Gowder, Paul. "The Gavel and the Fist: The Problem of Sovereignty and Borders." *The Rule of Law in the United States: An Unfinished Project of Black Liberation*. Oxford: Hart Publishing, 2021. 134–169. The Rule of Law In Context. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509940028.ch-006>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 06:07 UTC.

Copyright © Paul Gowder 2021. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

The Gavel and the Fist: The Problem of Sovereignty and Borders

IN 1943, A United States Department of State official named Josiah DuBois wrote an explosive report accusing the Department of culpability in the Holocaust. A key claim in this report is that the United States had imposed impossible red tape on Jewish refugees from Germany, requiring them to turn up ‘among other things two affidavits of support and sponsorship to be furnished with each application for a visa. To each application for support and sponsorship there must be attached two letters of reference from two reputable American citizens’.¹ These requirements were imposed allegedly for ‘security reasons’, but DuBois observed that they operated as if they were ‘specifically designed to prevent Jewish refugees from entering this country’. Herd and Moynihan detail still more requirements and explain why this looks like a deliberate imposition: the requirements were almost totally impossible for a refugee to satisfy.² For example, immigrants were obliged to collect all kinds of government documents from their home country, and the State Department enforced those requirements against Jews fleeing Germany – even though they obviously couldn’t be expected to show up at their local Gestapo office to ask for a copy of their police record to take to the Americans.

Today, the use of bureaucracy as a weapon against refugees and other immigrants continues. Under the Trump administration, the United States Citizenship and Immigration Services quietly implemented a policy requiring immigrants to fill out every single field in their immigration paperwork, even if a field didn’t apply, and rejecting applications if there are any black spaces at all. For example, a refugee who did not have a middle name would have their application rejected for leaving a blank middle name field rather than writing ‘none’ in it.³ Journalists reported on one example of a rejection under this policy: an 8-year-old child

¹ R. Medoff, *Blowing the Whistle on Genocide: Josiah E. Dubois, Jr., And the Struggle for a U.S. Response to the Holocaust* (Purdue University, 2009).

² P. Herd and D. P. Moynihan, *Administrative Burden: Policymaking by Other Means* (Russell Sage Foundation, 2018) 5–9.

³ C. Rampell, ‘This Latest Trick From the Trump Administration Is One of the Most Despicable Yet’ (*Washington Post*, 13 February 2020) www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html.

who listed 'none' for employment history but left the dates of employment field blank.⁴

Not seriously publicising this new policy, of course, the Trump regime clearly adopted it not for the purposes of getting more complete or accurate information – the failure to write 'n/a' in the field for 'spouse' when one has already checked the box saying one is single deprives the government of no information whatsoever – but for the purposes of tricking people into filing applications that would be deemed invalid, and hence having an excuse to deny people immigration benefits to which the law entitled them. As of this writing, the Biden administration appears to have undone the rule, but its creation during the Trump years illustrates the persistence of the capacity to use bureaucratic power to deny basic human rights to immigrants from 1943 to the present.

This sort of blatant procedural malice also bears a troubling relationship to prominent elements of Jim Crow, such as the disenfranchisement techniques in which Black Americans were forced to answer byzantine trick quizzes in order to be allowed to vote.⁵ But I submit that this resemblance is not coincidental: in immigration law, we can simultaneously see the heritage of slavery and Jim Crow, as well as of Indian Removal, filtered through utterly unconstrained executive power in its Kafkaesque bureaucratic face. This chapter aims to bring to light our most lawless area of contemporary American law in our immigration system.

The origins of our immigration law lie in the Chinese Exclusion Act era, which wrote open racism into federal law; its plenary power doctrine is shared with the covertly colonial relationship between the federal government and Native American Nations, and the openly colonial Insular Cases – both covering groups who have been represented as quasi-foreigners with subordinate legal rights. In many respects its formal characteristics are a reprise (albeit at a lower key) of many of the ways in which slavery and Jim Crow warped the American legal system. Immigration, like slavery, has been characterised by the rhetorical and legal creation of categories of legal non-subjects or outlaws who are excluded from the ordinary protections of due process and subject to the whims of both specially empowered public officials as well as private persons. And much as in the time of slavery, immigration law today creates perennial conflicts over federalism, as states struggle to be more or less protective of migrants than the federal government would permit. Slavery even raised the legal issue most characteristic of immigration law, deportation itself, as some contended that free Black Americans were noncitizens who could be forcibly removed from US territory or from specific states, or at least encouraged to leave.⁶ In recent years

⁴ *ibid.*

⁵ eg, R Onion, 'Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s' (*Slate Magazine*, 28 June 2013) slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html.

⁶ MS Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge University Press, 2018) ch 2.

the notion of 'self-deportation' has been popular on the political right in the form of the open desire to make conditions so unpleasant for immigrants that they leave of their own 'free will'. But this is a longstanding US policy that was also applied to Black Americans and to Native Americans.⁷

Much like the Fugitive Slave Act, in immigration too the existence of legal caste has compromised the procedural protections available to those whom the law targets as well as those adjacent; the immigration enforcement regime thereby poses a threat to the protections of law for citizens and others outside the immediate immigration context. The organisations tasked with immigration enforcement, like all bureaucracies, have a tendency to grow and to propagate the distinctive logic of their operation – in the case of the immigration agencies, a lack of internal legal culture and habit of ignoring individual rights. The willingness of political leaders, courts, and ordinary citizens to ignore the lawless behaviour of the immigration enforcement agencies has a corrupting effect on their collective capacity to check the lawless behaviour of other public officials. And the boundary between the categories of 'citizen' and 'non-citizen' is sufficiently porous, both conceptually and in practice, that citizens cannot safely assume that the misconduct of these officials will not be directed against them. Such is the argument of this chapter.

THE PLENARY POWER

Even the legal rules that supposedly regulate immigration themselves defy the ambition to legal order in American governance, although the defenders of its most harsh features claim that they are necessary to uphold the rule of law, represented as the effectiveness of the prohibition on unauthorised migration. Certain doctrines in US immigration law effectively represent the proposition that some migrants are outside the legal community entirely.

In particular, the plenary power doctrine, according to which Congressional legislation relating to immigration is largely immune from judicial review, seems to represent the view that migrants entirely lack legal rights.⁸ The plenary power doctrine in immigration was born at the end of the nineteenth century in the famous *Chinese Exclusion Case*, in which the Court stepped aside to permit the political branches to implement the policy of excluding almost all immigrants from China, notwithstanding a case only three years before which held that race discrimination against Chinese people already in the country

⁷ K-S Park, 'Self-Deportation Nation' (2019) 132 *Harvard Law Review* 1878; cf Jones (n 6) 44 for an 1831 example of Black Americans accusing the government of just that.

⁸ The plenary power doctrine at its fullest expression only applies to would-be migrants seeking admission to the United States. Once an immigrant is in the United States, it is well established that they have some constitutional rights enforceable by a court. *Wong Yang Sung v McGrath* 339 US 33 (1950). However, those rights still seem to turn out to be substantially lower than those of citizens.

could be struck down under the Equal Protection Clause (a case and argument which the Court did not discuss, instead focusing on the Act's consistency with prior treaties).⁹ Formally speaking, those cases were not inconsistent, for the Fourteenth Amendment's Equal Protection Clause only applies to the states, while Chinese exclusion was accomplished through federal legislation; it was not for many years until it became clear that Equal Protection doctrine would largely be applied against the federal government through 'reverse incorporation' under the Fifth Amendment's Due Process Clause.¹⁰ Nonetheless, the moral, political, and policy inconsistency, if not the legal inconsistency, of the two cases is palpable, and plenary power is the justification that the Court adopted in order to rationalise that inconsistency by declaring migration largely outside the laws.

The Chinese Exclusion era was also a period of innovation in administrative law, particularly the development of the strategy of taking adjudications away from Article III courts and allocating them to administrative agencies to procure decisions which were both more informal (ie, absent procedural protections) and more biased in favour of the government.¹¹

A key example of that strategy (which also further illustrates that Chinese exclusion was about race rather than allegiance) is the infamous 1905 case of *United States v Ju Toy*.¹² In that case, the executive branch was permitted to deport a 'person of Chinese descent' notwithstanding a District Court's ruling that he was a native-born US citizen. The Supreme Court sent *Ju Toy* into exile because Congress had stripped the federal courts of jurisdiction to review the determinations of executive branch immigration agents as to any deportations. The Court upheld that privative clause and undid the District Court's habeas corpus ruling on his citizenship, notwithstanding the almost entirely process-free character of the administrative determination, declaring that 'the almost necessary result of the power of Congress to pass exclusion laws' is that 'the decision may be entrusted to an executive officer and that his decision is due process of law'.

The dissent, by contrast, emphasised the character of the law as applying only to 'Chinese persons' (a characterisation which must, in view of the citizenship

⁹The *Chinese Exclusion Case* is more formally styled *Chae Chan Ping v United States* 130 US 581 (1889); the earlier case is *Yick Wo v Hopkins* 118 US 356 (1886). While the Court does not formally consider the race discrimination in play against an explicit constitutional challenge, it does endorse the racial motivations for the Act in dicta, noting that 'differences of race' exacerbated the conflict between native-born Americans and Chinese immigrants in the west, in part because of an alleged failure of the immigrants to assimilate. Congress's motivations for the Act are alleged to involve the fear 'that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization'. In short, federal plenary power was manifestly invoked to permit this open racism.

¹⁰*Bolling v Sharpe* 347 US 497 (1954).

¹¹LE Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (University of North Carolina Press, 1995).

¹²*United States v Ju Toy* 198 US 253 (1905).

of the petitioner, refer to race rather than to nationality) and explained the lawless character of the rules the executive was supposed to apply as follows:

It will be seen that under these rules it is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if under the circumstances the Chinaman has been able to procure one, is permitted to look at the testimony but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three days thereafter the record is to be sent to the Secretary at Washington; and every doubtful question is to be settled in favor of the Government. No provision is made for summoning witnesses from a distance or for taking depositions, and if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. If he does not happen to have money he must go without the testimony, and when the papers are sent to Washington (three thousand miles away from the port, which in this case was the place of landing) he may not have the means of employing counsel to present his case to the Secretary. If this be not a star chamber proceeding of the most stringent sort, what more is necessary to make it one?

Ju Toy, thankfully, no longer reflects the present state of the law. Although it has not, as far as I can determine, been formally overruled, the Supreme Court made essentially the opposite holding as to the due process rights of American citizens stopped at the border 15 years later – continuing to permit the determination to be made by the executive, but at least requiring some rudiments of procedural justice to be observed in the process.¹³ But the essential permission that the Court gave for even citizenship itself to be adjudicated within the executive branch remained, and, as Chin has shown, became a foundational holding for the doctrine of ‘administrative finality’ which permitted executive branch agencies to render final judgments without the involvement of any court.¹⁴

In post-Chinese-Exclusion cases, the plenary power doctrine and the closely related doctrine of ‘consular nonreviewability’ (providing that visa decisions by consular officers are immune from judicial review) have been used to justify a wide variety of egregious shortfalls from procedural justice that have frequently sank to the level of freeing the political branches from any real obligation to make immigration determinations according to the law. A particularly notable example is *Knauff v Shaughnessy*, which held that ‘the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II’ could be refused admission on the basis of secret evidence, with no hearing, and ‘solely upon a finding by the Attorney General that her admission would be prejudicial to the interests of the United States’.¹⁵ In that case, the

¹³ *Kwock Jan Fat v White* 253 US 454 (1920).

¹⁴ GJ Chin, ‘Regulating Race: Asian Exclusion and the Administrative State’ (2002) 37 *Harvard Civil Rights-Civil Liberties Law Review* 1.

¹⁵ *Knauff v Shaughnessy* 338 US 537 (1950).

