Chapter 1

Immigration Law’s Long Founding Moment

In the spring of 1798, the young American Republic faced an existential threat. The country was on the brink of war with France. Though France had been an ally during the fight for independence, relations between the two countries soured in the wake of France’s own revolution. The violence it spawned chilled many early American statesmen. Even Thomas Jefferson, an enthusiastic supporter of the revolution and committed Francophile, blanched at the Terror unleashed.¹ When war broke out across the European continent in the 1790s, with France and Britain on opposite sides, the Washington administration debated whether to remain neutral. Secretary of State Thomas Jefferson advocated a “tilted” neutrality toward the nation’s former ally, while Secretary of the Treasury Alexander Hamilton insisted that strict neutrality served the United States’ interests.² In response to President George Washington’s eventual Neutrality Proclamation and other provocations, including the signing of the Jay Treaty with Britain, France retaliated, seizing thousands of American merchant ships in a commercial quasi-war that lasted until 1800.³ The United States quickly place itself on wartime footing: in 1798, Congress enacted a trade embargo and authorized the U.S. navy to attack and seize French ships.⁴

The external threat from European powers exacerbated a growing internal political crisis. The founders who penned the American Constitution disdained political faction and hoped to build a political machine that would rise above it. Yet by 1798, two proto-parties had emerged. The Federalists and the Democratic-Republicans vied for power and clashed mightily over the shape of the young republic. At the center of that fight stood the country’s second president, the
Federalist John Adams, and his Democratic-Republican Vice President, Thomas Jefferson. They, along with their political factions, were intractably divided over the French Revolution and America’s responsibility with respect to its former ally. France fueled these divisions as it sought to eliminate the threat to its interests posed by Washington. In 1796, for example, the French Foreign Affairs Minister urged France’s charge d’affaires to “use all the means in his power in the United States to bring about a successful revolution and Washington’s replacement,” emphasizing that “[w]e must raise up the people and at the same time conceal the lever by which we do so.”

Fearful of the Jeffersonians and their French sympathizers, Federalists in Congress targeted suspected immigrant spies, infiltrators, and agitators—as well as their domestic political opponents. In 1798, Congress enacted the infamous Alien and Sedition Acts. The two Alien Acts, though less studied than their Sedition Act counterpart, constituted the nation’s first experiment with deportation and thus marked important moments in the development of the American state. The Alien Enemies Act authorized the deportation of citizens of any state with which the United States was at war. Despite being the firstever American law to assert the national government’s power to expel foreigners residing in the country—a power not explicitly spelled out in the Constitution—the law was relatively uncontroversial and passed with broad bipartisan support. Indeed, it remains on the books today.

The Alien Friends Act, however, ignited fierce opposition. Justified by Federalists as a national security measure, it gave the President power to personally order the deportation of “all such aliens as he shall judge dangerous to the peace and safety of the United States.” The power was not fettered by the judicial process that was provided for in the Alien Enemies Act. Nor was the Alien Friends Act subject to any meaningful congressional control. Under the Alien Enemies
Act, the President could deport foreigners only after Congress first exercised its Article I authority to declare war. This invested Congress with direct control over the exercise of expulsion authority and restricted the power’s operation to wartime. By contrast, under the Alien Friends Act, the President had exclusive authority, in times of peace as well as war, to decide which aliens were dangerous and to expel them from the country.8

In addition to passing the Alien Acts, the Federalist-controlled Congress attempted to manipulate the country’s early naturalization laws to target immigrants supportive of France. In 1790, Congress had exercised its constitutional power to “establish a uniform rule of naturalization” by requiring that noncitizens reside in the United States for two years before becoming citizens. By 1795, amid deteriorating relations with France, Congress extended this residency requirement to five years. At the height of the crisis in 1798, Congress lengthened the period to fourteen years, with an eye to keeping pro-French immigrants out of the voting booth and the government out of the hands of the Jeffersonians.9

