ANTI-DEMOCRATIC IMMIGRATION LAW

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ABSTRACT

"[I]n order to fully abolish the oppressive conditions produced by slavery, new democratic institutions would have to be created . . . ."

– W.E.B. DuBois

This Article will bring together, in a novel way, three critical themes or concepts—settler colonialism, immigration plenary power, and rule of law.

The U.S. constitutional democracy has naturalized racialized social and political stratification and subordination. Plenary power, a court-made doctrine founded upon sovereignty and nationalism, is one of the manifestations of the dark, anti-democratic undercurrents of oppression. The Chinese Exclusion Act, the contemporary ban on migration of persons from Muslim-majority countries, and the caging of asylum seekers are justified as necessary to maintain rule of law, sanctioned by the judiciary via plenary power.

Plenary power's legitimacy is taken for granted. In fact, it could be characterized as lawless because it has represented a politicized excuse by the judiciary to decline jurisdiction, or to provide lower levels of scrutiny to acts of Congress limiting the rights of particular classes of people, including immigrants. While immigration plenary power has been carefully studied by immigration scholars, none have considered it through the lens of settler colonialism in conjunction with a theory of rule of law to address the ways in which it undermines rights. This Article will directly take on the question of whether rule of law can facilitate challeng-

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ing the racializing and subordinating function of immigration plenary power. Ultimately, the plenary power doctrine may help demonstrate that the problem with "rule of law" may not be that it means too many things to too many different people but that it means one thing, predetermined by the history of the settler colonial project.

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INTRODUCTION

The settler colonial state is one defined by laws. However, it was the settlers themselves who defined their initial colonizing actions as lawful and their descendants who continue to create law according to their objectives.[1] The founding of the United States' constitutional democracy instilled racialization and inequality in the country's political structure.[2] Subsequent policies, which attempted to address inequality,

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1. *See* Natsu Taylor Saito, *Redressing Foundational Wrongs*, 51 U. TOL. L. REV. 13, 16 (2019).

2. Danyelle Solomon et al., *Systematic Inequality and American Democracy*, CTR. AM. PROGRESS: RACE & ETHNICITY (Aug. 7, 2019, 7:00 AM), https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/; see *also* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 1 (2020) ("[N]either the Constitution's guarantee of equal protection nor the 'nation of immigrants' mantra can effectively dislodge structural racism."); Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. Gender Race & Just. 633, 636 (2011) (in the context of reparations, addressing the absence of democracy where institutions facilitate racialized oppression); Richard Delgado, *Liberal*

acknowledge the problematic nature of an inherently race-based society.[3] In immigration law, this effort to address inequality has been characterized by superficial or incomplete attempts to rid immigration law of racial or ethnic bias[4] and discourage discrimination, while remediating expressly racialized harm to national origin and ethnicity as proxies for race. In this manner, immigration law is formally colorblind and race neutral regardless of its racialized impacts.

This Article explores what rule of law[5] means in the immigration context, characterized in part by doctrines of exceptionalism and plenary power when equality and anti-discrimination norms are given serious consideration. An equality lens may illuminate our understanding of the notion of "rule of law" in the context of immigration law, especially in this particular social, political, and legal moment while, at the same time, underscoring its limitations.[6]

The plenary power doctrine spans more temporal and ideological depth and breadth than often recognized in immigration law scholarship—it exceeds the bounds of immigration law.[7] Instead of being an

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McCarthyism and the Origins of Critical Race Theory, 94 Iowa L. Rev. 1505, 1510 (2009) (discussing critical race theory approaches to address "subtle, unconscious, or institutional racism").

3. *See* Saito, *supra* note 1, at 33.

4. *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 24, 27 (10th Anniversary ed. 2006) (analyzing the "prerequisite cases" whereby the Supreme Court grappled with racial restrictions on naturalization and racial bars, later replaced by national origin quotas); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 6–7 (William Chafe et al. eds., 2004).

5. See discussion *infra* Section II.B, for establishment of a theory of rule of law relevant to questions of equality amongst those territorially present. The meaning and value of the term "rule of law" has been a topic of debate for decades and has been defined in ways critiqued as lacking practical value. In using the term, I seek to identify a conception of rule of law that can have practical value for those other than the elites and can be used to deconstruct norms taken for granted as comporting with democracy and rule of law. My aspiration is to find a definition of rule of law that can create guiding principles to increase equality for those formally inside and outside of the polity—citizens, noncitizens, and others historically excluded, literally or figuratively. Rule of law can be more than a catchphrase that is bandied about in a glib or offhanded manner. When politicians, including Donald Trump, weaponized it against ideological domestic enemies, its meaning was eroded. However, in this Article, I consider the case for the value of rule of law as a key democratic principle.

6. *See* PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 14–19 (2008) (the Magna Carta and principle of rule of law defined therein at the core the intentions of the U.S. and British democratic projects define core values under law, such as constitutional protections, fundamental human rights, and specifically, expressions of rights such as due process; also defining "authority under law" as akin to the King (contemporarily, the Executive, by implication) as "below the law"); *see generally* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 171 (2018) (presenting comparative case studies of Presidents Obama and Trump's immigration policies and a discussion regarding the rule of law debate around their respective immigration policies).

7. *See, e.g.*, David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 181–84 (2018) [hereinafter *Immigration Blame*] (examining plenary power doctrine through the prism of blame); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583 (2017) [hereinafter *Immigration Exceptionalism*] (arguing that by "simultaneously accounting for rights, federalism, and separation of powers" their "model captures a set of normative tradeoffs that context-specific appraisals"); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30–32 (2015) (discussing the voluminous literature on plenary power and suggesting that "[t]he litigation picture is not so bleak as often portrayed"); Hiro-

anticonstitutional aberration, solely explained by immigration law's exceptionalism, plenary power is a component of the settler colonial design and the institutional infrastructure. This infrastructure and the plenary power doctrine undermine equality-focused democratic legitimacy and rule of law.[8]

Plenary power and immigration law's history of discrimination are characteristics of the United States' story and part of the DNA of the nation. The plenary power doctrine and immigration exceptionalism have contributed to disproportionate racialized impacts and, somewhat invisibly, continue to play a role in legitimizing such outcomes.[9] Justifications for plenary power claimed to be race-neutral but were, and are, bold assertions of racialized power.[10] Theoretical justifications for plenary power have included sovereignty, national security, nationalism, and foreign policy.[11] But, can sovereignty or nationalism, which manifest racially or reinforce systemic inequality, coexist with democratic rule of law and citizenship?

Rule of law is a vast concept that can facilitate an array of ideological arguments. The usefulness of a rule of law theory depends on how rule of law is defined and to whom it applies.[12] In recent literature, David Rubenstein challenges the usefulness of rule of law in the context of executive power through the lens of Obama and Trump era immigration policies.[13] While true that when invoked by theorists, or in popular debate, rule of law has been a means to a predetermined ideological end, others, like scholar Paul Gowder, have proposed an iteration of rule of law in a democracy[14] which requires adherence to a notion of equality principles. Rather than dismissing rule of law as too broad and malleable, this Article offers a definition that builds on Paul Gowder's equality informed version[15] and is examined through a settler colonial lens. With

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shi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L.J. 545, 550–613 (1990) (discussing "the plenary power doctrine as the dominant principle of constitutional and subconstitutional immigration law"). *But see* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 68 (2014) (not confining the analysis of plenary power to immigration law).

8. *See* Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 28–29 (1995).

9. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998).

10. SAITO, *supra* note 2, at 154–58.

11. Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1119 (2002).

12. *See* Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 532 (2002).

13. *See generally* Rubenstein, *supra* note 6.

14. See discussion *infra* Section II.A, discussing that what constitutes a democracy is also vast. One shorthand way to distinguish two general types of democracy is the notion of a "thick" versus a "thin" version, where the "thick" version provides more rights and protection than the "thin" version.

15. Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565, 605–06 (2013).

this conception of rule of law, the Article will attempt to determine if rule of law can do meaningful work, particularly in the context of understanding immigration plenary power.

Because borders play a role in creating insiders versus outsiders, or aliens versus citizens,[16] with respect to allocation of substantive rights and in defining what constitutes equal treatment, it is also necessary to ask, "For whom can there be rule of law?" Does rule of law itself, a principle component of liberal democratic theory, "naturalize and realign . . . normative practices[?]"[17] If so, is plenary power naturalized in this kind of democratic regime? If plenary power is so naturalized, is plenary power an appropriate manifestation rule of law?

Part I will introduce the history of settler colonialism to contextualize plenary power. Part II traces the common thread of plenary power over American Indians,[18] slaves and former slaves, and immigrants. Part III establishes a theory of rule of law in a settler colonial democracy, including the question of equality. In concluding, the Author applies an equality-informed rule of law lens to plenary power, questioning the role of membership and whether borders, sovereignty, and nationalism permanently stymie the quest for equality.

I. THE SETTLER COLONIAL PROJECT

Settler colonialism and acknowledging the United States as a settler colonial project is relevant to understanding racial injustice and inequality today because it allows us to recognize racial hierarchy as essential to the establishment of the United States. Accordingly, once we examine the United States and its legal system through this lens, we can more accurately assess the usefulness of constructs like rule of law that are inherently intertwined with the existing legal architecture.[19]

Settler colonial studies is a new discipline which differs from "classical" colonialism and is particularly illuminating to an examination of plenary power and rule of law in contemporary U.S. immigration law

16. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 126 (2006).

17. AMY L. BRANDZEL, AGAINST CITIZENSHIP: THE VIOLENCE OF THE NORMATIVE 5 (2016).

18. Following the lead of Natsu Taylor Saito, I use the term "American Indian" rather than Native American or indigenous persons to refer to all members of all American Indian nations because that is the term used by the American Indian movement and activists. *See generally* Saito, *supra* note 1. "Indigenous" is used here to refer to people who identify themselves as indigenous as a collective identity expressing a relationship to land. Other than when in a quotation, I use "Black" per Kimberlé Crenshaw because Blacks are "a specific cultural group" such that a proper noun is appropriate. I use "White" to refer to those who claim to be of exclusive European descent to identify them as a group. Saito, *supra* note 7, at 3 n.3, 6 n.22 (citing GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998); *see also* Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

19. SAITO, *supra* note 2, at 4.

and policy. Unlike classic colonialism where the colonist is understood to have departed after colonizing, within the settler colonial framework, the settler colonialist does not return home (to Europe or otherwise) but instead settles permanently.[20] Through assertion of dominance, the settler colonialist declares sovereignty over the territory and establishes a political infrastructure to perpetuate that dominance.[21] A settler colonialist then is one who comes with the intent to stay, rather than return to a home in a distant land.[22] Settler colonialists saw, and inherently still perceive, themselves as founders of a political order with an entitlement to a preordained, unique, and inherent sovereign claim.[23] This history provides the backdrop for the plenary power doctrine and is a critical component in examining the democratic principle of rule of law.

Once European settlers arrived in North America, the self-anointed "settler colonial state," they accorded the rights and obligations of citizenship to the European minority.[24] At the same time, they excluded most of the conquered, indigenous majority from liberal democratic rule and "subjected them to a unique form of despotism."[25]

Through plenary power, the political branch of the federal government can exercise complete and nearly unreviewable power in particular contexts, including, but not limited to, immigration law.[26] Narratives that have erased the agency of the settlers normalizes plenary power. When describing acts of U.S. settler colonialism, such as the colonization of Hawai'i, the violence, purposefulness, and willfulness of the colonizers is negated; their actions are described in passive voice, as if the violence they perpetrated just happened, as if by magic.[27] These manifestations of

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20. Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 46 (2015).

21. *See* Saito, *supra* note 7, at 21.

22. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006) ("Settler colonizers come to stay."); *see also* LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 53 (2010) [hereinafter SETTLER COLONIALISM]. Also note that while this sovereignty was used by the colonizers to justify plenary power, colonized peoples assert their sovereignty in opposition to the state. LORENZO VERACINI, THE SETTLER COLONIAL PRESENT 9 (2015) [hereinafter COLONIAL PRESENT] (stating that settler colonialism never goes away). A colonialist comes to colonize and returns to the place they consider home. While this exploration of settler colonialism focuses on the United States, settler colonialism is not unique to the United States. *See* Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548, 550 (2019) (citing COLONIAL PRESENT, *supra*) ("[S]ettler colonialism forever proclaims its passing but it never goes away.").

23. SETTLER COLONIALISM, *supra* note 22, at 53.

24. *Id.* at 62.

25. *Id.* at 121 n.48; *see also* DAVID THEO GOLDBERG, THE RACIAL STATE (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1595 (2002) (citing DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING (1993)) ("While liberalism claimed to promise universal liberty and equality, these were in fact only guaranteed to propertied, European male subjects.").

26. SAITO, *supra* note 2, at 155–57.

27. BRANDZEL, *supra* note 17, at 113 ("[a]s far as the Supreme Court majority is concerned," in discussing *Rice v. Cayetano*, 120 S. Ct. 1044 (2019), "U.S. settler colonialism is not purposeful, willful, nor violent").

the settler colonial project, or the acts of settlers who arrive, conquer, and never leave, can be described as "colorblind colonialism."[28] To the extent that this intentional racialized violence has been usurped by a historical narrative of winners and losers, colonizers and the colonized, the racializing force of colonialism is erased.[29] Colonization is represented in a manner that tends to downplay the extent to which race was made by the act of colonization through the dehumanizing of colonial subjects.[30] To understand the complexity and relative utility of rule of law, one must grapple with its origins in settler institutionalizations of power.[31] The postconquest and postrevolutionary legal infrastructure follows these patterns.

The court's characterization of legal controversies concerning the rights of American Indians, people living in the territories, and "aliens" or noncitizens as matters of foreign relations[32] was a mechanism by which settlers could construct a project of settlement and management of nonmembers or noncitizens, racializing them in the process.[33] This was all considered, by the settlers, to be done lawfully.[34] The federal Constitution's silence regarding which branch of the federal government was empowered to regulate immigration was akin to particular omissions in delegation of power over American Indians and the territories; it was in

28. *Id.* at 113.

29. *See* Josué López, *CRT and Immigration: Settler Colonialism, Foreign Indigeneity, and the Education of Racial Perception*, 19 U. MD. L.J. RACE RELIG. GENDER & CLASS 134, 149–50 (2019).

30. SAITO, *supra* note 2, at 29 ("'Race' is a social and legal construct, not a biological reality."); *see also id.* at 44 (describing the construction of racial identities as an imperative of the settlers whereby race connotes savagery and barbarism, justifying the colonists' civilizing mission).

31. Natsu Taylor Saito similarly describes the need to consider contemporary questions of rights and inequality through the lens of settler colonialism, both to see the limitations of rights rhetoric and the need for systemic change theorized through self-determination and decolonization. *See, e.g.*, *id.* at 24 ("For most of the past half century, we have relied on the Constitution's guarantees of due process and equal protection to rectify racial injustices. But this strategy . . . does not address the underlying dynamics of power."); *id.* at 7 ("[I]f racism is essential to the continued well-being of the settler state . . . eliminating racism will require us to move beyond nondiscrimination to decolonization.").

32. Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1135–36 (1999) (citing Worcester v. Georgia, 31 U.S. 515, 559–60 (1832) ("The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings . . . . We have applied them to Indians, as we have applied them to the other nations of the earth.")). *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (Justice Sutherland identified "the power to expel undesirable aliens" and "[t]he power to acquire territory by discovery and occupation" as part of the foreign relations power of the United States); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (though sovereign, Indian tribes were "domestic dependent nations" and could not sue as "foreign nations" in federal courts).

33. Cleveland, *supra* note 32, at 1136 n.50 (explaining that "Native Americans did not achieve full citizenship until 1924"); *see* Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1994)). Those residing in "territories of Puerto Rico and the Philippines [acquired later] and other aliens did not attain citizenship until 1952." *See* Act of June 27, 1952, ch. 1, 66 Stat. 266 (codified as amended at 8 U.S.C. § 1402 (1994)).

34. *Curtiss-Wright*, 299 U.S. at 318.

this vacuum that plenary power emerged[35]—not contrary to the Constitution, and filling a legal void.

Settler colonialism is still experienced by immigrants—alien citizens[36]—who are subjected to a system of U.S. settler colonial immigration laws[37] that fails to recognize them in ways similar to the ways in which former slaves were not formally granted full membership rights.[38] Plenary power functioned first as an extralegal tool that provided a purported rationale to limit rights and enable exclusion and line-drawing on the basis of otherized and racialized identity.[39] Mahmood Mamdani said that "[s]ettlers are made by conquest, not just by immigration[;]" the political nature of the relationship defines them as settler and native.[40]

The predominant narrative of the founding of the United States has served settler colonial structures by erasing the nation's colonial past and present. Because the settler historical narrative of the founding of the nation and the evolution of plenary power prevailed, history was a tool to "displace coloniality from structures of racism"[41] and make racialization and colonialism invisible. The story of the nation's founding was immediately rewritten as one in which anti-imperial and anti-colonial norms, freedom, and equality were essential defining characteristics.[42]

White Americans embraced and maintained a notion of themselves in "civic rather than settler terms,"[43] perceiving themselves as creating and participating in democratic institutions rather than imposing a power structure for their benefit at the expense of others. Americans rarely con-

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35. Cleveland, *supra* note 32, at 1137.

36. *See* NGAI, *supra* note 4, at 2.

37. *See, e.g.*, Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 108 (2007); Jeff Faux, *How NAFTA Failed Mexico*, AM. PROSPECT (June 16, 2003), https://prospect.org/features/nafta-failed-mexico/.

38. *See* Volpp, *supra* note 25, at 1595–96 (citing Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 616–19 (1997) (discussing second-class citizenship of native-born and immigrant black women in the United States) ("Despite the liberal universalizing discourse of citizenship, not all citizens are equal."); Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 77–83 (2001) (describing how racialization of Asian Americans limits their enjoyment of citizenship as political activity and citizenship as identity).

