# THE RIGHT TO MIGRATE

*by*
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*Since the late-19th century, the Supreme Court has insisted that the preservation of national sovereignty requires a constitutional chasm between immigration law and ordinary law. If the Court is to bridge that chasm, it must reimagine the long-standing premise of the federal immigration power that the presence of noncitizens in U.S. territory menaces the nation's sovereignty and security. This Article contributes to that reimagining by chronicling a compelling alternative worldview with a venerable historical pedigree—that of a quintessentially American right to migrate.*

*During the Founding Era, American statesmen described the impoverished subjects of Europe's monarchies as protagonists in an unfolding world-historical drama of human liberation and enlightenment, shaking off the servitude and privations of the Old World and reinventing themselves as free, equal, and independent republican citizens. Although the scope of that vision originally was limited to Europe, it nevertheless seeded a field of American national identity that eventually would yield a genuinely universal (though ultimately unconsummated) right to migrate to the United States and be incorporated within the American political community. Following the Civil War, leading congressional architects of Reconstruction sought to expand the right to migrate beyond Europe to an emerging global theater of cosmopolitan culture, commerce, and labor. To the liberal internationalists of the postbellum era, migration was not a discrete, constitutionally exceptional subject of federal policymaking; rather, it was integral to the monumental post-Civil War project of renovating and reinvigorating American liberty, equality, and citizenship. Theirs was a worldview in which federal sovereignty and citizenship were paramount, yet the border between citizen and alien was both porous and transitory, and in which immigrants were regarded as "Americans in waiting." That worldview serves as a forceful rebuttal to the Court's presumption that preserving national sovereignty and security requires that immigration law occupy a constitutional world apart.*

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## INTRODUCTION

American immigration law exists in a constitutional netherworld—a singular, obscure realm of federal lawmaking that is mostly shielded from judicial scrutiny. When the federal government banishes a noncitizen from the country, detains her for months or years at a time, or declines her visa application without explanation, she does not enjoy the same constitutional protections to which she, as a constitutional "person," otherwise would be entitled.[1] The Supreme Court first endowed the "political branches" with this vast, extra-constitutional authority more than a century ago, in the *Chinese Exclusion Case*. There, a unanimous Court upheld a federal statute revoking the right of a Chinese resident of San Francisco to reenter the United States following a trip abroad. The U.S. Government had judged "the presence of foreigners of a different race . . . , who will not assimilate with us, to be dangerous to [the nation's] peace and security," the Court explained, and Congress's efforts to secure the nation against "foreign aggression and encroachment"—to repel the "Oriental invasion" then underway—were "conclusive upon the judiciary."[2] To-

[1] The Due Process and Equal Protection Clauses protect "persons" without regard to citizenship. U.S. CONST. amends. V, XIV, § 1. The Supreme Court has long acknowledged as much when reviewing state laws discriminating on the basis of alienage. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (observing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"). On the history and legal implications of the United States's extraconstitutional immigration power, see Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 746–49 (2013).

[2] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595, 606 (1889).

day, talk of invading foreign races has long since been purged from the Court's immigration lexicon, if not mainstream political discourse. To the extent that the Court bothers to justify its extraordinary deference to the government in immigration matters, it merely gestures perfunctorily toward immigration law's purportedly intricate connection with "basic aspects of national sovereignty, more particularly our foreign relations and the national security."[3] And indeed, federal legislators, executives, and courts continue to abide immigration law's constitutional liminality as though it were a natural incident of sovereign nationhood and exclusive citizenship.[4]

Although immigration attorneys, scholars, and dissenting Justices have long decried the paucity of judicially enforceable constitutional constraints, until recently the phenomenon has not garnered broad attention. This may be because the immigration issues that typically reach the Supreme Court—the conditions triggering removal, the terms of detention, or the judicial reviewability of visa denials, for example—though legally important, generally do not involve the kinds of politically sensational questions that stir public interest. And then came Donald Trump, who forged his political brand by promising to protect the American nation against an invading foreign menace. Only extraordinary defensive measures, candidate Trump repeatedly declared—the "extreme vetting"[5] of prospective immigrants, a 2,000-

[3] Galvan v. Press, 347 U.S. 522, 530 (1954); *see also* Demore v. Kim, 538 U.S. 510, 522 (2003) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). The Court cites this foreign-affairs/national-security rationale for judicial deference even when the challenged law or enforcement action bears no plausible relationship to those interests. *See* Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 187–93 (2016).

[4] Immigration law's constitutional exceptionalism has been subject to much scholarly criticism. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992) (noting the "singularity" of immigration); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (defining "immigration exceptionalism" as "the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking"); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 13–14 (1996) (describing the "immigration anomaly"); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 19 (1998) (characterizing immigration as a legal "maverick" and "wild card"); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 153, 183 (2002); T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9, 9 (1990); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 4–5 (2007); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. CT. REV. 255 (1984); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.–C.L. L. REV. 1 (2010).

[5] JESSICA BOLTER, EMMA ISRAEL & SARAH PIERCE, FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY 78 (2022).

mile border wall, mass deportation of unauthorized migrants, and a ban on Muslims entering the United States—would keep the barbarians at bay. Nor was this merely election-season hyperbole. After Trump won the presidency, his administration undertook an extraordinary array of immigration initiatives, headlined by legally dubious efforts to make good on his two signature campaign promises—the construction of a border wall and the enactment of a "Muslim ban."[6]

While Trump's unvarnished nativist demagoguery was anathema to advocates of a more humane, constitutionally constrained immigration system, it nevertheless provided a grim service of sorts by exposing judicial review in immigration cases for what it often is: an exercise in conscious disregard of arbitrary authority, deprivations of personal liberty, and illicit discrimination that, in virtually any other context, would raise grave constitutional concerns. Consider the Supreme Court's 2018 decision in *Trump v. Hawaii*,[7] rejecting an Establishment Clause challenge to a presidential Proclamation excluding from the United States migrants from six Muslim-majority countries.[8] Because the "admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control,'"[9] the Court observed, it would uphold the Proclamation so long as the "[e]xecutive gave a 'facially legitimate bona fide reason' for its action."[10] Accordingly, the Court squinted past abundant evidence of

[6] The Migration Policy Institute has documented 472 distinct immigration-related policy changes implemented by the Trump administration. In addition to the travel ban and the President's diversion of money allocated for military construction to fund a border wall, major initiatives included: attempting to end Deferred Action for Childhood Arrivals (DACA) or reduce the protection afforded by DACA; changing the indicia by which foreign nationals are deemed "likely to become a public charge" and thus ineligible for legal permanent residency; adopting the Migrant Protection Protocols (MPP), also known as the "Remain in Mexico" policy, under which migrants (mostly asylum seekers) who arrived in the United States by land from Mexico were required to return to Mexico while their immigration claims were pending; slashing the numerical ceiling for refugee admissions from 110,000 to 15,000; dramatically increasing migrant apprehensions at the southwest border; and, beginning in March 2020 with the onset of the coronavirus pandemic, excluding and expelling noncitizens on public health grounds, known as Title 42. BOLTER, ET AL., *supra* note 5, at 1, 4, 16, 31, 74. For another helpful overview of the Trump administration's immigration-related policy changes, see SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019).

[7] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[8] Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017). In addition to the constitutional claim, the Court likewise rejected the plaintiff's argument that the Proclamation exceeded the President's authority under the Immigration and Nationality Act, 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." *Trump*, 138 S. Ct. at 2413–15.

[9] *Trump*, 138 S. Ct at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[10] *Id.* at 2419 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

discriminatory animus, including the President's repeated characterization of the order as a "Muslim ban," to the Proclamation's fig leaf of national security, ultimately concluding, in a paean to judicial abnegation, that "[i]t cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus."[11]

How does the Court justify this yawning constitutional chasm between immigration and other fields of law? How can such "barren invocation[s]" of national sovereignty and security countenance turning a blind judicial eye to governmental conduct that would be constitutionally intolerable in virtually any other setting?[12] While the Court no longer likens would-be immigrants to "hordes" of racially unassimilable "invaders,"[13] it continues to account for this vast, extra-constitutional sphere of federal authority by uncritically conflating immigration regulation with national security. Although that move has acquired an aura of inevitability, even naturalness, history tells a very different story. Before the 1880s, immigration law looked a lot like plain old law. During the nation's first century—a time when the federal government was merely a junior partner in the landing and incorporation of foreign migrants—immigrants' non-citizenship was mostly incidental to the regulatory authority to which they were subject. As objects of the state police power—as potential paupers or carriers of disease, for example—immigrants were simply persons whose effect on the health, morals, and welfare of the community was, like that of all persons, native and foreign alike, subject to regulation.[14] Even after Congress claimed control of immigration in the 1870s and 1880s and the Supreme Court rebranded foreign migrants "articles of commerce,"[15] federal regulatory power did not distinguish between human subjects of commerce transported from a neighboring state and those transported across an ocean. The Commerce Clause, like the state police power, was indifferent to citizenship.[16] It was only in the final decades of the 19th century that the Court distinguished immigration law from ordinary law, as foreignness came to signify not merely the absence of citizenship but a more fundamental alienation from the American constitutional community.[17] This reconstruction of foreignness gave substance to the invasion trope and, with it, to an immigration power better suited to repelling a hostile foreign enemy than the routine governance of human beings in an era of global migration.

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[11] *Id.* at 2420–21.

[12] *Id.* at 2433, 2447–48 (Sotomayor, J. dissenting).

[13] Lindsay, *supra* note 1, at 795 (quoting Oyama v. California, 68 S.Ct. 269, 278, 283 (1948) (Murphy, J., concurring)).

[14] *Id.* at 774–86.

[15] *Id.* at 747.

[16] *Id.* at 789–93, 810.

[17] *Id.* at 748.

This Article argues that history belies the Court's unexamined presumption that preserving national sovereignty and security requires that immigration law occupy a constitutional world apart. It demonstrates that during the two most critically transformative periods of U.S. political and constitutional history, when sovereign nationhood loomed largest—the Founding Era and Reconstruction—leading policymakers, diplomats, and other thinkers insisted that immigration was integral to the American project and viewed foreign migrants less as outsiders than future compatriots. For the leading congressional architects of Reconstruction, in particular, immigration was not a discrete, constitutionally exceptional subject of federal policymaking; rather, it was essential to the monumental post-Civil War project of renovating and reinvigorating American liberty, equality, and citizenship. Their efforts to reconstruct American immigration law by recognizing a universal right to migrate, guaranteeing civil equality to noncitizens, and removing the long-standing racial barrier to naturalized citizenship, allow us to glimpse an alternative constitutional and political worldview in which immigrants, though noncitizens, were nevertheless viewed as "Americans in waiting."[18] That was a worldview in which federal sovereignty and citizenship were paramount, yet the border between citizen and alien was both porous and transitory. Although it would be misleading to characterize this worldview as fully "representative" of the era, federal immigration policymaking in the years following the Civil War nevertheless reflected the premise that migration was a natural human right and an unambiguous national good, and that it should be governed according to the same liberal, egalitarian values that animated the broader reconstruction of the American political and constitutional order.

Part I of this Article addresses the right of migration in the period before the Civil War. It recounts how Jeffersonians, in particular, scorned what they characterized as the slavish "Old World" doctrine of organic, perpetual allegiance between sovereign and subject, and exalted the inherent human right to sever an old, unhappy political bond in favor of a new, more fruitful one. This natural right of expatriation was essential to the young nation's self-understanding as an asylum of republican liberty. Part II then explores how Reconstruction-Era statesmen, like Jeffersonians generations earlier, insisted that the natural right to cross an ocean in pursuit of a freer, more prosperous life, and to be thus absolved of one's former allegiance, was integral to America's "Second Founding." Accordingly, Congress and the Johnson and Grant administrations pursued a concerted policy of encouraging European and Chinese immigration alike, through treaties and federal legislation. Moreover, for leading Republicans in Congress, the right to migrate entailed both a right to civil and legal equality and a right to be incorporated within the American political community. This vision received its fullest elaboration in the nearly successful 1870 campaign by Radical Republicans in the Senate to remove

[18] I borrow the phrase from HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 8–9 (2006).

the racial bar to naturalization, thus opening up U.S. citizenship to Chinese and other non-white foreign migrants. The Article concludes by proposing that the right to migrate championed during these two formative periods of American nation building serves as a forceful rebuttal to the ongoing presumption that preserving national sovereignty requires that immigrants occupy a constitutional world apart.

## I. AN AMERICAN ASYLUM OF LIBERTY: THE RIGHT TO MIGRATE BEFORE THE CIVIL WAR

"Strangers are welcome," declared Benjamin Franklin in a 1782 dispatch inviting Europe's impoverished multitudes to claim for themselves a new beginning across the Atlantic. In the American land of opportunity, he advised, they would "enjoy securely the profits of [their] industry," set themselves along a path of economic prosperity and independence, and in a year or two gain "all the rights of a citizen."[19] Fellow Pennsylvanian Benjamin Rush agreed that America's unparalleled promise of economic prosperity and political freedom—the very quality that distinguished the United States from the Old World—would serve as an irresistible draw to would-be migrants. "[I]n Europe, success in any pursuit, may be looked upon in the same light as a prize in a lottery," Rush observed. "But the case is widely different in America. Here there is room for every human talent and virtue to expand and flourish."[20] Not least, "foreigners of good character" would be admitted to "all the privileges of citizenship" after a mere two-year residence, as Congress had determined that "[e]ven that short period of time . . . [was] sufficient to give strangers a visible interest in the stability and freedom of our governments."[21] Like many

[19] BENJAMIN FRANKLIN, *Information for Those Who Would Remove to America*, *in* THE WORKS OF DR. BENJAMIN FRANKLIN, CONSISTING OF ESSAYS, HUMOROUS, MORAL, AND LITERARY: WITH HIS LIFE, WRITTEN BY HIMSELF 252, 255 (1825). Franklin's tract was "the most widely reprinted statement on America's postwar immigration policy." MARILYN C. BASELER, "ASYLUM FOR MANKIND" AMERICA, 1607–1800, at 239 (1998). General George Washington similarly assured a gathering of Irish ex-patriots that "[t]he bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations And Religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment." George Washington, Letter from George Washington to Members of the Volunteer Association and Other Inhabitants of the Kingdom of Ireland Who Have Lately Arrived in the City of New York (December 2, 1783), *in* 27 THE WRITINGS OF GEORGE WASHINGTON 254 (John C. Fitzpatrick ed., 1938).

[20] Benjamin Rush, Information to Europeans Who Are Disposed to Migrate to the United States of America, in a Letter to a Friend in Great Britain, *in* ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 191, 201–02 (1798) (first published in 1790). The United States's new national government, which united the "vigour" and "stability" of Britain with "all the freedom of a simple republic," served as a "further inducement to Europeans to transport themselves across the Ocean." *Id.* at 202–03.

[21] *Id.* at 203.

among the Founding generation, moreover, Rush assigned the American experiment a starring role in the great drama of human enlightenment and progress then underway in both Europe and America. Europeans' very willingness to throw their lot in with the new nation—to accept the expense, hazard, and uncertainty that transatlantic migration necessarily entailed—only further testified to the great promise of America, "the first asylum in the world."[22]

It may be tempting to read Franklin and Rush's paeans to the American asylum cynically, as propagandistic pablum. Indeed, to accept uncritically their image of a universal American asylum of liberty is to view the American past through a rose-colored lens. That image, after all, elides a long and prominent history of racially discriminatory naturalization law, restrictionist immigration policy, national origins quotas, and a dizzying array of nativist movements.[23] Yet if Franklin and Rush's words anticipated the now-time-worn conceit that the United States has always been a "nation of immigrants" where the world's "huddled masses yearning to breathe free"[24] might find sanctuary, in substance they were much more than that. Their appeal to Europe's dispossessed reflects a deeper sense in which the notion of an American asylum, and of universal freedom to migrate in pursuit of a better life, were integral to the republican project. Notwithstanding the rampant illiberalism that has infused much American immigration policy, the early evangelists of American opportunity nevertheless were engaged in a formative and, with time, politically fruitful project of national self-definition. When they and other Founders celebrated an idealized image of an American asylum, where Old World victims of religious, economic, or political oppression could *choose* to begin their civic lives anew as republican citizens, they were seeding a field of American national identity that later

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[22] *Id.* at 191. To late-18th-century liberals on both sides of the Atlantic, the United States's position at the vanguard of human progress and enlightenment extended beyond the asylum ideal, to a new, more benevolent future for all of humanity. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 5–52 (2009).

[23] The Naturalization Law of 1790 restricted eligibility to "free white persons," establishing a racial bar to naturalized citizenship that was not repealed until 1952. An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103, 103 (1790), *repealed by* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163. For a small sampling of scholarship analyzing immigration illiberalism throughout U.S. history, see DAVID H. BENNETT, THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY (1988); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (1955); BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018); KUNAL PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000 (2015); PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM (2010).

