO. REV. STAT. § 18-11-205 (2016); H.R. 07-1073, 66th Gen. Assemb., Reg. Sess. (Colo. 2007); IDAHO CODE § 73-121 (2017); S. 70, 2007 Leg., Reg. Sess. (W. Va. 2007); Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance (Sept. 12, 2006), *amended by* Hazleton, Pa., Ordinance 2006-40 (Dec. 13, 2006); and Ordinance 2007-6 (Mar. 21, 2007); Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), *enjoined in part by* Lozano v. City of Hazleton, 724 F.3d 297, 300 (3d Cir. 2013) (holding that the ordinance's employment and housing provisions were preempted federal law); Frederick County, Md., Ordinance No. 12-03-598 (Feb. 22, 2012) (repealed 2015); Nashville & Davidson County, Tenn., Substitute Ordinance No. BL2006-1185 (passed Feb. 6, 2007, vetoed Feb. 12, 2007); Farmers Branch, Tex., Ordinance No. 2952 (Jan. 22, 2008), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 526 (5th Cir. 2013) (en banc); Farmers Branch, Tex., Resolution No. 2006-130 (Nov. 13, 2006) (repealed 2017); Kevin Bouffard, *Avon Park Ordinance Fails*, THE LEDGER (July 25, 2006, 6:45 AM), https://www.theledger.com/news/20060725/avon-park-ordinance-fails [https://perma.cc/F8BB-N9MB] (discussing the proposal and narrow defeat of an ordinance in Avon Park, Florida, called the "Illegal Immigration Relief Act"); *Vasquez v. City of Farmers Branch, Texas*, MALDEF (Sept. 22, 2008), https://www.maldef.org/2008/09/vasquez-v-city-of-farmers-branch-texas/ [https://perma.cc/T4NP-58MP] (discussing litigation around three successive anti-immigrant ordinances in Farmers Branch, Texas, beginning in 2006; the final ordinance was found preempted by federal law, *Villas at Parkside Partners*, 726 F.3d at 526). In 2006, Arizona introduced a proposition to institute English as the official language of the state alongside a proposition that would have limited access to adult education (and therefore English classes) on the basis of citizenship status. *See 2006 Ballot Propositions & Judicial Performance Review: Proposition 103*, ARIZ. SEC'Y OF STATE (Sept. 2006),

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Arizona's S.B. 1070 in 2010 openly declared it intended "to discourage and deter the unlawful entry and presence of aliens" by making "attrition through enforcement" — Kansas Secretary of State Kris Kobach's term of art for self-deportation — the law of the land.[10] In 2011, when Alabama passed H.B. 56, its sponsor, former Representative Micky Hammon, explained the law was designed to "attack[] every aspect of an illegal alien's life," and "to make it difficult for them to live here so they will deport themselves."[11]

These laws unified wildly divergent legal provisions — civil and criminal, those involving alienage and immigration — through a single underlying logic: they sought to make individuals into agents of the state's goal of their removal by making their lives unbearable.[12] This Article examines the long history of this approach to removal, and shows that it originated during the earliest period of English colonization in America. Although the scholarly literature on self-deportation has focused almost exclusively on the recent subfederal legislation, the roots

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https://apps.azsos.gov/election/2006/info/PubPamphlet/english/Prop103.htm [https://perma.cc/PTG8-MFZF]; *2006 Ballot Propositions & Judicial Performance Review: Proposition 300*, ARIZ. SEC'Y OF STATE (Sept. 2006), https://apps.azsos.gov/election/2006/info/PubPamphlet/english/Prop300.htm [https://perma.cc/HEQ5-8GEE]. As many politicians and reporters pointed out, the two bills contradicted each other unless they were designed for the purpose of making life more difficult for immigrants. *See* Jesse McKinley, *Arizona Law Takes a Toll on Nonresident Students*, N.Y. TIMES (Jan. 27, 2008), https://nyti.ms/2FoVFax [https://perma.cc/P3MC-47X6]. For an analysis of how denying immigrants drivers' licenses attacks their social and economic survival, see Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. L. REV. 879, 887–93 (2015).

[10] S.B. 1070, 49th Leg., 2d Reg. Sess. § 1, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41). Kobach drafted much of this legislation and served as the architect of Romney's self-deportation platform. Jefferson Morley, *The Man Behind Romney's "Self-Deportation" Plan*, SALON (Feb. 23, 2012, 3:44 AM), https://www.salon.com/2012/02/22/the_man_behind_romneys_self_deportation_dreams/ [https://perma.cc/K5FM-7VVV].

[11] HUMAN RIGHTS WATCH, NO WAY TO LIVE: ALABAMA'S IMMIGRANT LAW 1 (2011), https://www.hrw.org/sites/default/files/reports/us1211ForUpload_1.pdf [https://perma.cc/H5GG-WTTK]; *see also* Diane McWhorter, *The Strange Career of Juan Crow*, N.Y. TIMES (June 16, 2012), https://nyti.ms/2F8MUMS [https://perma.cc/Q3EE-XD76].

[12] By reading these types of provisions together, and identifying a common logic at work across genres of laws, I claim neither that the laws serve no purposes other than self-deportation, nor that the overlap between these genres and self-deportation law is total. I presume that people retain agency under all manner of life-challenging circumstances and that all laws elicit a broad range of responses. I do not aim to identify the outer limits of self-deportation policy in each situation, but rather, its work across a range of historical circumstances, in order to discern the pattern of its development. In reading self-deportation across genres of law, I follow Kobach's lead: he emphasizes targeting employment ("when the jobs dry up, unauthorized aliens self-deport"), Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157 (2008) [hereinafter Kobach, *Attrition Through Enforcement*], and bringing unauthorized persons into more frequent and more onerous contact with law enforcement (people are more likely to leave "[w]hen the risks of being detained and/or prosecuted go up dramatically"), *id.* at 160; *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 471 (2008) [hereinafter Kobach, *Reinforcing the Rule of Law*].

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of this policy lie in debates and practices that were long central to Indian Removal and which evolved through deliberations over the fate of emancipated slaves. Between 1827 and 1830, for example, the Georgia legislature passed a series of "extension laws" targeting Cherokee lands and sovereignty and, like the Arizona legislature in 2010, openly declared these laws "calculated to induce [the Indians] to remove."[13] Anticipating abolition during the Civil War, a U.S. congressman from Pennsylvania warned that a state that did not pass legislation to keep free blacks out would see "great swarms of fugitives — thousands and tens of thousands of them — . . . come like black locusts, and settle down upon us."[14] The policy then acquired new life with the establishment and growth of the modern deportation regime during the era of Chinese Exclusion, the Mexican Removals of the Great Depression, and beyond.[15]

Yet the tactic of self-deportation remains little understood. In particular, the notion that recent self-deportation laws were an unprecedented state and local effort to fill gaps left by the federal government's failure to enforce immigration laws is still prevalent.[16] Politicians have

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[13] TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL 107 (2002) (quoting ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, 1829 (Milledgeville, Camak & Ragland 1830) (alteration in original).

[14] CONG. GLOBE, 37th Cong., 2d Sess. 1644 (1862).

[15] In synthesizing these histories, I follow a broader project advanced by Professors Gerald Neuman, Hiroshi Motomura, Kerry Abrams, and others who have demonstrated how immigration law scholarship's traditional categories and frameworks have tended to obscure the full spectrum of laws that have controlled migration and populations they affect. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING 10–12 (2006); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1355 (2009); Motomura, *What Is "Comprehensive Immigration Reform"?*, *supra* note 3, at 234; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1836–37 (1993). Abrams highlights scholars' failure to recognize the impact of indirect as well as direct laws governing immigration and points out that many direct and indirect immigration laws historically controlled interstate rather than "international" migration. *Id.* at 1355–56. Others have explored how lawyers and courts have constructed the category of "immigrant" and "alien" to encompass Native Americans, slaves, and free blacks for the purpose of coercing their migration. *See, e.g.*, KUNAL M. PARKER, MAKING FOREIGNERS 88–89 (2015); DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW 156 (2007); Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 89–107 (1999); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 300–15 (2015).

[16] *See, e.g.*, Kobach, *Attrition Through Enforcement*, *supra* note 12, at 156 (stating that self-deportation, or "attrition through enforcement," "has never been the immigration strategy of the United States"); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1445 (1995) ("The problem is framed by the peculiar circumstance that the state has a legitimate interest in deterring 'illegal' aliens from residence but no power to remove them directly."); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 82 (2013) ("Frustrated [with Congress and the Executive], and by default, states and localities increasingly have sought to 'cooperate' in immigration enforcement through self-help measures."); Benjamin D. Galloway, Comment, *Perpetual Congressional Inaction: State Regulation of Immigration in Response to Lack*

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reinforced the idea that self-deportation is a recent and marginal phenomenon. When Mitt Romney declared on the 2012 presidential campaign trail that "[t]he answer [to the immigration question] is self-deportation,"[17] even members of his own party dismissed this platform as unheard of and cruel. Newt Gingrich called it laughable for Romney "to believe that somebody's grandmother is going to be so cut off that she is going to self deport. . . . He certainly shows no concern for the humanity of people who are already here."[18] Similarly, future President Trump attributed Romney's loss to this position, commenting: "[h]e had a crazy policy of self deportation which was maniacal . . . . It sounded as bad as it was . . . ."[19]

In this Article, I analyze the legal phenomenon of "self-deportation." The oxymoronic quality of the term captures the logic by which the strategy works: it is a variety of state-sponsored coercive removal that assigns some agency to individuals in their own departure. Although this term only recently came to popularly describe this phenomenon, "self-deportation" long predates the modern era as a serious government strategy for controlling the migration of undesired populations.[20] Parts I and II describe how American lawmakers repeatedly turned to indirect legal strategies to pursue the mass removal of unwanted groups. Section I.A describes how colonists who arrived to take possession of land in America realized that they could not use direct methods to remove the people already living there but could make them remove themselves by using law to target every aspect of their lives. This indirect policy made it possible for colonial officials to maintain diplomatic relations with tribes and helped colonial settlements avoid war by distancing official acts from the acts of private entities. However, settlers escalated conflict with native nations in ways that threatened to undermine the twin projects of expansion and removal. Colonial officials and the British Crown

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of Reform, 65 MERCER L. REV. 795, 826 (2014). Professor Linus Chan notes that "[p]re-emption's role in the S.B. 1070 litigation is unsurprising as it has been used to challenge state based immigration regulation for more than a century." R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 PACE L. REV. 814, 816–17 (2014) (citing Chy Lung v. Freeman, 92 U.S. 275 (1875)).

17 *Mitt Romney Talks "Self-Deportation"; More About What that Really Means*, AMERICA'S VOICE (Jan. 25, 2012), http://americasvoiceonline.org/blog/mitt_romney_talks_self-deportation_more_about_what_that_really_means/ [https://perma.cc/99LC-5DLG].

18 Matthew Jaffe, *Gingrich Mocks Romney's "Self-Deportation" Policy*, ABC NEWS (Jan. 25, 2012), https://abcnews.go.com/blogs/politics/2012/01/gingrich-mocks-romneys-self-deportation-policy/ [https://perma.cc/TX9T-6E3F].

19 Kevin Robillard, *Trump: "Self-Deportation" Cost Votes*, POLITICO (Nov. 26, 2012, 3:42 PM), http://www.politico.com/story/2012/11/trump-romneys-crazy-policy-of-self-deportation-cost-votes-084238 [https://perma.cc/8P29-W6S7].

20 In this Article, I refer to "migration" interchangeably with "immigration" and "emigration," since self-deportation policies cause interstate migration. I also address historical periods when the usage of these terms differed from contemporary usage. Neuman, for example, writes that "nineteenth-century usage more frequently referred to 'emigration' and 'emigrants.'" Neuman, *supra* note 15, at 1837 n.19.

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therefore attempted to constrain such settlers by preempting private and unlicensed purchases of native land. Section I.B.1 illustrates how these preemptive measures evolved into doctrine in U.S. removal policy when courts prohibited states from legislating public discrimination. Shortly after the courts checked the states' attempts to create independent self-deportation regimes, the federal legislative and executive branches exercised their supremacy in the realm of removal by undertaking the mass deportation of tribes. Section I.B.2 explores how the nation's experience with Indian Removal influenced its anticipation of abolition. After abolition, the Fourteenth Amendment's prohibition on public discrimination also widely permitted private discrimination, which came to perform new work, as employers increasingly turned to nonwhite foreigners for cheap labor. Subordination, as a mechanism of removal, became a means of regulating both migration and labor at once.

Part II shows how the influx of immigrants to meet these labor needs sparked another round of state and local efforts to legislate public discrimination as a means of promoting self-deportation. Again, courts found these laws preempted by federal supremacy in the realm of removal; these laws again elicited a strong legislative and executive response in the form of a deportation initiative — this time, the establishment of the individual deportation system during the late nineteenth century. Section II.A analyzes the way the national removal system evolved as the federal government developed its deportation system in relation to self-deportation policy. Specifically, the courts have allowed states and municipalities to increase federal direct removal capacity, while the deportation option has allowed the legislative and executive branches to combine direct and indirect methods and expand the range and dynamics of federal removal techniques. Section II.B follows the development of federal self-deportation policy through the end of the twentieth century to the present. Once again, courts preempted discriminatory subfederal self-deportation legislation; and, once more, the federal legislative and executive branches dramatically escalated federal deportation policy in ways that maximize its self-deportation effects. Indeed, the threat of the deportation system has grown so far beyond the government's ability to enforce deportation laws that now, far from obscuring its aim of removal, the public spotlight on deportations has eclipsed the effect of the deportation system's *threat*: the subordination of deportable persons as a means of controlling their labor.

Part III describes the lessons that this history imparts for our understanding of self-deportation policy and U.S. immigration law more broadly. It focuses on how the creation of the deportation system transformed a policy marked by distinct delegations to subfederal and private entities, before discussing the policy's structural limitations and costs. The range of actors that the government depends upon to carry out self-deportation policies includes private entities, states, and cities. States and cities have frequently pursued the removal of unwanted populations

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by attempting to pass independent self-deportation legislation, openly articulating tenets of a policy that otherwise tends to work in understated and nonmaximalist registers. Following colonial strategies of preemption, courts have used the principle of preemption to affirm the federal government's supremacy in the realm of removal and, hence, its coordinating role. When federal courts have checked states and cities in this way, the legislative and executive branches have repeatedly responded to states' and cities' expressions of agitation with harsh national direct deportation initiatives. These developments include the mass deportation of tribes in the 1830s, the creation of the deportation system during the era of Chinese Exclusion, and the streamlining of deportation processes to facilitate mass removal that is ongoing now.

These repeated subfederal attempts to introduce such legislation have occasioned an explicit conversation between state actors about self-deportation that lies at the surface of an immigration system permeated by the logic of the policy. Indeed, the debates over this legislation represent rare instances where policymakers have both explicitly advocated for self-deportation and rejected it. These clear expressions notwithstanding, the phenomenon I describe below is not one characterized by global intent. Rather, the development of self-deportation policy reflects the outcomes of the aggregate actions of a multitude of different agents, both public and private, whose incentives and berth of action have been guided by institutional structures not of their making, which usually long preceded these agents' entry into the arena of removal. The arc of this history furthermore reflects only the prevailing trends that have emerged from a series of highly contested debates over national removal policy in every instance. Though self-deportation has worked across a range of historical circumstances, it has largely escaped assessment and analysis, likely because its indirect design evolved from colonial policies meant to obscure the goal of removal and thereby guard settler-tribal diplomatic relations. The legacy of this history is an indirect system for regulating migration that is diffuse in its operation and whose component provisions are more difficult to detect than laws that announce their purpose of regulating migration or border crossings.[21] Most operate not independently, but together and with background conditions, to produce compounded effects, which government actors do not oversee and thus cannot measure or record.[22]

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[21] Professors Adam Cox and Eric Posner have argued that the "second-order" question of institutional design is critically important, but often overshadowed by "first-order" questions concerning immigration law's substantive goals. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811–12 (2007).

[22] These laws are characteristic of a legal system that governs in "disjointed and indirect modes." Desmond King & Robert C. Lieberman, *The Civil Rights State: How the American State Develops Itself*, *in* THE MANY HANDS OF THE STATE 178, 194 (Kimberly J. Morgan & Ann Shola Orloff

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Far from a passing phenomenon, self-deportation forms both the fuel and firmament of national removal policy. It has had an influence upon life and migration in America that is both diffuse and, as Isabel Wilkerson wrote of the Great Migration, "so vast that, throughout history, it has most often been consigned to the landscape, rarely the foreground."[23] Its mechanism, which Safire described as "[a]n incentive called misery,"[24] now affects the lives of minority groups within a consolidated territory, rather than communities external to one that is expanding. Consequently, in addition to causing removal and deterring entry — functioning as "get out" *and* "stay out" laws[25] — self-deportation subordinates the target group. This subordination necessarily outsizes any migration the laws can provoke, since all those who leave will suffer, while not all those who suffer will leave.

This Article illuminates a locus of uncontrolled and hidden power in United States immigration policy that is urgent to comprehend as self-deportation policy enters a new stage in the twenty-first century. At a time when policymakers' vociferous advocacy for self-deportation is still fresh, it is critical to honestly assess the mechanisms and major actors of a ubiquitous mode of immigration regulation that has heretofore largely escaped acknowledgment or examination. Without such a reckoning, the optics of self-deportation policy that make it so elusive create conditions under which policymakers can misunderstand or disavow responsibility for the effects of their own policy.[26] This analysis finally underscores the extent to which the policy has depended on the actions of local and private entities who help shape its target: people's everyday lives. Building on its observations of how the policy delegates power to private and subfederal entities, this Article concludes by highlighting the limitations on the government's ability to take that power back.

I. HISTORICAL PRECEDENTS OF SELF-DEPORTATION

From the early colonial period, American lawmakers contemplated the mass removal of groups they viewed as outside their polity, including natives, American-born black people, and nonwhite immigrants, and

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eds., 2017). Work in the field of American political development, inspired by legal realism, increasingly recognizes indirect law and policymaking as the principal mode of operation for the American state. *See, e.g.*, William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 763 (2008).

[23] WILKERSON, *supra* note 2, at 13.

[24] Safire, *supra* note 1.

[25] Chan, *supra* note 16, at 816.

[26] In 2013, Reince Priebus, then Republican National Committee Chairman, specifically objected to the *term* "self-deportation," calling Romney's use of the word "horrific," and added that "[i]t's not something that has anything to do with our party." Aaron Blake, *Priebus: Romney's Self-Deportation Comment Was "Horrific*," WASH. POST (Aug. 16, 2013), https://wapo.st/16QEhMN [https://perma.cc/7ZCB-8JAZ].

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repeatedly considered using indirect legal strategies that targeted the lives of these groups to remove them.[27] Part I traces the development of indirect removal strategies from the colonial period through the nineteenth century. Section I.A describes how colonists came to rely first on indirect methods to remove native peoples, and then preemption as a means of controlling this approach. Though the British Crown's attempt to similarly restrain the colonies through preemption provided part of the impetus for independence, as section I.B.1 relates, the United States immediately adopted identical preemptive measures to coordinate settlers' actions with its own. When states tested the limit of these contraints and attempted to institute independent self-deportation policies, courts insisted on federal supremacy over removal, prompting the executive and legislative branches to move forward with a direct deportation effort to supplement their indirect approach: the mass deportation of tribes. Section I.B.2 shows how these dynamics in removal policy reappeared during debates over how to remove freed slaves during the antebellum period, culminating in abolition, the passage of the Fourteenth Amendment, and the search for new sources of cheap labor and new forms of labor control.

A. Indian Removal in the Colonies: An Indirect Strategy that Obscured Its Own Aim

The first two centuries of Indian Removal represent the earliest development of indirect removal laws in America. The colonies, to some extent, also engaged in the practice of directly removing individuals by enforcing "poor laws," more commonly known as laws of settlement and removal, which provided for the removal of indigent people to their home parishes on the public fisc. Usually, individuals were removed to neighboring parishes, but sometimes parishes paid their fare back to their country of origin.[28] Writing about similar poor laws passed by states during the first century of the United States, Professors Gerald Neuman and Hidetaka Hirota have pointed out that the antecedents of the individual deportation system lie in this history of expulsion of the poor.[29]

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[27] In each of these examples, the consideration of indirect removal tactics reached the level of a national conversation. While this Article focuses on the history of the development of this specific approach to removal, in each instance the approach constituted but one of many ways — including programs to encourage assimilation and detention or incarceration — through which governments variously sought to manage and control these different groups.

