

# A Theological Response to the “Illegal Alien” in Federal United States Law

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*For Douglas Corbett Heimburger  
and Elizabeth Holloway Heimburger*



# Abstract

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Today, some twelve million immigrants are unlawfully present in the United States. What response to this situation does Christian theology suggest for these immigrants and those who receive them? To this question about the status of immigrants before the law, the theological literature lacks an understanding of how federal U.S. immigration law developed, and it lacks a robust theological account of the governance of immigration. To fill this gap, the thesis presents three stages in the formation of the laws that designate some immigrants as aliens unlawfully present or illegal aliens, drawing out the moral argumentation in each phase and responding with moral theology. In the first stage, non-citizens were called *aliens* in U.S. law. In response to the argument that aliens exist as a consequence of natural law, Christian teaching indicates that immigrants are not alien either in creation or for the church. In the second stage, the authority of the federal government to exclude and expel aliens was established, leaving those who do not comply to be designated *illegal* aliens. To the claim that the federal government has unlimited sovereignty over immigration, interpretations of the Christian Scriptures respond that divine sovereignty limits and directs civil authority over immigration. In the third stage, legal reforms that were intended to end discrimination between countries allowed millions from countries *neighboring* the U.S. to become illegal aliens. These reforms turn out to be unjust on philosophical grounds and unneighborly on theological grounds. While federal law classes many as aliens unlawfully present in the United States, Christian political theology indicates that immigrants are not alien, the government of immigration is limited by divine judgment, and nationals of neighboring countries deserve special regard.

# Long Abstract

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Today in the United States of America, some twelve million immigrants reside in the country without permission of the federal government. The U.S. government’s judgment that many immigrants are unlawfully present complicates ordinary ways that immigrants and members of host communities relate. Everyday activities like employing an immigrant or working as an immigrant, transporting an immigrant or driving as an immigrant, may become unlawful when the immigrant involved lacks permission to be in the country. Lack of legal status leaves these immigrants in fear of being apprehended, and the great number of these immigrants compromises the rule of law.

Members of the church of Jesus Christ who live in the U.S. encounter these illegal aliens as part of their communities; indeed, many in the churches are themselves classed as illegal aliens. What counsel does Christian theology offer to those mixed up in this state of affairs? Sound theological counsel requires a careful reading of the situation. In response to a lack in relevant theological works, this thesis presents a history of how it came to be that so many could be unlawfully present in the U.S. The thesis presents three stages in the

history of U.S. federal immigration law and the moral argumentation that made the law possible. At each stage, the thesis responds by drawing upon Christian theology.

The introduction surveys the theological literature on unauthorized immigration in the United States, demonstrating what this literature lacks. The tradition of Roman Catholic social thought prizes the dignity of each migrant and encourages solidarity with migrants, but the recent documentary tradition underestimates the goods of peoplehood and government. Those like M. Daniel Carroll R. and James K. Hoffmeier who start with biblical interpretation develop a Christian ethic of loving the stranger and following the law, but they provide little guidance when law and love seem to conflict. Others like William T. Cavanaugh advance critiques of the divisions between nations in light of our destiny to be one church, yet these fail to point to how God might provide and direct multiple peoples and civil authorities. The relevant theological literature on migration leaves us in need of two things if we are to reckon with the problem of the illegal aliens, a history of U.S. immigration law and a political theology that addresses the governance of immigration.

Chapter 1 sets out on this quest for a legal history and a political theology of the alien unlawfully present. Part A presents the move in U.S. law to distinguish *aliens* from citizens. From 1790, the alien is the one who can become a citizen, but by 1891, the law describes “classes of aliens” who shall be “excluded from admission into the United States.” The term “alien” originates in the English common law, where the alien is defined as one who is not a subject of the monarch. Edward Coke’s Report on the 1608 case of *Calvin v. Smith* provides a definitive account of the alien, revealing the separation over time of the term “alien” from terms that might qualify it, leaving the alien as a lone and fixed type.

Coke also describes a relationship of government and allegiance by natural law, so that those outside of this relationship are alien.

Part B of chapter 1 responds by qualifying the understanding of those from other lands as aliens. Karl Barth argues that the divine command does not meet us essentially as a member of one people to whom others are alien. Rather, the divine command meets us as “near ones” on the way to “far ones,” as a member of a particular people seeking to communicate with those far away, who can only be relatively foreign to us because of their shared humanity. Not only by divine providence but in the church are we brought near to those far away: in 1 Corinthians 9, the Apostle Paul writes that the law of Christ frees him and sends him migrating, moving, and adapting to the ways of other peoples to proclaim the gospel of salvation. So long as the church is apostolic, sent out to become like those who are distant, the migrant is not alien to it: rather, there is a likeness between migrant and missionary. So, both a doctrine of providence and a doctrine of the church militate against understanding those from other lands as alien. Rather, they are distant ones to whom we draw near, and when they immigrate they parallel the forced migration of the missionary.

Once we have thought about the alien and looked at how Christian doctrine qualifies that designation, chapter 2 indicates how the alien could become an *illegal* alien. Part A describes how the authority of the U.S. federal government over immigration was established so that aliens who contravene that authority become aliens unlawfully present. After years of little regulation of immigration, in the 1880s the U.S. Congress responded to allegations that Chinese immigrants were not assimilating by excluding all Chinese from entry and expelling those without a certificate of residence. A series of Supreme Court cases backed these actions, establishing the right of a sovereign nation to exclude and expel aliens

as inherent, inalienable, and limited only by the will of the people. The Court made reference to Emer de Vattel, who along with international lawyers before him looks back to Thomas Hobbes. Hobbes' *Leviathan* conceives of interactions at the frontiers between sovereign nations as taking place in the state of nature, where no right or *ius* forbids killing. The U.S. federal government's claims to unlimited sovereignty over immigration are seen to result from a similar rejection of natural right or divine law that might guard non-citizens.

Chapter 2, part B, responds with an account of immigration authority subject to divine judgment, an account drawn from biblical and traditional texts read in conversation with Martin Luther, Jacques Ellul, and Oliver O'Donovan. In Genesis 2-4, the deity Yhwh Elohim gives the task of keeping the garden to the earthling. Yet the first son kills the second, and cities with their walls are built as a God-given preservation of human life. *Keeping* becomes *guarding* as fellow human beings pose a threat. The final chapters of Revelation present a walled city with open gates, a kept place no longer defended against human beings. The guarding of places thus constitutes a good for the present age, a good qualified by Psalm 127 and its claim that the watchman guards the city under Yhwh's guarding of the city. Guarding is further qualified by Psalm 82, which stresses that civil authority is set up by Elohim to judge Elohim's own people. God continues to judge the ruler, requiring the ruler to maintain peace and protect the vulnerable, even the vulnerable newcomer.

Led by contemporary biblical theologians, a reading of Deuteronomy 2-3 indicates a similar pattern for national lands, granted by Yhwh for possession but also for dispossession when peoples do not uphold the covenants and standards of judgment that Yhwh requires. Counter to the doctrine of popular sovereignty in federal U.S. law, then,

the government of a territory proceeds under the judgment and direction of God. A phrase adapted from *Rerum Novarum* permits us to perceive the shape of immigration authority when it is rightly exercised: in most cases, authority over immigration responds to a threat of harm against what a society shares. A distinction from William Blackstone further indicates that immigration offenses are not wrong in themselves but wrong because they are prohibited. This means that most of the time, immigration authorities protect society against some future detriment, that offenses against that authority are not criminal, and that punishment of those offenses must be commensurate with the modest nature of the offenses. In the end, governance of immigration is a practice for this age that rulers must carry out within a larger moral order, the very judgment of God.

Once we have heard about where aliens come from and how they become unlawfully present, part A of chapter 3 demonstrates how those from countries neighboring the United States could become illegal aliens. From the 1920s onward, Congress placed immigration from countries in the Eastern Hemisphere under numerical quotas but left immigration from the Western Hemisphere free of numerical restriction, though the impoverished and unhealthy were still subject to restrictions. A move that began in the 1960s to end discrimination based on national origin resulted in a new system that allotted the same number of spaces to immigrants from every country in the world. Immigration from the United States' southern neighbor Mexico continued unabated, but while most Mexican nationals had entered legally, now many of them entered the U.S. illegally. This prepared the way for the large number of men, women, and children who live in the U.S. today without permission, fearful and subject to exploitation.

Part B of chapter 3 responds to this move by way of philosophy and theology. Equipped with Aristotle's justice, corrective and distributive, and Hugo Grotius'

appropriation of that justice, expletive and attributive, the national origins quotas represent an unjust kind of distribution, while the non-discriminatory system that follows it represent a distribution with its own injustices. Better would be an immigration admissions system that is corrective by recognizing debts to long-term residents and workers and that is attributive by recognizing the fitness of awarding admission to Mexicans as nearby neighbors. Better yet, the system might recognize ongoing patterns of migration that ought to be protected but not halted. Finally, the invocation of the “good neighbor” in U.S. foreign policy demands a return to the Parable of the Good Samaritan from Luke’s Gospel. For individuals and communities in the United States, the parable urges a readiness to receive and extend mercy to the one we actually encounter, the one from the hated immigrant group. In modest ways, legal reforms can allow the federal government to be a better neighbor to Mexico, and more importantly they can remove barriers to everyday neighborly activity.

A search for a theological response to unauthorized immigration in the U.S. leads first to the history of immigration law. This history indicates where aliens come from, how they become unlawfully present, and how many from neighboring countries also become aliens unlawfully present. In response, Christian political theology declares that the members of other peoples are not entirely alien, that God judges and directs the government of immigration in a certain way, and that the members of neighboring countries deserve special consideration.



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# Abbreviations

- B.D.A.G. Bauer, Walter. *A Greek-English Lexicon of the New Testament and Other Early Christian Literature*. Edited by Frederick W. Danker. 3rd ed. Chicago: University of Chicago Press, 2000.
- C.B.P. United States Customs and Border Protection
- C.D. Karl Barth, *Church Dogmatics*
- I.C.E. United States Immigration and Customs Enforcement
- I.B.P. Grotius, Hugo. *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur*. Ed. 2a emendatio & multis locis auctior. Amsterdam: Guiljelmum Blaeuw, 1631.
- I.G. O'Donovan, Oliver, and Joan Lockwood O'Donovan, eds. *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625*. Grand Rapids, Mich.: Eerdmans, 1999.
- K.B. Köhler, Ludwig, and Walter Baumgartner. *The Hebrew and Aramaic Lexicon of the Old Testament*. Translated by M. E. J. Richardson. 5 vols. Leiden: Brill, 1994.
- K.D. Karl Barth, *Kirchliche Dogmatik*
- L.W. Luther, Martin. *Luther's Works*. 55 vols. American ed. St. Louis: Concordia, 1955-1986.
- E.N. Aristotle, *Nicomachean Ethics*
- O.L.D. Glare, P. G. W., ed. *Oxford Latin Dictionary*. Oxford: Clarendon Press, 1982
- W.A. Luther, Martin. *D. Martin Luthers Werke: Kritische Gesamtausgabe*. Weimar: Hermann Böhlhaus Nachfolger, 1883-1929.

## Legal Citations

H.B.	House Bill
H.R.	United States House of Representatives Bill
I.N.A.	Immigration and Nationality Act of 1952, with Amendments
<i>Stat.</i> , as in 1 <i>Stat.</i> 103	United States Statues at Large
S.	United States Senate Bill
S.B.	Senate Bill
U.S., as in 130 U.S. 581	United States Reports

## Bibles and Bible Translations

A.V.	Authorized Version, a.k.a. King James Version
B.H.S.	Elliger, Karl, Wilhelm Rudolph, and Rudolf Kittel, eds. <i>Biblia Hebraica Stuttgartensia</i> . Editio quinta emendata. Stuttgart: Deutsche Bibelstiftung, 1997.
E.S.V.	English Standard Version
N.A. 28	Aland, Barbara, Kurt Aland, Eberhard Nestle, Erwin Nestle, Holger Strutwolf, Johannes Karavidopoulos, Carlo Maria Martini, and Bruce M. Metzger, eds. <i>Novum Testamentum Graece</i> . 28th rev. ed. Stuttgart: Deutsche Bibelgesellschaft, 2012.
N.A.S.B.	New American Standard Bible (Update)
N.I.V.	New International Version
N.J.B.	New Jerusalem Bible
N.R.S.V.	New Revised Standard Version
R.S.V.	Revised Standard Version
T.N.I.V.	Today's New International Version
U.B.S. 4	Aland, Barbara, Kurt Aland, Johannes Karavidopoulos, Carlo M. Martini, and Bruce M. Metzger, eds. <i>The Greek New Testament</i> . 4th rev. ed., 6th printing. Stuttgart: Deutsche Bibelgesellschaft; United Bible Societies, 2001.



# Introduction

When I met Miguel Villanueva in the Mexican border town of Nogales in 2011, he had just been removed from the United States. He talked to me in fluent English as he ate breakfast at the Kino Border Initiative, a Roman Catholic shelter for migrants. After a prayer by a Jesuit priest, Miguel told me that at age fifteen, he had left his home in Mexico, where jobs were scarce and those there that were available hardly paid enough to buy clothes, food, and fuel. Miguel and his brother headed north to the U.S., settling in a Midwestern city. There he met a woman he came to call his wife, and together they had a daughter, now aged three. Lately, Miguel had worked two jobs waiting tables, one at a Mexican restaurant and another at an American breakfast restaurant.<sup>1</sup>

The trouble was that Miguel didn't have papers. He had entered the United States illegally, without permission from U.S. immigration authorities. Miguel's common law wife had permanent residency, and his daughter was a U.S. citizen because she was born on U.S. soil. Though Miguel lacked proper documentation, he managed to live in the Midwest for six years without being caught or deported. He tried registering for high school, but the school officials asked him for a Social Security number and identification, which he did not have. But just recently, at age twenty-one, Miguel was caught driving without a license, and the police handed him over to the immigration authorities. He was given the option of

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<sup>1</sup> To protect the subject's identity, his name has been changed and his places of residence have not been revealed. Given these conditions, the subject gave oral and written permission to let his story be used.

paying bail and waiting for a court date, where he might be sentenced to a few months in jail. Instead, he decided to return to Mexico, and the officials sent him to a Texas border town where he crossed into Mexico. After returning to see his mother — his father had died years before — Miguel made his way north to rejoin his wife and daughter. In decades past someone like him would have attempted a crossing at one of the larger border cities, from Tijuana to San Diego or from Ciudad Juárez to El Paso, but now these cities had well-guarded crossing points, and high walls stretched along the U.S.-Mexico border for miles into the countryside. Avoiding the cities, Miguel crossed through the desert that stretches from the Mexican state of Sonora to the U.S. state of Arizona, a way that has led to death for many thousands of border crossers since 2000. Though he did not tell me so, Miguel probably paid someone called a *coyote* to help him across the border. He joined a group to walk on foot through an unfortified section of the border, making his way under a hot, dry sun through a mountainous landscape of snakes and scorpions, prickly cactuses, and flash floods in the summer monsoon season. After three days, the U.S. Border Patrol found Miguel, and when he could not produce travel documents, they took him into custody. As part of the Operation Streamline program, Miguel was tried along with dozens of others for illegal entry or reentry. He pled guilty so as to avoid a sentence of a year or two if he fought the charge. The judge gave him a month and a half in prison, telling him that if he was caught again he could be charged for a felony and spend years in prison. After serving his time in a jail in Arizona, Miguel was transported across the border to Nogales, Sonora, and left there.

At the Kino Border Initiative, Miguel ate his breakfast eagerly. I asked him what his plans were. “I’ll go back to see my mother for a little while.” “But you want to get back to your family, don’t you?” I said, and he told me, “Yes, I’ll try to get back to them. Can I go

back to Tucson with you today?” “No, I’m sorry,” I responded, pondering what it would be like to hide him in the fifteen-passenger van that would take me back to the U.S. that day.

“When are you coming back here?” he asked. “I don’t know,” I said.

Rev. Charles Adams pastors an evangelical church in a small town in the American South.<sup>2</sup> He told me in 2009 that a family like Miguel’s comes to worship at his church. The parents lack the documents that would allow them to stay in the U.S. legally, and while in the U.S. they have had three children. Like Miguel’s daughter, these children would be U.S. citizens because of the guarantee that every person born in the United States is a citizen. If the parents were to follow the law, they would have to move with their children to a country their children have never lived in, likely to a place where opportunities to make a living and support their children are few. Pastor Charles says that his church members do not feel it is appropriate to hire the parents to work, something that would be against the law. He says that the church has occasionally helped the family with personal needs, like taking them to see a lawyer, who was not able to help them find a way out of their dilemma. When I contacted Charles again in 2013, he told me that the family is still at his church, and their son was to be baptized that week. The parents are working and paying Social Security taxes, but lawyers tell them there is nothing they can do but wait, staying with their three U.S. citizen children, but staying without legal status. Charles offered little more than this information, indicating the bind he feels he is in as the family’s pastor and a citizen who wishes to uphold the law.

Spencer Bachus has served as a Republican member of the U.S. House of Representatives since 1993, representing much of the Birmingham, Alabama, metropolitan

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<sup>2</sup> The name of the pastor has been changed and the location of his church hidden to protect his identity and the identity of the family. Under these conditions, the subject gave written permission for the use of his story.

area. Bachus is also a regular churchgoer, attending Hunter Street Baptist Church in the Southern Baptist Convention. As of 2013, he served on the House Judiciary Committee, the committee that must approve proposals to alter immigration laws before the entire House has a chance to vote on the laws. Bachus often sided with the more conservative end of his party, but he broke rank with his peers on immigration issues. Up for debate in 2013 was a series of proposals for reform, many gaining support from conservative Republicans in the House. While his fellows supported an increase in funds and agents committed to border security and an increase in visas for highly-skilled workers, few of them supported an additional proposal, a pathway to citizenship for those illegally present in the U.S. Bachus' conservative colleagues rejected this pathway as a concession to lawbreakers who should rightly be deported from the country.

Bachus saw things differently, and he said that his Christian faith guided his judgment. When a constituent asked about immigration reform at a 2013 meeting in Gardendale, Alabama, Bachus spoke highly of recent immigrants, saying that nearly all of them came to the U.S. for the same reason present Americans' ancestors immigrated, to seek a better life. He pointed out that nearly all unauthorized immigrants are members of families whose other members are often U.S. citizens. In many cases, enforcing immigration laws would mean dividing families. Said Bachus, "Y'all may think I'm copping out, but with my Christian faith, it's hard for me to say that I'm going to divide these families up." He related stories of constituents, a Guatemalan national who grew up in the U.S. and did not speak Spanish removed to Guatemala at age eighteen, a widow of a U.S. veteran threatened with deportation to the Philippines, and a fast-food manager who depended on undocumented workers to clean his store overnight. Bachus gave his prescription: "Bring them into our system. Give them legal status. They will pay worker's

comp. They will pay Social Security. They'll work hard." If nothing is done, Bachus said, these men and women will continue to work in the shadows and undermine legal residents' wages. He concluded: "I'll tell you this, as your Congressman, I am not going to separate families or send them back."<sup>3</sup>

The millions of those like Miguel Villanueva who remain in the U.S. live what Leo Chavez calls "shadowed lives," avoiding contact with government agencies while working without permission, going to college without job prospects, driving without a license, or witnessing crimes they are afraid to report.<sup>4</sup> Many experience life in the U.S. as what a character in a song by the band Los Tigres del Norte calls a *jaula de oro*, a cage of gold that is a prison. "I hardly ever leave the house/Well, I'm afraid they'll find me/and they can deport me," he says.<sup>5</sup> Those like Villanueva who are prevented from returning to the U.S. leave behind a spouse or children whom they will rarely or never see. Some like Charles Adams' congregants who remain in the U.S. without permission feel torn between following the law and supporting their U.S.-born children. In churches like Adams', those who lack legal residency may be baptized and communing members, but their fellow

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<sup>3</sup> Rep. Spencer Bachus III, "Speech to Constituents" (Gardendale Civic Center, Gardendale, Ala., August 21, 2013), <https://www.dropbox.com/sh/lwo6835cvqrzofc/-xwvCTxas9>; Greg Sargent, "A Conservative Christian in a Deep Red District Makes Case for Immigration Reform," *Washington Post*, August 23, 2013, <http://www.washingtonpost.com/blogs/plum-line/wp/2013/08/23/a-conservative-christian-in-a-deep-red-district-makes-case-for-immigration-reform/>.

<sup>4</sup> Leo R. Chavez, *Shadowed Lives: Undocumented Immigrants in American Society* (Fort Worth: Harcourt Brace Jovanovich, 1992). Jeffrey S. Passel, D'Vera Cohn, and Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed* (Washington, D.C.: Pew Hispanic Center, September 23, 2013), 9, <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>, estimate that 11.7 million people were in the U.S. without authorization in March 2012, with a ninety percent confidence level in a range of 11.1 to 12.2 million. These are indeed estimates, since unauthorized immigrants meet with success so long as they avoid detection. Passel, Cohn, and Gonzalez-Barrera arrive at their figure by subtracting a government estimate of legal residents from the total foreign-born population measured in a survey, *ibid.*, 2, 7, 28–35.

<sup>5</sup> *De mi trabajo a mi casa,/no sé lo que me pasa./Que aunque soy hombre de hogar/casi no salgo a la calle./Pues tengo miedo de que me hallen/y me pueden deportar./¿De qué me sirve el dinero/si estoy como prisionero/dentro de esta gran nación?/Cuando me acuerdo hasta lloro./Aunque la jaula sea de oro,/no deja de ser prisión*, Los Tigres del Norte, *Jaula de Oro*, Jaula de Oro (Fonovisa, 1984).

churchgoers are hesitant to give them work. Those already established in the U.S. are unsure how to love their “illegal” neighbors. Lawmakers like Spencer Bachus want to prevent illegal immigration, but they find that their worship of Jesus Christ makes them unwilling to support enforcing the law if it means removing one member of a family to another country.

## Theological Voices on Illegal Immigration

How shall we respond to illegal immigration in the United States? Intelligent ruminations on the subject by Christian theologians can be found in articles, in the official proclamations of the Roman Catholic Church, and in books written by academics for a general audience. Only recently have academic monographs appeared on the subject.<sup>6</sup> Non-confessional philosophers and social scientists might approach illegal immigration in terms of rights, national communities, transnational trends, or economic wellbeing, but theologians tend to approach the subject in three ways. The first group looks primarily to the Bible to provide guidance, and among these we will look at evangelical scholars Daniel Carroll and James Hoffmeier. A second group looks to natural law combined with Scripture for insight, and in this category we will survey Catholic Social Teaching. The

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<sup>6</sup> What follows does not take into account Dana W. Wilbanks, *Re-Creating America: The Ethics of U.S. Immigration and Refugee Policy in a Christian Perspective* (Nashville: Abingdon Press, 1996); James R. Edwards, Jr., “A Biblical Perspective on Immigration Policy,” in *Debating Immigration*, ed. Carol M. Swain (Cambridge: Cambridge University Press, 2007), 46–62; Gemma Tulud Cruz, “Toward an Ethic of Risk: Catholic Social Teaching and Immigration Reform,” *Studies in Christian Ethics* 24, no. 3 (2011): 294–310; Ched Myers and Matthew Colwell, *Our God Is Undocumented: Biblical Faith and Immigrant Justice* (Maryknoll, N.Y.: Orbis Books, 2012); Kristin E. Heyer, *Kinship Across Borders: A Christian Ethic of Immigration* (Washington, D.C.: Georgetown University Press, 2012); Ilsup Ahn, *Religious Ethics and Migration: Doing Justice to Undocumented Workers* (New York: Routledge, 2014). It does not include the theological journalism of Ananda Rose, *Showdown in the Sonoran Desert: Religion, Law, and the Immigration Controversy* (New York: Oxford University Press, 2012), nor does it include works that center on interviews and testimonies, Miguel A. De La Torre, *Trails of Hope and Terror: Testimonies on Immigration* (Maryknoll, N.Y.: Orbis Books, 2009); Ben Daniel, *Neighbor: Christian Encounters with “Illegal” Immigration* (Louisville, Ky.: Westminster John Knox Press, 2010).

third group looks to Christian worship and practice as a way to approach our subject, and here we will look at Daniel Groody and William Cavanaugh. Each of these groups has something to offer: rich biblical insights, strong affirmations of family economics and human dignity, and accounts of worship as counter-political. For all they supply, these writings do not go far enough to answer questions for Miguel, for Pastor Charles' congregation, or for Spencer Bachus.

### Evangelical Biblical Scholars on Illegal Immigration

Two books invite Christians to approach illegal immigration in the U.S. as Christians. Daniel Carroll, in *Christians at the Border*, and James Hoffmeier, in *The Immigration Crisis*, approach the subject as Old Testament scholars presenting the fruits of biblical studies for a wider audience.<sup>7</sup> As evangelical Protestants, both assume that a Christian perspective on immigration will arise by interpreting what the entire Bible has to say on the subject and applying its fruits to contemporary America. The two agree on many things, but they provide divergent accounts of illegal immigration. We will begin with Carroll and then indicate how Hoffmeier differs.

In *Christians at the Border: Immigration, the Church and the Bible*, M. Daniel Carroll Rodas writes as a Guatemalan-American, a person whose bicultural upbringing he thinks offers him insight into the present situation in the U.S.<sup>8</sup> Carroll provides an overview of U.S. immigration history and legislation, but his distinctive contribution is an overview of

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<sup>7</sup> M. Daniel Carroll R., *Christians at the Border: Immigration, the Church, and the Bible* (Grand Rapids, Mich.: Baker Academic, 2008); James K. Hoffmeier, *The Immigration Crisis: Immigrants, Aliens, and the Bible* (Wheaton, Ill.: Crossway, 2009). 2013 saw the release of Carroll, *Christians at the Border: Immigration, the Church, and the Bible*, 2nd ed. (Grand Rapids, Mich.: Brazos Press, 2013).

<sup>8</sup> Carroll R., *Christians at the Border*, 2008, 15.

the Old and New Testaments as they speak about immigration and address the contemporary United States. Carroll begins with the creation of man and woman in the image of God in Genesis, and he writes that those who cross borders are persons above all.<sup>9</sup> From the Law and the Prophets, he presents stories told from the perspectives of immigrants caused to move because of hunger or invasion, faced with opportunities to assimilate, or allowed to return home.<sup>10</sup> Carroll details the Ancient Near Eastern practice of hospitality, with its expectation that hosts would be hospitable and guests thankful, commending this pattern for the United States today.<sup>11</sup>

Carroll's attention rests on Old Testament legislation concerning immigrants and foreigners, and he interprets the law not as the way Israel was to earn redemption but as the way they were to live as a redeemed people. He describes the frequent injunctions to love *גֵּרִים*, *gērîm*, sojourners or immigrants, and to treat them justly. These people without kin and land, who lacked ways to provide for themselves, were guaranteed protection in Israelite households and farms, at the temple, and at the city gate, where elders would issue judgments.<sup>12</sup> These laws, unique among Ancient Near Eastern peoples, flow from two sources: first, Deuteronomy and the Psalms present God himself as one who loves the sojourner, so that the one who does justice to the foreigner imitates God.<sup>13</sup> Second, the presence of immigrants reminds Israelites that they were sojourners in Egypt, enslaved and rescued by a God who provided them with their land. "[T]he arrival and presence of sojourners," Carroll intimates, "were not a threat to Israel's national identity; rather, their

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<sup>9</sup> Ibid., 65–71.

<sup>10</sup> Ibid., 72–89.

<sup>11</sup> Ibid., 92–95.

<sup>12</sup> Ibid., 95–103.

<sup>13</sup> Ibid., 93–94, 102, 104–105.

presence was fundamental to its very meaning.”<sup>14</sup> Since justice for the immigrant distinguished Israel’s law from the laws of its neighbors and since it is described as a character trait of God himself, Carroll thinks that justice for the sojourner applies today.<sup>15</sup> He says that like in ancient Israel, immigrants do not threaten American identity; rather, they remind the U.S. of her identity as a nation of immigrants.<sup>16</sup>

Carroll carries on into the New Testament, where he identifies Jesus as a refugee and a Jew open to marginalized outsiders. The lawyer who hears Jesus’ parable of the Good Samaritan, who asks, “Who is my neighbor?” is surprised to discover that his hated enemy, a Samaritan, turns out to be the neighbor who loves the robbed man.<sup>17</sup> Carroll discusses the discourse about the sheep and the goats in the Gospel of Matthew, where on the day of judgment Jesus will tell his followers that when they welcomed a stranger (ξένος, *xenos*), they welcomed him. Carroll says that though we might take this to mean that when we welcome immigrants, we welcome Christ himself, he says that in context, this passage applies only to welcoming the “little ones,” the “brothers” of Matthew’s Gospel, who are disciples and messengers of Christ.<sup>18</sup> Carroll mentions other New Testament passages that describe Christians as aliens and strangers who go against the patterns of the majority, and he says that the experience of Hispanics allows them to grasp this aspect of the Christian life better than most.<sup>19</sup> For Carroll, the New Testament has divine hospitality at its center, as Christ welcomes everyone to the Lord’s Supper.<sup>20</sup> Romans 13:1-7 Carroll leaves for the end, and he says that Christians often cite this passage to argue that immigrants must

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<sup>14</sup> Ibid., 104, 109-10.

<sup>15</sup> Ibid., 107-112.

<sup>16</sup> Ibid., 110.

<sup>17</sup> Luke 10:25-37; *Christians on the Border*, 2008, 121-122.

<sup>18</sup> Matthew 25:31-46; *Christians on the Border*, 2008, 122-123.

<sup>19</sup> 1 Peter 2; Hebrews 13; *Christians on the Border*, 2008, 126-129.

<sup>20</sup> *Christians at the Border*, 2008, 130.

follow the law. Carroll does not interpret this passage about legality. Instead he tells us that one should bring to the passage the teaching of the Bible and the “heart of God” as they incline toward the immigrant.<sup>21</sup> Carroll recommends an approach to immigration law that keeps in mind the contradictions in U.S. laws and seeks new laws, all the while heeding the Apostle Paul’s words from the previous chapter, Romans, chapter 12: “Do not be conformed to this world, but be transformed by the renewal of your mind...”<sup>22</sup>

James K. Hoffmeier’s *The Immigration Crisis: Immigration, Aliens, and the Bible* closely resembles Carroll’s *Christians at the Border*. Hoffmeier claims that his experiences as a foreigner and a refugee make him well-qualified to speak on immigration issues.<sup>23</sup> Hoffmeier is also an Old Testament scholar who attempts a comprehensive approach to the Scriptures, surveying “data” and extracting “principles” from the Torah within broader biblical themes, and applying them to contemporary America.<sup>24</sup> Hoffmeier reviews many of the same biblical themes as Carroll, including the privileges afforded to immigrants in the legal texts, though with slight differences in emphasis.<sup>25</sup> Yet when he comes to points of biblical interpretation that touch on the distinction between legal and illegal immigration, Hoffmeier diverges from Carroll.

Hoffmeier argues that in the Ancient Near East, governments controlled territories and admitted or denied entry to those who requested it. Hoffmeier draws on archaeological findings and the literature of Israel’s neighbors alongside the Hebrew Scriptures to support his case. He cites evidence that Egyptians built forts to guard the entry points to their

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<sup>21</sup> Ibid., 132.

<sup>22</sup> Romans 12:2a, E.S.V.; *Christians on the Border*, 2008, 131-134.

<sup>23</sup> Hoffmeier, *The Immigration Crisis*, 15-17.

<sup>24</sup> Ibid., 17, 24-27.

<sup>25</sup> Ibid., 97-129.

territory,<sup>26</sup> that Abraham was expelled from Egypt for telling the Pharaoh that his wife Sarah was his sister,<sup>27</sup> and that Abraham negotiated a purchase of land from the Hittites where he might bury Sarah.<sup>28</sup> He also notes that Edom denied Moses and the Israelites passage through its lands,<sup>29</sup> and he cites inscriptions of the foreign chieftain Abishai entering Egypt and presented with a document by an official that details that thirty seven foreigners could enter to carry out blacksmithery or mining.<sup>30</sup> In these examples and others, Hoffmeier finds evidence for ancient equivalents of border controls, work visas, residence visas, transit visas, deportations, and land purchases.

In his reading of Israel's law, Hoffmeier offers a different interpretation of terms for foreigners from Carroll's. Carroll writes that the adjectives נֹכְרִי, *nokrî*, and זָר, *zār*, apply to foreigners who may be newcomers to Israel but remain unassimilated, while the noun תּוֹשָׁב, *tôšāb*, seems to indicate one who relies on Israel for her sustenance. The more notable word is *gēr*, a term translated as resident alien, stranger, or sojourner, and the term to which the laws about just treatment apply.<sup>31</sup> Hoffmeier specifies these terms more fully, writing that the *nokrî* and the *zār* could be enemy invaders, squatters, people passing through, or workers residing for a limited time. Hoffmeier considers the *gēr* to be foreigner who has been offered hospitality by a host, legally allowed to enter, protected by a sponsor, and when coupled with the term *tôšāb* residing for a time.<sup>32</sup> Even the *gēr*, he tells us, could not invite family members to join him in his new land, except in the case of a spouse.<sup>33</sup>

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<sup>26</sup> Ibid., 43.

<sup>27</sup> Genesis 12:10-20; *The Immigration Crisis*, 46.

<sup>28</sup> Genesis 23; *The Immigration Crisis*, 34.

<sup>29</sup> Numbers 20:14-21; *The Immigration Crisis*, 32.

<sup>30</sup> *The Immigration Crisis*, 38-40.

<sup>31</sup> *Christians at the Border*, 2008, 100-101.

<sup>32</sup> *The Immigration Crisis*, 50.

<sup>33</sup> Ibid., 51.

Hoffmeier sees here a distinction between a foreigner and a resident alien, one passing through or staying temporarily and one who has been invited to stay for a while.<sup>34</sup> He surmises that the *gēr* has “followed legal procedures to obtain recognized standing as a resident alien,” and he concludes that the laws concerning justice toward the foreigner only apply to the legal resident alien, not to the outright foreigner.<sup>35</sup>

These precedents of ancient immigration controls and of special treatment of the legal resident alien inform Hoffmeier’s reading of the New Testament. He briefly draws on three sources to say that the Christian is required to follow the civil law: Jesus’ statement about rendering to Caesar what is Caesar’s and to God what is God’s, Jesus’ claim that Pilate would have no authority were it not given to him from above, and the Apostle Paul’s requirement that everyone submit to the governing authorities from Romans 13.<sup>36</sup> He says that the New Testament only calls us to break the law when it expressly opposes divine law, as when the *magi* avoid informing the nefarious King Herod about the whereabouts of the infant Jesus, and when Peter and John do not assent to a command from the Jewish authorities not to speak openly of Jesus.<sup>37</sup> Hoffmeier says that Carroll’s reluctance to advise following U.S. immigration laws is only justified if those laws are “inherently unjust.”<sup>38</sup> But with reference to the longstanding precedent from the Old Testament of laws concerning the border crossing and residence of immigrants, Hoffmeier writes, “I see nothing in Scripture that would abrogate current immigration laws.”<sup>39</sup> He thinks that it is within the proper authority of government to restrict immigration, allowing for a distinction between

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<sup>34</sup> Ibid., 48–52, 57.

<sup>35</sup> Ibid., 52.

<sup>36</sup> Mark 12:17, Luke 20:25; John 19:11; Romans 13:1, 5; *The Immigration Crisis*, 140–142.

<sup>37</sup> Matthew 2; Acts 4:1–22; *The Immigration Crisis*, 146–147.

<sup>38</sup> *The Immigration Crisis*, 145.

<sup>39</sup> Ibid., 146.

legal and illegal immigrants, and he thinks that immigration laws are among those Christians must follow. He concludes that the Scriptures call Christians to treat the immigrant with respect and love, but that Christians should not put up with law-breaking.

Reading Daniel Carroll and James Hoffmeier side-by-side, we see two ways that a comprehensive biblical account of immigration can take us in the current U.S. debates over illegal immigration. Both scholars are clear that due to God's character and the identity of God's people, immigrants deserve respect, love, and just treatment, but the two differ about how and when Christians should follow U.S. immigration laws. Carroll thinks that the high valuation of immigrants in the Scriptures should lead us to a nuanced response to U.S. immigration law, one that seeks better laws while siding with undocumented immigrants. He leaves us with a general sense that U.S. law is flawed and needs reform, but he does not tell us how to move forward in acting toward the law. Hoffmeier, on the other hand, thinks that U.S. immigration laws are not so unjust that Christians should break them or approve those who break them. Those who heed Hoffmeier are left acquiescing to the law without critically considering the circumstances that render many of our immigrant neighbors "illegal." As they diverge in their response to immigration law, they reveal a need for a more careful reading of the American legal tradition. And while they provide a good biblical theology of immigration, they demonstrate the need for theology that connects a careful reading of U.S. immigration law with the passages of Scripture that speak about the concerns of the law. One step forward from biblical interpretation toward a more comprehensive theology comes from a different tradition.

## Catholic Social Teaching on Illegal Immigration

In recent years, Cardinal Roger Mahony, former Roman Catholic Archbishop of Los Angeles, has spoken out in favor of immigrants who reside in the United States without permission, along with those who relate to them. When a 2006 House of Representatives bill would have criminalized assisting an illegal alien, he wrote in the *New York Times* that a higher authority, God himself, calls us to aid a fellow human being.<sup>40</sup> In these and other comments on immigrants, Mahony speaks out of the tradition of Catholic Social Teaching, another theological approach that we will look at here following evangelical biblical interpretation. In the touchstone of modern Catholic Social Teaching, the 1891 encyclical letter *Rerum Novarum*, Pope Leo XIII draws up an account of human labor that draws upon natural law, the law of the nations, and the Christian Scriptures. Here Leo XIII argues that human beings are older than the state, and their right to provide for their lives comes before the state. He says that as human beings cultivate the soil, they transform the soil, and they rightly possess the fruits of their labor. Likewise, a man possesses property to provide for his family.<sup>41</sup> This family he calls a “true society,” governed by the father, and it has “at least equal rights with the State in the choice and pursuit of these things which are needful to its preservation and its just liberty.”<sup>42</sup>

After defining the society and the economy of the household as primary, Leo XIII enumerates the duties of the state in safeguarding a community, but he does not mention the power to control migration, nor does he speak about migration for work. Still, his

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<sup>40</sup> “Called by God to Help,” *The New York Times*, March 22, 2006, sec. Opinion, <http://www.nytimes.com/2006/03/22/opinion/22mahony.html>.

<sup>41</sup> Leo XIII, “*Rerum Novarum: The Condition of Labor (1891)*,” in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O’Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 6, 9.

<sup>42</sup> *Ibid.*, sec. 9, 10.

account of a right of the head of the family to provide for its needs, a right prior to the right of the state, is the seed which germinates and flowers in the teaching of more recent popes. In the 1961 encyclical letter *Mater et Magistra*, Pope John XXIII draws on Leo XIII's argument by saying that out of the duty of the father to provide for his family arises "the right of the family to migrate."<sup>43</sup> Two years later, in *Pacem in Terris*, John XXIII mentions among the rights of human being the "right to emigrate," as a human being is not only a citizen of one country but a member of the human family and a citizen of the world community.<sup>44</sup> Catholic Social Teaching thus envisions migration as a matter of the right of the head of a family to provide for his family, a right that historically precedes and trumps the authority of the state. According to Magisterial teaching, men, women, and children moving to the U.S. to provide for their families should not be considered "illegal," for they are exercising a right prior to any right of the state.

In 1999, Pope John Paul II reaffirmed and extended these claims when he addressed the "Church in America" as one America made up of many commonwealths. Speaking in Spanish in Mexico City, he said that the Church in America must be an advocate and defender of "the natural right of individual persons to move freely within their own nation and from one nation to another."<sup>45</sup> Here, the head of the largest

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<sup>43</sup> John XXIII, "Mater et Magistra: Christianity and Social Progress (1961)," in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O'Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 45.

<sup>44</sup> John XXIII, "Pacem in Terris: Peace on Earth (1963)," in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O'Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 25.

<sup>45</sup> *El derecho natural de cada persona a moverse libremente dentro de su propia nación y de una nación a otra*, John Paul II, "Exhortación apostólica postsinodal Ecclesia in America sobre el encuentro con Jesucristo vivo, camino para la conversión, la comunión y la solidaridad en América," 1999, sec. 65, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_22011999\\_ecclesia-in-america\\_sp.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_sp.html); John Paul II, "Post-Synodal Apostolic Exhortation Ecclesia in America on the on the Encounter with the Living Jesus Christ: The Way to Conversion, Communion and Solidarity in America," 1999, sec. 65, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_22011999\\_ecclesia-in-america\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html).

Christian church, present in nearly every nation on earth, said that the transnational Church in America must defend the legal priority of individuals to migrate, and it must defend human dignity even in cases of “non-legal immigration.”<sup>46</sup>

This key insight – the priority of family sustenance over state law, even the priority of individual movement over state restriction – is augmented by a cluster of related concepts in Roman Catholic teaching. A series of documents deals with migration as a matter of pastoral care, organizing the ministries of a church divided into territorial parishes to better serve the needs of migrants.<sup>47</sup> Migrants are understood as human persons worthy of welcome, a welcome that extends in part from Christian charity, from the love of members of the universal Church.<sup>48</sup> Welcome also extends from human solidarity, the notion that all human beings are part of one family, and that together they are responsible for the “universal common good.”<sup>49</sup> Closely tied is an affirmation that all created things have a common destiny, serving the good of every human being, so that any property, whether land or material good, is placed in the hands of individuals and families so that they might promote the welfare of all human beings.<sup>50</sup> Christians are duty-bound to welcome strangers with love, and human beings in their natural state treat others as brothers and sisters. Catholic Social Teaching contends that though government regulation cannot extend genuine fraternity, regulation has a particular role to play, protecting

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<sup>46</sup> “Ecclesia in America,” 1999, sec. 65.

<sup>47</sup> “Ethnografica Studia,” *Acta Apostolicae Sedis* 6 (1914): 182–86; “Magni Semper,” *Acta Apostolicae Sedis* 11 (1919): 39–43; “Exsul Familia,” *Acta Apostolicae Sedis* 44 (1952): 649–704; Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Erga Migrantes Caritas Christi: The Love of Christ Towards Migrants* (London: Catholic Truth Society, 2004).

<sup>48</sup> Paul VI, “Populorum Progressio: On the Development of Peoples (1967),” in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O’Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 67.

<sup>49</sup> *Ibid.*; Second Vatican Council, “Gaudium et Spes: Pastoral Constitution on the Church in the Modern World (1965),” in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O’Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 84.

<sup>50</sup> “Populorum Progressio,” sec. 22f.

migrant laborers so that they receive the same pay and work in the same conditions as natives.<sup>51</sup> Public authorities along with local people should endeavor not to treat them as tools but as persons, helping them to live with their families in decent housing.<sup>52</sup>

When this body of teaching is applied to the U.S. situation, the implications are fairly obvious: so-called “economic migrants” have rights to move greater than the rights of the U.S. government. Instead of intimidating and troubling those who have broken its immigration laws, the government should endeavor to protect them from workplace exploitation. Parish churches in the U.S. are to care for migrants, and people across the country should welcome migrants into their community life and treat them with dignity, even when they are non-legal immigrants. The United States finds itself addressed as one part of a larger America, addressed by a larger Roman Catholic Church, speaking from nature and revelation about the paramount value of the family economy and the value of the human person.<sup>53</sup>

Catholic Social Teaching provides a counter-argument to the logic that the priorities of the nation are all that matter. The social encyclicals and conciliar documents remind us that the economy of the family and the dignity of the individual deserve respect. They remind us too of the Church as a charitable society and the human family as a fraternal reality. Together these affirmations speak powerfully on behalf of migrants, and those who heed Catholic Social Teaching will be well equipped to resist the state in favor of

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<sup>51</sup> “Gaudium et Spes,” sec. 66; John Paul II, “Laborem Exercens: On Human Work (1981),” in *Catholic Social Thought: The Documentary Heritage*, ed. David J. O’Brien and Thomas A. Shannon (Maryknoll, N.Y.: Orbis Books, 1992), sec. 23.

<sup>52</sup> Second Vatican Council, “Gaudium et Spes,” sec. 66.

<sup>53</sup> See also Conferencia del Episcopado Mexicano and United States Conference of Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope: A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States* (Washington, D.C.: United States Conference of Catholic Bishops, 2003).

other societies and out of concern for individuals. Still, Catholic Social Teaching leaves us with little more than resistance when we approach governments that judge some immigration to be illegal. This tradition lacks what the biblical scholars lack, a close reading of American legal thought that might indicate what goods immigration law seeks to preserve. Further, the social teaching of Rome needs a more robust theology of the people or the nation and the government that guards that people. If Catholic Social Teaching is to help Christians seek the common good in America, it needs a stronger sense that today's predominant form of worldly political community matters.

### Theologians of Worship on Illegal Immigration

In a pair of articles, two other theologians approach illegal immigration in the U.S. by drawing on Christian worship and Christian practices. Daniel G. Groody interprets the immigrant experience through the four verbs in the narrative of the Eucharist.<sup>54</sup> “He took the bread” becomes the choice to migrate when bread is lacking, and “He said the blessing” becomes the migrant’s praise of God in the troubled circumstances of migrating. “He broke the bread” becomes the one whose body is broken by hard work to bring bread to others’ tables. “He gave it to the disciples” becomes the migrant’s giving of life through a sort of labor that may qualify as modern slavery. Groody links the final phrase “do this in memory of me” to a remembering of the immigrant. This central act of Christian worship, the Eucharist, thus enables us to perceive and remember the migrant, Groody tells us, though we wonder whether it reconfigures our perception of the migrant or simply reiterates the perception we already have.

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<sup>54</sup> Daniel G. Groody, “Fruit of the Vine and Work of Human Hands: Immigration and the Eucharist,” in *A Promised Land, a Perilous Journey: Theological Perspectives on Migration*, ed. Daniel G. Groody and Gioacchino Campese (Notre Dame: University of Notre Dame Press, 2008), 299–315.

While Groody draws upon the Eucharist, William Cavanaugh interprets the migrant – and the unauthorized immigrant – by way of the Christian practice of pilgrimage.<sup>55</sup> He argues that even in an era of globalization, of the growth of international trade, national borders are not becoming obsolete. Rather, they play a role of defining some migrants as “illegal,” and these migrants are exploited for their cheap labor. In a time when governments guarantee more and more social rights and claim to protect life itself, says Cavanaugh, there is a need for a population of people lacking the rights of citizens who can work for little pay. Borders produce people whose status is liminal. The Christian pilgrim is also liminal, on a journey toward heaven, humbly seeking forgiveness of sins, Cavanaugh tells us. In a post-Constantinian era, when the power of the church has declined, the church is made up of pilgrims who recognize that government belongs to a passing age, short of the age of full communion with God. The pilgrim church is catholic, extending across national borders, and Christian identity is to come before American identity.<sup>56</sup> This means seeing as relative those borders that make some people “illegal,” and it means standing “on the margins of the law,” Cavanaugh writes.<sup>57</sup> Along with the global status of the pilgrim church, the church finds itself in solidarity with local people: the migrant poor. Migrants, like Christians, have a liminal status, and Christians may express their solidarity with migrants by feeding them, praying with them, and washing their feet, treating them like pilgrims rather than migrants.<sup>58</sup> Thus, Cavanaugh approaches the matter of illegal immigration in the U.S. as a matter of taking on a Christian practice of pilgrimage

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<sup>55</sup> William T. Cavanaugh, “Migrant, Tourist, Pilgrim, Monk: Identity and Mobility in a Global Age,” in *Migrations of the Holy: God, State, and the Political Meaning of the Church* (Grand Rapids, Mich.: Eerdmans, 2011), 69–87; originally published as “Migrant, Tourist, Pilgrim, Monk: Mobility and Identity in a Global Age,” *Theological Studies* 69 (2008): 340–56.

<sup>56</sup> Cavanaugh, “Migrant, Tourist, Pilgrim, Monk,” 2011, 73–74, 79–84, 86–87.

<sup>57</sup> *Ibid.*, 87.

<sup>58</sup> *Ibid.*, 82, 86–87.

and becoming a pilgrim church. The worldwide church on pilgrimage toward God sees national borders as relative, and it treats those who cross those borders, especially those called “illegal” for crossing those borders, as fellow pilgrims. Cavanaugh places the church front and center and writes off the nation and its borders as provisional, as possessing only relative importance.

Those authors who draw on Christian worship and practice prepare us to stand with immigrants, but they leave us in or propel us toward a primarily oppositional stance to American political life. For Groody, through the Eucharist we interpret the vulnerable migrant’s journey, but that interpretation appears parasitic upon a fellow-feeling we already possess for the migrant. Cavanaugh helps us orient our response to immigrants around a Christian practice of pilgrimage. He is right to tell Christians that their identity starts with the Church, a community on a journey toward the kingdom of heaven. He opens our imaginations to perceive the migrant poor as pilgrims on a similar journey, victims of provisional borders that give them liminal status. We need Cavanaugh’s voice, but if we listen to him alone, the Church will be left only to oppose territorial government. We will be left with no good theological account of how we might value a life as creatures participating in a governed community. Cavanaugh will let us value local community, but he will not affirm anything larger, and he will soon convince us that the modern state is opposed to divine order. An account of the political community in terms of human desire will keep us from seeing the political community as God’s ordinance and instrument. As such, the theologians of Christian worship and practice suggest that we respond to illegal aliens by resisting the authority that has deemed those immigrants *illegal*. These theologians give an answer to our question about how to respond to illegal immigration, but their answer is theologically deficient. Like the rest, they need a theology of a people and its

government that will allow us to hope that God works through flawed states to preserve the life of a people in a place.

## **The Task Ahead: Legal History and Political Theology**

Whether they draw from the Bible, natural law, or worship, these three theological approaches tell us plenty about how to respond to immigrants. But they do not tell us enough about how to respond to immigrants who are unlawfully present. These immigrants' lives are particularly troubled because by immigrating they have contravened the authority of the law. As they go on living, they must continue to reckon with their relationship to civil authority. Those who relate to these immigrants must also face questions about where they stand in relationship to this law, whether in obedience, tension, or defiance. If we are to know how to act as immigrants who already lack legal status, and if we are to know how to respond to those immigrants, we need more than these rich insights from Scripture, natural law, and Christian worship.

First, we need to understand the moral judgments that have formed immigration law and made it possible for so many to be aliens unlawfully present in the United States of America. A close reading of American legal thought as it has developed over time is in order. Instead of understanding immigration law as monolithic or static, we will come to understand the cases and the convictions that have formed judgments ensconced in law. We propose a search for roots, for the historical origins of the concepts at work in each stage of legal history. Equipped with this understanding, we will be better equipped to seek theological concepts that fit the phenomenon at hand. Second, as concepts of those from afar, of territorial government, and of justice between nations emerge in U.S. law, we will look for Christian accounts of these goods in a better developed political theology. We will

ask what role these features of this age play in the history of God's dealings with his beloved creation. Theological concepts will largely emerge from readings of relevant passages of Scripture in conversation with trusted interpreters of those passages. Both steps will take on the discipline of careful reading, spending time with pivotal texts and reading relevant passages in context. We seek to *hear* these texts, placing ourselves under their authority and allowing them to take us where we did not expect to go.

A quest to grasp the history of the illegal alien and discern a fitting Christian political theology will proceed in three chapters. Chapter 1 will ask where the term *alien* came from. We will look at how U.S. law from the start distinguished the alien from the citizen as its basic division of persons. A survey of the first century of U.S. law will indicate an extension from a type that could become a citizen to a type that could be excluded from entry. We will track the term back into the common law of England, with particular attention to the case of *Calvin v. Smith* in 1608. We will watch the alien emerge in the late medieval and early modern periods as a fixed and natural type. Doubts about the appropriateness of understanding those from far away as aliens will turn us to the Christian theology for an alternative set of concepts. Karl Barth will lead us through the biblical testimony on peoples and nations, and an understanding of our relationship with those from other countries will emerge within doctrines of God's creation of the world, his providential care for it, and the destiny of the peoples in God's people, Israel and the church. Paul's communication with the Corinthians about being sent out as an apostle will provide an example of the likeness that God's people have with what the common law considers unlike or alien. The chapter will achieve a critical account of the term "alien" in legal history and point toward an alternative imaginary of the migrant drawn from Christian theology.

Chapter 2 will ask how some aliens came to be classed as unlawfully present. A reading of American legal history will demonstrate when and how the authority of the federal government over immigration was articulated and established. Our reading will center around Supreme Court cases that upheld Congressional legislation to ban Chinese immigration in the late nineteenth century. A notion of a sovereign right to exclude and expel aliens, accountable only to the will of the people, will emerge. We will trace this notion to its early modern forebears, through Emer de Vattel to Thomas Hobbes, who placed interactions at the frontiers of sovereign nations in the state of nature, where no right or *ius* holds. Concerns over the unlimited nature of what came to be called “plenary power” over immigration will turn us toward theology in search of an alternative. We will ask, where do guarded places emerge in the Christian narrative of creation, fall, and redemption, and what is their destiny? Readings from Genesis and Revelation led by Martin Luther, Jacques Ellul, and Oliver O’Donovan will qualify the value of guarding places during the world. We will gain a better sense of the responsibilities and limits that God’s judgment places on those who guard places through Luther’s readings of Psalms 82 and 127. With the help of theological interpreters, a reading of Deuteronomy 2-3 will suggest the contours of possessing and dispossessing lands under a divine overlord. An account of civil authority from Leo XIII will indicate a way of characterizing the right exercise of authority over immigration, and a distinction between types of law from William Blackstone will reveal what sort of offense those who go against this authority commit. The chapter will reveal the troublesome notions on which the making of *illegal* aliens depends, and it will indicate the limits that God’s ongoing judgment places on those who protect territories.

Chapter 3 will ask how it came about that those from *neighboring* countries could become aliens unlawfully present in the United States. We will possess a better grasp of the *alien* and the *illegal* alien from the previous two chapters, but it is not yet obvious how so many millions of men and women living in the U.S. today could be classed as aliens unlawfully present. A reading of twentieth century legislative history will reveal a move by Congress to end what were seen as discriminatory patterns in admissions to the U.S. This was a move to set a numerical quota on immigration admissions from every country in the Western Hemisphere as well as in the Eastern. We will find that Mexican nationals kept migrating to the U.S. in similar numbers, now illegally rather than legally. This move against discrimination made possible the growing community of immigrants now present in the U.S. without legal status and open to exploitation. Both the quotas and the opposition to discrimination make sense as applications of notions of justice explored by Aristotle and Hugo Grotius. Examination of their twofold notions of justice will result in a policy more sensitive to undocumented workers and to Mexico in particular. Prompted by talk of the United States being a good neighbor in its foreign policy, a reading of the Parable of the Good Samaritan in the Gospel of Luke will provide another approach to those we actually encounter, and such a reading will push against labels that enable U.S. citizens to turn a blind eye to a whole class of their neighbors. A reading of the parable will suggest ways of becoming neighbors across divides of legality and ethnicity, along with ways that the United States might become a neighbor.

In the conclusion, we will present the fruits of our inquiry, and we will indicate further areas for exploration for a theological response to the alien unlawfully present in the United States.

Before we begin, two notes about terminology are in order. First, though men and women from south of the United States consider themselves Americans, this work is written in the English language and from the point of view of the United States. As such, we use “American” to denote what the convenient Spanish term *estadounidense* denotes, someone or something from the United States of America.

Second, we translate a crucial term from the Hebrew Bible, the גֵּר, *gēr*, as “migrant,” “immigrant,” or “displaced person,” and we translate other terms, נִכְרִי, *nēkār*, and נֹכְרִי, *noḵrī*, as “foreigner,” “stranger,” or “outsider.” We have already heard a discussion about these terms between Carroll and Hoffmeier. On the *gēr*, we are largely in agreement with Frank Anthony Spina, who defines גֵּרִים, *gērīm*, as those outside of their original social setting who depend on a new group for their wellbeing.<sup>59</sup> Spina thinks that the term “immigrant” ably captures the way the *gēr* settles in a place after emerging from some degree of social conflict, and he prefers it to the more standard translation “sojourner,” which focuses on the present settlement of the person, or the “resident alien.” As support, he cites three meanings of the related verb גָּר, *gūr*, which can mean “to sojourn,” “to stir up strife, create confusion, quarrel,” or “to dread, be afraid.”<sup>60</sup> He reckons that the use of *gēr* combines these meanings, as one who comes to settle in a new place, escaping from strife and experiencing fear.<sup>61</sup> When Spina uses the term “immigrant,” he thinks of the *gēr* as someone from outside the community but not necessarily from outside of the nation of Israel, and perhaps “migrant” or “displaced person” are more fitting terms.

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<sup>59</sup> “Israelites as *Gērīm*, ‘Sojourners,’ in Social and Historical Context,” in *The Word of the Lord Shall Go Forth: Essays in Honor of David Noel Freedman in Celebration of His Sixtieth Birthday*, ed. Carol L. Meyers and Michael Patrick O’Connor (Winona Lake, Ind.: Eisenbrauns, 1983), 323.

<sup>60</sup> *Ibid.*, 325.

<sup>61</sup> *Ibid.*, 325–327.

The scholarly literature suggests other interpretations of the *gēr*. Christoph Bultmann traces a trajectory that begins with the pre-Deuteronomic narratives, where he believes the *gēr* is not of foreign nationality, but lives in an area without family connections or inherited land. Among other texts, he finds in the Holiness Code of Leviticus 17-26 a *gēr* who is part of a social class of Israelites without land or family, and in Exodus 12:43-49, he takes the *gēr* to be a circumcised convert who can partake in the Passover unlike the *nokri* who cannot partake.<sup>62</sup> Christina van Houten also draws a trajectory, understanding *gērîm* in Deuteronomy as non-Israelites and *gērîm* as converts in the Priestly Laws that she takes to arise after Israel's exile.<sup>63</sup> José E. Ramírez Kidd mentions another view, where the *gērîm* were immigrants fleeing from the northern kingdom after the fall of Samaria in 721 B.C.<sup>64</sup> D. Kellerman points out that the *gēr* stands between the native *ezrah*, and the foreigner, the *nokri*.<sup>65</sup>

All these authors agree that the *gēr* is a vulnerable outsider who perhaps provokes conflict, and Spina with the more traditional interpretation is open to the *gērîm* coming from outside Israel, not only from outside the clan or tribe. "Migrant" or "displaced person" seem fitting translations, then, for this person who might come from within or without of the nation. The *nokri* and the *nēkār*, on the other hand, cannot or do not join

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<sup>62</sup> *Der Fremde im antiken Juda: eine Untersuchung zum sozialen Typenbegriff gēr und seinem Bedeutungswandel in der alttestamentlichen Gesetzgebung* (Göttingen: Vandenhoeck & Ruprecht, 1992).

<sup>63</sup> *The Alien in Israelite Law* (Sheffield: J.S.O.T. Press, 1991).

<sup>64</sup> *Alterity and Identity in Israel: The gēr in the Old Testament* (Berlin: De Gruyter, 1999), 5-6.

<sup>65</sup> "גֵּר *gūr*; גֵּר *gēr*; גֵּרֹת *gērûth*; מְגֻרִים *m'ghûrîm*," in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck and Helmer Ringgren, trans. J. T. Willis, vol. 2 (Grand Rapids, Mich.: Eerdmans, 1975), 439-49.

themselves to Israel, more a foreign visitor than a migrant or resident alien. These are the other, the one outside the family, a stranger, foreigner, or simply a foreign country.<sup>66</sup>

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<sup>66</sup> B. Lang and Helmer Ringgren, “נכר nkr; נָכַר nēkār; נְכָרִי nōkri,” in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck, Helmer Ringgren, and Heinz-Josef Fabry, trans. David E. Green, rev. ed., vol. 9 (Grand Rapids, Mich.: Eerdmans, 1998), 425–426; Ludwig Köhler and Walter Baumgartner, *The Hebrew and Aramaic Lexicon of the Old Testament (K.B.)*, trans. M. E. J. Richardson (Leiden: Brill, 1994), 700.



# 1. The Immigrant as Alien?

This thesis seeks a Christian response to the alien who is unlawfully present under the federal law of the United States of America. Before there were “illegal aliens” in U.S. immigration law, there were “aliens.” Where does the legal concept of the alien come from, and how does the law conceive of an alien? Is the alien a type that belongs to nature, to the created order? Is regarding someone as an alien consistent with the freedom enjoyed by those within the law of Christ?

In part A of chapter 1, we will see how the concept of the alien is developed in federal United States law, and we will trace the emergence of this American legal concept from English common law. We will find in the seminal *Calvin’s Case* evidence of the increasing isolation of the “alien” as qualifying terms disappear, and we will see how the alien is thought to come as a result of a natural relationship of government and allegiance. In part B we will find an alternative in Karl Barth’s conception of “near and distant ones,” of peoples and all humanity, within the preserving activity of God. We will also examine the Apostle Paul’s description in 1 Corinthians 9 of the migration he undertakes through the liberating compulsion of the gospel. In contrast to a fixed designation of the immigrant as foreign, strange, other, and alien, we will find that according to Christian doctrines of creation and the church, those in Christ are freed to draw near to distant neighbors and to become migrants.

## 1.A. The Alien in United States Law and Common Law

### 1.A.1. The Alien as Constitutive Concept of United States Immigration Law

Historians disagree on where to place the origins of United States immigration law. Roger Daniels begins his story, “In the beginning Congress created the Chinese Exclusion Act,” referring to the 1882 federal statute that banned the entry of Chinese persons into the United States.<sup>1</sup> Aristide Zolberg identifies an earlier origin, arguing that “from the moment they managed their own affairs, well before political independence, Americans were determined to select who might join them, and they have remained so ever since.”<sup>2</sup> To defend his claim he cites practices that went on in the colonial era, the killing of Native Americans, the importation of Africans as slaves, the recruitment of certain Europeans, and the deterrence of convicts and paupers.<sup>3</sup> In this chapter, we seek to go farther back, locating an earlier concept that makes possible laws that restrict immigration. In 1790, the Congress of the newly formed United States passed a law regarding naturalization, breaking with the British language of “subjects” to speak of “citizens.”<sup>4</sup> The law provided a “uniform rule” by which a newcomer could become a U.S. citizen. While these shifts represented a revolution, this revolution did not touch another basic concept: the law retained the concept of the “alien” from the laws of Great Britain. This abiding concept deserves our attention.

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<sup>1</sup> Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882* (New York: Hill and Wang, 2004), 3; Daniels is speaking of *An Act to Execute Certain Treaty Stipulations Relating to Chinese (Chinese Exclusion Act)*, 22 Stat. 58, 1882.

<sup>2</sup> Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, Mass.: Harvard University Press, 2006), 1.

<sup>3</sup> *Ibid.*, 1–2, 26.

<sup>4</sup> *An Act to Establish an Uniform Rule of Naturalization*, 1 Stat. 103, 1790.

Today, the term “alien” is the basic building block of U.S. immigration law. The last significant overhaul of federal immigration law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, uses the term “alien” or “aliens” some twelve hundred times in the course of 179 pages. This alien is the object of the Act, the item to admit or exclude, to remove if unlawfully present, whose forced importation is forbidden, whose employment is regulated, and whose benefits are restricted. But what does the term mean? This 1996 Act looks back to the Immigration and Nationality Act of 1952 for its definitions of terms like “alien” and “immigrant.”<sup>5</sup> The 1952 Act defines the alien as “any person not a citizen or national of the United States,” and it goes on to define an immigrant as any sort of alien that does not fall within certain “classes of nonimmigrant aliens,” including foreign diplomats, tourists, businesspeople, and students.<sup>6</sup> The picture of an immigrant that emerges in contrast is an alien who comes to settle and stay. There are “quota immigrants” and “nonquota immigrants,” but like these, all subsequent terms build on the immigrant, or behind that, on the alien. So, in these 1952 definitions, “immigrants” are a subset of aliens, the general term for one who belongs to another political community, who may move into United States territory.

The founding documents of the United States of America prepared the way for the coming of the alien. The Declaration of Independence of 1776 listed as a grievance that the British King had prevented the passage of “Laws for Naturalization of Foreigners” and the passage of other laws “to encourage their migration hither.” Naturalization was the process of making someone an obedient member of a political community by making a person natural, as if she were born, *natus*, in that community’s lands. As William Blackstone

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<sup>5</sup> *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 110 Stat. 3009-546, 1996.

<sup>6</sup> *An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes (Immigration and Nationality Act; McCarran-Walter Act)*, 66 Stat. 163, 1952, 166-169.

explained just before American independence, Britain's process of naturalization turned an alien into a subject so that "an alien is put in exactly the same state as if he had been born in the king's ligeance" or allegiance.<sup>7</sup> In Britain, membership consisted of being a subject, a term that emphasized loyalty and service to the King. There was no regular process by which someone could become a subject of the King; naturalization required an Act of Parliament that specifically named the person in question. That person had to receive the Lord's Supper within a month before the bill was brought before Parliament, and the person had to take the oaths of allegiance and supremacy in the presence of Parliament, according to Blackstone.<sup>8</sup> Under King George II, a different pattern was put in place in the colonies in the decades leading up to independence: Protestants from other nations and Jews could be naturalized as subjects after seven years of residence in the colonies, so long as they swore the two oaths.<sup>9</sup> Still, the colonists remained aggrieved. In the years running up to the Revolution, the crown had blocked Acts by various colonies to ban the importation of slaves, to keep out paupers and convicts, and to give tax exemptions for new settlers. The crown had also gone against the colonists' wishes by blocking the emigration of valued British subjects and preventing migration into western territories won from France in the 1760s.<sup>10</sup> Freed from the oversight of London, the new republic in its 1789 Constitution authorized Congress to "establish an uniform rule of Naturalization."<sup>11</sup> The Constitution's only other reference to matters concerning immigration came when it forbade Congress from prohibiting "the Migration and Importation of such persons as any

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<sup>7</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), bk. 1, ch. 10, 362, from the Lillian Goldman Library at the Yale Law School, "The Avalon Project: Documents in Law, History, and Diplomacy," 2008, <http://avalon.law.yale.edu/default.asp>.

<sup>8</sup> *Commentaries on the Laws of England*, 1:362.

<sup>9</sup> *Ibid.*, 1:363.

<sup>10</sup> Zolberg, *A Nation by Design*, 25–26.

<sup>11</sup> *The Constitution of the United States*, 1789, Article I, Section 8, Clause 4.

of the States now existing shall think proper to admit” until 1808.<sup>12</sup> In these founding documents, the breakaway colonists sought the power to promote the “migration” and increase the “population” of the new states. We hear of “foreigners,” and we also hear of people who migrate as “persons,” though the signatories of the Constitution use the seemingly more dignified appellation “person” to refer to slaves and ensure that their importation would not be banned until 1808. The founding documents do not yet use the term “alien.”

The first appearance of the alien in federal United States law comes in Congress’ first year, 1790. The United States Congress used its power to “establish an uniform rule of Naturalization,” declaring

That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer...<sup>13</sup>

One naturalized no longer became a subject of the King but a citizen of the United States. This was the first time that the English term “citizen” appeared in the law of a national government, indicating the republican aspiration that each person would share in ruling and being ruled.<sup>14</sup> Naturalization no longer required a legislative act; there was now a regular pattern by which those born elsewhere could become like those born within the

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<sup>12</sup> Ibid., Article I, Section 9, Clause 1.