Court declared that ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’

Commentators often talk as if the plenary power and consular nonreviewability doctrines are dead or dying, or securely locked up behind a wall of statutory interpretation.¹⁶ Alas, the Supreme Court seems to think the opposite – it permitted consular officers to exclude the spouse of a US citizen on the bare allegation that he was involved in ‘terrorism’, not only without a hearing but without even an explanation of the basis for this allegation as recently as 2015.¹⁷ And it upheld Donald Trump’s infamous Muslim ban in 2018.

Shortly after his inauguration, Donald Trump fulfilled a campaign pledge to put a stop to Muslim immigration by issuing an executive order suspending entry from seven predominantly Muslim countries. Under pressure from lower-court injunctions, he issued two revised orders which created a Homeland Security review process and several iterations of the travel ban, ultimately including two countries without significant Muslim populations among a list of predominantly or largely Muslim countries. Under conventional constitutional religious discrimination doctrine under both the Establishment Clause and the Free Exercise Clause, such a course of events would have been quite likely to have been struck down. In both areas of doctrine, an extended course of behaviour indicating that some public act was motivated by religious goals or sectarian animus would be sufficient to render it unconstitutional.¹⁸

However, rather than rely on First Amendment doctrine, the Supreme Court first turned to *Kleindienst v Mandel*, an immigration case which had permitted the viewpoint-based exclusion of a Marxist professor who wanted to give a talk at Stanford on the basis of the ‘facially legitimate and bona fide’ alternative reason that the executive branch articulated, namely his violation of the conditions attached to a previous visa.¹⁹ In a pregnant passage, the Court suggested that applying this review would be even *weaker* than the ‘rational basis’ standard that it applies to ordinary economic regulation legislation by Congress (under which it is generally supposed that the government almost always wins):

The upshot of our cases in this context is clear: ‘Any rule of constitutional law that would inhibit the flexibility’ of the President ‘to respond to changing world conditions should be adopted only with the greatest caution,’ and our inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end

¹⁶ M Kagan, ‘Plenary Power is Dead! Long Live Plenary Power’ (2015) 114 *Michigan Law Review First Impressions* 21; H Motomura, ‘Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation’ (1990) 100 *Yale Law Journal* 545.

¹⁷ *Kerry v Din* 576 US 86 (2015).

¹⁸ *McCreary County v ACLU* 545 US 844 (2005); *Lukumi Babalu Aye v Hialeah* 508 US 520 (1993).

¹⁹ *Kleindienst v Mandel* 408 US 753 (1972).

to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes.²⁰

Unsurprisingly, given that standard, the Supreme Court permitted the Muslim ban to stand, ruling that the Homeland Security review process on which it was nominally based was sufficient to show a plausible relationship to national security. In short, the plenary power and consular nonreviewability doctrines still exist – and even if the political branches must now utter some plausible reason other than sheer racial or religious animus, the power to exclude migrants may be exercised without the constitutional constraints that apply in every other domain of government action.

The conventional rationale for the plenary power and consular nonreviewability doctrines is articulated in the *Chinese Exclusion Case*; in essence, it is about sovereignty – that immigration is a foreign affairs power – that the political branches have the power to determine the United States's relations with foreign countries, relations which include decisions about whose nationals are to be admitted where, and also to make related decisions about the military security risks posed by decisions about who may cross the border.

The Courts of the Conqueror

The other main site of the contemporary plenary power doctrine is in Federal Indian Law, and the foreign affairs origin of the doctrine is visible there as well.²¹ The plenary power in that domain fundamentally originates

²⁰ *Trump v Hawaii* 138 S Ct 2392, 2419–20 (2018) (internal citations omitted).

²¹ See generally SH Cleveland, 'Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs' (2002) 81 *Texas Law Review* 1. A third context, which I briefly discuss at the end of this section, is over unincorporated territories. That context is less relevant to contemporary law, as the US no longer holds vast colonial possessions like the Philippines, but is still analytically important (and is still available to be used against territories such as Puerto Rico). Other important works on the conjunction of plenary power concepts include SB Coutin, J Richland and V Fortin, 'Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous under U.S. Law' (2014) 4 *UC Irvine Law Review* 97; N Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (University Press of Colorado, 2007); PP Frickey, 'Domesticating Federal Indian Law' (1996) 81 *Minnesota Law Review* 31. I use the term 'Indian Law' with some discomfort, as 'Indian' seems racist to me – a way of referring to the people who were in the US at the time of settlement by Europeans not by the names of their own nations but by an externally imposed colonial term, which, moreover, was just transposed from an entirely different country. However, legal scholars who are also members of Native American nations also use the term 'Federal Indian Law' referring to the body of federal law that came out of that colonial tradition, so I will defer to that usage. Outside of the legal context, where possible, we ought to refer to individuals by the name of the indigenous nation with which

from the 1823 case of *Johnson v M'Intosh*, in which the Supreme Court invalidated the sale of Native American land to a private party on the basis of a doctrine of 'discovery' according to which the United States, as successor in interest to the European nations who allegedly 'discovered' the continent, was the only party who could acquire land from Native Americans.²² The court asserted that title in land could only originate from the United States, via the colonial charters that it absorbed in the revolution, and 'the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others'. In other words, Native Americans, viewed as often-hostile nonmembers occupying the same space as citizens, would not be seen as capable of exercising property rights which American citizens need respect.²³

Particularly striking in Chief Justice Marshall's opinion for the Court is the flat denial of law's universality in dealing with conquered lands: 'Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.'²⁴ The construction 'the courts of the conqueror' lets the mask of the rule of law slip all the way off in a kind of foundational rejection of the idea of judicial impartiality familiar from domains like criminal law: because the sovereignty of the state is at stake, the courts cease to be neutral between the government and the person seeking a remedy and merely become agents of the conqueror. The sovereign conqueror, in other words, is very much judge in its own case, and, for Marshall, this is acceptable (or at least the way things are) because the sovereign does not stand in a *legal* relationship to conquered peoples, but only in a relationship of power. This construction sits in parallel to Madison's unification of 'the impartiality of judges' and 'the affection of friends' in Federalist 43's discussion of the federal government's power to put down slave revolts and serve as 'umpires' in civil conflict in which the enslaved have chosen a side: impartiality and friendship can only go together if we imagine that impartiality is a duty only owed to members, that is, that the United States speaks to the enslaved as a conqueror's court.

I contend that 'the courts of the conqueror' is the real theoretical root of the idea of plenary power. When the United States stands as a sovereign to an outsider, its courts and its legal system cease to offer the rule of law and become

they are affiliated. In general, I will use 'Native Americans' or 'members' to refer to individuals whose legally meaningful status is just that – their membership in some Native American nation. For similar reasons, I will refer to Native American 'nations' rather than 'tribes'.

²² *Johnson v M'Intosh* 21 US 543 (1823).

²³ Ten years later, the Court moderated this view. Cleveland (n 21) 39–40, but the essential idea of the incapability of Native Americans to hold title to their lands, except at the sufferance of the federal government, remained, and reappeared as late as 1977. *ibid* 53.

²⁴ *Johnson v M'Intosh* 21 US 543, 588 (1823).

bureaucratic instrumentalities of raw force. Its ancient precedent is Thucydides's Melian dialogue: 'the strong do what they can, and the weak suffer what they must'. Its twenty-first century heir is Carl Schmitt's Political Theology – and immigration law.²⁵

Expropriation in the Schmittian Judiciary

Unsurprisingly, given the centrality of property rights to the American rule of law, when the courts (and Congress) set aside their legal role and adopt their sovereign function of conquest, the protection of property has often been the first thing to go.

The instability of property rights on both a collective (ie, property of a given Native American nation) and an individual basis is a persistent theme of the use of plenary power in American Indian law – of which the whole course of Indian Removal stands as the most obvious example. Even after the removal period, and fluctuating depending on Congressional policy in any given decade, sometimes members might be obliged to hold individual land; sometimes they might be obliged to maintain land in the authority of their nation, but subject (of course) to the federal government. Harris and Carrillo each sketch versions of this instability focused on the colonial notion that only the sorts of property associated with white Europeans could be protected by law – and that having individual property was itself associated with whiteness as membership.²⁶

The Dawes Act of 1887 is a clear illustration both of the tie between property and legal status and of Congress's self-asserted power to dispose of Native American property however it pleased. In that legislation, Congress directly tied landholding to citizenship: Native Americans would be given 'allotments' of reservation land, which the US government would hold in trust for 25 years; after that period was over, those who had received allotments would acquire title to the land and citizenship.²⁷ Compounding the problem with arbitrary

²⁵ There are several existing Schmittian accounts of immigration law, including R Koulisch, *Immigration and American Democracy: Subverting the Rule of Law* (Routledge, 2010) ch 2; M Coleman, 'Immigration Geopolitics Beyond the Mexico-US Border' (2007) 39 *Antipode* 54; and PJ Pope and TM Garrett, 'America's Homo Sacer: Examining U.S. Deportation Hearings and the Criminalization of Illegal Immigration' (2013) 45 *Administration & Society* 167.

²⁶ CI Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707, 1921–24; J Carrillo, 'Identity as Idiom: Mashpee Reconsidered' (1995) 28 *Indiana Law Review* 511, 536–45.

²⁷ An Act To provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes, 24 Stat 388 (1887). See also An Act To amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes ('Burke Act'), 34 Stat 182 (1906), which provided that citizenship would not pass at the issuing of the patent (as seems to be suggested by the quoted text), but be extended only after the expiration of the trust period, while also conferring on the Secretary of the Interior the fully discretionary power to drop the trust period and convey full title to anyone 'competent and capable of managing his or her affairs'.

executive power, the President would have untrammelled discretion not only to decide which nations would be subject to the effective dissolution entailed by such allotment, but also to extend the 25-year 'trust' period and hence deprive any individual person of full land title for as long as he saw fit.

Taking up the 'allotment' would entitle a member to legal protection to go with their citizenship. This was written right into the text of the Dawes Act:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens[.]

That passage could be the subject of a book all on its own. Note the clear linguistic references to the Fourteenth Amendment – effectively, the Act purported to extend the protections of that Amendment to members of Native American nations on the condition that they accept individualised rather than collective national property and abandon their culture. From the standpoint of the United States it seems to be extending property, and with it citizenship and legal standing, but only as an exercise of foreign affairs discretion to get rid of the pesky nations by chopping up their land and encouraging their people to abandon them. It's exactly the way a conqueror deals with property and persons of the conquered: absorb ('assimilate') those who are willing to join the conquering people and exclude the rest. (Recall the complaints of the court in the Chinese Exclusion Case that people from China wouldn't assimilate.) This sort of history explains why it can be confusing to try to figure out whether promoting the alienability of Native American land is good or terrible for their members (and as a non-Native-American I am not remotely competent to judge).²⁸ The Indian Reorganization Act of 1934 put a stop to allotments and tried to encourage constitution-making among the Native American nations – another shift in policy toward the notion of more independent sovereignty but also less emphasis on the individual members' rights

²⁸ Some of the debate about the extent to which restrictions on alienability were offensively paternalistic or necessary to protect individuals from exploitation and nations from dissolution – as well as the patently racist administration of the Secretary of the Interior's exercise of the discretion to confer fee title before the expiration of the statutory trust period, which was based on the belief that those with more 'white blood' were more intelligent – can be gleaned from JA McDonnell, *The Dispossession of the American Indian, 1887–1934* (Indiana University Press, 1991).

vis a vis the United States.²⁹ That Act explicitly restricted the alienability of land in Indian Country.³⁰

The merger of immigration plenary power and Indian plenary power was achieved in *Lone Wolf v Hitchcock*.³¹ In that case, the Kiowa sued seeking to strike down legislation providing for the allotment of their reservation as well as its sale to nonmembers, arguing that it was in violation of their treaty rights as well as their vested property interests as a nation under the Medicine Lodge Treaty of 1867. Citing the *Chinese Exclusion Case* as well as the nineteenth century caselaw about the mere occupancy rights of the Indians, the Court concluded that ‘as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts’.³²

That statement bears a strong resemblance to similar statements in immigration law cases like the *Chinese Exclusion Case* and *Knauff v Shaughnessy*. Reading them together, we must see the instability of Native American property rights – and hence their marginal status as subjects of the law – to be a consequence of their semi-foreign status. As chapter 1 discussed, property rights in the United States were initially reserved to citizens. The notion that secure rights to landownership are inextricable from full-fledged republican citizenship, and hence unavailable to Native Americans, could be deployed to permit the legislative instability of land rights under Federal Indian law.