[28] *See* Nian-Sheng Huang, *Financing Poor Relief in Colonial Boston*, 8 MASS. HIST. REV. 73, 77 (2006); Howard Mackey, *Social Welfare in Colonial Virginia: The Importance of the English Old Poor Law*, 36 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 357, 360 (1967); Howard Mackey, *The Operation of the English Old Poor Law in Colonial Virginia*, 73 VA. MAG. HIST. & BIOGRAPHY 29, 38–39 (1965).

[29] *See* HIDETAKA HIROTA, EXPELLING THE POOR 9 (2017); Neuman, *supra* note 15, at 1846–59.

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While colonies occasionally directly deported individuals, the bulk of removal that colonial governments sought to control and manage was indirect. British colonists' primary interest in North America, before long, became the appropriation of land on a vast scale.[30] As Professor Christopher Tomlins notes, the elevation of "land over people as the primary object of the colonizer's attention" during the late seventeenth century was "a peculiarity of the English" that "rearranged both the legalities and the institutional mechanisms of colonizing accordingly."[31] The main prerequisite to colonists' ability to take possession of lands was the mass removal of the people who lived on them. Colonists had no capacity to do so directly. However, they quickly realized that their own settlement created hostile conditions that caused native peoples to remove themselves without always being legible as an assault on tribes that would lead them to declare war.[32] Colonists therefore pursued an indirect removal policy by passing laws and building institutions that had the effect of attacking native peoples' lives from every angle, impacting their health, safety, and freedom of mobility, and their ability to find food, shelter, and maintain kinship bonds and political orders. Importantly, if colonists caused tribes to "self-deport," in so doing, they did not expel tribes from territories that were already in colonists' possession. Rather, colonists first claimed territories as their own by expelling tribes. Their settlement everywhere constituted encroachment.

As I describe below, the colonial period constituted an experimental incubation period for the indirect approach of removal through settlement that, by the time of the Revolutionary War, had become a well established and favorite tool. Where direct removal would have immediately triggered war, indirect removal methods offered the advantages of cost efficiency and preserving settlers' diplomatic position vis-à-vis tribes. In 1783, General Philip Schuyler therefore advised Congress:

> [A]s our settlements approach their country, [the tribes] must, from the scarcity of game, which that approach will induce to, retire farther back, and dispose of their lands, unless they dwindle comparatively to nothing, as all

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[30] *See* BERNARD BAILYN, THE PEOPLING OF BRITISH NORTH AMERICA 66–67 (1986) ("Land speculation was everyone's work and it affected everyone . . . . Every farmer with an extra acre of land became a land speculator — every town proprietor, every scrambling tradesman who could scrape together a modest sum for investment.").

[31] CHRISTOPHER TOMLINS, FREEDOM BOUND 133 (2006).

[32] Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1146 (2000). Further, comparing English colonization to Spanish colonization, Professor Eric Kades writes that "[t]he difference between the two colonial methods was simple: the Americans engaged in widespread agricultural settlement; the Spanish generally did not." *Id.*

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> savages have done . . . and thus leave us the country without the expence of a purchase, trifling as that will probably be.[33]

Two months later, George Washington endorsed Schuyler's view in a letter:

> [T]he Indians . . . will ever retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy; That it is the cheapest as well as the least distressing way of dealing with them, none who are acquainted with the Nature of Indian warfare, and has ever been at the trouble of estimating the expence of one, and comparing it with the cost of purchasing their Lands, will hesitate to acknowledge.[34]

When the war ended, the new federal government worried about the fiscal and human resources it would require to directly remove native peoples from the lands the British surrendered to it.[35] In 1789, Secretary of War Henry Knox observed that "the finances of the United States would not at present admit of the operation [of military conquest],"[36] and opined, "it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number."[37] Settlement, he reiterated, would achieve the same effect: "As the settlements of the whites shall approach near to the Indian boundaries established by treaties, the game will be diminished, and the lands being valuable to the Indians only as hunting grounds, they will be willing to sell further tracts for small considerations."[38]

The legacy of this policy in the context of Indian Removal has been obscured, however, by a public narrative that has rendered such active decisionmaking as passive circumstance.[39] In the judicial record, for example, Chief Justice Marshall, in his infamous 1823 opinion in *Johnson v. M'Intosh*,[40] noted that colonial settlement had the effect of displacing the native peoples: "As the white population advanced, that

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[33] Letter from General Philip Schuyler to the President of Congress (July 29, 1783) (on file with the National Archives, Washington, D.C.).

[34] Letter from George Washington to James Duane (Sept. 7, 1783) (on file with the Library of Congress).

[35] *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 130–32 (2005).

[36] Report of Henry Knox on the Northwestern Indians (June 15, 1789), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 12, 12 (Francis Paul Prucha ed., 3d ed. 2000). Conquering the Wabash, Knox estimated, would require an army of at least 2500 men and sums "far exceeding the ability of the United States to advance." *Id.* at 13.

[37] *Id.*

[38] *Id.*

[39] For an in-depth analysis of this narrative phenomenon, and more specifically of the construction of "replacement narratives" in New England during the colonial period and the period of the early Republic, see JEAN M. O'BRIEN, FIRSTING AND LASTING 55–104 (2010). For an analysis of practices of discursive as well as material foreclosure that have characterized accounts of indigenous dispossession through the colonial economy, see K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & SOC. INQUIRY 1006 (2016).

[40] 21 U.S. (8 Wheat.) 543 (1823).

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of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed."[41]

As I will show, however, the white population "advanced" only through a mighty coordinated legislative effort by colonists to make it impossible for indigenous communities to stay in their homelands. The colonists' obvious inability to forcibly remove native peoples during the early colonial period worked in their favor by giving their claims to seek peaceful coexistence with tribes some credibility. However, as settlers grew in numbers, territory, and power, their increasing aggression against tribes threatened to provoke wars and jeopardize colonies' indirect removal and expansion projects. As a result, from the early period, colonial governments passed numerous preemption laws forbidding private purchases of native lands in an attempt to coordinate settlers' actions with their own.

As a background matter, the first settlers in America found their very arrival depopulated the lands. Wherever settlers arrived, they spread diseases and caused epidemics with mortality rates that, because of indigenous people's lack of immunity, frequently rose as high as eighty or ninety percent of a village's population.[42] Early settlers found the phenomenon favorable to their colonization.[43] The decimating effects of disease allowed many settlements in New England to find their footholds without going to war with native inhabitants, or to quash burgeoning conflicts.[44] Many indigenous people also "quickly learned that the new diseases could be escaped only by casting aside family and community ties and fleeing"; in the 1640s, Roger Williams observed that "[s]o terrible is their apprehension of an infectious disease that not only persons, but the Houses and the whole Towne takes flight."[45] Colonists built more than fifty early settlements on the sites of villages destroyed and vacated by disease.[46]

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[41] *Id.* at 590–91.

[42] WILLIAM CRONON, CHANGES IN THE LAND 86 (1983); Alfred W. Crosby, *Virgin Soil Epidemics as a Factor in the Aboriginal Depopulation in America*, 33 WM. & MARY Q. 289, 290 (1976).

[43] After a devastating epidemic among the Native Americans from 1616 through 1618, Plymouth colonists who came to settle in southern New England observed that there were "none to hinder our possession." NEAL SALISBURY, MANITOU AND PROVIDENCE 175 (1982); *see also* CRONON, *supra* note 42, at 87.

[44] When colonists' presence incited a "quarrell" with the Massachusett and Pawtucket "about their bounds of Land," the arrival of several thousand settlers brought an epidemic that destroyed the conflict with the tribes. SALISBURY, *supra* note 43, at 192.

[45] CRONON, *supra* note 42, at 88.

[46] *Id.* at 90. Professor John Duffy described smallpox as a "dangerous ally" that "was frequently a decisive factor in the victories of the Europeans over the Indians." John Duffy, *Smallpox and the Indians in the American Colonies*, 25 BULL. HIST. MED. 324, 341 (1951). U.S. Army medical officer Percy Moreau Ashburn similarly reflected that weapons, smallpox, and other eruptive fevers were

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Colonists who pursued settlement as a policy sought to facilitate Europeans' migration to America.[47] However, as Professor Bernard Bailyn writes, "the actual organizing, supplying, shipping, and settling of people on the land was difficult and expensive, and hence risky."[48] For settlers, overseas migration was also costly and arduous, and settlement was fraught with risks of illness, starvation, and unnatural death. To recruit settlers, colonial authorities therefore promised them title to lands if they would occupy them.[49] In the service of this policy, colonies gave away so much land that Senator Thomas Hart Benton described the thirteen colonies as having been "settled upon gratuitous donations, or nominal sales."[50] For decades, Virginia shareholders received fifty acres for every person they transported to the colony.[51] Lord Baltimore promised every head of a household one hundred acres for settling in Maryland, one hundred more for bringing a wife and for each adult servant, and fifty acres for each child under sixteen years.[52] Any adventurer who brought five men between the ages of sixteen and sixty received 2000 acres in 1633, 1000 acres in 1635, and 50 acres for each man in 1641.[53] The Carolinas promised emigrating "undertakers" 100 acres, 50 acres for each male servant, and 30 acres for each female servant.[54] Georgia offered every immigrant fifty acres,[55] and Massachusetts

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"more effective, of greater range, of surer aim than any rifle or poison gas ever devised." P.M. ASHBURN, THE RANKS OF DEATH: A MEDICAL HISTORY OF THE CONQUEST OF AMERICA 81 (Frank D. Ashburn ed., 1947).

47 Professor Aziz Rana also traces "this openness to European immigration" into the period of the early Republic. *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 116 (2010).

48 BAILYN, *supra* note 30, at 81.

49 These challenges to emigration and the importance of the promise of land ownership continued to be factors in settlement into the period of the early Republic, as Professor James Pfander and Theresa Wardon observe in the context of their discussion of early U.S. naturalization policy. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 365–66, 376–77 (2010).

50 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 106 (New York, D. Appleton & Co. 1854).

51 The Charter of 10th of Oct. 1676, *in* 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 532, 532 (New York, R. & W. & G. Bartow 1823) [hereinafter LAWS OF VIRGINIA]; Instructions to Governor Yeardley, 1618, *in* 2 VA. MAG. HIST. & BIOGRAPHY 154, 157, 164 (1894). In or around 1614, Governor Dale promised every man who brought a family to the Virginia colony a house with four rooms and twelve fenced acres adjacent to the house. RALPH HAMOR, A TRUE DISCOURSE OF THE PRESENT ESTATE OF VIRGINIA 19 (Richmond, Virginia State Library 1860).

52 Conditions of Plantations, 1636, *in* 3 PROCEEDINGS OF THE COUNCIL OF MARYLAND 1636–1667, at 47, 47 (Baltimore, Maryland Historical Society 1885).

53 EUGENE IRVING MCCORMAC, WHITE SERVITUDE IN MARYLAND 13–15 (1904); Conditions of Plantations, 1636, *supra* note 52, at 47–48, 99–100.

54 A Declaration and Proposals to All that Will Plant in Carolina (Aug. 25, 1663), *in* 1 COLONIAL RECORDS OF NORTH CAROLINA 43, 45 (Raleigh, P.M. Hale 1886).

55 AN ACCOUNT SHOWING THE PROGRESS OF THE COLONY OF GEORGIA IN AMERICA, FROM ITS FIRST ESTABLISHMENT 6 (Annapolis, Jonas Green 1741).

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Bay Company gave stockholders fifty acres for every person they transported.[56]

While colonial governments were making regular overtures to tribes to attempt to maintain diplomatic relations, they simultaneously engaged private citizens in the project of Indian Removal by linking settlers' private incentives to their own ends. This strategy gave private individuals an inordinately large role to play in land acquisition and Indian Removal, which constituted a single project. Colonial officials used legal rules to "channel[] settlement to maximize" the deleterious effects of settlers' everyday lives on native peoples, which included not only spreading disease but also thinning game and destroying native peoples' means of subsistence.[57] Laws of settlement placed conditions on land bounties, including requirements that settlers occupy and "improve" the lands by building on them, clearing them, planting crops, and keeping stock, within a term of years.[58] Colonists deforested the lands to build ships, houses, and furniture and to burn firewood, thereby exposing the soil and causing extreme temperatures, floods, and droughts.[59] English mill dams obstructed indigenous peoples' ability to fish. English cows and pigs ate Indian crops and grass that animals indigenous to the territory had fed on.[60] As a result of this range of activities, indigenous people who survived disease frequently could no longer find basic subsistence or stay in their homelands. As Professor William Cronon has commented, "the Indians' earlier way of interacting with their environment became impossible."[61]

Colonies also made larger grants to skilled laborers who established businesses in powder, printing, iron works, mining, salt works, and

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[56] 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 43 (Boston, W. White 1853).

[57] Kades, *supra* note 32, at 1072.

[58] Amelia Clewley Ford, *Colonial Precedents of Our National Land System as It Existed in 1800*, 2 BULL. U. WIS. 323, 423 (1910). In Virginia, for example, within three years, settlers had to build a house, plant one acre, and keep stock for one year, or the land would revert to the colony, Act XVIII, An Act for Seating and Planting, *in* 2 LAWS OF VIRGINIA, *supra* note 51, at 244, 244; later, settlers could not claim land entitlements unless they raised a crop of corn or resided on lands for one year, 2 REVISED CODE OF THE LAWS OF VIRGINIA 358 (n.p., 1819). In Maine, for example, settlers had to build a house of eighteen square feet and clear five to eight acres for mowing and tilling within three years. 2 WILLIAM D. WILLIAMSON, THE HISTORY OF THE STATE OF MAINE 180 (Hallowell, Glazier, Masters & Co. 1832).

[59] CRONON, *supra* note 42, at 111–21 ("New England lumbering used forests as if they would last forever." *Id.* at 111.).

[60] *See* VIRGINIA DEJOHN ANDERSON, CREATURES OF EMPIRE: HOW DOMESTIC ANIMALS TRANSFORMED EARLY AMERICA 221 (2004).

[61] CRONON, *supra* note 42, at 15. These factors led to the demise of white deer, elk, bear, lynx, beaver, otter, foxes, martens, minks, raccoons, and muskrats in New England. *Id.* at 99, 101, 105–07.

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copper works.[62] Colonial authorities especially rewarded settlers who promoted and governed settlements[63] and who engaged in armed combat. In general, settlers arrived armed and ready to defend the lands they wished to claim.[64] Many colonial laws required settlers to bear arms, even at church, and forbade selling arms to natives. In 1646, Virginia granted 100 acres to the commander at Middle Plantation, and in 1679, it conditioned large land grants to military leaders on settling the land with 250 men, fifty of whom were to be well armed and always ready for conflict.[65] Connecticut granted Captain John Mason 1000 acres for serving in the Pequot massacre, whose survivors fled west to seek refuge with the Mohawks.[66]

Though some communities simply fled disease, colonial officials also quickly learned that creating these new conditions made native people more likely to sell their land. Indeed, colonists came to view this kind of devastation as a precondition to their ability to purchase lands. In Tomlins's words, their purchases of native land were always "larded with menaces."[67] As Professor Stuart Banner explains: "Repeated encroachment must have tipped Indians toward selling land they would not have otherwise sold, as a means of obtaining some recompense for a state of affairs they had great trouble preventing . . . . Every increase in the English population gave the Indians more reason to sell their land."[68] By the eighteenth century, settlers were rapidly converting native "lands into commodities transferable out of the Indian community, creat[ing] the conditions for a vigorous land market that attracted

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62 For example, one man, for 3000 acres, covenanted to bring twenty people from England to Maryland who were "Artificers, Workmen, and other very useful persons." JOHN KILTY, THE LAND-HOLDER'S ASSISTANT, AND LAND-OFFICE GUIDE 79 (Baltimore, G. Dobin and Murphy 1808). Captain Thomas Barwick received at least 1200 acres in 1622 for bringing twenty-five shipwrights to Virginia to build houses, boats, and pinnaces. ALEXANDER BROWN, THE FIRST REPUBLIC IN AMERICA 474 (Boston and New York, Houghton, Mifflin & Co. 1898).

63 MELVILLE EGLESTON, THE LAND SYSTEM OF THE NEW ENGLAND COLONIES 20 (Herbert B. Adams ed., Baltimore, Johns Hopkins University 1886).

64 Ford, *supra* note 58, at 423–24 ("The policy gradually developed of using military bounties to promote compact settlement on the frontier by men able to defend it, and in this way to secure protection without the expense of a standing army."). Professor Wendy Warren recently made a similar argument by pointing out that Plymouth, like other early settlements, was a garrison. *See* WENDY WARREN, NEW ENGLAND BOUND 84 (2016).

65 LYON GARDINER TYLER, WILLIAMSBURG, THE OLD COLONIAL CAPITAL 12 (1907); An Act Enabling Major Laurence Smith and Capt. William Bird to Seate Certaine Lands at the Head of Rappahannock and James River, *in* 2 LAWS OF VIRGINIA, *supra* note 51, at 448, 452–53.

66 *See* J. HAMMOND TRUMBULL, 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT PRIOR TO THE UNION WITH NEW HAVEN COLONY 208 (Hartford, Brown & Parsons 1850); NEW ENGLAND HISTORICAL AND GENEALOGICAL REGISTER 345 (1943).

67 TOMLINS, *supra* note 31, at 151.

68 BANNER, *supra* note 35, at 54.

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English speculators and new English residents into the community."[69] Meanwhile, landless native people who remained within a growing settler society could find only menial work, frequently became entrapped in debtor-creditor relationships and indentured servitude, and lost their children to English guardians, who claimed expenses that increased native debt, forcing them to sell remaining lands to pay.[70] Native people who wished to challenge any of this faced a costly, biased, and English-controlled legal system. Colonies' Black Codes further restricted the mobility of nonwhites, including natives, through curfews, which prohibited travel and gatherings.[71]

In many colonies, individuals and groups of private citizens, as well as colonial officials, purchased lands directly from native people. Indeed, a talent for acquiring native lands through negotiation, purchase, or war frequently propelled individual settlers into governing positions in the colonies.[72] However, settlers' steady encroachment onto and dispossession of native lands generated conflicts with tribes that both erupted into bloody wars and raised the constant threat of war.[73] In an effort to reduce the instances of war, nearly every colony therefore passed laws prohibiting trespass and waste on native lands, as well as private purchases of native lands without official order or leave of a court. These laws first appeared in the 1630s in Massachusetts Bay Colony and Maryland[74] and continued to proliferate through the end of the seventeenth century.[75] Some laws preempted private purchases by

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[69] JEAN M. O'BRIEN, DISPOSSESSION BY DEGREES 170 (1997); *see also id.* at 151 ("[T]he individualization of landownership that made a land market possible constituted the most significant structural alteration in the Indian community in the eighteenth century.").

[70] *Id.* at 132–33.

[71] Colonies applied laws to subordinate free blacks to mixed race and native persons as well. The examples are too numerous to list, but for a sample of such laws in several colonies, see JOHN B. DILLON, ODDITIES OF COLONIAL LEGISLATION IN AMERICA 203–42 (Indianapolis, Robert Douglass 1879). For a succinct description of such laws in Massachusetts Bay, see YASUHIDE KAWASHIMA, PURITAN JUSTICE AND THE INDIAN 206–16 (1986).

[72] JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS 18 (1991).

[73] For example, the Anglo-Powhatan Wars, Kieft's War, Metacom's War, the Susquehannock War, the Yamasee War, Father Rale's War, and others.

[74] Mass. Bay: Law to Prohibit Unauthorized Purchase of Indian Land (Mar. 4, 1634), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, at 81 (Alden T. Vaughan & Deborah A. Rosen eds., 2004) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS]; Laws Concerning Indians in Code of 1648, *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra*, at 102 (codifying 1634 law); Md.: Law to Regulate Land Purchases (Feb. 25–Mar. 19, 1639), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra*, at 259.

[75] *See, e.g.*, N.Y.: Law to Prevent Trespasses on Indian Lands (May 9, 1640), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 493; N.H.: Order to Regulate Purchase of Indian Lands (Feb. 3, 1641), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 22; Plymouth: Law to Protect Indians' Land and Timber (June 6, 1643), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 13; New Haven: Law to Prohibit Unauthorized Acquisition of Land (Feb. 24, 1645), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 395; Law to Prevent Individual Purchases of Land (Jan.