Democratic-Republicans fiercely opposed giving the President a free hand to deport foreigners of his choosing. Pragmatically, they feared that the power would be used to target any foreigner opposed to the Federalists. Philosophically, they argued that the bill offended the separation of powers. James Madison argued that “by uniting legislative and judicial powers, to those of executive, [the Alien Friends Act] subverts the general principles of free government.” Thomas Jefferson similarly contended that the Act violated Article III of the Constitution, which vests in politically independent courts the judicial power of the United States, by “transferring the power of judging any person . . . from the Courts to the President of the United States.”10 Embodied in resolutions drafted by Madison and Jefferson and passed by the legislatures of Virginia and Kentucky, these arguments nearly sparked a constitutional crisis. In the resolutions,
the state assemblies claimed the freedom to ignore, or “nullify,” national legislation they believed to be unconstitutional, casting the states as protectors of the founders’ Constitution and as bulwarks against federal tyranny.\textsuperscript{11}

Fortunately, the threat to the constitutional order posed by the Alien Friends Act receded quickly. President Adams, perhaps to avoid open defiance by states controlled by the Democratic-Republicans, never asserted the authority the Alien Friends Act gave him. Two years later, the law expired.\textsuperscript{12} That same year, following Jefferson’s victory in the fiercely contested election of 1800, Congress returned the residency requirement for naturalization to five years, where it remains today. From that point forward, the antebellum Congress stayed away from legislating immigration policy. It was not until 1875 that it passed the first federal law barring the entry of some immigrants into the United States. And it was 1882, more than eight decades after the passage of the Alien Acts, before Congress again enacted a authorizing the deportation of noncitizens residing in the country.\textsuperscript{13}

Today, the well-established power to deport gives the President tremendous policy-making authority—to decide which immigrants should be removed and which may stay as the result of executive grace. The fact that early Congresses declined to extend this authority, or regulate immigration at all, did not mean that immigrants flowed freely into early America. State and local governments, through their police power, exerted considerable influence over immigrant movement. And early Presidents significantly shaped the contours of nineteenth century immigration politics, precisely because of immigration’s connection to foreign affairs and the attendant concerns of foreign influence. In this chapter, we highlight the reasons for congressional quiescence, as well as the centrality of diplomacy and statecraft to nineteenth century immigration policy and thus the inevitability of the President’s immigration law.
A Quiet Congress

Congressional inaction on immigration did not result from widespread political consensus about the place of immigrants in early America. The country never really welcomed all immigrants with open arms, as some mythmakers have suggested. Nearly every decade brought pitched battles over the desirability of immigration, with new arrivals regarded as different than, and inferior to, their predecessors. In the 1840s and 1850s, for example, rising levels of migration from Ireland prompted a political backlash. Many Irish immigrants were Catholic, and increasing anti-Catholic sentiment eventually gave rise to an entirely new political party—the Know-Nothings. By the mid-1850s, “the Know-Nothings had captured eight governorships, more than a hundred seats in Congress, and mayor’s offices in Boston, Philadelphia, and Chicago.” In Massachusetts, the Know-Nothing controlled legislature passed rules requiring immigrants to wait several years after they naturalized before receiving the right to vote.

Political battles over immigration also gave rise to considerable sectional conflict. Different regions had different needs: new western states, like Ohio and Illinois, desperately sought immigrants to settle their territories; established Eastern seaboard states, such as New York and Massachusetts, had less need for labor. These regions were also receiving different migrants: migrants who moved west were more likely to be German than Irish, and many perceived the Germans to be “economically more prosperous and socially more stable than immigrants in the East.”

These antebellum controversies never translated into congressional legislation directly regulating immigration. While this might seem surprising, Congress refused to act in part because debates about the national regulation of immigration were inextricably linked to fights over the expansion of slavery. This can be seen even in the sole provision of the Constitution to
mention migration. The Constitution nowhere expressly enumerates a power on the part of Congress to regulate immigration. But In Article I, Section 9, which imposes a number of specific prohibitions on the federal government, the Constitution specifies that:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.

