



Spring 2013

# Our Illegal Founders

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## Recommended Citation

Victor C. Romero, *Our Illegal Founders*, 16 *Harv. Latino L. Rev.* 147 (2013).

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# OUR\* ILLEGAL FOUNDERS

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Victor C. Romero\*\*

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## I. THE CURRENT IMMIGRATION DEBATE IN HISTORICAL CONTEXT

During the waning years of the Bush Administration, the Republican President and the Democratic Congress attempted different legislative solutions to help comprehensively repair our broken immigration system. Central to negotiations between a bipartisan Senate bill and a Republican-backed House bill was the question of how to resolve the status of the estimated eight to twelve million undocumented persons already in the United States and prevent future visa overstays or unauthorized border crossings.<sup>1</sup> Marches reminiscent of the Civil Rights Movement broke out in cities across the na-

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\* Although I acknowledge that not all readers are U.S. citizens, the use of the word “our” deliberately links the actions of the founding fathers to current residents as a way of interrogating contemporary American immigration policy.

\*\* Maureen B. Cavanaugh Distinguished Faculty Scholar and Professor of Law, Penn State; [vcr1@psu.edu](mailto:vcr1@psu.edu). I’d like to thank my wonderful wife, Corie Phillips Romero, for her terrific insights and feedback on a different version of this piece, Ben Babcock for his helpful research on Washington and Allen, and Dean Phil McConaughay for his support of all my work. I also appreciate the critical eye of the editors of the *Harvard Latino Law Review* for their careful review, which further improved this piece. Thanks, as always, to my family in the Philippines and Singapore, and my children, Ryan, Julia, and Matthew, for reminding me daily about what’s truly important in life. All errors that remain are mine alone.

<sup>1</sup> Rachel L. Swarns, *Senate, in Bipartisan Act, Passes an Immigration Bill*, N.Y. TIMES, May 26, 2006, [http://www.nytimes.com/2006/05/26/washington/26immig.html?\\_r=1](http://www.nytimes.com/2006/05/26/washington/26immig.html?_r=1).

tion, with thousands forcefully claiming their right to remain in a country they helped shape through their industry in the fields, *maquiladoras*,<sup>2</sup> construction sites, and urban *esquinitas*.<sup>3</sup>

Around the same time, a satirical YouTube video of a cartoon called “The Great Immigration Debate of 1621” went viral.<sup>4</sup> It depicted an American Indian tribal council meeting in which the members debated what to do about the mass influx of Pilgrims fleeing religious persecution in England.<sup>5</sup> At the evening gathering, all sides in the debate were aired – “Build a wall;” “Welcome [the newcomers as] good for the economy;” “Treat them with respect;” “Exclude them all as dangers to our way of life;” and so on.<sup>6</sup> The next morning, the Chief announced a new immigration policy: All uninvited migrants would be considered “illegals” and could be sent back at any time, and all illegals had to register with the new Guest Indian Program.<sup>7</sup> After “living in harmony with the land for at least six years,” illegals would be eligible for a “junior scout card” that they would then need to present at all public places.<sup>8</sup> The Pilgrims were unsurprisingly outraged by the new policy and staged a mass protest, declaring their basic human right to live and work in the New World.<sup>9</sup>

This video has been viewed over three million times<sup>10</sup> because it satirically and succinctly captures the inherent tension in any immigration decision that weighs the interests of a sovereign power in securing its borders against its desire to welcome newcomers. A cartoon gracing the November 28, 2011 cover of the *New Yorker* likewise depicted Pilgrims sneaking across what looks like the U.S.-Mexico border.<sup>11</sup> By placing our European forebears in the role of migrants rather than policymakers, the video and the

<sup>2</sup> A “maquiladora” is a “manufacturing plant that imports and assembles duty-free components for export,” creating tax advantages for plant owners by employing low-cost labor whose production is subject only to value-added duties. See Encyclopedia Britannica, “Maquiladora,” available at <http://www.britannica.com/EBchecked/topic/363663/maquiladora> (last accessed Nov. 19, 2012).

<sup>3</sup> Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, [http://www.nytimes.com/2006/04/11/us/11immig.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2006/04/11/us/11immig.html?pagewanted=1&_r=1). From the Spanish for “little corners,” “esquinitas” refer to the street corners of our nation’s cities, where day laborers patiently wait to be picked up by small business owners and individuals. Some progressive cities, like Los Angeles, have created formal day laborer programs in an effort to streamline and regularize the process, benefiting both employer and laborer. See *Day Laborer Program*, CITY OF LOS ANGELES, [http://cdd.lacity.org/emp\\_empday.html](http://cdd.lacity.org/emp_empday.html) (last accessed Nov. 19, 2012).

<sup>4</sup> Current, *Supernews!: The Great Immigration Debate: Supernews!*, YOUTUBE (May 3, 2006) <http://www.youtube.com/watch?v=YhEl6HdfqWM>.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Christoph Niemann, *The Promised Land*, THE NEW YORKER, Nov. 28, 2011, at Cover. Christoph Niemann writes of his cartoon, “I draw a parallel between current immigrants and early settlers—the hope is that it will provide context, to help keep things in perspective. Cartoonists, not politicians, should be the ones who condense political discussions into simple images.” Mina Kaneko & Françoise Mouly, *Cover Story: Promised Land*, THE NEW YORKER,

cartoon wryly point out that, but for their successful conquest, Europeans could well have been excluded by a stringent anti-illegal immigration policy that eerily parallels some state anti-immigration laws that have recently been enacted.<sup>12</sup> The video and the *New Yorker* cartoon both oversimplify the complex relationship between diverse American Indian tribes and equally diverse European migrants, but they highlight the fact that the U.S. government and its policies do not adequately represent all the interests of its diverse people.

Of course, the Indians were not a unified nation but were as diverse a group of tribes as were the European settlers; indeed, both groups sometimes spent much time bickering and fighting amongst themselves rather than against each other. Some might argue, therefore, that the video is a poor parody at best – that its oversimplification of the complex relationships between diverse Indian tribes and equally diverse European migrants provides a weak parallel to our current federal government’s struggles with border policy in the twenty-first century. Yet, it would be equally simplistic to assume that the United States government and its policies adequately represent the true interests of its diverse people. As historian Howard Zinn notes:

The pretense is that there really is such a thing as “the United States,” subject to occasional conflicts and quarrels, but fundamentally a community of people with common interests. It is as if there is a ‘national interest’ represented in the Constitution, in territorial expansion, in the laws passed by Congress, the decisions of the courts, the development of capitalism, the culture of education and the mass media.<sup>13</sup>

Perhaps our best rejoinder to Zinn is that in the immigration context, the federal government aims to create a coherent policy that puts our nation and its citizens first, though U.S. citizens might quibble with their representatives as to whether they got the answer right. Because U.S. citizens’ interests take precedence over noncitizens’ interests, and because the nation takes precedence over the individual, any immigration policy will, on balance, favor the natives over the migrants, whether the present-day Latinos or the Pilgrims of yesteryear.