39. *See generally* LÓPEZ, *supra* note 4 (outlining the role of U.S. legal immigration history in establishing race as a construct which is then used to exclude groups based on the basis of race); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2015) (theorizing race as an ideological construct).

40. Mahmood Mamdani, AC Jordan Chair, Univ. of Cape Town, When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa (May 13, 1998) (describing the colonial state in equatorial Africa where the two proscribed identities were civic or ethnic).

41. BRANDZEL, *supra* note 17, at 108.

42. See *Civics Practice Test*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://my.uscis.gov/prep/test/civics (last visited May 13, 2020), for example of the view of history presented in the U.S. history test required of aspiring U.S. citizens. *See also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 21 (2011).

43. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 268 (2015).

sider themselves as part of an "imperial family of settler polities[,]" preferring to "conceive of the country as quintessentially anti-imperial and inclusive."[44] Plenary power gave legal cover to the settler colonial project by naming itself as legal doctrine.[45]

This erasure of the settler colonial project has created and fostered collective institutions that provide "racially defined insiders with the emancipatory conditions of self-government and economic independence"—the settler class.[46] And at the same time, the literal legal and political institutions and epistemological cultural practices established facilitated the extraction of land and labor from native and nonsettler groups.[47] One version of the national narrative has suggested that equality, citizenship, and "patriotic attachment to a shared set of political practices and values" are defining factors of the democracy.[48] U.S. immigration policy has emanated from settler colonialism with all of its racializing propensities, reflecting these same motivations of domination and control.

This narrative helps obscure the reality of the harshest immigration laws, including a new wave of incarceration enforced almost exclusively against racialized immigrants of color[49] and an immigration ban targeting Muslims and those of Arab descent.[50] Similarly, the settler colonial project naturalizes a prison system—both criminal, and civil immigration detention, as consisting of predominantly racialized people of color.[51]

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44. *Id.* at 263–64 (arguing that the symbolic power of the American federal Constitution sustains a narrative of the nation "as free and equal from the founding" even though this narrative is also responsible for a manifestation of deep denial regarding the nation's colonial underpinnings and failure to address systemic failures); *see also* Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51, 54 (2016) (placing U.S. immigration policy within a widened framework of settler imperialism and arguing that, across the White settler world, excluding racialized newcomers is constitutive of nation-state formation).

45. BRANDZEL, *supra* note 17, at 112 (explaining that Justice Kenney's majority opinion in Rice v. Cayetano, 528 U.S. 495 (2000) describes the legal trajectory of the colonization of Hawai'i in a way that gave U.S. colonialism the cover of law).

46. Rana, *supra* note 43, at 266.

47. *Id.*

48. *Id.* (quoting MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 3–4 (1993)).

49. Aída Chávez, *"No One Will Believe Baboon Complaints"– Racist Abuse in Immigration Detention on the Rise in Trump Era, Report Says*, INTERCEPT (June 26, 2018, 1:14 PM), https://theintercept.com/2018/06/26/immigration-detention-center-abuse-ice/; Emily Kassie, *How Trump Inherited His Expanding Detention System*, MARSHALL PROJECT (Feb. 12, 2019, 3:45 PM), https://www.themarshallproject.org/2019/02/12/how-trump-inherited-his-expanding-detention-system.

50. Proclamation No. 9645, 82 Fed. Reg. 45161 (2017). For discussion of plenary power and the Muslim Bans, see Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1476–81 (2018).

51. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 187 (2010) ("Since the first day the prison opened, people of color have been disproportionately represented behind bars."); TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES (2019) (referencing W.E.B. DuBois' *The Souls of Black Folk* to emphasize that after Reconstruction, the South "established a system of policing that 'was arranged to deal with blacks alone, and tacitly assumed every white man was *ipso facto* a member of that police'"); *see also* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion*

Through a formally colorblind criminal and immigration justice system, in part because of over-policing communities of color and under-policing predominantly white spaces, a disproportionate number of people of color continue to be incarcerated.[52] This reality is generally taken for granted, and the stigma of prison serves to define the criminal, rather than the complex set of racialized circumstances that shaped this carceral state.[53] Immigration incarceration has historically targeted racialized immigrant groups, starting with Chinese immigrants.[54] As immigration prisons have expanded over the past two decades, they have been filled with racialized immigrants predominantly from Mexico, Central America, and parts of Africa.[55]

At the beginning of the 20th century, racism was endorsed by national leaders that are now posthumously viewed as progressives.[56] Theodore Roosevelt praised the conquests of the United States and stated that "progress and nationality" would be achieved heroically by "men who impose on the course of events the latent virtues of their 'race.'"[57] Roosevelt oversaw the continuation of empire building from an imperialist standpoint; used military force abroad; and in justifying settler coloni-

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Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights, 10 Asian L.J. 13, 24 (2003) (addressing plenary power historically, and in the context of post-9/11 profiling of Arab, Muslim, and Middle Eastern descent).

> [T]he plenary power doctrine will undoubtedly play a prominent role in the government's justification of these post-September 11 actions as legal challenges work their way up through the federal courts. If this is the case, then those who believe such actions are contrary to the rule of law need to have a clear understanding of the plenary power doctrine.

Id. American Indians and African Americans are similarly disproportionately impacted by the U.S. criminal justice system, though this reality is infrequently interrogated as a manifestation of settler colonialism. *See* Kelly Lytle Hernández, *The Carceral West*, 88 PAC. HIST. REV. 4, 12–13 (2019) (arguing that the "study of racial disparities in the U.S. criminal justice system demands more than a Black/White analysis" and using the U.S. West as the place to study this, and the relationship between U.S. immigration control as a "carceral regime" in this context); *see generally* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965 (JUSTICE, POWER, AND POLITICS) (2017) (employing the settler colonial frame to examine mass incarceration in Los Angeles).

52. *See* ALEXANDER, *supra* note 51, at 98–99. As an example, Alexander notes that in 2000, "[a]lthough the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black[] [or] Latino[]." *Id.* at 98 (citing MARC MAUER & RYAN SCOTT KING, THE SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION* 3 (2004)). Additionally, Alexander notes that "African Americans are incarcerated at [a] grossly disproportionate rate[]." *Id.* at 99 (citing MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 6 (2009)).

53. *See id.* at 179 ("Although a million black men can be found in prisons and jails, public acknowledgment of the role of the criminal justice system in 'disappearing' black men is surprisingly rare."). The author notes that the settler colonial project may explain the reason for the lack of such public acknowledgment.

54. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON 31 (2019); *see also* ERIKA LEE, AT AMERICA'S GATES: THE EXCLUSION ERA, 1882–1945 at 82–83 (2003) (Chinese detained on Angel Island through eugenicist claims of inherent illness).

55. GARCÍA HERNÁNDEZ, *supra* note 54, at 113 ("Reflecting the racially skewed criminal justice system, black migrants are more likely to be detained by ICE . . . than are other migrants.").

56. Elizabeth Martinez, *Reinventing "America": Call for a New National Identity*, *in* DEBATING DIVERSITY 82–83 (3d ed. 2002).

57. *Id.*

al policies in the United States and vice versa, characterized "Asians as Apaches and the Philippines as Sam Huston's Texas" as Texas was "seized from Mexico."[58]

The political or ideological framework that evolved subsequent to this overt racism was superficially equality-oriented, yet still indicative of the infrastructure and institutions that allowed settler colonial power to thrive.[59] At best, apologetic liberalism acknowledges colonialism as willful but relegates it to a mere past mistake.[60] The myth of equality obscures the reality that "[n]either 'the people' nor 'the races' actually exist rather they are based on a fictive ethnicity that becomes naturalized with the imagined nation[,]"[61] just as equality is little more than imagined for large portions of the population. Discourses of law and history disrupt and undermine narratives of racialized colonial oppression by overlaying a "colorblind, multicultural, liberal ideological" story that "disaggregate[s] . . . race from colonialism."[62]

The colonization of the Americas and the colonizers' intellectual legal ingenuity to racialize and control American Indians, Blacks, and other racialized groups are components of the establishment of the nation, modern-day institutions, jurisprudence, social norms, and political practices.[63] The United States is often depicted, or perceived, as anti-imperial and without a colonizing history,[64] which reinforces dominant narratives that confirm this view. Racism has been the linchpin of the U.S. national identity for generations and part and parcel of settler colonialism.[65] "Rac-

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58. *Id.* at 83.

59. Rana, *supra* note 43, at 268; *see* Sally Engle Merry, *Colonial and Postcolonial Law*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 569, 575–76 (Austin Sarat ed., 2004) (essay on colonial and postcolonial law); *see also* JOHN L. COMAROFF & JEAN COMAROFF, OF REVELATION AND REVOLUTION, VOLUME 2: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER 404 (1997) (seminal work on law and colonialism and settler colonialism focusing on British colonialism in South Africa and regions other than North America, describing law as "a devastating weapon of warfare, like no other in its capacity to annihilate and dispossess without being seen to do anything at all").

60. BRANDZEL, *supra* note 17, at 113–14 (while the United States may be identified as a colonial power, and the colonized are given a modicum of agency, placing blame not on the system created by settlers, but on a few bad apples as exemplified by the Apology Resolutions—signed by President Clinton in 1993).

61. WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 10 (2013).

62. BRANDZEL, *supra* note 17, at 123.

63. *See, e.g.*, Kashyap, *supra* note 22, at 550 (observing the interconnectedness between settler colonialism and modern incarnations of racialized immigration policies).

64. *See generally* SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 35–39 (2000) (examining the political and cultural history of the use of law in colonizing Hawai'i and in controlling and shaping indigenous Hawai'ians in the vision, and for the purposes, of the colonizers, who displaced or replaced indigenous law with Anglo-American law influenced by capitalism, Christianity, and imperialism).

65. *See generally* Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. OF RACE & ETHNICITY 52 (2015) (examining "the various ways in which the development of a White settler U.S. state and political economy shaped the race and gender formation of Whites, Native Americans, African Americans, Mexican Americans, and Chinese Americans").

ism is an enduring . . . social formation[,] [and one] that preceded modern colonialism and nationalism."[66]

A. *Plenary Power Over Racialized People of Color—African Slaves, American Indians, and Immigrants*

The initiation of the plenary power doctrine was not initially grounded in law but based on prevailing nationalistic theoretical influences.[67] The doctrine was an initial part of settler colonialism and shaped the allocation of civil and civic rights.[68] Plenary power has a relatively long history of making the illegal, or extralegal, "legal" by rhetorical fiat (as was the case with Chinese exclusion[69]) while simultaneously designating those subjected to plenary power as non-national, other, or foreign.[70] As a part of the settler colonial project, plenary power can be traced through the racialization, subordination, and elimination of enslaved African Americans, American Indians, and immigrants.[71]

Congress has passed laws which infringe upon mainstream constitutional norms, and the Supreme Court has relied on plenary power in refusing to "enforce otherwise applicable provisions of [the] [C]onstitution[]" to "abrogate the rights not only of immigrants, but of a much broader cross-section of peoples."[72] The continuity of plenary authority is evidenced by the ways in which the political branch, with the sanctioning of the judiciary, uses plenary power to reinforce social othering of "colonial subjects."[73]

When the settler colonialists arrived from Europe as ex-patriots, they colonized what would become North America and promptly established plenary authority over American Indians, colonized peoples, slaves, and then freed slaves." [74] Plenary power is a manifestation of the

66. HIXSON, *supra* note 61, at 10 (referencing early othering of indigenous populations prior to Darwinism).

67. SARAH SONG, IMMIGRATION AND DEMOCRACY 25–29 (2018) (discussing Emer de Vattel's work on nationalism and sovereignty in *The Law of Nations*).

68. *See* SETTLER COLONIALISM, *supra* note 22, at 32, 67; *see also* Wolfe, *supra* note 22, at 388.

69. Chinese exclusion and the Chinese Exclusion Act cases refer to a set of racially restrictive laws commencing in 1882 and ensuing litigation in the cases of Chae Chan Ping v. United States, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698 (1893), and Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

70. Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 103 (2014).

71. Saito, *supra* note 7, at 1–9.

72. Saito, *supra* note 51, at 25.

73. Saito, *supra* note 11, at 1129.

74. *Id.* at 1123 ("The law of slavery that evolved in America identified slaves as property, classified persons with any discernible African ancestry as 'black,' presumed black persons to be slaves, and then used the power of the federal government to protect 'this property' everywhere under its jurisdiction."); *see also* SONG, *supra* note 67, at 29; Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 3, 13–14 (2000) (discussing the way in which Congress created race along lines of not only race, but class, and the ways in which those enforcing immigration law could not make sense of the instructions to enforce pursuant to manufactured notions of race and belonging, suggesting the

practice of excluding (literally and figuratively) colonized subjects from the definition of "the people" within a democracy.[75] Indigenous populations were "mere subjects[,]" and such distinctions were demarcated by racial constructs.[76]

Legal scholar Natsu Saito Taylor has written about how plenary power has been used to justify a variety of insidious practices. Such practices include using it to control American Indians and their territory; detain and deport noncitizens, deny rights to African Americans; limit the political rights and autonomy of Puerto Ricans; and engage in "selective imprisonment and deportation of Muslim, Arab, and Middle Eastern immigrants."[77]

When viewed as a broader expression of state power, preceding its more formal incantation, plenary power may have originated before colonization of the Americas. As early as 1619, Europeans and their governments exercised what became plenary authority over Africans that they captured and kidnapped.[78] Within European colonies and beyond, the "legal language of the state" was used to assure the interests of the colonizers and establish their hegemony.[79] The U.S. empire evolved, or

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total subjectiveness of racialization) (observing that "the indeterminacy of law parallels and reflects . . . the indeterminacy of identity," and as Congress attempted to exclude Chinese immigrants, "[i]ronically, in their reluctance to see upper-class merchants as members of the 'Chinese race,' these lawmakers were implicitly recognizing the social character of race despite their continual recourse to biological models through their references to blood and breeding stock and their fanciful botanical metaphors"); *see generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 19-23 (1991) (starting from the premise that "[b]ecause skin color determined which Virginians were entitled to a full panoply of rights, the phrase 'free blacks' was paradoxical during the colonial and antebellum periods" to explore Antebellum Virginia to argue that statutes and cases were "representative of the racial jurisprudence of the time" to better understand the "legacy and evolution" of U.S. race relations).

75. Caroline Elkins, *Race, Citizenship, and Governance: Settler Tyranny and the End of Empire*, *in* SETTLER COLONIALISM IN THE TWENTIETH CENTURY 203, 206 (Caroline Elkins & Susan Pederson eds., 2005).

76. *Id.*

77. Saito, *supra* note 11, at 1120; Saito, *supra* note 51, at 13; *see also* Coutin et al., *supra* note 70, at 101–02 ("[T]he ability to damn or be merciful speaks of the theological alchemy by which administrators work up the United States as a nation whose contours are figured through the auditing of its aliens, whether they are immigrants or indigenous, or as matter-of-fact nationals of external U.S. colonies or even, in another era, African American."); *see generally* Natsu Taylor Saito, *An Authority Unchallengeable and Complete: Plenary Power Over Immigrants, American Indians, and External U.S. Colonies*, *in* FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 13 (2007).

78. Saito, *supra* note 11, at 1123. Long before the plenary power doctrine was established in such terms, African Americans, especially fugitive slaves, had also been made alien and subject to the implied power of Congress. *E.g.*, Prigg v. Pennsylvania, 41 U.S. 539, 622–25 (1842). For a recent discussion of *Prigg*, see Sora Y. Han, *The Long Shadow of Racial Profiling*, 1 BRIT. J. AM. LEGAL STUD. 77, 89–93, 96 (2012) which discusses how the Court created a structural framework to resolve the tension between federal and state laws regarding slaves. *See also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428–29 (2011); Sanford Levinson, *Is* Dred Scott *Really the Worst Opinion of All Time? Why* Prigg *Is Worse than* Dred Scott *(but Is Likely to Stay Out of the "Anticanon")*, 125 HARV. L. REV. F. 23, 30–31 (2011).

79. Elkins, *supra* note 75, at 208.

"progressed," as if by a divine force through naturalizing acts of violence and oppression.[80]

The 1857 *Dred Scott v. Sandford*[81] case was an early articulation of plenary power in the context of slavery.[82] In considering Dred Scott's suit to be adjudicated a free man, Chief Justice Taney declared that Scott lacked jurisdiction to make any kind of legal claim because Black people were not citizens of the United States or of any particular state; they were not even "persons" under the law.[83] This framing becomes critical in assessment of who is entitled to "rule of law" when it is not a dog whistle, but an extension of protections in a civil society or bounded nation-state.[84]

Justice Taney described those of African descent as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[85] This case can be understood as an early expression of plenary power because it symbolized the U.S. Supreme Court's willingness to circumscribe individual rights along manufactured racialized lines in the name of sovereignty or nationalism.

Taney's dehumanizing characterization of Black people is analogous to the portrayals of Chinese immigrants in the Chinese Exclusion cases where, for all practical purposes, the Court substituted racism for legal or doctrinal authority, as manifested in an inculcation of plenary power.[86] In spite of the Thirteenth, Fourteenth, and Fifteenth Amendments formally purporting to establish equality and abolish slavery, a sublegal structure propped up by plenary power perpetuated disenfranchisement, inequality and oppression through segregation, Jim Crow laws, convict leasing, and mass incarceration.[87] The underlying demo-

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80. *See generally* Moon-Ho Jung, *Seditious Subjects: Race, State, Violence, and the U.S. Empire*, 14 J. ASIAN AM. STUD. 221, 224 (2011) (describing acts of radicalism and violence as the U.S. Empire spread, primarily into and through the Pacific region).

81. 60 U.S. 393 (1857) *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

82. *Id.* at 407 (describing how Dred Scott sued his nominal owner in federal court and argued, among other things, that he should be adjudicated a free man because of the time he had spent in territory where slavery was forbidden; the federal court had no diversity jurisdiction because Scott was not a citizen of Missouri. Taney went on to assert that black people were not citizens of the United States or of any particular state; they were not even "persons" under the law).