This thinly veiled reference to the slave trade was one of several compromises in the Constitution that papered over the ultimately unbridgeable divide between the North and the South. The fraught politics of slavery made Congress reluctant to regulate the movement of people, including in the form of immigration. The decision to do so would have exacerbated and inflamed already intractable disputes over Congress’s authority to regulate slavery’s westward expansion. It also would have required revisiting and questions about Congress’s constitutional authority to exclude or expel foreigners, authority left unresolved in the wake of debates over the Alien Friends Act. Thus, though states petitioned Congress to regulate and restrict immigration to serve their local interests, Congress declined to act.¹⁹

In this political and legal climate, Congress restricted itself to passing only the most quotidian legislation to help manage immigration flows. For example, Congress not infrequently passed passenger vessel regulations designed to protect immigrants and increase the safety of passage to America. In 1819, for example, Congress responded to complaints that overcrowded conditions on trans-Atlantic ships resulted in many deaths onboard by setting a limit of two passengers for every five tons of vessel burden, for all ships carrying passengers to the United States.²⁰ The Act also required ship captains to deliver “a list or manifest of all the passengers taken on board,” an effort by Congress to better understand who was arriving on the country’s
shores. Later Acts expanded these information-gathering provisions and added further safety requirements. One required that all ships provide fourteen square feet of clear deck space for each passenger. Other Acts regulated ventilation, cooking facilities, food and water supplies, and sanitation.

These regulations did have some regulatory significance. At the very least, they provided a bureaucratic foundation for the restrictionist edifice Congress would create at the century’s end. But the laws did not attempt to curtail immigration or select for particular types of immigrants. During this same period, California and other states notoriously passed supposedly benign “regulations” of passenger travel with the goal of suppressing new arrivals. But nothing in the congressional record suggests that Congress intended its own passenger regulations as indirect means of restricting immigration.

State Regulation

With Congress mostly inactive, states and local governments became de facto immigration legislators in the early nineteenth century, through the exercise of their police powers. Today we would not identify these rules as immigration law; there was little formal exclusion or expulsion by states or local governments during this period, and many of the relevant laws applied to citizens and non-citizens alike. Instead, states utilized their powers to protect the health, safety, and welfare of their populations in ways that shaped the movement of people. Through local regulation, they attempted to attract or repel new residents, depending on the needs and preferences of their own communities.

In the coastal states where immigrants landed—New York, Massachusetts, and later California—governments wielded their inspection and taxation powers to shape the flow of immigrants into the nation, imposing head taxes, bonding requirements, and other sorts of
passenger regulations. These laws served to “articulat[e] local policy choices that signaled to carriers and European governments opposition to the ‘dumping’ of paupers and convicts.”

States also policed entry through poor laws and quarantine provisions.

Receiving states often undertook these regulatory efforts while simultaneously (though always unsuccessfully) prodding Congress to act. They saw themselves both as local regulators and national agenda-setters. When immigration from Ireland spiked in the 1830s, for example, the Massachusetts legislature presented the following resolution to Congress: “Resolved, That it is expedient to instruct our [congressmen] . . . to obtain the passage of a law to prevent the introduction of foreign paupers into this country.” Local governments sent similar petitions during these years. Boston and New York, along with other cities and counties, presented Congress a memorial “praying a repeal of the naturalization laws” or, failing that, an alteration to extend the time of residence prior to naturalization. Sullivan County in New York petitioned to complain about Catholic immigrants. Even while they were pleading with Congress, states were contemplating state legislation to protect themselves from the perceived financial costs of arriving immigrants. Both Massachusetts and New both ultimately imposed head taxes on arriving immigrants. These taxes were struck down by the Supreme Court in the 1849 Passenger Cases. But all of the justices agreed that states retained at least some power to regulate immigration, and for decades states continued other regulatory efforts, such as requiring vessel masters to post bonds for arriving passengers, as insurance against future relief costs born by the states.