Thus, the most vexing question arising out of the current immigration debate – and that of 1621 – is: How should the government regulate the flow of migrants across our borders? Related, though subsidiary, questions include: How do we determine where our borders begin and end? What consequences – civil or criminal – should attend a border breach? When, if

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Nov. 21, 2011, available at <http://www.newyorker.com/online/blogs/culture/2011/11/cover-story-christoph-niemann.html>.

<sup>12</sup> See, e.g., New American Media, *Immigrants Prepare for Increased Threats Under “Show Me Your Papers” Enforcement*, Sept. 19, 2012, available at <http://newamericamedia.org/2012/09/immigrants-prepare-for-increased-threats-under-show-me-your-papers-enforcement.php> (describing immigrants’ reactions to the recent spate of state anti-immigration laws).

<sup>13</sup> HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492-PRESENT* 9 (1995).

ever, might there be exceptions to these consequences? Our answers to these difficult questions may depend on which group we tend to identify with: the U.S. citizens the law aims to privilege or the newcomers the law simultaneously wishes to welcome. Current restrictionist legislators who favor more stringent border security coupled with equally strict interior enforcement might think twice about their positions if they took a moment to hypothesize an America in which their forebears were similarly marginalized.

This Essay briefly mines America's history from before the Founding through the mid-twentieth century to argue that the law setting forth where our national borders are and how strictly we patrol them has always been subject to the vagaries of politics, economics, and perception. Illegal (im)migration has long been part of our migration history, engaged in not just by Latin American border-crossers or Asian overstays, but also by prominent colonists, giving the lie to the claim that upholding border laws should always be sacrosanct. In many school districts today, the usual summary of American history from our childhood civics classes no longer bypasses the uncomfortable truths of conquest and westward expansion by Anglo-Protestant settlers to the detriment of American Indians and Mexicans. However, not often is this story described as a parable of illegal immigration. This Essay recounts the prominent role illegal immigration played in America's prehistory.

## II. A BRIEF HISTORY OF (IL)LEGAL IMMIGRATION

### A. *Private Borders, National Borders, and the Role of Law*

Boundaries and borders have long been a fixture of western communal existence. Prior to the advent of modern mapping, "boundary stones" marked the private borders in the American frontier, a practice English surveyors likely imported to this country.<sup>14</sup> Though they occasionally coincided with a natural, physical border like a river, these boundaries were a legal creation designed to demarcate private property ownership. As Powell on Real Property, a leading treatise, explains:

A boundary exists because the law permits it to exist, yet one cannot feel it, touch it, or see it; it is not in any way manifested by a dimension. Yet once it becomes created, it has legal authority. One neighbor cannot cross over a neighbor's boundary without being in trespass, and possibly being responsible for damages.<sup>15</sup>

Whether under the common law of property, tort, or crime, American law has long protected against trespass both to preserve the economic interests of

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<sup>14</sup> CURTIS M. BROWN, WALTER G. ROBILLARD, & DONALD A. WILSON, *BROWN'S BOUNDARY CONTROL AND LEGAL PRINCIPLES* 3 (4th ed. 1995).

<sup>15</sup> POWELL ON REAL PROPERTY, vol. 16, § 91.01[2] (Michael Allan Wolf ed. 2005).

the landowner and to keep the peace between disputants. Interestingly, the law also allowed trespassers rights over or to the land whose borders they breached if the landholder expressed apparent consent, whether explicitly or by abandonment, for instance.<sup>16</sup> First-year law students recall the ancient and rather curious doctrine of “adverse possession,” the idea that if one openly occupies another’s property for a specified time period, the squatter’s rights supersede the owner’s.

Like setting borders between private individuals, immigration law can be seen as a government’s attempt to order boundaries between nations and their citizens, on a much larger, public scale. United States immigration law has often been described as a set of rules premised on the distinction between U.S. citizens and noncitizens, thereby governing when noncitizens may enter the United States, under what conditions, and when they must leave.<sup>17</sup> The U.S. must consider what consequences befall noncitizens who run afoul of immigration laws – are they to be treated like criminals, or will their transgressions be viewed as civil infractions only? Of course, with rules come possible *exceptions*: Are there times when, even if a person has no documents to enter, she may be allowed to remain? What if she is married to a U.S. citizen? What if she has important national security information to disclose to U.S. authorities? What if she is a successful entrepreneur who desires to open a new business that will bring hundreds of jobs to native workers? What if she is fleeing persecution in her home country? And if exceptions effectively excuse a border breach, what does this mean for preserving the integrity of the border?

### B. *The Malleable Border in U.S. History*

The complexity of ordering the rules, consequences, and exceptions in formulating U.S. immigration and border policy has long been influenced by economics, politics, and perception. Laws (or exceptions excusing their breach) have long favored the powerful, and border laws have not been immune from this. While contemporary debates about border security appear to be fixed upon our southern border with Mexico, before the founding of the United States, border disputes within the pre-United States were internal: between colonists and colonies, between the Indian nations and the colonies, between the English and French colonial masters, and so on.<sup>18</sup> Instead of the current concern over the northern movement of peoples from the south, much of the early history of America involved the westward expansion of the country, coinciding with the revolution against England.<sup>19</sup>

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<sup>16</sup> JESSE DUKERMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, & MICHAEL H. SCHILL, *PROPERTY* 116 (7th ed. 2010).

<sup>17</sup> VICTOR C. ROMERO, *EVERYDAY LAW FOR IMMIGRANTS* 5 (2009).

<sup>18</sup> See generally THOMAS PERKINS ABERNETHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* (1959).

<sup>19</sup> *Id.*

## 1. Privilege and Power during the 1700s: Our “Illegal” Founding Fathers<sup>20</sup>

Perhaps unsurprisingly, England set colonial boundaries throughout its American holdings; perhaps even less surprisingly, the colonies and colonial leaders would challenge both the English and each other over where borders were set.<sup>21</sup> Following the French and Indian War of the mid-eighteenth century, several of our most prominent founders were engaged in what might be termed “illegal immigration” today – they would disregard borders set forth by governmental authorities, sometimes through subterfuge and legal machinations, and sometimes through force.<sup>22</sup> To be clear, this discussion is not intended to diminish these founders or their contributions; indeed, many others engaged in these unauthorized border crossing ventures as well. Rather, the point is to remind us that the economic factors that motivate many faceless unfortunates to travel to the United States today were the same factors that prompted their more famous ancestors to cross into forbidden or disputed territories in colonial America.

