SELF-DEPORTATION NATION

K-Sue Park*

This article offers a theory and history of self-deportation policy, or the immigration policy of making life so unbearable for a group not desired as part of a polity that its members will leave. Scholarship on this topic so far has largely focused on recent state and municipal legislation that aimed to “attack every aspect of an illegal alien’s life,” including one’s ability to earn income, find housing, speak a language other than English in a public institution, and attend school. In this article, I describe the deep historical roots of the policy in order to show the logic at its heart: attempting to force a population’s removal through conditions of deep subordination. Self-deportation always domestically subordinates the targeted group because subordination is the very mechanism of the policy, which sometimes also leads to people’s removal or their deterred entry.

This article identifies the roots of self-deportation policy in the early history of Indian Removal and examines its role in the creation of private property in America. It then explores how the technique operated to protect white property interests within the labor control regimes of post-Civil War Black Codes and Jim Crow laws – creating the conditions that gave rise to

* Critical Race Studies Fellow, UCLA School of Law. I am grateful to Aziza Ahmed, Asli Bali, Joe Bera and the students of the Immigrant Rights and Policy Clinic of UCLA, Devon Carbado and the students in his Advanced Critical Race Theory seminar during Spring 2018, Guy-Uriel Charles, Justin Driver, Ingrid Eagly, Cheryl Harris, Darryl Li, Hiroshi Motomura, Sherally Munshi, Shaun Ossei-Owusu, Shakeer Rahman, Beth Ribet, Roxana Rahmani, Alicia Solow-Niederman, Michael Tan, and Noah Zatz for extremely helpful feedback and conversations. I also thank Gerald Neuman, who supervised this project in its earliest stages and offered helpful comments along the way. Thanks to Adrian Hernandez for excellent research assistance. This article is for Rina and Alejandro Paiz, who I hope have found a safe home elsewhere. © 2018, K-Sue Park.
the Great Migration, which profoundly transformed the country’s race relations and economic development. By connecting these histories to the history of U.S. immigration law, it shows that American statesmen repeatedly contemplated this indirect removal strategy as an alternative to mass deporting an unwanted group, and further, that the modern deportation system arose as a supplement to that long-established and prevalent technique of self-deportation. The article therefore illuminates the historical and functional relation between self-deportation and deportation policies: self-deportation policy forms both the fuel and firmament of coercive removal policy, atop which more mechanical deportation policy was built and of which it remains a part.

It is urgent to comprehend the ways that self-deportation has fundamentally shaped the American demographic landscape as the policy enters into a new stage of evolution under President Trump’s administration. This article therefore explains the practical mechanics and limits of self-deportation policy. It shows how the policy mobilizes communities to carry it out and relies heavily on private and subfederal actors. It therefore illuminates the mechanics of ideas that often remain nebulous in immigration discourse, including how deportation functions as a form of social control, the stakes of a “culture of fear,” and the connection between migration, racial subordination, and labor. Finally, I point to the conditions that can limit this approach and I identify avenues for resistance to this policy by observing the extent to which the government shifts costs to private citizens is equivalent to the extent to which it relinquishes control.

CONTENTS

I. THE NEED FOR A MORE CAPACIOUS THEORY OF SELF-DEPORTATION ................................................................. 10

II. HISTORICAL PRECEDENTS OF SELF-DEPORTATION ................................................................. 23
   A. Self-Deportation Strategy: Attacking Every Aspect of a Person’s Life ................................................................. 24
   B. Self-Deportation as an Alternative to Mass Deportation ................................................................. 32
   C. The Effects of Self-Deportation Strategy: Subordination, No Entry, and Removal ................................................................. 39

III. DEPORTATION AND SELF-DEPORTATION AS COMPLEMENTARY SYSTEMS: THE RISE OF THE MODERN REMOVAL SYSTEM ................................................................. 44

CONCLUSION: A NATION SHAPED BY SELF-DEPORTATION ................................................................. 57
“An incentive called misery”

“Yet for all of its influence, the Migration was so vast that, throughout history, it has most often been consigned to the landscape, rarely the foreground.”

“Self-deportation” refers to an indirect method for removing a group not desired as part of the polity from a jurisdiction. The term began as a joke in 1994, when artists Lalo Alcaraz and Esteban Zul coined it in a fake press release in response to California’s Proposition 187, which would have prohibited state-run hospitals and schools from serving undocumented immigrants. Shortly thereafter, their fictional press contact, the “militant self-deportationist” Daniel D. Portado, aired a mock interview, and then used the term when he appeared in real news. Within months, the term made its way into public political discourse: California Governor Pete Wilson, champion of Proposition 187, explained to New York Times columnist William Safire, “If it's clear to you that you cannot be employed, and that you and your family are ineligible for services, you will self-deport.” In the 2000s, states and municipalities began to introduce a growing stream of legislation that attempted to make it impossible for unauthorized individuals to rent homes, find shelter or employment, receive public benefits, transport, resident tuition rates, or drivers’ licenses; increasing state-level criminal sanctions against unauthorized persons and facilitating local police offers’

---


5 Safire, supra n.1.
ability to enforce federal immigration laws; and attempting to make life difficult for immigrants in other respects, such as by banning the display of foreign flags and the use of languages other than English in public institutions. Legislators willingly explained self-deportation to be the purpose of the bills. Arizona’s S.B. 1070 in 2010 openly declared it intended “to discourage and deter the unlawful entry and presence of aliens” by making “attrition through enforcement”—the Republican term of art for self-deportation—the law of the land. In 2011, when Alabama passed H.B. 56, its sponsor, then Representative Micky Hammon explained the law was designed to “attac[k] every aspect of an illegal alien’s life,” and “to make it difficult for them to live here so they will deport themselves.”

Though the scholarly literature on self-deportation has focused almost entirely on this recent chapter of the policy’s history, in this article, I show that the immigration policy of attempting to make life so unbearable for members of a group is one that American governments have drawn on since the earliest period of English colonization. Drawing on historical evidence from the colonial period and the period of the early Republic, I demonstrate that contemporary self-deportation policy is continuous with a set of debates and practices that were long central to Indian removal, and appeared again concerning the undesirability of integrating free blacks in the antebellum north and across the country after the Civil War. Between 1827 and 1830, for example, the Georgia legislature passed a series of “extension laws” targeting Cherokee lands and sovereignty and, like the Arizona legislature in 2010, openly declared these laws were “calculated to induce [the Indians] to remove.” During the Civil War, anticipating abolition, a Pennsylvanian representative warned, a state that did not pass legislation to keep free blacks out would see “great swarms of fugitives—thousands and tens of thousands of them—come like black locusts, and settle down on us.” The same debates and practices acquired new life with the establishment of the modern deportation regime to expel immigrants during the era of Chinese Exclusion and beyond.

---


10 CONG. GLOBE, 37TH CONG., 2ND Sess. 1644 (1862).
Self-deportation has fundamentally shaped the American demographic landscape and national economic growth in ways that are urgent to comprehend as the policy enters into a new stage of evolution under President Donald Trump’s administration. However, prevailing analyses of the policy are insufficient to describe the operation of this policy in the current moment because they are limited by the scope of the doctrines and historical periods they consider. Because courts struck down much of the recent subfederal self-deportation legislation on preemption grounds, for example, scholarship on self-deportation has largely focused on questions of immigration federalism, or the proper respective roles of states and the federal government in regulating immigration. Litigation and advocacy for these bills produced the still dominant notion that the subfederal legislation represented state and local efforts to fill perceived gaps in federal immigration policy, resulting from the combination of federal supremacy in immigration policy and a supposed failure of federal enforcement.\footnote{See, e.g., Kris W. Kobach, \textit{Attrition Through Enforcement: A Rational Approach to Illegal Immigration}, 15 TULSA J. COMP. & INT’L L. 155 (2007); Gerald L. Neuman, \textit{Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine}, 42 UCLA L. REV. 1425, 1445 (1994) (“The problem is framed by the particular circumstance that the state has a legitimate interest in deterring ‘illegal’ aliens from residence but no power to remove them directly”); David Rubenstein, \textit{Immigration Structuralism: A Return to Form}, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 82 (2013) (“Frustrated [with Congress and the Executive], and by default, states and localities increasingly have sought to ‘cooperate’ in immigration enforcement through self-help measures”); Benjamin Galloway, \textit{Perpetual Congressional Inaction: State Regulation of Immigration in Response to Lack of Reform}, 65 MERCER L. REV. 795, 826 (2014); cf. Chan notes that “Pre-emption’s role in the S.B. 1070 litigation is unsurprising as it has been used to challenge state based immigration regulation for more than a century.” R. Linus Chan, \textit{The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws}, 34 Pace L. Rev. 814, 816-17 (2014) (citing Chy Lung v. Freeman, 92 U.S. 275 (1875)).}

Public responses to the policy echoed the notion that self-deportation was an unprecedented and marginal recent phenomenon.\footnote{Kobach commented in 2007 that self-deportation policy “has never been the immigration strategy of the United States.” Kobach, \textit{supra} n.11.} When Mitt Romney declared on 2012 presidential campaign trail in response to a question about immigration, “the answer is self-deportation,”\footnote{Van Le, \textit{Blog: Mitt Romney Talks ’Self-Deportation,’ AMERICA’S VOICE}, Jan. 25, 2012, http://americasvoiceonline.org/blog/mit Romney_talks_self-deportation_more about_what_that_really_means/} even members of his own party dismissed this platform as unheard of and cruel. Newt Gingrich, for example, called it laughable for Romney “to believe that somebody’s grandmother is going to be so cut off that she is going to self deport… He certainly shows no concern for the humanity of people who are already here.” Similarly, Donald Trump attributed Romney’s loss...
to this position, commenting, “He had a crazy policy of self deportation which was maniacal. It sounded as bad as it was….”

Although the term is of recent vintage and originates in satire, the policy of “self-deportation” long predates the contemporary era as a serious government strategy for controlling the movements of undesired populations. In Part I, I describe the limitations of existing theories for describing this broad-reaching historical phenomenon, and how they have tended to elide the logic at its heart—subordinating a group of people within a jurisdiction, in order to make them leave or keep out. Part I then offers a more capacious description of self-deportation policy, which Safire described as operating according to “an incentive called misery,” by turning to the question of its institutional design. Most basically, I argue self-deportation laws are removal laws that work indirectly by targeting individuals’ ability to live—that is, to find sustenance and move freely within their environment, or in modern terms, to obtain housing, employment, education and healthcare, and to pursue one’s daily life with relative freedom and ease. As a result, whether self-deportation laws result in migration or deter it, or not, they always create conditions that are oppressive for a group living within a jurisdiction, which do not apply to those understood to be desired members of the polity. Sometimes, self-deportation laws involve prohibitions, and sometimes, positive incentives; sometimes, they specifically address migrants, and sometimes not. They operate together with other self-deportation laws and conditions on the ground, since they comprise part of a group of laws with compounded effects, not each capable of causing migration alone. They also work heuristically, and achieve general, incomplete results that government actors do not oversee, and thus cannot measure or record. They are laws characteristic of an American state and legal system that generally governs in “disjointed and indirect modes.”

---


15 Adam B. Cox and Eric A. Posner, The Second-Order Structure of Immigration Law, 59 STAN. L. REV. 809, 812 (2007) (arguing that this “second-order” question is critically important, but often overshadowed by “first-order” questions concerning immigration law’s substantive goals).

16 See infra Part II(A).


18 Desmond King & Robert C. Lieberman, The Civil Rights State: How the American State Develops Itself, in THE MANY HANDS OF THE STATE 194 (Kimberley J. Morgan & Ann Shola Orloff eds. 2017). New work in the field of American Political Development, inspired by the tradition of legal realists, increasingly recognizes indirect law and policymaking as the principal mode through which American law and statecraft has functioned. See,
Because self-deportation laws work indirectly, they frustrate many more familiar ways of categorizing immigration laws and are inevitably more difficult to analyze than laws that announce their purpose as controlling migration or protecting the national border. The examination below therefore follows a broader project advanced by Gerald Neuman, Hiroshi Motomura, Kerry Abrams, and other immigration law scholars, who have drawn attention to how existing categories and frameworks in immigration law histories can obscure the full spectrum of laws that control migration, and the populations. In particular, Abrams generally highlights much scholarship’s failure to recognize the impact of indirect as well as direct laws governing immigration, which has led to the strange implication that some of the most significant migrations in American history, both in and out of a territory, had little more to do with legal design than a policy of “open borders.” Leti Volpp, Deborah Rosen, Kunal Parker, and Lolita Buckner-Inniss, too, have all helpfully explored how the category of “immigrant” and “alien” can or has been used to encompass Native Americans, slaves, and free blacks whether conceptually or historically by lawyers and courts.

In Part II, I draw upon these scholars’ insights to elaborate how American lawmakers have repeatedly contemplated and implemented indirect legal strategies to pursue the removal of groups it viewed apart from their polities—immigrant, native, and black. In Part II(A), I describe how Indian removal policy during the colonial period and the early Republic proceeded through the indirect strategy of increasing settlement to make it difficult for indigenous people to survive in their homelands. Then, in Part II(B), I show that historically and now, the policy has operated upon different racial groups that the government considered deporting en masse. In Part II(C), I further explore the relationship between re-

---


20 Abrams also points out that as well as that many direct and indirect immigration laws of earlier times, much like recent self-deportation legislation, controlled interstate rather than “international” migration. Abrams, supra n.19, at 1355-56.

moval, deterred migration, and subordination— the different effects of self-deportation policy— by examining the aftermath of the failure of black colonization plans and the example of the Jim Crow south.

Building on this long history of self-deportation, Part III describes how the government resorted to direct removal methods to supplement self-deportation policy, and to increase its control within an area in which its deployment of indirect techniques had left it with limited power. This Part therefore shows how acknowledging the history of self-deportation transforms our understanding of the American immigration system more broadly, both how it has worked historically and how it continues to operate today. It shows that self-deportation regimes did not come into being because of the supposed failings of the existing federal immigration system. Rather, the examples of Indian Removal and the establishment of the modern deportation system both show that the federal government adopted direct removal methods to fill in gaps left by self-deportation policy. Further, the introduction of the modern deportation system revitalized the government’s use of self-deportation policy by increasing the range of its effects and tools. This Part therefore describes the rise of a modern removal system that combines techniques of self-deportation and deportation, and shows that self-deportation policy is what makes this system both effective and possible.

The historical uses of self-deportation policy attest to the way that American colonial, state and federal governments have repeatedly adopted an indirect legal strategy to craft removal policy, on the deeply sociolegal premise that they could cause and control certain behaviors through the creation of specific social conditions. The effects of these policies historically indicates that self-deportation laws’ multiple, layered effects include removal, the prevention of that group’s entry into a jurisdiction, and subordination, the last of which derives from its very mode of operation. Self-deportation policy works by imposing challenges upon life conditions that make life so unbearable within a jurisdiction that people will leave or avoid it. In other words, its primary work is to cause people’s suffering. Historically and in the present, self-deportation laws have sought to create these challenges through an extremely broad range of tactics, from prohibitions on displaying flags or gathering berries to destroying a group’s food sources or ability to secure employment and income. The compounded effects of the laws thereby create conditions for individuals that make them highly vulnerable to exploitation and violence. Collectively, the imposition of this intolerable suffering— of any kind, by any means, whether imposing hunger, homelessness, or fear— subordinate that group to other groups within the polity. Subordination is therefore both the mechanism of the law and its consistent result. The suffering the laws cause
necessarily outsizes any migration\(^\text{22}\) that the laws can succeed in provoking. All those who leave will suffer, while not all those who suffer will leave.

Thus, in addition to controlling migration, self-deportation changes the very social fabric of a territory. Self-deportation derives a great deal of power from expressions of hostility that activate and consolidate some communities—anti-immigrant, anti-native, and anti-black—at the same time that they fragment and strain others, by causing their members to leave, subjecting them to hardship and violence, and spreading fear to prevent others from providing the people who are targeted with support. History suggests that self-deportation is one particular entailment of American racial regime, which does not only cause or deter migration, but aims to control the demographic constitution of its population and power dynamics between different groups within it. Further, the history of self-deportation exposes a deep and intimate relationship between migration and property in America. The early dependence of land policy upon migration policy provides a framework and background for understanding how immigration policy functions to maintain and protect property interests today. This connection to property illuminates the interests that motivate the social work of self-deportation policy, for it is in relation to property interests that the policy mobilizes some communities, while it aims to shatter other forms of human relation.

