

2013

## Immigration, Sovereignty, and the Constitution of Foreignness

Matthew J. Lindsay

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### Recommended Citation

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# CONNECTICUT LAW REVIEW

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VOLUME 45

FEBRUARY 2013

NUMBER 3

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## Article

### Immigration, Sovereignty, and the Constitution of Foreignness

MATTHEW J. LINDSAY

*It is a central premise of modern American immigration law that immigrants, by virtue of their non-citizenship, are properly subject to an extra-constitutional regulatory authority that is inherent in national sovereignty and buffered against judicial review. The Supreme Court first posited this constitutionally exceptional authority, which is commonly known as the “plenary power doctrine,” in the 1889 Chinese Exclusion Case. There, the Court reconstructed the federal immigration power from a form of commercial regulation rooted in Congress’s commerce power, to an instrument of national self-defense against invading hordes of economically and racially degraded foreigners.*

*Today, generations after the United States abandoned overtly racist immigration policies, such as Chinese exclusion and national origins quotas, the Supreme Court continues to reaffirm Congress and the President’s virtually unchecked authority over the admission, exclusion, and removal of non-citizens, as though such authority were a logical concomitant of national sovereignty. Accordingly, modern judicial defenders of the plenary power doctrine generally turn a blind eye to the indecorous racial reasoning deployed by its architects. This Article argues that although the language of race and invasion has been purged from the vocabulary, and perhaps worldview, of most modern policymakers and judges, the logic of foreign aggression remains indispensable in accounting for a power unmoored from the Constitution and shielded from judicial scrutiny.*

*Throughout the nation’s first century, the Supreme Court found nothing constitutionally exceptional about a statute that governed foreigners engaged in the process of immigration. Immigrants’ non-citizenship was incidental to the nature of the regulatory authority to which they were subject. Non-citizenship became a trigger for extra-constitutional authority only in the final decades of the nineteenth century, as Chinese and “new” European migrants alike increasingly became understood as fundamentally and permanently alien to the national character. This Article demonstrates that it was precisely this perception of immigrants’ essential, indelible foreignness—their racial difference, their inability to assimilate, their corrosive effect on American citizenship—that gave substance to the metaphor of racial invasion, and thus to the Court’s analogy between immigration regulation and war. The Court’s intemperate defense of American citizenship against invading foreign races cannot, therefore, be swept aside as anachronistic dicta cluttering the otherwise logically sound foundation of immigration exceptionalism; rather, it is the cornerstone of the entire edifice.*

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# Immigration, Sovereignty, and the Constitution of Foreignness

MATTHEW J. LINDSAY\*

## I. INTRODUCTION

In 1954, the Supreme Court upheld the deportation of a non-citizen named Juan Galvan because he had briefly been a member of the Communist Party decades earlier, at a time when such membership was neither illegal nor grounds for deportation.<sup>1</sup> Galvan had lived in the United States legally for thirty-six years, had an American wife and four native-born American children, and, the evidence showed, had always been “a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of government.”<sup>2</sup> Yet for the mere act of “joining a lawful political group,” Galvan stood to lose “his job, his friends, his home, and maybe even his children, who must choose between their father and their native country.”<sup>3</sup> Writing for the majority, Justice Frankfurter acknowledged that because Galvan was a “person” who “legally became part of the American community,” he should, at least in theory, be entitled to “the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen.”<sup>4</sup> But Galvan’s status as a non-citizen changed everything. The exclusive entrustment to Congress of policies bearing on the right of aliens to enter or remain in the country, Frankfurter explained, “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”<sup>5</sup>

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<sup>1</sup> *Galvan v. Press*, 347 U.S. 522, 523, 528, 532 (1954). Galvan faced deportation under a provision of the Internal Security Act of 1950 requiring the Attorney General to deport aliens who had ever been “members of or affiliated with . . . the Communist Party of the United States.” Internal Security Act of 1950, Sec. 22 (C), § 1(2), 64 Stat. 987; *Galvan*, 347 U.S. at 523.

<sup>2</sup> *Galvan*, 347 U.S. at 532–33 (Black, J., dissenting).

<sup>3</sup> *Id.* at 533.

<sup>4</sup> *Id.* at 530. Deportation was “a drastic measure . . . at times the equivalent of banishment or exile,” Frankfurter acknowledged. *Id.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). Deportation could “deprive a man of ‘all that makes life worth living.’” *Id.* (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

<sup>5</sup> *Id.* at 531.

The modern federal immigration power, which is commonly known as the “plenary power doctrine,” is defined by two features. First, Congress’s authority to regulate immigration derives not from any constitutionally enumerated power, but is rather “an incident of sovereignty belonging to the government of the United States.”<sup>6</sup> Second, federal laws or enforcement actions that bear on a non-citizen’s right to be present within the country are buffered against judicially enforceable constitutional constraints.<sup>7</sup> The extent to which governmental authority is constitutionally constrained is thus contingent on the citizenship status of the person who is subject to that authority, rather than (as would normally be the case) the subject-matter or purpose of the regulation involved. This is true even when the constitutional protection at issue—be it the First Amendment or the Due Process and Equal Protection Clauses—makes no distinction between “persons” and “citizens.”<sup>8</sup> Indeed, even as Justice Frankfurter upheld Juan Galvan’s deportation, he was struck by “a sense of harsh incongruity” between the principle that “the Due Process Clause [normally] qualifies the scope of [Congress’s] political discretion” and the deportation of a long-term resident alien who was innocent of any wrongdoing.<sup>9</sup> Ever since the Supreme Court first adopted the plenary power doctrine in the 1889 *Chinese Exclusion Case*,<sup>10</sup> it has justified the “constitutional exceptionalism”<sup>11</sup> of American immigration law with reference to the purportedly intricate connection between the admission and removal of foreigners and “basic aspects of national sovereignty, more particularly our foreign relations and the national security.”<sup>12</sup> Despite Justice Frankfurter’s misgivings, the Supreme Court continues to reaffirm

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<sup>6</sup> *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

<sup>7</sup> For the classic formulation of the plenary power doctrine, see *The Chinese Exclusion Case*, 130 U.S. at 606–09; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1891); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893).

<sup>8</sup> See, e.g., *Demore v. Kim*, 538 U.S. 510, 530–31 (2003) (Due Process Clause); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488, 491–92 (1999) (First Amendment); *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976) (Equal Protection Clause).

<sup>9</sup> *Galvan*, 347 U.S. at 530–31.

<sup>10</sup> 130 U.S. at 604.

<sup>11</sup> Scholars and courts alike have long noted and often criticized the constitutionally exceptional status of the federal immigration power within American public law. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 13 (1996) (describing the “immigration anomaly” in U.S. constitutional law); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 245 (1995) (observing that immigration is “alienate[d] . . . from other branches of public law”); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 19 (1998) (characterizing immigration as a legal “maverick” and “wild card”); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992) (noting the “singularity” of immigration).

<sup>12</sup> *Galvan*, 347 U.S. at 530. See Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 40 (2010) for a discussion on the “national security rationale” for immigration exceptionalism.

immigration exceptionalism as though it is a natural, self-evident consequence of exclusive citizenship and sovereign nationhood.<sup>13</sup>

This Article challenges the central orthodoxy of modern constitutional immigration law that the regulatory authority to which an immigrant is subject properly hinges on her citizenship status. It argues that, notwithstanding its aura of naturalness, the legal construction of foreignness that underwrites the inherent sovereignty rationale did not take shape in its recognizably modern form until the 1880s. Throughout the nation's first century, immigrants' non-citizenship was incidental, or at least secondary, to the nature of the regulatory authority to which they, as immigrants, were subject. The reasons for this lie largely outside of the law. Until the decades following the Civil War, most Americans shared a broad confidence both in immigrants' moral natures and in the power of American economic and political institutions to transform them into patriotic republicans.<sup>14</sup> During this era of relative confidence, the individual states reserved significant authority over immigrants and immigration under their traditional police powers. State police authority, in turn, depended not on immigrants' status as foreigners, but rather on the *purpose* of the particular regulation at issue. As the objects of the state police power—as potential paupers or carriers of disease, for example—immigrants were simply persons, whose effect on the health, morals, and welfare of the community was, like that of all persons, native and foreign alike, subject to regulation.<sup>15</sup> Even after the Supreme Court re-branded immigrants as articles of commerce in the 1870s to accommodate the transfer of regulatory authority from the individual states to Congress, it did not distinguish between human commercial goods transported from a neighboring state and those transported across an ocean. The Commerce Clause, like the police power, was indifferent to citizenship.<sup>16</sup>

Immigrants were legally reconstructed as foreigners only in the final decades of the nineteenth century, as Europeans and Chinese migrants alike increasingly became understood as fundamentally and permanently alien to the American character.<sup>17</sup> In the 1870s and 1880s, Americans' long-standing confidence in the assimilative power of American institutions came into progressively sharper conflict with the economic and social realities of industrialization, including the triumph of the wage system; the deskilling of labor; and increasingly intense wage competition,

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<sup>13</sup> To be clear, the constitutional "exceptionalism" of the federal immigration power lies not in the fact that some laws apply only to non-citizens. Indeed, that is an irreducible feature of regulating immigration. Rather, immigration law is constitutionally exceptional because constitutional scrutiny varies according to the citizenship status of the persons being regulated.

<sup>14</sup> See *infra* Part III.A.

<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> See *infra* Part IV.B.

<sup>17</sup> See *infra* Part IV.C.

often from recent immigrants. As contemporaries grappled with this conflict, they generally focused less on these broad structural economic changes than on the alleged economic pathologies of immigrants themselves—specifically, a disposition toward “uncivilized” standards of life and labor. Without the requisite economic conditions and racial material, critics argued, simply exposing immigrants to republican political culture and institutions afforded little value as a force of assimilation. As post-Civil War Americans re-imagined their polity as a social and political body, the health of which depended on the collective natural endowments of its constituent members, immigrants’ foreignness came to signify more than merely the absence of citizenship; it became, instead, a token of fundamental, indelible moral difference.<sup>18</sup> The Supreme Court then translated the discourse of indelible foreignness into a potent and durable rationale for immigration exceptionalism, forging the immigration power into an instrument of national “self-preservation” to be deployed against invading armies of economically degraded, politically unassimilable, racially suspect foreigners.<sup>19</sup>

Modern judicial defenders of the plenary power doctrine justify the political branches’ virtually unchecked authority over immigration as a logical concomitant of national sovereignty and, specifically, of the President’s authority to conduct foreign affairs and national security. Accordingly, they generally turn a blind eye to the indecorous references to racial “degradation” and “alien invasion” that color the doctrine’s historical origins, as though they were merely anachronistic dicta—the rhetorical artifacts of a bygone era.<sup>20</sup>

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<sup>18</sup> See *infra* Part IV.C.

<sup>19</sup> See *infra* Part IV.D.

<sup>20</sup> See *Demore v. Hyung Joon Kim*, 538 U.S. 510, 522 (2003) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” (quoting *Mathews v. Diaz*, 426 U.S. 67, 81, n. 17 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952))); *Fiallo v. Bell*, 430 U.S. 787, 792 (1976) (“Our cases ‘have long recognized the power to expel aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1952))); see also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (Kennedy, J., dissenting) (stating that judicial interference with the executive branch’s judgment to detain a removable alien threatens to “undermine the obvious necessity that the Nation speak with one voice on . . . foreign affairs matters”). As the citations above suggest, modern judicial affirmations of the political branches’ plenary power over immigration tend to rely directly on a series of cases from the 1950s, in which the Supreme Court upheld the exclusion or deportation of aliens on political or ideological grounds in the interest of “national security.” Foundational late nineteenth-century cases such as *The Chinese Exclusion Case* and *Fong Yue Ting* are sometimes buried in a string citation, but virtually never quoted directly. The effect is to launder the racially inflected construction of national “sovereignty” and “security” that characterized the birth of the plenary power doctrine through cases that do have a colorable connection to national security (as the concept is currently understood) and that lack the doctrine’s original association with racially discriminatory immigration policy.

This Article demonstrates, to the contrary, that it was precisely the construction of immigrants as indelibly alien to the national character that gave substance to the metaphor of invasion, and thus enabled the Supreme Court to transform the immigration power from a species of commercial regulation to a power “inherent in sovereignty, . . . essential to self-preservation,” and “conclusive upon the judiciary.”<sup>21</sup> As much as the tropes of racial degradation and alien invasion have been purged from the vocabulary, and perhaps worldview, of most modern legislators and judges, the association between immigration regulation and national security remains essential to justifying a power unmoored from the Constitution and shielded from judicial scrutiny.

It is a staple of immigration law scholarship that the racial construction of various immigrant groups, coupled with Americans’ waning faith in assimilation, gave rise to restrictive immigration *policy*, beginning with the Chinese Exclusion Act<sup>22</sup> in the 1880s and ultimately culminating with the national origins quota system in the 1920s.<sup>23</sup> Indeed, Americans’ impulse to defend the nation’s political integrity against corruption by racial others dates to the Naturalization Act of 1790, which restricted access to United States citizenship to “free white persons.”<sup>24</sup> This Article contends that the erosion of confidence in both the assimilative power of republican institutions and the plasticity of immigrants’ moral natures also propelled a deeper and more enduring process of constitutional estrangement, fundamentally redefining the very authority to which immigrants were subject. Even today, generations after the United States abandoned nativist immigration policy,<sup>25</sup> immigrants’ anomalous constitutional status remains

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Regardless of presidential administration, the executive branch routinely invokes national sovereignty, foreign affairs, and national security in support of a robust federal immigration power. *See, e.g.*, Brief of Respondent at 25, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (arguing that judicial deference to the political branches in immigration matters “affords Congress the practical latitude it needs to fulfill its responsibilities for national security, foreign affairs, and nation-building”); Brief of Respondents at 17, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182) (arguing that the federal government possesses exclusive authority to regulate immigration because “the United States’ ‘policy toward aliens is vitally and intricately interwoven with . . . the conduct of foreign relations’” (quoting *Harisiades*, 342 U.S. at 588–89)).

<sup>21</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 705–06 (1893).

<sup>22</sup> Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882).

<sup>23</sup> Immigration Act of 1924, ch. 190, 43 Stat. 153, 155 (1924); *see* SCHUCK, *supra* note 11, at 28 (discussing the quota system); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 357–61 (1997) (discussing Chinese exclusion in the 1880s); DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 142–43 (2002) (discussing the quota system); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 243–45 (2006) (discussing the post-World War I effort to curb immigration).

<sup>24</sup> Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

<sup>25</sup> This liberalization includes, most notably, the abolition of national origins quotas in the Immigration Act of 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

an axiomatic feature of the federal immigration power.<sup>26</sup> As a result, even non-citizens who, like Juan Galvan, have resided legally in the United States for decades lack robust constitutional protections against, for example, improper detention during often lengthy removal proceedings;<sup>27</sup> selection for removal because of otherwise constitutionally protected speech or associations;<sup>28</sup> or discrimination on the basis of alienage with respect to eligibility for public benefits.<sup>29</sup>

Part II of this Article describes the basic ideological framework within which Americans understood and debated immigration law and policy throughout the nineteenth century. It demonstrates that the first generation of American statesmen imagined the very act of immigrating to and incorporating oneself within republican America as a catalyst for personal moral and political regeneration. This confidence in the assimilative power of republican cultural and institutions, in turn, was reflected in the relative liberality of the nation's naturalization laws.<sup>30</sup> Part III analyzes the history of immigration law and politics in the nineteenth-century United States as a history of repeated and progressively sharper clashes between the terms of the regenerative model of immigration and the seismic social and economic transformations of the industrial era. It demonstrates that throughout the nation's first century—a period characterized by broad, if uneven, confidence in assimilation—the absence of citizenship did not operate as a presumptively natural, self-evident marker of legal difference. Rather, the Supreme Court, like most Americans, understood the problems associated with immigration to be local and discrete. As such, their regulation fit comfortably within the province of the states' traditional police authority, which figured immigrants simply as persons, rather than foreigners.<sup>31</sup>

Part IV analyzes the federalization of immigration regulation during the last third of the nineteenth century. When the Supreme Court transferred regulatory authority from the individual states to Congress in

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<sup>26</sup> As the Supreme Court said recently, it is a fundamental premise of constitutional immigration law that, in “the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

<sup>27</sup> *See id.* (upholding mandatory detention of certain “deportable criminal aliens pending a determination of their removability” under 8 U.S.C. § 1226 (2012)).

<sup>28</sup> *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 472–74 (1999) (upholding selection of aliens for deportation on the grounds that they were associated with the Popular Front for the Liberation of Palestine).

<sup>29</sup> *See Mathews*, 426 U.S. at 80 (upholding state welfare eligibility rules disfavoring non-citizens). Non-citizens denied entry at the border enjoy no judicially enforceable constitutional protection. *See Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process.”).

<sup>30</sup> *See infra* Part II.

<sup>31</sup> *See infra* Part III.

the 1870s, it recharacterized immigrants as articles of commerce.<sup>32</sup> Yet the federal commerce power, like the state police power, was indifferent to citizenship. The national economic importance of immigration, for better and worse, defined the nature and scope of congressional authority; it mattered not whether the human cargo was transported from a neighboring state or across the ocean.<sup>33</sup> Even as the Court was anchoring federal authority in the Commerce Clause, however, a swelling chorus of legislators, workers, economists, and others were condemning the degradation of American labor and citizenship by Chinese “coolies” in the American West and European “foreign pauper laborers” in the Northeast.<sup>34</sup> It was this critique that propelled both the legal reconstruction of foreignness and the Court’s discovery of an extra-constitutional regulatory authority that was inherent in the nation’s sovereignty and essential to its “self-preservation.”<sup>35</sup> The Article concludes, in Part V, by considering how this historical genealogy challenges the central orthodoxy of modern constitutional immigration law.

## II. AWAKENING THE “DORMANT SEED OF VIRTUE”: IMMIGRATION AS REGENERATION IN REPUBLICAN AMERICA

As the first American Congress took up its constitutional charge to “establish a[] uniform Rule of Naturalization,”<sup>36</sup> it confronted a basic conflict between two fundamental but potentially incompatible aspirations: the creation of a national political fellowship sustained by the broadly shared republican value of “public virtue,” and the revolutionary ideal of the American republic as an “asylum of liberty” and a refuge to the victims of Old World oppression. This Part describes how the first generation of American statesmen resolved, or at least accommodated, these competing aspirations. They did so, in short, by imagining the very act of immigrating to and incorporating oneself within republican America as a catalyst for personal moral and political regeneration. Under this narrative of immigration as regeneration, the economic opportunities afforded by a

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<sup>32</sup> Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 819 (1996).

<sup>33</sup> See *infra* Part IV.B.

<sup>34</sup> See *infra* Part IV.C.

<sup>35</sup> See *infra* Part IV.D.

<sup>36</sup> U.S. CONST. art. I, § 8, cl. 4. The early congressional debates that shaped the nation’s political posture toward immigration centered not on the creation of “immigration policy” *per se*, understood as the rules governing admission to U.S. territory (e.g., the *number* of immigrants that should be admitted to the country, appropriate *criteria* for admission, and specific *conditions* of continued residence), but rather the admission of foreigners to American citizenship. To the extent that there existed a national “immigration policy” in the 1780s and 1790s, it was largely one of non-intervention, as Congress consistently rejected calls either to deny entry to “undesirable” immigrants, or to offer special inducements, such as subsidies and free land, to would-be migrants. See MARILYN C. BASELER, “ASYLUM FOR MANKIND”: AMERICA 1607–1800, 195–98 (1998).

open continent and easy access to land, coupled with immersion in republican political culture and institutions, would transform the vast majority of European immigrants into patriotic American citizens. This narrative provided the basic framework within which Americans would understand and debate immigration for the next century, and is essential to understanding why, in the final third of the nineteenth century, immigrants became strangers to the Constitution.

A. *The Republican Paradox: The Ideal of Asylum in a Heterogeneous World*

The narrative of immigration as regeneration was deeply embedded in the ideology of republicanism that infused the political culture of the American revolutionary generation. For devoted republicans, the revolution had accomplished more than political independence from England; it had also effected a wholesale transformation in the nature of political authority, the character of society, and the spirit of the people.<sup>37</sup> Republicans viewed politics as the collective pursuit of a transcendent “public good.”<sup>38</sup> The people’s representatives would govern not as advocates for the “partial” interests of individuals or political factions, but as disinterested servants of the entire polity.<sup>39</sup> This collective submersion of private and factional interests required extraordinary moral character on the part of the people and their representatives. Republicans termed such character “public virtue,” and it was the soul and lifeblood of republicanism.<sup>40</sup>

Republicans staked the people’s capacity for public virtue to a model of disinterested, independent citizenship that could be achieved only through economic self-sufficiency. In the republican worldview, men who labored for a wage at the behest of another not only surrendered their economic independence; they subjected their personal autonomy and political will to the authority of their employer.<sup>41</sup> True political independence, and thus the capacity for public virtue, could only be

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<sup>37</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 47–48 (1969) [hereinafter WOOD, *AMERICAN REPUBLIC*] (“Republicanism meant more for Americans than simply the elimination of a king and the institution of an elective system. It added a moral dimension, a utopian depth, to the political separation from England—a depth that involved the very character of their society.”).

<sup>38</sup> *Id.* at 53–55.

<sup>39</sup> *Id.* at 53–59.

<sup>40</sup> *Id.* at 68.