Let’s consider the case of George Washington, the first President of the United States and a first-rate military commander and leader.<sup>23</sup> Having served the Crown with distinction during Britain’s Ohio Country skirmishes against the French in the 1750s, Washington returned to Mount Vernon to take his place among Virginia’s civilian gentry.<sup>24</sup> Because of his early travels as a young surveyor and then as a military man, Washington had his eye on what many other colonial elites desired at the time: acquiring lands west of his Virginia home.<sup>25</sup> Unlike other modern speculators, Washington did not acquire land for future resale, but instead intended it to remain in the family.<sup>26</sup> Unfortunately, Washington’s overweening ambition led him to cross legal and ethical boundaries in his quest for ever more western property.

In 1763, King George III issued a proclamation that set the boundaries of British colonial rule along the Appalachians from modern-day Maine to Georgia, reserving all land west of that area to American Indian tribes.<sup>27</sup> Washington had little regard for the proclamation, viewing it as “a tempo-

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<sup>20</sup> This is a play on a *New York Times* article that alerted me to this history, William Hogeland, *Our Founding Illegals*, N.Y. TIMES, Dec. 27, 2006, available at <http://www.nytimes.com/2006/12/27/opinion/27hogeland.html> (describing George Washington’s and Ethan Allen’s illegal westward land grab).

<sup>21</sup> *Id.*; see also JOHN PELL, ETHAN ALLEN 28-30 (1929).

<sup>22</sup> Hogeland, *supra* note 20.

<sup>23</sup> For a thoroughgoing discussion of Washington’s formative period and his land acquisition exploits, see ROBERT F. JONES, GEORGE WASHINGTON 30-41 (rev. ed. 1986); JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 42-72 (2004).

<sup>24</sup> JONES, *supra* note 23, at 18-30.

<sup>25</sup> ELLIS, *supra* note 23, at 55.

<sup>26</sup> JONES, *supra* note 23, at 30. Interestingly, Washington never obtained the riches he desired through land ownership; the War of Independence and his own participation in nation building interrupted his aspirations to land baronage. *Id.* at 31.

<sup>27</sup> ELLIS, *supra* note 23, at 55.

rary expedient to quiet the Minds of the Indians [that] must fall of course in a few years especially when those Indians are consenting to our Occupying the Lands.”<sup>28</sup> Despite his use of the word “consent,” Washington thought it was only a matter of time before white settlers took over the western Indian lands by force or threat of force, a natural outgrowth of the English victory in the French and Indian War.<sup>29</sup> Washington attached no moral significance to this “manifest destiny,” viewing America’s westward expansion as inevitable. As such, Washington believed the Proclamation to be either naïve for discounting this inevitability, or underhanded if London had planned to reserve the western lands to the British, leaving the colonists only the eastern seaboard.<sup>30</sup> Washington’s letter to his agent, William Crawford, supports this reading:

Any person therefore who neglects the present opportunity of hunting out good Lands and in some measure marking and distinguishing them for their own (in order to keep others from settling them) will never regain it, if therefore you will be at the trouble of seeking out the Lands I will take upon me the part of securing them as soon as there is a possibility of doing it . . . . By this time, it may be easy for you to discover, that my Plan is to secure a good deal of Land.<sup>31</sup>

Later on in the letter, Washington cautions Crawford not to disclose Washington’s view of the King’s Proclamation, advising instead that Crawford proceed “snugly under the pretence of hunting other Game . . . and leave the rest to time and my own Assiduity to Accomplish.”<sup>32</sup>

At first blush, the letter might charitably be viewed as poor support for the view that Washington was planning to engage in an illegal border crossing. After all, expressing disagreement with a law does not violate it, nor does informally surveying the land perfect title in it. Yet, Washington insisted that Crawford mark the land to prevent others from claiming it despite the fact that the Proclamation forbade western settlement. As Joseph Ellis summarized the conflict over the Ohio Country’s legal status, “Washington believed it was open to settlement; the British government believed it was closed; and the Indians believed it was theirs.”<sup>33</sup>

Washington’s next move was to explore possible loopholes in the Proclamation. In 1754, then Virginia Governor Robert Dinwiddie had issued an order allotting 200,000 acres of bounty land to those who enlisted in the French and Indian War. The 1763 Proclamation, while specifically forbid-

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<sup>28</sup> ABERNETHY, *supra* note 18, at 69 (quoting Letter from George Washington to William Crawford (Sept. 21, 1767)).

<sup>29</sup> *Id.*

<sup>30</sup> ELLIS, *supra* note 23, at 55.

<sup>31</sup> ABERNETHY, *supra* note 18, at 69 (quoting Letter from George Washington to William Crawford (Sept. 21, 1767)).

<sup>32</sup> *Id.*

<sup>33</sup> ELLIS, *supra* note 23, at 55.



ding western settlement, simultaneously announced a grant of 5,000 acres to each veteran who served until the end of the war. Washington was clearly ineligible for the 5,000 acres, since he did not serve until the war's end, resigning his commission in 1758. Instead, he organized a committee to claim the Dinwiddie bounty, selecting a peninsula along the Ohio and Great Kanawha rivers and eventually claiming 20,147 of the 200,000 acres of choice land for himself, with the enlisted men receiving only 400 acres each.<sup>34</sup>

The legality of this action was questionable in two ways. First, the language of the Dinwiddie order strongly suggested that the shares be given to enlisted men only, and Washington was an officer – a colonel who had received 5,000 acres through this order and who had purchased many more acres of land from those uninterested in redeeming their shares. Moreover, Virginia law forbade anyone from reserving the richest, most fertile portions of the land to himself, as Washington did. Second, the 1763 Proclamation arguably voided all his western land claims within the Ohio Country; the British proclamation of 1763 would have superseded the later Virginia Dinwiddie bounty of 1754. Yet Washington did not view his acquisitions as either illegal or unethical, but rather as a fair share for his initiative in organizing the Ohio Country expedition. Indeed, Washington even questioned the enforceability of the 1763 Proclamation in light of the reality of the colonists' westward expansion. His actions were no different from those of other Virginia planters; Washington was simply more determined and diligent than his contemporaries. Washington's response to the Proclamation "was to regard the British policies as superfluous and to act on the assumption that, in the end, no one could stop him."<sup>35</sup> Washington's reaction to the Proclamation serves to elucidate the notion that boundaries are malleable and subject to changing laws and attitudes.

My point here is not to impugn George Washington's integrity nor dishonor his memory, but simply to point out the historical malleability of borders. George Washington was undoubtedly a great man, but his avaricious land grab in defiance of then-existing rules is less than noble. Washington crossed borders in pursuit of personal enrichment and in defiance of British (and indeed, Virginia) law. Still, this transgression usually warrants little discussion in light of the overwhelming evidence of Washington's enormous contributions to the nation's founding. This vignette from Washington's life reminds us that legal borders and the laws that recognize them are not permanent boundaries that follow fixed, natural, physical limits, but are instead man-made creations of governments that should be subject to reflection and reassessment.