In this country, self-deportation has had an influence upon migration in America that is both diffuse and, as Isabel Wilkerson wrote of the Great Migration, “so vast that, throughout history, it has most often been consigned to the landscape, rarely the foreground.”\(^\text{23}\) Despite the challenges that attend the project of recognizing and understanding self-deportation, the sheer scale of migration that the United States has effect through such policies, and their primacy within President Trump’s immigration policy give this project new significance and urgency. Far from a passing phenomenon, self-deportation now constitutes the de facto national immigration policy under President Trump’s regime. This article concludes with reflections on how understanding the logic of the policy helps us to recognize the President’s many threats and promises to deport people, ban specific groups of people, and build a wall as more than mere rhetoric or bluster. They constitute part of a highly effective, historically tested, if blunt removal strategy that represents the cheapest option for the government, as it redistributes reinforcement responsibilities and costs to state and local governments and private individuals. Finally, I seek to show that the possibilities of resistance depend

\(^{22}\) In this article, I refer to “migration” rather than “immigration” or “emigration” since self-deportation policies cause interstate migration. Furthermore, I address historical periods during which the usage of these terms differed from contemporary usage. Gerald Neuman, for example, writes that “Late nineteenth century usage “more frequently referred to “emigration” or “emigrants.” Neuman, supra n.19 at n.19.

\(^{23}\) Wilkerson, supra n.2 at 13.
on our sense of the stakes, or understanding how the policy delegates power to members of the community, the effects of this policy on the community, and the limitations on the government’s ability to take that power back.

I. THE NEED FOR A MORE CAPACIOUS THEORY OF SELF-DEPORTATION

The subfederal self-deportation legislation of the 1990s and 2000s swept extremely widely with respect to the variety, intensity and the sources of this suffering that they aimed to cause, from the obstruction of the basic possibility of subsistence, to one’s ability to pursue an education, or to move through public space without fear of violence, apprehension, or deportation. This legislation included provisions prohibiting private businesses from hiring unauthorized workers, and state agencies from contracting with businesses employing unauthorized workers, and mandating the use of E-verify programs to verify the employment eligibility of employees\(^\text{24}\); prohibiting landlords from renting or providing services to unauthorized persons\(^\text{25}\); nullifying contracts with unauthorized persons where a citizen had direct knowledge of that person’s immigration status\(^\text{26}\); requiring high schools, middle schools and elementary schools to ascertain students’ immigration status, and prohibiting unauthorized persons from attending publicly owned colleges and universities\(^\text{27}\). Much of this legislation also contained provisions requiring state or local law enforcement to determine an individual’s immigration status during stops, detentions, or arrests, “show me your papers” provisions, barred state and local officials or agencies from restricting enforcement of federal immigration laws, and imposed penalties on individuals for sheltering, hiring and transporting unauthorized persons\(^\text{28}\). Some bills targeted still more peripheral facets of people’s lives, such as the languages they

\(^{24}\) Arizona HB 2799 (2007); Arizona SB 1070 (2010); Arkansas HB 1024 (2007); Colorado HB 1073 (2007); Hazelton (2007); West Virginia SB 70, Ch. 144


\(^{26}\) Alabama Act 2011-535 (HB 56).

\(^{27}\) \textit{Id.}

\(^{28}\) Arizona SB 1070.
could speak or the kinds of flags they could display. Again, as Hammon described Alabama’s HB 56, this type of legislation aimed to “attac[k] every aspect of an illegal alien’s life.”

The scholarship that has theorized self-deportation, however, has not been able to account for the variety of self-deportation legislation as a unified phenomenon, nor for the major role self-deportation legislation has played in shaping migrations in U.S. history. In this Part, I discuss the shortcomings of existing theories and categories for understanding such laws in order to point to the importance of recognizing the historical tradition of self-deportation and the need for a theory capacious enough to describe it. I first point to the limitations of the category of “alienage” and the theory of “attrition through enforcement,” to show how these ways of describing self-deportation laws were shaped by historically specific advocacy concerns. In particular, I examine the way that self-deportation policy encompasses measures that fall under both the categories of alienage” and “immigration,” to show how prioritizing one over the other in describing self-deportation legislation obscures the fundamental logic of the policy: to affect the experience of alienage to achieve an immigration law aim. I then outline the logic that is common to the wide variety of self-deportation laws, which makes it possible to identify self-deportation as an independent and centuries-old tradition of American policymaking to control migration, as I demonstrate in Part II.

Self-deportation laws include a broad range of laws affecting immigrants’ ability to procure housing, education and benefits, which traditionally fall under the categorical designation of “alienage” laws, which are often categorically separated from those involving “immigration laws.” According to this distinction, alienage laws “determine the consequence of being a certain type of alien or noncitizen,” or target aspects of immigrants’ lives, while immigration laws affect a person’s entry into, exit from or authorization within the country per se. Alienage provides an important example of how self-deportation laws, conceived of as a total phenomena, implicate a number of immigration law categories whose boundaries scholars have already broken down. As many scholars have noted, alienage and immigration laws frequently overlap as a practical matter.\footnote{Hiroshi Motomura, Immigration and Alienage, Federalism and Proposition 187, 35 VA. J. INTL. L. 201, 203 (1994); Michael Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism, 76 N.Y.U. L. REV. 493, 526}

\footnote{See, e.g., Colorado Revised Statute 18-11-205; Frederick County English Ordinance; Farmer’s Branch English Ordinance; Nashville English Ordinance; Idaho English Ordinance; Alaska English Law; Arizona English-only declaration was introduced with bill making it harder for people to take English classes.}

\footnote{Human Rights Watch report, supra n.8.}

\footnote{Mмотomura, supra n.19 (2014) at 58.}
genre of self-deportation laws designated as alienage laws present a clear case of the overlap between “alienage” and “immigration” genres: they target aspects of immigrants’ lives, but with “immigration law” aims—expulsion and the prevention of entry—that bring them squarely under the statutory definition of “immigration law.”

Yet at the same time, we have seen that other self-deportation laws formally mimic “immigration,” or deportation laws, and “mirror” federal immigration crimes, require state and local police to verify the status of those entering into their custody, or authorize local and state officials to arrest and detain individuals for immigration violations and investigate immigration cases under section 287(g) of the Immigration and Nationality Act (INA). These self-deportation laws, by contrast, show how immigration laws also have effects on the experience of alienage. However, scholars and judges have tended to obscure, rather than illuminate this categorical merging, by choosing one side of the lines drawn above for advocacy purposes.

For example, former Kansas Secretary of State Kris Kobach, who drafted much of the recent subfederal self-deportation legislation, served as the architect of Mitt Romney’s self-deportation immigration platform, and now closely advises President Trump, focused his conception of “attrition through enforcement” on self-deportation laws that mimicked law enforcement measures, to propose that self-deportation laws more broadly would act as a “quintessential force multiplier.” By doing so, he was able to reinforce the notion that states and municipal governments were reacting to a failure of enforcement by the federal government with subfederal legislation. By equating subfederal action with federal action, and self-deportation with deportation, Kobach unsuccessfully sought to convince courts that subfederal self-deportation legislation would be “consistent

---

(2001) (the distinction is not dispositive in case law); Linda Bosniak, Varieties of Citizenship, 75 FORDHAM L. REV. 2449, 2451-52 (2007) (distinction between alienage and immigration law is highly problematic); David Rubenstein, Immigration Structuralism: A Return to Form, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 120 (2013) (“characterizing subfederal regulations as either ‘immigration’ or ‘alienage’ is frustrated by the very nature of the inquiry and by the inescapable truth that subfederal regulations are usually a bit of both”); cf. Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 VAND. L. REV. 787, 798-99 (2008) (acknowledging this overlap but emphasizing the importance of the distinction for understanding immigration federalism).


with congressional objectives.” However, Kobach’s argument was misleading in two respects. First, evidence shows that local immigration law enforcement does not merely “multiply” federal immigration law enforcement, but is both qualitatively and normatively different, as the Supreme Court suggested when striking down much of Arizona’s SB 1070. Indeed, Ingrid Eagly has shown that even before the subfederal self-deportation legislation phenomenon, increasing local regulation of immigration was already in the process of redefining and re-structuring the federal system for punishing immigration crime, rather than merely mirroring it. Second, perhaps more deceptively, Kobach’s argument elides acknowledging the effects of other subfederal self-deportation laws that were wholly new and outside the scope of federal immigration law— affecting the rental housing market, and imposing official languages, for example— where he had encouraged states and municipalities to maximize the effects they could have on people’s lives lawfully within a field covered by Congress. However, Kobach focused on issues of preemption and mirroring in order to help states and local governments find a legally viable pathway for implementing self-deportation policy.


38 few fields—the closely related foreign affairs and American Indian policy. Sarah Cleveland.

39 Kobach, supra n.34 at 463 (states’ and municipalities’ “will to act did not always coincide with the boundaries defined by Congress and the attendant principles of federal preemption”). As lawmakers attempted to rid their jurisdiction of unauthorized immigrants by attacking their lives, they had often exceeded the bounds of permissible law; thus in 2008, Kobach counseled that “statutes must be carefully drafted to avoid federal preemption.” Id. at 464. Kobach therefore drew these subfederal governments a complete limiting rubric to which state and local governments should adhere in designing such legislation, which, he enumerated, were limited to denying unauthorized immigrants public benefits, resident tuition rates, and drivers’ licenses; prohibiting their employment; enacting state-level crimes against identity theft and mirroring federal immigration crimes; facilitating state and local law enforcement assistance to ICE; and presuming unauthorized persons to be flight risks for purposes of granting bail during criminal prosecution. Id. at 465.
Kobach’s theory of “attrition through enforcement,” unfortunately, remains one of the most developed theories about self-deportation policy as such. Scholars have crafted legal arguments about the policy and studied its various effects, but have not proposed a theory that can account for the logic that unifies the genre, and explain how it operates beyond the bounds of federalism, a single doctrine, whether preemption or Equal Protection, and the most recent chapter of the policy’s history. Cristina Rodriguez came close by offering a “restrictionist typology” for subfederal laws, which drew a line between “direct enforcement measures” and “indirect enforcement measures” based on the difference between “immigration” and “alienage” type laws. This typology, however, excludes the historical precedents and the history of federal self-deportation strategies described below. Further, while Rodriguez’s distinction is clearly valid in one sense, I will argue that it is important to recognize that there is simultaneously, in another, no functional distinction between “direct” self-deportation measures and the ordinances she describes as “designed to make it untenable for unauthorized immigrants to remain in the communities that adopt them, thereby ensuring their migration elsewhere.”

The dual function of deportation or “direct enforcement measures” points to the fact that, as Adam Cox has argued, “legal rules cannot be classified as concerning either selection”—laws concerning entry, authorization, and exit—“or regulation”—so-called “alienage” laws—“because every rule concerns both.” As he explains, any rule imposing duties on non-citizens can influence non-citizens’ decisions about whether to enter or depart the United States, while rules about entry and deportation can influence how resident non-citizens live, or, as self-deportation laws exemplify, become unable to live in a place. The hybrid nature of self-deportation laws—selection rules that work

---

40 Chan, supra n.11; Neuman, supra n.11.
42 Cristina M. Rodriguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 591-93 (2008). Rodriguez actually also proposes a third category of “public benefits statutes,” which “would deny immigrants access to a range of services and institutions, including health care benefits and in-state college tuition,” but acknowledges that “[e]ven these measures operate as forms of indirect enforcement, because they discourage immigrant settlement and prompt what restrictionists call ‘self-deportation,’ or movement to other communities or the home country.” Id.
43 Id.
through regulation, not any mechanism or criteria of selection—demonstrates Cox’s point that “[s]election and regulation are simply alternative strategies for achieving whatever a state’s normative goals… happen to be.”

In the absence of such a theory, it is easy to miss the common logic behind the full range of the effects of self-deportation laws, and what is arguably the principal question that they present: whether it is permissible to use alienage laws to control immigration at all? Judges and scholars have instead resorted to analyzing them as immigration laws through “procedural surrogates” such as preemption, as in nearly all the litigation generated by the self-deportation bills of the 2000s. Others have considered these laws within the alienage category. Writing about Proposition 187, for example, Neuman conceded that the state is not constitutionally obliged to provide unauthorized persons with all the benefits it provides citizens, but argued that although “some goods can be reserved for citizens, it hardly follows that all goods can.” In making this argument, Neuman did not presume a situation in which the condition in question—alienage—eliminates itself by triggering self-deportation; rather, he contemplates the consequences of the condition for the alien as long as that person is present in the United States.

According to a similar logic, during the oral arguments for Plyler, which again, concerned the question of whether states could prohibit unauthorized children from attending public schools, Justice Thurgood Marshall asked the attorney for Texas if the state could deny fire protection to unauthorized persons. When the attorney balked, and then said he did not think that it could, Marshall asked rhetorically, “Why not?... Somebody’s house is more important than his child?”

Given the reality that unauthorized persons reside in this country and are likely to continue to do so, Neuman and Justice Marshall’s arguments insist on an obligation to provide basic protections to aliens. In raising questions about what the limits should be on state’s restrictions of benefits based on alienage, however, they do not further query whether such restrictions or other efforts to create detrimental effects for aliens is an acceptable removal strategy. I have attempted to outline a theory here that permits us to question the logic that motivates self-deportation laws—to confront questions about the full range of the policy’s devastating effects, its limiting conditions, and perhaps above all, of whether inflicting misery can, under any circumstances, be an appropriate way of making people remove. Yet it is only by reaching these questions that it is possible to

45 Id.
47 Neuman, supra n.11 at 1427.
48 Motomura, supra n.19 (2014) at 19 (n.1).
recognize that the mechanism of the policy is the imposition of suffering, and thereby to fully understand its wide-reaching subordinating effects.

In order to recognize how self-deportation policy has and continues to shape migration in America, it is important to recognize the distinct unifying logic that brings laws from a number of disparate categories together. Indeed, the policy appears to have escaped comprehensive analysis for so long precisely because its laws have frequently come under the cover of many other categories, including restrictive alienage laws, crimmigration laws, and public benefits restrictions, as well as settlement laws, land laws, extension laws, Black Codes, Jim Crow laws, as I will describe below in Part II. I do not claim that laws within these genres serve no other purposes than self-deportation, nor that the overlap between these genres and self-deportation law is total. Further, I presume that people retain agency under all manner of life-challenging circumstances, and that all laws elicit a broad range of responses. Nevertheless, the point of self-deportation laws is to create certain conditions including causing expulsion and deterring entry that but for the law, would not exist. Key aspects of self-deportation that I examine here include its indirect logic, and how it has affected the people whom it targets; its distinction from and relation to deportation laws; the multiple, layered results that the policy produces; the way the policy mobilizes private actors as well as institutional actors at all levels of government to carry it out, or how the policy shifts the costs of removal to different actors, institutions, and communities.

Importantly, self-deportation laws are based on a sociological conception of how law operates. The lawmaker who designs a self-deportation law presumes that controlling social situations through the law can engineer a person’s behavior: if life becomes difficult enough for a person within a jurisdiction, that person will leave it. On the other hand, this philosophical approach contradicts Anglo-American law’s more general embrace of ideologies that conceive of subjects as sovereign actors making rational choices. The government relies on the power of this ideology to disclaim responsibility for having forced people out, even when it applies coercion through the laws that is calculated to make people remove. Part of the appeal of self-deportation policy stems from the illusion of distance it creates between the government’s use of force and the act of removal and the moral ground it thereby preserves for the state.

Another way to describe the socio-legal logic of self-deportation laws is to say, following Hiroshi Motomura’s observation about restrictionist subfederal legislation, that they work indirectly to influence migration. An indirect law is

49 Motomura, supra n.19 (2014) at 58-59, 69-76; see also Hiroshi Motomura, What is Comprehensive Immigration Reform? Taking the Long View, 63 ARK. L. REV. 225 (2010) (“Immigration law’ is not just a set of laws on the books that regulate admission and deportation. It includes a broader array of ways in which we encourage or discourage population flows.”).
one calculated to achieve one effect, which in turn will have a second effect that entails the purpose of the law. Under the purpose avowed for such laws as Arizona’s SB 1070 and Alabama’s HB 56, self-deportation laws aim to make life so intolerable in a place for a group that they cause removal. This two-step strategy of frustrating a group’s basic subsistence was indeed the basis of Kobach’s repeated admonishment that “when the jobs dry up, unauthorized aliens self-deport.” Further, the variable effects of such indirect laws indicates that self-deportation laws work in tandem with one another, with federal law, with already existing oppressive conditions, or through cumulative effects; it is questionable whether a family would uproot their lives and leave their home simply because of English-only requirements imposed on interactions in public institutions. These laws appeared in the context of other immigrant restrictive provisions, however, and in a general climate where an anti-immigrant fever, manifest in this type of legislation, was sweeping the country.