83. *Id.*

84. *See infra* Section II.B.

85. *Dred Scott*, 60 U.S. at 407.

86. *Compare* Saito, *supra* note 51, at 14–16 (describing the first articulation of the plenary power doctrine in the Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889)), *with Dred Scott*, 60 U.S. at 407 (holding that black people were not citizens of the United States or of any particular state, and that they were not even "persons" under the law).

87. *See* Saito, *supra* note 11, at 1119–20, 1127–28. Natsu Taylor Saito describes Jim Crow as the perpetuation of:

> [P]lenary authority exercised over African Americans . . . but not through legal doctrine that explicitly declares African Americans to be outside the protection of the Constitution, as is the case for certain groups whom the Supreme Court has declared to be subject to the plenary power of the U.S. government.

cratic machinery remained intact; while Congress tinkered at the margins making gestures toward equality, plenary power remained an opaque mechanism to achieve the same ends as early, more overt racialized oppression.[88]

The Supreme Court that decided the Chinese Exclusion Act cases of the 1880s, enshrining immigration plenary power, was the same Court that upheld what some have called "American apartheid" in *Plessy v. Ferguson*[89] shortly thereafter.[90] It also made the plenary power doctrine the cornerstone of what became federal Indian law,[91] as well as the law applied to external U.S. colonies such as Puerto Rico and Guam.[92]

Even before the criminalization and massive surge in incarceration of African Americans in the 1970s and 1980s, during the civil rights era, leaders such as Stokely Carmichael and Charles Hamilton rejected traditional civil rights civic nationalist rhetoric.[93] Even though the Black Power and civil rights movements were responsible for the social change that came with the Civil Rights Acts of 1964 and 1966, their visions were very different.[94]

The Black Power movement was anti-imperialist and anticolonialist, framing the Black struggle as one for liberation for all African peoples.[95] They saw mainstream civil rights leaders' nationalism and support for U.S. foreign policy as oppression of Blacks in America and

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Id.

88. *See id.* at 1121–22, 1133, 1134.

89. 163 U.S. 537 (1896).

90. *Id.* at 548–49 (1896) (upholding constitutionality of racial segregation laws for public facilities as long as the segregated facilities were equal in quality).

91. *See* Saito, *supra* note 11, at 1129 n.81 ("'Indian Law' might be better termed 'Federal Law About Indians'" (quoting WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (1998)) (suggesting "'federal Indian law' is a misnomer because Indian nations have had and continue to have their own law").

92. *See id.* at 1129–1131 (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382, 406–18 (1993) (arguing that "Chief Justice Marshall struck a relatively coherent balance between colonialism and constitutionalism that is overlooked by contemporary commentators"); Helen W. Winston, *"An Anomaly Unknown:" Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases (1831-32)*, 1 TULSA J. COMP. & INT'L L. 339, 349–58 (1994) (analyzing the cases in the context of international law as articulated by early international law theorists Hugo Grotius and Emmerich de Vattel).

93. Rana, *supra* note 43, at 279.

94. *See* MARY FRANCES BERRY, BLACK RESISTANCE WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 140, 159, 170 (1971).

95. ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY (Africa World Press 1990) (1969); *see also* John Hayakawa Török, *Freedom Now!--Race Consciousness and the Work of De-Colonization Today*, 48 HOW. L.J. 351, 380 (2004) (describing "Pan-Africanism" as "a coherent theory" whose "aim [is] the complete destruction of all phases of colonialism and their consequences").

colonized people all around the world.[96] American aggression abroad was driven by White colonial motives.[97]

These leaders highlighted the persistence of oppression in spite of formal citizenship given to African Americans. Oppressed African Americans "stand as colonial subjects in relation to . . . white society" and institutionalized racism could be known as colonialism.[98] Formal citizenship was not enough to protect African Americans from plenary authority. Plenary power manufactured all manner of alien citizens.[99] By limiting access to rights and justifying subordinate status, even to those deemed citizens, the plenary power effectively created second class citizens in spite of Justice Harlan's insistence in his 1896 dissent in *Plessy* that "there is no caste here."[100]

Writing together, Susan Bibler Coutin, Justin Richland, and Véronique Fortin said of immigrant and indigenous persons, "[b]oth . . . occupy a space of exception vis-à-vis U.S. law: as 'resident aliens' and 'dependent nations' they are inside and outside at the same time."[101] Their racialized subordinate status necessitates legal and highly discretionary processes often outside of the control of the judiciary—emblematic of plenary power.[102] The rights of immigrants and indigenous persons are equally undermined as a result.

When the Court shields such acts of discretion as authorized by Congress in spite of potential constitutional implications, plenary power's lawlessness is easier to postulate. These discretionary extensions of plenary power are always exceptional, such that they are not what defines the system—they embody extraordinary moments that may stretch the bounds of democratic rule of law but somehow always fit just inside of it.[103]

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96. Rana, *supra* note 43, at 279.

97. *See, e.g.*, STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 5 (1st ed. 1967); *see also* W. E. B. DU BOIS, *IX: Of the Sons of Master and Man*, *in* THE SOULS OF BLACK FOLK (1903).

98. Rana, *supra* note 43, at 279 (citing CARMICHAEL & HAMILTON, *supra* note 97, at 5); *see also* DU BOIS, *supra* note 97 (drawing connections between racial subordination in the United States and colonialism).

> [T]he characteristic of our age is the contact of European civilization with the world's undeveloped peoples . . . . War, murder, slavery, extermination, and debauchery—this has again and again been the result of carrying civilization and the blessed gospel to the isles of the sea and the heathen without the law.

Id.

99. The same was true of naturalized or even native-born citizens of Mexican descent, as well as the U.S. citizens of Japanese descent imprisoned during Japanese internment. *See* NGAI, *supra* note 4, at 128–29, 175–76.

100. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

101. Coutin et al., *supra* note 70, at 99.

102. *Id.*

103. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 15, 17–18 (Werner Hamacher & David E. Wellbery, eds., Daniel Heller-Roazen trans., 1998).

Just before deciding what would be the first of the Chinese Exclusion cases, the Supreme Court held that the political branches of government had plenary power over American Indian nations.[104] In comparing plenary power's extraconstitutional authority over American Indians, Bibler Coutin, Richland, and Fortin refer to the *United States v. Kagama*'s[105] justification[106] of federal jurisdiction over American Indians:

> [T]his power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the [C]onstitution . . . *as from the ownership of the country* in which the territories are, and the right of *exclusive sovereignty which must exist in the national government*, and can be found nowhere else.[107]

Relying on the doctrine of discovery,[108] the Supreme Court labeled American Indian nations as "semi-independent"—infantilizing them and de facto initiating their lack of sovereignty by mere expression of the

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104. Saito, *supra* note 51, at 26.

105. 118 U.S. 375 (1886).

106. *Id.* at 385 (holding that Congress's 1885 Major Crimes Act was constitutional even though it gave federal courts jurisdiction over crimes committed on an Indian reservation); *see also* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 171 (2002).

> The Supreme Court simply validated the unilateral claims by Congress to a greatly enlarged legal hegemony over non-consenting Indian peoples. The Court's first effort at rationalizing this new federal role in *Kagama* is truly instructive. It indicates how novel, and constitutionally unfounded, the federal Indian plenary power doctrine that evolved from that case really was.

Id.

107. Coutin et al., *supra* note 70, at 114 (quoting *Kagama*, 118 U.S. at 380); *see also* Clinton, *supra* note 106, at 175.

> Careful attention to this penultimate language from the *Kagama* opinion clearly demonstrates that the Court rationalized the growing colonial power of Congress on very peculiar constitutional grounds. Nowhere does the Court cite or rely on a textual delegation of congressional authority. Rather, the Court merely asserts a colonial power to govern Indians because they are "communities dependent on the United States."

Id.

108. Tonya Gonnella Frichner, *The "Preliminary Study" on the Doctrine of Discovery*, 28 PACE ENVTL. L. REV. 339, 339–40 (2010) (describing the Doctrine of Discovery as a violation of the human rights of Indigenous persons); Saito, *supra* note 20, at 51.

> Robert A. Williams, Jr. explains that the "Marshall Model of Indian Rights," articulated in *Johnson v. McIntosh* and refined in *Cherokee Nation v. Georgia* and *Worcester v. Georgia,* recognizes an "exclusive right of the United States to exercise supremacy over Indian tribes on the basis of the Indians' presumed racial and cultural inferiority." [And] it relies upon the doctrine of discovery "to define the scope and content of that right to White privilege as covering the entire continent," using the portrayal of Indian-as-savage to justify settler conquest and privilege.

Id. (footnotes omitted); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 682 (1990); *see also* Blake A. Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title*, 15 LEWIS & CLARK L. REV. 995, 996–97 (2011) (describing the Doctrine of Discovery as "developed by European nations to justify the process of colonization and dominion" because it allowed "newly arrived Europeans [to] immediately and automatically acquire[] legally recognized property rights in native lands" and gave the settler colonialists "governmental, political, and commercial rights over the inhabitants without the knowledge or the consent of the Indigenous peoples").

claim of mere "semi" independence.[109] This pronouncement deemed them subordinate because of their limited authority over their own "internal and social relations."[110] Justice Miller described American Indians in terms that were benignly paternalistic yet revealed racialized subordination inherent in the settler colonial ethos: "[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is secessary [sic] to their protection, as well as to the safety of those among whom they dwell."[111] As if the alleged, implicit weakness, diminishment, and need for safety came from an unknown force, or perhaps a eugenicist philosophy,[112] rather than from the settler class itself, evidencing the reality that the Justice subscribed to a historical narrative authored by the settler class.[113]

Shortly after the *Kagama* decision, Congress passed the Dawes Severalty Act, also known as the General Allotment Act.[114] The Act eliminated Indian tribal land holdings and only gave back portions of the land on individual bases on the condition that the American Indian become a U.S. citizen—subjecting themselves to the control of the state.[115] Any allegedly leftover or unclaimed land by those who rejected this forced offer was sold to White settlers.[116]

The Dawes Act resulted in massive land expropriation between 1887 and 1934.[117] American Indian men were forced to trade their sovereignty and tribal land systems in exchange for a "gift" of a portion of their own, newly privatized land, along with citizenship.[118] Additionally, they had to express a willingness to "adopt the habits of civilized life" or obey the authority of the United States, although they were not formally

109. Clinton, *supra* note 106, at 174.

110. Saito, *supra* note 51, at 26 (quoting *Kagama*, 118 U.S. at 381–82); *see also* Clinton, *supra* note 106, at 175 ("[T]he *Kagama* wardship rationale was about supposed racial, cultural, economic and political inferiority of tribes.").

111. *Kagama*, 118 U.S. at 384.

112. *See generally* Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from A Lost World*, 39 PEPP. L. REV. 101, 102 (2011) (describing the underlying eugenic rationale in *Buck v. Bell*, even though the 1927 case was somewhat after the "heyday" of eugenics).

113. *Kagama*, 118 U.S. at 384–85.

114. Indian General Allotment Act (Dawes Act (Indians)), ch. 119, 24 Stat. 388 (1887).

115. *Id.*

116. WARD CHURCHILL, *The Tragedy and The Travesty: The Subversion of Indigenous Sovereignty in North America*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE, AND COLONIZATION 37, 48 (2002).

117. John Collier, Mem. on Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs, 73d Cong. 16–18 (1934), *reprinted in* DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 73–75 (1979); *see* BLUE CLARK, *LONE WOLF V. HITCHCOCK*: TREATY RIGHTS & INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2 (1994) ("After removal from their homelands earlier in the century, allotment was the most traumatic federal policy affecting Indian people."); *see also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 65-117 (1997). In other challenges to the Allotment Act, the Court held that the plenary power allowed Indian property, even land held in fee simple, to be "subject to the administrative control of the government," due to the Indians' "condition of dependency." Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902); Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899).

118. WILKINS, *supra* note 117, at 65–117.

granted citizenship until the Indian Citizenship Act of 1924.[119] Even then, courts were still not willing to recognize them as citizens equal to the settler class. Congress gave and took away American Indians' constitutional rights in another incarnation of plenary power.[120] Congress gave American Indians formal citizenship.[121] However, Congress and the courts simultaneously relegated them to second-class citizenship by exerting plenary power over them to justify denying the individual rights that they would otherwise be entitled to as U.S. citizens.[122]

In *Lone Wolf v. Hitchcock*,[123] the Court denied Lone Wolf's claim that the Dawes Act was a Fifth Amendment due process violation of Indian rights, irrespective of whether the alleged land agreement was valid.[124] Referencing *Chae Chan Ping v. United States*,[125] the infamous immigration case known for excluding a Chinese migrant from returning to his home in the United States primarily on the basis of race, the Court declared that Congress had "plenary authority over the tribal relations of the Indians" and was a political power that the Court lacked the power to curtail.[126]

The settler colonial project also informed allocation of citizenship.[127] State power was used to discriminate along lines of both race and national origin, including the limitation on naturalization to those defined as "White" until 1870,[128] "nonwhite" until the 1940s,[129] and Asians until

119. Indian Citizenship Act of 1924, Pub. L. No. 68-233, 43 Stats. 253 (1924); Indian General Allotment Act, ch. 119, 24 Stat 388, 390 (1887), *amended by* 25 U.S.C. § 331 (2018); *see also* KEVIN BRUYNEEL, THIRD SPACE OF SOVEREIGNTY 109–10 (2007) (characterizing this alleged gift of U.S. citizenship as a "transparent colonial imposition of U.S. citizenship on their political identities" that undermined their sovereignty).

120. VINE DELORIA JR. & DAVID E. WILKINS, THE LEGAL UNIVERSE: OBSERVATIONS ON THE FOUNDATIONS OF AMERICAN LAW 197 (2011).

121. *Id.*

122. *Id.*

123. 187 U.S. 553 (1903).

124. *Id.* at 564.

125. 130 U.S. 581 (1889).

126. *Lone Wolf*, 187 U.S. at 565 (citing *Chae Chan Ping*, 130 U.S. at 600); *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 n.18 (1982) ("The United States retains plenary authority to divest the tribes of any attributes of sovereignty."); United States v. Wheeler, 435 U.S. 313, 319 (1978), *superseded by statute*, 25 U.S.C. § 1301(2), *as stated in* United States v. Lara, 541 U.S. 193 (2004) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); Winton v. Amos, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011) (stating, "[t]hroughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress"); United States v. Candelaria, 271 U.S. 432, 439 (1926); Tiger v. W. Inv. Co., 221 U.S. 286, 315 (1911).

127. *See* discussion *supra* Section I.A.

128. Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2107 (1997) (citing the Act of July 14, 1870, Pub. L. No. 41-254, § 7, 16 Stat. 254, 256 (repealed 1952)).

the 1950s.[130] This is one of the ways in which racial discrimination arising out of plenary power and settler colonialism has impacted American Indians, African American former slaves born in the United States, and immigrants.

The parallel histories of the racialization of African Americans and immigrants of color help explain why and how a settler colonial order perpetuates marginalization of the indigenous; the formerly colonized or residents of territories; former slaves; and new or intending immigrants. The same sorts of punitive practices of social control evident in the Jim Crow era were employed by the settler colonialists in periods of "conquest and consolidation."[131] In contemporary immigration policy, reminiscent of Jim Crow measures, states have pursued attrition via enforcement strategies.[132] Policies designed to make life so difficult for the undocumented, like denying access to driver's licenses, a college education, and increased interior enforcement encourage out-migration.[133]

The settlers' dehumanization of the colonized justifying a "civilizing mission" flowed from settlers' self-proclaimed superiority and was echoed in the original Chinese Exclusion cases, as well as in contemporary rhetoric justifying exclusion, imprisonment, and mistreatment of immigrants.[134] The institutions and practices that grew out of this dichot-

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129. LÓPEZ, *supra* note 4, at 30-33.

130. Chang, *supra* note 128, at 2107.

131. Elkins, *supra* note 75, at 207.

132. *See, e.g.*, Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011).

133. *See, e.g.*, Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (2016) (arguing immigration federalism "should view such local resistance not as mere opposition to be quashed, but as . . . a source of insight into the on-the-ground problem"); Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119–21 (2007); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013) (in an era post *Arizona v. United States*, 567 U.S. 387 (2012), and *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011), an "'immigration federalism' encompasses dynamic and interactive multi-governmental rulemaking pertaining to immigrants and immigration, including rulemaking intended to foster immigrant inclusion"); Huyen Pham, *The Constitutional Right Not To Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400–01 (2006); Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter J. Spiro, *Learning To Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635–36 (1997); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–95, 1104 (2004).

134. Elkins, *supra* note 75, at 213; *see also* Lindsay Pérez Huber, *"Make America Great Again!": Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 216 (2016) (analyzing "articulatory practices of racist nativism in mainstream public discourse about Latina and Latino immigrants"); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 162 (2016) (examining narratives "used to set political agendas and control policy across the crimmigration arena" including racialization and demonization of Mexican and Central American migrants); Maritza Perez, *Los Lazos Viven: California's Death Row and Systematic Latino Lynching*, 37 WHITTIER L. REV. 377, 386 (2016) (discussing history of Latino lynching and contemporary anti-Latinx and immigrant rhetoric and policy); Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L.

omy underlie the formation of the so-called liberal democracies—the state serves the settler interests.[135] To the extent that unjust harm was perpetuated in the process of such alleged "civilizing" missions, these harms could be described away as mere individual acts of corruption or a momentary lapse in rule of law if they were not the result of an inherently flawed democratic political system.[136]

Those same contradictions are just as apparent today, and the plenary power doctrine is a prime example of the undemocratic, anti-rule of law tendencies emanating from settler colonial normative practices.[137] Legal anthropologist Laura Nader argued:

> The rule of law can be deemed illegal when it is applied criminally, arbitrarily, and capriciously, victimizing weaker subjects, or when it violates the spirit and the letter of treaties . . . or when those in power purposefully and systematically do not enforce the law or enforce it based on double standards or discriminatorily.[138]

Plenary power is used to victimize and it was created based on double standards to make legal what would otherwise be unlawful or intolerable discrimination.[139] The doctrine of plenary power was created via jurisprudence—the Chinese Exclusion cases, the American Indian cases, and others—which "relied on concepts of inherent powers derived from the international law concepts of discovery and sovereignty . . . substantially unhinged from constitutional text."[140] Plenary power remains influential today. It continues to underpin Supreme Court rulings that uphold laws that would otherwise be invalidated as discriminatory.[141]

B. *Immigration Plenary Power as an Outgrowth of Settler Colonial Migration Policy*

The contours of the past and current U.S. migration policy, including plenary power, reflect the settlers' goals—a stratified state in their own racialized image. Today, Donald Trump's Administration has fur-

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REV. 575 (2019) (examining "the current war against immigration diversity" and contending that it is designed to help return to "pre-1965 immigration policies designed to maintain a 'white nation'").