[24] FRANKLIN, *supra* note 19; Rush, *supra* note 20; Emma Lazarus, The New Colossus (1883) (unpublished sonnet manuscript bound in journal) (text affixed in a tablet at the base of the Statute of Liberty and original manuscript available through the Library of Congress at https://www.loc.gov/exhibits/haventohome/haven-century.html#obj1).

generations of policymakers and intellectuals would harvest in the service of a genuinely universal right to migrate.

That vision of national membership was sharply at odds with long-standing British and European understandings of subjecthood. Under that model, allegiance ran not to the state itself, defined either in territorial or political terms; it consisted, instead, in a personal bond between subject and sovereign—a reciprocal, perpetual, and inviolable relation of obedience and protection rooted in nature and divine ordinance.[25] European governments, in turn, administered that model through a host of legal barriers to emigration.[26] On the eve of the American Revolution, Sir William Blackstone described English subjecthood as a form of "natural allegiance . . . which cannot be forfeited, cancelled or altered . . . ." "For it is a principle of universal law," he explained, "that the natural-born subject of one prince cannot, by any act of his own, . . . [including] swearing allegiance to another, . . . discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other."[27]

The republican vision of an American asylum, by contrast, exalted human mobility, including the freedom to sever an old, unhappy allegiance in favor of a new, more beneficial one. Political obligation originated not in God or nature, but rather, as John Locke had theorized nearly a century earlier, in the mutual consent of the individual and the political state. Both the right of expatriation from one's country of birth and liberal naturalization within one's country of choice were paramount.[28]

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[25] This model of subjecthood received its first systematic elaboration by Sir Edward Coke in his highly influential opinion in *Calvin's Case*. Calvin v. Smith (Calvin's Case), 77 Eng. Rep. 377 (K.B. 1608); *see* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 13–29 (1978); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 44–49 (1997); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 37–40 (2010).

[26] "[T]o emigrate was equivalent to desertion and meant forfeiture of all political and economic rights, with the penalty of imprisonment in case of return." John Duncan Brite, The Attitude of European States Toward Emigration to the American Colonies in the United States, 1607–1820, at 195 (1937) (Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Libraries) (quoted in Aristide R. Zolberg, *The Exit Revolution*, *in* CITIZENSHIP AND THOSE WHO LEAVE: THE POLITICS OF EMIGRATION AND EXPATRIATION 33, 36 (Nancy L. Green & François Weil eds., 2007)). Among other tactics, European governments prohibited pro-emigration propaganda, created obstacles to would-be emigrants' disposal of property, and deprived emigrants of any inheritance by stripping them of their nationality. Zolberg, *supra*, at 36.

[27] 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 368–69 (St. George Tucker ed., 1803).

[28] JOHN LOCKE, *Two Treatises of Government*, *in* 5 THE WORKS OF JOHN LOCKE §§ 95–131, at 394–411, (London, Thomas Tegg et. al. 1823) (Essay Two: Concerning the True Original Extent and End of Civil Government, Chapter VIII: Of the Beginning of Political Societies, and

Looking back decades later, Thomas Jefferson congratulated himself for having implanted the "right of expatriation" into the Virginia Code in 1776, alongside the state's naturalization provisions. "[T]he evidence of this natural right, like that of our right to life, liberty, the use of our facilities, the pursuit of our happiness . . . is impressed on the sense of every man," he explained. When the "king of kings . . . made it a law of nature of man to pursue his own happiness, he . . . left him free in the choice of place as well as mode." There was no "geographical line which [Nature] forbids him to cross in the pursuit of happiness." For Jefferson, mobility was not merely a natural right; it was essential to the American creed.[29] Accordingly, several American states enshrined a "natural inherent right to emigrate" in their constitutions.[30]

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Chapter XI: Of the Ends of Political Society and Government). The American model of voluntary expatriation and elective allegiance posed a direct affront to the established European convention of perpetual allegiance. ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 59 (2006); GARY GERSTLE, LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE PRESENT 30–33 (2015).

[29] Letter from Thomas Jefferson to John Manners (June 12, 1817), *reprinted by* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-11-02-0360 (last visited Apr. 20, 2023). On the right of expatriation in early American thought, see DOUGLAS BRADBURN, THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774–1804, at 104–19 (2009); Nancy L. Green, *Expatriation, Expatriates, and Expats: The American Transformation of a Concept*, 114 AM. HIST. REV. 307, 310–12 (2009). Not least, the United States's very independence as a nation was premised on the Lockean notion that, because governments "deriv[ed] their just powers from the consent of the governed," it was the right of "one people to dissolve the political bands which have connected them with another . . . ." THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776). The Virginia legal scholar St. George Tucker, in one of his many annotations of *Blackstone's Commentaries*, explained that the English model of natural, perpetual allegiance could not be "translated to America" for reasons that went to the foundations of American identity and independence. He wrote:

> The American revolution is a case in point, to shew that a man is not obliged to continue the subject of that prince under whose dominion he was born, for otherwise we must admit that America was not independent, until the king of Great Britain was pleased to recognize her independence. . . . Therefore, all the citizens of America had the right to put off their natural and primitive allegiance . . . .

BLACKSTONE'S COMMENTARIES, *supra* note 27, at 370.

[30] Green, *supra* note 29, at 313 n.16 (quoting PA. CONST. of 1776, ch. 1, § XV). Indeed, Americans drew a pointed contrast between republican citizenship and the "feudal," "slavish" European doctrine of perpetual allegiance. Justice James Iredell declared in 1795:

> [A] man ought not to be a slave; . . . he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; . . . he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another.

Talbot v. Janson, 3 U.S. (3 Dall.) 133, 162 (1795) (Iredell, J., concurring).

The historical roots of this fundamental right of mobility, however, extended beyond the revolutionary idealism of the 1770s and 1780s; beyond the Lockean emphasis on individual consent that infused Anglo-American thinking about political obligation; to the British colonial imperative of peopling the North American continent. From the beginning of English colonization of the New World, the demand for settlers who would clear and cultivate land and defend English territorial claims against Native American encroachment was urgent and insatiable. The practical exigencies of settlement, as much as liberal or republican political theory, thus shaped colonial ideas about the nature of allegiance. Indeed, competition among the colonies for settlers long had favored liberal immigration and naturalization policies.[31] Colonial leaders viewed the promise of British subjectship, in particular, as a critical lure to foreign settlers, and chafed at Parliament's general conservativism with respect to naturalization.[32] By the end of the 17th century, colonial governments, acting in implicit defiance of Parliament's supremacy in such matters, had begun to adopt various inducements to aliens to settle within their territory and to incorporate themselves into local economic and political life.[33] Although English

[31] KETTNER, *supra* note 25, at 107–10. On the law and logic of English colonial settlement of North America—of establishing occupancy of land, asserting sovereignty over it, and extracting value from it through the organization of labor—see CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1965, 21–190 (2010).

[32] KETTNER, *supra* note 25, at 66–75. Throughout most of the 17th and 18th centuries, acquiring British subjectship was expensive and administratively cumbersome, and certain classes of aliens—most notably Catholics—were outright barred from naturalization. Until Parliament adopted, in 1740, The Plantation, or Naturalization, Act 1740, 13 Geo. 2 c. 7 (Eng.), prescribing an inexpensive, administratively simple process by which local courts could naturalize as full British subjects aliens who had resided in the colonies for seven years, British law required aliens who settled in America to seek a special act of Parliament to become full British subjects. KETTNER, *supra* note 25, at 74–75. The 1740 Act reflected the government's mercantilist approach to population, stating, in part:

> [T]he increase of People is a Means of advancing the Wealth and Strength of any Nation or Country: And . . . many Foreigners and Strangers, from the Lenity of our Government, the Purity of our Religion, the Benefit of our Laws, the Advantages of our Trade, and the Security of our Property, might be induced to come and settle in some of his Majesty's Colonies in America, if they were made Partakers of the Advantages and Privileges which the natural born Subjects of this Realm do enjoy.

13 Geo. 2 c. 7 (Eng.); ZOLBERG, *supra* note 28, at 39.

[33] Some colonial assemblies provided for naturalization by simple enrollment; others passed special acts of naturalization admitting discrete groups of aliens to British subjectship. Several colonies adopted statutes limiting naturalization fees and waived fees for poor immigrants. In contravention of parliamentary policy, some also relaxed or eliminated Protestant oaths in order to admit Catholics to British subjectship. Finally, colonies mitigated a host of traditional alien disabilities, easing restrictions on rights to own, convey, and inherit property; conduct commerce; seek legal protection in the courts of law; and participate in the political process. Even after Parliament adopted the Act of 1740, colonial assemblies continued to administer their own

officials may have regarded colonial innovations as local "fictions" and assured themselves that Parliament retained ultimate jurisdiction over the naturalization of aliens, it refrained from interfering with colonial policies up until the eve of the American Revolution.[34] The combined effect of those policies was to make admission to British subjectship available on vastly more liberal terms in the colonies than in England, and to give substance to the emerging consensus that, as a matter of both good policy and abstract justice, naturalized subjects should enjoy equal rights with those who were natural-born.[35]

British toleration of colonial moonlighting in naturalization policy ended abruptly in 1773, when King George III ordered colonial governors to withhold their assent from any colonial bill to naturalize aliens or to secure title to land held by aliens.[36] Set against the mounting imperial crisis, the revocation of the colonies' traditional de facto right to define the terms of membership appeared to colonists yet another determined assault on colonial sovereignty and self-determination. Less than three years later, the Continental Congress would include the King's actions "obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their migrations hither" among the "injuries and usurpations" that justified "dissolv[ing] the political bands" of empire.[37] That grievance at once underscored the economic and political importance that colonial leaders attached to

policies. KETTNER, *supra* note 25, at 74, 83–103, 113–14, 111–12; *see* The Plantation, or Naturalization, Act 1740, 13 Geo. 2 c. 7 (Eng.). Georgia was perhaps most active in its encouragement of foreign settlement, at various points offering to pay the cost of transportation, supply tools and other provisions, grant lengthy land leases at low or no cost, and provide protection against creditors. KETTNER, *supra* note 25, at 111–12. South Carolina, too, subsidized the immigration and resettlement of British subjects as early as 1731. BERNARD BAILYN, THE PEOPLING OF BRITISH NORTH AMERICA 39 (1986). Naturalization conferred political membership, of course, but its most "crucial benefit" to native and alien settlers alike, explains James Kettner, was the security of property titles. Under the common law, an alien could acquire only a defeasible title, which escheated to the government upon the alien's death. In addition to the obvious disadvantages for aliens and their heirs, this rule also infected the market in land with insecure titles, rendering all would-be purchasers, native and foreign alike, "vulnerable to the machinations of schemers." Because "[n]aturalization altered defeasible titles and made them unchallengeable," Kettner explains, much of the popular support for generous admission to British subjectship "derived from the widely shared desire to make all private property secure." KETTNER, *supra* note 25, at 117–19.

[34] ZOLBERG, *supra* note 28, at 25; KETTNER, *supra* note 25, at 127–28.

[35] KETTNER, *supra* note 25, at 126–27.

[36] BASELER, *supra* note 19, at 125.

[37] THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776). That grievance likewise protested the King's having "rais[ed] the conditions of new Appropriation of Lands." That phrase refers to a 1773 Privy Council Order that sought to staunch immigration from the British Isles to North America by suspending the authority of colonial governors and other officials to issue land grants, and requiring that they dispose of public lands only through well-advertised public auctions. *Id.* para. 2; BAILYN, *supra* note 33, at 73; BERNARD BAILYN, VOYAGERS TO THE WEST:

immigration, and declared that the authority to govern both migration flows and formal political membership was essential to sovereignty and political self-determination. More broadly, the Declaration also instantiated within the emerging American lexicon of republican liberty the right to shift allegiance from one state to another in the pursuit of happiness.[38]

Long after the flush of revolutionary idealism had faded, national statesmen and other opinion leaders continued to echo the pro-immigration ethos of the Founding Era. Secretary of State John Quincy Adams described the republican vision in 1819. For Adams, the expediency of siphoning valuable human capital from Europe was irresistible. "Neither the general government . . . nor those of the individual states, are . . . unobservant of the additional strength and wealth, which accrues to the nation, by the accession of a mass of healthy, industrious, and frugal laborers," he acknowledged.[39] Hezekiah Niles, the editor and publisher of the popular *Niles' Weekly Register*, America's first weekly news magazine, echoed Adams's acquisitive spirit when he enthusiastically calculated "the incipient benefits resulting to a country, like the United States, from emigration"—in his estimation, "no less than ten million[] [dollars] a year." "The quantity of labor here is yet inadequate to the want of it," Niles explained, "and as it is increased our wealth is increased."[40]

American hospitality during these early decades was not merely a matter of national economic interest. Statesmen continued to insist that it was the also the fulfillment of the revolutionary-era asylum ideal.[41] Jefferson (now in retirement in Virginia) continued to celebrate the asylum ideal in almost messianic terms. Writing to an English friend in 1817, he explained that the United States opened its doors

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A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION 55–56 (1986). The charge that the King had "refus[ed] to pass other laws to encourage [foreigners'] migration hither" probably refers to the British government's disallowance of two colonial acts intended to encourage immigration: Georgia's policy of awarding bounties and other benefits to immigrants from Ireland, which was vetoed in 1767; and North Carolina's policy of providing a four-year tax exemption for European settlers, which was vetoed in 1771. BAILYN, *supra* note 33, at 39; ZOLBERG, *supra* note 28, at 25.

[38] In modern accounts of the American Revolution, the Declaration's grievance with respect to immigration and naturalization policy is typically overshadowed by the more familiar imperial conflicts over taxation and commercial regulation. At the time, however, both British and American authorities regarded immigration and naturalization policy as essential to the size and composition of colonial polities. Imperial clashes over citizenship were thus "vital episodes in the larger war over sovereignty, and amounted to an epochal struggle over the structure or 'design' of American society." ZOLBERG, *supra* note 28, at 24–25, 50–51.

[39] Letter of John Quincy Adams to Baron Morris von Furstenwaerther, *in* 13 NILES' WEEKLY REGISTER, Apr. 29, 1820, at 157.

[40] *Home Market and Internal Wealth*, 11 NILES' WEEKLY REGISTER, Oct. 19, 1816, at 115.

[41] With the restoration of monarchy across Europe, Americans observed, the United States had emerged from the War of 1812 as a solitary, luminous beacon of republican liberty in a darkening Atlantic world. WOOD, *supra* note 22, at 46–47, 737.

to foreign immigrants "not on the selfish principle of increasing our own population at the expense of other nations . . . , but to consecrate a sanctuary for those whom the misrule of Europe may compel to seek happiness in other climes." The very existence of an American "refuge" for republican liberty and "self-government," Jefferson continued, would "restrain[] within certain limits" the "oppressions" of Old World "taskmasters," and thus "become[] . . . a blessing to the whole earth."[42] John Quincy Adams agreed. Upon landing on American soil, even "indigent" Europeans enjoyed "the means of obtaining easy and comfortable subsistence for themselves and their families." In exchange for committing to a "life of labor," he counseled, the industrious newcomer acquired nothing less than a "life of independence"—an eminently valuable condition that was wholly elusive in his country of birth.[43]

Some Americans did voice apprehensions that immigration might give rise to undue foreign influence on American political institutions, particularly when foreigners settled in distinct, insular ethnic blocks, where they were shielded from the civilizing influence of American economic and political life. As Jefferson explained to an English friend in 1817, non-English foreigners should be "discourage[d] [sic] their settling together, in large masses," and instead "distribute themselves sparsely among the natives for quicker amalgamation."[44] Yet even those who were troubled by the potentially unrepublican character traits of various immigrant groups remained confident in both the regenerative influence of American geography and political institutions, and the moral and political natures of immigrants themselves. In keeping with such confidence, early republican immigration policy was remarkably hospitable by historical and international standards. With respect to European

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[42] Letter of Thomas Jefferson to George Flower (Sept. 12, 1817), *reprinted in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-12-02-0012 (last visited Apr. 20, 2023). Niles wholeheartedly agreed: "No man, unless he puts his fellow-creatures on a level with the brute creation, can advocate their perpetual allegiance, and deny them the privilege of locating themselves, as they feel most needful to their happiness and comfort." *Naturalization*, 10 NILES' WEEKLY REGISTER, May 11, 1816, at 171 (emphasis omitted).

[43] Letter of John Quincy Adams to Baron Morris von Furstenwaerther, *in* 13 NILES' WEEKLY REGISTER, Apr. 29, 1820, at 158.