<sup>13</sup> 1 Stat. 103.

<sup>14</sup> R. R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America, 1760-1800*, vol. 1 (Princeton: Princeton University Press, 1959), 224. Palmer cites John Adams’ draft of the Massachusetts Constitution from 1780 as the first appearance of the “citizen” (Adams, *Works*, 1851, IV, 219), and he speculates that the term may have come to John Adams from Jean-Jacques Rousseau’s *Du Contrat social* of 1762, ch. vi, book 1, which Adams read as early as 1765 (ibid., 1:223).

limits and the jurisdiction of the United States. The 1790 Act did away with the requirement to participate in the sacrament of the Lord's Supper, opening naturalization to those who were not communicating Protestants, though it restricted naturalization to those who were "white." Those who might object to swearing an oath could give a simple affirmation. In the 1790 Naturalization Act, Congress brought about a revolution in how membership in a political community came about and how that membership was understood. Yet despite the novelty of calling the member a citizen, the American citizen was produced out of the same material as the British subject. That material was the alien.

In the years after 1790, the process of naturalization was revised: more years of residence were required, and the content of the oath was strengthened.<sup>15</sup> Still, the alien remained as the contrast figure to the citizen, and the alien remains so until the present. Though largely static over more than two centuries, the alien has appeared with some variation in sense and application in U.S. law. An anomaly in the law occurred in 1798, when in response to upheaval in France and Ireland, Congress passed two Acts to give the President power to bring about the removal of certain aliens, whether through command or by force. Among these were "such aliens as he shall judge dangerous to the peace and safety to the United States"<sup>16</sup> as well as "alien enemies," defined as "natives, citizens, denizens, or subjects of the hostile nation."<sup>17</sup> These Acts were not renewed, but the Acts revealed something of what it meant to be an alien. After this, for most of the nineteenth

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<sup>15</sup> See *An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on That Subject*, 1 Stat. 414, 1795; *An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Acts Heretofore Passed on That Subject*, 2 Stat. 153, 1802.

<sup>16</sup> *An Act Concerning Aliens (Alien Friends Act)*, 1 Stat. 570, 1798, 571.

<sup>17</sup> *An Act Respecting Alien Enemies*, 1 Stat. 577, 1798.

century the alien appeared only in naturalization law, not in immigration law.<sup>18</sup> The alien was the one who could be made a citizen, but there was no talk of aliens as persons who move into the United States, whether to visit or to settle. The occasional federal laws governing the movement of persons into the United States used other terms. Acts concerning shipping spoke of “passengers” who might become “inhabitants,” and other acts used the term “emigrant” with an “e.”<sup>19</sup> Among these was an 1864 Act that sought to encourage “immigration” during the Civil War.<sup>20</sup> A later Act from 1882 used the term “immigrant” alongside the “passenger not a citizen of the United States.”<sup>21</sup>

Alongside legislation concerning “passengers” and “emigrants,” other laws restricted emigration from China. The first Act of this kind, from 1862, restricted the forced migration of “coolies,” “Chinese subjects” who were brought as “servants” or “apprentices,” but the Act not forbid “voluntary emigration.”<sup>22</sup> This changed two decades later in a series of laws. An Act of 1882 forbade all “Chinese laborers” from “coming...to the United States” and remaining there. These persons were not eligible for citizenship.<sup>23</sup> Two years later, Congress restricted the “coming” of “all subjects of China and Chinese, whether

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<sup>18</sup> Cf. 1 Stat. 103; 1 Stat. 414; *An Act Supplementary to and to Amend the Act, Intituled “An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on That Subject,”* 1 Stat. 566, 1798; 2 Stat. 153; *An Act in Addition to the Act Intituled, “An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Acts Heretofore Passed on That Subject,”* 2 Stat. 292, 1804; *An Act Supplementary to the Acts Heretofore Passed on the Subject of an Uniform Rule of Naturalization,* 3 Stat. 53, 1813; *An Act Relative to Evidence in Cases of Naturalization,* 3 Stat. 258, 1816; *An Act in Further Addition to “An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Acts Heretofore Passed on That Subject,”* 4 Stat. 69, 1824; *An Act to Amend the Acts Concerning Naturalization,* 4 Stat. 310, 1828; *An Act to Amend the Naturalization Acts and to Punish Crimes against the Same, and for Other Purposes,* 16 Stat. 254, 1870.

<sup>19</sup> *An Act Regulating Passenger Ships and Vessels (Steerage Act),* 3 Stat. 488, 1819, 488, 489; *An Act to Regulate the Carriage of Passengers in Merchant Vessels,* 9 Stat. 127, 1847, 127, 128; *An Act to Regulate the Carriage of Passengers in Steamships and Other Vessels,* 10 Stat. 715, 1855, 716–721.

<sup>20</sup> *An Act to Encourage Immigration,* 13 Stat. 385, 1864, 386.

<sup>21</sup> *An Act to Regulate Immigration,* 22 Stat. 214, 1882.

<sup>22</sup> *An Act to Prohibit the “Coolie Trade” by American Citizens in American Vessels,* 12 Stat. 340, 1862, 340, 341.

<sup>23</sup> 22 Stat. 58, 59.

subjects of China or any other foreign power.”<sup>24</sup> These laws moved from restricting “Chinese laborers” to positing a Chinese race stretching beyond the Chinese empire. This new class of “Chinese” spanned the divide between immigration law and naturalization law: “Chinese” were excluded from entering the United States, and if already present, they were excluded from becoming citizens. Still, up to this point in U.S. law, an alien was the sort of person who might become a “citizen,” while those who moved into United States territory were “passengers,” “emigrants,” “immigrants,” or “Chinese.”<sup>25</sup>

Just around this time, a linguistic innovation in immigration law spanned the same divide that the term “Chinese” had spanned. For the first time, the term “alien” was used not only in the context of becoming a citizen, but in the context of moving into United States territory. An 1875 law, known as the Page Law, sought to ensure that “immigration” into the U.S. was “free and voluntary,” forbidding the importation not only of coolies but specifically of “immigrants” who have agreed to serve “a term of service within the United States, for lewd and immoral purposes.”<sup>26</sup> The law also forbade the importation of persons convicted of a felony in some other country and sent to the United States as punishment. While it might seem right for lawmakers to prohibit the importation of prostitutes and convicted felons into the United States, by doing so they introduced a new phrase into federal law that would make it possible to forbid other groups from entering. Part of the mechanism by which the law forbade sex trafficking and the transportation of convicts was by stating that “it shall be unlawful for aliens of the following classes to immigrate into the

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<sup>24</sup> *An Act to Amend an Act Entitled “An Act to Execute Certain Treaty Stipulations Relating to Chinese Approved May Sixth Eighteen Hundred and Eighty-Two,”* 23 Stat. 115, 1884, 115, 118.

<sup>25</sup> For more on Chinese exclusion, see chapter 2.A.2.

<sup>26</sup> *An Act Supplementary to the Acts in Relation to Immigration (Page Act),* 18 Stat. 477, 1875.

United States.”<sup>27</sup> Here, the alien was no longer simply a non-citizen who could be made a citizen, but a potential member of a “class,” and a class that could be forbidden from “immigrat[ing] into the United States” with no attention given to the particularities of the person and her case.

This innovation in legal language, the notion of “classes of aliens,” facilitated the development of immigration laws that parceled aliens into certain types to be excluded. The next step happened in 1891, when a law declared “that the following classes of aliens shall be excluded from admission into the United States,” going on to name

all idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come...<sup>28</sup>

A 1917 law used the same formula to introduce a much longer list of “classes of aliens,” adding among others, “anarchists” and persons originating from a triangle stretching from Arabia and Afghanistan to Asiatic Russia and the East Indies.<sup>29</sup>

And who was an alien, briefly stated? Federal law first defined the alien indirectly in 1798 as “natives, citizens, denizens, or subjects of [another] nation.” The first direct definition comes in 1917 in the same law that generated a lengthy list of excluded “classes of aliens,” where the alien is defined as “any person not a native-born or naturalized citizen of the United States.”<sup>30</sup> The definition we encountered from 1952, the one that would be

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<sup>27</sup> Ibid.

<sup>28</sup> *An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor*, 26 Stat. 1084, 1891, 1084.

<sup>29</sup> *An Act To Regulate the Immigration of Aliens To, and the Residence of Aliens In, the United States*, 39 Stat. 874, 1917, 875–876.

<sup>30</sup> Ibid., 874.

assumed in 1996, is similar: an alien is “any person not a citizen or national of the United States.”<sup>31</sup>

The alien had now bridged the gap: aliens were not only the stuff new citizens were made of, but they were the stuff that was excluded from entry into American territory. Naturalization law and immigration law were merged at the federal level around this term “alien.” Though the powers of the federal government over the alien had been expanded, the understanding of what defined an alien stayed relatively constant over the course of two centuries of federal law. Lawmakers assumed that an alien, someone who was not a citizen, was a normal part of the universe.

A 2011 speech by a federal agent testified to the consensus that the alien is real. Richard Crocker, Deputy Special Agent in Charge of United States Immigration and Customs Enforcement (I.C.E.) in Southern Arizona, discussed his work in a presentation to a community group in Tucson. As well as explaining his efforts to deter the smuggling of drugs, weapons, and human beings across the U.S.-Mexico border, Crocker described his efforts to prevent the movement of “aliens” across the border. He only occasionally used the term “economic migrant,” but he spoke again and again about aliens being smuggled, about aliens walking through difficult desert routes to cross the border, about drop houses for aliens, and about the removal of 392,000 illegal aliens by I.C.E. in 2010. The alien was a basic feature of his job, and as he spoke about aliens, he encouraged his hearers, “trust me....I’m just talking about reality.” For this agent, the world he worked in included aliens as plainly as it included deserts, rivers, mountains, and drugs.<sup>32</sup>

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<sup>31</sup> 66 Stat. 163, 166.

<sup>32</sup> Richard Crocker and Rudy Bustamante, Community Relations Officer, “Immigration and Customs Enforcement in Southern Arizona” (Borderlinks, Tucson, Arizona, July 28, 2011).

### 1.A.2. The Emergence of the Alien in Common Law: *Calvin v. Smith* (1608)

We have followed the alien through the history of United States federal law, noting how consistent American lawmakers were in defining the alien. We have seen that while the U.S. rejected the British notion of subjecthood and replaced it with a notion of citizenship, the contrast term for both the subject and the citizen remained the alien. Where does the alien come from, and has it always been understood as a fixed notion? To answer this question, we turn to the law that American lawmakers and judges took as precedent, the common law of England.<sup>33</sup> The developing notion of the alien was given its classic definition in the 1608 case of *Calvin v. Smith*, better known as *Calvin's Case* or the *Case of the Postnati*.<sup>34</sup> Here we will survey the case, the account of the alien that comes to the fore through the case, and the reasons given for this account.

The most influential account of *Calvin's Case* comes to us in the Report of Sir Edward Coke, who was at the time the Chief Justice of the Common Pleas. Coke tells his readers that so significant was this case that all the major judges of England came to argue and participate in the judgment.<sup>35</sup> The matter at hand was this: at the death of Queen Elizabeth I in 1603, the crown of England had descended to her relative King James VI of Scotland, who became King James I of England. After James' accession to the English throne, a man named Robert Calvin was born in Edinburgh, Scotland. Calvin was due to

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<sup>33</sup> *Calvin's Case* is cited in federal U.S. law as the source of the rule that every person born within U.S. territory is a citizen, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). See chapter 2.A.2.

<sup>34</sup> Sir Edward Coke, *Calvin v. Smith*, 77 Eng. Rep. 377 (1608). References will be drawn from this edition: Sir Edward Coke, "Calvin's Case, or the Case of the Postnati," in *Selected Writings of Sir Edward Coke*, ed. Steve Sheppard, vol. 1, 3 vols. (Indianapolis: Liberty Fund, 2003), <http://oll.libertyfund.org/title/911/106337>. Coke's Report, Moore's Report on the case, and two prominent speeches on the case by Lord Francis Bacon and Thomas Egerton, Lord Chancellor Ellesmere, are included in William Cobbett et al., eds., *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time*, vol. 2 (London: R. Bagshaw, 1809), 559–657.

<sup>35</sup> Coke, "Calvin's Case," Preface.

inherit property in Shoreditch, Middlesex, England, but Englishmen Richard and Nicholas Smith had taken control of the land, claiming that as a Scotsman, he was not able to inherit land in England. This was the case for the *antenati*, those born under the old arrangement when England and Scotland were two separate kingdoms, when James was only King of Scotland. In the old system, a “subject born” of the King of Scotland could inherit property in Scotland but not in England, where the same person was an “alien born.” But was this the case for the *postnati*, for those born after James’ accession as King of England, and could Robert Calvin lawfully inherit the land in Shoreditch?<sup>36</sup>

The Smiths claimed that though James now ruled over both England and Scotland, the two remained separate kingdoms, with separate allegiances and separate laws.<sup>37</sup> Thus, the argument ran, Robert Calvin remained an alien born: “Every subject that is *alienae gentis (id est) alienae ligeantiae, est alienigena* [Every subject that is of an alien people, i.e., of an alien allegiance, is alien born].”<sup>38</sup> As an alien born, Robert Calvin was not eligible to inherit the land at Shoreditch. But the Lord Chancellor and twelve of the fourteen judges assembled ruled “that the Plaintiff was no alien,” and that the land was rightfully his.<sup>39</sup> The majority in the case ruled that Calvin cannot be an enemy or merely an alien friend of the king. Instead, he is born under the allegiance and obedience, within the power and protection of the king of Scotland, who is also the king of England. This relationship happens according to the law of nature, and it cannot be altered. Since Calvin is not an

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<sup>36</sup> Ibid., 2a.

<sup>37</sup> It would not be until a century later that England and Scotland would be made the United Kingdom of Great Britain through the Act of Union of 1707.

<sup>38</sup> Coke, “Calvin’s Case,” 3a. Translation author’s.

<sup>39</sup> Ibid., Preface, 3b.

alien to the one who is king of both kingdoms, he cannot be an alien to the subjects of England. Thus, not being an alien, Calvin could inherit the property at Shoreditch.<sup>40</sup>

These arguments indicate the conceptual space that surrounded the term “alien.” Coke’s analysis circles around the notion of *ligeantia*, or *ligeance* from the Anglo-French of the medieval law courts. Every person is a subject, born into the *ligeance* of a “Sovereign.” In this *ligeance*, this bond, the subject offers obedience in return for protection; the subjects “obey” and “serve” the king, who “maintain[s]” and “defend[s]” his subjects.<sup>41</sup> Coke offers other ways of describing allegiance, saying that “they that are born under the obedience, power, faith, ligealty, or *ligeance* of the King, are natural subjects, and no aliens.”<sup>42</sup> He describes four types of allegiance: (1) natural allegiance, due from one born in the dominion of the king and considered a *subditus natus*, “subject born”; (2) acquired allegiance, granted by king or Parliament so that one becomes a *subditus datus*, a “subject given” or “made”; (3) local allegiance, as when a “Frenchman” or “Portugal born” enters the protection of the King of England as an alien friend, whose children born in England become subjects; and (4) legal allegiance, which all free and noble men swear by oath, promising truth and faith to the king and his heirs, “life and member, and terrene honour” to defend the king against any ill.<sup>43</sup>

In this account of the reasoning of the majority in *Calvin’s Case*, subjects are defined as natural, born into the allegiance of the king, or else made by grant. The “alien born” fits within this setting as one who is not a subject of the king. Coke offers a definition: “An Alien is a subject that is born out of the ligeance of the king, and under the

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<sup>40</sup> Ibid., 24b–25b.

<sup>41</sup> Ibid., 4b–5a.

<sup>42</sup> Ibid., 5b.

<sup>43</sup> Ibid., 5a–7a.

ligeance of another, and can have no real or personal action for or concerning land....”<sup>44</sup>

We might be confused by Coke when he defines an alien as still a subject even though not a subject of the King, but in Coke’s *Report*, “subject” is a basic term for an individual in his or her capacity as a political being, more common than the words “man” or “person.” Even an alien is still a subject of some king. Coke goes on to proffer a general scheme of types of subjects and aliens:

Every man is either *Alienigena*, an *Alien* born, or *subditus*, a subject born. Every Alien is either a friend that is in league, &c., or an enemy that is in open war. &c. Every Alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made.<sup>45</sup>

Here Coke maps out the universe of “men” and “subjects” for us: everyone is either born a subject or born an alien. There is no man or subject in between, no one without a sovereign, no one with partial or dual allegiances. Those alien born may come as friends, and they often do. They may show the King a temporary allegiance, a local allegiance, when they pass through or reside in his lands. But even if they come as friends, they have not sworn to defend the King with their life and give him all earthly honor, unlike the noblemen of England. So long as they are alien, they remain obedient to another sovereign. They may come as enemies to undermine the realm and even to kill the King.

This is the realm of possibilities presented by an alien in Coke’s telling of *Calvin’s Case*. But how would Coke’s contemporaries hear the term “alien”? Today the term “alien” conjures up extra-terrestrial life forms, perhaps threatening or monstrous, and when a

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<sup>44</sup> Ibid., 16a.

<sup>45</sup> Ibid., 17a. Coke explains that all of Christendom is in league with the king, and the subjects of these lands are alien friends, who can trade and own goods but not land. Aliens may enter into a temporary war and become alien enemies *pro tempore*. Perpetual enemies include “the devils,” *infideli*, *Judaei*, and “Pagans.” Specially permitted enemies may be allowed into the Realm for a time. No alien enemy may trade or own anything in the Realm (ibid., 17a-b).

human being is described as an alien, the term accentuates that person's strangeness.

Before the science fiction of the twentieth century, would the term "alien" have indicated a milder form of strangeness?<sup>46</sup> To discover the associations that "alien" might bear before science fiction, we turn to two sources. The first is popularly known by the name of the same king whose accession to the English throne provided the occasion for *Calvin's Case*. King James' Authorized Version of the Bible from 1611 uses the word "stranger" to translate the Hebrew גֵר, *gēr*, a word that occurs frequently in the Old Testament. This word refers to one who comes from elsewhere to reside in Israel, who can eat the Passover meal if he and all males in his household are circumcised. The *gēr*, the "stranger," is thus one who can be joined to Israel, more akin to an immigrant than a foreign visitor.<sup>47</sup> The Authorized Version only occasionally uses the word "alien," and that word is used to translate נֹכְרִי, *nokri*, and נֶכְחָר, *nēkḥār*, the Hebrew words for one who comes from afar but does not remain in Israel or attach herself to the people of Israel. At times, the Authorized Version translates these words as "foreigner."<sup>48</sup> The translators of the Authorized Version carry forward this pattern into the New Testament, where "alien" appears twice, referring to those separated from the people of Israel or to enemies in battle.<sup>49</sup> In the verb form, the

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<sup>46</sup> The Oxford English Dictionary lists the first instances of "alien" to mean "extra-terrestrial" as 1929 for the adjective and 1931 for the noun, while the phrase "alien life form" first appears in 1937, "Alien, Adj. and N.," *Oxford English Dictionary Online* (Oxford: Oxford University Press, September 2012), <http://www.oed.com/view/Entry/4988>.

<sup>47</sup> On the *gēr*, see the note in the introduction.

<sup>48</sup> Deuteronomy 14:21 gives instruction on what to do with a dead animal: it can be given charitably to what the A.V. calls the "stranger," or it can be sold to an "alien." Here the stranger is at the margins of Jewish society, while the alien is outside. Four Old Testament passages use "alien" in poetic couplets where "stranger" translates גֵר, *zār*, in the first line and "alien" translates *nokri* or *nēkḥār* in the second line. In these passages, the speaker bemoans the misfortune of becoming an "alien" unto members of his household (Job 19:15; Psalm 69:8), laments the seizure of Israel's houses by "aliens" (Lamentations 5:2) or foretells that "aliens" will plow and dress vines for Zion (Isaiah 61:5). Only one passage translates *gēr* as "alien," Exodus 18:3, out of keeping with general practice in the A.V. On *nēkḥār* and *nokri*, see the introduction.

<sup>49</sup> In Ephesians 2:12, the A.V. translates ἀπαλλοτριωμένοι, *apēllotriōmenoi*, a passive participial form of ἀπαλλοτριώω, *apallotriōō*, as "being aliens" in the phrase "being aliens from the commonwealth of Israel." In

Authorized Version uses “alienated” in Ezekiel for a term meaning to turn away in disgust with connotations of a tear, a split, or a crack.<sup>50</sup> In the Pauline epistles, someone may be “alienated” from the life of God or “alienated and enemies” of Christ because of “wicked works.”<sup>51</sup> In sum, the Authorized Version of the Bible uses “stranger” as a milder term for someone not from here, while “alien” stresses the strangeness of the person more powerfully, sometimes indicating tragic separation or violent conflict. “Alien” may not be as strong as it sounds today, since it is sometimes used interchangeably with “foreigner,” a term that modern science fiction has not adopted for extra-terrestrials. Still, a survey of the Authorized Version indicates that at the time of *Calvin’s Case*, “alien” was a term for someone who is stranger than a stranger and at least as foreign as a foreigner. The term carried overtones of repugnance and hostility.

A second source indicates that the term “alien” held a consistent meaning through to the 19<sup>th</sup> century, prior to the aliens of science fiction. *Silas Marner*, Mary Ann Evans’ 1861 novel written under the name George Eliot, describes how peasants perceived weavers who came from the city to ply their trade. These “pallid undersized men,” writes Eliot, “by the side of the brawny country-folk looked like the remnants of a disinherited race.” To weathered, strong country people, these weavers were “alien-looking men.” They suspected that weaving might take place with the help of the “Evil One,” and “superstition clung easily round” them: “No one knew where wandering men had their homes or their origin; and how was a man to be explained unless you at least knew somebody who knew his

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Hebrews 11:34, the A.V. translates παρεμβολὰς ἔκλιναν ἀλλοτριῶν, *parembolas eklinan allotriōn*, as “turned to flight the armies of the aliens.”

<sup>50</sup> In Ezekiel 23:17, 18, 22, 28, the A.V. uses “alienate” and “alienated” to translate forms of the related verbs עָקַר, *yaq’* and נָקַר, *naq’* which mean “to turn away in disgust.” Cognates in similar languages also mean splitting, tearing, cracking, and breaking, *The Hebrew and Aramaic Lexicon of the Old Testament (K.B.)*, trans. M. E. J. Richardson (Leiden: Brill, 1994), 431, 722.

<sup>51</sup> In both Ephesians 4:18 and Colossians 1:21, the word “alienated” is used to translate participial passive forms of ἀπαλλοτριῶ as in Ephesians 2:12. See note 49.

father and mother?” Even one who came and settled would continue to be “viewed with a remnant of distrust,” allowing for no surprise if after a long time of benign conduct the tradesman was found to commit a crime.<sup>52</sup> Skill and cleverness were in themselves “suspicious,” since their source was hidden and thus seemed a kind of “conjuring.” The passage concludes: “In this way it came to pass that those scattered linen-weavers – emigrants from the town into the country – were to the last regarded as aliens by their rustic neighbors....”<sup>53</sup> That Eliot chooses “alien” and not “foreigner,” “stranger,” or some other word is significant. The unfamiliar origins, the strange physical characteristics, the obscure expertise of the tradesmen cause the locals to respond to them with distrust, even associating them with occult powers, and it is as aliens that Eliot describes this assessment of the newcomers by the peasants.

The answer to our question, whether Coke’s readers would have understood “alien” as a friendlier designation than we do, appears to be “no.” The Authorized Version from the same era as *Calvin’s Case* uses “alien” as not a congenial appellation for the member of another group but rather to indicate an oppositional otherness, a foreignness sometimes bleeding into antagonism. George Eliot’s *Silas Marner* gives us a sense that “alien” continued to carry this connotation until the century before science fiction, indicating a sense of suspicion. While the term continued to apply to human beings through the nineteenth century, “alien” appears to be the strongest English term short of “enemy” for someone from far away. It is not surprising, then, that science-fiction writers adopted the term “alien” for extra-terrestrials. When Coke’s report describes the alien as born elsewhere, under another ruler, and within another sovereignty, that term to the original

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<sup>52</sup> George Eliot, *Silas Marner* (London: Penguin, 1994), 9.

<sup>53</sup> *Ibid.*, 10.

readers would have emphasized the strangeness of a person and given them license to suspect the person of hostility to the King. Coke's definition of the subject thus depends on circumscribing an alien, a foreign, perhaps hostile other, as a contrast term.

### *The Alienation of the Alien*

Having discovered something of the meaning of "alien" in Coke's milieu, we turn to Coke's handling of the concept of the alien. It is Coke's task to demonstrate that the conception of the alien in *Calvin's Case* is well established in the law that precedes it. He begins with the common law, citing authorities that attest to a similar notion of an alien. Here we note the ways that the oldest authorities disagree with Coke, despite his presentation of them as authorities in agreement. Coke says that after the Danish king Canute conquered England in the eleventh century, the peers and nobles of England sought to persuade him to reduce the numbers of troops he stationed in England. They did this by proposing a law to guarantee that if someone who was not an Englishman was killed, the killer would be held to account and punished. Coke explains, "This law was penned *Quicumque occiderit Francigenam, &c.* [Whoever kills French born, etc.] not excluding other aliens, but putting *Francigena*, a Frenchman for example, that others must be like unto him, in owing several ligeance to a several Sovereign, that is, to be *extra ligeantiam Regis Angl'*, and *infra ligeantiam alterius Regis* [outside the ligeance of the King of England, and within the ligeance of another, or the other, king]."<sup>54</sup> Coke writes that in the same context, the legal authorities Bracton and Fleta "describ[e] an alien [as] *ad fidem Regis Franciae* [owing

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<sup>54</sup> Coke, "Calvin's Case," 16b. Coke cites Bracton lib. 3. Tract. 2. Cap. 15. Fol. 134.

faith to the King of France].”<sup>55</sup> Later in the same century, from the laws of William the First, the Conqueror, Coke cites a law defining the privileges of *omnis Francigena*, all French born, saying that *Francigena* was “there put for example as before is said, to expresse what manner of person *alienigena* should be.”<sup>56</sup> These examples provide a window into a period when the law employed the terms *Francigena* or *ad fidem Regis Franciae* but no more general term for someone who was not an English subject, when a Danish subject could qualify under laws referring to *Francigena* without being called *alienigena* or “alien.” Coke thinks that he can replace *Francigena* with *alienigena* to translate the law into its current use and application. His analysis fails to recognize a significant difference between eleventh-century law and the law of his time: while the older laws used the name for someone from a particular foreign realm, *Francigena*, Coke used and took for granted general terms for “subjects” from any other realm, the terms *alienigena*, “alien born,” and “alien.”

As Coke handles the common law, he reveals that he has a hand in a troubling historical trajectory. Before his time, the law considered the specific term *Francigena* or French-born to be sufficient to designate a Dane. In *Calvin’s Case*, the general terms *alienigena*, “alien born,” and “alien” are available in common law as terms for the class of those who are not subjects of the King. Still at this point, two of these three terms retain a helpful suffix, *-gena* or “born,” reminding us that these are aliens only in a restricted sense — only in the sense that they are born in an “alien” land, in an “other” land. But Coke also uses the term “alien” on its own, and he makes it available to future generations of judges and lawmakers. By the time of the American founding, the term “alien” is the primary term

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<sup>55</sup> Ibid. Coke writes that the law also stated that if someone was found slain, the person had to be proved to be “an Englishman,” or else “he should be taken for an alien.” Coke says that this law of “Englesherie” continued until it was abolished in 14 Edw. 3. Cap. 4.

<sup>56</sup> Ibid., 17a.

used for someone who is not a citizen, not “French born” with its specificity or “alien born” with its helpful suffix. The definitions of *Calvin’s Case* bequeath to the United States of America the notion of an alien as summing up a type of person. A survey of close to a millennium of the common law reveals no greater recognition of commonality among human beings. Rather, the common law produces a sharper definition of those from other lands as aliens – no longer as ones from “other” lands or under “other” rulers, but as “others” plain and simple. From English law to American law, those with some alien attachment are increasingly qualified as nothing more than aliens. Aliens are isolated as a type: they are alienated.

### *The Alien as a Consequence of the Natural Law*

As well as enabling the alienation of the alien, Coke’s account envisions the distinction between subjects and aliens as depending not only on the positive developments of the common law, but on the natural law. That “every man is either an alien born or a subject born” is not the case only because judges or Members of Parliament have decided it is so. Rather, for Coke, the distinction is a consequence of how the world is, how it is naturally ordered. Coke’s positioning of the alien in relation to the law of nature happens by way of an argument that we reconstruct as follows:

[1] “The Law of Nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the Moral Law, called also the Law of Nature.”<sup>57</sup>

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<sup>57</sup> *Ibid.*, 12b.

[2] “For whatsoever is necessary and profitable for the preservation of the society of man, is due by the Law of Nature:

[3] “But Magistracy and Government are necessary and profitable for the Preservation of the society of man;

“therefore [4] Magistracy and Government are of Nature.”<sup>58</sup>

Corresponding to government is the obedience of the subject:

[5] “By this Law of Nature is the Faith, Ligeance, and Obedience of the Subject due to his Sovereign or Superiour.”<sup>59</sup>

The one born outside of the bond between a particular sovereign and his subjects is the alien, in a passage already quoted:

[6] “An Alien is a subject that is born out of the ligeance of the king, and under the ligeance of another, and can have no real or personal action for or concerning land...”<sup>60</sup>

In [1], Coke draws his initial account of natural law both from the Bible and from reason: The people of God, Coke says, were governed by the law of nature even before Moses wrote the law, and as the Apostle Paul writes in the Letter to the Romans, those who do not have the law still follow the law. The law of nature and the law of God are the same for all. Coke mentions Aristotle, Bracton, and Fortescue as authorities who agree on this picture of natural law. Fortescue and Virgil also attest to “natural equity” by which kings judged before judicial and municipal laws were made.<sup>61</sup>

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<sup>58</sup> Ibid., 13a.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., 16a.

<sup>61</sup> Ibid., 12b–13a.

Against this backdrop of the law of nature comes Coke's argument in [2] to [5] that the obedience of subject to superior is by nature. Coke says that the natural law not only preserves individual men and women, but the society of human beings; indeed, anything that preserves human society is by the law of nature. Magistracy and government achieve this end of preservation, and thus they are by nature, as are the faith, ligeance, and obedience that correspond to them. Coke cites a number of authorities to establish this argument. In the Law of Moses, the "commandment of the Moral Law, *Honora patrem*, ...doubtless doth extend to him that is *pater patriae*"; the command to honor father extends to the father of the fatherland.<sup>62</sup> Coke also thinks that Paul in Romans 13:1 refers to government by nature when he writes, *Omnis anima potestatibus sublimioribus subdita sit*, "Let every soul be subject to the higher authorities."<sup>63</sup> Coke also says that Aristotle in book 1 of the *Politics* proves "that to command and to Obey is of Nature," though Coke draws this from a broader argument from Aristotle that some are naturally rulers and others are naturally slaves.<sup>64</sup> Later, Coke offers another argument: just as we are born as son or daughter of a father, and this state cannot be changed by law, he says that we are also born into the protection of the King as *pater patriae*, and this relationship is indelible and immutable.<sup>65</sup>

Out of this picture flows Coke's proposition [6]: those outside of this particular bond of ligeance and magistracy are aliens. Yet to say this is to introduce new concepts and assumptions. Propositions [2] to [4] speak of magistracy and government as a general principle; proposition [5] moves to identify a particular person who is sovereign and

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<sup>62</sup> Ibid., 12b.

<sup>63</sup> Romans 13:1, from *ibid.*

<sup>64</sup> Ibid., 13a; Aristotle, *Politics*, trans. H. Rackham, rev. ed., Loeb Classical Library 264 (Cambridge, Mass.: Harvard University Press, 1944), 1254a14-1255b15, esp. 1254b19-23.

<sup>65</sup> *Indelebilis et immutabilis*, Coke, "Calvin's Case," 13b-14a.

superior; but by the time we get to proposition [6], we have shifted to a world of multiple dominions and sovereigns. Coke does not explain this shift, but we offer an argument in the spirit of Coke for the existence of multiple sovereigns:

[5a] There are some subjects who are not subject to the sovereign in question.<sup>66</sup>

[5b] Those subjects are subject to some other sovereign.

Therefore, [5c] there exists more than one sovereign and more than one ligeance.

Coke does not explicitly make this argument. After his general account of the law of nature, he argues that the law of nature is “parcel of the Laws, as well of England, as of all other nations.”<sup>67</sup> Here the law of nature is discerned in a world where England is one of “several & distinct kingdoms.”<sup>68</sup> Coke tells us that government and obedience is by nature, but he does not tell us if the very plurality of political communities is also by nature; he takes plurality for granted, but he does not give it greater force by saying that there are many kingdoms by nature. When Coke goes on to state proposition [6] and expand it in the way we have discussed above, he also does not say directly that the subject-alien relationship is by nature. So, for Coke government is natural, the plurality of governments is taken as fact, and the existence of some who are alien to this sovereign, this dominion, and these subjects come as a result. The existence of aliens thus arises as a consequence of the natural principle of subjection to a sovereign, but Coke does not explicitly describe alienage as natural.

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<sup>66</sup> As we have discussed above, Coke assumes that every person is a subject to some king, so a subject not subject to one king must be subject to another king.

<sup>67</sup> Coke, “Calvin’s Case,” 14a.

<sup>68</sup> *Ibid.*, 15a.

This feature of Coke’s argument from natural law may save the alien from its alienation: Coke stops short of describing aliens as natural. He does not offer this stronger qualification of aliens, exhibiting some unease with saying that aliens arise naturally within the order of the world. Aliens exist in fact – there are men and subjects from other lands which Coke tends to call aliens – but he does not say that they are there naturally.

It is this gap between what is natural and what is now the case that we will attend to in the rest of this chapter. We will ask: Have there always been some who are alien to us subjects? When and how do the distinctions between one set of subjects and another arise? Is our destiny to remain alien to other human beings? We will save a discussion of government and whether it belongs to nature for the following chapter, where we will read Scripture with trusted interpreters to discern a theology of government as it guards places. In the next section we will exploit the subtle difference between Coke’s account of government as natural and the subject-alien distinction as factual but not natural, in a doctrine of providence with Karl Barth, and in a doctrine of the church through Paul’s first Letter to the Corinthians.

## **1.B. The Ones From Far Away within Providence and the Church**

### **1.B.1. The Ones Nearby and the Ones Far Away: Karl Barth’s Biblical Theology of the Nations**

In part A of this chapter, we followed the emergence of the alien as a constitutive feature of United States immigration law, as one who may become a “citizen” and as one whose entrance into U.S. territory may be restricted. We traced the alien backward to its seminal

formulation in English common law, where in *Calvin's Case* the alien is in the process of emerging as a fixed type, no longer modified by other terms. There the alien is defined as the one who is not the subject of a given sovereign. In what follows, part B, we seek to discern how those who hear the Word of God are freed to relate to immigrants. First we will ask whether God has created and preserved the world in such a way that immigrants are alien to those who are settled, and later we will ask whether immigrants are alien to the church.

The twentieth-century Swiss Reformed theologian Karl Barth provides an answer to the first question in a section of the *Church Dogmatics* entitled *Die Nahen und die Fernen*, translated as “Near and Distant Neighbors.”<sup>69</sup> Barth’s attentive exegesis of key biblical passages, his considered valuation of national belonging, and his perceptive guarding of nationhood from distortion commend his writing to us.<sup>70</sup> Barth’s stated opposition to natural law arguments may make him seem too easy a figure to oppose to Edward Coke, yet if we read *Die Nahen und die Fernen* along with the surrounding writing in Barth’s ethics of creation, we find that Barth sketches an intricate picture of human life within the nations and within all humanity.<sup>71</sup>

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<sup>69</sup> Karl Barth, *Kirchliche Dogmatik (K.D.)*, vol. III/4, *Die Lehre von der Schöpfung* (Zürich: Theologischer Verlag Zürich, 1980), 320–366, originally published in 1951; Karl Barth, *Church Dogmatics (C.D.)*, ed. G. W. Bromiley and T. F. Torrance, trans. A. T. Mackay et al., vol. III/4, *The Doctrine of Creation* (Edinburgh: T. & T. Clark, 1961), 285–323. Carys Moseley, in *Nations and Nationalism in the Theology of Karl Barth* (Oxford: Oxford University Press, 2013), 201, argues that this 1951 statement by Barth represents his mature thought on nations and nationalism, a statement he did not modify before his death in 1968.

<sup>70</sup> Two contemporary theologians interpret peoplehood in ways that closely echo Barth. Nigel Biggar makes his debt to Barth clear in “The Value of Limited Loyalty: Christianity, the Nation, and Territorial Boundaries,” in *Boundaries and Justice: Diverse Ethical Perspectives*, ed. David Miller and Sohail H. Hashmi (Princeton: Princeton University Press, 2001), 38–54. Oliver O’Donovan’s debt to Barth remains implicit in *The Ways of Judgment* (Grand Rapids, Mich.: Eerdmans, 2005), 149–157.

<sup>71</sup> See Emil Brunner and Karl Barth, *Natural Theology: Comprising “Nature and Grace” by Emil Brunner and the Reply “No!” By Karl Barth*, trans. Peter Fraenkel (London: Geoffrey Bles, The Centenary Press, 1946); Stanley Hauerwas, *With the Grain of the Universe: The Church’s Witness and Natural Theology* (London: S.C.M. Press, 2002).

Coke's definition of the alien in *Calvin's Case* arose in a context, a court case about the inheritance of property once England and Scotland shared the same monarch. Barth's ways of describing those from other countries also have a definite context. In one sense that context is the *Church Dogmatics*, a thirteen-volume exposition of the Word of God that formed Barth's life work from the 1930s until his death in 1968. The section that merits our attention falls within Barth's teaching on creation, where he says that the command of God directs persons toward their fellow human beings, to "affirm, honor, and enjoy" them, in what seems to be Barth's long-hand for love for the neighbor.<sup>72</sup> Barth writes that certain kinds of relationships belong to humanity as created by God: every human being is male or female and incomplete without the other, and everyone is a child and possibly a parent. But are there further spheres of human relationships that belong to creation? Are we necessarily given a *Volk*, a people or a nation to be a part of, and a wider sphere of humanity to be a part of?<sup>73</sup> As Barth explores this question, he reveals an historical occasion of the utmost urgency: writing just after the Second World War, Barth wants to rectify the errors of the «*völkische Bewegung*», the "people's movement" in German Protestant theology that aided and abetted the disastrous nationalism of the Third Reich just a few years prior.<sup>74</sup> He decries the invention by "sentimental or wicked fools" of a theology and ethics that sees the *Volk* as God's chief gift to humanity.<sup>75</sup> The likes of Paul Althaus, Emmanuel Hirsch, and Friedrich Gogarten understood the life of the nation as the basic revelation of God's ways, the foundational God-given imperative which government rather than the Church is equipped to illuminate. The church was tasked with upholding the nation and

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<sup>72</sup> C.D., 1961, III/4:116.

<sup>73</sup> Ibid., III/4:286.

<sup>74</sup> K.D., III/4:347; C.D., 1961, III/4:307.

<sup>75</sup> C.D., 1961, III/4:292, 307-308.

supporting the preservation of a healthy race, which in the hands of the National Socialists soon led to the murder of those considered weak or degenerate.<sup>76</sup> Barth describes this as a movement without precedent in theology, and “one of the most curious and tragic events in the whole history of Protestant theology.”<sup>77</sup> With this behind him, Barth’s writing returns to the question of the place of the people and all humanity in creation, pruning away over-confident assertions about nationhood yet not discarding what might be true about the people, the nation, as the setting in which a person hears the command of God.<sup>78</sup>

In *die Nahen und die Fernen*, Barth offers two suggestions about how the divine command frees the hearer to relate to those whom federal U.S. law calls “aliens.” First, he writes that the members of other peoples are always fellow human beings. He has explained at the start of the larger section that a human being is always a fellow human being, a *Mensch* is always a *Mitmensch*, an “I” encountering, relating to, and partnering with a “You.” For Barth this basic truth about humanity becomes clear as we hear how the human being relates to God: the human being is determined to be the covenant partner of God, and likewise human beings are brought into partnership with other human beings. For Barth, this truth also becomes clear when we see God as triune rather than solitary, so that human beings made in God’s image are not solitary but freed in fellowship.<sup>79</sup> When Barth moves to consider the members of other peoples, he says that we might call them *Fremden*, “foreigners” in Harold Knight’s translation, but they are “only partial and relative

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<sup>76</sup> *Ibid.*, III/4:308–309. See Timothy Gorringer, *Karl Barth: Against Hegemony* (Oxford: Oxford University Press, 1999), 118; Arthur C. Cochrane, *The Church’s Confession Under Hitler* (Philadelphia: Westminster Press, 1962).

<sup>77</sup> *C.D.*, 1961, III/4:305.

<sup>78</sup> *Ibid.*, III/4:287.

<sup>79</sup> *Ibid.*, III/4:116–117; *K.D.*, III/4:127–128. For Barth’s fuller account of humanity as fellow-humanity, see *Church Dogmatics (C.D.)*, ed. Geoffrey W. Bromiley and T. F. Torrance, trans. Harold Knight et al., vol. III/2, *The Doctrine of Creation* (Edinburgh: T. & T. Clark, 1960), sec. 45, especially 247, 285.

foreigners” because they are fellow human beings.<sup>80</sup> If the German term *Fremde* means one who is foreign, strange, or other, then it coincides with the English term “alien,” or at least with the milder term “foreigner.” So, from the beginning Barth opposes the notion that some human beings are simply alien or plainly foreign. Barth does not base this stance against considering others to be alien on a claim that we share a common humanity, some common substance or nature; instead, he says that we are human to the extent to which we partner with other human beings, that we move out toward our fellows. Barth suggests, then, that before God the Creator, the members of other peoples are only relatively alien because they are fellow human beings, partnering human beings.

Barth makes a second suggestion that works against a static and final distinction between what Coke calls subjects and aliens. Barth develops a distinctive kind of speech to explain the relationship between a nation and other nations, between a people and all humanity. He speaks in terms of *die Nahen und die Fernen*, which Harold Knight’s 1961 translation renders as “near and distant neighbors.” Knight’s translation represents a gloss on Barth; Barth does not mention the *Nächster*, the next or proximate one we cannot choose, the standard term in German Bibles for the Greek πλησίον, *plēsion*, translated “neighbor” in English Bibles. Nor does Barth mention the *Nachbar*, the German term for the neighbor we can choose, except when he discusses the *Nachbarvolk*, the neighboring people, which we will discuss below. *Die Nahen und die Fernen* simply means “the nearby ones and the distant ones,” “the ones close by and the ones far away,” without drawing out the associations that the “neighbor” carries in Christian theology. In the end, Knight’s gloss “near and distant neighbors” proves a helpful way of tying together Barth’s insights, as we

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<sup>80</sup> C.D., 1961, III/4:286; K.D., III/4:322. See also C.D., 1961, III/4:287, 290.

will see after we have undertaken a careful reading of Barth on his own terms. Another of Knight's translations is worth resisting: he renders Barth's *Volk* as "people," "nation," and "race," but Barth uses *Volk* to mean a people or a nation, not to speak of a biological human type, a "race."<sup>81</sup> With these German terms better defined, we turn to Barth to grasp his distinctive understanding of peoples.

Barth asks, where does the command of God meet us to free us for fellowship? It meets us where we are, among those nearby, among our people, determined sometimes by blood relationships, by history, by language, by customs, or by location. The command of God also meets us where we are among those far away, among the peoples of the world. God makes this place holy where we live, among those nearby and those far away, and here he commands us to obey. There is no autonomous law that holds in the national or international spheres, but here too God is Lord and Deliverer, says Barth.<sup>82</sup> Today we live within a people and among all humanity, but is our nationality an essential feature of how we are created? Are we called always to honor, promote, and protect the people we are a part of? No, Barth says. In an earlier work, the 1928 *Ethics*, Barth had placed nationhood within a discussion of calling, so that we could be called to loyalty to our people. Here in 1951, Barth writes otherwise: The people is not an order of creation, but instead an ordinance.<sup>83</sup> Nationhood is a sphere of obedience, a sphere in which the command of God meets us, and no more. The eternal God rules over all of history, but some of his gifts he only gives for a time, and the people is among those.<sup>84</sup> While the confrontation between

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<sup>81</sup> We follow Moseley in rejecting the translation of *Volk* as "race," *Nations and Nationalism in the Theology of Karl Barth*, 178.

<sup>82</sup> C.D., 1961, III/4:287.

<sup>83</sup> *Ethics*, ed. Dietrich Braun, trans. Geoffrey W. Bromiley (Edinburgh: T. & T. Clark, 1981), 191, 193. See Moseley, *Nations and Nationalism in the Theology of Karl Barth*, 177.

<sup>84</sup> Barth, C.D., 1961, III/4:301, 305.

man and woman and parent and child is unalterable, Barth says, the confrontation between the near and the distant is not fixed or permanent. The peoples are a “fatherly” gift of God to preserve us from harm, neither original nor final.<sup>85</sup>

Barth’s case for the near ones and the distant ones as temporary dispositions of God arises from his reading of the peoples or nations in the biblical narrative, which appears in small type in *Church Dogmatics* III/4. Barth remarks that the peoples do not arise in the creation accounts of Genesis 1 and 2, nor do they appear in the account of the fall and its aftermath for a united humanity in Genesis 3-9.<sup>86</sup> Instead, the peoples arise after God has made his covenant with Noah and every living creature in Genesis 8:20–9:17, when he promises to preserve them from total destruction.<sup>87</sup> The peoples first appear in what Barth reads as synchronous accounts in Genesis 10:1-32 and 11:1-9. The first account presents a separation into peoples, lands, and languages as an obedient response to God’s command to multiply and fill the earth, while the second account presents the dispersion of separate peoples as a divine judgment. In Barth’s reading, while humanity has one language, it gathers to build a tower at Babel where it will make a name for itself rather than calling on God’s name, where it will offer sacrifices under its own power. The sinfulness of the one humanity grows, and its unity achieved through force and ideology threatens to destroy it. God comes down to scatter the peoples and their languages to preserve them from self-destruction.<sup>88</sup> His judgment is severe, since they now live in a world with geographical borders and separate histories, in an antithesis of near and distant, where

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<sup>85</sup> Ibid., III/4:324.

<sup>86</sup> Ibid., III/4:309, 311.

<sup>87</sup> Ibid., III/4:315.

<sup>88</sup> Ibid., III/4:312–318.

there can be little cooperation across borders, where there remains a “great homesickness.”<sup>89</sup> Still, God does not leave them without hope.

A plurality of peoples has arisen both as a response to the divine command and as divine judgment. The many peoples form the scene on which the main story of Scripture takes place from Genesis 12 onward. In Barth’s reading, God forms a unique people, Israel, who lies now at the center of history with the other peoples at the periphery. Israel is only a people so long as it remembers that God has brought it together, and it is made to summon the peoples to worship God. Barth says that it is the Jews and not others who sing Psalm 100:

Make a joyful noise unto the Lord, all ye lands.  
 Serve the Lord with gladness; come before his presence with singing.  
 Know ye that the Lord he is God: it is he that hath made us, and not we  
 ourselves; we are his people, and the sheep of his pasture.<sup>90</sup>

For Barth, God does a work within Israel at Pentecost. There the followers of Jesus are filled with the Holy Spirit and enabled to speak the languages of the known world, “telling...the mighty works of God” (Acts 2:11). God enables disciples from the margins of Israel, Galilee, to speak the languages of the Jewish diaspora, with no mention of Israel’s metropolis, Jerusalem, Barth writes. The Holy Spirit breaks Israel out of its old confines and makes possible a new Israel, an Israel which will include the speakers of a multitude of languages. It is a work of the Holy Spirit, not of a human being, to build this bridge from those nearby to those far away, enabling the witnesses of Christ to move out to those far away.<sup>91</sup> If we move beyond Barth here, we can see Pentecost not as a reversal of the tower of Babel; the work of the Holy Spirit is not to unify the peoples of the world under one

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<sup>89</sup> Ibid., III/4:317.

<sup>90</sup> Ibid., III/4:318–319. Ps. 100:1-3, A.V.

<sup>91</sup> Ibid., III/4:320–322.

language. Rather, the Spirit enables a new Israel to form, speaking the one Word about the risen Christ in many languages.

Barth concludes his reading of Scripture with a passage from the Letter to the Ephesians. It is here that the provenance of Barth's central terms becomes clear: "But now in Christ Jesus you who once were far off have been brought near by the blood of Christ. For he himself is our peace, who has made us both one and has broken down in his flesh the dividing wall of hostility."<sup>92</sup> The destiny of the far ones and the near ones is given here: their end is to come near in the blood of Christ, where the walls of hostility are broken down.<sup>93</sup> This is not simply a move toward the universal: the nations are not headed toward the unified humanity present at creation, nor are their members to become cosmopolitans.<sup>94</sup> Rather, the destiny of the peoples is that they will be included in that very particular people made by God, Israel. In Barth's striking phrase, "...It is not any other people, nor the totality of others, but the Jews who are the universal horizon of each and all peoples."<sup>95</sup> It is as part of a new Israel that the nations find their end.

Barth's passage on the ones nearby and the ones far away begins with a general treatment in full-size print and ends with a reading of Scripture in small type. He does not make this plain, but we think that his general treatment of the peoples only makes sense

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<sup>92</sup> Eph. 2:13-14, E.S.V.

<sup>93</sup> C.D., 1961, III/4:323.

<sup>94</sup> While Barth rejects cosmopolitanism, theologian Luke Bretherton argues for a "Christian cosmopolitanism" in *Christianity and Contemporary Politics: The Conditions and Possibilities of Faithful Witness* (Oxford: Wiley-Blackwell, 2010), 129-137. Barth and Bretherton are not strongly opposed, however. Bretherton argues against a rationalist cosmopolitanism that sees national memberships as dissolving into a united humanity. Instead, he proposes a Christian cosmopolitanism, in which national communities have value, nations seek an international common good within a commonwealth of nations, and nations find their *telos* in the communion of human beings with God. Bretherton calls this end the "city of God" (134), and he states that Christian universality is more properly called "catholicity" (136), a reference to the church in its wholeness. Barth on the other hand avoids talk of world citizenship or cosmopolitanism in favor of what he sees as the end of nations: inclusion in the people of Israel, the people made by God.

<sup>95</sup> C.D., 1961, III/4:319. ...*Kein anderes Volk und auch nicht die Völker in ihrer Gesamtheit, sondern sie, die Juden, sind der universale Horizont aller Völker und jedes einzelnen Volkes*, K.D., III/4:361.

once we get to the end of Barth's biblical narrative, once we discover their origin and their end. Indeed, we think that Barth proposes that the nature and purpose of peoples and nations only makes sense once we understand God's purpose for them. It is to this general treatment that we now turn.

We really are among peoples, Barth tells us, with our languages, our shared places, and our histories. And we are to be committed to each of these, to learn our national speech and use it well, to have a proper patriotism about our country, to take responsibility within history. But to be really among our people, says Barth, is to make use of language, place, and history in an outward-looking manner. The command of God moves us to use speech rightly, to seek to communicate not only with those who speak our dialect or national language, but to seek fellowship with those who speak foreign languages.<sup>96</sup>

Locality, too, is best understood as a place to look out from. We are there with all others who look out from that place, and that home will remain with us invisibly even if we pass on to another place.<sup>97</sup> At the borders of our locality there is a neighboring people, a *Nachbarvolk*, to whom we must reach out.<sup>98</sup> Barth writes, "One's own people in its location cannot and must not be a wall but a door. Whether it be widely opened or not, and even perhaps shut again, it must never be barred, let alone blocked up."<sup>99</sup> When Barth argues that distinctions between near ones and distant ones are fluid (*fliessend*), he continues this theme:

We have seen that, although this does not mean the removal of boundaries (*Grenzsteine*), it certainly means the overthrow of barriers (*Schlagbäume*) and a certain coming and going, a common mind and mutual intercourse, a

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<sup>96</sup> C.D., 1961, III/4:289-291, 294-298.

<sup>97</sup> Ibid., III/4:290-292.

<sup>98</sup> Ibid., III/4:293; K.D., III/4:330.

<sup>99</sup> C.D., 1961, III/4:294.

certain measure of co-operation and the establishment of genuine societies across the frontiers.<sup>100</sup>

As we stand within our people's history, too, we are to look out toward the history of all peoples as it finds its center in Jesus Christ.<sup>101</sup> Not when we make our language a prison, not when we bar our borders, not when we act only to further our nation's history, but when we move outward are we most faithful to our people as it is made to be. Barth pronounces, "The one who is really in his own people, among those near to him, is always on the way to those more distant, to other peoples."<sup>102</sup>

We must begin with those nearby, Barth says, but where we really are is on the way to those who are far off. The command of God meets us on the way, as pilgrims.<sup>103</sup> As human beings we are not essentially only in our people or essentially among all humanity; rather, we are involved in a centrifugal motion; we are set on a path, moving out from near to far.<sup>104</sup> Our place within one people rather than another is "reversible," it is "fluid," hard to define even if we are not Alsatians, and it is ultimately "removable."<sup>105</sup> While we remain man and woman, parent and child, Barth suggests that when it comes to being a Chicagoan or an American or a Mexican, we put on "pilgrim's clothing" and we might put it off again.<sup>106</sup> Where we are is just one place to exercise our natural fellow-humanity. Barth concludes: "Since the confrontation of near and distant neighbors is reversible, fluid, and removable, this means that it is not original or final. It is not a natural and necessary

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<sup>100</sup> *Ibid.*, III/4:300; *K.D.*, III/4:339.

<sup>101</sup> *C.D.*, 1961, III/4:297.

<sup>102</sup> *Ibid.*, III/4:294.

<sup>103</sup> *Ibid.*, III/4:302.

<sup>104</sup> *Ibid.*, III/4:291.

<sup>105</sup> *Ibid.*, III/4:299-302.

<sup>106</sup> *Ibid.*, III/4:302.

confrontation. It is a fact. It is thus self-evidently according to the will of God and under his lordship.”<sup>107</sup>

Here it becomes clear that Knight’s inappropriate translation of *die Nahen and die Fernen* as “near and distant neighbors” is a correct interpretive move. Barth thinks that we are freed by the divine command to come near to those near us and to those far away. If our basic stance toward the members of our people is to grow in loyal and responsible partnership with them, then it is right to call them “neighbors,” potentially or actually. If our basic stance toward the members of other peoples is to seek fellowship with them, then it is also right to call them “neighbors.” We are freed to name, view, and treat those nearby and those far away as neighbors. They may be near or they may be far, but they are near neighbors or distant neighbors.

Barth’s picture of the nearby ones and the distant ones has an unexpected similarity with Coke’s subject and aliens. Coke was content to call government and allegiance natural without saying the same about distinctions between subjects and aliens, treating those distinctions as not so much natural as factual. Barth explicitly proposes that the distinctions between peoples are mere facts, occasions to be freed by God, but not natural distinctions.

Still, Barth goes beyond Coke when he touches on the question of the foreigner or the alien. Coke’s account of *Calvin’s Case* sets up clear distinctions between subjects and aliens, allowing for an alien to become a subject through a process of naturalization. For Barth, though, the terms themselves are not to be left alone. Human beings rightly exercise their place within their people when they are not content to let those far away remain alien,

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<sup>107</sup> Ibid.

when they seek fellowship and partnership with those far away. Indeed, Barth says, every human being wears pilgrim's clothing. Immigrants are not fundamentally different or alien to those who are more settled among a people; all travel on the pilgrim's way. Immigrants remain fellow human beings and neighbors. If we extend Barth's terms, we might call immigrants distant neighbors coming near. Those more settled are enabled to come near to these neighbors as they respond to God's word.

### 1.B.2. The Migrant Missionary and the Apostolic Church: Wannenwetsch and Brock on 1 Corinthians 9

Karl Barth has afforded us an account of what federal United States law calls "aliens" from within a doctrine of creation and providence, and that has culminated in a reading of the Pentecost narrative. What do we find as we carry on further into the doctrine of the church? Is there something about God's new people that alters how we regard those from other lands?

The theme of the people of God as a migrant people appears regularly in the Scriptures and in the theologians of the church.<sup>108</sup> Here we will draw out one instance of this theme, the figure of the missionary in the First Letter to the Corinthians, chapter 9. In

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<sup>108</sup> For example, in Leviticus, Yhwh addresses Israel as former sojourners in the land of Egypt and sojourners with Yhwh (Lev. 19:34, 25:23, etc.). The New Testament epistles address the believers in Jesus Christ as foreigners and pilgrims among the nations, seeking a heavenly city (Heb. 11:13, 1 Peter 2:11). In the early church, the Epistle of Diognetus describes a dual citizenship, and Augustine narrates the sojourning of the heavenly city among the earthly city, *The City of God Against the Pagans*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 1998), esp. chs. 14, 15, and 19. In the twentieth century, our erstwhile interlocutor Karl Barth claims that "the earthly Church stands over against the earthly State as a sojourning (*paroikia*) and not as a State within the State, or even as a State above the State," rendering the Church "an establishment among strangers," a "foreign community" that preaches justification, *Church and State*, trans. G. Ronald Howe (London: Student Christian Movement Press, 1939), 45–46. A document of the Second Vatican Council likewise declares that "the pilgrim church is missionary by her very nature, since it is from the mission of the Son and the mission of the Holy Spirit that she draws her origin, in accordance with the decree of God the Father," Second Vatican Council, "Ad Gentes: Decree on the Mission Activity of the Church," 1965, sec. 2.

this passage, the Apostle Paul writes that he has been sent out “to become all things to all people” as he preaches the good news, migrating, forced to migrate, and becoming like those he goes to. A forthcoming commentary on 1 Corinthians by two contemporary moral theologians, Bernd Wannewetsch and Brian Brock, will guide us as we explore this notion of the migrant missionary in this section.<sup>109</sup> We will extend these observations to the church as apostolic, as sent out, and discern a special solidarity between the missionary church and fellow migrants.

In chapter 9 of this letter, Paul writes to the Corinthians, “Am I not free? Am I not an apostle (ἀπόστολος, *apostolos*)?” (9:1) Paul addresses Corinthian expectations that he would receive remuneration for his work preaching the gospel, that he would be wined and dined. This would be right, he says, for workers are due their wages, whether in the temple or as evangelists (9:3-12). But Paul travels as a single man, he makes tents (Acts 18:2-4), and he does not accept payment for his preaching. Wannewetsch and Brock suggest he does this not in a heroic renunciation of material goods, but so that nothing will get in the way of the good news of Christ (9:12b).<sup>110</sup> As an apostle, he is one sent out; a necessity is placed upon him, a commission is laid upon him, and he is under compulsion to preach the gospel (9:16-17). He wants nothing to get in the way of his sharing in the “spiritual” (9:11) reward fitting the gospel: in a reward intrinsic in the act of preaching the gospel, and in sharing with the Corinthians in the outworking of the gospel (9:23). Only one receives the

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<sup>109</sup> *1 Corinthians*, Sept. 6, 2012, manuscript used with permission, Brazos Theological Commentary on the Bible (Grand Rapids, Mich.: Brazos Press, forthcoming), 62–100. This is the first letter from Paul to the Corinthians in the canon, though probably the second letter he sent: he mentions an earlier letter in 1 Cor. 5:9.

<sup>110</sup> *Ibid.*, 62–85.

prize (9:24), the risen Christ, say Wannewetsch and Brock, and Paul shares in that prize as the resurrection takes hold among the Corinthians.<sup>111</sup>

Paul reveals what his freedom in the gospel enables:

<sup>19</sup> For being free from all things,  
I have enslaved myself to all,  
that I might win more of them.

<p><sup>20</sup> I became to the Jews, as a Jew, in order to win Jews; to those under the law, as one under the law, <i>though not being myself under the law,</i> that I might win those under the law;</p> <p><sup>21</sup> to those outside the law, as one outside the law, <i>not being outside the law of God but within the law of Christ,</i> that I might win those outside the law;</p>	<p>καὶ ἐγενόμην τοῖς Ἰουδαίοις ὡς Ἰουδαῖος, ἵνα Ἰουδαίους κερδήσω:</p>
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<sup>22</sup> I became  
to the weak, weak,  
that I might win the weak;

to all people  
I have become all things,  
that by all means I might save some.

<sup>23</sup> All things I do for the sake of the gospel,  
that I may become a fellow partaker of it.<sup>112</sup>

As one sent out, Paul is free from all things that would get in the way of the gospel – here, free from honorariums, from lavish hospitality. According to Wannewetsch and Brock, there should be no “though” in v. 19, as in the N.R.S.V., “for though I am free from all.” It is not that Paul deserves praise for conceding to enslavement despite his privileges. Rather, he is freed in such a way that allows him to make himself a slave to all people, so

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<sup>111</sup> Ibid., 88, 98. See 1 Cor. 15.

<sup>112</sup> Translation author’s.

that he might win more of them over to participating in Christ's victory over death.<sup>113</sup> In his freedom, a movement begins that follows a pattern in these verses: "I became to the Jews, as a Jew...to those under the law as one under the law...to those outside the law as one outside the law...to the weak, weak." The movement begins with the necessity that has been laid upon him as an apostle in previous verses (9:16-17). In response, Paul undergoes a process of becoming. The verb here for becoming indicates that he participates in this process of transformation, actively involved in the process laid out before him, against Wannewetsch and Brock's emphasis on merely passive becoming.<sup>114</sup>

What does Paul become? To the Jews, he becomes not exactly a Jew, but ὡς Ἰουδαῖος, *hōs Ioudaios*, as a Jew, like a Jew.<sup>115</sup> We know that Paul is a practicing Jew before his encounter with Christ on the Road to Damascus.<sup>116</sup> Yet now in Jesus Christ he is no longer subject to "the law," to the Law of Moses that orders each realm of the life of the Jews (see 9:9). Paul's side comments explain: though outside of the Law of Moses, he does not lie outside of the law of God. He is under the law of Christ – literally, he has been "en-lawed" (ἐννομος, *ennomos*) in Christ. We have no trouble accepting a "law of Christ" as the one way of Christ's death, burial, and resurrection that both compels Paul and frees him,

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<sup>113</sup> Wannewetsch and Brock, *1 Corinthians*, 90–91.

<sup>114</sup> On the middle voice of the verb ἐγενόμην, *egenomēn*, translated above as "I became," Wannewetsch and Brock are wrong to claim that the middle voice lies between the passive and the active and thus cannot be rendered in English (91–92). They read the phrase as indicating that as Paul becomes a missionary, his self is actively engaged in a process of becoming, but that process is passive in the sense that it is laid out in advance by larger forces. In contrast, Greek grammarians tend to understand the middle voice as indicating something simpler than Wannewetsch and Brock do, that the subject is involved in the process that the verb indicates. Having no active form, the word *ginomai* in the middle voice indicates that the process of becoming involves the subject who becomes. Thus 1 Cor. 9:20 means that Paul acts to be as a Jew, and his self is involved in this change of his nature. We have to look to other points in the passage to see signs that Paul responds to a role or office given to him (9:1, 16, 17). See James Hope Moulton, *A Grammar of New Testament Greek*, vol. 3 (Edinburgh: T. & T. Clark, 1976), 54; Daniel B. Wallace, *Greek Grammar Beyond the Basics: An Exegetical Syntax of the New Testament with Scripture, Subject, and Greek Word Indexes* (Grand Rapids, Mich.: Zondervan, 1996), 414.

<sup>115</sup> Wannewetsch and Brock, *1 Corinthians*, 94.

<sup>116</sup> See Philippians 3:5, Romans 11:1, 2 Corinthians 11:22, Acts 9:1ff.

against commentators Barrett and Conzelmann who kick against this use of the word *nomos*, unusual in the New Testament.<sup>117</sup> Under this law, he moves, he is moved, out into different social practices and new sets of rules. He is concerned with preaching to the descendants of Abraham, the people to whom Yhwh has revealed himself, and he returns to their ways and norms so that they might recognize Jesus as the promised Messiah. Yet he does not assume that legal and cultural barriers are of such little significance that he can transcend them and become entirely “a Jew” while en-lawed in Christ. He approximates their ways, he becomes “like a Jew,” “as one under the law,” respecting the significance of the boundaries that mark off Jews from himself and from other groups. His purpose remains to win and to gain Jews. Not “the Jews”; there is no definite article here.

Wannenwetsch and Brock point out that Paul’s aim is to win Jews, some Jews, leaving room for the work of the Spirit to move in certain individuals.<sup>118</sup>

The Apostle Paul begins with the Jews, but the flow of the passage moves outward: to those without the Law of Moses, those beyond the way of the Torah, he becomes as one outside the law. He accommodates himself to the ways of the Gentiles, of non-Jews, bearing the good news to peoples beyond Judea.<sup>119</sup> Paul’s move from those under the law to those outside the law is centripetal, directed outward, under the transcending direction and the freeing peace of the rule of Christ. His journey to Corinth and his activities there bear out this movement from those under the law to those outside the law. In the account of his first visit to Corinth from the Acts of the Apostles (18:1-17), we see Paul in Greece,

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<sup>117</sup> C. K. Barrett, *A Commentary on the First Epistle to the Corinthians* (London: Adam & Charles Black, 1968), 214; see 199; Hans Conzelmann, *1 Corinthians: A Commentary on the First Epistle to the Corinthians*, ed. George W. MacRae, trans. James W. Leitch (Philadelphia: Fortress Press, 1975), 159–161.

<sup>118</sup> *1 Corinthians*, 90.

<sup>119</sup> This flow outward parallels the account of Jesus’ final promise and charge to his disciples in the Acts of the Apostles: “you will be my witnesses in Jerusalem and in all Judea and Samaria, and to the end of the earth” (Acts 1:8b).

reasoning with Jews and Greeks, some of whom believe and are baptized, others of whom oppose him and bring charges against him before the Roman proconsul. This very letter, the First Letter to the Corinthians, bears out Paul's accommodation to become like the Corinthians: he will not approve incest (chapter 5) or their use of civic courts to judge disputes between them (chapter 6), but he takes great care to address what concerns and troubles them, say Wannenwetsch and Brock.<sup>120</sup> Paul takes up their questions about whether to eat food offered to idols (chapters 8 and 10), he sets them straight about what place marriage has for believers (chapter 7), and he opposes the ways that some get drunk while others go hungry when they gather to celebrate the supper of the Lord (11:17ff).

Following this first set of becomings is another: "I became to the weak, weak...to all people I have become all things." Paul's stance is not just to become like the weak, but actually to become weak. His approach as apostle, as missionary, is not to come in strength or to condescend for just a while. This is not the sort of missionary who might point out his rights and then accept the attention that his heroic sacrifice brings, the sort that a misunderstanding of the earlier part of chapter 9 would invite. Paul empties himself. He does not hold onto a national or legal identity; his Jewish origin is not controlling. He opens himself, accepting a flexibility, meeting others in a weak state, embodying what Wannenwetsch and Brock say "encapsulates the core of Christian existence as a life of dependence on grace."<sup>121</sup> He does not steel himself for an inflexible encounter, a power play, but comes as a weak man to those who are weak. He does not take the time to mention a mission to the powerful, to the movers and shakers; he does not meet them with

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<sup>120</sup> *1 Corinthians*, 96.