The indirect approach of self-deportation stands in contrast to the direct removal strategy of deportation, under which the government funds the physical removal of a person, and its agents oversee and enact this removal, according to processes provided for by deportation law. If the goal of both policies is removal, then self-deportation and deportation constitute alternative mechanisms for achieving that end. With respect to the goal of removal, the state applies violence directly in physical acts of apprehension, detention, and deportation, and indirectly when it manipulates the conditions that shape how people live and their ability to survive. When the government utilizes the indirect strategy of self-deportation, it retains no control over, nor any knowledge of how many will leave or where they will go, so that an unknowable but substantial proportion of the resulting migration entails interstate migration; indeed, many people who initially flee their homes appear later to return.

This comparison between the approaches of self-deportation and deportation requires two important qualifications. First, deportation policy has indirect as well as direct effects, making deportation laws a variety of self-deportation law. Clearly, deportation laws serve an independent purpose, which is to provide for people’s apprehension, detention and actual deportation. But at the same time, in

---

50 Id. at 157; see also Kobach, supra n.34 at 471.
51 Though Kobach argued that “attrition through enforcement possesses a significant advantage over other competing approaches: it is comparatively inexpensive to implement,” Id. at 162.
52 Kobach’s suggestion that self-deportation simply constitutes more direct enforcement, or more deportation, obscures this crucial characteristic of the policy.
addition to facilitating some people’s deportation, a harsh deportation regime increases people’s fear of apprehension, detention, and deportation, and causes others to self-deport. When deportation laws target a specific group of immigrants, they have a powerful expressive function that contributes to a hostile environment for that group. The comprehensive self-deportation legislation of the 2000s included provisions that would bring unauthorized persons into more frequent and more onerous contact with law enforcement, including by facilitating state and local law enforcement assistance to ICE and presuming unauthorized persons to be flight risks for purposes of granting bail during criminal prosecution for these reasons. Kobach, too, recognized that in addition to increasing the chances of their actual deportation, life also becomes more unbearable for people in a place “when the risks of being detained and/or prosecuted go up dramatically.”

Deportation laws functionally double as self-deportation laws; self-deportation laws encompass but exceed deportation laws.

Second, self-deportation policy produces results besides removal—results that deportation laws produce only to the extent that they function as self-deportation laws. By creating hostile conditions, as R. Linus Chan has pointed out, self-deportation laws aim to both cause a group’s out-migration and deter that same group from migrating in. They work, in other words, both as “get out” and “stay out” laws. Further, perhaps more than most laws, given the relative absence of direct government involvement in enforcement, self-deportation laws have limited efficacy. The entire group targeted by the laws will almost never migrate from the jurisdiction; those who leave cross state rather than national boundaries; and some will leave and return. The limitations of self-deportation laws derive from a range of factors, including the strength of people’s commitments to and in a place, and the choices available to them—some may simply have nowhere else to go. Regardless, in all cases where people stay in a jurisdiction despite the detrimental effects upon their lives, the policy ensures their continuous suffering as long as it remains in place.

Self-deportation laws thus have three distinct effects: people’s departure from the jurisdiction, prohibition of entry for those exiled, as well as no additional prospective entrants from the targeted group, and deep subordination for those who stay. Again, self-deportation laws leave the variety, intensity and the source of this suffering remarkably open: they make it more difficult for people to obtain a job, assert employment rights while on their jobs, obtain housing or...

54 Kobach, supra n.11 at 157.

55 Chan, supra n.11 at 816 (self-deportation “is not limited to the removal of unwanted migrants currently residing in the state or municipality, but also refers to the creation of a hostile environment for undocumented migrants so as to deter them from migrating into the state or municipality at all”).
an education, and so on, and also deter individuals from reporting crimes committed against them. The laws place conditions upon those who do not leave, insofar as they must submit to suffering not inflicted upon neighbors. This differential treatment frequently buttresses existing racial caste systems in the relevant jurisdictions. For all these reasons, the laws contribute to a targeted group’s subordination where they do not effect its removal.

These layered effects of self-deportation provide another way to explain why, as immigration scholar Daniel Kanstroom has argued, the deportation system “has functioned primarily as a labor control device, a kind of extra tool in the hands of large businesses (and, for that matter, American families seeking nannies, gardeners, and so forth) to provide a cheap, flexible, and largely rightless labor supply.”56 The deportation system does not function to control the labor of actual deportees, but of those whom it affects through its self-deportation function. Insofar as deportation law renders workers vulnerable, it does so by deterring them from reporting labor abuses and forcing them to live in shadows. As many scholars have observed, historically and in the present, the creation of a rightless population within a population sows fertile ground for that population’s exploitation and renders it a pliable, miserable labor source.57 This analysis suggests that the advocates for self-deportation likely embrace the policy for different reasons, some because of the result of removal and others because it produces subordination.

Toward the goal of removal, many lawmakers in American history have advocated for self-deportation policy as a significantly cheaper and more effective mechanism for mass expulsion than deportation. That is, deportation laws require the state to follow a complicated set of procedures to apprehend and deport every individual, which has the benefit of displacing the focus of the removal process on that individual’s transgressions, or the defendant’s, rather than the government’s choices. However, the process is costly; as Kobach has reflected, “[i]t takes considerable government manpower and other resources to arrest [a person], initiate removal proceedings, detain him if necessary, provide the hearings and appellate review to which he is entitled, and ultimately remove him.”58 In order to relieve itself of some of these costs, the government has at different times in American history resorted to “voluntary repatriation” programs—which represent a compromise between self-deportation and deportation, wherein the government recruited deportees to appear at a pointed time of departure by promising

56 Daniel Kanstroom, Deportation Nation 245 (2007).
58 Kobach, supra n.11 at 162.
to pay for their transportation, and thereby avoids the costs of apprehension, detention, and hearings.\textsuperscript{59} By contrast to deportation, but like “voluntary repatriation,” self-deportation policy acts on many people at once, and as Kobach notes, “[i]t costs the federal government very little when aliens self-deport.”\textsuperscript{60} The policy goes into effect with the passing of self-deportation legislation, the signing of Executive Orders, termination of protective programs, and broadcasts of official plans to build walls, with little follow-up required from the federal government.

In other words, self-deportation laws depend heavily on the expressive power of laws. The policy targets particular groups in unmistakeable ways that communicate that they are unwelcome in a jurisdiction. The effects of such laws manifest even before such legislation is passed, in response to imminent as well as actual threats: even before the vote to pass a self-deportation bill in Avon Park, Florida in 2006, business owners “saw a drop in business from immigrants wary of coming into their shops. At area farms, droves of workers stopped showing up to milk the cows and harvest the crops, afraid of being arrested. Landlords saw a sudden rise in vacant apartments.”\textsuperscript{61} Indeed, such clear expressions of state hostility cause individuals to act in anticipation of such legal acts, or out of fear for their own safety and ability to survive, perhaps in greater proportion to those that leave because of the actual, variable effects of such laws (e.g. the loss of a job, inability to find housing, deportation, etc.).

Evidence from the aftermath of recent state and municipal self-deportation legislation also suggests that more specifically, this expressive function works through a delegation of power to public and private actors to create effects of hardship and fear. For example, after the passage of H.B. 56, citizens in Alabama “acted as if they themselves were deputized to enforce H.B. 56.”\textsuperscript{62} The subfederal self-deportation laws not only resulted in a high degree of racial profiling by police, but energized and intensified the ongoing activities of existing anti-immigrant groups. Sociologist Renee Flores has shown that the anti-immigrant animus the laws express has a viral effect that transforms the social environment.\textsuperscript{63} In research on the social consequences of subfederal self-deportation laws in Penn-

\textsuperscript{59} See infra Part III.

\textsuperscript{60} Kobach, supra n.11 at 162.


\textsuperscript{63} Flores, supra n.41.
ylvania, South Carolina, Arizona and Nevada, Flores found that these laws motivated anti-immigrant activism, hardened non-Hispanic citizens’ views of Hispanics, both citizen and non-citizen, and increased white citizens’ fears about lawlessness and crime. It appears that through self-deportation policies, the government allocates power to vigilantes; the policy operates through a penumbra effect that works through private actors, who give non-citizens and citizens, family members of unauthorized persons and people unrelated to them, a variety of reasons to leave their homes. Angela M. Banks has further shown that the hostile environment created by these laws may discourage immigrants from naturalizing even when they are eligible. Because these effects cannot be evenly distributed, moreover, self-deportation laws exacerbate an already uneven “patchwork” of immigration law across the country.

In addition to redistributing the labor of law enforcement to subfederal and private actors, self-deportation laws also shift costs, rather than eliminate them altogether. Such laws primarily shift costs, of course, to the targeted group, whose members must fund their own departures, or suffer the consequences; further, when families leave, many citizens, especially citizen spouses and children, have had to choose between following family-members on whom they were dependent or economic ruin. The human costs of family separations, inability to report crimes, and limitations on mobility were particularly high for women, who were already often especially vulnerable to exploitation at home and at the work place. Self-deportation laws therefore also affect citizen members of the enacting community. When immigrants stopped reporting crimes committed against

64 Banks, supra n.41.

65 Kobach attempts to refute this argument by reverting to the argument that self-deportation would consist of no more than more deportation, and merely “fill in the gaps created by inconsistent federal enforcement.” Kobach, supra n.34 at 483.


them and communicating with the police altogether, the laws obstructed law enforcement, leaving people within and outside the targeted group vulnerable to a wide range of forms of violence and exploitation. Further, the laws shift costs to state and local agencies, institutions, private companies and small businesses. After the passage of H.B. 56 in Alabama, for example, new requirements that individuals show proof of legal status to obtain services like renewing vehicle tags overwhelmed existing bureaucracies, and generated long lines for citizens and noncitizens alike. Companies found themselves unsure about whether to cut off people’s access to water and electricity without proof of status, generating public health hazards. The immediate outflux of large numbers of Latino workers after the passage of the bill devastated the poultry and agricultural industries, helping make Alabama “the worst economy in the Southeast.” Finally, cities that passed such legislation incurred millions of dollars in litigation costs to defend them.

Though it has not attached to the policy for most of its existence, the term “self-deportation” implies a mythical transfer of agency and choice from the government enacting the policy to the subject on which it is enacted. At the same time, it also insists that the policy is a variety of state-sponsored forcible removal.” In the next Part, under the rubric of this oxymoronic, well-known joke-term, I gather historical examples that show how the state has relied on this indirect approach to mass removal, with its delegation of responsibility to private

---

68 Id.
71 See, e.g., Muzaffar Chishti and Claire Bergeron, Hazleton Immigration Ordinance That Began With a Bang Goes Out With a Whimper, Migration Policy Institute, March 28, 2014, https://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper (describing how the city of Hazleton, PA, spent more than $6 million fighting legal challenges to its anti-immigrant law over six years); JonMcclure, Farmers Branch Settles Last Part of Lawsuit over Rental Ordinance for $1.4 Million, DALLAS NEWS, June 2014 (describing how Farmers Branch, TX, spent over $6 million in l fighting legal challenges to its anti-immigrant law over seven years).
72 This may explain why Reince Priebus in 2012 specifically objected to the term “self-deportation. In 2013, Reince Priebus, then Republican National Committee Chairman, called Romney’s use of the word self-deportation “horrific,” and added “It’s not something that has anything to do with our party.” Aaron Blake, Priebus: Romney’s self-deportation comment was ‘horrific,’ WASHINGTON POST, Aug. 16, 2013, https://www.washing-tonpost.com/news/post-politics/wp/2013/08/16//.
actors and institutional actors at other levels of government, the mobilization of private actors and communities, and aim of shifting costs, across a range of historical situations. Indeed, the logic I have described is one that American statesmen have articulated and deliberated under a number of different circumstances toward the end of removal, and which produced a consistent, recognizable policy that has wielded considerable force on patterns of migration in America. Under different circumstances, the multiple, layered results of this policy appear to shift in priority to one another, although the result of subordination, because it is inherent in the very mechanism of the policy, is constant. Despite these variables, the criteria I described above help us to identify the cross-historical operation of a policy with an independent logic.

II. HISTORICAL PRECEDENTS OF SELF-DEPORTATION

Since the early colonial period, American lawmakers have contemplated the question of the mass removal of groups it viewed apart from their polities, including natives, black people, and non-white immigrants. Moreover, to pursue their removal goals, they have implemented indirect legal strategies that target the lives of these groups. By highlighting the legal dimensions of self-deportation strategy in regimes that we usually do not think of as including this particular entailment, including settlement Indian removal, black colonizations, post-Civil War Black Codes and Jim Crow laws, together with the policy as it manifested in immigration law, I show how governments developed a consistent and cost effective approach for dealing with populations that presented a problem by virtue of being already “here,” and who we identified as outsiders who threaten the sovereignty and property entitlements of the Euroamerican state.

Subpart II(A) explores the indirect strategy of attacking every aspect of a person’s life through early laws of settlement, colonial codes and U.S. land grant and homestead legislation that early statesmen used to create conditions under which tribes could no longer survive in their homelands. Subpart II(B) then illustrates how self-deportation policy has operated upon different racial groups that the government considered deporting en masse by examining the direct removal of tribes under the Indian Removal Act, northern states’ responses to the failure of black colonization plans, and the voluntary repatriation of Mexicans during the Great Depression. Subpart II(C) examines removal, deterred migration, and subordination as simultaneous, distinct effects of self-deportation policy through the example of the Jim Crow south and the Great Migration.
A. Self-Deportation Strategy: Attacking Every Aspect of a Person’s Life

The first two centuries of Indian Removal represent the earliest development of indirect removal laws in America.73 British colonists’ primary interest in North America was the appropriation of land on a vast scale, but the mass removal of indigenous inhabitants was a prerequisite to their ability to take possession of these lands and convert them into private property.74 The British in America uniquely relied on settlement as a colonization tool that caused native deaths and displacement indirectly.75 Colonial Indian removal laws created hostile conditions that gave indigenous people two choices: to leave their homelands, or to stay and accept a place of deep subordination in colonial society. Removal policy attacked native peoples’ lives from every angle, impacting their health, safety, their ability to find food and shelter, maintain their kinship bonds and political orders, and their freedom of mobility and comfort. However, if colonists caused tribes to “self-deport,” in so doing, settlers did not expel tribes from settlers’ territories. Rather, settlers first claimed territories as their own by expelling tribes, and their settlement everywhere constituted encroachment. The colonial legal infrastructure devoted to encouraging settlers to migrate into and natives to migrate out of their homelands to further these goals indexes the extent to which American policies governing migration policy and property accumulation were early imbricated in one another.

Indeed, by the time of the Revolutionary War, indirect removal through settlement had become a well-established and highly favored tool. In 1783, General Philip Schuyler advised Congress that “as our settlements approach their country, [the tribes] must, from the scarcity of game, which that approach will induce to, retire farther back, and dispose of their lands, unless they dwindle comparatively to nothing, as all savages have done… and thus leave us the country without the

73 The word “removal” connects the long history of Indian Removal to deportations under contemporary immigration law, which calls them “removal proceedings,” and the self-deportation policies that bring their substantive legacy into the present. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009.

74 Bernard Bailyn, The Peopling of British North America 66-67 (1986) (“Land speculation was everyone’s work and it affected everyone… Every farmer with an extra acre of land became a land speculator—every town proprietor, every scrambling tradesman who could scrape together a modest sum for investment.”).

expence of a purchase, trifling as that will probably be.”

Two months later, George Washington endorsed Schuyler’s view in a letter avowing his belief that “the Indians … will ever retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy; That it is the cheapest as well as the least distressing way of dealing with them, none who are acquainted with the Nature of Indian warfare, and has ever been at the trouble of estimating the expence of one, and comparing it with the cost of purchasing their Lands, will hesitate to acknowledge.”