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delegating purchasing power to townships and specific counties;[76] as time went on, colonies passed laws increasing the penalties for violations, in an effort to send a message to tribes as much as to settlers themselves.[77]

The acceleration of land appropriation and removal in the eighteenth century intensified settler-native conflicts and made the threat of war omnipresent,[78] spurring a concerted attempt by colonies to preempt

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4, 1640), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 393; Va.: Law to Preserve Indian Territory (Oct. 10, 1649), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 41–42; Law to Christianize Indians and Regulate Land Sales (Mar. 10, 1656), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 47–48; Law to Protect Indians' Land (Nov. 25, 1652), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 43–44; Conn.: Law to Prohibit Taking Indians' Property (Oct. 4, 1660), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 280; Law to Prohibit Acquisition of Indian Land for Private Use (May 14, 1663), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 282 ("[N]o person in this Colony shall buy, hire or receive as a gift or mortgage, any parcel of land or lands of any Indian or Indians, for the future, except . . . with the allowance of the Court."); N.J.: Law to Acquire Land from Indians in West New Jersey (May 2–15, 1683), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 668; Law to Require Permission to Buy Indian Lands (Sept. 8, 1683), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 668; N.H.: Law to Regulate Purchase of Indian Lands (June 1, 1687), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 227; N.Y.: Law to Regulate Purchase of Indian Lands (Oct. 23, 1684), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 530; Pa.: Law to Regulate Purchases of Land from Indians (Mar. 10, 1683), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 733; Law to Nullify Unauthorized Land Purchases (Nov. 27, 1700), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 735.

[76] *See, e.g.*, Conn.: Law to Clarify Purchase of Indian Lands (Oct. 8–14, 1702), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 318; Va.: Law to Allow Northampton County to Purchase Indian Lands (Nov. 20, 1654), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 46–47.

[77] *See, e.g.*, R.I.: Law to Regulate Purchase of Indian Lands (Nov. 4, 1651), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 420; Law to Prohibit Unauthorized Land Purchases (Nov. 2, 1658), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 423; Law to Prevent Illegal Purchases of Indian Land (Oct. 25, 1727), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 459; Mass. Bay: Order to Regulate Land Purchases (June 1, 1687), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 143; Conn.: Law to Prohibit Purchase of Indian Lands (May 17, 1680), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 311; Law to Regulate Purchase of Indian Lands (June 1, 1687), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 314; Law to Regulate Purchase of Indian Lands (Oct. 11, 1722), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 340; N.J.: Law to Regulate Purchases of Indian Lands (Dec. 13, 1703), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 678; N.H.: Law to Regulate Purchases of Land from Indians (May 2, 1719), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 235.

[78] Military leaders drew from some of the lessons of settlement. In 1763, Captain Simeon Ecuyer famously sought to "exterminate[]" the Delawares at "one single stroke" by giving two Delaware leaders infected blankets and handkerchiefs; a receipt initialed by top British brass noted that the purpose was "to Convey the Smallpox to the Indians." GREGORY EVANS DOWD, WAR UNDER HEAVEN 190 (2002); *see also* FRANK FENNER ET AL., SMALLPOX AND ITS ERADICATION 239 (1989).

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private purchase of native lands.[79] Nonetheless, the colonies both embroiled themselves in quarrels with one another and collectively brought settler-tribal relations to the brink of a general war. In a bid to reassert control of the colonization effort and reassure tribes of the Crown's good will, King George III issued the Royal Proclamation of 1763. The Proclamation forbade all settlement west of a boundary line drawn along the Appalachian Mountains and preempted both private purchases and colonial officials' power to grant lands.[80]

Settlers' aggression so exposed the colonial goal of removal that it jeopardized colonies' relations with one another and threatened colonial officials' ability to maintain diplomatic ties with tribes. In other words, private individuals' hunger for land threatened to destroy the alignment between private interests and official interests in maintaining control of the territory by avoiding war. Colonies therefore preempted private purchases of native lands in an attempt to coordinate removal policy. The Crown — similarly wary of colonial governments' ability to avoid war with native nations or one another — took a similar approach with its Proclamation. Colonists' resounding rejection of this attempt to restrain their land acquisition, however, culminated in the Revolution, bringing the history of removal to its next chapter. As I will show in the next section, the model through which private citizens had sought to recursively *realize* the Lockean ideal of "vacant lands" by causing native people to remove themselves became the prototype for removal in the new nation.[81] Further, despite the unpopularity of the Proclamation, the principle of preemption both preceded and survived it to structure land and removal policy in the United States.[82]

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[79] *See, e.g.*, Pa.: Law to Regulate Purchases of Land from Indians (Feb. 14, 1730), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 755; S.C.: Law to Prevent Purchase of Indian Lands (Dec. 18, 1739), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 295–96; Ga.: Law to Regulate Purchase of Land from Indians (Feb. 15, 1758), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 406; Md.: Law to Determine Indian-English Controversies (May 1, 1756), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 339; Va.: Law to Prevent the Dispossession of Indians (Feb. 27, 1752), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 195.

[80] In the following years, Pennsylvania passed laws imposing punishments for violations of the Proclamation that included "death without the benefit of clergy," imprisonment, and a £500 fine. Law to Proscribe Settlement on Indian Lands (Feb. 3, 1768), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 781; Law to Amend Prohibition Against Settling on Indian Lands (Feb. 18, 1769), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 74, at 785.

[81] *See generally* Robert Nichols, *Theft Is Property! The Recursive Logic of Dispossession*, 46 POL. THEORY 3 (2017).

[82] For a fuller elaboration of this argument, see Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

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B. U.S. Removal Policy During the Early Republic

Despite the outrage inspired by the Proclamation of 1763, the United States recognized immediately after its founding the necessity of having a mechanism for coordinating removal policy. Early on, it therefore incorporated preemption provisions that mirrored those of the hated Proclamation into its own land and removal policy. Before long, these constraints provoked states to attempt to create their own independent self-deportation regimes by legislating public discrimination. As in the colonies, this subfederal legislation misaligned state and federal interests, and though it drew on indirect principles — attacking every aspect of native peoples' lives — it made the removal aim overt and the tactic of discrimination painfully clear. Moreover, the limited scope of these laws promised spillover effects that risked further destabilizing interstate relations. Perhaps for all these reasons, federal courts struck this legislation down. This section examines the development of the preemption principle in removal federalism in the context of debates about self-deportation and mass deportation in the early Republic. It shows how the nation's experience with Indian Removal shaped its anticipation of and responses to abolition: the Fourteenth Amendment, for example, codified the courts' prohibition on public discrimination and affirmed subordination as the purview of private citizens. Emancipation also set the stage for the next chapter of removal history by sparking a search for new sources of cheap labor and new ways of controlling it. Abolition shifted the property interests driving removal policy from land acquisition to control of labor.

1. Indian Removal in the United States: The Coordinating Function of Preemption in Self-Deportation Policy. — In its first decades, the federal government continued to pursue Indian Removal principally through a combination of indirect methods and outright warfare, as the colonies had done for two centuries.[83] Soon after the formation of the United States, the federal government also asserted control over the land market to try to keep the states from going to war with each other and with tribes.[84] It preempted the direct purchase of tribal land by any entity other than itself, creating a centralized structure through which it coordinated national removal policy.[85] As a result, the new states could

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[83] In a trend so broad that it is not useful to single out any scholar as an example, the literature frequently employs the term "Indian Removal" to refer to direct removals, rather than self-deportation. However, Banner presents an exception to this rule when he observes, "If the 1830s were an era of removal, so too were the previous two centuries," for "most of the features of U.S. government policy that are conventionally thought to make up Indian removal were nothing new." BANNER, *supra note* 35, at 192.

[84] For a detailed account of how the United States came to consolidate federal power in the area of land policy and Indian affairs during the period of the ratification of the Constitution, see Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1038–50 (2014).

[85] Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (1982)).

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not purchase lands from tribes who remained within their territorial boundaries, nor, therefore, remove them. In theory at least, they had to wait for the federal government to act. States' impatience with and challenges to the federal government's preemptive power sparked the first federalism disputes in the field of removal and culminated in the only mass deportations, in a strict sense, in the nation's history.

New circumstances in the United States whetted both the federal and state appetites for a faster, more aggressive means of land acquisition and removal. The federal government urgently desired to take possession of the lands the British had surrendered to it under the Treaty of Paris to pay off its considerable war debt. Meanwhile, many eastern states had taken possession of sufficient lands that they sought to claim total jurisdiction within their territorial boundaries.[86] Federal and state governments as well as private entities all continued to encourage settlement on native lands and, thus, ensured that private individuals would continue to play a major role in Indian Removal. Congress made a series of early land grants to settlers who would defend against immediate "threats," especially along contested borders in the Mississippi, Louisiana, Missouri, and Michigan Territories.[87] Even before the war had ended, new states including Virginia, North Carolina, and Massachusetts adopted systems of free land grants, and states with large backcountry regions, such as Pennsylvania, Minnesota, and Wisconsin, continued to recruit settlers from the East Coast and Europe for the next century,[88] like the federal government.[89]

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[86] *See* BANNER, *supra* note 35, at 147 ("Americans now wanted to obtain the Indians' land more quickly, too quickly for the old method of patient, parcel-by-parcel purchasing. There were now too many emigrants to the west, and too much need for the federal revenue the land promised to bring in, to wait for the game to be driven away.").

[87] *See, e.g.*, Act of Mar. 3, 1807, ch. 34, § 2, 2 Stat. 437 (regulating grants of land in Michigan Territory); Act of Mar. 27, 1804, ch. 61, § 13, 2 Stat. 303 (regulating grants of land in Louisiana Territory, present day Missouri); Act of Mar. 3, 1803, ch. 27, § 17, 2 Stat. 229 (disposing of land in Mississippi Territory); Act of Mar. 3, 1791, ch. 27, 1 Stat. 221 (giving 400 acres to individuals who were "heads of families at Vincennes or in the Illinois country" as of 1783); Letter from President George Washington to Congress (Dec. 23, 1790), *in* ANNALS OF CONGRESS 1826 (Joseph Gales ed., 1834).

[88] EDITH ABBOTT, HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM 129–32, 167–72, 732–33 (1926) (collecting documents describing state efforts to recruit settlers).

[89] In the nineteenth century, the federal government continued to pass legislation to subsidize land and lure settlers to territory still under native control, including the Armed Occupation Act of 1842, ch. 122, 5 Stat. 502; the Homestead Act of 1862, ch. 75, 12 Stat. 392; the Southern Homestead Act of 1866, ch. 127, 14 Stat. 66; and the Timber Culture Act of 1873, ch. 277, 17 Stat. 605. Settlers also continued to spread disease that greatly afflicted tribes across the West. *See, e.g.*, JEFFREY OSTLER, THE PLAINS SIOUX AND U.S. COLONIALISM FROM LEWIS AND CLARK TO WOUNDED KNEE 31, 33 (2004); Crosby, *supra* note 42, at 290–91 (describing epidemics in the 1820s and 1830s). Settler-native wars reached their height during this period, and the army used techniques from settlement in these wars, including destroying central plains tribes' main source of food — the buffalo. RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 219 (1991).

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While states tried to use this power by more thickly settling their lands, and though the white and black settler population in Georgia, for example, almost doubled between 1790 and 1800, and again from 1800 to 1820, the Creeks and Cherokees refused to leave.[90] Federal officials "discussed speeding up the process of dispossession," but as Professor Paul Frymer notes, for a few decades, they "remained content to move people via individual treaties and voluntary emigration, efforts that slowly but exhaustively removed Indian title and communities from lands east of the Mississippi."[91] After its purchase of 530 million acres west of the Mississippi in 1803, Congress authorized the President to promise eastern tribes western lands if they would relinquish their own,[92] furnishing the Executive with a new removal tool that overcame a limitation of self-deportation policy — people's inability to leave without somewhere else to go. The government also agreed to cover relocation costs if a tribe would agree to remove. Consequently, thousands of Cherokee moved west of the Mississippi before 1820;[93] between 1817 and 1821, some Cherokees, Shawnees, Delawares, and Kickapoos agreed to ten such exchanges of western for eastern lands.[94] Through the 1820s, the government continued to apply pressure on many tribes, many of whose members, including Oneidas, Kickapoos, Choctaws, and Creeks, continued to cede their land to the United States.[95] Still, in

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[90] BANNER, *supra* note 35, at 195.

[91] PAUL FRYMER, BUILDING AN AMERICAN EMPIRE 114 (2017); *see also* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 123–24 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter AMERICAN STATE PAPERS] (describing Senate proceedings from 1817 regarding land exchanges with tribes); Ronald N. Satz, *The Cherokee Trail of Tears: A Sesquicentennial Perspective*, 73 GA. HIST. Q. 431 (1989). From 1800–1830, the federal government engaged in ninety-one transactions to purchase lands from weary tribes; between 1795 and 1838, the federal government spent more than $80 million to purchase 419.4 million acres of land from tribes. INDIANS REMOVED TO WEST MISSISSIPPI FROM 1789, H.R. Doc. No. 25-147 (1839).

[92] 2 AMERICAN STATE PAPERS, *supra* note 91, at 124–25.

[93] *Id.*; *see also* STANLEY W. HOIG, THE CHEROKEES AND THEIR CHIEFS 104 (1998); Letter from Joseph McMinn, Governor, Tenn., to Daniel Graham, Sec'y of State, United States (Oct. 1, 1818), SOUTHEASTERN NATIVE AMERICAN DOCUMENTS 1730–1842, http://neptune3.galib.uga.edu/ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=GML007 [https://perma.cc/E2ZX-6WQA]; Letter from Joseph McMinn, Governor, Tenn., to Daniel Graham, Sec'y of State, United States (Nov. 19, 1818), SOUTHEASTERN NATIVE AMERICAN DOCUMENTS 1730–1842, http://neptune3.galib.uga.edu/ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=GML011 [https://perma.cc/7VKR-BCK6]; Letter from Joseph McMinn, Governor, Tenn., to Daniel Graham, Sec'y of State, United States (Dec. 11, 1818), SOUTHEASTERN NATIVE AMERICAN DOCUMENTS 1730–1842, http://neptune3.galib.uga.edu/ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=GML010 [https://perma.cc/4P8W-9Q4U] (also available at the Tennessee State Library and Archives, Governor McMinn Letters, Box 10, folder 53).

[94] BANNER, *supra* note 35, at 194.

[95] *See, e.g.*, Treaty with the Creeks, Jan. 18, 1821, 7 Stat. 215; MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL 69–141 (1982) (describing the experiences of the Creeks during this time period); *Creek Indians*, 22 NILES' WEEKLY REGISTER 223 (1824); Letter from Duncan Campbell and James Meriwether, Comm'rs, United States, to Creek Chiefs (Dec. 9, 1824), SOUTHEASTERN NATIVE AMERICAN DOCUMENTS 1730–1842, http://neptune3.galib.uga.edu/

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1825, the War Department estimated that nearly 54,000 native people, including Cherokees, Choctaws, and Creeks, continued to live within the boundaries of Georgia, Tennessee, Alabama, Mississippi, and New York.[96] The Cherokees still held 5.3 million acres of fertile land in Georgia and over a million in Tennessee, while the Creeks held well over 4 million in Georgia and the Choctaw and the Chickasaw held over 15.7 million in Mississippi.[97]

In the late 1820s, impatient southeastern states responded to what they perceived as federal inaction with respect to the issue of Indian Removal. Presaging the subfederal self-deportation legislation of the twentieth and twenty-first centuries, they began to pass legislation that asserted states' rights to initiate indirect removal processes.[98] The Georgia legislature led this effort with a series of "extension laws" that sought to subordinate the Cherokee and establish jurisdiction over all the lands within the state's boundaries. First, in 1827, Georgia assigned Cherokee land to various Georgia counties, denying Cherokee sovereignty and subjecting Cherokees to the state's jurisdiction and laws. In 1828, it formally declared Cherokee laws void within the state. In 1830, it first authorized the state to take possession of all Cherokee gold, silver, and other mines, and then to seize all Cherokee land and distribute it to white settlers. It made it illegal for Cherokees to assemble for any purpose and voided contracts into which they entered.[99] Governor George Gilmer acknowledged these laws "were produced for the sole purpose of making life so miserable for the Cherokees that they would be forced to remove," privately echoing the purpose the legislature had openly declared in 1829.[100] Secretary of War John Eaton argued the laws were "legitimate powers which attach, and belong to [the states'] sovereign character."[101]

Despite technically deploying indirect strategies of removal by attacking Cherokee lives, the extension laws' explicit goals of removal and control of Cherokee lands raised the public debate over this indirect policy to a feverish pitch. A famous legal battle ensued in which the

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ssp/cgi-bin/tei-natamer-idx.pl?sessionid=7f000001&type=doc&tei2id=tcc008 [https://perma.cc/K5CX-XSZY] (also available at the Hargrett Rare Book and Manuscript Library, University of Georgia Libraries, Telamon Cuyler collection, Box 77, folder 33).

96 1 Reg. Deb. app. 63 (1825).

97 *Id.* at app. 61.

98 As Banner comments, "[i]t was only a matter of time before frontier state governments, answerable to white settlers bordering on Indian land, began ratcheting up the pressure on the non-selling tribes by threatening to make life considerably more difficult for Indians who refused to sell their land." BANNER, *supra* note 35, at 213.

99 BANNER, *supra* note 35, at 201; *see also* FRYMER, *supra* note 91, at 116 (describing a January 1828 Georgia resolution asserting title over tribal land within its state boundaries).

100 GARRISON, *supra* note 13, at 107.

101 Letter from John H. Eaton, Sec'y of War, United States, to Cherokee Delegation (Apr. 18, 1829), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 36, at 44, 46.

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Supreme Court ultimately rejected these overt self-deportation laws and refused to allow states to legislate public discrimination in this way.[102] Although the Court affirmed inherent tribal sovereignty in *Worcester v. Georgia*[103] by asserting the federal government's supremacy in the realm of Indian Affairs, the Court also guaranteed the government's prerogative to coordinate the national removal effort.[104] Further, the other branches of the federal government generally acquiesced in the southeastern states' informal refusal to abide by the Court's holding limiting their jurisdiction in *Worcester*. Because these states' courts went on to assert their jurisdiction in dozens of criminal cases with Indian defendants, Professor Tim Garrison concludes that state supreme courts effectively "displaced the Supreme Court's decision," making "southern removal ideology . . . the law of the land."[105] Observing the effects of federal and state nonenforcement, Professor Deborah Rosen comments that "[t]he federal government and the state governments shared an end goal, and they acted in tandem to achieve that goal"[106]: "control of Indians and Indian lands."[107]

This convergence between state and federal interests came into stark relief in the federal government's choice to exercise its supremacy in this realm to pursue a mass deportation plan. After the election of Andrew Jackson, Congress passed the Indian Removal Act of 1830,[108] which appropriated $500,000 for the direct removal of tribes.[109] This Act, by making the threat of mass deportation imminent,[110] had immediate *indirect* effects: its passage spurred more tribes to enter into treaties to

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[102] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). In 1831, the Supreme Court punted on deciding the constitutionality of Georgia's extension laws, but by declining jurisdiction, it limited Cherokee sovereignty by declaring the Cherokee Nation a "domestic dependent nation[]" rather than a "foreign state[]." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 13 (1831). By describing the tribe's relationship to the United States as that of a "ward to his guardian," the Court reinforced the idea of a trust relationship between tribes and the federal government. *Id.* at 17. Chief Justice Marshall's famous decisions "conceived a model that can be described broadly as calling for largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control." CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987). For a concise summary of the significance of these cases, see Angela Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 372–73 (2013).

[103] 31 U.S. (6 Pet.) 515.

[104] *Id.* at 519–20.

[105] GARRISON, *supra* note 13, at 229.

[106] ROSEN, *supra* note 15, at 78.

[107] *Id.* at 78–79.

[108] Ch. 148, 4 Stat. 411 (1830).

[109] *Id.* at 412.

[110] BANNER, *supra* note 35, at 191–93, 227 ("[R]emoval was going on long before the so-called era of removal, and it would go on long afterward." *Id.* at 227.); *see also* FRANCIS PAUL PRUCHA, THE GREAT FATHER 244 (1984) ("Nor was the relation of the United States with these groups in the 1830s, after the passage of the Removal Act, a new departure. Rather, it was a continuation of

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exchange their lands, beginning with the Choctaw in 1830.[111] Still, the Cherokee refused to leave, and in 1835, U.S. statesmen negotiated and ratified with a minority coalition a treaty requiring the tribe to depart, though Cherokee leaders objected that the treaty was fraudulent.[112]

In March 1836, more than two-thirds of the peoples targeted for removal remained on their lands.[113] President Jackson authorized 10,000 volunteer troops to deport them,[114] and in 1838, the U.S. Army interned the Cherokee in Georgia in forts to await mass expulsion.[115] The War Department, woefully and predictably short on funds, allowed Georgia to assist with the deportation effort by directing the troops and requested an additional $1.1 million from Congress.[116] The mass deportation of over 18,000 Cherokee across several hundred miles was an administrative and humanitarian disaster. Between 4000 and 8000 Cherokee died. Many more suffered from dysentery, cholera, malnutrition, and exposure as they walked across the frozen ground and the Mississippi river.[117]

Beyond rooting the removal system in indirect strategies, Indian Removal also served as a testing ground through which the U.S. government developed a coordinated indirect removal policy and flexed its newfound power to experiment with direct mass removal. Critically, it coordinated its own removal efforts with those of states by prohibiting states from legislating public discrimination. By permitting states to continue recruiting settlers who would engage in hostilities and discrimination on the ground, however, the federal government continued to delegate the work of subordination to the private sphere instead. From its evolving seat of power, it further undertook the mass deportation of eastern tribes and, there, allowed states to play a supporting role. This decision highlights an important limitation of self-deportation strategy: while potent enough to have facilitated the establishment of

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policies and actions that had been going on for more than three decades (although without doubt new impetus was given by the 1830 legislation).").