<sup>121</sup> *Ibid.*, 94.

power. He is ready to encounter those who are simple and humble. He is ready to be attacked and imprisoned by the recipients, or even to be shaped by them.

The movement culminates: “to all people I have become all things, that by all means I might save some.” Paul is not concerned to exercise his power, his authority (ἐξουσία, *exousia*, 9:4-6, 12, 18). He is moved out by the power of the gospel to every sort of people, taking whatever form is needed, using any and all means. He does not expect to win all, but hopes that “some” are gained for the rule of Christ. As he is moved out by the gospel, his hope is that he might be made, he might become, a fellow partaker of it (ἵνα συγκοινωνὸς αὐτοῦ γένωμαι, *hina sugkoinōnos autou genōmai*, 9:23). Here, most modern translations read, “so that I might share in its blessings,” as if Paul gets to share in the dividends the gospel pays.<sup>122</sup> The Authorized Version presents a stricter reading of the Greek: “that I might be partaker thereof with you.” This reading is liberating: Paul’s hope is to share with the Corinthians and with the recipients of the gospel in that very gospel. Wannewetsch and Brock indicate that his hope is not in the gospel’s results or payback; his hope is in the gospel itself, as the jurisdiction of Christ is extended, and as individuals from all nations come to share in Christ’s death and resurrection.<sup>123</sup>

Elsewhere, Wannewetsch describes this movement as a “migration” of the missionary.<sup>124</sup> We see the pattern: the apostle, the missionary, both acts and is acted upon, deciding to move and being moved. This may be a movement to a new place, to another neighborhood, or to another land with new laws. It may be a movement into a new social setting, with new ways of communicating, new ways of doing business, new food or attire.

<sup>122</sup> The R.S.V., the N.R.S.V., the E.S.V., the N.A.S.B., the N.I.V., and the T.N.I.V. go in this direction.

<sup>123</sup> *1 Corinthians*, 67, 82, 84–85, 98.

<sup>124</sup> Bernd Wannewetsch, “‘Becoming All Things to All People’: The Migration of the Gospel and the Kenotic Travelling of the Migrant Missionary” (presented at the Societas Ethica, Sibiu, Romania, August 24, 2012).

This movement happens under allegiance to God in human flesh, died and risen, an allegiance that precedes and moderates other allegiances, loyalties, and belongings. This allegiance moves the missionary to take on a temporary and local allegiance, to use the term from *Calvin's Case*, becoming “like” a local, and abiding by the rules of that place up to a point. That approximation of local life leaves space to exercise moral judgment through the law of Christ, avoiding those new ways that run counter to the resurrection life. The move into local customs recognizes some distance, seeing that the integrity of the new society will not allow for quick transitions. The missionary is in a profound state of weakness, open to intellectual and cultural encounter and transformation. If this is not the case, that missionary has accepted some compromise that does not fit the gospel: The missionary has claimed rights, seeking glory as a hero, or the missionary has grasped the gospel as his or her own, assuming full understanding of its significance, and meeting hearers in triumph and domination. The one fully set free by the living Christ will not fall into futile efforts at self-directed achievement: the Pauline missionary arrives, willing, flexible, and vulnerable. This is the migrant missionary, the alien apostle.

In Christian worship, those gathered confess the ancient words of the creed: “We believe in one holy catholic and apostolic church.”<sup>125</sup> The church acts out its apostolicity not only by relying on the teaching of the apostles who were eyewitnesses of Jesus and handing on that teaching. The church is also apostolic because it is sent out, commanded by the authority of the gospel, freed through the death and resurrection of Christ. It is apostolic so long as it is missionary, sent to become as Japanese to the Japanese, as Brazilian to the Brazilians, as American to the Americans, in order to win some. The church’s

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<sup>125</sup> πιστεύομεν...εἰς μίαν ἁγίαν καθολικὴν καὶ ἀποστολικὴν ἐκκλησίαν, *pisteuomen...eis mian hagian katholiken kai apostolikēn ekklēsian*, the Nicene-Constantinopolitan Creed of 381, J. N. D. Kelly, *Early Christian Creeds*, 3rd ed. (London: Longman, 1972), 297–298.

confession of its divinely given character depends on a freeing obedience to the law of Christ, becoming weak, becoming all things to all people. Within the church are individuals who are sent out, like Paul, as migrants crossing cultural or natural divides. Yet everyone in the church is arrested by the good news and sent out to those who are different from themselves.

The Spirit who sends out the church, ensuring its apostolicity, makes possible a new solidarity with migrants. Stronger than the solidarity that Catholic Social Teaching emphasizes between every human being, missionaries are allowed to discover a solidarity with migrants.<sup>126</sup> The people of God are given a more specific solidarity with the migrant, a concern for the wellbeing of the migrant and a desire to be blessed by the migrant. This solidarity means that the simple and unqualified term “alien” is not a true term for a believer to use for a migrant, since the migrant is not fundamentally different from the believer, not “other” from the one forced to migrate.

The freedom of the migrant church enables a transformed relationship with migrants, who indeed are fellow migrants. Along its missionary journey, the church will encounter men, women, and children who are also on a journey. Like her, these migrants may have entered new countries and new societies, freely or under compulsion or both. They might answer to some loyalty beyond their country, like the missionary. They may be weak, lacking local knowledge, friends or family, like those sent out by the good news. These fellow human beings may be hungry or homeless, or they may be detained or imprisoned, like the apostolic church. These encounters with fellow migrants may save the church, reminding it of its missionary character. Meetings with fellow migrants might

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<sup>126</sup> See Introduction.

dislodge the church from a disobedient settling into place, particularly if that settling requires it to classify certain migrants as aliens as a contrast to its own defined existence. Encounters with fellow migrants may awaken the church to freedom, freedom to be on the move within the law of Christ.<sup>127</sup>

The missionary freedom of those in Christ places them in tension with the ways of nations like the United States that restrict and punish acts of migration. Will the migrant people of God uphold laws that regard migrants as aliens? Will they serve in branches of government that enforce immigration laws predicated on the existence of aliens? When the terms of the law stimulate broader habits of treating immigrants as aliens, will God's missionaries go along? Will those within the law of Christ do business in ways that treat immigrants as simply foreign? When migrants are forced into greater alienation, when migrants are made more vulnerable, will God's people remember their weakness as missionaries and resist the spirit of the age? Will God's migrant people defend aliens, take their place among aliens or do both? Those who follow the risen Christ as migrants have a new freedom to bring to these vexing boundary cases.<sup>128</sup>

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<sup>127</sup> See Mark Griffin and Theron Walker, *Living on the Borders: What the Church Can Learn from Ethnic Immigrant Cultures* (Grand Rapids, Mich.: Brazos Press, 2004). On a life lived between Mexico and the United States, see Sandra Cisneros' novel *Caramelo: Or Puro Cuento* (New York: Alfred A. Knopf, 2002). On Hispanic culture as a borderland culture, see Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza*, 2nd ed. (San Francisco: Aunt Lute Books, 1999); Virgilio P. Elizondo, *Galilean Journey: The Mexican-American Promise*, 2nd rev. ed. (Maryknoll, N.Y.: Orbis Books, 2000).

<sup>128</sup> For a plea to the church to regain its alien identity, see Stanley Hauerwas and William H. Willimon, *Resident Aliens: Life in the Christian Colony* (Nashville: Abingdon Press, 1989). A fruitful example of the freedom of the people of God toward migrants comes from the Sanctuary Movement in the 1980s, where U.S. churches and synagogues broke laws, followed laws when the government was not, and fought for court judgments in favor of Central Americans who were not granted the refugee status those in the movement thought they were owed. Among many available resources, see Jim Corbett, *The Sanctuary Church* (Wallingford, Pa.: Pendle Hill Publications, 1986); Ann Crittenden, *Sanctuary: A Story of American Conscience and the Law in Collision* (New York: Weidenfeld & Nicolson, 1988).

What have we discovered in this chapter? We have found that the basic term of immigration law comes from somewhere. The alien is not a timeless, given type of person, but what it means to be alien emerged at a certain point in Western history. In the English language, this alien has developed out of looser distinctions between the subjects of the King of England and the subjects of the Kings of France, Denmark, and other sovereigns, and over the course of the late medieval and early modern periods, the alien has emerged as a noun, as a type that sums up someone's status before the law. This alien, the lawyers argued, came as a consequence of a relationship between subject and sovereign that is given from when we take our first breath. We are born into an allegiance and a faith to a king, and an alien is one outside that bond and faithfulness. In a turn that deserves further exploration, the basic legal distinction between alien and subject grew to replace the previous primary distinction between persons, that between slave and free. Out of the salutary move to cease thinking of everyone in terms of their liberty or servitude, a new basic distinction came about. Calling someone an alien was in a sense required for the sense of unity that subjects had as part of a body politic, even a mystical body. This body demanded an allegiance uncompromised by other sovereigns or allegiances.

What else did we discover as we looked at Christian theology? We found out that as we come to understand nationhood within a broad Christian narrative, understanding those from afar as aliens convinces us of something that is not true, either as a fatherly God watches over the creation or as the good news of the Lord Jesus goes out in the power of the Spirit. We found that as we followed the nations through the Scriptures, there are distinctions between peoples, but they are fluid rather than fixed. Life as part of a people is an occasion from which to enjoy a rich life as creatures, a life that is oriented toward other peoples. We heard that we are authentically within our peoples as we reach out to those

from afar, a movement fulfilled in drawing near within the one people of God. As we reflected further on God's people, we found that one of its key figures is the apostle or missionary, who migrates and adapts to local customs in the service of the good news that Christ has defeated death. As a church that includes missionaries and is missionary herself, the people of God has a special solidarity with other kinds of migrants, who remind the church that she is a community of sojourners. She is a people en-lawed in Christ, becoming like the members of the many peoples of the world so that they might share in the fruits of the gospel.

Some might say that we can let the alien remain as only a distinction in written law: it helps divide those who are on the inside of a political community from those on the outside. Perhaps the fact that in this chapter we are so concerned with what it means to call someone alien is a symptom of a certain American disease, the politicization of all of life. In a modern democracy like the United States, we might suppose, its members gather not around a monarch or some other symbol but around the law and its terms, and so Americans take on the category of the alien as their own. This may be true to an extent, but insofar as the category of the alien is a building block of the illegal alien, this category enables a way of defining someone that characterizes much or all of their life as outside the regular life of American communities. If there can be aliens, there can be illegal aliens who are not supposed to be here, whose whole life goes against the laws of the political community that inhabits these lands.

Whether we interpret this pattern of imbibing the term "alien" in one way or the other, it is worth resisting. Whether the language of the law colonizes our lives in damaging ways and we should forgo that colonization in favor of a different language, or whether the law in its workings is worth opposing as an essential part of our life as an earthly political

community, we ought to resist taking on this language as our own. When we start thinking that it is obvious that there are aliens in the world, when we perceive people primarily as among us, or as of another place, unlike us and worthy of suspicion, then we take on something that does not reflect how God's creation and God's church are. A closed, starkly defined territorial state is not humanity's final belonging, though a modest, thankful approach to earthly political community is appropriate now, as we will see in the following chapter. Final belonging lies not in this nation now but in that gathering of every nation and tongue to worship the true Sovereign.

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This thesis offers a Christian theological response to the alien unlawfully present under federal United States law. This chapter has explored the basic term of immigration law, the alien, tracing its development in federal law and its source in common law. In contrast to this conceptual world, we have discovered a way of characterizing our relationship with foreigners and migrants as God's creatures and as members of God's church. The next chapter will deal with how aliens could become unlawfully present within the development of federal United States law. The chapter will explore how theology qualifies and directs authority over immigration.

## 2. The Alien as Unlawfully Present?

This thesis seeks a Christian response to the alien who is unlawfully present under federal United States law. In chapter 1, we traced the rise of the alien in the common law that precedes U.S. law, and we moved beyond the alien to see those from far away as distant neighbors coming near within God's preserving activity and to discover the missionary as migrating in response to the gospel. In this chapter, we will ask how it became possible in federal law for an alien to be considered unlawfully present in the United States. Once we have discerned the notions of territorial government that makes this possible, we will look at how we might interpret territorial government within Christian theology. Within the government of God, we will discover a chastened understanding of the government that makes such a character possible.

In part A of this chapter, chapter 2, we will see how the federal government claimed plenary power over immigration. Two landmark Supreme Court cases from the late nineteenth century will claim a right to exclude and expel that depends solely on the consent of the nation. We will place this understanding of immigration controls within a tradition that extends back to Emer de Vattel and Thomas Hobbes, a tradition which places international relations in a state of nature without a preexisting moral order. In part B, we will enquire as to what moral order the Christian tradition holds as framing the government of immigration. Martin Luther and other respected theologians will guide us through passages from the Scriptures that will lead us toward an answer, and two eminent

scholars will help us reach a clearer understanding of immigration authority and defiance of it. To discover where the guarding of places might fit within God's purposes for the creation, we will read Genesis, chapters 2 to 4, and Revelation, chapters 21 and 22, with Luther, Jacques Ellul, and Oliver O'Donovan. To discover how guarding fits within divine guarding and judging, Luther will lead us through Psalms 127 and 82. To find out whether not only cities but something resembling national territories have a place within God's economy, we will read Deuteronomy, chapters 2 and 3, with the assistance of theologically oriented biblical scholars. A definition of government from Pope Leo XIII will help us define what it is that government properly does when it governs immigration. Finally, a distinction from William Blackstone will clarify the nature of an offense against immigration law. These sources will help frame the guarding of places and the governing of immigration within a Christian narrative of the creating, providing, and redeeming God.

## **2.A. Sovereignty Over Immigration in Federal United States Law and Intellectual History**

How did it become possible for an alien to be considered unlawfully present under federal United States law? In what follows, we will first ask what terms the law uses for this sort of alien and what kinds of persons can be excluded in a survey of federal legislation. Second, we will look at what kinds of aliens are banned from being present in United States territory and why they are banned, with a survey of immigration law from across U.S. history. Second, we will discover the arguments in case law that established the federal government's authority to dictate who could be present in the United States. This discovery will focus on Supreme Court judgments in the late nineteenth century. Third, we will

investigate what intellectual tradition the Supreme Court works out of on these matters, reading beyond the Court judgments to Vattel and Hobbes in preceding centuries. This study will prepare the way for a theological consideration of the legal notions that make possible this type of person, the alien who is unlawfully present in the United States.

### 2.A.1. Alien Illegality: Terminology and Exclusion in Federal Legislation

#### *What are the Terms of Federal Legislation?*

In chapter 1, we saw that the alien has a stable meaning across the history of federal law, though there are shifts in how legislation uses the term. In contrast, terms surrounding those men and women who are present in the U.S. without legal permission have only recently begun to stabilize in federal law. It has been possible to be present in the country without legal permission under federal law since 1808, but before 1986, there were hardly any references to these persons in Congressional legislation. An 1891 Act spoke of “aliens who may unlawfully come to the United States,” but it did not envision them staying long, ordering that they should “be immediately sent back on the vessel by which they were brought in.”<sup>1</sup> Significant immigration Acts from 1921, 1924, 1952, and 1965 speak of those who are “lawfully admitted,” but the Acts have no term for those who are not legally admitted or who overstay their leave.<sup>2</sup> The 1952 Act mentions those who have entered improperly within a section more concerned to identify “deportable aliens” who become

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<sup>1</sup> *An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor*, 26 Stat. 1084, 1891, 1086.

<sup>2</sup> *An Act To Limit the Immigration of Aliens into the United States (Emergency Quota Law)*, 42 Stat. 5, 1921, 5; *An Act To Limit the Immigration of Aliens into the United States, and for Other Purposes (Immigration Act of 1924; Johnson-Reed Act)*, 43 Stat. 153, 1924, 154, 155, 164; more than thirty times in *An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes (Immigration and Nationality Act; McCarran-Walter Act)*, 66 Stat. 163, 1952, 166, 169, etc.; *An Act To Amend the Immigration and Nationality Act, and for Other Purposes (Hart-Celler Act)*, 79 Stat. 911, 1965, 911, 913, 915 (twice), 916, 918.

dangerous to the United States after entering.<sup>3</sup> Only in 1986 do those who do not have permission to be in the country appear as a significant preoccupation of federal law.<sup>4</sup> The *Immigration Reform and Control Act of 1986* announces its first priority in Title I: “Control of Illegal Immigration.”<sup>5</sup> Here, the term “illegal immigration” makes its first appearance in major Congressional legislation, emerging as a problem that demands a response. Two other terms also appear for the first time, the “illegal alien” and the “unauthorized alien.” The Act speaks of illegal aliens only when it addresses those convicted of a felony, while it speaks of unauthorized aliens only when it deals with those who are unauthorized to work.<sup>6</sup> Of these terms, only the unauthorized alien receives a definition: this is an alien without the lawful admission for permanent residence that would authorize employment, or otherwise without authorization to be employed.<sup>7</sup> In this Act, there is still no broad term for a range of cases where someone is in the U.S. illegally.

The next major immigration Act announces its priority in its title: the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*. In this Act, the “illegal immigrant” makes its first appearance in a significant immigration Act, here in the context of felons to incarcerate.<sup>8</sup> The “unauthorized alien” again appears primarily within discussions of work, but the “illegal alien” admits of a wider range of uses, appearing not only in the case of felons but also as the name for those who can be harbored, apprehended

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<sup>3</sup> 66 Stat. 163, 204.

<sup>4</sup> See chapter 3 for the story of how the Acts of 1965 and 1976 made possible the growing numbers that made deportable aliens a subject for lawmaking in 1986.

<sup>5</sup> *An Act to Amend the Immigration and Nationality Act to Revise and Reform the Immigration Laws, and for Other Purposes (Immigration Reform and Control Act of 1986, Simpson-Mazzoli Act)*, 100 Stat. 3359, 1986, 3359.

<sup>6</sup> The illegal alien appears in *ibid.*, 3443, and the unauthorized alien appears in *ibid.*, 3360, 3361, 3364, 3366, 3367, 3368, 3369, 3370, 3381, 3416, 3441.

<sup>7</sup> 100 Stat. 3359, 3368.

<sup>8</sup> *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 110 Stat. 3009-546, 1996, 3009-631.

near the border, and forbidden to have driver's licenses.<sup>9</sup> Along with the expanded use of the illegal alien, a new type of alien appears in the 1996 Act, "the alien unlawfully present in the United States."<sup>10</sup> Occasionally, this figure is reduced to the "alien unlawfully present," but the phrase "in the United States" usually remains, and often "alien" is broken away from its qualifying terms as part of a lengthier phrase, as in "an alien who was unlawfully present in the United States."<sup>11</sup> What it means to be unlawfully present is defined here:

An alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.<sup>12</sup>

This type includes two sorts of aliens, those who overstay visas and those who enter without permission. The alien who is unlawfully present in the United States proves to be the primary category of alien that runs afoul of the law, appearing more often than the illegal alien in the 1996 Act. As of early 2014, no comprehensive immigration legislation has passed since the 1986 and 1996 Acts, but there have been many efforts to reform the law. Looking at two representative reform efforts, two pieces of state legislation from 2010 and 2011 and a Bill that passed the U.S. Senate but not the House of Representatives in 2013, the alien unlawfully present in the United States appears to lead the field as the term for someone who lacks permission to be in the country. In these pieces of legislation, the illegal

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<sup>9</sup> The unauthorized alien or aliens appear in *ibid.*, 3009-565, 648, 660, and the illegal alien or aliens appear approximately nine times in *ibid.*, 3009-567, 631, 634, 651, 671.

<sup>10</sup> Forms of the alien unlawfully present appear approximately twelve times in *110 Stat. 3009-546*, 3009-575, 576, 577, 586, 631, 641, 720, and unlawful presence appears approximately six times in *ibid.*, 3009-576, 577, 578.

<sup>11</sup> *110 Stat. 3009-546*, 3009-576.

<sup>12</sup> *Ibid.*; *Immigration and Nationality Act*, sec. 212(a)(9)(B)(ii).

alien only occasionally appears, and the illegal immigrant disappears altogether.<sup>13</sup> These bills deal with unauthorized aliens when they address employment on its own, but they speak of aliens unlawfully present in the United States when they deal with those who lack permission to be in the country.<sup>14</sup>

As we survey the terminology of the law, we discover that only in the eighties did the law identify the issue we are dealing with as “illegal immigration,” and only in the nineties has it begun to use two newly defined terms to qualify the object of this study, the “unauthorized alien” and the “alien unlawfully present in the United States.” While chapter 1 saw the English and American legal tradition narrow in on a concise term for the non-member of the body politic, the alien, here we discover a different tendency toward multiple, more sophisticated terms. The defined term that is available for use in the most contexts, the alien unlawfully present in the United States, is unlike the simple term alien: it takes some time to say, it keeps its qualifying phrase, and it is often broken apart in the course of a sentence. This is a move that resists defining some persons as simply and essentially illegal.<sup>15</sup> Then again, the illegal alien continues to appear in Congressional legislation, though it lacks a strict definition.

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<sup>13</sup> The illegal alien appears in *Support Our Law Enforcement and Safe Neighborhoods Act*, Arizona Senate Bill (S.B.) 1070, 2010, 2, 6; *Beason-Hammon Alabama Taxpayer and Citizen Protection Act*, Alabama House Bill (H.B.) 56, 2011, 1, 3, 51, 52; and not at all in *Border Security, Economic Opportunity, and Immigration Modernization Act*, U.S. Senate Bill S. 744, 2013.

<sup>14</sup> The unauthorized alien appears approximately fifty times in Arizona S.B. 1070, 5, 6, 7, etc.; over twenty five times in Alabama H.B. 56, 1, 2, 10, etc.; and over fifteen times in U.S. Senate Bill S. 744, 151, 250, 263, etc. The alien unlawfully present appears approximately five times in Arizona S.B. 1070, 1, 5; over twenty times in Alabama H.B. 56, 1, 2, 8, etc.; and twice in U.S. Senate Bill S. 744, 209, 441.

<sup>15</sup> An incisive scholarly history of illegal immigration in law and policy fails to note the more complicated picture we have sketched of federal law, interpreting the federal law as latching on to the illegal alien as the primary term for outsiders who break the law, Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), xix. Indeed, Ngai’s book was published in 2004, not so long after the 1996 Act that defined the construction of unlawful presence, and as we note below, federal law enforcement agencies tend to speak of illegal aliens rather than aliens unlawfully present in the United States.

Still, current discourses beyond the texts of legislation tend to depend on tersely stated essences, with a notable exception. Federal law enforcement agencies tend to speak of the illegal alien rather than the alien unlawfully present in the United States.<sup>16</sup> In popular discourse and in the press, those who wish to emphasize the illegality of the person's presence tend to use the terms "illegal immigrant," "illegal alien," or simply "illegal," while those wanting to focus attention away from illegality or ease immigration restrictions tend to use the term "undocumented worker." In 2013, a source that provides other news media outlets with reporting took a turn that parallels to the designations of the federal law: the stylebook of the Associated Press was updated to forbid speaking of persons as illegal, allowing actions alone to be deemed illegal, so that reporters could speak of "living in the country illegally" but not call someone an illegal immigrant.<sup>17</sup>

In this essay, we are seeking to respond theologically to how the federal U.S. law defines and constructs the lives of those who lack permission to be in the country. Our concern is not primarily about what the law calls "the unauthorized alien," since the authorization in question is authorization to work. Our concern is about those who are on U.S. lands but not allowed to be there. Since 1996, the law has used the lengthier term, the "alien unlawfully present in the United States." We will attempt to reflect what we see as a

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<sup>16</sup> Websites for the U.S. Department of Homeland Security, Immigrations and Customs Enforcement, and Customs and Border Protection emphasize enforcing and administering immigration laws, with only occasional mentions of "illegal aliens" and "inadmissible persons," "Snapshot: A Summary of C.B.P. Facts and Figures," *CBP.gov*, January 31, 2014, [http://www.cbp.gov/linkhandler/cgov/about/accomplish/cbp\\_snapshot\\_2014.ctt/cbp\\_snapshot\\_2014.pdf](http://www.cbp.gov/linkhandler/cgov/about/accomplish/cbp_snapshot_2014.ctt/cbp_snapshot_2014.pdf); and "criminals aliens," "Criminal Alien Program," *I.C.E.*, accessed March 5, 2014, <http://www.ice.gov/criminal-alien-program/>; "Enforce and Administer Our Immigration Laws," *Homeland Security*, accessed March 5, 2014, <http://www.dhs.gov/administer-immigration-laws>. In a public presentation, an official tended to talk about illegal aliens, though he also mentioned "economic migrants," Richard Crocker, Deputy Special Agent in Charge, I.C.E., Southern Arizona and Rudy Bustamante, Community Relations Officer, "Immigration and Customs Enforcement in Southern Arizona" (Borderlinks, Tucson, Arizona, July 28, 2011). See chapter 1.A.1.

<sup>17</sup> Paul Colford, "'Illegal Immigrant' No More," *The Associated Press: The Definitive Source*, accessed April 3, 2013, <http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/>.

salutary turn in the law, speaking of aliens who are unlawfully present in the United States, though now and again we will use the simpler term that remains in law and law enforcement, the “illegal alien.”

### *Who is Excluded Under Federal Legislation?*

To become an alien unlawfully present in the United States requires breaking a ban on entry or continued presence. What sorts of persons have been excluded from admission by federal legislation over the course of American history? Here we offer a brief survey of the first restrictions of different types of aliens, although we do not always indicate points when those restrictions were removed.

The very first men and women in this category did not come to the United States because they wanted to. After the trade in human slaves was outlawed in 1808, about fifty thousand slaves were smuggled into the U.S. between then and the end of slaveholding in 1865, and these were the first aliens who were present in the U.S. without legal permission.<sup>18</sup> The Page Act of 1875 required that no one could enter the U.S. from “China, Japan, or another Oriental country,” if they were brought to serve as prostitutes, if they came to be servants without their consent, or if their sentences for felonies were reduced on the condition that they leave their home countries.<sup>19</sup> The Chinese Exclusion Act of 1882 forbade Chinese laborers from coming into the U.S., and related court cases described this as a measure to prevent the growth of a settlement of foreigners who would not assimilate

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<sup>18</sup> Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882* (New York: Hill and Wang, 2004), 6; *An Act to Prohibit the Importation of Slaves into Any Port or Place within the Jurisdiction of the United States, from and after the First Day of January, in the Year of Our Lord One Thousand Eight Hundred and Eight (Slave Importation Act)*, 2 Stat. 426, 1807.

<sup>19</sup> *An Act Supplementary to the Acts in Relation to Immigration (Page Act)*, 18 Stat. 477, 1875, 477.

into American society.<sup>20</sup> Later in the same year, the *Act to regulate Immigration* forbade “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge” from landing at U.S. ports.<sup>21</sup> In an effort to protect jobs for United States citizens, the *Foran Act of 1885* discouraged the entry of aliens under a contract to perform labor by forbidding and annulling such contracts.<sup>22</sup> In 1891, Congress added to the banned list polygamists, those with a “dangerous contagious disease,” those who had committed a crime “involving moral turpitude,” and those whose ticket had been paid by another.<sup>23</sup> An Act of 1903 expanded bans on those who were diseased and impoverished and added anarchists and those opposed to organized government to the list. The Act issued a general ban on prostitutes beyond those coming from Asia, and it banned those who attempted to bring women into the country for prostitution.<sup>24</sup> In 1917, Congress further expanded bans on disease and mental illness, and it banned admission from a region stretching from Afghanistan to the Pacific, except for Japan and the Philippines. The Act also required that immigrants be able to read in English or some other language.<sup>25</sup> One of the more significant later laws to continue this trajectory, the *McCarran-Walter Act of 1952*, added alcoholics, drug addicts, and drug traffickers; communists; those convicted of

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<sup>20</sup> *An Act to Execute Certain Treaty Stipulations Relating to Chinese (Chinese Exclusion Act)*, 22 Stat. 58, 1882. See the following section, 2.A.2.

<sup>21</sup> *An Act to Regulate Immigration*, 22 Stat. 214, 1882, 214.

<sup>22</sup> *An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, Its Territories, and the District of Columbia (Contract Labor Act; Foran Act)*, 23 Stat. 322, 1885, 332.

<sup>23</sup> 26 Stat. 1084, 1084.

<sup>24</sup> *An Act To Regulate the Immigration of Aliens into the United States*, 32 Stat. 1213, 1903, 1214. In the *Gentleman's Agreement*, Executive Order No. 589, 1907 the U.S. made a diplomatic agreement with Japan under which Japan agreed to limit emigration by denying passports to laborers; cited in Ngai, *Impossible Subjects*, 39, 39n61. This is was not legislated, and so we do not consider it here.

<sup>25</sup> *An Act To Regulate the Immigration of Aliens To, and the Residence of Aliens In, the United States*, 39 Stat. 874, 1917, 875–877; Ngai, *Impossible Subjects*, 37, 37n51 defines the “Asiatic barred zone.”

two or more offenses, even if they did not involve moral turpitude; and “aliens coming to the United States to engage in any immoral sexual act,” targeting homosexuals.<sup>26</sup>

Long before this Act, a new era of restrictions had already started. In 1921, Congress added numerical limits on the rest of the Eastern Hemisphere to the absolute limits already in place for much of Asia. The *Act To limit the immigration of aliens into the United States* limited the admission of aliens to 3 percent of the number of foreign-born persons of that nationality living in the United States according to the 1910 Census.<sup>27</sup> These so-called emergency quotas preceded the full-blown quota system of the Johnson-Reed Act of 1924, which eventually reduced admissions from other countries in proportion to the contribution those countries made to the citizenry in 1920. The Act exempted the wives and children of citizens along with students from these quotas, but it placed numerical limits on everyone coming from the Eastern Hemisphere even if they were healthy, self-supporting, and peaceable.<sup>28</sup> In effect, the 1924 Act allowed continued immigration from Northern and Western Europe but severely limited immigration from the rest of Europe, Africa, the Middle East, and the South Pacific. The Hart-Celler Act of 1965 followed, and while expanding categories of immigrants not subject to numerical limits, it set in place a trajectory that would put in place numerical limits for every country.<sup>29</sup> The system of preferences for the first time included the Western Hemisphere in its scope, and by 1976 every country from Canada to Chile was subject to the same quotas as countries in the Eastern Hemisphere.<sup>30</sup> Though the 1924 Act produced a lull in numbers

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<sup>26</sup> 66 Stat. 163, 182–185.

<sup>27</sup> 42 Stat. 5, 5.

<sup>28</sup> 43 Stat. 153, 155, 159.

<sup>29</sup> 79 Stat. 911, 911–914.

<sup>30</sup> *Ibid.*, 921; *An Act To Amend the Immigration and Nationality Act, and for Other Purposes (Immigration and Nationality Act Amendments of 1976; Western Hemisphere Act)*, 90 Stat. 2703, 1976, 2704.

of immigrants and the 1965 Act allowed for a great increase in numbers, the 1965 Act reproduced the basic pattern of the 1924 law. This was that in addition to qualitative screening of candidates for immigration, screening would be quantitative: each year, only so many newcomers would be allowed in from each country in the world.<sup>31</sup>

The first phase of restrictions from 1808 to 1917 served three aims. The first aim was to protect men and women from being brought to the U.S. against their will to work, so that from 1808 onwards, newcomers would do so freely, by their own consent. The second aim was to bar men and women who were *unhealthy* from entering the country. Those who would infect the United States with contagious diseases, who would sap its resources because they were unable to work, who would sully its public morals – these would compromise the health of the American people. The laws had a third aim, to bar those who were *healthy* from entering the country. Congress barred from admission those immigrants who formed an enclave that might threaten the integrity and power of the body politic because of its virility. The Chinese community, separate from the European stock of U.S. citizens, was seen as *a state within a state*, a healthy community threatening the nation that dominated the territory stretching from the Atlantic to the Pacific. The first threat was a lack of freedom unbecoming to American ideals, the second threat was a contagion that would make the American people diseased, and the third threat was a virile counter-society that would oppose U.S. control over territory.<sup>32</sup>

The second phase of restrictions from 1921 onward changed the game. These restrictions set most of those who wanted to migrate to the U.S. under a system of

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<sup>31</sup> See chapter 3.A.1 for a discussion of the 1965 response to the 1924 Act.

<sup>32</sup> We are indebted to Bernd Wannewetsch for his suggestion that these immigration restrictions represent responses to healthy and unhealthy threats.

numerical quotas. Bans on those threatening the body politic remained, bans on the unfree, the unhealthy, and the healthy. A growing pattern of bans on immigrants who would not assimilate, on people groups thought to be incompatible with American society, ended up producing a new scheme from 1965 onward. The assumption stuck that immigration from other countries needed to be numerically limited, regardless of what a newcomer might bring to the U.S. In this setting, categories emerged of immigrants with special privileges, especially family members and useful workers. But soon an all-embracing bureaucracy came into place, and lawmakers came to assume that the federal government needed to apply numbers to the human persons who could immigrate from each country in the world, as Mae Ngai argues.<sup>33</sup> The architecture of the system implied that not only the poor, the sick, or the criminal would compromise the United States, but simply too many newcomers from a particular country would prove a threat.

If under the new system, every immigrant had to be given a “yes” or a “no,” then every person who disobeyed the “no” became an alien unlawfully present in the United States. This new figure became a basic feature of federal immigration law and a significant form of life. The illegal alien, the illegal immigrant, the alien unlawfully present, became a new sort of member of American society – and yet not a member in the eyes of the law. By 2012, more than eleven million men and women lived life as aliens unlawfully present, amounting to about three or four out of every hundred people living in the United States.<sup>34</sup>

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<sup>33</sup> Ngai, *Impossible Subjects*, 227–228.

<sup>34</sup> Jeffrey S. Passel, D’Vera Cohn, and Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed* (Washington, D.C.: Pew Hispanic Center, September 23, 2013), 9, <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>, estimate that 11.7 million unauthorized immigrants lived in the United States in March 2012, and they estimate the number at 11.5 million in 2011. See Introduction, note 6. They write that the American Community Survey estimates the total population in 2011 as 311,592 million, and that the Current Population Survey (March Supplement) estimates the population in 2012 as 308,827 million and the

## 2.A.2. The Sovereign Right to Exclude and Expel Aliens: The United States Supreme Court, 1812-1898

Congress progressively restricted immigration into the U.S., but it was not always assumed that the federal government had such a power. The authority to govern immigration was not explicitly given to the federal government in the United States Constitution, and so it remained to the courts to look to reason and legal precedent to establish this authority. The key move that set in place the right of the federal government to restrict immigration came in legal challenges to the Chinese Exclusion Acts of 1882 and following. In two cases, the Supreme Court established the right to exclude and expel aliens as a basic feature of national sovereignty. These cases followed on from a noteworthy precedent dealing with immigrants like imported goods, and alongside these cases came a stream of cases establishing the rights of Chinese already in the country. This story, the story of how the Supreme Court established immigration authority as a matter of sovereignty, we will tell now.

### *Chae Chan Ping and the Right to Exclude Aliens*

The first step along the way to establishing federal sovereignty over immigration came when the United States Supreme Court ruled on taxes for ship passengers. In the Passenger Cases of 1849, the Court responded to New York and Massachusetts, two states that had placed taxes on passengers arriving from other countries.<sup>35</sup> The Court ruled that the power

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population in 2011 as 306,583 million, *ibid.*, 36. Using these numbers, approximately one in every twenty six or twenty seven people in the United States is unlawfully present.

<sup>35</sup> Passenger Cases: *George Smith v. William Turner, Health Commissioner of the Port of New York*; *James Norris v. The City of Boston*, 48 U.S. 283 (1849). The Court confirmed this decision in the *Head Money*

to place a tax on persons entering the U.S. was reserved to the federal government and not within the scope of state authority. It ruled that just as the U.S. Constitution gave Congress the power “to regulate Commerce with foreign Nations” (art. 1, sec. 8), so only Congress could levy taxes on ship passengers. An analogy was made: just as goods arriving by ship from another country can be taxed by the federal government, so persons arriving by ship from another country can be taxed by the federal government. At a stage when most persons and goods entered the U.S. by water rather than by land or air, the Court judged that commercial goods and human persons both counted as objects of commerce. The Passenger Cases represented a first step toward establishing federal authority over immigration, but while in them the Court looked only to the Constitution to make its case, in the cases that followed, the Court made arguments about powers that accrue to any sovereign state.

The Supreme Court firmly established federal sovereignty over immigration when it took up a case from the new state of California. Just after 1848, as explorers struck gold, as the U.S. wrested control of western lands from Mexico, and as the building of the transcontinental railway demanded laborers, Chinese immigrants began arriving in California.<sup>36</sup> The following decades saw the city of San Francisco, the state of California, and the U.S. federal government enact a series of laws meant to impede Chinese immigration and restrict the Chinese already present. By 1882, Congress passed *An act to execute certain treaty stipulations relating to Chinese*, announcing that “in the opinion of the Government of the

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Cases: *Edye and Another v. Robinson, Collector*; *Cunard Steamship Company v. Same*; *Same v. Same*, 112 U.S. 580 (1884).

<sup>36</sup> See chapter 3.A.2 on the Treaty of Guadalupe Hidalgo that transferred Alta California from Mexico to the U.S. Gold was discovered in California at Sutter’s Mill just nine days before the treaty was signed. The transcontinental rail line was built jointly by the Central Pacific and the Union Pacific between 1863 and 1869.

United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof.”<sup>37</sup> Better known as the Chinese Exclusion Act, the Act forbade any new Chinese laborers from coming to the U.S. or remaining in the U.S., and it barred all Chinese from U.S. citizenship.

We hear an account of Chinese exclusion in the first major case to uphold the 1882 law, *Chae Chan Ping v. United States* (1889), also known as the Chinese Exclusion Case.<sup>38</sup> Chae Chan Ping arrived in California in 1875 and resided there without gaining citizenship until 1887, when he left by ship for a year-long visit to China. Upon leaving, Ping took with him a certificate guaranteeing that he could reenter California, a certificate provided for in 1882 and 1884 Congressional legislation.<sup>39</sup> On September 7, 1888, Ping boarded the steamer *Belgic*, bound for San Francisco from Hong Kong. On October 1 of that year, Congress passed an Act annulling the sort of certificate Ping held.<sup>40</sup> The *Belgic* arrived in the port of San Francisco on October 8, and Ping was held on board the steamer because his certificate was now invalid. In effect, a long-time resident of California, a Chinese man who did not become an American citizen and in the latter years of his residency was ineligible for citizenship, departed from the U.S. with a certificate promising him the right to reenter, only to have that certificate annulled while on board a ship returning to the U.S.

Hired by Chinese community organizations who rallied around Ping, Ping’s lawyers mounted an argument against Ping’s detention aboard the *Belgic* and his exclusion from

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<sup>37</sup> 22 Stat. 58.

<sup>38</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Two prior cases had tested the 1882 law, *Chew Heong v. United States*, 112 U.S. 536 (1884); *United States v. Jung Ah Lung*, 124 U.S. 621 (1887).

<sup>39</sup> 22 Stat. 58; *An Act to Amend an Act Entitled “An Act to Execute Certain Treaty Stipulations Relating to Chinese Approved May Sixth Eighteen Hundred and Eighty-Two,”* 23 Stat. 115, 1884.

<sup>40</sup> *An Act a Supplement to an Act Entitled “An Act to Execute Certain Treaty Stipulations Relating to Chinese” Approved the Sixth Day of May Eighteen Hundred and Eighty-Two,* 25 Stat. 504, 1888.

American territory.<sup>41</sup> They argued that Ping's detention was a punishment given out without a ruling from a court or judicial officer, a deprivation of Ping's liberty without due process, against Ping's inalienable possession of liberty as a man, a liberty guaranteed by the Constitution.<sup>42</sup> Ping's detention came as the result of an exercise of power that the people of the United States had not delegated to Congress or any other branch of government, the lawyers argued, the power to prohibit entry into U.S. territory.<sup>43</sup> They said that the 1888 law that annulled certificates like Ping's was an *ex post facto* law that wrongfully applied the punishment of detention and banishment to those who had acted lawfully.<sup>44</sup> What was more, Ping had entered the U.S. under the terms of a treaty with China, and after living there he had established a right of residence that gave him a right to return to the United States.<sup>45</sup> Indeed, the United States had made a contract under the 1882 and 1884 Acts, allowing Ping to leave and return with a certificate in hand, an offer the United States made in good faith. Ping kept his side of the contract, but the United States did not, acting in bad faith by annulling the certificates of resident aliens in 1888.<sup>46</sup> Not only was Ping's detention on board the *Belgic* a retrospective punishment carried out without due process by a government that had no such power, but it also represented a breach of contract against a man who had a right to return to the U.S.

Despite the arguments of Ping's counsel, the Supreme Court upheld the exclusion of Chae Chan Ping from United States territory. Justice Stephen J. Field wrote the opinion

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<sup>41</sup> Gabriel J. Chin, "Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power," in *Immigration Stories*, ed. David A. Martin and Peter H. Schuck (New York: Foundation Press and Thomson/West, 2005), 9.

<sup>42</sup> 130 U.S. 581, 584 (1889), 130:584; *The Constitution of the United States*, 1789, Fifth and Fourteenth Amendments.

<sup>43</sup> 130 U.S. 581, 585 (1889), 130:585.

<sup>44</sup> *Ibid.*, 130:589; *U.S. Constitution*, art I, secs. 9, 10.

<sup>45</sup> 130 U.S. 581, 585–586 (1889), 130:585–586; *Additional Articles to the Treaty between the United States and China, June 18, 1858 (Burlingame Treaty)*, 16 Stat. 739, 1868.

<sup>46</sup> 130 U.S. 581, 586–589 (1889), 130:586–589.

of the Court and explained its judgment as follows: The Burlingame Treaty of 1868 had recognized “the inherent and inalienable right of man to change his home and allegiance” along with the “mutual advantage of the free migration and emigration of [American] citizens and [Chinese] subjects respectively from the one country to the other.”<sup>47</sup> Yet, Justice Field argued, laws passed since 1868 to restrict Chinese immigration in contravention of the treaty were justified because “a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there.”<sup>48</sup>

Justice Field explained: Chinese immigrants came to California to work in the gold mines, but soon their numbers grew, and they began to work as tradesmen and artisans. The Chinese worked hard and lived frugally, and in business they undercut their competition from U.S. citizens, evoking “irritation” and “open conflicts.”<sup>49</sup> “The differences of race added greatly to the difficulties of the situation,” Justice Field wrote. “They remained strangers in the land,” he said, living together and holding on to the habits and customs of their country. “It seemed impossible for them to assimilate with our people,” Justice Field stated. As the numbers of Chinese grew, Americans began to worry that “the crowded millions” of China would soon “overrun” the West Coast. Justice Field wrote that the 1878 constitutional convention of California had petitioned Congress to act to limit Chinese immigration, describing the situation as dire. The convention complained that the presence of Chinese had “a baneful effect...upon public morals,” a reference to the

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<sup>47</sup> 16 *Stat.* 739, 740.

<sup>48</sup> 130 U.S. 581, 594 (1889), 130:594.

<sup>49</sup> *Ibid.*, 130:594-595.

suspicion that nearly all of the few women within the Chinese community were prostitutes.<sup>50</sup> The convention went on, in Justice Field's words, to judge that Chinese

immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; ...that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions....<sup>51</sup>

To the perceived threat that the Chinese posed to "material interests," "public morals," and the people of America, the Court ruled that Congress was justified in progressively limiting Chinese immigration.<sup>52</sup> This threat justified Congress in going against its treaty with China, in restricting entry, and in annulling reentry certificates.<sup>53</sup>

Justice Field's opinion went beyond these prudential considerations to provide a general justification for the right of a nation to exclude aliens. This argument has two prongs, and the first appears here:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.<sup>54</sup>

Justice Field's argument was that for a nation is to be independent and free from the control of another nation, it must maintain exclusive rule over its lands. To establish precedent for this assertion, Justice Field quoted from Chief Justice Marshall's opinion from the 1812 case of the *Schooner Exchange v. McFaddon & Others*:

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<sup>50</sup> *Ibid.*, 130:595. <sup>51</sup> *Ibid.*, 130:595-596.

<sup>51</sup> *Ibid.*, 130:595-596.

<sup>52</sup> *Ibid.*, 130:594-596.

<sup>53</sup> *Ibid.*, 130:600.

<sup>54</sup> *Ibid.*, 130:603-604.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.<sup>55</sup>

What it means to be independent and sovereign is to issue binding judgments within a territory, judgments that no other authority may make – this much was clear in the Court opinion from the Exchange. Also clear from the Exchange was that only the nation can consent to an abridgement of control over its territory. Justice Field seized this terse definition of sovereignty and grafted in an argument about the exclusion of aliens: a basic feature of sovereignty, jurisdiction over territory, implies the right to decide who will enter that territory. Hence, an independent and sovereign nation by definition can exclude those who are not its citizens or its subjects. As a nation has “exclusive and absolute” jurisdiction over its territory, as it has “full and complete power...within its own territories,” it also has exclusive, absolute, full, and complete power to turn away aliens from its territory.

Justice Field’s argument had a second prong:

To preserve its independence, and give security against foreign aggression and encroachment is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.<sup>56</sup>

Justice Field argued that another dimension of a nation’s independence is to provide security against attack, and this is its first and greatest purpose. But Justice Field was not

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<sup>55</sup> *The Schooner Exchange v. McFaddon & Others*, 11 U.S. 116, 136 (1812); 130 U.S. 581, 604 (1889), 130:604. Justice Field also cites dispatches of U.S. diplomats stretching back to 1852 which claim that it is basic power of a sovereign nation to exclude aliens, *ibid.*, 130:606–609.

<sup>56</sup> 130 U.S. 581, 606 (1889), 130:606.

content to affirm that a sovereign nation is responsible to defend itself from an organized military attack by another nation. Large numbers of private citizens moving into a territory also count as “aggression and encroachment.” When the legislative branch of the U.S. determines “foreigners of a different race...who will not assimilate with us to be dangerous to its peace and security,” Congress has the authority to exclude such foreigners.<sup>57</sup> Justice Field said that it does not matter that the United States is not at war with the nation whose subjects the foreigners are. Large numbers of non-assimilating foreigners can be repelled during times of peace. Justice Field concluded that if foreigners resident in the U.S. are dissatisfied about how they are treated, their government should complain directly to the executive head of the U.S. It seems that diplomacy – or war – is the only check on the power of a government to defend its peace and security from attack by aliens.<sup>58</sup>

Our reading of this 1889 Supreme Court decision has revealed a line of reasoning that would prove historic for the United States. Port authorities prevented one Chinese man from disembarking in the San Francisco harbor, and to justify this move, the Court provided a general argument for the power to exclude aliens. In the Court opinion, Justice Field analyzed national sovereignty, producing a two-pronged argument for the power to exclude aliens. First, if a nation did not have the power to exclude an alien from entering its territory, that nation would be subject to the jurisdiction of another nation, the nation to which the alien belongs as subject or citizen. Second, Justice Field argued, since a nation’s highest duty is to provide security from other nations, when a settlement of non-assimilating foreigners threatens a nation’s security, the nation has the power to exclude

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

these aliens. Justice Field took the independence of the nation, viewed two ways, to imply the power to exclude aliens. His argument for the authority to exclude aliens made some use of legal precedent and diplomatic communications, but it did not derive such authority from the Constitution. In this judgment, the power to turn away foreigners rested primarily on reason.

Justice Field expressed his case for the power to exclude as a general argument that would apply to any nation. Yet his account of Chinese immigration to the U.S. gives us insight into what he thinks state power over immigration is meant to protect. Justice Field implied that it is the government's role to maintain peace and to protect the economic interests of its citizens. He also indicated that it is the government's role to protect a civilization and to prevent the tarnishing of public morals. He assumed that if immigrants come and settle somewhere, it is their duty to take on the customs and ways of living of their new country, and to take interest in that country and its institutions. Justice Field saw race as a complicating factor in this assimilation, though he did not imply that racial differences make integration impossible.<sup>59</sup> He did not envision a society composed of multiple and separate ethnic groups, but neither did he oppose immigration altogether; he merely required that immigrants join in the customs of their new country and take an interest in that country. If we read the Court opinion as a whole, it appears to claim that the sovereign powers of government serve to protect the common life of a nation. The

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<sup>59</sup> Justice Field mentions "race" at significant junctures in his argument: as a complicating factor in the peaceful cooperation of the peoples of California, and as a feature of those foreigners who in not assimilating threaten the "peace and security" of the country, *ibid.*, 130:595, 606. We might read his opinion less charitably, arguing that in using the word "race" Justice Field employs a rhetorical fiction designed to protect a "white" America. We might, on the other hand, see "race" as a feature of the conceptual world Justice Field inhabits, and one that does not preoccupy him as much as assimilation into a united society.

Justice seemed concerned that a society be unified by shared practices, by common institutions, and by mutual concern.

In justifying the exclusion of aliens, *Chae Chan Ping v. United States* supplied the conceptual framework for an immigration policy as such. Justice Field's opinion for the Court described how national sovereignty implies the power to exclude an immigrant, who for his purposes embodies the threatening power of another nation. The power to exclude made possible the general policies on immigration that Congress would institute in the twentieth century. A byproduct of these policies is that those who defy them are aliens unlawfully present in the United States. Yet along with providing a framework for an immigration policy, and one which would make possible the illegal alien, Justice Field's opinion revealed what state power over movement across borders was thought to protect: the unity and common life of a society.

### *Fong Yue Ting and the Right to Expel Aliens*

In the case of *Chae Chan Ping v. United States*, the Supreme Court was unanimous: the power to exclude aliens was given in the notion of national sovereignty.<sup>60</sup> But just four years later, another new assertion about a sovereign nation's power over aliens caused an uproar in the Court. In 1893, *Fong Yue Ting v. United States* resolved a battle over further restrictions placed on Chinese immigrants. Justice Horace Gray, writing for the five justices in the majority, wrote that along with the power to *exclude* aliens came the power to *expel* aliens. The four dissenting justices wrote heated statements objecting to this move from

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<sup>60</sup> Justice Gray writes in his opinion that *Chae Chan Ping v. United States* was a unanimous judgment of the court, *Fong Yue Ting v. United States*, *Wong Quan v. United States*, *Lee Joe v. United States*, 149 U.S. 698, 723 (1893).

turning foreigners away at the border to removing them from within the confines of the United States. Indeed, one of these opinions opposing the power to expel aliens came from Justice Stephen Field, the very justice who had written the Court opinion affirming the power to exclude aliens in *Chae Chan Ping v. United States*. In what follows, an examination of opinions in *Fong Yue Ting v. United States* will demonstrate that as the notion of federal sovereignty over aliens developed, it rested on an articulation of national self-preservation as paramount. At the same time, that sovereign authority was contested in the name of a right of domicile, a fair trial, and limits to powers that could turn despotic.

In 1893, three cases involving Chinese immigrants came before the Supreme Court just as a new law came into effect. After the 1882, 1884, and 1888 Acts progressively tightened the restrictions on the Chinese, the Geary Act of 1892 added a new twist: Chinese men and women were deemed to be in the United States illegally unless they were able to prove otherwise. Chinese immigrants were required to apply for a certificate of residence from the government, a sort of internal passport which would demonstrate that they were present prior to the 1882 Exclusion Act and thus entitled to stay in the U.S. Without such proof, any “Chinese person or person of Chinese descent” would “be removed from the United States to China.”<sup>61</sup> After the passage of the Geary Act, as an act of civil disobedience, only about a tenth of Chinese Americans complied with the Act and registered for a certificate.<sup>62</sup> The Chinese had been given a year to register, and as soon as that year was up, three cases came before the Court. The three Chinese men in question were residents of New York, and they had been in the U.S. since before the first Exclusion Act. When New York marshals found that Fong Yue Ting, Wong Quan, and Lee Joe lacked

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<sup>61</sup> *An Act to Prohibit the Coming of Chinese Persons into the United States (Geary Act)*, 27 Stat. 25, 1892.

<sup>62</sup> Daniels, *Guarding the Golden Door*, 21.

certificates, they arrested the three men and threatened them with deportation. The first two had not registered for a certificate, and the third had attempted to register, but his application was refused because he failed to comply with one of the conditions of the Geary Act: he needed “at least one credible white witness” to testify that he had been a resident of the U.S. in 1892.<sup>63</sup> Top lawyers were again brought in to articulate the case of the Chinese, arguing that those invited by the federal government to come to the U.S. gained a right of residence that could not be taken away. To take away that residence by ordering the deportation of Chinese men and women without certificates would be an exercise of power that had not been given to Congress, and it would represent a dangerous expansion of governmental power. But the Court judged that it was within the authority of the federal government to expel and deport these three men, and the conceptual move required to justify that authority deserves our attention.

Chae Chan Ping v. United States had established the right of the government to exclude foreigners, to bar them from entering the country. What was in question in Fong Yue Ting v. United States was whether the government could expel foreigners who were living within its borders by its consent. Justice Gray’s opinion dealt more extensively than Justice Field’s with cases and authorities in federal and international law. Along with reiterating the power to exclude aliens that the Court had upheld in Chae Chan Ping v. United States, Justice Gray repeated a statement he had made in an intervening case, Nishimura Ekiu v. United States:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and *essential to self-preservation*, to

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<sup>63</sup> 27 Stat. 25, 26; 149 U.S. 698, 702–704 (1893), 149:702–704.

forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.<sup>64</sup>

Here, Justice Gray made clear that authority over immigration serves to defend the continuing life of a society, which is oriented toward its own preservation. To back up this national self-interest, he drew on the scholar of international law Emer de Vattel, who had stated in the previous century,

Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. *What it owes to itself, the care of its own safety*, gives it this right, and in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.<sup>65</sup>

Having established that the right to exclude aliens rests on self-care and self-preservation, Justice Gray cited a series of authorities in international law who recognized a right to expel foreigners. Among these was Théodore Ortolan, who claimed that a government always reserves “the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier,” as foreigners are only present in its territory by “pure permission.”<sup>66</sup>

In what is the central conceptual innovation of his judgment, Justice Gray said that the power to exclude aliens and the power to expel aliens are so closely tied that they are two aspects of a single power: “The power to exclude aliens and the power to expel them

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<sup>64</sup> *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1891), emphasis ours.

<sup>65</sup> Emer de Vattel, *The Law of Nations*, bk. 1, sec. 230, as quoted in 149 U.S. 698, 707 (1893), 149:707, emphasis ours. See 2.A.3 on Vattel.

<sup>66</sup> *Règles internationales et diplomatie de la mer*, 4. éd. (Paris: Henri Plon, 1864), lib. 2, c. 14, 297; cited in 149 U.S. 698, 708 (1893), 149:708. Justice Gray also cites U.S. Secretary of State Fish from 1869 in Francis Wharton, ed., *A Digest of the International Law of the United States: Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General*, 2nd. ed. (Washington: Government Printing Office, 1887), sec. 206; Robert Phillimore, *Commentaries Upon International Law*, 3rd ed., vol. 1 (London: Butterworths, 1879), c. 10, sec. 220; Ludwig von Bar, *International Law: Private and Criminal*, trans. G. R. Gillespie (Edinburgh: W. Green, 1883), 708 note, 711; citations in 149 U.S. 698, 707–708 (1893), 149:707–708.

rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.”<sup>67</sup> The same sorts of goals that Justice Field offered in the case of *Chae Chan Ping v. United States* are scattered through Justice Gray’s opinion: protecting the sole power of the nation over its territory, keeping it secure against attack, and maintaining its health. Justice Gray offered a summary of these two powers wrapped up in one:

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.<sup>68</sup>

We note that in uniting exclusion and expulsion, Justice Gray called them both *powers* and *rights*. These powers do not just touch individual aliens but *all* aliens or *any class* of aliens.

Both are non-negotiable aspects of what it means to be a nation that is sovereign, independent, safe, and well. That nation is interested in what is *its own* to possess.

Having established a unity of the powers to exclude and expel aliens, Justice Gray located those powers as Congress’ to regulate and the President’s to execute, as with other matters of international relations. It is not for the courts, then, to pass judgment on the exclusion and expulsion of foreigners.<sup>69</sup> Indeed, as the Court affirmed in *Nishimura Ekiu v. United States*, one officer from the executive branch of the government could judge exclusively about the cases of exclusion or expulsion, that person’s decision counts as due process of law in keeping with the Fourteenth Amendment to the Constitution, and foreigners have no right to trial before a court when they are threatened with deportation.<sup>70</sup>

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<sup>67</sup> *Fong Yue Ting v. United States*, *Wong Quan v. United States*, *Lee Joe v. United States*, 149 U.S. 698, 713 (1893), 149:713.

<sup>68</sup> *Ibid.*, 149:711.

<sup>69</sup> *Ibid.*, 149:711–712.

<sup>70</sup> 142 U.S. 651, 660 (1891), 142:660.

Also, to the charge that expulsion represents a type of cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution, Justice Gray argued that expulsion is merely a way of enforcing conditions that are within the government's proper exercise of authority to place on aliens.<sup>71</sup>

Now that Justice Gray had established the absolute and inalienable powers of the United States as a sovereign nation over the location of aliens, he said that those powers were otherwise limited. He affirmed that aliens are still owed a range of protections under the law, among them the rights to person and property. Despite the civil rights they have once inside the country, as aliens they gain no rights before immigration authorities. Even those who came to live in the U.S. legally and intend to continue to reside in the U.S. do not over time gain a right to remain:

...It appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it.<sup>72</sup>

In sum, Justice Gray affirms that non-citizens benefit from certain legal rights and responsibilities, but before the raw power of the immigration authorities, non-citizens have no one to appeal to once a single immigration officer makes a judgment about their case. The Court had affirmed in *Chae Chan Ping v. United States* that while civil rights and responsibilities hold within national territory, at the border of that territory, the sovereign power of the nation holds absolute sway over aliens wishing to enter. In *Fong Yue Ting v. United States*, the Court allows the powerful arm of immigration authorities to reach within national territory, plucking up the aliens it chooses and banishing them from its

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<sup>71</sup> 149 U.S. 698, 730 (1893), 149:730.

<sup>72</sup> *Ibid.*, 149:723-724.

territory. The 1889 decision had envisaged bare federal power as operating at the borders, while the 1893 decision authorized that power to operate within the country's interior.

The four dissenters raised a vociferous protest against the conceptual innovation that Justice Gray expressed. Justice David Josiah Brewer, Chief Justice Melville Fuller, and the same Justice Field who had penned the opinion justifying the power to exclude aliens each wrote to object to the power to expel aliens. The dissenters drew upon international law, the U.S. Constitution, and a notion of the appropriate limits of federal power to frame their arguments. They argued for a right of domicile for the appellants and for a limitation on the powers of government over those domiciled. The dissenters reasoned that persons who move to a new place and set up an abode with an intention to stay gain a right to domicile, strengthened when they pay taxes, give allegiance, and obey the laws of their new country. Following the common law precedent, Fong Yue Ting, Wong Quan, and Lee Joe possessed the status of denizens, between aliens and citizens.<sup>73</sup>

Since they owed temporary obedience to the Constitution, these denizens deserved to receive its guarantees, including freedom from “unreasonable searches and seizures” and from “cruel and unusual punishment.”<sup>74</sup> They also deserved the constitutional “right of a speedy and public trial, by an impartial jury,” along with the guarantee that they would not “be deprived of life, liberty, or property, without due process of law.”<sup>75</sup> Chinese residents deserved “equal protection of the laws” accorded to everyone within U.S. territorial

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<sup>73</sup> Ibid., 149:735–736; citing Emer de Vattel, *The Law of Nations: Or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), bk. 1, sec. 218; Phillimore, *Commentaries Upon International Law*, vol. 1, chap. 18, 347; Wharton, *International Digest*, sec. 198.

<sup>74</sup> 149 U.S. 698, 739, 740, 749, 759, 760 (1893), 149:739, 740, 749, 759, 760; *U.S. Constitution*, Fourth and Eighth Amendments.

<sup>75</sup> 149 U.S. 698, 698, 739, 741, 749, 754, 761 (1893), 149:698, 739, 741, 749, 754, 761; *U.S. Constitution*, Fifth and Sixth Amendments.

jurisdiction in the Fourteenth Amendment, a protection extended to people “without regard to any differences of race, of color, or of nationality” just a few years before in the case of *Yick Wo v. Hopkins*.<sup>76</sup> As denizens, these persons differ from citizens only in that they lack voting privileges and cannot hold public office. Justice Field said that this was right for “men having our common humanity,”<sup>77</sup> and he expressed this pride:

It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, come from what quarter it may, is “caught upon the broad shield of our blessed Constitution and our equal laws.”<sup>78</sup>

The dissenters argued that while the power to exclude holds legitimately at the borders, the power to expel domiciled foreigners is a novelty, claimed only in the “barbarous” Alien Act of 1798.<sup>79</sup> This expulsion was certainly cruel and unusual punishment, in the words of Justice Field:

As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family and business there contracted. The laborer may be seized at a distance from his home, his family and his business, without permission to visit his home, see his family, or complete unfinished business.<sup>80</sup>

Lawful punishment requires a trial and the due process of law, but instead, these resident aliens had their cases decided by a single individual.<sup>81</sup> This power was “dangerous and despotic,” in the warning of Justice Field, who said that deportation without a fair trial by

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<sup>76</sup> 118 U.S. 356, 369 (1886); quoted by Justice Brewer in 149 U.S. 698, 739 (1893), 149:739.

<sup>77</sup> *Fong Yue Ting v. United States*, *Wong Quan v. United States*, *Lee Joe v. United States*, 149 U.S. 698, 754 (1893), 149:754. This reference to a “common humanity” that necessitates legal protections appears to be unique in this court case, though a lawyer for Chae Chan Ping made recourse to what was owed “men, as men,” 130 U.S. 581, 584 (1889), 130:584.

<sup>78</sup> *Ho Ah Kow v. Nunan*, 5 Sawyer 552, 563 (C.C.D. California 1879); cited in 149 U.S. 698, 755 (1893), 149:755.

<sup>79</sup> *An Act Concerning Aliens (Alien Friends Act)*, 1 Stat. 570, 1798; 149 U.S. 698, 746–747 (1893), 149:746–747.

<sup>80</sup> 149 U.S. 698, 759 (1893), 149:759.

<sup>81</sup> *Ibid.*, 149:749.

jury “establishe[s] a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its consent.”<sup>82</sup>

Another of the dissenters, Justice Brewer, took aim at Justice Gray’s analysis of sovereignty in a tightly argued passage:

It is said that the power here is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers — ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power, and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.<sup>83</sup>

According to Justice Brewer, the notion of sovereignty required to justify the expulsion of a lawfully admitted alien is an unlimited and dangerous sort, where the sovereign body merely asserts what its powers are. This despotism needed the limits of the Constitution.

Writing the opinion for the Supreme Court in *Fong Yue Ting v. United States*, Justice Gray had proposed a new power to expel aliens that he saw as one and the same as the power to exclude aliens. His argument made plain that this rested on the powers of a sovereign nation to preserve itself, its safety, and its welfare. The dissenting minority displayed outrage at what they saw as a despotic power to remove aliens from the country who had gained a right of residence or domicile. Especially those permitted and, in their words, “invited” to make a home in the United States deserved the protections of the

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<sup>82</sup> *Ibid.*, 149:750, 755.

<sup>83</sup> *Ibid.*, 149:737.

Constitution, including a fair trial and a protection from cruel and unusual punishment.<sup>84</sup>

Yet as they objected to expulsion, these dissenters did not object to the move made just four years prior in *Chae Chan Ping v. United States*. As the ship came into port, as the train arrived at the border, as someone walked across that border, the inherent powers of sovereignty held: it was fully within the rights of that government to exclude the alien, to turn away the foreigner at the point of entry.

### *Yick Wo, Wong Kim Ark, and Expanded Rights for Aliens Lawfully Admitted*

Alongside the *Chae Chan Ping-Fong Yue Ting* stream of cases ran the *Yick Wo-Wong Kim Ark* stream. On first glance, this second stream seems opposed to the first, since just as the powers to exclude and expel aliens were being established, these cases established that aliens were owed many of the rights owed to citizens. The cases extended guarantees awarded to former slaves and their descendants in the Fourteenth Amendment to the Constitution in 1868. A few years before *Chae Chan Ping v. United States*, the Supreme Court ruled in *Yick Wo v. Hopkins* (1886) that the city of San Francisco could not deny permits to Chinese-owned laundries while granting permits to laundries owned by those with European heritage. The Court cited the provisions of the Fourteenth Amendment of the Constitution of due process of law and equal protection of the laws, arguing that “these provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”<sup>85</sup> Every branch of government, even local authorities, had to apply laws equally. The Court said that the

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<sup>84</sup> *Ibid.*

<sup>85</sup> 118 U.S. 356, 369 (1886), 118:369.

sovereign powers of government were circumscribed by laws, which applied in the same way to every person in its jurisdiction.<sup>86</sup>

In the following years, 1889 and 1893, the Supreme Court affirmed that aliens had no rights before the sovereign powers to exclude and expel them, but just a few years later, the Court extended a further right to aliens already present in U.S. territory. Wong Kim Ark had been born in San Francisco in 1873 to parents who were subjects of the Chinese emperor. Ark left the U.S. for a temporary visit to China in 1894, and when he returned in 1895, he was denied permission to land because he was judged not to be a citizen of the United States. While the port authorities judged that Ark “has been at all times, by reason of his race, language, color and dress, a Chinese person,” the Supreme Court called on another provision of the Fourteenth Amendment: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”<sup>87</sup> Writing the Court opinion, Justice Gray argued that this provision guarantees citizenship not only to the children of slaves but to the children of aliens. Since federal law had not clarified the issue, Justice Gray ruled that the law followed not the civil law pattern of *ius sanguinis*, where the citizenship of a child followed its parent, but the English common law pattern of *ius soli*. As birth within the dominions of the king made one a subject at birth, so birth within United States jurisdiction made one a citizen. Wong Kim Ark was a citizen.<sup>88</sup> Aliens born outside of the U.S. were subject to the sovereign powers of exclusion and deportation, but their children, born on U.S. soil, were citizens who could come and go from the U.S. as they pleased.

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<sup>86</sup> Ibid., 118:370.

<sup>87</sup> United States v. Wong Kim Ark, 169 U.S. 649, 650-651, 653 (1898).

<sup>88</sup> Ibid., 169:666-667, 675, 688, 694, 705.