Newer states in the west, by contrast, actively sought to attract immigrants. They had vast tracts of land waiting to be settled and cultivated. What each state most needed were homesteaders and laborers, people who would contribute to the state’s economy—and its
political clout, by growing the state’s population and consequently increasing its representation in the House of Representatives. Many Midwestern legislatures used land grants, voting and property-holding rights for non-citizens, and other inducements to attract new immigrants to their states. The original 1857 Iowa Constitution, for instance, included a provision that non-citizens who may “become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native born citizens.”

The result was a patchwork quilt of disparate, even contradictory rules, designed to serve local interests rather than some national agenda. It was not until 1875, after the abolition of slavery and at the outset of an era of vast federal lawmaking, that the Court clearly intervened to put significant limits on state regulation. In *Chy Lung v. Freeman*, it treated an onerous bonding requirement imposed by California as in excess of the state’s police power and as a usurpation of Congress’s power over interstate commerce. In granting an earlier writ of habeas corpus in the case, Justice Field re-evaluated the police power said to undergird state regulation: “[w]e cannot shut our eyes to the fact that much which was formerly said upon the power of the state . . . grew out of the necessity which the southern states, in which the institutions of slavery existed, felt of excluding free negroes from their limits.” During the final few decades of the century, then, the balance of power over immigration regulation tilted decisively toward federal dominance.

*Treaty Making*

If one consequence of congressional inaction was to push policy-making down to the states, a second was to divert national policy-making into other lawmaking channels. In the nineteenth-century world of proto-immigration policy, immigration bore even more directly on foreign policy than it does today. And even in the early nineteenth century when the presidency represented a far weaker institution than it does today, the Constitution clearly laid out a leading
role for the President in foreign affairs. Through the treaty-making power, the President and his
advisors played a pivotal role in the immigration policy-making process, actively recruiting
immigrants from abroad and protecting their interests at the same time.

Article II of the new Constitution, which created the presidency itself, also laid out the
rules for entering into the treaties that would serve as vehicles for establishing robust inter-state
relations and related migration. Section 2 provides that the President “shall have Power, by and
with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators
present concur.”35 Whereas the ordinary lawmaking process in Article I gave Congress the
initiative and required enactment through both Houses of Congress, as well as approval by the
President, Article II gave the President a kind of primacy over external matters. With the power
to enter into treaty negotiations unilaterally, needing only the Senate’s consent, the President
thus had agenda-setting authority. This is not to say that presidential treaty-making concerning
immigration silenced Congress; just as Presidents can set the legislative agenda, Congress can
prod and limit the President’s diplomacy, and eventually the domestic politics of immigration
exploded into exclusionary legislation. But for a time, Presidents actively set the terms of
immigrants’ entry and stay in the United States.

The practice of making treaties to facilitate immigration pre-dates the Constitution itself.
In 1778, just two years after the United States declared its independence from Britain and in the
midst of the revolutionary war, the Continental Congress signed the Treaty of Amity and
Commerce with France, which recognized U.S. independence and various mutual commercial
benefits, including protection of vessels and abstention of fishing.36 After the Constitution’s
ratification in 1789, the practice of making such treaties accelerated. Over the following decade,
the nation entered into nearly a dozen treaties of friendship, commerce, and navigation, all
modeled on the first treaty with France. The treaties varied in their details. But a typical one—such as the Jay Treaty with Britain, which in 1794 settled some still outstanding issues from the Revolutionary War—conferred much more than just navigation and trading rights. They also conferred rights of entry and residence—the right to come and live in the United States. And they conferred certain individual liberties, including access to the courts, the right to own and devise property, and protection from discrimination by local authorities. This flurry of treaty making served crucial interests of the fledgling republic. As David Golove and Dan Hulsebosch have argued, the framers of the Constitution grappled with the pressing need to establish the United States as a credible player in the international arena. They sought to give foreign investors confidence that the legal system would protect their holdings in the United States, and merchants assurances that they would be able to conduct business within the new nation without interruption.

