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Cowboys and Indians: Settler Colonialism and the Dog Whistle in U.S. Immigration Policy

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The nineteenth-century Indian problem has become the twenty-first century border crisis. While the United States fancies itself a nation of immigrants, this rhetoric is impossible to square with the reality of the systematic exclusion of migrants of color. In particular, the Trump administration

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In regards to asylum law, I am dismayed at what I have found. In regards to the mentorship and support I have received at the University of Miami School of Law, I am eternally grateful. In particular, I would like to thank Rebecca Sharpless for her guidance in this Note and for her unwavering drive in the face of ever-worsening immigration policy, Romy Lerner for the direct link between her endless patience and my professional development, Elizabeth Montano for her love and her leadership, the fierce women of the Miami Public Interest Scholarship Program, and of course, my team, the *University of Miami Law Review*. I am also grateful to my family, particularly my mother, Mary Hayes Gordon, and my father, Dean Gordon, for supporting me through decisions they agreed with (such as going to law school) and decisions they did not (*inter alia*, moving to one of the most dangerous countries on the planet). Finally, I am grateful to and inspired by my *Escuela Bilingüe Honduras* students—now nearly grown—for their defiance in a world not made for them and for welcoming me into their country even as mine shut its doors. Thank you.

has taken the exclusion of migrants descended from the Indigenous inhabitants of Mexico and Central America to a reductio ad absurdum. This Note joins a body of scholarship that centers the history of genocide in the United States to examine what our settler colonial history means for today's immigration law and policy. It concludes that the contemporary treatment of Mexican and Central American migrants echoes the ways in which the legal definition of citizenship was developed to exclude Indigenous people. Furthermore, it urges a reckoning with the past both to make sense of the present and to chart a different future.

INTRODUCTION

In January 2018, anti-immigration protesters in Arizona asked a Navajo legislator if he was an "illegal."[1] State Representative Eric Descheenie has medium-brown skin and straight, black hair.[2] Indeed, ingrained into our national psyche is the idea that "real Americans"[3] are white, and brown skin is a marker of otherness.[4] This

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[1] Ben Giles & Paulina Pineda, *Legislative Staffers Say Pro-Trump Supporters Called Them 'Illegal' for Being Dark-Skinned*, ARIZ. CAPITOL TIMES (Jan. 26, 2018), https://azcapitoltimes.com/news/2018/01/26/arizona-capitol-eric-descheenie-cesar-chavez-lisette-flores-selianna-robles-katie-hobbs-tomas-robles-trump-supports-yell-illegal/.

[2] *See* Photograph of Representative Eric Descheenie, *in id*.

[3] This Note recognizes that using "American" to describe only people from the United States of America is a misnomer. The Americas, of course, are two large continents, comprising everything from Alaska to the Chile, and everyone from the Americas could accurately be called "American." *See generally* Mariana C. Irazu, *¿Por qué en algunos lugares se les llama americanos a los estadounidenses?* [*Why, in Some Places, Do They Call People from the United States "Americans"?*], BBC MUNDO [BBC WORLD] (June 8, 2017), https://www.bbc.com/mundo/noticias-38937236.

[4] *See, e.g.*, Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 451 (2005) (concluding from a psychological study of American students that despite a theoretical endorsement of egalitarianism and a race-blind American identity, in practice, "the view is that some

paradigm, of course, puts people like Representative Descheenie in the odd position of appearing foreign in their ancestral homelands.[5]

At first glance, mistaking an Indigenous person for an "illegal" seems absurd. Questionable noun usage aside, however, this mistake is oddly understandable. Many of the people who emigrate from elsewhere in the Americas, particularly from Mexico and Central America, *do* look quite a lot like Representative Descheenie. Like Representative Descheenie, many of these people are descended from the Indigenous inhabitants of the Americas.[6] When the colonizing powers drew and re-drew the line between the United States and Latin America, they did not have the colonized in mind.[7]

The United States built a nation by systematically exterminating the people who were already here.[8] This Note joins a body of scholarship that assumes this nation is what it is today *because* of—rather than in spite of—its foundation of genocide.[9] The United States

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ethnic groups are simply less American than others—not in rights and liberties but in the degree to which they embody the concept 'American.'"); *see also* Giles & Pineda, *supra* note 1.

[5] Giles & Pineda, *supra* note 1.

[6] Identity *vis-à-vis* race is as difficult of a subject in Mexico and Central America as it is everywhere in the world. *Not* everyone from these countries identifies as Indigenous, not even many people with mixed Indigenous ancestry. Identity is a personal matter, and this Note does not seek to impose upon anyone the way she should see herself. However, on a broad scale, most people from these countries are of Indigenous descent, and this Note argues that this fact is important for how the world sees them. For a full discussion on race in Latin America, see generally, e.g., Nancy P. Appelbaum et al., *Racial Nations in* RACE AND NATION IN MODERN LATIN AMERICA 1, 1–22 (Nancy P. Appelbaum et al., eds. 2003) (introducing an anthology on different interpretations of race in Latin America).

[7] *See* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 18 (2014) ("Mexicans continue to migrate as they have for millennia but now across the arbitrary border that was established in the U.S. war against Mexico in 1846–48.")

[8] *Id.* at 1–14.

[9] Many scholars are embarking on the work of centering the narratives of Indigenous people to make sense of the contemporary United States. *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1795 (2019) ("In fact, if we define federal Indian law as the law of national power and rights developed in the context of Native Nations and Native peoples, much of constitutional law actually *is* federal Indian law"); DUNBAR-ORTIZ, *supra* note 7, at 1–14 (introducing *An Indigenous People's History of the United States*); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 29

hides behind rhetoric about being a nation of immigrants to sanitize its violent history of settler colonialism.[10] This Note argues that U.S. immigration law and policy are designed to deny refuge to people Indigenous to the Americas in a way that echoes early jurisprudence denying citizenship to Native Americans.[11] Immigration law, like many fields, can be seen in a different light when viewed as part of a settler-colonial project. In the preface to *Blood and Land: The Story of Native North America*, anthropologist J.C.H. King observes that "Native America provides a touchstone of identity: about who we westerners are and particularly about *who we are not*."[12] People of Indigenous descent have always been othered in the post-colonial United States of America.[13]

Part I of this Note gives a brief overview of the historic exclusion of Indigenous peoples from the legal and colloquial definitions of what it means to be an "American" in the United States. Part II looks at what legal options presently exist for people who want to become "American." It concludes that few to none are available for people from Mexico and Central America, particularly those seeking escape from violence, poverty, and persecution. Part III dives into the executive actions used to narrow the application of asylum in 2018 and 2019. Part IV argues that the Trump administration's hateful rhetoric and actions toward Mexican and Central American asylum seekers mirror the rhetoric and actions historically used to disappear[14] Indigenous peoples. This Note concludes with several legislative and policy proposals to right the course of a settler colony that has spent the entirety of its history building an identity around who it is not.

(2014) ("Those of us who are not Indigenous to this land would not be here but for settler occupation and appropriation, and our primary relationship to the structures of power and privilege must be understood in that context.").

[10] Settler colonialism differs from classic colonialism in that the new arrivals sought to replace, rather than simply conquer, Indigenous inhabitants. Saito, *supra* note 9, at 25–28.

[11] *See infra* Part IV.

[12] J.C.H. KING, BLOOD AND LAND: THE STORY OF NATIVE NORTH AMERICA xi (2017) (emphasis added).

[13] *See* DUNBAR-ORTIZ, *supra* note 7, at 1–14.

[14] Saito, *supra* note 9, at 26 n.131. This Note uses "disappeared" in the context of international law to describe the phenomenon by which a government commits and covers up murder or arbitrary detention. *Id.*

I. HERE LEGALLY: THE "OTHER ORIGINAL SIN" FROM THE MARSHALL TRILOGY TO THE WASHINGTON REDSKINS

In arguing that Federal Indian Law should be centered within the constitutional canon along with the jurisprudence of slavery and apartheid, Maggie Blackhawk refers to colonialism as this country's "other original sin."[15] The early Supreme Court grappled with its own sovereignty *vis-à-vis* violent conquest, and the consequences of these decisions are still felt today.

A. *The Marshall Trilogy and the Jackson Doctrine: A Nation Built on White Supremacy*

1. *JOHNSON V. M'INTOSH*: INDIGENOUS PEOPLES AS MERE OCCUPIERS

Johnson v. M'Intosh[16] is a seminal case for the relationship between Indigenous people and the federal government and the first case in the Marshall Trilogy.[17] Two white men contested title to the same piece of land.[18] One chain of title began with a settler colonist, the other began with a Native American.[19] Chief Justice John Marshall, writing for a unanimous Court,[20] held that Indigenous people could not exercise dominion over land but instead merely "occupied" it.[21] Title was created by the crown with no regard to Indigenous people, and these were the legitimate titles when the settlers ousted the British in the Revolutionary War.[22] In discussing the origin of U.S. property law, Chief Justice Marshall noted:

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed

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15 Blackhawk, *supra* note 9, at 1800.

16 21 U.S. (8 Wheat.) 543, 571–72 (1823).

17 Blackhawk, *supra* note 9, at 1795. The other two cases are *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

18 *Johnson*, 21 U.S. (8 Wheat.) at 571–72.

19 *See id.* at 571–73.

20 *Id.* at 571.

21 *Id.* at 579.

22 *Id.* at 579–81.

> and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.[23]

Marshall then, in his own way, recognized the historical anomaly of United States settler colonialism in his discussion of the nature of conquest.[24] Under normal circumstances, colonizing powers either incorporate the conquered into their ranks or govern them as a separate people.[25] However, Marshall distinguished conquest in the United States:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[26]

As Marshall spells out, the very foundation of the United States as a sovereign nation was premised on the idea that Indigenous people were unfit to be members of its society.[27] While it may be tempting to dismiss this history as an embarrassing vestige of a distant past, *Johnson v. M'Intosh* remains good law, and it is unlikely anyone would be willing to give up her title on the basis that it was obtained in violation of human rights.