Within a decade and a half, the Supreme Court applied significant civil rights to aliens, yet at the same time it affirmed the powers of government to exclude and deport aliens. Though these two streams seem to clash, on closer examination, they complement one another. *Yick Wo v. Hopkins* and *United States v. Wong Kim Ark* were moves to define the American polity as enveloping everyone within a territory, moves to apply the law to everyone within U.S. lands and to extend membership to everyone born in those lands. *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States* strengthened the borders around U.S. territory, justifying government as it turned aliens away at its boundaries and reached within its lands to expel unwanted aliens. Extensions of legal protections to everyone within a territory coincided with a strong enunciation of territorial sovereignty. On closer examination, the two streams are closely related: government is increasingly defined as the power of law over a territory. Along with this conceptual confluence comes a practical agreement between the two streams: as everyone in the U.S. receives greater legal protections, the law grows to fend off newcomers. A hard crust protects privileges newly extended to everyone in the interior.<sup>89</sup>

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In the nineteenth century, the Supreme Court articulated a vision of goods held in common: peace, safety, economic wellbeing, democratic participation, sexual propriety, democratic participation, freedom from slavery, and social and racial unity. Within the country, aliens were increasingly enabled to share in at least some of those goods as their rights and privileges expand. Yet, if the people judged that prospective immigrants would compromise those goods, or if the nation judged that present immigrants detract from

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<sup>89</sup> Kieran Oberman calls this the “coconut consensus,” “What Is Wrong with Permanent Alienage?” (Oxford, October 29, 2012), <http://podcasts.ox.ac.uk/what-wrong-permanent-alienage>.

what is held in common, by their consent the federal government was given a tool that it still possesses in the early twenty-first century: the right to expel and exclude aliens, later interpreted as the “plenary power doctrine.”<sup>90</sup> So far as the people of the United States are independent from other authorities, it is up to them to judge when what they share is threatened, and when a threat is identified, their powers over aliens are practically unlimited. By their consent, the legislature can draw up laws to expel and exclude aliens, and the executive branch can exclude and expel aliens even if just one of its agents judges it right. The courts have little or no hold on what Congress and executive agencies do. In the early twenty-first century, plenary power is restricted only minimally: before expulsion, aliens are promised a hearing, they may have legal counsel present for the hearing though that counsel is not supplied, and they may not be held beyond six months if no other country will receive them.<sup>91</sup> Beyond those holds, powers to exclude and expel are not limited: the federal government retains sole control over immigration, and only very rarely do complaints about immigration authority reach the courts. The door is open for the federal government to claim extensive powers, to break faith with Chae Chan Ping and not honor the certificate guaranteeing reentry to a long-term resident, and to expel Fong Yue Ting, Wong Quan, and Lee Joe because of their failure to secure certificates of residence.

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<sup>90</sup> Chin, “Chae Chan Ping and Fong Yue Ting,” 7; Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002), 109. See also Gabriel J. Chin, “Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law,” *Georgetown Immigration Law Journal* 14 (2000): 257–87, which casts doubt on whether a plenary power doctrine exists, arguing that discrimination based on race, belief, and sexual preference in immigration law were consistent with discrimination in domestic law at the time of the court decisions.

<sup>91</sup> The Immigration and Nationality Act outlines the procedures for a removal hearing: an alien must be given notice of the charges and of the time and place of the hearing, the alien may be represented by legal counsel at no expense to the government, the alien will have opportunity to examine the evidence and cross-examine witnesses, and deportation can only be served if it is based on “reasonable, substantial, and probative evidence,” 66 Stat. 163, 209–210, sec. 242(b). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court ruled that an alien may not be held for more than six months under a deportation order if no other country will accept that person. We are indebted to Steve Meili for pointing out these limits on plenary power.

The door is open for the government in the mid-twentieth century to imprison the alien wife of an American veteran or to imprison a legal resident of twenty-five years based on confidential evidence.<sup>92</sup> The door is open in the early twenty-first century for the government to remove an unlawfully present alien and take her children into state custody or to remove a young adult brought to the United States illegally as a child. The sharp edge of the sovereign powers over aliens remains nearly unlimited.

In the cases we have considered, there are hints that sovereignty over immigration is to be limited by notions of justice. For instance, when Justice Field outlines “sovereign powers” in *Chae Chan Ping v. United States*, he states that these are “restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”<sup>93</sup> This statement allows for a reading of the cases that emphasizes the moral goods to which the people must refer if they are to remain “civilized” in their exercise of sovereign power. Yet the stress of the arguments of the Court in *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States* lies on uncompromised sovereignty for the purpose of self-preservation. While other moral considerations may be at play, national independence trumps these in frequent cases of detention and expulsion. There is little evidence that anything beyond the existence of the nation-state matters. *Ius* or Right, human rights, the good of other nations, and the judgment of God seem to place no hold on federal authority over the bodies of aliens. If the people signal through their representatives that they wish to exclude an alien from entering U.S. territory, if the legislature decides to expel an alien already within U.S. territory, it may do so. Indeed, power over immigration seems to prove the independence

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<sup>92</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); see Tichenor, *Dividing Lines*, 200.

<sup>93</sup> 130 U.S. 581, 604 (1889), 130:604.

of the nation; it demonstrates that no other power rules the land. Insofar as power over immigration is a sign of sovereignty, it does not need any other justification. These cases leave a legacy, then. They bequeath to U.S. immigration law a notion of sovereignty that is disconnected from some wider moral field, some outside considerations of justice. Here we are right to heed the warnings of the dissenters in *Fong Yue Ting v. United States*, who said that the assertion of the right to expel aliens “contains within it the germs of the assertion of an unlimited and arbitrary power,” one leading to “despotism and tyranny.”<sup>94</sup>

### 2.A.3. Sovereignty Over Immigration in an Intellectual History of Self-

Interest: Vattel and Hobbes against Grotius

What tradition of thought did the Supreme Court draw upon when it said that absolute authority over immigration is simply part of what it means to be a sovereign nation, when it said that this authority depends on the consent of the nation and no other substantial considerations? The Court opinion in *Chae Chan Ping v. United States* did little to connect to a juridical tradition: Justice Field reasoned from sovereign authority to the right to expel aliens, he demonstrated the agreement of the Court in other judgments, and he cited examples of diplomatic communications that accord with his view. In his opinion on *Fong Yue Ting v. United States*, however, Justice Gray turned to leading authorities on the law of nations to find agreement with his argument for the right of a nation to exclude or expel aliens. He cited Emer de Vattel, Théodore Ortolan, Robert Phillimore, and Ludwig von Bar, and while Ortolan, Phillimore, and Bar wrote not long before *Fong Yue Ting v.*

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<sup>94</sup> 149 U.S. 698, 755, 763 (1893), 149:755, 763.

United States, Vattel wrote in the previous century.<sup>95</sup> Vattel's *Le Droit des Gens* (1758) was perhaps the most prominent work on the law of nations in the eighteenth century, and it exerted great influence over Americans through the nineteenth. The work is also a link to an earlier tradition, drawing on Christian Wolff, Samuel Pufendorf, Thomas Hobbes, and Hugo Grotius.<sup>96</sup> After considering Vattel, we will move on to Hobbes and to Grotius from the seventeenth century. Though Vattel refers to Grotius more often than to Hobbes, Vattel sides with Hobbes in placing self-interest as primary in the law of nature. In contrast, Grotius' mature work posits a desire for society as the wellspring of natural right, and he alleges that those who start with self-love think there is no such thing as justice. Vattel and Hobbes will cast the nation as aiding the foreigner only when their self-preservation is not compromised, notions that pave the way for the late nineteenth-century judgments of the United States Supreme Court.

Vattel first came to our attention in Justice Gray's opinion in *Fong Yue Ting v. United States* above, where a quote for Vattel gave the nation justification for excluding a foreigner to protect against danger or injury. Justice Gray extracted a phrase justifying a nation's right to refuse to admit a foreigner out of a passage that sets out the opposite aim, to encourage nations to receive foreigners in need. Still, the Justice's quotation captures

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<sup>95</sup> *Ibid.*, 149:707-709. The first edition of Ortolan appeared in 1845, and Justice Gray cites from the 1864 edition, *Règles internationales et diplomatie de la mer*. Phillimore first appeared in 1854-1861, and Justice Gray cites from the 1879 edition, *Commentaries Upon International Law*. Bar was published in German as *Das internationale Privat- und Strafrecht* (Hannover: Hahn'sche Hofbuchhandlung, 1862); Gray cites from the 1883 English translation, *International Law*. Vattel appeared in French as *Le Droit des Gens, ou, Principes de la Loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains*, 2 vols. (London, 1758), and the work appeared in English translation in various editions from 1760 onwards. Here we draw upon the Liberty Fund edition, *The Law of Nations*, 2008, a representation of *The Law of Nations: Or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns* (London: G. G. and J. Robinson, 1797). Italicized words in the text above are drawn from the French.

<sup>96</sup> As an indication of the importance of Vattel for American understandings of the law of nations, Chief Justice Marshall cites Vattel and only other one other authority, Cornelius van Bynkershoek, in *The Schooner Exchange v. McFaddon & Others*, 11 U.S. 116, 143, 144 (1812), 11:143, 144; Vattel, *The Law of Nations*, 2008, bk. 4, sec. 92.

something that runs through Vattel's treatise: before mutual aid lies self-interest, both for individuals and for nations. In the passage, the Swiss jurist from Neuchâtel, born under Prussian rule but made an advisor to the elector of Saxony, writes that nations should respond to the imperfect right of those driven from home by giving them a place to stay, temporarily or permanently.<sup>97</sup> The proto-historical rise of property and national domain does not take away the right given by nature and nature's author to every person, the "right to dwell somewhere on earth."<sup>98</sup> But Vattel offers an abundance of provisos: if the nation (*Nation*) has reason to believe that the exile may cause damage to it by consuming its scarce resources, spreading disease, tarnishing manners, or disturbing the peace, that nation can – indeed, it must – ban the foreigner from entering its domain.<sup>99</sup> Still, this prudential reasoning should not hold onto "unnecessary suspicion and jealousy," and it should be tempered by "charity and commiseration."<sup>100</sup> Even for those who fall into an unhappy state by their own fault, Vattel says, we should not forget that all human beings should love one other.<sup>101</sup>

Vattel's casuistry on admitting exiles exemplifies a line of reasoning that recurs throughout his lengthy treatise. For the individual as for the nation, Vattel announces a duty of mutual aid, since none can fulfill its needs without others. His strong case for universal human society rests on something still stronger: this society enables a person to achieve her own preservation and the perfection of her nature.<sup>102</sup> Likewise with nations: "Each individual nation is bound to contribute every thing in her power to the happiness

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<sup>97</sup> *The Law of Nations*, 2008, bk. 1, sec. 230.

<sup>98</sup> *Ibid.*, bk. 1, sec. 229. *Le droit d'habiter quelque part sur la terre, Le Droit des Gens*, 1758.

<sup>99</sup> *The Law of Nations*, 2008, bk. 1, sec. 231.

<sup>100</sup> *Ibid.* *La charité & le commisération, Le Droit des Gens*, 1758.

<sup>101</sup> *The Law of Nations*, 2008, bk. 1, sec. 231. *Tous les hommes doivent s'aimer, Le Droit des Gens*, 1758.

<sup>102</sup> *The Law of Nations*, 2008, Prelim. sec. 10.

(*bonheur*) and perfection (*perfection*) of all the others.”<sup>103</sup> But such a claim does not stand on its own. Right away, Vattel qualifies it: “The duties that we owe to ourselves [are] unquestionably paramount to those we owe to others.”<sup>104</sup> This is because whether individual or collective, a moral being no longer exists if it does not fulfill its obligations to itself: “To preserve and to perfect his own nature, is the sum of all duties to himself,” says Vattel.<sup>105</sup> And though the nation differs from the individual in some ways, it still is duty-bound to do what the individual is bound to do according to the law of nature, “to fulfill the duties of humanity toward strangers.”<sup>106</sup> Not only is an individual due a place to live, but so is a whole nation, says Vattel in a separate passage: “If a people (*peuple*) are driven from the place of their abode, they have a right to seek a retreat (*retraite*).”<sup>107</sup> But immediately, Vattel offers a way out: the country (*pays*) to which the beleaguered nation comes can dismiss this nation if the receiving country does not have enough by which to preserve itself.<sup>108</sup>

When Justice Gray uses Vattel, then, he does not responsibly represent the flow of the argument, but his misquotation grabs onto something more firmly rooted in Vattel. Vattel agrees with the Roman-Christian legal synthesis that the earth is given to human beings in common, and that the duties and rights of humanity hold even after they join sovereign bodies.<sup>109</sup> Here Vattel seems to maintain a sense of Right that guides the treatment of foreigners by the sovereign state and its members. But he does not speak of

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<sup>103</sup> Ibid., Prelim. sec. 13. *Bonheur & perfection, Le Droit des Gens*, 1758.

<sup>104</sup> *The Law of Nations*, 2008, Prelim. sec. 14.

<sup>105</sup> Ibid., bk. 1, sec. 14, emphasis Vattel’s. *Se conserver & se perfectioner, c’est le somme de tous devoirs envers soi-même, Le Droit des Gens*, 1758.

<sup>106</sup> *The Law of Nations*, 2008, Prelim. sec. 11.

<sup>107</sup> Ibid., bk. 2, sec. 125.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., bk. 2, sec. 203.

Right in a strong sense; for him, everything boils down to the preservation and perfection of self. Vattel speaks of love that tempers suspicion toward foreigners, and he even claims that nations ought to love one another.<sup>110</sup> Yet despite this, in the end, for Vattel the nation is sole judge of what it ought to do. The nation alone decides whether aiding another will help it achieve its development or will compromise its continuing existence and its development. Vattel says that as a being naturally in possession of liberty and independence, “it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her – of what she can or cannot do, – of what it is proper or improper for her to do.”<sup>111</sup> Here we see a precursor to the assertions that Justice Field draws from Chief Justice Marshall, that “all exceptions...to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”<sup>112</sup> For Vattel as for these Supreme Court justices of the nineteenth century, the nation is judge of when it can assist others. Also like the justices, Vattel says that the rights of domain and empire intrinsic to a nation’s hold over land means that the sovereign may forbid the entrance of foreigners “according as he may think it advantageous to the state.”<sup>113</sup> His reference to virtue and love restrains the excesses of a state seeking its own advantage, but it does not stop the state seeking its own advantage. The basic right, the basic law that moves the world, is to preserve self.

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<sup>110</sup> Ibid., bk. 2, sec. 11.

<sup>111</sup> Ibid., Prelim. sec. 16.

<sup>112</sup> *The Schooner Exchange v. McFaddon & Others*, 11 U.S. 116, 136 (1812), 11:136; *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889), 130:604.

<sup>113</sup> *The Law of Nations*, 2008, bk. 2, sec. 94. ...*Selon qu’il le trouve convenable au bien de l’Etat...Droits de Domaine & d’Empire*, Vattel, *Le Droit des Gens*.

Standing before Vattel, seventeenth-century English philosopher Hobbes does not treat immigration at any length in his masterwork the *Leviathan* (1651).<sup>114</sup> He does not offer casuistry in international law of the sort found in Vattel, but what he does offer is an account of the genesis of civil authority that would set the terms of philosophical debate for generations to come, an account that lends a certain interpretation of immigration. In the *Leviathan*, Hobbes claims that by nature, human beings have equal faculties, and they equally desire certain ends. If one gains, builds, or cultivates a “convenient Seat,” a pleasant bit of land or homestead, then another will come as “Invader,” to take what the first owns, perhaps taking their life or liberty as well. “Competition,” “Diffidence,” and “Glory” cause human beings to quarrel, leaving them without desire to keep company.<sup>115</sup> “Hereby it is manifest,” writes Hobbes, “that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.”<sup>116</sup> In such a setting, without a “common Power,” there is “no Law” and therefore “no Injustice.”<sup>117</sup>

Hobbes describes in the subsequent chapters how human beings grow tired of such a miserable state, wanting to defend themselves and the work of their hands from the threats of others. The “Fundamentall Law of Nature,...to seek Peace, and follow it,” compels them to make a new arrangement, yet that arrangement must go through and not around “the summe of the Right of Nature,” which, according to Hobbes, is “by all means

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<sup>114</sup> Thomas Hobbes, *Leviathan, Or, The Matter, Form, and Power of a Common-Wealth Ecclesiastical and Civil* (London: Printed for Andrew Crooke, 1651). The page numbers here come from the bracketed numbers in *Leviathan*, ed. Richard Tuck, rev. student ed. (Cambridge: Cambridge University Press, 1996). These are drawn from the large-paper 1651 London edition from the Cambridge University Library, Syn 3.65.1. The quotations here from the *Leviathan* reflect the spelling, capitalization, and italics of Tuck’s edition.

<sup>115</sup> Hobbes, *Leviathan*, 1996, 60–61.

<sup>116</sup> *Ibid.*, 62.

<sup>117</sup> *Ibid.*, 63.

we can, to defend our selves.”<sup>118</sup> A desire for peace reigns, and that peace cannot be other than complete self-defense. So, a great multitude gathers to achieve peace and to defend themselves from “the invasion of Forraigners,” says Hobbes. The multitude achieves unity by placing all their power and strength on one person, or one assembly of persons, reducing their will to one will and allowing that man or assembly to bear their person.<sup>119</sup> They make a “Covenant of every man with every man,” giving up their “Right of Governing” themselves to a new person, an “Artificiall person.”<sup>120</sup> The one that carries this person is “Soveraigne,” and everyone else is “his Subject.”<sup>121</sup> The multitude united in one person is “a COMMON-WEALTH, in latine CIVITAS...that great LEVIATHAN, or rather...that *Mortall God*, to which wee owe under the *Immortal God*, our peace and defence.”<sup>122</sup> Thus Hobbes thinks the war of every man against every man ends within a commonwealth, but the same war continues on at its borders:

...Yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War.<sup>123</sup>

Hobbes says little more in the *Leviathan* about immigrants and international relations. Indeed, some say there is reason to think that his views on international relations would be very different from the protean picture we have here, were he to treat the law of nations.<sup>124</sup> Still, if we imagine where immigrants fall in the picture from the *Leviathan*,

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<sup>118</sup> Ibid., 64.

<sup>119</sup> Ibid., 87.

<sup>120</sup> Ibid., 80, 87.

<sup>121</sup> Ibid., 88.

<sup>122</sup> Ibid., 87.

<sup>123</sup> Ibid., 63.

<sup>124</sup> So argues Michael C. Williams, “Hobbes and International Relations: A Reconsideration,” *International Organization* 50, no. 2 (1996): 213–36.

immigrants cross militarized borderlands. No Right guides the treatment of immigrants by sovereign nations because Right can only operate within those sovereign nations. How sovereigns respond to immigrants will flow out of their *raison d'être*, to defend against foreign invasion. Immigrants will be dealt with in the nexus of competition, diffidence, and glory that Hobbes has described. The sovereign is first tasked with defending those it represents, seeking their peace, allowing them to hold on to their property, and maintaining their life and liberty. The immigrant can only be understood within this framework, as threat or benefit, but not as a creature bearing witness to some external Right or as messenger of some divine word.

In the same century as Hobbes lies a figure whose work Vattel often draws on but who posits another source for justice – and alleges that the likes of Hobbes and Vattel have given up believing in justice. In his early work *De Indis* (1603/1604), not published in full until 1868, well after Vattel, Dutch jurist Hugo Grotius resembles Hobbes and Vattel in theological attire. He claims that in the way that God has fashioned creation, “love, whose primary force and action are directed to self-interest, is the first principle of the whole natural order.”<sup>125</sup> The regard of self, he says, can be seen not only in human beings but in animals and inanimate objects, “being a manifestation of that true and divinely inspired self-love which is laudable in every phase of creation.”<sup>126</sup> The regard for self produces two laws of nature: “It shall be permissible to defend [one’s own] life and to shun that which threatens to prove injurious; secondly, that It shall be permissible to acquire for oneself,

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<sup>125</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum and Gwladys L. Williams (Indianapolis: Liberty Fund, 2006), 5’; based on Hugo Grotius, *De Iure Praedae Commentarius: Commentary on the Law of Prize and Booty*, ed. Gwladys L. Williams and Walter H. Zeydel, 2 vols. (Oxford: Clarendon Press, 1950); see Oliver O’Donovan, “The Justice of Assignment and Subjective Rights in Grotius,” in *Bonds of Imperfection: Christian Politics, Past and Present*, ed. Oliver O’Donovan and Joan Lockwood O’Donovan (Grand Rapids, Mich.: Eerdmans, 2004), 175.

<sup>126</sup> Grotius, *The Law of Prize and Booty*, 5’a.

and to retain, those things which are useful for life.”<sup>127</sup> But we are also made to regard others and seek their welfare, even loving them, says Grotius. This is the starting point of “justice properly so called,” justice that concerns the good of others.<sup>128</sup> In this early work, then, love motivates justice, and the first love is love of self. Love for others follows on from this, and justice proceeds with this love for others.

By the time he writes his mature work *De Iure Belli ac Pacis* (1625), Grotius starts in a different place. His previous commitment to self-preservation only appears as a foil, in the person of Carneades as represented in Cicero’s *De Re Publica*.<sup>129</sup> Carneades argues that there is no natural Right, since it changed according to custom and time, and since with other animals, human beings by nature pursued their own interests. Says Carneades according to Grotius, “either there was no such thing as justice, or such justice as existed was pure folly, for concern for others’ welfare damaged one’s own.”<sup>130</sup> Grotius responds that this teaching cannot be accepted, either for human beings or for some other animals. Human behavior is distinguished by a “desire for society” or “community,” for “peaceable society with members of the same species, organized appropriately to human rational capacities.”<sup>131</sup> This inclination to society is fixed in human nature, and this, not self-interest, is “the mother of natural Right.”<sup>132</sup> Out of humankind’s social nature, then, flows

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<sup>127</sup> Ibid., 6.

<sup>128</sup> Ibid., 6’.

<sup>129</sup> Carneades’ words are known through a lost section of Cicero known now, as to Grotius, through Lactantius, *Divinae institutiones* 5. See O’Donovan, “The Justice of Assignment and Subjective Rights in Grotius,” 187n52.

<sup>130</sup> *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur (I.B.P.)*, Ed. 2a emendatior & multis locis auctior (Amsterdam: Guiljelmum Blaeuw, 1631), Prol.5; in Oliver O’Donovan and Joan Lockwood O’Donovan, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625 (I.G.)* (Grand Rapids, Mich.: Eerdmans, 1999), 792–793. For more on the text of *I.B.P.*, see chapter 3, note 163.

<sup>131</sup> *Inter haec autem quae homini sunt propria, est appetitus societas, id est communitatis, non qualiscunque, sed tranquillae & pro sui intellectus modo ordinatae cum his qui sunt generis, I.B.P.*, Prol.6, in *I.G.*, 793.

<sup>132</sup> *I.B.P.*, Prol.16, in *I.G.*, 795.

other kinds of right, a stricter sense of right in giving and taking, and wider sense of right in wise judgment.<sup>133</sup> Human beings have their social nature by the free will of God (*ex libera Dei voluntate*), and their inclinations are helped by interest (*utilitas*), says Grotius.<sup>134</sup>

In Grotius' mature account of natural Right or justice, then, a desire for society is the feature of human nature on which everything else builds. Vattel resembles Grotius in giving mutual aid a strong role, but by choosing the preservation of self as his starting point, he resembles Hobbes. When Hobbes begins his account of the Right of nature with self-defense, he manifests the dark side of self-preservation. When the Supreme Court judgments that established the sovereign right to exclude and expel aliens quoted from Vattel, then they were more indebted to Hobbes' primary assertion of self than to Grotius' primary assertion of community. The intellectual lineage from Justices Field and Gray through Vattel to Hobbes casts the sovereign nation as fundamentally committed to its own life, to preserving itself and defending itself from threat. Though in Justice Field's account, like in Vattel's, the nation can weigh substantial goods in deciding what it owes a foreigner as it seeks to preserve its own society, in the end, the nation does that weighing. External notions of justice do not have a hold on a nation that decides it is not in its interests to admit or assist a foreigner. Grotius' writing poses an allegation to this sort of thinking: If relationships with foreigners are predicated on self-interest, then there is no Right to speak of; there is no justice to speak of. There is only deficient self-love. In the Paris of 1651, where Hobbes writes, much the same framework holds as in the Washington

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<sup>133</sup> *I.B.P.*, Prol.8-9, in *I.G.*, 793-794. On these types of justice, which Grotius calls expletive and attributive, see chapter 3.B.1.

<sup>134</sup> *I.B.P.*, Prol.12, 16, in *I.G.*, 794, 795.

of 1889. The sovereign state reigns paramount over immigrants, and there is no Right beyond the judgment of the nation.<sup>135</sup>

## 2.B. Governing Immigration Under God's Government

Must we begin without universal Right, where governments fend off threatening foreigners to preserve their own sphere of justice? No: each nation stands judged by God in Christ. In a world created and upheld, judged and restored by the living God, not only those from far away but also the guarding of places takes on a different light. If we interpret the guarding of places and the governing of immigration within this judgment, should we oppose this governance altogether, or does a human authority over immigration belong within God's plans for the world? Reading Scripture with Martin Luther and other prominent theological interpreters, the guarding of places will emerge as a good for this age, limited by the judgment of God. Readings from a pope and a lawyer will clarify what immigration authorities rightly do and what sort of wrong those who break immigration laws commit.

### 2.B.1. Keeping Places, Guarding Places: Luther, Ellul, and O'Donovan on Genesis 2-4 and Revelation 21-22

Does the guarding of places properly belong within God's saving purposes? If so, where does guarding come from, and where is it destined? In what follows, we will look for answers in biblical accounts of the world's beginnings and its endings. Trusted interpreters

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<sup>135</sup> The genealogy of a politics sanctioned only by the people and insulted from divine and natural Right extends beyond Hobbes to Marsilius of Padua, *Defensor pacis*, 1324.

Martin Luther, Jacques Ellul, and Oliver O’Donovan will lead us through the Book of Genesis, chapters 2 to 4, and the Book of Revelation, chapters 21 and 22.

Human life began in a defined place. This is what we find in the creation narrative that begins in Genesis 2:4, Luther the sixteenth-century reformer and biblical scholar tells us in the lectures on what he considers the first book of Moses. “And Yhwh Elohim planted a garden in Eden, in the east, and there Yhwh put the earthling whom Yhwh had formed” (Gen. 2:8).<sup>136</sup> יהוה אֱלֹהִים, *Yhwh Êlōhîm*, defined a place, planting a garden not called Paradise but a garden with the proper name עֵדֶן, *Ēden*. This place was מִקְדֶּם, *miqqedem*, “from where things start,” or from where the sun comes up, an indicator of location in the east.<sup>137</sup> And there, אָדָם, *šām*, God placed the אָדָם, the *’ādām*, the one that he had formed from the dust of the ground, in whom he breathed the breath of life.<sup>138</sup> God placed the earthling not in all of nature, but in “a particular and limited bit of nature,” twentieth-century French sociologist and biblical interpreter Jacques Ellul points out in *The Meaning of the City*.<sup>139</sup>

The passage continues: “Yhwh Elohim took the earthling and put him in the garden of Eden to till it and keep it” (2:15). This place came with a twofold task. The first

<sup>136</sup> The subject of the sentence is named in the first instance (Yhwh Elohim), but the verb simply assumes a subject in the following instances.

<sup>137</sup> Martin Luther, *Lectures on Genesis Chapters 1-5 (1535/1538)*, trans. George V. Schick, American ed., Luther’s Works 1 (St. Louis: Concordia, 1958), 87–88; Ludwig Köhler and Walter Baumgartner, *The Hebrew and Aramaic Lexicon of the Old Testament (K.B.)*, trans. M. E. J. Richardson (Leiden: Brill, 1994), 1070.

<sup>138</sup> K.B., 1546. *’ādām* is translated “earthling” because of its connection with אֶדָם, *’adāmā*, the dust, earth, or ground from which the being was made (Gen. 2:7). *’ādām* does not appear to function as the proper name “Adam” until Gen. 5:1-5. Compare *ibid.*, 14–15.

<sup>139</sup> Jacques Ellul, *The Meaning of the City*, trans. Dennis Pardee (Grand Rapids, Mich.: Eerdmans, 1970), 173. “Dieu crée l’homme dans un jardin, au milieu du monde. Il lui donne comme milieu de vie, comme cadre et comme moyen d’expression, cette nature particulière et fermée qui n’est pas toute la nature,” in Jacques Ellul, *Sans feu ni lieu: signification biblique de la grande ville*, 2nd ed. (Paris: Table Ronde, 2003), 308.

was לַעֲבֹדָה, *l' 'ābdā*, to till, to toil, to work the ground, to cultivate the garden.<sup>140</sup> The second task was לְשָׁמְרָה, *l'šāmrā*, a term with a meaning that can include to keep, to preserve, to watch over, to keep watch, to guard, to spy out.<sup>141</sup> In what sense would the earthling keep or guard the garden? Luther imagines a sort of protecting tied to the earthling's relation to the animals. In the passage, Yhwh Elohim brought every beast and bird to the earthling. For Luther, the earthling in innocence and righteousness (*innocentia et iusticia*) knew the nature of each animal and was enabled to choose a name that fit the animal's nature. This naming was an indication of the earthling's rule over the animals (*dominium in omnes animantes*).<sup>142</sup> The earthling's naming extended farther, writes Luther: "Therefore by one single word (*uno verbo*) he was able to compel lions, bears, boars, tigers, and whatever else there is among the more outstanding animals to carry out whatever suited their nature (*quae naturae eius conveniebant*)."<sup>143</sup> In Luther's understanding, when God placed the earthling in the garden with the twofold task of tilling and keeping it (*ut operator et custodiret eum*),<sup>144</sup> the kind of protection that the first human being offered would have been very different: "by one single word, even by a nod, the earthling would have put bears and lions to flight."<sup>145</sup> The garden needed guarding against animals, not against fellow human beings, and that was best done not with a wall but with a word. This is what it meant to שָׁמַר, *šmr*, to keep the garden, on Luther's reading.

<sup>140</sup> K.B., 773; Helmer Ringgren, U. Rütterswörden, and H. Simian-Yofre, "עָבַד 'ābad; עָבַד 'ēbed; עֲבֹדָה 'ābōdā," in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck, Helmer Ringgren, and Heinz-Josef Fabry, trans. Douglas W. Stott, vol. 10 (Grand Rapids, Mich.: Eerdmans, 1999), 383.

<sup>141</sup> שָׁמַר is also the word for keeping covenant, keeping faith, and keeping festival, K.B., 1582; F. García López, "שָׁמַר šāmar; אֲשַׁמְרָה/אֲשַׁמְרָה 'āšmūrā/'āšmōret; מִשְׁמָר mišmār; שְׁמֹרָה šōmrā; שְׁמֹרָה š'murā; שְׁמֹרִים šimmurim; שְׁמֹר šemer," in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck, Helmer Ringgren, and Heinz-Josef Fabry, trans. David E. Green, vol. 15 (Grand Rapids, Mich.: Eerdmans, 2006), 279–305.

<sup>142</sup> Luther, *L.W. 1*, 119; Martin Luther, *Genesisvorlesung (cap. 1-17) 1535/38*, D. Martin Luthers Werke: Kritische Gesamtausgabe 42 (Weimar: Hermann Böhlhaus Nachfolger, 1911), 90.

<sup>143</sup> Luther, *L.W. 1*, 119; Luther, *W.A. 42*, 90.

<sup>144</sup> Luther, *W.A. 42*, 77.

<sup>145</sup> Luther, *L.W. 1*, 103.

Yet a little further into the Genesis account, the earthling was banished from the garden. The earthling had been told to eat from any tree of the garden, but not from the tree of the knowledge of טוֹב and רָע, *tōb* and *rā*, of good and evil (2:16-17). Yet *hā'ādām* did what God forbade, breaking the command. So that the earthling might not eat from the tree of life, Yhwh Elohim sent out the earthling from the garden with the task to לַעבֹד, *la'ābōd*, to till the ground, the ground from which the creature was taken (3:23). And to the east of the garden of Eden, God placed the כְּרֻבִים, *kerubîm*, the cherubim, and a sword to לִשְׁמֹר, *lišmōr*, to keep the way to the tree of life (3:24). The same two verbs that defined the earthling's task reappear: the earthling had the task of עבֹד, *'bd*, tilling the ground beyond the garden, but the task of שָׁמַר, *šmr*, the task of guarding the garden, was left to the cherubim. As a response to the breaking of the command, then, God banished the earthling from this defined place; he expelled the first human beings. God delegated the keeping of the garden to an angelic creature who had to prevent the earthling from entering it. With the coming of sin, a place defined and kept became a place that was guarded against human creatures.

After the first man and woman are banished from the garden, what future is there in keeping places? For Luther, the task of שָׁמַר, *šmr*, of keeping or guarding, was transformed by sin. No longer do human beings guard just by fending off animals with a single word, but they have to fend off fellow human beings who come to steal and to murder. "For this reason we have walls, hedges, and other defenses," Luther writes, "and yet only with difficulty can you keep unharmed what you have raised with much toil."<sup>146</sup> He goes on: "Indeed, we have protection today, but it is obviously awful. It requires swords,

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<sup>146</sup> Ibid., 102. *Ideo muris, sepibus et aliis munitiōibus opus est, et tamen aegre servari possunt, quae magno labore coluisti*, W.A. 42, 78.

spears, cannons, walls, redoubts, and trenches; and yet we can scarcely be safe with our families.”<sup>147</sup> Luther describes how *bd* and *šmr*, tilling and keeping, would have been carried out in play and with great delight, something we see in the zeal of the gardener. But there are only obscure and fleeting vestiges of this delight. Now, he says, *operari* and *custodire*, tilling and keeping, are difficult and sad words.<sup>148</sup> For Luther, then, sin disfigures guarding into something nearly bereft of joy, taken on as a necessity because other human beings come as thieves and murderers, and even so, safety is hard to come by. The guarding of places involves fortifications; it involves setting one’s land apart, in opposition to other pieces of land and other human beings.

British Anglican moral theologian Oliver O’Donovan finds an indication about the purpose of guarded places a little farther on in the Genesis narrative, when Cain built a city in Genesis 4. Though our other two interlocutors treat this episode with some care, they do not make much of this as an instance of a guarded place. Luther reads Cain as a wanderer who in founding the city, founded an *ecclesia* to oppose the *ecclesia* of God, a separate gathering that grew through procreation, an indication of Cain’s pride (*superbia*) and his lust for ruling (*libido dominandi*). Still, Luther does not take the city as indicative of the general guarding of places. Ellul begins his *The Meaning of the City* with Cain who, unsatisfied with God’s promise to avenge him after his death, went his own way to build a city, to guarantee his security and that of his family along with stable relationships with animals and things.<sup>149</sup> Yet Ellul does not read the city as solely a protected or fortified place, citing Chinese, Indian, and then medieval European cities, the last of which he

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<sup>147</sup> Luther, *L.W. 1*, 103. *Hodie habemus quidem defensionem, sed plane horribilem. Opus enim est ad eam gladiis, hastis, bombardis, muris, sepibus, fossis, et tamen vix possumus cum nostris in tuto esse*, *W.A. 42*, 78.

<sup>148</sup> Luther, *L.W. 1*, 102–103; *W.A. 42*, 78.

<sup>149</sup> *The Meaning of the City*, 2, 5; *Sans feu ni lieu*, 28, 33.

understands as defined by their charter rather than by their wall.<sup>150</sup> Both Luther and Ellul seem to follow Augustine's line of thought, though they do not refer to him, when he identifies Cain with the "City of man" and Abel with "the City of God." Augustine views Cain as a citizen of the world set against God's ways, who founded a city, while Abel remained a pilgrim in this world on God's way, not founding a city.<sup>151</sup> All read Cain's work to build a city as an act of defiance.

But perhaps the city that Cain built is in fact a divine gift to protect Cain's life, O'Donovan suggests. While Luther and Ellul are not sure about the identity of the mark of Cain, and while they read Cain's city as an act against divine purposes, O'Donovan thinks that the editor of Genesis 4 leaves the comment about the mark of Cain hanging, and soon after it, Cain built a city (4:15, 17). Following this reading, Cain killed his brother Abel out of jealousy for the favor Yhwh had shown Abel, and when Yhwh asked Cain where his brother is, Cain responded, "I do not know; am I my brother's keeper?" (4:9) Cain disavowed keeping or guarding his brother, and the blood of Abel that Cain had spilled cried out from the ground to Yhwh. At the horror of murder, natural justice demanded infinite retribution and opened the possibility of a never-ending feud.<sup>152</sup> Yhwh promised that if Cain were killed, the killer would be avenged sevenfold, and to fend off attackers Yhwh placed a mark on Cain, or he appointed a sign for Cain.<sup>153</sup> Cain moved to the east and built a city, and with O'Donovan we can read this city as the very warning mark from Yhwh. The city is thus what protected Cain's life, serving as a hold on vengeance. Insofar as

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<sup>150</sup> *The Meaning of the City*, 149–150; *Sans feu ni lieu*, 267.

<sup>151</sup> Augustine, *The City of God Against the Pagans*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 1998), 15.1, 634–635.

<sup>152</sup> Oliver O'Donovan, *The Ways of Judgment* (Grand Rapids, Mich.: Eerdmans, 2005), 66.

<sup>153</sup> Most modern translations render the phrase from Gen. 4:15, וַיִּשֶׂם יְהוָה לְקַיֵּן אֹתוֹ, "And the LORD put a mark on Cain," though the New American Standard Bible translates it, "And the LORD appointed a sign for Cain."

the city enclosed a governed community, the city replaced private vengeance with public judgment that is limited and provisional. O'Donovan thinks the story tells us that "the purpose of political life is to set a limit to the infinite reckonings of justice."<sup>154</sup>

O'Donovan thinks there is more to the city: he mentions the institution of the cities of refuge proposed around the time of the conquest of Canaan, where a manslayer could flee and await a decision about whether the killing was truly murder.<sup>155</sup> The success of this arrangement depends on a public authority, but it also depends on walls and weaponry, we would add. If the next-of-kin of the recently dead person can be successfully kept from killing the manslayer, what is needed are the stone walls and the iron swords of the city.<sup>156</sup> And this much we can find in the Genesis 4 narrative of Cain's descendants: Tubal-cain was the first to forge instruments of bronze and iron, and his brothers were the first to make music and herd livestock (4:20-22). Their father Lamech made a boast: he has killed a man, but if Cain's revenge is sevenfold, then Lamech's is seventy-sevenfold (4:24). Cain's city provided the protection that enabled revenge on an attacker, but the bronze and iron of Tubal-cain would allow for weapons that can more powerfully repel attack and avenge bloodshed. Seth's line replaced Abel's (4:25), and yet either his line coincided with Cain's in the persons of Enoch and Lamech (4:17, 18; 5:18, 25), or Seth's independent line produced no human culture besides the relief that Noah brings, which could have been wine (5:29; 9:21). In the book of Genesis, Seth's line provided some witness to the life of those like Enoch who walked with God (5:22, 24), but it seems that the only way forward

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<sup>154</sup> O'Donovan, *The Ways of Judgment*, 27.

<sup>155</sup> *Ibid.*, 25. See Num. 35:6-34; Deut. 4:41-43; 19:1-13; Josh. 20:1-9.

<sup>156</sup> It is plain that עִיר, 'ir, or city, refers to a walled or fortified settlement, since it is placed in opposition to הַקָּצֵר *hāṣṣēr*, the village with no wall about it, in Leviticus 25:29, 31. See also Num. 13:19; Deut. 3:5; 1 Sam. 6:18. E. Otto, "עִיר 'ir," in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck, Helmer Ringgren, and Heinz-Josef Fabry, trans. David E. Green, vol. 11 (Grand Rapids, Mich.: Eerdmans, 1997), 54.

for human culture lay with Cain's line. There is just one human family, and that one is preserved with arms and walls, perhaps the only way of life left after the fall.<sup>157</sup> Only the city, "that which protects" in the Hebrew, allows for human life to continue.<sup>158</sup>

And yet the ground still cries out, as O'Donovan points out from the Letter to the Hebrews: "Abel...still speaks."<sup>159</sup> Only God's judgment against the world could put that voice to rest, says O'Donovan.<sup>160</sup> The sacrifices of the Jerusalem temple cannot end the demand of Abel's blood, but the letter writer points to the heavenly Jerusalem and to Jesus, "the mediator of a new covenant," whose "sprinkled blood...speaks a better word than the blood of Abel."<sup>161</sup> The sacrifice required to respond to the demand of cosmic justice has been given in the body of Jesus, yet it is a sacrifice that brings a new start rather than destruction. As the world awaits the consummation of that new life, the guarded city foreshadows the new city to come, the new *place* to come. O'Donovan points to an Augustinian reading of the city that differs from the Luther-Ellul tradition, from their reading of the city-builders as beholden to the City of Man. Augustine recalls that to grow the new city of Rome, Romulus declared that all who joined him would be given impunity from their past crimes. This protection from vengeance, Augustine tells us, anticipates the remission of sins to come in the eternal *patria*.<sup>162</sup> We can say with Augustine, then, that the asylum that earthly cities grant foreshadows the asylum to come in the heavenly city, when the blood of Christ satisfies all demands for retribution and brings peace to the faithful.

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<sup>157</sup> We are indebted to Oliver O'Donovan for suggesting the lines of thought beyond *The Ways of Judgment* regarding weaponry and the one family in private communication.

<sup>158</sup> The Hebrew for city, עִיר 'ir, is likely derived from the verb \*'r, to protect, Otto, "עִיר 'ir," 54.

<sup>159</sup> Heb. 11:4.

<sup>160</sup> O'Donovan, *The Ways of Judgment*, 27.

<sup>161</sup> Heb. 12:24.

<sup>162</sup> Oliver O'Donovan, "Romulus's City: The Republic Without Justice in Augustine's Political Thought," unpublished manuscript used with permission, (2009), 16; Augustine, *The City of God Against the Pagans*, 5.17; cf. also 1.34, 2.29.

That city takes shape as the seventy-sevenfold vengeance of Lamech is overcome by the seventy-sevenfold forgiveness of Jesus (Matt. 18:21-22).

Just as we modestly commend the guarding of places as a hold on vengeance, as a preservation of life during this era, we ought to heed the voice of Jacques Ellul. The instrumental good of guarding will easily fall prey to the temptation of defiance and of confident self-seeking. Ellul's reading of the city across the canon of Scripture attends to that tendency, and we summarize it here. After Cain he points to Nimrod, the mighty conqueror who stands before the Lord and builds cities.<sup>163</sup> Yet when God forms a people, the first thing that people, Israel, builds is a pile of rubble as witness to God.<sup>164</sup> The people of Israel first learn to build cities while enslaved in Egypt, and they occupy cities in Canaan that they have not built.<sup>165</sup> The prophets tell the people in exile to seek the welfare of the city, but nowhere, writes Ellul, is the people of God told to build a city.<sup>166</sup> The city is subject to the curse, and the prophets speak against Babylon and her ilk, but the city is also subject to "temporal election": God chooses and uses even Babylon.<sup>167</sup> And as Ellul reads the Scriptures, even though humanity chooses the city as a move away from the place God had made, God "adopts" the city. He takes on this human work with its idolatry and vice and makes it his own: God adopts Jerusalem as a city to bear witness to God's judgment and his grace.<sup>168</sup> As Jesus Christ comes, he speaks only words of rejection and woe to the cities.<sup>169</sup> He rejects the settled life, wandering and indeed dying outside of the city.<sup>170</sup> As a man, as king, and as the living God, Jesus replaces Jerusalem with its temple and its royal

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<sup>163</sup> Ellul, *The Meaning of the City*, 12.

<sup>164</sup> *Ibid.*, 23; Gen. 31:43-50.

<sup>165</sup> *Ibid.*, 25, 27.

<sup>166</sup> *Ibid.*, 72, 74.

<sup>167</sup> *Ibid.*, 85.

<sup>168</sup> *Ibid.*, 102-106.

<sup>169</sup> *Ibid.*, 113-117.

<sup>170</sup> *Ibid.*, 120-123.

aspirations, and he renders Jerusalem common, a city like any other city.<sup>171</sup> Yet at the end of time, says Ellul, God will provide a wholly new city. Ellul's reading leaves us with no illusion that the city is praised or that the guarding of places is lauded in Scripture. Even if we accept that God provides guarded places, those who dwell there tend to defy God, and at best they witness to something better to come.

What the asylum of the city looks forward to and what Jesus' sacrifice makes possible is a new *place* at the end of time. Ellul will continue to serve as our guide to the new temple and the new city foretold by the biblical prophets.<sup>172</sup> Ellul points out the move from Ezekiel to Revelation, where in the first instance the vision of the future is for a Jerusalem with a new temple, a new temple that the glory of Yhwh fills (Ezek. 40:1; 43:4). But in Revelation, the dwelling place of θεός, *Theos*, God, is in the whole city, where God will dwell with human beings, and where they will be God's peoples (Rev. 21:3).<sup>173</sup> There is no temple in this city, for the Lord God Almighty and the Lamb are the temple, giving light (21:22-23). The nations will walk by that light, John relays, and the kings of the earth will bring their glory into it (21:24). For Ellul, here the nations become the *peoples* of God, retaining their plurality, their "particularity, their individual riches," and they walk by the light of God and the Lamb, Christ himself in the parlance of Revelation, present with them.<sup>174</sup> This is the city called in Ezekiel יהוה שָׁמָמָה, *Yhwh Šāmmah*, "Yhwh is there" (48:35).<sup>175</sup>

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<sup>171</sup> Ibid., 135-139.

<sup>172</sup> Ellul notes that a new Jerusalem is recorded in a variety of books, canonical and non-canonical: Isaiah, Ezekiel, Daniel, Zechariah, Ezra, Enoch, Jubilees, the Twelve Patriarchs, Baruch, and on to the Apocalypse, or the Revelation of Jesus Christ According to John. Ibid., 183, 185, 192-193.

<sup>173</sup> Ibid., 185. U.B.S. 4 chooses the reading of the plural λαοί, *laoi*, "peoples," giving it a [B], though the singular λαός, *laos*, "people," appears in some manuscripts.

<sup>174</sup> Ibid., 193; Ellul, *Sans feu ni lieu*, 342.

<sup>175</sup> *Šāmmah* is in the locative, and the phrase might be translated "Yhwh is toward there."

The Lord God Almighty and the Lamb, Christ, will make their dwelling in the new Jerusalem. The city John sees on a high mountain (21:10), a city with walls, great and high, with twelve gates (21:12). The prophets cry, “Open the gates!” (Isa. 26:2) and declare, “your gates shall be open continually; day and night they shall not be shut” (Isa. 60:11). And so it is with the new city: “its gates will never be shut by day,” nor is there night in the city lit by God and the Lamb (21:25). Ellul makes of this two things: first, while elsewhere the prophets tell us that all of nature will be transformed, in the resurrection, human beings will live only in one place, just as they did in Eden – not in all the earth, but in a limited, particular place. Yet this time, they will live in the city, a human work that God takes on and makes in a new way, as Ellul sees it.<sup>176</sup> Living in the city, the peoples will leave nature “relatively autonomous.”<sup>177</sup> Yet on the other hand, Jerusalem is “an open city.”<sup>178</sup> Ellul says: “This city is first of all no longer ‘against’ someone. It is no longer the city of war, no longer the city of slavery, no longer the world of confusion.”<sup>179</sup> The city is no longer defined in opposition to someone else; it is circumscribed but lacks a belligerent stance. What then does the wall mean? For Ellul, “this wall no longer has the meaning of a set of defenses, of a break between inside and outside. It is rather the sign of order, of harmony, of balance, of precision.”<sup>180</sup> This is a city defined and distinguished, yet no longer defended against other human beings in a posture of war.<sup>181</sup>

The future of humanity belongs in a place, then – not in all the earth, but in one city, provided by God, marked out, full of the presence of God, where the tree of life grows

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<sup>176</sup> Ellul, *The Meaning of the City*, 163, etc.

<sup>177</sup> *Ibid.*, 191; Ellul, *Sans feu ni lieu*, 338.

<sup>178</sup> Ellul, *The Meaning of the City*, 193.

<sup>179</sup> *Ibid.*, 192. *La ville tout d’abord n’est plus une ville « contre » quelqu’un*, Ellul, *Sans feu ni lieu*, 340.

<sup>180</sup> Ellul, *The Meaning of the City*, 197; Ellul, *Sans feu ni lieu*, 349.

<sup>181</sup> The ones “written in the Lamb’s book of life” (Rev. 21:27) are included, though others are kept outside the city and burned, those without faith, who remain detestable, who are wrapped up in falsehood (21:8, 27). The open city is made possible by the elimination of those who do not trust in the Lamb.

with leaves for the nations' healing, and where a flowing river brings life. Possessing walls with gates left open, this is a place no longer guarded in the postlapsarian sense, though it is kept in the sense of being defined and ordered.

Through a reading of Scriptures about the genesis and fulfillment of the world with trustworthy guides, we have arrived at some answers to our questions. The keeping and guarding of places is not anathema to the unfolding reign of God in Christ, on our interpretation. Rather, God created earthlings to live in a defined place and to keep that place. Because of their rebellion, God expelled the earthlings and set a guard on their first dwelling. When killing began, the keeping of places turned into guarding, and cities were built to stop a cycle of vengeance. Perhaps those cities were a divine gift to preserve human life, though guarding presents a temptation to forget the God who enables guarding. Still, guarded cities point toward an end to guarding; asylum within city walls foreshadows the end of vengeance achieved through the shed blood of Christ. In the end, God will provide a new city with walls and open gates, no longer defended.

The narrative surrounding guarded places is wider in this biblical account than it is in Hobbes' genesis narrative, but at a key point, the stories coincide. Defended walls protect against threats from outsiders in Hobbes just as they do in the biblical narrative, after Eden and before the new Jerusalem. Hobbes envisions borders as a place of war, where sovereigns brandish their weapons and maintain forts, where no law forbids killing. In Genesis, Lamech boasts of his ability to protect himself from vengeance after he murders a man, a boast based on the defenses of his city and its weapons. Despite some convergence in this era, in the Christian faith, God's gracious rule continues on even at walls and border fences. To move beyond killing at the borders and discover some Right that holds even internationally will require that we attend to the authority that governs the city.

## 2.B.2. Guards under God: Martin Luther on Psalms 127 and 82

The guarding of cities can be seen as a divine provision to protect human life, but what form this guarding takes remains to be seen. Who rightly guards the city, and how are they to guard it? Luther directs us to the first verse of Psalm 127:

Unless Yhwh builds the house,  
those who build it labor in vain.  
Unless Yhwh guards the city,  
the guard keeps watch in vain.<sup>182</sup>

Above, we noted Luther's account of the changing nature of keeping before and after the disfiguring effects of sin. At the start, the earthling *kept* the garden from injury by animals with a single word, but after Cain murdered Abel, his descendants *guarded* their cities against human beings who come to steal and murder. Psalm 127:1 connects the theme of keeping or guarding (שמר, *šmr*) with the city (עיר, *ʿir*). As we translate the verse into English, should we say that Yhwh keeps the city, or that he guards the city? If we attempt to use the word “keep,” we will translate verse 1b, “Unless Yhwh keeps the city,/its keeper watches in vain,” since the verb שָׁקֵד, *šāqad*, means to “be vigilant” or “watchful.”<sup>183</sup> The keeper keeps watch over the city, and this sounds like a step beyond the command of the animals that the earthling has in Luther's reading of Genesis 2. Further, this is no longer the garden that is kept, but the city that Cain first built, the city walled and ruled. While other translations use some variation of keeping or watching, it seems right to follow the lead of the N.R.S.V. and translate the verse, “Unless Yhwh guards the city,/the guard keeps watch in vain.”

<sup>182</sup> Our translation, following the N.R.S.V. In the Hebrew:

אִם־יְהוָהוּ לֹא־יִבְנֶה בַּיִת שׁוֹאֵא עֲמָלּוֹ בְּנִיּוֹ בָּו  
אִם־יְהוָה לֹא־יִשְׁמֵר־עִיר שׁוֹאֵא שְׁקֵד שׁוֹמְרֵ:

For this reading of Luther's political theology, we are indebted to the teaching of Bernd Wannewetsch and to Philip A. Lorish, “Subjected to the Spirit: An Investigation of Luther's Political Ethics” (M.Phil. Thesis, Faculty of Theology, University of Oxford, 2010).

<sup>183</sup> K.B., 1638.

On Luther's reading, too few of the nations of the world know the truth of this verse. Those in authority might possess reason, cleverness, courage, and prudence; they might grow in strength and wealth, building towers and walls while they put in place wise laws. They might obtain wisdom and virtue, yet they remain "blind" (*blinde*) if they do not know God and his work.<sup>184</sup> God allows governments to rise for a time, even the great empires of Assyria, Babylon, Persia, Greece, and Rome. So long as they rise through human ingenuity and pride, they will fall: "The true watchman had ceased to uphold them," Luther writes.<sup>185</sup> If God keeps the city, should city dwellers leave their gates open and their cities undefended, allowing attackers to destroy and kill those who dwell within?<sup>186</sup> No, says Luther. The psalm does not teach that those who know God should give up guarding cities. Instead, the psalm militates "against arrogance and anxiety"<sup>187</sup> and offers instead a faith or trust (*glauben*) that allows God to do the worrying.<sup>188</sup> "Bar the gates, defend the towers and walls, put on armor, and procure supplies," Luther says.<sup>189</sup> "In general, [those in authority] should proceed as if there were no God and they had to rescue themselves and manage their own affairs."<sup>190</sup> Guard even as though God were not guarding, he says, but watch out for the condition of the heart (*hertz*) so that it does not become arrogant or worried. The one in authority "should regard all such preparation and equipment as being the work of

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<sup>184</sup> Martin Luther, "Exposition of Psalm 127, for the Christians at Riga in Livonia (1524)," trans. Walter I. Brandt, in *Christians in Society II*, ed. Walter I. Brandt, American ed., Luther's Works 45 (Philadelphia: Fortress Press, 1962), 328. *Sie Gott und seyn werck nicht kennet, Predigten und Schriften 1524*, D. Martin Luthers Werke: Kritische Gesamtausgabe 15 (Weimar: Hermann Böhlau Nachfolger, 1899), 370. In this chapter, the spelling and capitalization of the German follows Luther's Early New High German (*Frühneuhochdeutsch*) from the Weimar edition rather than modern High German.

<sup>185</sup> L.W. 45, 329. *Der rechte wechter auff hoeret zu bewaren*, W.A. 15, 371.

<sup>186</sup> L.W. 45, 331.

<sup>187</sup> *Ibid.*, 332. *Wider die vermessenheyt und sorgfelltickeit*, W.A. 15, 373.

<sup>188</sup> L.W. 45, 330; W.A. 15, 371.

<sup>189</sup> L.W. 45, 331. *Thor zu schliessen, thuern und mauren bewaren, harnisch anlagen, vorrad schaffen*, W.A. 15, 373.

<sup>190</sup> L.W. 45, 331. *Und sich eben stellen, alls were keyn Gott da und muessen sich selbs erretten und selbs regiren*, W.A. 15, 373.

our Lord God under a mask.”<sup>191</sup> Again, Luther states that all in authority (*was regieren*) ought to watch over the city while at the same time, in faith, entrusting this watching to God, letting God care for the city. They should remember that their work preserves the city only if God acts to preserve the city.<sup>192</sup> For Luther, two actors participate in an analogous act: God and human ruler both guard. Knowing that God guards the city will allow rulers to do their proper business, Luther says, without either fearfulness or false pride.<sup>193</sup>

This verse and Luther’s commentary on it prove illuminating for our purposes. Once murder becomes a possibility in human history, it is right to guard the places where men and women live. Go ahead with watching and guarding cities, the psalm suggests, but know that that guarding depends on the guarding of God, who cares to watch over human life and fend off agents of death. Those who know this verse have this edge over the most reasonable, prudent, courageous, and wise of them all: they know that their watching is only successful if God deems it right to be successful. The knowledge that, in Luther’s words, their work is the “mask” under which God works frees their heart from the twin tendencies of arrogance and worry, of overconfidence and of anxiety.

Knowing that God guards the city will in decisive ways alter the practices of the human guardians of cities. To understand God’s direction of those who have authority over cities, we move on to the commentary of Luther on Psalm 82 and its first verse.

Luther’s German translation of the Hebrew runs along these lines:

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<sup>191</sup> L.W. 45, 331. *Sondern soll all solch bereytschafft und ruestunge lassen unsers Herr Gottes mummerey seyn*, W.A. 15, 373.

<sup>192</sup> L.W. 45, 330; W.A. 15, 371-372.

<sup>193</sup> L.W. 45, 335. W.A. 15, 377.

God stands in the congregation of God  
And is Judge among the gods.<sup>194</sup>

While we could interpret this psalm as a vindication of the one God over the many when an early Hebrew monotheism emerges from an earlier polytheism, Luther sees the psalm in a different light. Since the psalmist charges the “gods” to judge justly (v. 2) and since God tells the “gods” they will die like princes (v. 7), Luther takes this psalm to deal with worldly authority (*weltliche oberkeit*) as distinguished from spiritual authority within the church, with what he also calls the worldly *regiment* or the worldly “estate” (*stand*).<sup>195</sup> His adjective *weltlich* is better translated “temporal” rather than “worldly,” as belonging to this time, this age between God’s act of creation and the consummation of that creation in the new heavens and the new earth.<sup>196</sup> As we search out the right way to exercise authority over a city, to guard a place, Luther’s account of temporal authority takes us a step toward our goal of understanding the form guarding takes under God.

Luther responds to what he sees as folly: “mad reason” tells us that human communities have come about by accident when people live side-by-side, just like when

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<sup>194</sup> “Commentary on Psalm 82 (1530),” trans. C. M. Jacobs, in *Selected Psalms II*, American ed., Luther’s Works 13 (St. Louis: Concordia, 1956), 41. The Hebrew reads: :שָׁפֵט אֱלֹהִים בְּקִרְבֵּי אֱלֹהִים יִשְׁפֹּט. Luther translates this, *Gott stehet ynn der gemeine Gotes/Und ist richter unter den Goettern*, *Psalmenauslegungen 1529/32*, D. Martin Luthers Werke: Kritische Gesamtausgabe 31 (Weimar: Hermann Böhlau Nachfolger, 1913), 189. Noting the words for deities, we translate the Hebrew, “Elohim stands in the congregation of El;/in the midst of the elohim, [Elohim] judges.”

<sup>195</sup> L.W. 13, 42; W.A. 31, 190.

<sup>196</sup> Our reading of Luther’s psalm commentaries and Genesis commentaries reveals traces of two predominant themes of Luther’s. Here, he distinguishes two regiments, two *regimente*, as well as two estates, two *stande*. The first is well known in the English-speaking world as the doctrine of the two kingdoms, but its importance is often overplayed over against the doctrine of the three estates of *ecclesia*, *economia*, and *politia*, says Oswald Bayer, *Martin Luther’s Theology: A Contemporary Interpretation* (Grand Rapids, Mich.: Eerdmans, 2008), 124–125, 324–325.

murderers and robbers live side-by side.<sup>197</sup> But no – as the psalm says, each human

community is “the congregation of God” (*Gottes Gemeinde*, עֲדַת־אֱלֹהִים):

For He has made, and makes, all communities. He still brings them together, feeds them, lets them grow, blesses and preserves them, gives them fields and meadows, cattle, water, air, sun, and moon, and everything they have, even body and life, as it is written in the first chapter of Genesis.<sup>198</sup>

This phrase, “the congregation of God,” comforts those who live in human communities, knowing that God continues to care for them, but the same phrase is a threatening word against “evil-willed” rulers.<sup>199</sup> If they do what they like, if they do wrong to the communities they are set over; they are mistreating what is God’s own.<sup>200</sup>

Likewise, some say that government comes about by “human will.”<sup>201</sup> But Luther says this is wrong; the psalmist calls those in authority “gods.” They are “gods” in the sense that they are divinely established and preserved, writes Luther, and rule over a human community is not just an expression of human desire, but it is God’s ordinance (*ordnung*).<sup>202</sup> To maintain a peaceful life for the children of Adam, God establishes all authority and government office: “It is God’s servant to you for good,” Luther quotes from Paul’s Letter to the Romans.<sup>203</sup> Without peace, human beings would be threatened by wrongdoing and

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<sup>197</sup> L.W. 13, 46. *Die tolle kluge vernunft*, W.A. 31, 193. Here, *toll* does not mean “great” as in contemporary High German. The Weimar edition notes that *toll* means *unverständlich* or *sonderbar*, incomprehensible or strange. Jonathan West, *Early New High German-English Dictionary*, 2012, pt. D/T, [http://www.germanstudies.org.uk/enhg\\_dic/enhg\\_dic\\_intro.htm](http://www.germanstudies.org.uk/enhg_dic/enhg_dic_intro.htm), translates *die tolle* as “stupidity,” citing Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch* (Leipzig: S. Hirzel, 1854-1960), 11.1.1:637 (16c), and Peter Dasypodius, *Dictionarium Latinogermanicum* (Strasbourg, 1536). Thus this phrase means something like “stupidly clever reason,” “crazy reason,” or “mad reason.”

<sup>198</sup> L.W. 13, 46; English translation modified from W.A. 31, 193.

<sup>199</sup> L.W. 13, 47. *Mutwillig*, W.A. 31, 194. C. M. Jacobs translates *mutwillig* as “self-willed” here and *mutwille* as “self-will” at L.W. 13, 45, 60; W.A. 31, 192, 207. The translation draws out the connection of the German word to “will,” but “evil-willed” or simply “bad-minded” better captures the corrupted boldness that the term implies. We are indebted to Therese Feiler for guidance with the German.

<sup>200</sup> L.W. 13, 47; W.A. 31, 194.

<sup>201</sup> L.W. 13, 44. *Menschliche wille*, Luther, W.A. 31, 191.

<sup>202</sup> L.W. 13, 44; W.A. 31, 191-192.

<sup>203</sup> Romans 13:4; L.W. 13, 44; W.A. 31, 192. The American edition translates Luther’s Romans 13:4 with the word “minister,” but Luther’s *dienerin* corresponds more closely to the English “servant” and to the Greek

violence, they would have no space to teach God's word or to rear children, and they would have no opportunity to till the land and fill it.<sup>204</sup> To preserve God's creatures, God sets up government, giving it "the sword and the laws"; God sets up authority, and God preserves it.<sup>205</sup> Luther says that this follows from the first chapter of Genesis, from God's establishing and caring for human communities,<sup>206</sup> and the same pattern continues in the New Testament: "...our rulers...have been established anew, through Christ, by a special word."<sup>207</sup> Luther cites Jesus' teaching from Matthew's Gospel, "Give to Caesar what is Caesar's," along with instruction to be subject to rulers in Romans and the First Letter of Peter; he says there are many more such passages.<sup>208</sup> For Luther, only "believers" know these truths, that communities and the authority that guards their peace come from God as Creator and through the word given by Christ.<sup>209</sup>

Where is God among human communities and temporal government? In Luther's understanding, God does not merely set them going and leave them to himself. No: "He stands in His congregation,' for the congregation is also His; and 'He judges the gods,' for the rulers, too, are His."<sup>210</sup> God expects certain things of both the congregation and the rulers, that human communities obey the rulers and that the rulers give good judgment and protect the peace. Luther does not allow for popular revolt, stressing subjection, but he places the judgment of rulers in God's hands. If rulers do evil, he says that God will judge

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διάκονός, *diakonos*. Later in Romans 13, Paul calls the authorities λειτουργοὶ...θεοῦ, *leitourgoi...theou*, or "ministers of God" (13:6).

<sup>204</sup> L.W. 13, 44-45; W.A. 31, 192.

<sup>205</sup> L.W. 13, 45. *Das schwerd und gesetze*, W.A. 31, 192.

<sup>206</sup> L.W. 13, 46; W.A. 31, 194.

<sup>207</sup> L.W. 13, 48. *Unser oeberkeit...durch Christum von newen mit sonderlichem wort bestetigt sind*, W.A. 31, 195.

<sup>208</sup> L.W. 13, 48; W.A. 31, 195. Luther quotes from Matthew 22:21 (*Gebt dem Keiser, was des Keisers ist*), 1 Peter 2:13, and Romans 13:1.

<sup>209</sup> L.W. 13, 46. *Die gleubingen*, W.A. 31, 194.

<sup>210</sup> L.W. 13, 45-46. *Er stehet ynn seiner Gemeine, denn die Gemeine ist auch sein, wideruemb, Er richtet die Goetter, denn die oberkeit ist auch sein*, W.A. 31, 193.

and punish them; they will not escape God.<sup>211</sup> But again, Luther asks, where is God? “God stands in the congregation,” and Luther says that God stands there through priests and preachers.<sup>212</sup> Luther writes against those who speak evil of rulers in private,<sup>213</sup> but it is different for those who have been given “the duty of teaching, exhorting, rebuking, comforting, in a word, of preaching the Word of God.”<sup>214</sup> It is the duty of the preacher to “stand in the congregation,” to speak honestly and boldly before God and the community.<sup>215</sup> Preachers are right to “rebuke” rulers publicly as part of their office, and such rebuke, Luther says, is “not seditious.”<sup>216</sup> In fact, it would be more seditious to remain silent; if preachers remain silent, they would bear responsibility for the growing anger of the people and the growing tyranny of the rulers, and God as judge might allow for rebellion.<sup>217</sup> So, God actively judges those in authority, and God calls them to account through those who proclaim what God has said.

Luther’s interpretation of Psalm 82, then, brings out an understanding of government that is opposed to the statements of the U.S. Supreme Court. While it might be right that certain rulers have supreme authority over a community, it is not right that those rulers are limited only by the consent of that community. For Luther, civil authority is not just an expression of popular will, against the American assumption that looks back to Hobbes and beyond him to Marsilius of Padua. It is not the people that bestow authority to some person or assembly, but it is firstly God who bestows that authority. The God who sets in place offices of authority continues to judge those who hold office. Those in power

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<sup>211</sup> L.W. 13, 45; W.A. 31, 193.

<sup>212</sup> L.W. 13, 49; W.A. 31, 196.

<sup>213</sup> L.W. 13, 50; W.A. 31, 197.

<sup>214</sup> L.W. 13, 49. *Denn daselbst hat er seine Priester und Prediger bestellt, welchen er das ampt befolhen hat, das sie leren, vermanen, straffen, troesten und summa, das wort Gottes treiben sollen*, W.A. 31, 196.

<sup>215</sup> L.W. 13, 49; W.A. 31, 196.

<sup>216</sup> L.W. 13, 50. *Straffen; nicht auffrhuerrisch*, W.A. 31, 197.

<sup>217</sup> L.W. 13, 50–51; W.A. 31, 197–198.

must answer to the God who preserves and sustains human communities and life on earth. For Luther, the one through whom government officials hear God's directives for them is the preacher, the proclaimer of God's Word.

What responsibilities might those who govern immigration have before God? The next three verses of Psalm 82, read alongside Luther, move us closer to an answer:

- <sup>2</sup> “How long will you judge unjustly  
and show partiality to the wicked?  
<sup>3</sup> Judge the weak and the orphan;  
do justice to the afflicted and the destitute.  
<sup>4</sup> Rescue the oppressed and the needy;  
snatch them out of the hand of the wicked.”<sup>218</sup>

Verse 2 draws out the task of government as the task of *judging* (טשפ, *šft*), which we might understand as settling a case, as arbitrating a dispute, deciding between right and wrong, or praising and punishing.<sup>219</sup> This task of *judging* is the same task that Elohim carries out, recalling the mirrored activity of *guarding* in Psalm 127 that both Yhwh and the watchman carry out. Luther draws from this verse the first virtue (*tugent*) of three for rulers.<sup>220</sup> Because he translates יםִשְׁפִּי, *rēšā 'im*, as *Gotlossen*, “godless,” Luther reads verse 2 as “How long will you judge unjustly/and prefer the persons of the godless?”<sup>221</sup> This leads him to say that the first virtue of rulers is to protect those who fear God and to suppress the teaching of heresy.<sup>222</sup> It is better to translate *rēšā 'im* as “wicked” or “guilty,” so that verse 2 asks how

<sup>218</sup> Our translation. Though “give justice” (R.S.V., N.R.S.V., E.S.V.) or “vindicate” (N.A.S.B.) communicates more simply in English, we maintain the command “judge” in v. 3 to reflect the singular Hebrew verb שִׁפְטוּ, *šifū*. Translations render the second half of v. 3, עָנִי וְרָשָׁע הַצָּדִיקוֹ, alternatively as “do justice to the afflicted and destitute” (A.V., N.A.S.B.), “maintain the right...” (R.S.V., N.R.S.V., and E.S.V.), or “be fair...” (N.J.B.). Luther says that everyone in authority should have these verses painted on their walls, on their beds, over their tables, and on their clothes – imagine the sight! *L.W.* 13, 51; *W.A.* 31, 198.