More important to this history of modern immigration law, however, the United States concluded a series of trade treaties with China from the 1840s through the 1870s—a catalyst in the rise of restrictive federal immigration legislation. As we have established, states petitioned Congress for legislation to restrict immigration during the antebellum period, amidst percolating nativist sentiment; many members of Congress supported restriction, too. But when John Tyler assumed the Presidency in the spring of 1842, his opening message to Congress rejected this sentiment: “We hold out to the peoples of other countries an invitation to come and settle among us as members of our rapidly growing family.” (This message was echoed by later Presidents, like Abraham Lincoln, who in his 1863 address to Congress argued for the “expediency of establishing a system for the encouragement of immigration” because immigration was a crucial “source of national wealth and strength.”) Seeking access to Chinese markets on par with
Great Britain, President Tyler negotiated a treaty of commerce and friendship with China in 1844, in the aftermath of the First Opium War between China and Great Britain. This Treaty of Wangxia secured commercial rights for the U.S at five ports in China, as well as protection for American missionaries, and the right of U.S. citizens to be tried by American officials in China. Though the treaty itself did not mention it, this negotiation helped set the stage for future Chinese migration to the United States.\textsuperscript{41}

The California gold rush, followed closely by the construction of the transcontinental railroad, created tremendous demand for labor along the West coast. The Central Pacific Railroad Company employed Chinese laborers to build tracks through the Sierra Nevada – these laborers made up 90\% of their workforce.\textsuperscript{42} Chinese laborers were “actively recruited” to work in domestic service and laundromats.\textsuperscript{43} Chinese migration rose in response to this demand. When California’s congressional delegation raised the alarm about these developments, President James Buchanan moved to assuage concern while simultaneously negotiating amendments to the Treaty of Wangxia, to strengthen the rights of Chinese nationals in the United States.\textsuperscript{44}

These sorts of diplomatic efforts had limited, if any, effect on the growing nativist sentiment that favored excluding Chinese immigrants from the country. In the aftermath of the Civil War, those opposed to immigration from China and elsewhere appropriated anti-slavery sentiment to advance their claims. They contended that the Chinese were a subservient, inferior race and could never be free laborers—arguments similarly made about blacks both before and after the War.\textsuperscript{45} In the thick of this political maelstrom, the diplomatic establishment sought to protect U.S. commercial interests by protecting Chinese nationals in the United States. As part of a larger strategy of expanding U.S. power in East Asia, Secretary of State William Seward tasked the U.S. representative in China, Anson Burlingame, to negotiate a new treaty.
Seward treaty added two key articles to the Treaty of Tianjin. The first targeted the racialized “coolie labor problem” by obligating both nations to “pass laws making it a penal offense for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country, without their free and voluntary consent, respectively.” In exchange, the treaty offered something to China: a second clause in which the United States promised to protect the civil rights of resident Chinese immigrants, ensuring that “Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.”

This treaty guarantee was not just a rhetorical sop. Courts soon began wielding it to strike down state legislation that discriminated against Chinese immigrants. Attorneys also cited it to support the constitutionality of criminal indictments issued against perpetrators of mob violence that targeted Chinese residents in Oregon and California, pursuant to Reconstruction-era civil rights statutes. Eventually, however, the resistance to and distrust of Chinese immigrants that had long roiled state politics and the national debate catalyzed Congress. The Burlingame Treaty may have delayed congressional action, but only a few years after China and the United States came to their new understanding, Congress began to assert its authority to regulate immigration.

<1>Chinese Exclusion

In 1875, Congress passed the first federal law to exclude categories of immigrants from entering into the United States. The Page Act, named for the California congressman who spearheaded its passage, putatively targeted criminals and prostitutes. But it was widely understood as an initial effort to curb Chinese migration to the west coast. Even as Congress
moved toward exclusion, however, Presidents continued their resistance; the use of treaties to make migration policy had served to empower the President in the lawmaking process, and they often sought to advance elite commercial and nationalistic interests. For a time, the Chinese proved willing to accept treaty modifications that addressed the restive immigration politics of the United States. But as politics at home pushed Presidents to exact ever-more restrictive conditions, the diplomatic relationship between the U.S. and China broke down, and Congress seized control of the project of Chinese exclusion.