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[23] *Id.* at 574.
[24] *See id.* at 589–90.
[25] *Id.*
[26] *Id.* at 590.
[27] *See id.*

2. *CHEROKEE NATION V. GEORGIA*: DEPENDENT DOMESTIC NATIONS

As Georgia passed laws to "annihilate the Cherokee as a political society,"[28] Chief Justice Marshall wrung his hands at his inability to assert jurisdiction over the Cherokee's claim.[29] The Cherokee argued original jurisdiction in the Supreme Court as a foreign nation bringing a claim against a state.[30] Although the Court agreed that individual Native persons were "aliens,"[31] it found that Native Nations were not "foreign nations" within the meaning of the Constitution.[32] Marshall instead dubbed Indigenous people as "domestic dependent nations" who looked to the federal government, or their "great father," for enlightenment.[33] He further expounded that the framers could not have intended to include Indians as foreign nations:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government.[34]

He went on to say, in dictum, that even if the Court had jurisdiction, the case presented a political question: "If it be true that the Cherokee nation have rights," the Chief Justice lamented, "this is not the tribunal in which those rights are to be asserted.[35]

3. *WORCESTER V. GEORGIA*: THE DECISION AND THE FALLOUT

One year after *Cherokee Nation*, Marshall authored another opinion about the relationship between the states and Indigenous peoples. In *Worcester v. Georgia*, the Court held unconstitutional a

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[28] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

[29] *Id.* ("If courts were permitted to indulge their sympathies, a case better calculated to excite them can be scarcely imagined.").

[30] *Id.* at 16.

[31] *Id.*

[32] *Id.* at 17.

[33] *Id.*

[34] *Id.* at 18.

[35] *Id.* at 20.

state law prohibiting white persons from "residing within the limits of the Cherokee nation without a license," unless said white person took "the oath to support and defend the constitution and laws of the state of Georgia."[36] Because the Constitution considered the Cherokee as a separate (if inferior) nation, only the federal government could legislate with effect to it.[37]

Marshall recognized the reality of conflicts over land as European "discovery" grew.[38] He considered the Indigenous people "[f]ierce and warlike in their character," noting that "they might be formidable enemies, or effective friends."[39] However, he declared firmly war powers were only for defense, not for conquest.[40] The Cherokee were a separate people—a lesser people—and Marshall attempted to balance the states' eagerness to expand with the values of the Constitution. As Georgia had no right to criminalize Mr. Worcester's migration to the Cherokee nation, he was to be freed.[41]

And yet, President Andrew Jackson openly defied the Court, reportedly retorting that "John Marshall has made his decision; now let him enforce it."[42] Jackson ordered the withdrawal of all federal troops from Georgia, clearing the way for the state to sell Cherokee lands to white men for four dollars.[43] Mr. Worcester remained imprisoned for violation of a law that had been declared unconstitutional by the Supreme Court.[44] In 1836, only six years later, a combination of state militia members and federal soldiers forced the Cherokee to march to Oklahoma in what would become known as the Trail of Tears.[45]

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[36] 31 U.S. (6 Pet.) 515, 537(1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).

[37] *Id.* at 559–60.

[38] *Id.* at 546.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 562–65 (finding that the sentencing of Mr. Worcester for his migration to the Cherokee nation was repugnant to the Constitution).

[42] Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, ATLANTIC (Feb. 9, 2017), https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144/ (quoting President Andrew Jackson).

[43] Blackhawk, *supra* note 9, at 1823.

[44] *Id.*

[45] *Id.*

Following the prevailing logic that Europeans had a God-given right to dominion because Indigenous people are a subordinate race incapable of utilizing the land, the settlers displaced and disappeared those who stood in their way.[46] While Marshall might not have endorsed outright conquest, every case in the Marshall Trilogy starts from an assumption of white supremacy. This assumption succinctly summarizes the settlers' justification for genocide[47]—indeed; ridding the world of inferior races is the justification for genocide writ large.[48] The very sovereignty of the United States is based upon the hypothesis that the settlers were more deserving of the land than the Indigenous people.[49]

B. *The Taney Court and the Birth of Plenary Power*

While perhaps most infamous for the *Dred Scott*[50] decision, Chief Justice Roger Taney's philosophy of white supremacy also guided his view of Native peoples. Eleven years before *Dred Scott*,

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[46] Saito, *supra* note 9, at 27–28.

[47] Many scholars have written at length about the history and impact of the genocide of Indigenous people. *E.g*. DUNBAR-ORTIZ, *supra* note 7, at 57–133; Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 912 (2002) ("No longer can we remain indifferent and justify these acts of genocide committed by the United States government, its agencies, and its personnel against Native Americans as a result of colonization or the need to establish a prosperous union."); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 48 (2008) ("During [the nineteenth century] the U.S. Government officially embraced policies of forced assimilation aimed at the breakup of the American Indian family."); T.S. Twibell, *Rethinking* Johnson v. M'Intosh *(1823): The Root of the Continued Forced Displacement of American Indians Despite* Cobell v. Norton *(2001)*, 23 GEO. IMMIGR. L.J. 129, 152 (2008) ("The Removal Policy was designed to clear out an entire section of the country for European settlement and formalize, or make *de jure*, the policy of removal of Indians that already began to be a *de facto* policy.").

[48] *Genocide*, Black's Law Dictionary (11th ed. 2019) (defining genocide as "[a]n international crime involving acts causing serious physical and mental harm with the intent to destroy, partially or entirely, a national, ethnic, racial, or religious group."). Academics have speculated that the U.S. reservation system inspired Nazi concentration camps. Blackhawk, *supra* note 9, at 1830 (citing JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 115–16 (2017)).

[49] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

[50] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

Taney authored the Court's opinion in *United States v. Rogers*.[51] William Rogers, a white man, murdered Jacob Nicholson, another white man, in Cherokee country.[52] Rogers, who was something of a nineteenth-century Rachel Dolezal,[53] claimed that both he and Nicholson had become members of the Cherokee nation by virtue of their domicile in Cherokee country.[54] Consequently, Rogers argued, the federal courts had no jurisdiction.[55] The Court disagreed, finding it "very clear" that a white man cannot become an Indian.[56] Taney reasoned that "[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress."[57] Whiteness, according to Chief Justice Taney, was an inextricable part of U.S. citizenship.

Taney also broke from his predecessor's efforts to confine the doctrine of discovery.[58] Rather than basing the power over Native peoples in the text of the Constitution, as Marshall did, Taney rooted his reasoning in what would later become known as plenary power.[59] The United States could enforce its laws in Indian country because "from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate

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[51] 45 U.S. (4 How.) 567 (1846).

[52] *Id.* at 571.

[53] *See* Faith Karimi, *Rachel Dolezal, White Woman Who Portrayed Herself as Black, Accused of Welfare Fraud*, CNN, https://www.cnn.com/2018/05/25/us/rachel-dolezal-welfare-fraud-allegations/index.html (last updated May 25, 2018, 5:37 PM).

[54] *Rogers*, 45 U.S. (4 How.) at 571.

[55] *Id.*

[56] *Id.* at 572–73 ("And we think it very clear, that a white many who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced . . .").

[57] *Id.* at 573.

[58] Blackhawk, *supra* note 9, at 1837.

[59] *Id.* at 1837–38; *compare* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832) (Marshall, C.J.) (pointing to the Supremacy Clause to conclude that state legislation cannot contradict treaties made with Native Nations), *with Rogers*, 45 U.S. (4 How.) at 571–4 (Taney, C.J.) (reasoning that the nature of conquest gave the United States jurisdiction over crimes committed in Indian country).

race in the spirit of humanity and justice."[60] *Rogers* established what would become the pillars of plenary power: an extraconstitutional power rooted in the existence of sovereignty itself and a presumption of a political question.[61]

A comparison of Marshall's reasoning with Taney's shows the circular logic of the doctrine of discovery. According to Marshall, sovereignty is born from conquest.[62] A mere two decades later, Taney justified conquest through the existence of sovereignty.[63] Regardless of the origin of the power, the federal government began to use it aggressively after *Rogers* was decided. It created the reservation system, which gave the executive a power to confine and control Native people so absolute that some academics believe it inspired the Nazis.[64] It also took children from their families and sent them to federal boarding schools in order to "[k]ill the Indian and save the man."[65] From the 1840's on, the federal government turned to plenary power to solve the "Indian problem."[66]

C. *Build That Wall: Manifest Destiny and the United States/Mexico Border*

Considering the ire that migrants generate by "illegally" crossing the southern border,[67] it is worth examining the violence through

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[60] *Rogers*, 45 U.S. (4 How.) at 572.

[61] *Id.* For a detailed discussion of *Rogers* and the plenary power doctrine, see 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, 46–47 (2002).

[62] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

[63] *See Rogers*, 45 U.S. (4 How.) at 572.

[64] Blackhawk, *supra* note 9, at 1830.

[65] *Id.* at 1831.