<sup>41</sup> See DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 37–38, 118–19 (1980); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 9–10 (1998).

achieved through the ownership of real property.<sup>42</sup> Accordingly, Jeffersonians of the 1790s sought to preserve the United States as a predominantly agrarian republic of small, independent producer-citizens, and to forestall the emergence of a class of permanent wage workers who would be too preoccupied with the struggle for subsistence and too dependent on their employers to concern themselves with the public good.<sup>43</sup> Jeffersonians thus viewed Alexander Hamilton's program to promote domestic manufactures as a path not to American progress and prosperity, but to the kind of mass economic dependency, class hierarchy, and political subordination that plagued the manufacturing societies of Europe.<sup>44</sup> Indeed, the perpetual agrarianism of the United States, and the personal independence and citizenly virtue that flowed from and sustained it, defined the uniqueness of the American republic.<sup>45</sup>

If faith in the moral character and shared values of the people marked the greatness and beauty of the republican vision, however, even its most ardent partisans recognized that it was, as historian Gordon Wood has noted, "a fragile beauty indeed."<sup>46</sup> The distinctive emphasis on public virtue rooted in collective individual moral character counseled caution toward immigrants who might "bring with them the principles of the governments they leave," as Thomas Jefferson famously warned in 1782.<sup>47</sup> Refugees from European oppression would transmit "the maxims of

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<sup>42</sup> See, e.g., GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 178* (1991); Ruth H. Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 *SIGNS* 37, 40–41 (1987).

<sup>43</sup> See MCCOY, *supra* note 41, at 109–12.

<sup>44</sup> *Id.* at 14–15.

<sup>45</sup> This republican exceptionalism came into sharpest focus in contrast to the dual political and economic oppressions of the Old World. In the most widely read tract on America during the 1780s in Europe and Great Britain, essayist Hector St. John de Crèvecoeur captured the crux of the republican vision from the perspective of a newly landed immigrant:

He is arrived on a new continent . . . It is not composed, as in Europe, of great lords who possess everything and of a herd of people who have nothing. Here there are no aristocratical families, no courts, no kings, no bishops, no ecclesiastical dominion, no invisible power giving to a few a very visible one, no great manufacturers employing thousands, no great refinements of luxury. . . . We are a people of cultivators, scattered over an immense territory, . . . united by the silken bands of mild government, all respecting the laws without dreading their power, because they are equitable. We are all animated with the spirit of an industry which is unfettered and unrestrained, because each person works for himself.

Hector St. John de Crèvecoeur, *What Is an American?*, in *LETTERS FROM AN AMERICAN FARMER AND SKETCHES OF EIGHTEENTH-CENTURY AMERICA* 66, 67 (Albert E. Stone ed., Penguin Books 1981).

<sup>46</sup> WOOD, *AMERICAN REPUBLIC*, *supra* note 37, at 65–66.

<sup>47</sup> THOMAS JEFFERSON, *Notes on Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 187, 218 (Adrienne Koch & William Peden eds., 1944). This was true of many future Jeffersonians and Federalists alike, as the partisan division that would soon come to dominate immigration and naturalization policy (and American politics generally) had not yet coalesced in the 1780s and early 1790s.

absolute monarchies” to their children, who would “infuse into [our legislation] their spirit, warp and bias its direction, and render it a heterogeneous, incoherent, distracted mass.”<sup>48</sup> If the Republic were to “wait with patience” for its current population to grow naturally, rather than inviting foreigners by “extraordinary encouragements,” Jefferson queried, “[m]ay not our government be more homogeneous, more peaceable, more durable?”<sup>49</sup>

This republican commitment to a “homogeneous” national political fellowship sustained by a common pursuit of public virtue coexisted uncomfortably with a second core revolutionary ideal: that of the United States as an “asylum of liberty” and a refuge to the victims of Old World oppression.<sup>50</sup> Indeed, the American Declaration of Independence, and thus the political legitimacy of the American states, was premised on the right of the people to withdraw their allegiance to their countries of birth. Having thus defined their political revolution as a crusade for human freedom, to now prevent the victims of European tyranny from sharing in the blessings of republican liberty would be a repudiation of the nation’s founding principles.<sup>51</sup> In the 1780s and early 1790s, moreover, that ideal meshed almost seamlessly with the mercantilist worldview of the Hamiltonians, under which the acquisition of valuable human capital was a vital arena of international economic competition and the cornerstone of

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<sup>48</sup> *Id.* at 217–18. Because “[c]ivil government . . . must be conducted by common consent,” Jefferson explained, the political values of those who unite to form civil government must “harmonize as much as possible.” *Id.* at 217. At the 1787 Constitutional Convention, Pierce Butler, South Carolina’s future United States Senator and himself a former immigrant, declared himself “decidely [sic] opposed to the admission of foreigners without a long residence in the Country” because they brought with them “not only attachments to other Countries; but ideas of Govt. so distinct from ours that in every point of view they are dangerous.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 236 (Max Farrand ed., 1911).

<sup>49</sup> JEFFERSON, *supra* note 47, at 218. Jefferson thus contested the “present desire of America . . . to produce rapid population by as great importations of foreigners as possible.” *Id.* at 216. Nor were such sentiments limited to Jeffersonians. In response to a 1790 proposal “to let aliens come in, take the oath, and hold lands without any residence at all,” Massachusetts Federalist and future Speaker of the House Theodore Sedgwick denounced the “indiscriminate admission of foreigners to the highest rights of human nature, upon terms so incompetent to secure the society from being overrun with the outcasts of Europe.” 1 ANNALS OF CONG. 1109, 1117 (1790) (Joseph Gales ed., 1834). “[T]heir sensations, impregnated with prejudices of education, acquired under monarchical and aristocratical Governments,” he warned, “may deprive them of that zest for pure republicanism, which is necessary in order to taste its beneficence with that gratitude which we feel.” *Id.*

<sup>50</sup> JEFFERSON, *supra* note 47, at 218; BASELER, *supra* note 36, at 191.

<sup>51</sup> BASELER, *supra* note 36, at 13. In the years since independence from Great Britain, insisted fellow Republican John Swanwick,

it had uniformly been the language of this country that we had in the Western world opened an asylum for emigrants from every country. This was our language: “Come and join us in the blessing we enjoy, in a country large and fertile, and under a Government founded upon the principles of liberty and justice.”

7 ANNALS OF CONG. 423 (1797).

national power and prosperity.<sup>52</sup> As Hamilton explained in 1791, by providing “every possible avenue to emigration from abroad,”<sup>53</sup> the United States would accomplish the dual goals of “opening an asylum to those who suffer”<sup>54</sup> under Europe’s monarchies and enhancing the young nation’s wealth and security by populating the vast, fertile continent with “ingenious and valuable workmen.”<sup>55</sup>

The first generation of American statesmen ultimately mediated these competing postures toward immigration by staking the assimilation of Europe’s outcasts to the unique regenerative power of republican society. The immersion of foreigners in republican political culture, including their liberal naturalization, would transform a motley mass of Old World subjects harboring diverse moral and political constitutions into public-minded, patriotic Americans. Upon arriving in “this great American asylum,” testified the essayist Hector St. John de Crèvecoeur, immigrants underwent a personal “metamorphosis.”<sup>56</sup> The capacity to acquire lands and thus become “freemen,” protected by “indulgent laws” that “stamp[] on them the symbol of adoption,” will “tend[] to regenerate them,”<sup>57</sup> Crèvecoeur explained. Although some statesmen urged the removal of virtually all barriers to American citizenship,<sup>58</sup> for most lawmakers this

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<sup>52</sup> See ZOLBERG, *supra* note 23, at 70.

<sup>53</sup> ALEXANDER HAMILTON, REPORT OF THE SECRETARY OF THE TREASURY OF THE UNITED STATES ON THE SUBJECT OF MANUFACTURES 24 (1791).

<sup>54</sup> *Id.* at 74.

<sup>55</sup> *Id.* at 40. Federalist members of Congress, in particular, shared Hamilton’s goals. During debate over the Naturalization Act of 1790, for example, New York Federalist John Laurance explained his proposal to eliminate any residency requirement for naturalization. “The reason of admitting foreigners to the rights of citizenship,” he explained, “is the encouragement of emigration, as we have a large tract of country to people.” 1 ANNALS OF CONG. 1111 (1790) (Joseph Gales ed., 1834). “[E]very person, rich or poor,” Laurance declared, “must add to our wealth and strength.” *Id.* at 1115. On the mercantilist approach to immigration, see BASELER, *supra* note 36, at 17–18, 152–55, 227–28; ZOLBERG, *supra* note 23, at 69–72.

<sup>56</sup> Crèvecoeur, *supra* note 45, at 68–69.

<sup>57</sup> *Id.* The sooner would-be citizens were incorporated into the American political body, urged leading Federalist Tench Coxe, “[t]he sooner they become useful members; they then grow attached to their new country: they consider themselves as part of it: they adopt the opinions and affections of their new brethren, and soon forget they have adopted them, and imagine they are natural.” Tench Coxe, *An enquiry into the best means of encouraging emigration from abroad, consistently with the happiness and safety of the original citizens; read before the society for political enquiries, at the house of Dr. Franklin, April 20 1787*, in 10 THE AMERICAN MUSEUM, OR, UNIVERSAL MAGAZINE 114, 115 (1791). During congressional debate over the residency requirement for naturalization, for example, Pennsylvanian John Smilie rejected the suggestion that “foreigners, by interfering in our present political system, will injure or destroy it.” 12 ANNALS OF CONG. 573 (1803). A long period of residency was unnecessary, he urged, because “[f]oreigners . . . will soon be merged with ourselves, and instead of introducing among us their sentiments, will soon take up ours.” *Id.*

<sup>58</sup> The most idealistic lawmakers urged that any impediment to the American political fellowship was inconsistent with the young nation’s professed ideals. In opposing a modest two-year residency requirement for naturalization, Representative John Page explained that “we shall be inconsistent with ourselves, if, after boasting of having opened an asylum for the oppressed of all nations, and

regeneration was neither instantaneous nor universal. In crafting a naturalization law, prudence thus counseled that immigrants undergo a period of probation before being admitted to the American political fellowship, both to provide foreigners sufficient time to absorb republican values, and to afford the nation an opportunity to assess their moral and political character. After a decade of extraordinary fluctuation in the requirements for naturalization,<sup>59</sup> from a mere two-year residency in the Naturalization Act of 1790<sup>60</sup> to a high of fourteen years in 1798,<sup>61</sup> Congress settled on a residency requirement of five years—longer than some idealistic advocates of the American asylum had preferred, but still remarkably liberal by historical and international standards.<sup>62</sup> A five-year residency “occasioned the safest and surest transmutation,” explained

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established a Government which is the admiration of the world, we make the terms of admission to the full enjoyment of that asylum so hard as is now proposed.” 1 ANNALS OF CONG. 1110 (1790) (Joseph Gales ed., 1834).

<sup>59</sup> This fluctuation was the product of the politically volatile, intensely partisan 1790s, during which the two political parties essentially reversed their respective postures toward immigration. Federalists, most of whom began the 1790s advocating the aggressive recruitment of foreign immigrants and their liberal admission to citizenship, had by 1798 adopted a highly defensive position on naturalization. Those who would become Jeffersonian Republicans, by contrast, managed to assuage their earlier concern over the anti-republican political values imbibed by Europe’s refugees, and became vocal advocates for the ideal of the United States as an asylum for liberty. BASELER, *supra* note 36, at 243–44. During this period, relatively liberal requirements for naturalization, including a short (or even no) residency requirement and a low (or no) tax on naturalization certificates were widely understood both as inducements to immigration and as a fulfillment of the republic’s world-historical mission to serve as an asylum for the oppressed. More onerous requirements, including longer residency and a substantial tax on naturalization certificates, were believed to check the flow of immigration and to guarantee a measure of fitness on the part of those seeking admission to the American political fellowship. *See id.* at 243–309.

<sup>60</sup> Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

<sup>61</sup> Naturalization Act of 1798, ch. 54, 1 Stat. 566, *repealed by* Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153.

<sup>62</sup> Naturalization Act of 1802, ch. 28, 2 Stat. 153. Thomas Jefferson’s first message to Congress as President, in December of 1801, captures the extent to which Republicans had picked up the mantle of liberal asylum. Having famously worried two decades earlier that immigrants tainted by the “maxims of absolute monarchies” would destroy American law and politics, “render[ing] it a heterogeneous, incoherent, distracted mass,” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 93 (1853), President Jefferson now recommended that, in the interest of human freedom and economic prosperity, Congress reduce the fourteen-year residency requirement imposed by his Federalist foes five years earlier:

Considering the ordinary chances of human life, a denial of citizenship under a residence of fourteen years, is a denial to a great proportion of those who ask it; and controls a policy pursued, from their first settlement, by many of these States, and still believed of consequences to their prosperity. And shall we refuse to the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?

11 ANNALS OF CONG. 16 (1801).

Pennsylvanian Republican Michael Leib.<sup>63</sup> It would impart “knowledge and feeling,” and furnish an “opportunity[] for the intercourse that amalgamated the aliens with us, and gave them a common interest.”<sup>64</sup>

The relative liberality of the 1802 Act<sup>65</sup> cemented the regenerative theory of immigration as the law of the land, and reflected the delicate, self-conscious balance between the republican ideal of liberal asylum and the republican apprehension toward political heterogeneity. This confidence in the regenerative power of republican political culture rested on a deep faith in human moral nature. Even the “most vicious in one country, . . . being separated from their former connexions, and entering into new ones, of a better cast,” instructed the theologian, scientist and political philosopher Joseph Priestley, “may become reformed and useful citizens. Our natures being the same, . . . [s]easonable kindness may awaken the dormant seed of virtue, especially in a country like this.”<sup>66</sup> In contrast to Jefferson’s notably darker appraisal two decades earlier, one’s moral and political constitution was not stamped indelibly by the influences of his youth. Rather, as Priestley’s formulation suggests, Old World immigrants—even those who had imbibed the maxims of monarchy—could be reeducated in the principles and spirit of republicanism. Republicans were not born; rather, they were made.

The narrative of regeneration reflected lawmakers’ hopes and fears regarding not only immigration, but the American republic itself. It evinced a certain optimistic, almost self-congratulatory confidence that the transformative power of geography and political institutions would preserve for all time the core republican values of personal independence and citizenly virtue. Below the surface, however, lurked the same dangers that threatened virtuous citizenship generally: concentrations of population, a permanent class of “dependent” laborers, and entrenched social and political stratification. As went immigration, so went the Republic. Indeed, in the coming decades, the perceived viability of the regenerative theory of immigration would, in certain respects, serve as a referendum on the vitality of American republicanism itself. Thus freighted with the

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<sup>63</sup> 12 ANNALS OF CONG. 576 (1803).

<sup>64</sup> *Id.* A period of residency, Leib insisted, rather than a mere oath of allegiance, provided “the surest standard by which to test the desire for citizenship; it was action, and not declaration; it was fact and not theory.” *Id.*

<sup>65</sup> See generally ZOLBERG, *supra* note 23, at 78–98. The 1802 Act also retained other prerequisites for naturalization imposed by Federalists several years earlier that were intended to constrain aliens’ political influence and ensure that they gained a proper attachment to the United States and its government. These included requirements that an alien swear an oath three years prior to naturalization declaring her intention to become an American citizen; renounce her allegiance to any foreign sovereign; and register with a court upon initial arrival in the United States. Naturalization Act of 1802, ch. 28, 2 Stat. 153.

<sup>66</sup> Joseph Priestley, “*A Charity Sermon for Poor Emigrants*,” in HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM 708, 711 (Edith Abbott ed., 1926).

weight of the American Republic, this amalgam of strength and vulnerability established the terms in which legislators, judges, workers, economists, and political intellectuals would give meaning to immigrants and immigration for the next century.

B. *Aliens, Persons, and Regulatory Authority in the Early Republic: The Alien Friends Act of 1798*

The Constitution charges Congress with establishing a uniform rule of naturalization,<sup>67</sup> but it is otherwise silent regarding either the authority to regulate immigration or the constitutional rights of immigrants. The first and only sustained analysis of those issues during the Founding Era came in the politically heated, intensely partisan debate over the Alien Friends Act of 1798.<sup>68</sup> The Act authorized the President to order the removal of any alien, regardless of country of origin, that he judged “dangerous to the peace and safety of the United States,” or had “reasonable grounds” to suspect was engaged in treason or “secret machinations” against its government.<sup>69</sup> Congressional debate between the Act’s Federalist sponsors and its Republican opponents revealed the great extent to which the question of whether aliens had constitutional rights was intertwined with the question of whether the authority to regulate immigration resided with the federal government or the states.

The Alien Friends Act was a key component of the infamous Alien and Sedition Acts, and the most brazen statutory expression of the anti-alien frenzy stoked by Federalists in the closing years of the eighteenth century.<sup>70</sup> In defense of the Act, Federalists argued, first, that

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<sup>67</sup> U.S. CONST. art. I, § 8.

<sup>68</sup> It was so designated in order to distinguish it from the Alien Enemies Act, which was part of the same package of legislation and applied only to subjects of nations with which the United States was at war. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21 (2006)).

<sup>69</sup> Alien Act, ch. 58, 1 Stat. 571 (1798).

<sup>70</sup> During the so-called “quasi-war” with France, and amidst mounting apprehensions about the growing radicalism of the French Revolution, French conspiracies against American liberty, and the infection of American politics by European Jacobinism, Federalists admonished the nation, to great short-term partisan political benefit, that the tree of republican liberty would be devoured root and branch by alien enemies who had infiltrated the American polity. See BASELER, *supra* note 36, at 272. The “quasi-war” included the severing of diplomatic relations between the countries as well as actual naval combat. ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* 126–30 (1966); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 87–92 (2002). In the months preceding the Alien and Sedition Acts, Federalists in Congress had exploited the nation’s nativist mood to adopt two measures that were widely understood to discourage immigration—first, to lay a heavy (twenty dollar) tax on naturalization certificates, and second, to nearly triple the residency requirement for admission to American citizenship, from five to fourteen years. See 7 ANNALS OF CONG. 423 (1797) (discussing the tax); Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, *repealed by* Act of Apr. 14, 1802, ch. 28, § 5. Debate over the Alien Friends Act, including both initial passage of the law and subsequent efforts to

congressional—and, by delegation, presidential—authority to remove at will politically suspect foreigners was rooted in Congress’s constitutional power to defend the nation against foreign invasion; and second, that aliens were not entitled to constitutional protections against summary removal because they were not “parties” to the Constitution.<sup>71</sup> Although the Act’s narrow passage marked a short-term legislative victory for Federalists in Congress, the Act proved wildly unpopular among the American public, and contributed to the Republican electoral triumph in 1800 and the subsequent demise of the Federalist Party.<sup>72</sup> In fact, the constitutional arguments advanced by Republicans in opposition to expansive federal authority over immigration better reflected mainstream political and legal opinion both at the time and in subsequent decades.<sup>73</sup> After briefly describing the Federalist argument in support of the Alien Friends Act, this Section therefore turns its focus to the constitutional arguments developed by the Act’s Republican opponents.

Both supporters and critics of the Act recognized that it granted to the President extraordinary discretionary power. In rebuttal to Republican charges that the Act usurped the rightful, inherent authority of the states to regulate the presence of foreigners within their territory, Federalists lodged the constitutional power to expel foreigners squarely in Congress’s duty of national self-defense.<sup>74</sup> The Constitution was designed to “embrace all our exterior relations,” explained Massachusetts Federalist Harrison Gray Otis, the leading congressional critic of liberal immigration policies.<sup>75</sup> “The great objects of peace and war, negotiations with foreign countries, the

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repeal it, spanned two sessions of Congress and spilled into the Virginia and Kentucky legislatures, which adopted resolutions drafted by James Madison and Thomas Jefferson, respectively, forcefully denouncing the Act on constitutional grounds. See THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798 22–23, 162–67 (1850).

<sup>71</sup> See 9 ANNALS OF CONG. 2987 (1799) (“[T]he Constitution was made for citizens, not for aliens, who of consequence have no rights under it.”).

<sup>72</sup> As the historian Marilyn Baseler writes, “[t]he election of 1800 was a referendum on—and a repudiation of—the Federalist ‘doctrines’ enunciated in the debates” over, among other things, the Alien Friends and Naturalization Acts of 1798. BASELER, *supra* note 36, at 287.

<sup>73</sup> As Baseler explains, “Subsequent Republican victories in the early nineteenth century validated their principles and vision for the future of the United States, whereas the Federalist principles and pronouncements of the late 1790s were increasingly seen as archaic holdovers or temporary aberrations induced by ‘wartime’ hysteria.” *Id.* at 288.

<sup>74</sup> A House Report assessing the constitutionality of the Alien Friends Act explained:

The right of removing aliens, as an incident to the power of war and peace, according to the theory of the Constitution, belongs to the Government of the United States. . . . Congress is required to protect each State from invasion, and is vested . . . with [the] power to . . . remove from the country, in times of hostility, dangerous aliens, who may be employed in preparing the way for invasion.

9 ANNALS OF CONG. 2986 (1799). The Act’s principle congressional advocates echoed this rationale.

<sup>75</sup> 8 ANNALS OF CONG. 1986 (1798).

general peace and welfare of the United States,” Otis maintained, “must be provided for and maintained by the National Government.”<sup>76</sup> State authority must therefore “vanish before the obligation of the General Government to provide for the common defence.”<sup>77</sup> An exceptional, imminent foreign threat to the nation’s security warranted a constitutionally extraordinary power to expel foreigners.<sup>78</sup>

Federalists simultaneously denied that aliens even possessed the constitutional criminal rights that the Act was alleged to abridge, including the right to an indictment, to trial by jury, and to confront witnesses against them. “[T]he asylum given by a nation to foreigners [was] a mere matter of favor”<sup>79</sup> rooted in the government’s policy of “courtesy and humanity,”<sup>80</sup> Otis maintained, rather than in any “claim [of] equal rights.”<sup>81</sup> He found nothing in the Constitution “which bound us to fraternize with the whole world,” and condemned Republicans’ “very erroneous hypothesis, that aliens are parties to our Constitution, that it was made for their benefit as well as our own and that they may claim equal rights and privileges with our own citizens.”<sup>82</sup>

If the adoption of the Alien Friends Act represented a dramatic short-term political triumph for the Federalist Party, however, it proved virtually inconsequential as a matter of national policy.<sup>83</sup> The long-term importance of the Act lay instead in the galvanizing effect that it had on Republicans, spurring them to develop competing, and ultimately much more influential, accounts of the constitutional status of immigrants and governmental authority over immigration. Republican House leaders Edward Livingston of New York and Albert Gallatin of Pennsylvania spearheaded the opposition to the Act. They refuted at length the dual Federalist contentions that foreigners lacked constitutional rights, and that the Constitution permitted the federal Congress and President to usurp the

<sup>76</sup> *Id.* at 1986.