[44] Letter of Thomas Jefferson to George Flower, *supra* note 42. Niles likewise captured the blend of idealism and apprehension that marked republican immigration policy. He could at once proclaim the prodigious value of European immigration to the United States; celebrate it as a blessing to Europe and America alike; condemn the archaic doctrine of "perpetual allegiance" and champion the right of every nation to naturalize foreigners; and yet lament the persistence among many French and German immigrants of "a national pride and prejudice, foreign to the feelings which should belong to a purely American character." Their ethnic insularity inhibited their absorption of American "manners," kept them "ignorant of the principles and practice of their government," and thus "imped[ed] the progress to national character." *Mixed Languages and Dialects*, 20 NILES' WEEKLY REGISTER, June 30, 1821, at 273–74 (emphasis omitted); LUCY E. SALYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP 112–13 (2018).

immigration, it is broadly accurate to call federal policy one of laissez faire, in that it neither inhibited nor actively recruited or incentivized immigration.[45]

That liberalism was also highly conditional, however. First and most obviously, the full measure of American hospitality was reserved for immigration from Europe. Although Congress would not impose race- or nationality-based restrictions until much later in the late 19th century, the exclusion of all but "free white persons" from naturalized citizenship seriously circumscribed the putative universality of the asylum ideal.[46] Second, Americans' confidence in European "amalgamation" was rooted in a highly particular political economy, in which inexpensive, productive land was abundant and foreigners could be distributed among and assimilated with the native population.[47] Finally, several of the seaboard states adopted restrictions on the landing of foreign migrants within their territory. In the decades before the Civil War, states not only excluded foreign convicts; several also excluded and/or expelled public charges (or "paupers"); required shipmasters to pay large bonds for

[45] This characterization bears one modest qualification: The Passenger Act of 1819, also known as the Steerage Act, or the Manifest of Immigrants Act. Steerage Act of March 2, 1819, ch. 46, 3 Stat. 488; Removal of Obsolete and Unnecessary Regulations, 60 Fed. Reg. 24,748, 24,749 (proposed May 9, 1995) (calling it the "Steerage Passenger Act"); Robert Barde and Gustavo J. Bobonis, *Detention at Angel Island: First Empirical Evidence*, 30 SOC. SCI. HIST. 103, 133 n.5 (2006) (calling it the "Manifest of Immigrants Act"). Passed amid a deepening economic depression and following a relative spike in European immigration, the Act regulated the transportation of passengers by sea between American and foreign ports. The Act was the United States's first "immigration law" in the modern sense of directly governing foreign migration. The original initiative for the Act came from German immigrant aid societies concerned with the deplorable conditions under which German "redemptioners" were transported to the United States. Accordingly, congressional supporters of the bill stressed the extreme deprivation and high mortality aboard passenger ships from Antwerp and other European ports. E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 20–22 (1981); ZOLBERG, *supra* note 28, at 110–13. However humane its initial motives, the Act also operated as a form of what political scientist Aristide Zolberg has termed "remote control." By limiting the number of passengers per ship, Zolberg explains, the tonnage requirement raised the price of passage and thereby operated as an indirect form of immigrant selection, rendering uneconomical not only the German servant trade but also the subsidized "dumping" of paupers by European authorities. ZOLBERG, *supra* note 28, at 110–13; Zolberg, *supra* note 26, at 44. In practice, however, the Passenger Act did not significantly suppress European immigration. Its health and safety provisions were little enforced, as shippers and private immigration agents continued to crowd Europeans into steerage with scant regard to the tonnage and food and water requirements. TONY ALLAN FREYER, THE PASSENGER CASES AND THE COMMERCE CLAUSE: IMMIGRANTS, BLACKS, AND STATES' RIGHTS IN ANTEBELLUM AMERICA 11 (Peter Charles Hoffer & N.E.H. Hull eds., 2014).

[46] *See* ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 258–59 (1998); ERICA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 23–24 (2003).

[47] *See* Lindsay, *supra* note 1, at 752–58.

certain presumptively "dependent" foreigners; and, in the South, prohibited the entry "colored freemen" and "Negro seamen."[48]

The concerns about assimilability percolating through American political culture during the first quarter of the 19th century bubbled to the surface in the second. Beginning in the 1830s, American observers noted not only a dramatic increase in the number of immigrants, but also marked changes in their composition—in particular, that Irish and German migrants, the majority of them Catholic, comprised a large and growing proportion of the total.[49] The wave of Irish immigration crested between 1846 and 1855, as unprecedented droves of impoverished Irish Catholics landed in Boston and New York, fleeing the catastrophic Irish potato famine.[50] That

[48] Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776–1875), 93 COLUM. L. REV. 1833, 1837, 1846–47 (1993). In his seminal analysis of subnational immigration regulation during the nation's first century, Neuman helpfully notes that many state statutes that are not "immediately recognizable as immigration laws" nevertheless functioned as such. Laws prohibiting the transportation of persons, whether aliens or citizens, across borders within the United States, for example, also suppressed international migration. *Id.* at 1837–38. On state-level immigration regulations before the Civil War, see HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY (2017); Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DEV. 107, 114 (2014); MICHAEL SCHOEPPNER, MORAL CONTAGION: BLACK ATLANTIC SAILORS, CITIZENSHIP, AND DIPLOMACY IN ANTEBELLUM AMERICA (2019).

[49] The year 1832 was pivotal, with recorded arrivals increasing nearly three-fold over the previous annual average, to more than 60,000. Of those whose country of origin was recorded, 36% were Irish, 30% German, and only 16% English. ZOLBERG, *supra* note 28, at 128. From 1821 to 1830, the United States received 151,824 voluntary migrants; from 1830 to 1840, 599,125—a nearly four-fold increase. ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 124 tbl.6.2 (2d ed. 2002). Also during this period, European officials, now seized by Malthusian fears of overpopulation, abandoned their earlier efforts to inhibit emigration and came to view the departure of their indigent subjects as an economical solution to the growing problem of mass poverty. In 1828, for example, Britain greatly relaxed its statutory passenger-to-tonnage requirements, thus permitting extreme crowding on board trans-Atlantic passenger ships and dramatically reducing the price of passage. Zolberg, *supra* note 26, at 45–50.

[50] Between 1845 and 1854, about three million foreign immigrants arrived in the United States—a more than four-fold increase over the 709,000 that arrived between 1835 and 1844. By 1854, the foreign-born "constituted about 15 percent of the total U.S. population—the highest proportion . . . at any time in the young nation's history." DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 56 (2002); OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 5 tbl.1 (2019). Fully half of the population of New York City was foreign-born. SALYER, *supra* note 44, at 25. Throughout the 1840s and 1850s, only German immigrants rivaled the Irish in sheer numbers. IMMIGR. & NATURALIZATION SERV., DEP'T OF JUST., 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 17 tbl.1 (2003). As both contemporary and modern observers have noted, however, Germans tended to disperse themselves across the nation's

wave propelled the aggressively nativist Know Nothing movement to remarkable though short-lived electoral success. Through their formal organ, the American Party, the Know Nothings scored a series of stunning electoral triumphs in 1854 and 1855, particularly in the Northeast.[51] Their political appeal interwove dark warnings of papal conspiracy against American liberty; denunciations of Catholicism as a servile, unrepublican faith; the rising specter of mass poverty and class conflict; condemnation of the corrupt system of partisan (chiefly Democratic) patronage; and pro-temperance and anti-slavery themes. The Know Nothings spoke, above all, to what they characterized as a fundamental incompatibility between the North's burgeoning system of free labor capitalism—with its swelling class of unpropertied, often unskilled, and increasingly foreign-born wage laborers—and the core American principle of democratic–republican self-government.[52] If left unredressed, they argued, the votes of the foreign-born would plunge the republic into an abyss of class conflict, moral licentiousness, and political slavery.

Yet when we consider the Know Nothings' remarkable, if fleeting, political insurgency as a harbinger of later, more successful Gilded-Age movements to restrict or exclude various classes of "undesirable" immigrants, what is perhaps most striking is their relative *moderation*. First, for all their grave and sensational warnings that the nation was poised on the precipice of a political abyss, most Know Nothings also contemplated that, with sufficient time and conducive circumstances, many European immigrants, including many native Irish, nevertheless were morally and

territory, particularly the upper Midwest, while the Irish were more likely to congregate in Northeastern cities—a fact that made their numbers more conspicuous to contemporaries. SALYER, *supra* note 44, at 24–25.

[51] In Massachusetts, for example, they captured the governorship with 63% of the vote, the state legislature, and all 11 of the State's seats in the House of Representatives. TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S, at 92–93 (1992). Following the 1854 election, Know Nothingism became a national sensation, with the publication of the *Know Nothing Almanac* and *True American's Manual*; a profusion of Know-Nothing poems and stories; and the appearance of Know-Nothing-branded products and services, including candy, tea, toothpicks, and stagecoaches. BENNETT, *supra* note 23, at 115. By the end of 1855, the party had claimed eight governorships and more than 100 seats in Congress, along with thousands of local offices, including the mayorships of Boston, Philadelphia, and Chicago. ANBINDER, *supra*, at 144. Even as their support began to wane the following year, the Know Nothings were a major force in the presidential election of 1856. *Id.* at 226. The American Party ran former Whig President Millard Fillmore (who beat out Supreme Court Associate Justice John McLean, among others, for the nomination) and won 21.5% of the popular vote—at the time, the highest share ever for a third-party presidential candidate. BENNETT, *supra* note 23, at 128. For a full discussion of the electoral history, see ANBINDER, *supra*, at 220–45; BENNETT, *supra* note 23, at 115–34; SEAN WILENZ, RISE OF AMERICAN DEMOCRACY 696–702 (2005).

[52] Bruce Levine, *Conservatism, Nativism, and Slavery: Thomas R. Whitney and the Origins of the Know-Nothing Party*, 88 J. AM. HIST. 455, 467–69 (2001); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 226–260 (1970) [hereinafter FONER, FREE SOIL].

politically redeemable. And notwithstanding the Know Nothings' dire, often hyperbolic nativism, they said virtually nothing about limiting immigration per se.[53] In other words, with certain discrete exceptions—particularly their desire to ban the importation of foreign paupers and convicts—the Know Nothings were not immigration restrictionists; rather, they sought to protect America's political institutions against degradation by the very foreigners whose presence in, and continued immigration to, the United States was accepted as a given. Safeguarding the suffrage, rather than excluding suspect Europeans from American territory, would provide American Republicanism with ample protection. Often, in fact, they made a point to affirm the United States's traditional reputation as an asylum of liberty where the oppressed of all nations could gain refuge.[54] Ultimately, the Know Nothings failed in their signature political quest of imposing severe new restrictions on naturalization.[55] And notwithstanding their triumphs in the elections of 1854 and 1855, by the end of the decade the movement had disintegrated, eclipsed by the new Republican Party as the principal alternative to the Democrats.[56]

With the end of famine in Ireland, improved economic conditions across Europe, and economic depression in the United States following the Panic of 1857, the tide of truly destitute migrants receded in the late 1850s. Soon thereafter, surging labor demands of the Civil War fired a renewed enthusiasm for European labor among business leaders and federal policymakers.[57] And in 1863, President Lincoln

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[53] The various Know Nothing "platforms" advocated that western states repeal laws permitting noncitizens to vote; that Congress dramatically lengthen the period of residency required before an alien became eligible for citizenship, typically to 21 years (the time it took a native-born man to reach majority); that Congress enact a federal ban on the importation of foreign paupers and criminals; and that states and the federal government reserve the privilege of holding public office to the native-born. As one leading spokesman urged, foreigners' "opinions need to be recast before they [can] intelligently participate in public affairs," and "even a residence of fifteen or more years is absolutely essential in most instances before a man can vote intelligently." FREDERICK RINEHART ANSPACH, THE SONS OF THE SIRES: A HISTORY OF THE RISE, PROGRESS, AND DESTINY OF THE AMERICAN PARTY 65–69, 71 (1855); CONSTITUTION OF THE SUBORDINATE COUNCILS OF THE AMERICAN PARTY OF MASSACHUSETTS para. 1–3 (1855).

[54] FONER, FREE SOIL, *supra* note 52, at 237.

[55] *Id.* at 259.

[56] *Id.* at 250–60; HIGHAM, *supra* note 23, at 13.

[57] A consortium of industrialists and politicians incorporated the American Emigrant Company to procure European laborers, and railroads and manufacturers dispatched recruiting agents to Europe and French Canada. GYORY, *supra* note 46, at 19–20; HIGHAM, *supra* note 23, at 16–17. Secretary of State William Seward directed U.S. officials in Europe to distribute thousands of pamphlets publicizing the high wages available in America and the ready availability of western lands under the Homestead Act. Homestead Act of 1862, ch. 75, 12 Stat. 892; KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820–1924, at 36 (1984). The Act extended to immigrants who were eligible to naturalize (i.e., White immigrants) the same access to western lands that it afforded citizens—a powerful inducement to European immigration. Brendan P. O'Malley, Protecting the Stranger: The Origins of U.S. Immigration

entreated Congress to establish "a system for the encouragement of immigration," citing a serious "a deficiency of laborers in every field of industry." Foreign immigrants, he declared, composed "one of the principal replenishing streams which are appointed by Providence to repair the ravages of internal war, and its wastes of national strength and health."[58] Later that year, Congress passed the Act to Encourage Immigration, establishing the short-lived Federal Bureau of Immigration for the purpose of developing a surplus labor force.[59]

## II. RECONSTRUCTING IMMIGRATION: THE RIGHT TO MIGRATE DURING THE SECOND FOUNDING

In December 1869, in a moment of both breathtaking possibility and bitter protest, Frederick Douglass addressed a Boston audience on the subject of America's "composite nationality." If the gathering of liberal reformers and intellectuals was expecting the kind eloquent, aspirational discourse for which the acclaimed abolitionist and equal rights advocate was renown, they would not have been disappointed. The world's beacon of universal liberty and equal rights had emerged at last from a fog of contradiction, Douglass explained. "[A] heavy curse rested upon our very soil, defying alike the wisdom and the virtue of the people to remove it; . . . our professions were loudly mocked by our practice," he observed.[60] But that founding hypocrisy had "happily passed away," and the republic stood poised to embrace "the principle of absolute equality."[61] If Douglass's exhortation that the nation

Regulation in Nineteenth-Century New York 160 (2015) (Ph.D. dissertation, City University of New York) (on file with the CUNY Graduate Center). In one of his many diplomatic dispatches on the subject, Seward sounded positively Jeffersonian: "How much the old European nations suffer from the immobility of classes and masses, which the new nation needs?" he queried. "Let us hope that the European minds may be sagacious enough to discern that the cure for all the social evils in both hemispheres is migration of surplus population to regions where population is deficient." Letter to the Editor, *American Emigrant Company*, N.Y. TIMES, Sept. 6, 1863, at 3.

[58] CONG. GLOBE, 38th Cong., 1st Sess. app. at 1 (1863); Annual Message of the President to Congress (Dec. 6, 1864), *in* 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 141 (Roy P. Basler ed., 1953). "While the demand for labor is thus increased here, tens of thousands of persons, destitute of remunerative occupation, are thronging our foreign consulates, and offering to emigrate to the United States, if essential, but very cheap, assistance can be afforded them," Lincoln declared. CONG. GLOBE, 38th Cong., 1st Sess. app. at 1–2, *quoted in* HUTCHINSON, *supra* note 45, at 48.

[59] Though the Act was repealed in 1868, during its short life the Bureau fostered the creation of a variety of private labor recruitment agencies that continued to encourage immigration. CALAVITA, *supra* note 57, at 41.

[60] Frederick Douglass, *Our Composite Nationality*, *reprinted in* THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 216, 219 (Nicholas Buccola ed., 2016). On Douglass's complicated role in the broad arc of Reconstruction, see DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 464–505 (2018).

[61] Douglass, *supra* note 60, at 219–31 (emphasis omitted).

honor its own professed ideals was familiar, however, his address bypassed the monumental political and constitutional controversies then consuming the nation's attention—the recently ratified Fourteenth Amendment; the rancorous sectional dispute over the military occupation and reconstruction of the former Confederacy; or the yet-to-be ratified Fifteenth Amendment.

Douglass spoke, instead, about immigration. Although the subject lay, at least for the moment, at the periphery of national political consciousness, it was nevertheless central to Douglass's egalitarian creed. His immediate intention was to contest the "avowed hostility to the Chinese"[62] arising in the American West. The broader purpose of the lecture, however, was to urge that welcoming foreigners into the American political fellowship without regard to race, creed, or prior nationality was integral to the revolutionary reconstruction of America's multi-racial polity. The American citizenry was "the most conspicuous example of composite nationality in the world," Douglass declared.[63] And in this extraordinary historical moment, the American "asylum of republican liberty" championed by the nation's founders—universal in theory yet always parochial in practice—might, like the nation itself, be purged of curse and contradiction.

If Douglass's audience detected echoes of a much earlier, broadly cosmopolitan vision of American civic identity, however, they would not have mistaken it for nostalgia. The United States was "no longer an obscure and inaccessible country," but was enmeshed in vast web of global commerce and communication.[64] "We live under new and improved conditions of migration," he observed. "Our ships are in every sea, our commerce in every port, our language is heard all around the globe, steam and lightning have revolutionized the whole domain of human thought."[65] In an era when technological improvements had collapsed time and space, when international trade increasingly bound distant nations and peoples, Douglass argued, it was naive to suppose, as some contemporaries had, that Chinese immigrants would remain modest in number and confined mostly to the American West. The "same mighty forces which have swept to our shores the overflowing populations of Europe; which have reduced the people of Ireland three millions below its normal standard," Douglass prophesied, "will operate in a similar manner upon the hungry population of China and other parts of Asia." Nor will the Chinese "halt upon the shores of California."[66] When opportunities in the West cease to hold them, they will "fix [their eyes] upon the rising sun. They will cross the mountains, cross the

[62] *Id.* at 223.