Immigration too is associated with a history of unstable property rights in addition to the alienage restrictions on land ownership at the time of the founding. As an outgrowth of Chinese exclusion, ‘aliens ineligible to [naturalized] citizenship’ – which meant nonwhite persons, and in practice was applied against Asians, particularly Japanese immigrants – were prohibited from owning land in many western states in the early twentieth century.³³ If a non-white immigrant acquired land, the state could bring an escheat action to seize it; moreover, under California’s law, the state divested land by operation of law even after the ‘alien

²⁹ An Act To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes, 48 Stat 984 (1934).

³⁰ ‘Indian Country’ is another term that I use only because it seems to be the preferred term when many Native American scholars and activists themselves refer to ancestral and/or reservation land. See eg National Congress of American Indians, ‘NCAI Response to Usage of the Term ‘Indian Country’ (27 December 2019) www.ncai.org/news/articles/2019/12/27/ncai-response-to-usage-of-the-term-indian-country (‘The term is used with positive sentiment within Native communities, by Native-focused organizations such as NCAI, and news organizations such as Indian Country Today.’).

³¹ *Lone Wolf v Hitchcock* 187 US 553 (1903).

³² Fortunately, once again, this harsh ruling has been moderated somewhat. See Cleveland’s (n 21) 78–81 discussion.

³³ K Aoki, ‘No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment’ (1998) 37 *Boston College Law Review* 37.

ineligible to citizenship' sold it, even to a citizen.³⁴ Such enactments would be unconstitutional under contemporary doctrine, in view of the fact that state law distinctions on the basis of alienage are generally subject to strict scrutiny (as, obviously, are the race based motivations) but there are still alien landownership restrictions on the books in most states.³⁵ Moreover, many of those in Mexican ethno-national groups now stereotyped as 'immigrants' lost their land at the hands of the courts of the conqueror after the Mexican-American war.³⁶

Even today the de facto consequences of immigration enforcement can pose a serious threat to property ownership not only of migrants but also of their families: there is empirical evidence suggesting that immigration enforcement initiatives are an important factor leading to foreclosures in mixed-status households by depriving those households of income-earners,³⁷ and deported immigrants also regularly find that their personal property has disappeared in Immigration and Customs Enforcement (ICE) or Customs and Border Patrol (CBP) custody.³⁸

Yet, paradoxically – and representing the grip of the property-focused conception of the rule of law even as the Court carries out lawlessness – the Supreme Court denied, in the *Chinese Exclusion Case*, that plenary power could undermine property rights. The Court had no compunctions about holding that the political branches had complete authority to abrogate a treaty and declare that a Chinese citizen who had left the country could be barred from returning at the naked will of the political branches and with no judicial scrutiny. But the Court balked at imagining that such a person could be deprived of property. In distinguishing the right to retain property from the right to return to the United States, the Court drew on a distinction later to be deployed by later rule of law critics of administrative law such as Gary Lawson who are interested in sorting out which sorts of economic monopolies (like patents) can count as property rights entitled to full procedural protections in adjudication, to wit, between a vested right and an expectancy:

[In a prior case] the learned justice observes that, 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects

³⁴ *ibid* 55, 59, 63.

³⁵ A Brownell Tirres, 'Property Outliers: Non-Citizens, Property Rights and State Power' (2012) 27 *Georgetown Immigration Law Journal* 77, 97–101. In 1948, the Supreme Court struck down some of the burdens those laws imposed on citizen children of immigrants in *Oyama v California* 332 US 633 (1948). This case was a landmark in establishing the legal right of even subordinated minorities (at least if they were citizens) to land ownership, and was cited as authority shortly thereafter in *Shelley v Kraemer*. R Cuisson Villazor, 'Rediscovering *Oyama v. California*: At the Intersection of Property, Race, and Citizenship' (2010) 87 *Washington University Law Review* 979.

³⁶ GT Luna, 'Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a Naked Knife' (1989) 4 *Michigan Journal of Race & Law* 39.

³⁷ J Rugh and M Hall, 'Deporting the American Dream: Immigration Enforcement and Latino Foreclosures' (2016) 3 *Sociological Science* 1077.

³⁸ W Ewing and G Cantor, 'Deported With No Possessions: The Mishandling of Migrants' Personal Belongings by CBP and ICE' (*American Immigration Council*, 21 December 2006)

such rights than the repeal of a municipal law affects rights acquired under it.’ Of this doctrine there can be no question in this court; but far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.³⁹

There’s one problem with this distinction: on the actual facts of the case before the Court, the plaintiff had been issued a certificate by a customs official, under the authority of pre-existing legislation, declaring that he was entitled to return to the US. The Court makes no effort to explain why the government might issue someone a piece of paper saying ‘this is a patent to land, you have rights to it now’ and not be able to extinguish it by the arbitrary will of a political official when the law changes, but can issue the almost identical piece of paper ‘this is a patent to land *on our shores*, you have the right to do that now’ and take it away afterward by pure fiat.⁴⁰ In a sense, the *Chinese Exclusion Case* encompasses the whole theoretical framework of this book in one go: even in cases that stand as monuments to arbitrary power, our courts still sing a paean to the legal protection of property rights – but what kinds of things get counted as property rights is entirely endogenous to pre-existing relations of political power and who is counted as a member of the legal community.⁴¹

In short, the US seems to have a consistent strategy in dealing with those who are present but considered external to the legal community. As Coutin et al aptly put it, citing both *Chae Chan Ping* and *Lone Wolf*:

Both immigrant and indigenous groups occupy a space of exception vis-a-vis U.S. law: as ‘resident aliens’ and ‘dependent nations’ they are inside and outside at the same time. Their presence demands law – the petition, the recognition claim – even as this demand simultaneously seeks an exception to law in that officials have the discretion to decide what presence means, acting according to what has been termed ‘administrative grace’ or the government’s ‘pleasure,’ in a manner “not subject to be controlled by the judicial department.”⁴²

www.americanimmigrationcouncil.org/research/deported-no-posessions#:~:text=New%20Survey%20Data%20Reveals%20That%20Migrants%20Are%20Routinely%20Removed%20Without%20Their%20Personal%20Belongings&text=According%20to%20new%20data%20from,their%20personal%20belongings%20were%20returned.

³⁹ *Chae Chan Ping v United States* 130 US 581, 610 (1889); cf G Lawson, ‘Appointments and Illegal Adjudication: The America Invents Act through a Constitutional Lens’ (2018) 26 *George Mason Law Review* 26.

⁴⁰ *cf* *ibid* 39–43.

⁴¹ Maybe this helps reconcile the *Chinese Exclusion Case* with *Yick Wo v Hopkins*: in the earlier case, the discrimination against Chinese people was in their right to operate laundries in San Francisco – and hence threatened their capacity to use real estate. Indeed, much of the rhetoric in *Yick Wo* sounds eerily similar to that of *Lochner*.

⁴² Coutin, Richland and Fortin (n 21) 99. C Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory*, 1st edn (WW Norton & Company, 2020), has

Often, the categories of legal exclusion have overlapped. During the colonial and then antebellum periods, the statuses of ‘alien,’ of ‘Indian,’ and of slave could be intertwined. As early as 1670, Anthony Johnson, a Black person who had originally been carried over from Africa but had managed to become free and to acquire property, was subjected to alien land laws prohibiting his children from inheriting on the grounds that ‘he was a Negroe and by consequence an alien’.⁴³ Black Americans also could sometimes claim Native American ancestry as a way to escape enslavement.⁴⁴ And many Native Americans themselves were enslaved – albeit mostly illegally – up to the Civil War.⁴⁵ Of course, the colonisation movement represented an outright effort to ascribe the status of alien on free Black Americans. Today, members of Native American nations whose ancestral lands occupied both sides of what are now US borders are still subject to legally liminal statuses as their citizenship status and movement rights sometimes renders them ‘immigrants’ to land their ancestors occupied long before the United States existed.⁴⁶ And this is precisely what we would expect in a society rooted in settler ideology, in which the conception of freedom at the root of American society required the creation of legally subordinated castes which lacked the right to property ownership, and hence to legal protection.⁴⁷

The courts of the conqueror also intersect with slavery in that the theoretical tradition in which America’s founders were embedded understood one of the main justifications of slavery to be property rights acquired by conquest. According to one common argument in the period, the victor in a war has the right to enslave those whom they would otherwise have a right to kill – a view that John Locke at least partially endorsed (albeit with some complexities), and which Montesquieu tried to refute.⁴⁸ Chief Justice Marshall’s appeal to ‘the courts of the conqueror’ in *Johnson v M’Intosh* was followed two years later by his declaration that ‘[b]ut from the earliest times, war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was that the victor might enslave the vanquished’.⁴⁹ Hinshelwood completes the scholarly circle between slavery, conquest, and

recently done important work in connecting Native American removal to the concept of ‘deportation’ as applied to immigrants – and, not incidentally, in developing the relationship between this programme of deportation and the expansion of slavery, thus connecting the three great American failures of the rule of law.

⁴³ A de la Fuente and AJ Gross, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (Cambridge University Press, 2020) 15.

⁴⁴ *ibid* 94–98.

⁴⁵ A Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America*, 1st edn (Mariner Books, Houghton Mifflin Harcourt, 2017).

⁴⁶ EM Luna-Firebaugh, ‘The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas’ (2002) 17 *Wicazo Sa Review* 159.

⁴⁷ A Rana, *The Two Faces of American Freedom* (Harvard University Press, 2014).

⁴⁸ See W Uzgalis and N Zack, ‘John Locke, Racism, Slavery, and Indian Lands’ in *The Oxford Handbook of Philosophy and Race* (Oxford University Press, 2017); DJ Schaub, ‘Montesquieu on Slavery’ (2005) 34 *Perspectives on Political Science* 70.

⁴⁹ *The Antelope* 23 US 66, 120 (1825).

Native Americans by drawing out the relationship between Locke's theory of slavery and efforts to justify the enslavement of Native Americans in Carolina in the late seventeenth century.⁵⁰

Another kind of merger of the way the US has interacted with Native Americans as the human impediments to an expanding empire and the way the US has interacted with immigrants as unwanted intruders can be perceived in its treatment of Filipinos in the early twentieth century, after it had acquired the Philippines in the Spanish-American war. These territorial acquisitions formed the basis for the third assertion of plenary power, the *Insular Cases*. Filipinos were characterised as 'tribal,' and hence unsuited for self-rule – much like Native American nations were – and the expressed goal was 'benevolent assimilation'.⁵¹ Consistent with this goal, they were regarded by law as 'U.S. nationals' (not citizens), and permitted to travel to the mainland – but when they arrived, they were subjected to racially motivated violence on the basis of the familiar story, so prominent in today's anti-immigrant narrative, about competition for jobs. Filipinos also were the victims by transposition of many racist cultural tropes often applied to Black Americans, such as beliefs about sexual aggression.

The Supreme Court appealed directly to the authority of *Johnson v M'Intosh* in applying the plenary power doctrine to its newfound colonial empire, quoting a passage from Chief Justice Marshall's opinion in that case to justify maintaining a distinction between a conquered but separate people whose status is 'maintained by force' until such time as they are 'incorporated with the victorious nation'. It thus justified the different constitutional statuses of colonial territory and metropole on the same conquest and assimilation theory with which it justified the failure to respect Native American property rights.⁵²

The Plenary Power Doctrine is Indefensible

Expressed as a proposition of foreign relations, the notion that there may be some sovereign 'plenary powers' has a substantial degree of historical support. Doubtless, many countries, including the United States, have coerced foreigners found abroad in numerous ways without offering them any kind of legal process – seizing their property, killing them in wartime, and otherwise treating

⁵⁰ B Hinshelwood, 'The Carolinian Context of John Locke's Theory of Slavery' (2013) 41 *Political Theory* 562.