<sup>77</sup> *Id.* Otis continued: “[N]o other authority is competent to these great duties; no other can judge of the necessity of measures preparatory to the national defence, nor enforce such measures with general effect.” *Id.*

<sup>78</sup> *See, e.g.*, 8 ANNALS OF CONG. 1987 (1798) (“If we find men in this country endeavoring to spread sedition and discord; who have assisted in laying other countries prostrate; whose hands are reeking with blood, and whose hearts rankle with hatred towards us—have we not the power to shake off these firebrands?”); *id.* at 1992 (“Are we to wait . . . until the dagger is plunged into our bosoms, before we take any means of defence?”).

<sup>79</sup> *Id.* at 2986.

<sup>80</sup> *Id.* at 2019; *see also id.* at 1983 (stating that the United States’s authority “to withdraw their protection to aliens . . . is bounded only by sound discretion”).

<sup>81</sup> *Id.* at 2018.

<sup>82</sup> *Id.* (“[U]pon reading the Constitution, [Otis] found that ‘we, the people of the United States,’ were the only parties concerned in making that instrument. . . . [U]ntil [foreigners are] entitled [to American citizenship,] they cannot complain of any breach of our Constitution.”).

<sup>83</sup> The Act expired by its own terms after two years, in 1800, and no alien was ever deported under the Act. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 33 (2004); ZOLBERG, *supra* note 23, at 310.

authority of the states to regulate immigration.<sup>84</sup> Republicans rejected the argument made by Otis and others that “the Constitutional compact was made between citizens only, and that, therefore, its provisions were not intended to extend to aliens.”<sup>85</sup> “[T]he Constitution expressly excludes any . . . distinction between citizen and alien,” Livingston maintained, and it was “an acknowledged principle of the common law . . . that alien friends . . . residing among us, are entitled to the protection of our laws.”<sup>86</sup> Citizens and aliens alike thus enjoyed “the same equal distribution of justice [and] . . . the same humane provision to protect their innocence.”<sup>87</sup> So indistinguishable was the constitutional status of aliens and citizens, Livingston warned, that the same rationale for subjecting “a few unprotected aliens” to the Act’s “inquisitorial power” would “apply with equal strength . . . in the case of citizens.”<sup>88</sup> The same “plea of necessity,” he warned, could justify the banishment of both.<sup>89</sup>

Republicans condemned the bill as a frontal assault on the Constitution—a “sacrifice of the first-born offspring of freedom . . . by those who gave it birth”<sup>90</sup>—that violated the fundamental tenets of both separation of powers and federalism. By withholding constitutional criminal rights from the “accused,” and vesting the unchecked discretion to judge “dangerousness” in the person of the President, critics charged, the Act transferred judicial power from the courts to the Executive.<sup>91</sup> The effect was to “confound these fundamental powers of Government, vest them all in . . . unqualified terms in one hand, and thus subvert the basis on which our liberties rest.”<sup>92</sup>

Republicans voiced even greater concern, however, over Congress’s invocation of its constitutional authority to wage war and repel invasion. “[I]nstead of being bound by a Constitution,” a Congress acting under a

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<sup>84</sup> *Infra* notes 86–101 and accompanying text.

<sup>85</sup> *Id.* at 8 ANNALS OF CONG. 2012 (1798).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2013.

<sup>89</sup> *Id.* By the terms of the Constitution, Livingston continued,

“all crimes” are to be tried by jury; “no person” shall be held to answer unless on presentment; in all “criminal prosecutions” the “accused” is to be informed of the nature of the charge; to be confronted with the witness against him; . . . and is to be allowed counsel for his defence. Unless, therefore, we can believe that the treasonable machinations and the other offenses described in the bill are not “crimes;” that an alien is not a “person;” and that one charged with treasonable practices is not “accused” . . . we must allow that all these provisions extend equally to aliens and natives, and that the citizen has no other security for his personal safety than is extended to the stranger who is within his gates.

*Id.*

<sup>90</sup> *Id.* at 2015.

<sup>91</sup> *Id.* at 1013–15.

<sup>92</sup> *Id.* at 2007–08.

virtually unrestrained war power could “justify any measure [it] may please to adopt,” though in fact impelled by mere “suspicions, alarms, popular clamor, private ambition, and by the views of fluctuating factions.”<sup>93</sup> As a consequence, “all the reserved powers of the people or of the States will be swallowed up at [Congress’s] pleasure by that undefined discretion.”<sup>94</sup> Because “[t]he Constitution gives to Congress no power over aliens, except that of naturalization,” Republicans maintained, the power “remains with the States to give to aliens the rights of denizens.”<sup>95</sup> Several representatives recalled that the Declaration of Independence included in its list of grievances the British Crown’s hindering of foreign immigration to the American colonies.<sup>96</sup> Notably, even Federalist supporters of the Act conceded that under normal circumstances “the power of admitting foreigners . . . remained with the states.”<sup>97</sup>

And indeed, Republicans noted that state legislatures had long acted on the presumption that the individual states had “reserved to themselves the power of regulating what relates to emigrants.”<sup>98</sup> That presumption, moreover, was rooted in the fundamentally local nature of immigration policymaking, shaped, as it was, by the specific demographic and economic circumstances within each state. While “States whose population is full, and to which few migrations take place, are little concerned” with the bill’s potential to discourage immigration, urged Gallatin, it was of great “consequence . . . to those States whose population is thin, and whose policy it has always been to encourage emigration.”<sup>99</sup> By way of illustration, Republicans cited various laws that had been passed by their respective state legislatures “for the express encouragement of emigration.”<sup>100</sup> “Not only in some States have aliens been enabled to purchase, to hold, to inherit, and to leave by will, real estates,” Gallatin recounted, “but many have actually been admitted in some States . . . to all

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<sup>93</sup> 9 ANNALS OF CONG. 2996 (1799) (statement of Rep. Gallatin).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2000. Gallatin acknowledged that “Congress has the power to declare war, and to punish any persons guilty of treasonable practices,” but insisted that “what relates to aliens as suspicious characters, the Government of the United States has no cognizance of.” 8 ANNALS OF CONG. 1977 (1798).

<sup>96</sup> *See, e.g.*, 9 ANNALS OF CONG. 2023 (1799) (statement of Rep. Smith); *id.* at 1983 (statement of Rep. Gallatin).

<sup>97</sup> *Id.* at 1986 (statement of Rep. Otis); *see also id.* at 1991 (statement of Rep. Harper) (“allow[ing] that the States have a right to admit such foreigners as they think proper till a certain period” but insisting that “the General Government is, in the meantime, charged with the common defence”).

<sup>98</sup> *Id.* at 2022 (statement of Rep. Smith).

<sup>99</sup> *Id.* at 1982.

<sup>100</sup> *Id.* at 2022 (statement of Rep. Smith); *see also id.* at 1982 (statement of Rep. Gallatin) (“It had been an established principle in Pennsylvania, from its first establishment to the present time [to hold out] every encouragement . . . to emigrants of all nations.”).

the rights of citizens of those states.”<sup>101</sup>

Congressional debate surrounding the Alien Friends Act reveals the great extent to which the first generation of American statesmen understood foreign immigration to implicate fundamentally local, rather than national, concerns. In all but the most exceptional circumstances, Republicans and Federalists agreed, foreign migrants were properly subject to state, rather than federal, authority.

### III. AN UNEXCEPTIONAL POWER: IMMIGRANTS AS PERSONS IN THE ERA OF CONFIDENCE

The history of immigration law and politics in the nineteenth century is, in an important respect, a history of repeated and progressively sharper clashes between the regenerative model of assimilation and the seismic social and economic transformations of industrial era: the concentration of population and industry; the emergence of a permanent, “dependent” wage-earning class; and, finally, the shifting origin of America’s immigrants. In the eight decades between the nation’s founding and the Civil War, Americans’ relative confidence in the transformative power of immigration and in immigrants’ capacity for moral and political regeneration directly shaped both the political construction of immigrants and their legal identity as objects of regulation. During that period, the perceived viability of the regenerative theory of immigration served as a referendum on the vitality of American republicanism itself. As went immigration, so went the Republic.

This Part analyzes the relationship between Americans’ relative faith in assimilation, the regulatory construction of immigrants, and the evolution of state and federal authority to govern immigrants and immigration. Section A describes the ongoing defense and adaptation of the regenerative model of immigration in the face of social and economic changes that threatened to upend its core republican premises. Section B then explains that throughout the first two-thirds of the nineteenth century both the interests implicated and problems caused by foreign immigration were understood by state governments and, to a point, by the United States Supreme Court, in fundamentally local terms that warranted state, as opposed to federal, regulation. States thus reserved substantial authority to regulate immigration under their traditional police powers. The state police power figured immigrants not as foreigners *per se*, but rather as persons, whose effect on the health, morals, and welfare of the community was governed under the same terms as that of citizens.

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<sup>101</sup> *Id.* at 3000 (statement of Rep. Smith); *see also* 8 ANNALS OF CONG. 2022–23 (1798) (statement of Rep. Smith).

### A. *Immigrants as Americans in Waiting*

The narrative of immigration as regeneration imagined the republican system itself, as well the economic arrangements on which that system rested, as a great hopper of assimilation with the capacity to transform the oppressed dregs of the Old World into patriotic republicans. The regeneration narrative evinced a certain optimistic, almost self-congratulatory confidence that the transformative power of geography and political institutions would preserve for all time the core republican values of personal independence and citizenly virtue. Notwithstanding the hopper's tremendous power, however, its machinery was also remarkably fragile. Its effectiveness depended entirely on the integrity of its various constituent parts: independent, virtuous citizenship rooted in individual economic proprietorship; the immersion of immigrants in social and political institutions that promoted the adoption of republican values; and finally, the moral and political natures of immigrants themselves. These were the essential conditions of the nation's liberal immigration and naturalization policy, and virtually from the beginning they appeared threatened by the same dangers that jeopardized virtuous republican citizenship generally: concentrations of population in great manufacturing centers; the clustering of immigrants into ethnic enclaves where, instead of assimilating, they allegedly formed distinct political identities and interests defined by their shared national origins; and finally, the emergence of a permanent class of "dependent" laborers.

Over the first half of the nineteenth century, even as Americans developed progressively sharper critiques of immigration, they nevertheless retained a basic faith in the fundamental moral natures of immigrants and in the capacity of American economic and political institutions to transform foreign migrants into patriotic republicans. The problems associated with European immigration were generally considered fatal neither to the nation's historically liberal immigration and naturalization policy, nor to the regeneration narrative that underwrote that liberality. So long as immigrants were properly diffused throughout the nation, contemporaries maintained, the warm bath of economic freedom and republican political fellowship would dissolve away the residue of Old World economic and political oppression, and infuse them with economic and political independence, habits of strenuous labor, and devotion to their adopted nation. It was only in the late 1840s and 1850s that a politically robust nativist movement gained broad support and political influence. There began to take hold a critique of immigrants as fundamentally, irredeemably foreign, animated by a deep suspicion that they either carried no "dormant seed of virtue" as a matter of nature, or, if they once had, that

it had atrophied beyond any hope or revival.<sup>102</sup> Although the nativist movement was ultimately unsuccessful in its primary policy demand—the extension of the period of residency required for naturalization—and was soon swallowed up by the Civil War and the increased demand for immigrant labor, it nevertheless represents an important chapter in the legal construction of foreignness. This Section describes the defense and adaptation of the narrative of immigration as regeneration during the first half of the nineteenth century, and how that narrative was strained, but not broken, during the nativist crescendo of the 1850s.

### 1. *Challenges of Assimilation in the Young Republic*

In an 1835 article published in the prestigious *North American Review*, Henry Duhring, a German immigrant, prominent Philadelphia merchant, and well known writer, crystallized both the mounting political and ideological challenges posed by the swelling tide of poor immigrants, and the ways in which Americans adapted and qualified the national regeneration narrative in order to meet those challenges. Duhring cautioned that, in recent decades, as the United States had become “the natural and undoubted receptacle of the surplus population of Europe,”<sup>103</sup> Americans had been so “keenly engrossed by the task of counting our rapidly multiplying millions”<sup>104</sup> that they had failed to grasp the emerging threat to American social and political institutions. In order to preserve the American “sanctuary” as “the best and perhaps last hope of the human family,” Duhring urged the nation to exercise some “regulating superintendence” over “the enormous influx of foreign emigrants.”<sup>105</sup> Should the nation neglect to do so, he concluded, “our social character be liable to be infected by the vices and misery of older countries, from a too rapid absorption of their redundant population, or our political institutions exposed to overthrow and corruption by the undue accession of unassimilating elements.”<sup>106</sup> Notwithstanding his call to action, however, Duhring maintained the two basic faiths that underlay the nation’s tradition of immigration liberalism: first, that the vast majority of the nation’s immigrants shared with Americans a fundamental moral nature, and thus the capacity for regeneration; and second, that the nation’s great assimilationist hopper would continue to transform Europe’s “surplus population” into patriotic republicans.

The problem, Duhring explained, was that the “residue”<sup>107</sup> of the

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<sup>102</sup> See Priestley, *supra* note 66, at 711 (using the phrase “dormant seed of virtue” to describe the redeemable moral natures of Old World immigrants).

<sup>103</sup> Henry Duhring, *Immigration*, 40 N. AM. REV. 457, 459 (1835).

<sup>104</sup> *Id.* at 458.

<sup>105</sup> *Id.* at 459.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 461.

immigrant stream too often settled in the nation's port cities, where, "so far from being speedily and systematically absorbed into the mass of the native population and dispersed throughout the country, they are allowed by the neglect or indifference of the nation to collect in masses and to settle upon particular points of the body politic."<sup>108</sup> There they remained "insulated from all the friendly influences of the society into which they have been transplanted," unable to "undergo that nationalizing process, which can only result from intimate and friendly contact in the walks of private business and domestic life."<sup>109</sup> The problem was especially acute among Irish immigrants, who had been reduced by "destitution and misery" to a "state of disqualification for every pursuit of laborious and persevering industry"<sup>110</sup> and were "most inclined to linger about the cities by which they have been first received."<sup>111</sup> The condition was not unique to the Irish peasantry, however. "[B]y robbing labor of its just fruits, and diverting so large a portion to the supply of the church and state," Duhring explained, the governments of Europe had "deprived the individual of a just reliance upon his own resources and prevented the acquisition of those habits of patient and unremitting application, which can scarcely be implanted with success, except in early life and by the animating expectation of a fair and certain profit on personal effort."<sup>112</sup> As there was

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<sup>108</sup> *Id.* at 464.

<sup>109</sup> *Id.* at 461–62. The Society for the Prevention of Pauperism in the City of New York similarly lamented the mass of poor immigrants who, upon arrival in New York, "instead of seeking the interior, . . . cluster in our cities, or sojourn along our sea-board, depending on the incidents of time, charity, or depredation, for subsistence." SOC'Y FOR THE PREVENTION OF PAUPERISM, SECOND ANNUAL REPORT ON THE MANAGERS OF THE SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, DEC. 29, 1819, TO WHICH IS ADDED AN APPENDIX, ON THE SUBJECT OF PAUPERISM 19 (1920) [hereinafter SECOND ANNUAL REPORT].

<sup>110</sup> Duhring, *supra* note 103, at 469. The Irish were frequently singled out for their alleged difficulties in assimilating. Francis Lieber, the noted jurist, political economist and public intellectual, explained that, because the "great and laudable desire" of a German immigrant "is always to get a form, and to own it," he "generally remains in a large city only so long as he cannot help it." The Irish, however, were "very different." "[T]hey prefer the cities, and wherever you meet with a populous place in the United States . . . you are sure to find a great number of poor Irish in and about it." 1 FRANCIS LIEBER, THE STRANGER IN AMERICA 84–85 (1835). They likewise "clan more together than the emigrants from any other nation," Lieber observed. 2 FRANCIS LIEBER, THE STRANGER IN AMERICA 40 (1835). Timothy Dwight, the renowned theologian and President of Yale College, voiced a typical critique of the Irish character: "From their extreme ignorance, their apprehensions concerning moral obligation must be essentially defective; and this defectiveness must be increased by the doctrines taught in the Romish church concerning absolution, indulgences, and other licentious tenets." 3 TIMOTHY DWIGHT, TRAVELS; IN NEW-ENGLAND AND NEW-YORK 533 (1822). Even the character of the Irish, however, by consensus the least assimilable of America's immigrants, was understood to be morally redeemable. The various "evils" associated with Irish immigrants, Dwight explained, were "not . . . derived from the native character of these people." The Irish were "[un]surpassed in native activity of mind, sprightliness, wit, good-nature, generosity, affection, and gratitude. Their peculiar defects, and vices . . . are owing to the want of education, or to a bad one." *Id.*

<sup>111</sup> Duhring, *supra* note 103, at 466.

<sup>112</sup> *Id.* at 461.

“no charm in the middle passage to remove from [their] character the impress of recklessness and ignorance,”<sup>113</sup> such immigrants “landed on the quays of New York, Boston or Philadelphia” in a state of arrested moral development.<sup>114</sup>

To awaken in each immigrant the dormant seed of virtue, Duhring counseled, Americans needed to instill in him the value of “property and independence.”<sup>115</sup> In order to set the immigrant on “a course of rigorous self-denial and strenuous exertion,” it was “necessary to implant in him a taste for many of the gratifications of life to which he has hitherto been a stranger, and to enlarge the scope of his purposes beyond the mere support of a reckless and precarious existence.”<sup>116</sup> Such moral rehabilitation could only be accomplished by placing each immigrant “in direct subordination to the habits, genius and character of American society,” which would provide a vital “species of national education.”<sup>117</sup> The essential first step was to procure for each immigrant “some situation where he shall be detached . . . from the seductions incident to large cities, [and] brought into direct contact with American habits and industry,” so that he may be “fixed in his attachment to the country, and enlightened with respect to his rights, his interests, and his duties.”<sup>118</sup> Only by immersing himself in “the pursuits of the community,” Duhring explained, would the immigrant “become identified with its interests, and by some experience of its benefits, . . . devote to it, not merely his fealty, but his affections.”<sup>119</sup>

Duhring proposed that the United States take certain affirmative measures to “facilitate the transit of the emigrant from the sea-port to the interior, and to promote . . . his safe and speedy resolution into the political and social body, of which he is to be thenceforward a constituent portion.”<sup>120</sup> In order to promote the efficient diffusion and digestion of foreigners, Duhring recommended the formation of “a very extensive and

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<sup>113</sup> *Id.* at 469.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 469–70.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 461.

<sup>118</sup> *Id.* at 474. Immigrant aid societies, too, identified the tendency of recently landed immigrants to congregate in cities as the principal impediment to assimilation, and urged immigrants to travel immediately to the less densely populated lands of the West. *See, e.g.,* SHAMROCK SOC’Y OF N.Y., EMIGRATION TO AMERICA: HINTS TO EMIGRANTS 16 (London, MacDonald & Son 1817) (“[W]e think that young men, whose habits are not fixed, cannot pass too speedily to the fine regions beyond the Alleghany.”).

<sup>119</sup> Duhring, *supra* note 103, at 474. As the New York Irish Emigrant Association advised, the Irish immigrant “will love with enthusiasm the country that affords him the means of honorable and successful enterprise, and permits him to enjoy unmolested and undiminished the fruits of his honest industry. . . . [H]e will himself cherish, and will inculcate in his children, an unalterable devotion to his adopted and their native country.” 31 ANNALS OF CONG. 202, 205 (1817) (statement of the N.Y. Irish Emigrant Ass’n, presented by Sen. Nathan Sanford).

<sup>120</sup> Duhring, *supra* note 103, at 464–65.

effective association” to assist the immigrant and to “enlighten[] him with respect to the choice of an ulterior destination, and . . . enabl[e] him to reach that destination as soon as possible after his arrival in the country.”<sup>121</sup> Such an association should be truly national in scope, “spread[ing] its branches into every district and village of the country” so that each immigrant may go where “he might be most speedily and effectually engrafted into the community.”<sup>122</sup>

Notwithstanding mounting reservations about mass immigration, Duhring, like most of his contemporaries, thus retained a basic faith in the value of immigration to the American nation, the moral natures of immigrants, and the capacity of American social and political institutions to transform the subjects of Old World monarchies into republicans. In response to proposals to extend the period of residency required for naturalization, Duhring maintained that “[f]ive years, under favorable circumstances, are perhaps quite sufficient” to relieve immigrants of the “moral incapacity” inflicted upon them by the governments they had fled.<sup>123</sup> “Even the throng of less brilliant, but not ignoble minds,” he declared, “we welcome as life-giving streams in a thirsty land; as a strong and animating testimony to the value of our institutions, operating to the assurance of that faith . . . in . . . human liberty.”<sup>124</sup>

Even as most Americans retained their confidence in assimilation, however, the narrative of immigration as regeneration had acquired a heightened sense of contingency. The easy assumption that immigrants would naturally disperse themselves throughout the vast, open American continent and be absorbed into the tissues of the body politic had lost some of its force. At the very least, the hopper of assimilation needed to be jostled to prevent it from clogging.

## 2. *Nativism in the 1850s: The Origins of Indelible Foreignness*

Americans’ confidence in assimilation suffered its first significant,

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<sup>121</sup> *Id.* at 473. The Society for the Prevention of Pauperism in the City of New York similarly proposed transporting “able-bodied foreigners into the interior,” where they could be provided with suitable labor. SECOND ANNUAL REPORT, *supra* note 109, at 26. Such a program would not only provide relief to the cities; the immigrant, “[i]nstead of bringing up his children in idleness, temptation and crime, . . . would see them amalgamate with the general mass of our population, deriving benefits from our school establishments, our moral institutions, and our habits of industry.” *Id.*

<sup>122</sup> Duhring, *supra* note 103, at 473–74. As the New York Irish Emigrant Association explained, when immigrants—and the Irish in particular—cluster in cities they become “perplexed, undecided, and dismayed,” and “the very energies which would have made the fields to blossom make the cities groan.” 31 ANNALS OF CONG. 202, 203–04 (1817) (statement of the N.Y. Irish Emigrant Ass’n, presented by Sen. Nathan Sanford). The Association thus requested that “a portion of unsold [federal] lands may be set apart or granted to trustees, for the purpose of being settled by emigrants from Ireland, on an extended term of credit.” *Id.* at 204.