<sup>219</sup> *K.B.*, 1622-1626.

<sup>220</sup> *L.W.* 13, 52; *W.A.* 31, 199.

<sup>221</sup> *L.W.* 13, 41. *Wie lange wolt yhr unrecht richten/Und der Gottlosen person furziehen?*, *W.A.* 31, 189.

<sup>222</sup> *L.W.* 13, 52-53, 61-67; *W.A.* 31, 199-200, 207-213. “The first [virtue] is that they can secure justice for those who fear God and repress those who are godless,” *L.W.* 13, 52. *Die erst ist, das sie koennen recht schafffen den Gottfuerchtigen und steuren den Gottlosen*, *W.A.* 31, 199. Though we do not follow Luther on this virtue, we

long the ruler will show partiality to the “wicked.”<sup>223</sup> In the Hebrew Scriptures, guilt is ultimately guilt before God, but we take this verse to deal with wrongdoing in general rather than wrong teaching about God. Passing on, the second and third virtues that Luther draws from verses 3 and 4 are worth our attention.

“Judge!” So verse 3 begins. “Judge the weak and orphan.” Can judging amount to anything good? Yes, if we understand the task of judgment as treating disputants fairly, not favoring the rich or the strong or the powerful. Luther draws from this verse his second virtue of the ruler, “to help the poor, the orphans, and the widows to justice, and to further their cause.”<sup>224</sup> Luther thinks this is best when a city is governed by good laws and customs so that relationships are ordered and businesses are honest. He charges those in authority to keep a close eye on financial transactions to prevent extortion, robbing, and cheating. Without this watchful care, those of the lowest social status will be oppressed. Luther writes that it is a great thing to endow a hospital, but a much greater thing to turn a whole land into a hospital, where the land is so ordered by law that no one has to become a beggar.<sup>225</sup>

Luther takes the “orphan” of verse 3 as shorthand for the orphan and the widow, though the context of the Old Testament demands a further step to include the sojourner, the outsider, or the migrant. The widow, the fatherless, and the migrant, the אֶלְמָנָה, *almānā*, the יְתוּם, *yāṭôm*, and the גֵּר, *gēr*: this is the star trio of good government in the Old Testament; judgment is just if and only if the widow, the fatherless, and the migrant are

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must acknowledge that he allows civil authorities room to do things that might work against him and his followers. When he allows princes to suppress teaching against the Creed and resolve conflicts between the “papists” (*die Papisten*) and “my Lutherans” (*meine Lutherischen*), he is driven by a concern for right teaching and peace that may not work in his favor, *L.W. 13, 62–63; W.A. 31, 209.*

<sup>223</sup> *K.B.*, 1295.

<sup>224</sup> *L.W. 13, 53. Die ander tugent, das sie den elenden, waisen und widwen zum recht helfen und yhre sachen foddern, W.A. 31, 200.*

<sup>225</sup> *L.W. 13, 53–54; W.A. 31, 200.*

not mistreated.<sup>226</sup> These three were those left outside the Israelite household and thus without a source of food, shelter, and protection: the widow and the orphan without a head of household, and the sojourner as the migrant from outside the community with no local ties. The trio first appears in the short law code of Exodus 20-23, where Yhwh commands Israel not to wrong or oppress the widow, the orphan, or the migrant.<sup>227</sup> Yhwh invokes Israel's history as sojourners in the land of Egypt as reason not to oppress migrants among Israel (Ex. 22:21; 23:9). Also, Yhwh adds a warning: when these three on the margins are mistreated, they will cry out, and I will listen to them, Yhwh says; I will avenge them by killing the oppressing Israelites and leaving their wives and children as widows and orphans (22:22-24). Yhwh repeats this warning when he forbids leaving a person to face the night without their cloak, again commanding the protection of the most vulnerable (22:26-27).<sup>228</sup>

When Psalm 82 tells those in authority, "Judge the weak and the orphan; do justice to the afflicted and the destitute," their right use of their authority finds its demonstration in their protection of the most vulnerable from oppression. In the legal texts that Psalm 82 recalls, among the vulnerable is the one from outside the community who comes to stay. The text does not directly call for government to concern itself with the protection of the vulnerable in every place. It especially calls those in authority to judge on behalf of the vulnerable under their jurisdiction, including the immigrant who has come to stay. The

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<sup>226</sup> See the introduction for the decision to translate *gēr* as "migrant." For a critical account of the laws that guard this trio, see Harold V. Bennett, *Injustice Made Legal: Deuteronomic Law and the Plight of Widows, Strangers, and Orphans in Ancient Israel* (Grand Rapids, Mich.: Eerdmans, 2002), ix, 11, 22, who draws on critical theory and social-scientific study of the Hebrew Bible to argue that the laws in Deuteronomy that appear to protect these three in fact serve to oppress them further.

<sup>227</sup> The code follows the giving of the Ten Commandments in Ex. 20:1-21, stretching from 20:22 to 23:19, and concluding with a promise in 23:20-33 that Yhwh will clear space for Israel to live in Canaan.

<sup>228</sup> The trio appears again in Psalm 146: Yhwh's reign is distinguished from that of the human princes by this: "Yhwh guards (רָמָה) the sojourners; he upholds the widow and the fatherless..." (146:9a,b, our translation).

degree of protection that political authorities offer outsiders in their lands indicates whether they are just and worthy of their office in God's sight. God lends God's ear in a special way to the one from outside the community, as we see in Exodus 22. These mark God's ongoing activity as judge, regardless of whether or not government officials are faithful in shielding the migrant from harm.

“Rescue!” The imperative heralds verse 4. And rescue not just “the weak and the needy,” as many English translations have it. The Hebrew terms include a dimension of oppression and powerlessness: “Rescue the oppressed and the needy.”<sup>229</sup> The second half of the verse demands drama: “snatch them out of the hand of the wicked,” take them away, extricate them from the clutches of wrongdoers.<sup>230</sup> In this verse Luther finds his third virtue of the ruler: to “protect and guard against violence and force. This,” he says, “is called peacemaking.”<sup>231</sup> While the last verse spoke of the law, this verse deals with the sword. It is right that rulers protect those who are helpless from the onslaught of the violent; those entrusted to the prince deserve to live in safety and peace. Luther thus orients the sword toward peace: arms exist to maintain peace. Here, Luther concurs with the just war tradition: do not begin a war or work for it; avoid it if at all possible.<sup>232</sup> Luther describes what peace brings: “it is from peace that we have our bodies and lives, wives and children, houses and homes, all our members – hands, feet, eyes – and all our health and liberty.”<sup>233</sup> And for Luther it is not only arms but walls that guarantee the integrity of body and home:

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<sup>229</sup> The R.S.V., N.R.S.V., E.S.V., N.I.V., N.A.S.B., and N.J.B. translate v. 4a as “Rescue the weak and the needy.” The first term, דַּל, *dal*, also means “powerless” or “oppressed,” and the second, עֲבֻיִן, *’ebvōn*, also means “oppressed,” K.B., 5, 221–222. We translate the pair “the oppressed and the needy” to indicate the power relationship of oppression that the two connote.

<sup>230</sup> The verb is חָשַׁלְתִּי, *haššilū*, Hiphil of חָשַׁל, *nšl*, meaning “to tear from,...remove, withdraw,...pull out,” K.B., 717.

<sup>231</sup> L.W. 13, 55. *Die dritte tugent ist, das sie koennen schuetzen und schirmen widder frevel und gewalt, das heisst frieden schaffen*, W.A. 31, 201.

<sup>232</sup> L.W. 13, 57; W.A. 31, 203–204.

<sup>233</sup> L.W. 13, 55; W.A. 31, 202.

“within these walls of peace we sit secure.”<sup>234</sup> Luther envisions a peaceful realm, a city or land armed at the edges so that within there might not be danger or fear. Without peace, life is “half a hell,”<sup>235</sup> he says, but a strong and peaceful city is a “heavenly stronghold.”<sup>236</sup> He writes that the keeping of peace does not depend on monks and priests but on the divinely given work of the “gods,” the authorities.<sup>237</sup> Protecting a realm of peace is a high, God-given task.

Protecting a place is not just an expression of the desires of the people to protect themselves, then. For Luther, that protection is something that comes from God, bestowed on certain office holders, who are given the unique task of holding the sword and protecting their subjects within walls. Because God, not the people, first gives authority to government, divine standards of justice come into play. It is not the case, as in *Chae Chan Ping v. United States*, that the people judge for themselves what constitutes peace and good order, or that the people can do what they want when they judge that non-members threaten that peace and order. Rather, divinely established authority proves the worthiness of its authority through its protection of vulnerable men and women within its jurisdiction. If we follow the logic of two of the Old Testament collections of laws, then those vulnerable include those who come from far away to stay. Good judgment that protects those who are vulnerable because of their lack of full membership in their new community, right judgment that shields migrants from oppression, is a marker of government as divinely intended. On the other hand, temporal government that supports citizens as they

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<sup>234</sup> L.W. 13, 55. *Wir...sitzen sicher ynn dieser mauren des friedes*, W.A. 31, 202.

<sup>235</sup> L.W. 13, 55. *Eine halbe Helle*, W.A. 31, 202.

<sup>236</sup> L.W. 13, 56. *Da sihe nu, was fuer eine Keiserliche, ja himelische burg ein solcher Fuerst bawen kan, seine unterthan zu schuetzen*, W.A. 31, 203.

<sup>237</sup> L.W. 13, 56; W.A. 31, 202–203.

mistreat and harm their non-citizen neighbors is government that deserves divine retribution. “God...is Judge,” the psalm reminds us.

Psalm 82 presents divine priorities for government, that authorities are to judge rightly, to shield the poor, and to protect the vulnerable against violent attack. But as the psalmist writes, the fact of the matter is different: The “gods,” the rulers, do not carry out their duties, and so the foundations of the earth shake (82:5). These “gods” will die like any mortal; they will fall (82:7). The psalmist concludes by invoking Elohim:

<sup>8</sup> Arise, O God, judge the earth!  
For it is You who possesses all the nations.<sup>238</sup>

In a sense, this verse reiterates what the psalm as a whole promises, that Elohim judges in an ongoing way, and the peoples beyond Israel belong to him. But Luther emphasizes a different sense of the verse, reading it as a prayer for a better future. Disenchanted with the failings of human governments, the psalmist “prays for another government and kingdom,” according to Luther.<sup>239</sup> This God that the psalm names is Jesus Christ, Luther says, who alone is “overlord” of all the earth.<sup>240</sup> It is the kingdom of Christ that the psalmist looks for: “Over and above temporal righteousness, wisdom, and power, although they are godly work, there is need for another kingdom, in which there is another righteousness, wisdom, and power.”<sup>241</sup> Even at the end, on Luther’s reading, the psalmist sees that the righteousness, wisdom, and power of this age are given and upheld by God, but at the same

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<sup>238</sup> N.A.S.B. Luther translates verse 8b as *Denn du erbest unter allen heiden*, where *erbest* means “you inherit,” W.A. 31, 189, 218. Other English translations render the word לַיְהוָה, *tinhal*, in terms of inheritance. Norman C. Habel surveys the literature and decides that the verb לָהַל, *nāhal*, and the noun הַלָּה, *nah<sup>a</sup>lā*, usually do not have to do with the allotment of land after death, but more simply with the division of property. The *nah<sup>a</sup>lā* thus is the “portion, share, entitlement, allotment, and rightful property,” *The Land Is Mine: Six Biblical Land Ideologies* (Minneapolis: Fortress Press, 1995), 35.

<sup>239</sup> L.W. 13, 72. *Bittet er umb ein ander regiment und Reich*, W.A. 31, 218.

<sup>240</sup> L.W. 13, 72. *Oberherr*, W.A. 31, 218.

<sup>241</sup> L.W. 13, 72. *Also sehen wir, das uber die weltliche gerechtigkeit, weisheit, gewalt, obs wol auch Goettliche werck sind, noch ein ander Reich not ist, darin man eine andere gerechtigkeit, weisheit, gewalt finde*, W.A. 31, 218. C. M. Jacob’s English translation misses the phrase *obs wol auch Goettliche werck sind*, “although they are godly work.”

time the psalmist looks forward to a greater kingdom in which these things come to fulfillment. The knowledge that human government is God-given work is continually buoyed up by hope of something better, the kingship of Christ.

In response to the strong claims that the federal U.S. government has plenary power over immigration, we follow Psalm 82 and its critique of sovereignty. It tells us that government is a divinely given task for this era, a task of judgment under God's judgment, a task of judgment that the interpreter of God's Word must call to account. The psalm directs us to two aspects of government as directed by God: that it shields the powerless, even the migrant, from harm, and that it shields those under it with laws, sword, and walls. Yet the space in which the psalmist writes is the space we often inhabit as we look at U.S. immigration law: temporal authorities claim independent sovereignty to the neglect of their duties, and the earth quakes. Just as we follow this implicit critique of sovereignty, we follow the psalmist in verse 8 as he cries out to God, hoping for another kingdom that is revealed as Christ's.

What does this mean for the claims of the federal United States government to sovereignty? It means that God delegates governmental authority, and so government cannot be understood as *sovereign* in an ultimate sense. The guarding of places is limited to this era, and it is subject to the ongoing judgment of God. It serves some good for a people to be independent of the governance of other peoples, but independence is only one good among many. Government is tasked with preserving other goods as well: here, with Luther, protecting the helpless and oppressed. Immigrants, then, must not be understood as pawns in a game of sovereignty. The U.S. government has responsibilities to protect their wellbeing, responsibilities that are not trumped by the effort to maintain independent power. Authority over immigration is not *plenary* or unlimited as in U.S. law, nor is it a

good in itself. Immigration authority must serve goods other than itself if it is to have purpose or warrant.

### 2.B.3. Lands Granted and Taken Away: Theological Interpreters on Deuteronomy 2-3

We have interpreted cities as a divine provision to preserve human life, and we have discovered that God oversees those who watch over cities. What, then, of larger tracts of land, aggregates of towns, pasture, farmland, wilderness, and waterways? Within divine plans to bless and save the world, do lands belong to peoples, and do they have some significance? In chapter 1, we drew on Karl Barth's account of the nations within the wider biblical narrative of salvation. Here we ask about national lands, drawing on a side story within the main story of God's love for Israel, Jesus, and the church.<sup>242</sup> Through the account of the Edomites in Deuteronomy, chapters 2 and 3, and with the assistance of theologically attuned contemporary Hebrew Bible scholars, we will arrive at a qualified "yes": national lands do have a place within the history of redemption, but with their possession comes requirements linked to their giver.<sup>243</sup>

In the Book of Deuteronomy, Moses addresses the children of slaves escaped from Egypt as they stand across from what he regularly calls "the land that Yhwh our God is giving us" (1:20, etc.). Moses reminds the people about the other peoples they met on their journey:

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<sup>242</sup> Theological discussions about bounded national lands often invoke brief phrases from the Song of Moses (Deut. 32:8-9) and Paul's speech at the Areopagus (Acts 17:26-27).

<sup>243</sup> We are indebted to Gordon McConville for suggesting that we look to Deuteronomy 2-3 to help address these questions.

<sup>1</sup>“Then we turned and journeyed into the wilderness in the direction of the Red Sea, as the LORD told me. And for many days we traveled around Mount Seir. <sup>2</sup>Then the LORD said to me, <sup>3</sup>“You have been traveling around this mountain country long enough. Turn northward <sup>4</sup>and command the people, “You are about to pass through the territory of your brothers, the people of Esau, who live in Seir; and they will be afraid of you. So be very careful. <sup>5</sup>Do not contend with them, for I will not give you any of their land, no, not so much as for the sole of the foot to tread on, because I have given Mount Seir to Esau as a possession. <sup>6</sup>You shall purchase food from them with money, that you may eat, and you shall also buy water from them with money, that you may drink. <sup>7</sup>For the LORD your God has blessed you in all the work of your hands. He knows your going through this great wilderness. These forty years the LORD your God has been with you. You have lacked nothing.” <sup>8</sup>So we went on, away from our brothers, the people of Esau, who live in Seir, away from the Arabah road from Elath and Ezion-geber (2:1-8a, E.S.V.).

In Moses' telling, the same pattern happens twice more after Israel passes the descendants of Esau, the Edomites.<sup>244</sup> As Israel approaches Moab (2:8b-16) and then Ammon (2:16-25), Yhwh tells Moses not to provoke these peoples to war, since Yhwh has already given the Moabites and the Ammonites territories as possessions. Along the way, the passage names peoples that preceded Esau, Moab, and Ammon in their territories. Regarding Esau, the preacher recounts that Esau dispossessed the Horites, just as Israel dispossessed peoples in the land Yhwh gave them (2:12),<sup>245</sup> and Yhwh destroyed the Horites before Esau (2:22). After encountering three nations whose territories Yhwh does not give to Israel as a possession, the pattern shifts as they meet Sihon, king of Heshbon (2:24-37) and Og, king of Bashan (3:1-7): Yhwh gives these lands to Israel to possess. Within a narrative focused on Israel, the passage displays a remarkable degree of attention to the lands and even the liberation of other nations.<sup>246</sup>

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<sup>244</sup> Moses refers to the people with the familiar term of their ancestor Esau, the brother of Jacob/Israel. The children of Esau are otherwise known as Edom; see Gen. 32:3-4.

<sup>245</sup> The Hebrew text shifts here to express Israel's dispossession in the past tense.

<sup>246</sup> Gerhard von Rad remarks with surprise on Israel's attention to histories that do not affect its own, *Deuteronomy: A Commentary*, trans. Dorothea M. Barton (London: S.C.M., 1966), 43.

In the narrative, a phrase stands out: “You are about to pass through the territory of your brothers and sisters.” As the people of Yhwh travel toward the land that Yhwh is giving them, they pass through or by the lands and territories of Edom among other peoples. The word “territory,” from the Hebrew גְבוּל, *gēbûl*, can also be translated as “border,” and so J. G. McConville translates the phrase from verse 4 as “You are about to cross the border of your brothers.”<sup>247</sup> In the passage from Deuteronomy, river gorges mark many of the borders (2:13-14, 24, 36, 37; 3:8, 16, 17),<sup>248</sup> and the edges of other territories are marked by a sea (3:17), a mountain (3:9), and two cities (3:10). In the Ancient Near East, monarchical authority might have radiated from fortresses and cities, leaving boundaries fuzzy, but in this passage many boundaries are clear.<sup>249</sup> In the parallel telling of Israel’s encounter with Edom in the Book of Numbers, Moses sends messengers to the king of Edom, asking permission to pass through his territory (Num. 20:16-17, 21).<sup>250</sup> Later in Deuteronomy, as Yhwh’s people approach Heshbon, Moses sends messengers to ask if they can pass through, buying food and water, but Yhwh hardens King Sihon’s spirit and gives the people possession of Heshbon (Deut. 2:24-37). Along with Moab and Ammon, then, Edom has a territory with borders, and on one telling, Israel must ask Edom permission to

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<sup>247</sup> Magnus Ottosson, “גְבוּל; גְבוּל; גְבוּלָה; גְבוּלָה,” in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck and Helmer Ringgren, trans. J. T. Willis, vol. 2 (Grand Rapids, Mich.: Eerdmans, 1975), 361–66; J. G. McConville, *Deuteronomy*, Apollos Old Testament Commentary 5 (Leicester, England: Apollos; Downers Grove, Ill.: InterVarsity Press, 2002), 77.

<sup>248</sup> What the E.S.V. renders as “brook” or “river,” the N.R.S.V. renders “Wadi,” and McConville explains that this is a river gorge, *Deuteronomy*, 84.

<sup>249</sup> Elsewhere in the Old Testament, the term *gēbûl* refers to the borders of national lands (e.g., 1 Kings 4:21, 1 Samuel 27:1). The term also applies to the limit of family lands, which Yhwh establishes to protect the vulnerable. See Deut. 19:14, 27:17; Proverbs 15:25; Job 24:1ff; 1 Kings 21.

<sup>250</sup> In Numbers 20:14-21, the king of Edom refuses to allow Israel to pass through his territory. In the Deuteronomy passage, it is the Edomites who are afraid (2:4), and in the Septuagint, Israel goes through Moab, but the Masoretic Text leaves the ending ambiguous, saying that the Israelites went away from their brothers (2:8a), McConville, *Deuteronomy*, 79, 83.

pass through its land. In the narrative of Deuteronomy, nations other than Israel have territories and exercise control over passage through their borders.<sup>251</sup>

Another phrase stands out in the Deuteronomy narrative. As the people approach the Edomites, Yhwh tells them, “Do not contend with them, for I will not give (לֹא־אֶתֶּן) you any of their land (מֵאֶרֶץ), no, not so much as for the sole of the foot to tread on, because I have given (נָתַתִּי) Mount Seir to Esau as a possession (יְרֵשָׁה)” (2:5). Yhwh says the same about the lands of Moab (2:9) and Ammon (2:19): the people must not fight them, because Yhwh has given them land as a possession. In a surprising way, the pattern that applies to Israel throughout Deuteronomy here applies to three other nations. What is this pattern? McConville reads the book as a story of giving (נָתַן, *nātan*): Yhwh is giving the land and everything in it to Israel, and under the covenant that Yhwh establishes, Israel will give in return.<sup>252</sup> The way that Yhwh gives the land, the recipients are not free to do whatever they like with the land. This is a particular kind of gift. On Norman Habel’s reading, Yhwh gives the land to the people, and as a response, Yhwh requires the people to follow the statutes outlined in Deut. 12:2–26:15. Following the statutes, the books states what Israel and Yhwh have declared to one another (26:16-19), a ceremony of sacrifice marks the agreement (27:1-8), and blessings for obedience and curses for disobedience are laid out (27:9–28:68).<sup>253</sup> Norbert Lohfink reads this as a typical Ancient Near Eastern treaty or covenant, called a בְּרִית, *bērit*, in Deuteronomy (5:2-3, etc.), that provides the setting for an

<sup>251</sup> James K. Hoffmeier is perhaps the only theological writer on migration who highlights territories and borders in the Tanakh. He begins his biblical survey by drawing on the Edom episode to conclude that “nations could and did control their borders and determined who could pass through their land,” *The Immigration Crisis: Immigrants, Aliens, and the Bible* (Wheaton, Ill.: Crossway, 2009), 33.

<sup>252</sup> J. G. McConville, *Law and Theology in Deuteronomy*, Journal for the Study of the Old Testament Supplement Series 33 (Sheffield: J.S.O.T., 1984), 11–13. As one example of the giving of Yhwh and Israel’s giving in return, McConville mentions Deut. 15:7-11, where in the land Yhwh their God is giving them, Israel must give freely to the poor, without their heart begrudging their brothers and sisters (12).

<sup>253</sup> Habel, *The Land Is Mine*, 44.

overlord to grant the use of land to a vassal lord.<sup>254</sup> On Walter Brueggemann's telling of the land grant, the land is given for Israel's "satiating."<sup>255</sup> Deut. 8 describes "a good land" flowing with water, full of wheat and barley, figs and pomegranates, "a land in which you will eat bread without scarcity...You shall eat and be full" (8:9-10, E.S.V.). But the land serves as a temptation, its abundance an opportunity to forget Yhwh.<sup>256</sup> The land also brings responsibilities. In Brueggemann's summary, Israel must not make images of other gods, it must carry on the Sabbath practices of freeing slaves and letting the land rest, and it must maintain justice for those who lack standing in the community.<sup>257</sup> These are those who have "no allotment or portion among you" (14:27, our translation), and among these is the *gēr*, the migrant.<sup>258</sup> If Yhwh's people do not carry out these tasks of worship, Sabbath, and judgment, according to the preacher they "will soon utterly perish from the land" (4:26, E.S.V.; see also 11:17; 30:18).

To hold on to her lands, then, God requires Israel to judge the vulnerable outsider fairly. Since it is relevant to our inquiry about the governance of territory and the treatment of migrants under God's rule, this component of the treaty deserves closer attention.

Deuteronomy 10:12-22 develops this requirement as flowing out of Yhwh's activity toward

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<sup>254</sup> Norbert Lohfink, "אֶרֶץ *yāraš*; אֶרֶץ *y'rēšā*; אֶרֶץ *y'ruššā*; מִוֶּרֶשׁ *môrāš*; מִוֶּרֶשׁ *môrāšā*," in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck and Helmer Ringgren, trans. David E. Green, vol. 6 (Grand Rapids, Mich.: Eerdmans, 1990), 385. What Habel calls a conditional grant, Bruce K. Waltke calls "usufruct...the legal right of using and enjoying the fruits or profits or something belonging to another," *An Old Testament Theology: An Exegetical, Canonical, and Thematic Approach* (Grand Rapids, Mich.: Zondervan, 2007), 537. Moshe Weinfeld finds parallels between Deut. 1-4 and Hittite treaties, where overlords grant lands to vassals and limit them to their lands, *Deuteronomy and the Deuteronomistic School* (Oxford: Clarendon Press, 1972), 72. Similar prohibitions on trespass extend to Sumerians and are basic to Ancient Near Eastern treaties, he claims (61n3, 73).

<sup>255</sup> Walter Brueggemann, *The Land: Place as Gift, Promise, and Challenge in Biblical Faith*, 2nd ed. (Philadelphia: Fortress Press, 2002), 46.

<sup>256</sup> *Ibid.*, 50.

<sup>257</sup> *Ibid.*, 58-61.

<sup>258</sup> Deut. 14:27 deals specifically with the Levite, who is allotted no land. אֶרֶץ *hēleq* we translate as "allotment," אֶרֶץ *nah'ālā*, as "portion." See note 238; *K.B.*, 323. See the introduction for the decision to translate *gēr* as "migrant."

Yhwh's people.<sup>259</sup> The passage calls Israel to walk in Yhwh's ways, reminding the people that although Yhwh owns all the heavens and the earth, Yhwh's heart is attached in love to Israel (vv. 12-15). In response, Moses tells Israel, "circumcise therefore the foreskin of your heart" (v. 16, E.S.V.). What would it mean to have a heart set aside and purified after the fashion of a circumcision? Look at the way that Yhwh judges, the preacher suggests: "For the LORD your God is God of gods and Lord of lords, the great, the mighty, and the awesome God, who is not partial and takes no bribe" (v. 17, E.S.V.). Yhwh's righteous judgment is distinguished by this: "Yhwh executes judgment for the fatherless and the widow, and loves the migrant (*gēr*), giving him food and clothing" (v. 18, our translation). The preacher might be expected to say that Yhwh executes judgment for the migrant, but he moves to the divine heart. It is part of who this God is that God demonstrates love for the outsider, the migrant. Moses calls the people to imitate not only Yhwh's judgment but also Yhwh's love: "You all shall love the migrant, for you were migrants in the land of Egypt" (v. 19, our translation). The Hebrew verb translated "love" has a dual sense, and it can be read as a command as well as a statement about the future. So, "You all shall love the migrant" means both "I command you all to love the migrant" and "I promise, you all will love the migrant."<sup>260</sup> Such love demonstrates proper "fear" of Yhwh, right worship of

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<sup>259</sup> Mark Glanville sets this passage within the broader economy in Deuteronomy of God's generosity, the people's response of thanksgiving, and the people's ensuing "generosity, justice, and inclusion," "Immigration, Refugees, and the Old Testament," *Comment: Public Theology for the Common Good*, December 12, 2011, <http://www.cardus.ca/comment/article/3015/immigration-refugees-and-the-old-testament/>; see also his "The *gēr* in Deuteronomy: An Ethic of Inclusivism?" (Ph.D. Thesis, Trinity College Bristol, forthcoming).

<sup>260</sup> The verb here, **וְאָהַבְתֶּם**, *va'ahabtem*, is a *Vav* consecutive Qal perfect second-person masculine plural verb lacking a preceding verb. It can be read as indicating a command, as S. R. Driver judges, "you must love" the migrant, *A Treatise on the Use of the Tenses in Hebrew*, 3rd rev. ed. (Oxford: Clarendon Press, 1892), 141. Following Driver's interpretation of the *Vav* consecutive perfect as taking on the meaning of the imperfect, the word can also be read in its parallel sense as indicating the future, "you shall, you will, you are going to love" the migrant (140-141). Alternatively, if the punctuation at the end of vv. 17 and 18 is taken away, the *Vav* consecutive perfect follows the Qal imperfect verbs of v. 17 and the participles of v. 18. The *Vav* consecutive perfect following the imperfect denotes the future, according to J. Weingreen, permitting the

the one who loved Israel first (v. 20). In response to Yhwh's giving, judging, and loving, Israel is commanded and enabled to love like Yhwh does, as a community showing love to the vulnerable person who has come from afar. This is one aspect of what is required if Israel is going to continue living in the land Yhwh has given her.

This is the pattern of Yhwh's land grant to Israel, and something of the pattern applies to other nations in the early chapters of Deuteronomy. In the passage, Yhwh does not only own Canaan and grant it to Israel, but Yhwh grants another part of the earth to Edom as a "possession" (נַחֲשָׂא, *y<sup>ʿ</sup>ruššā*). This word also appears in forms of the verb נָחַשׂ *yāraš*, translated "possess" or "dispossess," and it receives a special use in the early chapters of Deuteronomy.<sup>261</sup> According to Norbert Lohfink, *yāraš* means to "take formal possession of real property acquired by virtue of certain rights."<sup>262</sup> On this telling, in Deuteronomy 2-3, Yhwh grants the land to a nation, and then the nation occupies that land. Indeed, in the enfolding story of Edom, Yhwh granted the land to Edom as a *y<sup>ʿ</sup>ruššā*, Yhwh destroyed the Horites before Edom, and Edom dispossessed (נָחַשׂ) the Horites and settled in their place (2:5, 12, 22).

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translation "you will love" the migrant, *A Practical Grammar for Classical Hebrew*, 2nd ed. (Oxford: Clarendon Press, 1959), 91. In J. C. L. Gibson's more recent update of Davidson's Hebrew grammar, as a *Vav* consecutive perfect, *va'ahabtem* may begin an independent clause about the future following on from a prior statement, *Davidson's Introductory Hebrew Grammar: Syntax*, 4th ed. (Edinburgh: T. & T. Clark, 1994), 88. On this reading, "You will love" the migrant follows from the statement in v. 17 involving two imperfect verbs, that Yhwh does not prefer persons and does not take bribes, or it follows from the statements in v. 15 that Yhwh attached his heart in love to Israel's fathers and is choosing their offspring, with a perfect and a *Vav* consecutive imperfect verb. The love of the migrant is thus what will happen because of Yhwh's character as judge and Yhwh's covenant love with Israel. Alternatively, if the *Vav* consecutive perfect has a special relationship with the imperfect verbs of v. 17, the passage is either a future indicative, or it has a modal or contingent meaning (Gibson 92-93). The phrase would then mean either "you will love the migrant, it is sure," or "I want you to love the migrant," or "you are commanded to love the migrant." On these accounts, the meaning of the Hebrew is unclear, but the clues point to a multivalent meaning that combines a promise about loving the migrant with a command to love the migrant.

<sup>261</sup> Where much of the Hebrew Bible would use the noun *naḥ<sup>ʿ</sup>lā* and the verb *nāḥal* to speak of the division or allotment of lands and possessions, Deuteronomy 2-3 utilizes the distinctive vocabulary of *y<sup>ʿ</sup>ruššā* and *yāraš*. Like *naḥ<sup>ʿ</sup>lā*, *y<sup>ʿ</sup>ruššā* is sometimes translated as "inheritance," but it is better translated as "possession"; see note 238.

<sup>262</sup> Lohfink, "נָחַשׂ *yāraš*," 379.

When Yhwh tells Israel about the Edomites, “I will not give you any of their land, no, not so much as for the sole of the foot to tread on” (2:5bc), we receive a clue about what it means to take possession, *yāraš*.<sup>263</sup> A later passage in Deuteronomy reiterates this pattern, when Yhwh promises to bless Israel if they keep his command by driving out nations before them so that they might dispossess (*yāraš*) these nations. “Every place which the sole of your foot treads shall be yours,” Yhwh says through the preacher, going on to tell the people the extent of the territory (*gēbūl*) they will receive (Deut. 11:24). These passages might suggest a ceremony of treading on the land to claim it as a possession, or they might mean something simpler: to possess a territory is to tread on it, to walk back and forth through it. Either way, in Deuteronomy not only Israel but other nations possess land by treading on it. When Yhwh forbids Israel from treading on the land of Edom, Yhwh declares the hill country of Seir to be Edom’s to tread on with the sole of the foot, Edom’s to possess.<sup>264</sup>

The Deuteronomy account suggests that Yhwh not only gives lands to possess but also to dispossess. Here the same verb, *yāraš*, indicates both possession and dispossession, as we have seen. Yhwh’s grant of land and destruction of the Horites enables Edom to “dispossess” the Horites (2:12, 22), and the preacher presents variations on the theme: The Emim preceded the Moabites (2:10), the Ammonites “dispossessed” the Zamzumim (2:20-21), the Caphtorim “settled” in the place of the Avvim (2:23), and Israel “captured” the cities of Heshbon (2:34) and Bashan (3:4). There is reason to recoil from the hasty dispossessions in the narrative, where whole peoples die with the single word “destroy,” where when Israel carries out the dispossession, the narrative slows only slightly to mention

<sup>263</sup> Lohfink suggests this line of thinking, and he cites the handing of a sandal to a new owner, *ibid.*, 371, 379.

<sup>264</sup> What the E.S.V. calls Mount Seir, Weinfeld translates “the hill country” of Seir, *Deuteronomy 1-11: A New Translation with Introduction and Commentary*, Anchor Bible 5 (New York: Doubleday, 1991), 154.

the ritual killing of every man, woman, and child (2:34, 3:6).<sup>265</sup> The passage does not shy away from presenting an uncompromising displacement of one nation by another. As Yhwh's chosen instrument, Israel itself faces widespread death in this passage, as Yhwh "destroys" the older generation that failed to trust Yhwh and take possession of the land (2:14-15; see 1:19-46). In the economy of Deuteronomy, if we take a hint from the addresses to Israel, dispossession happens for a reason: Yhwh does not allow injustice to go on forever in the lands granted to the nations. Moses makes clear that Israel's second generation does not gain land because of its *הַקְּדָשׁ*, *ḥēdāqâ*, its blameless behavior or the just judgments of its rulers, but because of the *רַשָּׁעִים*, *reša'îm*, the wrong and injustice of the nations that preceded them in the land (Deut. 9:4-5).<sup>266</sup> We have seen that with Israel, Yhwh forbids false worship, commands Sabbath, and requires right judgment for the vulnerable. Something of this pattern recurs with the nations, and if guilty, they are condemned to dying and losing their land.

We have argued that Deuteronomy, chapters 2 to 3, signals a pattern of Yhwh granting land to nations other than Israel, but an objection can be made: only the close relatives of Israel seem to receive lands in these passages. Yhwh gives lands to the descendants of Esau, the brother of Jacob, also known as Israel (2:4; see Gen. 32:3; 35:10), and Yhwh gives lands to Moab and Ammon, descendants of Lot, the nephew of the patriarch Abraham (Deut. 2:9, 19; see Gen. 11:27; 19:37-38). But the one exception to this

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<sup>265</sup> These passages depict the people of Yhwh as they ritually destroy every human being in Heshbon and Bashan: "we devoted them to destruction (וַיְהַדְּמֵם)" (2:34, 3:6). Elsewhere in Deuteronomy, Moses commands this practice when Yhwh gives nations over to the people of Israel (7:2). For a discussion of the questions these passages raise about divine goodness, our moral judgments, the nature of revelation, and the interpretation of Scripture, see Christian Hofreiter, "Genocide in Deuteronomy and Christian Interpretation," in *Interpreting Deuteronomy: Issues and Approaches*, ed. David G. Firth and Philip S. Johnston (Nottingham: Apollos, 2012), 240-62; "Reading Herem as Christian Scripture" (D.Phil. Thesis, Faculty of Theology and Religion, University of Oxford, 2014).

<sup>266</sup> K.B., 1006, 1296.

rule hints at a pattern larger than the granting of land to those nations that are related to Israel. Amid the litany of possessions and dispossessions, we hear that “the Caphtorim, who came from Caphtor, destroyed [the Avvim] and settled in their place” (Deut. 2:23). Here, Yhwh is not named as the cause of this turn of events, but the mention of the Caphtorim comes within a passage steeped in Yhwh’s action in causing possession and dispossession. The Caphtorim are a people who appear to be unrelated to Israel, and in the tables of the nations they are said to be descended from Egypt (Gen. 10:13; 1 Chron. 1:11).

In one of the very few other mentions of Caphtor in the Scriptures, a striking motif emerges:

Are you not like the Ethiopians to me,  
 O people of Israel? says the LORD.  
 Did I not bring Israel up from the land of Egypt,  
 and the Philistines from Caphtor and the Arameans from Kir?<sup>267</sup>

The prophet Amos bears a message that strikes at Israel’s pride. As the one master of the stars, who brings night and day, who commands the seas (Amos 5:8; 9:6), Yhwh poses rhetorical questions to Israel: are the Ethiopians not like you to me, those people known for their different color of skin (Jeremiah 13:23)? When it comes to your perennial enemies, did I not bring them up like I brought you up from Egypt, the Philistines from Caphtor and the Syrians from Kir?<sup>268</sup> The Israelites to whom Amos speaks would rather answer “no” and consider themselves special, but Yhwh’s answer is “yes.” The prophet declares that just as Yhwh characteristically “brings up” (עלה, *’lh*) Israel out of Egypt, so

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<sup>267</sup> Amos 9:7, N.R.S.V.

<sup>268</sup> Deut. 2:23 describes the Caphtorim taking the place of the Avvim in Gaza. Both the Caphtorim in Deut. 2:23 and the Philistines in Amos 9:7 come from Caphtor, and they may be the same people, if Gen. 10:14 describes the Philistines coming from the place of the Casluhim. Gen. 10:14 may also be read as saying that the Philistines descend from the Casluhim people, who are listed as distinct from the Caphtorim, and in that case, the Philistines and Caphtorim might be two different peoples who came out of Caphtor. Then again, the accounts of peoples coming from Caphtor might not cohere.

Yhwh brings up other nations, even Israel's foes.<sup>269</sup> Beyond the granting of land to the other nations in Deuteronomy, the prophet Amos declares that Yhwh "performs exodus" for nations that bear no kinship with Israel, in Brueggemann's phrase.<sup>270</sup> Perhaps these nations, too, were subject to oppression and cried out to God, to Elohim. Perhaps Yhwh heard them and brought them up from the land of their oppressors, granting them land as a possession, as Brueggemann imagines.<sup>271</sup> Not only for Israel's relatives but for those unrelated to it, writes Brueggemann, "there is more than one promised land assured to more than one people."<sup>272</sup>

We began with the question, do not only guarded cities but something like national territories play a role in God's saving purposes? Interpreted with the assistance of theologically oriented biblical scholars, the comments from the fringes of Israel's story in Deuteronomy, chapters 2 to 3, indicate that national lands do play a role, in a carefully limited way. As Yhwh's people travel to the promised land of Canaan, their encounters with other nations and the instructions Yhwh gives them demonstrate that other nations are granted lands. The living God, the one revealed to Israel as Yhwh, rules all the earth, and lands are God's to give and take away. In this era, God grants lands to peoples so that they might enjoy its fruits and flourish. These are lands often defined by borders, lands to possess and walk about in. The giving God requires a people to give in response, to avoid wrong and to seek just judgment, and if they do not, God will remove them from the land. Giving and giving in return, possession and dispossession: this is the rhythm of

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<sup>269</sup> Walter Brueggemann interprets Amos this way, and he thinks that 9:7 stands apart from its immediate context, "'Exodus' in the Plural (Amos 9:7)," in *Many Voices, One God: Being Faithful in a Pluralistic World*, ed. Walter Brueggemann and George W. Stroup (Louisville, Ky.: Westminster John Knox Press, 1998), 20.

<sup>270</sup> Walter Brueggemann, *Deuteronomy*, Abingdon Old Testament Commentaries (Nashville: Abingdon Press, 2001), 38.

<sup>271</sup> Brueggemann, "'Exodus' in the Plural," 23–24.

<sup>272</sup> Brueggemann, *Deuteronomy*, 35.

Deuteronomy, chapters 2 to 3, and the pattern for national lands during this age before that age when “the meek will possess the land” (Psalm 37:11).<sup>273</sup>

An observation arises from this account from Deuteronomy and linked passages. As peoples and nations possess lands, they are due a request when non-members want to cross their lands. Yet at the same time, part of the condition of keeping their land is that they judge rightly. The hallmark of Yhwh’s just judgment, his governance, is justice for the one from far away and love for the migrant. It looks like nations may maintain their borders and admit or not admit outsiders, but if their legislatures, their courts, and their police do not treat migrants with justice, they risk losing their lands. It looks like the United States of America might rightly allow a non-citizen to enter or turn them away. Still, the U.S. government risks losing control of its lands if it does not treat non-citizens with justice. In the language of Deuteronomy, it risks being destroyed and dispossessed. If the Border Patrol mistreats those at the borders, if the courts fail to give a fair hearing to those charged with immigration offenses, if laws fail to give legal standing to the wage laborers the American people depend upon, then the good and sovereign God might end the U.S. government’s authority over the land. The message of Deuteronomy, chapters 2 to 3, for this modern nation is double-edged: possess this land and enjoy it, but another nation will soon displace you if you fail to follow God’s ways and practice God’s justice.

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<sup>273</sup> Within a psalm built around the possessing of land, Ps. 37:11 declares that “the meek will possess (*yāraš*) the land,” and the passage finds echoes in the Sermon on the Mount (Matthew 5:5), “Blessed are the meek, for they shall inherit the earth” (E.S.V.), or highlighting the Hebrew resonances, “Blessed are the meek, for they will possess the land.”

## 2.B.4. Responding to a Threat of Harm: Leo XIII and Immigration Authority

Authority over territory is divinely granted, but this authority and the authority over immigration is checked by the requirements of the one Sovereign. What, then, do authorities rightly do when they restrict the whereabouts of non-citizens? *In most cases, authority over immigration responds to a threat of harm against what a society shares.* We will reach this understanding of immigration authority by examining a claim in late nineteenth-century Pope Leo XIII's *Rerum Novarum* and that claim's elaboration in Oliver O'Donovan's *The Ways of Judgment*. We will appropriate their arguments for a discussion of immigration authority, and we will also enumerate exceptions to the rule, cases where immigration authority reacts to wrong or to a past act.

In *Rerum Novarum*, Pope Leo XIII asserts this about civil authority:

Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it... The limits must be determined by the nature of the occasion which calls for the law's interference – the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.<sup>274</sup>

In his encyclical on the condition of labor, Leo XIII has already made space for a humanity prior to the republic, for the family as a true society, for the Church as bearing the remedy to social conflict, and for a harmony between the wealthy and the working class.<sup>275</sup> In the quotation above, Leo announces that the task of the public authority is to protect the *res*

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<sup>274</sup> Leo XIII, "Rerum Novarum: On Capital and Labor," 1891, sec. 36, [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html). The Latin original reads, *Si quid igitur detrimenti allatum sit aut impendeat rebus communibus, aut singulorum ordinum rationibus, quod sanari aut prohiberi alia ratione non possit, obviam iri auctoritate publica necesse est... Quos fines eadem, quae legum poscit opem, causa determinat: videlicet non plura suscipienda legibus, nec ultra progrediendum, quam incommodorum sanatio, vel periculi depulsio requirat, Actes de Léon XIII: encycliques, motu proprio, brefs, allocutions, actes de dicastères, etc.*, vol. 3 (Paris: Maison de la Bonne Presse, n.d.), 48. The introduction, above, addresses the pivotal role of *Rerum Novarum* in Catholic Social Teaching on migration.

<sup>275</sup> "Rerum Novarum," sec. 7, 12, 16, 19.

*communes* – communications, or common matters, things, possessions, or affairs – as well as to protect any particular grouping within the whole.<sup>276</sup> The public authority protects against *quid detrimenti*, any harm, damage, loss, or material diminishment, whether that harm is *allatum*, already brought, or *impendeat*, it threatens or hangs over.<sup>277</sup> In the ellipsis between sections we quote above, Leo indicates a number of common matters that the public authority protects: peace and order, families, religious life, moral standards, and health. A different list of common possessions might well apply to the matter of immigration authority.<sup>278</sup>

Oliver O'Donovan elaborates upon Leo XIII's brief claim about public authority in *The Ways of Judgment* and elsewhere. O'Donovan argues that Leo's claim stands within a long discussion about where government falls in the history of God's dealings with the world. In O'Donovan's telling, Church Fathers like John Chrysostom and Augustine saw the rule of one human being over another as coming after the fall of Adam, and they drew on images from the first eleven chapters of Genesis that contrast an innocent beginning with a world of wrongdoing and bloodshed. One significant alternative to this line of thinking came with Thomas Aquinas, who under the influence of Aristotle cast government as ordering human life in a way that would be helpful to human beings had they not sinned. Some resolution of this tension came in the sixteenth century. The reformer Luther, as we saw earlier in the chapter, saw the first signs of government in the

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<sup>276</sup> *Oxford Latin Dictionary (O.L.D.)* (Oxford: Clarendon Press, 1982), 369–370, 1625–1626.

<sup>277</sup> *Ibid.*, 77–78, 532, 841–842. The translation here, from [www.vatican.va](http://www.vatican.va), accurately follows the Latin original, while another translation diverges from the Latin in ways that are significant for this discussion, that of David J. O'Brien and Thomas A. Shannon, eds., *Catholic Social Thought: The Documentary Heritage* (Maryknoll, N.Y.: Orbis Books, 1992), 12–39. O'Brien and Shannon translate *detrimenti* as “evils,” while the Vatican website translates it more accurately as “harm,” (*O.L.D.*, 532). O'Brien and Shannon wrongly translate *aut* as “of” in “the general interest of any particular class,” while the Vatican translation translates the word as “or,” so that it is *either* the general interest *or* any particular class that suffers or is threatened by harm (*ibid.*, 219–220).

<sup>278</sup> “*Rerum Novarum*,” sec. 36.

earthling's words for the animals, but he placed the guarding of places with walls and arms after the threat of murder entered the world. Likewise, Dominican Francisco de Vitoria noted a shift toward something new when Cain and Nimrod build their city, a city needed to fend off violent attack.<sup>279</sup> Thus on O'Donovan's reading of the tradition, *politia* takes two forms: first, human beings share, gather together, and organize themselves because of how they are created; and second, one person rules another when human society is threatened by sin.<sup>280</sup> Thus when Leo XIII names "public authority" as defending against harm or a threat of harm against common matters, common matters that also have a political character, he produces a sharp statement that is a fruit of a long-running conversation. On O'Donovan's reading, Leo's statement also responds to the threat of totalitarianism in the nineteenth century and the dangerous notion that civil authority dictates everything, that every sort of sociality has government at the top.<sup>281</sup>

What Leo articulates, O'Donovan calls "the reactive principle."<sup>282</sup> Human beings act freely and share in a common good, not because political authority has manufactured these things, but because it is in our nature to be social.<sup>283</sup> There is a sort of public activity that precedes the activity of civil government, an activity that seeks to develop social communications and pursue common goals. The role of political activity, however, is to react when the common good is harmed. For Leo, civil authority steps in to prevent harm to antecedently existing social relations. But Leo says more: civil authority not only reacts to harm or injury that is actual, but also to a *threat* of harm. Political judgment, in

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<sup>279</sup> Vitoria, *On Civil Power*, 4, q. 1, art. 2, sec. 4, in *Political Writings*, trans. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 9.

<sup>280</sup> O'Donovan, *The Ways of Judgment*, 59–60.

<sup>281</sup> *Ibid.*, 61; Oliver O'Donovan, "Judgment, Tradition, and Reason: A Response," *Political Theology* 9, no. 3 (2008): 397.

<sup>282</sup> O'Donovan, *The Ways of Judgment*, 59.

<sup>283</sup> *Ibid.*, 55.

O'Donovan's words, is "at once *reactive* to wrong and *proactive* to avert the threat of harm."<sup>284</sup> This qualification keeps Leo from libertarianism, says O'Donovan; government does not only respond to actual crimes and torts, but also to threats of future harm to the common good. If failure to act means that in years to come, what a people shares will experience harm, and if civil authority is best suited to the task, then that authority is right to fend off harm.<sup>285</sup> O'Donovan makes a final distinction, between wrong and harm: civil authority protects against both wrong as a "moral relation" and harm as an "objective detriment."<sup>286</sup> Government acts rightly when it protects the common good against acts that incur guilt as well as acts that diminish or hurt the common good, he says. We must keep in mind the limits that Leo places on civil authority: political activity must go no further than the matter in hand requires. Once that authority appropriately punishes the wrong or adequately averts the harm, it must stop.

Leo XIII's terse characterization of political authority helps make sense of immigration authority. It helps us clarify what most of us think a government is doing when it restricts who can enter and who can live in its territory. It also helps us clarify what government *rightly* does when it excludes or expels non-members.

First, Leo speaks of what is harmed, those things held in common. Some class or order within the community may also be the object of harm. What does this imply for authority over immigration? Civil authority can only be right to restrict immigration if by doing so it fends off some harm to what society shares or to some group within society. Immigration authority, like any civil authority, does not in the first instance make or

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<sup>284</sup> Ibid., 62; emphasis O'Donovan's.

<sup>285</sup> Ibid., 61; O'Donovan, "Judgment, Tradition, and Reason," 397.

<sup>286</sup> O'Donovan, *The Ways of Judgment*, 58.

manufacture society. Rather, human beings gather together and associate because of how they are created, while immigration authority acts to protect those gatherings against some danger. If those in government begin to see themselves as “making” society through immigration policy, then they arrogate to themselves a dangerous power. Now, immigration authority is unusual among civil powers: it has the power to shape the future membership of society, allowing some to come in and keeping others out. Recent scholarship recognizes this point: Aristide Zolberg’s masterful history, *A Nation by Design: Immigration Policy in the Fashioning of America*, stresses the ways that immigration authority has shaped American society. Zolberg acknowledges at the start of his book that he draws this emphasis from Benedict Anderson’s influential account of nations as *Imagined Communities*.<sup>287</sup> While it may take an act of imagination to be joined with those we do not meet, and while immigration law shapes society as it shifts and grows, the reactive principle implies that immigration law does not constitute society at its start. Even the United States, where most members are descended from men and women who arrived in the last four centuries, men and women settled and gathered together before there were laws to restrict entry. Zolberg offers as early instances of immigration policy controls on transported convicts and paupers, but even so, these controls sought to protect new societies in North America from harm.<sup>288</sup> Moves to restrict entry and residence constituted reactions to some harm or threat of harm against communal wellbeing. We conclude that authority over immigration exists only to serve *what a society shares*, protecting what is common but not making a society in the first place.

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<sup>287</sup> Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, Mass.: Harvard University Press, 2006), 1n1; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

<sup>288</sup> *A Nation by Design*, 26, 35, 42.

Second, Leo distinguishes some harm that is already brought, some actual harm, from some harm that threatens or hangs over. What sort of harm does immigration authority act against? In a small minority of cases, United States immigration authority responds to harm that is not simply threatened but actual. In one such case, current federal law places restrictions on those who have been convicted of “aggravated felonies.”<sup>289</sup> Those guilty of committing murder, exacting a ransom, or running a prostitution business, among other offenses, are barred from returning to the U.S. for twenty years.<sup>290</sup> On top of the punishment that these men and women already receive for their crimes, immigration policy mandates that they leave the U.S. and stay away for some time. Here, immigration policy protects what society shares – freedom from violence, fear, and mistreatment – against a threat that has already occurred. Still, these cases form only a small proportion of the cases that U.S. authorities deal with; in only four to five percent of cases involving immigration has the defendant committed a crime not connected to immigration. In a second case described earlier in this chapter, Congress placed restrictions on Chinese immigration and naturalization from 1882 onward in response to what it took to be present harm. The legislature judged that Chinese immigrants were at that time threatening the cohesion of American society, its institutions, language, economy, and morals, and it passed laws to fend off what it took to be harm. Still, the Chinese Exclusion Acts run against the grain of federal immigration law. In no other prominent example has the United States permitted a whole class of persons to enter the country with no time limit but later acted to discourage them from remaining in the U.S. or to expel them.

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<sup>289</sup> 8 U.S. Code 1101(a)(43); *An Act To Prevent the Manufacturing, Distribution, and Use of Illegal Drugs, and for Other Purposes (Anti-Drug Abuse Act of 1988)*, 102 Stat. 4181, 1988; see 110 Stat. 3009-546, 3009-627-628.

<sup>290</sup> *Immigration and Nationality Act (I.N.A.)*, 212(a)(9)(A)(ii)(II)(2013).

These cases of harm committed in the past or the present are worth noting, but they are the exception to the rule. In most cases U.S. immigration policy responds to a *threat* of harm against what society shares. One example is the exclusion of those who are most impoverished. Colonial authorities sought to exclude paupers, early state laws did the same, and an 1882 federal law forbade “any person unable to take care of himself or herself without becoming a public charge” from landing at a U.S. port.<sup>291</sup> The ban on those “liable to become a public charge” continues in federal law.<sup>292</sup> This exclusion may or may not be just, but it serves as a helpful example. When a U.S. citizen’s French husband is not granted permanent residency in the U.S. because the American earns a low income, the Frenchman is not excluded because he has harmed or is harming the United States. Rather, the concern is that if he comes, he will depend on government funds to live, and his presence will drain federal funds or detract from the life of the local community if he immigrates to the U.S. The harm here is not actual, but threatened. This is the sort of harm that much of U.S. immigration law guards against. Newcomers are not admitted without sufficient wealth, an adequately paid job, or support from a family member because Congress has judged that the presence of those who lack a way to support themselves is detrimental to society.

In a second example, federal law currently places numerical caps on how many can immigrate from any given country.<sup>293</sup> Only so many nationals of the Philippines are granted visas to settle in the United States each year, and these limits are not qualitative, based on some injury to the common good, but quantitative. What such laws imply is that if too

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<sup>291</sup> For example, the Massachusetts Poor Laws enabled the deportation of paupers of foreign origin, Zolberg, *A Nation by Design*, 75; 22 Stat. 214, 214.

<sup>292</sup> 8 U.S. Code 1182(a)(4).

<sup>293</sup> Quotas first went into place in 1921 for countries in the Eastern Hemisphere and then in 1965 for the Western Hemisphere, 42 Stat. 5; 79 Stat. 911. See the chapter 3.A.1 for more on numerical limits.

many men, women, and children arrived from the Philippines in the next few years, their presence would harm what American society shares. The availability of jobs or housing, the capacity of present U.S. residents to include these newcomers as members of society, or the resilience of a common language might be under threat. Once again, it is not clear whether these concerns are warranted or just. What is clear is that immigration law does not protect against some actual damage that those hoping to immigrate have done. Instead, the legislature has made a judgment about the future injury that immigrants will cause to the common good if too many enter the U.S. Whether or not this judgment about the future finds backing from past evidence, it is an uncertain judgment. The legislature cannot know in advance what will happen if more Filipinos settle in the U.S. next year. We conclude that while in some cases, immigration authority responds to *actual* harm, *most of the time*, immigration authority responds to *threatened* harm, as in this case.

Third, Leo XIII speaks of *detrimentum*, harm, injury, or detriment. Leo's definition encompasses many types of harm that civil authority is tasked with countering, harms that might include *wrongs*. In some rare cases, immigration authority responds to wrongs, or threats of wrongs. In the case of aggravated felonies above, these usually involve some wrong, something for which a person can be held guilty. Intentional acts of violence, coercion with words, and forcible exaction of property: these are types of acts for which someone is morally culpable. In some cases, immigration authority responds to wrongs already committed, or it responds to wrongs that might happen in the future. For example, the Immigration Act of 1891 excluded from admission into the United States "persons who have been convicted of a felony or other infamous crime or misdemeanor involving

moral turpitude.”<sup>294</sup> It appears that lawmakers were concerned that an immigrant might continue a pattern of immoral criminal activity once in the U.S. This law was concerned about future *wrong*, but this concern forms the exception to the rule.

Most of the time, immigration authority deals not with wrong but with *harm*, some act that though injurious to the common good does not entail moral guilt. When the Johnson-Reed Act of 1924 severely restricted immigration from countries like Poland and Italy, what the lawmakers primarily had in view was not “moral turpitude.”<sup>295</sup> Congress acted on an assessment of recent immigrants as dirty, physically deficient, disease-ridden, socialist, Jewish, and unable to assimilate into the Nordic race, on Peter Schrag’s telling.<sup>296</sup> The likes of Congressman Albert Johnson blamed immigrants for not integrating, for not becoming part of “white” American society, for bringing disease or dangerous ideas, but they did not focus their criticisms on immorality or crime. The concern was that new immigrants would be part of larger trends that would detract from what Americans shared over time. New immigrants would join separate societies and fail to contribute to the health, strength, wealth, and democratic ideals of the United States, those behind the Johnson-Reed Act alleged. Senators and Congressmen might have thought that the presence of many more Greeks or Ukrainians would cause some future damage to social bonds, to the goods that American citizens share. Above all, these immigrants would sully the country’s Northern European gene pool.

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<sup>294</sup> 26 Stat. 1084, 1084. The term “turpitude” still confronts those who make an application to enter the United States: “Have you ever been arrested or convicted for an offense or crime involving moral turpitude...?” “Electronic System for Travel Authorization – Application,” accessed December 19, 2013, <https://esta.cbp.dhs.gov/esta/application.html?execution=e1s1>.

<sup>295</sup> 43 Stat. 153.

<sup>296</sup> Peter Schrag, *Not Fit for Our Society: Nativism and Immigration* (Berkeley: University of California Press, 2010), 115–122.

The way lawmakers and thought leaders characterized immigrants at this time was rancorous and racist, but they still only alleged *harm* rather than *wrong*. They did not blame individuals for specific wrongs, but instead they were concerned that new immigrants would contribute to broad trends that would detract from common life. The contemporary tenor of American discussions of immigration policy may be more civil, but their allegations are of a similar type. When we hear that immigrants will take jobs from American citizens or that they will fail to learn English, the allegations are analogous to those made around 1924. Those who voice these concerns do not blame immigrants for moral wrongs; instead, they predict that the arrival of a large number of men and women from, say, Mexico will contribute to economic and social trends that detract from what Americans share. We conclude that immigration authority, by and large, responds to these sorts of *harm* rather than *wrong*, harm not due to specifiable immoral acts, but harm when one person contributes to trends whose cumulative effects damage what a society shares.

In three steps, then, Leo XIII's statement on civil authority produces a way of framing immigration authority: *In most cases, authority over immigration responds to a threat of harm against what a society shares.* The rule frames, directs, and limits the use of immigration authority without dictating its use. Questions of judgment remain open in each case: What is it that a certain society shares, common practices, ways of speaking, a tract of land, or a marketplace? Will new arrivals threaten this community or bring it new life? As those in authority seek to answer these questions with honesty and justice, Pope Leo's comments about limits to authority serve as a concluding warning. His encyclical states that if there is no other way to prevent harm, then civil authority must meet that threat. He stresses that the law must act within limits, doing no more than it must to correct some inconvenience

or avert some danger.<sup>297</sup> In the case of immigration, then, government must restrict entry and residence if there remains no other way to fend off some trouble. Still, the government may only act if other less formal or less coercive approaches cannot preclude harm. In the case of nineteenth-century Chinese immigration to the West Coast, perhaps some way could have been found to resolve difficulties without recourse to legal restrictions on entry and residence. Perhaps peace would have come about through the efforts of neighbors to get to know one another, or through meetings and negotiations between community groups. We do well to be mindful of proper limits to immigration authority.

### 2.B.5. Wrong Only Because Prohibited: William Blackstone and Immigration Offenses

Given this framework for the proper functioning of immigration authority, how should we understand an immigration offense and its punishment? *An immigration offense is not malum in se but malum prohibitum, and punishment should not exceed what is fitting for the offense.* We will reach this conclusion with the help of the eighteenth-century English legal scholar William Blackstone's statement on two types of *malum*, types still in current usage among lawyers.<sup>298</sup>

In the introduction to the *Commentaries on the Laws of England*, Blackstone makes a distinction between *malum in se* and *malum prohibitum*. The distinction arises out of a

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<sup>297</sup> ...*Videlicet non plura suscipienda legibus, nec ultra progrediendum, quam incommodorum sanatio, vel periculi depulsio requirat*, our paraphrase, with reference to William Whitaker, "William Whitaker's Words," 1993 to 2010, <http://archives.nd.edu/words.html>.

<sup>298</sup> We are indebted to Lisa Lorish for suggesting that this legal distinction would help reveal the nature of immigration offenses. An early, brief example of this sort of distinction comes from Aristotle's distinction between that part of the politically just that is natural (*φυσικόν*, *phusikon*) and that part that is legal or conventional (*νομικόν*, *nomikon*), Aristotle, *Nicomachean Ethics* (*E.N.*), trans. H. Rackham, rev. ed., Loeb Classical Library 73 (Cambridge, Mass.: Harvard University Press, 1934), V.vii.1; Aristotle, *Nicomachean Ethics* (*E.N.*), trans. Terence Irwin, 2nd ed. (Indianapolis: Hackett Publishing, 1999), 1134b19.

discussion on the nature of law that begins with the creation of the world. Blackstone writes that when the “supreme being” created the universe, “he impressed certain principles upon that matter, from which it can never depart.”<sup>299</sup> “God...created man” too as “entirely a dependent being.”<sup>300</sup> God gave us “freewill” but established “certain immutable laws of human nature” as limits that direct us to right and away from wrong.<sup>301</sup> God also gave us “reason” so that we could search out those laws, but according to Blackstone, our reason is “corrupt, ...full of ignorance and error.”<sup>302</sup> Thus, to guide us to the knowledge of the natural law, at different times and in different places, God provided “an immediate and direct revelation...the revealed or divine law...found only in the holy scriptures.”<sup>303</sup>

On these two sources, the law of nature and the law of revelation, depend the “municipal or civil law,” the law that governs communities.<sup>304</sup> Much of human law merely declares what is already made plain from nature and the Scriptures. Along these lines, when municipal law declares that certain acts are crimes and misdemeanors, the inferior, earthly legislature “acts only...in subordination to the great lawgiver, transcribing and publishing his precepts.”<sup>305</sup> These kinds of acts are “*mala in se*,” wrong in themselves.<sup>306</sup> Blackstone cites murder, theft, and perjury as examples of wrongs already forbidden by the “superior laws,” wrongs which “contract no additional turpitude from being declared unlawful by the inferior legislature.”<sup>307</sup> Since we are already bound by superior laws, we are

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<sup>299</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), 38, from the Lillian Goldman Library at the Yale Law School, “The Avalon Project: Documents in Law, History, and Diplomacy,” 2008, <http://avalon.law.yale.edu/default.asp>.

<sup>300</sup> Blackstone, *Commentaries on the Laws of England*, 1765, 1:39.

<sup>301</sup> *Ibid.*, 1:39–40.

<sup>302</sup> *Ibid.*, 1:41.

<sup>303</sup> *Ibid.*, 1:42.

<sup>304</sup> *Ibid.*, 1:42, 44.

<sup>305</sup> *Ibid.*, 1:54.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*

bound in conscience not to commit those offenses that are *mala in se*.<sup>308</sup> When the municipal law declares something to be a crime, it does not make them any more wrong than they already were.

According to Blackstone, there are other sorts of wrongs that are not *mala in se* but “*mala prohibita*,” wrong because they are prohibited.<sup>309</sup> The law of nature and the law of revelation command and forbid certain actions, but there remain a number of “indifferent points” on which municipal law restrains action to benefit society.<sup>310</sup> These indifferent matters, writes Blackstone, “become either right or wrong, just or unjust, duties or misdemeanors [sic], according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life.”<sup>311</sup>

Monopolies serve as one of Blackstone’s examples of *mala prohibita*: these are not wrong by nature, but municipal law declares them wrong to protect civil society.<sup>312</sup> If we follow Blackstone’s logic, when in 1984 the United States Department of Justice broke up A.T.&T.’s longstanding monopoly on telephone services, it did this not because the company had done something wrong in itself but because it judged that A.T.&T.’s monopoly was damaging to the public welfare.<sup>313</sup> Without competitors, the monopoly might command too high a price for its services, supply substandard services, or prevent the innovation that competitors could bring. Legislatures ban such monopolies to protect

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<sup>308</sup> Ibid., 1:57.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid., 1:42.

<sup>311</sup> Ibid., 1:55.

<sup>312</sup> Ibid.

<sup>313</sup> “Excerpts from Text of a Decree Signed by A.T.&T. and U.S.,” *The New York Times*, January 9, 1982, sec. Business, <http://www.nytimes.com/1982/01/09/business/excerpts-from-text-of-a-decree-signed-by-at-t-and-us.html>.

common goods, and holding a monopoly becomes an offense not wrong in itself but wrong because prohibited, *malum prohibitum*.

Blackstone goes on to indicate how *malum prohibitum* differs from *malum in se* in its relation to the conscience. For offenses that are *mala in se*, he writes, our consciences are bound before there are human laws, but for offenses that are *mala prohibita*, our consciences are only bound to submit to the penalty given for breaking the law.<sup>314</sup> In these cases, he writes, the main strength and force of the law comes not from what is God-given but from the penalty that the legislator gives for the law.<sup>315</sup> We take from Blackstone, then, that civil authorities do not only forbid and punish what natural and divine law indicate is wrong. Rather, civil authorities prohibit a range of actions in the interest of securing common goods, and an offense against laws in these cases is not an offense against what is wrong by nature, but an offense against what is wrong because the authorities have prohibited it.

The distinction between *malum in se* and *malum prohibitum* raises some difficulties. In many cases, its application is not clear. Theft might appear to be *malum in se*, but there are good reasons to think that stealing to help someone in dire need is not wrong in itself. Blackstone's sources require interpretation: even if we trust the Christian Scriptures to clarify the created moral order, the Scriptures do not make plain what of that order is rightfully enshrined in civil law. Blackstone's account of law that funds his distinction has its issues, too. When Blackstone says that we need nothing more to prompt us toward justice than "our own self-love, the universal principle of action," and when he offers "the one paternal precept, that man should pursue his own happiness" as the foundation of

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<sup>314</sup> Blackstone, *Commentaries on the Laws of England*, 1765, 1:57–58.