The Page Act of 1875 did little to quiet agitation against Chinese immigrants, and in 1879 west coast members of Congress introduced additional restrictive legislation. The bill they proposed limited to fifteen the number of Chinese immigrants permitted aboard American vessels for passage to the United States. President Hayes promptly vetoed the bill. Congress had enacted passenger limits before. But as Hayes made clear in his veto message, the fact that the passenger limit bore no relationship to the size of the vessel underscored that the law was meant “to repress this immigration to an extent falling but little short of its absolute exclusion.”

Despite his veto, Hayes acknowledged in his message the “grave discontents” of people along the Pacific coast, which he said the federal government should take seriously. But he argued that Congress’s actions violated the constitutional separation of powers. He took the position that the bill effectively abrogated the Burlingame Treaty and argued that Congress lacked the power to abrogate treaties—at least with a friendly nation. The Constitution, he contended, assigned the power of both treaty negotiation and abrogation to the President, acting with the advice and consent of the Senate. Changes in the nature of Chinese migration thus had to be initiated through diplomatic negotiations conducted by the Executive. He also emphasized that immediate withdrawal from the treaty was rash: “[N]o reasons can require the immediate
withdrawal of our treaty protection of the Chinese already in this country, and no circumstances
can tolerate an exposure of our citizens in China, merchants or missionaries, to the consequences
of so sudden an abrogation of their treaty protection.” While diplomatic negotiations to amend
the treaty might take some time, Hayes thought that any further “inconveniences” on the west
coast that might arise in the meantime would be significantly outweighed by the damage “to
much wider and more permanent interests of the country” that would flow from Congress’s hasty
abrogation of the treaty.

In his annual report to Congress the following December, President Hayes noted that
China was open to re-negotiating the Burlingame Treaty. A few months later, the President
ominated James Burrill Angell to lead a commission to China to seek reductions in migration
from China to the west coast. Angell succeeded, securing an agreement that permitted the United
States to suspend immigration by Chinese laborers to the United States temporarily, but not
permanently. In exchange, the agreement obligated the United States to take steps to protect the
rights of Chinese immigrants who had already entered the United States, including their rights to
travel freely to and from the United States in the future.

The parties signed the new treaty on November 17, 1880 in Peking (now Beijing).
Ratified five months later by the Senate, the Treaty Regulating Immigration From China
proclaimed its consistency with the spirit of the earlier agreements. But the treaty’s title
highlighted what the terms of the agreement drove home: it authorized the restriction of
immigration from China—the first effort by the federal government to restrict immigration from
any nation. It also departed explicitly from the reciprocal structure of many earlier treaties of
friendship and commerce, of which the Burlingame Treaty had been a variant. In that sense, it
openly acknowledged what had long been true: whereas large numbers of immigrants sailed
from China to the United States, the flow in the opposite direction amounted to little more than a trickle.

The incoming President, Chester A. Arthur, took the Angell Treaty’s promises seriously. He assumed office shortly before the Senate ratified the treaty amendments. In his address to Congress to open the legislative session, he called for “careful regard for the interests and susceptibilities of [the Chinese] government” in any modification of immigration laws. But lawmakers had no such intention. During the session, Congress passed a twenty-year “suspension” of immigration by Chinese laborers. With an eye to foreign affairs and the nation’s global standing, Arthur vetoed it. Like President Hayes before him, Arthur argued in his veto message that the statute violated the country’s treaty obligations. The Angell Treaty had not given the United States carte blanche to restrict Chinese immigration. It required that any “limitation or suspension shall be reasonable.” And it stated explicitly that the United States “may not absolutely prohibit” the immigration of any class of Chinese immigrants. President Arthur contended that banning all migration by Chinese laborers for a generation could only be seen as a prohibition, not as a reasonable suspension. He also thought that an additional requirement in the Act—that Chinese immigrants currently residing in the United States register with the federal government—was “undemocratic and hostile to the spirit of our institutions.”