[66] *Id.*

[67] *See, e.g.* Tucker Carlson, Opinion, *Tucker Carlson: Why No One Ever Makes the Economic Case for Mass Immigration*, FOX NEWS (Dec. 14, 2018), https://www.foxnews.com/opinion/tucker-carlson-why-no-one-ever-makes-the-economic-case-for-mass-immigration (arguing that immigration from Mexico and Central America "makes our own country poorer, *dirtier* and more divided") (emphasis added); Peggy Grande, Opinion, *Immigration: The Conversation We Need To Be Having Around America's Kitchen Table—But Aren't*, FOX NEWS (Dec. 2, 2018), https://www.foxnews.com/opinion/immigration-the-conversation-we-need-to-be-having-around-americas-kitchen-tables-but-arent (arguing that immigrants do not deserve tax money because "[i]t's time for 'We the People' to participate in determining the future of these caravan migrants, [sic] and other

which the settlers established the border in the first place.[68] One of the pillars of settler colonialism is the "presumption of sovereign entitlement" over land to which settlers have never been.[69] Once this presumption is justified,[70] what would more accurately be described as crimes against humanity instead become Manifest Destiny.[71] Black's Law Dictionary defines a crime against humanity as follows:

> A brutal crime that is not an isolated incident but that involves large and systematic actions, *often cloaked with official authority*, and that shocks the conscience of humankind; an inhumane act such as persecution on political, racial, or religious grounds, regardless of whether it is *permitted by the domestic law* of the country where perpetrated. Among the specific crimes that fall within this category are mass murder, *extermination*, enslavement, *deportation*, and other inhumane acts perpetrated against a population, whether in wartime or not.[72]

The zeitgeist of the early republic (and, for that matter, of today) was that the United States must naturally expand "from sea to shining sea," which necessitated the extermination and deportation of Indigenous peoples.[73] Such a paradigm comes part and parcel with the idea of *terra nullius*.[74] Indeed, the United States utilized the exact same rhetoric about the superiority of European civilization to

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immigrants"); Laura Ingraham, Opinion, *Laura Ingraham: Immigration Truths the Democrats Deny*, FOX NEWS (Dec. 13, 2018), https://www.foxnews.com/opinion/laura-ingraham-immigration-truths-the-democrats-deny (arguing that "[w]hen [Mexican and Central American migrants] illegally cross our borders, whether they come to work or to collect welfare, using false documents, whether they come to deal drugs or join murderous gangs that are already here, this does constitute a *foreign enemy action*") (emphasis added).

[68] *See* DUNBAR-ORTIZ, *supra* note 7, at 117–133.

[69] Saito, *supra* note 9, at 25.

[70] *See supra* Section I.A.

[71] *See* Twibell, *supra* note 47, at 152 n.109.

[72] *Crime Against Humanity*, BLACK'S LAW DICTIONARY, (11th ed. 2019) (emphasis added).

[73] DUNBAR-ORTIZ, *supra* note 7, at 117–133.

[74] *Terra nullius*, Latin for "the land of no one," is used to describe land that does not belong to any country. *Terra nullius*, BLACK'S LAW DICTIONARY, (11th

justify the conquest of Northern Mexico as it did to justify conquest of other Indigenous lands.[75] An observer of the West before the Mexican-American war postulated "[t]hat the Indian race of Mexico must recede before us, is quite as certain as that . . . is the destiny of our own Indians."[76] With this perspective as central, rather than tangential, to U.S. history, the anger around "border invasions" no longer appears to be a glitch in a nation of immigrants. It is the inevitable consequence of a colony of settlers.

The United States invaded Mexico in 1846 in order to fulfill its so-called manifest destiny.[77] In 1848, the war ended with Mexico ceding its northern territories in the Treaty of Guadalupe Hidalgo.[78] As the newly seized territories became states, one of the conditions for statehood was that the settler population outnumber the Indigenous population.[79] The presumption of sovereignty over the western United States, like the eastern United States, involved the presumption that forced removal and genocide were a natural part of human progress.[80] Following the Mexican-American war, the federal government used military enforcement to push westward and protect the settlers from the Indians.[81] As President Jackson had previously noted, laws of war "did not apply to conflicts with savages."[82]

Because the Spanish had mainly colonized Mexico with soldiers, rather than settler-families, the Mexican population remained largely of Indigenous or mixed descent.[83] Furthermore, following Mexican independence from Spain, roughly ten thousand Indigenous people from the eastern United States fled to Mexico to escape forced removal to Indian Country.[84] But for the southern border, the Indigenous peoples of Mexico and the Indigenous peoples of the

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ed. 2019). The popular imagination treats the United States as *terra nullius* before European conquest. *E.g.* DUNBAR-ORTIZ, *supra* note 7, at 2.

75 DUNBAR-ORTIZ, *supra* note 7, at 117–18.

76 *Id.* at 117 (quoting WADDY THOMPSON, RECOLLECTIONS OF MEXICO 239 (1846)).

77 *Id.* at 118.

78 *Id.* at 123.

79 *Id.* at 124.

80 *Id.*

81 WILLIAM S. KISER, COAST-TO-COAST EMPIRE: MANIFEST DESTINY AND THE NEW MEXICO BORDERLANDS 75–77 (2018).

82 Blackhawk, *supra* note 9, at 1827.

83 DUNBAR-ORTIZ, *supra* note 7, at 125.

84 *Id.* at 126.

Southwest have largely the same ancestry.[85] Under this framing, the belief that people from below the southern border do not belong in the United States is as old as the United States itself.

D. *The Birth of Cowboys and Indians*

It is this era of Westward expansion that gave rise to the Cowboys and Indians trope.[86] The Western, a genre of built around the idea that heroes kill Injuns,[87] is inarguably part of U.S. tradition.[88] According to Natsu Taylor Saito, "warfare between Indigenous peoples and settlers is central to the origin stories of most settler societies—certainly that of the United States."[89] The protagonists of these stories pursued the noble calling of taming the uncivilized.[90] The land in the West, having been successfully procured from Indigenous people by the Spanish and then by the United States, could not be left to the savages.[91] The settlers had rightful dominion.[92]

The ruggedness, individualism, and moral clarity of the cowboy heroes infatuated the U.S. audience.[93] To be "American," as these stories tell it, is to take risks, to do what is right, and to conquer the frontier.[94] The Western poster-boy himself, John Wayne, was an unsurprising choice to speak at the 1968 Republican National Convention. He delivered a speech called "Why I am Proud to be an American."[95]

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85 *Id.* at 125–26.

86 WARD CHURCHILL, FANTASIES OF THE MASTER RACE 168 (2d ed. 1998).

87 *See id.* at 178–79.

88 *Id.* at 167–68; *see also* Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 337 (2012) ("The nation's frontier past continued to dominate both popular entertainment and political imaginations in the 1960s. Hollywood turned out a steady stream of Western movies, while programs like *Bonanza*, *Gunsmoke*, and *The Virginian* filled a large part of the prime-time television schedule.").

89 Saito, *supra* note 9, at 26.

90 Rostron, *supra* note 88, at 338.

91 Saito, *supra* note 9, at 35.

92 Rostron, *supra* note 88, at 338 ("The Western hero's function was to tame the uncivilized land, by grit and gun, clearing the way for the institutions of American law, politics, and society.").

93 *See id.* at 338–39.

94 *Id.* at 337–38.

95 *Id.* at 341.

E. *Redskins, Seminoles, and Indians: Native America in the Contemporary National Psyche*

None of this is to say that conditions now are the same as they were in the nineteenth century. The United States has achieved many milestones, such as abolishing slavery, giving white women the right to vote, granting Indigenous people citizenship, granting other civil rights, et cetera.[96] However, for proof that "Native America" continues to symbolize "who we are not,"[97] this Note could look to a number of places. It could look to poverty rates and life expectancy.[98] It could look to the Dakota Access Pipeline for proof that *at this very moment* the reasoning in the Marshall Trilogy and *Rogers* is alive and well.[99] And, of course, it could look a game of Cowboys

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[96] Indigenous people were not granted citizenship until the Indian Citizenship Act of 1924, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (2012)). Throughout the South, people of color were systematically denied suffrage until the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)). The Nineteenth Amendment, ratified in 1920, therefore in practice did not apply to Indigenous women or many other women of color. *See* U.S. CONST. amend. XIV n.11. Progress notwithstanding, many argue that similar anti-democratic practices continue today. *E.g.*, Tristin Brown & Elijah Staggers, Preface, *Lessons from the 2018 Midterm Election and How to Protect Minority Voting Rights Post*-Shelby County v. Holder, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 91, 92 (2018) (introducing a special issue exploring arguments that "protections for minority voting rights are largely inadequate, and candidates can now openly wage racist attacks on their minority opponents.").

[97] *See* KING, *supra* note 12, at xi.

[98] *See* Saito, *supra* note 9, at 38–39. In 2005, half of Indigenous people living on or near reservations were unemployed. *Id.* at 38. Of those who were not, 29% earned below the poverty line. *Id.* Among what Saito considers "predictable results" of these economic realities are disproportionately high infant mortality rates, suicide rates, rates of death from disease, and generally low life expectancy. *Id.* at 39.

[99] *See* Jeff Brady, *Two Years After Standing Rock Protests, Tensions Remain But Oil Business Booms*, NPR (Nov. 29, 2018, 7:20 AM), https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming ("Two years ago in North Dakota, after months of protest by thousands of Indigenous and environmental activists, pipeline opponents celebrated when the Obama administration denied a key permit for the Dakota Access Pipeline (DAPL). A few months later, the Trump administration reversed that decision and approved construction"); Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline*, ATLANTIC (Sept. 9, 2016), https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/ ("The tribe and its legal team say that less than 24

and Indians.[100] To save some time, however, it will look to the most every-day example one could find—the world of sports.

The Washington Redskins, while the most egregious example of Indigenous dehumanization in athletics, is by no means the only example.[101] "Redskin" is a pejorative term, but the team refuses to follow the advice of Merriam-Webster: "[t]he word *redskin* is very offensive and should be avoided."[102] This slur does not refer to the color of Indigenous skin, but rather "the mutilated and bloody corpses [settlers] left in the wake of scalp-hunts."[103] Blatant racism notwithstanding, Redskins owner Dan Snyder has repeatedly shut down the idea of changing the name.[104]

Even among team names that are not hate speech,[105] employing imagery of Indigenous people as mascots is res ipsa loquitur white supremacy. Mascots are typically animals, sometimes abstract concepts, but rarely human beings.[106] In fact, the Spanish word for pet is *mascota*.[107] Of the teams that *do* chose human mascots, they are

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hours after evidence of the new sacred sites were provided to the court, the Dakota Access company began construction on those same exact sites, perhaps destroying many of them forever").

100 *See supra* Section I.D.

101 *See, e.g.*, Hayley Munguia, *The 2,128 Native American Mascots People Aren't Talking About*, FIVETHIRTYEIGHT (Sept. 5, 2014, 6:00 AM), https://fivethirtyeight.com/features/the-2128-native-american-mascots-people-arent-talking-about/.