<sup>315</sup> *Ibid.*, 1:57.

ethics or natural law, his system remains impoverished in the same way as Vattel's and Hobbes'.<sup>316</sup> Furthermore, Blackstone's confidence about the law of nature and the law of revelation will be greeted with doubt outside of and after Christendom, where the natural is contested and where the Christian Scriptures are not taken as divinely given. Though the distinction between types of wrong can be difficult to apply, and though the conception of law that lies behind it leaves unresolved questions, the distinction is still in currency in legal discourse. This distinction remains a useful, if blunt, tool for understanding types of wrong. Here, we will use it to characterize immigration offenses and the punishment of those offenses.<sup>317</sup>

What do we mean by an immigration offense? Someone who walks across the Sonoran Desert from Mexico into the United States breaks federal law and commits an immigration offense. Likewise, someone from the Dominican Republic who flies to New York, gains entry on a tourist visa, and stays longer than the visa allows, commits an immigration offense. At times, immigration authorities take into account sorts of crimes that are not immigration offenses when they issue a visa or deport someone, like in the example of aggravated felonies above. Burglary, for example, does not violate immigration laws even though it violates other laws. Only when someone is ordered to leave the country because he has committed a burglary and he goes into hiding, or when after being deported he reenters the country without permission, does he commit an immigration offense.

Where do immigration offenses fall in Blackstone's two types? Some would argue that it is *malum in se* to enter another country's territory without its permission. But to

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<sup>316</sup> Ibid., 1:40, 41. Internal quotation marks are omitted. See chapter 2.A.3.

<sup>317</sup> In vol. 4 of the *Commentaries*, Blackstone discusses the power of civil magistrates to punish, saying that the punishment of offenses that are *mala prohibita* depends on the consent of those who gather to form a political community, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769), 8-10, from the Lillian Goldman Library at the Yale Law School, "Avalon Project."

qualify as *malum in se*, it would have to be obvious where one country's territory ends and another's begins. In the mountains of the Sonoran Desert where there is no border wall, it is not obvious where Mexican territory ends and U.S. territory begins; the border is a line drawn on a map in the Gadsden Purchase of 1853, and it has no relation to features of the land. Even where the border coincides with a geographical feature like the Rio Grande, this division is neither natural nor divinely established. We might follow Luther in saying that Mexico and the U.S. may govern the territories in their possession under divine government, but it took the U.S.-Mexican War of 1846-48 and the Treaty of Guadalupe Hidalgo to establish the river as the border. This border is fixed by custom, war, and treaty between peoples and governments over which God presides, not fixed by nature or revelation. It is not wrong in itself to be on one side of a river rather than another, and so we conclude that immigration offenses are *mala prohibita*.

Some might object that once the authorities have ruled on the matter, many *mala prohibita* offenses are gravely immoral. For example, whether we drive on the right or the left side of the street is a morally indifferent matter. But once the custom is set, or once an authority declares which side we must drive on, it is a grave offense to drive on the wrong side of the road, since doing so endangers others on the road. This offense is criminal, and illegal entry is likewise immoral and criminal, some might argue.<sup>318</sup> But in the case of driving on the wrong side of the street, this act presents an immediate danger to fellow drivers and cyclists, a danger that is obvious to the driver in question – except, perhaps, when the street is deserted and visibility extends far off into the distance. Driving on the wrong side of the road threatens the life and health of fellow human beings, but crossing a

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<sup>318</sup> Thanks are due to Nigel Biggar for suggesting this example.

border or overstaying a visa does not present such an immediate threat. The threat that illegal entry presents tends to be distant and indirect, and the person who commits this act cannot see the potential for harm in the same way as the driver can. This *malum prohibitum* act causes no immediate injury.

If immigration offenses are merely wrong because the legislature has declared them to be wrong to protect the wellbeing of society, and if they inflict no immediate harm, what sort of punishment fits these offenses? Let us consider six plausible examples of unauthorized immigration into the United States and the penalties these offenses are subject to under federal law in 2014.

(1) A man and a woman from Vancouver, British Columbia, set off to hike a section of the Pacific Crest Trail from its northern end in Canada into Washington state. They know they are not allowed to cross into the U.S. on the trail since they will not cross by an official port of entry, but they want to hike the trail, and they have heard that they should not run into any trouble. What is more, as Canadian passport holders they would be eligible to enter the U.S. as tourists without applying in advance for a visa. As they hike into the U.S., Customs and Border Protection (C.B.P.) agents meet them. In a federal court, the pair are charged with failing to present themselves at a border crossing point when arriving other than by conveyance. They are fined \$1000 each in civil penalties, and because they knowingly violated the law, they are also fined \$1000 each in criminal penalties. The authorities “remove” or deport them to Canada, where they return to their university studies.<sup>319</sup>

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<sup>319</sup> In 2010, the C.B.P. warned the Pacific Crest Trail Association that hikers could not hike south into the U.S. on the trail without being liable for prosecution for a federal crime, K. C. Mehaffey, “Feds Warn Pacific Crest Trail Hikers About Crossing Border,” *The Seattle Times*, July 1, 2010,

- (2) A Mexican national hides in a truck and crosses into the U.S. from Nuevo Laredo, Tamaulipas, to Laredo, Texas. At the border, officials find and arrest him. They discover that he was previously removed from the U.S. after being convicted of a violent crime, a felony. The man is tried and convicted in a federal court for the felony of illegal reentry, he is imprisoned for a year, and then he is removed and flown to Mexico City. Tired of trying to return to the U.S., he returns to live with family members and looks for a job.<sup>320</sup>
- (3) A young man from Chihuahua, Mexico, paddles across the Rio Grande into Texas to look for work and escape the lawlessness of his home town, now dominated by a drug cartel. A day later, he is found walking through the countryside, arrested, and taken before a federal judge under the mass prosecution program Operation Streamline. He is told to plead guilty to the misdemeanor of illegal entry if he wants to avoid further time in jail. The judge sentences him to the time he has already served in jail, and he is removed to the border town of Manuel Ojinaga. He considers trying to enter again.<sup>321</sup>
- (4) A woman is arrested for using falsified documents to cross into the U.S. from Ciudad Juárez, Chihuahua, to El Paso, Texas. She has traveled to visit her ailing mother in the town where she was born in Sinaloa, Mexico, and she is attempting to return to her partner and two young U.S. citizen children along with her job as a housekeeper in

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[http://seattletimes.com/html/localnews/2012259887\\_pcthikers02.html](http://seattletimes.com/html/localnews/2012259887_pcthikers02.html). The hikers are each liable for criminal penalties of up to one year in jail and a \$5,000 fine and an additional \$5,000 fine as a civil penalty, 19 U.S. Code 1459. The Association's website still advises hikers of this as of early 2014, and it notes that it is possible to hike from the U.S. into Canada with an entry permit from the Canadian government, "Entering the U.S. from Canada," *Pacific Crest Trail Association*, accessed January 30, 2014, <http://www.pcta.org/discover-the-trail/permits/entering-the-u-s-from-canada-on-the-pct/>.

<sup>320</sup> One who commits illegal reentry is liable for fines and imprisonment of up to two years, for up to ten years if the person has committed a felony, and for up to twenty years if that felony is an aggravated felony, 8 U.S. Code 1326, 2013.

<sup>321</sup> One who commits illegal entry is liable to be fined and imprisoned for up to six months, 8 U.S. Code 1325, 2013.

Kansas, where she has lived for eight years without authorization. Tried and convicted for the misdemeanor of attempting to enter the United States by a willingly false representation, the woman is found to have a clean criminal record, and she is imprisoned for thirty days in El Paso and then removed to Ciudad Juárez. She is now ineligible to receive a visa to enter the U.S. for ten years, but she is determined to return to her family.<sup>322</sup>

(5) Border Patrol agents find a man by a road north of Sasabe, Arizona, thirsty and hungry, sunburned with torn clothes. Originally from El Salvador, he has made the grueling journey north riding freight trains through Mexico, fending off threats from gangs and police.<sup>323</sup> The man paid a *coyote* to lead him across the border into the U.S., and once there the *coyote* told him and his companions to keep walking north. He had intended to return as he has each year to work on a California farm and send money to support his wife and five children. With a charge of illegal entry already on his record, he is convicted in federal court of the felony of illegal reentry, imprisoned for ninety days, and removed to San Salvador. He begins the journey north once more.

(6) Police officers in Birmingham, Alabama, stop a man for driving a car with a broken taillight. He lacks a driver's license, and they suspect he might lack authorization to be in the country. When pressed, he cannot prove his immigration status, and they hand him over to federal agents. He tells them his parents brought him to the U.S. from Guatemala at age two, he grew up in Alabama, and now at age eighteen he has just graduated from high school. Customs and Border Protection grant the man "voluntary

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<sup>322</sup> The woman is liable for the same penalties as in the case of illegal entry, and because she is removed by an immigration judge, she is "inadmissible" for ten years, *I.N.A.*, 212(a)(9)(A)(ii).

<sup>323</sup> Sonia Nazario, *Enrique's Journey* (New York: Random House, 2006), depicts the often fatal dangers of the migrant trail through Mexico in a moving account of a boy's journey from Guatemala to join his mother in North Carolina.

removal” and fly him to Guatemala City. Since he is not guilty of a criminal offense, he is eligible to apply for a visa to go to the U.S. immediately, but he is unlikely to receive a visa since he lacks a U.S. citizen spouse, he has reached the age of majority, and he has no offer of a highly skilled job. The man speaks very little Spanish and ends up living on the streets.<sup>324</sup>

These examples represent typical immigration cases in United States federal courts today, except for the case of the Canadians (1). The hikers could be convicted for crossing into the U.S., but such convictions are either rare or nonexistent. The other convictions for entering, reentering, or residing in the U.S. without authorization represent frequent sorts of convictions. Most of these cases involve criminal penalties on top of civil penalties and removal from the country. The Immigration and Nationality Act of 1952 first called immigration offenses criminal offenses, making illegal entry a misdemeanor and illegal reentry a felony and leaving those who commit these offenses liable to be fined and imprisoned.<sup>325</sup> Since then, Congress has increased the maximum periods for which offenders can be imprisoned, up to twenty years in a case like case (2), where someone illegally reenters after being removed for an aggravated felony. A report by Human Rights Watch makes plain that the advent in most districts of the U.S.-Mexico border of rapid-fire group trials under Operation Streamline has contributed to an enormous increase in convictions for illegal entry and reentry. Between fiscal year 2002 and fiscal year 2012, annual convictions for illegal entry rose from just under three thousand to over forty-seven thousand, and convictions for illegal reentry rose from over seven thousand to nearly thirty-

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<sup>324</sup> Rep. Spencer Bachus cites a similar case, “Speech to Constituents” (Gardendale Civic Center, Gardendale, Ala., August 21, 2013), <https://www.dropbox.com/sh/lwo6835cvqrzofc/-xwvCTxas9>.

<sup>325</sup> 66 Stat. 163, 229.

six thousand.<sup>326</sup> Along with a rising probability of receiving a criminal conviction and being fined and imprisoned, those found guilty of immigration offenses may also be subject to fines as civil penalties.<sup>327</sup> Those found guilty are typically returned to their country of citizenship, either through voluntary return, through expedited removal, or through court-ordered removal. Even those who do not receive jail sentences can face months in detention while they wait for their cases to be processed or while they wait to be removed from the country.<sup>328</sup>

Do the punishments fit the wrongs committed in these cases? The punishment begins with the judge's declaration that someone has committed an unlawful act. If acts do break the law, then it is important to name them as against the law so that the community may know they are unlawful. The judgment that someone has broken the law affirms the integrity of the law and discourages others from breaking the same law. So long as individuals break immigration laws, it is right to declare their acts unlawful.

Are criminal sentences appropriate for these unlawful acts? Here further distinctions from Blackstone will help us. Blackstone distinguishes private wrongs from public wrongs, or civil injuries from crimes and misdemeanors, writing that

private, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; wrongs, or crime and misdemeanors [sic], are breach and violation of the public rights

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<sup>326</sup> *Turning Migrants into Criminals: The Harmful Impact of U.S. Border Prosecutions* (Human Rights Watch, May 2013), 13, <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals>. Over a similar period, rates of voluntary return and departure have decreased from over one million in 2001 to 324,000 in 2011 (18). Immigration cases predominate in federal U.S. district courts, far outstripping cases involving drugs, violent crime, and white-collar crime (14).

<sup>327</sup> 8 U.S. Code 1325-1326, 2013, refers to fines under Title 18.

<sup>328</sup> On detention conditions, see Julie Sullivan, "Prisons: Conditions Severe Even for Jails," *The Oregonian*, December 10, 2000, <http://www.pulitzer.org/archives/6511>; Stephanie J. Silverman, "Immigration Detention in America: A History of Its Expansion and a Study of Its Significance" (Centre on Migration, Policy, and Society, 2010).

and duties, due to the whole community, considered as community, in it's [sic] social aggregate capacity.<sup>329</sup>

Blackstone's examples are these: using someone else's field is a civil injury against an individual, not a crime, but treason, murder, and robbery are crimes "since, besides the injury done to individuals, they strike at the very being of society."<sup>330</sup> Now misdemeanors, properly speaking, are a variety of crime, since they infringe against society, but Blackstone accepts the common usage that crimes are "deeper and more atrocious" while misdemeanors have "less consequence."<sup>331</sup> In a later section, Blackstone deals with felonies, which he says involve some forfeiture, though they are not necessarily capital offenses deserving death. Blackstone does not make clear how felonies and crimes relate, but it seems that he does not think that all crimes other than misdemeanors are felonies.<sup>332</sup>

Putting Blackstone's categories to work, immigration offenses strike against the public good rather than against individuals, and thus they are crimes or misdemeanors. Excluding the rare cases of illegal entry by those intending to kill, or visa overstay by those convicted of some other crime, immigration offenses are banned because of projected rather than actual wrongs, such as the harm an immigrant might cause to a citizen's job prospects. These offenses tend to be of a sort that is not wrong in itself. For these reasons, it seems right to class immigration offenses not as grave crimes or felonies, nor as crimes in the common sense, but as misdemeanors. As misdemeanors, Blackstone suggests they can be understood as a minor variety of crime or as no crime at all.

If it is right to class immigration offenses as misdemeanors, is imprisonment an appropriate punishment? In case (4) above, for example, the woman determined to return

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<sup>329</sup> *Commentaries on the Laws of England*, 1769, 4:5.

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*, 4:94-98.

to her partner and children will face prison time that will keep her away from her family for a longer time and keep her from working to support them. Time in prison will cause the same harm for the father and migrant worker in case (5). For these two, criminal prosecutions name unlawful acts that are not morally grave, but imprisonment prevents these two individuals from achieving the substantial goods of living with their families, working, and supporting themselves and their families. Further, time in prison will induce those who commit immigration offenses to spend time among more serious offenders, where they may be subject to abuse or encouraged to consider committing offenses of a graver sort.<sup>333</sup> Thus, judges do well not to use the full extent of the criminal penalties available to them under federal law, keeping those who commit these misdemeanors out of prison.

If first immigration offenses are misdemeanors, should repeat offenses be classed as felonies? In case (4), if the mother tries to return to her family and is apprehended, she may be sentenced with a felony, making legal reunion with her family less and less possible. In case (5), the migrant farm worker's only wrong is entering and residing illegally, and so long as he does not commit an offense that is *malum in se*, a repeat offense need not be called a felony. On their own, it appears that immigration offenses should not be considered felonies.

What of civil penalties? Fines may be an appropriate way to penalize those a government wants to keep from entering its territory in an irregular manner. In case (1), fines may be a good way to make sure that everyone, even hikers, enter the U.S. at an official port of entry. Hikers are likely to be Internet-savvy, and other hikers would likely

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<sup>333</sup> The Human Rights Watch Report *Turning Migrants into Criminals* describes the increasing tendency to classify immigration offenses as crimes.

hear of a conviction in case (1) and avoid walking south along the Pacific Coast Trail from Canada to the U.S. In cases (2) to (5), if fines had been levied, perhaps they would serve as a deterrent and allow some of the costs to the enforcement agencies to be recouped.

Is removal or deportation a fitting punishment for an immigration offense? In one sense, removal proves a fitting response to the wrong in question. A non-citizen enters or resides in the country without permission, and the authorities act to remove that person from the country. On the face of it, there is a simple correspondence between act and punishment, but things are not so simple. If the only wrong committed by the person is failing to comply with government regulations, and if they have not done something *malum in se*, then other goods must be taken into account. To tell if removal fits an immigration offense, we have to weigh the goods that immigration law is thought to protect and the goods that the person breaking that law seeks to gain or preserve.

Of the six cases above, it is easiest to argue that removal is appropriate in the first two. We could argue that in case (1), the conviction of the pair of Canadian hikers sends a message to other hikers that everyone who wants to enter United States territory has to do so in the proper, legal way. The conviction promotes a federal effort to keep track of every person who enters the country. If the pair had only planned to hike a short part of the trail and then return to Canada, they might have bought food and supplies in the U.S. If they had hiked a longer part of the trail, they might have worked odd jobs in exchange for food or cash, work that a U.S. citizen might have performed. For them, removal might be frightening, but they have studies and homes to return to in Canada. In this case, removal promotes the federal government's efforts to certify every entry into U.S. lands, but it seems heavy-handed, since there is only a small possibility that the pair's presence will harm the common possessions of U.S. society. The removal of the Mexican national in case (2) is

easier to support. Since the man has already been convicted of a violent crime in the U.S., he has forfeited grounds for remaining in the U.S. as a non-citizen. His removal keeps the country free of someone who might commit another crime, we might argue. Still, his prosecution does not give him an opportunity to demonstrate that he has amended his way of life since being convicted. At the same time, as in the first case, we grant that there are reasons why removal might fit his offense.

In the rest of the cases, it is harder to argue that removal fits the wrong done, and it is difficult to see that what removal does for U.S. society is worth the damage done to the individuals who are deported. In case (3), if the man from Chihuahua remains in the U.S., some would suspect he would take away a job that a citizen could do, but others might conjecture that he would do work that citizens are not willing to do or that he might start a business and create work for others. On the other hand, there are good reasons to be suspicious of attempts to measure the worth of an immigrant based on his contribution to the cash economy of the U.S. If the man returns to his home state in Mexico, he will return to a place overrun by drug cartels and killings.<sup>334</sup> The uncertain effects of his presence in the U.S. balance unevenly with a difficult life for him at home. If we modify this case (3), would removal be more fitting? If the man came from the state of Guanajuato and had a chance to study engineering and work in the automobile industry, perhaps removal would do no great injury to him. Then again, he would be less likely to attempt to cross into the U.S. in the first instance. What if the man in case (3) lacked these opportunities but came from a different village, safer than the town in Chihuahua but impoverished? Removal might prevent the man from finding decent food and shelter that he could find in the

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<sup>334</sup> The man might be eligible for asylum, but interviews indicate that in recent years, officials who apprehend individuals near the border are not in the habit of advising Mexican nationals of their opportunities to apply for asylum, *ibid.*, 65.

neighboring country to the north, and his effect on the common possessions of U.S. citizens remains undetermined. Only if we modify case (3) to place the man in a safe hometown with work opportunities could removal be fitting, but in that case the man would not be likely to enter the U.S. illegally.

In case (4), it is harder to justify removal. Were the woman in case (4) to remain in the U.S., she would do so against the federal government's authority over the admission of non-citizens. She would add to a community of men and women living in the U.S. without permission, a community living in fear and prevented from contributing to her Kansas community by that fear. Those interested in an economic calculus would raise concerns about her taking work from U.S. citizens, and those who think culture is best preserved by limiting immigration would ask how well she would integrate into U.S. culture. On the other hand, the woman's regular work over eight years creates a bond between the woman and the Kansas residents who employ her. If the woman is removed, her children will be without a mother and her partner without her company, and she will be left alone. Administrative regularity matters, and some will think that protecting businesses and culture through immigration restrictions is worthwhile. Still, to remove her would be to ignore the bond she has formed with her Kansas community during eight years of work and residence. Also, to remove her would require that the state and the nation matter more than the woman's family. When children are left without a mother, federal intervention on a *malum prohibitum* matter appears unjustified.

Similar considerations come into play in case (5). The man from El Salvador has been offered regular work on California farms, participating in longstanding cyclical migration patterns. It is likely that he has provided steady, hard work for farm owners who have paid him less than the legal minimum wage and who might have avoided paying taxes

related to his labor. As an undocumented worker, the man has been afraid to complain if his employers leave him to breathe fumes from pesticides or strain his back. He has been without medical insurance, and perhaps he has nursed injuries sustained on the job. The farm owners have passed on the benefits of his cheap labor to consumers who buy their produce at low cost. Still, the man's low pay helps his family survive, and they depend on his work in the U.S. Some would express concerns about the rule of law, economics, and culture like in case (4) above, but to remove him is to fail to recognize the relationship the man has built with farm owners and consumers in the U.S. Removing him also endangers the wellbeing of his wife and five children in El Salvador. Once again, it is hard to argue that removing the man is a fitting punishment for the *malum prohibitum* he has committed by reentering illegally.

In case (6), it is difficult to make an argument that removal fits the wrong done. The man's parents brought him from Guatemala to the U.S. as a boy, and he is largely enculturated, possessing little knowledge of Spanish. Removing him to Guatemala sentences him to life in an unfamiliar country for which he is not prepared. In this case, removal punishes the man for his parents' illegal act when he is not responsible for that act. Some might say that allowing the man to stay would encourage other parents to do the same with their children, but we think the direct harms done to this man by deporting him outweigh the value of preventing possible future harm to what U.S. citizens share.

We are left, then, to conclude that removal as a punishment far exceeds what most immigration offenses deserve. Perhaps in cases where non-citizens have committed other offenses that are *mala in se*, and perhaps where no substantial harm is done to these persons could removal be an acceptable punishment, proportionate to the offense. However, removal is a powerful and potentially life-changing act by government, and when it does

damage to goods more substantial than national sovereignty, it is not justified. As ties to the host country grow, as a migrant contributes labor, as a newcomer builds a life and a home, it becomes more and more difficult to justify removal to punish the *mala prohibita* of falsifying immigration documents, illegally entering, overstaying a visa, and related offenses. When removal breaks up families or consigns them to poverty, what it does in the name of common possessions goes too far. When lawlessness and despotism threaten in the immigrant's country of origin, removal does more harm than is needed.

What we are arguing for here resembles the right of domicile that the dissenting justices in *Fong Yue Ting v. United States* favored. There, they said that an alien who is lawfully admitted and who establishes a place of residence and builds ties gains a right of domicile, a right not to be displaced from home. If a government does otherwise, these justices argued, it becomes tyrannical and despotic. We are arguing for something slightly different, since we are talking about non-citizens who are not lawfully admitted. Still, those who establish a home and build ties to a community, who do not commit crimes that are *mala in se*, still deserve to be left in place. A government that displaces settled people who do not commit serious crimes is a government that goes beyond its remit, holding an excess of power over the persons in its lands.<sup>335</sup>

If immigration offenses are not wrong in themselves but wrong because they are prohibited, then their immediate harm lies in failing to respect the sovereignty of the country in question, sovereignty that protects goods that a society holds in common against future harm. We have argued that it is right for governments to state when wrong is done,

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<sup>335</sup> Joseph H. Carens makes a similar argument in a pair of articles, arguing that the longer migrants stay in a country, the stronger their claims to membership become, "Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy," *Journal of Political Philosophy* 16, no. 4 (2008): 419–45; "The Case for Amnesty," *Boston Review*, 2009, <http://www.bostonreview.net/forum/case-amnesty-joseph-carens>.

to provide a “sentence” in the simplest sense. Civil penalties may be appropriate in the case of these wrongs, but they should be considered misdemeanors rather than felonies. The standard punishment for immigration offenses, removal or deportation, usually far outstrips the wrong done in breaking the law. Sovereignty cannot be taken as the overarching good in these cases, and other moral goods must come into account. Alongside protecting the society of those already within the land, civil authorities have responsibilities to preserve other goods, to protect family life, to ensure good relationships of employment and labor, to defend the most vulnerable from destitution, and to seek good relations with other nations. Other works argue that immigration law needs to protect families and those in poverty,<sup>336</sup> and in the next chapter we will indicate how immigration law might better respect relationships with neighboring countries.

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In this chapter, we have discovered that in the first century of the American republic, the federal government did not have a general authority over immigration. This authority came into place as Congress responded to what it saw as the threat of non-assimilating Chinese immigrants by excluding new Chinese arrivals and expelling some of those already present. In challenges to those laws, the Supreme Court justified this new federal power primarily on philosophical grounds, arguing that the right to exclude and expel aliens rested on the sovereignty, self-preservation, and self-defense of the nation. We found that only the consent of the nation constrains this authority over the whereabouts of aliens. No standard of Right beyond what the nation judges is right for itself holds when it comes to

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<sup>336</sup> Victor Carmona, “Love and Conflict in U.S. Immigration Preferences: Insights from the Christian Tradition” (Ph.D. Dissertation, University of Notre Dame, forthcoming), deals with the family and poverty in immigration preferences.

immigration. This does not bode well for immigrants, who are left as pawns within the self-interested logic of the federal government.

Such bad news for immigrants sent us looking for good news in Christian theology. With the help of Martin Luther and other trusted interpreters, we discerned what the Bible suggests about immigration authority. On our reading, Christian teaching agrees on the need to guard places, but it subjects that guarding to God's guarding. Defending territories against threats by those from outside is a feature of divine providence for this era before the open gates of the New Jerusalem, but it remains subject to God. Under divine judgment, human judgment is obligated to protect vulnerable migrants and to respect limits to its powers. By failing in these obligations, federal United States law arrogates to itself sovereign powers reserved for God. Still, so long as they seek power for power's sake, those in authority must be aware that it is within God's powers to displace and dispossess them, something we found affirmed in Scripture. But now is the time for repentance: the God revealed in Jesus Christ will forgive.

Within this broader frame, resources from the Christian tradition pointed us toward a more exacting account of what immigration authority rightly does and what punishment is appropriate for those who go against it. On our reading, the guarding of places under God's guarding is best expressed as a protection on human life, preventing unjust killing and vengeance. It is less clear that places may be guarded for other reasons – to protect jobs for citizens or to preserve a culture, for example. Indeed, forbidding immigration for such reasons places authorities in a bind, since with restrictions comes a commitment to enforcement through detention and deportation. Especially when an immigrant has established a residence in a new country, the diffuse harm that that person threatens to bring against an economy or a culture is rarely or ever commensurate with the

standard punishment for illegal entry or overstay, removal from the country. These considerations and others suggest that the authority over immigration is best understood modestly and best practiced mercifully.

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This chapter has demonstrated how it became possible to become an alien who is unlawfully present under federal United States law. In response to an uncompromising affirmation of federal sovereignty over immigration, our reading of the Christian Scriptures and tradition indicated a more limited role for civil government to guard places within God's guarding while protecting vulnerable migrants from harm. The next chapter will look at how a twentieth-century move against discrimination in immigration law made it possible for millions to become illegal aliens, and it will critique severe limits on Mexican immigration by drawing on resources from philosophy and theology.

### 3. An Unlawfully Present Alien from a Neighboring Country?

This thesis seeks a Christian theological response to the alien who is unlawfully present under federal United States law. In Chapter One, we saw how the alien arose in common law and United States law, and we argued that according to Christian teaching about creation, providence, and the church, this is not a truthful way of referring to those who are not from here. In Chapter Two, we saw how it became possible for aliens to be unlawfully present as federal United States authority over immigration was established, and we indicated that Christian teaching subjects such authority to the judging of God and keeps it within limits. In this chapter, we look at a third innovation in law that made it possible for so many men and women to become aliens unlawfully present in the United States. This final innovation was to subject Mexico and other nearby countries to numerical limits equal to those for faraway countries, in an effort to end discrimination based on nationality. On its own merits and for its effects in enabling the creation of a laboring underclass, this innovation proves unjust and unneighborly.

In part A of this chapter, we will trace two histories, starting with the history of twentieth century United States immigration law. We will watch as the reform of a discriminatory admissions regime is replaced by an egalitarian one, where the Western Hemisphere is no longer given special privileges. In parallel lies a story of Mexican migration to the United States, which continued largely illegally after the reforms, as a class

grew of those who are neither slave nor free. In part B, we will evaluate the laws, first by way of philosophical notions of justice. By way of Aristotle and Grotius, we will interpret the laws concerning immigration regimes and look for ways of bettering the United States' relationship with Mexican migrants. Then, by returning to the source of the notion of the neighbor in the Parable of the Good Samaritan, we will look for ways that United States residents, and the United States itself, could become a neighbor.

### **3.A. Neighbors, Good and Bad: Mexican Migration and United States Immigration Law in the Twentieth Century**

On October 3, 1965, United States President Lyndon B. Johnson stood before the Statue of Liberty in New York Harbor, signed a new immigration bill and declared, "This bill...repair[s] a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American Nation....For over four decades," he explained, "the immigration policy of the United States has been twisted and...distorted by the harsh injustice of the national origins quota system. Under that system," Johnson said, "the ability of new immigrants to come to America depended on the country of their birth. Only three countries were allowed to supply 70 percent of all the immigrants....Men...were denied entrance because they came from southern or eastern Europe or from one of the developing continents." The old system, the President said, "violated the basic principle of American democracy – the principle that values and rewards each man on the basis of his merit as a man." The bill he was signing into law, he told the crowd on Liberty Island, said "simply that from this day forth those wishing to

immigrate to America shall be admitted on the basis of their skills and their close relationship to those already here.”<sup>1</sup>

The law Johnson signed that day was the Immigration Act of 1965. This new Congressional legislation made this promise: “No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence...”<sup>2</sup> Few would be inclined to oppose such language, to suggest that it would be good to discriminate against persons based on their country of origin, or to say that government should not treat human beings equally. Yet behind Johnson’s talk of “reward[ing] each man on the basis of his merit as a man” and the law’s promise to end discrimination lay other shifts that proved more problematic. The national origins quota system in place from 1924 to 1965 had severely limited immigration from places like Italy and Romania, but it placed no limit on countries in the Western Hemisphere. As the framers of the 1965 Act worked to end discrimination against Southern and Eastern Europeans, they placed every nation on an equal footing, whether from the Eastern Hemisphere or the Western Hemisphere. Besides special allowances for family members and sought-after workers, by 1976, each country in the world received the same number of visas per year.

This shift would have significant implications for the United States’ southern neighbor, Mexico. The federal government had long encouraged Mexicans to come north to provide labor on American farms, and the most recent policy to encourage this, the Bracero Program, had ended just a year before, in 1964. Under the new immigration

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<sup>1</sup> Lyndon B. Johnson, “Remarks at the Signing of the Immigration Bill, Liberty Island, New York, October 3, 1965,” in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, vol. 2 (Washington, D.C.: Government Printing Office, 1965), 1037–40, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp>.

<sup>2</sup> *An Act To Amend the Immigration and Nationality Act, and for Other Purposes (Hart-Celler Act)*, 79 Stat. 911, 1965, 911.

regime, if Mexicans were to migrate into the United States at the same rate they had before, most of them would have to come without legal permission. After the 1965 law went into effect in 1968, Mexicans continued to migrate the United States in similar numbers, but most immigrated illegally. Half a century later, millions of unauthorized immigrants live in the United States, and a bare majority come from Mexico.<sup>3</sup> What is now a permanent and predominant feature of American political life, the alien unlawfully present, likely to be a native of Mexico, was made possible in part by the 1965 Immigration Act. A shadowy existence for so many who remain neither slave nor free came by way of a move to end discrimination.

This chapter will argue that although the 1965 change in immigration law to end discrimination based on national origins made great forward strides, it proved unneighborly. In it, the United States Congress chose an abstract, universal ethic without recognizing U.S. debts to neighboring Mexico. Part A will explore the context of the 1965 Act and the moral arguments that brought it about, and it will survey the longstanding ties between Mexico and the United States. An internal critique of the 1965 statute will indicate that in jettisoning discrimination, the federal government failed to recognize near neighbors and left them open to an oppressive sort of discrimination. The account will circle around the wordings of legislation and the speeches and letters of political actors.

Contemporary American and Mexican historians and social scientists, particularly Daniel J.

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<sup>3</sup> Jeffrey S. Passel, D'Vera Cohn, and Ana Gonzalez-Barrera estimate that in March 2012, there were 11.7 million men and women present in the United States without permission, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed* (Washington, D.C.: Pew Hispanic Center, September 23, 2013), <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>. See introduction, note 4. In an earlier study, Passel and Cohn estimated that in March 2010, 11.2 million were unlawfully present, and 6.5 million or 58 percent of those were from Mexico, 2.6 million or 23 percent were from elsewhere in Latin America, 1.3 million or 11 percent were from Asia, half a million or 4 percent were from Europe and Canada, and four hundred thousand or 3 percent were from Africa and elsewhere, *Unauthorized Immigrant Population: National and State Trends, 2010* (Washington, D.C.: Pew Hispanic Center, February 1, 2011), 1, 11, <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-national-and-state-trends-2010/>.

Tichenor, Mae M. Ngai, Aristide E. Zolberg, Douglas S. Massey, Jorge Durand, and Nolan J. Malone, will assist in rounding out the account.

### 3.A.1. Ending Discrimination, Ending Favor for Neighbors: United States Federal Immigration Law, 1921 to 1976

#### *Scientific Racism and Cultural Preservation: The National Origins Quota System of 1924*

In the quotation above, Lyndon B. Johnson declared the triumph of American democratic principles in immigration law. The bill he signed into law overturned a pattern that had been fixed since the Immigration Act of 1924, with a precursor in 1921.

What was the pattern that the 1965 Act overturned? As Daniel Tichenor tells the story, the Progressives of the early twentieth century had a penchant for expertise that was scientific and exacting, and this scientism turned its gaze to anthropology, positing distinct races among human beings.<sup>4</sup> In federal immigration law, both the Chinese and the Japanese were excluded, classed as unassimilable races, but scientific attention to race did not stop with Asia.<sup>5</sup> The scientists of race turned their attention to Europe, splitting the peoples of the continent into different types. A 1907 Congressional commission on immigration produced volumes that coalesced around a contrast between the longer-standing immigrant stocks from northern and western Europe and the newer arrivals from southern and eastern Europe, who were said to imperil the nation.<sup>6</sup> The commission's

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<sup>4</sup> Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002), 114–115, 128.

<sup>5</sup> *Ibid.*, 123. On the Gentleman's Agreement, see Chapter Two, note 24.

<sup>6</sup> *Ibid.*, 129.

lengthy *Dictionary of Races* parroted William Ripley's 1899 typology of three distinct European races, the Teutonic, the Alpine or Celtic, and the Mediterranean, with the last judged inferior to the others.<sup>7</sup> Though immigrant associations and some intellectuals envisioned a pluralist America, the tide swung in favor of Progressive, scientific racism. The movement achieved its first victory in the realm of immigration law in 1917, with a literacy test and further restrictions on immigrants.<sup>8</sup> Its second victory came in 1921, when under President Warren G. Harding and his America First nationalism, Congress enacted "emergency quotas" on immigration from the Eastern Hemisphere.<sup>9</sup>

The movement to restrict immigration gained steam in the following three years while the quotas were renewed. The head of the House immigration committee, Albert Johnson enlisted a eugenics expert who argued that the belief in the equality of all men should not blind Americans from "natural inborn hereditary mental and moral differences."<sup>10</sup> Johnson also maintained regular contact with Madison Grant, who thought the Nordic race, the "Great Race," was being diluted in the United States through immigration, in part because Christianity, "the religion of the slave, the meek, and the lowly" had broken down race distinctions.<sup>11</sup> Others who joined in the movement for racist immigration laws did not stress racial superiority so much as the idea that different races

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<sup>7</sup> Ibid., 129-131; Daniel Folkmar and Elnora C. Folkmar, *Dictionary of Races or Peoples, Presented by Mr. Dillingham, Dec. 5, 1910*, Reports of the Immigration Commission (Washington, D.C.: Government Printing Office, 1911), 5, 31; William Z. Ripley, *The Races of Europe: A Sociological Study Accompanied by a Supplementary Bibliography of the Anthropology and Ethnology of Europe*, 2 vols. (New York: Appleton, 1899); references are drawn from *The Races of Europe: A Sociological Study* (London: Kegan Paul, Trench, Trübner & Co., 1900), 121.

<sup>8</sup> *An Act To Regulate the Immigration of Aliens To, and the Residence of Aliens In, the United States*, 39 Stat. 874, 1917, 875, 877.

<sup>9</sup> *An Act To Limit the Immigration of Aliens into the United States (Emergency Quota Law)*, 42 Stat. 5, 1921, 5; Tichenor, *Dividing Lines*, 129.

<sup>10</sup> Harry H. Laughlin, in Oscar Handlin, *Immigration as a Factor in American History* (Englewood Cliffs, N.J.: Prentice-Hall, 1959), 132; cited in Tichenor, *Dividing Lines*, 144.

<sup>11</sup> Madison Grant, *The Passing of the Great Race; Or, the Racial Basis of European History* (New York: C. Scribner, 1916); references are drawn from *The Passing of the Great Race; Or, the Racial Basis of European History*, 4th rev. ed. with a documentary supplement (New York: C. Scribner, 1936), 167, 175, 222, 231.

had better not mix.<sup>12</sup> Historian Otis Graham, favorable to this milder account of race, suggests that we can better grasp the writings of the time if we substitute “culture” or “nationality” for “race,” capturing the often non-biological account of race present when, for example, Theodore Roosevelt spoke of the “American race.”<sup>13</sup> Beyond commitments to racism or cultural separation, other factors pushed Congress toward a restrictive immigration regime: isolationism after the war, a desire to protect domestic workers from competition that would drive down wages, concerns about political subversives, and a sense that too many newcomers of whatever national origin would destroy social unity.<sup>14</sup> To a Senate subcommittee, Senator David Reed signaled his assessment of public opinion: “I think the American people want us to discriminate; and I don’t think discrimination in itself is unfair....We have got to discriminate.”<sup>15</sup>

Congress acted in the Immigration Act of 1924, known by the name of its sponsors, Johnson and Reed. The Johnson-Reed Act enacted the discriminations that Reed had proposed, at first limiting yearly immigration from each country to 2 percent of the foreign born from that country represented in the 1890 U.S. census. In a second quota system that was not implemented until 1929, immigrants of each nationality were admitted in a number that bore that same ratio to 150,000 as the number of U.S. citizens of that national origin bore to the total number of U.S. inhabitants in 1920.<sup>16</sup> The first plan

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<sup>12</sup> For example, Edward R. Lewis, *America: Nation or Confusion?* (New York: Harper & Brothers, 1928), in Roger Daniels and Otis L. Graham, eds., *Debating American Immigration, 1882-Present* (Lanham, Md.: Rowman & Littlefield Publishers, 2001), 194–197; Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), 25.

<sup>13</sup> Otis L. Graham, “The Unfinished Reform: Regulating Immigration in the National Interest,” in *Debating American Immigration, 1882-Present*, ed. Roger Daniels and Otis L. Graham (Lanham, Md.: Rowman & Littlefield Publishers, 2001), 109.

<sup>14</sup> John F. Kennedy, *A Nation of Immigrants*, rev. and enl. ed. (London: Hamish Hamilton, 1964), 75–76.

<sup>15</sup> Quoted in President’s Commission on Immigration and Naturalization, *Whom We Shall Welcome* (Washington, D.C.: Government Printing Office, 1953), 89.

<sup>16</sup> *An Act To Limit the Immigration of Aliens into the United States, and for Other Purposes (Immigration Act of 1924; Johnson-Reed Act)*, 43 Stat. 153, 1924, 159; Tichenor, *Dividing Lines*, 144–145.

reproduced a long-past foreign-born population, while the second plan indexed a more recent figure of those who were full citizens, either by birth or naturalization. The second plan held until the Act of 1965 went into effect in 1968, and it continued to enforce a replication of the society of 1920. The national origins calculus effected a severe drop in the overall numbers of immigrants, with northern and western Europe allowed a much greater number than southern and eastern Europe. Alongside quotas for most of the Eastern Hemisphere, the Johnson-Reed Act perpetuated the thorough-going 1917 ban on immigration from most of Asia.<sup>17</sup> Still, the Act maintained an exception for the Western Hemisphere. Along with the children and wives of citizens, immigrants previously admitted but returning from a trip abroad, ministers, professors, and students, the Act listed those who were born in independent countries of the Americas as non-quota immigrants. Addressing males, it admitted an immigrant's wife and his unmarried children under eighteen years of age. Nevertheless, the Act counted those in Western Hemisphere colonies within the quotas of their respective colonizing powers.<sup>18</sup>

By 1929, then, only those races thought to be superior could join American society – or at least only those peoples that resembled Americans of years gone by. There remained a glaring exception: those from the Western Hemisphere were exempt from restriction, even if they were classed outside of the desired Nordic or Teutonic races. The invisibility and small proportion of Western Hemisphere immigrants who tended to work on farms, a push by Southern and Western legislators to keep the border open to these workers,<sup>19</sup> and

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<sup>17</sup> 39 Stat. 874, 876.

<sup>18</sup> The Act reads, "the term 'non-quota immigrant' means...(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him..." 43 Stat. 153, 155.

<sup>19</sup> Tichenor, *Dividing Lines*, 146.

a sense of neighborhood each contributed to keep the Western Hemisphere free of numerical quotas.

### *Good Neighbors and Discrimination: Toward Reform*

The national origins quotas of the 1924 Act did not come under serious threat of reform until the early 1950s. Those on both sides of the debate were troubled by past theories of superior races, and the role such dogmas played among the Nazis further doomed racist theories. The report of a 1950 Congressional commission, the McCarran Report, for example, repudiated “any theory of Nordic superiority” while arguing that the 1924 Act’s proponents were “fully justified in determining that...further immigration would not only be restricted but directed to admit immigrants considered to be more readily assimilable because of the similarity of their cultural background to those of the principal components of our population.”<sup>20</sup> A magazine article from the time by Robert C. Alexander sounded a similar theme: “Our national origins quota system is like a mirror held up before the American people,” allowing immigration in a way that reflects the national origins of the United States. Alexander reasoned, “Those who object to our national origins quota system obviously disapprove the national origins of our people.”<sup>21</sup>

An incipient reform movement was not strong enough to resist a repetition of the national origins quotas under a new guise in the Immigration and Nationality Act of 1952, known as the McCarran-Walter Act.<sup>22</sup> The law served primarily to introduce a new

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<sup>20</sup> *Immigration and Naturalization Systems of the United States: Report of the Committee on the Judiciary Pursuant to S. Res. 137 (80th Congress, 1st Session, as Amended), a Resolution to Make an Investigation of the Immigration System (McCarran Report)*, Senate Report 1515 (Washington, D.C.: Government Printing Office, 1950), 455.

<sup>21</sup> Robert C. Alexander, “Our National Origins Quota System: The Mirror of America,” *The American Legion Magazine*, September 1956, 52, quoted in Daniels and Graham, *Debating American Immigration, 1882-Present*, 198.

<sup>22</sup> Tichenor, *Dividing Lines*, 187, 189.

bureaucracy for immigration admissions, while maintaining the quotas that allowed admission to immigrants in proportion to the contribution a country made to the U.S. citizenry in 1920, altering the formula to one sixth of 1 percent of the 1920 figure.<sup>23</sup> The quotas saw only cosmetic changes, with one hundred visas annually for the previously barred Asia-Pacific triangle as well as for Western Hemisphere colonies, widely interpreted as an effort to prevent Afro-Caribbeans from immigrating to the United States.<sup>24</sup> The Act also left in place the exception for the Western Hemisphere, placing no quota on independent countries in the Americas.<sup>25</sup> Within the quotas, a new pattern of “preferences” for those with occupational skills and family connections guided the allocation of visas.<sup>26</sup> Naturalization law underwent a more significant shift than did immigration law when race was declared to be no longer a barrier to naturalization.<sup>27</sup>

Why did the McCarran-Walter Act of 1952 maintain only qualitative restrictions on Western Hemisphere immigration, imposing no numerical caps on independent countries? Just before the Act, the McCarran Report gave this rationale: “The blanket nonquota status in the case of Western Hemisphere aliens rests chiefly upon considerations arising from geographical proximity of Western Hemisphere countries and considerations of friendly relations among them.” The report also said that quota restrictions on the Western Hemisphere “are not compatible with our good-neighbor policy.”<sup>28</sup>

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<sup>23</sup> *An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes (Immigration and Nationality Act; McCarran-Walter Act)*, 66 Stat. 163, 1952, 175; see Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, Mass.: Harvard University Press, 2006), 318, and Ngai, *Impossible Subjects*, 249–250.

<sup>24</sup> 66 Stat. 163, 177–178; Zolberg, *A Nation by Design*, 312, 316–317.

<sup>25</sup> 66 Stat. 163, 169.

<sup>26</sup> *Ibid.*, 178.

<sup>27</sup> *Ibid.*, 239.

<sup>28</sup> *McCarran Report*, 473.

As applied to the Western Hemisphere, this Good Neighbor Policy was President Franklin D. Roosevelt's response to decades of distrust in response to the United States' readiness to intervene in Latin America. Earlier patterns of intervention by the U.S. in the Americas caused Roosevelt to move a step further the policies of nonintervention of his presidential forebears Calvin Coolidge and Herbert Hoover.<sup>29</sup> In 1933, at his first inauguration, Franklin Roosevelt said,

In the field of world policy I would dedicate this Nation to the policy of the good neighbor – the neighbor who resolutely respects himself and, because he does so, respects the rights of others – the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors.<sup>30</sup>

Roosevelt elaborated on the neighborliness of respect and obligation in a speech to the Pan-American Union a month later. He stressed the interdependence of nations, particularly in the Western Hemisphere, calling for a "Pan Americanism." Roosevelt called for "fraternal cooperation" and "friendship among nations," bound by "mutual...responsibilities." He went on to say that "The essential qualities of a true Pan Americanism must be the same as those which constitute a good neighbor, namely, mutual understanding, and, through such understanding, a sympathetic appreciation of the other's point of view." Roosevelt stressed that the hemisphere would defend itself, he opposed wars within the hemisphere, and he sought to abolish barriers to trade in the Americas.<sup>31</sup>

In the years of his presidency, Roosevelt took concrete steps toward becoming a good neighbor, or at least a better neighbor. He was the first president to discuss U.S.

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<sup>29</sup> Fredrick B. Pike, *F.D.R.'s Good Neighbor Policy: Sixty Years of Generally Gentle Chaos* (Austin: University of Texas Press, 1995), 171.

<sup>30</sup> Franklin D. Roosevelt, "Presidential Inaugural Address" (Washington, D.C., March 4, 1933), <http://www.inaugural.senate.gov/swearing-in/address/address-by-franklin-d-roosevelt-1933>.

<sup>31</sup> Franklin D. Roosevelt, "Address on the Occasion of the Celebration of Pan-American Day" (Washington, D.C., April 12, 1933), <http://www.presidency.ucsb.edu/ws/index.php?pid=14615>.

foreign policy with Latin American diplomats and the first to visit South America.<sup>32</sup> His administration took steps, too, offering a policy of nonintervention at the Montevideo Pan-American Conference, giving up most of its special privileges in Cuba, withdrawing troops from Haiti, and not intervening when Mexico nationalized American-owned oil industries.<sup>33</sup> One historian, Frederick B. Pike, interprets the Good Neighbor Policy as disingenuous, arguing that the U.S. defined whatever it was doing at the moment as nonintervention while continuing to intervene in Latin America, at least through economic measures and diplomatic encouragements or threats.<sup>34</sup> Pike raises further objections, writing that as Roosevelt faced Latin America, his outlook was European, and he romanticized the primitive “Other” of the Americas and constructed a mystical affinity for the hemisphere.<sup>35</sup> Nevertheless, Roosevelt succeeded in securing hemispheric unity against the Axis powers during the Second World War, but soon after and against talk of being a good neighbor, the United States picked up the pace of its Western Hemispheric interventions. Still, the notion of the Good Neighbor remained available for matters of Latin American relations in immigration law.

Along with the Good Neighbor Policy, a second reason that the Western Hemisphere was placed under no numerical restrictions in the McCarran-Walter Act had to do with a duplicitous truce with the illegal immigration of laborers. The McCarran Report stated, “The extensive Canadian and Mexican borders make it almost impossible to protect land borders from illegal entries.”<sup>36</sup> Such a statement acknowledged the futility of policing land borders, and it tacitly allowed the illegal movement of migrant workers across

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<sup>32</sup> Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1995), 63, 87.

<sup>33</sup> *Ibid.*, 66, 86, 87, 128, 175-176.

<sup>34</sup> Pike, *F.D.R.'s Good Neighbor Policy*, 164, 166.

<sup>35</sup> *Ibid.*, 211, 212.

<sup>36</sup> *McCarran Report*, 473.

the southern border. Senator Pat McCarran himself expressed such a desire in testimony to a Senate subcommittee, saying that illegal labor was better than *bracero* or contract labor. "A farmer can get a wetback and he does not have to go through that red tape," he stated. "We might just as well face this thing realistically. The agricultural people, the farmers...want this help. They want this farm labor. They just cannot get along without it."<sup>37</sup> This framer of the 1952 Act made plain that he did not want to discourage the illegal immigration of farm workers, citing the "reality" that farmers want and need these workers. We will hear more about this truce with the illegal immigration in the next section.<sup>38</sup>

In the years that followed, agitation continued against the national origins quotas and the discrimination that the 1924 Act's sponsor, Senator Reed, had said they represented. The reformers took aim at discrimination based on race or nationality. The 1953 report of a commission authorized by Truman while still in office in 1952, *Whom We Shall Welcome*, served as the manifesto of the movement. The report declared immigration law to be the sign of "whether Americans today believe in the essential worth and dignity of the individual human being," in "unalienable rights," in the notion that people are "the children of God."<sup>39</sup> The report judged that the national origins quotas system failed to uphold American ideals before other nations. "...We cannot be true to the democratic faith of our own Declaration of Independence in the equality of all men, and at the same time pass immigration laws which discriminate against people because of national origin, race, color, or creed," the Commission stated.<sup>40</sup> The Commission acknowledged that immigration laws needed to protect and preserve America from danger and disease, but it

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<sup>37</sup> Hearings before the Subcommittee of the Senate Committee on Appropriations on H.R. 4974, 83rd Congress, 1st Session (1953), 245-246, quoted in Eleanor Hadley, "A Critical Analysis of the Wetback Problem," *Law and Contemporary Problems* 21 (1956): 336, 337.

<sup>38</sup> See 3.A.2.

<sup>39</sup> *Whom We Shall Welcome*, xii.

<sup>40</sup> *Ibid.*, xiv.

expressed “that full security can be achieved only with a positive immigration policy based not on fears but on faith in people and in the future of a democratic and free United States.”<sup>41</sup> The Report called for faith: faith in the value of every human being, and faith that newcomers would aid in the continuing formation of a democratic America.

*Whom We Shall Welcome* linked immigration reform to another reform movement of the time when it said, “We cannot defend civil rights in principle, and deny them in our immigration laws and practice.”<sup>42</sup> The matter of equality for African-Americans was different from immigration law, as it concerned residents and citizens of the United States, yet the arguments were strikingly similar. As an example, two major provisions in the Civil Rights Act of 1964 used language that paralleled the campaign against discrimination in immigration law. In terms it reiterated for matters of employment, the Act declared, “All persons shall be entitled to the full and equal enjoyment of the goods [and] services...of any place of public accommodation...without discrimination or segregation on the ground of race, color, religion, or national origin.”<sup>43</sup> The power of these arguments was persuasive, and the immigration reform movement made use of a parallel discourse.

With support from each president in the 1950s and considerable support from both parties in Congress, it was not until the 1960s that promises of immigration reform came true. The man elected as president in 1960, John F. Kennedy, had published a book setting out the case for immigration reform while a Senator, arguing that the national

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid., xv.

<sup>43</sup> *An Act To Enforce the Constitutional Right to Vote, to Confer Jurisdiction upon the District Courts of the United States to Provide Injunctive Relief against Discrimination in Public Accommodations, to Authorize the Attorney General to Institute Suits to Protect Constitutional Rights in Public Facilities and Public Education, to Extend the Commission on Civil Rights, to Prevent Discrimination in Federally Assisted Programs, to Establish a Commission on Equal Employment Opportunity, and for Other Purposes (Civil Rights Act of 1964)*, 78 Stat. 241, 1964, 243, 255; cf. *Brown v. Board of Education of Topeka*, 349 U.S. 294, 298 (1954).

origins quota system was irrational and undemocratic.<sup>44</sup> In 1963, Kennedy commended immigration legislation to the House and the Senate, leveling the charge that the existing system was irrational, without national or international purpose, and “an anachronism, for it discriminates among applicants for admission into the United States on the basis of accident of birth.” Kennedy reiterated the themes of *Whom We Shall Welcome*, of equality and human dignity, of a nation made strong by immigrants, of “traditions of welcome.”<sup>45</sup> Still, it would not be until after his assassination that an immigration reform bill would pass in 1965. Through the skillful maneuvering of President Lyndon B. Johnson, Congress passed the bill with support in Congress of representatives from the urban Northeast and Midwest, despite the opposition of many from the South and Southwest. It was this Act that Johnson eulogized under the Statue of Liberty in New York harbor, proclaiming, “...it does repair a very deep and painful flaw in the fabric of American justice.”<sup>46</sup>

*Ending Discrimination and Imposing Numerical Limits on the Western Hemisphere:*

*The Immigration Act of 1965*

The Immigration Act of 1965 ushered in a new era for immigration law, both opening and restricting. Known by the names of its sponsors, Philip A. Hart in the Senate and long-suffering reformer Emanuel Celler in the House, the Act produced a great leveling. It provided opportunities for immigration for many Eastern Hemisphere countries, while at the same time establishing a global system of immigration restrictions that would touch

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<sup>44</sup> John F. Kennedy, *A Nation of Immigrants* (New York: Anti-Defamation League of B'nai B'rith, 1959).

<sup>45</sup> John F. Kennedy, “Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, July 23, 1963,” in *Public Papers of the Presidents of the United States: Containing the Public Messages, Speeches, and Statements of the President, January 1 to November 22, 1963* (Washington, D.C.: Government Printing Office, 1964), 594–97, <http://www.presidency.ucsb.edu/ws/?pid=9355>.

<sup>46</sup> Tichenor, *Dividing Lines*, 212–213; Ngai, *Impossible Subjects*, 258; Johnson, “Remarks at the Signing of the Immigration Bill.”

countries even in the Western Hemisphere. The Act dislodged national origins quotas, forbidding discrimination in the issuing of visas based on race, sex, or nationality.<sup>47</sup> At the same time, the Act retained the categories of the McCarran-Walter Act that gave priority to family members of citizens and legal residents, professionals, and desired workers.<sup>48</sup> In the language of the legislation, there was no “discrimination,” but there were “special immigrants” and “preferences.” For non-preference immigrants, the Hart-Celler Act allotted 170,000 places each year to the Eastern Hemisphere, and within this each country could take up twenty thousand places per year. No longer was Ireland preferred over Greece, Britain over Nigeria, or Germany over China; each country in the Eastern Hemisphere had been equalized. Beyond unlimited classes of family members and workers, every country was subject to a system that limited immigrants not by identifying some fault, lack, or threat they posed to the United States, but by simply allowing a certain number every year.

The changes did not stop there: for the first time, the Act of 1965 subjected the Western Hemisphere to a cap. Previous immigration reform bills from 1955 to 1965 had exempted the Western Hemisphere from numerical restrictions.<sup>49</sup> But as the House bill came to the Senate immigration subcommittee, Senators Sam Ervin and Everett Dirksen introduced an amendment, adding a cap on the Western Hemisphere. A result of a deal the Johnson administration made with those who were resisting reform, the amendment

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<sup>47</sup> 79 Stat. 911, 911.

<sup>48</sup> 66 Stat. 163, 169, 178; 79 Stat. 911, 911, 912.

<sup>49</sup> Ngai, *Impossible Subjects*, 255-257. *Ibid.*, 256n95, lists these as S. 1206, 84th Congress, 1st Session, 1955 (Lehman); H.R. 3364, 85th Congress, 1st Session, 1957 (Celler); S. 3043, 87th Congress 2d Session, 1962 (Hart); S. 747, 88th Congress, 1st Session, 1963 (Hart); S. 1932/H.R. 7700, 88th Congress, 1st Session, 1963 (Hart-Celler, Kennedy administration bill); S. 500/H.R. 2580, 89th Congress, 1st Session, 1965 (Hart-Celler, Johnson administration bill).

was included in the Act.<sup>50</sup> As approved, the legislation placed the Western Hemisphere under an overall cap of 120,000 per year with no per-country caps. Maintaining no per-country caps would allow nearest neighbors Mexico and Canada to continue to occupy the lion's share of the overall cap, which went into place in 1968.<sup>51</sup>

In the years to come, the logic of non-discrimination soldiered on. An amendment in 1976 extended the cap of twenty thousand for each foreign state from the Eastern Hemisphere to the Western Hemisphere, going into effect in 1977.<sup>52</sup> No longer could Mexico and Canada take up a large portion of the Western Hemisphere cap of 120,000 per year, and so immigration from Mexico and Canada would have to drop measurably if it was to remain legal. An amendment in 1978 united the two hemispheric caps into one global cap of 290,000, so that the Western Hemisphere no longer had proportionally more visas than the Eastern.<sup>53</sup> The move to limit numbers also continued, with a decreased global cap of 270,000 in 1980. 1990 legislation that would go into effect in 1994 introduced a cap of 675,000 on all sorts of immigrants, including family-sponsored and employment-based immigrants.<sup>54</sup> The moves to equalize all countries and to limit the numbers of all immigrants were complete.

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<sup>50</sup> Ngai, *Impossible Subjects*, 257–258; Zolberg, *A Nation by Design*, 332. Zolberg reports a deal between Dirksen and Attorney General Nicolas Katzenbach, *ibid.*, 332n120.

<sup>51</sup> The 1965 Act limited to 120,000 those “special immigrants” born in the Western Hemisphere and their spouses and children in Section 101(a)(27)(A) of the 1952 Immigration and Nationality Act, 79 Stat. 911, 916, 921.

<sup>52</sup> The 1976 Act eliminated those born in the Western Hemisphere from the “special immigrant category” and instituted a cap of twenty thousand per year for every single foreign state and six hundred per year for every colony or dependent area, *An Act To Amend the Immigration and Nationality Act, and for Other Purposes (Immigration and Nationality Act Amendments of 1976; Western Hemisphere Act)*, 90 Stat. 2703, 1976, 2704, 2076. See Ngai, *Impossible Subjects*, 261.

<sup>53</sup> *An Act To Amend Section 201 (a), 202(c) and 203(a) of the Immigration and Nationality Act, as Amended, and to Establish a Select Commission on Immigration and Refugee Policy*, 92 Stat. 907, 1978, 907.

<sup>54</sup> *An Act To Amend the Immigration and Nationality Act to Revise the Procedures for the Admission of Refugees, to Amend the Migration and Refugee Assistance Act of 1962 to Establish a More Uniform Basis for the Provision of Assistance to Refugees, and for Other Purposes (Refugee Act of 1980)*, 94 Stat. 102, 1980, 106–107; *An Act To Amend the Immigration and Nationality Act to Change the Level, and Preference System for Admission, of Immigrants to*

What was the source of the unprecedented 1965 move to place the Western Hemisphere under numerical limits? These limits had not come in Acts that sought to protect American racial and cultural uniformity, the Acts of 1924 and 1952, and thus the more moderate supporters of national origins quotas had not supported Western Hemisphere quotas. Only the fringe elements of the movement had pushed to cap immigration from the Americas. The idea of protecting American society from the peoples of Latin America gained a sense of urgency when growing populations in Latin America in the fifties and sixties led to predictions of increased migration to the United States.<sup>55</sup> Still, the liberal reform camp by and large eschewed Western Hemisphere quotas, and reformers Lehman, Hart, Celler, Kennedy, and Johnson did not include them in their bills from 1955 to 1965.<sup>56</sup> Nevertheless, the earliest proposal to reform the McCarran-Walter Act did include Western Hemisphere quotas. Though *Whom We Shall Welcome* advocated keeping the hemisphere out of the quotas in 1953, the proposal Senator Lehman made along with freshman Senator John F. Kennedy and others, and the proposal that Celler and Peter Rodino made in the House, did include Western Hemisphere quotas.<sup>57</sup> Here were the early signs that the reform movement was open to applying numbers across the entire globe.

Logically, Western Hemisphere quotas were consistent with the liberal aims of the reform movement. If reforms were to end discrimination based on race or nationality in immigration admissions, and if that was to be achieved by distributing visas equally, then it made no sense for Canadians, Mexicans, or Dominicans to be favored over Indians,

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*the United States, and to Provide for Administrative Naturalization, and for Other Purposes (Immigration Act of 1990)*, 104 Stat. 4978, 1990, 4982.

<sup>55</sup> Ngai, *Impossible Subjects*, 256.

<sup>56</sup> See note 49 above.

<sup>57</sup> Ngai, *Impossible Subjects*, 255; Zolberg, *A Nation by Design*, 318–319. The Senate bill was S. 2585, 83rd Congress, 1st Session, 1953 (Lehman), according to Ngai, *Impossible Subjects*, 256n95; Zolberg, *A Nation by Design*, 319n85.

Filipinos, or Chinese. Ngai finds an early instance of this logic in a letter by historian of immigration Oscar Handlin to Senator Lehman's executive assistant Julius Edelstein, writing in 1953,

Elimination of the Western Hemisphere [exemption from quota restriction] would be desirable. The argument of consistency, from our point of view, is so strong that none of the objections I have heard raised seem to me to have weight against it.<sup>58</sup>

Even if Western Hemisphere quotas cohered with Eastern Hemisphere quotas, what was the logic in allotting equal numbers of visas to countries that differed so widely in population? Why did China and Mongolia receive the same quota? Mae Ngai chalks it up to a commitment to formal equality. She says that the motivations of the reform movement depended in part on the Cold War demand that the United States represent democracy to the rest of the world.<sup>59</sup> To be a democratic nation that believed in human equality required placing citizens on an equal footing, and what was true for civil rights extended to immigration law. In Ngai's analysis, citing Oscar Handlin, the national origins quotas sent a message about those already present in the United States.<sup>60</sup> The quotas indicated that the descendants of immigrants from Poland, Italy, and Russia were less worthy to be Americans than the descendants of immigrants from Germany, Ireland, or England. Immigration reform was not needed so much because the U.S. had to treat other nations fairly, but because it needed to signal to current Americans citizens that they were of equal value, regardless of their national origin. For the reformers, the solution was to institute a "formal equality" between these groups, on Ngai's analysis.<sup>61</sup> They chose only one possible solution

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<sup>58</sup> Letter, Oscar Handlin to Julius Edelstein, July 17, 1953, file C76-18, Legislative files, Papers of Herbert H. Lehman, quoted in Ngai, *Impossible Subjects*, 255.

<sup>59</sup> *Ibid.*, 243.

<sup>60</sup> Oscar Handlin, "The Immigration Flight Has Just Begun," *Commentary* 14 (July 1952): 6; in Ngai, *Impossible Subjects*, 245.

<sup>61</sup> Ngai, *Impossible Subjects*, 245.

among many, giving equal numbers of visas to countries with unequal populations. This solution maintained a symbolic equality between nationalities.

Those who stood for formal equality tended to be from the Northeast of the United States, with only distant acquaintance with migration of migrant laborers across the U.S.-Mexico border. Ngai cites Handlin and Kennedy's writings on immigration as evidence that for these parochial universalists, the descendants of immigrants were primarily European-Americans.<sup>62</sup> Asian, African, and Latin American immigration did not figure prominently in their stories of immigration. Likewise, for these liberals, racism among immigrant groups was a primarily intra-European problem for the descendants of the likes of the English, the Italians, or the Russians. The reformers admitted equal treatment for those from the majority world, but what they promised conservatives, and what they seemed to believe, was that opening immigration from the Asia-Pacific Triangle would bring only a small increase in Asian immigration.<sup>63</sup>

On the occasion when the reformers did deal with Western Hemisphere policy, a strong commitment to the territorial nation-state was revealed. Against this backdrop, Lehman in 1954 decried the McCarran-Walter Act's continued openness to immigration from the Americas as allowing "undesirable aliens' by the thousands to stream across the Mexican and Canadian borders."<sup>64</sup> In the same year, Edelstein bemoaned the fact that

in 1953, 1,500,000 illegal immigrants – mostly wetbacks – streamed across the Mexican border, without so much as a How-do-you-do to an American immigration inspector. We stand triple guard, at the front door, bayonets at

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<sup>62</sup> Ibid., 246. Ngai points out that Kennedy's celebration of America as *A Nation of Immigrants* only spends two paragraphs on Asian and Latin American immigrants, *A Nation of Immigrants*, 1964, 62–63.

<sup>63</sup> Ngai, *Impossible Subjects*, 246. See Johnson, "Remarks at the Signing of the Immigration Bill."

<sup>64</sup> Letter, Herbert Lehman to Norman R. Sturgis, Jr., March 5, 1954, file C75-34, Legislative files, Papers of Herbert H. Lehman, quoted in Ngai, *Impossible Subjects*, 247.

the ready, to repel legal immigration, while illegal immigration swarms in at the back door and through the windows.<sup>65</sup>

The comments of these seminal figures in the reform movement, Lehman and Edelstein, permit an explanation for how the reformers were able to support Western Hemisphere quotas when conservatives demanded them in 1965. The reformers held to a universalism that was formal, demanding equal treatment of groups. That universalism was birthed in a region far from the site of migration through the back door, the migration of laborers from Mexico. The reformers expressed a strong attachment to territorial sovereignty, not taking into account the special nature of the United States' land borders nor the links between Western farms, industries, and migrant workers.

With numerical limits in place on Western Hemisphere immigration, the reach of immigration controls was complete. Now firmly in place was the assumption that immigration policy needed to restrict immigration from every country numerically, that every part of the globe needed constraint within a set of figures. The reformers of the fifties and sixties did not counter what they saw as discriminatory laws by lifting numerical restrictions and returning to only qualitative restrictions that would evaluate visa applicants for health or job skills or family connections. Instead, they extended the numerical restrictions that had first come into place in the 1920s. The reformers were not opposed to the restrictionists; they were restrictionists.<sup>66</sup> When they briefly justified their agreement on overall limits on immigration, Presidents Kennedy and Johnson sounded much like conservative Senator Robert C. Byrd. Kennedy said that the United States no longer needed settlers for virgin lands, and he said that the economy was growing more slowly

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<sup>65</sup> Transcript of Remarks by Julius Edelstein before National Federation of Settlements, March 1, 1954, file C75-34, Legislative files, Papers of Herbert H. Lehman, quoted in *ibid.*

<sup>66</sup> *Ibid.*, 227-228, 248-249, etc.; Zolberg, *A Nation by Design*, 293.

than it had.<sup>67</sup> Byrd, who opposed these presidents' reform bills, said that since the nation had expanded to use the resources available, it was time for the U.S. to stop seeking immigrants.<sup>68</sup> Johnson declared in front of the Statue of Liberty, "The days of unlimited immigration are past."<sup>69</sup>

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On the face of it, the reforms enacted in 1965 accomplished a laudable aim, removing the vestiges of racism from the law. With the passing of the Hart-Celler Act, Americans would no longer look at immigration law and feel that they were more or less worthy of membership than someone else. Still, the reforms further ensconced a tendency of the 1920s legislation and agreed to something new. The global reach of immigration controls that began in 1921 was complete: immigration from each region of the world was fixed by numbers. At the same time, a push to replace quotas that favored northwestern Europe with color- and culture-blind admissions brought about numerical caps on Western Hemisphere immigration. If in the name of ending discrimination, it was fair to subject the Eastern Hemisphere to formal equality, and it was fair to do the same to the Western Hemisphere. The move ignored the greater proximity of some countries than others, and the United States tried to treat Mexico like any other country. Forgetting its aspirations to be a good neighbor, the United States turned out to be an indifferent neighbor and an oppressive neighbor, as we will see.