⁵¹ MM Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, New Paperbook edn (Princeton University Press, 2014) 120–49.

⁵² *Downes v Bidwell* 182 US 244, 281–82 (1901). One meaningful point of tension in this legacy connecting slavery and American colonialism of both Native American nations and the Philippines, however, is that the application of the plenary power doctrine to unincorporated federal territory is hardly consistent with the proposition in *Dred Scott* – critical to that case's outcome for the reasons described in chapter one – that Congress lacks the authority to legislate to determine the scope of permissible property interests in such territories.

them merely as objects of foreign policy rather than legal rightsholders. But the plenary power doctrine as a way of dealing with persons who are peacefully in the United States or at its borders ought to be rejected as wholly inconsistent with the rule of law.

First of all, it seems to me that the full application of such doctrines violates the United States's international commitments. The US has joined the Protocol Relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Those international agreements, and statutes that have been enacted to implement them, impose constraints on unbounded executive discretion even in admitting refugees at the border – although they ultimately do not constrain Congress, as it is well-established that an after-enacted Act of Congress can abrogate a treaty, their current legal status seems to me inconsistent with notions like plenary power and consular nonreviewability.

Moreover, the executive branch certainly acts as if it seeks to regulate immigration by law as opposed to as a sheer exercise of sovereign power: it offers many immigrants some kind of hearing; it calls those who bear responsibility for adjudicating immigration claims ‘judges’ and requires them to wear judicial robes and operate in buildings that it calls courtrooms.⁵³ Accordingly, the idea of the rule of law has some normative bite in the US framework of addressing immigrants by the country's own performative admission.

I would further argue that the US morally ought to treat prospective migrants as legal subjects. I have argued elsewhere that we ought to understand the obligations of the rule of law as attaching when a country wields monopolistic coercive force against another under a claim of right.⁵⁴ For the reasons noted above, when the US confronts migrants who seek admission to its territory, it does not simply present itself as entitled to do so for the reasons of the Athenians at Melos – it participates in a robust domestic and international legal regime governing cross-border travel.⁵⁵ Indeed, the US specifically purports to subject migrants' actions at the border not to its military power but to its ordinary

⁵³ See U.S. Department of Justice, Executive Office for Immigration Review, Memorandum from Chief Immigration Judge, Operating Policies and Procedures Memorandum Number 94-10: Wearing of the Robe During Immigration Judge Hearings (17 October 1994) www.justice.gov/eoir/efoia/ocij/oppm94/94-10.pdf; U.S. Department of Justice, Executive Office for Immigration Review, Memorandum from Chief Immigration Judge, Operating Policies and Procedures Memorandum Number 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children (20 December 2017).

⁵⁴ P Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016) 9–10.

⁵⁵ This section in part responds to a more theoretical prior conversation in which Matt Lister and Chad Flanders have urged me to clarify my views on the conceptual applicability of the notion of the rule of law at the border. M Lister, ‘Can the Rule of Law Apply at the Border? A Commentary on Paul Gowder's *The Rule of Law in the Real World*’ (2018) 62 *Saint Louis University Law Journal* 323; C Flanders, ‘Keeping the Rule of Law Simple: Comments on Gowder, *The Rule of Law in the Real World*’ (2018) 62 *Saint Louis University Law Journal* 313, 319–21; P Gowder, ‘Resisting the Rule of Men’ (2018) 62 *Saint Louis University Law Journal* 333, 345; see also M Lister, ‘Enforcing Immigration Law’ (2020) 15 *Philosophy Compass* e12653.

criminal jurisdiction: it has established crimes with which many migrants can be charged simply on the basis of their entry – and hence has directly asserted that it stands in a legal relationship with those who pass its gates.⁵⁶

Furthermore, notwithstanding the economic and military rise of China and the loss of American international prestige occasioned by the Trump regime, the reality is that the US does not stand in the same position as other nations in the international system. It is a global hegemon that has long had disproportionate weight in shaping the international legal and political system, and hence in setting the real-world structures that individuals must navigate in their efforts to cross borders. In effect, the US is a major regulator of persons globally.⁵⁷ Furthermore, American foreign policy has substantially contributed to the conditions that have prompted international migrant flows, most obviously (but far from exclusively) by starting destabilising wars in the Middle East and by promoting years of ‘Washington consensus’ international economic policies that have dictated the development paths of numerous foreign countries and created both the conditions for its own wealth and economic incentives to migration by facilitating the free movement of capital and the restricted movement of labour.

It is hardly unreasonable, in light of the immense entanglement that the lives of migrants have with US regulation and US power, to demand that the US at least meet some minimal legal standards with respect to those who cross its borders.

Frickey rightly suggests that Federal Indian Law represents ‘the tension between colonization and American constitutionalism’.⁵⁸ Immigration law captures a similar tension, between constitutionalism and *empire*: as the

⁵⁶ See eg L Uhl, ‘Prosecuting Illegal Reentry Cases Where Evidentiary Documents Are Missing or Incomplete: Everything You Never Wanted to Know about A-Files and Removal Documents and Were Not Afraid Not to Ask’ (2017) 65 *United States Attorneys’ Bulletin* 17.

⁵⁷ The US also engages in a substantial amount of extraterritorial regulation, particularly with respect to the financial system, although the Supreme Court has partly restrained the global reach of American law via an interpretive ‘presumption against extraterritoriality’. P-H Verdier, ‘The New Financial Extraterritoriality’ (2019) 87 *George Washington Law Review* 239. Notwithstanding the Supreme Court’s restraint, US citizens residing abroad, for example, notoriously find it difficult to open bank accounts because the US has leveraged its economic domination to force foreign banks to assume burdensome compliance obligations. SE Pippin, JA Wong and RM Mason, ‘Perceived and Actual Consequences of the Foreign Account Tax Compliance Act: A Survey of Americans Living Abroad’ in *Advances in Taxation*, vol 25 (Emerald Publishing Limited, 2018); G Williams, ‘U.S. Expats Find Their Money Is No Longer Welcome at the Bank’ (*Reuters*, 11 June 2014) www.reuters.com/article/us-banks-expats-idUSKBN0EM16V20140611. Its Foreign Corrupt Practices Act regulates businesses all over the world. H Lowell Brown, ‘Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp’ (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 239. And it even extends its non-financial criminal jurisdiction to many acts done abroad that are perceived to affect American security interests. M Farbiarz, ‘Accuracy and Adjudication: The Promise of Extraterritorial Due Process’ (2016) 116 *Columbia Law Review* 625; SA Koh, ‘Foreign Affairs Prosecutions’ (2019) 94 *New York University Law Review* 340.

⁵⁸ PP Frickey, ‘Marshall Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law’ (1993) 107 *Harvard Law Review* 381, 383.

United States has expanded its global hegemony and the scale of the noncitizen individuals whom its policies affect, it becomes more and more difficult to understand its relationships with those persons as merely those of a sovereign interacting at a kind of Westphalian arms-length with foreigners. The state comes to people who are, via its power, partially integrated into its community; but, because that integration is only partial, it still has a taste of Melos to it in the form of a kind of Schmittian reserve capacity to treat them as invaders or conquered people (or sometimes, as with Mexicans crossing over into land in Texas which the United States grabbed from Mexico in the first place, both) and replace the gavel with a fist. This cannot be permitted in a country that purports to be a nation of laws.

IMMIGRATION 'COURT': BARELY ADJUDICATION AT ALL

The canonical way that any dispute between an immigrant and the government about the lawful character of their admission or presence is adjudicated is via a hearing before an 'immigration judge' within the Department of Justice, with an appeal thereafter to the Board of Immigration Appeals (BIA), and thereafter to a federal court of appeals. As will be seen, there are many categories of case that do not follow that route, but we may take it as the normative system. Of course, there is always a substantial drop-off at each level of an appeal, so the primary adjudicator with whom most immigrants subjected to exclusion or deportation will be concerned is an immigration judge.⁵⁹

Richard Posner once bluntly declared from the bench that the immigration courts have 'fallen below the minimum standards of legal justice'.⁶⁰ Posner's primary theory for this failure, as he articulated in another case, was 'its severe underfunding by Congress, which has resulted in a shortage of immigration judges that has subjected them to crushing workloads'.⁶¹

But these workloads themselves represent policy choices; immigration adjudication is an example of the Kafkaesque teeth of the administrative state in the form of its control over things like budgets and personnel rules, which itself operates as a site for the exercise of potentially arbitrary power.

⁵⁹ According to the Department of Justice, in fiscal year 2017, the 'immigration courts' within the department received 405,947 I-862 (deportation, exclusion) cases, while the BIA received 33,503 cases. Department of Justice Executive Office for Immigration Review Statistics Yearbook for Fiscal Year 2017, www.justice.gov/eoir/page/file/1107056/download (Accessed 19 April 2021). I cannot find statistics for how many cases from the BIA were appealed to federal court, but, assuming a similar proportion drop off at this second level of appellate review, that would entail that 99% of immigrants deported and excluded never see any kind of adjudication outside the executive branch. On the President's control over immigration adjudication more generally, see CY Kim, 'The President's Immigration Courts' (2018) 68 *Emory Law Journal* 1.

⁶⁰ *Benslimane v Gonzales* 430 F3d 828 (7th Cir 2005).

⁶¹ *Chavarria-Reyes v Lynch* 845 F3d 275 (7th Cir 2016) (dissenting opinion).

As an example of this power, in late 2002, the BIA was some 56,000 cases behind, so then-Attorney General Ashcroft ordered them to catch up and gave them a deadline of March 2003. Obeying the order, the Board drastically accelerated its review process, leading single BIA judges to dispose of a case as fast as one every ten minutes and increasing the Board's affirmation rate of immigration judges from 59 per cent to 86 per cent.⁶² Thus, by issuing a bureaucratic time management order, the Attorney General was able to deprive thousands of immigrants of any genuine opportunity for administrative review of their cases.

More recently, the Department of Justice imposed performance standards on its immigration judges requiring them to clear 700 cases a year or be punished, even while increasing their adjudicative burden by prohibiting them from administratively closing cases. Assuming 262 workdays a year, this amounts to a requirement that immigration judges clear 2.6 cases a day, rain or shine, and regardless of their complexity or any other duties they may need to carry out.⁶³ A telling indication of exactly how the immigration adjudication system is oriented toward racing through cases can be gleaned from one immigration judge's suggestion in an interview with Amit Jain that the process of judicial review of their decisions imposed pressure to 'do these lengthy decisions citing cases And so decisions that used to be quick now were taking 35, 40, 50, 60 minutes or more'.⁶⁴ Citing legal authority is evidently perceived as an unbearable burden, and thirty-five minutes per case is evidently considered slow.

In light of this crushing workload, immigration judges are frequently criticised for providing barely-serious hearings to the people before them. For example, in the case that so exercised Judge Posner, the 7th Circuit upheld (Posner was writing in dissent) the results of an adjudication in which the immigration judge 'never invited [*Chavarria-Reyes*] to present evidence on his own behalf'.

Immigrants who have legal representation tend to fare much better than those who do not: 'represented detained noncitizens were 10.5 times more likely to succeed in removal proceedings than their pro se counterparts'.⁶⁵ There's probably some selection bias in that ratio – counsel are probably more likely to offer their services to clients with strong cases. But there's some evidence suggesting a causal element too: a pilot programme providing universal representation to

⁶² L. Getter and J. Peterson, 'Speedier Rate of Deportation Rulings Assailed' (*Los Angeles Times*, 5 January 2003) www.latimes.com/archives/la-xpm-2003-jan-05-na-immig5-story.html.