[63] *Id.* at 219.

[64] *Id.* at 221.

[65] *Id.*

[66] *Id.* at 221–23.

plains, descend our rivers, penetrate to the heart of the country and fix their homes with us forever."[67]

Together, the irresistible forces of history and human nature thus posed a series of inescapable questions: Should the United States continue to welcome Chinese immigrants? And if so, should they be eligible for American citizenship—to vote and possibly hold office? In answering those questions, Douglass brushed aside the "popular contempt" with which the Chinese were held on the Pacific Coast. The solution to the "Chinese question" lay, instead, in the "universal and indestructible" "human . . . right of locomotion; the right of migration; the right which belongs to no particular race, but belongs to all and to all alike."[68] No people had venerated that very right more than Americans. The right to leave one's land of birth in pursuit of happiness, to disavow an old, wearisome allegiance in favor of a new, more attractive one, was essential to American independence and national identity. The same "great right that I assert for the Chinese and Japanese, and for all other varieties of men," Douglass counseled, "is the right you assert by staying here, and your fathers asserted by coming here."[69] Accordingly, he "reject[ed] the arrogant and scornful theory by which they would limit migratory rights, or . . . make them the owners of this great continent to the exclusion of all other races of men."[70] If America wished to "reach a degree of civilization higher and grander than any yet attained," he declared, "we should welcome to our ample continent all nations, kindreds, tongues and peoples; and as fast as they learn our language and comprehend the duties of citizenship, we should incorporate them into the American body politic."[71] Only by embracing without qualification the universal human right to migrate, moreover, could the United States fulfill its world-historical mission as "the perfect

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[67] *Id.* at 223. As Douglass's reference to "steam and lightning" suggests, a transportation and communications revolution during the middle decades of the 19th century ushered in a new era of international commerce, global migration, and cosmopolitan culture. The rapid construction of canals (in the 1820s and 1830s) and then railroads (in the 1840s and 1850s) opened the growing nation's vast interior to commercial exploitation. Improvements in steam navigation then greatly facilitated trans-Atlantic commerce and gave support to a thriving American shipping industry. The expanding national postal system, rapid growth in newspaper circulation, and (in the 1850s) the development of the telegraph transcended the boundaries of locality and region, thus decoupling communication from transportation. *See* HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 17–41 (1990). The first durable and reliable transatlantic telegraph cable was completed in 1866. Transpacific steamship service between Hong Kong and San Francisco began the following year. *See* H.W. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM, 1865–1900, at 14 (2010).

[68] Douglass, *supra* note 60, at 225.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 228. "The voice of civilization," Douglass continued, "speaks an unmistakable language against the isolation of families, nations and races, and pleads for composite nationality as essential to her triumphs." *Id.* at 227.

national illustration of the unity and dignity of the human family."[72] As Part I explained, earlier theorists had likewise celebrated the American mosaic, its diverse components coalescing harmoniously into a portrait of republican liberty. Yet the components in question had always been European in origin. Douglass's vision, by contrast, was insistently universal. The United States would find its "greatness and grandeur" only "in the faithful application of the principle of perfect civil equality to the people of all races and of all creeds."[73]

But what of the long-familiar challenge of assimilating newcomers into the American body politic? After all, even well before the Civil War, American critics of mass immigration had begun to doubt their nation's digestive fortitude, especially regarding the Irish. White westerners insisted that when Chinese immigrants' intractable racial differences were added to the equation—not least, their apparent disposition to live in squalor on starvation wages—the prospects of amalgamation were dim, indeed.[74] Douglass answered that the instinct to demand decent remuneration for one's labor was, like the impulse to migrate in pursuit of a better life, grounded in universal human nature. Because "[m]an is man, the world over," he explained, the designs of certain "Southern gentlemen" to replace their lost bondsmen with "Chinamen who, they hope, will work for next to nothing," was doomed to failure.[75] "The Chinaman will not long be willing to wear the cast off shoes of the negro," who "worked and took his pay in religion and the lash," Douglass declared. "The Chinaman . . . will want cash,"[76] and like other foreigners, will discover in the United States the same spirit of patriotism and appetite for material prosperity. "We shall mold them all . . . into Americans," Douglass declared. "Indian and Celt; Negro and Saxon; Latin and Teuton; Mongolian and Caucasian; Jew and gentile; all shall here bow to the same law, speak the same language, support the same government, enjoy the same liberty, vibrate with the same national enthusiasm, and seek the same national ends."[77]

In thus advocating a universal right to migrate and to be incorporated into the American political community, Douglass echoed the essential pre-Civil War themes

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[72] *Id.* at 226.

[73] *Id.*

[74] SCHRAG, *supra* note 23, at 36–37; Lea VanderVelde & Gabriel Chin, *Sowing the Seeds of Chinese Exclusion as the Reconstruction Congress Debates Civil Rights Inclusion*, 25 ASIAN PAC. AM. L.J. 29, 63 (2021).

[75] Douglass, *supra* note 60, at 222, 229. As Douglass suggests, southern planters developed elaborate schemes to replace their recently emancipated workforce with reputedly industrious, obedient Chinese laborers. MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION 73–145 (2006); *see also infra* notes 142–144 and accompanying text.

[76] Douglass, *supra* note 60, at 222.

[77] *Id.* at 231. "[A]ll races and varieties of men are improvable," Douglass counseled, and the "fact that the Chinese and other nations desire to come and do come is a proof of their capacity for improvement and of their fitness to come." *Id.*

addressed in Part I—the assimilative capacity of American economic and political life; the redeemability of foreigners' moral natures; and the nation's thirst for valuable immigrant labor. At the same time, however, Douglass adapted that traditional narrative to a radically transformed postbellum world. It was a world in which the ethos of universal freedom was ascendant (albeit briefly) and where formerly subjugated races might be drawn within the ambit of liberal equality; a world in which labor circulated alongside other commodities within a global commercial network of nation–states and international treaties.

Douglass was surely 19th-century America's leading "prophet of freedom" (in the words of a leading biographer), but he was hardly an eccentric.[78] In fact, a large and influential cohort of American lawmakers and diplomats shared Douglass's vision of a composite American nationality, and they notched several important political victories in their campaign to realize that vision. In the years following the end of the Civil War, Republicans in Congress embarked on an extraordinary series of legislative and constitutional reforms that promised fundamentally to remake the American economic, legal, and political order.[79] After seizing control of Reconstruction from an intransigent, obstructionist President Andrew Johnson, in a span of less than two years they affirmed and extended the abolition of slavery, defined national citizenship for the first time, secured equal rights to formerly enslaved people, including a right to vote, and reincorporated the successionist states into a newly robust federal union.[80] Critically, these changes empowered Congress and the federal courts to interpose themselves between the states and their residents to enforce individual rights—a revolutionary reordering of the American political and constitutional structure that "linked the progress of freedom directly to the power of the national state."[81]

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[78] BLIGHT, *supra* note 60, at 464–505.

[79] ERIC FONER, THE STORY OF AMERICAN FREEDOM 104–07 (1998).

[80] *Id.*

[81] *Id.* at 98. "The scale of the Union's triumph and the sheer drama of emancipation," Foner continues, "fused nationalism, morality, and the language of freedom in an entirely new combination." *Id.* at 99. This reordering of the American political and constitutional scheme included the Thirteenth Amendment (prohibiting slavery and involuntary servitude in the United States); the Civil Rights Act of 1866 (providing for birthright citizenship, defining the rights and privileges of citizens, and endowing federal course and other officials with extensive enforcement powers); the Reconstruction Acts (dividing the rebellious states into five districts governed directly by the U.S. military and establishing the conditions for readmission to the Union); the Fourteenth Amendment (providing that persons all persons born in the United States were citizens, and prohibiting the states from abridging the privileges and immunities of U.S. citizenship or from denying to any person due process of law or equal protection of the laws); the Fifteenth Amendment (prohibiting the denial of the right to vote "on account of race, color, or previous condition of servitude"); the Force Acts (attempting to combat White southern violence and intimidation by enforcing the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments, placing federal elections under federal control, and empowering federal judges to

For the architects of Reconstruction, however, this "second founding" would not be built from American materials alone.[82] This Part argues that the "new birth of freedom" heralded by the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth and Fifteenth Amendments reverberated beyond the freedpeople whose rights those enactments were intended to secure, to the millions of would-be foreign migrants weighing their prospects in America. Foreign immigration had receded during the war and replenishing that stream—typically in the name of equal rights and universal freedom—occupied a remarkably prominent place on an otherwise crowded congressional agenda.[83] Section A describes how, just days after the ratification of the Fourteenth Amendment, Congress enacted the Expatriation act of 1868, its first formal affirmation of an inherent human right to dissolve the bonds of political allegiance to one's country of birth. Then, between 1868 and 1872, the United States entered into a dozen bilateral "naturalization treaties," in which the United States and its treaty partners affirmed man's inalienable right to migrate. Section B explores the initially promising but ultimately thwarted campaign to extend the right to migrate to immigrants from China, which culminated in a vehement internecine contest among congressional Republicans over whether to remove the racial bar to naturalized citizenship.

### *A. The Right of Expatriation*

If the nation's war-time encouragement of European immigration was borne of, in Lincoln's words, the necessity of "replenishing . . . [the] national strength and

oversee polling); and the Civil Rights Act of 1875 (prohibiting racial discrimination in a wide range of public accommodations). The historical literature on Reconstruction is vast. Select works focusing on its legal and political dimensions include LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (Henry Steele Commager & Richard B. Harris eds., 2014); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR (2007).

[82] Historian Eric Foner attributes the first use of the phrase to Republican Carl Schurz. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION, at xx (2019).

[83] The pre-Civil War surge in immigration peaked in 1854, with 427,833 arrivals. Immigration bottomed out in 1861 and 1862, when the number of annual arrivals dropped below 92,000. *Legal Immigration to the United States, 1820–Present*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends (last visited Apr. 20, 2023) (choose "Legal Immigration to the United States, 1820–2021" under the subheading "Immigration Over Time") (citing *Yearbook of Immigration Statistics*, DEP'T HOMELAND SEC. (Dec. 5, 2022), https://www.dhs.gov/immigration-statistics/yearbook).

health" that had been so depleted by the "ravages of internal war," the Reconstruction-Era initiatives were framed in the ascendant idiom of universal liberty.[84] The "right of expatriation" was "a natural and inherent right of all people," Congress declared in the Expatriation Act's preamble, and was "indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[85] That principle, moreover, had guided the nation's immigration and naturalization policy for almost a century, as the American "government . . . freely received emigrants from all nations, and invested them with the rights of citizenship."[86] This is U.S. immigration history through a rose-colored lens, of course. As the previous Part noted, although federal immigration and naturalization policy was certainly "liberal" by world-historical standards, it was also fraught with ambivalence and qualified by state-level restrictions.[87] Eligibility for naturalization had always been limited to the distinct minority of the world's population denominated "free white persons." Moreover, American enthusiasm for European immigration was rooted in a highly particular political economy of assimilation, in which inexpensive, productive land was abundant and foreigners could be distributed among and amalgamated with the native population.[88] Not least, both the right of expatriation and the broader principle of political allegiance rooted in individual volition were highly circumscribed by sex. A foreign woman who married an American man, or whose foreign husband naturalized, simply acquired U.S. citizenship by proxy, without having to undertake the naturalization process or swear allegiance.[89]

As an ideal, however, the right of expatriation had a distinguished heritage. Recall how Jefferson, among others, scorned the slavish "Old World" doctrine of organic, perpetual allegiance between sovereign and subject, and exalted the inherent human right to sever an old, unhappy political bond and to form a new one. Just as Jeffersonians had placed geographical mobility at the heart of the republican project, so did Reconstruction-Era statesmen insist that the natural right to cross an ocean in pursuit of a freer, more prosperous life, and to be thus absolved of one's

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[84] At Lincoln's urging, in 1864 Congress passed the Act to Encourage Immigration, authorizing the President to appoint a Commissioner of Immigration for the purpose of developing a surplus labor force. An Act to Encourage Immigration, ch. 246, 13 Stat. 385 (1864); CALAVITA, *supra* note 57, at 36; *see also supra* notes 57–59 and accompanying text.

[85] An Act Concerning the Rights of American Citizens in Foreign States, ch. 249, 15 Stat. 223, 223 (1868).

[86] *Id.*

[87] KETTNER, *supra* note 25, at 107.

[88] An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103, 103–04 (1790), *repealed by* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163; Lindsay, *supra* note 1, at 793.

[89] LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 37 (1998). *See generally* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 15–44 (1998).

former allegiance, was integral to the rebirth of American freedom.[90] The American diplomat George Yeaman well captured the confluence of idealism and national interest in his 1867 pamphlet, *Allegiance and Citizenship*.[91] The right to "throw[] off ones [sic] native allegiance," Yeaman declared, distinguished political systems in which the individual exists to serve the nation from those in which "the Government exist[s] that the man may till the earth, attend his flocks, weave his cloth and forge his metal in peace and security."[92] For by natural right, "the world is the theater of his enterprise, and he goes where it offers the best reward for his labor."[93] Yet European nations clung stubbornly to the premodern, unrepublican notion of an "indestructible political tie" between sovereign and subject, forged by mere "accident of birth."[94] The "idea of an irrevocable natural allegiance . . . is eminently feudal in its nature," Yeaman lamented—an artifact of a time when people were "born vassals, villeins, followers, attached to the soil and sometimes transferred with it." Yet even in his own era of relative enlightenment, when "feudalism and its tenure, its service, its remorseless caste, were . . . finally broken down," there endured the "evil legacy . . . of the perpetuity of natural allegiance, transferred from the liege lord to the state."[95]

In some respects, the teleology of progress in which Yeaman situated the right of expatriation—of civilization poised to shed the last barbarous vestiges of its feudal past and spread, one pursuer of happiness at a time, across a global theater of human

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[90] In fact, Americans had reached broad consensus on the issue before the Civil War. Secretary of State Lewis Cass wrote to the U.S. Minister in Berlin, in July 1859, "The moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassible line separates him from his native country." Quoted in Richard W. Flournoy, Jr., *Naturalization and Expatriation*, 31 YALE L.J. 702, 714 (1922). Still, it was only with Union victory in 1865, followed by Reconstruction, writes historian Lucy Salyer, that Congress defined U.S. citizenship and that Americans embraced the "notion of a singular, indivisible allegiance" to the government of the United States. SALYER, *supra* note 44, at 69.

[91] GEORGE H. YEAMAN, ALLEGIANCE AND CITIZENSHIP: AN INQUIRY INTO THE CLAIM OF EUROPEAN GOVERNMENTS TO EXACT MILITARY SERVICE OF NATURALIZED CITIZENS OF THE UNITED STATES (1867).

[92] *Id.* at 4.

[93] *Id.* (emphasis omitted).

[94] *Id.* at 15 (emphasis omitted).

[95] *Id.* at 27–29. Although Yeaman's critique centered on the charge of feudalism, neither could he resist a timely metaphor. Perpetual, indissoluble allegiance was "only a modified form of slavery, and slavery is no longer approved." Further, he declared:

> [T]o compel a man and his descendants to live in such a county against his will is to a certain extent enslaving him that a Government may exist on a certain part of the earths [sic] surface, a good illustration of the idea, not yet entirely abandoned, that the People were made for the Government, rather than the Government for the People.

*Id.* at 18.

enterprise—conjures Jefferson's expanding empire of republican liberty. Yet Reconstruction-Era statesmen also reimagined the rights of unrestrained mobility and volitional allegiance within a decidedly un-Jeffersonian ethos of global commerce. For Jeffersonians, the right of expatriation had been embodied in the European farmer or craftsman fleeing vassalage or industrial slavery for the American asylum of republican liberty, where he could carve an independent homestead from a vast western wilderness.[96] For an emergent Reconstruction-Era school of liberal internationalist thinkers and statesmen, by contrast, including Secretaries of State William Seward and Hamilton Fish, that right inhered in the millions of self-possessed laborers pursuing their individual interests within of a global framework of interdependent nation–states bound together by commerce and international law.[97]

The eminent jurist and legal theorist Francis Lieber described this emergent internationalism in 1868. Lieber identified "three main characteristics of the political development which mark the modern epoch." The first two—the concept of a "national polity" and the extension of "human rights and civil liberty"—were, of course, central to the entire project of Reconstruction.[98] To these, however, Lieber added a third, decidedly outward-looking vision of "leading nations . . . striving together, with one public opinion, under the protection of one law of nations, and in the bonds of one common moving civilization." This "divine law of inter-dependence" was an elemental "characteristic[] of humanity" that applied to individuals and nations alike, Lieber wrote, and only "increases in intensity and spreads in action as men advance."[99] By propagating a law of nations through diplomacy and scholarly dissemination, moreover, the "leading nations—the French, the English, the German, the American"—might "draw the chariot of civilization" beyond "the Christian community" and incorporate China into an international union over which "the Law of Nations has its sway in peace and in war."[100]

Post-Civil War enthusiasm for the right of expatriation extended well beyond the world-civilizing project of international law theorists. Concrete disputes with European nations about the status of naturalized U.S. citizens pushed the issue to the forefront of American diplomacy. U.S. consulates across Europe constantly were beset by "the long-vexed question concerning the claims of foreign states for military service from their subjects naturalized in the United States," President Andrew

[96] *See supra* notes 41–43 and accompanying text.