135. Elkins, *supra* note 75, at 213.

136. BRANDZEL, *supra* note, 17, at 115 (describing this neoliberal narrative in the context of the Spanish–American war and colonial annexation of Hawai'i).

137. COLONIAL PRESENT, *supra* note 22, at 15.

138. UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 4 (2008).

139. *Id.*

140. Cleveland, *supra* note 32, at 1154.

141. *Id.*; *see also* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 718 (2019) (examining "executive overreaching in immigration adjudication" and noting that *Trump v. Hawaii* and *Arizona v. United States* suggest that the "political branches' plenary power over immigration" persists); Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1042 (2019) (stating that Kennedy's reliance on the plenary power doctrine indicates that he is "a Justice who simply relies on this precedent and chooses to overlook its racist underpinnings acquiesces to white nationalism" in the context of *Trump v. Hawaii*).

thered implicitly racist and oppressive policies harkening back to the segregated social and political reality of the 1950s,[142] and his immigration policies can be traced back even earlier to the inception of plenary power and racial restrictions on immigration.[143] Immigration plenary power has followed the same motivations and reflected the same results as plenary power over African Americans and American Indians.[144] This common thread exposes immigration law's lack of exceptionality and underscores the role of the settler state in creating the law according to a theory of rule of law.

Early immigration policy, from the late 1800s through post-war development of political and cultural ideas around "citizenship, race, and the nation-state,"[145] was and continues to be, shaped by the settler colonial project.[146] Plenary power plays on a sympathetic settler public's acceptance that "discrimination against non-valued others is legitimate and necessary."[147] In order to sustain White settlers' republican freedom and their continuing pursuits of territorial conquest to benefit Anglo settlers, the settlers need non-Anglo, or racialized non-White, migrants.[148] Capitalism, in essence, requires a malleable and subordinate work force and with the abolition of slavery, immigrants have filled that void.[149] Even

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142. *See, e.g.*, David A. Graham et al., *An Oral History of Trump's Bigotry*, ATLANTIC (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/; Brentin Mock, *The Racist Roots of Trump's 'Public Charge' Policy*, CITYLAB (Aug. 14, 2019), https://www.citylab.com/equity/2019/08/us-immigration-policy-racist-welfare-queen-anchor-baby/596005/; Lydia O'Connor & Daniel Marans, *Trump Condemned Racism As 'Evil.' Here Are 20 Times He Embraced It*, HUFFINGTON POST (Aug. 14, 2017, 3:17 PM), https://www.huffpost.com/entry/trump-racism-examples_n_5991dcabe4b09071f69b9261; Nell Painter, *Trump Revives the Idea of a 'White Man's Country', America's Original Sin*, GUARDIAN (July 20, 2019, 2:00 PM), https://www.theguardian.com/commentisfree/2019/jul/20/as-donald-trump-revives-racism-struggle-against-it-gathers-momentum; Derek Thompson, *Donald Trump and the Twilight of White America*, ATLANTIC (May 16, 2016), https://www.theatlantic.com/politics/archive/2016/05/donald-trump-and-the-twilight-of-white-america/482655/.

143. *See* Cleveland, *supra* note 32, at 1148.

144. Saito, *supra* note 11, at 1124 (describing similarities in racialization of American Indians and "Africans" as inferior, and as Justice Taney stated in *Dred Scott v. Sandford*, "beings of an inferior order" lacking any "rights which the white man was bound to respect").

145. NGAI, *supra* note 4, at 3.

146. *See, e.g.*, Glenn, *supra* note 65, at 55.

147. LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 18 (2012); *see also* Adam Serwer, *What Americans Do Now Will Define Us Forever: If multiracial democracy cannot be defended in America, it will not be defended elsewhere*, ATLANTIC (July 18, 2019), https://www.theatlantic.com/ideas/archive/2019/07/send-her-back-battle-will-define-us-forever/594307/ (describing President Trump's racialized public verbal attack on a member of Congress, by default, insisting she "go back" to her country and the public's response, or lack thereof, to the racist, exclusionary threat).

148. SAITO, *supra* note 2, at 79 (explaining that Anglo-American settlers "would desire a large labor force to consummate their occupation" and that a "master narrative" purports that the settlers' own labor fueled economic expansion when instead, it was enslaved or only quasi-voluntary workers responsible for such growth, and that "migrant Others" have not "come voluntarily to share in the benefits of settler colonialism" but migrate due to economic need or other push/pull factors).

149. *See* LEE, *supra* note 54, at 77–109 (describing the role of Chinese "coolie" laborers as filling a void created by the formal demise of slavery); NGAI, *supra* note 4, at 129 (describing Mexi-

though the United States has been heralded by some as a "melting pot" of diversity, settler needs and institutions have shaped U.S. immigration imperatives and the Constitution has been interpreted to further those goals.[150]

Plenary power has been used to control deportation and exclusion—first of Chinese nationals, and over time, other racialized non-White foreign nationals including Mexicans, Central Americans, Africans, and those of Middle Eastern origin.[151] Much of the discriminatory treatment within immigration and crimmigration[152] (or the intersection of criminal and immigration law) has fallen most heavily on these same groups.[153] Even before the Chinese Exclusion Act cases,[154] the Hamiltonian Federalists relied on nationalistic and sovereignty principles when they argued that the Constitution's promise of rights to "We the People" did not apply to aliens.[155] Even those who later became citizens remained racialized others as alien citizens.[156] Mae Ngai describes the "alien citizen" as "an American citizen by virtue of her birth in the United States but whose citizenship is suspect, if not denied, on account of the racialized identity of her immigrant ancestry."[157] Non-Europeans are alien citizens because their foreignness is perceived as immutable as a matter of race, in spite of the formal status of citizenship.[158]

Immigration law plenary power is sometimes referred to more generally as immigration exceptionalism.[159] Immigration exceptionalism is

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can migrant workers, undocumented, and bracero (temporary) workers, as a kind of "imported colonialism").

150. *See* Rana, *supra* note 43, at 4. It is important to note that the otherizing or designating non-Anglo groups as inferior to the settlers was not only based on national origin, but the settlers' Protestantism demonized non-Protestants. *Id.* at 9.

151. Saito, *supra* note 11, at 1137.

152. "Crimmigration" was theorized for the first time by Juliet Stumpf and is the merging of criminal and immigration law. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

153. *See* Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 316–18 (2003); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 611 (2012); Campbell, *supra* note 132, at 2; Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crimmigration Law*, 66 CASE W. L. REV. 993, 994–96 (2016); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 216 (2003); 609, 611 (2012); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006–07 (2010) [hereinafter *Racial Profiling in America*]; Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 533 (2017); Vasanthi Venkatesh, *Mobilizing Under "Illegality": The Arizona Immigrant Rights Movement's Engagement with the Law*, 19 HARV. LATINO L. REV. 165, 166–67 (2016).

154. *See* cases cited *infra* note 189.

155. Sarah Cleveland marks this as the first implicit manifestation of immigration plenary power. *See* Cleveland, *supra* note 32, at 1142–43.

156. NGAI, *supra* note 4, at 2.

157. Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2521 (2007) (adding that "the foreignness of non-European peoples is deemed unalterable, making nationality a kind of racial trait").

158. *Id.*

159. *See Immigration Exceptionalism*, *supra* note 7, at 585, 654.

characterized by the ways in which the Supreme Court has determined that immigration law and policy are excepted from, or outside of, mainstream constitutional norms;[160] however, this characterization neglects the settler colonial context which would suggest that the exceptionality is not unique to immigration law. Constitutional norms "govern expressly constitutional decisions" and "provide the background context that informs our interpretation of statutes and other subconstitutional texts."[161] The departures from constitutional norms[162] in cases involving American Indians, noncitizens, and other groups shield insidious discrimination and otherwise result in deprivations of rights that would not be tolerated if constitutional norms applied.

Temporally coinciding with Jim Crow, the Chinese Exclusion Act cases symbolize the origin of the plenary power doctrine in immigration law.[163] Any time the Court conjures the plenary power doctrine, the Court defers to Congress to except itself from the necessity of considering whether an exercise of state power violates constitutional rights and "affords the federal government virtually unchecked power to make immigration decisions."[164]

In the late 19th Century the United States' need for labor outweighed its racial, ethnic, and nationality-based biases.[165] The need for labor would result in a trend of first, inviting and tolerating migrant workers, and later, deporting and excluding them.[166] Treaties and policies were enacted to incentivize the free movement of people for their labor without the significant restrictions that exist today.[167] However, when the capitalistic demands for labor subsided, racial resentment again flourished and outweighed all else.[168]

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160. *Id.* at 584–85, 85 n.2 (citing Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984)) (noting that doctrines of immigration exceptionalism, including but not limited to plenary power, stray from constitutional norms, as the doctrines "do not apply to other regulatory fields and enable government action that would be unacceptable if applied to citizens," and "'immigration exceptionalism' made its first literary appearances in the late 1980s and early 1990s"); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

161. Motomura, *supra* note 7, at 548–549.

162. Such departures manifest in the characterization of American Indians as not subject to the jurisdiction of the United States because they are not persons recognized by law pursuant to *Elk v. Wilkins*, 112 U.S. 94 (1884), and more contemporarily with decisions like *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), where substantive due process rights of noncitizens are circumscribed. *See, e.g.*, Motomura, *supra* note 7, at 549.

163. *See* Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681, 687 (2017).

164. *Immigration Exceptionalism*, *supra* note 7, at 586.

165. Robert L. Bach, *Mexican Immigration and the American State*, 12 INT'L. MIGRATION REV. 536, 542 (1978).

166. *Id.* at 546.

167. *See, e.g.*, Peace, Amity, and Commerce Treaty, U.S.-China, June 18, 1858, 16 Stat. 739 [hereinafter Burlingame Treaty] (later rescinded pursuant to the Chinese Exclusion Act).

168. Bach, *supra* note 165, at 546.

After the transcontinental railroad was complete and the U.S. economy began to decline, the Chinese migrant workers were hastily deported and restricted from entering the United States.[169] The settler class racialized Chinese immigrants to justify treating them as disposable.[170] Comparative racialization was evidenced by measurement of Chinese immigrants and African Americans on a spectrum of inassimilability, compared to "ethnic whites."[171] "Ethnic white" elites were situated as the most "American," with subsequent racialized hierarchies of belonging and deservedness across and within lines of citizenship.[172] Migration policy was shaped in the image of the settlers, and Chinese nationals were deemed less assimilable than former slaves.[173]

In the 1880s, Congress created racially and ethnically based grounds of exclusion and deportation, including detention without constitutional due process.[174] In 1882, Congress prohibited immigration of new Chinese workers and, shortly thereafter, ceased allowing Chinese nationals who previously had permission to return to the United States.[175] No other foreign nationals experienced comparable restrictions on their migration.[176] Relying on plenary power, the Supreme Court upheld these constitutional due process limitations.[177]

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169. *See* STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 9 (2015) (discussing ethnic and racial bias in origins of immigration law); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights,* 92 COLUM. L. REV. 1625, 1633 (1992); Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 435 (1999) ("[C]ompletion of the transcontinental railroad in 1869, which left nearly 10,000 Chinese workers jobless and dried up a major source of employment in general, widespread racial prejudice against Chinese immigrants."); Saito, *supra* note 7, at 46 ("[S]ettlers' sovereign prerogative gave them absolute authority to control who would be allowed to enter or remain within their claimed territorial boundaries.").

170. Chinn, *supra* note 163, at 690.

171. *Id.* at 696 (studying the Trump presidential victory and contemporary politics through the lens of the passage of the Chinese Exclusion Act of 1882 to understand the history and relevance of nativist-influenced exclusion). Chin also notes that legislators, during the time of origination of the Chinese Exclusion laws, "often invoked the example of white European immigrants who were viewed by many as having customs and habits much more aligned with those of white America." *Id.*

172. *Id.*

173. *Id.* at 697–99.

174. GARCÍA HERNÁNDEZ, *supra* note 54, at 24–28 (describing detention on ships and later at Angel Island).

175. Beginning in 1882, Congress began restricting immigration by contradicting prior foreign policy, namely the Burlingame Treaty between the United States and China. In 1868, the Burlingame Treaty encouraged migration of Chinese nationals to the United States invoking the "inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of . . . free migration." *See* Saito, *supra* note 11, at 1136 (citing Burlingame Treaty, *supra* note 167, at art. V); *see also* LUCY SAYLER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP 195–03 (2018) (examining the significance in the Burlingame Treaty advancing the possibility of the right to migrate—both the right to leave a country, as well as the implications of such a right to enter. For the purposes of this Article and future work, it is notable that the ways in which such a possibility were opened and foreclosed corresponded with racial animus and have set the stage for decades of exclusionary policies).

176. SAYLER, *supra* note 175, at 219.

177. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889).

The Court's decision in the first of the Chinese Exclusion Act cases did not purport to comply with the Constitution.[178] Instead, the Court justified differential treatment of Chinese immigrants on the basis of a factually nonexistent national security threat and the notion of sovereignty.[179] Racialized non-White migrants were a threat to the kind of polity the settler class intended to build.

The Court's rationale in the Chinese Exclusion cases reflected the Court's willingness to sanction Congress's rationale in excluding noncitizens as a matter of power and privilege[180] and by discretionary feat.[181] The newly minted plenary power became like a carve out, excepting it from constitutional law norms and making it extraconstitutional[182] and unenumerated.[183] Plenary power permitted policy made by race rather than reason and "more by politics than principle"[184] to justify exclusion and oppression.[185]

In the case of *Chae Chan Ping*, Justice Field's ruling "present[ed] the government's power to exclude as an already established fact, grounded in sovereign independence and jurisdiction, rather than as a doctrine that is being created in the very moment that it is announced."[186] The Court contended that Mr. Ping's ethnic Chinese identity threatened national security and sovereignty, and that the Constitution impliedly gave Congress the power to regulate immigration under such circumstances.[187] The Court manufactured Mr. Ping's racialized ethnic identity to justify the ultimate outcome. The implied, or extraconstitutional power that is plenary power permitted, in colonizing terms, is "[t]he power to acquire territory by discovery and occupation . . . [and] the power to expel undesirable aliens . . . ."[188]

The subsequent two Chinese Exclusion Act cases[189] expanded plenary power to sanction Congress's determination that noncitizens could

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178. *Id.* at 610–11.

179. *See id.*

180. Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 702, 745 (2005).

181. *Id.* at 745.

182. Coutin et al., *supra* note 70, at 108 (citing Augustine-Adams, *supra* note 180, at 712–713) (discussing the Supreme Court's justification of the plenary power).

183. *Id.* (citing Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854 (1987) (exploring "the constitutional jurisprudence that has come to surround the power to regulate immigration" through the lens of the Chinese Exclusion Act, and considering consequences from the perspective of international law).

184. Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 757 (2000).

185. *See id.* at 757–58.

186. Coutin et al., *supra* note 70, at 108.

187. *See id.* at 109.

188. *Id.* at 103 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)).

189. Fong Yue Ting v. United States, 149 U.S. 698, 725–30 (1893). In 1892, Congress extended an existing ban on the immigration of Chinese laborers and prohibited workers already here from remaining unless they obtained a certificate of residency corroborated by the testimony of a "credi-

also be deported—not just excluded—on the basis of race and that whatever process Congress said was due constituted due process.[190]

The mystique of plenary power cases like *Chae Chan Ping* originates within a realm of science fiction more than democratic rule of law; "like the immigrant and indigenous subjects to which it is applied, these cases constitute plenary power as a kind of present absence, citations to it in the Constitution point to something that is not there."[191] Plenary power is a made-up authority not found in the Constitution but in imagined principles.[192] Expressions of plenary power manifest in moments imbued with magical realism, underscoring its lawless origins. Case law stands as plenary power's "only real textual instantiation—the announcement is the founding of this doctrine, but also one that denies its role and authority in so doing."[193]

Settler colonialism masked its own contradictions. With a similar sleight of hand:

> [T]hese [plenary power] cases transcend the contexts of their own announcement of plenary power, in that they return to and reconstruct the supposed meaning of the Constitution, and U.S. power more generally, imbuing the Constitution with a quality that it did not have previously but that it is now found to always already have.[194]

Susan Bibler Coutin, Justin Richland, and Véronique Fortin reveal the magician's sleight of hand as merely circular reasoning and propose:

> [O]fficial actions taken on the veneer of legal form—in both the ideational sense of routine formula, but also in actual documents and texts—these practices also announce, point to, and give authority to that which is silent in the Constitution, that which is outside the four corners of the founding text . . . ironically, rather than suggesting the extra constitutional authority of certain aspects of U.S. political pow-

ble White witness" confirming the truth of the Chinese resident's representation. Lacking a White witness, in spite of acknowledging their residence, the Court ruled against them. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659–61 (1892).

190. *See Ekiu*, 142 U.S. at 659–61.

191. Coutin et al., *supra* note 70, at 106.

192. *Id.* at 103; *see also* Motomura, *supra* note 7, at 549 (explaining the subconstitutional norm established by plenary power).