111 Treaty of Dancing Rabbit (Sept. 27, 1830), *in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 310–15 (Charles J. Kappler ed., 1904).

112 Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836–1838*, 73 GA. HIST. Q. 540, 544–45 (1989).

113 FRYMER, *supra* note 91, at 119–20.

114 Letter from Lewis Cass, Sec'y of War, United States, to C.C. Clay, Governor, Ala. (Apr. 15, 1836), *in* REPORT FROM THE SECRETARY OF WAR, 25th Cong., 2d Sess. 6 (1838).

115 BANNER, *supra* note 35, at 224.

116 FRYMER, *supra* note 91, at 122. In 1828, the Indian Affairs Committee had informed the Secretary of War of the "enormous" costs of deporting 800 of the Creeks west. Letter from Thos. L. McKenney, Superintendent, Bureau of Indian Affairs, to James Barbour, Sec'y of War (Jan. 4, 1828), *as reprinted in* H.R. DOC. NO. 44, at 5–6 (1828).

117 BANNER, *supra* note 35, at 225; FRYMER, *supra* note 91, at 119; ROSEN, *supra* note 15, at 46; Satz, *supra* note 91, at 431; *see* Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49 (2008–2010).

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the United States, the policy left the government with little control over removal and no ability to force final land cessions from tribes.[118] In a catastrophic experiment that it would not repeat, the federal government therefore used direct removal methods to supplement and fill in the gaps of its indirect policy of self-deportation, rather than the reverse.

2. Black Colonization Plans and Their Aftermath: Subordination as the Domain of the Private Sphere in Self-Deportation Policy. — The more land colonists sought, the more they relied upon the African slave trade to procure labor that would give productive value to the lands they expropriated. From an early period, therefore, the growing number of civic and racial outsiders in colonial society concerned white settlers, who considered mass deporting the increasing numbers of free blacks in colonial society.[119] After the establishment of the United States, the specter of abolition only intensified these debates.[120] Legislators brought their experience with Indian Removal to bear on their debates over the options of mass deporting and self-deporting emancipated slaves.[121] Indeed, the expense and logistical difficulties of mass deportation in Indian Removal perhaps explain why a national "black colonization" effort, as these mass deportation plans were called, never came to pass. Consistent with its anticipation of abolition, the nation's experience with removal marked the developments that followed it. Perhaps most importantly, the government consecrated the prohibition on public discrimination in the Fourteenth Amendment while sanctioning private discrimination. This new federal constraint sparked conflict with southern states, which sought immediately to legally subordinate free blacks. It also paved the way for indirect removal policy — with its heavy structural reliance on private discrimination — to answer the post–Civil War need for new methods of controlling new sources of cheap, increasingly foreign labor.

Between 1770 and 1810, most statesmen opposed slavery for various reasons. But they would not seriously consider emancipation because they could not imagine integrating blacks into the national polity. White northerners wished to ensure that blacks would stay in the South, and white southerners would not contemplate civic equality. These factors, together with the daunting expense and logistics of a mass expulsion,

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118 FRYMER, *supra* note 91, at 114.

119 In 1691, for example, Virginia enacted a law forbidding further emancipation of slaves unless the owner provided for their transportation beyond the limits of the colony within six months of the manumission date. An Act for Suppressing Outlying Slaves, *in* 3 LAWS OF VIRGINIA 87–88 (Philadelphia, n.p. 1823).

120 H.N. Sherwood, *Early Negro Deportation Projects*, 2 MISS. VALLEY HIST. REV. 484, 494 (1916).

121 Long before Kobach described self-deportation and mass deportation as alternative removal methods, legislators compared them in terms of cost and feasibility. Kobach argued for self-deportation as a third option alongside the choices of "attempt[ing] to round them up and remove them all, or grant[ing] a massive amnesty." Kobach, *Attrition Through Enforcement*, *supra* note 12, at 155.

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long stymied efforts during the early Republic to imagine a concrete end to slavery.[122] In 1790, the black population of Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia comprised between 36% and 44% of the total population.[123] In many counties and districts, blacks outnumbered whites. During the constitutional ratification process, James Galloway of North Carolina had commented that "[i]t is impossible for us to be happy, if, after manumission, they are to stay among us."[124]

States and statesmen therefore long deliberated over the individual[125] and mass deportation of free blacks. In particular, the question of where to send deportees preoccupied proponents of black colonization plans, but to no resolution. As President, Thomas Jefferson considered but rejected western lands in the United States, the West Indies, Santo Domingo, and Sierra Leone as destinations for both black and Indian deportees.[126] More than a dozen state and local legislatures pleaded with Congress for aid for black colonization in 1827 and 1828, but Senate Committee members worried that "taking land in Africa required a new conquest unlike the manner by which the United States extinguished Indian lands" and estimated that the costs of transportation alone would amount to more than $28 million.[127] Legislators from Delaware described mass deportation as "essential to our safety" and a "necessity of self-defense."[128] As Frymer recounts, Maryland allocated $200,000 for mass deportation in 1832, authorized the establishment of a colony at Cape Palmas, and later offered blacks free passage to Liberia or Trinidad.[129] Indeed, Frederick Douglass remarked that "almost every

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[122] Civil rights attorney Don B. Kates, Jr. sought to explain the conundrum they faced as follows:

> How could any 'responsible' person — where 'responsible' connotes fundamental agreement in the basic structure of American society and politics — look with equanimity on the accretion to the political and social population of an immense Negro mass, alien to the body politic, whose unarticulated aspirations might pursue any direction under any leaders. If emancipation and integration would inevitably overthrow the political status quo then they were unacceptable. For Northerners the clinching argument was not only that the political balance of the nation would be overthrown in the South, but that only slavery and its attendant restrictions on Negro movement kept Negroes in the South.

Don B. Kates, Jr., *Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic*, 53 J. NEGRO HIST. 33, 38–39 (1968).

[123] DEP'T OF COMMERCE, BUREAU OF THE CENSUS, NEGRO POPULATION 1790–1915, at 45 (1918).

[124] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL COSNTITUTION (Jonathan Elliot ed., 2d ed. 1907).

[125] *See* PARKER, *supra* note 15, at 97–99.

[126] FRYMER, *supra* note 91, at 227, 230–31 (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 149; Letter from Thomas Jefferson to James Monroe (Nov. 24, 1801); Letter from Thomas Jefferson to Governor Page (Dec. 27, 1804)).

[127] FRYMER, *supra* note 91, at 232.

[128] *Id.* at 229.

[129] *Id.* at 230 (citing *Cuban Affairs-Colored Emigration-Political Business*, N.Y. DAILY TRIB. (Sept. 5, 1851); WILLIAM W. FREEHLING, THE ROAD TO DISUNION 191 (1990)).

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respectable man" in the north was in favor of black colonization.[130] By the 1840s, Frymer tells us, eleven northern state legislatures had formally endorsed black colonization.[131]

Meanwhile, Southern politicians vehemently opposed abolition and black colonization together, viewing the latter as an attack on slavery. Publically, many opposed such plans on the grounds of cost and logistical impossibility. Patrick Henry, for example, lamented that "to re-export them is impracticable, and sorry I am for it."[132] Virginia abolitionist Judge St. George Tucker believed that a "marked physical and intellectual inferiority" required the removal of blacks after emancipation, but "heaped scorn" on plans calling for "deportation at government expense."[133] The cost would be prohibitive, he argued; if Virginia suffered from the tax burden of providing for three or four thousand soldiers in the west during the Revolution, how could it possibly pay to deport 305,000 freedmen in Virginia, or the 800,000 freedmen in all the slaveholding states?[134] Tucker therefore proposed Virginia use a self-deportation strategy instead, to achieve the outcome of removal without the expense of deportation: the state should, "by denying them those privileges here which they might hope to acquire elsewhere, endeavour to prompt them to migrate from hence."[135] Practically, this plan meant laws that would disarm blacks and exclude them from office; and "by incapacitating them from holding lands, we should add one inducement more to emigration and effectually remove the foundation of ambition, and party struggle."[136] "Under such an arrangement," he mused, "we might reasonably hope, that time would remove from us a race of men, whom we wish not to incorporate with us, which now form an obstacle to such incorporation."[137]

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130 FRYMER, *supra* note 91, at 221. Southern legislators blocked national legislative efforts to promote and fund colonization. In response, many prominent statesmen, including Supreme Court Justice Bushrod Washington, James Madison, Henry Clay, Chief Justice John Marshall, Daniel Webster, and Rufus King helped found or joined the American Colonization Society in 1816 to advocate for black colonization using state and private channels. *Id.* at 228.

131 *Id.* at 229.

132 WILLIAM W. HENRY, 1 PATRICK HENRY 114 (New York, Charles Scribner's Sons 1891).

133 Kates, *supra* note 122, at 42.

134 Sherwood, *supra* note 120, at 487–88. Massachusetts Governor James Sullivan agreed that the federal treasury could not bear the expense of any mass exportation. *Id.*; *see also* St. George Tucker, *On the State of Slavery in Virginia*, in ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCES app. 31 (Philadelphia, William Young Birch & Abraham Small 1803); Kates, *supra* note 122, at 41–42.

135 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 421 (Boston, Massachusetts Historical Society 1792).

136 *Id.* at 421; Sherwood, *supra* note 120, at 488.

137 Sherwood, *supra* note 120, at 488; 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, *supra* note 135, at 421. Tucker's plan for the gradual emancipation of slaves in Virginia was submitted to the state assembly. 3 COLLECTIONS OF THE MASSACHUSETTS

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As nationwide emancipation loomed closer, the challenges of directly removing more than four million African Americans concretized the untenability of their mass deportation.[138] As late as 1862, President Abraham Lincoln urged Congress to adopt a colonization plan and acquire the territory to carry it out.[139] Many northern states had already passed explicit "stay out" laws.[140] As early as 1848, Illinois prohibited "Negro immigration" entirely in its constitution,[141] and Oregon, California, Illinois, Indiana, and Iowa also passed constitutions prohibiting the settlement of blacks.[142] Pennsylvania, Rhode Island, New Jersey, Indiana, and Ohio all enacted legislation making it practically impossible for free blacks to live within their boundaries.[143] Virtually all northern states embraced self-deportation policies of the "stay out" variety at this time.

White southerners, for their part, responded to abolition and the failure of black colonization by seeking new means of legally subordinating the free black population. Almost immediately, southern states began to pass Black Codes that targeted every aspect of black people's lives to differentiate them from whites[144] and attempt to control black people's

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HISTORICAL SOCIETY, *supra* note 135, at 421; ST. GEORGE TUCKER, DISSERTATION ON SLAVERY 93–94 (Philadelphia, n.p. 1796).

138 FRYMER, *supra* note 91, at 222–25, 255. Frymer also suggests that Indian Removal left a strong structure of advocacy opposed to removal in general. *Id.* at 260 (comparing the failure of black colonization to "the greater 'success' of Indian removal decades earlier in removing just under 100,000 people").

139 Abraham Lincoln, *First Annual Message*, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 44, 54 (James D. Richardson ed., 1908).

140 Neuman, *supra* note 15, at 1866–73 (discussing states' efforts to restrict the migration of free blacks and analyzing these efforts as immigration law history).

141 JAMES R. GROSSMAN, LAND OF HOPE 23 (1989).

142 FRYMER, *supra* note 91, at 236. Efforts to do so in Michigan, Pennyslvania, Ohio, and New Jersey were narrowly defeated. *See id.* at 236–37.

143 Pennsylvania left a legislative loophole allowing blacks to be sold south to avoid manumission in the state, while Rhode Island prohibited the importation of slaves and free blacks alike. Kates, *supra* note 122, at 42 n.24; *see also* FRANK U. QUILLIN, THE COLOR LINE IN OHIO 21–34 (1913); Simeon F. Moss, *The Persistence of Slavery and Involuntary Servitude in a Free State (1685–1866)*, 35 J. NEGRO HIST. 289, 308 (1950).

144 The Codes imposed poll taxes and barred blacks' access to courts, poor relief, orphanages, parks, schools, and other public facilities. *See* Daniel Jay Whitener, *Public Education in North Carolina During Reconstruction, 1865–1876*, *in* ESSAYS IN SOUTHERN HISTORY 67–73 (Fletcher Melvin Green ed., 1949); LETTER OF THE SECRETARY OF WAR, S. EXEC. DOC. NO. 39-6, at 192–97, 218–19 (2d Sess. 1867) (concerning "reports of the assistant commissioners of freedmen, and a synopsis of laws respecting persons of color in the late slave States"). They further criminalized hunting, fishing, and freely grazing livestock, making it impossible for landless individuals to own livestock at all. ERIC FONER, RECONSTRUCTION 203 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 203, 319–22 (1979). Apprenticeship laws allowed judges to send individuals over sixteen and children under the care of parents into bondage, without their parents' knowledge or permission, replicating one of the cruelest aspects of slavery — subordinating kinship bonds to a white master's whim. *Id.* at 365–66.

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labor through employment laws, criminal laws,[145] and the vast expansion of the convict lease system and public works projects.[146] The federal government responded to these laws and their bald attempts to undermine the outcome of the war by asserting federal prerogative to prohibit such public discrimination, now to protect the formal equality of all U.S. citizens. Congress first asserted this prohibition by passing the Civil Rights Act of 1866 over President Andrew Johnson's veto,[147] and then enshrined the principle in the Fourteenth Amendment.[148] The Fourteenth Amendment importantly prohibited *states* from abridging the "privileges or immunities" of U.S. citizens or depriving them of due process and equal protection of the laws.[149] This emphasis on official action and general permission of private discrimination eventually hardened into the famous state action doctrine, according to which the Constitution does not tolerate discrimination committed by a government entity, but places no prohibition on discrimination by private citizens.[150]

This federal constraint sparked new conflicts between the federal government and the states whose power it checked. Reconstruction efforts went into demise after the federal commitment to protect them ended with President Rutherford Hayes's pledge to respect "local

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[145] Employment laws required people to obtain year-long contracts to prove their employment status; laborers who left their jobs before the expiration of a contract forfeited wages already earned; sharecropping contracts were enforced criminally, rather than civilly; and anyone offering work to a laborer already under contract risked imprisonment or a $500 fine. FONER, *supra* note 144, at 199. As under slavery, black people could not rent land in urban areas, were subject to arrest by any white citizen, and faced criminal charges for vague offenses, including "vagrancy," "insulting" gestures or language, "malicious mischief," and preaching without a license. *Id.* at 198 (citing WILLIAM C. HARRIS, PRESIDENTIAL RECONSTRUCTION 99–100, 112–15, 130–31 (1907); S. EXEC. DOC. NO. 39-6, *supra* note 144).

[146] FONER, *supra* note 144, at 205.

[147] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. § 1982 (2012)).

[148] *See* U.S. CONST. amend. XIV.

[149] *Id.* Professor Gerard Magliocca has also posited that Cherokee Removal influenced the drafting of the Fourteenth Amendment. He shows that Representative John Bingham, who authored most of Section 1, both explicitly intended to make the Bill of Rights binding upon *states*, and referred to Georgia's actions at issue in *Worcester v. Georgia* to describe the protections the Section would provide. Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 929–32 (2003).

[150] Professor Pamela Brandwein has demonstrated that for a few decades after the passage of the Fourteenth Amendment, early interpretations preserved the possibility that the federal government could punish private individuals for race-based wrongs through either a Fifteenth Amendment exemption to the state action doctrine or the theory of "state neglect," under which individuals' actions gained "the color of law . . . or custom" through states' failure to enforce the laws when whites violated them against blacks. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 13 (2011). The "state neglect" doctrine therefore represents another variant of the prohibition on public discrimination, which recognizes that states can discriminate through negative as well as affirmative acts, namely, through the failure to enforce their laws equally as shown by race-based patterns. *See id.*

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autonomy" and withdrawal of federal troops from the south in 1877.[151] By around 1890, this practical federal abdication had plunged the South into the era of Jim Crow. States began once more to pass contract-enforcement and vagrancy laws, as well as laws restricting the activities of labor recruiters,[152] expanding the convict-lease system,[153] imposing poll taxes and literacy tests to suppress the black vote, mandating segregation in railway travel, and increasing racial disparities in educational funding.[154] In addition to passing public laws of subordination, the South also pursued the same results through private discrimination and law enforcement patterns: the sharecropping system and debt-cycles also worked to entrap and subordinate blacks; and while white police forces, state militias, and judicial systems enforced Jim Crow laws, their failure to enforce other laws allowed racial terror to grow to such proportions that people referred to this aspect of the subordination regime as an independent, extrajudicial order — "lynch law."[155] As a result, black migration out of the South increased dramatically in the 1890s, and about 185,000 people went North that decade.[156]

Private discrimination in the North, freshly sanctioned, continued to limit the possibility of black migration there, however. In the late nineteenth and early twentieth centuries, sundown towns, where white citizens committed collectively to maintaining the racial homogeneity of their jurisdictions, were steadily increasing across the North and West.[157] In urban centers, too, private employers widely refused to hire

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151 Andrew Buttaro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 161–162 (2015). Almost 10,000 people from Kentucky and Tennessee settled in Kansas during the 1870s, and more than 6000 Texans, Mississippians, and Louisianians followed in the "Kansas Fever Exodus" in 1879 and 1880 during the bloody aftermath of the collapse of Reconstruction. GROSSMAN, *supra* note 141, at 23–24. Emmett J. Scott writes that "[t]he real causes of the migration of 1879 were not far to seek. . . . [B]y far the most potent factor in effecting the movement was the treatment received by negroes at the hands of the South." EMMETT J. SCOTT, NEGRO MIGRATION DURING THE WAR 3 (1920).

152 Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive*, 51 U. CHI. L. REV. 1161, 1163–64 (1984) (discussing the "labor cartel" effects under Jim Crow).

153 H.R. EXEC. DOC NO. 49-1, pt. 5, at 1–6 (1886); TWENTIETH ANNUAL REPORT OF THE COMMISSIONER OF LABOR: CONVICT LABOR, H.R. REP. NO. 59-906, at 230–70 (1906).

154 MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 10–11 (2004).

155 As southern states sank under intensifying Jim Crow regimes, more than 7000 blacks participated in the 1889 Oklahoma land rush, and approximately 100,000 more followed during the next two decades, to establish approximately twenty-five black towns in that state. GROSSMAN, *supra* note 141, at 24–25.

156 *Id.* at 32. For analyses comparing Jim Crow laws with contemporary self-deportation laws, see Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 377–78 (2013); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010).

157 JAMES W. LOEWEN, SUNDOWN TOWNS 25, 80–84 (2005). Small communities of blacks lived in urban areas in the North, including Boston, Philadelphia, and New York. VANESSA H. MAY, UNPROTECTED LABOR 4 (2011).