[97] *See generally* Jay Sexton, *William H. Seward in the World*, 4 J. CIVIL WAR ERA 398, 399, 412–13, 418 (2014); SALYER, *supra* note 44, at 99–100, 185, 196, 200, 214–15.

[98] FRANCIS LIEBER, FRAGMENTS OF POLITICAL SCIENCE ON NATIONALISM AND INTERNATIONALISM 19 (1868).

[99] *Id.* at 19, 22.

[100] *Id.* at 22–23. On the right of expatriation as a component of the emergent liberal internationalism, see SALYER, *supra* note 44, at 180–88.

Johnson complained in 1867.[101] Prussia, in particular, asserted a right to military service from those who emigrated and later returned on a transient visa for ten years following their initial emigration—that is, as long as five years after some individuals had become naturalized U.S. citizens.[102] Other European states likewise denied "an absolute political right of self-expatriation," or that "naturalization in conformity with the Constitution and laws of the United States absolves the recipient from his native allegiance." "This conflict perplexes the public mind concerning the rights of naturalized citizens and impairs the national authority abroad," Johnson lamented.[103] Although few nations insisted on such a right "rigidly and uniformly," Yeaman acknowledged, "frequently American Ministers and Consuls are put to the humiliation of asking, or in any event accepting, as a favor or courtesy a release which ought to be due as a matter of right."[104] And while an act of Congress could not compel European nations to surrender claims of allegiance upon their former subjects, a "suitable [and] well considered Expatriation Act" would nevertheless "complete our policy and strengthen our position" by giving the United States "a body or system of statute laws . . . consistent with themselves, consistent with international law . . . ."[105]

If the consular humiliation of having to wrangle diplomatic favors from foreign governments had kept the expatriation issue simmering on the back burner of American politics, Great Britain's 1867 capture of 32 Irish Americans who had joined the Fenian revolt against British rule in Ireland heated it to a rolling boil.[106] The prosecution in Dublin for treason of one of the band's leaders—the Irish-born, U.S.-naturalized Civil War officer Robert Warren—placed the right of expatriation squarely before the Dublin court and the broader public. Throughout his trial,

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[101] Andrew Johnson, Third Annual Message (Dec. 3, 1867), *reprinted in The American Presidency Project*, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/third-annual-message-10 (last visited Apr. 20, 2023).

[102] SALYER, *supra* note 44, at 192; Johnson, *supra* note 101; Andrew Johnson, Second Annual Message (Dec. 3, 1866), *reprinted in The American Presidency Project*, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/second-annual-message-10 (last visited Apr. 20, 2023); E.M. Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312, 315 (1931).

[103] Johnson, *supra* note 102; Johnson, *supra* note 101. Yeaman confirmed that "most European Governments cling with great tenacity to the theory of an indissoluble natural allegiance, and the right to enforce the rendition of military service to them . . . ." YEAMAN, *supra* note 91, at 32.

[104] YEAMAN, *supra* note 91, at 32.

[105] *Id.* at 38, 46.

[106] The following discussion relies on SALYER, *supra* note 44. Conflict with Great Britain over the right of expatriation stretched back to the War of 1812, fought in part over British "impressment" into military service of British-born naturalized Americans. SALYER, *supra* note 44, at 89–105.

writes historian Lucy Salyer, Warren strove to shift the focus from his Fenian activities "to the real issue in the case: British contempt for American sovereignty and the United States' commitment to its adopted citizens." Following his conviction, Warren condemned both his unjust prosecution by Great Britain and the U.S. government's alleged neglect of his rights as an American citizen. At stake in his prosecution, Warren insisted, was not merely one man's guilt or innocence, but the right of all Irish-born American citizens to sever unwanted political ties, as well as the equal citizenship of those who had sworn an oath of allegiance to the United States. As he declared to a crowded courtroom before being sentenced:

> If England is allowed to abuse me as she has done, and if America does not resent England's conduct toward me; if the only allegiance I ever acknowledged is not to be vindicated, then thirteen millions of the sons of Ireland who have lived in happiness in the United States up to this [time] will have become the slaves of England.[107]

In the following months, Warren and his many vocal supporters in the United States broadened their campaign, celebrating the patriotism of foreign-born Americans and demanding that the U.S. government defend the rights of its naturalized citizens with the same fervor it displayed toward those of newly emancipated African Americans. Naturalized citizens, he declared, were "the faithful sentinels on the outpost, guarding with a jealous, with a vengeful eye the sacred approaches to republicanism and freedom."[108]

With the Expatriation Act, Congress heeded the call issued by Warren, President Johnson, and Ambassador Yeaman, among many others. Yet the Act did more than harmonize American law with American ideals and strengthen the hand of American diplomats in Europe. It was also an integral component of post-Civil War immigration policy. The Act served, first and foremost, as a pledge to prospective European migrants that naturalization to U.S. citizenship would secure them against taxation, unjust prosecution, or, as the Prussian example suggests, demands of mil-

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[107] SALYER, *supra* note 44, at 121–22. For a fascinating account of Warren's Dublin trial, see *id.* at 110–23.

[108] LETTER FROM JOHN WARREN TO THE IRISHMEN OF THE UNITED STATES ACCOMPANYING LETTER FROM CHARLES FRANCIS ADAMS TO WILLIAM SEWARD, SEPT. 3, 1867, H.R. EXEC. DOC. NO. 1438, at 133, 136 (40th Cong., 2d Sess., 1867), *quoted in* SALYER, *supra* note 44, at 137. Even as proponents of the right of expatriation often spoke in universal terms, sometimes employing the language of the Radical Republicanism, they generally "took the white European as their model claimant." SALYER, *supra* note 44, at 152. Although Warren himself was an anti-slavery Republican (a rarity among Irish Americans), other prominent advocates of the right of expatriation made race-baiting a centerpiece of their appeal, routinely demanding that the rights of Irish or German "adopted Americans" be bolstered against the rising threat of "Negro supremacy." *Id.* at 146–47, 152.

itary service by their native states. In the words of historian Nancy Green, "expatriation had become immigration."[109] Accordingly, the Act declared that naturalized U.S. citizens traveling abroad would enjoy "the same protection of persons and property that is accorded to native-born citizens," and directed the President to use any means short of war to secure the "rights of American citizenship" against foreign governments.[110]

Yet however forcefully the right of expatriation might be rendered by Congress or enforced by the President, it was not self-executing. A mere statute could not compel foreign nations to relinquish claims of allegiance upon their one-time subjects.[111] Securing such compliance, and thus ending the perpetual dispute between the United States and European nations over the citizenship status of naturalized Americans, fell initially to George Bancroft, an eminent historian and experienced diplomat who, in 1867, President Johnson appointed U.S. Minister to Prussia.[112] The naturalization Treaty that Bancroft negotiated with Chancellor Otto von Bismarck's government provided that citizens of the North German Confederation who resided in the United States for five years and became naturalized U.S. citizens "shall be held by the North German Confederation to be American citizens."[113] The U.S.–Prussia Treaty served as a template for a bevy of additional naturalization trea-

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[109] Green, *supra* note 29, at 314.

[110] An Act Concerning the Rights of American Citizens in Foreign States, ch. 249, 15 Stat. 223, 224 (1868). The enforcement language reflected a compromise worked out during debate in the Senate. The bill passed through the House of Representatives had authorized the President to detain as a "hostage" of sorts any subject of a foreign government holding an American citizen without cause. SALYER, *supra* note 44, at 160–62, 172–73.

[111] As the international law scholar Edwin Borchard explained in 1931, the right of expatriation—to emigrate from one's country of birth—presumes a corollary freedom to immigrate to and acquire citizenship on one's country of choice. Borchard wrote:

> When naturalization is denied to many people, their right of expatriation ceases in practice to be either "natural" or "inherent." When immigration is denied to many people, their "inherent right" of expatriation becomes rather an empty formula, for their "inalienable right" to "liberty" and the "pursuit of happiness" is strictly confined to enjoyment at home.

Borchard, *supra* note 102, at 314.

[112] ROBERT H. CANARY, GEORGE BANCROFT 101 (1974).

[113] Treaty Between the United States of America and the King of Prussia, N. Ger. Union-U.S., art. I, May 27, 1868, 15 Stat. 615. In a concession to Prussia, however, the Treaty also provided that "[i]f a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States." A German-born, U.S.-naturalized person's residence in Germany for two years would, in turn, give rise to a presumption that he did not intend to return to the United States. *Id.* art. IV.

ties forged over the following four years, known collectively as the "Bancroft Treaties." Among the Bancroft Treaties was a pact with Great Britain, concluded in May 1870.[114]

### *B. Chinese Immigration and the "Trial of Republicanism"*

If the legislators and diplomats responsible for the Expatriation Act and Bancroft Treaties envisioned free and equal European immigrants selling their labor within a global commercial network, their approach to Chinese immigrants was more equivocal. Critically, congressional Republicans did extend the right of migration to the Chinese. Further, the Congress that adopted the Fourteenth Amendment in 1867 well understood that it conferred natural-born citizenship on children born in the United States to Chinese parents and guaranteed to Chinese immigrants in the United States due process and equal protection of the laws.[115] After a protracted and often vehement debate during the summer of 1870s, however, the U.S. Senate narrowly decided that Chinese subjects' right to migrate to the United States and to enjoy civil equality before the law did not include a right to become a naturalized American citizen.[116] This is perhaps unsurprising when we consider that merely eight years later, Congress would overwhelmingly endorse the outright exclusion of

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[114] It was at this time that Great Britain explicitly abandoned the principle of perpetual allegiance. A special commission appointed to study the issue reported in February 1869 that the traditional common law doctrine of perpetual allegiance "conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration." The British Naturalization Act of May 12, 1870, in turn, provided that a British subject who shall "voluntarily become naturalized" in a foreign state shall "be deemed to have ceased to be a British subject and be regarded as an alien." 33 & 34 Vict., c. 14, § 6 (Eng.), *quoted in* Flournoy, *supra* note 90, at 717.

[115] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment's Citizenship Clause, providing that all persons born in the United States "are citizens of the United States and of the State wherein they reside," attracted the most (though still modest) debate. Senator Jacob Howard of Michigan introduced the specific language, explaining that the clause "is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United Sates, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1865). When Senator Edgar Cowan of Pennsylvania protested, "Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?" supporters affirmed that the Citizenship Clause would make children born of Chinese immigrants, as well as "gypsies," natural-born citizens. As Senator John Conness of California explained, "The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so." *Id.* at 2890–91. *See generally* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 234–36 (2006).

[116] *See infra* notes 172, 186; CONG. GLOBE, 41st Cong., 2nd Sess. 5123–24, 5168–77 (1870).

Chinese laborers from the United States.[117] Indeed, the strident anti-Chinese racism that permeated American political culture later in the decade was already threaded through the Reconstruction-Era debates. Far more remarkable, perhaps, is that on the eve of Chinese Exclusion, Congress affirmatively encouraged Chinese immigration; protected the civil rights of Chinese immigrants; and very nearly amended the naturalization law to admit Chinese immigrants to U.S. citizenship. For a fleeting historical moment, Frederick Douglass's vision of a "composite" American nationality must have appeared within reach.

*1. An "Inalienable Right" to Migrate: The Burlingame Treaty*

The day after the U.S. Senate passed the Expatriation Act, it unanimously ratified the Burlingame Treaty between the United States and China.[118] So named after Anson Burlingame, the former U.S. Minister to China who led the Chinese diplomatic delegation to the United States, the Treaty marked a stark reversal of China's long-standing prohibition on emigration.[119] Echoing the U.S.–Prussia Treaty, China and the United States "recognize[d] the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other . . . ." Critically, the Treaty also guaranteed to "Chinese subjects visiting or residing in the United States . . . the same privileges, immunities, and exemptions in respect to travel or residence as . . . the citizens or subjects of the most favored nation."[120] With its express endorsement of an inherent right to migrate and its most favored nation provision, the Burlingame Treaty thus reflected the nation's broader policy of recruiting foreign labor, and framed the government's pursuit of that policy in the Reconstruction-Era rubric of freedom and equality.[121]

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[117] Act of Dec. 17, 1943, ch. 344 § 1, 57 Stat. 600. President Hayes vetoed this bill, citing the Burlingame Treaty. VETO OF THE CHINESE IMMIGRATION BILL, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TO THE HOUSE OF REPRESENTATIVES, H.R. EXEC. DOC. NO. 102, at 1, 6 (45th Cong., 3rd Sess. 1879).

[118] Treaty of Trade, Consuls and Emigration Between China and the United States (Burlingame Treaty), China-U.S., July 28, 1868, 18 Stat. 147; SALYER, *supra* note 44, at 196.

[119] SALYER, *supra* note 44, at 196–97.

[120] Treaty of Trade, *supra* note 118, arts. V & VI. The Chinese prohibition on emigration was, as a formal matter, punishable by death; in practice, however, the Chinese government had scarcely enforced it. Over the previous three decades, China had witnessed a humiliating erosion its sovereignty, as Great Britain and, to a lesser extent, the United States, sought to protect their interest in the opium trade between India and China. The Chinese government viewed the Burlingame Treaty as a means of asserting its status as a sovereign, self-governing state, alongside the United States, Great Britain, and the major European powers in the "family of nations." SALYER, *supra* note 44, at 197; LEW-WILLIAMS, *supra* note 23, at 25; MAE NGAI, THE CHINESE QUESTION: THE GOLD RUSHES AND GLOBAL POLITICS 10–13 (2021).

[121] The purpose of the Treaty from the perspective of American policymakers was to promote commerce between the United States and China, the "essential element" of which,

Yet Chinese immigrants were not simply borne along by the rushing current of radical Reconstruction. Even the Burlingame Treaty's affirmation of the "inalienable" freedom to change one's "home and allegiance" was decidedly more circumscribed than that guaranteed to Europeans by the Bancroft naturalization pacts. The Treaty did nothing to alter the nation's naturalization law, under which all but white foreigners remained ineligible for citizenship.[122] When some senators nevertheless worried that the "most favored nation" provision would supersede the racial bar to naturalized citizenship, however, the Senate amended the Treaty to mollify them, declaring that nothing in the pact would be "held to confer naturalization . . . upon the subjects of China in the United States."[123]

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explained Secretary of State Seward, was "the free emigration of the Chinese" to the United States. *Hon. William H. Seward: His Departure from Hong-Kong—Reception and Speech at the American Consulate*, N.Y. TIMES, Feb. 25, 1871, at 2, *quoted in* SALYER, *supra* note 44, at 196, 200. While the Treaty bears Burlingame's name, Seward was the diplomatic force behind the pact. As secretary of state from 1861 to 1869, Seward strove to make the United States "the conduit between Western and Eastern civilizations," writes Lew-Williams. The Treaty was, in Seward's words, the ultimate "act of consummation." Notwithstanding such high-minded rhetoric, however, Seward and other postbellum "cosmopolitan expansionists" were motivated less by racial egalitarianism than national economic interest and, accordingly, viewed Chinese immigrants less as Republicans-in-waiting than as a valuable reserve supply of inexpensive, expendable labor. LEW-WILLIAMS, *supra* note 23, at 24–28.

[122] *See supra* note 120. Nor did the Treaty unsettle Congress's previous decision to withhold access to public lands from Chinese and other nonwhite residents. The Donation Land Act of 1850, for example, sought to encourage homestead settlements in the enormous Oregon Territory (comprising present-day Oregon, Washington, Idaho, and parts of Wyoming and Montana) by conferring legal title to "every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law . . . and who shall have resided upon and cultivated the same for four consecutive years." Act of Sept. 27, 1850, ch. 76, 9 Stat. 496, 497; 26 CONG. REC. 3371 (1894); *Formation of the Oregon Territory*, NAT'L PARK SERV., https://www.nps.gov/places/formation-of-the-oregon-territory.htm (Aug. 6, 2022). Although the Homestead Act of 1862, ch. 75, 12 Stat. 892, which provided that any adult citizen or intended citizen who had not taken up arms against the United States could claim up to 160 acres of surveyed public lands, did not explicitly limit eligibility to "white" settlers, the citizenship requirement meant that Chinese and other nonwhite foreigners were ineligible. *See* § 1, 12 Stat. at 892.