When the war ended, the new federal government had no fiscal resources to take possession of the lands the British surrendered to them by force. In 1789, Secretary of War Henry Knox therefore observed that “the finances of the United States would not at present admit of the operation [of military conquest],” and opined, “it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number.” “As the settlements of the whites shall approach near to the Indian boundaries established by treaties,” he continued, “the game will be diminished, and the lands being valuable to the Indians only as hunting grounds, they will be willing to sell further tracts for small considerations.”

In his infamous 1823 opinion in Johnson v. M’Intosh, Chief Justice John Marshall noted that colonial settlement had the effect of displacing the native population:

[a]s the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed.

The white population only “advanced,” however, through a mighty coordinated legislative effort by colonists to make it impossible for indigenous communities

---


77 Letter from George Washington to James Duane (Sept. 7, 1833).

78 To conquer the Wabash, Knox estimated that it would require an army of at least 2500 men each year and sums “far exceeding the ability of the United States to advance.” FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 3d ed. 12 (2000) (Report of Henry Knox on the Northwestern Indians (June 15, 1789)).

79 Id. at 13. See also STUART BANNER, HOW THE INDIANS LOST THEIR LAND 130-32 (2005).

to stay in their homelands. As I show below, colonists primarily achieved this by facilitating settlement, but also through the imposition of colonial general laws and Black Codes on natives who sought to stay in their homelands, as well as on free blacks and people of mixed race who they wished to maintain as a subordinated population whose labor they could control.

As a background matter, the first settlers in America found their very arrival had the effect of depopulating the lands. Wherever settlers arrived, they spread disease that killed scores of indigenous people, who lacked immunity to the diseases settlers, which included smallpox, influenza, plague, malaria, yellow fever, tuberculous, measles, typhus, dysentery, and syphilis. As a result, European arrival on the eastern seaboard caused epidemics with mortality rates that frequently rose as high as 80 or 90 percent of a village’s population. While settlers did not calculate that they would have this effect during the first years, they found the phenomenon favorable to their colonization. When colonists’ presence incited a “quarrell” with the Massachusett and Pawtucket tribes “about their bounds of land,” the arrival of several thousand settlers in the area brought an epidemic that destroyed the Massachusett, the Pawtucket, and the conflict too. The decimating effects of disease allowed many settlements in New England to find their footholds without going to war with native inhabitants, opening up new options through which to pursue continuous expansion.

Disease not only caused death, but made many indigenous people leave their homelands, as they “quickly learned that the new diseases could be escaped only by casting aside family and community ties and fleeing.” In the 1640s, Roger Williams observed that “[s]o terrible is their apprehension of an infectious disease that not only persons, but the Houses and the whole Towne takes flight.” As a result, colonists built more than fifty of their earliest settlements on the sites of indigenous villages destroyed and vacated by disease. John Duffy therefore

---

81 Alfred Crosby, Virgin Soil Epidemics as a Factor in the Aboriginal Depopulation in America, 33 The William and Mary Quarterly 289, 290 (1976); William Cronon, Changes In The Land 86 (1983).

82 In 1616, Plymouth colonists who came to settle in southern New England after such a devastation observed that there were “none to hinder our possession.” Neil Salisbury, Manitou And Providence 175 (1982); see also Cronon, supra n. 81 at 87.

83 Salisbury, supra n.82 at 183, 190-92.

84 Cronon, supra n.81 at 86.

85 Id. at 88.

86 Id. at 90.
describes smallpox as a “dangerous ally” that “was frequently a decisive factor in the victories of Europeans over the Indians.”

Because colonists found the presence of evermore settlers greatly facilitated their expansion, they encouraged Europeans to migrate to and settle in America by promising prospective settlers land ownership. Migration overseas was costly, arduous, and once in America, settling was fraught with risks of illness, starvation and unnatural death. For potential settlers, the benefits of emigrating had to outweigh the risks; for colonial officials, as historian Bernard Bailyn writes, “the actual organizing, supplying, shipping, and settling of people on the land was difficult and expensive, and hence risky.” To facilitate settlement of the lands, colonial authorities promised settlers land in exchange for activities that would make life intolerable for natives who did not die from disease. In a testament to the aggressive nature of settlement, settlers arrived armed and ready to defend the lands they wished to claim. Plymouth, like other early settlements, was a garrison. Many colonial laws required settlers to bear arms, even at church, and forbade the sale of arms to natives.

Through laws intended to work indirectly, colonies gave away so much land that Thomas Hart Benton described the original thirteen colonies as having been settled upon gratuitous donations or nominal sales. In the southern and middle

---


88 Law professor Aziz Rana traces this “openness to European immigration” into the period of the early Republic. Aziz Rana, The Two Faces of American Freedom 116 (2010) (“If the republican goals of economic independence and freedom as self-rule necessitated territorial expansion, they also required enough people to work the land and to participate in projects of conquest”).

89 Bailyn, supra n.74 at 81.

90 Amelia C. Ford, Colonial Precedents of Our National Land System as it Existed in 1800 103-04 (1910) (“The policy gradually developed of using military bounties to promote compact settlement on the frontier by men able to defend it, and in this way to secure protection without the expense of a standing army.”).


colonies, in particular, colonies grew by offering settlers head rights or concessions. For decades, Virginia shareholders received fifty acres for each person they transported to the colony. Lord Baltimore promised every head of a family who brought his household to Maryland one hundred acres, an additional hundred acres for bringing a wife and for each adult servant, and fifty acres for each child under sixteen years. In 1633, any adventurer who brought five men between the ages of sixteen and sixty received 2,000 acres in 1633, and 1,000 acres in 1636, and fifty acres in 1642. The Carolinas promised each “undertaker” 100 acres for emigrating, fifty acres for each male servant, and thirty acres for each female servant. Georgia offered every immigrant fifty acres each. Massachusetts Bay Company gave stockholders fifty acres for every person they transported.

To expropriate land from natives, Eric Kades observes that colonists made use of two “natural allies”: disease and the fact that settlement thinned game and transformed the environment on which indigenous communities depended to survive. Colonial officials used legal rules to “channel” settlement to maximize the effect of these allies. In particular, they placed conditions on land bounties, including requirements that settlers occupy and “improve” the lands in these ways within a term of years by building, clearing, planting crops, and keeping

93 In or around 1614, Governor Dale promised every man who brought a family to the Virginia colony a house with four rooms and twelve fenced acres adjacent to the house. RALPH HAMOR, TRUE DISCOURSE, ETC. 19 (1860).

94 At the Court at Whitehall, Nov. 19th, 1675, in 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 528, 530 (William Waller Hening ed., 1823) [hereinafter LAWS OF VIRGINIA]; Instructions to Governor Yeardley, 1618, 2 VA. MAG. HIST. & BIOGRAPHY 154, 156-57, 164 (1894).

95 Calvert Papers I 138.


97 1 COLONIAL RECORDS OF NORTH CAROLINA 45 (William L. Saunders ed. 1886).

98 AN ACCOUNT SHOWING THE PROGRESS OF THE COLONY OF GEORGIA IN AMERICA FROM IT’S FIRST ESTABLISHMENT 5 (1835).


100 Kades, supra n.75 at 1072.
Colonies made larger grants to skilled laborers, such as those that began businesses in powder, printing, iron works for mining, salt works, copper works, and who promoted and governed settlements. In particular, colonial authorities rewarded settlers with land for armed combat. In 1646, Virginia granted one hundred acres to the commander of the settlement at Middle Plantation, Henry Tyler; in 1679, it conditioned large land grants to Major Lawrence Smith and Captain William Byrd on their settling the land with 250 men, fifty of whom were to be well armed and ready for conflict at all times. Connecticut granted Captain John Mason 1,000 acres for his service in the “Pequett War,” in which Massachusetts Bay, Plymouth, and Saybrook Colonies set killed approximately 500 sleeping men, women and children at Mystic Fort in a surprise dawn attack. After this slaughter, many surviving Pequots fled west to seek refuge with the Mohawks.

As a result of this range of settlement activities, indigenous people who survived disease frequently could no longer find basic subsistence or stay in their homelands. As historian William Cronon has shown, “the Indians’ earlier way of interacting with their environment became impossible” as a result of English

101 Ford, supra n.90 at 95. In Virginia, for example, within three years, settlers had to build a house, plant one acre and keep stock for one year, or the land would revert to the colony, An Act for Seating and Planting, 2 LAWS OF VIRGINIA 244, supra note 94; later, settlers could claim four hundred acres if they raised a crop of corn or resided on lands for one year. Revised Code of Va (1819) II 339. In Massachusetts, for example, settlers had to build a house of eighteen or twenty square feet, and clear five to eight acres for mowing and tilling within three years. WILLIAM D. WILLIAMSON, HISTORY OF MAINE VOL. II 180, 507 (1832).

102 For example, one man, for three thousand acres, covenanted to bring twenty people from England to Maryland who were “Artificers, Workmen, and other very useful persons.” JOHN KILTY, THE LAND HOLDER’S ASSISTANT AND LAND OFFICE GUIDE 79 (1893). Captain Thomas Barwick received at least twelve hundred acres in 1622 for bringing twenty-five shipwrights to Virginia to build houses, boats and pinnaces. ALEXANDER BROWN, FIRST REPUBLIC IN AMERICA 430 (1898).


104 An Act Enabling Major Laurence Smith and Capt. William Bird to Seate Certaine Lands at the Head of Rappahannock and James River, 2 LAWS OF VIRGINIA 448-54, supra note 94.

hunting and the English demand for fur. Colonists also deforested the lands to build ships, houses, furniture, and to burn as firewood, in ways that exposed the soil, causing more extreme temperatures, floods and draughts. English mill dams obstructed indigenous peoples’ ability to fish. English cows and pigs ate Indian crops and grass that animals indigenous to the territory had fed on.

Lawmakers who created positive incentives for settlers intended these laws to effect Indian removal by creating intolerable conditions for natives. Though in the earliest period, many communities simply fled, leaving lands vacant for settlement, colonial officials quickly learned that by creating these conditions, they could force native people into selling their land. Indeed, colonists viewed this kind of devastation as the precondition to their ability to purchase lands from natives. As law professor Stuart Banner notes, “Repeated encroachment must have tipped Indians toward selling land they would not have otherwise sold, as a means of obtaining some recompense for a state of affairs they had great trouble preventing... Every increase in the English population gave the Indians more reason to sell their land.”

In the eighteenth century, settlers thereby increasingly transformed indigenous land into “commodities transferable out of the Indian community, creat[ing] the conditions for a vigorous land market that attracted English speculators and new English residents into the community.”

As sales, removal and land appropriation intensified, the impact on native people who sought to stay in their homelands was tremendous. Landless Indians were forced to find wage labor to subsist, but could only find menial work,

---

106 Craton, supra n.81 at 15. These factors led to the demise of white deer, elk, bear, lynx, beaver, otter, foxes, martens, minks, raccoons, and muskrats in New England. Id. at 101, 106.

107 Id. at 111-21 (“New England lumbering used forests as if they would last forever.”).

108 Banner, supra n.79 at 54.

109 Id.

110 JEAN O’BRIEN, DISPOSSESSION BY DEGREES 170 (1997) (“the individualization of landownership that made a land market possible constituted the most significant structural alteration in the Indian community in the eighteenth century.” Id. at 151.).

111 During this period, accelerating land appropriation intensified settler-native conflicts, and colonial military leaders used tools developed through indirect removal techniques in these wars. In 1763, for example, Captain Simeon Ecuyer famously sought to “exterminate” the Delawares at “one single stroke” by giving two Delaware leaders infected blankets and handkerchiefs; a receipt initialed by General Jeffrey Amherst noted that the purpose was “to Convey the Smallpox to the Indians.” GREGORY EVANS DOWD, WAR UNDER HEAVEN 190 (2002); SEE ALSO FRANK FENNER, THE HISTORY OF SMALLPOX AND ITS SPREAD AROUND THE WORLD 239 (1989).
and became embroiled in debtor-creditor relationships, which frequently brought them into indentured servitude. Colonies folded natives into their Black Codes, which restricted the mobility of non-whites through curfews, prohibitions on travel and gatherings; and indigenous people had little power to defend themselves within the costly, biased, and English-controlled legal system that created these conditions. Further, guardianship arrangements for Indian children enabled English caretakers to claim expenses that Indians would have to sell land to pay. Historian Jean O’Brien describes how in colonial Natick, as Indians grew increasingly marginalized, they “set their sights on objectives of very basic subsistence in some degree of comfort… many simply left,” angry about English trespass and manipulation, and hopeless that any future remained for them in their homelands.

After the United States was established, it established federal control over the land market to prevent the states from going to war with each other and with tribes. It then continued this strategy of making land grants to settlers who would defend against immediate threats, especially along contested borders in the Mississippi, Louisiana, Missouri and Michigan Territories. Even before the war had ended, new states including Virginia, North Carolina, and Massachusetts adopted systems of free land grants, and states with large back country regions, such as Pennsylvania, Minnesota and Wisconsin, continued to recruit settlers

112 O’Brien, supra n.110 at 132-33.
113 Id. at 208.
114 These efforts at this time constituted an attempt to prevent “international conflict” akin to the government’s assertion of federal supremacy in the field of immigration during Chinese exclusion.
115 An Act for granting lands to the Inhabitants and settlers at Vincennes and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possessions, 1 Stat. 221 (Mar. 3, 1791) (giving 400 acres to persons who in 1783 were “heads of families at Vincennes or in the Illinois county”); see also DAVID ANDREW NICHOLS, RED GENTLEMEN AND WHITE SAVAGES 87-88 (2008); U.S. President to Congress, Communication Regarding Land Claimants in the Northwestern Territory, 1st Cong., 3d sess., (Dec. 23, 1790): 9-15; An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee, 2 Stat. 229 (Mar. 3, 1803) (disposing of land in Mississippi Territory); An Act regulating the grants of land in the territory of Michigan, 2 Stat. 437 (Mar. 3, 1807) (regulating grants of land in Michigan Territory); An Act supplementary to the act intituled “An act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee,” 2 Stat. 303 (Mar. 27, 1804) (regulating grants of land in Louisiana Territory, present day Missouri).
from the east coast and Europe for the next century. Over the course of the nineteenth century, the federal government passed a series of legislation to subsidize land and thereby lure settlers to territory still occupied by natives, including the Armed Occupation Act of 1842, the Homestead Act of 1862, the Southern Homestead Act of 1866, and the Timber Culture Act of 1873.

During the colonial period and period of the early Republic, in what political theorist Robert Nichols describes as the “recursive logic of dispossession,” settlers engaged in activities calculated to realize the Lockeian ideal of “vacant lands”--by literally working to vacate them of their inhabitants. Settlers pursued this displacement, the prerequisite to their ability to realize their claims to the lands, through indirect strategies designed to attack indigenous peoples’ lives from every angle. Historically, the mass removal of indigenous people from the land, and thus the migration policies of Indian Removal, were integral to the settler projects of landed property creation and the establishment of an exclusively white polity.

B. Self-Deportation as an Alternative to Mass Deportation

Historically, the government used self-deportation policies to target groups that it contemplated mass deporting—groups comprising communities that the

---

116 Edith Abbott, Historical Aspects of the Immigration Problem 732-33; 129-31; 167-72 (1926) (“Immigrants Welcomed in Western Pennsylvania,” Addressed “To All Those Who May Be Desirous of Emigrating to the Western Country,” Extract from Hazard, Register of Pennsylvania (1828); “Stimulation of Emigration by American States,” Extract from Second Annual Report (1853) of the State Commissioner of Emigration (Herman Haertel); “Efforts to Attract Immigrants to a Western State,” extract from Report of the Minnesota Board of Immigration (1871)).