⁶³ I take the 262 workdays a year figure from the U.S. Office of Personnel Management, 'Fact Sheet: Computing Hourly Rates of Pay Using the 2,087-Hour Divisor' www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/.

⁶⁴ A. Jain, 'Bureaucrats in Robes: Immigration Judges and the Trappings of Courts' (2019) 33 *Georgetown Immigration Law Journal* 261, 286.

⁶⁵ American Bar Association, '2019 Update Report: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases' (American Bar Association Commission on Immigration, March 2019) 5–3 www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

migrants in New York yielded a substantial increase in successful adjudicatory outcomes for migrants.⁶⁶ Another study found that, after controlling for factors like a detainee's criminal record and employment history (which may be part of the indicia of merit that immigration lawyers use to select cases), detainees represented by counsel were more than three times more likely to be released on bond.⁶⁷ Yet immigrants typically don't receive court-appointed representation in the process, and while some 61 per cent are represented, substantially fewer of those who are detained manage to find representation.⁶⁸

Compounding the problem is the famous complexity of American immigration law – so complex that non-specialist lawyers screw it up in drastic ways; for example, criminal defence lawyers can easily fail to correctly advise their clients about the immigration consequences of criminal convictions.⁶⁹ Unrepresented – possibly non-English-speaking and desperately poor – immigrants who may be in detention and hence unable without extreme difficulty to do things like conduct legal research and gather evidence are almost certainly unaware of such rights as they may enjoy. Ryo reports that large proportions of surveyed detainees did not know why they were in removal proceedings and did not understand the contents of bond notices.⁷⁰

While an immigrant may ultimately appeal an immigration judge's determination to the BIA and thereafter to a real court, the factual determinations made in the immigration judge's hasty hearing are reviewed under a deferential standard, and a court is prohibited from remanding for additional fact-finding.⁷¹ Moreover, the BIA review level may be minimal. Under existing regulations, a single BIA member is authorised to affirm an immigration court decision in summary fashion, with no written opinion.⁷² And Congress has specifically stripped the real courts of jurisdiction over a number of determinations.⁷³ Access to an appeal from the executive to the judiciary is further impaired by the fact that a final administrative decision renders a migrant immediately deportable in the absence of a stay – the government can whisk even an

⁶⁶ *ibid* 5–10.

⁶⁷ E Ryo, 'Detained: A Study of Immigration Bond Hearings' (2016) 50 *Law & Society Review* 117, 139.

⁶⁸ American Bar Association (n 65) 5–8 to 5–9.

⁶⁹ JA Cade, 'The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court Part VI: Immigration Litigation Issues' (2013) 34 *Immigration and Nationality Law Review* 597. The Supreme Court, in *Padilla v Kentucky* 559 US 356 (2010), held that it constitutes ineffective assistance of counsel to fail to advise clients of 'succinct and straightforward' immigration consequences – but explicitly recognised that the complexity of immigration law is such that even a skilled criminal defence lawyer could miss 'situations in which the deportation consequences of a particular plea are unclear or uncertain' without the conviction being unconstitutional under the Sixth Amendment, as long as they advise the client that there *might* be immigration consequences.

⁷⁰ E Ryo, 'Fostering Legal Cynicism through Immigration Detention' (2017) *Southern California Law Review* 999, 1034–36.

⁷¹ 8 USC § 1252(b)(4)(B); 8 USC § 1252(a)(1).

⁷² 8 CFR § 1003.1(c).

⁷³ 8 USC § 1252(a)(2).

unrepresented immigrant thousands of miles away from any court the minute the administrative process is done unless they're savvy enough to ask for a stay quickly and lucky enough to get it.⁷⁴

Immigration adjudication is also notoriously lacking in independence.⁷⁵ Unlike many other executive branch adjudicators, immigration judges lack the protections provided by the Administrative Procedure Act.⁷⁶ Catherine Kim and Amy Semet have provided empirical evidence suggesting that the president in office at the time of a particular adjudication exercises more influence over immigration judges' rulings than the president who appointed an immigration judge – ie, when a more or less immigrant-friendly president is in power, the decisions of the judges shift.⁷⁷ It's no surprise then that a qualitative study of immigration court judges found that they largely experience their role as bureaucratic cogs rather than as independent adjudicators.⁷⁸

The compromises to judicial independence in immigration adjudication have run even deeper. In conjunction with the 2002 speedup, Ashcroft reduced the size of the BIA and reassigned some of its members to other duties. Those who were reassigned were heavily weighted toward those known to make 'liberal' decisions.⁷⁹ In one case from the period, a senior immigration judge stepped in to take over an immigration case and reverse the rulings of a judge who had determined in favour of the immigrant – after *ex parte* contact from the government's lawyers.⁸⁰ More recently, during the Trump administration, the Department of Justice replaced an immigration judge midway through the adjudicative process because it was annoyed that the judge was making a serious effort to have notice of a hearing served on a child.⁸¹ There have been allegations – which, due to a 'lack of transparency', cannot be investigated – that the Department of Justice uses political criteria as a basis for the selection of adjudicators.⁸²

⁷⁴ American Bar Association (n 65) 3–15, 4–3.

⁷⁵ SH Legomsky, 'Deportation and the War on Independence' (2006) 26 *Journal of the National Association of Administrative Law Judiciary* 387.

⁷⁶ Those protections, and other procedural requirements, are given by 5 USC § 554. It has been established that they do not apply in immigration cases since *Marcello v Bonds* 349 US 302 (1955). For discussions of the difference between 'Administrative Law Judges' and 'Administrative Judges', and the lack of procedural protections in the latter, see K Barnett, 'Against Administrative Judges' (2016) 49 *UC Davis Law Review* 1643; M Asimow, 'Five Models of Administrative Adjudication' (2015) 63 *American Journal of Comparative Law* 3.

⁷⁷ CY Kim and A Semet, 'Presidential Ideology and Immigrant Detention' (2020) 69 *Duke Law Journal* 1855.

⁷⁸ Jain (n 64).

⁷⁹ Legomsky (n 75) 376–77.

⁸⁰ E Schmitt, '2 Judges Do Battle in an Immigration Case' (*New York Times*, 21 June 2001) www.nytimes.com/2001/06/21/us/2-judges-do-battle-in-an-immigration-case.html.

⁸¹ T Kopan, 'Immigrant Ordered Deported After Justice Department Replaces Judge' (CNN, 7 August 2018) www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html. The Attorney General used poor Mr Castro-Tum's case as an excuse to make new rules regarding the practice of administrative closure. *Matter of Castro-Tum* 27 I&N Dec 271 (AG 2018).

⁸² American Bar Association (n 65) 2–19.

From those facts, it is impossible to avoid the conclusion that there are no fair hearings in immigration court. Rather, a presidential administration – like the Trump administration – bent on excluding and deporting as many immigrants as possible has the power to largely ignore underlying law by acting as judge in its own case.

Even if the designated adjudicators themselves were independent, the immigration system contains one further feature that makes it incompatible with any serious notion of judicial independence: the Attorney General is entitled to exercise what is known as the 'self-referral power' to order any case transferred from the BIA to himself, after which he may unilaterally adjudicate it in any fashion he pleases. This is frequently used as a direct instrument of executive branch policy, including for the purpose of setting determinative legal rules through precedential adjudication.⁸³

The Attorney General's referral authority can be exercised in an arbitrary fashion, with no procedural protections whatsoever. The Third Circuit described the process in one such case: 'Despite requests by Silva-Trevino's counsel, the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure.'⁸⁴

Accordingly, a political appointee of the president has the authority to dictate the outcome of any adjudication determining an individual's legal right to be present in the United States based on nothing more than short-term political considerations. Moreover, the Attorney General might apply those political considerations retroactively – the Attorney General may announce a new rule, disadvantageous to the immigrant, and motivated solely by what we might call 'reasons of state', and immediately (ie, retroactively) apply that rule in a case they have referred to themselves, depriving the immigrant of a neutral adjudicator and using that immigrant's fate as nothing more than a means for the pursuit of broader policy goals.

This power was used repeatedly by the Trump administration, surely the most anti-immigrant US presidency in modern history. For example, consider *Matter of A-B-*, in which the Attorney General declared that domestic violence is not group-based persecution for purposes of asylum.⁸⁵ Or *Matter of Castro-Tum*, in which Jeff Sessions overruled two precedential decisions to determine that immigration judges lack the power to suspend or close cases on their own.⁸⁶

⁸³ AR Gonzales and P Glen, 'Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority' (2016) 101 *Iowa Law Review* 841, 841–94, review the history and uses of the referral authority. Stella Elias and I have a more extensive discussion of the lawless character of the self-referral authority in a working paper currently entitled 'Lawless Lawmaking: The Attorney General Self-Referral Power and the Rule of Law'.

⁸⁴ *Jean-Louis v Attorney General* 582 F3d 462, 470 n 11 (3d Cir 2009).

⁸⁵ *Matter of A-B-* 27 I&N Dec 316 (AG 2018).

⁸⁶ *Matter of Castro-Tum* 27 I&N Dec 271 (AG 2018). In addition to undermining the capacity of judges to manage their dockets, the facts of *Castro-Tum* are troubling. The judge in *Castro-Tum*

Regardless of the substantive correctness or incorrectness of such rulings, in their political context it's impossible to understand them as anything other than politically motivated retroactive changes to immigration law, carried out as a matter of executive prerogative.

Expedited Removal: For When Executive Adjudication is Still Too Fair

Yet immigration courts represent a relatively generous extension of procedural protections for immigrants compared to the main alternative under existing law, namely, the 'expedited removal' process. If subjected to 'expedited removal', an immigrant may be deported without any appearance before a judicial officer, or even a quasi-judicial immigration 'judge', whatsoever. Expedited removal has grown to account for some 35–40 per cent of removals.⁸⁷ The process applies to anyone stopped at the border allegedly without proper documentation – and, under Trump administration regulations expanding the scope of expedited review to the limits of its statutory authority, to anyone allegedly without proper documentation found in the US within two years of entry – with narrow exceptions relating to asylum claims, claims of citizenship or lawful permanent residence, and the like.⁸⁸

Lest the reader think that expedited removal is merely a process that applies to persons who sneak across the physical border in the dead of night or who procure admission through forged documents, it should be noted that it also applies to migrants who (are alleged to have) crossed the border in a wide variety of other unlawful ways – for example, immigrants who enter claiming to be tourists while actually intending to stay, or even people whose passports do not have six months of validity remaining.⁸⁹ The Seventh Circuit has recognised that the inquiry as to a person's intent at the border is a giant hole in the process: some immigration official can arbitrarily dump someone in the expedited review category without any judicial scrutiny at all by deciding that, even though the individual insists that they're entering the country for some non-immigrant purpose and intend to leave, they're really an 'intending immigrant'.⁹⁰ Moreover, the burden of proof even when a person is apprehended

had ordered the proceedings be closed because they were not convinced that the respondent had been successfully notified of the hearing, and were not satisfied with the reliability of the Department of Homeland Security's address database. The Attorney General ruled that there was a presumption that notice had been carried out because it had been mailed to an address that the immigrant – a 17-year-old unaccompanied child – had given the government.

⁸⁷ American Immigration Council, 'A Primer on Expedited Removal' (*American Immigration Council*, 3 February 2017) www.americanimmigrationcouncil.org/research/primer-expedited-removal.

⁸⁸ HR Smith, 'Expedited Removal of Aliens: Legal Framework' (Congressional Research Service, 2019) R45314 10–11.

⁸⁹ *ibid* 12; *Smith v US Customs & Border Prot* 741 F3d 1016 (9th Cir 2014).

⁹⁰ *Khan v Holder* 608 F3d 325, 329–30 (7th Cir 2010).

in the interior is on the immigrant to show that they are not subject to expedited removal for being in the US less than two years, or have been admitted to the US as opposed to having entered without permission.⁹¹ ‘Burden of proof’ in this context really just means a near-total lack of legal protection, since the person to whom an immigrant must prove their status is a potentially biased or legally untrained immigration official. Thus, in reality, expedited removal processes may apply far beyond their intended bounds.