[123] Burlingame Treaty, *supra* note 120, art. VI. The Senate debate was not recorded because it occurred in executive session, but subsequent statements by key participants suggest that the amendment was critical to ratification. Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 229 (1994). The Treaty was ratified on July 28, 1868, the same day that Secretary of State Seward announced the ratification of the Fourteenth Amendment. The effect was to deny Chinese immigrants access to U.S. citizenship "exactly on the day that the cornerstone importance of citizenship was embedded in the . . . Constitution." VanderVelde & Chin, *supra* note 74, at 47. The ongoing exclusion of Chinese and other nonwhites from eligibility for naturalization also created a notable anomaly, as the Fourteenth Amendment guaranteed citizenship to children born

That amendment did more than affirm the racial exclusivity of the nation's naturalization policy. It also signaled how questions about Chinese immigrants' legal and political status would inform broader debates over where exactly the reconstructed boundaries of American freedom, equality, and citizenship should be drawn. As a matter of demography, Chinese immigration barely registered nationally at the time the Senate endorsed an "inalienable right" to migrate. But in western states such as California, Oregon, and Nevada, where Chinese-born residents comprised, respectively, 8.7%, 3.7%, and 7.4% of the total population, Chinese immigration had already become a familiar target of labor protest, repressive legislation, and political demagoguery.[124] And throughout Reconstruction, anti-Chinese western congressmen ensured that what they dubbed the "Chinese Question" would hover over the nation's Second Founding like a spectral admonition against the naïve idealism of Charles Sumner and Thaddeus Stevens. As California Representative (and later Senator) Aaron Sargent explained, the Senate's purpose in amending the Treaty was to declare, "We do not intend by this treaty to sanction the idea that these Asiatic hordes can become citizens of the United States; that they can be brought here to swamp American, Christian, Anglo-Saxon civilization."[125] Notwithstanding its veneer of inalienable rights and equal treatment, no one would have mistaken the Burlingame Treaty for Douglass's charter of cosmopolitan, multi-racial pluralism.

*2. The Freedom to Migrate and the Problem of "Coolieism"*

Reconstruction lawmakers well understood that they were ushering in a new era of inalienable rights and universal freedom, but of what exactly did that freedom consist? In the years following emancipation, precisely that question was vigorously contested by Radical Republicans and former Confederates, Supreme Court Justices and the recently enslaved, workingmen and women's rights advocates. Did freedom mean, as Congressman James Garfield queried in 1865, "the bare privilege of not

to Chinese and other immigrants who themselves were ineligible for naturalization. *See supra* note 121 and accompanying text.

[124] The 1860 U.S. Census reported that between 1851 and 1860, 2,598,214 foreign-born persons were landed in the United States. Of those, 41,397—less than two-tenths of one percent—were born in China. U.S. DEP'T OF INTERIOR, POPULATION OF THE UNITED STATES IN 1869: COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS, at xxii (1864). The 1870 U.S. Census—the first to document the number of Chinese-born residents by state—reported 48,826 Chinese-born residents of California out of a total population of 560,247; 3,327 Chinese-born residents of Oregon out of a total population of 90,923; and 3,146 Chinese-born residents of Nevada out of a total population of 42,491. U.S. DEP'T OF INTERIOR, A COMPENDIUM OF THE NINTH CENSUS tbl.I, tbl.XIV (1872).

[125] CONG. GLOBE, 41st Cong., 2d Sess. 4276 (1870) (statement of Rep. Sargent, R-CA).

being chained?" If so, he declared, "then freedom is a bitter mockery, a cruel delusion."[126] By 1866, the Republicans who controlled Congress reached broad consensus that freedom meant, at a minimum, male civil equality before the law and the right of every man to the "fruits of his labor."[127] Beyond that, however, the meaning of freedom remained an open question. Was the kind of economic autonomy traditionally associated with property ownership indispensable to true freedom? Or was a man's bare ownership of himself, expressed through his sale of his own labor, now sufficient? Although some workingmen and their allies vigorously contested the easy equation of individual freedom with liberty of contract, in the decades following the Civil War, in the North and South alike, a man's capacity to alienate his labor for a

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[126] Oration Delivered at Ravenna, Ohio (July 4, 1865), *in* 1 THE WORKS OF JAMES ABRAM GARFIELD, 85, 86 (Burke A. Hinsdale ed., 1882), *quoted in* FONER, *supra* note 79, at 100.

[127] FONER, *supra* note 79, at 104–05 (noting the repeated use of the phrase throughout congressional debates during Reconstruction). As congressional Republicans strove to inscribe that meaning into American law, however, they were not writing on a clean slate. The basic political-economic conditions of American freedom and independence had evolved over the 19th century, as the market revolution transformed self-employed farmers and craftsmen into wage earners, as male workers and their families moved from self-owned farms to towns and cities, and as the debate over slavery loomed increasingly large in the national consciousness. On the intensification of market relations and the transformation of labor before the Civil War, see STEVEN HAHN, A NATION WITHOUT BORDERS 83–111 (2016); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 525–69 (2007); BRUCE LAURIE, ARTISANS TO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 14–73 (1889). Although commercial contracts had long been associated in western law, economics, and philosophy with the sovereign will of the contracting parties, the wage contract, by contrast, signified a forfeiture of economic independence. In common law, hireling labor was classified as a domestic relation, alongside other presumptively natural status hierarchies such as husband and wife, parent and child, and master and slave. Hirelings were not only denied the economic independence associated with property ownership and self-employment; they subjected their personal autonomy and political will to the authority of their employer. William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767, 774–75, 782 (1985); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 9–10, 16 (1998); *see also* DANIEL RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850–1920, at 30–64 (1974); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870, at 185–87 (1991). In the postbellum era, however, for the first time in the nation's history a majority of male workers labored for wages. *See* DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872, at 25–44 (1981). Whether the status of those men was compatible with equal democratic-republican citizenship became a paramount political and ideological problem in the decades following the Civil War, as the "Labor Question" replaced the Slavery Question at the center of American political-economic debate. *See generally* ROSANNE CURRARINO, THE LABOR QUESTION IN AMERICA: ECONOMIC DEMOCRACY IN THE GILDED AGE (2011); NANCY COHEN, THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865–1914, at 29 (2002); STANLEY, *supra*, at 60–97.

price was transformed from a badge of emasculating dependency to a hallmark of masculine freedom and independence.[128]

One of the most revealing post-Civil War contests over the metes and bounds of individual freedom centered not on Southern Blacks but on "imported" laborers—migrants from Europe or China who entered labor contracts with American employers or recruitment agencies, often for lengthy terms and at sub-market wages, prior to arriving in the United States. Up until this time, U.S. policy toward foreign contract labor had been ambivalent.[129] For many lawmakers, the legal enforcement

[128] *See* LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY 17–34 (1997; STANLEY, *supra* note 127, at 1–59. More than any statute, constitutional amendment, or Supreme Court decision, the decades-long conflict over slavery had transformed the meaning of the wage contract. The compulsion inherent in the slave system, abolitionists had argued, violated the fundamental tenets of both economic morality and human nature, denying man's right to govern himself, to enjoy bodily integrity, to own property, and to dispose of his labor as he saw fit. Consent thus became the language of individual freedom and acquired the moral and emotional weight of opposing human bondage. *Id.*; *see* RONALD G. WALTERS, THE ANTISLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830 (1976). On the relationship between slavery and liberal capitalism in abolitionist thought, see DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 255–57, 286 (1975). Emancipation and the victory of the Union Army then ratified the abolitionists' celebration of the wage contract as the antithesis of slavery and the essence of economic freedom and independence. Congress, in turn, enshrined that equation into law in the Civil Rights Act of 1866, defining the right to contract for the sale of one's labor as an essential right of citizenship. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 244–45 (2d ed. 2014). The equation of the wage contract with individual freedom and autonomy did not go uncontested, as northern labor spokesmen vigorously dissented throughout the 1870s and 1880s. *See* GLICKMAN, *supra*, at 17–25; MONTGOMERY, *supra* note 127, at 230–60; STANLEY, *supra* note 127, at 60–97.

[129] In 1862, Congress had adopted an "Anti-Coolie Act," making it unlawful for any American citizen or vessel to transport to a foreign port "the inhabitants or subjects of China, known as 'coolies,' . . . to be held to service or labor," and requiring that each Chinese immigrant obtain from the U.S. consular agent at his point of departure a certificate attesting to the voluntariness of his migration. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, §§ 1, 4, 12 Stat. 340–41 (1862). In the 19th century, "coolie" was used loosely, typically as a term of derision, to refer to Asians who participated in cheap, allegedly-less-than-free labor. "The distinction between a coolie and a free laborer was ideological," writes historian Elliott Young. "*Coolie* was not a legal term but rather a vague notion of cheap and easily exploitable labor that was almost inextricably linked to Asians, and particularly to Chinese and Indians." ELLIOTT YOUNG, ALIEN NATION: CHINESE MIGRATION IN THE AMERICAS FROM THE COOLIE ERA THROUGH WORLD WAR II, at 46 (2014). The word itself, writes historian Mae Ngai, is "a European pidgin neologism referring to a common laborer and then to indentured Indian and Chinese workers in plantation colonies." Mae M. Ngai, *Chinese Gold Miners and the "Chinese Question" in Nineteenth-Century California and Victoria*, 101 J. AM. HIST. 1082, 1084, n.3 (2015); *see also* STACEY L. SMITH, FREEDOM'S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION 97 (2013). The Act's failure to define the term "coolie," combined with its affirmation that the law should not be construed to interfere with the

of labor contracts formed abroad was a natural extension of the nation's long-standing policy of inviting valuable European workers to partake of American opportunity.[130] In the years following the Civil War, however, a growing number of congressional Republicans saw in the contract labor system something more nefarious and began to question the presumption that contract labor was always, by definition, "free labor." Chairman of the Senate Committee on Appropriations and future Treasury Secretary Lot Morrill queried how the U.S. Government ever became involved in the "importation of men"—a practice that "smacks so nearly of that trade which was African" and was "so closely allied to the coolie business."[131] A private company's recruitment of labor from Europe or elsewhere was an ordinary commercial practice, to which Morrill had no objection. But for the U.S. Government to underwrite a system of labor importation—"to enforce those contracts and impound the labor and pursue the laborer, the immigrant, where ever he might go"—was to implement "a species of slavery" that betrayed the United States's standing as an asylum of republican liberty.[132] California Republican John Conness was even more emphatic. To "authorize contracts to be made in foreign countries and compel their execution by the laborer in distant lands," he declared, was "more monstrous . . . in character than the negro slavery that we have abolished." Conness appeared incredulous, stating:

> [N]ow the mission [of] this great Republic is . . . to hunt up and hunt out

"free and voluntary immigration of any Chinese subject," made the prohibition virtually unenforceable. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27 at 341 (1862); *see* JUNG, *supra* note 75, at 73–145; GYORY, *supra* note 57, at 32–33. Just two years later, however, as part of a concerted war-time program to recruit European labor, Congress adopted "An Act to Encourage Immigration," establishing the short-lived Federal Bureau of Immigration and authorizing the enforcement in federal and state courts of labor contracts formed between American employers and foreigners abroad who pledged up to a year's wages in exchange for the cost of immigrating. An Act to Encourage Immigration, ch. 246, 13 Stat. 385, 386 (1864).

[130] As an Oregon Republican explained, the United States stood ready to profit from the "thousands of people in Europe who are desirous to come to this country." CONG. GLOBE, 39th Cong., 1st Sess. 4043 (1866) (statement of Sen. Williams); GYORY *supra* note 57, at 54. The only impediment was that "[t]hey have not the means to pay for their passage." The Act simply removed that impediment by "protect[ing] persons, ship-owners and others, that may provide those poor immigrants with a passage." To garnish an immigrant's earnings to pay for the cost of transportation, he continued, "does not in any way affect the liberty of the man but simply relates to his wages." CONG. GLOBE, 39th Cong., 1st Sess. 4043 (1866) (statement of Sen. Williams).

[131] CONG. GLOBE, 39th Cong., 1st Sess. 4040 (1866) (statement of Sen. Morrill).

[132] *Id.* Sen. Morrill made these statements in the course of debating a bill to expand the federal government's role in the recruitment of foreign contract laborers, including opening new offices of the U.S. Superintendent of Immigration and granting the United States greater powers to enforce labor contracts on behalf of American employers against foreign workers who had absconded before completing the contract term. The Senate tabled the question, but Congress finally did repeal the contract labor law in 1868. GYORY, *supra* note 46, at 24–25.

> white men, to enable men who want their labor, and can make money and profit and wealth out of it to make contracts with them in their impoverished condition, . . . and then use the right arm of the law to compel their execution under the stars and stripes.[133]

The small but growing presence of Chinese immigrants in the American West posed for contemporaries vexing questions about the meaning of free labor and free migration in post-Civil War America, and cast an outsized shadow over the contract labor debate. Particularly in California, organized laborers and their political allies had forced the issue of Chinese immigration to the forefront of the State's political agenda even before the Civil War.[134] But despite periodic anti-Chinese speechmaking by some western congressmen, Chinese immigration remained mostly latent as a national political issue until 1869.[135] Following the completion of the transcontinental railroad in May of that year, eastern manufactures and mining companies began to organize agencies to import newly available Chinese laborers as strikebreakers.[136] At the same time, southern planters saw them as a ready alternative to a Black agricultural labor force that, they believed, had been hopelessly corrupted by northern influence. Chinese were docile, obedient, and industrious, their boosters explained, and were willing to sign labor contracts for five or even eight years for a small fraction of the wages earned by Black laborers.[137] "They are just the men, these Chinese, to take the place of the labor made so unreliable by Radical interference and manipulation," editorialized a Memphis newspaper.[138] Attendees of a widely publicized "Chinese labor convention" in Memphis later that summer left the meeting "envisioning the day when plantations, railroads, and infant industries throughout the South would be manned by quiet, complaint Chinese laborers," explains historian Andrew Gyory.[139] Within weeks, recruitment agents were deluged with

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[133] CONG. GLOBE, 39th Cong., 1st Sess. 4043 (1866) (statement of Sen. Conness); *see* Robert Denning, *A Fragile Machine: California Senator John Conness*, 85 CAL. HIST., no. 4, 2008 at 26, 38–41.

[134] On the political history of the California anti-Chinese movement, and especially the role of organized labor, see ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 68–78 (1971); CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 9–42 (1994); NGAI, *supra* note 120, at 82–101; SMITH, *supra* note 129, at 95–108.

[135] GYORY, *supra* note 57, at 28–29.

[136] *Id.* at 29–30. *See generally* THE CHINESE AND THE IRON ROAD: BUILDING THE TRANSCONTINENTAL RAILROAD 18–20 (Gordon H. Chang & Shelley Fisher eds., 2019).

[137] GYORY, *supra* note 57, at 30–31; *see* Matthew Pratt Guterl, *After Slavery: Asian Labor, the American South, and the Age of Emancipation*, 14 J. WORLD HIST. 209, 219 (2003).

[138] *Chinese Labor*, MEMPHIS DAILY APPEAL, June 26, 1869, at 2, *quoted in* GYORY, *supra* note 57, at 30.

[139] GYORY, *supra* note 57, at 31–32.

hundreds of "orders" for thousands of Chinese laborers to be deployed in any number of industries.[140]

The prospect of "importing" hundreds of thousands, perhaps even millions, of laborers bound by contract to years of service at sub-market wages raised difficult moral and political questions. Was a man really "free" who, illiterate and lacking an understanding of the American labor market, was induced by circumstances "voluntarily" to be transported halfway around the world and bound to labor for five years at poverty-level wages? Organized laborers were already certain that he was not when, in May of 1870, a North Adams, Massachusetts, shoe manufacturer procured from a Chinese emigrant agency "75 steady, active, and intelligent Chinamen"[141] to replace striking workers. The North Adams incident triggered a surge of similar threats by employers seeking leverage in labor negotiations. The resulting national publicity galvanized workers across the Northeast and Midwest, who denounced capitalist efforts to resurrect slavery and degrade labor with cheap, servile foreign workers.[142]

*3. Congress Debates America's "Composite Nationality": The Naturalization Act of 1870*

The "Chinese Question" spilled into Congress that summer, in the form of two closely entwined legislative measures. In June, Senator William Stewart of Nevada proposed, in the name of free labor and high wages, to resurrect and refine the Anti-Coolie Act that Congress had abandoned in the context of war-time labor shortages.[143] Although directed at Chinese immigration, in particular, Stewart's "Anti-Coolie Bill" prohibited "any alien from any foreign country" from entering a "contract for servile labor" in the United States.[144] The following month, as the

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[140] *Id.* at 31–34.

[141] *Testimony of C.T. Sampson*, *in* REPORT OF THE BUREAU OF STATISTICS OF LABOR, EMBRACING THE ACCOUNT OF ITS OPERATIONS AND INQUIREIS FROM MARCH 1, 1870, TO MARCH 1, 1871, at 98, 103–07 (1871), *quoted in* GYORY, *supra* note 57, at 30.