117 The Armed Occupation Act of 1842, the Homestead Act of 1862, the Southern Homestead Act of 1866, and the Timber Culture Act of 1873. Additionally, settlers continued to spread disease that greatly afflicted tribes across the west during the nineteenth century. See, e.g., Crosby, supra n.81 at 290-91; Dowd, supra n.111 at 23, 35; Jeffrey Ostler, The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee 31; 33 (2004). As a result of this settlement, settler-native wars reached their height during the nineteenth century. In these wars, again, the army used techniques adapted from the long history of removal, and sought to force the tribes of the central plains onto reservations by destroying their main source of food—the buffalo. In the fall of 1873, Lieutenant Colonel Dodge wrote that in Kansas, “[w]here there were myriads of buffalo the year before, there were now myriads of carcasses… the vast plain, which only a short twelvemonth before teemed with animal life, was a dead, solitary, putrid desert.” Richard Irving Dodge, The Plains of the Great West and Their Inhabitants 133 (1959); see also Richard White, It’s Your Misfortune and None of My Own 219 (1991).

government has not wished to integrate into the national polity, including native peoples, black people, and various groups of immigrants. In the case of Indian removal, reflecting the necessity of eliminating natives to establish the settler claim to land and produce private property, the federal government and the states disagreed less about the desirability of ridding their jurisdictions of natives than about who had the prerogative to do so, how to do so, and the issue of cost that direct mass deportation presented. Perhaps for this reason, the only mass deportation in a strict sense in American history occurred to supplement indirect strategies of Indian Removal.\textsuperscript{119} When statesmen considered removing other groups in the future, however, the contradiction between the desire to be rid of these groups and whites’ reliance on their subordination as a means of maintaining their proprietary interests, produced less unanimous debates that did not end in another comparable mass deportation. Nonetheless, the debates reveal both that legislators considered self-deportation and mass deportation as alternative strategies long before Kobach described them as such the twenty-first century, and that the matter of financial and logistical difficulties dominated the discourse then, as now.\textsuperscript{120}

In the early nineteenth century, for example, the federal government was not yet willing to mass deport tribes from the southeastern states, to the great disappointment of those states. Subsequently the Georgia legislature, in acts presaging the subfederal self-deportation legislation of the twentieth and twenty-first centuries, proceeded to pass a series of “extension laws” asserting the state’s sovereign jurisdiction over all the lands within its boundaries. First, in 1827, it assigned Cherokee land to various Georgia counties, denying Cherokee sovereignty and subjecting Cherokees to the state’s jurisdiction and laws. In 1828, it declared Cherokee laws void within the state. In 1830, it first authorized the government to take possession of all Cherokee gold, silver, and other mines, and then, to seize all Cherokee land and distribute it to white settlers. Georgia made it illegal for Cherokees to assemble for any purpose and voided contracts into which they entered.\textsuperscript{121} Governor George Gilmer acknowledged these laws “were produced for

\textsuperscript{119} See infra Part III.

\textsuperscript{120} The millions of unauthorized persons in the United States, Kobach writes, “need not be rounded up and forcibly removed through direct government action.” Kobach, \textit{supra} n. 11 at 156. He denounced the idea that there are only two means of dealing with the unauthorized population in the United States: to “either attempt to round them up and remove them all, or grant massive amnesty.” \textit{Id.} at 155.

\textsuperscript{121} Banner, \textit{supra} n.79 at 201 (n.20); Ga. Acts 1826, 68; Ga. Acts 1827, 99, 236; Ga. Acts 1828, 87, 88; Ga. Acts 1830, 154, 127, 114, 118; Resolutions of the Legislature of the State of Georgia in Relation to Certain Lands Occupied by the Cherokee Indians, Belonging
the sole purpose of making life so miserable for the Cherokees that they would be forced to remove,” privately echoing the purpose the legislature had openly declared in 1829. Tennessee and Alabama followed suit before the federal government finally embraced the solution of a mass deportation plan after the election of Andrew Jackson, who affirmed Georgia’s passage of the extension laws as “legitimate powers which attach, and belong to their sovereign character.” A famous legal battle over federalism ensued, in which the Supreme Court, ultimately found Georgia’s extension laws unconstitutional. However, Georgia refused to abide by the Court’s ruling, and as historian Tim Garrison has shown, courts in many southeastern states went on to assert their jurisdiction in dozens of criminal cases with Indian defendants, despite the Court’s holding that they could not do so in *Worcester v. Georgia*. While Garrison concludes that state supreme courts thereby effectively “displaced the Supreme Court’s decision in *Worcester*,” making “southern removal ideology… the law of the land,” Deborah Rosen points out that states and the federal government nonetheless agreed to frame land controversies as federalism and states’ rights cases, rather than cases about tribal sovereignty. Further, when states openly flouted federal law, she notes, the federal government “made only weak gestures toward meeting its treaty obligations to protect Indian tribes, and mounted no serious effort to defend federal constitutional prerogatives on matters relating to Indians.” As long as states did not create problems that would demand resources of the federal government, it “usually acquiesced when states took authority upon themselves to regulate Indians.” For Rosen, it is therefore “disingenuous to present the federal and state governments as having conflicting interests when it came to Indians… The federal government and the state governments shared an end goal, to the Said State, 20th Congress, 1st Session, Doc. No. 102 (January 28, 1828). See also PAUL FYRMER, BUILDING AN AMERICAN EMPIRE 116 (2017).

122 Garrison, *supra* n.9 at 107 (n. 6).

123 Banner, *supra* n.79 at 216 (fn 42: Niles’ Weekly Register 36 (1829): 259); see also DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW 46 (2007).

124 In 1831, the Supreme Court punted on deciding on the constitutionality of Georgia’s extension laws, but by declining jurisdiction, denied Cherokee sovereignty and status as a “foreign state.” *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet.) (1831) (declaring the Cherokee instead to be a “domestic, dependent nation”).


126 *Id.* at 46 (n. 56).

127 *Id.* at 76.

128 *Id.* at 75.
and they acted in tandem to achieve that goal”: “control of Indians and Indian lands.”

During the same period, the United States also deeply contemplated the removal of black Americans, both free and whose future freedom white statesmen anticipated and worried over for several decades before the actual event of abolition. In 1790, the black population of Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia comprised between 36 and 44% of the total population, and in many counties and districts, blacks outnumbered whites. Since colonial times, whites had pondered mass deportation options in response to manumissions, the increasing numbers of free blacks in colonial society, and the specter of abolition. As James Galloway of North Carolina had commented during the constitutional ratification process, “It is impossible for us to be happy, if, after manumission, they are to remain among us.” Though between 1770 and 1810, most statesmen opposed slavery for various reasons, they could not seriously consider? emancipation because they would not imagine integrating blacks into the national polity. Civil rights attorney Don B. Kates, Jr. sought to explain their conundrum from their perspective as follows:

How could any ‘responsible’ person—where ‘responsible’ connotes fundamental agreement in the basic structure of American society and politics—look with equanimity on the accretion to the political and social population of an immense Negro mass, alien to the body politic, whose unarticulated aspirations might pursue any direction under any leaders. If emancipation and integration would inevitably overthrow the political status quo then they were unacceptable. For Northerners the clinching argument was not only that the political balance of the nation would be overthrown in the South, but that only slavery and its attendant restrictions on Negro movement kept Negroes in the South.

---

129 Id. at 78-79.

130 H. N. Sherwood, Early Negro Deportation Projects, 2 The Mississippi Valley Historical Review 484, 494 (1916).

131 In 1691, for example, Virginia enacted a law forbidding further emancipation of slaves unless the owner provided for their transportation beyond the limits of the colony within six months of the manumission date. The fine for violating this law was ten pounds, which the colony would use to fund the removal of the freedman. An Act for Suppressing Outlying Slaves, 3 Laws of Virginia 87-88, supra note 94.

132 Sherwood, supra n.130 at 2 (JONATHAN ELLIOT, 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 101 (1836-1845)).

White northerners wished to ensure that blacks would stay in the South; white southerners would not contemplate civic equality; and these factors, together with the daunting expense and logistics of a mass expulsion, long stymied efforts during the early Republic to imagine a concrete end to slavery.

“Black colonization,” or the mass deportation of blacks never came to pass, largely because of the sheer expense and logistical challenges of an undertaking of this scale. However, Thomas Jefferson was an early proponent of the plan, and during the antebellum period, Frederick Douglass remarked that “almost every respectable man” in the north, where abolition did not threaten their property interests, was in favor of abolition and black colonization, as a pair. More than a dozen state and local legislatures pleaded with Congress for aid for black colonization in 1827 and 1828, but Senate Committee members worried that “taking land in Africa required a new conquest unlike the manner by which the United States extinguished Indian lands,” and estimated transportation costs alone would amount to more than $28 million. By the 1840s, eleven northern state legislatures had formally endorsed black colonization. Delaware and Indiana emphasized it as a measure “essential to our safety” and the “necessity of self-defense” given the growing numbers of black people in their states. Maryland allocated $200,000 for mass deportation in 1832, authorized the establishment of a colony at Cape Palmas, and later offered blacks free passage to Liberia or Trinidad.

---


135 Id. at 221. Southern legislators blocked national legislative efforts to promote and fund colonization. In response, many prominent statesmen, including Supreme Court Justice Bushrod Washington, James Madison, Henry Clay, Chief Justice John Marshall, Daniel Webster, and Rufus King helped found or joined the American Colonization Society (ACS) in 1816 to advocate for black colonization using state and private channels. Id. at 228.

136 LITTLEON WALLER TAZEWELL, SUNDRY MEMORIALS AND RESOLUTIONS OF SEVERAL STATE LEGISLATURES, ON COLONIZATION OF PERSONS OF COLOR, S. DOC. NO. 20-178 (1st Sess. 1828). Henry Clay frequently proposed using sales of federal public lands to fund black colonization, but Andrew Jackson vetoed his most successful attempt to introduce such legislation in 1833. Frymer, supra n.121 at 233.

137 Id. at 229-30 (“Cuban Affairs-Colored Emigration-Political Business,” New York Daily Tribune (September 5, 1851); Freehling, Road to Disunion, 191 (1832 appropriation)).
Meanwhile, Southern politicians who knew their property interests to be at stake vehemently opposed abolition and black colonization together, viewing the latter as an attack on slavery. Publically, many opposed such plans on the grounds of cost and logistical impossibility. Patrick Henry, for example, lamented, “To re-export them is impracticable, and sorry I am for it.” Virginia abolitionist and judge St. George Tucker believed that a “marked physical and intellectual inferiority” required the deportation of blacks after emancipation, but “heaped scorn” on plans calling for “deportation at government expense.” The cost would be prohibitive, he argued; if Virginia suffered from the tax burden of providing for three or four thousand soldiers in the west during the Revolution, how it could possibly pay to deport 305,000 freedmen in Virginia, or the 800,000 freedmen in all the slaveholding states? Tucker therefore proposed Virginia use a self-deportation strategy instead, to achieve the outcome of removal without the expense of deportation: the state should, by “denying them those privileges here which they might hope to acquire elsewhere, endeavor to prompt them to migrate from hence.” Practically, this meant disarming and excluding blacks from office; and “by incapacitating them from holding lands, we should add one inducement more to emigration and effectually remove the foundation of ambition, and party struggle.” “Under such an arrangement,” he mused, “we might reasonably hope, that time would remove from us a race of men, whom we wish not to incorporate with us, which now form an obstacle to such incorporation.”

During the Civil War, President Abraham Lincoln strongly linked emancipation with black colonization, and in his December 1861 State of the Union address, “strongly urged” Congress to both adopt a colonization plan and acquire the territory to carry out. However, as nation-wide emancipation loomed into a more proximate reality, the challenges of directly removing more than 4 million African Americans from the United States in the 1860s concretized the untenability of mass deportation. In anticipation of abolition and the failure of this

138 WILLIAM W. HENRY, I PATRICK HENRY 114 (1891).

139 Massachusetts Governor James Sullivan agreed that the federal treasury could not bear the expense of any “mass exportation.” Sherwood, supra n.110 487-88; see also Kates, supra n.113 at 41-42; ST. GEORGE TUCKER, ON THE STATE OF SLAVERY IN VIRGINIA (1803).

140 Tucker’s plan for the gradual emancipation of slaves in Virginia was submitted to the state assembly. Massachusetts Historical Society, Collections, fifth series, 3:421; ST. GEORGE TUCKER, DISSERTATION ON SLAVERY 93-94 (1796) 93, 94.

141 Abraham Lincoln, State of the Union Address 1861.

142 Frymer, supra n.121 at 255 (n.147). Frymer also suggests that Indian Removal left a strong structure of advocacy opposed to removal in general, and refers to Indian removal
plan to come to fruition, some northern states passed explicit “stay out” laws: Illinois prohibited “Negro immigration” entirely in its 1848 constitution; Oregon, California, Illinois, Indiana and Iowa also passed constitutions prohibiting the settlement of blacks within their boundaries.143 Pennsylvania, Rhode Island, New Jersey, Indiana, and Ohio all enacted legislation making it practically impossible for free blacks to live within the state.144

The next Subpart explores the relationship between the multiple effects of self-deportation policy—removal, no entry, and subordination—in the aftermath of the failure of black colonization plans, the consequences of northern states’ adoption of self-deportation policies, and the later effect of their partial abandonment of them during World War I upon the Jim Crow South. Before turning to this subject, however, it is worth noting that later, the government would contemplate the direct and indirect removal of several immigrant groups it considered undesirable as citizens, and not potential members of the national polity, including people from China, Japan, India, and Mexico, among others.145 When the modern deportation system provided for direct removal on only an individual basis, the new cost and pace of deportation affected the discourse of alternatives only slightly. For example, when California organized “voluntary departures” for Mexicans during the Great Depression only after considering “the desirability of wholesale deportation” of Mexicans. As I show in Part III below, it opted for

143 Efforts to do so in Michigan, Pennsylvania, Ohio and New Jersey were narrowly defeated. See JAMES R. GROSSMAN, LAND OF HOPE 23 (1989); Frymer, supra n.121 at 236-37; EUGENE BERWANGER, THE FRONTIER AGAINST SLAVERY, 43, 51, 72-77, 93-94 (1967).

144 For example, Pennsylvania left a legislative loophole allowing blacks to be sold south to avoid manumission in the state, while Rhode Island prohibited the importation of slaves and free blacks alike. EDWARD TURNER, THE NEGRO IN PENNSYLVANIA 82-85 (1911); Simeon F. Moss, The Persistence of Slavery and Involuntary Servitude in a Free State, 1685-1866, 35 THE JOURNAL OF NEGRO HISTORY 304 (1950). See also Ralph L. Ketcham, The Dictates of Conscience: ‘Edward Coles and Slavery, 36 VA. Q.R. 46, 54, (1960); FRANK URIAH QUILLIN, THE COLOR LINE IN OHIO (1913).

145 See, e.g., Sherally Munshi, Race, Geography, and Mobility, 30 GEO. IMMIGR. L. REV. 245 (2016); Gerald P. Lopez, Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy, 28 UCLA L. REV 615 (1981). Government reports, including the Dillingham Commission report of 1911, and other literature show that Mexican laborers were considered useful but undesirable as citizens, and not potential members of the community. 1 U.S. Immigration Commission, Abstracts of Reports, S. Doc. No. 747, 61st Cong., 2d Sess. 682-90 (1911).
“voluntary” deportations after reaching the conclusion that the expense of deportation hearings meant that actual deportation “could not be used to advantage in ousting any large number.”146

C. The Effects of Self-Deportation Strategy: Subordination, No Entry, and Removal

The case of the Black Codes and the Jim Crow regime in the post-Civil War south illustrates legislators’ investment in realizing the property interests inherent in the subordination of black people, as opposed to the investment in eliminating native people in order to realize property interests in land. After abolition, white southerners, smarting from the loss of their property interest in slaves, sought to take all possible measures to subordinate the newly free black population to preserve the property interests and cultivate the advantages that they retained. Through a series of Black Codes, they imposed a system of labor control and new forms of oppression to maintain the dynamics of white supremacy and deep subordination that had governed the south during the antebellum period. As those dynamics spiraled, after the end of Reconstruction, into the legal regime of Jim Crow, states and municipalities attacked every aspect of black people’s lives, in an effort to render them a pliant, miserable labor source. However, with the outbreak of World War I, factories in northern states that had theretofore discouraged black migration to their jurisdictions opened their doors to women and blacks to meet their labor needs.147 The new possibility of creating a viable life in the north triggered the massive exodus from the south known as the Great Migration.

The Great Migration underscores the functional similarity of laws imposing subordination and self-deportation laws, and highlights the difficulty of identifying which of self-deportation laws’ multiple, layered effects—removal, deterred entry, or subordination—takes priority for any given legislator or advocate, after Indian Removal. Further, it suggests that self-deportation policy, insofar as formally, it primarily imposes subordination, functions according to a logic of relativity. That is, it shows the potential for a shift in external conditions to convert a system designed to entrap people in conditions of deep subordination into one that functioned to drive people out.