Yet, despite offering migrants no procedural protections, expedited removal carries significant collateral legal consequences. An immigrant who is subjected to expedited removal is subject to a five-year or longer bar to re-entry and becomes guilty of a felony if they re-enter the US later, just the same as an immigrant who is removed under normal procedures that provide them with a real opportunity to contest the grounds for removal.⁹²

THE TENDENCY OF ARBITRARY POWER TO METASTASIZE THROUGHOUT THE LEGAL SYSTEM

In arguing that ‘the principle that unadmitted aliens have no constitutionally protected rights defies rationality’, Justice Thurgood Marshall, dissenting in *Jean v Nelson*, pointed out that ‘the Fourteenth Amendment was specifically intended to overrule a legal fiction similar to that undergirding [plenary power doctrine cases] *Knauff*, *Chew*, and *Mezei* – that freed slaves were not “people of the United States”’.⁹³ Justice Marshall identified a condition of outlawry connecting the enslaved and those who seek admission to the United States.⁹⁴

The connections between immigration and slavery cannot be explored fully in this volume. One important aspect of those connections is grimly paradoxical: it would be fair to say that the Chinese Exclusion regime which spawned

⁹¹ 8 USC § 1225(b)(1)(a)(iii)(II); 8 CFR 235.3(b)(6).

⁹² Smith (n 88) 13; J Lee Koh, ‘When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement’ (2018) 96 *Washington University Law Review* 337; 8 USC § 1225(b)(1); 8 USC § 1326. However, there is some possibility for collateral attack of the underlying order of removal in such a criminal proceeding. *United States v Villarreal Silva* 931 F3d 330 (4th Cir 2019); *United States v Mendoza-Lopez* 481 US 828 (1987); Smith (n 88) 35–36.

⁹³ *Jean v Nelson* 472 US 846, 874–75 (1985) (Marshall J, dissenting) (quoting *Dred Scott v Sandford* at the end).

⁹⁴ A number of scholars have compared the immigration regime to the Fugitive Slave Act. See KM McKanders, ‘Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities’ (2012) 61 *Catholic University Law Review* 921; J Stevens, ‘The Alien Who Is a Citizen’ in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press, 2017) 225; N Lasch, ‘Rendition Resistance’ (2013) 92 *North Carolina Law Review* 149. Actually, the very first comparison between immigration adjudication and the Fugitive Slave Acts was made in 1921: in that year, the *Yale Law Journal* printed an article defending the constitutionality of the Fugitive Slave Acts (!) via an analogy to the result in cases like *Ju Toy* where biased administrators could adjudicate the right to enter the country of citizens of Chinese descent. A Johnson, ‘The Constitutionality of the Fugitive Slave Acts’ (1921) 31 *Yale Law Journal* 161, 182.

contemporary immigration law itself was in part an outgrowth of *abolition*. Historians have identified that Chinese Exclusion was rooted in part in post-Civil-War Republican fears about the importation of unfree labourers – although straightforward racism was also implicated.⁹⁵

Yet in many other ways the immigration regime stands as a betrayal of the legacy of abolition, as it resurrects many of the legal and social conditions of slavery, albeit in less egregious form. Let's start with the superficial, albeit particularly shocking: even though the Thirteenth Amendment only carves out an exception to its prohibition on involuntary servitude for 'punishment for crime whereof the party shall have been duly convicted', and even though immigration detention and removal is nominally a civil rather than a criminal process, immigrant detainees labour on behalf of the private companies who manage ICE detention facilities for little or no pay.⁹⁶

Nor are detained immigrants the only ones who are subject to forced or quasi-forced labour. Many industries, such as agriculture, meatpacking, construction, and nail salons, frequently employ undocumented workers under coercive conditions.⁹⁷ The National Employment Law Project conducted a 2009 study of low-wage workers in America's three largest cities, and found that almost 39 per cent were undocumented.⁹⁸ It turns out that when someone is an outlaw

⁹⁵ On the association between Chinese immigrants and unfree labour, see M-H Jung, 'Outlawing 'Coolies': Race, Nation, and Empire in the Age of Emancipation' (2005) 57 *American Quarterly* 677. For a general survey of the influences on Chinese exclusion cogently discussing both the fear of unfree labourers and the racism, see L VanderVelde and GJ Chin, 'Sowing the Seeds of Chinese Exclusion as the Reconstruction Congress Debates Civil Rights Inclusion' (2020) 12 *Tsinghua China Law Review* 185.

⁹⁶ J Stevens, 'One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present' (2015) 29 *Georgetown Immigration Law Journal* 391; J Booth, 'Ending Forced Labor In ICE Detention Centers: A New Approach' (2020) 34 *Georgetown Immigration Law Journal* 573; A Sinha, 'Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment' (2015) 11 *Stanford Journal of Civil Rights and Civil Liberties* 1; J Stevens, 'One Dollar Per Day: A Note on Recent Forced Labor and Dollar-Per-Day Wages in Private Prisons Holding People Under Immigration Law' (2018) 52 *Valparaiso University Law Review* 343. Detention bears many other similarities to criminal imprisonment. Detainees are subject to the physical and symbolic conditions of imprisonment such as shackles, jumpsuits, strict rules on visitation and touching, strip searches, arbitrary discipline, and even enforced social hierarchies between themselves and guards such as rules about who is allowed to speak to and look directly at whom. Ryo (n 70) 1027–34; E Ryo, 'Understanding Immigration Detention: Causes, Conditions, and Consequences' (2019) 15 *Annual Review of Law and Social Science* 97, 104; L Ricciardelli et al, 'A Snapshot of Immigration Court at Stewart Detention Center.' (2019) 20 *Critical Social Work* 57. The length of detention too can more resemble prison than temporary adjudicative detention, with the average being over a month but with substantial numbers of immigrants being detained for years. E Ryo and I Peacock, 'A National Study of Immigration Detention in the United States' (2018) 92 *Southern California Law Review* 1, 32.

⁹⁷ See E Fussell, 'The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery' (2011) 52 *The Sociological Quarterly* 593; E Schlosser, 'In the Strawberry Fields' (*The Atlantic*, November 1995) www.theatlantic.com/magazine/archive/1995/11/in-the-strawberry-fields/305754; S Maslin Nir, 'The Price of Nice Nails' (*New York Times*, 7 May 2015) www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html.

⁹⁸ A Bernhardt, R Milkman and N Theodore, 'Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities' (*National Employment Law Project*, 2019) 15

who can be deported if they come into contact with the government, they don't really have anyone to turn to in order to protect them from their employers – and so employers are frequently caught subjecting undocumented immigrants to wage theft, passport withholding, and debt peonage.⁹⁹

The forced labour of noncitizen workers has been going on at least since emancipation – the Radical Republicans enacted an anti-peonage statute in 1867 to try to stop the forced labour of Mexicans and Native Americans in New Mexico.¹⁰⁰ Authorised workers can be little better off than the undocumented – the 'Bracero' guest-worker programme of the mid-twentieth century has been widely criticised for creating exploitative and at least quasi-coercive labour conditions.¹⁰¹ Today, we have the H-visa system, but Ontiveros argues that such guest worker programmes serve a similar economic function as coerced labour, and lead to similar treatment of workers.¹⁰² And largely immigrant workers in agriculture and in domestic labour are excluded from important protections of federal labour law, an exclusion that traces directly back to Jim Crow and was, Perea has convincingly argued, intended to secure the votes of Southern Democrats for the passage of the National Labor Relations Act by excluding Black workers.¹⁰³

Immigration Outlawry Harms Citizens Too

Introducing procedural injustice into a system on a caste basis inevitably spills over to those who are nominally protected by the law, for a person who is falsely accused of being in the group that lacks legal protections can easily find themselves subjected to outlaw procedures and hence without any ability to defend themselves. We saw this first in the kidnapping of Black Northerners under the

www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/.

⁹⁹K Kim, 'The Coercion of Trafficked Workers' (2011) 96 *Iowa Law Review* 409; B Azmy, 'Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda' (2002) 71 *Fordham Law Review* 981. For an extreme example of the abuse to which immigrants can be subjected, see *United States v Alzanki* 54 F3d 994 (1st Cir 1995), concerning a Sri Lankan domestic worker held in what I must characterise as outright slavery. Of course, that sort of treatment, which included copious physical violence, is a crime, and the enslaver in Alzanki was rightly convicted – but the point is that their status as quasi-outlaws makes immigrants, and especially undocumented immigrants, vulnerable to this kind of criminal enslavement because they – rationally – fear the state.

¹⁰⁰A Soifer, 'Old Lines in New Battles: An Overlooked Yet Useful Statute to Confront Exploitation of Undocumented Workers by Employers and by ICE' (2018) 19 *Nevada Law Journal* 397.

¹⁰¹eg, RL Mize Jr, 'Reparations for Mexican Braceros – Lessons Learned from Japanese and African American Attempts at Redress' (2005) 52 *Cleveland State Law Review* 273, 283–91.

¹⁰²ML Ontiveros, 'Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs' (2007) 38 *University of Toledo Law Review* 923.

¹⁰³JF Perea, 'The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act' (2011) 72 *Ohio State Law Journal* 95.

Fugitive Slave Act regime: in view of the lack of procedural protections before federal commissioners, a kidnapped free Northerner could easily be unable to put up a defence and end up enslaved.¹⁰⁴ We also saw that in the Chinese Exclusion era in cases like *Ju Toy*, where a US citizen could be deported because the process for proving his citizenship began with the presumption that he was not a citizen, and hence deprived him of the capacity to prove his entitlement to process itself.

Today, lawful permanent residents and even US citizens who are subject to the scrutiny of the immigration authorities for whatever reason may find themselves caught up in the expedited removal process. Consider the case of Sharon McKnight, a native-born New Yorker who made the mistake of visiting family in Jamaica – and who was arrested at JFK airport upon her return, detained, and deported back to Jamaica the next day, despite presenting her perfectly valid US passport to border patrol officers – and despite the heroic efforts of her family, who showed up at the airport with her birth certificate, which the federal agents also disbelieved. Despite her manifest and perfectly documented citizenship, she was subjected to expedited removal, and only made it back to the US via the intercession of a member of Congress.¹⁰⁵ If it can happen to her, it can happen to any of us – or at least any of us with the markers of ‘foreignness’ as they might be perceived by the sort of person who works for the Border Patrol (about whom see below) – markers which the Supreme Court declared in *United States v Brignoni-Ponce* can even include race.¹⁰⁶

This happens outside the expedited removal process as well. Consider the case of Mark Daniel Lyttle: a US citizen with psychiatric disabilities, he was taken from a mental health ward in a North Carolina jail by ICE agents who ignored his insistence that he was a US citizen, brought before an immigration court judge before whom he ‘did not have an opportunity to present evidence or challenge the evidence of Mexican citizenship brought against him’, and then deported to Mexico, where he ‘wandered around Central America for 125 days, sleeping in the streets, staying in shelters, and being imprisoned and abused in Mexico, Honduras, and Nicaragua because he had no identity or proof of citizenship’.¹⁰⁷

Mr Lyttle’s case shares commonalities with other deportations of US citizens, particularly mentally disabled citizens who have pieces of paper shoved in front of them by ICE and CBP agents with no effort to determine whether

¹⁰⁴ J Oliver Horton and LE Horton, ‘A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850’ (1993) 68 *Chicago-Kent Law Review* 1179, 1189–90.

¹⁰⁵ I James, ‘Wrongly Deported, American Citizen Sues INS for \$8 Million’ (*Los Angeles Times*, 3 September 2000) www.latimes.com/archives/la-xpm-2000-sep-03-mn-14714-story.html.

¹⁰⁶ *United States v Brignoni-Ponce* 422 US 873, 887 (1975) euphemistically declared that ‘Mexican appearance’ is ‘a relevant factor’ in detaining an individual.