The story of Ethan Allen, another early patriot perhaps best remembered for leading the capture of Fort Ticonderoga during the American Revolutionary War, offers similar evidence of the pliability of American

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<sup>34</sup> JONES, *supra* note 23, at 34-35.

<sup>35</sup> ELLIS, *supra* note 23, at 56-57.

borders and the contemporary debate around undocumented migration. As with George Washington, history generally regards Ethan Allen as an early patriot, although a closer examination of Allen's illicit border-crossing activity (and his violent defense thereof) offers similar lessons for our study of the pliability of American borders and the contemporary debate around undocumented migration.

The colonial borders of the British northeast provinces were murky at best. For many years, overlapping royal charters and inaccurate surveys fueled disputes among the nascent states, with Connecticut, Massachusetts, and New Hampshire all controlling lands already claimed by New York. New Hampshire's governor, Benning Wentworth, was particularly bold and greedy, extending his colony's borders in 1749 into uncharted acreage as far west of the Connecticut River as possible without running into established New York settlements. The ensuing border dispute between the two colonies ran for fifteen years, with Wentworth occupying the land pursuant to an ambiguous royal charter and then taking advantage of the British government's slow resolution of the claims, as well as delays occasioned by the French and Indian War. New York had the last laugh, however, as the king awarded it the disputed lands in the Proclamation of July 20, 1764, prompting Wentworth's resignation as governor. New York then granted these newly acquired lands aggressively, though no towns were established and settlers were few. As with other rulings, the king's proclamation was not enforced, leading to the New Hampshire settlers' resistance to the New Yorkers' claims.<sup>36</sup>

It is into this legal and political thicket that Ethan Allen entered the fray on New Hampshire's side against New York. Unlike the absentee New Yorkers, the New Hampshire grantees who purchased Governor Wentworth's (fraudulent) titles settled the lands in earnest. As one settler, Timothy Dwight, put it, "[e]very planter went upon his farm . . . with a full conviction that no change was to be expected in his civil concerns."<sup>37</sup> Ethan Allen was no different; while some engaged in speculation and resale, Allen settled his land as part of the approximately 12,000 people who populated what became known as the New Hampshire Grants between 1763 and 1775.<sup>38</sup> Once New Yorkers began to lay claim to the Grants under the 1764 Proclamation, the New Hampshire settlers procured a 1767 decree from the king prohibiting the New York governor from issuing new land grants until he could review the matter further.<sup>39</sup> Civil suits erupted, pitting the New York claimants against the New Hampshire settlers.<sup>40</sup> This left the New Hamp-

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<sup>36</sup> This episode is described in great detail in MICHAEL A. BELLESILES, *REVOLUTIONARY OUTLAWS: ETHAN ALLEN AND THE STRUGGLE FOR INDEPENDENCE ON THE EARLY AMERICAN FRONTIER* 30-32 (1993). See also PELL, *supra* note 21, at 28-30.

<sup>37</sup> BELLESILES, *supra* note 36, at 32.

<sup>38</sup> *Id.* at 33.

<sup>39</sup> PELL, *supra* note 21, at 29.

<sup>40</sup> *Id.* at 29-32.

shire settlers little legal recourse but to form a resistance militia, the Green Mountain Boys.<sup>41</sup>

Though widely regarded as a patriot for leading the capture of Fort Ticonderoga during the American Revolutionary War, Allen is less well-known for heading the Green Mountain Boys, New Hampshire grantees all, in their often violent campaign to expel legal New York titleholders from the Grants.<sup>42</sup> Historian John Pell describes Allen and his gang's lawlessness in resisting New York landlords' efforts to survey the land: "When [Allen] came upon surveyors running lines in the forest, he set up a 'Judgment Seat' under some huge, old pine tree, tried them on the spot, and often had them stripped and whipped, calling the punishment 'Chastisement with the Twigs of the Wilderness.'" <sup>43</sup> One older New Yorker, John Munro, was "taken, tried, and ordered to be whipped on his naked back. He was tied to a tree and flogged till he fainted; on recovering, he was whipped again till he fainted; he underwent a third lashing till he fainted; his wounds were then dressed and he was banished from the district of the New Hampshire Grants."<sup>44</sup> Allen and the Green Mountain Boys served as the proverbial judge, jury, and executioner of any hapless New Yorkers, including sheriffs, who dared to assert their legal rights over the Grants.<sup>45</sup> Indeed, in Allen's view, the New York landlords were officious intermeddlers, sowing where they did not reap: "Can the New York scribblers, by the art of printing alter wrong into right, or make any person of good sense believe that a great number of hard labouring peasants, going through the fatigues of settlement, and cultivation of a howling wilderness, are a community of riotous, disorderly, licentious, treasonable persons?"<sup>46</sup>

Like Washington, Allen did not let the law stand in the way of his desire to acquire land and cross borders. It mattered not that the New Hampshire Grants were illegally obtained, nor that the Crown ruled in New York's favor regarding this land; Allen and the Green Mountain Boys appeared to assert their rights by virtue of having occupied and developed the land first. So convinced were they of their claims that they were willing to defend their settlements with physical force, even against law enforcement officers.

One might attempt to defend Allen by questioning the wisdom of the Crown's decision to side with New York against the New Hampshire grantees. After all, it was Governor Wentworth, not the grantees, who sold fraudulent titles, and New Hampshire residents physically settled the land more often than absentee New York titleholders.<sup>47</sup> Still, even if one sympathized with the New Hampshire grantees, it is difficult to condone the use of extra-legal force to physically thwart the New Yorkers. Allen and his associates

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<sup>41</sup> *Id.* at 33.

<sup>42</sup> BELLESILES, *supra* note 36, at 33, 94.

<sup>43</sup> PELL, *supra* note 21, at 35.

<sup>44</sup> *Id.* at 36.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 44.

<sup>47</sup> *See id.* at 29.

could have proceeded within existing legal and political channels rather than staging elaborate pseudo-trials ending in corporal punishment for the accused.<sup>48</sup> Just as Washington overreached by claiming western territory to which he had questionable legal right, Allen defended borders illegally breached by the New Hampshire grantees and used excessive, extralegal force to do so.

Though these vignettes illustrate the malleability of borders, they do not detract from the role each man played in founding the United States. Society's collective "amnesia" when it comes to our heroes is not unique – for instance, that Washington had African slaves is common knowledge – but in thinking about what constitutes an illegal border crossing, one has to remember that society's perception of an illegal act might often be viewed in a context that goes beyond evaluating legal niceties, instead placing the act within the framework of the transgressor's larger historical role.