> Immigration law, as it has developed over the past one hundred years under the domination of the plenary power doctrine, represents an aberrational form of the typical relationship between statutory interpretation and constitutional law . . . attributable to the prolonged nature of the contradiction between these two sets of "constitutional" norms in immigration law. The constitutional norms that courts use when they directly decide constitutional issues in immigration cases are not the same constitutional norms that inform interpretation of immigration statutes. To serve the latter function, many courts have relied on what I call "phantom constitutional norms," which are not indigenous to immigration law but come from mainstream public law instead. The result has been to undermine the plenary power doctrine through statutory interpretation.

Id. (citations omitted).

193. Coutin et al., *supra* note 70, at 106.

194. *Id.*

> er, these official actions actually fill in its gaps, revealing the moment of 'full administrative power'[195] in which . . . the separation of law-making and law-preserving violence is suspended.[196]

As characterized, plenary power operates "between rule and exception, law and the extralegal, sovereignty and dependency, absence and presence, promise and revocation," and perhaps, when read outside of the settler colonial story, aberrant hypocrisy.[197] In authorizing power over certain categories of individuals, "'[i]mmigrant' and 'indigenous' people are only such when they are within United States territory, even as these designations mark them as outside," such that "they can be treated as legally outside even as their presence is what gives the United States the authority to act over them."[198]

When viewed as a doctrine between rule and exception and law and extralegal, the notion of plenary power appears antidemocratic. It enables "the national government [to] enjoy inherent, extraconstitutional sovereign powers."[199] This is contrary to the premise that a liberal democracy is characterized by "a national government with limited powers, based on a written constitution, and subject to constitutional constraints and judicial review," and these features "distinguish the American democratic experiment from authoritarian forms of government."[200]

1. Sovereign Power and Nationalism

For the Court to defend broadening of the 1882 Chinese Exclusion Act, permitting Congress to reverse the policy of allowing a Chinese national to return with a certificate, they had to reaffirm Congress's abrogation of the Burlingame Treaty,[201] which had implied a general right of migration.[202] The Court chose to defer to Congress's assertion that the United States had an inherent right to exclude, and the Court's rationale was that Congress had such power rested in the notion of sovereignty.[203]

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195. *Id.* at 100 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903)).

196. *Id.* at 101 (citing Walter Benjamin, *Critique of Violence*, *in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 286 (Peter Demetz ed., 1978)).

197. *Id.* at 100–01.

198. *Id.* at 104.

199. *Id.*

200. *Id.* (citing 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, 5 (2003)).

201. The Burlingame Treaty allowed voluntary migration between the United States and China; quite remarkably it called for "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively for the purposes of curiosity, of trade, or as permanent residents." Chinese migrants were to have the same "privileges, immunities, and exemptions in respect to travel or residence, as there be enjoyed by the citizens or subjects of the most favored nation." Burlingame Treaty, *supra* note 167, at art. V, VI.

202. SONG, *supra* note 67, at 24 (citing Cleveland, *Powers Inherent in Sovereignty, supra* note 200, at 133-134).

203. *Id.* at 24-25.

The plenary power doctrine subverts human rights in the name of sovereignty.[204] Sovereignty coupled with nationalism has been at the core of ensuring equality within members of the settler class and exclusion of everyone else.[205] Racism, intricately tied to sovereignty, was also a significant part of the congressional and judicial history of the Chinese Exclusion Act cases, and it evolved to be only partially camouflaged by nationalism.[206] The "ascriptive ideologies" of federal judges limited their embrace of doctrines of human liberties; such liberties only extended to the "'superior' races and nations."[207]

The rationale of the Court in the plenary power cases served the "[p]reservation of a white national identity" premised as a "legitimate ground for exclusion."[208] The rationale and political philosophy underlying plenary power and the Chinese Exclusion Act cases can be traced to Swiss scholar and statesman Emmerich (or Emer) de Vattel, an international law theorist of the mid-1700s.[209] Vattel was highly influential on international law and policy in British, French, and American academic and political circles in the 1760s.[210] His theories emphasized a state's duty to self-preservation, which has evolved into a longstanding underlying principle of colonial and settler colonial nation-states' immigration policies and justifying exclusion above individual or human rights.[211]

The Court in *Fong Yue Ting v. United States*[212] relied on Vattel's assertion of a state's right to exclude for reasons of "self-preservation,"[213] conceptualized by the Court as the fictionalized danger of non-racialized inhabitants or migrants.[214] At the time, the same fictionalized threat—invasion (by Mexicans)—was expressed by a White supremacist who went on a shooting rampage. [215] His racist manifestos echoed Vattel,[216] the *Chae Chan Ping* Court,[217] and the current sitting U.S. president.[218]

204. Saito, *supra* note 11, at 1116 (arguing that while human rights law is intended to protect fundamental rights of individuals from government violations against them; to protect racial, ethnic, religious and national minorities within states; and ensure self-determination, the United States, however, does not comply with these values, using sovereignty as a justification).

205. *Id.* at 1115.

206. *Id.* at 1159.

207. SONG, *supra* note 67, at 25.

208. *Id.*

209. *See id.* at 27–29.

210. *Id.* at 25–26.

211. *Id.* at 27.

212. 149 U.S. 698 (1893).

213. SONG, *supra* note 67, at 27.

214. *Fong Yue Ting*, 149 U.S. at 708.

215. Wajahat Ali, *The Death Rattle of White Supremacy*, ATLANTIC (Aug. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/08/el-paso-and-death-rattle-white-supremacy/595438/; Robert Moore & Mark Berman, *Officials Call El Paso Shooting a Domestic Terrorism Case, Weigh Hate Crime Charges*, WASH. POST (Aug. 4, 2019), https://www.washingtonpost.com/nation/2019/08/04/investigators-search-answers-after-gunman-kills-el-paso/?utm_term=.b42423a3fc88.

216. EMER DE VATTEL, THE LAW OF NATIONS (1758).

Evidencing the settler colonial framework in which plenary power exists, Vattel's theory also justified appropriation of American Indian lands and oppression of American Indian peoples.[219] The colonizers justified land appropriation on the basis of superiority as Christians.[220] This logic has undergirded colonial and settler colonial mindset internationally.[221]

2. Contemporary Ebbs and Flows of Immigration Plenary Power

The immigration plenary power doctrine has a long lineage, traceable through contemporary jurisprudence, and immigration law scholars postulate about its evolution.[222] The doctrine has been criticized for insulating immigration law from constitutional protections and fostering discrimination.[223] In recent decades, there have been instances where the Court asserted jurisdiction and ruled in favor of rights,[224] but the doctrine shows no signs of being put to rest.[225]

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217. Chae Chan Ping v. United States, 130 U.S. 581, 608 (1889).

218. Ali, *supra* note 215.

219. MATTEI & NADER, *supra* note 138, at 67 (citing VATTEL, *supra* note 216) ("The rule of law, grounded in natural justice, was used to justify and validate land appropriation, and the discovery principle remains to this day one of the most entrenched legal doctrines undergirding US federal Indian policy to the detriment of Native Americans.").

220. *Id.* at 67; *see also* NGAI, *supra* note 4, at 50–51 (this theory of White Protestant Christian superiority where Manifest Destiny indicated that, even in the former Mexican territories annexed by the United States after the Mexican–American War, Mexicans were considered racially inferior, but nevertheless, were racialized as White for the United States to have sovereign jurisdiction over the Mexicans living in what was now U.S. territory).

221. *See* DANIEL IMMEWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 12, 17 (2019) (the same rationale that was used to appropriate American Indian land is the same, or similar, rationale used to create rules to exclude noncitizens from constitutional protections, and the Constitution was rationalized as not applying to those living in territories of Guam and the Philippines).

222. *See, e.g.*, Chin, *supra* note 9, at 2 (considering whether the doctrine may be waning); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257 (2000); Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58–66 (2015) (concluding that Roberts Court decisions generally applied established statutory interpretation methodologies and administrative deference doctrines); Motomura, *supra* note 161, at 1626; Motomura, *supra* note 7, at 578–80; Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215, 222–23 (2018) (arguing that the courts have moved toward applying accepted administrative and constitutional principles to immigration cases).

223. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 381–82 (2004); Jennifer Gordon, *Immigration As Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 665, 665 n.54 (2018). See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting), and *Kerry v. Din*, 135 S. Ct. 2128, 2139–40 (2015) (Kennedy, J., concurring), for examples of the doctrine being cited by the Supreme Court in upholding immigration policies that openly discriminate on the basis of a noncitizen's race, gender, national origin, or political views.

224. *See, e.g.*, LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 186 (1987) (describing the Court's avoidance of the plenary power doctrine in favor of more liberal interpretations of the law); *see also* Motomura, *supra* note 7, at 608.

225. *See, e.g.*, Motomura, *supra* note 7, at 611.

The Court has called the doctrine into action to justify extended civil detention of noncitizens without the due process protections that would apply to citizens convicted or accused of crimes.[226] Plenary power was used to exclude on the basis of political philosophy[227] after September 11, 2001, to incarcerate on the suspicion of alleged terrorist activity in spite of never identifying a single terrorist,[228] and more recently, detaining and deporting racialized would-be refugees[229] and limiting suppression of unconstitutionally obtained evidence of noncitizens.[230] The doctrine has remained true to its sociopolitical and historical origins.

The U.S. government, asserting its expansive power over immigration, has gone to extreme lengths to deny noncitizen detainees' rights when physically present but not formally, legally admitted—including denial of their "limited constitutional right to be free from 'malicious infliction of cruel treatment' or 'gross physical abuse'" when in immigration prisons.[231]

The settler colonial project's practice in racialization was particularly triggered after the events of September 11, 2001.[232] The Court used membership theory in conjunction with the plenary power doctrine to construct "a pseudo-citizenship class subject to greater federal power and fewer constitutional protections."[233] The recent reports of U.S. immigra-

226. *See id.* at 556–58 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953)).

227. *Shaughnessy*, 345 U.S. at 210–11.

228. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); *Racial Profiling in America*, *supra* note 153, at 1035 & n.172 (citing Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 48 ANN. SURVEY AM. L. 295, 351–55 (2002)); Volpp, *supra* note 25, at 49.

229. *See, e.g.*, R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015) (describing a district court's consideration of the question of use of detention as a deterrent to migration by migrants fleeing Honduras, Guatemala, and El Salvador with their minor children during the Obama Administration); *see generally* Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 688 (1993) (explaining that the main, racially discriminatory goal was, and is, "to keep Haitians in Haiti"); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 258 (2010) (in Jean v. Nelson, 472 U.S. 846 (1985), the U.S. Supreme Court decided that the government could deny parole to Haitians fleeing their country, even if the denials were race-based; perhaps the Haitian slave revolt was not entirely forgotten by the ruling elite of the 1980s.); Margaret H. Taylor & Kit Johnson, "*Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of* Chae Chan Ping, 68 OKLA. L. REV. 185, 186 (2015).

230. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) (upholding a denial of Fourth Amendment protection to a nonresident alien awaiting criminal prosecution in the United States); *see also* Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

231. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1093 (1995).

232. Saito, *supra* note 7, at 64.

233. Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 575 (2017) (suggesting "[t]he most significant line drawn by the Court in its equal protection jurisprudence addressed to immigrants is the immunity afforded federal laws distinguishing on the basis of non-citizenship status"); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 97 (2004) (discuss-

tion officials' abuse of migrants at the Mexico–U.S. border are indicative of what transpires when constitutional rights and protections are so brazenly overridden by plenary power.[234]

In recent plenary power jurisprudence, *Jennings v. Rodriguez*,[235] the Court refrained from bringing immigration due process into the constitutional mainstream[236] and has since issued rulings that continue to limit substantive and procedural due process rights of immigrants.[237]

Yet some scholars are optimistic, observing a potentially diminishing grasp of plenary power and increasing judicial review.[238] Even in the Trump era, the Supreme Court has engaged in judicial review of immigration laws; in *Dimaya v. Lynch*,[239] the Court invalidated an immigration law on the basis of a constitutional due process and vagueness claim.[240] Rather than a rule of law victory or transitioning immigration law into the constitutional mainstream,[241] this ruling may be nothing more than an anomalous outcome. It fails to signify an unexceptionalizing of immigration law. In *Trump v. Hawaii*,[242] the Court exercised judicial review where it could have declined to do so, invoking plenary power.[243] While the Court did not entirely defer to the Executive and decline

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ing the "radical redefining of citizenship" through post-9/11 case law and contending that designation of "'enemy combatants' blurred the distinctions between citizens and non-citizens" and traces this exclusionary tendency back to plenary power).

234. Taylor, *supra* note 231, at 1093–94 (noting that the "higher constitutional hurdle sometimes imposed on alien detainees reflects the silent influence of the plenary power doctrine on cases that should be governed by the aliens' rights tradition").

235. 138 S. Ct. 830 (2018).

236. *See* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119–20 (2018); *see also Immigration Blame*, *supra* note 7, at 198 (considering the role of blame in immigration law and policy and framing *Jennings* from the perspective that "the constitutionality of statutes that require the detention of certain categories of migrants, without the opportunity for bond, even if the migrants pose no flight risk" or danger to the community are particularly harsh, and "[w]ere the Court to apply its mainstream due process principles, rather than the highly deferential plenary power doctrine, this detention scheme would most likely be unconstitutional. Indeed, but for the enabling plenary power doctrine, the statutory scheme may never have been created in the first place").

237. Nielsen v. Preap, 139 S. Ct. 954, 959 (2019) (holding that immigrants with criminal convictions, who have been released from criminal custody and later re-arrested by immigration agents, are not entitled to a bond hearing).

238. *See* Rosenbaum, *supra* note 236, at 137 (noting that as the Supreme Court is perceived as increasingly partisan, a trend towards judicial review is unlikely to help, further elucidating the challenges at issue).

239. 803 F.3d 1110 (9th Cir. 2015).

240. Kevin R. Johnson**,** Dean, Univ. Cal. Davis School of Law, Keynote Address at the Southwestern Law School Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws (Feb. 2019) (discussing *Dimaya v. Lynch* and highlighting the *Morales-Santana* decision where the Court found that constitutional equal protection prohibited gender based discrimination in immigration law).

241. *See* Rosenbaum, *supra* note 236, at 137 n.124 (citing Schuck, *supra* note 160, at 4) (examining the historical arch towards increased rights and protections for noncitizens characterized by "communitarian" principles where a "central idea is that the government owes legal duties to all individuals who manage to reach America's shores" and an "ideological shift, an altered legal consciousness" moving immigration law toward the constitutional mainstream).

242. 138 S. Ct. 2392 (2018).

243. *Id.* at 2420.

any review of the Trump Administration's ban on immigration from designated Muslim majority countries, the Court only applied rational basis review and still upheld the Travel Ban. The Court's implicit plenary power justification relied on the same strained rationales of sovereignty and security used over 100 years ago.[244]

Even if the Court occasionally utilizes canons of statutory construction in lieu of plenary power when interpreting immigration law, this does not mean that this trend will continue.[245] Where the court has considered, and even invalidated, an immigration law on constitutional grounds,[246] there is a lack of consistency in adherence to constitutional rule of law that ensures this trajectory.[247] There is nothing within the legal architecture of American law that ensures that the Court will keep moving towards mainstreaming constitutional immigration law. Because of the lack of a recognized Constitutional or statutory check on plenary power and the whimsical nature of plenary power, reliance on sovereignty and national security can continue to justify differential treatment.[248]

Ultimately, as often as the Court starts to consider embracing its role and engaging in judicial review, it either declines it or provides only rational basis review.[249] It will also likely exercise *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[250] deference,[251] even after the Trump Administration and its Attorney Generals appoint adjudicators who will follow the Administration's ideological directives—even when contrary to the Constitution or rule of law.[252] Deference to the agency

244. *Id.* at 2407, 2422, 2423 (citing "national security interests" and referencing Congress's delegation of authority to the Executive Branch in its rationale for declining to intervene beyond exercising jurisdiction; the government has set forth a sufficient national security justification to survive rational basis review); *see also* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J. FORUM 641, 649–50 (2019) (comparing *Korematsu* and the Supreme Court's reliance on plenary power to uphold internment of Japanese Americans on the basis of race with the *Trump v. Hawaii* decision where both relied on plenary power and "blind deference to partial truth").

245. *Chevron* deference has been increasingly controversial under this Administration where the Attorney General is understood to be carrying out a partisan racialized and restrictionist immigration agenda. The rule of law question is ripe to be explored in this domain too. *See infra* note 251 and accompanying text.

246. *See generally Trump*, 138 S. Ct. 2392 (2018).

247. *See generally id.*

248. *Id.* at 2422–23.

249. *See id.* at 2423.

250. 467 U.S. 387 (1984).

251. *See* Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for A Crime*, 9 DREXEL L. REV. 323, 324–25 (2017) (highlighting that "[i]n *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* . . . the U.S. Supreme Court . . . developed a robust, albeit uneven, jurisprudence regarding when, and how, courts should defer to agency interpretations of statutes" and explaining that under *Chevron*, "reviewing courts generally defer to reasonable interpretations of the INA made by the U.S. Attorney General and the Board of Immigration Appeals ("BIA") in precedential, adjudicative decisions"); *see also* Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (arguing that "[j]udicial deference to the executive branch is inappropriate when courts review the legality of a government intrusion on physical liberty").

252. Kagan, *supra* note 251, at 492–94, 516.

will be deference to Donald Trump, rather than the rule of law.[253] The history of settler colonialism suggests that, as many cracks as there may be, plenary power is not viewed as lawless by the settler class, and therefore persists.[254]

II. RULE OF LAW IN A SETTLER COLONIAL DEMOCRACY

The U.S. settler colonial project is a system comprised of laws. The settler colonial lens complicates an attempt at understanding what rule of law means and who it serves. It also provides insights into the shortcomings of an equality-oriented rule of law. If rule of law requires equality and can embody it, at the very least, manifestations of the settler colonial project, such as plenary power, have significance for the potential value of rule of law.