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black people, producing "the very hard fact that, though the North afforded larger privileges, it would not support negroes."[158] In a testament to the force of private discrimination, black migration north remained low until the outbreak of World War I abruptly halted European immigration to the country.[159] Northern factory owners who faced labor shortages just as they stood to gain spectacular profits from war mobilization then opened their doors to women and blacks in large numbers for the first time, triggering the mass exodus from the South known as the Great Migration.[160] As one Mississippian explained, "[b]efore the North opened up with work all we could do was move from one plantation to another in hope of finding something better."[161]

Jim Crow was not a self-deportation regime. This public regime of subordination, rather, was designed to hold black labor captive in the South. The Great Migration nevertheless reveals the structural similitude of subordination regimes intended to control labor and to cause removal, and the way a single regime can achieve both. It also exposed the external, background conditions that southerners had taken for granted in designing the labor control regime of Jim Crow — namely, the prevalence of self-deportation policies in the North and the intransigence of northern private discrimination. By banking on black people having nowhere else to go, southern lawmakers believed they could maintain the population as a source of cheap labor with little recourse to the law. However, by using the tool of private discrimination as a lever, northern employers activated the logic of relativity inherent in subordination to show that better options elsewhere could convert a system designed to entrap people into one that functioned to drive them out.[162] Against the backdrop of "stay out" public regimes of discrimination in the North, the Great Migration underscored the power of

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158 SCOTT, *supra* note 151, at 16–17. As Scott writes, though most southern black people wished "to escape from the oppressive social system of their section," "not until fifty years after the privilege was granted negroes to go where they pleased did they begin to make a sudden rush for the northern states." *Id.* at 16. In the words of a black church elder in Macon, Georgia, when new employment opportunities appeared, the "unjust treatments enacted daily on the streets, street cars and trains . . . [began to drive] the Negro from the South." GROSSMAN, *supra* note 141, at 17; *see also* Charles S. Johnson, *The New Frontage on American Life*, *in* THE NEW NEGRO 280 (Alan Locke ed., 1925) (describing oppression in the South as the "soil" that bred the impulse to leave). Professor James R. Grossman cautions, however, against trying to separate out "push" and "pull" factors that drove the Great Migration, or to artificially distinguish "economic" and "social" factors. *See* GROSSMAN, *supra* note 141, at 14. In 1918, Carter G. Woodson argued it was unclear whether blacks would have fled the South and its oppression if given an alternative before, or if they would have stayed in the South in spite of new jobs in the North had they been treated "as men." CARTER G. WOODSON, A CENTURY OF NEGRO MIGRATION 169 (1918).

159 LOEWEN, *supra* note 157, at 58.

160 *Id.*

161 GROSSMAN, *supra* note 141, at 18.

162 One observer wrote in 1917 that a group of migrants leaving Louisiana were "willing to run any risk to get where they might breathe freer." W.E.B. DuBois, *The Migration of Negroes*, 14 CRISIS 63, 66 (1917).

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contrasting levels of *private* discrimination to influence migration by creating the conditions for a group's life possibilities in a place.

The Fourteenth Amendment's constraint on state power elevated longstanding and pervasive discrimination in the private sphere to a constitutional principle. This national institutionalization of the public and private roles in subordination held significant meaning for removal policy at a moment when abolition had propelled the nation into a search for new sources of cheap labor and new methods of labor control. As employers increasingly turned toward nonwhite foreigners for cheap labor, the increasing presence of these populations in the country incited the demand for their removal. Meanwhile, Jim Crow's use of subordination to control labor accented the extent to which removal strategies relied on private discrimination. This structural homology suggested that, within a territory newly consolidated and under U.S. control, the approach of attacking immigrants' lives could accomplish both labor control *and* removal. Consequently, as the next Part explores, indirect removal strategies that had long been used to accumulate property in land now became a method of controlling foreign labor, while the subordination that had long been their mechanism became another end of the policy in itself.

II. The Rise of the Modern Removal System

Part II describes how the advent of the federal individual deportation system renovated the removal system of the United States. In doing so, it integrates the history of self-deportation with the better-known history of the deportation system to offer a new narrative about the rise of the modern removal system overall. Section II.A recounts how the increasing population of Chinese people in western states spurred another round of subfederal self-deportation laws targeting it for public discrimination; again, the Supreme Court found such laws preempted by the federal prerogative to regulate removal, now under the Fourteenth Amendment's new prohibitions on discriminatory state action. Once more, the legislature and Executive responded by exercising the federal prerogative to advance the national practice of direct removal, this time through the establishment of the individual deportation system. As Congress widened this system's reach and power, however, it also notably leveraged the new *threat* of deportation to reshape its self-deportation policy. Similarly, when the Executive escalated removals, it did not rely on its newly crafted legal channels so much as implement hybrid techniques that drew on the indirect effects of the deportation system. With subfederal help, it conducted widespread raids that spread terror and caused self-deportation while bringing people into the net of the deportation system; and for the mass removals of the Great Depression, it used "voluntary departure" programs that recruited deportees with fear and the promise of financing their transportation out

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of the country. Section II.B then turns to the most recent cycle of subfederal self-deportation legislation, the Court's rejection of most of its provisions based on preemption, and the legislative and executive surge in deportation policy that has followed in response. Here, consistent with past practice, the Court granted subfederal governments direct enforcement powers to broaden the reach of the deportation system. The legislature and Executive concurrently and rapidly intensified the deportation system by streamlining its processes and amplifying its self-deportation effects. Indeed, the hallmark of contemporary removal policy is its expansion of the grounds of deportability far beyond the possibility of actual enforcement. The widespread threats these developments create function to subordinate a population on which the nation relies heavily for labor, suggesting that the policy works in the service of outcomes other than removal alone: now, the strong emphasis on removal in discourse about immigration law and policy obscures another effect of the immigration system — subordination in the service of labor control.

A. The Individual Deportation System and Its Self-Deportation Effects

In the mid-nineteenth century, the federal and state governments began to contemplate the removal of nonwhite immigrants, whom they did not consider to be potential members of the national polity but who were present in increasing numbers.[163] As in the late 1820s, states and municipalities began to pass legislation designed to attack different aspects of these people's lives. The Supreme Court asserted federal supremacy over the regulation of removal and struck down these new subfederal laws as discrimination, noting that the removal aim motivating them was evident. While it did so, the federal government exercised its prerogative to build an individual deportation system upon the foundations of its indirect approach to removal, which began to work through the new deportation system almost immediately.[164]

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[163] These immigrants came primarily from China, Japan, India, and Mexico, among other places. *See, e.g.*, Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981); Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 246, 278 n.182 (2016). Government reports, including the Dillingham Commission report of 1911, show that Mexican laborers were considered useful but undesirable as citizens, and not potential members of the community. 1 U.S. IMMIGRATION COMM'N, ABSTRACTS OF REPORTS, S. DOC. NO. 61-747, at 682–91 (3d Sess. 1910).

[164] My analysis contests the idea that in the absence of federal direct removal policy, there was no federal removal policy. *Cf.* HIROTA, *supra* note 29, at 9; DANIEL KANSTROOM, DEPORTATION NATION 92–95 (2007); MAE M. NGAI, IMPOSSIBLE SUBJECTS 58 (2014) (counting poor laws and the Alien and Sedition Laws as antecedents and noting that other than these, "the nation operated without federal regulation of immigration for the better part of the nineteenth century. Unfettered migration was crucial for the settlement and industrialization of America, even if the laboring migrants themselves were not always free."); DANIEL TICHENOR, DIVIDING LINES 87–113 (2001);

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During this period, states and municipalities began to clamor for the removal of Chinese immigrants.[165] California Governor John Bigler called for head taxes and a foreign miners' tax to target this group, as well as for their disqualification as jurors and witnesses in state courts.[166] In 1856, Mariposa County, California, ordered all the Chinese within its jurisdiction to leave, or to be whipped and then removed "by force of arms."[167] In 1860, San Francisco denied Chinese people admission to San Francisco City Hospital[168] and Chinese children admission to general public schools,[169] and California passed "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor."[170] In 1870, San Francisco banned the use of shoulder poles to carry vegetables and laundry bundles[171] and, between 1873 and 1875, passed a variety of ordinances banning the use of firecrackers and Chinese ceremonial gongs.[172]

Again, the Supreme Court found that the federal government held preemptive power to regulate removal from the country, and denied state and local governments the power to directly subordinate the Chinese toward that end. In its 1875 decision in *Chy Lung v. Freeman*,[173] for example, the Court struck down a California statute that "very clearly" aimed to "extort money from a large class of passengers, or to prevent their immigration to California altogether."[174] Over the next decade, the

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Cox & Posner, *supra* note 21, at 816 ("[T]he U.S. federal government placed few formal restrictions on immigration prior to the 1870s."); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 483 (2009) ("For much of the nineteenth century, few immigration rules existed, and the treaty power played a central role in the adoption of some of the earliest federal rules regulating immigrant admissions.").

165 PETER SCHRAG, NOT FIT FOR OUR SOCIETY 36–37 (2010).

166 The California Supreme Court granted part of Bigler's wish in *People v. Hall*, 4 Cal. 399 (1854), by racially classifying Chinese people with Indians, blacks, and mulattoes to prevent them from testifying against white defendants. *See id.* at 399, 403.

167 IRIS CHANG, THE CHINESE IN AMERICA 90 (2003).

168 Fae Myenne Ng, *Orphan Bachelors*, HARPER'S MAG., Feb. 2019, at 66; *see also No Room for Chinese: They Are Denied Admission to the County Hospital*, S.F. CHRON., Nov. 20, 1881, at 3.

169 Act of Apr. 28, 1860, ch. 329,§ 8, 1860 Cal. Stat. 321, 325 (1860); William Courtney, San Francisco's Anti-Chinese Ordinances, 1850–1900, at 8 (1956) (unpublished M.A. thesis, University of San Francisco) (on file with the Harvard University Library); *see also* Joyce Kuo, Comment, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181 (1998); Ng, *supra* note 168, at 66.

170 Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (1862), *invalidated by* Lin Sing v. Washburn, 20 Cal. 534 (1862).

171 Order No. 697 (May 4, 1866), *in* SAN FRANCISCO MUNICIPAL REPORTS FOR THE FISCAL YEAR 1871–1872, ENDING JUNE 30, 1872, at 503, 520; Christopher Chou, *Land Use and the Chinatown Problem*, 19 ASIAN PAC. AM. L.J. 27, 40 (2014).

172 Order No. 697 (May 4, 1866), *in* SAN FRANCISCO MUNICIPAL REPORTS FOR THE FISCAL YEAR 1874–1875, ENDING JUNE 30, 1875, at 791, 807; Order No. 884 (July 29, 1869), *in* SAN FRANCISCO MUNICIPAL REPORTS FOR THE FISCAL YEAR 1868–1869, ENDING JUNE 30, 1869, at 544, 544.

173 92 U.S. 275 (1875).

174 *Id.* at 275.

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Court invoked the Equal Protection Clause of the Fourteenth Amendment to affirm its prohibition of subfederal self-deportation laws instituting public discrimination. In 1879, for example, Supreme Court Justice Field, riding circuit, found that San Francisco's "Pigtail Ordinance" violated the prohibition on discriminatory state action because it targeted Han Chinese prisoners who wore their hair in long braids.[175] In the 1886 case *Yick Wo v. Hopkins*,[176] the Court similarly struck down a San Francisco law requiring permits to operate laundries in wooden buildings, which targeted the Chinese population.[177] It quoted a lower court, which found that the law "indicate[d] a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety."[178]

Instead, during a period called the "Driving Out," the work of subordination fell to private citizens, who set fires to Chinatowns and committed massacres and mob violence with little interference from law enforcement.[179] As they did so, Congress began to build the federal individual deportation system. Most famously, the Chinese Exclusion Act of 1882 for the first time prohibited the entry of a specific ethnic group to preserve "good order" and brought individual deportation, which had long been the province of states and municipalities, under the purview of the federal government.[180] During their first years, federal deportation laws focused only on immigrants' preentry conduct and contained statutes of limitation;[181] courts ensured immigrants' rights to process,[182] and the reach of the system was relatively limited. Nonetheless, the creation of the system itself sent a strong expressive message,

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[175] Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6546); Joseph Tartakovsky, Opinion, *An Enlightened California Judge Paved the Way to Fight Trump's Travel Ban More than a Century Ago*, L.A. TIMES (June 3, 2018, 4:05 AM), www.latimes.com/opinion/op-ed/la-oe-tartakovsky-judge-stephen-field-20180603-story.html [https://perma.cc/R9WX-ETXT] (describing Field's opposition to various anti-Chinese ordinances and referring to this law as the "infamous 'pigtail ordinance'").

[176] 118 U.S. 356 (1886).

[177] *See id.* at 372–73.

[178] *Id.* at 363 (quoting *In re* Yick Wo, 26 F. 471, 475 (C.C.D. Cal. 1886)).

[179] CHANG, *supra* note 167, at 216–20.

[180] The Act placed an absolute moratorium on the entry of Chinese labor for ten years, prohibited Chinese people from becoming citizens, and required Chinese people who left the country to obtain certifications to reenter. Act of May 6, 1882, ch. 126, §§ 1, 12, 14, 22 Stat. 58, 59, 61 (making deportable any Chinese person who entered unlawfully after its adoption), *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

[181] Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 (generalizing the provisions of the Act of 1882). The first federal immigration controls that the Page Act introduced in 1875, as Cox and Rodríguez observe, neither provided for deportation nor made mention of immigrants' post entry conduct. Cox & Rodríguez, *supra* note 164, at 512, 514; *see also* Act of Mar. 3, 1875, ch. 141, § 1, 18 Stat. 477, 477. They note that the anomalous Alien and Enemies Act of 1798 is one exception. Cox & Rodríguez, *supra* note 164, at 512 n.184; *see also* Act of June 25, 1798, ch. 58, §§ 1–3, 1 Stat. 570, 570–71.

[182] *See* Wong Wing v. United States, 163 U.S. 228 (1896).

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and the new threat of deportation combined with congressional measures to make life more difficult for Chinese people in ways that indirectly encouraged their removal.[183] Congress also quickly began to expand federal direct removal power by adding causes for which it could deport a person under law, including a range of postentry conduct. Between 1907 and 1922, it made deportable immigrants who engaged in prostitution, advocated anarchy, committed crimes of moral turpitude, or had convictions for importing or dealing opium, respectively.[184] It then began to eliminate statutes of limitations, making people indefinitely deportable for these reasons.[185] Still, the Immigration Service oversaw few deportations during this period — "only a few hundred aliens a year between 1892 and 1907,"[186] and an annual average of two or three thousand between 1908 and 1920.[187]

Because employers again found themselves in need of cheap replacement labor during the era of Chinese Exclusion, inspectors did not regulate Mexicans entering across the southwestern border for work in railroad construction, mining, and agriculture during the first two decades of the twentieth century.[188] Many fundamental aspects of the modern deportation system emerged during the 1920s. The Immigration Acts of 1921 and 1924 imposed numerical restrictions on immigration for the first time,[189] creating the basis for a system of selective admissions. The 1924 Act finally eliminated statutes of limitations on nearly all forms of unlawful entry. In Professor Mae Ngai's words, these

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183 For example, the 1892 Geary Act required Chinese people to obtain a certificate of residence to prove their presence in the country was authorized. "Show me your papers" laws at this time required an affirmative act, since the government did not issue social security numbers (or cards) until the 1930s and birth certificates did not become common until the Second World War. The Chinese community responded with massive civil disobedience, refused to apply for such certificates, and successfully prevented the government from enforcing this law. Act of May 5, 1892, ch. 60, § 3, 27 Stat. 25, 25 (creating a presumption that any Chinese resident was deportable "unless such person shall establish, by affirmative proof, . . . his lawful right to remain in the United States"); *see* LUCY E. SALYER, LAWS HARSH AS TIGERS 43–68 (1995) (describing development of documentation requirements).

184 Immigration Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889; Immigration Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899–900. Cox and Rodríguez observe that the five-year statute of limitations is one of the only such provisions that remains on the books. Cox & Rodríguez, *supra* note 164, at 515; *see also* Act of May 26, 1922, ch. 202, § 2(e), 42 Stat. 596, 597.

185 Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012, 1012; Act of Mar. 26, 1910, ch. 128, § 3, 36 Stat. 263, 264–65.

186 NGAI, *supra* note 164, at 59.

187 *Id.* Most of these deportees came from asylums, hospitals, and jails. *Id.* During the Palmer Raids in the winter of 1919–1920, authorities arrested ten thousand alleged anarchists and deported hundreds. KANSTROOM, *supra* note 164, at 149–55; WILLIAM PRESTON JR., ALIENS AND DISSENTERS 221 (1963).

188 NGAI, *supra* note 164, at 64.

189 The Johnson-Reed Act of 1924 made it possible to deport any person for entering without a valid visa or inspection after July 1 of that year. Immigration Act of 1924, ch. 190, § 14, 43 Stat. 153, 162.

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restrictions "stimulated the production of illegal aliens" to "mass proportions."[190] In 1925, Congress created a land Border Patrol, a force with little supervision and no formal training that quickly assumed the character of criminal pursuit, despite being charged with enforcing civil laws.[191] Congress criminalized immigrants in 1929 by making unlawful entry an independent criminal offense — a misdemeanor punishable by imprisonment or a fine, or both — and a second unlawful entry after deportation a felony carrying double the consequences of the first.[192]

The rapid expansion of the pool of deportable persons quickly outstripped the deportation capacity of the system. The deportation system did facilitate an increasing number of actual deportations, but its capacity to deport the growing population of people subject to its reach was inherently limited by the individual process it required.[193] As Secretary Kobach reflected nearly a century later, "[i]t takes considerable government manpower and other resources to arrest [a person], initiate removal proceedings, detain him if necessary, provide the hearings and appellate review to which he is entitled, and ultimately remove him."[194] As the total number of deportations rose, these processes proved so costly for the government that in 1928, the Assistant Secretary of Labor requested a budget for deportations amounting to more than ten times the appropriation of the previous year.[195]

By contrast, Kobach notes, "[i]t costs the federal government very little when aliens *self*-deport."[196] The new deportation system magnified the government's ability to threaten immigrants with apprehension, detention, and deportation. Deportation laws, in other words, immediately

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190 NGAI, *supra* note 164, at 57.

191 Act of Feb. 27, 1925, 43 Stat. 1049; NGAI, *supra* note 164, at 69.

192 Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551. Between 1930 and 1936, the Immigration Service brought over 40,000 criminal cases against unlawful entrants and won convictions in about 36,000, or 90%, of them. *See* U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1929); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1930); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1931); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1932); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1933); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1934); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1935); U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR (1936).

193 KANSTROOM, *supra* note 164, at 216.

194 Kobach, *Attrition Through Enforcement*, *supra* note 12, at 162.

195 *See Hearing Before the H. Comm. on Immigration and Naturalization on H.R. 3, H.R. 5673, H.R. 6069*, 70th Cong. 7–9 (1928) (statement of Robe Carl White).

196 Kobach, *Attrition Through Enforcement*, *supra* note 12, at 162.

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began to serve the double purpose they do now. Indeed, the indirect function of the new deportation system quickly produced the irony that although deportation laws on the books allowed for the removal of a larger population than ever before during the 1920s and 1930s, the vast majority of people removed during this time did not leave through the process created by these laws.[197] Rather, the federal government combined direct and indirect methods in such programs as "voluntary departure" and raids that, on the pretense of enforcing deportation law, terrorized communities to encourage them to self-deport.

In the early 1920s, the United States worked with the Mexican government to create a "voluntary departure" program administered by Mexican consuls that provided "free return transportation to the Mexican interior and subsistence" to around 100,000 people between 1920 and 1923.[198] The government thereby recruited deportees by promising to cover some of their costs in a compromise that, like the exchanges of lands the United States engaged in with tribes a century earlier, saved the government significant funds while also relieving deportees of some burdens.[199] In 1927, the Immigration Service again began to offer "voluntary departure" to aliens without criminal records to avoid the time and expense of formal deportation proceedings.[200] The number of people the government expelled each year consequently rose from 2762 in 1920[201] to 9495 in 1925,[202] and to 38,796 in 1929.[203]

During the Great Depression, economic insecurity further inflamed white Americans' racial hostility toward people of Mexican descent, regardless of whether these people were in the country legally or not, or were citizens.[204] Although immigration from Mexico had abated,[205] removal numbers reached new heights[206] as the Border Patrol, under the

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197 Manuel García y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942–1964: Antecedents, Operation, and Legacy*, *in* THE BORDER THAT JOINS 49, 53 (Peter G. Brown & Henry Shue eds., 1983).

198 NGAI, *supra* note 164, at 72.

199 *See supra* section I.B.1, pp. 1898–1901.

200 NGAI, *supra* note 164, at 150; *see also* Mae Ngai, *The Strange Career of the Illegal Alien*, 21 LAW & HIST. REV. 69, 77 (2003).

201 U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 10 (1920) (figure excludes fifteen deportations under the Chinese Exclusion laws).

202 U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 9 (1925).

203 U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 1 (1929) (figure combines deportations and "voluntary departures").

204 NGAI, *supra* note 164, at 71.

205 *Id.*

206 JOSEPH NEVINS, OPERATION GATEKEEPER 27 (2002) (recounting that an estimated 415,000 people were deported between 1929 and 1935, with another 85,000 leaving "voluntarily"); *see also* KANSTROOM, *supra* note 164, at 218.