At the end of the Civil War, southern states adopted Black Codes that affected every aspect of people’s lives, but especially sought to control their labor

146 Kanstroom, supra n.56 at 217-18 (n. 369, 371).

through employment and criminal laws. Under these laws, individuals had to possess written evidence of employment for the year each January and obtain year-long contracts; laborers who left their jobs before the expiration of a contract forfeited wages already earned; sharecropping contracts were enforced criminally, rather than civilly; and anyone offering work to a laborer already under contract risked imprisonment or a $500 fine.  

Further, black people were subject to arrest by any white citizen, as under slavery; they could not rent land in urban areas, and faced criminal charges for such vague offenses as “insulting” gestures or language, “malicious mischief,” and preaching without a license. Under vagrancy laws, “vagrants” included “persons who lead idle or disorderly lives,” including traveling performers and artists, anyone “misspending what they earn” or who refused to work for “the usual and common wages given to other laborers.” Courts could also send black people into public works projects, or send them to prison to work within a convict lease system, which expanded significantly during this time. Along with the sharecropping system that replaced slavery and debt cycles that kept black renters or wage laborers on hand for harvest, this legal system gave white planters nearly total control over black labor.

The Black Codes further imposed heavy poll taxes, and barred blacks from poor relief, orphanages, parks, schools, and other public facilities. Lawmakers limited blacks’ access to subsistence and economic resources more generally with laws criminalizing hunting, fishing, and freely grazing livestock. Laws requiring livestock owners to fence in their animals made it impossible for landless individuals to own livestock. Legislators imposed taxes on ownership of dogs and guns, or prohibited blacks’ owning weapons altogether. In 1866, in counties with large black populations, Georgia outlawed hunting on Sundays and the taking of timber, berries, fruit and anything “of any value whatever” from private

---


150 S. Exec. Doc. No. 39-6, supra note 149, at 218-19.

151 Grossman, supra n.123 at 23, 27 (n.35); Foner, supra n.130 at 200.

152 Daniel J. Whitener, Public Education in North Carolina During Reconstruction, 1865-1876, in Essays in Southern History 66-73 (Fletcher M. Green, ed. 1949).
property at any time.\textsuperscript{154} Law enforcement in southern states during this time occurred through white police forces, state militias, and judicial systems.\textsuperscript{155} North Carolina awarded double settlements to landlords whose tenants unsuccessfully appealed a local court decision; Mississippi fined, imprisoned, or sent to hard labor blacks who “falsely and maliciously” brought legal charges against a white.\textsuperscript{156} States passed apprenticeship laws allowing judges to bind black orphans and children of parents deemed unable to support them to white employers, with the result of putting into bondage individuals over sixteen years of age and children with parents willing to care for them, often without their parents’ knowledge or permission, replicating one of the cruelest aspects of slavery—subordinating the possibility of maintaining kinship to a white master’s whim.\textsuperscript{157}

This oppressive subfederal legislation drew the southern states into a period of tension with the federal government, leading to the passage of the Civil Rights Act of 1866 over President Andrew Johnson’s veto.\textsuperscript{158} However, Reconstruction efforts went into demise after President Hayes withdrew federal troops from the south in 1877, pledging to respect the autonomy of “local government.”\textsuperscript{159} While black communities continued fighting to make living conditions more tolerable in the south, as legal historian Michael Klarman writes, by around 1890, race relations in the South “had begun what was to be a long downward spiral.\textsuperscript{160} Virtually all the Southern states began passing black codes similar to those they had passed in the wake of abolition. Southern states thereby restored white control over black labor again,\textsuperscript{161} through enticement laws and contract-enforcement laws, which forced blacks to prove employment through contracts signed at the

\begin{itemize}
\item Foner, supra n.148 at 203.
\item S. Exec. Doc. No. 39-6, supra n.149 at 196-97.
\item Id. at 172-74, 180-81, 190, 209-10.
\item Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27, 27 (codified at 42 U.S.C. §1982 (1982)).
\item Andrew Buttaro, The Posse Comitatus Act of 1877 and the End of Reconstruction, 47 St. Mary’s L.J. 162 (2015).
\item Michael Klarman, From Jim Crow to Civil Rights 10 (2004).
\item On “labor cartel” effects in Jim Crow era, see Jennifer Roback, Southern Labor Law in the Jim Crow Era: Exploitative or Competitive, 51 U. Chi. L. Rev. 1161, 1192 (1984).
\end{itemize}
beginning of the calendar year,\textsuperscript{162} emigrant-agent laws restricting the activities of labor recruiters,\textsuperscript{163} vagrancy laws,\textsuperscript{164} and laws establishing the convict-lease system.\textsuperscript{165} Further, they passed laws imposing poll taxes and literacy tests to suppress the black vote, laws mandating segregation in railway travel, and laws increasing racial disparities in educational funding, again. At the same time, racial terror grew to such proportions that people referred to it as “lynch law”-- an extrajudicial legal order.

The hostility of conditions for blacks in southern states under Jim Crow caused a significant number of them to self-deport, despite not having real alternatives. Many migrated west in the late nineteenth century, including 10,000 people from Kentucky and Tennessee who settled in Kansas during the 1870s, and more than 6,000 Texans, Mississippians, and Louisianians who followed in the “Kansas Fever Exodus” in 1879 and 1880 during the bloody aftermath of the collapse of Reconstruction.\textsuperscript{166} Emmett J. Scott writes that “[t]he real causes of the migration of 1879 were not far to seek... by far the most potent factor in effecting the movement was the treatment received by negroes at the hands of the South.”\textsuperscript{166} Similarly, as southern states sank under intensifying Jim Crow regimes, more than 7,000 blacks participated in the 1889 Oklahoma land rush, and approximately 100,000 more followed during the next two decades, to establish...


\textsuperscript{166} Grossman, \textit{supra} n.125 at 23-24.

\textsuperscript{167} \textit{Emmett J. Scott, Negro Migration During the War} 3 (1920).
approximately 25 black towns in that state.\textsuperscript{168} Black migration out of the South increased dramatically in the 1890s, and about 185,000 people went North that decade. During this period, blacks encountered a steadily increasing number of sundown towns forming across the North and West, causing most to seek refuge in urban centers such as New York, Philadelphia and Chicago.\textsuperscript{169}

As conditions worsened in the South, they also worsened in the North, where cities grew increasingly segregated and violent for blacks, and increasingly instituted discrimination in public accommodations and segregation in schools.\textsuperscript{170} When the outbreak of World War I in 1914 created a labor shortage in northern factories and abruptly halted European immigration to the United States, however, U.S. factories stood to gain spectacular profits from orders stimulated by war mobilization and required labor. For the first time, northern employers opened their doors to women and blacks in large numbers. While northern states remained hostile environments for black people in many respects, the new possibility of work and subsistence, even under conditions of subordination, made migration northward an option where it had not been before.

When new employment opportunities appeared in the north, the “unjust treatments enacted daily on the streets, street cars and trains… [began to drive] the Negro from the South,” in the words of a black church elder in Macon, Georgia.\textsuperscript{171} As Emmett J. Scott writes, though most southern black people wished “to escape from the oppressive social system of their section,” “not until fifty years after the privilege was granted negroes to go where they pleased did they begin to make a sudden rush for the northern states.”\textsuperscript{172} They could not escape before because, he explains, of “the very hard fact that, though the North afforded larger privileges, it would not support Negroes.”\textsuperscript{173} As one Mississippian explained, “[b]efore the North opened up with work, all we could do was move from one plantation to another in hope of finding something better.”\textsuperscript{174} James R. Grossman cautions against trying to separate out “push” and “pull” factors that drove the Great Migration, or to artificially try to distinguish “economic” and “social” factors. In 1918, Carter G. Woodson argued that it was unclear both whether blacks

\textsuperscript{168} Grossman, \textit{supra} n.143 at 24-25.
\textsuperscript{169} \textit{Id.} at 32-33; Loewen, \textit{supra} n.147 at 80-84.
\textsuperscript{170} Klarman, \textit{supra} n.160 at 12.
\textsuperscript{172} Scott, \textit{supra} n.148 16-17.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} Grossman \textit{supra} n.143 at 18 (n.18).
would not long before have fled the South and its oppression if given an alternative, or if they would have stayed in the South in spite of new jobs in the North had they been treated “as men.”

Although southern lawmakers had relied on northern intransigence, under a change in conditions external to the south, the Jim Crow laws that made life for black people intolerable began to serve a self-deportation function. This conversion of the function of the legal regime underscores, first, how primary the function of subordination is to the operation of self-deportation laws. Second, the functional similarity between Jim Crow laws and self-deportation laws after new options in the north triggered migrations from the south highlights the way that self-deportation policy operates according to a logic of relativity within a larger scenario. As a result, external conditions can influence what results the policy achieves. At the same time, it shows that a major limiting condition of the policy is that it can only work when the targeted group has somewhere else to go. Where there exists an alternative, laws that subordinate minority groups will drive people out, whether that end is intended by legislators or not. As a group of migrants leaving Louisiana told W.E.B. Du Bois in 1917, they were “willing to run any risk to get where they might breathe freer.”

III. DEPORTATION AND SELF-DEPORTATION AS COMPLEMENTARY SYSTEMS: THE RISE OF THE MODERN REMOVAL SYSTEM

Part III offers a new narration of a well-known story about the rise of the modern deportation system. It shows that this system arose within a landscape of immigration regulation and removal policy dominated by self-deportation techniques, and has never operated independently of them. It further demonstrates that historically, the state resorted to direct removal methods, and indeed established the modern deportation system, in order to supplement and to fill in gaps left by self-deportation policy, rather than the reverse. Even before the establishment of the modern deportation system, Indian removal culminated in the famous mass deportations of the nineteenth-century because of the government’s ultimate lack of control over migration under the indirect methods it had by then employed for centuries. Then, by creating the modern deportation system to deal with the arrival of non-white immigrants in increasing numbers during the late nineteenth century, the government not only supplemented self-deportation policy with direct removals, but also altered the scope of self-deportation policy by introducing a new dimension through which it could operate—through the threat

---

175 Grossman, supra n.143 at 14; CARTER G. WOODSON, A CENTURY OF NEGRO MIGRATION 169 (1918).

of deportation. In other words, by establishing the modern deportation system, it expanded the range of how self-deportation policy could work, and developed techniques that represented a compromise between them, such as “voluntary repatriation,” which it exercised vigorously during the period of the Great Depression. Together, these techniques comprise the range of the government’s removal techniques in the modern era, and without understanding the role, capacities and limitations of self-deportation, our understanding of the government’s immigration system is incomplete.

Before turning to the famous history of Chinese Exclusion, it is worth observing that the government’s attempt to accrue some control over an unwieldy indirect removal regime by resorting to direct deportation finds a precedent within the first example of self-deportation law and policy discussed above: Indian Removal. Even before the establishment of the modern deportation system, the culmination of two centuries of indirect Indian Removal policy provides an early illustration of how the government turned to direct removal, or mass deportation to supplement self-deportation methods. By the time of the disastrous mass deportation of over 18,000 Cherokee across several hundred miles known as the “Trail of Tears,” “the bulk of Indian removal had already occurred.” As we saw above, Indian Removal proceeded principally through indirect methods for two centuries. Self-deportation strategies continued to be the backbone of Indian removal policy in the United States during its first few decades. While federal government officials “discussed speeding up the process of dispossession,” as politics professor Paul Frymer notes, for a few decades, they “remained content to move people via individual treaties and voluntary emigration, efforts that slowly but exhaustively removed Indian title and communities from lands east of the Mississippi.”

However, soon after the establishment of the United States, new circumstances stirred new dissatisfaction with the gradual, incomplete results of indirect removal that led ultimately to the infamous mass expulsions of the nineteenth

---

177 See 2 AMERICAN STATE PAPERS INDIAN AFFAIRS 123-4 (Lowrie & Franklin eds. 1834); Ronald N. Satz, The Cherokee Trail of Tears: A Sesquicentennial Perspective, 73 Georgia Historical Quarterly 73:3 (1989). During the first three decades of the nineteenth century, the federal government engaged in ninety-one transactions to purchase lands from weary tribes; between 1795 and 1838, the federal government spent more than $80 million to purchase 420 million acres of land from tribes. Office of Indian Affairs, J. R. POINSETT, INDIANS REMOVED TO WEST MISSISSIPPI FROM 1789, H.R. Doc. No. 25-147(3rd Sess. 1839).
century. First, the new federal government urgently desired to take actual possession of all the lands the British had surrendered to it under the Treaty of Paris in order to use it to pay off its considerable war debt. Second, the blunt tool of self-deportation had also allowed settlers to take possession of much but not all of the lands within eastern states’ territorial boundaries. In 1825, the War Department estimated that nearly 54,000 native people, including Cherokees, Choctaws, and Creeks, still lived within the boundaries of Georgia, Tennessee, Alabama and Mississippi, and New York. The Cherokees still held 5.2 million acres of fertile land in Georgia, while the Choctaw and the Chickasaw held 15.7 million acres in Mississippi. As Banner writes, “Americans now wanted to obtain the Indians’ land more quickly, too quickly for the old method of patient, parcel-by-parcel purchasing. There were now too many emigrants to the west, and too much need for the federal revenue the land promised to bring in, to wait for game to be driven away.”

After its purchase of 530 million acres west of the Mississippi in 1803, Congress had authorized the President to promise eastern tribes land in the Louisiana Territory if they would relinquish their own. This compromise represented a form of negotiation akin to “voluntary repatriation,” insofar as the federal government conceded to pay for part of the costs of removal while relying on the self-deportation to relieve it of additional expenses that mass deportation would require. The government also therefore overcame a limitation of self-deportation policy—people’s inability to leave without somewhere else to go—by supplying tribes with an alternative destination. Consequently, between 1817 and 1821, the

---

178 For example, like many scholars, Kanstroom uses the term to refer to the direct removal when he writes, “[t]he repatriation of Mexicans was a racial expulsion program exceeded in scale only by the Native American removals of the nineteenth century.” Kanstroom, supra n.56. However, as Banner observes, “If the 1830s were an era of removal, so too were the previous two centuries,” for “most of the features of U.S. government policy that are conventionally thought to make up Indian removal were nothing new.” Banner, supra n.79 at 192.

179 First, states sought to establish total jurisdiction within their territories by more thickly settling their lands. But though the white and black settler population in Georgia almost doubled between 1790 and 1800, and more than doubled again between 1800 and 1820, the Creeks and Cherokees refused to leave. Banner, supra n.79 at 195 (n.8). Annals of Cong. 1644 (1820).

180 1 Reg. Deb. app. 63 (1825).

181 1 Reg. Deb. app 61 (1825).

182 Banner, supra n.79 at 147.

183 2 Stat 283 (1804); American State Papers, 2:124-125.
federal government engaged in ten such exchanges with some Cherokees, Shawnees, Delawares, and Kickapoos.\(^{184}\) Through the 1820s, members of many tribes, including the Oneidas, Kickapoos, Choctaws, and Creeks, continued to cede their land to the United States.\(^{185}\)

Impatient southeastern states, however, responded to what they perceived as federal inaction with the extension laws, or self-deportation policies described above in Part IIB.\(^{186}\) Federal and subfederal removal efforts ultimately came into concert when the federal government acquiesced to the southeastern states and embraced direct expulsion of the tribes that remained within their territorial limits. In 1830, Congress finally passed the Indian Removal Act, which set up no infrastructure for direct removal, but appropriated $500,000 for that purpose.\(^{187}\) The Act therefore for the first time financed government action to supplement and complete the indirect processes by which Indian Removal had proceeded the past two centuries.\(^{188}\) In orchestrating direct, mass removal of tribes, the government sought to complete the removal that had so far proceeded through self-deportation strategies. Though indirect strategies had made it possible for the colonies to gain the territory upon which the United States established its sovereignty, they could not by themselves carry removal far enough to satisfy the states and


\(^{185}\) MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL 69-141 (1982); 7 Stat 215 (1821); “Creek Indians,” Niles’ Weekly Register 22 (1824): 223; US Commissioners to Creek Chiefs, 9 Dec. 1824, Document TCC008, SNA. In 1828, the Indian Affairs Committee told the secretary of war that the costs of deporting 800 of the Creeks west had been “enormous”: “Starving Indians must be fed, and naked ones clothed, and sick ones physic ked and nursed, and, so far as the fund will allow of it, dead ones buried.” Thos. L. McKenney to James Barbour, Secretary of War, HR Doc. No. 44 (Jan 3, 1828), 5.