102 *Redskin*, MERRIAM-WEBSTER LEARNER'S DICTIONARY, http://www.learnersdictionary.com/definition/redskin (last visited Dec. 28, 2019).

103 DUNBAR-ORTIZ, *supra* note 7, at 65.

104 Kevin Skiver, *Roger Goodell: Redskins Aren't Changing Name After Indians Retire Chief Wahoo*, CBS SPORTS (Jan. 30, 2018, 1:22 PM), https://www.cbssports.com/nfl/news/roger-goodell-redskins-arent-changing-name-after-indians-retire-chief-wahoo/; Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY, https://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/ (last updated May 10, 2013, 8:14 AM).

105 *See* Munguia, *supra* note 101 (listing sports teams named after tribe names, among other names).

106 *See* Allison L Thomasseau, *Top Ten Most Common High School Mascots*, USA TODAY (Oct. 21, 2014, 12:53 PM), https://www.usatoday.com/story/sports/high-school/2014/10/21/common-high-school-mascots/17662249/ (listing eagles, bulldogs, and tigers as the three most common mascots).

107 *Mascota* [*Pet*], REAL ACADEMIA ESPAÑOLA [ROYAL SPANISH ACADEMY], http://dle.rae.es/?id=OWl1ptF (last visited Dec. 28, 2019).

typically of a bygone era meant to harken back to a romanticized, warrior past.[108] Conceptualizing Indigenous people in this category is, by its very nature, dehumanizing. While some teams try to sanitize their appropriated mascots,[109] the thing speaks for itself. Indigenous people as sports mascots makes sense, if, like Chief Justice John Marshall, one considers them "fierce savages, whose occupation [is] war."[110] This Note argues that the persistence of such imagery is the most visible testament to the persistence of such reasoning in the national consciousness.

II. NO RIGHT WAY: THE SYSTEMATIC EXCLUSION OF DESCENDANTS OF INDIGENOUS PEOPLES FROM U.S. IMMIGRATION LAW

If still you think me mad, you will think so no longer when I describe the wise precautions I took for the concealment of the body.[111]

Having briefly established settler colonialism a paradigm through which to view life in the contemporary United States, Part II turns to what this means for immigration law. Immigrants, unlike settlers, do not presume sovereignty or superior civilization.[112] Migration is not, as some fear, a "foreign enemy action."[113] Whether

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[108] *See* Thomasseau, *supra* note 106 (listing the Vikings among top ten high school mascots).

[109] The Florida State University ("FSU") "Seminoles" are a particularly interesting example of a futile attempt to reconcile with the reasons Indigenous people are considered mascots. FSU insists that it "does not have a mascot," but rather a relationship with the Florida Seminole Tribe built on mutual respect. *University Communications: Relationship with the Seminole Tribe of Florida*, FLORIDA STATE UNIVERSITY, https://unicomm.fsu.edu/messages/relationship-seminole-tribe-florida/ (last visited Dec. 28, 2019). However, whether the university decides to use the word "mascot" or not, Seminole traditions are employed to galvanize a crowd at sporting events. *Id.* No amount of historical accuracy or "mutual respect" can change the fact that the university is conceptualizing Indigenous people as suitable material for a mascot. Res ipsa loquitur.

[110] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

[111] EDGAR ALLEN POE, *The Tell-Tale Heart*, *in* SELECTED POEMS, TALES, AND ESSAYS 173, 176 (Jared Gardner & Elizabeth Hewitt, eds. 2016).

[112] *See* Saito, *supra* note 9, at 27.

[113] Ingraham, *supra* note 67.

they enter with documentation or without it, immigrants accept the U.S. government as a legitimate authority. The popular hysteria around the fear that non-white newcomers—particularly those Indigenous to other parts of the Americas—will replace "real Americans"[114] is akin to the hysteria of Edgar Allen Poe's *The Tell-Tale Heart*.[115] Like the madman narrator of the poem, the contemporary United States is standing atop the grave of its own victim. The beating of the proverbial heart manifests itself in chants of "BUILD THAT WALL;"[116] despite having gotten away with the crime, the country cannot escape its madness. In practical terms, this paranoia amounts to hateful rhetoric about "invasions" of immigrants "taking our country,"[117] which has already been rightfully stolen.

A. *No Border, No Country: The White Supremacist Roots of the Power to Exclude*

"So, you believe in 'No border, no wall, no USA at all?' . . . Because if you do, why are you here? Because if you don't support America, why are you here?"[118] At the same anti-immigrant rally where protesters asked Navajo Representative Descheenie if he was an "illegal," protesters also espoused the idea that to be anti-border is to be anti-American.[119] This logic is nothing new.[120] Since settlers arrived on this continent, they have been afraid that other groups of people will try to take it from them.[121] This fear is arguably a rational response from a group of people who base their sovereignty on violent land-theft, and it remains a part of the national consciousness.[122] Interestingly, however, the power to exclude appears nowhere in the

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114 *See supra* notes 1, 3, & 67 and accompanying text.

115 POE, *supra* note 111, at 173–78.

116 Fox 10 Phoenix, *"BUILD THAT WALL!" Donald Trump Chants After Major Endorsement*, YOUTUBE (May 26, 2016), https://www.youtube.com/watch?v=ZGSAhNZnisk (crowd chanting, with Donald Trump joining in, "BUILD THAT WALL!" at 2:01–2:25).

117 *See infra* Part III.C.

118 Giles & Pineda, *supra* note 1.

119 *Id.*

120 *See* Saito, *supra* note 9, at 58–64.

121 *Id.*

122 *See supra* Part I.

Constitution.[123] With reasoning—and racism—strikingly similar to both the Arizona protesters[124] and Chief Justice Taney's justification for conquest in *Rogers*,[125] the Court inferred the power to exclude a century after the founding of the United States.[126]

The case in controversy that led the Court to infer the federal government's power to bar noncitizens from the United States was a challenge to the Chinese Exclusion Act.[127] Congress reacted to the "great danger" that California would be "overrun" by Chinese immigrants who brought unwanted competition and "differences of race" by restricting Chinese immigration.[128] U.S. citizens at the time worried that "[Chinese] immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[129] That any sovereign government must be able to exclude "foreigners of a different race" was, to the Court, self-evident in response to this threat.[130]

And yet, the Supreme Court's citation for the proposition of the power to exclude is unorthodox at best.[131] The ability of the federal

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123 *See* Chae Chan Ping v. United States, 130 U.S. 581, 595–610 (1889) (holding that the very existence of sovereignty gives the federal government the power to exclude aliens of a different race who cannot assimilate).

124 Giles & Pineda, *supra* note 1.

125 United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846).

126 *Chae Chan Ping*, 130 U.S. at 595–610. Clearly, the Chinese Exclusion Act did not deal with immigration from Mexico and Central America, as this Note focuses on. However, it is by no means true that immigrants from the other parts of the Americas are the *only* immigrants to suffer from U.S. settler-colonial history. Rather, it argues that the seemingly contradictory U.S. immigration policy is illuminated when viewed through a settler-colonial lens. The white settlers who justified conquering the West with the idea that they were a superior civilization not only needed to remove the "savages" already there, they also needed to prevent other non-white peoples from "taking" the territory. *See* Saito, *supra* note 9, at 58–64.

127 *Chae Chan Ping*, 130 U.S. at 589.

128 *Id.* at 595.

129 *Id.*

130 *Id.* at 606.

131 *Compare id.* at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."), *with* United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) ("It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many

government to keep certain people out of its territory, like the ability of the federal government to dominate Indigenous peoples, flows not from the Constitution but from *independence itself*.[132] "If [the federal government] could not exclude aliens it would be to that extent subject to the control of another power."[133] By the mere fact that the United States is a sovereign nation, it must have this power.[134] The Court goes on to list a number of other powers associated with sovereignty—declaring war, making treaties, quashing insurrections, regulating foreign commerce[135]—which are all *actually listed in the Constitution*.[136] In an impressive feat of legal acrobatics, the Court finds that because the United States has enumerated sovereign powers, it must be sovereign, and if it is sovereign, it must have the power to exclude noncitizens.[137] As such, it does not matter that this particular power is not enumerated in the Constitution, because it flows from the mere existence of sovereignty.[138] To be less verbose, "No border, no wall, no USA at all?"[139] The Court found the power to exclude obvious because it was obvious that the federal government must be able to keep out people of a different race.[140] What is taken for granted as a legitimate government function[141] is inextricably tied to unabashed racism.

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instances exercised. . . . from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race . . .").

132 *Chae Chan Ping*, 130 U.S. at 603.

133 *Id.* at 604.

134 *Id.*

135 *Id.* at 604–05.

136 U.S. CONST. arts. I, §§ 8, 10 (giving Congress the power to regulate foreign commerce, declare war, suppress insurrections, and enter treaties).

137 *Id.*

138 *See id.*

139 Giles & Pineda, *supra* note 1.

140 *Chae Chan Ping*, 130 U.S. at 606 ("If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed . . .").

141 Jane C. Timm, *Sessions Defends 'Zero Tolerance' Border Policy, New Asylum Restrictions*, NBC NEWS (Sept. 10, 2018, 11:44 AM), https://www.nbcnews.com/politics/donald-trump/sessions-defends-zero-tolerance-border-policy-new-asylum-restrictions-n908121. Then-Attorney General Jefferson B. Sessions defended the controversial zero-tolerance policy by explaining that "[n]o great and prosperous nation can have both a generous welfare sys-

B. *Just Wait in Line: Access to Immigration Laws*

One of the main criticisms of "illegal" immigration is that it is well, illegal—it flouts the rule of law.[142] The argument typically follows some version of the following: why don't they just *wait in line* and enter *legally*, like *my ancestors did!?*[143] As demonstrated below, unlike the (typically white)[144] ancestors of those prone to making this argument, almost no legal avenues exist for Mexican and Central American migrants. This is a cruel irony, to first ensure that no legal immigration is possible and then decry people for not immigrating legally.[145] Implicit in this argument is the idea that if one cannot immigrate legally, one should not immigrate at all.[146] Assuming arguendo that migrants from Mexico and Central America did just "wait in line," the current administration is continuously narrowing[147] their already limited options while faulting them for not following the law.