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<sup>67</sup> Kennedy, *A Nation of Immigrants*, 1964, 80.

<sup>68</sup> Robert C. Byrd, in *Congressional Record – Senate*, vol. 111, 1965, 23793–23795, quoted in Daniels and Graham, *Debating American Immigration, 1882-Present*, 201, 202.

<sup>69</sup> Johnson, "Remarks at the Signing of the Immigration Bill."

### 3.A.2. Migration Between Mexico and the United States

The move to end discrimination based on national origin had particular import for the United States' neighbor to the south, Mexico. Sharing a long land border that now runs to nearly two thousand miles, the two countries are linked not only by geography but by war, trade, and migration. In what follows, we offer an analysis of Mexican-U.S. relations that highlights territorial claims and migration. What emerges is a pattern of Mexicans migrating to the U.S. who, in the words of American voices from the time, provided backs and arms to serve American brains. Immigrating as contract laborers and increasingly as undocumented workers, these would form an enduring class of those who are "neither slave nor free," in the words of an historian.<sup>70</sup> This, we will argue, was a direct result of reforms that sought to end discrimination based on nationality while ignoring that the United States has neighbors.

#### *American Migration to Mexico: Insurrection, War, and Land-Grabbing*

The tale begins with two federal republics, recently independent from European colonial powers and only recently sharing a land border. As Mexico declared independence from Spain in 1810, as Spain recognized that independence in 1821, and as Mexico instituted a republican constitution in 1823, the new country held approximately twice as much territory as it does today. Mexico included its current lands from Chiapas to Baja California along with the states of Texas, New Mexico, and Alta California, as far north as the border with Oregon. Most of the former British colonies to the north had declared independence

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<sup>70</sup> Zolberg, *A Nation by Design*, 181. We are indebted to Victor Carmona for pointing out Zolberg's phrase, which forms a focus of Carmona's critique of U.S. immigration preferences in "Love and Conflict in U.S. Immigration Preferences: Insights from the Christian Tradition" (Ph.D. Dissertation, University of Notre Dame, forthcoming).

in 1776, which Britain acknowledged in 1782 and 1783, and the new federation approved a lasting constitution in 1789. The United States of America controlled land from the Atlantic to the Mississippi River, and an 1803 purchase from France doubled its territories, adding lands west of the Mississippi River to the Rocky Mountains and north to the British Canadas. 1819 saw the United States acquire lands from Spain, the Floridas, and in 1846 it gained lands from Great Britain, the Oregon territory to the forty-ninth parallel. Both sides had gained their territories from a multitude of native peoples. As new confederations, the Estados Unidos Mexicanos and the United States of America came to abut one another along a line winding from Louisiana northwest along the mountainous continental divide.

The relations of these new neighbors started off with a bang. Mexico's northern lands were sparsely populated, and in this period some twenty to thirty thousand United States citizens moved into Texas on the invitation of the Mexican government. After Mexico halted further immigration in 1830 and introduced measures to give the capital more control over the Mexican states, American immigrants sought to throw off what they saw as harsh control. They declared Texas independent in 1836, and after a famous loss at the Alamo, Texans of American and Mexican descent defeated the federal Mexican forces. After most of a decade as an independent republic, Texas became a U.S. state in 1845, with a southern border at the Nueces River, when one writer famously stated that other nations working against this annexation were "checking the fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions."<sup>71</sup> Having come to power on a platform of annexing Mexican lands, U.S. President James K. Polk claimed that Texas extended farther south to the Rio Grande,

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<sup>71</sup> John O'Sullivan, "Annexation," *United States Magazine and Democratic Review* 17, no. 1 (1845): 5-10, in Christopher Conway, ed., *The U.S.-Mexican War: A Binational Reader* (Indianapolis: Hackett Publishing Company, 2010), 51-54.

also known as the Río Bravo del Norte. When Mexico rebuffed Polk's efforts to buy the land between the rivers, Polk commanded troops to move into the disputed area in 1846. Two months later, Mexican forces attacked American troops in a war they saw themselves forced into, and Polk cited this as provocation for war, failing to honor requests by Abraham Lincoln in Congress for clarification about whether these attacks took place on American soil.<sup>72</sup>

Though Whigs alleged that the war was a way to seize land illegitimately,<sup>73</sup> the majority in the U.S. Congress supported the war, with Democrats in the South leading the way. A declaration of war ensued, and after some months of fighting, Mexico also declared war. Mexico proved too disunited at home to wage an effective war, and during the war it experienced antagonism between federalists and centralists, rioting in Mexico City, and multiple coups that finally saw Antonio López de Santa Anna serve as general.<sup>74</sup> After victories in Upper California and New Mexico, U.S. forces under Winfield Scott took Mexico City in 1848. In the settlement that ended the war, the Treaty of Guadalupe Hidalgo, the U.S. gained land north of the Rio Grande as well as lands north of a line that ran from the western fringes of the river to the Pacific Ocean. What it gained would become part or all of eight U.S. states, Arizona, California, Colorado, Nevada, New Mexico, Oklahoma, Utah, and Wyoming.<sup>75</sup> Perhaps as an indication of remorse over the war, the United States paid Mexico fifteen million dollars for these lands and assumed

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<sup>72</sup> James K. Polk, "War Message," May 11, 1846, in Conway, *The U.S.-Mexican War*, 58-61; among Lincoln's protestations was the Spot Resolution, December 22, 1847, in *ibid.*, 122-124; Christopher Conway, "Introduction," in *ibid.*, xii-xxi; Orlando Martínez, *The Great Landgrab: The Mexican-American War, 1846-1848* (London: Quartet Books, 1975), 7.

<sup>73</sup> Representative Joshua Giddings of Ohio, May 12, 1846, in Conway, *The U.S.-Mexican War*, 108-109.

<sup>74</sup> Conway, "Introduction," in *ibid.*, xix-xxi; Timothy J. Henderson, *A Glorious Defeat: Mexico and Its War with the United States* (New York: Hill and Wang, 2007), xviii.

<sup>75</sup> "Treaty of Guadalupe Hidalgo (February 2, 1848)," in *Treaties and Conventions between the United States of America and Other Powers Since July 4, 1776* (Washington, D.C.: Government Printing Office, 1871), [http://avalon.law.yale.edu/19th\\_century/guadhida.asp](http://avalon.law.yale.edu/19th_century/guadhida.asp), art. 5.

millions more in claims that U.S. citizens had made against Mexico.<sup>76</sup> For the Mexican nationals that lived in these newly acquired lands, the Treaty stipulated that if they remained, they could either remain Mexican citizens or become citizens of the United States.<sup>77</sup> Despite the protestations of some in its legislature, Mexico begrudgingly accepted the terms of the treaty, and no more than fifty thousand Mexicans became U.S. citizens through its provisions.<sup>78</sup> Five years later, in the Gadsden Treaty of 1853, the United States bought a southerly strip of land south of the Gila River from Mexico for ten million dollars for the purpose of building another transcontinental rail link.

Armed rebellion by American immigrants to Mexico, war, and American seizures of land characterized the early decades of relations between two newly independent colonies, Mexico and the United States. U.S. citizens moved into Mexican lands and fought to be an independent country, the United States acquired that country and much more under questionable circumstances. As a result, those Mexicans who did not move south found that the border crossed them, that all of a sudden they were in the U.S. with the opportunity to become naturalized citizens. On the one hand, very few Mexicans lived in the northern territories that became U.S. possessions. It appears that Mexico was too divided to populate and govern these northern lands, while Americans were ready to begin settling Texas and beyond. On the other hand, President Polk jumped at an excuse to go to war with Mexico and to claim new lands, in an era when the ideology of Manifest Destiny ruled and the United States saw itself as destined to gain lands “from sea to shining sea.”

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<sup>76</sup> Ibid., art. 12-15; Otis A. Singletary, *The Mexican War* (Chicago: University of Chicago Press, 1960), 5.

<sup>77</sup> “Treaty of Guadalupe Hidalgo,” art. 8.

<sup>78</sup> Conway, “Introduction,” in *The U.S.-Mexican War*; Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Free Trade* (New York: Russell Sage Foundation, 2002), 25.

Though many Americans gathered around the war effort against Mexico, there were protesters, among them Lincoln, who said that “the blood of this war, like the blood of Abel, is crying out against it.”<sup>79</sup> In the years following the war, opinion did not look so favorably on the war. Ulysses S. Grant, who served in the war before leading the Union forces in the United States Civil War and serving as the nation’s president, said in 1879, “I do not think there was ever a more wicked war than that waged by the United States on Mexico. I thought so at the time, when I was a youngster, only I had not the moral courage enough to resign.”<sup>80</sup> The war did much more than resolve the dispute about the southern border of Texas: it brought in vast new western lands to the United States. The war transferred lands to a country more capable of fending off attacks from Comanches, Navajos, Apaches, and other indigenous peoples who had first settled the region, and the U.S. soon managed to contain on reservations what the Treaty of Guadalupe Hidalgo called “savage tribes.”<sup>81</sup> In the Texan revolt and again in the U.S.-Mexican War, United States citizens proved the aggressors, violating Mexican sovereignty and dispossessing it of half of its lands. Americans think little on the war, but *la Guerra de 47* or *la invasión norteamericana* remains in the collective Mexican memory as a national failure and reason for suspicion of their northern neighbor.<sup>82</sup>

It is to this triangle of land the United States wrested from Mexico that the majority of Mexican immigrants to the United States have come. The new border crossed Mexicans, and from the early twentieth century, many more Mexicans crossed the border. In the

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<sup>79</sup> Robert W. Johannsen, *To the Halls of the Montezumas: The Mexican War in the American Imagination* (New York: Oxford University Press, 1985), chap. 3–5; Martínez, *The Great Landgrab*, 8.

<sup>80</sup> Grant to a journalist, quoted in Amy S. Greenberg, *A Wicked War: Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico* (New York: Alfred A. Knopf, 2012), 274.

<sup>81</sup> Brian DeLay, *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War* (New Haven: Yale University Press, 2008), xv, xxi; “Treaty of Guadalupe Hidalgo,” art. 11.

<sup>82</sup> Michael Van Wagenen, *Remembering the Forgotten War: The Enduring Legacies of the U.S.-Mexican War* (Amherst: University of Massachusetts Press, 2012), xv; Martínez, *The Great Landgrab*, 2.

United States, those who began to immigrate from Mexico were in a state of limbo since at the time, naturalization law only enabled persons who were white or of African descent or nativity to become citizens.<sup>83</sup> As a *mestizo* people descended from Spanish colonizers and indigenous peoples, Mexicans were seen as racially ambiguous. The eligibility of Mexicans for citizenship was tested in 1897, when a federal court considered whether Ricardo Rodriguez could become a citizen. A native of Mexico, Rodriguez lived in San Antonio, Texas, for ten years, and a district court judge classed him “with the copper-colored or red men.” The judge decided that he was not an Indian, since he “knows nothing of the Aztecs or Toltecs.”<sup>84</sup> In the final case, the judge admitted that though Rodriguez might not strictly be classed as white, the Texas constitution, the Treaty of Guadalupe Hidalgo, the Gadsden Treaty, and other agreements gave citizenship to Mexicans or allowed for their naturalization without reference to color.<sup>85</sup> Because testimony indicated that Rodriguez was “a very good man, peaceable and industrious, of good moral character, and law-abiding ‘to a remarkable degree,’” the judge allowed him to be naturalized.<sup>86</sup> The case established that Mexicans could seek naturalization, but their status remained ambiguous. Even as Euro-Americans in the new Southwest intermarried with Mexican-Americans, rhetoric against Mexicans grew, alleging criminality, lack of health, mental disability, and a liability to become a public charge.<sup>87</sup>

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<sup>83</sup> *An Act to Establish an Uniform Rule of Naturalization*, 1 Stat. 103, 1790, 103, stated that only a “free white person” was eligible for citizenship. In 1868, the Fourteenth Amendment to the United States Constitution declared that all those born in the United States were citizens, allowing former slaves and their descendants to become citizens. Two years later, *An Act to Amend the Naturalization Acts and to Punish Crimes against the Same, and for Other Purposes*, 16 Stat. 254, 1870, 256, stated that “naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.” Only with 66 Stat. 163, 239, did the law state that race could not be a factor in determining eligibility for naturalization.

<sup>84</sup> *In re Rodriguez*, 81 Fed. 337, 337–338 (W. D. Tex. 1897).

<sup>85</sup> *Ibid.*, 81:348, 350, 354–355.

<sup>86</sup> *Ibid.*, 81:355.

<sup>87</sup> Ngai, *Impossible Subjects*, 52–53.

From the end of the U.S.-Mexican War until the 1920s, the new U.S.-Mexico border existed in law and on maps, but it hardly existed as a physical reality. This was especially the case west of the Rio Grande, where the border was little more than a line drawn on a map accompanied by a few piles of stones and markers laid down by representatives of the two countries. A series of events began to make the border more significant, from civil conflicts to contraband trade. In the U.S. Civil War of 1861 to 1865, trade bypassed a Union naval blockade, moving through Mexico to supply the Confederate states. During the Mexican Revolution of 1910 to 1917, U.S. border towns proved places for combatants to seek refuge, assemble, and secure weapons. Border towns were sources of banned goods and entertainment, especially during the United States' era of prohibition on alcohol, and the border limited each country's authorities from pursuing both native peoples and criminals. With the founding of the U.S. Border Patrol in 1924, policing made the border a more tangible reality.<sup>88</sup>

### *Mexican Migration to the United States: Backs and Arms in the Early Twentieth Century*

While in the late nineteenth century, only about thirteen thousand Mexicans had migrated to the new U.S. lands, the pace increased at the turn of the century.<sup>89</sup> The latter years of the presidency of Porfirio Díaz in Mexico (1876-1910) brought privatization, growth in rail and mining, the fencing and consolidation of lands, and the mechanization of agriculture. By the end of the Porfiriato, some 95 percent of rural households were landless, and there was little rural work.<sup>90</sup> Crossing a border that was only minimally policed, Mexicans began to

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<sup>88</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 25-26.

<sup>89</sup> *Ibid.*, 26, 31.

<sup>90</sup> *Ibid.*, 29-30.

move north to work on the farms of the American Southwest.<sup>91</sup> There, few U.S. citizens wanted to work in the heat, where with only occasional dwellings in the large fields, workers spent harvest seasons in temporary accommodations.<sup>92</sup> After the migration of workers from China and then Japan was halted, Western farmers and industrialists desired more laborers, and private labor contractors began to recruit men from Mexico. In what was called *el enganche* or “the hook,” recruiters told Mexicans of riches to be made in the U.S. and advanced them the money to travel north. On arrival, they were bound to repay the *enganchadores* while facing low wages, high interest rates, and poor working conditions.<sup>93</sup> The only large movement of refugees in the history of migration from Mexico to the U.S. came around the same time, during the violent final years of the Mexican Revolution.<sup>94</sup>

The U.S. Immigration Act of 1917 placed a hold on free movement so that Mexican nationals could not only be excluded from the United States because they were liable to become a public charge, but because they failed to pass a literacy test or pay an increased head tax of eight dollars.<sup>95</sup> But such a hold did not stand: in the same year, as the United States fought in the First World War, Secretary of Labor William B. Wilson used a proviso of the Act to waive these requirements for laborers coming to the United States from Mexico. Along with the Immigration Bureau, the Labor Department enabled thousands of Mexicans to work as contract laborers while U.S. citizens fought abroad, and the 1917 restrictions continued to be waived beyond the war’s ending in 1918 until 1921.<sup>96</sup> Many others avoided the legal requirement that they bathe, be deloused, have their baggage

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<sup>91</sup> Tichenor, *Dividing Lines*, 168.

<sup>92</sup> Timothy J. Henderson, *Beyond Borders: A History of Mexican Migration to the United States* (Malden, Mass.: Wiley-Blackwell, 2011).

<sup>93</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 27–28.

<sup>94</sup> *Ibid.*, 30.

<sup>95</sup> 39 Stat. 874, 875, 877.

<sup>96</sup> Tichenor, *Dividing Lines*, 169–170; see 39 Stat. 874, 878. Restrictions were lifted first on agricultural workers in 1917 and then on mining, rail, factory, and construction workers in 1918, Henderson, *Beyond Borders*, 31.

fumigated, shave their heads, and walk naked before medical inspectors, and many migrated illegally to work in the U.S.<sup>97</sup>

In 1921, when the first national quotas were set in place, an exemption of the Western Hemisphere from the quotas enabled laborers to continue to come north. Though nativists feared the results of intermarriage between Mexicans and Anglo-Saxons, farm lobbies and Southern and Western lawmakers pushed for continuing exemption for the Western Hemisphere from the quota system. Many nativists came to see Mexicans on labor contracts in the United States as no threat to white civilization, since in Tichenor's words they were "by definition temporary, powerless, and easily expelled."<sup>98</sup> In the end, Congress exempted immigrants from the Western Hemisphere from quotas in the Johnson-Reed Act of 1924.

The demand for migrant laborers from Mexico was made clear in testimony before a House committee two years later. Representing thousands of sugar beet farmers in Colorado, Fred Cummings declared that ten years before, farm help had come from Russia or Germany, but now many of those men and women owned or rented farms. The farmers looked to help from Mexicans, whom he said produced more sugar beets per acre than the remaining Russian or German workers.<sup>99</sup> Cummings testified,

...There is not a white man of any intelligence in our country that will work an acre of beets.... I want to say that I do not want to see the condition arise again when white men who are reared and educated in our schools have got to bend their backs and skin their fingers to pull those little beets.... If you are going to make the young men of America do this back-breaking work, shoveling manure to fertilize the ground, and shoveling beets, you are going to drive them away from agriculture. I will tell you, you have got to give us a

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<sup>97</sup> Henderson, *Beyond Borders*, 35.

<sup>98</sup> Tichenor, *Dividing Lines*, 170, 172.

<sup>99</sup> *Seasonal Agricultural Laborers from Mexico: Hearings before the Committee on Immigration and Naturalization, House of Representatives, 69th Congress, 1st Session, January 28 and 29, February 2, 9, 11, and 23, 1926, on H.R. 6741, H.R. 7559, H.R. 9036* (Washington, D.C.: Government Printing Office, 1926), 61.

class of labor that will do this back-breaking work, and we have the brains and ability to supervise and handle the business part of it. There is no danger of that class of labor taking over the supervising work.<sup>100</sup>

The lines were clear: white, educated, with brains, unwilling to pull beets on the one side, and a laboring class, skinning their fingers, bending and breaking their backs, on the other side.

The coming of the Depression changed the tenor of the debate, and the American Federation of Labor (A.F.L.) spoke out against the some two million Mexicans whom they believed were in the United States.<sup>101</sup> The Immigration Bureau responded with a 1929 campaign that combined a few deportations of undocumented Mexican workers with prominent publicity that prompted hundreds of thousands more to return to Mexico.<sup>102</sup> At the same time in Mexico, the new *mestizo* class that came to power after the Revolution enacted a redistribution of land that came to fruition in the 1930s, dividing up rural estates and providing opportunities that reduced the push for the rural poor to migrate to the United States.<sup>103</sup> In the same decade, the A.F.L. continued to campaign for Western Hemisphere quotas, but soon another war changed the game. As U.S. citizens once again left to fight in the Second World War, Western growers asked for Mexican workers. The Roosevelt administration responded in 1942, negotiating a treaty with Mexico to bring what would be called *braceros* to lend their *brazos* or arms to work in the fields. In the treaty, the U.S. promised fair wages, good living and working conditions, no discriminatory acts, and no military service for *braceros*, and the Mexican government would oversee their recruitment and contracting. The Bracero Program brought hundreds of thousands from Mexico to the U.S. to work over the course of two decades, but neither the federal U.S.

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<sup>100</sup> Ibid., 62, 66.

<sup>101</sup> Tichenor, *Dividing Lines*, 172.

<sup>102</sup> Ibid., 173.

<sup>103</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 30-31.

administrators nor the employers kept to the terms of the agreement. *Braceros* were regularly paid less than citizens, their living and working conditions were poor, and employers were allowed to recruit *braceros* right at the border. Many more Mexicans circumvented the terms of the Bracero Program to immigrate illegally, and those that swam across the Rio Grande earned these migrants the name *mojados* or wetbacks.<sup>104</sup>

In the 1950s, as *braceros* continued to work in the U.S. without receiving the protections they had been promised, and as other Mexican nationals came to work illegally, the federal government struggled over how best to proceed. One response was to “dry out wetbacks”; the Border Patrol rounded up men who were unlawfully present, taking them to recruitment centers on the Mexican border, where they were legalized under the Bracero Program and “paroled” to American employers who had wide authority over them.<sup>105</sup> A second response was to avoid enforcing measures against illegal immigration in an effort to protect crops. Under pressure from farm groups, the Immigration and Naturalization Service (I.N.S.) periodically avoided deporting those illegally present and allowed them to work the fields.<sup>106</sup> A third response came in a convoluted section of the McCarran-Walter Act of 1952, which placed a ban on helping to enter, transporting, harboring, or concealing an alien not lawfully admitted, while declaring that employment did not constitute harboring. This provision made a show of cracking down on illegal entry but protected those who employed unauthorized workers in what was called the “Texas proviso.”<sup>107</sup>

A fourth response came in the same Act of 1952, where deportation of long-term residents of good moral character could be stayed and they could be given permanent

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<sup>104</sup> Tichenor, *Dividing Lines*, 173–174; Zolberg, *A Nation by Design*, 308–311.

<sup>105</sup> Zolberg, *A Nation by Design*, 309; Henderson, *Beyond Borders*, 73–74.

<sup>106</sup> Tichenor, *Dividing Lines*, 174, 201.

<sup>107</sup> 66 Stat. 163, 228–229; Tichenor, *Dividing Lines*, 194; Zolberg, *A Nation by Design*, 310.

residence if deportation would cause them or their families severe hardship. Those from contiguous countries – Mexicans – were excluded from this ban on deportations, making it more difficult for them to join a path to citizenship.<sup>108</sup> A fifth response was the first large deportation campaign in years, Operation Wetback of 1954. The I.N.S. recruited a military general who rounded up over a million illegal aliens who worked in Southwestern farms and Midwestern factories in what the then Attorney General called a “wetback invasion.”<sup>109</sup> Though the I.N.S. declared that it had secured the border, this was an empty boast. What Tichenor calls an “iron triangle” of growers, Congressional subcommittee chairs, and I.N.S. bureaucrats protected a continuing stream of temporary Mexican laborers.<sup>110</sup>

Despite talk from the time of the Mexican Revolution of the “Mexican family” with the government as patriarch, Mexicans continued to move north to the United States.<sup>111</sup> In one instance in 1952, when the United States and Mexico failed to come to an agreement and Mexico forbade its people from crossing into the U.S., Mexican immigrants rushed the border against an opposing force of U.S. border guards.<sup>112</sup> Those who made their way north were met by American business owners who willingly hired both those who came legally and those who came illegally, not only on farms, but in mining, construction, and railroads. Alongside the many *braceros* came an increasing number of legal immigrants from Mexico, though *braceros* far outnumbered them. In the period of the Bracero Program (1943-64), numbers of both peaked in 1956, when there were over 445,000 *braceros* and over sixty-five thousand legal immigrants who were granted permanent residence.<sup>113</sup> In this

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<sup>108</sup> 66 Stat. 163, 214–216; Zolberg, *A Nation by Design*, 313.

<sup>109</sup> Tichenor, *Dividing Lines*, 202.

<sup>110</sup> *Ibid.*

<sup>111</sup> Henderson, *Beyond Borders*, 75.

<sup>112</sup> *Ibid.*, 71.

<sup>113</sup> Data from I.N.S., *Annual Report, 1943-1964* (Washington, D.C.: Government Printing Office, 1944-1965), cited in Tichenor, *Dividing Lines*, 210, table 7.9.

year, Mexico emerged as the largest source of legal immigrants to the United States, and it would remain so from 1956 on through the turn of the century.<sup>114</sup> Still, at this point most Mexicans coming to the U.S. came as temporary workers, and the Mexican immigrant became identified in the minds of Americans with the manual laborer who lacked a path to citizenship.

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Amid the seeming incoherence of the policies in the *bracero* era there emerged a marked coherence. As arms of the federal government sometimes deported but often turned a blind eye to illegal entry, as legal guest workers were underpaid for work in poor conditions while those who worked illegally experienced much the same, patterns became firmly established. Mexican migration to the U.S. became frequent and circular, and many returned after short stays as *braceros* or without lawful admission across a little-policed land border.<sup>115</sup> First Southwestern growers, and then employers in other industries, became “addicted to Mexican labor.”<sup>116</sup> And those who came to the U.S. from Mexico were understood primarily as labor or as workers, but not as persons. As testimony from the Great Western Sugar Company indicated, Mexicans provided backs for the breaking and fingers for the skinning to complement American brains. Those who came through the Bracero Program were valued for their arms, their *brazos*. Men and women from Mexico formed a class of bodies to work for American businesses.

This is the class of those who are “neither slave nor free,” on Zolberg’s interpretation, a long-running class of contract laborers and unauthorized workers who

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<sup>114</sup> Zolberg, *A Nation by Design*, 321.

<sup>115</sup> Henderson, *Beyond Borders*, 87.

<sup>116</sup> Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882* (New York: Hill and Wang, 2004), 142.

have entered through a “revolving back door” of United States immigration policy.<sup>117</sup> As Federal policies authorized yet restrained the enforcement of immigration laws at the border, and as they forbade the harboring of unauthorized workers but exempted employers from prosecution, disparate federal policies conspired to maintain a class of men and women from Mexico in a liminal state. As Congress promised that *braceros* would be well treated but broke the agreement, and as it encouraged Mexicans to come for a short time but prevented them from seeking permanent residence, the legislature colluded to foster the growth of this suspended class. These men and women remained in limbo between free and slave, between legal and illegal, between dominated and self-determined. They would be present in American communities, but they would move on soon enough; they would work willingly but not supervise others in work. In another of Zolberg’s phrases, they were “wanted but not welcome.”<sup>118</sup>

This era reached its denouement soon enough when Congress failed to renew the Bracero Program in 1964, under attack from 1961 onward. Religious groups and welfare organizations denounced the Bracero arrangement for keeping men and women in poor conditions.<sup>119</sup> Representative Henry B. Gonzalez, Democrat of Texas, emerged as a voice for Latino civil rights, arguing that Latinos should be welcomed as legal immigrants who could become citizens of the United States.<sup>120</sup> The united A.F.L.-C.I.O. argued that the program caused problems not only for *braceros* but also for U.S. citizen farmworkers.<sup>121</sup> Other factors, such as the increased mechanization of cotton picking in Texas, also played a

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<sup>117</sup> Zolberg, *A Nation by Design*, 10, 181. Zolberg traces the origins of this class to the Chinese laborers who came to California from 1848 onward, *ibid.*, 181.

<sup>118</sup> Zolberg, *A Nation by Design*, 313.

<sup>119</sup> Tichenor, *Dividing Lines*, 209.

<sup>120</sup> *Ibid.*, 211n116, n117, cites *Congressional Record*, Sept. 18, 1963, pp. 16438-16439, and an interview with Gonzalez.

<sup>121</sup> *Ibid.*, 209, 211.

part.<sup>122</sup> Protests from agricultural lobbies kept the program afloat for a time, but it expired in 1964.

*Exploding Illegal Immigration and the Growth of a Permanent Underclass in the Late Twentieth Century*

It was at this moment that the Immigration Act of 1965 arrived. As U.S. farmers and businesspeople came to count on temporary Mexican laborers, both legal contract workers and undocumented workers, the legal route for menial laborers came to a halt. Labor markets had adapted to this source of labor, and a structural demand for migrant labor remained after the Bracero Program was gone.<sup>123</sup> In the latter years of the contract labor schemes and until the 1965 Act went into effect in 1968, a smaller but still significant number of Mexicans received visas for permanent residency. In 1968, when Mexican immigration came under the Western Hemisphere cap, prospective immigrants had to compete with other countries from the Americas for space within the 120,000 limit. The favoring of Cuban immigrants in the aftermath of the 1959 Revolution resulted in a successful class-action lawsuit by Refugio Silva, who alleged that Mexican immigrants were disadvantaged by Washington's political stance against the communist regime in Cuba. As a result, during a brief window from 1977 to 1981, Mexicans received nearly 150,000 extra visas.<sup>124</sup>

But soon, legal immigration from Mexico was subject to the stricter caps of 1976 Congressional legislation that allowed Mexico only twenty thousand non-preference slots and erected barriers to family reunification by preventing citizens under twenty-one years of

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<sup>122</sup> Zolberg, *A Nation by Design*, 321-322.

<sup>123</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 41.

<sup>124</sup> *Ibid.*, 43.

age from petitioning for visas for a parent.<sup>125</sup> Though visas for close family members and desirable workers were not under numerical restrictions, by the early 1980s, the scene had changed drastically. While in 1956, over 450,000 per year received *bracero* permits and over 65,000 received permanent residency visas from Mexico, legal Mexican immigration dropped to 45,000 in 1977, surged to 101,000 in 1981 with the Silva program, and settled at around 55,000 to 60,000 in the early 1980s.<sup>126</sup> In the space of three decades, legal immigration from Mexico was a tenth of what it had been. This same period saw population growth and economic decline in Mexico. The habitual, ingrained patterns of Mexican migration to the United States did not go away, and as Massey, Durand, and Malone put it, “only one outcome was possible: the explosion of undocumented migration.”<sup>127</sup>

This explosion of illegal immigration came, first with a mobile class of short-term migrants, and after 1986, with a growing class of settled migrants. Substantiating such a claim with numbers requires delving into what one article in demography calls “A Count of the Uncountable” in a search that reveals as much about the limits of statistical analysis as it does about what it is like to migrate without authorization.<sup>128</sup> Before 1965, the available statistics count deportations, which are only tenuously related to the number of those who migrate temporarily or permanently.<sup>129</sup> For the period from 1965 to 1986, demographers offer figures of high rates of entry and exit, with a comparatively small number that remain in the United States. Heer estimated in 1979 that from 1970 to 1975, the net flow of those

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<sup>125</sup> 90 *Stat.* 2703, 2704, 2705.

<sup>126</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 43–44.

<sup>127</sup> *Ibid.*, 44.

<sup>128</sup> Robert Warren and Jeffrey S. Passel, “A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census,” *Demography* 24, no. 3 (August 1, 1987): 375–93.

<sup>129</sup> See, for example, Parker Frisbie, “Illegal Migration from Mexico to the United States: A Longitudinal Analysis,” *International Migration Review* 9, no. 1 (April 1, 1975): 5.

in the country unlawfully was anywhere from 82,000 to 232,000 per year.<sup>130</sup> In 1986, Passel adjusted U.S. Census data to estimate that in 1980, there were between 2.5 and 3.5 million at any one time who were unlawfully present, with approximately two thirds of these from Mexico.<sup>131</sup> In 1995, Massey and Singer drew on surveys from Mexican communities to estimate that from 1965 to 1986, 28.0 million Mexicans entered the United States unlawfully, though only 4.6 million of those stayed.<sup>132</sup> During the same period, there were a mere 1.3 million legal immigrants and forty-six thousand contract workers from Mexico.<sup>133</sup> Thus, during these two decades, Mexican migrants to the United States tended to immigrate illegally and stay only temporarily before returning to Mexico. For the young men who made up most of these temporary workers, the United States in effect operated a permanent guest worker program, though this time without legal approval or the protections that the law might afford.

This community in the shadows changed shape after the Immigration Reform and Control Act of 1986, briefly shrinking in size, but soon growing rapidly and becoming more permanent. The 1986 legislation allowed two categories of those unlawfully present to gain legal status, those present since 1982 as well as Special Agricultural Workers, and by 1992 some 2.7 million had been legalized.<sup>134</sup> After a brief drop in numbers, studies indicate

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<sup>130</sup> David M. Heer, "What Is the Annual Net Flow of Undocumented Mexican Immigrants to the United States?," *Demography* 16, no. 3 (August 1, 1979): 421.

<sup>131</sup> Jeffrey S. Passel, "Undocumented Immigration," *Annals of the American Academy of Political and Social Science* 487 (September 1, 1986): 188, draws his figures from the 1980 Census, adjusting for estimates of what percentage of those unlawfully present the Census successfully counted. Kenneth Hill, "Illegal Aliens: An Assessment," in *Immigration Statistics: A Story of Neglect*, ed. Daniel B. Levine, Kenneth Hill, and Robert Warren (Washington, D.C.: National Academies Press, 1985), 243, <http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10071404>, estimates a population of 1.5 to 3.5 million.

<sup>132</sup> Douglas S. Massey and Audrey Singer, "New Estimates of Undocumented Mexican Migration and the Probability of Apprehension," *Demography* 32, no. 2 (May 1, 1995): 210.

<sup>133</sup> Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 45.

<sup>134</sup> *An Act to Amend the Immigration and Nationality Act to Revise and Reform the Immigration Laws, and for Other Purposes (Immigration Reform and Control Act of 1986, Simpson-Mazzoli Act)*, 100 Stat. 3359, 1986, 3394ff, 3417ff; Zolberg, *A Nation by Design*, 372.

that the population of those illegally present began to grow again from 1990 at the latest, when the numbers were about 3.5 million, rising every year until 2007, when the population reached a peak of 12.2 million, and dropping and then rising again before 2012.<sup>135</sup> A steady increase in border enforcement from the 1986 Act onward discouraged circular migration, and those who came to the United States more often stayed, fearful that if they returned to their home countries, they would not be able to return to work, family, and homes in the United States.<sup>136</sup> The 1986 Act also forbade businesses from hiring those unlawfully present, reversing the Texas proviso and creating a new locus of enforcement, the workplace.<sup>137</sup>

While laws further restricted migrant labor, within a few years, Mexico, the United States, and Canada reached an agreement that lifted restrictions on the movement of goods between the three countries. When the North American Free Trade Agreement (N.A.F.T.A.) went into effect in 1994, the three countries opened up trade and business across their borders, and Mexico agreed to alter its protective land policies that had allowed subsistence farmers to remain on their land. Though these farmers were now on the move, the movement of human persons across national borders remained highly restricted.<sup>138</sup> In effect, a move toward the free trade of goods was paired with continuing restrictions on the movement of labor so that workers could not legally work in another country. Still, women as well as men moved in ever larger numbers from Mexico to the U.S. to work without

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<sup>135</sup> The estimates for 1990 are drawn from Robert Warren and John Robert Warren, "Unauthorized Immigration to the United States: Annual Estimates and Components of Change, by State, 1990 to 2010," *International Migration Review* 47, no. 2 (June 1, 2013): 315; the rest of the estimates come from Passel, Cohn, and Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, 9. Warren and Warren's closely mirror those of Passel, Cohn, and Gonzalez-Barrera's. Warren and Warren point to 2008 as the peak year for the unauthorized immigrant population, at 12.0 million, and they see a drop to 11.7 million in the last year of their estimates, 2010, when Passel et al. offer an estimate of 11.4 million.

<sup>136</sup> *100 Stat.* 3359, 3381ff.

<sup>137</sup> *Ibid.*, 3360ff.

<sup>138</sup> Zolberg, *A Nation by Design*, 383; Massey, Durand, and Malone, *Beyond Smoke and Mirrors*, 48-49.

proper documentation. From 1986 onward, what had been an unofficial program for temporary guest workers turned into an unofficial program for permanent guest workers. This population established themselves in and among American communities, but without the controls and benefits that the rule of law would provide.

Along with ties through neighborhood, friendship, and worship, the labor of those unlawfully present continues to tie them to U.S. citizen and legal resident consumers. In 2010, about eight million unauthorized immigrants worked, forming over 5 percent of the U.S. workforce.<sup>139</sup> In figures from 2008, these workers were clustered in particular industries, so that a quarter of all farmworkers and at least one in ten workers in grounds keeping, maintenance, construction, and food preparation lacked permission to be in the country. In specific professions, those lacking documents formed an even larger proportion of workers: 40 percent of brick masons, 37 percent of drywall installers, 28 percent of maids and housekeepers, and 21 percent of parking lot attendants were unauthorized.<sup>140</sup> In the early twenty-first century, then, American citizens and legal residents depend on unauthorized laborers to pick their apples, cook their food, maintain their lawns, clean their buildings, park their cars, and lay brick walls and install drywall in their homes and public buildings. Those with legal status are implicated in this unofficial guest worker program that keeps men, women, and children in the shadows, with low pay, poor conditions, an uncertain future, and fear of deportation.

The farcical film *A Day Without a Mexican* presents a California where Mexicans have suddenly disappeared, and the state is disabled by their absence.<sup>141</sup> Something like this

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<sup>139</sup> Passel and Cohn, *Unauthorized Immigrant Population*, 17.

<sup>140</sup> Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Washington, D.C.: Pew Hispanic Center, April 14, 2009), 15, <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>.

<sup>141</sup> Sergio Arau, *A Day Without a Mexican* (Santa Monica, Calif.: Xenon Pictures, 2004).

happened in Alabama in 2011, after the state legislature passed House Bill 56, a bill that, according to the sponsoring Representative Micky Hammon, “attacks every aspect of an illegal alien’s life.”<sup>142</sup> The bill enabled police to stop and search those suspected of unlawful presence, added penalties for hiring and transporting aliens, and required record keeping on illegal aliens at schools. It also forbade contracts made between illegal aliens and the state, including for the provision of water or power.<sup>143</sup> Though judges struck down most of the bill within a year of its going into effect, the bill served its intended purpose of attrition through enforcement, intimidating many into leaving the state. A report from Albertville, Ala., told of a chicken factory that lost many of its workers when Mexican immigrants fled the state, while the managers found it difficult to recruit citizens and legal residents to spend their days standing in a cool, wet factory and cutting the heads off chickens. The article also told of a tomato farmer who lost his entire crew and struggled to find workers to bend over in the heat, picking tomatoes for two dollars for a large box.<sup>144</sup> In a state where only a small proportion of the population either originates from Mexico or lacks legal status, many businesses found themselves crippled without unauthorized laborers.<sup>145</sup> With the current size of the undocumented population, with its close involvement in a variety of industries, Americans with legal status are implicated in the lives of those who butcher their chickens, pick their tomatoes, and live down the road.

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<sup>142</sup> Kim Chandler, “Alabama House Passes Arizona-Style Immigration Law,” *The Birmingham News*, April 5, 2011, [http://blog.al.com/spotnews/2011/04/alabama\\_house\\_passes\\_arizona-s.html](http://blog.al.com/spotnews/2011/04/alabama_house_passes_arizona-s.html).

<sup>143</sup> *Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Alabama House Bill (H.B.) 56*, 2011.

<sup>144</sup> Pamela Constable, “Alabama Law Drives Out Illegal Immigrants but Also Has Unexpected Consequences,” *The Washington Post*, June 18, 2012, sec. Local, [http://www.washingtonpost.com/local/alabama-law-drives-out-illegal-immigrants-but-also-has-unexpected-consequences/2012/06/17/gJQA3Rm0jV\\_story.html](http://www.washingtonpost.com/local/alabama-law-drives-out-illegal-immigrants-but-also-has-unexpected-consequences/2012/06/17/gJQA3Rm0jV_story.html).

<sup>145</sup> Warren and Warren, “Unauthorized Immigration to the United States,” 318, 319, estimate that in January 2010, Alabama had ninety-five thousand unauthorized immigrants. Alabama ranked number twenty five out of fifty states in numbers of unauthorized immigrants, much fewer than states like California (with 2,934,000) and Texas (1,068,000) and fewer than neighboring Georgia (397,000). Still, Alabama was the state with the fastest growing population of unauthorized immigrants between 1990 and 2010, better explaining the state’s harsh legislative response.

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Over the course of the twentieth century, a solution to one problem created another problem. Bringing an end to racist, protectionist immigration laws led the United States Congress to disregard neighboring Mexico, enabling a settled, servile underclass of undocumented workers to grow. The mid-century was an era of national origins quotas that were alternately defended as allowing only superior races or those similar to Americans to immigrate. At the same time, Congress maintained a lack of quotas on the Americas, whether seeking to be a good neighbor or enabling farm workers to come and go from Mexico. These came through the Bracero Program or crossed illegally, providing arms and backs to serve American brains, in the language of one farmer.

As a reform movement gained steam, its leaders announced that discrimination based on nationality had to end, and they sought to signal racial and cultural equality through a policy of formal equality. After categories for close family members and needed workers, each nation would get an equal number of visa slots. Those who trumpeted democratic values of equality and dignity landed on an abstract universalism nurtured in the Northeast, with little acquaintance with migration from Mexico across the Southwestern border. An opposition to discrimination meant that immigration law could not take into account the place, neighborhood, and historical relations of the United States. This was the aleatory, denatured liberalism that John Kennedy expressed when he said that the United States should stop considering the “accident of birth.”

In tandem with patterns of migration between the United States and Mexico, the ideology of equality worked to foster the growth of an underclass, against the better instincts of its adherents. The twentieth century saw growing migration from Mexico to the

U.S., with contract laborers and undocumented workers migrating back and forth between the countries from the turn of the century through the 1960s. From the sixties to the eighties, workers kept coming and going, but most were unlawfully present, due to the 1965 and 1976 Acts that sought to end discrimination and give Mexico the same number of visas as Belgium or Botswana. From the eighties, men and women came from Mexico, often to work, but they came and stayed. A temporary underclass of migrant workers who would return to Mexico was replaced by a permanent underclass of migrant workers who remained in the U.S. By the early twenty-first century, some twelve million of these were present without permission, and they provided unskilled labor in a variety of industries. The citizens and legal residents of the United States continue to be bound up with these men, women, and children. So far as Americans participate in the economy, and so far as they depend on bodies to do the hard work they would rather not do, they are tied to those who work on the black market. Americans do not keep slaves anymore, but they have something close. Across town or next door live members of a settled underclass which is neither slave nor free.

### **3.B. Justice for Neighbors in Philosophy and Theology**

Shifts from national origins quotas to equal allotments in federal U.S. immigration law, from more open Western Hemisphere migration to numerical limits on nearby countries, happened alongside extended moral arguments. These arguments focused on race and culture, on economy and work, and on democracy and equality. The arguments leave open lines of inquiry that could point a way out of the conundrum of the alien unlawfully present in the United States. In part B of Chapter 3, we will deal with two elements of the discussions surrounding immigration law in the twentieth century. First, we will interrogate

the talk of discrimination, tracing a path through Aristotle and Grotius to the right sort of justice for immigration admissions, one that responds to wrongs done to migrants, and one that attributes visas to the fitting, to nearby neighbors, or that goes so far as to defer to international society between countries sharing a land border – in this case, the United States and Mexico. Second, talk of a Good Neighbor Policy raises the question of what it means to be a neighbor. We will revisit the parable of Jesus Christ that creates the notion of the neighbor, the parable of the Good Samaritan from the Gospel According to Luke. In response to laws that give Americans an excuse to neglect their neighbors, and in response to laws that make the United States a bad neighbor to Mexico, we will argue for special consideration of neighboring Mexico that will make way for neighborly assistance in everyday life.

### 3.B.1. Immigration Admissions for Neighbors: Aristotle, Grotius, and Justice

Different sorts of goods require different notions of justice. We would likely agree that at least some goods should be distributed equally, goods like treatment in emergency medical care or fair hearings before a judge. We might also think that other goods should be distributed equally, from education to health care to wealth. But such a justice does not fit immigration admissions. The 1965 and 1976 United States move to distribute visas in equal numbers to every independent country appears to be a misapplication of distributive justice. In what follows, Aristotle will offer a classic account of justice as corrective and distributive, and Hugo Grotius will reconfigure these as justice, expletive and attributive. In an analysis indebted to Oliver O'Donovan, a philosopher will have his system modified by

an early modern jurist and theologian.<sup>146</sup> Employing these accounts of justice, we will indicate what is owed to those unauthorized immigrants already enmeshed in American life and what is fairly given to prospective immigrants from nearby Mexico.

### *Aristotle: Corrective and Distributive Justice*

What is justice, and what is injustice? In Book Five of the *Nicomachean Ethics*, Aristotle considers general justice, the virtue of the just person, and then a part of that justice, the way that judgment is carried out in a community.<sup>147</sup> The Macedonian philosopher of the fourth century B.C. proposes that there are two species of special justice, a justice of distribution and a justice of rectification in transactions. The first species of special justice, he writes, “is found in the distributions of honors or wealth or anything else that can be divided among members of a community who share in a political system.”<sup>148</sup> He also describes this as “the just in distributing what is held in common.”<sup>149</sup> Since “the unjust is unfair,” he reasons, “the just is fair.”<sup>150</sup> Or, if we translate this claim differently: “If the unjust is unequal, the just is equal.” Crucially, Aristotle’s Greek term τὸ ἴσον, *to ison*, can be translated as “the fair” or “the equal.”<sup>151</sup> This kind of justice, Aristotle argues, involves apportioning an amount that is neither too little nor too much, but in the middle – the

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<sup>146</sup> “The Justice of Assignment and Subjective Rights in Grotius,” in *Bonds of Imperfection: Christian Politics, Past and Present*, ed. Oliver O’Donovan and Joan Lockwood O’Donovan (Grand Rapids, Mich.: Eerdmans, 2004), 167–203; *The Ways of Judgment* (Grand Rapids, Mich.: Eerdmans, 2005), 31–51.

<sup>147</sup> Aristotle explores justice, δικαιοσύνη, *dikaioisunē*, injustice, ἀδικία, *adikia*, and a part, μέρος, *meros*, of each, Aristotle, *Nicomachean Ethics* (E.N.), trans. H. Rackham, rev. ed., Loeb Classical Library 73 (Cambridge, Mass.: Harvard University Press, 1934), 1130a15.

<sup>148</sup> Aristotle, *Nicomachean Ethics* (E.N.), trans. Terence Irwin, 2nd ed. (Indianapolis: Hackett Publishing, 1999), 1130b30; Henry George Liddell et al., eds., *A Greek-English Lexicon*, 9th ed. (Oxford: Clarendon Press, 1940), 405. “Distributions” = διανομαῖς, *dianomais*.

<sup>149</sup> τὸ...διανεμητικὸν δίκαιον τῶν κοινῶν, *to...dianemētikon dikaion tōn koinōn*, author’s translation, Aristotle, E.N., 1934, 1131b29.

<sup>150</sup> E.N., 1999, 1131a13.

<sup>151</sup> *Ibid.*, 230, 325–326; E.N., 1934, 256; Liddell-Scott, 839. We are indebted to Start Ramsay for drawing attention to the dual meaning of *ison*.

mean or the intermediate. The relation between the goods apportioned is the same as the relation between the persons involved. So, argues Aristotle, those who are equal should receive equal shares, and the unequal, unequal shares, or else there will be quarrels.<sup>152</sup>

Along these lines, he describes the proportions of distributive justice as geometrical, so that the proportion between two people matches the proportion of the two goods that are allotted to them.<sup>153</sup> From there, he says, distribution proceeds *κατ' ἀξίαν*, *kat' axian*, in accordance with worth, dignity, merit, or desert.<sup>154</sup> What marks those worthy of receiving some common good: Is it citizenship? Wealth? Good birth? Virtue? It all depends on what conception of political justice we have, says Aristotle. He expresses this kind of justice in another way: it is *ἀνάλογον*, *analogon*, according to, *ana*, a due *logon* or rationality.<sup>155</sup>

*Analogon* is often translated as a “proportion”: goods are allotted proportionately to the worth of the recipient.

There is another type of special justice, on Aristotle’s analysis. This kind of justice happens in *συναλλάγμα*, *sunallagma*, the transactions or dealings between people, in interchange, covenant, or contract.<sup>156</sup> This second kind of justice corrects; it sets straight, it restores to order, reconciles, or rectifies.<sup>157</sup> While the other kind of justice gives out what is held in common, this kind of justice steps in when someone’s gain has meant someone else’s loss. When one person steals from another, when one person kills another, rectificatory justice seeks to bring the situation back to a state of equality.<sup>158</sup> Again, when one person takes too much in a transaction, corrective justice ensures that this profit is

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<sup>152</sup> E.N., 1999, 1131a23.

<sup>153</sup> Ibid., 1131b13.

<sup>154</sup> E.N., 1934, 1131a25; Liddell-Scott, 170, 171.

<sup>155</sup> Aristotle, E.N., 1934, 1131a15–30.

<sup>156</sup> Ibid., 1135b25; Liddell-Scott, 1694.

<sup>157</sup> Aristotle uses two terms to mean corrective or rectificatory, *διορθωτικός*, *diorthōtikos*, and *ἐπανορθωτικός*, *epanorthōtikos*, E.N., 1934, 1131b25, 1132a19; Liddell-Scott, 434, 609.

<sup>158</sup> E.N., 1999, 1132a7.

returned to the one who has lost.<sup>159</sup> Often called commutative justice, this justice does not require what distributive justice required, a geometrical proportion, where the ratio of the merit of two people matches the ratio between the goods allotted. Instead, says Aristotle, it requires a numerical or arithmetical proportion.<sup>160</sup> In these cases, it does not matter if one person is more worthy than the other; the two are treated as equals.<sup>161</sup> The calculation here only concerns the profit and loss of the two equals, and this justice requires that the amount wrongly taken is restored.<sup>162</sup> Here justice requires a judge or a mediator.<sup>163</sup>

Stepping back to get a view of these two types of special justice, distributive and corrective, Aristotle's arrangement seems both discerning and adaptable.<sup>164</sup> The distinction between the two serves to make justice appropriately complex: there might be different ways of being just that fit different scenarios. But Aristotle's notions are troubled in one significant way. At every level, he foregrounds the mathematical, suggesting that to some degree we can calculate harm in terms of loss and profit, or that to some degree we can quantify the worth and merit of individuals. As such, even distributive justice involves certain demands to give what the recipient is due. His conception of justice suggests a scarcity of goods in a closed system, that the goods that we have in common must be distributed proportionately. He does not leave room for the justice of giving out of abundance, beyond the goods that are rightfully due to a person.

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<sup>159</sup> Ibid., 1132b13.

<sup>160</sup> Ibid., 1132a2.

<sup>161</sup> Ibid., 1132a1–6.

<sup>162</sup> Ibid., 1132a25–1132b10.

<sup>163</sup> Ibid., 1132a20–24.

<sup>164</sup> Here we will not consider Aristotle's further thoughts about reciprocity in exchange, which first appears to fall under rectificatory justice as another sort of transaction, and then is said not to fit either kind of justice, *ibid.*, 1131b25, 1132b11–20, 1132b25.

*Grotius: Expletive and Attributive Justice*

Gratuity is what Grotius allows for in his adaptation of Aristotle's system. Hugh de Groot, seventeenth-century Dutch jurist, theologian, and diplomat for Sweden, reconfigures Aristotle's two types of justice at the start of *The Right of War and Peace*.<sup>165</sup> Unlike Aristotle, he does not deal with justice within the virtues but within an account of *ius* or Right, marking his place at the tail end of a long interaction between Christian theology and Roman law. In the Prolegomena and in Book I, Grotius outlines natural Right, which he argues flows from the desire for society that is a feature of every human being.<sup>166</sup> Our inclination to society implies two senses of Right that correspond to Aristotle's two kinds of justice, says Grotius. The distinction between the two kinds of justice comes not between public and private or between types of proportion, writes Grotius, but between two kinds of right that attach to a subject. By right, Grotius means "a moral quality attaching to a subject enabling the subject to have something or do something justly."<sup>167</sup> One kind of right Grotius calls a "real" or "perfect right," "a right in the strict sense," or a *facultas*, which

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<sup>165</sup> The work was first published in Latin as *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur (I.B.P.)* (Paris: Nicolas Buon, 1625). Latin citations here come from *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur (I.B.P.)*, Ed. 2a emendatio & multis locis auctior (Amsterdam: Guiljelmum Blaeuw, 1631). There is no faithful, complete, contemporary English translation of the work. We rely on the excerpts translated by the O'Donovans, who pay close attention to the translation of *ius* as Right, right, or law, Oliver O'Donovan and Joan Lockwood O'Donovan, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625 (I.G.)* (Grand Rapids, Mich.: Eerdmans, 1999), 792–815. These excerpts are based on a new Latin edition, *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur (I.B.P.)*, ed. B. J. A. de Kanter-van Hettinga Tromp et al., 1939 ed. based on the 1631 ed., with new annotations (Aalen: Scientia Verlag, 1993). We also refer to a translation that is less careful with the translation of *ius*, *On the Law of War and Peace*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925). Kelsey's translation is based on *De Iure Belli ac Pacis: In quibus ius naturae & Gentium: item iuris publici praecipua explicantur (I.B.P.)*, Editio nova, cum annotatis auctoris, ex postrema ejus ante obitum cura multo nunc auctior (Amsterdam: Iohannem Blaeu, 1646). As he introduces his abridged version of Kelsey's translation, Neff says that the 1646 edition includes new material from contemporary events but represents no substantial changes on the 1631 edition, *On the Law of War and Peace*, ed. Stephen C. Neff, student ed. (Cambridge: Cambridge University Press, 2012), xxxvi. The only full edition in print today relies on Morrice's 1738 English translation of Barbeyrac's 1715 French edition, *The Rights of War and Peace*, ed. Richard Tuck and Jean Barbeyrac, trans. John Morrice (Indianapolis: Liberty Fund, 2005).

<sup>166</sup> *I.B.P.*, 1631, Prolegomena, 6, 16, in *I.G.*, 793, 795.

<sup>167</sup> *I.B.P.*, 1631, I.10, in *I.G.*, 797.

we translate as faculty, power, or entitlement.<sup>168</sup> This kind of right has to do with the classic rule of *suum cuique*, to each his own, and is in effect when someone has power, dominion, or ownership, or when someone owed something under contract.<sup>169</sup> This is like Aristotle's corrective justice, and Grotius calls it *justitia Expletrix*, or expletive justice, justice that satisfies the demands of rights that someone already possesses.<sup>170</sup> The word *Expletrix* suggests this justice responds to rights already in place by filling them, carrying them to completion, satisfying their demands, or making good.<sup>171</sup> As examples, Grotius mentions restoring another's property along with the profit we might have gained from it; keeping promises; repaying losses; and deserving punishment.<sup>172</sup> Expletive justice has to do with "letting someone keep, or have, what is already his," says Grotius.<sup>173</sup>

The second kind of justice parallels Aristotle's distributive justice, but here Grotius makes more decisive shifts. While expletive justice metes out what is owed to someone due to an entitlement, this second kind of justice responds to a less perfect right, an *aptitudo*. Grotius appropriates Aristotle's *axia* or worth and replaces it with this term *aptitudo*, saying that it has to do with something that is fitting or suitable (*convenit*).<sup>174</sup> To this fitness corresponds what Grotius prefers to call not distributive justice but *justitia Attributrix*, attributive justice.<sup>175</sup> This kind of justice no longer has to do with righting wrongs or awarding what is due by right; it has to do with virtues like "liberality, compassion, and

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<sup>168</sup> *I.B.P.*, 1631, I.4, 5, in *Kelsey*, 35, and *I.G.*, 797–798; R. E. Latham, ed., *Revised Medieval Latin Word-List from British and Irish Sources* (London: Published for the British Academy by the Oxford University Press, 1965), 184; P. G. W. Glare, ed., *Oxford Latin Dictionary (O.L.D.)* (Oxford: Clarendon Press, 1982), 670–671; see O'Donovan, "The Justice of Assignment and Subjective Rights in Grotius," 180.

<sup>169</sup> Grotius' words for these three types of right in the strict sense are *Potestas*, *Dominium*, and *creditum*, *I.B.P.*, 1631, I.5.

<sup>170</sup> *Ibid.*, I.8, in *I.G.*, 790, 798.

<sup>171</sup> From *explere*, J. F. Niermeyer, *Mediae Latinitatis Lexicon Minus: A Medieval Latin-French/English Dictionary*, 2nd ed. (Leiden: Brill, 1993), 398; *O.L.D.*, 650.

<sup>172</sup> *I.B.P.*, 1631, Prol.8, in *Kelsey*, 12–13, and *I.G.*, 793.

<sup>173</sup> *I.B.P.*, 1631, Prol.10, in *I.G.*, 794.

<sup>174</sup> *I.B.P.*, 1631, I.7, in *I.G.*, 797–798; *O.L.D.*, 155.

<sup>175</sup> *I.B.P.*, 1631, I.8, in *Kelsey*, 37, and *I.G.*, 798.

prudent government.”<sup>176</sup> Nor does Grotius take on Aristotle’s suggestion that this justice is about distributing what is already common property to those who are owed it. Rather, this kind of justice has to do with attributing, assigning, or granting goods to fitting recipients.

Grotius announces attributive justice as a wider sort of justice, one that enlarges and elaborates: “To this belongs the prudent allocation of resources in *adding* to what individuals and collectives own.”<sup>177</sup> The term that the O’Donovans paraphrase as “adding,” *elargiendis*, speaks of enlarging or increasing, from the older Latin word *largior*, meaning to give generously or lavishly.<sup>178</sup> In a legal sense, it seems to refer to grants. Grotius suggests that beyond the expletive justice that gives out what is owed, this kind of justice is right to show preference to those most fit to receive the good in question: “...Sometimes a wiser person is favored over someone less wise, sometimes a neighbor receives preferential treatment over a foreigner, sometimes a poor man is treated more generously than a rich man.”<sup>179</sup> The example that Grotius uses to explode Aristotle’s notion that justice always enacts a proportion between at least two people is this: if an opening for a public office only has one suitable candidate, then by attributive justice that person assumes the office. This is just even if there are no competitors.<sup>180</sup> Thus attributive justice, on Grotius’

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<sup>176</sup> *Liberalitatis, misericordiae, providentiae rectoris*, I.B.P., 1631, I.8, in I.G., 798.

<sup>177</sup> *Atque huc etiam pertinet in his quae cuique homini aut coetui propria sunt elargiendis prudens dispensatio*, I.B.P., 1631, Prol.10, in I.G., 793–794 emphasis translators’. In translating this phrase, an issue arises. How can there be an enlarging, *elargiendis*, of what someone owns, *quae...propria sunt*? Kelsey subsumes *elargiendis* with *dispensatio* as “allotment” (13). Tuck’s version of Morrice keeps *elargiendis* as “gratuitous Distribution,” but he takes this to be distribution “of Things that properly belong to each particular Person or Society” (87). The O’Donovans interpret Grotius as talking about grants which enlarge by giving things that become what someone owns, and they paraphrase *elargiendis* as “adding.” Thanks are due to Oliver O’Donovan for comments on the translation in private communication.

<sup>178</sup> *Mediae Latinitatis Lexicon Minus*, 367; *Revised Medieval Latin Word-List*, 162; O.L.D., 1003.

<sup>179</sup> I.B.P., 1631, Prol.10, in I.G., 794.

<sup>180</sup> I.B.P., 1631, I.8, in I.G., 798.

reckoning, shows preference when it is fitting: "...depending on what is being done in each case and what the business in hand requires."<sup>181</sup>

Grotius' account of Right goes further, but in reapportioning Aristotle's two kinds of justice, he has left us insight into how good judgment operates.<sup>182</sup> Grotius' arrangement of justice into expletive and attributive justice is capable and supple, leaving room both for justice that rights wrongs and justice that promotes future welfare. There is a kind of justice that responds to what is due and what is owed, that rights inequalities when those inequalities are hurtful or harmful. But there is also a kind of justice that responds to diversity, that gives what fits the particular character of the recipient. So, there is a time for justice to punish wrongs, to return what has been gained wrongfully, but there is also a time for justice to give out honors and opportunities, to give opportunity to talent, to strengthen bonds of family or community. This is why Oliver O'Donovan praises Grotius' attributive justice: it "elaborates differences," enhancing healthy differentiation in social life.<sup>183</sup> He goes further, claiming that Grotius' is "the best Christian revision of Aristotle's theory."<sup>184</sup> His praise for Grotius indicates why he thinks Grotius' system is right, but he does not make clear what makes it Christian.

If Grotius' rearrangement of Aristotle is a particularly Christian one, then this is because it leaves room in justice for gift and overflow. If distributive justice was still beholden to the idea of proportional distribution of what the recipients had some right to, attributive justice allows for the recognition of something more within justice. Beyond the justice that corrects wrongs, that rewards to individuals what is already theirs, there is a side

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<sup>181</sup> *I.B.P.*, 1631, Prol.10, in *I.G.*, 794.

<sup>182</sup> We leave behind Grotius' third sense of natural Right as legal obligation, as well as his sources of Right in the will of God, in agreements, and in the practice of nations, *I.B.P.*, 1631, Prol.12, 15, 17; I.9, in *I.G.*, 794, 795, 799.

<sup>183</sup> O'Donovan, *The Ways of Judgment*, 42.

<sup>184</sup> *Ibid.*, 38.

to justice that gives more than is owed or needed. In the private life of one who has more than they need, in the prudential reasoning of a government official who looks to promote the future welfare of his people, then there are times to give out more than what is required. There is a prudence, a right judgment, that goes beyond rights and duties to include giving and enabling.

### *Justice in Immigration Admissions: Undocumented Workers and Neighboring Countries*

What does this conversation tell us about justice in immigration admissions? The discussion between Aristotle and Grotius about types of justice lends us a matrix for evaluating the justice of the different regimes the United States has maintained for granting visas. In what follows, we offer one way of charting the shifts in immigration law that we discussed above (3.A.1) in terms of corrective and distributive, expletive and attributive justice.

The national origins quotas of the 1920s, we suggest, were an assertion that immigration admissions are a form of distribution. When Congress acted to restrict the number of immigrants admitted, it chose to work with proportions. The first set of proportions matched the nationalities of new immigrants to the nationalities of immigrants already present, admitting newcomers as a small percentage of those who had already arrived. The second set of proportions matched the nationalities of new immigrants to the national origins of citizens, admitting the first as a fraction of the second. Immigration admissions were not equal, but they were fair under a certain logic, distributing to each nation of origin visas in a way that reflected that nation's contribution to current United States residents or citizens.

There were exceptions to this logic: close family members, those born in the Western Hemisphere, and members of professions were exempted from the quotas. Though these exceptions can be seen as a form of attributive justice, recognizing those fitted for admission, we think it better to interpret them as expletive justice. The federal government recognized spheres of Right that already obtain. It was right that husbands and wives, parents and children remain together and have privileges within their own sphere, not primarily because government thinks it in its interest to maintain that integrity but because these relationships were created alongside ordered civil society. Likewise, the 1924 legislation recognized that it was right for certain professions to have the privilege of drawing their members from other nations. Finally, the federal government recognized that it was right to allow migration within the Western Hemisphere to continue with little hindrance, fostering a society of societies lying close to one another. Sadly, in an underhanded way, the federal government also recognized that it was right that an unfair and oppressive system of migrant labor continue. As Western Hemisphere migrants were given special recognition, they were like family – or like household servants.

The equal allotment of visas from the 1960s and 70s represented a new understanding of distribution, we suggest, where each nation was treated equally. The new legislation treated each independent nation as a unit, rather than considering its population. Nationalities were now treated symbolically, so that each independent nation received an equal number of visas each year. This way of understanding distributive justice tied admissions more strongly to what was owed to each country. The logic of the system seemed to be that each nation was owed equal treatment, and so this distributive justice kept to the rule of *suum cuique*, to each his own. Indeed, it borrowed the logic of a different movement for justice in the United States, the civil rights movement. This movement

worked to rectify injustices between American residents of different nationalities, giving to each person what was owed them, acknowledging rights to equal treatment and equal access to public schools and accommodations. The reform movement in immigration applied this form of corrective justice to foreign affairs, treating each foreign country as a person that ought be given equal opportunity and equal treatment. The system of the late twentieth century continued to recognize spheres of Right beyond the federal government, enacting expiative justice by expanding categories for family members and for skilled workers. But in keeping with the steamrolling logic of equality, Western Hemisphere immigrants no longer received special recognition. There was no special community between the American republics, and these immigrants were owed the same treatment as immigrants from any other country. While the legislation simply assumed that reducing visas for the Western Hemisphere would reduce immigration from that hemisphere, the movement back and forth between Mexico and the U.S. in particular carried on, without legal permission.

The reform movement that produced the shifts of the 1960s and 70s fought against what we agree was injustice, but they furthered another sort of injustice. The scientific racism that some invoked as a rationale for national origins quotas was unfair: it either posited some groups within humanity as superior, or at least it posited different groups that should not intermarry. The milder understanding of the quotas as a mirror of American society was also unfair, since it mirrored a society long-past, making the Anglo-American feel a more worthy American than the Greek-American by favoring British immigrants over Greek immigrants. The system took scarcity for granted, counting human beings as equal units and implying that American society could take in only about one sixth of 1 percent of its population as new immigrants each year. It evaluated these new immigrants not in terms

of their abilities or their promise but in terms of their sheer numbers. Still, at the same time family members and skilled workers were given special recognition, as were those in special need of a country under separate legislation concerning refugees.

The reforms of the sixties and seventies shared this assumption of scarcity: America could only take so many at a time. It up-ended the racism and the vicious side of the inequalities of the national origins quotas, but it adopted a strange new kind of justice. To end discrimination, the new system admitted immigrants in proportion to units of sovereignty. One nation that could claim the right to conduct its own affairs without interference was given visas for twenty thousand persons. The system ignored the difference between a unit of sovereignty and an immigrant: some independent nations have many more people than others, and some have more that apply for visas than others. So long as they do no great injustice, China and Nepal are both independent nations, but China has a much greater population than Nepal. The Netherlands and the Dominican Republic both deserve to have their territories respected, but the Dominican Republic has many more men and women than the Netherlands who hope to immigrate to the United States. The 1965 and 1976 system landed on a type of proportionality that did not fit the matter at hand.

Today, in the early twenty-first century, the United States Congress has the opportunity to mollify the injustices built into its immigration policy. Here we propose advances both in expletive and attributive justice. In the area of expletive justice, new immigration legislation ought to recognize those immigrants who are already present in the United States, though present illegally. For these millions of men, women, and children who have broken the law, as they establish a residence and a domicile, it is right that they are allowed to remain in their new country. Their stability is more significant than

upholding the laws that forbade their immigration in the first place. As they work for employers willing to hire them, perhaps immigrating because they knew they would be hired, they become part of the economy that federal law elsewhere recognizes as having certain privileges to enable its workers to move across borders. Justice in this area is not a matter of attributing visas for some future immigrants; instead, justice responds to relationships that are already in place and obligations that already obtain between newcomers and a host society. We suggest that the law recognize the unauthorized work that so many contribute by authorizing it and giving it the benefits and protection that legal recognition affords. Immigration law must also do more to recognize not only professional work but manual work as valuable and essential to American society.