¹⁰⁷ The quotations are from the district court opinion in Mr Lyttle’s ultimate suit for damages as a result of this conduct. *Lyttle v United States* 867 FSupp2d 1256 (2012).

they understand or agree with what they are signing. Another example is Los Angeles-born Peter Guzman, who had a 'voluntary departure' form shoved under his nose which was then used to deport him to Mexico, despite the fact that he only could read at a second-grade level. In Mexico, '[h]e frequently ate out of garbage cans and for the most part slept outside without adequate shelter or warmth, bathing in rivers'.¹⁰⁸

Supposed voluntary departure and other documentary concessions of alienage brought about by coercion or manipulation seems to be a common fact pattern in deportations of US citizens.¹⁰⁹ In this respect, immigration law's resemblance to the Fugitive Slave Act regime can be supplemented by its resemblance to coercive plea bargaining: the overwhelming power of government officials who hold a person in detention can be used to extract false confessions – in plea bargaining, of criminal guilt; in immigration, of alienage; accordingly, the majority of the US citizens Stevens found who had falsely signed statements declaring themselves noncitizens did so as a way to get out of custody or as a result of intimidation by federal agents.¹¹⁰ And once a citizen has been removed via the unfair immigration process, they lose effective access to the processes that may have protected their claim to citizenship (if only they had known how to invoke them) while they were in the US.¹¹¹

One prominent study estimates that upwards of 20,000 US citizens were detained by ICE or deported between 2003 and 2010.¹¹² And even detention without deportation can cause serious harms. Consider the case of Davino Watson, a US citizen who was held in immigration detention for three years while ICE and the Department of Justice tried to sort out who his parents were and what the government thought about his citizenship status.¹¹³ This power may have even been deployed for the purpose of retaliation against citizens who report human rights abuses: as I write this, it has come out that Alma Bowman, an ICE detainee who blew the whistle on forced hysterectomies of detainees at the facility in which she is housed, actually is a US citizen. She's been detained for two years, and was put on the deportation schedule after her whistleblowing.¹¹⁴

¹⁰⁸ Testimony of JJ Brosnahan and MD Rosenbaum, Submitted to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Judiciary Committee, 13 February 2008, www.aclu.org/other/testimony-mark-rosenbaum-and-james-brosnahan-about-deportation-us-citizen-peter-guzman.

¹⁰⁹ J Stevens, 'U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens' (2011) 18 *Virginia Journal of Social Policy & the Law* 606, 621, 627, 630–32.

¹¹⁰ *ibid* 627.

¹¹¹ C Burke Robertson and ID Manta, 'Litigating Citizenship' (2020) 73 *Vanderbilt Law Review* 757, 778.

¹¹² Stevens (n 109) 608.

¹¹³ *Watson v United States* 865 F3d 123 (2d Cir 2017).

¹¹⁴ J Washington and J Olivares, 'ICE Medical Misconduct Witness Slated for Deportation Is a U.S. Citizen, Says Lawyer' (*The Intercept*, 2 November 2020) theintercept.com/2020/11/02/ice-medical-misconduct-us-citizen-deportation/.

Immigration Outlawry Corrupts the System as a Whole

When enforcement agencies are created to operate in spaces of legal liminality or even outlawry, their interactions with those who possess legal rights are bound to be infected by that culture. ICE and CBP agents typically interact with those who have weakened or no due process rights under the plenary power doctrine. Those agents, accordingly, have developed a culture of disregard for individual rights and an expectation of impunity.¹¹⁵ This is perhaps most saliently highlighted by the recent Supreme Court case of *Hernandez v Mesa*, in which a border patrol officer was granted impunity from civil liability for firing across the border and killing a 15-year-old child.¹¹⁶ But it is psychologically and sociologically unrealistic to expect officials who operate in such an environment to seamlessly switch modes from the bureaucratic priority to get rid of an intruder as efficiently as possible when interacting with a noncitizen to providing due process and the respect owed to a fellow legal subject when interacting with a person who says they're a citizen, when they may be encountered in a similar location and may have similar ascriptive characteristics (ie, ethnicity) and behave similarly to noncitizens. This goes not just for front-line enforcement officials but also for adjudicators: how could we realistically expect them to internalise two such radically different modes of interacting with the persons who appear before them? Instead, they carry on their assembly-line processing of noncitizens even when a citizen appears before them, with the results described.

This too is a commonality between slavery and the contemporary immigration regime. Even the Southern courts recognised that compromises to legal procedures to permit the harsh treatment of slaves could leak out into the treatment of whites if not closely guarded.¹¹⁷ One particularly important manifestation of what we might call the leakage of lawlessness thesis that can be found in abolitionist literature is that slavery corrupted the moral character of masters and overseers.¹¹⁸

Thomas Jefferson recognised this psychological fact:

The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to his worst of passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities. The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execration should the statesman be loaded, who permitting one half the citizens thus to trample on the

¹¹⁵ EF Cohen, *Illegal: How America's Lawless Immigration Regime Threatens Us All*, 1st edn (Basic Books, 2020) ch 1.

¹¹⁶ *Hernandez v Mesa* 140 S Ct 735 (2020).

¹¹⁷ M Tushnet, *The American Law of Slavery, 1810–1860: Considerations of Humanity and Interest* (Princeton University Press, 1981) 122.

¹¹⁸ DG Matthews, 'The Abolitionists on Slavery: The Critique Behind the Social Movement' (1967) 33 *The Journal of Southern History* 163, 179–80; LF Leach, 'Roots and the Trope of the Good Slaveholder' (2019) 40 *Slavery & Abolition* 361, 362, 371.

rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the amor patriae of the other.¹¹⁹

Jefferson probably learned this argument from Montesquieu, who observes that a master ‘grows accustomed to failing in all the moral virtues, because he grows proud, curt, harsh, angry, voluptuous, and cruel’.¹²⁰ Jefferson and Montesquieu were obviously right. Exercising unconstrained power over other human beings and telling oneself that those others lack basic rights as a justification for that unconstrained power is inherently corrupting because it trains one to disregard the humanity of others.¹²¹ This folk-psychological insight is consistent with current research in psychology on cognitive dissonance reduction and moral disengagement, through which people who find themselves engaging in reprehensible behaviour develop stories to justify that behaviour to themselves and decline to subject their actions to moral scrutiny.¹²²

Now consider that the immigration enforcement agencies commit cruelties like destroying caches of water left for the survival of people in the desert and arresting members of humanitarian groups who try to keep border-crossers alive.¹²³ Those agencies participated in a deliberate practice of separating parents from their children for the purposes of deterrence and holding those children in overcrowded cages.¹²⁴ What kinds of habits of moral judgement and perceptions of the world must someone who engages in such behaviour adopt, and how might they carry those habits into their interactions with others?¹²⁵

Actually, we’ve already seen one example of the moral corruption of immigration enforcers, and with it, seen that deportation is not the only way that

¹¹⁹ T. Jefferson, *Notes on the State of Virginia* (John Stockdale, 1787) 271.

¹²⁰ C de Secondat Montesquieu in AM Cohler, BC Miller and H Samuel Stone (eds), *The Spirit of the Laws* (Cambridge University Press, 1989) 246.

¹²¹ Immanuel Kant recognised this point with respect to animals as well, arguing that cruelty to animals was impermissible because of the way it twisted the characters of the people who engaged in it. AW Wood, ‘Kant on Duties Regarding Nonrational Nature’ (1998) 72 *Aristotelian Society Supplementary Volume* 189, 194.

¹²² A Bandura, ‘Moral Disengagement in the Perpetration of Inhumanities’ (1999) 3 *Personality and Social Psychology Review* 193; S Shalvi et al, ‘Self-Serving Justifications: Doing Wrong and Feeling Moral’ (2015) 24 *Current Directions in Psychological Science* 125.

¹²³ AB Wang, ‘Border Patrol Agents Were Filmed Dumping Water Left for Migrants. Then Came a “Suspicious” Arrest’ (*Washington Post*, 24 January 2018) www.washingtonpost.com/news/post-nation/wp/2018/01/23/border-patrol-accused-of-targeting-aid-group-that-filmed-agents-dumping-water-left-for-migrants/.

¹²⁴ MD Shear, K Benner and MS Schmidt, “We Need to Take Away Children”, No Matter How Young, Justice Dept. Officials Said’ (*The New York Times*, 6 October 2020) www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rostenstein.html; C Domonoske and R Gonzalez, ‘What We Know: Family Separation And “Zero Tolerance” At The Border’ (*National Public Radio*, 19 June 2018) www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border.

¹²⁵ Another important location for examining the corrupting effect of power is policing. Police exist in a hyper-masculine culture in which they are trained to display constant dominance over others. They also have a marked propensity to commit acts of domestic violence off the job. L Goodmark, ‘Hands up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse’ (2015) 2015 *Brigham Young University Law Review* 1183.

the corruption of the immigration regime spills out to deprive even US citizens of their legal rights. The violent and lawless culture of the Border Patrol has been brought into the interior: during the summer 2020 protests in Portland, Oregon, the Trump administration deployed ‘BORTAC’ special forces troopers into streets of the city, where they – perhaps with other federal agents (it is not clear) – went on a Pinochet-style rampage: arresting people without probable cause, sticking hoods on them, and stuffing them into vans; brutally beating a 53-year-old Navy veteran who merely came to the protests to peacefully ask the federal officers how their behaviour comported with their oath to uphold the Constitution.¹²⁶ But what else would we expect when we take troops whose ordinary job is to deal out brutality to stigmatised and racialised foreigners with zero legal rights and deploy them on the streets of a city?¹²⁷

In less immediately violent terms, the compromise of legality occasioned by the immigration regime also operates geographically. Racial profiling is specifically permitted in immigration enforcement, just so long as it isn’t the *only* excuse a Border Patrol officer can give for their stop and search of a private person.¹²⁸ Now further consider that the Border Patrol claims the authority to operate anywhere within 100 air miles of the US border – and that ‘border’ in this context includes not just the Canadian and Mexican borders, but also the coastline, the Great Lakes, and the like; and hence most major US population centres are in that region.¹²⁹ Accordingly, the majority of US citizens are potentially subject to arbitrary stops and searches by the Border Patrol on the basis of suspicion, not of any kind of crime, but merely of being an immigrant without papers, and where the basis for that suspicion can include the person’s race.

Plano, Illinois is a tiny midwestern town so stereotypically American that it was used in a Superman movie as the site for ‘Smallville’, the fictional rural American town where the Man of Steel was raised to love truth, justice, and the

¹²⁶ E Pilkington, “‘These Are His People’: Inside the Elite Border Patrol Unit Trump Sent to Portland’ (*The Guardian*, 27 July 2020) www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac; S Olmos, M Baker and Z Kanno-Youngs, ‘Federal Agents Unleash Militarized Crackdown on Portland’ (*The New York Times*, 17 July 2020) www.nytimes.com/2020/07/17/us/portland-protests.html; J Ismay, ‘A Navy Veteran Had a Question for the Feds in Portland. They Beat Him in Response’ (*The New York Times*, 20 July 2020) www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html; T Jawetz, PE Wolgin and C Flores, ‘5 Immediate Steps To Rein in DHS in the Wake of Portland’ (*Center for American Progress*, 2 September 2020) www.americanprogress.org/issues/immigration/reports/2020/09/02/489934/5-immediate-steps-rein-dhs-wake-portland/.

¹²⁷ See also J Levy, ‘Law and Border’ (*Niskanen Center Blog*, 25 July 2018) www.niskanencenter.org/law-and-border/; Cohen (n 115) 20–21; DW Carbado and CI Harris, ‘Undocumented Criminal Procedure’ (2011) 58 *UCLA Law Review* 1543.

¹²⁸ *United States v Brignoni-Ponce* 422 US 873 (1975).

¹²⁹ D Anthony, ‘The U.S. Border Patrol’s Constitutional Erosion in the 100-Mile Zone’ (2020) 124 *Penn State Law Review* 391. The ACLU, ‘ACLU Factsheet on Customs and Border Protection’s 100-Mile Zone’ (*American Civil Liberties Union*) www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone, estimates that this border region contains 2/3 of the US population.