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auspices of the Immigration and Naturalization Service (INS), began to apprehend large numbers of people in "sweeps."[207] During this period, the federal government sought to enlist state and local aid to increase the capacity of the federal deportation system and its self-deportation effects. In particular, U.S. Secretary of Labor William Doak "encouraged local immigration officers, law enforcement agencies, and newspapers to join forces to publicize deportation raids, frightening many Mexicans into self-deportation."[208] State and municipal agents thereafter collaborated with federal officers to conduct surprise raids that involved intimidation tactics including circling and barricading in residents of colonias and that resulted in the arrest, interrogation, and detention of scores of people.[209] The head of the L.A. Citizens Committee on the Coordination of Unemployment Relief, Charles Visel, commended the Immigration Service's "efficiency, aggressiveness, [and] resourcefulness" in using these tactics, stating: "The exodus of aliens deportable and otherwise who have been scared out of the community has undoubtedly left many jobs which have been taken up by other persons (not deportable) and citizens of the U.S. and our municipality."[210]

In these raids, the federal deportation power served as the excuse for spreading terror that fueled both self-deportation and the success of local "voluntary departure" programs across the Southwest and Midwest. Welfare bureaus and relief workers played a significant role in pressuring immigrants to leave.[211] One major obstacle to their wholesale deportation, however, was the expense of deportation hearings, which meant, as Californians concluded, that actual deportation "could not be used to advantage in ousting any large number."[212] Instead, Los Angeles county relief agencies opened negotiations with the Southern Pacific Railroad to organize "voluntary departure" programs, and discovered that "in wholesale lots, the Mexicans could be shipped to Mexico City for $14.70 per capita . . . less than the cost of a week's board and lodging."[213] During the early 1930s, Southwestern and Midwestern states removed over 400,000 people, many by train.[214] A large number had

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207 NGAI, *supra* note 164, at 70.

208 KANSTROOM, *supra* note 164, at 218. Arguing that deporting Mexicans would create jobs for citizens, Doak claimed that one quarter of around 400,000 "illegal aliens" in the country were immediately deportable under existing law. *Id.* at 215.

209 *See id.* at 219 (describing raid on La Placita in early 1931 by U.S. immigration officers and Los Angeles police); NGAI, *supra* note 164, at 73 (describing raid of a colonia in San Fernando by Immigration Service and deputy sheriffs).

210 NGAI, *supra* note 164, at 73.

211 KANSTROOM, *supra* note 164, at 218; NGAI, *supra* note 164, at 73, 75.

212 KANSTROOM, *supra* note 164, at 218 (quoting Carey McWilliams, *Repatriados*, AM. MERCURY, Mar. 1933, http://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=591 [https://perma.cc/3D4K-HQ4L]).

213 *Id.*

214 NGAI, *supra* note 164, at 72.

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been in the country for at least a decade, and an estimated 60% were citizens, children, or both.[215] In a final "voluntary" deportation at the end of the decade, the INS transported 1200 people, about half of whom were citizens, to the border with Mexico at Brownsville, Texas.[216]

At this time, state and local governments focused on welfare, local law enforcement policies, and public employment as areas where they might permissibly discriminate against immigrants. Drawing on the tradition of poor laws, California towns passed settlement laws denying welfare to unemployed migrant workers. In El Paso, Texas, local relief agencies reported lists of Mexicans on their rolls, including citizens and legal residents, to immigration authorities for deportation.[217] Many towns, including the City of Los Angeles, tried to keep indigent migrants from entering by stationing police at "bum blockades."[218] Colorado Governor Edwin C. Johnson sought to reserve "the possibility of employment . . . for only native sons,"[219] proclaimed martial law in southern counties in 1936, and instructed Military District officers to prevent Mexican workers with labor contracts from entering the state.[220] Arizona passed laws punishing anyone who hired noncitizens as public employees with a fine or imprisonment.[221]

The way the federal government coordinated the direct removal of over one million people of Mexican ancestry during this era[222] was consistent with the historical development of its removal policy. Subfederal entities' role was restricted to expanding the federal government's deportation capacity, determining local law enforcement priorities, and denying unauthorized immigrants welfare and public employment. Both federal and state governments stoked the hostility of private citizens toward Mexicans to encourage them to make life unbearable for Mexicans so that they would self-deport. The individual deportation

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215 *Id.*

216 *Id.* at 74–75.

217 *Id.* at 72 (citing Letter from Edward Shaughnessy to Harry Coffee (June 4, 1935) (file 55854/100, INS)).

218 *Id.* at 71 (citing Paul S. Taylor, *Migratory Farm Labor in the United States*, 44 MONTHLY LAB. REV. 537, 547 (1937), *in* LABOR ON THE LAND 1930–1970, at 91, 101 (1981)).

219 FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 89 (1995).

220 NGAI, *supra* note 164, at 71.

221 Act of Mar. 3, 1931, ch. 31, sec. 2, § 1352a, 1931 Ariz. Sess. Laws 53, 54; Act of Mar. 19, 1929, ch. 85, sec. 2, § 1353, 1929 Ariz. Sess. Laws 267, 267–68. For a much more extensive catalog of status-based prohibitions on employment in states across the country, see Harold Fields, *Where Shall the Alien Work?*, 12 SOC. FORCES 213, 213–21 (1933).

222 KANSTROOM, *supra* note 164, at 215. Estimates of the total population removed during this period vary. Motomura estimates that around two million were forced to leave the United States as a result of the raids conducted by federal, state, and local officials during this period. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 41. Ngai writes that "nearly 20 percent of the Mexican population in the United States returned to Mexico during the early years of the Depression," and that "the repatriation of Mexicans was a racial expulsion program exceeded in scale only by the Native American removals of the nineteenth century." NGAI, *supra* note 164, at 75.

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system, however, strengthened and systematized the coordination between the actors carrying out removal policy. An emerging bureaucracy of federal immigration officers assumed a newly significant role in removal policy and collaborated explicitly and routinely with state and local law enforcement. All actors, public and private, could use as new leverage the threat of deportation furnished to carry out their work. As the volume of federal removal laws burgeoned, those laws threatened an ever-increasing number of immigrants, growing the government's coercive bargaining power vis-à-vis deportees. In other words, the individual deportation system breathed new life into the well-worn indirect approach to removal in the United States.

B. Mass Removal Strategies in the Modern Era

The national removal system's evolution during the first half of the twentieth century set the stage for the developments that followed. Courts continued to cabin states' and municipalities' role within the national removal scheme and protect the federal government's coordina ting role. Congress continued to expand the grounds of deportability far beyond the possibility of enforcement. In combination with the private sector's creation of incentives through the furnishing of jobs, which induced people to enter the country,[223] these trends resulted in an enormous population of deportable people in the country and a national immigration code that went largely unenforced. This production of an excess of options to legally remove people widened the berth of executive discretion both to determine its deportation priorities *and* to calibrate self-deportation policy by leveraging the threats inherent in federal deportation law. Below, I describe the developments in immigration law, including the establishment of alienage case law and growth of the federal immigration code, that led to the most recent wave of subfederal attempts to legislate public discrimination, courts' preemption of these laws, and the ways that the subsequent legislative and executive build-up of the deportation system has worked to maximize its self-deportation effects.

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[223] The Bracero Program, which bridged the first and second halves of the century, provides a good illustration of the delegation to the private sphere that allowed employers to incentivize immigration to the United States. After the statutory authorization for this war-time worker recruitment program expired in 1947, *see* Farm Labor Supply Program-Extension-Liquidation, Pub. L. No. 80-40, 61 Stat. 55 (1947), the INS allowed employers to directly recruit bracero workers from Mexico. The INS further helped to reduce the costs of recruitment for employers and encourage workers' unauthorized entry by prioritizing, for a period, the legalization of unauthorized immigrants already present in the United States. *See* KITTY CALAVITA, INSIDE THE STATE 2 (1992). Indeed, in 1951, President Truman's Commission on Migratory Labor found that the INS "had effectively abdicated its border control responsibility" and that its legalization policies, lax enforcement, with the incentives created by employers, "had given rise to unprecedented levels of illegal immigration." *Id.* The program was not terminated for another seventeen years. *Id.* at 3.

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In the twentieth century, states and municipalities continued to pass self-deportation legislation in the tradition of extension laws. The Court continued to invoke the Fourteenth Amendment's prohibition on public discrimination, thereby establishing a famous line of cases scrutinizing the status of "alienage."[224] In the 1948 case *Takahashi v. Fish & Game Commission*,[225] the Court struck down a California statute forbidding aliens "ineligible to citizenship" from receiving commercial fishing licenses;[226] in *Graham v. Richardson*[227] in 1971, the Court invalidated an Arizona law requiring citizenship or fifteen years of residence to receive welfare benefits;[228] and in 1982, in *Plyler v. Doe*,[229] the Court struck down a state statute denying funding for unauthorized children, blocking a municipal school district's attempt to charge unauthorized children an annual tuition fee.[230] In the 1976 case *Mathews v. Diaz*,[231] however, the Court affirmed and reserved the federal government's right to discriminate as a privilege of its supremacy in the field of immigration.[232]

It is worth noting how this development contributed to interpretations that have isolated the component parts of self-deportation policy and made it more difficult to grasp their overall logic. The Fourteenth Amendment's consecration of the prohibition on public discrimination led to courts' application of this doctrine to some self-deportation laws and the doctrine of preemption to others. This split has given rise to an artificial yet potent division between "alienage laws," or laws imposing conditions upon alien status, and "immigration laws," or laws affecting a person's entry into, exit from, or authorization within the country.[233]

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[224] With some notable exceptions: During the second and third decades of the twentieth century, the Supreme Court repeatedly upheld the constitutionality of western states' alien land laws. *See, e.g.*, Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923). These laws first targeted immigrants' fee simple ownership of or long-term lease of agricultural lands, and then targeted their ability to hold sharecropping contracts or shares of stock in corporations owning such lands. *See* Keith Aoki, *No Right to Own?: Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 38 (1998). The Court's decisions scrutinizing alienage status indicate a continuing intimacy between property and membership, while the Court's invocation of the Fourteenth Amendment indicates that its discomfort with subfederal institution of public discrimination might stem from the legacy of Jim Crow.

[225] 334 U.S. 410 (1948).

[226] *Id.* at 412, 422.

[227] 403 U.S. 365 (1971).

[228] *Id.* at 371, 374.

[229] 457 U.S. 202 (1982).

[230] *Id.* at 216, 230.

[231] 426 U.S. 67 (1976).

[232] *Id.* at 84–85.

[233] MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 58. In 1994, Professor Linda Bosniak explained how these categories produce different legal possibilities, since in "the world of social relationships among territorially present persons, . . . government power to impose disabilities on people based on their status is substantially constrained," while the government's

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With respect to this doctrinal confusion, many scholars have noted that these categories overlap as a practical matter;[234] because laws concerning entry and exit affect how immigrants live, and vice versa, Professor Adam Cox, for example, has written that "legal rules cannot be classified as concerning *either* selection *or* regulation because every rule concerns both."[235] This overlap is not incidental, however, in self-deportation laws, which concern both selection *and* regulation *by design*. Nonetheless, it has become common sense to see the infringement of these categories upon each other as only ancillary, as evidenced in two widespread ideas: 1) that federal immigration laws inflict suffering as an unfortunate byproduct of their other, legitimate goals; and 2) that state and municipal alienage laws can impose some "appropriate" level of discrimination, but exceed what is "tolerable" when they infringe on the federal immigration power by affecting entry and exit.[236] Notably, framing this over-

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immigration power, by contrast, "remains exceptionally unconstrained." Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056 (1994). Kobach therefore advocated for subfederal self-deportation laws as properly constructed *immigration* regulations, skirting the question of discrimination altogether in his theory of "attrition through enforcement." *See* sources cited *supra* note 12. He put forth a rubric for drafting statutes to avoid federal preemption, Kobach, *Reinforcing the Rule of Law*, *supra* note 12, at 464–65, and elsewhere argued that self-deportation laws would act as a "quintessential force multiplier," *see* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

234 *See, e.g.*, Bosniak, *supra* note 233; Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2451–52 (2007) (showing that the distinction between alienage and immigration law is highly problematic); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 120 (2013) ("[C]haracterizing subfederal regulations as either 'immigration' or 'alienage' is frustrated by the very nature of the inquiry and by the inescapable truth that subfederal regulations are usually a bit of both."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 526 (2001) (observing that the distinction is not consistently embraced in case law). *But see* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798–99 (2008) (acknowledging this overlap but emphasizing the importance of the distinction for understanding immigration federalism); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591–93 (2008) (drawing a distinction between "[d]irect enforcement measures" and "[i]ndirect enforcement measures," but acknowledging that public benefits statutes also "operate as forms of indirect enforcement, because they discourage immigrant settlement and prompt what restrictionists call 'self-deportation,' or movement to other communities or to the home country").

235 Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 343 (2008).

236 In his discussion of Proposition 187, for example, Neuman argues for limits on discrimination against aliens, writing that "even if *some* goods can be reserved for citizens, it hardly follows that all goods can." Neuman, *supra* note 16, at 1427. During oral arguments for *Plyler*, Justice Thurgood Marshall queried whether such limits derive from the harm to the targeted group or to greater society, and asked the attorney for Texas if the state could deny fire protection to unauthorized persons. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 19. When the attorney said he did not think that it could, Justice Marshall asked rhetorically, "Why not? . . . Somebody's house is more important than his child?" *Id.* Bosniak, too, asked when,

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lap as nonessential obscures two of the most important aspects of contemporary self-deportation policy: 1) the use of alienage provisions precisely to make life *in*tolerable and thereby cause a group's removal; and 2) the use of deportation law to subordinate a class of workers.

In 1952, the Immigration and Nationality Act[237] (INA) consolidated the provisions governing entry, removal, and authorized presence in the United States.[238] This law established a selective admissions system that eventually created preferences for skilled laborers and relatives of citizens.[239] The 1952 Act also initiated a streamlining of process by making the crime of illegal entry a "petty offense" punishable by six months' imprisonment, channeling these cases to new misdemeanor courts, and thereby eliminating grand jury indictments and jury trials, to reduce both the expenses and protections of the process.[240] During the next decades, the unauthorized population grew as a result of the new caps on admissions, lax enforcement on the southern border for labor purposes,[241] and legislative acts that deauthorized more and more persons already present in the United States. Through a series of restrictive amendments, Congress continued to expand the grounds of deportability to apply to lawful entrants who overstayed their visas and individuals who engaged in an increasingly wide range of post-entry conduct.[242] As Professors Adam Cox and Cristina Rodríguez have commented, the consequence of the new laws was to render both "a huge

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through imposing suffering upon those who perform "much of our society's undesirable labor[,] . . . immigration regulation exceeds its legitimate bounds and becomes little more than a mechanism for institutionalizing the status of a permanent underclass in our society." Bosniak, *supra* note 233, at 1146–47.

237 Pub. L. No. 414, 66 Stat. 1632 (1952) (codified as amended in scattered sections of 8 U.S.C.).

238 *See Developments in the Law — Immigration and Nationality*, 66 HARV. L. REV. 643, 646 (1953).

239 *See id.* at 652. The law also abolished the racial restrictions of previous immigration and naturalization statutes, *see* Mae Ngai, *The Architecture of Race in American Immigration Law*, 86 J. AM. HIST. 67, 81 (1999), but retained national-origin quotas until Congress passed the Hart-Celler Act in 1965, *see* Munshi, *supra* note 163, at 281.

240 Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1326–27 (2010).

241 *Cf.* López, *supra* note 163, at 667–72; Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1770–73 (2012).

242 *See* Cox & Rodríguez, *supra* note 164, at 512; INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2012); INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C). In 1988, Congress made deportable any noncitizen with a conviction for an "aggravated felony." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470–71 (codified at 8 U.S.C. § 1251). While the INA initially defined "aggravated felony" as a serious drug trafficking offense, in 1990, 1994, and 1996, Congress expanded the definition of the term to include minor convictions and even some misdemeanors; it also made these provisions retroactive. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified at 8 U.S.C. § 1501, 1501 note); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–22 (codified at 8 U.S.C. § 1101, 1101 note); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009–546, 3009–627 to 3009–628 (codified at 8 U.S.C. § 1101, 1101 note); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110

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fraction of resident noncitizens deportable at the option of the Executive" and the laws on the books mostly unenforced.[243]

In the early 1990s, economic depression spurred a new wave of anti-immigrant sentiment.[244] In 1994, California voters passed Proposition 187, which included diverse provisions conscripting state and local law enforcement in the apprehension of unauthorized persons, prohibiting schools and hospitals from serving unauthorized persons, and criminalizing identity fraud.[245] While the bill purported to "provide for cooperation between agencies of state and local government with the federal government" to regulate immigration,[246] a U.S. district court insisted that the authority to coordinate national removal policy belonged to the federal government alone.[247] Nonetheless, states and municipalities subsequently introduced hundreds of bills on the model of Proposition 187, many of which met the same end.[248] Despite its general failure to create good law, this subfederal legislation illustrated the capacity of self-deportation laws to achieve their intended effects even *without* surviving a preemption challenge. Because they were calculated to spur people's action in anticipation of harm, the laws often had immediate impact; indeed, their effects frequently manifested even before their passage. For example, before the vote to pass a self-deportation bill in Avon Park, Florida, in 2006, business owners "saw a drop in business from immigrants wary of coming into their shops. At area farms, droves of workers stopped showing up to milk the cows and harvest the crops, afraid of being arrested. Landlords saw a sudden rise in vacant apartments."[249] Professor Angela M. Banks has also shown that the laws

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Stat. 1214, 1276–79 (codified in scattered sections of 8 U.S.C.); *see also* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (defining "aggravated felony"); Guerrero-Perez v. INS, 242 F.3d 727, 730, 737 (7th Cir. 2001) (holding that the Illinois Class A misdemeanor of criminal sexual abuse constitutes an "aggravated felony" for purposes of the INA); CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05(2)(d) (examining case law interpreting the breadth of "aggravated felony"); Dawn Marie Johnson, Note, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001).

243 Cox & Rodríguez, *supra* note 164, at 511; *see also* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 26.

244 Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 943–44 (1994).

245 Initiative Statute, Proposition 187, 1994 Cal. Legis. Serv. (West).

246 *Id.*

247 *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1253–55 (C.D. Cal. 1997).

248 This trend began with Proposition 187 itself. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768–69 (C.D. Cal. 1995); *see also* Arizona v. United States, 567 U.S. 387, 401–02 (2012). Consistently, however, courts did uphold provisions requiring employers to use the federal E-Verify system to ascertain the status of employees and authorizing state and local police to determine the immigration status of persons. *See, e.g.*, Chamber of Commerce v. Whiting, 563 U.S. 582, 607–11 (2011); United States v. Alabama, 691 F.3d 1269, 1283–85 (11th Cir. 2012).

249 Christina E. Sanchez, *Avon Park Mayor Isn't Giving Up*, SARASOTA HERALD TRIB. (July 26, 2006), http://www.heraldtribune.com/article/LK/20060726/News/605228621/SH/ [https://perma.cc/L3LZ-644M].

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discouraged immigrants from naturalizing even when they were eligible.[250] Finally, the laws had a viral effect on private citizens: after the passage of H.B. 56, citizens in Alabama "acted as if they themselves were deputized to enforce H.B. 56";[251] the laws motivated anti-immigrant activism and hardened non-Hispanic citizens' views of all Hispanics, regardless of citizenship, while increasing white citizens' fears about lawlessness and crime.[252]

These laws, and their preemption, have been accompanied by a massive buildup of the deportation system by Congress and the Executive.[253] Shortly after the passage of Proposition 187, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[254] (IIRIRA) and the Antiterrorism and Effective Death Penalty Act[255] (AEDPA). With these laws, Congress surprised a huge population of lawful entrants by deauthorizing their presence, in addition to narrowing both long-standing pathways to obtaining authorized status and forms of relief such as cancellation of removal.[256] As these legislative changes catalyzed the commission of new immigration violations, the executive branch concurrently ratcheted up enforcement but could not keep up with the scale of these legislative transformations. Between 1993 and 1999, for example, the annual budget of the INS nearly tripled to reach $4.2 billion; by 2010, the combined budgets of its successor agencies, Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services (CIS), together reconstituted as the

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250 Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1152 (2012). The U.S. Citizenship and Immigration Services's (USCIS's) push to denaturalize individuals under the Obama-era program Operation Janus is likely to have the same effect. *Cf.* Amy Taxin, *U.S. Launches Bid to Find Citizenship Cheaters*, AP NEWS (June 11, 2018), https://apnews.com/1da389a535684a5f9d0da74081c242f3 [https://perma.cc/6FJN-X6RQ] (describing USCIS's Operation Janus initiative).

251 Benjamin D. Galloway, Comment, *Perpetual Congressional Inaction: State Regulation of Immigration in Response to Lack of Reform*, 65 MERCER L. REV. 795, 820 (2014).

252 *See* René D. Flores, The Social Consequences of Subnational Restrictionist Immigration Policies in the U.S., at III (Sept. 2014) (unpublished Ph.D dissertation, Princeton University) (on file with author).