[142] GYORY, *supra* note 57, at 40. Even as organized laborers denounced the importation of foreign workers, they continued to support "voluntary" immigration and generally directed their venom toward unscrupulous capitalists rather than the "imported" Chinese laborers themselves. They also resisted the isolated calls for Chinese exclusion, emphasizing the vast difference between immigration, which they supported, and "coolieism," which they condemned as a species of slavery. *Id.* at 40–45.

[143] *See supra* note 129.

[144] The bill provided:

> [E]very contract for labor, any part of the consideration of which shall be the money for passage or transportation advanced or secured for any alien from any foreign country to the United States, which provides for a longer period of service than six months, is hereby declared a contract for servile labor and contrary to public policy.

Senate was debating a separate Naturalization Bill to deny suffrage to noncitizens, Senator Charles Sumner of Massachusetts moved to strike the word "white" from the naturalization law. For Sumner and his Radical allies—many of whom, including Sumner himself, concurrently opposed Stewart's Bill—the principle of equality before the law dictated an inalienable and absolute equality of rights among men, including the right of naturalization, that could yield to neither race nor circumstance. Nothing short of excising from American law all distinctions of race, creed, and color would redeem the promise of Reconstruction and make manifest the self-evident truths set forth in the Declaration of Independence.[145]

Sumner's amendment very narrowly failed, with opposition led not by Democrats (though every Senate Democrat did vote against it) but rather Western Republicans, foremost among them Senator Stewart.[146] Even as Stewart and many (though not all) of his allies claimed to share Sumner's commitment to racial equality before the law, they maintained that admission to citizenship ought to be conditioned on a measure of individual freedom and independence that could not be inferred from

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CONG. GLOBE, 41st Cong., 2nd Sess. 4126 (1870). Any person who contracted for such labor (i.e., an employer) or who enforced such a contract was guilty of a misdemeanor punishable "by a fine of no less than $1,000 [and] no more than $5,000." *Id.*

[145] Sumner's amendment directed that "all acts of Congress relating to naturalization be . . . hereby, amended by striking the word 'white' wherever it occurs, so that in naturalization there shall be no distinction of race or color." *Id.* at 5121 (statement of Sen. Sumner). Sumner had introduced the same proposal in 1867 and again in 1869, both times failing to win passage. *Id.* at 5154. On the political background of Sumner's proposed amendment and the debate that followed, see GYORY, *supra* note 46, at 50–55.

Noncitizen voting remained a common practice in the postbellum period and was a source of corruption, both real and imagined, typically to the detriment of Republican candidates. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1415 (1993); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change*, 18 MINN. J.L. & INEQ. 271, 281 (2000); *see* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–06 (2000).

[146] The partisan dynamic behind the anti-coolie program in Congress bears brief explanation. Following emancipation, explains historian Stacey Smith, California Democrats "appropriated the Republican wartime idiom of free labor and abolition and turned it back on" Republicans, arguing that "excluding the Chinese was the only way to protect the accomplishment of emancipation and safeguard the nation from human bondage." SMITH, *supra* note 129, at 209. This was an anti-coolie appeal for the post-Emancipation Era—the era of free labor—and it proved remarkably potent. California Democrats routed their Republican opponents in the elections of 1867 and 1869, winning a massive majority in the assembly, control of the Senate, and two additional congressional seats. *Id.* at 209–13. In response, western Republicans like Stewart embraced the anti-coolie program, sought to strip away its association with political demagoguery and irrational race prejudice, and to couch it instead within the Republican legacy of antislavery advocacy, emancipation, and free labor. *Id.*

the bare fact of manhood.[147] The vast majority of Chinese immigrants were irremediably unfree, they insisted, ensnared within an intricate, transcontinental web of dehumanizing labor contracts, financial bonds, and religious–cultural commitments. To admit this servile population to citizenship risked a catastrophic corruption of American democracy. First dismantle the coolie system, they argued, and only then would it be proper to discuss Chinese fitness for American citizenship.[148] And indeed, that was precisely the declared purpose of the "Anti-Coolie Bill" that Stewart had introduced just weeks before.[149]

The legislative tandem of Stewart's Anti-Coolie Bill and Sumner's naturalization proposal incited a lengthy and often vehement debate that laid bare a remarkable schism within the Republican Party over the metes and bounds of Reconstruction—specifically, whether the Republican commitment to racial equality extended beyond recently emancipated African Americans. Yet for many lawmakers, the Chinese Question also represented an unprecedented trial of democratic-republican government itself. In the post-Civil War Era, the newly triumphant values of "free labor" and universal manhood suffrage collided with the industrialization of work and the dramatic acceleration of both European and Asian migration. In this pivotal moment in American history, would the right to shape the nation's political destiny depend on manhood alone, or would Congress continue to insist on additional conditions, racial or otherwise? As Congress considered the naturalization of Chinese (and other nonwhite) immigrants, the nation's newly transformed political and ideological landscape came into increasingly sharp focus.[150]

Sumner's nearly successful campaign bears close attention for its remarkable contrast to Congress's overwhelming vote merely a decade later to outright exclude Chinese laborers from U.S. territory. For these leading congressional architects of the nation's Second Founding, nothing less than a thoroughgoing reconstruction of

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[147] *See id.* at 193–98 (discussing the political and ideological divisions within the Republican Party).

[148] CONG. GLOBE, 41st Cong., 2nd Sess., 5124 (1870) (statement of Sen. Stewart). *See generally Struggling for Work*, LIBR. OF CONGRESS, https://www.loc.gov/classroom-materials/immigration/chinese/struggling-for-work/ (last visited Apr. 20, 2023).

[149] CONG. GLOBE, 41st Cong., 2nd Sess. 4126 (1870).

[150] Although the 1870 debate was rooted firmly in the political and ideological terrain of the Reconstruction Era, its broad outlines nevertheless were anticipated by earlier contests in California. Throughout the 1850s and early 1860s, Democrats successfully deployed the charge of Chinese coolieism as a political wedge to divide Radical Republicans, who defended Chinese laborers as voluntary immigrants and free laborers, from their more moderate colleagues, many of whom followed the Democrats in scorning the Chinese as quasi-slaves. *See* SMITH, *supra* note 129, at 193–98. Writes Smith: "Imagined at once as slave and free, desirable immigrants and dangerous imports, 'coolies' exposed the tensions among different factions of Republicans and the contradictions between Republican antislavery ideology and dedication to equality before the law." *Id.* at 194.

American immigration policy—the recognition of a universal right to migrate, a guarantee to noncitizens of civil equality before the law, and the removal of the long-standing racial barrier to naturalized citizenship—would fulfill the American promise. Their campaign was rooted in a constitutional and political worldview in which federal sovereignty and citizenship were paramount, yet the border between citizen and alien was both porous and transitory. It was a worldview in which migrants were not barbarians at the gates but rather Americans in waiting.

When the Radical Republican lion Charles Sumner rose on July 4, 1870, to denounce the racial bar to naturalized citizenship, Frederick Douglass' "Composite Nation" must have felt tantalizingly within reach. In exhorting his colleagues to redeem the nation's long-deferred promise of liberty and equality for all, Sumner invoked the "great, self-evident" truths set forth in the Declaration of Independence—the "baptismal vow of this nation"—that "inalienable rights belong to 'all men'" regardless of "race or color."[151] Sumner made sure that the symbolism of the date was not lost on his audience. "[W]hat better thing can you do on this anniversary," he demanded, "than to expunge from the statute that unworthy limitation which dishonors and defiles the original Declaration?" Sumner answered preemptively the familiar objection that, were Congress to admit Chinese immigrants to U.S. citizenship, the nation's political system would be swarmed by pagan imperialists: "Let us surrender ourselves freely and fearlessly to the principles originally declared. . . . How grand, how beautiful, how sublime is that road to travel!"[152]

Even as Sumner drew from the time-tested rhetorical reservoir of self-evident truths and inalienable rights, he and his allies also anchored the cause of Chinese naturalization explicitly in the great project of Reconstruction then consuming the nation. Addressing Stewart and other Republican opponents of Sumner's motion, Illinois Republican Lyman Trumbull, a one-time Democrat and sometimes-Radical who had co-authored the Thirteenth Amendment, declared it

> extraordinary . . . that the Republican party, which has achieved all its triumphs in the name of freedom and equality, which has emblazoned upon its banners, "Equal rights to all men; no distinction on account of race or color," should be alarmed lest the Chinese take possession of the country, and that Senators should be . . . willing to forsake the foundation upon which they have stood for twenty years advocating human rights and equal privileges to all men alike.[153]

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[151] CONG. GLOBE, 41st Cong., 2nd Sess. 5155 (1870) (statement of Sen. Sumner).

[152] *Id.* "It is 'all men,'" Sumner declared, "and not a race or color that are placed under protection of the Declaration; and such was the voice of our fathers on the 4th day of July, 1776."

[153] *Id.* at 5165.

In keeping with the letter and spirit of the Republican Party, Trumbull could not "deny a man the rights of citizenship simply because of the color of his skin or the place of his birth."[154]

To underscore this point, several Republican Senators likened the position of Chinese immigrants to that of the formerly enslaved. Wisconsin's Matthew Hale Carpenter reminded lawmakers that Congress had only recently addressed "in a statesmanlike way" the question of whether four million freedmen, "ignorant and degraded by their long condition of servitude[,]" would be "admitted to [the] full rights of citizenship."[155] The answer flowed naturally from the irreducible republican principle that "all free men subject to the law ought to have a vote."[156] That the question of equal citizenship for the freedmen had been resolved according to sound principle did not mean that it was free from angst. "[E]very candid man admitted that it was subjecting our American theory to a severe trial when we admitted the freedmen to citizenship," he acknowledged.[157] Yet the alternative would have been "manifestly absurd," a betrayal of lawmakers' "faith in Americanism" worthy of the "monarchists of Europe." Carpenter found it remarkable that with the Fifteenth Amendment only just ratified, "a new question arises. Shall Chinamen be citizens; or . . . shall they constitute a class inferior to citizens?" It was "strange to say," he continued, that "the very men who settled the former question upon principle now hesitate to apply the principle . . . and now interpose the very objections to the enfranchisement of Chinamen that Democrats urged against the enfranchisement of the freedmen."[158] For these Republicans, at stake in Sumner's proposal was not just the right of Chinese immigrants to naturalize, but "this American maxim," without which "we are at sea . . . that all freemen, bound by the law, ought to have a voice in making the law . . . ."[159] To oppose Sumner's amendment was thus to "repudiate the principle upon which we have stood as a party; the principle upon which we have builded [sic] as a nation."[160]

Yet the argument for an American naturalization law purged of distinctions of race, color, or country of birth did not rest on political principle alone. Like Frederick Douglass and generations of statesmen, essayists, and orators before him, the Radicals invoked the confident humanism traditionally applied to immigration from Europe—of the universality, and thus redeemability, of man's moral nature—and of the enduring capacity of American economic and political institutions to

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[154] CONG. GLOBE, 41st Cong., 2nd Sess. 5165 (1870).

[155] *Id.* at 5160.

[156] *Id.* at 5161.

[157] *Id.* at 5160–61.

[158] *Id.* at 5160.

[159] *Id.* at 5161.

[160] *Id.*

assimilate all comers. They sought to extend that faith in assimilation beyond Europe and to recast it in the modern idiom of racial egalitarianism. The very attributes that had long marked the borders of national political belonging—race, religion, or place of birth—were mere incidents of a more fundamental humanity, they declared. A man "may come here from the center of effete Asia, or from the arid plains of Africa," argued Kansas Republican Samuel Pomeroy, but it was "not his color, nor his condition, nor the country of his birth that identifies him with human nature and that makes him a man. He is a man because he is of the human family."[161] Talk about different "races of men" was "little better than infidelity itself," Pomeroy declared. "I cannot understand 'the races' of men, but only the human race . . . ."[162]

Once lawmakers accepted the fundamental premise of a universal human nature, Pomeroy explained, the arbitrariness of denying a man access to the American political community due to "[a] circumstance over which he had not the least control" became plain.[163] Addressing a fellow senator who had just spoken in opposition to Sumner's amendment, Pomeroy pictured the subject of China who, "looking over the Pacific, sees and reads of American institutions; . . . and he says, 'I want to identify myself with those men who are trying an experiment on the American continent for free government.' 'No,' says the Senator from Oregon, . . . 'you cannot identify yourself with the people of America who are demonstrating that man is susceptible of self-government, because you were not born in the right place.' If that is not protection run mad," Pomeroy concluded, "if that is not reduced to an absurdity, nothing can be reduced to an absurdity."[164] The Founding-era apostles of republican liberty had cast the impoverished subjects of Europe's monarchies as worthy protagonists in an unfolding world-historical drama of human liberation and enlightenment, shaking off the servitude and privations of the Old World and reinventing themselves as free, equal, independent republican citizens. In exercising their fundamental rights of emigration and expatriation, moreover, European migrants exalted the United States's position at the vanguard of progressive civilization and the unrivaled freedom and equality of its citizens. The Radical authors of America's Second Founding now recast that drama with the subjects of China.

But what of the presumably profound differences in culture and character between Chinese migrants and European? As one critic had charged, Sumner's unyielding insistence that the principle of racial equality be carried forward across an

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[161] *Id.*, at 5169 (statement of Sen. Pomeroy).

[162] *Id.* Earlier, Pomeroy responded to the charge that the "paganism" of the Chinese rendered them irredeemably unfit for naturalization: "If I have got to believe in a God that has not made of one blood all nations of men to dwell upon all the face of the earth, then commend me affectionately to paganism, for this gospel is burlesque upon human nature . . . ." *Id.*

[163] *Id.* at 5169.

[164] *Id.*

unbridgeable gulf of racial difference was "to sacrifice the pride and glory of American citizenship" on the altar of "theory."[165] Senator Carl Schurz of Missouri, a Republican leader and himself a naturalized citizen from Germany, provided the answer. Confidence in the mutability of both political allegiance and moral nature was key. "[T]he Chinaman, transplanting himself permanently from his own home to this country, will soon cease to be a Chinaman," declared Schurz. "[H]e will . . . identify himself with the interests of this country, to accommodate himself to the requirements of our civilization."[166] Schurz then addressed the essence of the Western argument against Sumner's proposal—that the "servile" quality of Chinese laborer suppressed American wages, dishonored labor, and degraded the quality of American citizenship.[167] While Schurz was "certainly opposed to the introduction of a new class of serfs," and, unlike Sumner himself, supported Stewart's bill to prohibit exploitative foreign labor contracts, he steadfastly rejected the notion that Chinese labor was inherently servile labor.[168] Consider the striking North Adams shoemakers who had been replaced with "imported" Chinese laborers, Schurz advised. "Instead of persecuting [and swearing at] the Chinese would it not be far better to make a hearty attempt to educate them right in their midst?" he queried. If the shoemakers were to "set themselves to work to inform them of the value of their work, the Chinese will not be so absolutely forlorn and obtuse as not gradually to understand that it is better form them to take what they can get."[169] Schurz's proposal was identical to Jefferson's and John Quincy Adams's solution to the "problem"[170] of non-English Europeans generations earlier: to integrate the Chinese into American economic life. If they could only be "interspered [sic] with our population . . . ," he explained, they would not "very long remain as cheap producers, as they now are; neither will they remain as bad consumers, as they now necessarily

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[165] *Id.* at 5157 (statement of Sen. Williams).

[166] *Id.* at 5159 (statement of Sen Schurz). Schurz continued:

> [A]s to . . . people who come here to settle among us, to identify themselves with our interests, to join their fortunes with ours, to live under our protection, and to raise children who will be native-born citizens of this Republic, there is no other solution possible but that they should be included in our system of naturalization.

*Id.*

[167] *Id.* at 5159 (1870) (statement of Sen. Schurz) ("[W]hile I am strongly opposed to the servile labor contract system . . . I do not see how in point of principle we can put any obstacle in the way of those Chinese who voluntarily come and reside among us and to abide by our fortunes.").