A. Democracy

In even a normative examination of rule of law as a concept, it helps to broaden the frame to the political context in which it resides. Starting broadly, democracy has been described as "denoting the process of democratic self-government, deliberative democracy, and the practice of active engagement in the political community."[255] The "thick, "[256] rather than the "thin,"[257] version of democracy is most appropriate for discussing equality-oriented rule of law and theories of rights because it is theorized as balancing majority rule with minority rights and equality.[258] The "thick" version emphasizes the need for majority rule to be balanced against minority rights, whereas a "thin" version makes no such special account.[259] Democracy can be "an account of membership in the people" and collective decision-making by "citizens" who constitute "a body"[260] as well as a form of collective choice mandated by the fundamental idea

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253. *See id.*

254. *See* Saito, *supra* note 7, at 67–69.

255. BOSNIAK, *supra* note 16, at 44; *see also* Volpp, *supra* note 25, at 289, (discussing the way the study and teaching of immigration law "imagines away the fact of preexisting indigenous peoples" and "reflects and reproduces" the ways immigration law defines and limits national membership).

256. Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 TEX. L. REV. 1339, 1350 n.52 (2009) ("[I]n a thick democracy, majority rule ought be balanced against other equally important values, most notably minority rights." (quoting CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 114 (2001))).

257. Alfred C. Aman, Jr., *Administrative Law in A Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1119 (1988) ("Thin democracy is democracy based on large delegations of power to representatives with only limited political participation in the day-to-day operations of government by the citizenry at large.").

258. Hirschl, *supra* note 256, at 1350.

259. Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UNITED NATIONS CHRON. (Dec. 2012), https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices.

260. Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY 17, 17 (Thomas Christiano ed., 2003).

that citizens are to be treated as equals.[261] The theory of democratic rule of law developed below comports with a "thick" version of democracy.

Opinion aggregation and "hearing minority views"[262] are components of a democracy, and their legitimacy should be assessed from a substantive perspective based on outcomes, and not just processes.[263] The rule of law in a "fundamentally just society" should make decisions more predictable and increase likelihood of fair administration of public power.[264] Thomas Hobbes recognized states' overwhelming power and force within their territories, and therefore, this power makes it impossible for individuals to resist state power or find protection from it.[265]

The United States of America has been upheld as a beacon with a constitutional framework and legal order designed to serve "public interests, at once protecting individual freedom and promoting a stable polity."[266] Because of its democratic ideals, Americans are alleged to "turn to the legal order for guidance more often than any other people on the planet and exhibit extraordinary faith in our basic legal structures."[267] Yet even amongst those descendants of the original settler class, faith in U.S. institutions is diminishing, and its international moral and ethical standing is eroding.[268] And historically, those that have proclaimed faith

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261. *Id*. See *infra* Section III.C, for discussion of the problematic nature of citizenship in this equation. *See also* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1996) (contrary to other schools of democratic political theory, Will Kymlikca suggests that group-differentiated rights can be harmonious with "the liberal belief in individual freedom and equality"). Kymlicka also suggests that "some self-government rights and polyethnic rights are consistent with, and indeed required by, liberal justice". *Id.* at 108.

262. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 9 (2016) (discussing which "minority" views are not often considered in detail).

263. *See id.*

264. RONALD CASS, THE RULE OF LAW IN AMERICA xi (2001).

265. *See* GOWDER, *supra* note 262, at 10.

266. CASS, *supra* note 264, at xii.

267. *Id.* at xiii.

268. *See Democracy in Retreat: Freedom in the World 2019*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat (last visited May 19, 2020).

> While not without problems, the United States has enjoyed a strong tradition of respect for the rule of law. President Trump has repeatedly shown disdain for this tradition. Late in 2018, after a federal judge blocked the administration's plan to consider asylum claims only from those who cross the border at official ports of entry, the president said, "This was an Obama judge. And I'll tell you what, it's not going to happen like this anymore." . . . The president has since urged the Department of Justice to prosecute his political opponents and critics. He has used his pardon power to reward political and ideological allies and encourage targets of criminal investigations to refuse cooperation with the government . . . . His administration's harsh policies on immigrants and asylum seekers have restricted their rights, belittled our nation's core ideals, and seriously compromised equal treatment under the law.

Id.; *see also* Simon Tisdall, *American Democracy is in Crisis, and Not Just Because of Trump*, GUARDIAN (Aug. 7, 2018, 12:59 AM), https://www.theguardian.com/commentisfree/2018/aug/07/american-democracy-crisis-trump-supreme-court.

in the American democratic project may not include those touched by plenary power, and the reaches of settler colonialism.[269]

By neglecting to situate theories of democracy within the frame of settler colonialism, it is possible to presume that these values of active and equal engagement in the polity are equally accessible. However, the history of the settler colonial project and the formation of the nation-state naturalized racialization and colonization such that the mechanisms for equality were limited to those in the settler class.[270] The settler colonial lens necessarily problematizes even the most equality-minded theories of democracy.[271]

B. Democratic Rule of Law and Equality

Democratic rule of law viewed through an equality lens requires the question of, "Who dictates the rule" and "To whom does it apply?[272] Rule of law is characterized by its political context and is colored by western political liberalism.[273] E.P. Thompson wrote in 1975 in *Whigs and Hunters* that law was used to benefit the ruling class at the time of the enclosures, or privatization, of land in the early 1700s.[274] At the same time, he wrote that rule of law was "an unqualified human good" and that exposing shams and inequities beneath law was necessary.[275] He also urged that if the rule of law, which was universal, could be realized, it would be the only hope for achieving justice in an inequitable society.[276]

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269. *See* Saito, *supra* note 7, at 66 (discussing how plenary power allowed the federal government to exercise "plenary -- full or complete, and therefore unchallengeable -- authority over [American Indian nations, immigrants, and residents of unincorporated territories]").

270. *Id.* at 78 ("Assimilation offers non-Indigenous Others the possibility of gaining limited access to some of the privileges of the settler class at the expense of other peoples, but this does not equate to freedom.").

271. *Id.* at 22.

> Understanding the structural dynamics of the United States through the lens of settler colonial theory can provide us with analytical tools that facilitate a realistic assessment not only of the conditions currently faced by Indigenous peoples, but also peoples brought to this country as enslaved workers, incorporated by virtue of territorial annexation, or induced to migrate without the option of becoming part of the settler class.

Id.

272. Thanks owed to Maritza Reyes for this fundamental inquiry.

273. Thanks to Sherally Munshi for highlighting the inherent ideological or philosophical discord between western democratic political liberalism, and postcolonial thought and decolonization scholarship. Whether rule of law is by necessity and definition absolutely complicit with, or constitutive of, settler colonialism is part of what this paper intends to explore. *See generally* UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY LIBERAL THOUGHT 1 (1999) (discussing "British liberal thought in the late eighteenth and nineteenth centuries by viewing it through the mirror that reflects its association with the British Empire").

274. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 264 (1975).

275. *Id.* at 266.

276. *Id.* at 260, 263; *see* Nancy Lee Peluso, Whigs and Hunters: The Origins of the Black Act, *by E.P. Thompson*, 44 J. PEASANT STUD. 309, 309–11 (2017) (discussing E.P. Thompson's seminal book, *Whigs and Hunters*); *see also* Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 997 n.192 (2010) (citing Morton J. Horowitz, *An Unqualified Human Good?*, 86 YALE L. J. 561, 566 (1977)) (complaining that "I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'" and calling this "surprising and disturbing" step).

Once the most suitable definition of rule of law can be identified, it may be more possible to determine the status of plenary power and whether rule of law can expose and remedy inequities.

More recently, legal scholar Paul Gowder has provided a similarly optimistic, yet circumspect, equality-oriented contemporary theory of rule of law.[277] Gowder questions whether rule of law is merely "another form of neocolonial cultural hegemony, an excuse for state-building" or whether it can have meaning for the people, including historically oppressed groups.[278] If any theory of rule of law has the potential to encompass equality concerns, Gowder's theory provides the most fruitful starting point.

Some of the basic principles and components of an equality-informed rule of law are as follows: First, a law can be a law without comporting with rule of law.[279] Rule of regulative law applies when [states] exercise their power over individuals."[280] Rule of law is primarily relevant to mediating or dictating the relationship between the state and a people.[281] Sometimes, those characterized as "the people" are official members called citizens.[282]

Along these lines, Gowder asserts that rule of law is "morally valuable . . . because it is required for the state to treat subjects of law as equals," and it serves a role in fostering legal institutions that guard against officials using the state's power to manipulate "individuals into submissiveness."[283] Gowder contrasts his equality-oriented normative theory with a more conventional account, where rule of law is viewed as valuable because it "promotes individual liberty."[284] In his account, the state may also need to affirmatively accommodate differences to ensure equality.[285]

Gowder also suggests that rule of law should "prevent legal caste . . . particularly along ascriptive group lines"[286] and ensure that the law does

277. *See* GOWDER, *supra* note 262, at 1.

278. *Id.*

279. There is also the question of the "law on the books" and "law in action." *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1045 (2013) (considering the role of enforcement as a part of the law); *see also* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910). For the purposes of defining rule of law in a democracy, and consideration of plenary power, it functions more as "law in action," but became law "on the books" through judicial activism or fiat.

280. Gowder, *supra* note 15, at 569.

281. *Id.* at 569 ("[T]he rule of law is a regulative principle for states, when they exercise their power over individuals.").

282. *Id.* at 574.

283. *Id.* at 565, 567.

284. *Id.* at 566.

285. KYMLICKA, *supra* note 261, at 108.

286. Gowder, *supra* note 15, at 567. The theme of treatment of immigrants and racialized non-White citizens as constituting a caste is referenced throughout legal and historical humanities focused scholarship and was referenced in *Plyer v. Doe*, 457 U.S. 202, 218–19 (1982). *See, e.g.*, NGAI, *supra* note 4, at 2–3; Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L.L. REV.

not treat the interests of anyone in the community with complete disregard.[287] "Public reason" ensures that we treat "our fellow subjects of law as equals" and offer reasons for decisions, such that members are included in the political and legal community "on equal terms."[288] A state's laws must apply to all subjects and treat all subjects equally.[289]

The core of the rule of law is not necessarily identified in or by a particular institutional scheme, but instead, by the "idea of social equality within a state."[290] Thus, inequality and explicit and implicit forms of racialized violence or oppression represent an absence of rule of law because rule of law has failed to extend to all within a society.[291] The Equal Protection Clause of the Constitution is an example of the embodiment of this equality norm. However, at the same time, the need for the Equal Protection Clause, and the ways in which it falls short, are simultaneously evidence of the failures of equal protection and an absence of rule of law.[292] Put differently, the instances in which Equal Protection fails to protect are indications of the limitations of the utility of the concept of rule of law.[293]

Gowder acknowledges aspects of the United States' violent and oppressive history by proposing that the rule of law can exist for some people and not others—for example, extralegal lynching of African Americans and Jim Crow.[294] These instances of implicitly sanctioned racialized violence may be an absence of the rule of law or an expression of it. Does rule of law fail to exist where law does not apply equally and consistently across lines of race and class—irrespective of accidents of

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257, 304 (2017) (considering problems with the concept of earned citizenship, stating that "a focus on caste forces consideration of the current [and historic] realities of racialized inequality" and "maintenance of an equality regime, for the enjoyment of all citizens, depends on the elimination of caste" and, he suggests, "*[t]he coexistence of citizenship and caste is the destruction of citizenship itself*" (emphasis added)).

287. Gowder, *supra* note 15, at 565.

288. *Id.* at 606, 613.

289. *Id.* at 600–01.

290. Matthew Lister, *Can the Rule of Law Apply at the Border? A Commentary on Paul Gowder's The Rule of Law in the Real World*, 62 ST. LOUIS U. L.J. 323, 323 (2018) (citing GOWDER, *supra* note 262, at 4–5).

291. *Id.* at 324.

292. Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1024 (2014).

293. GOWDER, *supra* note 262 (noting that his focus on an "equality rationale for the rule of law is a minority position in all of the academic disciplines concerned with it"). The rule of law is connected to the concept of equality, but only by adopting a thick conception of the rule of law, closely intertwined with other political values. I aim to offer an account of the egalitarian value of the rule of law that does not sacrifice the traditional thin conception of what the rule of law is, a conception that keeps it distinct from other political values. This idea remains dominant today. *See, e.g.*, Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, *in* 50 NAMOS 64, 75–81 (2011). Additionally, the rule of law is generally seen as valuable for protection of individual liberty, or for political economic purposes—Lockean derived property and related purposes. Those modes of inquiry are not necessarily the best starting points for establishing a theory of rule of law that is particularly concerned with equality.

294. GOWDER, *supra* note 262.

birth?[295] If rule of law is absent where inequality is present, exclusion of noncitizens from the political community and plenary power's role in limiting civil rights may have the same result.[296] When does the exception become the rule? When does inequality become the rule of law?

To complicate and historicize Gowder's account of an equality informed rule of law, as he would certainly acknowledge, the state has not historically treated subjects of law as equals.[297] Instead, the settler class is "the state." This is both because the settler class established the state infrastructure and because it was designed to protect the privilege and power of its leaders.[298] Thus, as a manifestation of the state, the settler class has used state power to manipulate individuals into submissiveness under the banner of rule of law.[299] Immigration law has consistently produced racial knowledge and identity, where Euro-American persons are constructed as part of an assimilable "nationality-based cultural identity" defined by Whiteness.[300]

Where immigration law and immigration plenary power reflect the settler colonial project's drive for a White settler state and result in racialized disparities, they are either out of sync with an equality-oriented conception of rule of law, or they are signifiers of the limitations of rule of law within the confines of the settler colonial project. Rule of law has done its job to justify the sovereign prerogative, embodied in the plenary power doctrine.[301] The questions of which law and for whom have been constrained by the parameters of their context.[302] Rule of law may not be able to do the necessary work to ensure equality, equality norms, or equity because of the systems and structures in which it lives.

Instead, a normative theory of decolonization, rather than an interpretation of rule of law, may be a more suitable framework.[303] At the same time, reexamining rule of law from the perspective of contemporary and historical racialization of noncitizens and immigrants helps expose the ways in which law and social order have been organized around liberal democratic epistemologies.[304] The settler colonial project helps reframe an examination of rule of law and elucidates its shortcomings.

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295. An accident of birth is the idea that some people are born into the White settler class, while others are born into groups racialized adversely; some are born wealthy, others poor. These are all conditions outside of one's control at the moment they are born.

296. GOWDER, *supra* note 262.

297. Gowder, *supra* note 15, at 565, 612.

298. *Id.* at 571, 574.

299. *Id.* at 567.

300. NGAI, *supra* note 4, at 7.

301. *See, e.g.*, MATTEI & NADER, *supra* note 138, at 67 (stating that the rule of law has been used to justify exercises of sovereignty, for example, land appropriation); Coutin et al., *supra* note 70, at 106 (stating that plenary power is a "political force inherent in sovereignty").

302. GOWDER, *supra* note 262, at 29.

303. *See, e.g.*, Munshi, *supra* note 44, at 55.

304. *See generally* MEHTA, *supra* note 273, at 1.

C. The Settler Colonial Project and Shortcomings in Ensuring Equality – Rule or Exception?

The United States' historical and contemporary legal infrastructure has been inconsistent (at best) in serving equality interests and comporting with a conception of rule of law that characterizes "law" as requiring equality. The Constitution and equal protection doctrine provide the predominant framework that embodies empirical democratic theory of equality in the United States.[305] However, for reasons both historical and contemporary, equal protection falls short as a remedy in ensuring that democratic rule of law honors equality principles both for citizens, as well as foreign nationals or noncitizens—plenary power is but one example.[306]

The Constitution is inherently premised on exclusion—explicitly through plenary power and implicitly by failing to provide substantive equality to former slaves, American Indians, and noncitizens.[307] Plenary power created "law" that arguably did not comport with "rule of law," unless rule of law is only for the settlers.[308] Plenary power is a manifestation of law that corresponded with the settler colonial mission of creating a racialized White nation.[309] The system of racial classification and codified subjugation that continued to emerge had to struggle to "find a racial logic capable of circumventing the imperative of equality"[310] of the Fourteenth Amendment, and by in large, it succeeded.[311] And presently, when the President demonstrates Executive animus the Court sanctions discriminatory predilections that carry the power of a presidential proclamation.[312]

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305. *See* Louis Henkin, *Rights: American and Human*, 79 COL. L. REV. 405, 417–18 (1979) (discussing the limited conception of American equality embodied in the Constitution and equal protection doctrine).

306. *See, e.g.*, Rosenbaum, *supra* note 236, at 120 (discussing substantive due process jurisprudence pertaining to immigration detention).

307. *See* Munshi, *supra* note 44, at 54. (recognizing that American Indians do not necessarily want to be considered under the jurisdiction of the United States and contend that the Fourteenth Amendment jurisdictional component of the guarantee of citizenship was at least a partial recognition of native sovereignty) Thank you again to Sherally Munshi for this important point.

308. *See* SORA Y. HAN, LETTERS OF THE LAW: RACE AND THE FANTASY OF COLORBLINDNESS IN AMERICAN LAW 7 (2015) (discussion of the Constitution and slavery); *see also* Han, *supra* note 78, at 105–06.

309. *See* SONG, *supra* note 67, at 25 (exploring cases that used plenary power to maintain "white national identity").

310. NGAI, *supra* note 4, at 9.

311. *Id.*

312. The author has in mind the *Trump v. Hawaii* litigation. *See* Richard Delgado, *J'accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. ONLINE 119, 151 (2018) (considering the possibility that democratic principles might be used to address "animus head on" such that the President should be deemed acting in a "purely private capacity" and "ultra vires," due "no special deference by the courts, legislators, the citizens, or anyone else" when acting out of racist animus); *see also* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 13 (2019) (arguing in the context of *Trump v. Hawaii* and other cases involving animus by the lawmaker, "courts should use a mixed motives framework invalidating a contested law where the same law would not have been promulgated but for animus").