American Way. But Plano is only about 60 miles from Lake Michigan. If you believe the Department of Homeland Security, it's actually part of the border and hence perfectly fair game for all kinds of searches, seizures, and miscellaneous harassment and racial profiling.¹³⁰

Immigration law also serves as a site for experimentation with techniques of lawlessness to be later deployed elsewhere. For example, the indefinite incarceration of people believed to be associated with terrorism in the legal black hole of the Guantanamo Bay military base in Cuba during the War on Terror has rightly subjected the United States to intense criticism.¹³¹ But that was the second use of Gitmo to arbitrarily detain people: a decade beforehand, during the Haitian refugee crisis, the Coast Guard and the INS interdicted refugees on the high seas and held them there, denying them access to counsel or correct information about the right to seek asylum; the Eleventh Circuit held that because the refugees had never reached US soil, they were not entitled to any procedural rights.¹³² The Bush Administration tried to use the very same idea of a space which the writ of US law would not reach, applied to the very same military base, to defend its far more famous use of Gitmo as a black hole for accused terrorists in *Rasul v Bush*.¹³³ Small mercy: the government lost the second time around.

Lawless Racism: The Challenge to Birthright Citizenship

Even the constitutional foundations of citizenship are under attack by those who seek to subordinate immigrants. A number of extreme rightist commentators, some in the academy (or recently departed the academy, as did John Eastman, formerly of Campbell University, who resigned in early 2021 in disgrace after speaking at the rally that led to the 6 January 2021 coup attempt), have advanced frivolous arguments according to which the birthright (*jus soli*) citizenship clause of the Fourteenth Amendment does not apply to US born children of undocumented immigrants on the putative grounds that they were not born under the 'jurisdiction' of the United States – thus directly attacking one of the core achievements of the Black freedom movement.¹³⁴ This argument is

¹³⁰ See also Cohen (n 115) 47–54.

¹³¹ eg, R Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (McGill University Press, 2017) 110–27.

¹³² *Haitian Refugee Center v Baker* 953 F3d 1498, 1505-09 (11th Cir 1992); GL Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197.

¹³³ *Rasul v Bush* 542 US 466 (2004).

¹³⁴ eg JC Eastman, 'From Feudalism to Consent: Rethinking Birthright Citizenship' (*Heritage Foundation*, 2006) www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship. This argument appeared some decades before Eastman in PH Schuck and RM Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale University Press, 1985). As to the Schuck/Smith book, N Gotanda, 'Race, Citizenship, and the Search for Political Community

so blatantly nonsensical that it can be dispatched in a blog post – and I have – and even far-right legal scholars have rejected it.¹³⁵ Nonetheless, Donald Trump went so far as to claim that he could strip away citizenship from the US-born children of immigrants by executive order.¹³⁶

The legal debates about this argument (such as it is), however, are not pertinent to this book. Rather, my point in introducing it is to illustrate the reprise of legal and political ideas first used against freedpeople to the case of immigrants and their children. The theoretical basis of the contemporary attack on birthright citizenship is the idea that citizenship cannot be achieved except by the ‘consent’ of those who are already present; because the American people allegedly have not consented to the presence of undocumented immigrants in the territory, they cannot have consented to including their children as citizens.¹³⁷ But the ‘consent’ argument has been tried before – indeed, we can plausibly interpret the Fourteenth and Fifteenth Amendments as in part a response to it. In 1866, Andrew Johnson opposed Black demands for the vote by assuming ‘the people’ of the South meant white people only and then insisting that he could not force Black members on that community without the consent of that ‘people’.¹³⁸ The affinity of the argument against Black suffrage and the argument against birthright citizenship today can also be seen in the form of at least one contemporary scholar who has gone so far as to reprise the citizenship by consent argument as a defence of Johnson’s and ex-Confederate resistance to Black citizenship after the Civil War: according

Among “We the People” – A Review Essay on Citizenship Without Consent’ (1997) 76 *Oregon Law Review* 233 and GL Neuman, ‘Back to Dred Scott’ (1987) 24 *San Diego Law Review* 485, conclusively dispatch the arguments therein. Fortunately, Smith seems to have moderated his position somewhat, and he has sensibly argued in RM Smith, ‘Living in a Promiseland?: Mexican Immigration and American Obligations’ (2011) 9 *Perspectives on Politics* 545, that the coercive character of the United States’s relationship with Mexican immigrants in particular entitles them to substantial solicitude in immigration and citizenship law.

¹³⁵ P Gowder, ‘Reading the Plain Text of the Birthright Clause in the Fourteenth Amendment’ (*Niskanen Center*, 1 November 2018) www.niskanencenter.org/reading-the-plain-text-of-the-birthright-clause-in-the-fourteenth-amendment/; JC Ho, ‘Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment’ (2006) 9 *Green Bag* 359; J Yoo, ‘Settled Law: Birthright Citizenship and the 14th Amendment’ (*American Enterprise Institute*, reprinted from *The American Mind*, 25 October 2018) www.aei.org/articles/settled-law-birthright-citizenship-and-the-14th-amendment/.

¹³⁶ J Wagner, J Dawsey and F Sonmez, ‘Trump Vows Executive Order to End Birthright Citizenship, a Move Most Legal Experts Say Would Run Afoul of the Constitution’ (*Washington Post*, 30 October 2018) www.washingtonpost.com/politics/trump-eyeing-executive-order-to-end-citizenship-for-children-of-noncitizens-born-on-us-soil/2018/10/30/66892050-dc29-11e8-b3f0-62607289efee_story.html.

¹³⁷ Eastman (n 134) 6–7.

¹³⁸ J Gray Pope, ‘Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon’ (2014) 49 *Harvard Civil Rights-Civil Liberties Law Review* 385, 396–97. A contemporaneous newspaper account of Johnson trotting out these arguments in a meeting with George Downing and Frederick Douglass is in the 8 February 1866 *National Intelligencer*, available at www2.vcdh.virginia.edu/saxon/servlet/SaxonServlet?source=/xml_docs/valley_news/newspaper_catalog.xml&style=/xml_docs/valley_news/news_cat.xml&level=edition&paper=rv&year=1866&month=02&day=16&edition=rv1866/va.au.rv.1866.02.16.xml.

to one Thomas G West of Hillsdale College, giving the vote to Black people was just like forcing a group of immigrants on a community without their consent.¹³⁹

The consent argument also showed up with respect to Indian removal: at least once in the South the notion that the federal government could confer citizenship on Native Americans was taken to entail that the states would no longer be able to exercise control over whom they admitted to their own political communities and ultimately seemed to risk the threat that the enslaved, too, would come to citizenship.¹⁴⁰ In the words of an editorialist in the *Southern Recorder*, admitting that the federal government had the power to include Native Americans ‘would, in the end, deprive the States of all power in deciding what should be the condition, and character, and rights of any description of their inhabitants’.¹⁴¹ We all know which ‘inhabitants’ the editorialist had in mind.

In the United States, protestations of a right to withhold consent on behalf of the white-identified, European/coloniser descended, group that sees itself as the community whose consent is to be sought have always been particularly dishonest, since, of course, the land that group occupies was first taken by military force from the Native American nations, who are also addressed with the ‘plenary power’ doctrine of immigration law and whose members then became just another outsider group to be granted citizenship only by statute rather than by constitutional provision.¹⁴² And, of course, those freed by the Thirteenth Amendment were around only because their ancestors were brought here and incorporated into the territory and the economy by the very people who wanted to later claim the right to ‘consent’ to their sharing of political power. Similarly with respect to the Mexican people who are the victims of the chief stereotypes about ‘illegal immigration’, immigration courts often are also the courts of the conqueror: the US outright seized most of the Southwest from Mexico in the first place via fomenting revolution in, then annexing, Texas and then going to war and seizing more land still in the Treaty of Guadalupe Hidalgo. That’s why Mexican activists often say ‘we didn’t cross the border, the border crossed us’.

The US has purposefully availed itself of its immigrants, documented or undocumented, in numerous ways; for example, by operating industries that depend on undocumented immigrant labour with a nudge and a wink. And Black abolitionists raised precisely this point as an argument for their own citizenship, with or without the ‘consent’ of whites: in 1852, Martin Delany argued

¹³⁹ TG West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Rowman & Littlefield Publishers, 2001) 28–30.

¹⁴⁰ Saunt (n 42) 39–40.

¹⁴¹ Quoted by Saunt from an unsigned editorial of 9 April 1827, which is available in an online archive at gahistoricnewspapers.galileo.usg.edu/lccn/sn82016415/1827-04-09/ed-1/seq-1/.

¹⁴² Cleveland (n 21) 48, 56–58.

that Black Americans had ‘a birthright citizenship – natural claims upon the country – claims common to all others of our fellow citizens’.¹⁴³ The basis for his argument was in substantial part the contributions that Black labour had made to the country – contributions made because Europeans had brought their ancestors from Africa in order to procure them.¹⁴⁴ While immigrants are here more-or-less voluntarily – certainly relative to the enslaved – Delany’s argument about the rightful claim to citizenship of those who are here to do necessary labour that nobody else is able or willing to do applies just as well to the locally-born children of the former as it did to the latter.¹⁴⁵

The birthright citizenship argument illustrates the roots of our contemporary discourse of immigration and alienage in white nationalism and the incompatibility of that white nationalism with the rule of law. The people constructed by law have consented through their laws to the application of the birthright principle in the very text of the Fourteenth Amendment. The only way I can interpret the shocking difficulty that the ‘scholarly’ critics of the birthright principle associated with far-right/West Coast Straussian institutions like the Claremont Institute and Hillsdale College seem to have in understanding that the consent they demand was given a century and a half ago – though I do not claim to know their individual racial attitudes or the contents of their innermost thoughts – is to suppose that they implicitly operate from an assumption similar to that of Andrew Johnson, ie, that the people constituted by law are not the *real* people. And – again with the caveat that I speak here of my interpretation of their arguments and claim no knowledge of their personal dispositions – it’s hard not to suspect that their notions of the true American people are ethno-nationally defined. And because general legal rules neutrally applied do not permit the moment-by-moment rule of the sovereign group (white people), they seem to interpret the neutral application of the Fourteenth Amendment as anti-democratic and anti-national. In short, white people must consent on a moment-by-moment basis to the inclusion of political others; they cannot bind themselves by law in a way that would alienate their control of and identification with the state as nation, nor even make binding commitments to expand the identity of the nation to encompass people other than their own ethnic group.

¹⁴³ M Robison Delany, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States Politically Considered* (Published by the Author, 1852) 48–49.

¹⁴⁴ *ibid* 49–51, 63–66.

¹⁴⁵ In light of the system of global economic hegemony that the US operates, one could fairly deny that immigrants are truly here of their own free will. Notably, Emily Ryo found in interviews with immigrants both that they often experienced their migration to be a matter of necessity and that they understood the violation of immigration laws to be distinct from the violation of criminal laws because immigrants are coming not to harm the community but to benefit it, with honorable and fair work. E Ryo, ‘Less Enforcement, More Compliance: Rethinking Unauthorized Migration’ (2015) 62 *UCLA Law Review* 622, 650–56.

All this talk about ‘consent’ and ‘allegiance’ should be exposed for what it is: another version of the phenomenon that Charles Tilly named ‘opportunity hoarding’.¹⁴⁶ Ultimately the two themes of this book come together in the way that the dominant groups within the United States have since the founding treated membership in the legal community itself as a kind of property, to which they have some kind of pre-existing claim of natural right – and hence have twisted the universalistic ambitions of law for the purpose of the benefit of their own narrow group. But here I need do no more than to cite Cheryl Harris, who has made this point with great force.¹⁴⁷

¹⁴⁶ C Tilly, *Durable Inequality* (University of California Press, 1999).

¹⁴⁷ Harris (n 26).