\(^{186}\) As Banner comments that “[i]t was only a matter of time before frontier state governments, answerable to white settlers bordering on Indian land, began ratcheting up the pressure on the non-selling tribes by threatening to make life considerably more difficult for Indians who refused to sell their land.” Banner, supra n.79 at 213.

\(^{187}\) U.S. Statutes at Large 4:411-12.

\(^{188}\) Banner, supra n.79 at 191, 192, 193, 227 (“removal was going on long before the so-called era of removal, and would go on long afterward.”). See also Prucha, at 88 “Nor was the relation of the United States with these groups in the 1830s, after the passage of the Removal Act, a new departure. Rather, it was a continuation of policies and actions that had been going on for more than three decades (although without doubt new impetus was given by the 1830 legislation).”
federal government to whose sovereignty persistent tribal presence continued to present an unwelcome challenge.\textsuperscript{189}

Just a few decades later, the modern deportation regime arose in the late nineteenth century in response to subfederal attempts to expand their removal power, both direct and indirect. Before the late nineteenth century, mass deportation plans for free slaves had failed, and federal approaches to removal consisted largely of indirect self-deportation strategies-- with the notable exception of the mass deportation of tribes just described. Colonies and states had provided for the deportation of individuals “likely to be a public charge.”\textsuperscript{190} The arrival of Chinese people in the United States as a result of economic instability and Western imperialism in their homelands in the mid-nineteenth century sparked a subfederal struggle to remove them. In his 1852 message to the legislature, for example, California Governor John Bigler first advocated for direct removal and Chinese exclusion, arguing that states had a right to bar the entry of certain classes of people.\textsuperscript{191} After he called for the disqualification of Chinese people as jurors and witnesses in California courts, the California Supreme Court granted part of his wish two years later in \textit{People v. Hall}.\textsuperscript{192} In 1856, Mariposa County ordered all the Chinese within its jurisdiction to leave or be whipped and then removed “by force of arms.”\textsuperscript{193} California passed an “Anti-Coolie” Act in 1862.

In response, the Supreme Court began to establish federal exclusivity in the field of immigration law to prevent states from bringing the United States into conflict with foreign nations, as in its 1875 decision in \textit{Chy Lung v. Freeman}. There, the Court found a California statute requiring shipmasters pay a bond for certain passengers to be aimed at making the Chinese “stay out”; it declared, “very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether.”\textsuperscript{194} The Court continued to strike down subfederal laws akin to self-deportation laws, in that they were designed to harass, subordinate, and encourage over the next decade. In 1879, Supreme Court Justice Stephen Johnson Field in 1879 found San Francisco’s...
“Pigtail Ordinance,” to violate the Equal Protection Clause because it inordinately affected Han Chinese prisoners who wore their hair in long braids.  

Then, in 1886, the Court in *Yick Wo v. Hopkins* similarly struck down a San Francisco law requiring permits to operate a laundry in a wooden building that would disproportionately affect the Chinese population, finding that the law “indicate[d] a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety.”

At the same time, Congress began to build a “coherent federal deportation system” with the passage of laws to prohibit the entry of Chinese immigrants, most notably the Chinese Exclusion Act of 1882. In its early years, the new federal deportation system did not operate extensively, focused on immigrants’ pre-entry conduct and contained statutes of limitation restricting the reach of its laws. In the same period, Congress pursued measures designed to make life more difficult for Chinese people, such as the 1892 Geary Act, which required them to obtain a certificate of residence to prove their presence in the country was authorized. Notably, “show me your papers” laws at this time required an affirmative act on the part of immigrants, since the government did not issue the

---

197 Hirota, *supra* n.190 at 9; Kanstroom, *supra* n.56 at 92-95; DANIEL TICHE, *DIVIDING LINES* 87-113 (2001); Cox and Posner, *supra* n.15 at (“the U.S. federal government placed few formal restrictions on immigration prior to the 1870s.”); MAI NGAI, *IMPOSSIBLE SUBJECTS* 58 (2014) (counting poor laws and the Alien and Sedition Laws as antecedents, and noting that other than these, “the nation operated without federal regulation of immigration for the better part of the nineteenth century. Unfettered migration was crucial for the settlement and industrialization of America, even if the laboring migrants themselves were not always free.”); Adam B. Cox and Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 483 (2009) (“For much of the nineteenth century, few immigration rules existed, and the treaty power played a central role in the adoption of some of the earliest federal rules regulating immigrant admissions.”).
198 Act of May 6, 1882 (The Chinese Exclusion Act), ch. 126, §12, 22 Stat. 58, 61 repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (making deportable any Chinese person who entered unlawfully after its adoption); Act of Mar. 3, 1891, ch. 551, §11, 26 Stat. 1084, 1086 (generalizing the provisions of the Act of 1882 to make deportable “any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing”). The first federal immigration controls that the Page Act introduced in 1875, as Cox and Rodriguez observe, neither provided for deportation nor made mention of immigrants’ post-entry conduct. Cox and Rodriguez, *supra* n.197 at 512, 514; Act of Mar. 3, 1875, ch. 141, §1, 18 Stat. 477, 477. They note that the anomalous Alien and Sedition Acts of 1798, which authorized the President to deport noncitizens he deemed dangerous and expired two years after its passage, is one exception. Act of June 25, 1798, ch. 58, 1 Stat. 570, 570-71.
first social security numbers (and cards) until the 1930s and birth certificates did not become common until the Second World War. In response, the Chinese community engaged in massive civil disobedience and refused to apply for such certificates, and successfully prevented the government from enforcing this law.\footnote{Act of May 5, 1892 (Geary Act), ch. 60, §3, 27 Stat. 25, 25 (creating a presumption that any Chinese resident was deportable “unless such person shall establish, by affirmative proof, … his lawful right to remain in the United States”). See LUCY SALYER, LAWS HARSH AS TIGERS 43-68 (1995) (describing development of documentation requirements).}

Shortly thereafter, Congress began to build federal direct removal power by expanding the grounds of deportability. In particular, it created provisions targeting post-entry conduct: between 1907 and 1922, Congress made deportable immigrants who engaged in prostitution, advocated anarchy, committed crimes of moral turpitude, or had convictions for importing or dealing opium, respectively.\footnote{Immigration Act of Feb. 20, 1907, ch. 1134, §3, 34 Stat. 898, 899-900; Immigration Act of 1917, ch. 29, §19, 39 Stat. 874, 889 (making deportable “at any time within five years after entry… any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States”); Immigration Act of 1917, ch. 29, §19, 39 Stat. 874, 889 (making deportable any alien “hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed any time after entry”). As Cox and Rodriguez note, the five year statute of limitations is one of the only such provisions that remains on the books. Cox and Rodriguez, supra n.179 at 515. Act of May 26, 1922, ch. 202, §2(e), 42 Stat. 596, 597.}

It then began to eliminate the statutes of limitations it had originally attached to such provisions in 1910, making people indefinitely deportable for these reasons.\footnote{Act of Mar. 26, 1910, ch. 128, §3, 36 Stat. 263, 264-65; Act of Oct. 16, 1918, ch. 186, §2, 40 Stat. 1012, 1012.} Still, the Immigration Service oversaw few deportations during this period-- only a few hundred aliens a year between 1892 and 1907, and an average of two or three thousand annually between 1908 and 1920,\footnote{Ngai, supra n.197 at 59.} and most of these deportees came from asylums, hospitals and jails.\footnote{Id.; during the Palmer Raids in the winter of 1919-1920, authorities arrested ten thousand alleged anarchists and deported around five hundred. WILLIAM PRESTON JR., ALIENS AND DISSENTERS (1963).}

As Mai Ngai writes, it was not until the 1920s that deportation “came of age.”\footnote{Ngai, supra n.197 at 146.} The Immigration Acts in 1921 and 1924 imposed numerical restrictions
on immigration for the first time, which “stimulated the production of illegal aliens” to “mass proportions.” Further, the law of 1924 finally eliminated the statutes of limitations on deportation for nearly all forms of unlawful entry and made it possible to deport any person for entering without a valid visa or inspection after July 1st of that year. 205 Because employers had found themselves in need of a cheap labor source after stemming the flow of immigrants from Asia through Chinese Exclusion, immigration inspectors had not regulated Mexicans entering across the southern border to work in railroad construction, mining and agriculture during the first two decades of the twentieth century. 206 However, after the first World War ended, the Immigration Service began to require Mexicans apply for admission to the United States at lawfully designated points of entry. 207 In 1925, Congress created a land Border Patrol, a force with little supervision, no formal training, and which quickly assumed the character of criminal pursuit and apprehension despite being charged with enforcing civil laws. 208 By 1928, the Bureau was exhausting its annual fund for deportations so quickly that the Assistant Secretary of Labor requested a budget amounting to more than ten times the appropriation of the previous year. 209 In 1929, Congress made unlawful entry a misdemeanor, punishable by imprisonment, fine, or both, and made a second unlawful entry a felony carrying double the consequences of the first. 210 The law made illegal entry a separate criminal offense, and criminal conviction made future reentry impossible. 211

As the national deportation system blossomed, it gave indirect methods of removal new life. First, as they came into being, deportation laws immediately began to serve the double purpose they have now: in addition to providing for actual deportation, they also presented the threat of detention and deportation and energized pre-existing anti-immigrant movements. New deportation laws also made expulsion by deportation more expensive than it had previously been, since

205 Immigration Act of May 26, 1924, Sec. 14.
206 Ngai, supra n.197 at 64.
207 Id. at 64 (n.31).
211 Between 1930 and 1936, the Immigration Service brought over 40,000 criminal cases against unlawful entrants and won convictions in about 36,000, or 90 percent of them. INS Annual Reports, 1929-32; Secretary of Labor, Annual Reports, 1933-36.
courts now oversaw proceedings that required individual hearings. The United States thus sought more efficient means to remove immigrants during this period, including both self-deportation and methods that combined direct and indirect strategies, especially “voluntary repatriation,” or “voluntary departure” programs. Under such programs, the government drew on lessons of the past to lean heavily on a compromise in-between direct and indirect removal methods: where they could not field the entire cost of rounding up, processing, and deporting a community, they sought that community’s cooperation in appearing for the deportation with the promise of covering some, but not all of its costs. Self-deportation techniques helped the government to recruit such deportees with the promise of sharing some of the costs of what seemed like imminent removal.

The government removed the vast majority of people during the 1920s through voluntary departure programs rather than direct deportation. Most were families including many citizen children. In the early 1920s, the federal government worked with the Mexican government, which welcomed repatriation, to create a program with the network of Mexican consuls in the United States that provided “free return transportation” and “subsistence” to the Mexican interior to around 100,000 people between 1920 and 1923. In 1927, the Immigration Service again offered “voluntary departure” to aliens without criminal records to avoid the time and expense of formal deportation proceedings. Consequently, the number of people the government expelled each year rose from 2,762 in 1920 to 9,495 in 1925, and to 38,796 in 1929. Many of these people were individuals without proper visas, and a huge proportion were of Mexican descent.

During the Great Depression, the United States’ removal efforts were both federal and subfederal, direct and indirect. Economic insecurity inflamed white Americans’ racial hostility toward Mexicans, even though immigration from Mexico had abated and regardless of whether people were in the country legally or not, or were citizens. By the early 1930s, the INS was apprehending nearly five times as many suspected unauthorized aliens in the Mexican border zone than in the Canadian one. Border Patrol aggressively apprehended and deported large numbers of Mexican laborers they encountered on roads and in

212 Kanstroom, supra n.56 at 216.
213 Ngai, supra n.197 at 72 (n.58).
214 Kanstroom, supra n.56 at 216.
216 Ngai, supra n.197 at 71.
217 Id. at 70 (n.51).
towns, often in “sweeps” of several hundred people at a time. Federal immigration agents also conducted surprise raids as a simultaneous self-deportation and deportation enforcement tactic. U.S. Secretary of Labor William Doak early argued that deporting Mexicans would create jobs for citizens. Claiming that one quarter of around 400,000 “illegal aliens” in the country were immediately deportable under existing law,\textsuperscript{218} Doak encouraged local immigration officers, law enforcement agencies, and newspapers to “join forces to publicize deportation raids, frightening many Mexicans into self-deportation.”\textsuperscript{219}

Subsequently, state and local governments introduced a stream of laws to make life for Mexicans intolerable, to restrict the migration of Mexicans into their jurisdictions and to encourage them to leave. California towns passed settlement laws that restricted relief to residents in order to deny welfare to unemployed migrant workers. Several towns, including the city of Los Angeles, tried to keep indigent migrants from entering by stationing police at “bum blockades.”\textsuperscript{220} Arizona passed a law requiring citizenship for all public employees, and punishing employers who violated this law with a fine or imprisonment.\textsuperscript{221} Colorado Governor Edwing C. Johnson led a crusade to reserve “the possibility of employment… for only native sons,”\textsuperscript{222} proclaimed martial law in the southern counties in 1936, and instructed officers of the Southern Colorado Military District to prevent Mexican workers alleging they had labor contracts from entering the state.\textsuperscript{223} In El Paso, Texas, Anglo-americans sought to keep commuters from Ciudad Juarez from getting to their jobs by demanding the International Bridge close daily between 6pm and 10am; and local relief agencies reported lists of Mexicans on their rolls to immigration authorities for deportation, including citizens and legal residents.\textsuperscript{224}

Federal, state and municipal agents frequently collaborated in raids that involved the arrest and detention of scores of people, the interrogation of hundreds,
and intimidation tactics that included circling and barricading in residents of colonias.\textsuperscript{225} The head of the L.A. Citizens Committee on the Coordination of Unemployment Relief, Charles Visel, commended the Immigration Service’s “efficiency, aggressiveness, resourcefulness” in using these tactics, stating: “The exodus of aliens deportable and otherwise who have been scared out of the community has undoubtedly left many jobs which have been taken up by other persons (not deportable) and citizens of the U.S. and our municipality.”\textsuperscript{226} These raids stoked a climate of fear that fueled both self-deportation and the success of local voluntary repatriation programs in the Southwest and Midwest. Los Angeles county relief agencies opened negotiations with the Southern Pacific Railroad to organize voluntary departure programs, and discovered that “in wholesale lots, the Mexicans could be shipped to Mexico City for $14.70 per capita... less than the cost of a week’s board and lodging.”\textsuperscript{227} California subsequently removed over 400,000 Mexicans by train during the early 1930s.\textsuperscript{228} Relief workers pressured U.S. citizens of Mexican heritage to repatriate, urging them to think of their families’ dependency on them.\textsuperscript{229} The vast majority of those who left spoke English and many had been in the country for at least a decade; an estimated 60 percent were citizens, children, or both.\textsuperscript{230} The INS organized a final “voluntary” deportation at the end of the decade, and transported 1,200 Mexicans from Texas to the border in Brownsville for removal to Mexico, mostly families, and about half of whom were citizens, many of them children.\textsuperscript{231}

Federal, state and local governments collaborated in the mass expulsions of this era, which occurred through the creation of a social environment saturated by racial animus and terror.\textsuperscript{232} They removed more than one million people of

\begin{itemize}
  \item \textsuperscript{225} Kanstroom, \textit{supra} n.56 at 219 (describing raid on La Placita in early 1931 by U.S. immigration officers and Los Angeles police); Ngai, \textit{supra} n.179 at 73 (n.61) (describing raid of a colonia in San Fernando by Immigration Service and deputy sheriffs).
  \item \textsuperscript{226} Ngai, \textit{supra} n.197 at 73 (n.62).
  \item \textsuperscript{227} Kanstroom, \textit{supra} n.56 at 217-18, fn 369, 371.
  \item \textsuperscript{228} Ngai, \textit{supra} n.197 at 72.
  \item \textsuperscript{229} Id. at 73.
  \item \textsuperscript{230} Ngai, \textit{supra} n.197 at 72.
  \item \textsuperscript{231} Id. at 75.
  \item \textsuperscript{232} See Balderrama & Rodríguez, \textit{supra} n.221 at 1 (“Laws were passed depriving Mexicans of jobs in the public and private sectors. Immigration and deportation laws were enacted to restrict emigration and hasten the departure of those already here. Contributing to the brutalizing experience were the mass deportation roundups and reparation drives. Violence and ‘scare-head’ tactics were utilized to get rid of the unwanted horde. An incessant cry of ‘get rid of the Mexicans’ swept the country.”).
\end{itemize}
Mexican ancestry through deportation and voluntary departure, but countless more people left their homes without the government’s help, because life had become unbearable.\textsuperscript{233} Through this collaborative effort, that is, federal, state and local governments drew on both direct and indirect strategies, and most of all, on methods that combined the two, with an eye toward maximizing effectiveness and minimizing cost. As in the present moment, the fever for removal and subordination that drove these efforts sprung from economic crisis and anxiety about the majority’s ability to maintain its privileges and survive.