253 See, e.g., Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.) (2012); Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of the U.S. Code) (2012).

254 Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of the U.S. Code) (2012).

255 Pub. L. No. 104-132, 110 Stat. 1217 (1996) (codified in scattered sections of the U.S. Code) (2012). Indeed, after California Governor Gray Davis abandoned the state's appeal of the 1998 ruling that found most of Proposition 187 unconstitutional, he commented that, "Yes, but" — despite the formal failure of Proposition 187 — "it is supplanted by federal legislation that is faithful to the will of the voters who passed 187." GRACE CHANG, DISPOSABLE DOMESTICS 8 (2016).

256 MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 28. The legislative path therefore raises a puzzle: In the face of a supposed "crisis" of enforcement, why would Congress exacerbate the situation by choosing, among other things, to convert legally present persons into more unauthorized immigrants?

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Department of Homeland Security (DHS) in 2003, exceeded $20 billion.[257] Nonetheless, in 2010, ICE had the capacity to arrest only about 2–3% of the estimated 22 million unauthorized persons present in the United States.[258]

The fruits of this growth have encompassed a succession of programs and initiatives to further strip deportation of procedural protections, reduce the costs of deportation, and maximize the self-deportation effects of the deportation system. In 2005, DHS and DOJ's joint initiative "Operation Streamline" began the practice of now-routine en masse, "fast track" trials of up to seventy defendants at once, with proceedings lasting as little as twenty-five seconds for each individual.[259] In 2008, ICE unsuccessfully tried to replicate historical "voluntary departure" programs with an initiative entitled "Operation Scheduled Departure,"[260] which sought to avoid the costs of apprehending and detaining immigrants. However, only eight out of 457,000 eligible immigrants appeared for deportation.[261] More successfully, the federal government has increasingly delegated law enforcement power to state and local law officials to expand the reach of the deportation system, especially by integrating immigration and criminal law systems while emphasizing the "criminal alien" in policy justifications.[262] The federal government has also rapidly escalated its reliance upon summary removal proceedings,

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[257] *Id.* at 50.

[258] Memorandum from John Morton, Assistant Sec'y, U.S. Dep't of Homeland Sec., to All ICE Employees (June 30, 2010) [hereinafter Morton Memo]; Mohammad M. Fazel-Zarandi et al., *The Number of Undocumented Immigrants in the United States: Estimates Based on Modeling with Demographic Data from 1990–2016*, PLOS ONE (2018), https://doi.org/10.1371/journal.pone.0201193 [https://perma.cc/S9ZL-CMYG].

[259] *See, e.g.*, Fernanda Santos, *Detainees Sentenced in Seconds in "Streamline" Justice on Border*, N.Y. TIMES (Feb. 11, 2014), https://nyti.ms/1fWYvIU [https://perma.cc/E8LN-KWTC].

[260] U.S. IMMIGRATION & CUSTOMS ENF'T, *ICE Scheduled Departure Program for Non-Criminal Fugitive Aliens*, https://web.archive.org/web/20080917222707/http://www.ice.gov/scheduled-departure/index.htm [https://perma.cc/43VK-3E3B]. This program and its historical antecedents should not be confused with the statutory options of "voluntary departure" under INA § 240(B) and withdrawal of application for entry under INA § 235(a)(4). For an overview of the statistical significance of such "returns," see ALISON SISKIN, CONG. RESEARCH SERV., ALIEN REMOVALS AND RETURNS 14 (2015), which describes how the number of such returns exceeded 1 million persons annually between 1997 and 2006, with the exception of 2003.

[261] ALEXANDRA FILINDRA, AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., THE MYTH OF SELF DEPORTATION 5–6 (Apr. 2012).

[262] For descriptions and analyses of this integration, see Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 643 (2016); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146 (2013); Eagly, *supra* note 240, at 1300; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

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including expedited removal,[263] reinstatement of removal,[264] administrative removal,[265] and stipulated orders of removal.[266] As a result of such processes, in 2015 and 2016, in approximately 85% of all deportations conducted by the United States, individuals did not have a hearing, never saw an immigration judge, and were deported through "cursory administrative processes where the same presiding immigration officer acted as the prosecutor, judge, and jailor."[267]

Within the individual deportation system, the new absence of procedural protections creates numerous opportunities for government agents

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[263] In 1996, the IIRIRA added expedited removal to the INA, making it mandatory for DHS officials to return arriving noncitizens without authorization at ports of entry to their countries of origin, without delay and without an immigration court proceeding. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2012). Expedited removals have risen from 23,487 in total in 1997, to a total of around 193,000 in 2013, constituting 44% of all removals. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 166 (1999); JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1 (2014).

[264] *See, e.g.*, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012); Apprehension and Detention of Aliens Ordered Removed, 8 C.F.R. § 241.8 (2001). Particular harms arise at the intersections of expedited removals and reinstatement of removals, which Professor Jennifer Lee Koh describes as "legal black holes." Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 1, 24–25 (2018).

[265] In administrative proceedings, individuals can be deported before seeing a judge. INA § 238, 8 U.S.C. § 1228 (2012); Expedited Removal of Aggravated Felons, 8 C.F.R. § 238.1 (2016). For a discussion of expedited removal, reinstatement of removal, and administrative removal, see Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–10 (2014).

[266] A stipulated order of removal is a deportation order entered without a hearing and signed by an immigration judge, constituting "a conclusive determination of the alien's removability from the United States." INA § 240(a)(d), 8 U.S.C. § 1229(a)(d) (2012). ICE described stipulated removal orders as "a good avenue for judicial economy in that they create operational efficiencies for both the immigration and criminal courts." U.S. IMMIGRATION & CUSTOMS ENF'T, PROTECTING THE HOMELAND: A TOOL KIT FOR PROSECUTORS 32 (Apr. 2011). Ninety-six percent of individuals who signed stipulated orders between 2004 and 2011 did not have a lawyer. JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 8 (Sept. 2011); *see also* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 495 (2013).

[267] AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (Dec. 2014). These proceedings also routinely deny asylum seekers the opportunity to apply for asylum. *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS & RECOMMENDATIONS 4 (Feb. 2005); U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 22 (2016) [hereinafter USCIRF, BARRIERS TO PROTECTION]. The President's tweet advocating that prospective entrants to the country should be immediately deported "with no Judges or Court Cases," Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), https://twitter.com/realDonaldTrump/status/1010900865602019329 [https://perma.cc/6MJB-M753], articulates a proposal that is already close to the de facto norm, *see* Jennifer Lee Koh & Shoba Sivaprasad Wadhia, Opinion, *Deport, Not Court? The U.S. Is Already Doing That*, L.A. TIMES (June 30, 2018), http://www.latimes.com/opinion/op-ed/la-oe-koh-wadhia-deportations-20180630-story.html [https://perma.cc/7T24-UXGC].

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to coerce individuals to become the agents of their own removal, or self-deport. In this refurbished system, frontline agents of Customs and Border Patrol (CBP) and the Office of Field Operations (OFO) wield tremendous power.[268] CBP, for example, routinely intercepts arriving noncitizens at ports of entry along the southern border, including on bridges, and convinces them to turn back in contravention of their right to seek asylum.[269] Government observers have found that immigration officers regularly coerce individuals to accept "voluntary" returns and departures by signing removal forms they cannot read or do not understand.[270] Immigration officers also pressure individuals to take plea agreements requiring them to waive their rights to trial and appeal, and sometimes containing immigration waivers compelling them to relinquish their asylum or protection claims.[271] When individuals self-deport *within* the deportation system in this way, as with voluntary departures, the government regains some of the control over a person's departure that it relinquishes when they self-deport outside of it.

In addition to normalizing skeletal procedures, toward similar ends, the Executive has increasingly subjected noncitizens to punitive, carceral detention conditions, including freezing holding cells called "ice boxes,"[272] as well as lengthy and potentially indefinite sentences.[273] More recently, it has also chosen to exercise its discretion to selectively enforce deportation laws in spectacularly harsh ways. Perhaps most notoriously, it has separated children from their parents and prosecuted these parents for illegal entry or reentry.[274] In the summer of 2017, the Executive increased its use of this practice,[275] and in spring 2018, it separated around 2000 children from their parents over the course of about

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268 In 2005, the U.S. Commission on International Religious Freedom (USCIRF) had already found "alarming" evidence that CBP and OFO were routinely conducting their responsibilities to create inaccurate, incomplete, and unreliable records for immigration law judges. USCIRF, BARRIERS TO PROTECTION, *supra* note 267, at 19.

269 *See* HUMAN RIGHTS FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION'S MISUSE OF CRIMINAL PROSECUTIONS 15–16 (Jan. 2018).

270 USCIRF recommended in 2014 that CBP ensure OFO officers and Border Patrol agents understand they have no authority to reject or assess claims of fear or eligibility for asylum. USCIRF, BARRIERS TO PROTECTION, *supra* note 267, at 32–33; *see also* AM. CIVIL LIBERTIES UNION, *supra* note 267, at 5, 21. December 2013 statistics from ICE show 23,455 voluntary returns took place in FY 2013. *Id.* at 23.

271 *See* HUMAN RIGHTS FIRST, *supra* note 269, at 19–20. One federal public defender from Florida observed that the government uses "the hammer of threat of prosecution and a long prison sentence to [convince immigrants to] give up the rights in an immigration case." *Id.* at 20.

272 USCIRF, BARRIERS TO PROTECTION, *supra* note 267, at 58.

273 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 868 (2018) (Breyer, J., dissenting) (discussing the potentially indefinite detention, without bond, of certain categories of aliens awaiting removal proceedings).

274 HUMAN RIGHTS FIRST, *supra* note 269, at 24.

275 *See id.*

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six weeks.[276] White House Chief of Staff John Kelly defended the policy against a national uproar as a "tough deterrent," declaring that the "name of the game is deterrence";[277] Attorney General Jefferson Sessions stated the policy was "necessary" to keep people from "stamped[ing]" the borders.[278] ICE has since denied bond to parents separated from their children who are eligible to apply for asylum and distributed forms to coerce them to relinquish their claims and agree to removal in exchange for the return of their children.[279] One parent declared in a pending court case that the officers "said the children would not return [and that] 'it is the price you pay for crossing the border. We do this so that when you return to your countries you do not return, and so you tell your relatives not to come because we will take your children from you.'"[280]

Indeed, the current Administration's commitment to spectacle appears to stem from the purpose of encouraging immigrant communities to leave. Deterrence measures, for example, clearly and openly intend to harness the indirect effects of direct enforcement to discourage people from entering unlawfully and encourage those who have entered unlawfully to leave. However, selective, widely broadcast cruelty by the federal government to immigrants, combined with clear expressions of hostility directed at immigrant communities,[281] does more than just produce imminent threats. It affects a broader community by triggering fear-based responses even before a law or policy is actually implemented.[282]

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[276] Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran "Pilot Program" for Separating Migrant Families in 2017*, NBC NEWS (Jun. 29, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616 [https://perma.cc/3WWP-N57P].

[277] William Cummings, *John Kelly Defends Separating Immigrant Families, Saying "The Name of the Game Is Deterrence*," USA (MAY 11, 2018, 4:16 PM), https://usat.ly/2rB4u44 [https://perma.cc/J737-2C6M]; *see* Michelle Mark, *John Kelly: It's Not "Cruel" to Separate Families at the Border — Children Will Be "Put into Foster Care or Whatever*," BUS. INSIDER (May 11, 2018, 2:52 PM), http://www.businessinsider.com/john-kelly-family-separation-policy-illegal-border-crossing-2018-5 [https://perma.cc/T7LE-AGZ5].

[278] Christopher Ingraham, *Sessions Says Family Separation Is Necessary to Keep the Country from Being Overwhelmed. Federal Immigration Data Says Otherwise.*, WASH. POST (June 18, 2018), https://wapo.st/2K3G4v6 [https://perma.cc/A7HR-8JVF]. CBP data shows apprehensions at the southwestern border have dropped to levels near historic lows. *See id.*

[279] Caitlin Dickson, *New ICE Form to Separated Parents: Choose Deportation With or Without Kids*, YAHOO (July 3, 2018), https://www.yahoo.com/news/new-ice-form-separated-parents-choose-deportation-without-kids-232452897.html [https://perma.cc/5E3E-8LK7]. The form can be accessed here: http://media1.s-nbcnews.com/i/today/z_creative/iceform.jpg [https://perma.cc/C28W-64XU].

[280] Declaration of Maricela Batres at 2, Washington v. Trump, No. 18-cv-00939 (W.D. Wash. July 2, 2018).

[281] For instance, the Trump Administration has justified its zero-tolerance policy by citing "infest[ation]" by immigrants. Hamed Aleaziz, *Trump's Claim that Migrants "Infest" Country Seen as Whipping Up Fear*, S.F. CHRON. (June 19, 2018), https://www.sfchronicle.com/bayarea/article/Trump-s-claim-that-migrants-infest-13008615.php [https://perma.cc/FLU8-2M52].

[282] In this respect, the expressive power of such articulations and policies is similar to that of subfederal self-deportation. *See supra* pp. 1924-25.

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Within this framework, many of the current Administration's actions gain coherence, including its vocal embrace of a zero-tolerance policy with respect to unauthorized immigration;[283] its implementation of travel bans against persons from a number of majority-Muslim countries;[284] and its vows to add 5000 agents to CBP and 10,000 agents to ICE,[285] terminate Temporary Protected Status for individuals from Haiti and El Salvador,[286] retaliate against sanctuary cities and states with raids,[287] attempt to denaturalize immigrant citizens,[288] expand expedited removal,[289] and build a 2000-mile border wall between the United States and Mexico.[290] These policy announcements may or may not ever result in actual or successful policies. Nonetheless, their official announcement itself has a non-negligible impact. It contributes to the suffering, subordination, and self-deportation of both the people who are their clear targets and the citizens who are part of their networks.[291]

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[283] Miriam Valverde, *What You Need to Know About the Trump Administration's Zero-Tolerance Immigration Policy*, POLITIFACT (June 6, 2018), https://www.politifact.com/truth-o-meter/article/2018/jun/06/what-you-need-know-about-trump-administrations-zer/ [https://perma.cc/C75E-HNW4].

[284] Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. TIMES (Sep. 24, 2017), https://nyti.ms/2ynmNvf [https://perma.cc/6YU9-V7GN].

[285] Brennan Weiss, *Trump Wants 15,000 More Agents to Patrol the US Border, but Immigration Authorities Say There's One Big Problem*, BUS. INSIDER (Nov. 16, 2017), http://www.businessinsider.com/border-patrol-cant-handle-thousands-of-new-agents-2017-11 [https://perma.cc/6T9C-CNE2].

[286] Karen DeYoung & Nick Miroff, *Trump Administration to End Provisional Residency Protection for 60,000 Haitians*, WASH. POST (Nov. 21, 2017), http://wapo.st/2zTzCS9 [https://perma.cc/CA2M-SP6E]; Miriam Jordan, *Trump Administration Says That Nearly 200,000 Salvadorans Must Leave*, N.Y. TIMES (Jan. 8, 2018), https://nyti.ms/2EmEtKl [https://perma.cc/2MTD-DVJS].

[287] Matt Shuham, *ICE Director Calls for Arrest of 'Sanctuary' City and State Officials*, TALKING POINTS MEMO (Jan. 3, 2018), https://talkingpointsmemo.com/livewire/thomas-homan-arrest-politicians-sanctuary-cities-states [https://perma.cc/8F9S-J4WW].

[288] U.S. Citizenship & Immigration Services, *USCIS Partners with Justice Department and Secures First Denaturalization as a Result of Operation Janus*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, (Jan. 10, 2018), https://www.uscis.gov/news/news-releases/uscis-partners-justice-department-and-secures-first-denaturalization-result-operation-janus [https://perma.cc/H5CC-9YNG].

[289] Abigail Hauslohner & David Makamura, *In Memo, Trump Administration Weighs Expanding the Expedited Deportation Powers of DHS*, WASH. POST (July 14, 2017), http://wapo.st/2tophNX [https://perma.cc/GR6H-KL9D].

[290] Julie Hirschfeld Davis, David E. Sanger & Maggie Haberman, *Trump to Order Mexican Border Wall and Curtail Immigration*, N.Y. TIMES (Jan. 24, 2017), https://nyti.ms/2kqTEIA [https://perma.cc/J4P3-DPR2].

[291] A growing literature documents the fear or "chilling effects" of such measures as the 1996 immigration legislation and ICE's creation of the Secure Communities program, which deter unauthorized persons and citizens from accessing services for which they are eligible through programs such as Medicaid, Women, Infants, and Children (WIC), Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), and the Affordable Care Act (ACA) for fear of deportation consequences. *See, e.g.*, Tara Watson, *Inside the Refrigerator: Immigration Enforcement and Chilling in Medicaid Participation*, 6 AM. ECON. J.: ECON. POL'Y 313 (2014) (discussing Medicaid); Francisco I. Pedraza & Ling Zhu, *The "Chilling Effect" of America's New Immigration Enforcement Regime*, PATHWAYS 15–17 (2015) (discussing TANF); Edward D. Vargas & Maureen A. Pirog, *Mixed-Status Families and WIC Uptake: The Effects of Risk of Deportation*

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Private citizens and anti-immigrant vigilantes further appear to understand these kinds of official expressions as a directive to perform the kind of discrimination that has historically been their province. The Administration's cues have energized and emboldened such networks, likely contributing to the nationwide surge in hate crimes and white supremacist–organized activity in recent years.[292]

Despite the massive growth of the deportation system, as of 2010, ICE had the capacity to remove less than 2% of the 22 million unauthorized persons then present in the United States.[293] This circumstance is popularly called the country's "immigration crisis." The parameters of the raging national debate it has elicited are set by the poles of advocacy for mass deportation and mass amnesty. Amidst much intense dispute, there is some consensus that two conditions distinguish the situation in particular: first, the presence of an excessive number of deportable people in the country, and second, a corresponding excess of immigration laws that remain largely unenforced. Most agree, too, that these conditions are symptomatic of a dysfunctional deportation system.

These same conditions, however, also index the vigorous operation of self-deportation logic working *through* the individual deportation system and beyond it. The contemporary individual deportation system fosters a logic of self-deportation in two principal ways: first, by stripping process to produce opportunities to coerce individuals already *within* the deportation system, who may face indefinite detention or the permanent loss of their children, into agreeing to their removal by the state; and second, by selectively enforcing deportation laws in especially harsh and painful ways, to magnify the spectacle of this suffering as a threat, a deterrence, or a directive to those outside of the system. The first way, self-deportation within the deportation system, escalates the total volume of removals and, by reducing costs, expands the capacity of the formal removal system. However, the second way, the use of the deportation system to create terror and subordination, may have more

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on Program Use, 97 SOC. SCI. Q. 555 (2016) (discussing WIC); Marcella Alsan & Crystal Yang, *Fear and the Safety Net: Evidence from Secure Communities* 22–26 (Nat'l Bureau Econ. Research, Working Paper No. 24731, 2018) (discussing food stamps and the ACA).

[292] *See, e.g.*, John Eligon, *Hate Crimes Increase for the Third Consecutive Year, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2018), https://nyti.ms/2DlupUZ [https://perma.cc/GN8R-YE7Q]; Joe Heim, *Hate Groups in the U.S. Remain on the Rise, According to New Study*, WASH. POST (Feb. 21, 2018), https://wapo.st/2W7mqkc [https://perma.cc/WR5A-QW7F]; Maria Hinojosa, *Hate Crimes Against Latinos Increase in California*, NPR (Jul. 15, 2018, 8:18 AM), https://n.pr/2JsFAKD [https://perma.cc/6AKE-DHK3].

[293] *See* Morton Memo, *supra* note 258 (stating ICE had resources to remove less than 4% of the removable population when that population was estimated to be 11.2 million); *see also* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 27 (stating that in 2009, ICE arrested less than 6% of the removable population when that population was estimated to be 11.2 million). However, a Yale study released last year shows that the population has been about twice as high as previously estimated for decades. *See* Fazel-Zarandi et al., *supra* note 258. The researchers' 95% probability range is between 16.2 million and 29.5 million, with a mean of 22.1 million. *Id.* at 2, 10.

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far-reaching effects because of the sheer scale of the population for whom deportation is now a threat. Indeed, despite the growth of the deportation system, a century of government acquiescence in private employers' creation of incentives to migrate has grown a deportable population that still exceeds the overall system's removal capacity to an extreme extent. This legally fashioned gap — which is steadily being exacerbated by the federal government's pursuit of measures to deauthorize more and more groups of people — raises questions about the deportation system's function. Far from obscuring the end of removal, the government now vigorously brandishes it as the justification for its programs and policies. History, however, instructs us to look past what self-deportation policy avows to what it accomplishes in the contemporary environment: the subordination of an ever-widening population vulnerable to exploitation and not desired as a part of the nation's polity.