Two days later, members of Congress introduced several new bills in response to the President’s veto. One bill was similar to the legislation that had been vetoed, except that it reduced to ten years the period during which immigration would be suspended and eliminated the registration requirement. After a series of amendments by the Senate, which included the addition of the first statutory provision since the Alien Friends Act to authorize deportation—in this case of “any Chinese person found unlawfully within the United States”—the bill was
passed by Congress. President Arthur, having hinted in his veto message that he would be open to a shorter suspension, concluded that the ten-year suspension of labor immigration from China complied with the terms of the Angell Treaty and signed the bill into law. The watershed Chinese Exclusion Act of 1882, widely seen as the birth of modern immigration regulation, was now on the books.

The law did not quell anti-Chinese sentiment, which erupted in violence along the west coast in the late 1880’s. In September 1885, white miners in Rock Springs, Wyoming attacked their Chinese counterparts over a labor dispute, resulting in twenty-eight Chinese deaths. In 1887, a gang of horse thieves robbed and murdered as many as thirty-four Chinese miners in Hell’s Canyon, Oregon. In Seattle, a mob rounded up Chinese immigrants and strong-armed them onto a ship bound for San Francisco. In Rock Springs and Seattle, the federal government sent in troops to restore order. Amidst this upheaval, President Grover Cleveland sent a delegation to China to negotiate a new treaty. The terms proposed in the Bayard-Zhang Treaty would have extended Chinese exclusion for twenty years and prohibited re-entry by most migrants who left the United States to visit China. Congress passed implementing legislation that would have come into effect immediately upon ratification.

But the Chinese government finally balked. It demanded that the period of suspension be shortened, and that the United States permit re-entry by Chinese residents who traveled abroad. China’s rejection of the new terms rendered Congress’s implementing legislation inoperative, but lawmakers responded quickly by passing the Scott Act of 1888, an addendum to the exclusion law of 1882. The core provision of the new law prohibited Chinese residents who departed the United States from returning. The Act clearly repudiated the commitments the United States had made in the 1880 Burlingame Treaty. Yet unlike President Hayes, who had vetoed legislation
that he believed to be in conflict with those treaty obligations, President Grover Cleveland signed the Scott Act into law. In the highly politicized environment of an election year, Cleveland issued a long signing message arguing that the failure of the Chinese government to ratify the Bayard-Zhang Treaty created an “emergency in which the government . . . is called upon to act in self-defense by the exercise of its legislative power.”62 His signature precipitated litigation, ultimately pushing the Supreme Court to take up some unfinished business from the founding—to determine how the Constitution allocated the authority to regulate immigration.

Prior to the period of Chinese exclusion, the Supreme Court had dealt piecemeal with the absence of an express provision in the Constitution addressing the regulation of immigration. The only cases to reach the Court during this period involved challenges to state laws regulating immigration. The Court gave these state efforts a mixed reception and evaluated them for the extent to which they interfered with federal commercial powers. In the antebellum period, the Court struck down head taxes imposed on landing passengers.63 But it upheld other laws, including a New York law requiring ship captains to remove any passenger the mayor of New York deemed likely to become a public charge, and to post security for other passengers in case they later became wards of the city.64 Throughout this period, the Court regularly affirmed the idea that states possessed some power to regulate immigration to protect their local interests. In Miln, for example, Justice Barbour argued that the New York law fell within internal police power to “take care that no detriment come” and “provide precautionary measures against . . . moral pestilence.”65

Not until 1876, with the slavery question settled, did the Court signal its turn from this view in Chy Lung v. Freeman. In that case, the Court for the first time struck down a state law
requiring ship captains to post bonds for the immigrant passengers they transported to America. The Court was careful not to hold that all state imposed security requirements for landing immigrants were, per se, usurpations of Congress’s constitutional authority to regulate international commerce: “We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist.”66 Instead, Justice Miller chastised California’s statute as a source of uniquely usurious and arbitrary power for state immigration inspectors.67 Nonetheless, by invalidating California’s thinly-veiled attempt to suppress Chinese migration, the Supreme Court helped propel political efforts to pass federal legislation accomplishing that same end. When those efforts culminated less than a decade later in the passage of a string of Chinese exclusion laws, the Court found itself once again confronting the question of what the Constitution had to say about who had the authority to regulate migration.