As such, most Americans will have little trouble relegating these vignettes to the historical dustbin – they are interesting tidbits about Washington and Allen, but they do not diminish the stature of either great man. And that would be a fair assessment – a man's life should not be measured by a single illegal act, but should be viewed in the context of his entire life. The theme of "redemption" similarly informs this Essay: Like our illegal founders, illegal border crossers today should not be irredeemably vilified because of their one desperate act, but rather their transgressions should be weighed against the full scope of their lives. Instead, so much of the current discourse about undocumented migration focuses on the *illegality of the migrant's act* – the unauthorized border crossing or overstay – rather than on the individual's subsequent contributions.

## 2. The View from Below: "Illegal" People in the New Republic<sup>49</sup>

Often, history's and society's assessment of a man's life depends on not just the individual life itself, but on whether that life was lived as part of a privileged and powerful elite. In contrast to our founding fathers' interesting but relatively irrelevant border crossing adventures, confining certain minority groups to real or figurative borders became a crucial feature of much of our early American history. American Indians and Mexicans, African slaves, Asian laborers, and European immigrants all found themselves on the outside looking in, their cultural differences perceived as barriers to building the Anglo-Protestant vision of a new "city on a hill."

While seeking to expand its borders westward, the burgeoning nation also increasingly sought to shield its shores against foreign incursion through state and federal immigration restrictions. For George Washington, Ethan Allen, and their ilk, the expulsion of the British and the acquisition of

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<sup>48</sup> BELLESILES, *supra* note 36, at 94.

<sup>49</sup> See generally JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2d ed. 2007).

new land during the mid- to late-1700s were a breath of fresh air, the beginnings of a great nation liberated from the shackles of oppressive European masters. However, from the perspective of many others, this glorious expansion wrought exploitation and exclusion during the 1800s, leading to the displacement of American Indians and Mexicans from their homelands.

This story begins in the 1800s, not too long after independence in 1776, from the perspective of those whose borders were breached: the racial and ethnic minority groups who had no choice in the legal policies and cultural restrictions placed on their free movement either within, or into, these new United States.

Not surprisingly, the English elites that comprised the political and economic upper-class in eighteenth and nineteenth century America adopted the same outlook of cultural superiority that their British forebears had, and directed this toward the non-English. Immigrants themselves, who in their Declaration of Independence from England asserted the equality of all men and their universal rights to life, liberty, and the pursuit of happiness, the Anglo-Protestant majority nonetheless ignored American Indian land claims, exploited African, Chinese, and Mexican labor, and limited immigration to those whom they believed were most like them.

American racism is by no means unique and can be traced back to its continental roots. During the Age of Discovery, European colonizers justified their expeditions abroad as a means for civilizing native “savages” and, in the case of the Spanish particularly, saving their souls through Catholic conversion.<sup>50</sup> It is no wonder then that the American aristocracy of the 1700s and 1800s inherited the same worldview.<sup>51</sup>

Thus, notwithstanding the appeals to equality espoused in the Declaration of Independence, the upshot of this perspective was that borders – whether legal or social – were erected by the Anglo-Protestant majority to the detriment of the racial and ethnic minorities whose rights were constrained and circumscribed accordingly.

*a. Westward Expansion: Displacement and Discrimination*

Despite its newfound political independence from Britain, the fledgling United States struggled to wean itself economically from its former master, find a suitable balance between federal power and state sovereignty (often defined by the debate over African slavery), and negotiate a fair-minded approach toward the American Indian nations, many of whom fought on the English side during the Revolutionary War. Echoing the border-crossing ventures of Washington and Allen, the federal government pursued westward expansion as the domestic version of its European forebears’ colonizing efforts abroad. With the 1803 Louisiana Purchase from France, Thomas

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<sup>50</sup> See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (describing Spanish, English, and Early American principles justifying the subjugation of indigenous peoples and their lands).

<sup>51</sup> See generally PEREA, *supra* note 49, at 140.

Jefferson's administration doubled the size of the United States, significantly expanding arable land available for the growing number of European immigrants seeking to move out of the largely settled Atlantic colonies, as well as offering a place to resettle American Indian nations still remaining in the east.

While the new Constitution established federal treaty power with the American Indians<sup>52</sup> and Jefferson's hope was for voluntary resettlement through assimilation and negotiation,<sup>53</sup> pressure on the federal government from an increasing number of European immigrant settlers led to forcible removal and displacement when the tribes ceased to voluntarily sell and relocate.<sup>54</sup> Ironically, even when American Indians chose to sell their land to private individuals according to native traditions, such title was not recognized in U.S. courts, per the Supreme Court's ruling in *Johnson v. McIntosh*.<sup>55</sup> As historian Francis Paul Prucha put it, "The goal of American statesmen was the orderly advance of the frontier. . . . But if the goal was an *orderly* advance, it was nevertheless *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result."<sup>56</sup>

Mexicans also suffered collateral damage from the nation's westward movement. Just as Americans had successfully won independence from Britain in 1776, Mexico revolted against Spain to claim statehood in 1821, occupying a territory twice as large as it is today, including all or part of present-day Arizona, California, Colorado, Kansas, Nevada, New Mexico, Oklahoma, Texas, Utah, and Wyoming.<sup>57</sup> Suffering internal struggles of its own following its long war for independence, Mexico could not thwart the arrival of Anglo settlers into the Texas territories as American expansion continued west.<sup>58</sup> In the ensuing Mexican-American War from 1846 to 1848, Mexico's armed forces proved no match for the technologically and numerically superior U.S. army, eventually leading to the annexation of millions of acres of Mexican land.<sup>59</sup>

Although the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War in 1848, purported to preserve Mexican landowners' rights in the annexed land, the U.S. government's burdensome and expensive owner-

<sup>52</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>53</sup> See PEREA et al., *supra* note 49, at 191 (citing 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 352 (James D. Richardson, ed., 1899)) ("In leading them thus to agriculture, to manufactures, and civilization; in bringing together their and our sentiments, and in preparing them ultimately to participate in the benefits of our Government, I trust and believe we are acting for their greatest good.")

<sup>54</sup> See generally GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (paperback ed., 1974).

<sup>55</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>56</sup> FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 3 (1962).

<sup>57</sup> STEVEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 17 (2010); JOSEPH WHEELAN, INVADING MEXICO: AMERICA'S CONTINENTAL DREAM AND THE MEXICAN WAR, 1846-1848 (2007).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

ship confirmation process rendered proof based on Mexican laws insufficient in the eyes of American adjudicators.<sup>60</sup> When Nemecio Dominguez attempted to evict Anglo squatters from his ranch, he presented a valid Mexican title, which the California Supreme Court considered binding. The U.S. Supreme Court disagreed, refusing to credit Dominguez's title for his failure to abide by Congress's claims process: "We are unable to see any injustice . . . in the means by which the United States undertook to separate lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons."<sup>61</sup> Like the American Indian titles at issue in *McIntosh*, Mexican grants were presumptively invalid unless specifically recognized and approved by the United States.