<sup>123</sup> Duhring, *supra* note 103, at 476.

<sup>124</sup> *Id.* at 470.

though by no means fatal, shock during the wave of anti-immigrant nativism that swept the American political scene in the late 1840s and 1850s. The so-called Know Nothings (and their formal organ, the American Party) rode this wave to widespread, albeit relatively brief, electoral success by denouncing Irish immigration, in particular, which had surged to unprecedented levels beginning in the mid-1840s.<sup>125</sup> The nativists of the 1850s were ultimately unsuccessful in their declared political goal of imposing harsh new restrictions on alien suffrage, including lengthy naturalization periods and even post-naturalization limits on the franchise.<sup>126</sup> But their remarkably swift political ascendancy signals the moment when a critical mass of Americans began to worry that a substantial proportion of European immigrants were fundamentally, irredeemably alien to the national character.<sup>127</sup>

To observers with an eye on the nation's burgeoning cities, the confluent problems of increasing economic dependency, intense wage competition from foreign workers, and progressively greater concentrations of both economic production and population, were seismic historical upheavals that threatened to erode the very pillars of republican government. The Jeffersonian republic of economically independent,

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<sup>125</sup> See ZOLBERG, *supra* note 23, at 129 (describing the “tidal wave” or European immigration to the United States in the 1840s and early 1850s). On the influx of Irish immigrants during the mid-nineteenth century, see KERBY A. MILLER, *EMIGRANTS AND EXILES: IRELAND AND THE IRISH EXODUS TO NORTH AMERICA* 280–344 (1985).

<sup>126</sup> See ZOLBERG, *supra* note 23, at 161–65.

<sup>127</sup> Even observers who did not share the ideological outlook or legislative goals of the Know Nothings recognized that the “swelling tide” of often impoverished immigrants “pouring into the United States” represented an unprecedented problem. NYAICP, *ANNUAL REPORT FOR 1858*, at 33 (1858). New York’s leading charity, the New York Association for Improving the Condition of the Poor, objected in 1852 that, whatever the advantages of unrestricted immigration to the nation as a whole, “the disadvantages are mostly felt at the great point of debarkation”—New York City, where the “worst part of the refuse class which is thus thrown upon our shores . . . clan together . . . [and cannot] be persuaded to leave it.” *Id.* The Association’s complaint echoed the familiar concern that by clustering in cities immigrants deprived themselves of the salutary, regenerative effects of full immersion in American life and labor. But it also raised the new—or at least newly menacing—specter of a vast, permanent class of foreign poor siphoning resources from the community. “Our actual pauperism consists mainly not only of immigrants,” the Association reported a few years later, “but of the accumulated refuse of about two and a half millions of that class, who have landed in New York, in the past ten years.” As the nation’s principal point of entry for foreign migrants, the report continued, New York City had “operat[ed] like a sieve, let[ting] through the enterprising and industrious, while . . . retain[ing] the indolent, the aged, and infirm, who can earn their subsistence nowhere.” NYAICP, *ANNUAL REPORT FOR 1858*, *supra*, at 36. Nor was the problem limited to the economic burden of supporting thousands of “foreign paupers.” The unprecedented magnitude of foreign immigration to the United States had given rise to a “profound sense of danger” not only to the fiscal integrity of states and localities, reported the Massachusetts Legislature, but to the “social and political institutions of the United States.” *Report of the Joint Special Committee of the Legislature of Massachusetts Appointed to Consider the Expediency of Altering and Amending the Laws Relating to Alien Passengers and Paupers* [hereinafter *Report of the Joint Special Committee*] (Mass. Senate Doc. No. 46, 1848), in *HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM*, *supra* note 66, at 584, 587.

politically virtuous producer-citizens appeared to be slipping from view, crowded off the historical stage by new, characteristically “European” forms of economic social and economic organization. As Americans’ confidence in the great hopper of assimilation wavered, critics of the United States’s liberal immigration and naturalization policies typically invoked two intertwined arguments for curbing the nation’s traditional generosity. First, they argued that the disappearance in recent decades of vacant lands and the increasing concentration of industry and population had skewed two of the hopper’s integral components: immigrants’ ready access to individual economic proprietorship, and their immersion in American life and labor. The effect was to radically impair the capacity of American economic and political institutions to transform Europe’s outcasts into patriotic republicans.

Second, and most often, however, critics pointed to the poor quality of the raw material that the assimilationist hopper was tasked to digest: the fundamental moral natures of immigrants themselves. A leading contemporary chronicler of the Know-Nothing movement, Frederick Anspach, was representative in blending an account of changing economic organization and settlement patterns with a palpable disdain for immigrants’ moral constitutions. When the naturalization laws were first formed, Anspach explained, “we were an infant nation . . . with an immense territory . . . . It was an object of paramount importance at the time, to have our lands occupied, our solitudes peopled, our roads opened, and our cities built.”<sup>128</sup> Faced with such exigencies, policymakers sought to encourage immigration by permitting foreigners to acquire property and, most importantly, providing for easy access to American citizenship. If former circumstances warranted liberality, however, “[s]uch is not our condition now.”<sup>129</sup> In the new, post-agrarian republic, where “[m]uch of our territory is peopled, our wide domain is rapidly filling up, our coasts are protected, [and] our cities built,” the time had come to “guard against the evils which do accompany the unparalleled influx of foreigners.”<sup>130</sup> In order to prevent hastily enfranchised foreigners from “convert[ing] this asylum . . . into a despotism of oppression,”<sup>131</sup> Anspach counseled the erection of substantial new barriers to United States citizenship.<sup>132</sup>

If the digestive capacity of the nation’s territory and institutions had declined, however, so had the quality of the “unbroken current which is

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<sup>128</sup> FREDERICK RINEHART ANSPACH, *THE SONS OF THE SIRENS; A HISTORY OF THE RISE, PROGRESS, AND DESTINY OF THE AMERICAN PARTY* 66 (1855).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *See id.* at 65 (“[W]e are clearly of the opinion that unless some radical change takes place in relation to the admission of foreigners to citizenship, they will work disastrous ruin to our institutions.”).

pouring its millions upon our soil.”<sup>133</sup> “In the infancy of our national existence,” explained Anspach, that current bore men “whose souls throbbed with aspirations [to] freedom, . . . who either came for conscience sake, or in obedience to those noble impulses which inclined them to a nation of freemen.”<sup>134</sup> In recent years, however, this “state of things is materially altered.”<sup>135</sup> A large proportion of the present mass of immigrants was “unquestionably totally destitute of those elements of character, which our laws should require before adopting them as citizens.”<sup>136</sup> The Irish, in particular, appeared beyond rehabilitation, their economic and political independence hopelessly degraded through generations of poverty and will-crushing domination by their native government and the Catholic Church. Irish immigrants “evinced too little force and energy to be arbiters of their own destiny,” observed New York’s leading charity, the Association for Improving the Condition of the Poor. Rather than seek out opportunities in the West, they were “prone to stay where another race furnishes them with food, clothing, and labor.”<sup>137</sup> The rising pauper class was thus distinctly unsuited and unwilling to travel the traditional path to assimilation—namely, geographical dispersion. Even if such immigrants could be persuaded to migrate to the interior, the Association reported, they were “so pauperized in spirit,” and so plagued by “ignorance, and physical and mental imbecility,” that they were “unfit to be their own masters.”<sup>138</sup> The extraordinary liberality of the young republic had been “adapted . . . to the nature of the times and the character of the men of that age,” explained Anspach.<sup>139</sup> But recent events had so

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<sup>133</sup> *Id.* at 67.

<sup>134</sup> *Id.* at 66–68.

<sup>135</sup> *Id.* at 68.

<sup>136</sup> *Id.* A Massachusetts legislative committee charged with recommending amendments to the State’s laws “relating to alien passengers and paupers” similarly lamented the recent decline in the quality of America’s immigrants. *Report of Joint Special Committee*, *supra* note 127, at 584 n.1. In the “earliest years of the government, those who came here were generally persons of education, of pecuniary means, industry and character,” who “added to the intelligence and wealth of the community; while, as producers, they assisted in developing the resources of the country,” the Committee observed. *Id.* at 584. By contrast,

[t]hose now pouring in upon us are wholly of another kind in morals and intellect, and, through ignorance and degradation from systematic oppression of bad rulers at home, neither add to the intelligence nor wealth of this comparatively new country. As a body, they are consumers, and not producers to an extent equaling their own physical wants.

*Id.*

<sup>137</sup> NYAICP, ANNUAL REPORT FOR 1858, *supra* note 127, at 36.

<sup>138</sup> *Id.* The Massachusetts legislature similarly complained of the swelling class of immigrants who “cluster about in cities, and rarely express a willingness to travel to the new settlements west,” preferring to rely instead on the state’s “liberally-sustained institutions, . . . to which they cling with a tenacity commensurate with their moral debasement, want of self-respect, and abject and needy circumstances.” *Report of Joint Special Committee*, *supra* note 127, at 588.

<sup>139</sup> ANSPACH, *supra* note 128, at 68.

transformed “the times and the people” that there was “no longer that adaptation which existed at that period.”<sup>140</sup> For many Americans, such developments laid bare the profoundly contingent quality of the nation’s traditional immigration liberalism.

As much as complaints of unassimilability grew more commonplace in the 1850s, however, the view that a large portion of immigrants were indelibly stamped by nature as alien to the American character had not yet taken hold among a broad swath of the American public, and failed to shape federal immigration and naturalization policy. Indeed, even writers who in one breath condemned immigrants’ corrosive effect on the quality of American citizenship could, in the next, affirm their faith in assimilation. The renowned clergyman and author Edward Everett Hale, for example, described with alarm the “Celtic Exodus,”<sup>141</sup> and consequent “annual invasion”<sup>142</sup> of the United States by “a horde of discouraged, starved, beaten men and women”<sup>143</sup> whose “inferiority as a race compels them to go to the bottom.”<sup>144</sup> Within a few pages, however, Hale pivoted sharply, adopting a markedly more optimistic vision of assimilation. “[T]he country [is] richer for the coming of the foreigner,”<sup>145</sup> he declared, and “to attain the full use of this gift, the emigrant must be cared for.”<sup>146</sup> Rather than throwing up obstacles to immigration, Hale insisted, the nation “must open its hand to receive the offering of Europe.”<sup>147</sup> Once here, the immigrant should be welcomed warmly into the American political fellowship, not as a gesture of national generosity, but as a spur to

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<sup>140</sup> *Id.* at 69.

<sup>141</sup> EDWARD E. HALE, LETTERS ON IRISH EMIGRATION 51 (photo. reprint 1972) (1852).

<sup>142</sup> *Id.* at 47.

<sup>143</sup> *Id.* at 52.

<sup>144</sup> *Id.* at 54.

<sup>145</sup> *Id.* at 55.

<sup>146</sup> *Id.* at 56. Indeed, commentators were just as likely to attribute immigrants’ economic dependency—their “charge upon the tax-paying and benevolent citizen”—to the fraud and exploitation that they encountered upon arrival in the United States, as to their fundamental natures. ASSEMB. OF THE STATE OF N.Y., REPORT OF THE SELECT COMMITTEE TO WHOM WAS REFERRED THE MEMORIAL OF THE CITY OF NEW-YORK RELATIVE TO THE LANDING OF ALIEN PASSENGERS, Assemb. No. 216, 68th Sess., at 5 (1845). A New York legislative committee could lament, for example, that “almshouses, prisons, dispensaries and benevolent societies are kept up at an enormous expense, almost wholly for the benefit of foreign paupers and criminals,” yet lay the blame not with the “honest immigrant” rendered vulnerable by “ignorance of our language,” but with “the unprincipled mariner’s agent or boarding-house keeper; and . . . those who . . . abet them in their wickedness, and both contribute largely to deprave and injure, and oppress with taxation our citizens and expose us to every thing unworthy of a free people.” *Id.* Throughout the middle decades of the nineteenth century, the state agencies charged with administering the landing of immigrants understood their primary mission to be that of providing needy immigrants with care and support, including “protecting immigrants from being looted by thieves or defrauded by deceitful boardinghouse keepers, inland transportation companies, freight and luggage handlers, and employers.” Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181, 198 (2005) [hereinafter Lindsay, *Preserving the Exceptional Republic*].

<sup>147</sup> HALE, *supra* note 141, at 56.

assimilation. “The stranger cannot serve the country while he is a stranger,” Hale counseled, but “must plunge, or be plunged, into his new home.”<sup>148</sup> “He must, for the purpose we seek, profit by the measure of its civilization. He must be directed by its intelligence. His children must grow up in its institutions. He must be, not in a clan in a city, surrounded by his own race.”<sup>149</sup> Notwithstanding Hale’s dark assessment of the Irish “race” pouring in on the republic, his proposed solution was a familiar one: geographical dispersion. In order to “stimulate the [nation’s] absorbents,” Hale urged, “private action and public policy in this matter should unite . . . [so] that each little duct, the country through, may drink its share, of those drops which some do not taste at all, of the perpetual Westward flood.”<sup>150</sup>

In contrast to the immigration restriction movement of the late-nineteenth and early twentieth centuries, in the 1850s even those critics who were most skeptical of immigrants’ capacity for assimilation usually advocated limiting access to American citizenship rather than excluding immigrants from American territory.<sup>151</sup> Foreigners’ “opinions need to be recast before they [can] intelligently participate in public affairs,” wrote the Know Nothing Anspach.<sup>152</sup> “[E]ven a residence of fifteen or more years is absolutely essential in most instances before a man can vote intelligently,”<sup>153</sup> he counseled. Indeed, to the extent that leading nativists sought to reduce the number of immigrants entering the country, they proposed to do so not by restricting immigration *per se*, but rather by removing the “inducements” furnished by “[t]he existing laws of naturalization, by which the meanest serf of Europe could be converted into a voter in five years.”<sup>154</sup> This exclusive focus on naturalization stands in sharp contrast to the anti-immigrant program of the 1880s and 1890s, in which foreign laborers’ very presence on American territory—and particularly their participation in the labor market—threatened to corrode republican institutions.

Despite the intensity of the nativist fervor, it faded from political prominence as rapidly as it had emerged. The nation’s enduring, if

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<sup>148</sup> *Id.* at 57.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See ANSPACH, *supra* note 128, at 71 (“There are numerous . . . weighty reasons . . . for a change in the laws relating to this subject [of naturalization]. . . . [P]ersons reared on foreign soil . . . cannot possibly possess the needful qualifications of citizenship after the few years’ residence which is now the only condition.”).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> THOMAS R. WHITNEY, A DEFENCE OF THE AMERICAN POLICY, AS OPPOSED TO THE ENCROACHMENTS OF FOREIGN INFLUENCE, AND ESPECIALLY TO THE INTERFERENCE OF THE PAPACY IN THE POLITICAL INTERESTS AND AFFAIRS OF THE UNITED STATES 314 (Jerome S. Ozer ed., photo. reprint 1971) (1856).

increasingly cautious, faith in assimilation combined with the surging labor demands of the Civil War to submerge for another generation the immigration illiberalism of the 1850s. An 1864 report issued by the United States Senate Committee on Agriculture suggested the great extent to which Americans' assessment of immigrants' suitability for republican institutions—their fundamental moral natures—was very much shaped by the nation's current economic circumstances.<sup>155</sup> After declaring that “the encouragement of foreign immigration [w]as of the highest importance,” the Committee proceeded to sweep away the doubts that had mounted over the previous decade about both the continuing effectiveness of the American hopper of assimilation and the quality of the foreign material that the hopper was expected to assimilate.<sup>156</sup> “The rapid growth of our country arises from three causes, equally necessary,”<sup>157</sup> the Committee reported:

[F]irst, the extent of unoccupied soil, with a climate and fertility not surpassed in any portion of the world; second, a native population, free, hardy, industrious, improved by a mixture of the blood of all the European nations, engrafted on the anglo-Saxon stock, and incited to great activity by institutions offering the highest honors and rewards to those who, by industry and merit, deserve them; and third, the addition to and absorption into our population of a large number annually of immigrants, whose labor adds to our annual production an amount increasing at a compound ratio . . . .<sup>158</sup>

In marked contrast to the pessimism of the previous decade, the Committee reaffirmed in one breath the essential plot points of the traditional narrative of immigration as regeneration: the transformative capacity of an open continent and free institutions, and the suppleness and redeemability of immigrants' moral natures.

#### B. *Immigrants as Persons: The State Police Authority*

As we have seen, during the nation's first century, immigrants' non-citizenship generally did not operate as a presumptively natural, self-evident marker of legal difference; nor did it trigger an exclusively federal, constitutionally exceptional form of regulatory authority. Rather, until the 1870s the individual states engaged in substantial regulation of

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<sup>155</sup> STAFF OF S. COMM. ON AGRIC., 38TH CONG., REPORT ON THE ENACTMENT OF SUITABLE LAWS FOR THE ENCOURAGEMENT AND PROTECTION OF FOREIGN IMMIGRANTS 1 (Comm. Print 1864).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

immigration under their traditional police powers. The state police power figured immigrants simply as persons, whose effect on the health, morals and welfare of the community was governed under the same terms as that of citizens. The Supreme Court's mid-century immigration law opinions likewise treated non-citizenship as a relatively inconsequential aspect of an immigrant's legal identity. After briefly sketching the contours of state regulatory practice during the first half of the nineteenth century, this Section explores the debate among lawyers and jurists over the proper source, scope, and locus of governmental authority to regulate immigration, and the body of constitutional immigration law that this debate produced.

### 1. *Immigration Localism in the Era of Confidence*

Before the 1870s, the federal government exercised very little authority over immigration, neither establishing terms of eligibility for foreigners' admission into United States territory nor processing their entry.<sup>159</sup> Rather, the seaboard states—foremost New York and Massachusetts—administered the landing of immigrants, and each individual state determined the rights and privileges of foreigners residing within its territory.<sup>160</sup> Even in the decade following the Civil War, most Americans continued to view the problems associated with mass immigration as an acceptable burden to bear in exchange for the overwhelming economic benefits reaped from the nation's traditionally liberal immigration and naturalization policy. Because such problems were understood to be local and discrete, the regulation of immigration continued to fit comfortably within the province of state police authority, under which states and municipalities regulated all aspects of public health, safety, morals, and welfare throughout the nineteenth century.<sup>161</sup> This Section maps the logic of immigration localism that shaped the regulation of non-citizens for the first half of the nineteenth century. That logic rested on two pillars: (1) a broad consensus that the regulatory challenges and

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<sup>159</sup> The national government never acted to exclude any class of immigrants until 1875, when Congress prohibited the immigration of prostitutes, contract laborers, or convicts from "China, Japan, or any Oriental country." Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). The only two federal regulations adopted before that time—the Passenger Acts of 1819 and 1847—were directed toward improving the conditions of passage by reducing the number of passengers per ship. See Act of Mar. 2, 1819, ch. 46, 3 Stat. 488 (repealed 1855); Act of Feb. 22, 1847, ch. 16, 9 Stat. 127 (repealed 1855).

<sup>160</sup> See Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, *supra* note 12, at 13 (stating that "throughout the first two thirds of the nineteenth century, the seaboard states, rather than the federal government, exercised primary authority over the landing of immigrants").

<sup>161</sup> On the pervasiveness of police regulations in the nineteenth-century United States, see generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

political interests implicated by the presence of foreigners—the problem of economic dependency and crime, for example, or the desire to attract laborers or settlers—were fundamentally local in nature; and (2) the lack of any meaningful regulatory competition from the federal government.

In an earlier study of immigration regulation in nineteenth-century New York, I demonstrated that mid-century regulators' strong preference for state, rather than federal, control over the landing of immigrants rested on their confidence in immigrants' moral natures and in the nation's powers of cultural and political assimilation.<sup>162</sup> The New York Commissioners of Emigration ("Commissioners")—the state agency that administered the landing of three-quarters of the nation's immigrants from its creation in 1847 until 1891—championed European immigrants as an invaluable economic resource and the embodiment of free, independent labor.<sup>163</sup> Commissioner Friedrich Kapp, one of the nation's leading authorities on immigration, explained in 1870 that the United States "owe[d] its wonderful development mainly to the conflux of the poor and outcast of Europe within it"—to "the sturdy farmer and industrious mechanic," who through their "toils and sufferings . . . built up . . . the proud structure of this Republic, which in itself is the glorification . . . of free and intelligent labor."<sup>164</sup> Kapp's sanguine assessment of immigrants' moral and economic character was embedded in his, and the nation's, enduring confidence in the regenerative power of free labor and republican institutions.<sup>165</sup>

Indeed, the Commissioners defined their mission to be that of preserving immigrants' moral fortitude and economic independence as much as defending the state against the burden of caring for impoverished foreigners. To that end, the Commissioners operated a refuge and hospital at New York's Castle Garden Depot for immigrants who arrived in New York destitute or sick, and attempted to protect immigrants against a cast of villains that was said to populate the areas surrounding the Depot, including deceitful boardinghouse keepers, inland transportation companies, freight and luggage handlers, and would-be employers.<sup>166</sup> "The problem to be solved," wrote Commissioner Kapp, "was to protect the newcomer, to prevent him from being robbed, to facilitate his passage

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<sup>162</sup> See Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 191.

<sup>163</sup> *Id.* at 195.

<sup>164</sup> Friedrich Kapp, *Immigration*, 2 J. SOC. SCI. 1, 2 (1870).

<sup>165</sup> To the extent that immigrants were said to endanger the political health of the republic, the threat came not from any inherent unfitness for republican government—as many came to believe in the 1890s—but rather from their tendency to cluster together, forming political loyalties distinct from the interests of the polity as a whole. The solution was thus not to limit immigration, but to break up such ethnic clusters by encouraging, and even providing financial support for, westward migration. See Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 197.