[168] *Id.*

[169] *Id.*

[170] Letter of Thomas Jefferson to George Flower (Sept. 12, 1817), *reprinted in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-12-02-0012 (last visited Apr. 23, 2023); *see* Letter of John Quincy Adams to Baron Morris von Furstenwaerther, *in* 13 NILE'S WEEKLY REGISTER, Apr. 29, 1820, at 158. CONG. GLOBE, 41st Cong., 2nd Sess. 5159 (1870).

must be." Rather, "having been for a certain season in this country," Chinese who remain in the United States will learn both to earn and to consume according to American standards, while "those who go home will do so with new wants; at home they will propagate those wants, and propagating them they will gradually create markets there for the products of our civilization . . . ."[171] On the strength of such arguments, the U.S. Senate adopted Sumner's amendment by a vote of 27 to 22 (with 23 not voting).[172]

That vote spurred the opposition into action, led by western Republicans. Some forthrightly insisted that Sumner's vaunted "principles" were never intended to apply to those outside the circle of white, Christian civilization. Oregon Republican and future U.S. Attorney General George Henry Williams decried the "absurd and foolish" belief that "the Declaration of Independence mean[s] that Chinese coolies, that the Bushmen of South Africa, that the Hottentots, the Digger Indians, heathen, pagan, and cannibal, shall have equal political rights under this Government with citizens of the United States[.]"[173] Unlike the panoply of European immigrants who had come before them, Williams explained, Chinese racial difference precluded assimilation:

> Elements that will not coalesce with the other elements of our population and form together a national entity are dangerous to the peace and integrity of this nation. Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people. They never will amalgamate with persons of European descent; and so, as their numbers multiply, as thousands are added to thousands, until they may be counted by millions, we shall have in the United States a separate and distinct people, an empire of China within the North American Republic.[174]

Williams thus foreshadowed a key rationale for Chinese exclusion. The question raised by Chinese immigration was not, as Sumner had supposed, one of political or constitutional principle. It was, instead, "the practical question [of how] . . . to deal with this mighty tide of ignorance and pollution that Asia is pouring with accumulating force and volume into the bosom of our country"—a "countless horde of aliens, whose besotted ignorance is only equaled by their moral debasement."[175] California Representative Aaron Sargent, an early critic of Chinese immigration who would go on to champion Chinese exclusion in the Senate, agreed that to adopt

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[171] CONG. GLOBE, 41st Cong., 2nd Sess. 5159 (1870) (statement of Sen. Schurz).

[172] *Id.* at 5123–24.

[173] *Id.* at 5155 (statement of Sen. Williams).

[174] *Id.* at 5156.

[175] *Id.* at 5157.

Sumner's proposal would be "to take these hordes with all their deformities of character, ingrafted upon them by ages of degradation and idolatry and by the want of proper humanizing influences, and lead them to the ballot-box."[176]

For the most part, however, Republicans who spoke against Sumner's amendment disavowed any intention to deny Chinese immigrants access to an American asylum. Instead, they cast their opposition as a defense of free labor against a form of peonage that was little better than slavery. Although "America must be the asylum of all who choose to come here,"[177] including the Chinese, argued Stewart of Nevada, the typical Chinese "coolie" was indentured to the Chinese ticket broker who had paid his passage and held as a security the freedom of his family members. Before throwing open naturalization to all comers, the great pillars of Reconstruction—free labor; republican government; and actual, rather than merely theoretical, equality of citizenship—should be reinforced by abolishing servile labor. With the slave system finally vanquished, Stewart warned, there was now a movement afoot in states as diverse as Massachusetts and South Carolina to install a pernicious new form of unfree labor.[178] The vast majority of Chinese laborers were "imported" into the United States under an oppressive "system of coolie contracts" that bound them "from four to six years; they stipulate[d] for very low wages; they pile[d] up commissions on the coolies" totaling five or six times the actual price of passage.[179] Although Stewart's depiction of Chinese coolieism—his categorical equation of Chinese labor with unfree labor—was more myth than reality,[180] it found a receptive

[176] *Id.* at 4276 (statement of Sen. Sargent).

[177] *Id.* at 5151 (statement of Sen. Stewart).

[178] *Id.* at 4126, 5385. On the use and etymology of the term "coolie," see *supra* note 129.

[179] CONG. GLOBE, 41st Cong., 2nd Sess. 5385 (1870) (statement of Sen. Stewart).

[180] In the earliest years of the California gold rush, mining entrepreneurs did undertake a short-lived experiment in semi-bound Chinese labor, funding the passage of Chinese laborers in exchange for their signing fixed, long-term labor contracts requiring them to serve the entire contract term before receiving any wages. When those laborers, "eager for mobility and better opportunities in the gold fields," nevertheless violated those contracts by running away, explains historian Stacey Smith, courts declined to enforce them. As a result, very few Chinese arrived in California under contract after 1851. SMITH, *supra* note 129, at 36–37. To the extent that "coolies"—understood as indentured or otherwise bound laborers—existed as actual people, as opposed to an ideological construct, they existed not in the American West but in British and European plantation colonies in the Caribbean and South America. "Nearly a quarter-million indentured Chinese workers were shipped to plantations in British Guyana, the British West Indies, Cuba, and Peru between the 1830s and the 1870s" to perform agricultural labor, explains historian Mai Ngai. NGAI, *supra* note 120, at 33. "Collectively they made up the so-called coolie trade, the notorious traffic of bound labor that snared the most destitute and dispossessed people of Asia for labor in New World colonies." *Id.* By contrast, Chinese who migrated to California in search of gold "were neither as poor nor as desperate as plantation indentures. They were farmers, rural workers, artisans, mechanics, and merchants who, in many respects, were just like other people from around the world who came seeking gold." *Id.* at 34. In fact, Chinese migrated to

audience among lawmakers for whom the late triumph of "free labor" marked the era's defining achievement.[181]

As a nation, Stewart explained, "[w]e have decreed against slavery; we have determined that there shall be no form of barter in slave labor[.]" Accordingly, "it should now be the principle of every American that there shall be no mode of servile labor allowed here to compete."[182] Yet there were now "discussions" throughout the South "with regard to supplying the place of the former slave labor . . . with this kind of coolie labor . . . ." "While we admit men of all nations that come here who are free, and who wish to labor in a free country," Stewart continued, "we are unalterably opposed to any form of slave labor, we are unalterably opposed to the importation of any people to be bound by contracts that render them less than free." Let the South and Massachusetts alike, "work out [their] problem[s] with [their] free labor."[183] Moreover, such economic unfreedom entailed a grave threat of political unfreedom, as well. Stewart doubted that "one in twenty of the Chinese in our country. . . would have control of his own vote today any more than the slave population of South Carolina would have had the control of their votes if the ballot had

California under a wide variety of legal and financial arrangements that, like those of their European counterparts, "involved elements of both coercion and volition." *Id.* at 48. Rather than submitting to long indentures as virtual "slaves," most Chinese funded their passage with family money, loans from clan associations, or credit supplied by shipping companies. *Id.* at 34–35.

[181] Ngai calls the myth of Chinese coolieism the "big lie" that nevertheless "persist[ed] throughout the rest of the nineteenth century and well into the twentieth." *Id.* at 137. Its origins lie in the earliest years of California politics. The state's first governor, John Bigler, successfully deployed the coolie trope as a reelection strategy to gain political support from economically precarious white miners. Bigler warned in 1852 of the "present wholesale importation" into California of a "class of Asiatics known as 'Coolies.'" LEG. JOURNAL, 1852 Assemb., 3rd Sess., at 371, 373 (Cal. 1852) (special message from Gov. Bigler), *quoted in* NGAI, *supra* note 120, at 85. The same year, the California Assembly's Committee on Mines and Mining noted the "alarming inroad of hired serfs" from China, who arrived "not as freemen" but were "brought as absolute slaves by their foreign masters and by foreign capitalists, and are held to labor under contracts." REPORT OF THE COMMITTEE ON MINES AND MINING INTERESTS, LEG. JOURNAL, 1852 Assemb., 3rd Sess., app. at 829, 831, 834–35 (Cal. 1852), *quoted in* SMITH, *supra* note 129, at 80. On the "invention" of coolieism by white California workers and politicians, see SMITH, *supra* note 129, at 95–108.

[182] CONG. GLOBE, 41st Cong., 2nd Sess. 5385 (1870) (statement of Sen. Stewart).

[183] *Id.*

been granted to them . . . ."[184] He proposed instead "to liberate these persons before they shall be naturalized by their masters for the purpose of carrying elections."[185]

In contrast to Sargent's claim that Chinese laborers bore inherent "deformities of character" that had been "ingrafted" on them by "ages of degradation[,]" Stewart's focus on the highly exploitative conditions under which many Chinese were believed to migrate to the United States illustrates that many congressional Republicans had not yet conflated the conduct ascribed to Chinese laborers—their willingness to work for a pittance and live in squalor, and their unwavering allegiance to China and lack of attachment to the United States or to republican principles—with ineradicable differences of race, as they would later in the decade. Apparently persuaded by the arguments of Stewart and his western allies, the Senate reconsidered Sumner's amendment just two days later, defeating it by a vote of 27 to 14, with 31 not voting.[186] Eight years later, Congress voted overwhelmingly to exclude Chinese laborers from the country—a restriction that remained in place until

[184] *Id.* at 5387. Given the political expediency of western Republicans' anti-coolie appeal, see *supra* note 145, it may be tempting to dismiss it as insincere—a veil of righteous principle covering over some noxious amalgam of racism and rank political opportunism through which Republicans reconciled their support for racially discriminatory legislation with the party's declared commitment to equal rights. For many Republicans, the embrace of the anti-coolie program was, undoubtedly, strategic. *See* SMITH, *supra* note 129, at 218. For others, however, including some Republican leaders with radical bona fides, concern over "servile" Chinese contract laborers appears to have been sincere. Recall Senator Carl Schurz's concurrent support for Stewart's Anti-Coolie bill and Sumner's naturalization amendment. *See supra* notes 166–67 and accompanying text. Senator Henry Wilson of Massachusetts, a close ally of Sumner who would soon be elected Vice President, likewise could simultaneously condemn "the importation of servile labor into the country under labor contracts . . ." as "more wicked than . . . the African slave system one hundred years ago," while also voting to abandon the racial bar to naturalization. CONG. GLOBE, 41st Cong., 2nd Sess. 5161 (1870) (statement of Sen. Wilson) ("Whether a man comes from Asia, Africa, Europe, or the isles of the seas, whatever be his language or his religion or his faith, if he comes to these United States, I would throw over him the shield and protection of equal law; I would meet him like a brother and treat him as a man that God made . . . .").

[185] *Id.* at 5124. "[T]o extend to these coolies naturalization . . ." would place "their votes in the market, as their labor is . . . [.]" *Id.* at 5151. On the "credit ticket" system through which many Chinese laborers funded their migration to the United States and the 1850s and 1860s, *see* SMITH, *supra* note 129, at 37–38. *See also* ZOLBERG, *supra* note 28, at 176–77.

[186] *Compare* CONG. GLOBE, 41st Cong., 2nd Sess. 4276 (1870) (statement of Sen. Sargent), *with id.* at 5173–77 (statements of Sen. Stewart). The Act did make one important inroad on the racial bar, however, providing "[t]hat the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." *Id.* at 5176.

1943.[187] It would take another 82 years, until 1952, to purge the racial restriction from the nation's naturalization law.[188]

In light of subsequent history, scholars understandably have focused on the arguments of Sumner's opponents, including both Williams and Sargent's strident anti-Chinese racism and Stewart's more nuanced critique of exploitative labor contracts.[189] After all, those arguments not only prevailed in 1870; they also anticipated the congressional rationale a decade later for Chinese Exclusion—an era-defining event in the history of American immigration policy. And indeed, by the mid-1880s, the essential themes of the Naturalization Act debate—of a foreign threat to independent citizenship; the troubled relationship between "free labor" and "foreign contract labor"; the fledgling concept of an "American standard of living"; and not least, racial fitness for democratic republicanism—would overflow the Chinese Question and consume the entire province of immigration lawmaking.[190] Chinese exclusion thus looms in our historical consciousness as a towering monument to a century-and-a-half of explicitly racist immigration and naturalization policy, casting a shadow over the surrounding historical landscape.

This Part has illuminated some of that dusky terrain by focusing not on the proto-exclusionists, but rather on the leading architects of Reconstruction who sought to affirm and extend the traditional ideal of an American asylum. To characterize the Naturalization Act debate, and the Reconstruction Era generally, as merely a prelude to the Exclusion Era is thus to neglect a broadly shared worldview in which the right to migrate was integral to the monumental post-Civil War project of renovating American citizenship and redeeming the nation's unfulfilled promise of equal liberty for all.

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[187] In December of 1878, Congress passed a bill limiting to fifteen the number of Chinese passengers that could be transported to a U.S. port on any "one voyage." President Hayes vetoed the bill on the ground that it violated the Burlingame Treaty. Following his veto, Hays renegotiated the Treaty to permit the United States to limit or suspend immigration from China, clearing the way for the Chinese Exclusion Act of 1882. Although Congress formally repealed the Chinese Exclusion Act in 1943, immigration from China remained extremely limited for another two decades due to the miniscule immigration quotas allocated to nations in the "Asia-Pacific triangle." *See generally,* An Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes, ch. 344, 57 Stat. 600 (1943); *see* GYORY, *supra* note 46, at 157–67, 212-16.

[188] An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790); Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952).

[189] *See, e.g.*, Maltz, *supra* note 123, at 237–41; VanderVelde & Chin, *supra* note 74, at 47–77; GYORY, *supra* note 57, at 50–56. Undoubtedly, many of Sumner's opponents in the Senate were indeed sowing the seeds of Chinese exclusion, even if they had not yet arrived at that position.

[190] *See* Lindsay, *supra* note 1, at 793–805.

## CONCLUSION

Long after Congress abandoned race- and nationality-based restrictions on immigration and naturalization in the mid-20th century, the Supreme Court continues to affirm that when the political branches make and enforce rules governing noncitizens, they are acting mostly beyond the reach of judicially enforceable constitutional norms. In this key respect, the immigration power of the 21st century is a direct legacy of an idea first set in judicial motion at the end of the 19th—that of foreigners as agents of incursion. The Court's predictably rote pleas of national sovereignty and security suggest a body borne along by the river of history and precedent—a river gushing from its headwaters in Chinese Exclusion down across the historical landscape; over the National Origins Quota System of the 1920s[191] and the summary mass deportations of Operation Wetback in the 1950s;[192] surging undeterred through the liberalizing counter-current of the Civil Rights Era; and cascading all the way down to our own era of indefinite detention, family separation, stymied asylum claims, and President Trump's Muslim ban.

To extricate itself from that river, the Court must reimagine the immigration federal immigration power's governing premise. It must reject the narrative of immigration as an incursion on American sovereignty and replace it with an alternative that is consonant with both national ideals and constitutional principle. This Article offers such an alternative, and one with a venerable historical pedigree. When the founding generation celebrated an idealized image of an American asylum, where Old World victims of religious, economic, or political oppression could begin their civic lives anew as republican citizens, they were seeding a field of American national identity that would, following the Civil War, yield a genuinely universal right to migrate to and be incorporated within the American political community. For a remarkable number of Reconstruction-Era lawmakers, diplomats, and scholars, migration was a natural human right that should be governed according to the same liberal, egalitarian values animating America's political and constitutional revolution. Theirs was a worldview in which federal sovereignty and citizenship were paramount, yet the border between citizen and alien was both porous and transitory, and in which immigrants, though noncitizens, were nevertheless regarded as "Americans in waiting."

Any reorientation of American immigration law, whether legislative or judicial, will necessarily be informed by some thesis, or set of premises, about what immigration *means* for American nationhood and national identity. Will that thesis be jaundiced by the blood and soil nationalism of modern-day demagogues, with their talk of foreign "invasions," of conspiracies to "replace" native-born voters with those

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[191] SCHRAG, *supra* note 23, at 116–18; PARKER *supra* note 23, at 156.

[192] PARKER *supra* note 23, at 204.

from the "Third World," of border walls and travel bans?[193] Or will it regard mass immigration, for all the very real policy challenges that it presents, as not only an inescapable corollary of modern nationhood but also an affirmation of American national identity? U.S. history offers abundant precedent for both visions. In the historical narrative presented here, immigration was encompassed within what the economist Gunnar Myrdal—like Frederick Douglass, Charles Sumner, and even Thomas Jefferson before him—famously characterized as the "American Creed" of human dignity, equality of opportunity, and inalienable rights.[194] If the Court is to traverse the constitutional chasm between immigration law and ordinary law, the quintessentially American right to migrate must serve as an essential analytical foothold.

[193] *See, e.g.*, Joel Rose, *A Majority of Americans See an 'Invasion' at the Southern Border, NPR Poll Finds*, NPR (Aug. 18, 2022, 5:00 AM), https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds; Philip Bump, *Nearly Half of Republicans Agree with the 'Great Replacement Theory,'* WASH. POST (May 9, 2022, 4:28 PM), https://www.washingtonpost.com/politics/2022/05/09/nearly-half-republicans-agree-with-great-replacement-theory/. Although former President Trump did not invent this brand of nationalism, in recent years he has surely been its most successful purveyor. *See, e.g.*, *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST. (June 16, 2015, 1:03 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/ ("When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists."); Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States*,' WASH. POST (Dec. 7, 2015, 8:12 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

[194] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 3–17 (1944). This is not to suggest, of course, that the "American Creed" has ever been an accurate description of reality. Indeed, the ideal documented by Myrdal and advocated by Douglass and Sumner has been observed, at best, only highly selectively. But that makes it no less powerful *as an ideal*—in Myrdal's words, the standard against which various "wrongs" are judged, and as such, a "means of pleading unfulfilled rights." *Id.* at 4.