1. "CHAIN MIGRATION:" FAMILY-BASED IMMIGRATION

> *Congress must end chain migration so that we can have a system that is SECURITY BASED! We need to make AMERICA SAFE! #USA*[148]

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tem and great prosperity, and open borders. Such a policy is radical, it's dangerous . . . so it must be rejected out of hand, and the American people have done so." *Id.*

142 *E.g.* Jay Webber, Opinion, *The Real Meaning of American Citizenship*, FOX NEWS (Nov. 3, 2018), https://www.foxnews.com/opinion/the-real-meaning-of-american-citizenship (arguing naturalized citizens, unlike "illegal" immigrants, show "love of our country and a respect for the rule of law").

143 *See, e.g.* Jenna Amatull, *Tomi Lahren Hits Back at Genealogist Who Researched Her Family, Misses the Point*, HUFFINGTON POST (May 15, 2018, 12:57 PM), https://www.huffingtonpost.com/entry/tomi-lahren-tries-to-clap-back-at-genealogist-misses-the-point_us_5afaea6ce4b044dfffb60765 (rebutting Fox News contributor Tomi Lahren's argument that her family's history of "legal" immigration distinguishes her from today's immigrants).

144 *Id.*

145 *See infra* Part III.

146 *See infra* Part III.

147 *See infra* Part III.

148 Donald J. Trump, (@realDonaldTrump), TWITTER (Nov. 2, 2017, 11:43 AM), https://twitter.com/realdonaldtrump/status/926157911151214592?lang=en.

The most common type of "legal" immigration is through family petitioning.[149] President Trump and those who share his worldview disparage this path as "chain migration," falsely claiming that it allows one person to bring her entire extended family.[150] In reality, family-based immigration is a complicated, lengthy, and expensive process, available to only the lucky few with qualifying relatives.[151]

a. *Defining Family: Immediate Relatives and Preference Categories*

While the name is relatively self-explanatory, family-based immigration requires that an intending immigrant have a family member that is already a U.S. citizen or Lawful Permanent Resident

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[149] *Legal Immigration Report and Status Quarterly Data*, U.S. DEP'T OF HOMELAND SEC., (April 9, 2019), https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration (citing figures from Table 1B). Apart from asylum, discussed *infra* Section III.A, the other legal routes to immigrate to the United States are employment-based immigration and the diversity lottery. 8 U.S.C. § 1151(a) (2012). Although there are many immigrant and nonimmigrant employment-based visas, nearly all require high levels of education, which gives an advantage to noncitizens from developed countries. *See* 8 U.S.C. § 1153(b); *see also* Grace H. Parsons, Note, *An Overview of the US Immigration System and Comparison with Merit-Based Immigration Systems in Light of the Proposed Raise*, 35 ARIZ. J. INT'L & COMP. L. 469, 478–81 (2018). President Trump wants to make this the main form of immigration. Donald J. Trump, (@realDonaldTrump), TWITTER (Aug. 2, 2017, 11:29 AM), https://twitter.com/realdonaldtrump/status/892814520942460928?lang=en ("I campaigned on creating a merit-based immigration system that protects U.S. workers & taxpayers.") The diversity lottery provides a small number of immigrant visas for people who do not qualify in any other category. 8 U.S.C. § 1151(a)(3). President Trump wants to abolish it. Donald J. Trump, (@realDonaldTrump), TWITTER (Feb. 8, 2018, 3:26 PM), https://twitter.com/realdonaldtrump/status/961743032952459264?lang=en ("Time to end the visa lottery."); *see also* Glenn Kessler, *President Trump's Consistent Misrepresentation of How the Diversity Visa Lottery Works*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/02/26/president-trumps-consistent-misrepresentation-of-how-the-diversity-visa-lottery-works/?utm_term=.6735650031e9.

[150] President Donald J. Trump, Address Before a Joint Session of Congress on the State of the Union (Jan. 30, 2018), https://www.govinfo.gov/content/pkg/DCPD-201800064/pdf/DCPD-201800064.pdf, at 6 [hereinafter 2018 State of the Union Address].

[151] *See* Parsons, *supra* note 149, at 475–78.

("LPR").[152] Immediate relatives of U.S. citizens are at a distinct advantage, as they are not subject to annual quotas and can therefore have their petitions processed immediately.[153] However, unlike the President has claimed,[154] merely having legal status does not mean a person can bring her entire extended family.[155] "Immediately family members" are statutorily defined as children, parents, and spouses of U.S. citizens.[156] "Children" are defined as unmarried and under twenty-one years of age, with further stipulations for children who are born out of wedlock, adopted, or stepchildren.[157] "Parents" only qualify as immediate relatives if the U.S. citizen petitioner is over twenty-one.[158]

The other possible route for family-based immigration is the "preference categories" of relationships with U.S. citizens or LPRs.[159] There are four preference categories.[160] The first is for unmarried sons or daughters of U.S. citizens.[161] An intending immigrant is a "son or daughter," rather than a "child," if he or she is over twenty-one years old.[162] The second preference category is the only category in which an LPR can petition for a family member.[163] The 2A category is for spouses and children (unmarried and under twenty-one, as defined by the statute).[164] The 2B category is for unmarried sons or daughters who are at least twenty-one years old.[165] No preference category exists for married sons or daughters of LPRs.[166] The third preference category is married sons or daughters of U.S. citizens, and does not factor in their age.[167] The fourth and

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152 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).
153 § 1151(b)(2)(A)(i).
154 2018 State of the Union Address, *supra* note 150, at 6.
155 *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).
156 § 1151(b)(2)(A)(i).
157 §1101(b)(1).
158 § 1151(b)(2)(A)(i). Notably, this statute complicates the fearmongering around the "anchor baby." *See infra* Section II.B.1.b.
159 § 1153(a).
160 *Id.*
161 § 1153(a)(1).
162 *See* § 1101(b)(1).
163 § 1153(a)(2).
164 *Id.*; § 1101(b)(1).
165 § 1153 (a)(2).
166 *See* § 1153(a).
167 § 1153(a)(3).

final preference category is for brothers and sisters of U.S. citizens.[168] The sponsoring U.S. citizen must be at least twenty-one to petition for the fourth preference category.[169]

Unlike immediate family members of U.S. citizens,[170] intending immigrants in preference categories have to wait in one of the "lines" to which opponents of undocumented immigrants seem to be referring. The "line," which is actually called the visa bulletin, is based on the date United States Citizenship and Immigration Services ("USCIS") receives the petition.[171] The wait time varies by country and shows some extraordinary delays. As of June 2019, USCIS was approving F3 and F4 applications filed from the Philippines in 1997.[172] The listing does not always progress chronologically—if the applicants in a category fill their quota, the priority date could move backward.[173]

The current head of state claims that "distant family members"[174] are taking advantage of this system. However, if relatives of citizens or LPRs are neither immediate family members nor in any of the preference categories, they *have no family-based options for immigration*.[175]

b. *Much Ado About Nothing: "Anchor Babies" and the Unlawful Presence Bar*

At the same time opponents of immigration disparage those who thwart the labyrinth of the system, they also denounce those who they perceive as trying to use it in ways of which they do not approve. Opponents of immigration complain about so-called "anchor

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168 § 1153(a)(4).

169 §1151(a) (2012).

170 § 1151(b)(2)(A)(i).

171 BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR JUNE 2019, at 1 (2019), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_june2019.pdf [hereinafter VISA BULLETIN].

172 *Id.* at 2.

173 *Id.* at 1 ("If it becomes necessary during the monthly allocation process to retrogress a final action date, supplemental requests for numbers will be honored only if the priority date falls within the new final action date announced in this bulletin.").

174 2018 State of the Union Address, *supra* note 150, at 6.

175 *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).

babies."[176] In fact, President Trump has gone so far as to threaten to upend the Fourteenth Amendment to deal with this "problem."[177]

"Anchor babies," besides being an unnecessarily crass way to refer to innocent children, would have a wait time for bringing their relatives comparable to a Filipino in the fourth preference category—long.[178] As shown above, a U.S. citizen child cannot petition for her parents until she turns twenty-one years old.[179] While having a U.S. citizen child could technically provide a path to lawful residency, the process would take *over two decades*.[180]

Even if an undocumented parent of a U.S. citizen did wait the twenty-one years until his child could petition for him, he would still trigger the unlawful presence bar.[181] The unlawful presence bar is a penalty for being in the United States without valid status.[182] If a noncitizen leaves the United States after accruing six months of unlawful presence, he is prohibited from reentering for three years.[183] After one year of unlawful presence, the ban increases to ten years.[184]

The unlawful presence bar becomes important because an applicant must interview for his visa with the Department of State at a consulate or embassy in his home country.[185] Known as consular

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176 *See, e.g.* John Binder, *Watch–Tucker Carlson: If Children of Illegal Aliens Are Given U.S. Citizenship, Why Should I Pay Taxes?*, BREITBART (Aug. 15, 2018), https://www.breitbart.com/politics/2018/08/15/watch-tucker-carlson-if-children-of-illegal-aliens-are-given-u-s-citizenship-why-should-i-pay-taxes/.

177 Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html; *see also* Reena Flores, *Donald Trump: "Anchor Babies" Aren't American Citizens*, CBS NEWS (Aug. 19, 2015, 10:44 AM), https://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens/.

178 *See* VISA BULLETIN, *supra* note 171, at 1 (announcing a wait time of twenty-two years for relatives of Filipino citizens in the fourth preference category); 8 U.S.C. § 1151(b)(2)(A)(i).

179 § 1151(b)(2)(A)(i).

180 *Id.*

181 *See* § 1182(a)(9)(B).

182 *Id.*

183 § 1182(a)(9)(B)(i).

184 § 1182(a)(9)(B)(ii).