In the American public's imagination, the perception of the meaning of the federal Constitution and Declaration of Independence has been fluid and contested territory. These unstable meanings have contributed to diverging perceptions of what the law is and rule of law.[313] In one iteration, these texts are the symbol of the possibility of freedom and equality for all.[314] In another iteration, with decades of empirical support, the documents arose out of a conflicted origin within the rubric of the "great white origin myth."[315] Even though the Constitution did not clearly codify the kind and degree of equality and inclusiveness imagined by some, civic arguments envision it as such, as a part of the broader narrative of American political ideology.[316]

Before the Civil War, there was a perception of the nation as "a white republic" with the Constitution serving as the seminal document creating and ensuring a hierarchal and racially stratified population.[317] Prior to the Civil War, in an attempt to shape the Constitution's meaning and application, Senator Stephen Douglas declared:

> I hold that a negro is not and never ought to be a citizen of the United States . . . this government was made . . . by white men, for the benefit of white men and their posterity forever, and should be administered by white men and none others.[318]

And as history would have it, the nation has been predominantly administered by White men and for their posterity and benefit.[319] The senator proclaimed the Declaration of Independence's omission of "the negro" was intentional, because the authors only intended the document to apply to White men of European birth and descent.[320] "The negro, the

313. Rana, *supra* note 43, at 277.

314. *Id.* (citing Martin Luther King, Jr., *The American Dream*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 208, 208 (James M. Washington ed., 1990) (explaining that "arguments about American exceptionalism allowed civil rights leaders like Martin Luther King, Jr. . . . to depict black inclusion as part of the country's founding aspirations, albeit 'essentially a dream…yet unfulfilled'").

315. Martinez, *supra* note 56, at 85 (using the term coined by scholar activist Roxanne Dunbar Ortiz to discuss the way in which the United States has created an identity for itself that is the most flattering view of its history, tracing the narrative of Columbus's alleged "discovery" of a place already inhabited by some 80 million people, the colonists' love of independence, and the promise of a republic valuing democracy and equality (at least, for White male landowners). Then, of course, in 1840, the settler colonialists doubled the territory by taking land from Mexico, where Mexicans were depicted as backwards, small, and brown, just as American Indians were "savages." *Id.*

316. Rana, *supra* note 43, at 268.

317. *Id.* at 270.

318. *See* Stephen Douglas, Speech at the Third Lincoln-Douglas Debate, Jonesboro, Ill. (Sept. 15, 1858), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858 at 598 (Don. E. Fehrenbacher ed., 1989) [hereinafter Stephen Douglas Speech].

319. *See, e.g.*, Tom McCarthy, *'Democracy Has Been Hijacked by White Men': How Minority Rule Now Grips America*, GUARDIAN (May 24, 2019, 2:00 AM), https://www.theguardian.com/us-news/2019/may/24/democracy-has-been-hijacked-by-white-men-how-minority-rule-now-grips-america.

320. Stephen Douglas Speech, *supra* note 318, at 598; *see also* RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (7th ed. 2010) (a leading account of Chica-

savage Indians . . . or any other inferior or degraded race" were not to be included, just like nationals of China, Japan, Mexico, and numerous other nations would be excluded, and their rights limited.[321]

Others have read the Constitution as intending to eliminate absolutism, including domination over particular groups.[322] Implicitly challenging principles undergirding nationalism and racialization, David Jayne Hill wrote in 1916 that "there is no definable ethnic type that is exclusively entitled to be called American."[323] And embracing Enlightenment principles, America was to be committed to "inclusive civic values"[324] and "the Constitution gave substance to the egalitarian aspirations of the Declaration" such "that 'Americanism' was not reducible to racial criteria" and "there is no definable ethnic type that is exclusively entitled to be called American."[325]

However, the Constitution also reflected an intent to define the nation as limited to descendants of White Europeans, along racial lines, national origin, lineage as proxies for race.[326] The "vision of the country as first and foremost a white Republic, and of the Constitution as its ruling text," in this respect, "remained solidly entrenched for decades after the Civil War."[327] The trajectory of American immigration policy reflects this bias.[328]

The Constitution was interpreted as intending to establish a self-governing republic and to distinguish it from Europe, an imperial power, by focusing on civic development and independence.[329] The problems of inequality were largely erased in the rereading of the meaning of the original documents.[330] These reconstructions of the past and the undoing of the settler colonial history facilitate the persistence of inequality in the United States and inhibit the possibility of meaningful critique of settler colonial law and its institutions.

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no history and contested conceptualization of Chicanos in the United States as living in an internal colony).

321. Stephen Douglas Speech, *supra* note 318, at 598.

322. Rana, *supra* note 43, at 274.

323. *Id.* (quoting DAVID JAYNE HILL, AMERICANISM: WHAT IT IS at vii–x (1916)).

324. *Id.* at 275.

325. *Id.* at 274 (quoting DAVID JAYNE HILL, AMERICANISM: WHAT IT IS at vii (1916)).

326. *See, e.g.*, SAITO, *supra* note 2, at 1, 23–24, 101 (discussing the Constitution's guarantee of equal protection as inadequate to address structural racism; U.S. history is Eurocentric, reflecting the primacy of the Anglo-American colonists' perception of their right to the continent, thereby shaping a body of law, including the Constitution, to reflect this); *see also* Rana, *supra* note 43, at 267 (examining means by which the Federal Constitution came to be perceived as "giv[ing] concrete substance to the country's civic ideals, generating a political order grounded in democratic consent, pluralism, and equal rights for all" while erasing "almost entirely, the colonial structure of the American past" which was not founded on, nor reflective of equal rights for all).

327. Rana, *supra* note 43, at 271.

328. *See supra* Section II.C.

329. Rana, *supra* note 43, at 267–68.

330. *Id.*

The Equal Protection Clause has been touted as a fundamental component of a democratic community, impliedly prohibiting group subordination (and caste) because it would be incompatible with democratic community.[331] The Constitution, according to some, would "recognize[] the rights of all men and women everywhere" such that "[t]he United States may not deprive a person, *whether a citizen or foreign national*, of his life, liberty, or property without due process of law."[332]

Normatively, "[t]he Constitution does not give rights, not even to us. Our rights and the rights of people everywhere, do not derive from the Constitution; they antecede it."[333] However, settler colonialism ensured something very different. The idea that rights come before the Constitution and are inherent or natural speaks more to the imagined potential of the Constitution than its empirical characteristics.[334]

The flip side of this argument is that instead of rights, sovereignty is antecedent to the Constitution.[335] This is the premise at the heart of plenary power.[336] Theoretically, if the Constitution requires the U.S. government to respect human rights "with which all men and women are endowed equally,"[337] the plenary power doctrine squarely contradicts such principles.[338] It undermines the purported promise of the Constitution to recognize these rights, irrespective of legal or formal membership.[339] Sovereignty justifies plenary power, and thus far, has prevailed, as is evident today in modern immigration detention policy and jurisprudence.[340]

In creating and sustaining plenary power, the Court has determined that national security and sovereignty antecede the Constitution and the rights that presuppose the Constitution—plenary power—". . . is justified sometimes by reference to the Constitution, but sometimes (as Justice Sutherland does in his opinion in Curtiss-Wright) to a power that preexists it, a political force inherent in sovereignty more generally, of

331. OWEN FISS, A COMMUNITY OF EQUALS at xiv (Joshua Cohen & Joel Rodgers eds., 1999).
332. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985) (emphasis added).
333. *Id.*
334. Henkin, *supra* note 305, at 411–12.
335. Coutin et al., *supra* note 70, at 103, 106.
336. *Id.*
337. Henkin, *supra* note 332, at 32 (citing Henkin, *supra* note 305, at 408–09).
338. Saito, *supra* note 11, at 1169 (stating that the plenary power doctrine subverts human rights in the name of sovereignty).
339. *Id.*
340. *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 847–48, 851 (2018); *see also* Philip L. Torrey, Jennings v. Rodriguez *and the Future of Immigration Detention*, 20 HARV. LATINX L. REV. 171, 171 (2017) (discussing how the U.S. Supreme Court's decision in *Jennings* has the potential of "chip[ping] away at the plenary power doctrine"); Miriam Peguero Medrano, *Not Yet Gone, and Not Yet Forgotten: The Reasonableness of Continued Mandatory Detention of Noncitizens Without A Bond Hearing*, 108 J. CRIM. L. & CRIMINOLOGY 597, 598 (2018) (arguing that "the majority's decision in *Jennings v. Rodriguez* failed to enforce the Constitution and protect the due process rights of detained noncitizens").

which the U.S. government is only the most recent instantiation."[341] The plenary power is akin to a canon of construction without a construct.[342] "Declaring that the United States has plenary power in certain areas of law is an illocutionary legal act: it brings this power into being by calling it forth, and finding its limit" to the extent that there are any "there."[343]

Accordingly, our immigration policies include and sanction discriminatory practices that are difficult to square with an imagined version of liberal theory; however, they may be logical outgrowths.[344] "The courts have upheld these practices, indicating that the constitutional law doctrines applied in the context of purely domestic matters do not similarly constrain the federal government's plenary power over immigration"[345] or indigenous persons.[346] Either this is a contradiction with liberal democracy or a manifestation of it.

There is an ongoing, implicit battle to define rule of law between those who believe that the United States' exceptionalism stems from its commitment to equality and those who see American exceptionalism as an entitlement to continue to act out the settler colonial legacy through existing institutions, whether the judiciary, Congress, or otherwise.[347] The battle plays out in social movements, the political sphere, and in the courts.[348] If the Constitution strives to embody equality norms, plenary power reflects the interpretation of the Constitution as eliminating such potential.[349] When considering whether plenary power is the law from a rule of law standpoint, a truer and historically contextualized reading suggests that, even if it has achieved the status of "law," it may not comport with rule of law norms—if such norms can expand past the dictates of the settler colonial project.[350]

1. Limits of Constitutional Equality Norms in Immigration Law

To the extent that the Constitution includes some doctrinal mechanisms to create and further an equality norm, such as Equal Protection

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341. Coutin et al., *supra* note 70, at 106.
342. *Id.* at 103.
343. *Id.*
344. Chang, *supra* note 128, at 2105–06.
345. *Id.*
346. Coutin et al., *supra* note 70, at 99–100.
347. *See, e.g.*, Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13, 15 (2011) (discussing Justice Taney's ruling in *Dred Scott* attempting to "ensure that blacks could never be citizens, let alone equal ones"); *see also* Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149, 150 (2006) (examining authors who consider whether the death penalty is representative of American exceptionalism with respect to a history of racialized inequality).
348. *See, e.g.*, *Immigrants' Rights*, ACLU, https://www.aclu.org/issues/immigrants-rights (last visited May 20, 2020) (stating that "the ACLU protects the rights and liberties of immigrants" through "targeted impact litigation, advocacy, and public outreach").
349. Saito, *supra* note 11, at 1169.
350. Gowder, *supra* note 15, at 567 (describing an example of when laws (or in his example, non-general law) "count as law nonetheless" but violate rule of law).

and civil rights, protections designed to deter or prevent racialized harm are limited, and plenary power further waters down those equality impetuses.[351] The Constitution has ensured that the answer to the question of "to whom does democratic rule of law apply" is only to citizens, and even then, not to all citizens.[352] The civil rights framework is a limited strategic tool when it comes to contesting (White-, male-, hetero-) normative citizenship because it is also in part a mechanism "by which minoritized subjects reify settler colonial citizenship."[353]

Could it be possible to justify borders (and presumably migration laws) if they foster equality and dignity on the inside through civil rights laws and do not magnify inequality within a nation-state?[354] Or, is the law itself insufficient to ensure "ethical borders"?[355] While a civil rights framework can highlight and centralize arguments for equality in the United States to help make borders more ethical,[356] it falls short.[357] The civil rights framework evidences the underlying mandates of the settler colonial project.[358] Normative citizenship and instantiation of difference are exemplified by the historical and contemporary condition of national origin as well as religious proxies for discrimination legislated by the political branch and sanctioned by the judiciary.[359]

Rule of law-oriented remedies for facially neutral immigration laws with racially disparate impacts have been ineffective and highly restricted.[360] The equal protection doctrine has never been a robust remedy. The showing of discriminatory intent precludes claims more often than they can prevail.[361] While it may be important for advocates to use the courts to educate and influence the public by bringing race-based claims, even

351. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 167 (2009).

352. *Id.*

353. BRANDZEL, *supra* note 17, at 130.

354. Hiroshi Motomura, *The New Migration Law: A Roadmap for an Uncertain Future*, UCLA SCH. LAW (Feb. 22, 2019), https://international.ucla.edu/media/podcasts/2019-Global_migration_conference_Day1_QA-eo-4va.mp3 stating that (if immigration laws discriminate on the basis of citizenship, they should not go further and discriminate in a way prohibited domestically).

355. *Id.*

356. *Id.*

357. *Id.*

358. BRANDZEL, *supra* note 17, at 130.

359. As an example of race-neutral, colorblind immigration policy magnifying discrimination on the inside of the country yet evading an equal protection remedy, the Trump Administration ban on travel by immigrants from particular countries was replete with racialized and anti-Muslim references. The Supreme Court declined to recognize the role of racist rhetoric shaping the ban. *See* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019).

360. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012).

361. *Id.*; Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 2-3, 16-20 (2013); *see also* Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California Trust Act*, 18 CHAP. L. REV. 481, 482 (2015).

if those claims will ultimately likely fail, this underscores the underlying rule of law problem.[362]

Similarly, "phantom constitutional norms"[363] result where equal protection claims impact the Court's decision-making on other non-equal protection claims and lead to a favorable outcome, even where the equal protection claim itself is denied.[364] The ability of equality and antidiscrimination claims to prevail more often, if at all, via the back door, creating sublegal "phantom norms," evidences the failure and limitations of rule of law.[365] Equal Protection remedies are hollow, and plenary power relegates important democratic principles—like equality norms—to phantom, not mainstream, norms.[366]

Because citizenship in the United States is a White, heteronormative construct, it is unsurprising that even citizenship status does not lead

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362. Srikantiah & Sinnar, *supra* note 359, at 204. In considering the contemporary normative importance of the civil rights and equal protection frames in immigration law, immigration professors Jayashri Srikantiah & Shirin Sinnar highlight some of the past and potential future equal protection-oriented victories and address the juridical limitations of the doctrine. They urge the rhetorical public importance of bringing equal protection claims wherever possible, in the face of a right wing white nationalist infiltration in the public imagination, seeping into the foundations of law. Srikantiah & Sinnar suggest that the Court's recent ruling in *Trump v. Hawaii* is one such case. They also suggest that plenary power is still strong and that future rulings from this Court would follow the precedents condoning discrimination. The Court applied a highly deferential standard of review to plaintiff's Establishment Clause claim, presumably making irrelevant even "compelling evidence of animus when the government can offer any alternative, facially legitimate explanation for a policy." *Id.* Similarly, they suggest that the Court is likely to rule in favor of the executive in other upcoming equal protection immigration cases.

363. Motomura, *supra note 7*, at 549.

364. *Id.* at 590.

365. *Id.* at 549.

366. For more on the shortcomings of the equal protection remedy, see Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 665 (2017) (noting that Justices voting against affirmative action on the basis of the alleged colorblindness principle, in spite of the intent of such programs to redress wrongs for suspect classifications, has significance for other vulnerable groups, like Muslims, subject to "vetting and screening protocols," and such extreme vetting evades equal protection challenges because they are shaped to avoid overtly targeting such suspect classifications). Bans like the travel ban, known as the "Muslim Ban" because of President Trump's repeated campaign statements invoking that language, can be called "race-neutral," and "such programs may pass equal protection muster, even if they impose disparate consequences. *See* OMI & WINANT, *supra* note 39; Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); *see also* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015). Some scholars have noted the problematic nature of avoiding constitutional questions and leaving them to sidelines, rather than addressing constitutional problems directly. Though some may argue that what may be viewed as failure by the courts spurring congressional action to legislate is inherently part of the democratic process. *See* Srikantiah & Sinnar, *supra* note 359, at 208 (citing Ben Deporter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013), for the argument that adverse outcomes in litigation can benefit social movements. "[E]ven a high-profile loss on the equal protection claim can help mobilize political reform—if advocates drive home the message that political leaders must resist white nationalist immigration policy because the courts have failed to do so." *See also* Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 49 (2008) (suggesting that dissenting opinions in judicial decisions can promote democracy by addressing an issue of democratic legitimacy); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969-1011 (2011) (arguing that advocates can use litigation losses to shape organizational identity, mobilize constituents, and appeal to other state actors and the public).

racialized citizens of color or immigrants to "view citizenship as a guarantee of equal treatment."[367] From the perspective of the governed, "[m]any view race and class as salient aspects of difference that will continue to generate unequal outcomes *regardless of citizenship*."[368]

Thus, when considering rule of law in the context of immigration law and the question of to whom the law applies, it is important to remember that rule of law hinges not only on citizenship but also on perception of class and race and of the legal othering dehumanization that borders create. Theorists like Edward Said and Joseph Carens recognize the implicit way in which borders are a violent extension of imperialism and the settler conquest.[369]

The way in which "liberal nation-states appropriate and contort civil rights" is relevant to assessment of the relative fruitfulness of the rule of law theory.[370] Even when a framework is designed within the context of democratic rule of law and proposes valuing equality and rights, the confines of the nation-state are limiting factors.[371]

By attempting to find ethics and equality within the discourse of U.S. citizenship and civil rights, settler colonialism is erased and the role of plenary power naturalized.[372] The settler state uses sovereignty to control migration in a black box where civil rights are absent.[373] At the same time, American Indian sovereignty ceases to be recognized.[374] The "civil rights rhetoric fails racialized people of color and Indigenous peoples because U.S. citizenship is White normative and colonialist in nature."[375]

III. DEMOCRATIC RULE OF LAW AND SETTLER COLONIALISM–DISAGGREGATION OF STATUS AND CITIZENSHIP

Persons present in the United States without formal citizenship status and racialized non-Whites with citizenship status could be described as second class or even subcitizens. Those inside one of the ascriptive denotations of membership—citizens—are spared some formal inferior

367. Jennifer Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 80 (2018).

368. *Id.*

369. Edward Said, *Yeats and Decolonization, in* NATIONALISM, COLONIALISM, AND LITERATURE 77 (1990) (describing borders as a function of the "geographical violence of imperialism"); *see also* JOSEPH H. CARENS, CULTURE, CITIZENSHIP AND COMMUNITY – A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000).