<sup>166</sup> *Id.* at 198.

through the city to the interior, to aid him with good advice, and, in cases of most urgent necessity, to furnish him with a small amount of money.”<sup>167</sup> He explained:

For, whenever the poor immigrant is fleeced by rogues, his judgment is impaired, his energy is diminished, and in general that moral elasticity lost which he needs more than ever to start well in a strange land; and thus a heavy injury is inflicted on his adopted country, which, instead of self-relying, independent men, receives individuals who are broken in spirit, . . . useless, [and] . . . burdensome to themselves and to others.<sup>168</sup>

For Kapp and the others who administered the state’s regulatory regime, dependency and vice among immigrants were not so much foreign imports as products of the fraud and corruption they encountered upon arriving in New York. The aim of the Commissioner’s paternalism was thus to safeguard immigrants’ moral and economic character.

With respect to the governance of foreigners already present within a state’s territory, non-citizenship only gradually became a constitutive aspect of immigrants’ legal identity, over the first several decades of the nineteenth century. Historian Kunal Parker’s study of the legal construction of immigrants in antebellum Massachusetts reveals the “heavily contested process through which citizenship came to function . . . as a barrier to the individual’s right to enter, and remain within, territory.”<sup>169</sup> In the final decades of the eighteenth century, the specific town, rather than the state, “constituted the salient territorial unit,”<sup>170</sup> Parker explains. “Every individual possessed a settlement in, or ‘belonged to,’ a particular town.”<sup>171</sup> This meant that an individual “had legally recognized claims only upon that town’s treasury for purposes of poor relief and legally recognized rights of residence only within the territory of that town.”<sup>172</sup> Because “[o]utsiders were specifically understood as all individuals lacking a settlement in the town, rather than as individuals lacking citizenship,”<sup>173</sup> town officials did not distinguish between “foreigners” who had been born and long resided in a neighboring town or state, and “foreigners” who had immigrated to the United States from

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<sup>167</sup> FRIEDRICH KAPP, *IMMIGRATION AND THE COMMISSIONERS OF EMIGRATION* 85 (Arno Press & N.Y. Times 1969) (1870).

<sup>168</sup> *Id.* at 160.

<sup>169</sup> Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *LAW & HIST. REV.* 583, 586 (2001).

<sup>170</sup> *Id.* at 590.

<sup>171</sup> *Id.* at 588.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

Ireland a month earlier.<sup>174</sup> Rather, they “remove[d] ‘foreign’ paupers to places where they ‘belonged,’” which might be another town within Massachusetts, a different state, or “beyond sea.”<sup>175</sup> Between the 1790s and the 1830s, a combination of historical factors<sup>176</sup> caused a wholesale shift in responsibility for the state’s poor, from the individual towns to the state itself, thus radically expanding the number of so-called “state pauper[s].”<sup>177</sup> Only then, several decades after American independence, did Massachusetts respond to the growing burden of poor relief by “develop[ing] discourses of citizenship, foreignness, and cultural difference that represented resident immigrants’ claims for poor relief as illegitimate as the claims of aliens.”<sup>178</sup> In doing so, the state replaced the logic of settlement with the logic of citizenship, as foreignness—now understood as the absence of citizenship—came to signify the illegitimacy of an individual’s claims on the commonwealth.

## 2. *Constitutional Immigration Law in the Pre-Federalization Era*

This Section maps the contours of mid-century constitutional immigration law through two landmark Supreme Court cases: *City of New York v. Miln*<sup>179</sup> and *The Passenger Cases*.<sup>180</sup> Virtually all of the participants in those cases, litigants and jurists alike, agreed that federal authority over immigration, whatever its extent, derived from Congress’s constitutionally enumerated commerce power. Disagreement centered instead on the nature of the authority reserved by the states; in particular, under what circumstances a state regulation was preempted by Congress’s commerce authority. This Section argues that, notwithstanding the individual Justices’ widely divergent views over where, exactly, the line of demarcation between state and federal authority should be drawn, the Court consistently drew that line based on the purpose and effect of the regulation at issue, rather than the citizenship status of the persons upon whom the regulation operated.

The 1837 case of *City of New York v. Miln* marked the first time that the Supreme Court addressed the power to regulate immigration and, specifically, attempted to demarcate the states’ and Congress’s respective

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<sup>174</sup> See *id.* at 588, 597–98.

<sup>175</sup> *Id.* at 601.

<sup>176</sup> These developments include: the State’s adoption in 1794 of a law making citizenship a prerequisite for settlement, thus marking the immigrant poor as a charge of the Commonwealth; the dramatic increase of European immigration to the U.S. following 1820; the expanding scale of poverty resulting from industrialization; and aggressive, sometimes fraudulent, efforts by the towns to shift caring for their own poor onto the state. *Id.* at 597, 601–05.

<sup>177</sup> *Id.* at 602.

<sup>178</sup> *Id.* at 606.

<sup>179</sup> 36 U.S. 102 (1837)

<sup>180</sup> 48 U.S. 283 (1849).

spheres of authority. The case involved the constitutionality of an 1824 New York State law requiring the master of every vessel arriving in the Port of New York from outside the state to report the name, birthplace, last legal settlement, age, and occupation of each passenger.<sup>181</sup> Neither of the parties nor any of the Justices contested that Congress possessed authority to regulate immigration under its commerce power.<sup>182</sup> The legal dispute centered on whether Congress had claimed *exclusive* authority over all aspects of immigration when it adopted the Passenger Act of 1819,<sup>183</sup> which regulated stowage conditions on foreign vessels bound for the United States, or whether New York instead retained concurrent authority to regulate immigrants after they had landed.<sup>184</sup> George Miln, a shipmaster convicted under the New York law, maintained that the reporting requirement came into “direct conflict”<sup>185</sup> with the federal Passenger Act. New York countered that the reporting requirement was not a regulation of commerce,<sup>186</sup> but that even if it could be thus construed, the State reserved concurrent authority to regulate the landing of passengers so long as the law did not come into direct “collision” with federal policy.<sup>187</sup> A five-Justice majority rejected Miln’s challenge to the law, concluding that, by virtue of the Act’s purpose and object, it was “not a regulation of commerce, but of police; and [thus] . . . passed in the exercise of a power . . . rightfully belong[ing] to the states.”<sup>188</sup>

Echoing the state’s brief to the Court, the majority acknowledged that the challenged statute governed the conditions under which foreign migrants were landed in the Port of New York, but maintained that that

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<sup>181</sup> *Miln*, 36 U.S. at 130.

<sup>182</sup> *Gibbons v. Ogden*, decided thirteen years prior to *Miln*, had established that Congress’s commerce authority encompassed “navigation,” regardless of whether the object of navigation was the transportation of goods or of persons. 22 U.S. 1, 197 (1824).

<sup>183</sup> An Act Regulating Passenger Vessels, ch. 46, 3 Stat. 488 (1819).

<sup>184</sup> New York acknowledged that a “commercial regulation” adopted by a state would be unconstitutional if it conflicted with an act of Congress. *Miln*, 36 U.S. at 127. The Court agreed that a state immigration regulation “partaking of the nature of a commercial regulation . . . would stand the test of the most rigid scrutiny.” *Id.* at 139.

<sup>185</sup> *Id.* at 116.

<sup>186</sup> *Id.* at 107.

<sup>187</sup> *Id.* at 126.

<sup>188</sup> *Id.* at 132. The Court further reasoned that even if the reporting requirement “could be considered as partaking of the nature of a commercial regulation,” it remained within the authority of the state so long as it avoided a direct “collision” with the will of Congress. *Id.* at 138. Moreover, even state and federal regulations that are “scarcely distinguishable” from one another may not collide if they “flow from distinct powers.” *Id.* at 137. Because the most recent expression of national policy—the Passenger Act of 1819—acted on passengers only “whilst on their voyage, and until they shall have landed,” while New York’s reporting requirement applied to persons who had already landed, and thus “ceased to be passengers,” the law’s “operation only begins when that of the laws of congress ends.” *Id.* at 138.

fact did not impeach its status as a valid police regulation.<sup>189</sup> The Act was “obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without . . . the means of supporting themselves,”<sup>190</sup> the Court explained. For the purpose of defining the scope of the state’s regulatory authority, the operative phrase here was not “foreign countries” but “poor persons.”<sup>191</sup> Indeed, the Court stressed the profoundly local nature of the relevant legislative purpose: “New York, from her particular situation, is, perhaps more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there . . . .”<sup>192</sup> It was thus “the duty of the state,” the Court declared, to defend its citizens against the “danger” of “being subjected to a heavy charge in the maintenance of those who are poor.”<sup>193</sup> Even though the reporting requirement governed the landing of foreigners, it remained quintessentially a poor law, and as such “form[ed] a portion of that immense mass of legislation which embraces every thing within the territory of a state, not surrendered to the general government,”<sup>194</sup> including inspection, quarantine, and health laws. There was thus “no mode in which the power to regulate internal police could be more appropriately exercised.”<sup>195</sup>

The unexceptional nature of the states’ authority to regulate immigration is reinforced by the fact that, while the section of the law challenged in *Miln* applied to *foreign* migrants, the statute regulated poor citizens in substantially the same manner, obliging shipmasters to remove

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<sup>189</sup> *Id.* at 141. It is especially revealing in light of the modern presumption of federal exclusivity that New York explicitly acknowledged that the reporting requirement constituted an immigration regulation. It had become “obvious” in recent decades “that laws were needed to regulate” the “constant and steady migration” of Europeans to the United States, the State explained. *Id.* at 106. That the law was directed at foreigners and clearly amounted to what would today be classed as an “immigration regulation,” however, did not place it in an exclusively federal legislative domain. *Id.* Because New York had adopted the reporting requirement “to prevent the introduction of foreign paupers” into the state, the law was “a part of the system of poor laws,” *id.* at 110, and thus a quintessential police regulation, which “may operate on persons brought into a state in the course of commercial operations,” *id.* at 129, without making it a “commercial regulation in the sense contemplated in the constitution,” *id.* at 110. And indeed, New York cited hundreds of statutes enacted in dozens of states purporting to demonstrate that states had engaged in precisely such regulation since the nation’s founding. *Id.* at 114–15.

<sup>190</sup> *Id.* at 141.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* In its brief to the Court, New York likewise argued that the reporting requirement, by its very nature, addressed a quintessentially local interest. Upholding the statute would “vest[] power where there is an inducement to exercise it,” the State explained. *Id.* at 114. Because westerners in particular sought “to encourage emigration” and cared little how many impoverished migrants were “left as a burden upon the city of New York,” there was “a hostile principle in congress to regulating this local evil.” *Id.*

<sup>193</sup> *Id.* at 141.

<sup>194</sup> *Id.* at 133.

<sup>195</sup> *Id.* at 141.

to “the place of his last settlement” any *United States citizen* “deemed likely to become chargeable to the city.”<sup>196</sup> It was thus “apparent, from the whole scope of the law,” the Court observed, “that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states.”<sup>197</sup> Neither the legislature that adopted the statute nor the Court that upheld it distinguished between the state’s authority to protect itself against poor Americans and its authority to protect itself against poor Europeans.<sup>198</sup> Notwithstanding the legislature’s clear intention to regulate foreign immigration, it was not the citizenship status of the persons regulated, but rather the Act’s underlying purpose of governing poor persons within its territory that determined the scope of state authority.<sup>199</sup>

Finally, the majority opinion argued explicitly that there was nothing conceptually distinctive, let alone constitutionally exceptional, about a statute that regulates foreigners engaged in the *process* of immigration. The Court drew a telling analogy between the governance of foreign migrants under the challenged poor law and the prosecution under state criminal law of recently landed “officers, seamen, and passengers who are within its jurisdiction.”<sup>200</sup> Just as “[t]he right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law,”<sup>201</sup> the Court explained, “the same reasons, precisely, equally subject [Miln] . . . to liability for failure to comply” with the reporting requirement.<sup>202</sup> Each law depended upon the “same principle”—“that it was passed by the state of New York, by virtue of her power to enact such laws for her internal police . . . ; which laws operate upon the persons and things within her territorial limits.”<sup>203</sup> This formulation flatly

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<sup>196</sup> *Id.* at 154 (Story, J., dissenting).

<sup>197</sup> *Id.* at 133 (majority opinion).

<sup>198</sup> Indeed, New York insisted in its brief that to deny states the authority to control the entry of foreign poor would necessarily deprive them the ability to turn away domestic paupers as well. *Id.* at 111–12.

<sup>199</sup> The Justices in the majority made clear that the scope of the regulation’s territorial application was likewise pertinent. “If we look at the place of [the Act’s] operation,” the Court reasoned, “we find it to be within the territory, and, therefore, within the jurisdiction of New York.” *Id.* at 133. To the extent that “we look at the person on whom it operates,” it matters only that “he is found within the same territory and jurisdiction.” *Id.*

<sup>200</sup> *Id.* at 141.

<sup>201</sup> *Id.* at 140.

<sup>202</sup> *Id.* at 141.

<sup>203</sup> *Id.* If the power to regulate “the admission of passengers from Europe” is exclusive in Congress by virtue of its power to regulate foreign commerce, the power to “regulat[e] the arrival of passengers by land” must likewise be exclusive in Congress by virtue of its power to regulate interstate commerce. *Id.* at 111. Under such a construction, the “poor laws, providing for sending back paupers to their place of settlement, in the adjoining counties of a bordering state,” would become the exclusive province of Congress. *Id.* at 112. And if “congress may regulate passengers from one state to

defies the distinction, so crucial to modern constitutional immigration law, between the application of ordinary domestic law to non-citizens and a distinct class of “immigration laws” that govern the admission and removal of foreigners.<sup>204</sup>

Over the next four decades, the Supreme Court would gradually abandon the *Miln* majority’s theory of concurrent state and federal authority to regulate the landing of foreign migrants. Even as it edged progressively closer to a presumption of federal exclusivity, however, the Court continued to focus on the purpose and effect of the regulation at issue rather than the citizenship status of the persons regulated. The next major episode in the evolving federalism of immigration lawmaking, and the Court’s fullest attempt to demarcate the states’ and Congress’s respective spheres of authority, came twelve years after *Miln*, in *The Passenger Cases*.<sup>205</sup>

At issue in *The Passenger Cases* was whether similar New York and Massachusetts laws requiring the master of every vessel arriving from a foreign port to pay a small tax for each passenger—levied to fund a marine hospital and to support “foreign paupers,” respectively—treaded unconstitutionally into the exclusively federal domain of foreign commercial regulation.<sup>206</sup> A five-Justice majority comprised of five separate opinions concluded that it did. The question turned on whether the head taxes were regulations of police or of commerce, and, if the latter, whether they collided with the policy of Congress.<sup>207</sup> The opinions in the majority shared two notable features: first, consistent with *Miln*, when it came to defining the states’ and federal government’s respective spheres of authority, the Justices were far less concerned with immigrants’ non-citizenship than with the purpose and effect of the challenged head taxes; and second, the nation’s tradition of immigration liberalism informed both the legal construction of immigrants and the location of the boundary line

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another,” New York cautioned, “their power will extend to compel the states to permit paupers to pass from one state into another state.” *Id.* at 130. Not least, “[t]he laws of the southern states in relation to the intercourse and traffic with slaves” would be “abrogated,” rendering the subject “solely of federal jurisdiction.” *Id.* at 111.

<sup>204</sup> See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 PENN. L. REV. 341, 343 (2008) (observing that immigration law is organized around the idea that “rules for selecting immigrants are fundamentally different from rules regulating immigrants outside the selection process”).

<sup>205</sup> 48 U.S. (7 How.) 283 (1849).

<sup>206</sup> *Id.* at 303, 315.

<sup>207</sup> *Id.* at 322. At least three members of the majority (Justices Catron, McKinley, and Grier), along with the four dissenters, believed that the states possessed concurrent authority with Congress to regulate immigration. For these Justices, the dispositive inquiry was whether the state regulation at issue collided with federal policy. Justice McLean, and perhaps Justice Wayne (whose concurring opinion is ambiguous on this point), insisted that because the Constitution vested the authority to regulate foreign commerce exclusively with Congress, it thereby prohibited any and all state regulation. *Id.* at 392–410.

between state and federal, police and commerce.

Even as the Court struck down the state head taxes, most members of the majority and all of the dissenters affirmed *Miln*'s basic framework for evaluating the scope of the states' authority to regulate immigration. The purpose and effect of the regulation remained dispositive. The Justices in the majority were particularly bothered by the statutes' failure to distinguish, on the one hand, between immigrants who, due to poverty or physical incapacity, were likely to become public charges and, on the other, healthy, economically independent immigrants whose migration the United States had long sought to encourage. The majority rejected the states' argument that because a state may exclude "paupers" or "lunatics" under its police power, "therefore she may exclude all persons, whether they come within this category or not."<sup>208</sup> The head taxes exceeded the bounds of state authority not because they applied to foreign migrants, but because they applied to all foreign migrants equally, including those who posed no threat to the public health, morals, or welfare. The state "may exclude putrid and pestilential goods from being landed on her shores," Justice Grier explained, "yet it does not follow that she may prescribe what sound goods may be landed, or prohibit their importation altogether."<sup>209</sup> The over-inclusiveness of the head taxes appeared to defy their asserted regulatory purpose of protecting the state against the burden of caring for sick and dependent foreigners, and thus impeached their validity as police regulations.<sup>210</sup> The distinction between immigrants who were fit to assimilate into American economic and political institutions and those who appeared destined for lives of pauperism and dependency thus took on constitutional meaning in the Court's continuing struggle to define the boundary between commerce and police. Just as the regulation of healthy, economically independent immigrants lay beyond the scope of state authority, Justice Wayne explained, "[p]aupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations."<sup>211</sup>

If the *Miln* majority figured immigrants as mere "persons," *The*

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<sup>208</sup> *Id.* at 463 (Grier, J., concurring); see also *id.* at 410 (McLean, J., concurring) (arguing that, while each state possesses "an unquestionable power to protect itself from foreign paupers and other persons who would be a public charge," the state exceeded its police authority by extracting head taxes from passengers who did not fit that description); *id.* at 426–27 (Wayne, J., concurring) (arguing that the states are forbidden to exercise their police powers "over those who are not paupers, vagabonds, or fugitives"); *id.* at 448 (Catron, J., concurring) (arguing that the passengers subject to the state tax "were not subjects of any police power or sanitary regulation, but healthy persons of good moral character").

<sup>209</sup> *Id.* at 463.

<sup>210</sup> Notably, it also prompted a charge of injustice toward immigrants themselves. "The powers used for self-defence and protection against harm," Justice Grier insisted, "cannot be perverted into weapons of offence and aggression upon the rights of others." *Id.*

<sup>211</sup> *Id.* at 426 (Wayne, J., concurring in the judgment).

*Passenger Cases* marked their emergence as “subjects of commerce.”<sup>212</sup> The Court had laid the foundation for that construction twenty-five years earlier, in *Gibbons v. Ogden*.<sup>213</sup> In *Gibbons*, Chief Justice Marshall famously concluded that commerce encompassed not only “buying and selling, or the interchange of commodities,” but also “commercial intercourse” more broadly, including “navigation,” regardless of whether the things transported were goods or passengers.<sup>214</sup> For the purpose of defining the scope of congressional authority, explained Justice McLean, “no just distinction can be made . . . between the transportation of merchandise and passengers.”<sup>215</sup> Other Justices in the majority similarly affirmed that “persons as well as slaves may be the subjects of importation and commerce.”<sup>216</sup>

Even as the majority figured immigrants as subjects of foreign commerce, it was the commercial nature of their voyage rather than their non-citizenship that dictated the form of authority to which they were subject.<sup>217</sup> Several of the Justices in the majority insisted that, so long as the commercial goods at issue were transported across state lines, the Commerce Clause was indifferent to national origin of either the goods themselves or the persons engaged in their transportation. States were prohibited equally from imposing a duty upon merchandise “from one

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<sup>212</sup> *Id.* at 432–33.

<sup>213</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>214</sup> *Id.* at 189–90.

<sup>215</sup> *The Passenger Cases*, 48 U.S. (7 How.) at 405 (McLean, J., concurring in the judgment).

<sup>216</sup> *E.g., id.* at 414 (Wayne, J. concurring in the judgment). As this statement suggests, the debate among the Justices over the relative authority of the states and the federal government to control the landing of immigrants unfolded in the shadow of mounting sectional conflict over slavery. Specifically, the mostly pro-slavery dissenters rejected the notion that immigrants could be subjects of commerce, at least in part because that view suggested that Congress might also have the constitutional authority to regulate other human articles of commerce—namely slaves. Justices Taney and Woodberry, in particular, warned that the scope of the federal commerce power directly implicated the ability of the states to regulate the entry into their territory of slaves and free blacks. If the federal commerce power was exclusive of state regulations such as the challenged head taxes, Justice Woodbury explained, “all the laws of Ohio, Mississippi, and many other States, either forbidding or taxing the entrance of slaves or liberated blacks, will be nullified.” *Id.* at 567 (Woodbury, J., dissenting). Chief Justice Taney—who eight years later wrote the majority opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857)—similarly worried that if the federal government could oblige states to receive immigrants, then “emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences.” *The Passenger Cases*, 48 U.S. (7 How.) at 474 (Taney, C.J., dissenting); see generally Bilder, *supra* note 32 (arguing that the Court was unable to reach consensus on the nature of Congress’s commerce authority over immigration for most of the nineteenth century because the politics and legal culture of slavery prevented some Justices from accepting that immigrants could be “articles of commerce”).

<sup>217</sup> See *The Passenger Cases*, 48 U.S. (7 How.) at 450–51 (Catron, J., concurring in the judgment) (referencing the United States’s commercial treaty with Great Britain as an example of national authority to allow foreign entrants into the country).