III. A NATION SHAPED BY SELF-DEPORTATION

The history of self-deportation imparts a number of lessons that help us to better understand immigration law and policy in the United States as a whole. It shows us that the nation's removal system is not limited to deportation laws and direct deportations, but rather that the government's capacity expands by making other entities into agents of self-deportation policy, especially the individuals it seeks to remove. Doctrines such as preemption and the Fourteenth Amendment's prohibition on subfederal public discrimination have distinguished the roles of subfederal governments, businesses, and private citizens with respect to removal. The policy's history also indicates that, across historical situations, removal has not comprised an end in itself: rather, governments have pursued removal as part of other goals — first, control of land, and, after establishing control of the territory, control of labor. This Part elaborates on these lessons, with particular attention to how the roles of different agents and the goals of the policy changed after abolition and the creation of the individual deportation system. It concludes by assessing the structural limitations and costs of the policy based on this analysis.

Self-deportation policy expands the government's capacity by directing the costs of removal away from the government to other entities, and in particular, to the group that it seeks to remove.[294] Further, self-deportation policy demonstrates that removal policy is not just government-administered. Private entities, as well as federal and subfederal agents, create the conditions that cause individuals to self-deport. In particular, across historical circumstances, governments have delegated a large role in creating pressures upon the groups they seek to

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[294] *Cf.* Kobach, *Attrition Through Enforcement*, *supra* note 12, at 162 ("[A]ttrition through enforcement possesses a significant advantage over other competing approaches: it is comparatively inexpensive to implement.").

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remove to the private sphere. Because private entities, especially public-facing private entities, interact with the targets of removal policy on the ground, they hold a great deal of power to make these individuals' everyday lives — at which the policy aims — unbearable. Thus, the private citizens who are members of the community in which unauthorized people live — their employers, teachers, service providers, coworkers, and neighbors, for example — carry out the work of discrimination in ways that range from exclusion to active harassment and private whistleblowing. Self-deportation policy therefore operates through a penumbra that allocates power to private entities and vigilantes who are energized by official expressions of anti-immigrant animus, both federal and subfederal. Furthermore, it works within a landscape characterized by uneven racial distributions of power and property that it historically helped to shape. The intimate historical relationship between self-deportation policy and the production of property entitlements explains the policy's power to mobilize communities of private persons acting in their own interests and pit them against others whom they perceive to be a threat. The government's use of spectacle and expressive statements directed to private citizens suggests that at least some policymakers understand these motivations and their own power to draw on this force.

From the period of the early Republic, federal courts have sought to prohibit states and municipalities from legislating independent self-deportation regimes. Congress then constitutionalized this principle against public discrimination with the Fourteenth Amendment. The Court has repeatedly checked subfederal power — by invoking preemption in Indian Affairs against southeastern states' extension laws, equal protection against western states' and municipalities' Chinese exclusion laws, and preemption in the field of immigration against the recent nationwide wave of subfederal self-deportation bills. In each instance that the Court has limited subfederal attempts to create an independent removal regime, however, the legislative and executive branches have then shown that they are responsive to subfederal expressions of agitation by pursuing major ramp-ups to the federal deportation system.[295]

In particular, the establishment of the individual deportation system during the era of Chinese exclusion introduced a seismic transformation to the structure of self-deportation policy by expanding the federal government's own role. With the creation of the individual deportation system, the federal government substantially increased its control over

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[295] Thus, as Motomura observes, preemption guards against subfederal discrimination and the "serious but elusive constitutional violations" state and local governments might commit. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3, at 115. At the same time, as Professors David Rubenstein and Pratheepan Gulasekaram observe, "self-deportation, in general" — and the subordination through which it operates — "is not something that the federal government disapproves of." David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 601 n.91 (2017).

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removal and strengthened its formal ability to coordinate the different actors that have long enacted self-deportation policy under its watch. It created new opportunities to provoke self-deportation within the deportation system while growing an impressive capacity for direct removal, bringing diverse forms of removal under its oversight. When governments relied wholly on indirect tactics, they retained no control or knowledge about how many would stay out or leave, or where they would go; but when government agents deport someone — whether by process or lack of it — they regain control over the manner, time, and geographical coordinates of that person's removal. Since this development, the federal government has largely limited the subfederal role to expanding the capacity and reach of the deportation system. It has further systematized this delegation with a wide range of formal agreements that enlist states' and municipalities' aid in apprehending unauthorized persons.[296] Although the role of private citizens in the deportation system is minimal, the federal government also depends heavily and increasingly upon private corporations in order to detain the people it apprehends.[297]

Perhaps unsurprisingly, from the beginning, the deportation system has worked to maximize its self-deportation effects. That is, the threat of a harsh deportation regime has conditioned people's lives and controlled their behavior, both inside and outside of the deportation system. Indeed, the relationship between self-deportation and direct deportation can be summarized as follows: 1) the two removal strategies present qualitatively distinct alternatives, *and* 2) the deportation system always serves a double function, since deportation laws also have a self-deportation effect. The federal government immediately began to harness the indirect as well as direct effects of the deportation system, as demonstrated by the Mexican removal during the Great Depression, and its evolving deportation policy continues to reflect self-deportation

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[296] Such agreements include the Criminal Alien Program, under which federal officers identify noncitizens in violation of immigration laws by conducting interviews in local jails or prisons; 287(g) agreements, through which the federal government delegates power to state and local law enforcement to do the same; or the Secure Communities Program, where fingerprints taken by local law enforcement and received by the FBI are automatically sent to ICE electronically. *See* Eagly, *supra* note 262, at 1184, 1161–62, 1212–14. These measures all increase the state and local role in enforcing federal immigration laws, notwithstanding the qualitative and normative differences of local immigration law enforcement from federal law enforcement. *Id.* at 1222–23; Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269, 1270–73 (2012). Professor Ingrid Eagly has presented extensive evidence showing that even before the recent subfederal self-deportation legislation, increasing local regulation of immigration was redefining and restructuring the federal system for punishing immigration crime, rather than merely mirroring it. Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1755–805 (2011).

[297] Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. MIGRATION & HUM. SECURITY 145, 145 (2018).

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aims. Its decisions, in particular, to create spectacles from the violence of policies well after their creation and implementation, such as family separation, denaturalization, and the extreme streamlining of protections within the system, suggest an independent meta-policy — one that seeks to maximize the reach of the system's *threat*. The self-deportation function of deportation laws therefore allows us to more precisely understand an effect often referred to rather nebulously as a "culture of fear."

The use of the deportation system for indirect removal may be more efficacious than its use for direct removals. As discussed above, the system is technically inadequate for directly removing a population that is estimated at 22 million people; the biopower and administrative expenses that the individual deportation system requires make it simply unsuited for a task of this scale.[298] While streamlining the process has greatly magnified its capacity for direct removal, such modifications cannot cure the inherent structural limitation of the system in proportion to its target. Without trivializing the violence and escalation of the scale of the government's deportations, it is important to recognize that *no* escalation or expansion of this system — even with its self-deportation effects — would be sufficient to remove the entire unauthorized population in the United States. This limitation is further exacerbated by the fact that the government appears to be prioritizing the growth of this margin, by continuously deauthorizing additional groups.

However, the history of self-deportation instructs us that self-deportation policy has worked consistently to achieve an unstated goal other than removal itself. Discourse about immigration law and policy focuses almost exclusively on the deportation system and its avowed purpose of *removal* and the prevention of unauthorized entry. However, the development of removal policy after abolition suggests that this focus obscures another consequence of self-deportation policy — controlling noncitizen labor.[299] Indeed, the insufficiency of the self-deportation and deportation systems together to effect removal of all unauthorized persons in the country, and their effects of subordinating this massive population instead, suggest that the policy's function of regulating foreign labor after abolition and the close of the frontier has flourished wildly over the last century. As in the past, the mechanism of self-

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[298] The federal government, recognizing this incongruity, has periodically granted mass amnesty to excesses of unauthorized persons in order to bring the system's capacity in line with its purpose. *See* VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 66 (1984); *see also*, *e.g.*, Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-227, 112 Stat. 2681-538; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997); IRCA, Pub. L. No. 99-603, 100 Stat. 3359; Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

[299] In this new function of self-deportation policy, the most significant transformations to the policy's structure — the establishment of the deportation system — and its aim — subordination — converge.

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deportation inherently places conditions upon presence: targeted individuals must leave, or submit to subordination and vulnerability to exploitation if they stay.[300] Under the modern removal system, the conditional subordination this policy imposes as an alternative to removal suggests the two outcomes are complementary: the presence of these individuals may be tolerable or even desirable, as long as they remain compliant with the policy.[301] If we attend to both goals, the government's increasingly dramatic displays of its *deportation* power may even seem to constitute a response to critiques of the *discriminatory* effects of its immigration policy. The spectacles of cruelty the government enacts on deportees emphasize the goal of removal, rather than subordination, in a manner that tends to obstruct our appreciation of the effects of its removal policy on the social fabric of the nation.

To the extent that deportation laws produce results *other* than deportation, they produce subordination. It is because the threat of deportation shapes the contours of people's everyday lives that, in Professor Daniel Kanstroom's words, the system functions "as a labor control device, a kind of extra tool in the hands of large businesses (and, for that matter, American families seeking nannies, gardeners, and so forth) to provide a cheap, flexible, and largely rightless labor supply."[302] Kanstroom here captures the way that subordination, like removal, requires the collective, coordinated efforts of the federal system *with* private entities, especially employers across the spectrum of scale, from major corporations to small businesses and individual families.[303] Indeed, legislation that ostensibly seeks to hold employers accountable for employing unauthorized employees frequently operates to render those employees even more vulnerable.[304] In the current chapter of self-deportation, the federal government leans particularly heavily on the deportation system's capacity to produce fear and a culture of subordination — thereby increasing the power of private actors vis-à-vis individuals, who become less able to access the protections of law

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300 For scholarship on how the threat of deportation curtails the rights of unauthorized workers, see Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2183 (1994); and Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 968–71 (2006).

301 For scholarship that examines employers' preferences for workers without status, see Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1968–83 (2007); and Saucedo, *supra* note 300, at 999–1017.

302 KANSTROOM, *supra* note 164, at 245.

303 *See id.*

304 For scholarship that addresses the way the IRCA's employer sanctions have, in practice, burdened employees rather than employers, see Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009); and Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303 (2010).

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enforcement of any kind.[305] The federal government can increase *these* effects simply by expanding the population subject to the threat of deportation, not just legislatively, but by unprecedentedly making all deportable people enforcement priorities and by terminating and streamlining protections that have traditionally been available to unauthorized persons.

Nonetheless, the same aspects of self-deportation that increase the government's capacity for removal and subordination also generate critical structural limitations for the tactic. First, the delegation of agency to the targeted group has significant limits with respect to the goal of removal. Shifting the cost of removal to deportees means that people of few means often cannot go far, and they frequently cross state, rather than national, boundaries. Multiple chapters of the history of self-deportation instruct us that in order for people to self-deport, they must have somewhere else to go. In the early nineteenth century, recognizing this limitation, the government promised tribes alternate lands for their own and sought to secure lands for emancipated slaves to "colonize." In the recent aftermath of subfederal self-deportation bills, evidence shows that people frequently returned to their homes even after self-deporting.[306] The most efficacious way to promote self-deportation would be to refrain from making people's home countries unsafe, unfeasible places to live, to the extent that such external conditions are within an enacting government's control. The more dangerous, economically difficult, and insupportable life elsewhere remains, the less likely people will be to self-deport, and the more likely it is that the policy's effects will stop at its mechanism — subordination.

Additionally, the modern era poses unique challenges to the use of self-deportation because of the policy's structural reliance on private actors, over which the government retains little control. Because private actors must repeat official hostile gestures in countless institutional and extra-institutional contexts to create self-deportation conditions, the policy will fail to the extent that those private actors do not act in the ways that the government anticipates. The policy now targets people who are remarkably integrated in American society and relies on a more diverse polity than ever before, so that the polity's members may not as uniformly be willing to assume the role of promoting self-deportation as in past eras. A government that chooses to pursue a self-deportation policy likely also counts on the weakness of modern social relations as a background condition; but where private citizens are willing to provide significant aid to one another, the policy is likely to fail.

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[305] *See, e.g.*, Kartikay Mehrotra et al., *In Trump's America, Bosses Are Accused of Weaponizing the ICE Crackdown*, BLOOMBERG (Dec. 18, 2018, 5:00 AM), https://bloom.bg/2PIvtVb [https://perma.cc/KAL7-N4YQ] (describing the sharp increase in employers' abuses of labor with rising arrest rates of suspected unauthorized persons under the current administration).

[306] Benjy Sarlin, *How America's Harshest Immigration Law Failed*, MSNBC (May 9, 2014, 3:51 PM), https://on.msnbc.com/18T6dmQ [https://perma.cc/4ZG8-3T7K].

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A government's choice to shift costs to subfederal entities comes with similar limitations. States and municipalities whose resources the federal government seeks to marshal for its deportation system may have different priorities and refuse to accept this role. Indeed, state and local sanctuary policies are perhaps the most visible and powerful institutional responses to the effects of federal self-deportation. Subfederal power to refuse this role therefore ensures that the policy can operate only irregularly across the country, even if the regime is national in scope. Further, despite their limited role in the federal self-deportation scheme, subfederal entities also retain powers of official expression that can directly counter official expressions of hostility, in keeping with the welcoming role that is traditionally their province.[307]

A clear assessment of self-deportation's limitations and costs should motivate governmental, institutional, and private responses to U.S. immigration policy. Because the policy interpellates such a broad range of actors, the costs of self-deportation are high for everyone, economically,[308] socially, and politically. When a government shifts the costs of removal to the group it targets, departing individuals are forced to abandon the lives they have built in this country, sometimes over many decades. The policy also has more than a material impact on self-deportees, which is further exacerbated by its impact on their families and immediate communities, who may face removal or economic ruin.[309] Further, private and institutional actors frequently rely on racial heuristics to do the work of discrimination, which means they target

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307 MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 3; Rodríguez, *supra* note 234.

308 The immediate outflux of large numbers of Latino workers after the passage of H.B. 56 devastated poultry and agricultural industries, helping make Alabama "the worst economy in the Southeast." Benjamin D. Galloway, Casenote, *The Beginning of the End:* United States v. Alabama *and the Doctrine of Self-Deportation*, 64 MERCER L. REV. 1093, 1106 (2013) (quoting Joey Kennedy, *Alabama Has the Worst Economy in the Southeast. Wonder Why?*, AL.COM (Oct. 25, 2012, 12:17 PM), http://blog.al.com/jkennedy/2012/10/alabama_has_the_worst_economy.html [https://perma.cc/T8AB-V92W]); *see also* AM. CIVIL LIBERTIES UNION, ANTI-IMMIGRANT ORDINANCES HAVE REAL ECONOMIC AND POLITICAL COSTS FOR CITIES THAT ENACT THEM: A SURVEY OF THE COSTS AND CONSEQUENCES OF ANTI-IMMIGRANT MEASURES, (2009), http://observatoriocolef.org/_admin/documentos/costofantiimmig.pdf [https://perma.cc/HDA6-RXXG]. Cities that passed such legislation, moreover, incurred millions of dollars in litigation costs to defend them. *See, e.g.*, Muzaffar Chishti & Claire Bergeron, *Hazleton Immigration Ordinance that Began with a Bang Goes out with a Whimper*, MIGRATION POLICY INST. (Mar. 28, 2014), https://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper [https://perma.cc/N3DH-UASY]; Jon Mcclure, *Farmers Branch Settles Last Part of Lawsuit over Rental Ordinance for $1.4 Million*, DALL. NEWS (June 2014), https://www.dallasnews.com/news/farmers-branch/2014/06/03/farmers-branch-settles-last-part-of-lawsuit-over-rental-ordinance-for-1.4-million [https://perma.cc/UR3Q-3ZTN].

309 The human costs of family separations, inability to report crimes, and limitations on mobility are especially high for women, who are more vulnerable to exploitation at home and in the workplace. *See, e.g.*, Jorge R. Fragoso, Comment, *The Human Cost of Self-Deportation: How Attrition Through Enforcement Affects Immigrant Women and Children*, 28 WIS. J.L. GENDER & SOC'Y 69,

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a group far larger than the actual unauthorized population in the United States.[310] The subordination of a major part of the national population creates public health hazards in many respects, including ubiquitous violence that stems from racial division and vigilante activity. The government's reliance on these tools for maintaining the economy destroys the possibility of the peaceful enjoyment of life for all. This bleak situation, however, is one in which all actors with a role in the removal system have a stake, and is one which they can also affect. States, localities, and private actors can counter this policy by working to make life more viable for communities at whom the laws are aimed, in ways that neutralize their harm.

Finally, because self-deportation policy operates indirectly and diffusely, it presents issues of transparency and rule of law, as indirect regulation is more likely to do than direct forms of regulation in general. The pervasive degree to which the policy has escaped comprehensive description and analysis makes the extent of the power it has drawn from its own obscurity an open question. It appears, however, that a government that relies significantly on a policy designed to shift both expense and control away from it wagers much on the general population's ignorance about this choice. It will stake a great deal on a policy whose effectiveness is largely predicated on a lack of public understanding of what the policy is and how it works. By choosing to work through self-deportation, a government delegates away the power to decide the policy's effectiveness, which hinges on whether or not subfederal entities and private citizens will become agents of removal and subordination. With respect to the outcomes of its immigration system, it leaves the public with significant room to call its bluff.

CONCLUSION

This historical account of self-deportation explains how its evolution has shaped the policy's present dimensions and illuminates its current role in the larger U.S. immigration system. Under this indirect mode of regulation, one common logic mobilizes a range of different kinds of laws, including civil, criminal, immigration, alienage, and public benefits laws: the idea that people can be made to remove themselves by attacking different aspects of people's everyday lives. The basic elements of this attack include targeting their ability to keep their families together, access the protections of the legal system, move through public space without fear of public or private violence, and obtain shelter, employment, healthcare, and education. Today, this indirect policy serves two functions, although one tends to overshadow the other: removal and

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82 (2013); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545–58 (1995).

310 Professor Kevin Johnson has long argued that anti-immigrant sentiment both impacts minority citizens and shapes immigration law and policy. *See, e.g.*, Johnson, *supra* note 244, at 948–49.

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control of labor. Since its mechanism subordinates its target group relative to other members of the polity, self-deportation policy places conditions upon presence. Individuals can submit to the vulnerability imposed upon them, or leave.

Colonial governments' recognition that it was not necessary to use direct methods to effect the removal of native peoples from the lands they coveted imparted a searing lesson for removal policy in the United States. Even after the creation of a federal system for direct removal, the use of this system was still framed by the recognition that indirect methods were a powerful tool. Self-deportation policy in the modern era is consequently a palimpsest: contemporary state and municipal attempts to pass independent self-deportation legislation echo past chapters of its life, while the evolving deportation system continues to transform self-deportation policy in new directions. This cycle has produced its growth: repeatedly, courts have found subfederal self-deportation legislation preempted, and repeatedly, the legislative and executive branches have responded by exercising their supremacy in the domain of removal to dramatically escalate direct deportations.

The federal government coordinates its own actions with those of subfederal and private entities to enact this policy. Most visibly, it directs deportation policy to achieve removal and labor control at once; it partners with private corporations and enlists states' and municipalities' aid to expand capacity of the deportation system. This system further operates within a broader climate also shaped by the federal government's coordination. Most importantly, the federal government, with help from states and municipalities, delegates discrimination to private entities, who are best positioned to perform it because they interact with people in the register that the policy attacks — their everyday lives. These delegations to public and private entities, however, shift control away from the federal government, along with costs, rendering the policy susceptible to failure on its own terms in the event that their interests become misaligned and its partners refuse to cooperate.

Understanding the individual deportation system as a host for self-deportation policy clarifies the logic behind some of its most controversial characteristics — the government's spectacles of cruelty, and its continued expansion of an unauthorized population already exceeding 22 million people, along with an already bloated, mostly unenforced immigration code. These features are symptoms of more than a dysfunctional deportation system: they index the vibrancy of self-deportation logic as it operates through the deportation system today. Far from a marginal, recent experiment with alternatives to the more loudly contested issue of direct deportation, self-deportation policy both animates the individual deportation system and shapes the context in which its indirect effects work. Without seeing how direct and indirect strands of removal policy developed together and in relation to one another, it is

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not possible to understand the dynamics and scope of the immigration system as a whole.

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