370. BRANDZEL, *supra* note 17, at 130 (for example, Martin Luther King argued that civil rights were an inadequate framework for racial justice).

371. *Id.* at 130 (citing J. Kehaulani Kauanui, *Colonialism in Equality: Hawaiian Sovereignty and the Question of U.S. Civil Rights*, 107 S. ATLANTIC Q. 635, 636 (2008)).

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* 130–31.

treatment. Citizens cannot easily be deported, can vote,[376] and have more constitutional due process rights.[377] Plenary power does not limit the actual and theoretical rights of citizens as readily as noncitizens.[378] A partial answer to the problem of the inadequacies of the rule of law framework could be disaggregating immigration status and allocation of rights, which would require dismantling of plenary power. However, citizenship is not comprised of equally distributed rights because race has undermined the promise of equality provided by a liberal democracy and rule of law.[379] Citizenship as a legal status is no assurance of membership in the American body politic, instead, "the consolidation of American identity takes place against them"—those who are defined as not citizens.[380]

Individual rights may theoretically precede the rights of nations, but in practice such rights cease to exist without the nation-state's denotation of citizens and citizenship rights.[381] However, citizen status formally is not the same as, nor must be the antecedent to, citizenship rights.[382] One can exist without the other.[383] Rights can be said to attach for persons territorially present (or beyond)[384] even without formal citizenship.[385] Enjoying citizenship does not require being recognized as a citizen in any formal legal capacity.[386]

The recognition of rights in this manner derives from the Equal Protection Clause of the Constitution where "[r]ights and status" can be viewed as "relatively autonomous."[387] The Equal Protection Clause is a basis for a normative notion of citizenship that entitles protections for every "person" irrespective of formal, legal citizenship status.[388] The fact

376. With the exception of those disproportionately non-White or African Americans who are disenfranchised due to felony voter laws. *See, e.g.*, Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 324 (2018); Martha Guarnieri, *Civil Rebirth: Making the Case for Automatic Ex-Felon Voter Restoration*, 89 TEMP. L. REV. 451 (2017).

377. *See* Chacón, *supra* note 367, at 13.

378. *Id.*

379. *See* Volpp, *supra* note 25, at 1594 (citing Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000)) (critiquing Linda Bosniak's conception of the potential for rights of citizenship to attach even without the status of citizenship, arguing "the guarantees of citizenship as status, rights, and politics are insufficient to produce citizenship as identity").

380. *Id.*

381. Perez v. Brownell, 356 U.S. 44, 64–65 (1958) (Warren, J., dissenting) ("Citizenship *is* man's basic right for it is nothing less than the right to have rights.") (emphasis added); HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 123, 157 (1979).

382. BOSNIAK, *supra* note 16, at 2 .

383. *Id.*

384. *See, e.g.*, Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders, Political Theory*, 36 POL. THEORY 37, 48 (discussing the possibility of rights irrespective of territorial presence for democratic legitimacy where the question of immigration itself subjects individuals to the coercive power of the state).

385. BOSNIAK, *supra* note 16, at 88.

386. *Id.* at 96 (citing KENNETH KARST, BELONGING TO AMERICA (2006)).

387. *Id.* at 89.

388. *Id.* at 90–91.

that equal protection is not expressly confined to citizens permits the interpretation that it could support a principle of "equal citizenship" absent status or formal legal citizenship.[389] The idea of equal citizenship, from a universalist standpoint, indicates that "[e]very individual is . . . presumptively entitled to treatment in our public life as a person . . . deserv[ing] of respect."[390]

Disaggregating immigration status and the allocation of rights would not require eliminating borders[391] and would support the rights of status citizens by potentially diminishing the "alien citizen" problem.[392] A "personhood-based conception of rights" suggests that "as long as citizenship status is made available to noncitizens on liberal terms" then "granting . . . citizenship rights to status noncitizens . . . gives appropriate expression to the Constitution's universalist commitments."[393] Membership has limitations but could be more inclusive.[394] This seems an apt trajectory for any nation-state genuinely aspiring towards a more inclusive democracy and would require ending plenary power.[395]

Theories of nationalism manufacture race along lines of culture and suggest that shared political culture fosters trust and solidarity.[396] Even if this were true, expanding the bucket of rights to noncitizens could increase trust and solidarity amongst all members, creating a broader political culture and community.[397] If the government's legislative and rhetorical choices create the difference that is alleged to cause discord,[398] a positive response to increasing diversity, such as extending greater rights to those who have otherwise historically been marginalized, may lessen

389. *Id*. at 91.

390. *Id*. at 96.

391. *Id.* at 15 (stating that equal citizenship is ruled out by practices of bounded national membership and nationalism); *see also* CARENS, *supra* note 369, at 161–65 (2000) (noting that citizenship need not be, and is not, "a nation-state as an administratively centralized, culturally homogenous form of political community in which citizenship is treated primarily as a legal status that is universal, equal, and democratic," but instead, "our conceptions of citizenship and political community should grow out of, rather than determine, the political and social arrangements that we choose"). In other words, the state citizenship model is not the "only kind that matters" in part because legal citizenship is "closely linked to a norm of equality," and I'd argue, it's so linked that it's potentially inextricable, but at the same time, racialization limits rights and equality in spite of the legal status of citizenship. *Id.*

392. BOSNIAK, *supra* note 16, at 110.

393. *Id.* at 95.

394. *Id.* at 91. To a certain extent, by arguing that rule of law in a democracy requires equal and fair treatment that does not result in inequality, one might presume that by necessity, noncitizens must be treated like citizens such that citizenship loses its meaning. That may or may not be true.

395. *See* sources cited *supra* note 391.

396. SONG, *supra* note 67, at 68–69, 74 (citing CHARLES TILLY, DEMOCRACY (2007)).

397. *See id.* at 56.

398. The obvious example is a president racializing and demeaning particular groups. *See, e.g.*, Zeke Miller et al., *Trump Digs in on Racist Tweets: 'Many People Agree With Me'*, ASSOCIATED PRESS (July 15, 2019), https://www.apnews.com/9924c846abf84cfeabb76e6045190b42; Julia Carrie Wong, *Trump Referred to Immigrant 'Invasion' in 2,000 Facebook Ads, Analysis Reveals*, GUARDIAN (Aug. 5, 2019), https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion.

the divisive and disempowering harms of racialization.[399] Ending plenary power on the basis of its settler colonial racialized history could be more than symbolic. It might influence White settler public perception and serve as a counterweight to the history of government-created perceptions of racialized difference.[400]

Rather than require legal immigration status as a prerequisite for political community membership, the "personhood" conception of rights, irrespective of immigration status (citizenship rights for "status noncitizens"), could permit some degree of participation in the political community and would decrease the power of national origin and ethnicity as proxies for race.[401] Human rights and other universal norms support inclusion of outsiders within the auspices of the rule of law.[402] Similarly, the institutional harms caused by settler colonialism provide sufficient rationale for participation in the political community and equal rights for status noncitizens or those territorially present, short of decolonization strategies.[403]

The disaggregation or personhood conception of rights would be a tangible embodiment of Hiroshi Motomura's theory of "citizens-in-waiting" where immigrants, irrespective of race or national origin, are treated like future Americans.[404] In *Plyler v. Doe*,[405] the Supreme Court recognized the importance of membership for some of those persons territorially present, holding that a Texas state law denying public education to undocumented children was unconstitutional and would create an underclass.[406] Motomura suggests that the rationale behind supporting integration of undocumented children could apply to adults as well.[407]

If fairness and justice suggest that immigration is a kind of contractual relationship between the state and noncitizen,[408] settler colonialism has ensured unequal bargaining power (at best). The relationship be-

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399. SONG, *supra* note 67, at 59.

400. See *supra* Section I.B, for discussion on Vattel, nationalism, social science data, and the importance of cultural cohesion in a democracy. Barbara Arneil argued that "it is not the fact of diversity per se that leads to changes in trust and civic engagement but the politics of diversity," implicating the role of government itself in responding to norms governing a society and changes in its ethnic and racial composition. SONG, *supra* note 67, at 68 (citing BARBARA ARNEIL, DIVERSE COMMUNITIES: THE PROBLEM WITH SOCIAL CAPITAL (2006)). This principle is in keeping with Jayashri Srikantiah and Shirin Sinnar's call for pursuing equal protection litigation even when it is unlikely to prevail in order to send a political message. *See* Srikantiah & Sinnar, *supra* note 359.

401. *See, e.g.*, SONG, *supra* note 67, at 53–54 (discussing the "internal" conception of collective self-determination as an essential component of a nation-state's sovereignty).

402. *See* Lister, *supra* note 290, at 327–28.

403. *See* BOSNIAK, *supra* note 16, at 130.

404. Hiroshi Motomura, *Who Belongs: Immigration Outside the Law and the Idea of Americans in Waiting*, U.C. IRVINE L. REV. 359, 373 (2012).

405. 457 U.S. 202 (1982).

406. *Id.* at 230.

407. Motomura, *supra* note 404, at 373.

408. *See, e.g.*, Victor C. Romero, *United States Immigration Policy: Contract or Human Rights Law?*, 32 NOVA. L. REV. 309, 309 (2008).

tween a migrant (even undocumented) and the state implicitly acknowledges that the immigrant has come to seek work and attempt to participate in the political and social communities.[409] The idea of "immigration as affiliation" suggests an almost de facto policy of accepting undocumented immigrants by failing to genuinely pursue deportation of most of the undocumented immigrants present.[410] By receiving immigrants as willing participants, the state owes them certain minimal rights and protections considered essential to democratic rule of law.[411] Immigrants, via affiliation, build communities, social networks, and lives within the implicit understanding that the state may tolerate their presence indefinitely.[412] A personhood conception of rights would reconfigure the overall terms of engagement, albeit still within the limitations of a settler society.[413]

Given the coerciveness of state power and the power imbalance between citizens, noncitizens (or alien citizens), and the state, as well as the overarching history of settler colonialism in determining who is and may become "legal," presence alone should be sufficient for equal treatment.[414] If the duties and responsibilities of any member of the polity are to follow civil and criminal laws, noncitizens are held accountable to the same laws as citizens.[415] Moreover, law enforcement has historically and disproportionately targeted racialized non-White citizens and noncitizens.[416]

But, disaggregating citizenship may not be enough to escape the inequality created by bounded national membership of the settler state, particularly where even racialized citizens cannot escape settler colonial state power.[417] Without formal citizenship status, equal participation and rights are circumscribed.[418] To the extent that equal citizenship references community membership, or "belonging," it is inherently exclusive

409. *See generally id.* (discussing immigration as a contract between the state and the person).

410. Motomura, *supra* note 404, at 376.

411. *See id.* at 369 (discussing rights enjoyed by noncitizen Europeans).

412. *Id.* at 376; *see also* CARENS, *supra* note 369. Lister also supports the idea of ties to the United States as providing an increased entitlement to membership. Lister, *supra* note 290.

413. *See* SONG, *supra* note 67, at 54.

414. *Id.* at 55.

415. *Id.* (discussing the essential components of a legitimate democratic society).

416. *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 245–486 (2017) (arguing for immigration prison abolition and noting the half million overwhelmingly Latino immigration prisoners); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 200 (2018) (urging a disentanglement of criminal law and immigration law); *Racial Profiling in America, supra* note 153, at 1009 (arguing that "to truly root out racial profiling from modern law enforcement, the law must impose limits on the consideration of race in law enforcement, restrict law enforcement discretion in making stops, and afford a meaningful remedy for impermissible stops and arrests"); Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1100 (2017) (describing Latinos as "finely targeted" by crimmigration); Yolanda Vasquez, *Perpetualizing the Marginalization of Latinos*, 54 HOW. L.J. 639, 642–43 (2011).

417. SONG, *supra* note 67, at 175.

418. *See, e.g.*, *id.* at 177–78.

still.[419] Racialization and the manufactured political identity as, for example, an "Arab terrorist" or a "wetback," figuratively and metaphorically, dis-identifies members of this group irrespective of their formal or legal identity as citizens.[420]

In moving away from autonomous and concomitant limitations with respect to rights, transnational legal institutions could be a liberating replacement for nationally bound laws that may fail in protecting rights of all people, irrespective of immigration status or racialization.[421] The mere act of crossing a border does not have to be a prerequisite for membership in a political community.[422] Given the permeability of borders, the physical crossing of a border may not make sense as a basis for distinguishing categorization for allocation of rights.[423] Such a theory would have decolonizing potential and could reshape the meaning of rule of law.[424] The normative failures of the rule of law as discussed here could potentially be mediated either by disaggregating rights and eliminating status as a prerequisite to rights, or citizenship could be redefined to better incorporate all territorially present.

Yet, citizenship itself has not historically protected marginalized and colonized persons from plenary power and its related harms.[425] Citizenship in the United States is simultaneously White normative and colonialist.[426] Citizenship "is a self-referential system that continuously deploys anti-intersectional epistemologies in order to ensure its own futurity."[427] Instead of being the solution, citizenship itself may be the problem. It is a "'quintessential mechanism' of (de)valuing."[428]

This Article has largely imagined working within material realities and constraints in conceptualizing plenary power through a rule of law lens—the real world of settler colonialism. Theories of decolonization,

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419. BOSNIAK, *supra* note 16, at 96; *see also* Alex Aleinikoff, *Citizenship (Update 2)*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 368 (Leonard W. Levy & Kenneth L. Karst, eds., 2000) ("[T]he concept of citizenship perforce treats those outside the circle . . . as less than full members.").

420. Volpp, *supra* note 25, at 1576.

421. Iris M. Young, *Beyond Borders*, *in* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 62 (Joshua Cohen & Joel Rogers eds., 1999).

422. Mark Tushnet, *Open Borders, in* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS, *supra* note 421, at 69–73.

423. SONG, *supra* note 67, at 158.

424. BOSNIAK, *supra* note 16, at 95; *see also* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019) (contextualizing the history and legacy of the European colonial project to articulate a different conceptualization of sovereignty where economic migrants are understood as having compelling claims to national admission and inclusion in countries that exclude them and where they are "political agents exercising equality rights" engaging in "decolonial" migration).

425. BOSNIAK, *supra* note 16, at 95.

426. BRANDZEL, *supra* note 17, at 131.

427. *Id.* at 145.

428. *Id.* at 16.

however, may be the only way to escape the shackles of the settler state and its institutions.[429]

CONCLUSION

In a seemingly upside down state of affairs where refugees are put in prisons instead of given protection, and credible evidence suggests that the President of the United States breaks the law yet accuses others of lawlessness, one may question basic principles, like, what is "rule of law?" The source of the rule of law's failure may not be its malleability but the very nature of the democracy within which rule of law is defined.[430] If rule of law points us back to doctrine, and statutes and doctrine fail to honor the promise of equality in rule of law, either the law itself is lacking or the structure within which it exists is flawed.

In attempting to begin a conversation exploring the usefulness of the concept of rule of law by examining immigration plenary power, plenary power exposes the concept of rule of law as confined by the settler colonial democracy. Even when interpreted to embody equality principles as resolutely as possible, ultimately, the vaunted principle of "rule of law" is not up to the task.

The Constitution has been interpreted to permit plenary power—prioritizing racializing nationalism and sovereignty as justification to exclude, deport, and oppress. Thus, the ultimate substance at the heart of rule of law is lacking when attempting to identify law requiring the right to have rights as antecedents to sovereignty.

Borders create insiders and outsiders, and in the United States' settler past and present, such boundaries have served the settler colonial state in racializing ways that negate the very value of borders and defining insiders and outsiders. The "alien citizen" is a testament to this enduring problem.

At the very least, the quest for equality-oriented rule of law necessitates a sincere reckoning with the United States' settler origins and the deep inequality built into the framework of what was purported to create a democratic republic. Even if rule of law could be useful as an equalizing force to disrupt settler colonialism, the legal system would still require radical structural reform to address deficiencies implicated by the history of settler colonialism. Any legal system that is dependent on a

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429. Saito, *supra* note 7, at 99.

> Racial realism forces us to acknowledge that privilege and subordination are systemic and persistent in contemporary American society . . . . [I]t is illogical to believe that we can rely on settler state law or legal institutions to undo the very hierarchy they constructed and are intended to protect.

Id.

430. *See generally* Rubenstein, *supra* note 6, at 169–71 (evaluating rule of law talk in the context of immigration executive action under the Obama and Trump Administrations and suggesting that the theory of rule of law falls short and looking to law itself may be more fruitful).

bordered nation state will create outsiders. By reckoning with the reality of settler colonialism and the false promise of equality in the Constitution, and imagining, instead, a new national identity,[431] it may be more possible to envision a normative rule of law that does more justice to equality. Rule of law would be strengthened by formal legal equality, a reimagining of constitutional norms,[432] and replacing critical infrastructures to address the inequities and harms inflicted by the settler class on colonized and oppressed peoples.

Still, formal equality does not equate to actual equality. In some respects, the Constitution has been perceived as more of a hindrance than a tool to end settler colonial oppression. The task of uprooting colonial infrastructure to dismantle the tools of disempowerment of racialized peoples of color may require more than the adherence to rule of law and a critical race-informed view of rule of law.[433] The ultimate answer may require decolonizing democracy itself.

431. Martinez, *supra* note 56, at 85.
432. Derrick Bell, *Racial Realism,* 24 CONN. L. REV. 363, 374 (1992) (arguing that equality should be considered from the perspective that Black people (and logically also all racialized people of color) will never gain full equality in the United States through the existing legal, political, and economic systems and racial remedies).
433. Abolition of the carceral state would arguably be another step towards equality and rule of law.