Like the American Indians, the Mexican Americans could not prevent the Anglo-Protestants from breaching their borders. Some Mexican landowners were dispossessed of their lands through fraud (by exploiting the Mexicans' unfamiliarity with the English language and contracts) or force (by squatting on ranch land owned by Mexicans, harassing and inevitably evicting them).<sup>62</sup> Such tactics were particularly prevalent during the gold rush in California, which attracted 100,000 people into the state in 1849 alone.<sup>63</sup> By the early 1900s and continuing today, "Mexican-Americans, through legal defeat, fraud, or financial exhaustion, had been all but wiped out as a landholding class in the southwestern United States . . . set[ting] the stage for a new chapter in U.S.-Mexico relations: the exploitation of low-wage, migratory Mexican and Mexican-American labor."<sup>64</sup>

Both physical and virtual borders played a role in early America's westward expansion, establishing an economic hierarchy along racial lines. Whether one views this history as the product of unbridled racism or economic opportunism (or both), it is clear that the great western march of the 1700s and 1800s was a boon to the white settlers but not to the American Indians or the Mexican Americans. By and large, the Anglo-Protestant majority invoked borders when convenient and ignored them when they were not. Shaping the internal boundaries of these new United States expanded the land available to white settlers, but ultimately diminished the land available to nonwhites. Beyond physical boundaries, laws advantageous to the majority also served as borders, perpetuating the second-class status of Mexican Americans and American Indians dispossessed of their land.

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<sup>60</sup> BENDER, *supra* note 57, at 19–20.

<sup>61</sup> *Botiller v. Dominguez*, 130 U.S. 238, 238, 250 (1889).

<sup>62</sup> BENDER, *supra* note 57, at 22.

<sup>63</sup> *Id.*

<sup>64</sup> Christopher David Ruiz Cameron, *One Hundred Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo*, 5 SW. J. OF LAW AND TRADE IN THE AMERICAS 83, 97–98 (1998).

b. *Race as a Social Construct and the “Mexican as Illegal Alien” Stereotype*

The desired “racial homogeneity”—like race itself—was a social construction. Even before the 1924 Act, America was not racially homogeneous, even among so-called “whites.”<sup>65</sup> Although Anglo-Saxon culture and politics enjoyed historical prominence, non-English whites, though initially vilified like the Germans and Irish, eventually became part of the dominant racial group. “White” came to include northwestern Europeans, and then southern and eastern Europeans. Beyond the white majority, interracial relationships, both voluntary and involuntary, were long part of the American social fabric, so much so that states passed laws outlawing miscegenation.<sup>66</sup>

Further evidence of the quirkiness of these racial classifications lay in the seemingly arbitrary geographic distinctions the laws drew, treating certain Europeans and Asians less favorably than Mexicans, and other Western Hemisphere residents.<sup>67</sup> The 1924 Act establishing the permanent national origins quota system favored the English over other Europeans, barred East and South Asians from entry and citizenship, and exempted Western Hemisphere nations, including Mexico, from these quotas.<sup>68</sup> If these immigration policies generally favored whites over nonwhites, why was there an exemption for presumably darker-skinned Mexican and Latin Americans? The reason is political: European Americans likely did not consider Mexicans their equals, but neither did they believe it feasible to impose quotas upon their southern neighbors without also restricting Canadian migration.<sup>69</sup> Moreover, the need for cheap Mexican labor in the southwest spurred Congress’s decision to exempt Latin America from the national origins restrictions of 1924.<sup>70</sup>

Mexicans were not, however, exempt from discriminatory treatment. Euro-Americans’ perceived “manifest destiny” led to the annexation of Mexican land in Texas and California—sometimes by conquest, sometimes by intermarriage between wealthy Anglos and Mexicans—resulting in the assimilation and homogenization of the Mexican elite.<sup>71</sup> From 1900 to 1920, the westward migration of Anglo farmers and the northward movement of rural laborers fleeing the Mexican Revolution fueled the class and racial

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<sup>65</sup> KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 16-20* (paperback ed. 2004) (describing the racially exclusionary immigration laws of the early 1900s).

<sup>66</sup> Indeed, it was not until 1967 that the U.S. Supreme Court struck down state anti-miscegenation laws as unconstitutional under the Fourteenth Amendment in *Loving v. Virginia*, 388 U.S. 1 (1967). For a recent collection of essays examining the contemporary significance of *Loving*, see *LOVING IN A ‘POST-RACIAL’ WORLD: RETHINKING RACE, SEX AND MARRIAGE* (Kevin Maillard & Rose Cuison Villazor, eds., 2012) (a recent collection of essays examining the contemporary significance of *Loving*).

<sup>67</sup> See MAE M. NGAI, *IMPOSSIBLE SUBJECTS* 50 (2004).

<sup>68</sup> Immigration Act of 1924, Pub. L. 68–139, 43 Stat. 153.

<sup>69</sup> NGAI, *supra* note 67, at 50–51.

<sup>70</sup> *Id.* at 50.

<sup>71</sup> See *id.* at 51.



dichotomy currently existing in the agricultural southwest today, with white property owners employing unskilled landless Mexican laborers.<sup>72</sup>

During the first two decades of the twentieth century, the United States-Mexico border was not the militarized zone we know today.<sup>73</sup> “Before the 1920s, the Immigration Service paid little attention to the nation’s land borders because the overwhelming majority of immigrants entering the United States landed at Ellis Island and other seaports.”<sup>74</sup> Rather than patrolling the southern border, immigration inspectors assumed that market demands for Mexican labor would regulate migration; the government also described the southern states as the Mexicans’ “natural habitat,” begrudgingly acknowledging their claims to their former homeland to justify its lax enforcement policies.<sup>75</sup> Indeed, Mexicans were not even required to apply for admission at ports of entry until 1919.<sup>76</sup>

But with the advent of the national origins quota system and the barred Asiatic zone in the 1920s, deportation became the preferred remedy for immigration violations, eventually leading to the criminalization of border crossings. In the 1924 Act, Congress eliminated the statute of limitations on deportation, providing for the removal of any person who arrived without inspection or without a valid visa after July 1, 1924.<sup>77</sup> In 1929, Congress added a criminal sanction to the civil deportation remedy, making it a crime for anyone to cross the border without inspection—a misdemeanor charge for first-time offenders, a felony conviction for recidivists.<sup>78</sup>

Despite Mexicans’ exemption from the quota rules, the 1920s emphasis on numerical restriction, civil deportation, and criminal enforcement eventually led to the association of illegal immigration with Mexican immigration. Due to these more stringent laws, many Europeans began hiring smugglers to help them enter the United States from across both the Canadian and Mexican borders. By the late 1920s, however, ineligible Europeans from countries like Italy and Poland found a legal alternative. They began exploiting Canadian residency as an alternate means to immigrate; by residing in Canada for five years, they were allowed to legally immigrate into the United States. In addition, along the southern border, Anglo ranch owners

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<sup>72</sup> See *id.* at 51–52. For a more detailed analysis of Mexican farmworkers in California during the period, see CAMILLE GUERIN-GONZALES, *MEXICAN WORKERS AND AMERICAN DREAMS: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900-1939* (1994).