185 § 1201(a)(1).

processing,[186] this is the only way for someone who entered the United States without documentation to gain lawful status.[187] Although he could apply for a waiver of the unlawful presence bar, he would need to show extreme hardship to a qualifying U.S. citizen (not to himself).[188] The extreme hardship standard is notoriously difficult to meet.[189] An undocumented parent of an "anchor baby" would have to wait twenty-one years before his child could petition for him[190] and another ten before he could reenter the United States after processing the visa.[191] Nevertheless, President Trump has threatened the integrity of Fourteenth Amendment birthright citizenship to deal with a problem that doesn't even exist.[192]

For all the talk about rule of law, the only feasible ways to immigrate legally are to have family member with status (a Catch-22 in itself) or to be highly educated and have a job offer.[193] Most people cannot use rules that were simply not designed to allow them in,[194] and even an imagined attempt to find a loophole is met with

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[186] *Consular Processing*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/greencard/consular-processing (last updated May 3, 2018).

[187] 8 U.S.C. § 1255(i)(1) (in-country "adjustment of status" is available only to noncitizens who entered the United States with inspection).

[188] § 1182(h)(1)(B).

[189] *See In re* Cervantes-Gonzalez, 22 I. & N. Dec. 560, 565–66 (B.I.A. 1999).

> The factors deemed relevant in determining extreme hardship to a qualifying relative include, but are not limited to, the following: the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Id.

[190] 8 U.S.C. § 1151(b)(2)(A)(i).

[191] § 1151(b)(2)(A)(i).

[192] Davis, *supra* note 177.

[193] *See supra* text accompanying note 149.

[194] *See supra* text accompanying note 149.

anger and indignation.[195] Underlying this talk is a clear message: *We do not want you here. You do not belong in our country.*

2. ASYLUM LAW OVERVIEW AND HISTORICAL CONTEXT

Asylum, withholding of removal ("withholding"), and protection under The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") are the immigration laws most likely to apply to Mexican and Central American migrants.[196] These laws are based in the principle of *non-refoulement*, a pillar of both domestic[197] and international law under which it is illegal to return any person to a country in which she fears persecution or torture.[198] Following the Holocaust, the international community codified *non-refoulement* in the 1951 United Nations Convention relating to the Status of Refugees.[199] The UN later adapted the definition of "refugee" by removing limits on time and geography.[200] Domestically, Congress passed the Refugee Act in 1980 with the explicit intention of ensuring U.S. law conformed with the Protocol.[201]

Asylum, the most generous of the *non-refoulement* laws,[202] is a discretionary relief from deportation. [203] A grant of asylum provides a path to permanent residency[204] and allows asylees to bring spouses

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195 *See, e.g.*, Binder, *supra* note 176.

196 8 U.S.C. § 1158; 8 C.F.R. §§ 208.13, 208.16(b), 208.16(c) (2018).

197 8 C.F.R. §§ 208.13, 208.16(b), 208.16(c).

198 UNITED NATIONS HIGH COMM'R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 3–4 (1967), https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html.

199 *Id.* at 2.

200 *Id.* at 3.

201 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1521 (2012)); s*ee also* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . .").

202 *See* 8 U.S.C. § 1158 (2012).

203 § 1158(b)(1)(A).

204 § 1159(a)(1).

and children.[205] Regardless of how an individual entered the country, if she has a demonstrated fear of returning to her homeland, she is entitled to an opportunity to present her case.[206] An asylum applicant has the high burden[207] of showing that she meets the statutory definition of a refugee:

> The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[208]

The applicant therefore must show 1) a well-founded fear[209] 2) of treatment that rises to the level of persecution[210] 3) with a clear nexus between the persecution and the protected class[211] and 4) that

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[205] § 1158(b)(3).

[206] § 1158(a)(1).

[207] § 1158(b)(1)(B).

[208] § 1101(a)(42)(A).

[209] Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (establishing standard for "well-founded fear" can be as low as 10% chance of persecution).

[210] Hussain v. Holder, 576 F.3d 54, 57 (1st Cir. 2009) ("To qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering.") (quoting Jorgji v. Mukasey, 514 F.3d 53, 57 (1st Cir. 2008)).

[211] *In re* A-B-, 27 I. & N. Dec. 316, 338 (A.G. 2018) ("Establishing the required nexus between past persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum.").

her government is "unable or unwilling" to protect her.[212] If the applicant meets her burden,[213] she was never "firmly resettled" elsewhere,[214] no bilateral or multilateral agreement will allow the United States to send her to a "safe third country,"[215] and she is not otherwise inadmissible to the United States,[216] the Attorney General may, in his discretion, grant asylum.[217]

III. LIVES WORTH SAVING: 2018–2019 AND THE CULMINATION OF THE FAILURES OF ASYLUM LAW

Although the federal government has spent the last two decades narrowing the availability of asylum as a relief from deportation, the Trump administration is doing so rapidly and unapologetically.[218] Among the more jarring examples was the "zero tolerance policy" that dominated the headlines with images of toddlers ripped from their parents.[219] However, as shown below, the administration has also made it nearly impossible for applicants from Mexico and Central America to win an asylum case on the merits. Since 2018, the executive has, *inter alia*, narrowed the class of people who qualify as refugees, forced a group of asylum-seekers to wait in Mexico while their claims are processed, effectively barred claims from any country south of Mexico, and stripped due process protections from thousands of migrants.[220] Utilizing a settler-colonial perspective, it

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[212] *Id.* at 318 ("The prototypical refugee flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors—based upon a statutorily protected ground.").

[213] 8 U.S.C. § 1158(b)(1)(B).

[214] § 1158(b)(2)(A)(vi).

[215] § 1158(a)(2)(A).

[216] *See* § 1158(2)(A).

[217] § 1158(b)(1)(A).

[218] Kari Hong, *Weaponizing Misery: The Twenty-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 541, 546–54 (2018).

[219] *See infra* Section III.B.

[220] Advocates are challenging, with some success, executive authority to take such actions. *See, e.g.*, Make the Rd. New York v. McAleenan, No. 19-CV-2369 (KBJ), 2019 WL 4738070, at *3 (D.D.C. Sept. 27, 2019) (granting a preliminary injunction against a rule, discussed *infra* Section III.E, which broadens the class of immigrants subject to expedited removal); Grace v. Whitaker, 334 F. Supp. 3d 96, 105 (D.D.C. 2018) (abrogating *In re A-B-*, discussed *infra* Section III.A., in

becomes clear that legal treatment of migrants of Indigenous descent mirrors the legal treatment of Indigenous people north of the border.

A. In re A-B- *and the "Prototypical Refugee"*

While lacking the shock value of babies in cages,[221] *In re A-B-* also sent shockwaves through the immigration law community during the summer of 2018.[222] Then-Attorney General Jefferson B. Sessions used his authority under 8 U.S.C. § 1103(g)(2) and 8 C.F.R. § 1003.1(h)(1) to certify Ms. A.B.'s immigration case to himself.[223] Ms. A.B. is a survivor of domestic violence from El Salvador.[224] Sessions begins with a discussion of his own vast authority over immigration law, noting that "the extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique."[225] He then proceeds to reverse Ms. A.B.'s grant of asylum, wringing his hands about how he cannot apply the law (over which he had just claimed wide discretion) to her particular persecution—even while acknowledging that she had suffered "vile abuse."[226]

Sessions begins his opinion by describing the "prototypical refugee" as one who "flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actions—based upon a statutorily protected ground."[227] Ms. A.B. claimed the statutorily protected ground of "membership in a particular social group" and described the group as "El Salvadoran women who are unable to leave their domestic

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its application as a bright-line bar in credible fear interviews and expedited removals).

221 *See infra* Section III.B.

222 27 I. & N. Dec. 316 (A.G. 2018); Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html.

223 *In re* A-B-, 27 I. & N. Dec. at 323–24.

224 *Id.* at 321.

225 *Id.* at 323 (quoting Henderson v. INS, 157 F.3d 106, 126 (2d Cir. 1998)).

226 *Id.* at 346 ("I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband or the harrowing experiences of many other victims of domestic violence around the world. . . . But the 'asylum statute is not a general hardship statute.'") (quoting Velasquez v. Sessions, 866 F.3d 188, 199 (4th Cir. 2017) (Wilkinson, J., concurring)).

227 *Id.* at 318.

relationships where they have children in common with their partners."[228] Ms. A.B.'s social group was modeled after the group defined in *In re A-R-C-G-*: "married women in Guatemala who are unable to leave their relationship."[229] Sessions used *A-B-* to overturn *A-R-C-G-*, holding that the latter did not apply a rigorous enough definition to a standard that he himself referred to as "ambiguous."[230] He walked through a brief history of the evolution of the meaning of "particular social group.[231] The current understanding of the phrase, articulated in a 2014 precedential opinion from the Board of Immigration Appeals ("BIA"), is as follows: "the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[232] Sessions held that Central American society does not view victims of domestic violence as a particular group, but rather as individuals in discrete unfortunate circumstances.[233] He postulated that, under the correct application of the law, "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum."[234]

Sessions also heightened the standard for when a government is "unwilling or unable" to protect against persecution.[235] He held that an asylum applicant could only meet this burden by showing that the government was *completely helpless* in stopping non-government

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228 *Id.* at 321.

229 *Id.* at 319 (quoting *In re* A-R-C-G-, 26 I. & N. Dec. 338, 389 (B.I.A. 2014)) (internal quotation marks omitted).

230 *Id.*

231 *Id.* at 326–33.

232 *Id.* at 330 (quoting *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014)).

233 *Id.* at 336. Here, it is worth mentioning that the grounds for asylum— race, religion, nationality, political opinion, and membership in a particular social group—do not include gender. *See* 8 U.S.C. § 1101(a)(42)(A). *A-R-C-G-*, the case Sessions overturned, was part of a jurisprudence moving toward recognizing gender as grounds for asylum. For a full discussion, see Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46 (2010).

234 *A-B-*, 27 I. & N. at 320.