Soon after, the Immigration and Nationality Act (INA) of 1952 first laid out the fundamental form of the detailed code that still governs entry, exit, and authorizes presence in the United States.\textsuperscript{234} Over the second half of the twentieth century, through a series of restrictive amendments to this code, Congress continued to expand the grounds of deportability to astronomic proportions, and with it, Executive discretionary power. During this time, the unauthorized population grew as a result of traditionally lax enforcement of the southern border facilitated the labor needs of U.S. employers for most of the twentieth century,\textsuperscript{235} but also by legislative acts to deauthorize more and more persons already present in the United States. As Adam Cox and Cristina Rodriguez have shown, Congress expanded restrictions on entry and presence so far beyond the logistical ability of the Executive to enforce them—adding lawful entrants who overstayed their vi-

\textsuperscript{233} Kanstroom, \textit{supra} n.56 at 215.

\textsuperscript{234} Today, the Act is codified at INA §§ 101-507, 8 U.S.C. §§ 1101-1537 (2006); Pub. L. No. 82-414, 66 Stat. 163.

\textsuperscript{235} Cox and Rodriguez, \textit{supra} n.197 at 463, n.11.
sas, and those who engaged in an increasingly wide range of post-entry conduct— that immigration law on the books became mostly unenforced. In 1996, for example, Congress surprised a huge population of lawful entrants by de-authorizing their presence, and in addition, narrowed long-standing pathways to obtaining authorized status, in addition to long-standing forms of relief such as cancellation of removal. The consequence of the new laws on the books was to render "a huge fraction of previously legal immigrants deportable at the option of the Executive." The power of the Executive office to choose enforcement priorities, under this circumstances, gave it de facto control over the shape of the immigration regime. Between one quarter and one third of all resident non-citizens remain technically deportable, and each of these individuals’ fates, under the primary control of the Executive.

While these legislative changes did spur the Executive branch to ratchet up enforcement concurrently, the scale of legislative transformation so outsized the logistical possibility of enforcement that the Executive could do little to deflate

---


238 IIRIRA, Motomura, supra n.19 (2014) at 28.

239 Cox and Rodriguez, supra n.197; see also Motomura, supra n.19 (2014) at 26.
its newly swollen power over immigration. To provide some perspective, between 1993 and 1999, the number of agents on southern border more than doubled—growing from 3,400 to 8,200—and Congress almost tripled the budget of the Immigration and Naturalization Service, from $1.5 billion to $4.2 billion. By 2010, the combined budgets of the successor agencies of the INS, which was dissolved and reconstituted as the Department of Homeland Security (DHS) in 2003, exceeded $20 billion.\footnote{Motomura, supra n.19 (2014) at 50.} Despite this massive growth, in 2010, Immigration and Customs Enforcement (ICE), which took over the INS’ enforcement duties in 2003, had the capacity to arrest only between 4-6% of the estimated 11.2 million persons whose presence in the United States was then unauthorized.\footnote{Id. at 27; Morton Memo 2010.}

However, while the deportation system in this way grew by leaps and bounds, it did so against the background of continuing federal containment of state efforts to pass self-deportation legislation in the tradition of \textit{Chy Lung, Ho Ah Kow}, and \textit{Yick Wo}. The cases that resulted from this containment include \textit{Takahashi v. Fish \& Game Commission}, in which the Court in 1948 struck down a California statute that had revised a former statute forbidding alien Japanese from receiving commercial fishing licenses, to apply to aliens ineligible to citizenship instead;\footnote{\textit{Takahashi v. Fish \& Game Commission}, 334 U.S. 410 (1948).} \textit{Graham v. Richardson}, in which the Court in 1971 invalidated an Arizona law requiring citizenship or fifteen years of residence to receive welfare benefits;\footnote{\textit{Graham v. Richardson}, 403 U.S. 365 (1971).} and \textit{Plyler v. Doe}, where the Court in 1982 struck down a state statute denying funding for unauthorized children and a municipal school district’s attempt to charge unauthorized children a $1,000 annual tuition fee.\footnote{\textit{Plyler v. Doe}, 457 U.S. 202 (1982).} These cases, all decided on Equal Protection grounds, now constitute a famous line of so-called “alienage laws,” which have been treated largely as analytically distinct from the self-deportation tradition to which they belong.

\textbf{CONCLUSION: A NATION SHAPED BY SELF-DEPORTATION}

In contrast to mythologies about the nation’s values and historic traditions of welcoming immigrants, the history of the policy shows that government con-
TEMPLATION of mass expulsion and government subordination of unwanted outsiders is a recurrent feature in U.S. history.\(^{245}\) It illustrates the indirect logic by which the policy works and limits possibilities in people’s lives. It illuminates the astonishingly broad impact the policy has had on migration in America, but also the conditions that limit the circumstances under which the policy can work. In particular, historical reexamination of self-deportation shows that this policy has operated by mobilizing and delegating enforcement responsibilities to private actors and other levels of government. This analysis of self-deportation therefore reveals a locus of uncontrolled and hidden power in U.S. migration policy.

However, the failure to appreciate the scope, logic, and limitations of the policy obstructs our ability to perceive how self-deportation dominates in the landscape of removal today. Scholarship that describes self-deportation policy as no more than multiplying enforcement of federal law emphasize the end of removal while rendering the suffering that works as the very core of the tactic invisible. As a result, the range of conditions that the policy’s mechanisms produce, in the absence of a framework for understanding them, are often nebulously referred to as a “culture of fear.” By contrast, scholars and judges who focus on the hardship the laws impose under an alienage analysis do not consider whether imposing such hardship is a legitimate means of achieving a removal aim. Yet examination of the policy’s logic illuminates the very nexus between removal and subordination at the heart of so many debates about the relation between migration and labor control. Even the work that has attended to the social and subordinating function of self-deportation has not recognized the deep historical roots of the policy, or the extent to which it has shaped the conditions of possibility under which the policy operates today. That is, today, self-deportation operates within a landscape characterized by uneven racial distributions of power and property that the policy has helped historically to shape.

Not only does the absence of a comprehensive theory of self-deportation therefore distort our understanding of the scope and character of the policy itself, but it also limits our ability to appreciate the full scope of immigration law and regulation more generally, and its relation to other fields. Through the delegations of power through which self-deportation policy works, the government has distributed costs with violence, and therefore economic advantage. The roots of this policy in Indian Removal draw our attention to how self-deportation strategies underwrote the very creation of landed, private property in America. The continuing development of the policy through efforts to both remove and economically subordinate free blacks and non-white immigrants exposes how it then

\(^{245}\) See, e.g., Kanstroom, supra n.56 at 214 (“The mass deportation of a particular ethnic or racial group would seem to be among the most ‘un-American’ phenomena imaginable. It plainly contradicts pillars of our constitutional legal structure of which we are rightly proud.”).
contributed to ongoing efforts to maintain property and wealth in the hands of a white polity by controlling labor. The policy has achieved these material aims by enacting subordination more consistently than removal; and also, through the creation of the modern deportation system, which has powerful self-deportation effects. Self-deportation’s historical and continuing role in creating and distributing property entitlements clarifies and explains its power to mobilize certain communities in what they perceive to be their own interests and to pit them against others whom they perceive as a threat.

This analysis also importantly describes the precise nature of the relationship between self-deportation and deportation policy. Only by observing how indirect removal strategies work alongside direct removal methods is it possible to understand the full outcomes of interlocking systems. From its inception, the government benefited from indirect as well as direct effects of its deportation system. History reveals that while governments very often utilized self-deportation without deportation as a removal tactic, deportation has never operated except against the background of a self-deportation regime. The history of self-deportation in America indeed suggests that the practice of direct removal and indeed, the modern deportation system itself, arose to supplement the long-established and prevalent technique of self-deportation, rather than the reverse. Far from a marginal, recent experiment with alternatives to the more loudly contested issue of deportation, self-deportation policy forms the foundation of coercive removal policy, atop which deportation policy was built and of which it remains a part.

Historical analysis of the policy also demonstrates that self-deportation is no mere product of a federalism conflict. Rather, it has consistently generated federalism conflicts, but also more significant cooperation between the colonies, states and the federal government, in accordance with David Rubenstein and Pratheepan Gulasekaram’s observation that, “self-deportation, in general, is not something that the federal government disapproves of.”

The election of a President in large part based on his promise to take a hard line on “illegal immigration” has elevated the United States self-deportation regime to federal level once again. Further, the new alignment of state and federal removal interests has only opened up the legal avenues through which self-deportation policy can function, and as a result of litigation over recent subfederal self-deportation legislation, the Executive enjoys a new level of deference in the realm of immigration.

President Trump’s administration has ramped up threats about immigration enforcement beyond the extent to which it has actually ramped up immigration enforcement, and the most significant impact of current immigration policies

may lie in their indirect or self-deportation, rather than direct effects.\textsuperscript{247} Innumerable individuals and families are leaving their homes, whether to relocate to other countries or to other, more immigrant-protective states, in response to policy announcements and actions that include: the Executive’s vows to increase the immigration judges in the country by 19\%\textsuperscript{248} and to add 5,000 agents to Customs and Border Patrol (CBP) and 10,000 agents to Immigration and Customs Enforcement (ICE)\textsuperscript{249}; his termination of Temporary Protected Status for individuals from Haiti and El Salvador\textsuperscript{250}; his pursuit of travel bans against persons from a number of majority Muslim countries\textsuperscript{251}; his threats of raids against sanctuary cities and states; his promises to prosecute individuals for denaturalization and expand expedited removal\textsuperscript{252}; and finally, his promises to build a 2,000 mile border wall between the United States and Mexico.\textsuperscript{253}

While President Trump’s office may have neither the means nor the funds to execute all of these plans, these policy announcements comprise more than hot


air. They have emboldened and activated networks of anti-immigrant vigilante private actors; they have heightened the risks of apprehension, harassment, violence, and error within an already troubled immigration law system; and they have contributed to a national environment in which hate crimes and white supremacist organized activity are surging. These effects suggest that, contra Kobach’s arguments of a decade past, Trump’s immigration policy does not primarily depend on more direct enforcement. Rather, he appears to be deliberately and tactically constructing a self-deportation regime calculated to ignite private action and delegate intimidation to the public, and perhaps above all, to cause people’s removal, deter their entry, and restore a social order of racial subordination, all at the lowest possible cost to the government. 254

For this reason, above all others, it is critical to attempt to understand the limits of self-deportation policy. The policy of self-deportation continues to hold its power in part because the mechanisms by which it operates do so in largely unspoken, unexamined ways. As much as a misery-based policy, self-deportation is a fear-based policy. Since the policy itself banks on the tendency of fear to foment irrationality, analyzing its limitations based on the theory of its structure and logic, as I have laid it out here, is essential for understanding the weakness of the policy when it is drawn out of the shadows and exposed to the light.

First, the enactment of self-deportation policies follows from the convergence of multiple political actors with divergent interests, who may differently prioritize the results of the policy—removal, deterred entry, and subordination. When the aim is indeed removal, however, an efficacious self-deportation policy requires that people have somewhere else to go. As we saw in the aftermath of the recent subfederal iteration of the policy, people frequently return to their homes even after they have first fled. While some who stay may stay out of extraordinary resilience and a commitment to their homes, family, and community where they live, many stay because they have no other real choices. This limitation suggests that a way to make people remove to other countries, rather than to other states—if that is indeed the goal—would be to pursue efforts to make those countries safe, vibrant, viable places to live, rather than the contrary. For the more dangerous, economically difficult and insupportable life in immigrants’ countries of origins remains, the less likely they will be to self-deport, and the more likely a national self-deportation regime will tend to transform the country in the direction of an environment like the south under Jim Crow.

Second, self-deportation can never independently achieve mass removal. Structurally, the government retains very little control over the actual process of removal. As we have seen in its historical iterations, it depends heavily upon private actors serving a myriad of functions to ensure that the cumulative effects

254 Safire observed that self-deportation proposes “the most cost-effective way to change behavior is to make life unbearable under present behavior.” Safire, supra n.1.
of its policies create an environment in which a community is so little able to sustain itself that its members will leave. Further, transportation and relocation are expensive, and shifting the cost of migration from the government to individuals and families frequently means that people cannot go far, and frequently merely flee the bounds of a hostile locality for another city or state. Both the federalist system and the sheer territorial expanse of the country ensure that the policy will operate irregularly across it, even if the regime is national. The degree to which self-deportation policy can be effective therefore depends on a number of variables, but even under the “best” of circumstances, from the perspective of the perpetrating government, self-deportation ultimately requires deportations to both supplement and fuel its effects.

This limitation means that even when self-deportation policy plays a more marginal role in removal and deterred entry, it will still subordinate the targeted group and make it vulnerable to exploitation and violence. However, because the government relies so prominently on the penumbra effect of its state expressions of hostility, or on private actors who will repeat those gestures in countless institutional and extra-institutional contexts, it will fail more spectacularly in proportion to the number of private actors on whom the government relies do not act in the ways that the government anticipates. Both the targets of self-deportation laws and other private actors can engage in successful forms of resistance by working together to make life more viable for communities at whom the laws are aimed, in ways that track and counter the ways that the laws attempt to attack them. Sanctuary policies are perhaps the most visible and powerful institutional response to the effects of federal self-deportation. They too, have a powerful expressive function that can directly counter federal expressions of hostility, in keeping with the welcoming role that Rodriguez has identified as the province of state and local governments with respect to immigration. However, the state is not the only way that benefits are distributed in modern society. Another background condition that self-deportation advocates appear to take for granted is the weakness of modern social relations, and that private citizens will not significantly aid one another in resisting a policy that seeks to disintegrate them still further. But the government retains little control over this factor.

With respect to the way that self-deportation policy produces subordination, the more these limiting factors blunt the efficacy of the tool of self-deportation to spread fear and effect subordination, the more the government will be forced to rely upon the system that does remain within its control. That system, which supplements self-deportation and historically, has made up for its short-falls, is

255 See, e.g., supra Part III (Chinese community refused to cooperate with the requirements of the Geary Act).

256 Rodriguez, supra n.42.
the deportation system. Again, the deportation system produces fear as well as deportation; in this sense, the modern deportation regime works as a powerful form of social control precisely through its indirect, rather than direct functions. The possibility of countering the subordinating effects of the deportation system, and of self-deportation policies more broadly, therefore, are largely left to us—that is, to our ability and willingness to organize, to mobilize, to form community, and to protect one another.

With respect to the goal of removal, however, if, by the actions of private citizens, self-deportation policy is rendered practically useless, the only tool that remains to the government is the slow, expensive process of deportation. As we have seen, historically, the government has found the mass deportation of a population of scale impossible because unfeasible, financially and logistically. The government requires the force of self-deportation to perform the bulk of removal; with nothing but deportation to work with to expel people, it holds a weak hand. In particular, a wave of sustained efforts to enact sanctuary policies across the country could relatively easily overwhelm its resources for challenging them. The government thus has wagered much on the general population’s ignorance about its calculus by relying so heavily on a policy designed to shift both expense and control away from it. It has staked almost everything on a policy whose effectiveness is largely predicated on the lack of public understanding of what the policy is and how it works—that it is driven by fear in an already segregated and atomized society. The policy of self-deportation, in short, is one through which the government has delegated to private citizens the power to render the Executive’s reliance on this policy mere bluster. When it comes to the goal of removal, it has left us with significant room to call his bluff.

---

257 Kanstroom, supra n.56.