State to another State or [from] foreign countries,” irrespective of whether the importers “are citizens or foreigners.”<sup>218</sup> The majority likewise presumed that a holding with respect to foreign commerce would apply symmetrically to domestic interstate commerce. If New York could lay a tax on passengers arriving from Europe, Justice McLean warned, “the same principle [would] sustain a right in every State to tax all persons who shall pass through its territory on railroad-cars, canal-boats, stages, or in any other manner.”<sup>219</sup> The consequence would be to “enable a State to establish and enforce a non-intercourse with every other State.”<sup>220</sup>

For some members of the majority, the fact that the head taxes regulated foreign commerce was sufficient to render them unconstitutional.<sup>221</sup> For others, however, the head taxes were invalid only if they collided with the will of Congress.<sup>222</sup> That Congress had engaged in very little meaningful regulation of immigration might have suggested that the field remained largely open to state legislation—as the dissenters argued, either a reflection of Congress’s indifference or an invitation to the states to legislate. Instead, the Justices in the majority interpreted Congress’s relative inaction as an affirmative federal policy of encouraging immigration. “From the first day of our [nation’s] separate existence,” Justice Catron reasoned, “has the policy of drawing hither aliens, to the end of becoming citizens, been a favorite policy of the United States, . . . cherished by Congress with rare steadiness and vigor.”<sup>223</sup> No state could “claim the power of thwarting by its own authority the established policy of all the States united.”<sup>224</sup>

The specific meaning that the Justices in the majority attached to the dearth of federal regulation appeared to reflect each man’s assessment of the economic and political virtues of immigration, and particularly his relative faith in assimilation. Through the long-standing national policy of immigration liberalism, Justice Catron maintained, “our extensive and fertile country has been . . . filled up by a respectable population . . . that is easily governed and usually of approved patriotism.”<sup>225</sup> “Keeping in view the spirit of the Declaration of Independence with respect to the importance of augmenting the population of the United States,” Congress

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<sup>218</sup> *Id.* at 417 (Wayne, J., concurring in the judgment).

<sup>219</sup> *Id.* at 407 (McLean, J., concurring).

<sup>220</sup> *Id.* Justice Catron similarly cautioned that if “aliens belonging to foreign commerce, and passengers coming from other States, could have a poll-tax levied on them on entering any port of a State, . . . the great inlets of commerce might raise all necessary revenues from foreign intercourse, and from intercourse among the States.” *Id.* at 448 (Catron, J., concurring).

<sup>221</sup> *See supra* note 207.

<sup>222</sup> *The Passenger Cases*, 48 U.S. (7 How.) at 434 (Wayne, J., concurring).

<sup>223</sup> *Id.* at 440 (Catron, J., concurring in the judgment).

<sup>224</sup> *Id.* at 443.

<sup>225</sup> *Id.* at 440.

had frequently passed laws “to facilitate and encourage . . . the immigration of Europeans into the United States.”<sup>226</sup> It was evident from the “repeated and well-considered acts of legislation,” including the Passenger Act of 1819 and various laws exempting from duties certain household items and workmen’s tools, that “Congress has covered, and has intended to cover the whole field of legislation over this branch of commerce.”<sup>227</sup> Noting the nation’s “many millions of acres of vacant lands,” Justice Grier similarly found it impossible to conclude that “the framers of our Constitution had committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted” to settle here.<sup>228</sup> Indeed, it remained “the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation.”<sup>229</sup>

This Part has demonstrated that, during the eight decades between the nation’s founding and the beginning of the Civil War, Americans’ broad confidence in immigrants’ fundamental moral natures and in the power of American economic and political institutions to transform them in to patriotic republicans directly shaped both the political construction of immigrants and their legal identity as objects of regulation. Throughout this period, the Supreme Court figured immigrants not as foreigners, but simply as persons, whose effect on the health, morals, and welfare of the community was, like that of other persons, citizens and non-citizens alike, subject to the police power of the individual states. Even after the Court redefined immigrants as articles of foreign commerce in the 1870s, the Commerce Clause, like the police power, remained indifferent to citizenship.

#### IV. FROM COMMERCE TO SOVEREIGNTY: FEDERAL AUTHORITY IN THE POST-CIVIL WAR ERA

As we have seen, for the first century of the nation’s history, the absence of American citizenship did not trigger a constitutionally exceptional regulatory authority. For much of that time, the individual states reserved significant authority to regulate immigrants and immigration under their traditional police powers—an authority premised

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<sup>226</sup> *Id.* “[A]cting in the spirit of all our history and all our policy,” Justice Catron continued, Congress “has opened the door widely and invited the subjects of other countries to leave the crowded population of Europe and come to the United States.” *Id.* at 442.

<sup>227</sup> *Id.* at 442.

<sup>228</sup> *Id.* at 461 (Grier, J., concurring in the judgment).

<sup>229</sup> *Id.*

not on immigrants' status as foreigners, but rather on the *purpose* of the particular regulation at issue. As potential paupers or carriers of disease, immigrants were simply persons, whose effect on the health, morals, and welfare of the community defined them, irrespective of citizenship, as objects of state police power.<sup>230</sup>

As I argued in Part III, in the 1840s and 1850s, the same aspects of industrialization that appeared to threaten republican government generally—the concentration of population and economic production in the nation's cities; growing poverty; and increasingly intense wage competition, often from foreign workers—unsettled the nation's founding narrative of immigration as regeneration. Nativists recast structural poverty as moral deficiency, impugning immigrants as indelibly alien to the American character.<sup>231</sup> Notwithstanding the crescendo of nativism, however, the judgment that a large portion of foreigners were unassimilable had not yet taken hold among a broad swath of the American population.<sup>232</sup> Even as the Know Nothings gained remarkable, if brief, electoral success, they failed to achieve their stated goal of restraining foreigners' political influence by extending the period of residency required for naturalization.<sup>233</sup> Indeed, the nativist fervor faded as rapidly as it had appeared, as sectional conflict over slavery and the enormous labor demands created by the Civil War eclipsed the mid-century nativist movement.<sup>234</sup>

In this Part, I argue that when the same seismic social and economic upheavals that animated the nativism of the 1850s returned with a vengeance a generation later, they transformed both immigration policy and the nature of federal regulatory authority. Sections A and B argue that, following the depression of 1873, policymakers, judges, and other observers increasingly concluded that mass economic dependency had overflowed the bounds of locality and become an entrenched problem of national scope. At the very moment that Americans were proclaiming a national “crisis of foreign pauperism,” the Supreme Court declared that the laws under which the states had long administered the admission of foreigners were preempted by Congress's exclusive authority to regulate commerce with foreign nations.<sup>235</sup> As objects of federal commercial regulation, immigrants were thus recast as articles of commerce.<sup>236</sup> The foreign commerce framework registered immigrants' non-citizenship in a

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<sup>230</sup> *Supra* Part III.

<sup>231</sup> *Supra* Part III.A.2 and accompanying notes.

<sup>232</sup> *Supra* Part II.A.2 and accompanying notes.

<sup>233</sup> *Supra* notes 137–39 and accompanying text.

<sup>234</sup> *Supra* Part III.A.2 and accompanying notes.

<sup>235</sup> U.S. CONST. Art. I, § 8; *infra* Part IV.B and accompanying notes.

<sup>236</sup> *Infra* Part IV.B and accompanying notes.

way that the state police power did not—after all, immigrants were articles of commerce with foreign nations precisely because they were transported to the United States from abroad—but nevertheless retained the purpose-oriented analysis of the mid-century cases.<sup>237</sup> It was the economic impact of immigration on the nation rather than immigrants’ non-citizenship *per se* that defined the nature and scope of federal authority.<sup>238</sup> Sections C and D demonstrate that immigrants were legally reconstructed as foreigners, and their constitutional personhood eclipsed by their non-citizenship, only in the final decade of the nineteenth century. I argue that the political construction of Chinese and “new” European immigrants as indelibly different from “old stock” Americans animated the Supreme Court’s reinvention of the federal immigration power as an instrument of national self-defense.

A. *The “Crisis of Foreign Pauperism”*

Government officials and charity administrators had confronted intermittent episodes of widespread poverty since the beginning of the nineteenth century, most acutely during the depression years between 1837 and 1842, and again in 1857.<sup>239</sup> Yet before the 1870s, such economic downturns were generally understood as aberrant and unnatural exceptions to an otherwise healthy and prosperous economy.<sup>240</sup> The devastating depression triggered by the panic of 1873, however, changed the basic meaning of economic dependency, as mass poverty increasingly became understood as a chronic, entrenched feature of industrial America.<sup>241</sup> The six-year depression was the longest and deepest in United States history,<sup>242</sup> and left as many as one-third of the nation’s workers jobless.<sup>243</sup> Widespread begging and dependence on charity, coupled with the growing assertiveness and radicalism of organized laborers, conjured for many observers the intractable social stratification and class conflict of Europe. As charities struggled to assist unprecedented throngs of jobless, able-bodied male heads of household, the nation’s vaunted ideals of economic mobility and personal independence seemed genuinely vulnerable.<sup>244</sup>

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<sup>237</sup> *Infra* Part IV.B and accompanying notes.

<sup>238</sup> *Infra* Part IV.B and accompanying notes.

<sup>239</sup> ALEXANDER KEYSSAR, *OUT OF WORK: THE FIRST CENTURY OF UNEMPLOYMENT OF MASSACHUSETTS* 9, 14 (1986).

<sup>240</sup> *Id.* at 32–38, 47.

<sup>241</sup> See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 69 (1986); KEYSSAR, *supra* note 239, at 250–52.

<sup>242</sup> KATZ, *supra* note 241, at 69.

<sup>243</sup> KEYSSAR, *supra* note 239, at 52.

<sup>244</sup> See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 57–58 (1991). During the last third of the nineteenth century, explains historian Dorothy Ross, the sharpening conflict between “the existence of a permanent working class” subject to the “vicissitudes of the business cycle” and the

Though it is evident in retrospect that the mass dependency of the 1870s was attributable to a worldwide depression, declining wages and prices, and extraordinarily high levels of unemployment, a preponderance of contemporary observers focused on causes that were not so much economic as moral. The culprit was not merely poverty, but rather a “crisis of *pauperism*”—a much more menacing phenomenon characterized by a deficit of virtue.<sup>245</sup> As contemporaries diagnosed paupers’ fundamental moral unfitness for American economic and political life, they increasingly noted the presence of large numbers of foreigners among the emergent pauper class—an observation that quickly ripened into a full-throated and nearly ubiquitous discourse of “foreign pauperism.”<sup>246</sup> As the New York State Board of Charities observed in its first annual “Report on Alien Paupers” in 1875, a great “class of indolent and hereditary paupers . . . [has] been smuggled into our country by the connivance . . . of foreign nations.”<sup>247</sup> These unnaturally selected European paupers, which were “unchanged in character and tendencies” and still bore the “stamp of their far-off origin,” could be “recognized by any thoughtful visitor to the homes of the poor, in our cities, and among the crowds who resort to the offices of the superintendents of the poor as eager applicants for outdoor relief.”<sup>248</sup>

#### B. *Immigrants as Articles of Commerce*

The process of federalizing a regulatory domain that historically had been co-occupied, if somewhat uneasily, by both the states and the federal government, consisted of a succession of complementary moves by Congress and the Supreme Court. Beginning in 1875, Congress enacted a series of statutes transferring immigration policymaking and administrative control from the states to the federal government.<sup>249</sup> During the same

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long-standing ideal of a classless, or at least highly fluid, social, and economic system gave rise to a “crisis in the national ideology of American exceptionalism.” *Id.* at 53.

<sup>245</sup> Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 205.

<sup>246</sup> *Id.* at 211.

<sup>247</sup> STATE OF N.Y., EIGHTH ANNUAL REPORT OF THE STATE BOARD OF CHARITIES 137 (1875). The Report claimed that the “practice of pouring the scum of a population—the criminal classes and confirmed pauper classes—into the territory of a friendly state, is an invention of the very latest years.” *Id.*

<sup>248</sup> *Id.* at 112.

<sup>249</sup> See Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084 (1891) (codified as amended at 8 U.S.C. §§ 1551–74 (2006)) (transferring sole authority to administer immigration regulations to the federal government, and creating the Office of the Commissioner of Immigration and Naturalization under the authority of the Secretary of the Treasury); Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952) (prohibiting the immigration of any foreigner who had entered into an employment contract with an American employer prior to departing his country of origin); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1843) (prohibiting the entry of Chinese laborers into the United States for a period of ten years); Immigration Act of 1882, ch. 376, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–74 (2006)) (transferring authority over the landing of immigrants from individual states to the United States Treasury Department); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed

period, the Supreme Court struck down several existing state regulations and upheld the new federal legislation.<sup>250</sup> In so doing, the Justices reached unanimous consensus that the transportation of immigrants to the United States constituted commerce with foreign nations, and that Congress possessed exclusive authority to regulate that process.

Following the Court's decision in *The Passenger Cases* striking down the New York and Massachusetts head taxes, New York attempted to circumvent the constitutional infirmity by affording each ship owner or consignee the option of paying either a \$300 bond that would be refunded after four dependency-free years, or a nonrefundable "commutation fee" of \$1.50, for every passenger arriving from a foreign port.<sup>251</sup> The amended law reached the Supreme Court in the 1875 case *Henderson v. Mayor of New York*.<sup>252</sup> A unanimous Court held that because the "purpose and effect" of the New York scheme was to tax the landing of foreign passengers, it was no less unconstitutional that the head tax struck down in *The Passenger Cases*.<sup>253</sup> The ever-growing commercial significance of immigrant labor to the nation's material progress was essential. As Justice Miller observed,

the transportation of passengers from European ports to those of the United States has [in recent decades] attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and home . . . . In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads and develop the latent resources of the country . . . .<sup>254</sup>

Gone was the earlier notion of "two distinct sovereignties" exercising

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1974) (prohibiting the immigration of prostitutes, contract laborers, and convicts from "China, Japan, or any Oriental country").

<sup>250</sup> See *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875) (striking down state head taxes); *Chy Lung v. Freeman*, 92 U.S. 275, 278 (striking down a California statute empowering a state immigration commissioner to require a bond for immigrant women determined to be "lewd and debauched"); *The Head Money Cases*, 112 U.S. 580, 599 (1884) (upholding the "head tax" provision of the federal Immigration Act of 1882).

<sup>251</sup> Each bond was to be used to indemnify the state against the cost of supporting that passenger for four years, at which time it would be returned. As the state expected, ship owners invariably opted to pay the commutation fee. See Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, *supra* note 12, at 24 (describing New York State's revision of its "head tax" law following *The Passenger Cases*).

<sup>252</sup> *Henderson*, 92 U.S. at 267.

<sup>253</sup> *Id.* at 268–69.

<sup>254</sup> *Id.* at 270.

“concurrent power” over immigration.<sup>255</sup> For the *Henderson* Court, it was not the Constitution or the nature of national sovereignty that required federal exclusivity; rather, it was history.

If Congress’s immigration power derived from the Commerce Clause, however, it was an authority that extended well beyond strictly commercial matters. Notably, federal exclusivity would enable the United States to act as a single, unified sovereign in relation to foreign governments. As Justice Miller explained, a law that impedes immigration “may properly be called *international*,” as it “belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments.”<sup>256</sup> Indeed, on the same day the Court decided *Henderson*, it struck down a California bond requirement similar to the New York scheme, declaring that the Constitution had not “done so foolish a thing” as to allow “a single State . . . , at her pleasure, [to] embroil us in disastrous quarrels with other nations.”<sup>257</sup>

*Henderson* devastated New York’s ability to fund the administration of the Castle Garden Depot. New York responded by abandoning its longstanding opposition to federal control over immigration and, joined by several other seaboard states, lobbied for swift and aggressive national action.<sup>258</sup> Congress responded, somewhat belatedly, with the Immigration Act of 1882,<sup>259</sup> transferring authority over the landing of immigrants from the states to the federal government; authorizing the Treasury Secretary to enter contracts with state immigration commissions to inspect incoming foreigners; and providing that a duty of fifty cents be collected from each foreign passenger to fund the administration of the Act and to assist sick or destitute immigrants.<sup>260</sup>

The Supreme Court upheld the Act two years later, in *Edye v. Robertson*, known as *The Head Money Cases*.<sup>261</sup> The Court’s unanimous

<sup>255</sup> The Passenger Cases, 48 U.S. 283, 399 (1849) (McLean, J., concurring).

<sup>256</sup> *Henderson*, 92 U.S. at 273.

<sup>257</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). Under the California law, bonds were only required for specific classes of immigrants, including “lewd and debauched women”—the class to which the plaintiff, a Chinese woman, had been assigned. *Id.* at 276. The Court was particularly troubled by the potential for a single state to provoke an international conflict for which the national government would have to answer. *Id.* at 280. By placing “in the hands of a single [commissioner]” the authority to require or commute a bond, the Court worried, the California law empowered a lone state official “to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to the systematic extortion of the grossest kind.” *Id.* at 278. Under such a scheme, “a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a power nation, or the loss of an equally powerful friend.” *Id.* at 279.

<sup>258</sup> Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 215–17.

<sup>259</sup> Immigration Act of 1882, Ch. 376, §§ 1–4, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–56, 1571–74 (2006)).

<sup>260</sup> State commissioners would examine passengers and exclude “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.” *Id.* § 2.

<sup>261</sup> 112 U.S. 580 (1884).

opinion—again authored by Justice Miller—further defined the nature and scope of Congress’s authority to regulate immigration under its commerce power. In reply to the plaintiff ship master’s argument that the fifty-cent duty was an unconstitutional “direct tax,” lacking in uniformity and imposed for a “purpose [that] has nothing to do with the general welfare,” the Court observed:

The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration . . . . Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.<sup>262</sup>

Thus recast as “the business of bringing foreigners” to the United States, immigration *qua* immigration became a branch of commerce with foreign nations, and thus the exclusive province of Congress.

As Justice Miller’s reference to the “evils” inherent in immigration suggest, this great stream of international commerce carried not only valuable immigrant labor, but also the substantial burden of supporting the foreign “poor and helpless.”<sup>263</sup> To endorse the plaintiff ship master’s contention that Congress, too, lacked the power to tax foreign passengers, Justice Miller concluded, would be

to hold that [the power] does not exist at all; that the framers of the constitution have so worded that remarkable instrument that the ships of all nations . . . can, without restraint or regulation, deposit here . . . the entire European population of criminals, paupers, and diseased persons, without any provision to preserve them from starvation, and its concomitant sufferings.<sup>264</sup>

This rendering of the federal immigration power incorporates within the nationalizing rubric of foreign commerce the formerly local, geographically and temporally discreet, immigration problems of pauperism and crime. The Court’s vision of a foreign population of chronic dependents being thrown upon the public stands in sharp contrast to the nation’s earlier faith that, so long as immigrants were dispersed among the native population, they would in time be absorbed into the

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<sup>262</sup> *Id.* at 595.

<sup>263</sup> *Id.* at 591.

<sup>264</sup> *Id.*

tissues of the body politic and transformed into virtuous, patriotic republicans.

On the one hand, the federal immigration power set forth in *The Head Money Cases* and *Henderson* suggests that immigrants' foreignness was beginning to shape the authority to which they, as immigrants, were subject: first, the discourse of "foreign pauperism" cast the implications of mass economic dependency in increasingly national terms; and second, immigrants constituted articles of commerce with foreign nations precisely because they were transported to the United States from abroad. In this respect, we might understand the foreign commerce rationale for federal exclusivity to have edged the federal immigration power toward the discourse of national sovereignty that anchors the plenary power doctrine. On the other hand, and in marked contrast to the inherent sovereignty regime, the foreign commerce framework retained the purpose-oriented analysis of *Miln* and *The Passenger Cases*. It was the perceived economic impact of immigration, for better and worse, that defined the nature and scope of federal authority. Immigrants' non-citizenship remained incidental, or at least secondary, to the Court's understanding of congressional authority. In this respect, then, the commerce rationale of the 1870s and 1880s represents less a step toward immigration exceptionalism than an extension of the mid-century decisions.

### C. "Imported" Labor and the Problem of Indelible Difference

Section B argued that, even after immigrants were legally reconstructed as articles of commerce in the 1870s and 1880s, the essential premise of federal authority was not immigrants' foreignness, but rather the commercial importance of the immigration system.<sup>265</sup> It was only in the final decade of the nineteenth century that immigrants' foreignness *per se* came to dictate the source, locus, and scope of Congress's—and, by delegation, the President's—regulatory authority. This Section argues that immigrants were legally reconstructed as foreigners, and their constitutional personhood eclipsed by their non-citizenship, as they became understood as fundamentally and permanently alien to the national character.

As Part III discussed, the United States's traditional policy of open borders, as well as the reservation of most immigration regulation to the individual states, rested on a broad confidence that an open continent, easy access to land, and liberal exposure to republican values and institutions would assimilate all comers.<sup>266</sup> In the 1880s and 1890s, however, a growing chorus of observers lamented that the Jeffersonian vision of

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<sup>265</sup> *Supra* Part IV.B.

<sup>266</sup> *Supra* Part III.A.1.

virtuous citizenship rooted in property ownership and independent labor was fading into history. “[T]he conditions have changed utterly from the days when the supply of vacant land was indefinite, the demand for labor almost unbounded, and the supply of people very limited,”<sup>267</sup> counseled Henry Cabot Lodge, a leading congressional advocate of immigration restriction. For Lodge and his contemporaries, industrialization had rendered independent labor—and with it, the promise of assimilation—a relic of the past. The belief that “the earth is the great disinfectant,” explained the economist Richmond Mayo-Smith, “and that all we need to do is get these depraved dregs of European civilization on to the land in order to reform them—it is in this early civilization that this saying is true.”<sup>268</sup>

If the industrial reorganization of life and labor caused contemporaries to doubt the regenerative power of American economic and political culture, however, legislators and others increasingly focused on the alleged character deficiencies of immigrants themselves. As we have seen, in the middle decades of the nineteenth century this critique centered on the importation from Europe of “foreign paupers.” Beginning in the 1870s in the western states, and the 1880s in the northeast, contemporaries turned their attention to a new, more menacing phenomenon that they dubbed, variably, the “coolie trade” (for Chinese laborers) or the “crisis of foreign pauper labor” (for Europeans).<sup>269</sup> Unlike the “foreign paupers” whose economic dependency had long drawn the attention of lawmakers and charity administrators, Chinese “coolies” and European “pauper laborers” offended through an *excess* of economic competitiveness. Because they were willing to work for virtually any wage, critics charged, they robbed “American” workers of the ability to provide their families with a “civilized” standard of living, and thereby degraded not only the labor market, but also the economic independence of the citizenry—the cornerstone of virtuous citizenship.<sup>270</sup> As we will see in Section D, this critique propelled both the legal reconstruction of foreignness and the Court’s discovery of an extra-constitutional regulatory authority inherent in the nation’s sovereignty.