235 *Id.* at 337–39.

actors from persecuting on account of protected grounds.[236] The plain language of the statute articulates a different standard, and even the case that Sessions cites for the wording of "complete helplessness" actually uses the "unwilling or unable" standard.[237] By heightening the burden for victims seeking asylum based on violence by private actors, Sessions attempted to create a de facto categorical ban for Mexican and Central Americans seeking asylum on the basis of domestic or gang violence.[238]

Sessions's disdain for Central American asylum seekers is especially overt in footnote twelve.[239] After stating outright that "[n]either the immigration judge nor the Board addressed the issue of discretion regarding the respondent's asylum application" (essentially admitting his next statement is dictum), Sessions nevertheless went on to articulate the following:

> I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA. Relevant discretionary factors include, *inter alia*, the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country;

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236 *Id.* at 337.

237 *Id.* (quoting Galina v. I.N.S., 213 F.3d 955, 958 (7th Cir. 2000) (finding persecution for the purposes of asylum despite police response in applicant's home country)).

238 Benner & Dickerson, *supra* note 222 ("Attorney General Jeff Sessions . . . made it all but impossible for asylum seekers to gain entry into the United States by citing fears of domestic abuse or gang violence . . .").

239 *A-B-*, 27 I. & N. at 345 n.12.

> and her living conditions, safety, and potential for long-term residency there.[240]

As an initial matter, under the INA, the manner in which an asylum applicant arrives in the United States is *not* a factor.[241] Once present, anyone expressing fear of returning home is entitled to her due process rights regarding whether she meets the statutory definition of a refugee.[242] Therefore, turning oneself in at the border and expressing fear of return *is* an "orderly refugee [procedure]."[243] However, the talk about "whether the alien passed through any other countries" and the "potential for long-term residency there" seems to be a particularly pointed reference to Central American asylum seekers.[244] The majority arrive on foot, by bus, or by hitchhiking, and it is geographically impossible not to pass through at least one other country.[245] Although the statue does weigh "firm resettlement"[246] elsewhere or a "safe third country" option,[247] the regulations expressly exempt passing through another country on the way to the United States from the criteria.[248] By suggesting that even those lucky few who manage to meet the artificially-heightened standards still do not merit asylum as a matter of discretion, Sessions is clearly articulating that he does not want these people in his country. As discussed *infra* Part III.D, the executive has now formalized this position with a rule prohibiting asylum claims for anyone who

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240 *Id.*

241 8 U.S.C. § 1158(a)(1) (2012).

242 *Id.*

243 *See id.*

244 *See A-B-*, 27 I. & N. at 345 n.12.

245 *See Key Facts About the Migrant and Refugee Caravans Making Their Way to the USA*, AMNESTY INT'L (Nov. 16, 2018, 7:12 PM), https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/.

246 8 U.S.C. § 1158(b)(2)(A)(vi).

247 § 1158(a)(2)(A).

248 8 C.F.R. § 208.15 (2018) (exception to "firm resettlement" if passing through that country "was a necessary consequence of his or her flight from persecution.").

passes through another country without applying and with the ironically named "safe third country" treaties with Guatemala, El Salvador, and Honduras.[249]

B. *Babies in Cages: The Zero Tolerance Policy*

Apart from attempting to foreclose asylum as a legal option for Mexican and Central American migrants, then-Attorney General Sessions was also responsible for the "zero tolerance policy" that led to highly publicized family separations.[250] As a first-time offense, crossing the border without proper documentation is a misdemeanor.[251] Without warning the relevant agencies, Sessions decided to remove prosecutorial discretion and criminally charge all undocumented migrants.[252] As the adults were arraigned, their children were taken from them.[253] After a loud public outcry, Trump signed an executive order reversing the policy of separating families.[254]

However, Sessions has defended the move as "perfectly legitimate, moral and decent."[255] He claimed that, because of the United States' prosperity, "open borders" would be too radical and dangerous of a policy.[256] Even though, by his own account, the United States has never *had* open borders, he still defended the zero-tolerance policy as necessary to prevent them.[257]

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[249] *See* Nicole Narea, *Trump's Agreements in Central America are Dismantling the Asylum System as We Know It*, VOX, https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained (last updated Nov. 20, 2019, 3:08 PM).

[250] Molly O'Toole, *John F. Kelly Says his Tenure as Trump's Chief of Staff Is Best Measured by What the President Did Not Do*, L.A. TIMES (Dec. 30, 2018, 3:00 AM), https://www.latimes.com/politics/la-na-pol-john-kelly-exit-interview-20181230-story.html (quoting former White House Chief of Staff saying that "[w]hat happened was Jeff Sessions, he was the one that instituted the zero-tolerance process on the border that resulted in both people being detained and the family separation").

[251] 8 U.S.C. § 1325(a).

[252] Ron Nixon, *'Zero Tolerance' Immigration Policy Surprised Agencies, Report Finds*, N.Y. TIMES (Oct. 24, 2018), https://www.nytimes.com/2018/10/24/us/politics/immigration-family-separation-zero-tolerance.html.

[253] *Id.*

[254] *Id.*

[255] Timm, *supra* note 141.

[256] *Id.*

[257] *Id.*

C. *The "Invasion" of the Migrant Caravan*

> *Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border. Please go back, you will not be admitted into the United States unless you go through the legal process. This is an invasion of our Country and our Military is waiting for you!* [258]

The advent of the migrant "caravan," or group of Central American asylum seekers traveling together for safety in numbers,[259] has produced some of the ugliest rhetoric yet.[260] With no evidence—indeed, despite actual evidence to the contrary[261]—the Commander-in-Chief referred to the asylum seekers as an "invasion."[262] Conservative commentators have called the caravan a "foreign enemy action"[263] and a "looming crisis out of the southern border" consisting of many "[b]ad people constantly trying to gain access into our country."[264]

President Trump insists the migrants must go through the "legal process"[265] while ensuring no legal process is available to them.[266] He sent the military to stop unarmed asylum seekers from touching

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[258] Donald Trump (@realDonaldTrump), TWITTER, (Oct. 29, 2018, 7:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 [hereinafter Trump, *Very Bad People*].

[259] Bryan Mealer, *This Is What Trump's Caravan 'Invasion' Really Looks Like*, GUARDIAN (Nov. 26, 2018, 3:00 PM), https://www.theguardian.com/us-news/2018/nov/26/migrant-caravan-disabled-children.

[260] *See supra* text accompanying notes 1, 67.

[261] Mealer, *supra* note 259.

[262] Trump, *Very Bad People*, *supra* note 258.

[263] Ingraham, *supra* note 67.

[264] Sean Hannity, Opinion, *Sean Hannity: The Migrant Caravan and Three Simple Questions About What You Believe*, FOX NEWS (Nov. 27, 2018), https://www.foxnews.com/opinion/sean-hannity-the-migrant-caravan-and-three-simple-questions-about-what-you-believe.

[265] Trump, *Very Bad People*, *supra* note 258.

[266] *See supra* Part II.

U.S. soil,[267] where he would legally have to provide them due process for their claims.[268] Although he argues they are not entering legally, that is because *his administration is narrowing the definition of asylum to exclude them*.[269] Trump and his followers are far less concerned with the rule of law than they are with keeping migrants—of mainly Indigenous descent—out of their country.

D. *Come Back Never: "Migrant Protection" and "Safe Third Countries"*

In November 2018, Trump issued a proclamation claiming that aliens who do not enter through ports of entry may not apply for asylum.[270] The proclamation runs directly counter to the black-letter law: "any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival)" may apply for asylum.[271]

The administration sharpened its message with what is ironically called the Migrant Protection Protocol ("MPP").[272] Under the MPP, non-Mexican migrants must wait in Mexico while their asylum claims are processed in the United States.[273] The MPP was issued in January of 2019,[274] and the Ninth Circuit lifted a preliminary injunction in May of the same year.[275] In an official statement, the White House claimed that MPP was necessary to stem "[t]he flow of illegal aliens [that] is crashing our immigration system and overwhelming our country."[276] While the MPP theoretically builds in humanitarian protections, only 1% of the nearly 9,000 identified asylum seekers

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[267] Leo Shane III, *Trump to Boost Troop Deployments at U.S. Southern Border Again*, MILITARY TIMES (April 10, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/04/10/trump-again-looks-to-boost-troop-deployments-at-us-southern-border/.

[268] 8 U.S.C. § 1158(a)(1) (2012).

[269] *See supra* Section III.A.

[270] Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018).

[271] 8 U.S.C. § 1158(a)(1).

[272] Innovation Law Lab v. McAleenan, 924 F.3d 503, 506 (9th Cir. 2019) (per curiam).

[273] *Id.*

[274] *Id.*

[275] *Id.* at 512.

[276] Press Release, White House, Statement Regarding Migrant Protection Protocols Litigation (April 9, 2019), https://www.whitehouse.gov/briefings-statements/statement-regarding-migrant-protection-protocols-litigation/.

on the MPP docket are allowed into the United States.[277] Often, they are forced to wait in conditions rivaling the danger they fled.[278]

The President of the United States is so opposed to asylum seekers that he threatened[279]—but shortly withdrew[280]—calls for tariffs on Mexico if it could not secure *its* southern border with Guatemala and Belize. In a bizarre turn of events, what President Trump claimed as a swift victory in June 2019[281] appears to be only a public announcement of a deal reached in March.[282] Furthermore, despite the specter of tariffs, the President failed to procure his desired "safe third country" agreement per 8 U.S.C. § 1158(a)(2)(A).[283] This agreement would have forced non-Mexican asylum seekers to apply for asylum in Mexico before being considered in the United States.[284] Even so, under the deal reached several months before the would-be tariffs, Mexico agreed to deploy its National Guard to its southern border.[285]

The following month, DHS formalized then-Attorney General Sessions's dictum from *In re A-B-*.[286] The Department published an interim rule prohibiting any migrant who passed through another country and did not apply for asylum there.[287] Furthermore, the

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[277] Reade Levinson et al., *Exclusive: Asylum Seekers Returned to Mexico Rarely Win Bids to Wait in U.S.*, REUTERS (June 12, 2019, 6:09 AM), https://www.reuters.com/article/us-usa-immigration-returns-exclusive/exclusive-asylum-seekers-returned-to-mexico-rarely-win-bids-to-wait-in-us-idUSKCN1TD13Z.