<sup>73</sup> The following discussion regarding the genesis of the “Mexican as illegal alien” stereotype first appeared in my prior article advocating the decriminalization of border crossings; it is only slightly revised here. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 *FORDHAM URB. L.J.* 273, 292–94 (2010).

<sup>74</sup> NGAI, *supra* note 67, at 64; accord PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 32 (2000). See also ROBERT LEE MARIL, *THE FENCE: NATIONAL SECURITY, PUBLIC SAFETY, AND ILLEGAL IMMIGRATION ALONG THE U.S.-MEXICO BORDER* (2011); JOSEPH NEVINS, *OPERATION GATEKEEPER AND BEYOND: THE WAR ON “ILLEGALS” AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* 35 (2010).

<sup>75</sup> NGAI, *supra* note 67, at 64.

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

<sup>77</sup> See *id.* at 60; Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153.

<sup>78</sup> Act of March 4, 1929, 45 Stat. 1551 (1929).

often complained about the rough treatment they received from Border Patrol agents. These two developments eventually led to better, more courteous treatment of Anglos and Europeans by immigration agents, while Mexicans and other Latinos suffered the indignities of a more stringent border policy and racialized politics, fueled in part by the growing class divide between white owners and Mexican laborers in the south.<sup>79</sup>

Though Mexicans at the time were not subject to quotas like the Europeans or banned from naturalization and immigration like the Asians, they became associated with illegal migration.<sup>80</sup> As historian Mae Ngai explains,

[A]s numerical restrictions assumed primacy in immigration policy, its enforcement aspects—inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration—created many thousands of illegal Mexican immigrants. The undocumented Mexican laborer who crossed the border to work in the burgeoning industry of commercial agriculture thus emerged as the prototypical illegal alien.<sup>81</sup>

From 1930 to 1965, Congress vacillated between deportation and legalization as it attempted to craft policies that met the needs of the U.S. agriculture industry, provided sufficient protection for exploited Mexican workers, and gave coherence to the deportation system it had created.<sup>82</sup> Perhaps the symbiotic relationship between United States employers and Mexican farmworkers may best be illustrated by the recorded numbers at the end of the Bracero program, a migrant labor initiative begun in the 1950s.<sup>83</sup> Up to 1964, the number of workers almost equaled the number of deportees, at close to five million each.<sup>84</sup>

This history teaches that the boundaries of belonging are never fixed, but are subject to transgression, adjustment, and revision, depending on the vagaries of politics, economics, and perception, not unlike how the physical frontiers of the United States were simultaneously pushed westward while contained eastward through restrictive immigration policy.

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<sup>79</sup> NGAI, *supra* note 67, at 64–70.

<sup>80</sup> *Id.* at 71 (“It was ironic that Mexicans became so associated with illegal immigration because, unlike Europeans, they were not subject to numerical quotas and, unlike Asiatics, they were not excluded as racially ineligible to citizenship.”). For a compelling argument against contemporary immigrant race profiling, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

<sup>81</sup> NGAI, *supra* note 67, at 71.

<sup>82</sup> See DAN KANSTROOM, DEPORTATION NATION 214–24 (2007) (describing deportation of Mexicans from 1930–1965).

<sup>83</sup> *Id.* at 224.

<sup>84</sup> *Id.*

## III. THE OPTIMIST'S ALTERNATIVE: "AMERICA THE INCLUSIVE"

National boundaries, though sometimes physical, have always been a legal fiction, established and maintained by elites through the mechanism of state power. Yet, those same elites have also tested the limits of those borders, sometimes transgressing them through conquest, sometimes expanding them through purchase, always with the view of augmenting their wealth and power. But less powerful inhabitants, who may have first occupied the land or had migrated to it later (whether freely or by force), were displaced by the elites, either directly or through their loss of land (like the American Indians and Mexicans). Externally, although immigration from Europe and Asia was initially open, the new Republic worried about foreign influences, first enacting limits on movement into the individual states, and then passing qualitative and quantitative restrictions on immigration into the United States. Evincing the same prejudices that buttressed America's westward expansion, early federal immigration policy severely restricted southern and eastern European migration while effectively outlawing newcomers from Asia. Along with racial and ethnic stereotypes, negative views based on poverty, disability, ideology, and perceived criminality also influenced early immigration law, further widening the gulf between immigrant and citizen.

Following on the heels of the United States' resurgence as the dominant world power after the Second World War, the mid-twentieth century saw a momentous change in American racial politics, leading to a corresponding relaxation of racial restrictions within immigration policy. It's no surprise that this defining period in American history produced the iconic *Brown v. Board of Education*<sup>85</sup> decision in the Supreme Court, as well as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Immigration and Nationality Act of 1965, which repealed the national origins quota system.<sup>86</sup> Though met with great resistance as perhaps befits the societal upheaval of this period, America began a slow march toward greater racial and class equality, widening opportunities for citizens of color domestically while lifting the immigration barriers wrought by the national origins quota system on immigrants of color.<sup>87</sup> Alas, the pendulum appears to have swung back yet again: comprehensive immigration reform appears to be a blip on the legislative horizon while undocumented migration has increasingly occupied the agendas of state and local governments.

Notwithstanding our history and current politics, might there be a viable counter-narrative to the prevailing view? Because our Constitution distinguishes between the citizen and the noncitizen, alienage becomes an easy demarcation line, one to which public policymakers will default. Social psychology supports this idea, which might be termed, "discrimination by de-

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<sup>85</sup> 347 U.S. 483 (1954).

<sup>86</sup> Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

<sup>87</sup> *Id.* at 301-03.

fault.”<sup>88</sup> Human nature causes us to prefer the familiar, and to the extent noncitizens are easily identifiable as outsiders under the law, that designation then acquires more than just a legal meaning; over time, it becomes associated with other undesirable traits—such as criminality, inscrutability, unassimilability—withstanding a lack of data to support these assumptions.<sup>89</sup> Furthermore, should alienage be associated with other outsider characteristics such as minority race or religion, these characteristics become proxies for non-citizenship, lending credence to fears about racial profiling of Latinos that inevitably attend anti-immigration statutes such as Arizona’s “trespass” law.<sup>90</sup>

Moreover, part of the debate over how one perceives undocumented migrants might be explained by whether immigrants are viewed in the aggregate or as individuals.<sup>91</sup> If one sees immigrants as part of an invasion of a great number of foreigners whose values differ from Americans’, then it becomes easy to favor the rule of law as a paramount principle justifying exclusion. If, however, one sees through our immigration laws to the individuals and families making their way to America in order to provide better opportunities for themselves, one might be more willing to view the border crossing as a minor transgression, if one at all, not unlike how most Americans today have forgotten George Washington’s and Ethan Allen’s illegal border crossing activities before the U.S. was founded. Put another way, when we view immigrants as “illegal aliens,” we’re more likely to lump them with thieves; when we see them as pioneers struggling to better their lives, we’re no more worried about them than we would be about a jaywalker in Manhattan.