Because the Supreme Court adopted the plenary power doctrine in a case upholding Chinese exclusion, and did so in terms that appeared to endorse Congress’s racist rationale for that policy, it is tempting to

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<sup>267</sup> Henry Cabot Lodge, *The Restriction of Immigration*, 152 N. AM. REV. 27, 34 (1891).

<sup>268</sup> Richmond M. Smith, *Control of Immigration*, 3 POL. SCI. Q. 409, 413 (1888).

<sup>269</sup> “Coolie” was a generally derogatory but very common term for Chinese laborers. Beginning in the mid-nineteenth century, it was used “to designate some sort of contract labor, but [was more often] used to convey the idea of servitude, slavery or peonage.” MARY ROBERTS COOLIDGE, *CHINESE IMMIGRATION* 41 (1909).

<sup>270</sup> *Id.* at 221–22.

understand the doctrine merely as the legal expression of the anti-Chinese racism that pervaded Gilded-Age political culture. Indeed, the author of the decision, Justice Stephen Field, was himself a native Californian who made no secret of his concern about the destruction of “white labor” by “vast hordes” of degraded Chinese.<sup>271</sup> But to reduce the Court’s unanimous opinion in *The Chinese Exclusion Case* to its author’s hostility toward Chinese immigrants misses the full meaning and stakes of immigration regulation for late-nineteenth century judges and legislators. Nor does it account for the Court’s adoption of a constitutionally exceptional regulatory authority that the Justices knew would apply primarily to immigration from Europe. Rather, as this Section demonstrates, the political construction of European pauper laborers in many ways paralleled Americans’ contemporaneous condemnation of the “servile” Chinese. Together, they depicted an invasion of the United States by uncivilized, racially degraded, citizenship-destroying foreign laborers.

### 1. *The “Servile” Chinese*

The political origins of Chinese Exclusion lie in the American West of the 1870s, in a ferocious anti-Chinese movement led by the Workingmen’s Party of California. By the end of the decade, anti-Chinese legislators in California had amended the state constitution to permit a host of repressive measures, including the exclusion of Chinese from certain occupations and the forced relocation of resident Chinese into ghettos. The California legislature also aggressively lobbied the U.S. Congress to enact a national exclusion law.<sup>272</sup> In 1876, the California Senate adopted a “Memorial” titled *The Social, Moral and Political Effect of Chinese Immigration*.<sup>273</sup> The Memorial captures the meaning that cheap foreign labor held for the future of American citizenship and for the nation’s historical narrative of immigration as regeneration. As with new European pauper laborers, the

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<sup>271</sup> In an 1884 case, in which the Supreme Court sustained a Chinese immigrant’s challenge to a particularly harsh application of the Chinese Exclusion Act, Justice Field wrote a long dissent describing what he considered the distinctly destructive characteristics of Chinese laborers. “[T]hey had a wonderful capacity to live in narrow quarters without injury to their health,” he explained, and were “perfectly satisfied with what would hardly furnish a scanty subsistence to our laborers and artisans.” *Chew Heong*, 112 U.S. 536, 565–66 (1884). Congress thus adopted a policy of Chinese exclusion in order to interrupt “the certainty” that “vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve ourselves the inestimable benefits of our Christian civilization.” *Id.* at 569.

<sup>272</sup> On the political history of the California anti-Chinese movement, and especially the role of organized labor, see ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 68–78 (1971).

<sup>273</sup> COMM. OF SENATE OF CAL., *CHINESE IMMIGRATION: THE SOCIAL, MORAL AND POLITICAL EFFECT ON CHINESE IMMIGRATION* (1877) [hereinafter *MEMORIAL OF THE STATE OF CALIFORNIA*].

so-called “servile” Chinese raised the monumental question of whether a competitive market in wage labor was compatible with republican citizenship. The Memorial’s political construction of Chinese laborers became an archetype for the threatened degradation of American citizenship by cheap foreign labor, and previewed the ultimately successful arguments in Congress a few years later in favor of both Chinese exclusion and the exclusion of European “contract laborers.”

California lawmakers, as well as a growing cross-section of American judges, labor spokesmen, and economists, concluded that Chinese labor threatened not only American workers, but also American citizenship.<sup>274</sup> To understand why, it is essential to appreciate the ideologically freighted meaning that wage labor had acquired in the years following the Civil War. Over the course of the nineteenth century, the early republican vision of citizenship rooted in self-employment and the ownership of real property gradually gave way, as industrialization transformed farmers and craftsmen into wage workers.<sup>275</sup> As the traditional Jeffersonian prerequisites for independent citizenship became less broadly attainable, however, Americans did not abandon independence as an essential component of citizenship; rather, they redefined it. By the 1870s, there had emerged a general consensus among congressional Republicans and political intellectuals in the north and south alike that the sale of one’s labor was an expression of self-ownership. The wage contract, long thought incongruous with virtuous citizenship, had become instead a token of individual economic freedom.<sup>276</sup> Critically, however, the new

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<sup>274</sup> See *id.* at 41–42 (describing the corrosive effect Chinese laborers have on the culture of American labor).

<sup>275</sup> See *supra* notes 25–30 and accompanying text; see also SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850 107–08 (1984) (describing the rise of industrial culture in Manhattan). By the postbellum era, a majority of male workers labored for a wage for the first time in the Nation’s history. DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872 28–30 (1967).

<sup>276</sup> See NANCY COHEN, THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865–1914 29 (2002); LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY 17–34 (1997); STANLEY, *supra* note 41, at 75–77. Perhaps as much as any other factor, the conflict over slavery transformed the cultural and ideological meaning of the wage contract. Abolitionists extolled the voluntary exchange of one’s labor for a wage as the antithesis of slavery. The compulsion inherent in the slave system, they argued, violated the fundamental tenets of both economic morality and human nature, denying the right of man to govern himself, to enjoy bodily integrity, to own property, and to dispose of his labor at market price. Consent became the language of individual freedom, and thus acquired the moral and emotional weight of opposing human bondage. See STANLEY, *supra* note 41, at 4–5; RONALD G. WALTERS, THE ANTI-SLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830 121–23 (1978); William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767, 785–86 (1985). While this collective redefinition of independence reflected a general consensus, it was by no means unanimous, as organized labor continued to contest the easy equation of personal freedom with the wage contract. See DANIEL T. ROGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850–1920 155–68 (1978); STANLEY, *supra* note 41, at 68–70.

compatibility of wage labor and personal independence was subject to the essential condition that a man's wage be sufficient to sustain a respectable standard of living for himself and his family.

Against this ideological backdrop, wage competition between white and Chinese workers served as a referendum on the moral integrity of the industrial labor system. The crux of the problem, critics believed, was Chinese laborers' uncivilized standards of living. White laborers, American and European alike, "cannot compete with Chinese labor," the California Memorial explained. The reason was not "any deficiency of skill or will" on the part of white laborers, but rather their fidelity to the "mode of life hitherto considered essential for our American civilization."<sup>277</sup> Critics cited Chinese and white laborers' respective diets, in particular, as a source of competitive unfairness and a measure of fitness for citizenship. "Our laborers require meat and bread, which [are] . . . necessary to that mental and bodily strength [that] is . . . important in the citizens of a republic," the Memorial reported, "while the Chinese require only rice, dried fish, tea, and a few simple vegetables."<sup>278</sup> The residential habits of the Chinese were no better, characterized by "moral degradation," "the most disgusting licentiousness," and "the absolute certainty of pestilence arising from the[ir] crowded condition and filthy habits of life."<sup>279</sup> "To compete with the Chinese," the Memorial concluded, "our laborer must be entirely changed in character, in habits of life, in everything that the Republic has hitherto required him to be."<sup>280</sup> White laborers would not be "induced to live like vermin."<sup>281</sup>

Congressional advocates of Chinese exclusion sounded the same theme a few years later. Nevada Senator John P. Jones quoted at length from a letter he had received from a miner:

The forces of our civilization have . . . given me enough to support [my] wife and [four] children in . . . decency and comfort. . . . I have separate rooms in which the children may sleep; my wife must be clothed so that she does not feel ashamed in mixing with her neighbors; the children must be clothed as befits decency and order and the grade of civilization in which we live, and we must have a variety of

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<sup>277</sup> THE SENATE OF CALIFORNIA, CHINESE IMMIGRATION: THE SOCIAL, MORAL AND POLITICAL EFFECT ON CHINESE IMMIGRATION; POLICY AND MEANS OF EXCLUSION, MEMORIAL OF THE SENATE OF CALIFORNIA TO THE CONGRESS OF THE UNITED STATES, AND AN ADDRESS TO THE PEOPLE OF THE UNITED STATES 41(1877) [hereinafter MEMORIAL OF THE SENATE OF CALIFORNIA].

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 7.

<sup>280</sup> *Id.* at 42.

<sup>281</sup> *Id.* at 41. "[O]ur laborer has an individual life, cannot be controlled as a slave by brutal masters, and this individuality has been required of him by the genius of our institutions, and upon these elements of character the State depends for defense and growth." *Id.*

food to which we have been accustomed and a taste for which we have inherited from our ancestors. . . . While my work is very arduous I go to it with a light heart [because] . . . I am in the hopes to bring up my daughters to be good wives and faithful mothers, and to offer my sons better opportunities in life than I had myself.<sup>282</sup>

Servile Chinese labor jeopardized not only the rate of wages paid to American workers, Jones suggested, but the very pillars of American civilization and citizenship: self-respect, social order and, not least, the promise to future generations of upward economic mobility. “You cannot introduce Chinese wages and Chinese laborers without bringing in Chinese conditions, social and political,”<sup>283</sup> Jones warned. Chinese exclusion would therefore be “a blow struck at degraded, under-paid, under-clothed, and under-fed labor, and it is a blow in favor of that fair remuneration which the forces of our civilization up to this hour have decreed that the laborer should get.”<sup>284</sup>

As the California legislature saw it, the problem was not the wage labor system *per se*, but rather the state of unfreedom in which Chinese laborers arrived on the economic playing field. The “trite saying . . . that competition in labor is healthful” may be true enough, the Memorial declared, but competition could not exist “between free and slave labor; and the Chinese in California are substantially in a condition of servitude.”<sup>285</sup> Chinese laborers were “imported here by large companies under contracts,” for the duration of which they were, “to all intents, serfs, . . . let out to service at a miserable pittance to perform the labor that it ought to be the privilege of our own race to perform.”<sup>286</sup> “Even were it possible for the white laborer to maintain existence upon the wages paid to the Chinese,” the Memorial continued, “his condition nevertheless becomes that of an abject slave, for grinding poverty is absolute slavery.”<sup>287</sup> Under such conditions, “[t]he vaunted ‘dignity of labor’

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<sup>282</sup> 13 CONG. REC. 1741 (1882) (statement of Sen. Jones).

<sup>283</sup> *Id.* at 1743.

<sup>284</sup> *Id.* Senator Jones went on to explain why American workers might rationally prefer to compete with poor Europeans rather than poor Chinese:

European laborers, men of their own race, while they increase the supply of labor, also increase in nearly as great a proportion the demand for the products of labor. On the other hand, while the incoming of the . . . “little brown man” tends to glut the labor market to the full extent of his increased numbers, to nothing like the same extent as the European does he increase the demand for products.

*Id.*

<sup>285</sup> MEMORIAL OF THE SENATE OF CALIFORNIA, *supra* note 277, at 5.

<sup>286</sup> *Id.* at 5–6.

<sup>287</sup> *Id.* at 6.

becomes a biting [sic] sarcasm”<sup>288</sup> and a “burlesque on the policy of emancipation.”<sup>289</sup>

Under the traditional theory of immigration as regeneration, Chinese laborers perhaps could have been redeemable. Notwithstanding their alleged virtual slavery and degraded habits of life, in an earlier time liberal exposure to republican values and institutions might have awakened their “dormant seed of virtue,” transforming them into valuable and loyal members of the polity, if not citizens.<sup>290</sup> Indeed, as the Memorial acknowledged, the United States had long “invited the people of foreign countries to our borders . . . with the well founded hope that they would, in time, by association with our people, and through the influence of our public schools, become assimilated to our native population.”<sup>291</sup> In the case of the Chinese, however, the seed of virtue was not merely dormant; it was nonexistent. “Their code of morals, their forms of worship, and their maxims of life,” hardened over millennia by the “iron manacles of caste,” now stood as “a barrier against which the elevating tendency of a higher civilization exerts itself in vain.”<sup>292</sup> From an “ethnological point of view,” the Memorial explained, “there can be no hope that any contact with our people, however long continued, will ever conform them to our institutions, enable them to comprehend or appreciate our form of government, or to assume the duties or discharge the functions of citizens.”<sup>293</sup> Notwithstanding a quarter-century living alongside white Californians, the Chinese thus remained “the same stolid Asiatics that have floated on the rivers and slaved in the fields of China for thirty centuries of

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 7. In Congress, too, references to slavery abounded. Senator John Miller, a California Republican and sponsor of the Senate bill that would become the Chinese Exclusion Act, urged that, were the bill to fail, “all the speculators in human labor, all the importers of human muscle, all the traffickers in human flesh [will] ply their infamous trade without impediment . . . and empty the teeming, seething slave pens of China upon the soil of California!” 13 CONG. REC. 1482 (1882) (statement of Sen. Miller) (quoted in COOLIDGE, *supra* note 269, at 168).

<sup>290</sup> Under the provision of the Naturalization Act of 1790 limiting naturalization to “free white person[s],” Chinese immigrants were prohibited from becoming naturalized United States citizens. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790).

<sup>291</sup> MEMORIAL OF THE SENATE OF CALIFORNIA, *supra* note 277, at 14.

<sup>292</sup> *Id.* at 6–7. The Memorial continued:

[T]he Chinese who inundate our shores are, by the very constitution of their nature, by instinct, by the traditions of their order for thousands of years, serfs. They never rise above that condition in their native land, and by the inexorable degrees of caste, never can rise. Servile labor to them is their natural and inevitable lot. Hewers of wood and drawers of water they have been since they had a country, and servile laborers they will be to the end of time.

*Id.* at 6.

<sup>293</sup> *Id.* at 7.

time[,] . . . [i]mpregnable to all the influences of our Anglo-Saxon life.”<sup>294</sup> Senator Jones was likewise incredulous that “[t]hese people, indurated and buried under fifty centuries of stagnation, petrified in oppressive forms and oppressive systems, are to be made good citizens of the United States in one single generation!”<sup>295</sup>

In the context of the Chinese problem, the uneasy compatibility between the industrial labor system, on the one hand, and the health of republican civilization and citizenship, on the other, took on an urgent air of racial contingency. The Memorial sought to clarify the stakes:

Are we engaged in building up a civilized empire, founded upon and permeated with the myriad influences of Caucasian culture; or are we merely planted here for the purpose of fighting greedily, each for his own hand, and of spoiling a country for whose future we have no care? If the latter, then indeed we should welcome Chinese labor, and should encourage its advent until it had driven white labor out of the field. But if we have higher duties; if we owe obligations to our race, to our civilization, to our kindred blood, to all that proclaims our common origin and testifies to the harmony

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<sup>294</sup> *Id.* The Memorial elaborated at length on the self-enforced insularity of the Chinese and their failure to absorb American values and institutions:

[T]hey remain separate, distinct from, and antagonistic to our people in thinking, mode of life, in tastes and principles, and are as far from assimilation as when they first arrived.

They fail to comprehend our system of government; they perform no duties of citizenship; they are not available as jurymen, cannot be called upon as a *posse comitatus* to preserve order, nor be relied upon as soldiers.

They do not comprehend or appreciate our social ideas, and they contribute but little to the support of any of our institutions, public or private.

They bring no children with them, and there is, therefore, no possibility of influencing them by our ordinary educational appliances.

There is, indeed, no point of contact between the Chinese and our people through which we can Americanize them. The rigidity which characterizes these people forbids the hope of any essential change in their relations to our own people or our government.

*Id.* at 15.

<sup>295</sup> 13 CONG. REC. 1741 (1882) (statement of Sen. Jones). Indeed, faced with the prospect of unchecked Chinese immigration, Senator Jones saw cause to doubt the ostensible liberal universalism of the Declaration of Independence—the favorite authority of the bill’s critics. *Id.* at 1740. The fact that the Constitution sanctioned slavery, he argued, served to rebut any suggestion that “the authors of the Declaration of Independence intended to say that all men of all races were equal, and that they were entitled to come to this country at their pleasure.” *Id.* On the contrary, “[w]henever this country believes that the incoming of a race . . . is inimical to the best interests of our people, then the time has come and the power is inherent to remedy the threatened evil.” *Id.* On the impulse of immigration critics to revisit the supposedly “universal” principles of the past, see SMITH, *supra* note 23, at 360–62; Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 238–42.

and consistence of our aims—then assuredly we must decide that the Chinaman is a factor hostile to the prosperity, the progress and the civilization of the American people.<sup>296</sup>

Would Congress direct national immigration policy toward the good of the whole public—the guiding light of republicanism—or would it succumb to the unbridled greed and unrestrained competition that, for many critics, increasingly characterized industrial America? Because “the safety of our institutions depends upon the homogeneity, culture, and moral character of our people,”<sup>297</sup> the Memorial concluded, the American political fellowship “must necessarily be limited by race, nationality and kindred civilization.”<sup>298</sup> “[F]ree institutions are a monopoly of the favored races,” Senator Jones agreed, because none but the Caucasian race was “capable of creating them; no other race is capable of perpetuating them; no other race is capable of treading freedom’s heights with firm and unwavering step.”<sup>299</sup>

It was this indictment of the Chinese—with its inextricable fusion of economic, racial, and political deficiencies—that spawned the Chinese Exclusion Act of 1882.<sup>300</sup> The Act barred entry of Chinese laborers into the United States for a period of ten years, and required any Chinese laborer then present in the country who wished to depart and subsequently return to obtain a certificate of reentry.<sup>301</sup>

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<sup>296</sup> MEMORIAL OF THE SENATE OF CALIFORNIA, *supra* note 277, at 45.

<sup>297</sup> *Id.* at 14.

<sup>298</sup> *Id.*

<sup>299</sup> 13 CONG. REC. 1742 (1882) (statement of Sen. Jones). For Jones and other members of Congress, racial inheritance was destiny:

This race of ours has been struggling for centuries upon centuries for the principles of liberty. It found this country a wilderness. Our forefathers made great sacrifices to found the institutions which we enjoy. With unequalled valor they faced all the rude forces of nature; they confronted and overcame the wild Indian and the wild beast; they subdued the soil, and we, their descendants, on a hundred battle-fields have fought to preserve the precious inheritance bequeathed by them . . . .

*Id.*

<sup>300</sup> Chinese Exclusion Act of 1882, Ch. 126, 22 Stat. 58 (repealed 1952). Congress first passed the so-called Fifteen Passenger Bill in 1879, capping at fifteen the number of Chinese passengers each steamship could land in the United States. See COOLIDGE, *supra* note 269, at 135–39. President Hayes vetoed the bill, however, on the ground that it violated the 1868 Burlingame Treaty between the United States and China, which recognized the “inherent and inalienable right of man to change his home and allegiance” and promised to extend to each other’s citizens the same privileges and immunities as citizens of the most favored nation. Treaty with China, U.S.-China, art. V–VII, July 28, 1868, 16 Stat. 739, 740 [hereinafter Burlingame Treaty]. President Hayes then sent a commission to China to renegotiate the agreement. The commission returned the following year with a new treaty permitting the United States to “regulate, limit, or suspend,” though “not absolutely prohibit” the entry of Chinese laborers. Treaty Between the United States and China, Concerning Immigration, U.S.-China, art. I, Nov. 17, 1880, 22 Stat. 826, 826.

<sup>301</sup> Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–60 (repealed 1952). After federal judges in San Francisco created a broad set of exemptions to the certificate requirement, Congress amended the statute two years later, in 1884, to clarify that the certificate was the “only evidence permissible to establish [a] right of reentry.” Act of July 5, 1884, ch. 220, 23 Stat. 115, 116 (1884)

## 2. “New” European Immigrants and the “Crisis of Foreign Pauper Labor”

As a matter of federal policy, the near-total exclusion of Chinese laborers from the United States was singularly draconian. The basic terms in which American lawmakers and others condemned the menace of the servile Chinese, however, were far from unique, and bear remarkable parallels with the nearly contemporaneous political construction of European “pauper laborers.”<sup>302</sup> The critique of European pauper labor crystallized in the mid-1880s, in congressional debate over what would become the Contract Labor Act of 1885. That Act, known as the Foran Act after its sponsor, Ohio Representative Martin Foran, prohibited the immigration of aliens who had entered into a labor contract prior to departing for the United States.<sup>303</sup> In introducing the bill in the House of Representatives, Representative Foran began with “a general proposition that can not be controverted, that the rate of wages determines the social, moral, and intellectual status of a people.”<sup>304</sup> “High wages signify intelligence, ingenuity, invention, and a higher order of manhood,” he explained, while “[l]ow wages signify debasement, ignorance, degradation, brutality.”<sup>305</sup> “Cheapen labor and you destroy the incentive that spurs men to effort and improvement,” resulting in “cheap men, ignorant, degraded, dangerous citizens.”<sup>306</sup> In an era in which wage labor had become the norm rather than a disreputable exception, the receipt of a wage adequate to support a respectable standard of living had become a sufficient material basis for virtuous citizenship.