[278] *Id.*

[279] Donald J. Trump, @realDonaldTrump, TWITTER (May 30, 4:30 PM), https://twitter.com/realdonaldtrump/status/1134240653926232064.

[280] Donald J. Trump, @realDonaldTrump, TWITTER (June 7, 2019, 5:31 PM), https://twitter.com/realDonaldTrump/status/1137155056044826626.

[281] *Id.*

[282] Michael D. Shear & Maggie Haberman, *Mexico Agreed to Take Border Actions Months Before Trump Announced Tariff Deal*, N.Y. Times (June 8, 2019) https://www.nytimes.com/2019/06/08/us/politics/trump-mexico-deal-tariffs.html?module=inline.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *See supra* Section III.A.

[287] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019).

threat of tariffs[288] seems to have worked on Guatemala, El Salvador, and Honduras.[289] The same day the new rule was published, the United Nations High Commissioner for Refugees ("UNHCR") warned that it is "at variance with international law" and "could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers."[290] Two days later, the United States began deporting asylum seekers to have their claims adjudicated in Guatemala.[291]

E. *Expediting Removal*

While essentially ensuring that migrants cannot cross the southern border, the executive has also attempted to strip due process protections for migrants already in the country. On July 23, 2019, DHS promulgated a rule increasing their own power to remove migrants without a hearing.[292] The process, known as expedited removal, previously applied to migrants apprehended by Border Patrol within one hundred miles of the border and fourteen days of entry.[293] The new rule increased eligibility for migrants anywhere in the country within two years of entry.[294] The Department's brazen attempt to force this new rule through without a notice-and-comment period[295]

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[288] Michael D. Shear et al., *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html.

[289] Northern Triangle Deportation Agreements, 84 Fed. Reg. 63,994 (Nov. 19, 2019). The agreement with Guatemala is already in effect. Guatemala Deportation Agreement, 84 Fed. Reg. 64,095 (Nov. 20, 2019).

[290] Press Release, UNHCR, Statement on New U.S. Asylum Policy (Nov. 19, 2019), https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html.

[291] Camilo Montoya-Galvez, *U.S. Begins Deporting Migrants to Guatemala Under Asylum Deal*, CBS NEWS, https://www.cbsnews.com/news/guatemala-asylum-deal-us-begins-deporting-asylum-seekers-to-guatemala-under-new-deal/ (last updated Nov. 22, 2019, 3:09 PM).

[292] Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019).

[293] *Id.* at 35,411.

[294] *Id.* at 35,409.

[295] *Id.* at 35,413 ("Indeed, the application of APA's notice-and-comment requirements would defeat a major purpose of the expedited removal provision: To allow the Secretary to authorize immigration officers to respond rapidly, effectively, and flexibly to border security and public safety challenges, including urgent situations such as the present high number of aliens unlawfully entering and

has been enjoined by the United States District Court for the District of Columbia.[296]

IV. THE BORDER CRISIS AND THE INDIAN PROBLEM: THE DOG WHISTLE IN CONSERVATIVE IMMIGRATION RHETORIC

Conservative immigration rhetoric has a clear underlying message to listeners who, like Chief Justices Marshall and Taney and Presidents Jackson and Trump, equate U.S. citizenship with whiteness. Concerns about people who are inherently unfit to be part of this country, who are invading it, and who threaten its sovereignty[297] are all reminiscent of past justifications for genocide and forced removal. When Tucker Carlson warned of people who "make our own country poorer, dirtier and more divided,"[298] he sounded much like Chief Justice Marshall when he warned that "[t]o leave them in possession of their country, was to leave the country a wilderness."[299] When Trump raved over an "invasion" of "very bad people,"[300] is there really any difference from when Marshall warned of "fierce savages, whose occupation was war"?[301] Sessions's justification for caging babies, flows from the same logic as *Chae Chan Ping*, in which the Court recognized the necessity of excluding "foreigners of a different race" in order to preserve the United States.[302] Just as Sessions lamented that the "asylum statute is not a general hardship statute,"[303] Marshall dithered that "[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted."[304] The thousands of migrants forced to wait in Mex-

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remaining in the United States and the lack of sufficient DHS resources to deal with these aliens.").

296 Make the Rd. N.Y. v. McAleenan, No. 19-CV-2369 (KBJ), 2019 WL 4738070, at *3 (D.D.C. Sept. 27, 2019).

297 *See supra* Part I.

298 Carlson, *supra* note 67.

299 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

300 Trump, *Very Bad People*, *supra* note 258.

301 *Johnson*, 21 U.S. at 590.

302 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

303 *In re* A-B-, 27 I. & N. Dec. 316, 346 (A.G. 2018) (quoting Velasquez v. Sessions, 866 F.3d 188, 199 (4th Cir. 2017) (Wilkinson, J., concurring)).

304 Cherokee Nation v. Georgia, 30 U.S. (5. Pet.) 1, 21 (1831).

ico—not allowed by the executive to enter U.S. territory—looks eerily like an early reservation. This reasoning is so ingrained in the collective identity that anti-immigration activists assumed a descendant of the people who have called this land home for millennia must have come from somewhere else—illegally.[305] However, this mistake is not a surprise. The United States built a society around who it is not,[306] and the nineteenth-century Indian problem has become the twenty-first century border crisis.

CONCLUSION: BREAKING THE CYCLE

The ease with which the United States can label Indigenous migrants as "illegal" people suggests that United States is not so far removed from its violent beginnings as it would perhaps like to think. By mischaracterizing itself as a nation of immigrants, this country denies its true history of conquest and genocide as justified by white supremacy. If the country only exists because it was taken from people who were not fit to have it, it logically follows that descendants of the same people would be seen as invaders.

The human cost to the Trump administration's vitriol is real and mounting. As of December 23, 2019, there have been "at least 660 publicly reported cases of murder, rape, torture, kidnapping, [and] other violent assaults" against migrants waiting in Mexico under the Migrant Protection Protocol.[307] On November 25, 2019, a Honduran man was turned away from the United States and then kidnapped and tortured in front of his three-year-old son while his wife negotiated a ransom payment from New Jersey.[308] Customs and Border

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305 Giles & Pineda, *supra* note 1.

306 King, *supra* note 12, at xi.

307 *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, HUMAN RIGHTS FIRST, https://www.humanrightsfirst.org/campaign/remain-mexico (last visited Dec. 29, 2019) (tracking violence against migrants waiting in Mexico).

308 Miriam Jordan, *'I'm Kidnapped': A Father's Nightmare on the Border,* N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html ([B]ecause many asylum seekers have relatives in the United States, criminal cartels have begun kidnapping them and demanding ransoms, sometimes subjecting them to violence as bad or worse than what they fled.").

Protection ("CBP") has used tear gas to keep out Mexican and Central American asylum seekers.[309] Among migrants surveyed by immigration practitioners, 90% feel unsafe in Tijuana.[310] Among those that have made it in, three children have died in CBP custody.[311] This is not the first time in our history that law enforcement has committed atrocities against people of Indigenous descent in the name of protecting the nation; this story is as American as Cowboys and Indians.[312] If we want it to be the last time, I suggest we start by calling it by its name. The United States is not a nation of immigrants. It is a settler colony.

The law must recognize the full humanity of migrants of Indigenous descent. An immediate change should be to stop the cruel, overt attempts to blockade Indigenous migrants from attempting to cross the border. The White House could hear asylum claims before deporting migrants to third countries and end MPP, which both force asylum seekers from one dangerous situation to another. The United States claims to be a beacon of freedom and democracy. If this is to be so, it cannot simply ignore thousands of people fleeing persecution and lawlessness, hungry for a better life. The Attorney General can end the hand-wringing interpretations of asylum law that recognize and lament the likelihood of imminent death while claiming to be powerless to prevent it.[313] To ensure our commitment to never

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[309] Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas Into Mexico. Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html.

[310] Letter from Am. Immigration Council et al., to Kirstjen M. Nielsen, Secretary, Department of Homeland Security (Feb. 6, 2019), https://americanimmigrationcouncil.org/sites/default/files/general_litigation/letter_urges_sec_nielsen_end_migrant_protection_protocols_policy.pdf.

[311] Zolan Kanno-Youngs, *Guatemalan Boy Dies at Border Station While Awaiting Move to a Shelter*, N.Y. TIMES (May 20, 2019), https://www.nytimes.com/2019/05/20/us/politics/migrant-boy-dies.html. A fourth migrant child has died in the care of the Department for Health and Human Services. *Id.*

[312] *See supra* Section I.D.

[313] By recognizing the government-like authority that transnational criminal organizations assume in the power-vacuum of a weak state, the Attorney General could easily extend existing asylum and related relief to people from Mexico and Central America. *See* Steven H. Schulman, *Judge Posner's Road Map for Convention Against Torture Claims When Central American Governments Cannot Protect Citizens Against Gang Violence*, 19 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 297, 309–14 (2017).

send anyone to a country in which she will be persecuted, the legislature can expand the statutory meaning of asylum. Rather than forcing practitioners into molding ever more creative "particular social groups," the legislature must expand protected grounds to include gender-based violence. Such shifts in law and policy would affirm the United States' commitment to freedom, democracy, and the rule of law by making it clear that we welcome those fleeing persecution who want to live in peace, even if they do not fit traditional definitions of what it means to be "American."

In order to stop the beating of the tell-tale heart from driving us mad, we must reconcile with the fact that we are standing atop a grave. The treatment of non-white immigrants—especially those with Indigenous blood—is a continuation of the white supremacy on which the United States bases its very sovereignty. Through truth and reconciliation with this history, the country can move toward what it claims to already be: a land of freedom that welcomes those fleeing persecution in search of a better life.