What, then, is the way forward? Lessons from the Founding suggest that the United States should remove the stigma that attends undocumented border crossings just as it has excused the transgressions of patriots like Washington and Allen. Indeed, the United States Constitution aspires to such egalitarianism. While it clearly preserves our sovereignty by differentiating citizens from others, the Constitution also requires that all “persons”—not just citizens—be afforded due process and equal treatment under the law.

The alternative, then, is to reaffirm inclusion, not exclusion, as a core principle of post-Civil War America. Perhaps best embodied in the path-

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<sup>88</sup> See, e.g., LU-IN WANG, DISCRIMINATION BY DEFAULT 8–9 (2006) (noting that discrimination is more the process of default actions that perpetuate the status quo racial order).

<sup>89</sup> See, e.g., LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 2-3 (2008) (“The contemporary Latino Threat Narrative has its antecedents in U.S. history: the German language threat, the Catholic threat, the Chinese and Japanese immigration threats, and the southern and eastern European threat . . . Each [discourse] was pervasive and defined ‘truths’ about the threats posed by immigrants that, in hindsight, were unjustified or never materialized in the long run of history.”).

<sup>90</sup> Support Our Law Enforcement and Safe Neighborhoods Act, Arizona S.B. 1070 (2010).

<sup>91</sup> See, e.g., Stephen H. Legomsky, *Portrait of the Undocumented Immigrant*, 44 GA. L. REV. 65, 70–72 (2009) (arguing that one’s perception of proper immigration policy depends in part on whether one views migrants as individuals needing help or as a mass of undifferentiated, undocumented persons who are inherently lawbreakers).

breaking school desegregation decision of *Brown v. Board of Education*,<sup>92</sup> this “integrationist” alternative asserts that America is a land of opportunity for everyone who shares its core values, and therefore, the border should not be an obstacle to those who are willing to work hard to succeed and contribute to our society. Such a principle suggests a policy more welcoming of foreign nationals, only excluding those who are true threats to national security.

Embracing integration makes immigration easier for the vast majority of migrants who aspire to make the U.S. their home while simultaneously focusing scarce enforcement resources on the few true undesirables—criminals and terrorists—who present threats to the nation.<sup>93</sup> As applied to undocumented migrants, *Brown*’s commitment to equality was extended to children without papers, when the Supreme Court held in *Plyler v. Doe* that Texas must afford such a vulnerable population the opportunity to attend primary and secondary public schools regardless of their status.<sup>94</sup> In sum, *Brown* and *Plyler* reflect a commitment to what I’ve termed “integrative egalitarianism,” the idea that “governmental programs . . . designed to overcome arbitrary inequalities stemming from accidents of birth are a worthwhile investment in society’s future.”<sup>95</sup>

At the federal level, examples of “integrative egalitarianism” have included comprehensive immigration reform bills that seek a pathway to citizenship for many of the productive, upstanding undocumented migrants who want to become part of and contribute to the American dream.<sup>96</sup> Other highlights include the otherwise conservative Supreme Court’s decisions to recognize a minimum quantum of rights all persons enjoy, including the right not to be indefinitely detained<sup>97</sup> and the right to effective assistance of counsel.<sup>98</sup> Some states and localities, like New Haven, Connecticut, have embraced the idea of providing sanctuary to the undocumented, issuing local ID cards to all its residents so that they become invested in their community.<sup>99</sup>

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<sup>92</sup> 347 U.S. 483 (1954).

<sup>93</sup> See KEVIN R. JOHNSON, *OPENING THE FLOODGATES 196–199* (2007) (developing the idea of embracing immigrant integration).

<sup>94</sup> 457 U.S. 202 (1982).

<sup>95</sup> Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 276–77 (coining the term “integrative egalitarianism”).

<sup>96</sup> For example, Rep. Luis Gutierrez introduced a comprehensive immigration bill in 2009 that would have found a workable pathway to citizenship for many undocumented persons. See, e.g., Randal C. Archibold, *New Immigration Bill is Introduced in House*, N.Y. TIMES, Dec. 16, 2009, at A28 (N.Y. ed.), available at <http://www.nytimes.com/2009/12/16/us/politics/16immig.html>.

<sup>97</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>98</sup> See, e.g., *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that criminal defense attorneys must advise noncitizens of the possible immigration consequences of a guilty plea).

<sup>99</sup> See *Community Services Administration: New Haven Residents*, CITY OF NEW HAVEN, <http://www.cityofnewhaven.com/csa/newhavenresidents/> (last visited Nov. 8, 2012). The Los Angeles City Council overwhelmingly approved a plan to issue ID cards to the undocumented. See Kathleen Miles, *ID Cards for Undocumented in LA Approved by Council*, HUFFINGTON POST ON-LINE, Nov. 9, 2012, available at [http://www.huffingtonpost.com/2012/11/09/id-cards-undocumented-immigrants-la\\_n\\_2102504.html](http://www.huffingtonpost.com/2012/11/09/id-cards-undocumented-immigrants-la_n_2102504.html).

Similarly, New Mexico and Washington continue to issue state driver licenses to all residents, including undocumented migrants, reckoning that ensuring safety on the roads requires a universal approach.<sup>100</sup> Additionally, several states have extended in-state tuition benefits to undocumented high school graduates, permitting them to pursue their dreams of higher education.<sup>101</sup>

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Following the Civil War, the U.S. Constitution was amended to provide due process and equal protection for all persons, not just citizens. Liberated from their segregationist shackles by the Supreme Court in the *Brown* decision, the Fourteenth Amendment's twin guarantees appeal to the better angels of our nature, reminding us of a basic human truth—the equal dignity of all persons—that must be safeguarded in an increasingly complex and interconnected world. There is no reason why immigration policy should be exempt from the ideal of integrative egalitarianism. What was good enough for our illegal founders should be good enough for our undocumented brethren today.

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<sup>100</sup> See *How to Get a New Mexico Driver License*, NEW MEXICO MOTOR VEHICLE DIVISION ONLINE, <http://www.mvd.newmexico.gov/Drivers/Licensing/Pages/How-to-get-a-New-Mexico-Driver-License.aspx> (last visited July 16, 2012); *Getting a License*, WASHINGTON STATE DEPARTMENT OF LICENSING, <http://www.dol.wa.gov/driverslicense/gettingalicense.html> (last visited July 16, 2012).

<sup>101</sup> See MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND 64–69 (2012) (discussing the development of in-state tuition laws benefiting undocumented students).