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(repealed 1943). On the construction of the certificate requirement in the lower federal courts, see LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 18–20 (1995).

<sup>302</sup> I have previously explored this theme at length. See Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, *supra* note 12, at 33–40; Lindsay, *Preserving the Exceptional Republic*, *supra* note 146, at 220–50.

<sup>303</sup> The Foran Act made it unlawful “to prepay the transportation, or in any way assist or encourage the importation or migration of any alien . . . under contract or agreement . . . made previous to the importation or migration of such alien . . . to perform labor or service of any kind.” Contract Labor Act of 1885, ch. 164, 23 Stat. 332, 332 (repealed 1952).

<sup>304</sup> 15 CONG. REC. 5351 (1884) (statement of Rep. Foran).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* Senator Orville Platt, a Connecticut Republican, further elaborated on the vital nexus between high wages and a man’s fitness for republican citizenship:

[Y]ou must add to virtue and intelligence the prosperity of the citizen, if you expect the Republic to endure . . . . [T]o lower the standard of wages below fair remuneration is . . . vicious and destructive of republican institutions. . . . Up to this time those who have been willing to labor in this country under our system of free labor have been able to . . . comfortably clothe themselves and [their] families . . . [and] by thrift and prudence . . . secure a little home; attach themselves to the soil, and thus become conservative, patriotic citizens . . . .

16 CONG. REC. 1781 (1885) (statement of Sen. Platt).

With fitness for citizenship among the nation's growing class of wage workers now measured, at least in part, by their capacity to maintain a respectable household, legislators, economists, labor leaders, and others directed unprecedented attention to immigrants' "habits, customs [and] modes of living."<sup>307</sup> In this respect, congressional debate over the Foran Act echoed the construction of Chinese laborers two years earlier. Members of Congress frequently referred to reports purporting to document immigrant laborers' dismal consumption habits, singling out the "new" immigrants from southern and eastern Europe for special condemnation. Representative Foran cited accounts of Hungarian laborers "subsisting upon what an American laborer could not eat—such as mules, hogs, &c., which have been killed or died with cholera and other diseases."<sup>308</sup> "[T]he habits, morals, and modes of living of the Italians [are] of the same general character," he reported.<sup>309</sup> Francis Amasa Walker, the era's preeminent political economist, lamented the "foreigner, making his way into the little village, bringing . . . not only a vastly lower standard of living, but too often an actual present incapacity to even understand the refinements of life and thought in the community in which he sought a home."<sup>310</sup> Foreign pauper laborers threatened to degrade American citizenship not because they were poor, but because they appeared incapable of even comprehending a civilized standard of living.<sup>311</sup>

These critics routinely described European immigrants' alleged incapacity to appreciate life's creature comforts in terms of heredity and race. Henry Cabot Lodge cautioned that "[t]he immigration of people of those races which contributed to the settlement and development of the

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<sup>307</sup> 15 CONG. REC. 5350 (1884).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Francis A. Walker, *Immigration and Degradation*, 11 FORUM 634, 641 (1891).

<sup>311</sup> The Supreme Court offered a similar assessment in *Church of the Holy Trinity v. United States*, clarifying the class of immigrant laborers excluded under the Foran Act. 143 U.S. 457, 464–65 (1892). The Court explained that the purpose of the Act was to "raise the standard of foreign immigrants, and to discountenance the immigration of those who had not sufficient means in their own hands . . . to pay their passage." *Id.* at 464. Quoting directly from the House committee report on the Act, the Court continued:

This class of immigrants care[s] nothing about our institutions, and in many instances [has] never heard of them; they are men whose passage is paid by the importers . . . [T]hey are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and reduce it to the level of the imported pauper labor.

*Id.* at 465 (quoting 15 CONG. REC. 5359 (1884)).

United States is declining in comparison with that of races far removed in thought and speech and blood from the men who have made this country what it is.”<sup>312</sup> As a consequence, he explained, “[w]e have now before us race problems which are sufficient to tax to the utmost the fortunate conditions with which nature has blessed us.”<sup>313</sup> Walker agreed that the United States’ recent arrivals were “increasingly drawn from the nations of southern and eastern Europe—peoples which have got no great good for themselves out of the race wars of centuries,” and have thus “remained hopelessly upon the lowest plane of industrial life.”<sup>314</sup>

Moreover, lawmakers frequently used the language of foreign invasion to describe an American citizenry in jeopardy of degradation. Foreign pauper laborers were

the Goths and Vandals of the modern era. They come only to lay waste, to degrade, and to destroy. They bring with them ignorance, degraded morals, a low standard of civilization, and no motive of intended American citizenship. Like the vast flights of grasshoppers and locusts, . . . they sweep down upon our fields of labor to devour and strip from us the benefit of our customs and of the laws protecting American labor, and then take their flight again back to the breeding places from which they came.<sup>315</sup>

The trope of invasion was more than just a colorful metaphor. Indeed, as I demonstrate in Section D, the Supreme Court would soon adopt a constitutionally exceptional immigration power crafted expressly to repel foreign invasion.

This Section has demonstrated that in the post-Civil War campaign against the “importation” of cheap foreign labor, immigrants’ foreignness *per se* became a token of fundamental, indelible moral difference. Without the requisite economic conditions and racial material, simply exposing immigrants to republican political culture and institutions afforded little value as a force of assimilation. Critics of the “servile” Chinese and pauper laborers of Europe reimagined the American polity as a social and political body, the health of which depended on the collective natural endowments of its constituent members. From this perspective, the quality of American citizenship would be defined in opposition to and defended against the racially inferior, irreducibly foreign immigrant laborers that threatened to degrade it. It was precisely this perception of national vulnerability—this sense of peaceful invasion by a foreign menace—that

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<sup>312</sup> 22 CONG. REC. 2956 (1891) (statement of Rep. Lodge).

<sup>313</sup> *Id.*

<sup>314</sup> Walker, *supra* note 310, at 644.

<sup>315</sup> 15 CONG. REC. 5369 (1884) (statement of Sen. Cutcheon).

gave rise to the modern federal immigration power.

D. *A Power “Inherent in Sovereignty and Essential to Self-Preservation”*

The Supreme Court’s 1889 decision in *Chae Chan Ping v. United States*, titled *The Chinese Exclusion Case* by its author, Justice Stephen Field, reinvented the federal immigration power as an instrument of national self-defense.<sup>316</sup> Writing for a unanimous Court, Justice Field fashioned the discourse of indelible foreignness into a remarkably durable rationale for immigration exceptionalism. In so doing, the Court shifted federal authority to regulate immigration from its long-standing home in the Commerce Clause to the extra-constitutional concept of national sovereignty.<sup>317</sup> With the Immigration Act of 1891 and various amendments to the Chinese Exclusion Act, Congress, too, played an active, if underappreciated, role in claiming for itself the authority to legislate largely beyond the reach of judicial review.

Chae Chan Ping, a Chinese laborer, had lived in San Francisco from 1875 until he departed for China on June 2, 1887. He brought with him a certificate of reentry issued under the 1882 Act and 1884 amendments.<sup>318</sup> On October 1, 1888, while Chae Chan Ping was abroad, however, Congress again amended the Chinese Exclusion Act to prohibit any Chinese laborer who had resided in the United States and subsequently departed from ever returning. The so-called Scott Act thus voided every certificate issued under the 1882 and 1884 statutes.<sup>319</sup> Chae Chan Ping arrived in the port of San Francisco eight days later. When he presented his certificate, the collector denied him entry on the ground that it “had been annulled and his right to land abrogated,”<sup>320</sup> and detained him on board the passenger ship. The case came before the Court on a writ of habeas corpus.<sup>321</sup>

The legal question in dispute did not invite, let alone require, a reconstruction of the federal immigration power. Chae Chan Ping argued that his exclusion violated the 1868 and 1880 treaties between the United States and China, providing that Chinese laborers currently present in the country “shall be allowed to go and come of their own free will . . . and shall be accorded all the rights, privileges, immunities, and exemptions [as]

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<sup>316</sup> See *The Chinese Exclusion Case*, 130 U.S. 581, 606–07 (1889).

<sup>317</sup> See *id.* at 604–05 (articulating the concept of national sovereignty).

<sup>318</sup> *Id.* at 582.

<sup>319</sup> See Scott Act of 1888, ch. 1064, § 2, 25 Stat. 504 (repealed 1943).

<sup>320</sup> *The Chinese Exclusion Case*, 130 U.S. at 582.

<sup>321</sup> *Id.* at 581. Chae Chan Ping acknowledged the nation’s “inherent right [as] a sovereign power” to prohibit the entry of aliens into its territory—an authority derived, he noted, from Congress’s foreign commerce power—but insisted that such a right did not authorize the United States to revoke his “vested right to return.” *Id.* at 585.

. . . citizens . . . of the most favored nation.”<sup>322</sup> And in fact, Justice Field ultimately disposed of the basic question—whether Chae Chan Ping had a treaty-based right to re-enter the United States—in a single, apparently legally uncontroversial paragraph.<sup>323</sup> If he had been so inclined, he could have left the matter there.

Instead, Justice Field harnessed the discourse of indelible foreignness to remake Congress’s authority to regulate immigration, from a power to regulate foreign commerce to a power inherent in the nation’s sovereignty, essential to its self-preservation, and “conclusive upon the judiciary.”<sup>324</sup> Much of Justice Field’s opinion is an extended discourse on how Chinese immigrants’ uncivilized, servile habits of life and labor, all rooted in inexorable racial instincts, had made a mockery of the principle that every man had an “inherent and inalienable right . . . to change his home and allegiance.”<sup>325</sup> Although the arrival of Chinese laborers in California initially had “proved to be exceedingly useful,”<sup>326</sup> Justice Field explained, once they took up “various mechanical pursuits and trades,” they “came in competition with our artisans and mechanics, as well as our laborers in the field.”<sup>327</sup> “[C]ontent with the simplest fare, such as would not suffice for our laborers and artisans,” and without families to support, the labor market competition “between them and our people was . . . altogether in their favor.”<sup>328</sup> Notwithstanding the liberal welcome extended to Chinese laborers under the treaty provisions, they “remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country.”<sup>329</sup> “The differences of race added greatly to the difficulties of the situation,” Justice Field continued, for “[i]t seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.”<sup>330</sup> As the arrival of Chinese laborers continued “in numbers approaching the character of an Oriental invasion,” westerners worried that “at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their

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<sup>322</sup> Immigration Treaty of 1880, U.S.-China, art. II, Nov. 17, 1880, 22 Stat. 826.

<sup>323</sup> Justice Field conceded that the Scott Act directly contravened the 1868 and 1880 treaties, but concluded that this did not invalidate the Act. Because the Constitution declares both treaties and acts of Congress “to be the supreme law of the land, and [gives] no paramount authority . . . to one over the other,” he reasoned, “the last expression of the sovereign will must control.” *The Chinese Exclusion Case*, 130 U.S. at 600. That analysis reflected the Court’s long-standing position, which it had reaffirmed only the previous term. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that when a treaty and federal statute conflict, the more recent one controls).

<sup>324</sup> *The Chinese Exclusion Case*, 130 U.S. at 606.

<sup>325</sup> *Id.* at 585 (quoting the Burlingame Treaty, *supra* note 300, art. V.).

<sup>326</sup> *Id.* at 594.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 595.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

immigration.<sup>331</sup>

Only after describing the Chinese problem in detail did Justice Field turn to the nature of Congress's regulatory authority. The threat of foreign invasion served as the essential premise:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.<sup>332</sup>

It bears emphasis that the authority to exclude foreigners was *not* at issue in the case. As we have seen, the Court had recognized Congress's authority to regulate immigration under its commerce power for more than a half century, and had reaffirmed that framework just five years earlier, in *The Head Money Cases*.<sup>333</sup> Rather, the passage figures Chinese laborers not as articles of commerce, but as agents of foreign aggression. In so doing, Justice Field collapses two essential distinctions: first, between the Chinese nation "acting in its national character" and "vast hordes" of Chinese subjects; and second, between alien friends and alien enemies.<sup>334</sup>

In Justice Field's formulation, Chinese immigrants' irredeemable foreignness displaced the commercial character of the immigration system as an irreducible premise of the federal immigration power. For all the discussion of the destructive effects of cheap, servile Chinese labor on American workers, at bottom the issue was not the regulation of commerce, but the defense of American sovereignty against foreign "encroachment" and "aggression":

[If] the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 606.

<sup>333</sup> See *supra* Part IV.B.

<sup>334</sup> *The Chinese Exclusion Case*, 130 U.S. at 606. The construction of Chinese laborers as agents of foreign aggression defies the basic rule of international law that "aliens are responsible only for . . . offences in which their nation bears a part," in which case they become "alien enemies." The *Passenger Cases*, 48 U.S. 283, 510 (1849) (Daniel, J., dissenting). Not even Justice Field suggests, however, that Chinese laborers were literally agents of China. Even if Chinese laborers had been acting as agents of their home government, however, at the time the case was decided the United States had cordial relations with China, and only nine years earlier had entered into a treaty reaffirming that Chinese laborers then residing in the United States enjoyed "all the rights, privileges, immunities, and exemptions which are accorded to the citizens . . . of the most favored nation." Immigration Treaty of 1880, *supra* note 322, art. II. Under the law of nations, Chinese laborers were therefore "alien friends," however undesirable they may have been to members of Congress or the Justices of the Supreme Court.

security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity . . . only more obvious and pressing. The same necessity . . . may arise when war does not exist, and the same authority [applies] . . . . In both cases its determination is conclusive upon the judiciary.<sup>335</sup>

As a measure taken to repel foreign aggression, the provision of the Scott Act voiding Chae Chan Ping's certificate of reentry was authorized as "an incident of sovereignty belonging to the government of the United States."<sup>336</sup> Perhaps most remarkably, Congress's authority to exclude the subjects of a nation with which the United States was at peace, and who, at any rate, were not acting as agents of China, was now identical to Congress's power to conduct war. Chinese immigrants' fundamental foreignness, marked by their racial difference and failure to assimilate, was the lynchpin.<sup>337</sup>

Two years later, in 1891, two interrelated developments confirmed that this reconstructed, extra-constitutional immigration power was not confined to congressional efforts to repel the Chinese menace. First, Congress enacted the Immigration Act of 1891,<sup>338</sup> which precluded access to the federal courts for the mostly European migrants who would be denied entry by federal immigration inspectors. Second, in *Nishimura Ekiu v. United States*,<sup>339</sup> the Court upheld the 1891 Act's virtual foreclosure of judicial review of administrative immigration decisions. Justice Gray began his opinion for the Court with a formulation of the federal immigration power that would serve as a rhetorical and doctrinal touchstone for the next century:

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<sup>335</sup> *The Chinese Exclusion Case*, 130 U.S. at 606.

<sup>336</sup> *Id.* at 609.

<sup>337</sup> After reconstructing the immigration power, Justice Field proceeded to retroactively revise the Court's rationale in previous decisions upholding Congress's authority to exclude undesirable classes of Europeans. "The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed," he wrote, "is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country." *Id.* at 608. "[T]here has never been any question as to the power to exclude them," he continued. "The power is constantly exercised; its existence is involved in the right of self-preservation." *Id.*

<sup>338</sup> Immigration Act of 1891, ch. 551, 26 Stat. 1084. The Act modified the existing immigration framework in three key respects. First, it added "persons likely to become a public charge" to the previous list of excludable classes. *Id.* § 1. Second, it assigned exclusive authority to administer the immigration laws, including the inspection of immigrants, to a national Superintendent of Immigration lodged within the U.S. Treasury Department. *Id.* § 7. Third, and most important for the trajectory of the federal immigration power, it made final decisions of inspection officers "touching the right of any alien to land" subject to review only by the Superintendent of Immigration and the Secretary of the Treasury. *Id.* § 8.

<sup>339</sup> 142 U.S. 651 (1892).

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.<sup>340</sup>

This, in a nutshell, is the inherent sovereignty rationale for our constitutionally exceptional federal immigration power. Justice Gray proceeded to explain that this power is consigned to the “political department[s]” of government.<sup>341</sup> As he put it, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”<sup>342</sup> Under the police and commerce frameworks that prevailed throughout the nineteenth century, the purpose of the regulation at issue, rather than the identity of those regulated, determined the nature of the operative authority. Under the inherent sovereignty model, the bare fact of an immigrant’s non-citizenship triggered a virtually unrestrained, extra-constitutional authority that was “conclusive upon the judiciary.”<sup>343</sup> Two years later, in *Fong Yue Ting v. United States*,<sup>344</sup> the Court extended this principle to cover not only the exclusion of foreigners but also the expulsion of resident aliens.<sup>345</sup> There, the Court declared that “[t]he right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace,” was “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”<sup>346</sup>

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<sup>340</sup> *Id.* at 659 (citations omitted).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 660. Justice Gray explained:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.

*Id.*

<sup>343</sup> See *supra* note 335 and accompanying text.

<sup>344</sup> 149 U.S. 698 (1893).

<sup>345</sup> *Id.* at 731–32.

<sup>346</sup> *Id.* at 711.

## V. CONCLUSION: “SOVEREIGNTY” AND THE CONSTITUTION OF FOREIGNNESS

When Congress regulates the right of non-citizens to enter or remain within United States territory, it does so based on an extra-constitutional authority “inherent in sovereignty, and essential to self-preservation.”<sup>347</sup> In this formulation, the constitutional exceptionalism of the federal immigration power appears almost *sui generis*—in the words of the Supreme Court, a timeless “maxim of international law.”<sup>348</sup> This Article challenges this central orthodoxy of modern constitutional immigration law in two ways.

First, it reveals that the inherent sovereignty rationale came into being only in the 1880s and 1890s, after a century of constitutionally *unexceptional* state and federal authority. Throughout much of the nineteenth century, the Court figured immigrants not as foreigners, but simply as persons, whose effect on the health, morals, and welfare of the community was, like that of other persons, citizens and non-citizens alike, subject to the police power of the individual states. Even after the Court redefined immigrants as articles of commerce in the 1870s, it did not distinguish between human commercial goods transported from a neighboring state and those transported across an ocean. The Commerce Clause, like the police power, was indifferent to citizenship. When we look back at the state police and federal commerce frameworks today, after more than a century of plenary power, it is striking that the Court found nothing conceptually distinctive, let alone constitutionally exceptional, about a statute that regulates foreigners engaged in the *process* of immigration. The decidedly unexceptional manner in which the law operated on foreigners traveling to and landing in the United States defies the constitutional singularity, so crucial to modern constitutional immigration law, of a distinct class of “immigration laws” that govern the admission and removal of foreigners.

Second, and perhaps more fundamentally, the Article denaturalizes the concept of foreignness that underwrites immigration exceptionalism. For late-nineteenth century Americans, foreignness came to signify far more than the absence of citizenship. As wage labor became ascendant in the post-Civil War era, and as “native” workers confronted increasingly intense wage competition from recent immigrants, legislators, judges, labor leaders, and social scientists began to doubt both the regenerative power of American economic and political culture and, most importantly, the moral natures of immigrants themselves. Contemporaries concluded that simply exposing immigrants to republican institutions afforded little value as a

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<sup>347</sup> *Nishimura Ekiu*, 142 U.S. at 659.

<sup>348</sup> *Id.*

force of assimilation if the requisite economic conditions and racial material were lacking. As Americans reimagined their polity as a social and political body, the health of which depended less on the vitality of its economic and political life than on the collective natural endowments of its constituent members, foreignness itself became a token of fundamental, indelible moral difference. The Supreme Court then translated the discourse of indelible foreignness into a potent and durable rationale for immigration exceptionalism, forging the immigration power into an instrument of national “self-preservation” to be deployed against invading armies of racially degraded, economically and politically unassimilable foreigners.

Even today, generations after the United States abandoned Chinese exclusion and national origins quotas, immigrants’ *constitutional* estrangement—the principle that foreignness *per se* rightly dictates the nature of the authority to which they are subject—remains an axiomatic feature of the federal immigration power. For modern judicial and scholarly defenders of immigration exceptionalism, the indecorous rhetoric that clutters the historical origins of the plenary power doctrine does not diminish its legal soundness and continued legitimacy. Once we strip away the Court’s racism and the overwrought metaphor of alien invasion, the argument runs, there remains, as a logical concomitant of national sovereignty, an inherent power to govern the admission and expulsion of non-citizens. After all, outside of the Naturalization Clause the Constitution is silent on the federal government’s power to regulate immigration; but such authority must exist somewhere.

Yet even if one concedes that the principle of territorial sovereignty implies an authority to govern the right of non-citizens to enter into and remain within territory, it is unclear why the exercise of such authority also requires that immigrants be denied important constitutional rights to which they, as persons, would otherwise be entitled. (Recall that for the fifteen years preceding the Court’s decision in *The Chinese Exclusion Case*, Congress already enjoyed exclusive authority to regulate immigration under the commerce power.) Why should a body of federal law concerned overwhelmingly with ordinary matters of labor, economic dependency, and crime—the issues that dominate the vast majority of immigration regulation—be “conclusive upon the judiciary”? Why would we consign a regulatory domain dominated by patently unexceptional subject matter to the “political branches” of government, where it is buffered against judicially enforceable constitutional constraints? This Article demonstrates that it was the very same elements of Justice Field’s opinion that modern defenders of plenary power would like to dismiss as anachronistic dicta that enabled the Court to bridge the gaping chasm between its novel legal rationale for federal authority and the purpose and subject matter of most immigration lawmaking and enforcement. It was

precisely immigrants' fundamental, indelible foreignness—their racial difference, their inability to assimilate, their destructive effect on American citizenship—that gave substance to the metaphor of racial invasion, and thus to the analogy between immigration regulation and war. Indeed, the tropes of invasion and war allude to Congress's Article I authority to “repel Invasions” and “declare war” without strictly invoking them, thus summoning the tradition of judicial deference that accompanies these archetypal “political” powers. The Court's intemperate defense of American citizenship against invading foreign races cannot, therefore, be swept aside like some unseemly discursive debris of a bygone era, cluttering the logically sound foundation of immigration exceptionalism; rather, it is the cornerstone of the entire edifice.