What does justice look like for future immigrants? Beyond visas for family members and workers, it seems right to think of immigration admissions as a matter of attributive justice. The United States is in the position to give out visas to the most suitable, recognizing a fitness. Federal law already works this way for refugees, giving visas to those who would most benefit because it would free them from persecution and danger. Federal law also gives visas to those who would bring some gift to the United States. Whether because of their health, wealth, or strength, immigrants qualify over the unhealthy and the impoverished. These sets of priorities deserve further evaluation, but that is not our business here.

Within the logic of attributive justice, as visas are attributed to the fitting, immigration law ought to recognize members of closely tied countries as fit to be admitted. Mexico qualifies on a number of counts. Its people lived on lands the United States took unjustly, and Mexicans have continued to come and go regularly for a century, forming a sizeable community in the United States. More recently, Mexico has proved an ally, top

officials from the two countries are on friendly terms, and Mexico is one of the primary trade partners of the United States. Most importantly, the country shares a land border with the United States that is nearly two thousand miles long. The militarization of the border since the 1990s by the U.S. has made migration more difficult, but those who have the desire still get across. To stop the flow altogether would require an increase in fencing, guards, and weapons at many times the current level.

These same qualifiers might also establish Canada, Guatemala, Cuba, the Dominican Republic, and others in the Western Hemisphere as fit for visas, and to a lesser degree they would qualify allies like Great Britain, sites of warfare like Iraq, and trading partners like China for special consideration. Our primary aim here, however, is to establish Mexican citizens as having an aptitude to be admitted into the U.S. Their fitness qualifies them for special dispensation as the federal government gives out visas, as it attributes the gift of legal immigration. This could happen through an increased numerical cap for Mexico or the removal of the cap altogether, while retaining some of the qualitative restrictions on all immigrants. A notion of attributive justice indicates that the United States need not hold on to its attachment to mathematical proportions, instead admitting or denying entry on more substantial grounds. When immigration visas are a matter of surplus, Mexicans are recipients suited to carrying forward a beneficial relationship with the United States. Are Mexicans simply fit to be admitted, or are they owed admission? We argued that the 1924 immigration system recognized that it was right for social interchange between Western Hemisphere republics to continue through migration that was unhindered by numerical limits. It did so by classing immigrants born in the Western Hemisphere with family and the professions as deserving recognition. It is possible to argue for more extensive allowances for Mexico on the basis of attributive justice, based on

Mexicans' fit with the surplus good of visas. But we wonder if justice demands more. Perhaps this is a matter not just of attributive justice but of distributive justice. Established patterns of migration, not only for family members but for communities and nationalities, deserve the law's recognition and respect. When one country's people are accustomed to traveling by land to the neighboring country to work and live, when they are used to coming and going in large numbers, it is simply not feasible to stop this process with a piece of legislation. The caps on Mexican immigration that went into place from the sixties did not stop Mexican immigration; they merely pushed it underground. The inability of a powerful country like the U.S. to halt immigration from its neighboring country proves that flows of migrants are not amenable to quick shifts of policy. They have a momentum to them. Migration carries on largely unheeded, though migrants may take different land routes or require a *coyote's* guidance rather than a stamp on a passport.

Perhaps it is right that patterns of migration be allowed to continue. These patterns mark out special relations between countries, types of society that sovereign power ought to defer to when its efforts to stop them require large outlays of weapons and guards. On these grounds, then, the federal government has a place in watching over the migration process between Mexico and the United States, guarding those involved and keeping the process free of danger and exploitation. Its most immediate task would be to end the reign of death in the Sonora Desert, where thousands of migrants have died in this century while crossing into the United States. The nation-state must defer to long-established patterns of land migration; the United States must defer to more than a century of unstoppable migration from Mexico. Coming to terms with this will make it easier to resolve the other issues of expletive justice, exploitation and low pay in the workplace, when migrant labor is seen for what it is, a normal feature of life in the United States today.

Is it right to maintain the numerical caps that were the product of twentieth-century immigration legislation? Limits on immigration might rightfully help the United States keep the arrival of newcomers to a manageable pace, allowing time for them to get accustomed to a new setting. Still, the numbering of human persons is troublesome when beyond a certain number of thousand, an extra person is deemed damaging to the country. It is possible to imagine a system that protects the country from harm without using numbers, instead focusing on qualitative measures that restrict the likes of convicted felons from entering. Grotius' account of attributive justice suggests that immigration admissions might not only operate as a response to need in a closed system. Rather, admitting immigrants might be an expression of overflow, meting out the abundance of a country to those who wish to join it. Even if this suggestion is correct, that numerical limits need not stand, our preceding analysis of immigration admissions still applies if the current orthodoxy about numerical limits remains in place. Though we do not want to justify numerical limits on immigration, we seek justice in the way that those limits are applied.

In the end, legal reforms through the twentieth century moved from one form of injustice to another. It is within the powers of Congress to ameliorate this situation. It is right to give legal recognition to migrants who are well-established and have contributed to American businesses. It is right that immigration admissions be given to nearby neighbors as fitting recipients. Perhaps it is also right for the federal government to defer to migration patterns that continue unheeded by laws and policing, protecting those who migrate rather than escalating enforcement.

### 3.B.2. Loving the Illegal Neighbor: The Parable of the Good Samaritan

“And who is my neighbor?” This is the question that a legal scholar puts to Jesus of Nazareth, prompting him to tell the parable of the Merciful Samaritan in Luke’s Gospel (10:25-37). Known as the parable of the Good Samaritan, this is the parable that invents the Christian concept of the neighbor. It is the inspiration for Franklin D. Roosevelt’s Good Neighbor Policy, the stance sometimes noted as explaining a special dispensation for the Western Hemisphere in U.S. immigration law. In what follows, we will return to the source, letting the story come alive as a story about receiving and giving mercy. Reading it in relation to the question of the alien unlawfully present in the United States, we will first ask what it means for individual Americans. The over-confident judgment that some U.S. residents are illegal, we will argue, gives Americans an excuse not to recognize the love of their neighbors and return that love. We will then ask whether the American people as represented by the federal government can be a neighbor. With reservations about the degree to which a nation-state can be a neighbor in the Christian sense, we will suggest that the United States periodically reassess its relations with other nation-states so as to recognize its neighbors and become a neighbor.

#### *The Parable*

The story runs like this: A legal scholar stands to challenge Jesus. He knows the Mosaic law well, but something in this upstart teacher Jesus goads him on and prompts a question: What kind of action brings the kind of life that lasts forever? Jesus turns the question back on him, asking how he reads the law, and he responds, “You shall love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind,

and your *friend* as yourself,” (10:27, our translation). The lawyer draws together two strands from the Torah, a command to love God from Deuteronomy 6 that follows a declaration of who Yhwh is, and a command to love the friend, companion, fellow country-man, or fellow covenant member from the Holiness Code of Leviticus 19. As Jeremias, Fichtner, and Greeven suggest, the lawyer would not have meant “love your neighbor” in the way we might imagine it, since it is this very parable that creates the neighbor in the Christian sense.<sup>185</sup> By the word *πλησίον*, *plēsion* in Luke’s Greek, he would have meant what רֵעָא ‘ means in Leviticus 19 as an object of love, when it appears within the context of conflicts with a “brother or sister,” one of “the children of your own people,” (19:17-18, our translation). Later in the same passage from Leviticus, Yhwh issues a separate command to love as yourself the stranger who sojourns with you, the immigrant who comes to stay, the רֵעָא, *gēr* (19:33-34), but it is clear this is different from the *rēa* ‘ that the scholar mentions, who is a fellow participant in the covenant with Yhwh.<sup>186</sup> The man finds at the center of the Mosaic law the love of Yhwh and the love of the friend or compatriot. And Jesus commends him: You have answered rightly; if you do this, you will live life to the full.

The lawyer does not stop there; it is not enough to stand and challenge this Jesus. The man wishes to prove himself right, to justify himself. He asks a question that sidesteps the first half of the command. He assumes that he knows how to love Yhwh, and he thinks that if there is a dispute, it is about the second half: “And who is my friend?” Who am I responsible for? The man would have been enmeshed in a dispute about who counted as a true worshipper of Adonai, about who was in the covenant community. Among the sects of

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<sup>185</sup> Joachim Jeremias, *The Parables of Jesus*, trans. S. H. Hooke, 3rd rev. ed. (London: S.C.M. Press, 1972), 202n53; Heinrich Greeven and Johannes Fichtner, “πλησίον plēsion,” in *The Theological Dictionary of the New Testament*, ed. Gerhard Friedrich and Geoffrey W. Bromiley, trans. Geoffrey W. Bromiley, vol. 6 (Grand Rapids, Mich.: Eerdmans, 1968), 314, 317.

<sup>186</sup> On the *gēr*, see the introduction.

the day, Pharisees thought that love need only extend to Pharisees, Essenes thought love need not extend to the “sons of darkness,” and a rabbinical judgment demanded that apostates and rebels be allowed to die.<sup>187</sup> In Matthew’s Gospel, Jesus quotes a contemporary saying, “You shall love your friend and hate your personal enemy.”<sup>188</sup> Some were in and some were out.

Jesus resists this line of thinking in a story that answers the question, “Who is my friend?” A man, a man perhaps like you, travels a lonely mountain road from Jerusalem to Jericho. Robbers fall upon him, and they strip him and beat him, probably because he resisted them. They leave him half dead. By coincidence (συγκυρίαν, *sugkurian*) a priest comes down the road, likely a priest from the central temple of Jerusalem.<sup>189</sup> Seeing him (ιδὼν αὐτὸν, *idōn auton*), he moves over to pass by the bloodied man on the other side of the road. To get closer would risk ritual uncleanness, uncleanness that would keep him from completing his duties in the temple for a time, eating the food due to him and his family, or participating in giving to the poor. Or, if he risks approaching the altar in an unclean state, the Mishnah would require that his brain be smashed with clubs.<sup>190</sup> A secondary minister in the temple also passes by, and he does like the priest, moving to the other side of the road. This Levite has less to risk, but contact with a dead or wounded man would also make him unclean.<sup>191</sup>

A third man comes along the road, and the listening law expert suspects he will be a Jewish layperson, but no: the man is a Samaritan. The scholar has nothing but contempt

<sup>187</sup> Jeremias, *The Parables of Jesus*, 202–203.

<sup>188</sup> Matt. 5:43, our translation.

<sup>189</sup> Walter Bauer, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature* (B.D.A.G.), ed. Frederick W. Danker, 3rd ed. (Chicago: University of Chicago Press, 2000), 953.

<sup>190</sup> Kenneth E. Bailey, *Jesus Through Middle Eastern Eyes: Cultural Studies in the Gospels* (London: S.P.C.K., 2008), 293.

<sup>191</sup> Jeremias thinks it less clear that the Levite avoids the man to maintain cleanness, *The Parables of Jesus*, 203–204.

for such a man. One of the prophets, the Nevi'im, tells him that the Samaritans were a mix of five peoples that the king of Assyria brought in from around his empire to settle in the north of Israel (2 Kings 17:24-41). When Yhwh punished them with marauding lions for their failure to worship Yhwh, the Assyrian king sent Israelite priests to teach them how to worship. "So they feared Yhwh but also served their own gods," he would have heard (v. 33a, our translation). The Samaritans failed to recognize the covenant that Yhwh had made with the children of Jacob called Israel, as the legal scholar sees it. They were mired in a hopeless compromise. The law expert would have heard the prophet in the present tense: "To this day they do according to the former manner" (v. 34a, E.S.V.). They continued to get many of the key points of Jewish worship wrong, worshipping on Mount Gerizim rather than Mount Zion, taking only the first five books of the Hebrew Scriptures to be speech from God, and reading even those in a version that differed from Israel's text at thousands of points. Just a couple of decades beforehand, Samaritans had entered the Jerusalem temple by night and scattered human bones across the floor, an outrage to those who worshipped there.<sup>192</sup>

But Jesus tells his interlocutor that the Samaritan is unlike the clerics who "seeing" him decide that the fallen man lies beyond who counts as their friend, their *rēa'* or *plēsion*. As he comes to where he was, the Samaritan is moved with compassion. Seeing him, he is hit in the heart (*ιδὼν ἐσπλαγγνίσθη*, *idōn esplanchnisthē*). Though this word had come to mean the seat of emotion and eventually of compassion, its earlier connotations were of the nobler organs of the heart, lungs, liver, and kidneys.<sup>193</sup> His insides are moved immediately

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<sup>192</sup> Joachim Jeremias, "Σαμαρεία Samareia, Σαμαρίτης Samaritēs, Σαμαρίτις Samaritis," in *The Theological Dictionary of the New Testament*, ed. Gerhard Friedrich and Geoffrey W. Bromiley, trans. Geoffrey W. Bromiley, vol. 7 (Grand Rapids, Mich.: Eerdmans, 1971), 89, 90.

<sup>193</sup> Helmut Köster, "σπλάγγνον splanchnon, σπλαγγνίζομαι splanchnizomai, εὐσπλαγγνος eusplanchnos, ἄσπλαγγνος asplanchnos," in *The Theological Dictionary of the New Testament*, ed. Gerhard Friedrich and

upon seeing the man; in the words of Bernd Wannewetsch, his “heart was ‘in’ the eye.”<sup>194</sup> He treats and bandages the man’s wounds, he places him on his horse, and he takes him to an inn to be cared for. The Samaritan spends the night, likely endangering his life if he has gone down to the hostile Judean town of Jericho.<sup>195</sup> The next day, he promises the innkeeper that he will come back and pay the bill for the man’s stay, saving the wounded man from the risk of being sold into slavery as a debtor.<sup>196</sup>

The legal expert had started by asking whom he had to love, by asking how far his responsibilities extended. But Jesus concludes his story by flipping the question around: “Who became, who turned out to be, who proved to be a friend, a neighbor to the man in need?” (v. 36) Here the verb *γεγονέναι*, *gegonenai*, emphasizes not being but becoming, a change of state to arrive at being a neighbor.<sup>197</sup> And here the Greek permits Jesus in Luke’s hands to reveal something the Hebrew does not. Though the etymology of the Hebrew *rēa* ‘ implies a friend, spouse, or fellow shepherd, the term for neighbor in Luke’s Greek contains a root indicating a coming near, *pela-* or *plā-* in *plēision*.<sup>198</sup> This nearness the Latin *proximus* indicates as do terms in modern languages: the Spanish *prójimo*, the German *Nächster* and *nigh* in the English “neighbor.”<sup>199</sup> The Greek is a seed that turns the love

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Geoffrey W. Bromiley, trans. Geoffrey W. Bromiley, vol. 7 (Grand Rapids, Mich.: Eerdmans, 1971), 548–553.

<sup>194</sup> Bernd Wannewetsch, “The Fourfold Pattern of Christian Moral Reasoning According to the New Testament,” in *Scripture’s Doctrine and Theology’s Bible: How the New Testament Shapes Christian Dogmatics*, ed. Markus Bockmuehl and Alan J. Torrance (Grand Rapids, Mich.: Baker Academic, 2008), 183.

<sup>195</sup> Bailey believes that the Samaritan risks his life by going to the inn and staying the night in the hostile Jewish town of Jericho, *Jesus Through Middle Eastern Eyes*, 295. Jeremias, on the other hand, thinks the Samaritan regularly traveled the road as a merchant because he had at least one animal with him, he knew the way, and he promised to return soon, *The Parables of Jesus*, 204–205. If Jeremias is right, it is harder to imagine that the Samaritan is in grave danger.

<sup>196</sup> Bailey, *Jesus Through Middle Eastern Eyes*, 296.

<sup>197</sup> See Chapter One, note 113, on the verb *γίνομαι*, *ginomai*.

<sup>198</sup> D. Kellermann, “רֵעַ *rēa* ‘; רֵעִי *rē’ā*; רֵעִי *rē’eh*; מֵרֵעִי *mērēa* ‘; רֵעִי *rē’ā*; רֵעִי *ra’yā*; רֵעִי *rē’ūt*,” in *The Theological Dictionary of the Old Testament*, ed. G. Johannes Botterweck, Helmer Ringgren, and Heinz-Josef Fabry, trans. David E. Green, vol. 13 (Grand Rapids, Mich.: Eerdmans, 2004), 523–524; Greeven and Fichtner, “πλησίον *plēision*,” 312n1.

<sup>199</sup> *Oxford English Dictionary*, compact edition, vol. 1 (Oxford: Clarendon Press, 1971), 1911, 1925.

command into something other than love for friend or compatriot. “Love the one nearby you as yourself,” the command becomes. Who became a neighbor, who en-neighbored himself? Jesus asks the law expert. Unwilling to let the word “Samaritan” pass through his lips, the man tells Jesus, “The one who showed him mercy.” With ἔλεος, *eleos*, this man expresses love in other terms, as mercy, kindness, or concern for someone in need. He uses the word that in Greek literature denotes an affection kindled by meeting someone who is afflicted without deserving it, the word the Septuagint version of the Hebrew Scriptures uses to translate חֶסֶד, *hesed*, the free binding of one to another that characterizes Yhwh’s self-giving in covenant with his people.<sup>200</sup> As the man admits that the Samaritan has become a neighbor, Jesus draws the encounter to a close: “Go and act in the same way.”

### *Interpreting the Parable*

Again, “who is my neighbor?” As Jesus in Luke’s Gospel creates the notion of the neighbor, four points stand out. These come to the fore as we read the parable with the trustworthy interpreters who have guided us in past chapters, Karl Barth and Oliver O’Donovan, along with American Presbyterian minister Ben Daniel. First, the parable’s polemics push and push again against any confidence that mercy is only for the in-group. To “love your neighbor as yourself” does not just extend to brothers and sisters, to co-religionists, or to co-nationals like in the first command in Leviticus. It does not stop with the resident alien, the immigrant who settles, like in the second command in Leviticus. The Samaritan and the wounded man meet on the road, in transit, with no more context than that. Too, the Samaritan is not just a foreigner passing through, a member of some group from far away.

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<sup>200</sup> B.D.A.G., 316; Rudolf Bultmann, “ἔλεος *eleos*, ἐλεέω *eleeō*, ἐλεήμων *eleēmōn*, ἐλεημοσύνη *eleēmosunē*, ἀνέλεος *aneleos*, ἀνελεήμων *aneleēmōn*,” in *The Theological Dictionary of the New Testament*, ed. Gerhard Friedrich and Geoffrey W. Bromiley, trans. Geoffrey W. Bromiley, vol. 2 (Grand Rapids, Mich.: Eerdmans, 1964), 477–87.

He is a member of a group that is too close for comfort, who worships the same God as the Judeans but commits sacrilege by worshipping in the wrong place and reading from corrupted Scriptures. To the law expert, these heretics from just north of Judea are worthy of hate if anyone is. Yet it is one of these apostates that, without calculating the extent of his responsibility and without hesitating, goes to the wounded man and binds his wounds. It is this idolater and syncretist who becomes a neighbor. The parable presents a critique of love that only extends to insiders, to friends, family, race, class, nation, or religious community. It prepares the hearer to be ready to help anyone.

Second, the parable highlights an encounter with one who by chance comes near. This Oliver O'Donovan makes clear. By chance, by coincidence, as it happened – the priest goes down the road, and the same circumstances bring the Levite and the Samaritan down the same road. Though each was tied to some who were near them by affinity, the Samaritan responds to a different kind of nearness: the nearness of encounter and of contingency.<sup>201</sup> The parable militates against what Oliver O'Donovan calls an abstract universalism, a love in principle for all humankind that can turn complacent and translate into very little love for anyone in particular.<sup>202</sup> Again, O'Donovan warns against instances when love for neighbor becomes mere respect for persons or equal regard, since this neglects proximity.<sup>203</sup> It is one thing to send money or food to someone far away, and it is another to receive and extend mercy to those close by whom we are inclined to hate. The

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<sup>201</sup> Oliver O'Donovan, *Resurrection and Moral Order: An Outline for Evangelical Ethics* (Leicester: Inter-Varsity, 1986), 240. Augustine writes that love begins with those close to us, *Teaching Christianity (De Doctrina Christiana)*, ed. John E. Rotelle O.S.A., trans. Edmund Hill O.P. (Hyde Park, N.Y.: New City Press, 1996), I.28.29. Eric Gregory reflects on the parable of the Good Samaritan and argues that in a world closely linked by trade and communications, the affluent are obligated to respond to the needs of the poor far away, "Agape and Special Relations in a Global Economy: Theological Sources," in *Global Neighbors: Christian Faith and Moral Obligation in Today's Economy*, ed. Douglas A. Hicks and Mark R. Valeri (Grand Rapids, Mich.: Eerdmans, 2008), 16–42.

<sup>202</sup> "The Loss of a Sense of Place," in *Bonds of Imperfection: Christian Politics, Past and Present*, ed. Oliver O'Donovan and Joan Lockwood O'Donovan (Grand Rapids, Mich.: Eerdmans, 2004), 316, 317.

<sup>203</sup> *Resurrection and Moral Order*, 240.

parable raises a challenge to receive love from those nearby with the smelly food, the loud music, the distorted religion, or the dubious standing before the law. This O'Donovan calls a concrete universalism: giving and receiving mercy may happen anywhere, but it will happen in a particular place, with the one we run into.<sup>204</sup> Even the road, where we pass through, becomes a place of encounter. This is the sort of universalism Jesus' parable draws attention to: love anywhere, but especially here, in this encounter.

Third, the parable puts the power to act in the hated stranger's hands. Those who discover what it means to "love your neighbor" do not start by imagining themselves as the moneyed Samaritan traveler, as the actor who shows mercy. Rather, they start by identifying with the one who is beaten and left half-dead, the one who is passive and helpless. There they imagine the person they most hate coming along and showing them mercy. Identifying the neighbor means a shift toward receiving mercy from someone who has become a neighbor. As Ben Daniel writes,

...when we ask "who is my neighbor?" the answer is not so much a person who may benefit from our charity (though charity is good and often needed) or from a change in public policy (something we also need), but rather the person from outside our community who saves and blesses us despite the walls erected by long-held hostility.<sup>205</sup>

To hear Jesus' parting command, "go and do likewise," begins not with doing like the Samaritan but with doing like the fallen man. The legal expert's task is first to receive mercy from a distasteful neighbor. Only then can he go and do like the Samaritan, becoming a neighbor to someone he dislikes. Only after receiving mercy can he show mercy.

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<sup>204</sup> "The Loss of a Sense of Place," 317-318. Karl Barth drives home a similar point: neighbor love does not consist in mercy for all humanity, as John Calvin argues, but in receiving mercy from a particular person who has become a neighbor, *Church Dogmatics (C.D.)*, ed. G. W. Bromiley and T. F. Torrance, trans. G. T. Thomson and Harold Knight, vol. I/2, *The Doctrine of the Word of God* (Edinburgh: T. & T. Clark, 1956), 420.

<sup>205</sup> Ben Daniel, *Neighbor: Christian Encounters with "Illegal" Immigration* (Louisville, Ky.: Westminster John Knox Press, 2010), xix.

Fourth, the parable situates the love of neighbor within the love of God, in an encounter with Jesus Christ. To this Karl Barth points us, following Origen, Clement of Alexandria, Ambrose, and Augustine.<sup>206</sup> The expert on the law answers the question about eternal life by saying that it comes through the love of God and the love of the friend, but he chooses to ask a question about who counts as the friend. The man assumes he knows what it means to love God, but Jesus' telling of the parable begs the question of what it is to love God. Here is the strange rabble-rouser, come as a man to deliver the helpless at the cost of his life: the Good Samaritan represents Jesus. On Barth's reading, the story does not operate as the kind of sign of Jesus' saving work that allows the listener to forget the human encounter in the story. Rather, as the Samaritan acts as a "benefactor" to the man fallen among the thieves, as he shows mercy, the Samaritan bears divine mercy to the man.<sup>207</sup> Receiving mercy and giving mercy from one another draws us into receiving God's mercy and in return offering God the praise he is due. Barth turns to the passage in Matthew 25 about the sheep and the goats, where Jesus speaks to those who have fed the hungry and clothed the naked. Confused, they hear the news that Jesus encountered them in the hungry and the naked that they served.<sup>208</sup> Likewise in the parable, for Barth, "the afflicted fellow-man...is actually the representative of Jesus Christ." Barth continues, "As such he is actually the bearer and representative of the divine compassion. As such he actually directs us to the right praise of God."<sup>209</sup>

Is the neighbor actually Christ? Barth's claims about what is actual do not go quite that far. He says that mercy from the neighbor refers us to the order in which we offer the

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<sup>206</sup> Barth, *C.D.*, I/2:419; O'Donovan, *Resurrection and Moral Order*, 241; Arthur A. Just, ed., *Luke*, *Ancient Christian Commentary on Scripture, New Testament III* (Downers Grove, Ill.: InterVarsity Press, 2003), 178-181.

<sup>207</sup> *C.D.*, I/2:416, 420.

<sup>208</sup> *Ibid.*, I/2:429.

<sup>209</sup> *Ibid.*

praise that is acceptable to God.<sup>210</sup> The neighbor is not the same thing as divine compassion: rather, the neighbor bears and represents divine compassion.<sup>211</sup> In recognizing the neighbor, we come before Christ, says Barth. Barth flirts with identifying the neighbor with Christ in his brief treatment of the last judgment from Matthew 25, where he says that Jesus is not only seen in the least, but “actually declares Himself to us in solidarity, indeed in identity with them.”<sup>212</sup> But Barth does not press this point. Though he does not speak of the neighbor as an icon, an Eastern Orthodox understanding of the icon captures what Barth conveys: the neighbor as fleshy reality draws us into something of the divine. And though Barth does not speak of this as a mystery, mystery it is: somehow, beyond our understanding, recognizing a neighbor draws us into the divine life. When we “see and have a neighbor,” in Barth’s words, we are actually brought before Christ.<sup>213</sup>

### *Neighbors in the United States*

The neighbor is a familiar trope in debates about immigration: President Franklin D. Roosevelt claimed that the United States should be a “good neighbor” to countries in the Americas, and a Congressional report claimed this as a reason for keeping Western Hemisphere immigration to the U.S. free of a numerical cap. Now that we have spent time with the parable of Jesus that created the notion of the neighbor, what would being a good neighbor look like in contemporary America? When so many millions are unlawfully present in the United States, and when federal law restricts the immigration of more from Latin America, what could it mean to become a neighbor? We will leave till later the

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<sup>210</sup> “...Through my neighbor I am referred to the order in which I can and should offer to God, whom I love because He first loved me, the absolutely necessary praise which is meet and acceptable to Him,” *ibid.*, I/2:420.

<sup>211</sup> *Ibid.*, I/2:416, 429.

<sup>212</sup> *Ibid.*, I/2:429.

<sup>213</sup> *Ibid.*, I/2:419.

question of whether the United States as a nation-state can become a neighbor. For now, we ask, in a time of illegal immigration, what does it mean for men and women in the United States, for churches, families, or communities to become neighbors?

First, the parable of the Good Samaritan combats a notion that mercy is only due to an in-group. Today, identifying someone as Mexican or American, as Cuban or Guatemalan, as white or brown or black, can keep us from becoming a neighbor and from letting another person become a neighbor to us. Does the parable say more, drawing into question distinctions between legal and illegal residents? In one sense, one group is right, following the law, while the other is wrong. And yet as we have seen, the lawfully present community is bound up with those among it who employ those who are unlawfully present, inviting some to do something that is not wrong in itself but wrong because prohibited. These legal distinctions are legitimate, but they are linked with market demands from those on the side of the law that draw many into living without the full privileges and responsibilities of lawfully present persons.

Much like identifying someone as a Samaritan, identifying someone as an illegal alien can serve as an excuse not to be a neighbor. To place someone not only in a different ethnic group but in a group that defies the law allows Americans not to expect an undocumented worker to be an exemplary neighbor. The more firmly Americans believe that distinctions between legal and illegal immigration are just, the more they are tempted to discount unauthorized immigrants as neighbors. Even for those who have experienced the love of God through their neighbors and who desire to love their neighbors, “illegals” hardly count. They should not be here. They are illegal neighbors. But the parable of the Good Samaritan opens up new possibilities. In the eyes of the Jewish legal expert, the Samaritan was a heretic, a lawbreaker, and an unwanted neighbor. Yet this Israelite

pretender, outside the law, is the one from whom he received mercy and the one who showed him how to extend mercy.

Second, the parable of the Good Samaritan draws attention to the encounter with the neighbor. Its hearers are not left to embody the aspirations of the Immigration Act of 1965 by seeking to measure out their mercy and distribute it equally on all occasions. If they want to experience the life that goes on forever, they should be ready to extend mercy, but to extend mercy to those they actually encounter. They are to extend mercy to those they meet by chance, or indeed to seek out ways to bring about these happenstances, becoming neighbors to those they might not otherwise meet.

What kind of encounters happen in early twenty-first century America? As some three or four of every hundred has immigrated illegally, citizens and legal residents regularly run into those who are unlawfully present. They live in the same neighborhood, they meet at the grocery store or the movie theater, they go to school together, they worship together, and they play soccer together. There are other encounters that happen through buying and selling: the landscapers, the tomato pickers, the dishwashers at the restaurant, or the cleaners at the office are unlawfully present. The parable invites those in the United States to set their sights close by, beginning with those they run into. The story invites those with and without legal status to recognize one another as neighbors. Each hearing of the parable invites a reassessment: Who is my neighbor? Who am I ignoring who actually is my neighbor?

Third, the parable of the Good Samaritan lets the hated stranger set the example for being a neighbor. The initiative is not in the hands of the majority culture, nor does the parable start with charity as philanthropy. It tells the story of an abhorred outsider who

leads the way in becoming a neighbor, in loving and extending mercy. In the United States today, then, discovering neighborhood will start by looking to those men and women without legal status to demonstrate what it is to be a neighbor. Ben Daniel illuminates this theme with a story of how a member of his community who lacks legal status becomes a neighbor to him. María Teresa is the mother of a girl in his daughter's third-grade class at a charter school in inner-city East San José, California. Daniel is an American citizen and a Presbyterian minister, and María Teresa is originally from Mexico and in the U.S. without permission. The two families trade cooking lessons, making pesto and enchiladas. María Teresa takes the opportunities the charter school provides to contribute by speaking to teachers about homework and offering her opinions on the direction of the school. Daniel attributes to María Teresa and mothers like her much of the success of the school, which so exceeds the expectations for schools in its area that its test scores are among the best in the state. Who is Daniel's neighbor? "The teaching of Jesus...suggests that a person's neighbor is the marginalized foreigner who blesses him or her," he writes. "If that's the case, if Jesus is correct, then María Teresa, an undocumented, unemployed, single mother from Mexico is my neighbor."<sup>214</sup>

This is a pleasant story of someone who lacks legal status becoming a neighbor, but there are unpleasant stories too. When those without legal status dig the ditches or slaughter the chickens or lay the brick that those with legal status would rather not do, when they do so for little pay under conditions that they cannot complain about, they are showing mercy. So long as their work goes on unseen, unappreciated, and inadequately remunerated, their en-neighboring is not met on the side of the settled community with

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<sup>214</sup> Daniel, *Neighbor*, 144.

recognition. The fullness of being neighbors that comes when each side sees the other as a neighbor does not come about here.<sup>215</sup>

Fourth, the parable of the Good Samaritan suggests that those who become neighbors are summoned into the praise of God. Receiving and extending mercy, becoming neighbors, draws those actors into praising Christ through whom they have received mercy. In modern America, the divide between legal and illegal residents has a power akin to the divide between Jew and Samaritan in the parable. When men and women move across this divide to become neighbors, overcoming aversion and judgment, they are drawn into worshipping God. When men and women allow this divide to stand and avoid becoming neighbors, they neglect an opportunity to bring honor to Jesus Christ. Even those who care little for Jesus or believe in no god may find that an experience of becoming a neighbor speaks of something beyond the ordinary.

### *Nation as Neighbor*

Could a nation become a neighbor as it receives immigrants? It is clear that in a decisive way, individuals and communities in the U.S. are drawn into new ways of being neighbors when it comes to immigration and illegal immigration. But can a corporate person, a corporate person with the authority to issue judgment and the power to enforce that judgment, become a neighbor? In what follows, we will explore ways that the nation-state can and cannot be a neighbor.

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<sup>215</sup> T. C. Boyle's novel *The Tortilla Curtain* (London: Bloomsbury, 2004) offers another story of mercy from the immigrant who is unlawfully present, a story that closely reflects the parable of the Good Samaritan. Delaney the middle-class white man, living in a gated community in southern California, hunts for illegal immigrant Candido whom he thinks has caused him so much trouble. In the end, Delaney is swept away in a flash flood only to be saved by a hand that reaches down from a bridge, the hand of Candido.

We first encountered the idea that the United States could be a neighbor in the Good Neighbor Policy of Franklin D. Roosevelt. In an inaugural address he announced it as a policy for foreign relations with all countries, but he soon elaborated on it at a meeting of the Pan-American Union.<sup>216</sup> On the first occasion, his picture of a good neighbor circled around respect, respect first of oneself and then of the rights of others. Respect, he surmised, consisted in upholding obligations and keeping agreements. On the second occasion before representatives of the republics of the Americas, he said more, indicating that to be a good neighbor involved “a sympathy which recognizes only equality and fraternity.” It was something mutual, a friendship that began with understanding another’s point of view and appreciating it. He did not apologize for behavior that the other republics would readily identify as disrespectful, but one area he identified for improvement was the area that the others would identify as the United States’ primary wrong: Roosevelt praised recognizing the independence of the other republics and not seizing territory at the expense of a neighbor, against a long-running domineering role by the United States in the Americas. Roosevelt’s select concrete suggestions indicated something else of what it meant to be a neighbor: he supported mutual self-defense for the hemisphere, he opposed war between its nations, and he proposed open trade. He also professed a belief in the “spiritual unity of the Americas.”

Though there is much to appreciate in Roosevelt’s sketch of the nation as good neighbor, there is also much which falls short of what the parable of the Good Samaritan proposes as a neighbor. Insofar as countries recognize one another through diplomacy, by meeting and talking with one another, and by understanding one another, they operate as corporate persons in ways that approach the neighbors of the parable. When countries

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<sup>216</sup> Roosevelt, “Presidential Inaugural Address”; Roosevelt, “Address on the Occasion of the Celebration of Pan-American Day.”

defend one another from attack, aid another, keep peace with another, they move further toward the risky love of the Samaritan. When they give and receive by trading, they do something like giving and receiving mercy, though trade involves reciprocal gifts.

Roosevelt's implication that the United States has not respected other nations' independence indicates a willingness to move beyond his cousin President Theodore Roosevelt's Corollary of 1905 and its assertion that the U.S. will intervene when its interests are threatened, though we would have hoped for an explicit admission of wrongdoing.

Roosevelt's attention to respect troubles his account of neighborhood: the parable does not dwell on any sort of self-respect or self-understanding as a starting point for the Samaritan's action; he merely acts when he sees the bloodied man. When he speaks of friendship and fraternity, he turns the good neighbor into something better established and less occasional than the neighborhood of the parable. These images move the neighbor into a realm of longstanding agreements and treaties, something more comfortable and bourgeois than the stark and joyous appeal of the parable to be ready to help anyone who comes along. Still, insofar as he unfolds the Good Neighbor Policy before the representatives of nearby nations, his speech to the Pan-American Union allows the biblical reference a polemical edge. He implies: we are close to one another, and closely tied; let us learn to treat one another better. Finally, his gesture toward spiritual unity is, on one level, sentimental slop and idolatrous civil religion: some spirits of unity are allied with Christ, but some international agreements prove devilish. At another level, though, Roosevelt leaves open hemispheric relations to some trust beyond contracts, a trust that speaks of divine faithfulness. Roosevelt's sketch looks more or less like the liberal ideal of an autonomous actor who respects the autonomy of others, though his appeal for Pan-

American neighborhood carries those actors a step further. Though flawed and limited in what it can accomplish, Roosevelt's aspiration to become a Good Neighbor opens up Pan-American relations to salutary influences by way of a return to the biblical source of the notion of the neighbor.

A second attempt to treat countries like neighbors makes more explicit reference to the parable of the Good Samaritan. As he spells out a principle of mutual aid between countries within a discussion of the distribution of national membership, American political philosopher Michael Walzer speaks of two strangers meeting by the side of the road as in the Good Samaritan story. He writes that one individual ought to stop and help the other, regardless of group membership. Still, he qualifies this obligation in two ways, saying that help is only called for if the risks and costs of helping are "relatively low."<sup>217</sup> He wishes to capture the parable's sense of occasion, where help is required without regard to the strangers' attachments. But his proviso blunts the force of the parable, since he calls for assistance only when the actor does not have to risk very much. The Samaritan went beyond cleaning up the man and calling for help, carrying him to a town and staying the night in a place where he was likely in great danger.

Having gotten part of the way there but muting the parable's demands, Walzer writes that what applies to individuals also applies to collectives: "Groups of people ought to help necessitous strangers whom they somehow discover in their midst or on their path."<sup>218</sup> Here Walzer moves with the grain of the parable. His groups of people do not just learn respect, but they discover strangers they must help. He brings up this story in the process of addressing immigration admissions, and there his telling of the story is evocative.

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<sup>217</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 33.

<sup>218</sup> *Ibid.*

On a country's path, Walzer's terse phrase suggests, perhaps in the course of trading or warring, that country meets necessitous strangers and in an ad hoc way admits them as refugees. In the country's midst, too, a country discovers necessitous strangers. This phrase of Walzer's speaks to our question of men and women who lack legal permission to be in the country. Though the authority under which their presence is illegal deserves consideration, the sort of consideration we pay in chapter 2, what matters is that they are in the country's midst. Once again, Walzer returns to his proviso: a group need not take on too much risk or cost in providing aid. "My life cannot be shaped and determined by such chance encounters," Walzer writes.<sup>219</sup> Here Walzer goes astray again from the parable, but his suggestion that a people may discover necessitous strangers in their midst or on their path carries a reading of the parable a step forward.

A third treatment of the political community as a neighbor comes from Oliver O'Donovan when he casts a vision of a plural international system within divine providence. His attention is on the territorial border, which divides not only to set a limit to a people. He says the border also forms "a horizon which will stimulate neighborly relations between the people and other peoples. It defines a 'You' in relation to which the people acts as a corporate 'I.'"<sup>220</sup> In his idiosyncratic use of the word "horizon," O'Donovan sees the border as not just a stopping point, but an opportunity to relate and interact. Again, he writes, "Localities have boundaries that also form horizons. If bounded locality fosters neighborly responsibility within the society's compass, horizoned locality makes the society itself into a neighbor."<sup>221</sup> O'Donovan suggests a line of thought about how a land

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<sup>219</sup> Ibid.

<sup>220</sup> O'Donovan, *The Ways of Judgment*, 151.

<sup>221</sup> Ibid., 257. On this, see the author's "Philosophical and Theological Reflections on the U.S.-Mexico Border, with Special Reference to Joseph Carens, Michael Walzer, and Oliver O'Donovan" (M.Phil. Thesis, Faculty of Theology, University of Oxford, 2010), 63-70.

border can make countries into neighbors. A related thought, that being a people requires having neighbors, gets his picture of international relations off to a start, and how he develops this thought sounds much like Roosevelt. Imagining peoples as actors, he speaks of “respect and letting-be,” of “a truly universal common good of reciprocal acting and being acted open.”<sup>222</sup> O’Donovan makes a step beyond Roosevelt through the parable of the Good Samaritan. Instead of the perspective of empire that foreigners are enemies until they are brought into unity with us, O’Donovan commends not only recognition but welcome, friendship, hospitality, and love for the stranger we meet on the road.<sup>223</sup> In shorthand, he alludes to something more than Roosevelt’s respect, but he does not tell us what it looks like for peoples to welcome and to love.

O’Donovan’s thought that borders make neighbors finds echoes and elaborations in the writings of two other theologians. Cuban-American Methodist theologian Justo L. González reflects on how the Spanish *frontera* can be translated either as “frontier” or as “border” in English. He suggests that while a frontier only moves forward, bringing light to darkness, a border is a place where two realities and two cultures meet. The U.S.-Mexico border, he writes, expanded as an unstoppable frontier under the American ideology of Manifest Destiny and through “the most unjustifiable, unjust, and despicable war this nation has ever waged,” speaking of the United States’ war on Mexico.<sup>224</sup> González thinks that the Hispanic experience of being *mestizo*, mixed-breed, lends particular insight on the

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<sup>222</sup> O’Donovan, *The Ways of Judgment*, 152.

<sup>223</sup> “Xenophilia is commanded us: the neighbor whom we are to love is the foreigner whom we encounter on the road,” Oliver O’Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996), 268.

<sup>224</sup> Justo L. González, *Santa Biblia: The Bible Through Hispanic Eyes* (Nashville: Abingdon Press, 1996), 86.

border as a place of encounter.<sup>225</sup> A border, says González, works not like armor but like skin:

Our skin does set a limit to where our body begins and where it ends. Our skin also sets certain limits to our give-and-take with our environment, keeping out certain germs, helping us to select that in our environment which we are ready to absorb. But if we ever close up our skin, we die.<sup>226</sup>

Such a picture captures something of what it is to be a well-functioning border, providing protection but allowing movement if it is not to stifle the life within.

Another theologian offers an image of a border that draws out the reciprocal character of neighborhood. English Anglican theologian Luke Bretherton interprets the border not as a filter or fence but as a face. The border serves as the face a nation presents to the world, displaying whether it is hospitable or hostile, Bretherton writes. “A face says that I am somebody who deserves respect, I am not simply a piece of land to be bought and sold or a thing made use of for a time.” Bretherton goes on: “I have a personality and a history and a way of doing things, but I am made for relationship, and without coming into relationship with others who are different from me, then I do not grow.” Here Bretherton achieves what Roosevelt did: a face indicates a worthiness of respect, and it indicates a desire and need for relationship. But in a theological twist on the face, Bretherton considers it destined for God:

...Ultimately, I am a face who seeks to look upon the face of God and who finds the face of God reflected not in the faces of the strong and powerful, the skilled and the economically capable but in the face of the orphan, the widow and the refugee – and this is who God bids me be hospitable to.<sup>227</sup>

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<sup>225</sup> Ibid., 77.

<sup>226</sup> Ibid., 86–87.

<sup>227</sup> Luke Bretherton, “Filters, Fences or Faces? Asylum Seekers and the Moral Status of Borders,” *Australian Broadcasting Corporation*, June 28, 2012, Online edition, sec. Religion and Ethics, <http://www.abc.net.au/religion/articles/2012/06/28/3535073.htm>. In Heimburger, “Reflections on the U.S.-Mexico Border,” 78, this author lit on the image of a border as a face, but Bretherton develops the image into something more potent.

That a face is destined to see the face of God, Bretherton argues, means that a face is on its way to its intended end when it encounters the face of the widow, the orphan, and the immigrant who presents God's face. Insofar as a faced nation becomes a neighbor only to the strong, it has a face that is not on its way to God, a face that is hardened. This is a face that is headed toward death rather than eternal life, if we recall the interchange that frames the parable of the Good Samaritan. But as a people faces the weak, as it becomes a neighbor to the weak, it sets its face toward Christ and toward the never-ending life that comes in encountering him. Like Walzer's adaptation of the parable, Bretherton's explication of the border as a face lends neighborliness a direction beyond mutual respect: it implies aid for the powerless.

A final way of understanding the country as a neighbor comes from the etymology of the word "country." The English term first appears as a word for a region or district, and it is derived from the Old French *cuntrée*, from the late Latin *contrāta*, referring to a region or urban district.<sup>228</sup> This in turn comes from the Latin *contrā*, meaning in its most basic sense what lies in front of one or opposite one. From there, *contrā* may signify facing the enemy, or it may simply signify toward, up to a person, to meet a person, or face to face.<sup>229</sup> Indeed, this is the same root as in the English "counter" or "encounter," at the heart of what it means to become a neighbor. One source suggests that the term was applied to a region from the perspective of one in the city who viewed the country opposite,<sup>230</sup> but if we let the etymological possibilities lie open, the term is suggestive. The country is the land that presents itself to our gaze, across from us. It takes shape in relation to a viewer and to a distinct country. A people becomes defined by its land, its land fosters its growth, and the

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<sup>228</sup> *Oxford English Dictionary*, 1:580; *Mediae Latinitatis Lexicon Minus*, 67.

<sup>229</sup> *O.L.D.*, 432–433; see also Heimburger, "Reflections on the U.S.-Mexico Border."

<sup>230</sup> *Mediae Latinitatis Lexicon Minus*, 67.

term “country” holds together informal society, formal government, and the land in which it dwells.<sup>231</sup> A country has the potential to stand against another country, indifferent, unhelpful, oppressive, or ready for war. Then again, it might present its face in an opening to another country. That encounter is an opening to Christ the neighbor, an opening in which to receive mercy and extend mercy.

Can a nation-state be a neighbor in the sense revealed by the parable of the Good Samaritan? The picture that President Roosevelt and these theologians offer of an agent respectful of other agents gets part of the way there. When countries treat one another as free and independent, their achievement of this liberal ideal is no mean achievement. Seeing a neighboring country not as a country to be used, exploited, or conquered leaves room for more considerate relationships. Roosevelt’s appeal to countries in the Western Hemisphere moves a step closer to the neighborhood of the parable: certain countries encounter one another simply because they are located nearer one another. As the theologians call countries to aid one another in times of need, they take another step toward the parable. Defending one another from attack, granting funds to avert a financial crisis, receiving refugees when strife threatens the members of another country: these seem good examples of becoming a neighbor.

At other points, it is harder to imagine a people as a neighbor. Walzer thinks that chance occurrences are easy to come by, but more often those who govern peoples move slowly in becoming neighbors. When they act through legislative acts, they cannot be hit in the heart and act in mutual aid so quickly as an individual can, though perhaps executive action allows for quicker, less reflective action. By and large, through treaties and agreements, countries relate in a lethargic way, setting up longstanding arrangements

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<sup>231</sup> “Country” is the favorite term of Michael Walzer, e.g., in *Spheres of Justice*, 44.

without the “by chance” of the Samaritan passing the injured man. Borders rarely change, and so geographical neighbors do not often shift. Still, Walzer’s suggestion bears a repeated hearing: groups of people do somehow discover necessitous strangers in their path and among them. Perhaps a people can be a neighbor if its leaders stop regularly to ask, “who are our neighbors?” This could be an occasion to reassess their current position and the state of the countries around them, asking who has come into their path through their diplomatic efforts, their development goals, their peacekeeping operations, or their trading.

### *The United States as Neighbor*

Such a suggestion brings us back to the United States. The U.S. cannot be as flexible as an individual can in becoming a neighbor, yet it still has opportunities to become a neighbor. Still, those in authority can regularly ask, “Who is my neighbor?” This question could open up Congress and executive branches of the federal government to receiving mercy and giving mercy. In the early twenty-first century, the United States regularly encounters certain countries through its longstanding ties, its land borders, through shipping and travel, and through migration. Chief among these is Mexico: Mexicans are among the foreigners that the U.S. encounters on its path, and many Mexican citizens live within United States territory and form part of U.S. communities. These men, women, and children are already acting as neighbors, contributing to the wellbeing of the United States through their presence, activity, and labor. The U.S. government ought to recognize the many ways these men and women offer help to American communities and act to deliver them from their subjugation. Those from Mexico should not be used and exploited, but they should be received as neighbors.

We suggest three ways that the United States government can become a neighbor to Mexico and to its people. First, Congress ought to act to recognize those who have lived peaceably in the United States for some time. Such recognition should involve an opportunity for certain U.S. residents to admit that they have broken the law by remaining in the country without permission. It should also involve offering them legal residence, allowing those who are illegally present to come out of the shadows. By satisfying certain criteria and waiting for a period of time, citizenship should always be a possibility for legal residents, in keeping with democratic tenets as well as the good news of liberation from slavery.

The second way that the United States government can become a neighbor to Mexico and its people is to reform its laws so that future generations of Mexicans will not become illegal aliens in such large numbers. If the United States will carry on heavily restricting immigration, then it should face up to the problems caused by a policy that applies the same numerical limit to immigration from Mexico as from every other country. Lawmakers should not hold to a principle of non-discrimination in immigration admissions that proves indifferent and harmful to a nearby neighbor, ignoring place and contingency in the name of an abstract goal. Instead, the federal government should look to its limits and its place, to Mexico its neighbor, and to the people from that nation who come to live in it. It is time to relinquish such a small numerical cap for Mexico, either expanding the numerical limit or giving it up in favor of only substantial, qualitative limits.

It is time to receive the mercy that the Mexican people continue to extend to the United States, contributing to its prosperity in a way that Americans too easily dismiss as illegal.<sup>232</sup>

The third way that the United States government can be a neighbor is to seek opportunities for cooperation across its border with Mexico. Immigration laws could be drawn up in conversation with officials from Mexico and other nearby countries. Law enforcement agencies could work together more closely. Such cooperation tends not to go well because of leaks in Mexican agencies that allow information to flow to smugglers and drug cartels.<sup>233</sup> There are further opportunities for the United States to assist Mexico in preventing the forces that uproot Mexicans and cause them to move north. Promoting education for women as well as men, providing reliable and secure banking, and promoting small business initiatives would enable the most disadvantaged regions of Mexico to enable a better life for their people so that they do not have to leave for the United States.<sup>234</sup> Greater cooperation at the border, in the interior, and between the Distrito Federal and the District of Columbia would be steps toward neighborhood.

The best government can do is to become a neighbor so that men and women can become neighbors. These reforms of federal United States law would remove barriers for individuals and communities, Americans and Mexicans, to become neighbors. Legal reform, if successful, will foster everyday acts of receiving mercy and giving mercy. Reform will enable a new openness to those who are different that is no longer prevented through

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<sup>232</sup> American Methodist theologian Dana W. Wilbanks agrees, arguing that the U.S. immigration policy should involve a “principle of proximity” that favors the “neighbor close at hand,” *Re-Creating America: The Ethics of U.S. Immigration and Refugee Policy in a Christian Perspective* (Nashville: Abingdon Press, 1996), 160.

<sup>233</sup> Julia Preston, “Officers on Border Team Up to Quell Violence,” *The New York Times*, March 25, 2010, sec. World/Americas, <http://www.nytimes.com/2010/03/26/world/americas/26border.html>. Here, there are questions to ask about how authorities on both sides of the border conceive of and respond to the drug trade.

<sup>234</sup> Sonia Nazario makes this argument in “The Heartache of an Immigrant Family,” *The New York Times*, October 14, 2013, sec. Opinion, <http://www.nytimes.com/2013/10/15/opinion/the-heartache-of-an-immigrant-family.html>. See Chapter Two, note 321.

legal penalties for transporting or employing these neighbors, that no longer keeps men and women in their houses out of fear of being apprehended. Reformed laws will enable a new recognition of neighbors in the public square and in the public forum that is the church. The real business of becoming neighbors lies with ordinary Mexicans and Americans. As they receive mercy and extend mercy, they must keep in mind the promise that the neighbor represents the face of Christ. They should take courage that becoming a neighbor is the way to eternal life; indeed, it is already a taste of the life that goes on forever.

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In this chapter, we found out what made it possible for so many in the United States today to qualify as an illegal alien. What at first seems a quirk of logic made it possible, as an effort to overcome racism and discrimination in immigration admissions led to equalizing the number of visas for each country annually. In this system, Mexico and other nearby countries were placed on a par with countries farther away, but rather than heeding the severe drop in allowances for legal immigration, Mexicans kept migrating to the United States primarily through illegal channels. One problem created another, though the fix was consistent with a certain American commitment to abstract equality. This attempt at equality, we found, proceeded without acknowledging the United States' history with Mexico, especially its dependence on Mexicans to do much of its manual work. Under the new regime, more and more of these workers went through life without visas, breaking immigration laws, living a precarious existence, and compromising the rule of law in the United States.

We looked for ways of thinking through the laws that make nearby neighbors into illegal aliens, first from a philosophical and theological discussion on justice. An analysis of types of justice helped us see that federal law in its current form fails to right the wrongs done to the unlawfully present and fails to offer visas to suitable nearby neighbors. We ventured farther, wondering if justice requires recognizing ongoing patterns of migration and protecting those who migrate between Mexico and the United States. Talk of the U.S. as a good neighbor drove us to a second way of evaluating these laws and the lives they engender, the parable of Jesus that produces this notion of a neighbor. Reading this parable suggested to us that the laws under which so many in the United States are unlawfully present erect barriers to acts of love and mercy. We argued that it is time for those who live in the country to ask for the gift of receiving from a neighbor and becoming a neighbor. We also explored how the United States could become a neighbor, first by recognizing its role as an indifferent and oppressive neighbor to Mexico. Legal reform would allow the country to become a neighbor in modest ways that start by acknowledging the mercy it receives from Mexican immigrants.

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This thesis seeks to discover how so many in the United States today could become illegal aliens. The thesis has drawn on the Christian tradition to mount a response to the federal laws that make possible this existence below the law. This chapter examined a third move in the law that made it possible for men and women from neighboring countries to become aliens unlawfully present in the United States. These laws were seen to be unjust and unneighborly. The conclusion will draw together what the thesis has added to discussions about illegal immigration and point out areas for further reflection.



# Conclusion

What has this thesis added to a theological discussion about illegal immigration in the United States? Given the demands of the subject – so many millions present in the United States without legal permission, in defiance of the law and in a vulnerable condition – we surveyed Christian responses in the introduction to the thesis. These responses left issues unresolved. We judged it wrong to reject territorial government completely in the name of the body of Christ, but we also judged it wrong to acquiesce to a political arrangement under which exploitation and law-breaking are the norm. Those who agreed in rejecting these extremes, we found, were left with conflicts: between following the law and welcoming the stranger, in the case of evangelical biblical interpreters, or between a right to migrate when work is lacking and a right of sovereign nations to control their borders, in the case of Catholic Social Teaching. This search for a response to illegal immigration pointed out two areas for exploration, legal history and political theology. Rather than treating government as monolithic and timeless, how did immigration laws develop so that it would be possible for so many men, women, and children to break them? So far as Americans assume what the law tells them, where did these legal assumptions come from? Once this is clear, how might the Christian tradition analyze and qualify the government of immigration? What do biblical narratives and resources from the tradition say about authority over who comes into and out of territory?

Reading the history of U.S. immigration law, both legislative and judicial, we found that things have not always been as they are today. It was not always clear that those from far

away were aliens, but this characterization emerged out of an early modern hardening of bonds between subjects and sovereigns. Only in the late nineteenth century was it clear that the federal government had authority over immigration, and that authority was deeply contested by Supreme Court justices. Only since the late twentieth century did the United States limit immigration from nearby countries to a specific number. We discovered that what many Americans take to be true about illegal aliens has not always been the way it is. These concepts have developed in a certain way, and they could be otherwise.

As we followed the growth of U.S. immigration law, we learned that the courts and the legislature developed powerful and harsh conceptual instruments to protect a land where civil rights for all were growing. While provisions for those already inside increased, the law depended on a stark assessment of those called aliens who could make no rightful claim against the federal government's power to exclude and expel them. A country that professed liberty and justice for all made it clear that those privileges were for citizens, not aliens, since according to the law, practically no norms of justice constrained the executive powers to deny entry, detain, and deport aliens. Especially against the claimed power to expel aliens lawfully residing in the country, judges protested that the federal government was turning despotic and lawless, but those who advocated such extensive authority over immigration prevailed. These moves by the Supreme Court were funded by jurists and philosophers for whom international justice rested on national self-preservation, with no greater frame of reference.

We also observed that a high-minded campaign to end legal discrimination based on nationality reversed a pattern of special allowances for neighboring countries. Only fifty years ago, Mexico and other Western Hemisphere countries had no numerical limits on legal immigration, and many of their citizens came to the United States under contract labor programs. Only in recent history did numerical limits come into place on immigration from

Mexico and other nearby countries. As we discerned the contours of Mexico-U.S. relations over the past century, we found Congress playing a game, requiring visas but letting illegal entry carry on, drawing contract laborers and then undocumented workers to do the work Americans did not want to do. In effect, Congress and businesses collaborated to enable continued migration while classing it as illegal, using and exploiting Mexican workers.

Illegal immigration is not what it seems, then. It only became possible in the United States through stark characterizations of those from afar, through claims of government power over immigration without reference to justice, and through a mistaken admissions policy that went hand-in-hand with maintaining a class of migrant workers who were neither slave nor free.

Having seen that the possibility of illegal immigration rests on legal discourses about aliens, immigration authority, and justice, we uncovered ways that the Christian tradition understands those features of our life as creatures during this era. Peoples or nations are fluid distinctions, we heard, given both to bless human beings as they fill the earth and to judge human beings for their self-worship. These far-flung conglomerations of language, land, and history are best understood as opportunities to draw near to one another, a process that is complete in the people of God, in Israel and the church. We discerned that God's people has an apostolic character, sent out across national distinctions so that those of every tribe can share in the fullness of life that comes through Christ's death and resurrection. If nations find their end in drawing near, then calling those from elsewhere "aliens" cannot sit well with those who take on this narrative as their own. A Christian narrative of the healing of the nations stands at odds with treating those from other nations like aliens.

After discovering a Christian unease with the notion of the alien, we looked for a way that Christian theology might qualify the guarding of places. The keeping of places emerged as a task given to human creatures, a task that transformed into the guarding of places against fellow human beings when the threat of murder arose. This guarding, the Scriptures affirmed, takes place only under God's guarding, and it is subject to God's direction that guards judge fairly and shield those under their care, including migrants. Characterizations of government from the Christian tradition helped us understand what immigration authority properly does, that it primarily fends off threats of harm to what a society shares. We found that those who defy this authority do something that is not wrong in itself but wrong because it is prohibited, and that punishment of such wrongs ought not exceed the wrong done. In the end, we decided that the Christian tradition would cast immigration authority not as a strong expression of sovereignty by which a nation protects its life in the way it chooses, but as a ministry of the sovereign God who uses it to preserve human life.

From a chastened description of immigration authority, we found ways that the Christian tradition describes the ways of justice for migrants and the ways of love for neighbors. Justice is not only about equal distribution of goods like visas, but it rights wrongs and attributes gifts to the fitting. On this analysis, immigration admissions ought to give up equal treatment for Mexico and recognize American debts to Mexican migrant workers. Further, we argued that future admissions should be given to those nearby as among the most fitting, and perhaps that patterns of migration deserve recognition and protection by government. We discovered new things about what it means to be a neighbor, whether for individuals and communities in the United States or for the country as a whole. A fresh hearing of the parable of the Good Samaritan brought attention to the encounter with someone from a hated group who shows us mercy and teaches us how to show mercy. An

overly strong interpretation of the legal category of the illegal alien emerged as an excuse not to be a neighbor, to turn a blind eye. We said that it was time that U.S. residents receive mercy from the neighbors they dislike and recognize their neighborliness. It is time too for the United States as a whole to recognize the mercy it receives from its neighbor Mexico and to respond with mercy.

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This inquiry into immigration law and theology has uncovered areas for further reflection. In chapter 1.A, exploring the roots of immigration law in the notion of the alien raised a question: Does the understanding of some persons as aliens come into being as the political community arrogates to itself attributes reserved historically for Jesus Christ and his Church? The earliest U.S. naturalization laws suggest that the answer is yes. These required that to be admitted as a citizen, an alien had “to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.”<sup>1</sup> We might read this renunciation as operating simply on the level of earthly politics and not excluding allegiance and fidelity to the Lord Jesus. But just two centuries before, Queen Elizabeth I of England had instituted an oath with very similar wording, an oath that went a few steps further than previous oaths. This oath not only required faithfulness to the monarch but also renunciation of other powers like the American oath. The Oath of Supremacy also included a declaration that the Queen was “the only supreme governor of this realm, ...as well

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<sup>1</sup> *An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Acts Heretofore Passed on That Subject*, 2 Stat. 153, 1802, 153.

in all spiritual or ecclesiastical things or causes, as temporal.”<sup>2</sup> During the sixteenth century, the Crown may have pared back a Roman church that claimed too much in the way of temporal power, but it answered that distortion by claiming too much authority over the Church. The oath that distinguishes English subject from alien in 1559 and the oath or affirmation that distinguishes United States citizen from alien in 1802 promises allegiance that excludes other allegiances. Both promise fidelity that excludes other fidelities in a way that is not limited by an allegiance or fidelity with the Church of Jesus Christ. It appears that distinguishing others as aliens brackets off the body politic as all-consuming object of loyalty.

Looking farther back into history, there is another reason to think that the notion of the alien arose as the political community took on characteristics that were previously the property of the Christian church. In *Calvin’s Case*, Edward Coke took for granted that the subject-alien distinction was the basic distinction of persons before the law. But this was a relatively new thing to assume. From the Roman lawyer Gaius in the second century A.D. to approximately 1400 in England, the basic distinction between persons was between free and unfree.<sup>3</sup> As this distinction receded, personal status depended on allegiance and fidelity to the king, whom jurist John Fortescue described as the head bound to the body of his subjects. Fortescue understood this body as a *corpus mysticum*, a phrase drawn from an understanding of the unity of the Church achieved in the Eucharist.<sup>4</sup> As a stronger sense of political community in unity with the king grew in the late medieval period, that political community was understood in terms otherwise reserved for the church. The alien emerged as what was not of

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<sup>2</sup> I Elizabeth, cap. I: *Statutes of the Realm*, iv, pt. i. 350. [G. and H. lxxix], cited in Henry Scowcroft Bettenson and Chris Maunder, eds., *Documents of the Christian Church*, 3rd ed. (Oxford: Oxford University Press, 1999), 261.

<sup>3</sup> So argues Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000), 125.

<sup>4</sup> “In Praise of the Laws of England,” in *On the Laws and Governance of England*, ed. Shelley Lockwood, trans. S. B. Chrimes (Cambridge: Cambridge University Press, 1997), 19–21.

this mystical body, and it was a necessary term if the body politic was going to carry such weight. The Christian tradition would suggest wariness about such an over-reaching civil authority and, we suggest, wariness about the reified alien this over-reaching required.

Chapter 2 left a question unanswered: Is it right for immigration authorities to protect a culture or an economy? We offered a framework for answering these questions. Such protection might count as fending off harm that might come to what a society shares if certain immigrants are admitted. Still, enforcing these restrictions draws a government into a bind. Since the standard punishment for those who break these laws, detention and deportation, is disproportionate to the wrong done, either the government punishes too severely or it must let those who break immigration laws go free. There is room for further exploration here, but Christians do well to remember that treating immigrants with justice and love reminds Israel of her identity. Perhaps when Americans extend justice and love to immigrants, they too are reminded of their immigrant identity.

In chapter 3, there remains another question about the history we told there: What has kept so many U.S. residents in a class that is neither slave nor free? Behind the racism against Africans that perpetuated slavery in the United States, Wendell Berry finds a problem we have with our own condition. He says that at root, we have an “ordinate desire to be superior – not to some inferior or subject people, though this desire leads to the subjection of people – but to our condition.” He continues: “We wish to rise above the sweat and bother of taking care of anything – of ourselves, of each other, or of our country.”<sup>5</sup> Berry thinks that the history of slavery reveals a desire to cast some work as “‘nigger work’...that is, fundamental, necessary, and

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<sup>5</sup> *The Hidden Wound*, new ed. with a new afterword (San Francisco: North Point Press, 1989), 112.

inferior.”<sup>6</sup> That we wish to get beyond necessary work and to ignore the messes we make requires that we subjugate people and ruin places with our waste, says Berry.<sup>7</sup> Perhaps this is why American society has perpetuated a class of contract laborers and undocumented workers to do the dirty work it would rather ignore. Perhaps this is why calls for legal reform still focus on expanding the immigration of professionals without recognizing that immigrants do a significant portion of the United States’ manual work. All too easily in a post-industrial society, we can believe the fiction that all work will be immaterial, forgetting that we are bodies that get dirty securing food and shelter. A response to this disavowal of the flesh would require a theological valuation of the body and of work, leading to a conception of economics that does not require turning people into “niggers.”

In chapter 3, we hinted at a fourth question for exploration: How can those who reside in the United States without legal permission find release? Congress acted in 1986 to provide an adjustment of status, better known as an amnesty, for nearly three million men, women, and children.<sup>8</sup> In 2013 and 2014, advocates for legal reform proposed pathways to legal residence or citizenship, while critics alleged that these undervalued the rule of law. The Sabbath year in Deuteronomy 15 offers a parallel to amnesty for aliens unlawfully present in the United States. There, in the good land that Yhwh is giving to Israel, the people are told to release slaves every seventh year. In a passage that promises that there will be no poor in the land, this institution can be read as allowing a way out of lifelong servitude to the wealthy. In a passage that also promises that there will never cease to be poor in the land, the Sabbath year can also be read as a recognizing the inevitability of the impoverishment that leads to slavery,

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<sup>6</sup> Ibid., 113.

<sup>7</sup> Ibid., 123.

<sup>8</sup> *An Act to Amend the Immigration and Nationality Act to Revise and Reform the Immigration Laws, and for Other Purposes (Immigration Reform and Control Act of 1986, Simpson-Mazzoli Act)*, 100 Stat. 3359, 1986, 3394–3395.

providing a periodic levelling. While federal U.S. law interprets the migrations we discussed in chapter 3 as illegal, interpreting the shadowy lives of the undocumented through Deuteronomy 15 casts them as indentured, servants to the legal residents and citizens of the United States. As lawmakers disclaim amnesty, the model of the Sabbath year indicates that rather than undermining the rule of law, periodic release from forms of slavery resets and revives a just legal system.

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I reestablished contact with Miguel Villanueva in 2013. Miguel was still in Mexico, it turned out. After I had met him in Nogales, Mexico, he slept on its streets for about a month before a relative sent him money to take a bus back to stay with his mother. Since then, Miguel has been enrolled in a local university. He once tried crossing into the United States again, this time in Texas, but he was caught by border agents. He expected a judge to charge him with a felony, but instead the judge charged him with a misdemeanor and sentenced him to several days in jail. After that, Miguel was deported to Mexico. He told me he did not want to try to enter the United States again. He did not want to go to jail again, and he wanted to prevent his record from becoming irredeemable. A lawyer told Miguel that the U.S. might reform its immigration laws, and Miguel hoped that this might allow him to return north. In the meantime, Miguel said that his wife did not contact him anymore. He was not able to return to her and their daughter, and so his wife was now with another man.

In 2014, Miguel related another twist in his story. He said he had spoken to his ex-wife in the United States – no, his ex-girlfriend, he self-corrected. She told him that he was not the father of her daughter. A mutual friend told Miguel the same thing, saying that someone else was the father, and in the end, Miguel believed them. After years of thinking about his

daughter every day and regretting not being with her, this news allowed him to get on with life in Mexico with his girlfriend and his studies.

Psalm 146 offers words for those who are troubled by migrating illegally, or troubled on behalf of those who do. There the psalmist praises Yhwh, declaring earthly rulers as unworthy of trust, unable to deliver, and headed toward the grave. The God of Jacob is not so, for this God made heaven and earth and keeps trust forever. This Yhwh executes judgment for the oppressed, feeds the hungry, frees the prisoner, and upholds the widow and the fatherless. “The LORD watches over the sojourners,” or better: “Yhwh keeps the migrants” (v. 9a). The psalmist concludes: “Yhwh will reign forever....Praise Yhwh!” (v. 10)

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## Conclusion

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