*Chae Chan Ping v. United States* served as the first vehicle presenting that question. Chae Chan Ping lived in San Francisco and had arrived in the United States from China as a young man, well before the passage of the Chinese Exclusion Act of 1882. After living and working in California for many years, he traveled back to China in June 1887, presumably to see his family. Before departing, he obtained a “certificate of re-entry” from the San Francisco collector of customs, as required by the 1882 law. The certificate would attest to his identity and authorize him to re-enter the United States. Unfortunately for Chae Chan Ping, his trip abroad coincided with the Cleveland administration’s failure to negotiate Bayard-Zhang Treaty. While he was in the middle of the Pacific Ocean, steaming back to San Francisco, Congress passed the Scott Act, cancelling all existing certificates and barring the re-entry of Chinese immigrants who had left
the United States. Inspectors at the port of entry refused Chae Chan Ping’s certificate upon arrival; as a result, the ship’s captain detained him aboard. On Chae Chan Ping’s behalf, lawyers working with the Chinese community to challenge the exclusion laws filed a habeas petition challenging his detention and exclusion.

Scholars often treat Chae Chan Ping’s case as a watershed moment in American history, framing it as the case in which the Supreme Court, for the first time, embraced the government’s power to exclude foreigners, effectively rejecting an open borders regime implicit in the Constitution. But this common understanding of this famous case is mistaken. Chae Chan Ping’s case had little or nothing to do with open borders claims. His lawyers conceded that the federal government had authority to restrict immigration however it saw fit, including by closing the nation’s borders entirely. In their brief to the Supreme Court, they acknowledged “[t]he inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied.”

There are no canonical open borders arguments here. The Supreme Court did not hold that federal immigration law was immune from constitutional scrutiny altogether or that arriving immigrants lacked constitutional rights of any kind—long a favorite interpretation of the case. For decades, lawyers for the Department of Justice, defending the government, have argued that the case precludes judicial review of immigration policies. But the Court’s holding was much narrower and more technical. It simply rejected Chae Chan Ping’s argument that he had a vested right to reside in the United States that he could not be denied without due process of law under the Fifth Amendment. Instead, the Court concluded, he possessed only a privilege revocable at will by the United States. This distinction was crucial in nineteenth century constitutional law: treating Chae Chan Ping’s prior residence as a mere privilege meant that his exclusion at the
border could not implicate any interest in “life, liberty, or property” protected by the Due Process Clause.

To be sure, the Court’s conclusion that even lawfully domiciled noncitizens had no vested right in their residence rendered immigrants’ status precarious and subject to political whim. The Court empowered the Executive Branch, making it possible for officials inspecting disembarking passengers to order exclusion themselves. And it limited the role of the judiciary in supervising immigration policy by denying that exclusion had to be accompanied by trials at common law.

The Court’s conclusion also paved the way for its subsequent holding, a few years later, that the deportation of noncitizens authorized by the Scott Act of 1888 did not (as a legal matter) amount to “banishment.” Banishment was the term traditionally applied to the sovereign act of expelling a citizen from the territory, or removing him to a remote frontier or outlying colony. Sovereigns claimed the power dating back at least to Roman times, and Great Britain relied on the practice heavily during its colonial period, banishing English convicts to Australia and Quakers to America. For religious dissidents in Scotland during the 1660s and 1670s, “transportation to Barbados, Virginia, or Tangier was the usual fate of those who proved too obdurate.” While there has long been controversy over the power to banish, the famous jurist William Blackstone and many others believed that it could be imposed only on the authority of Parliament, and not just the Crown, and then only as punishment for a criminal conviction rendered by a court of law.

At least some federal courts in the nineteenth century United States, following Blackstone’s lead, appear to have believed that banishment could only result from a criminal trial, at least when the rights of a citizen were at stake. As Oregon circuit court Judge Deady
explained in 1888, citizens could be expelled from the United States only as punishment for a crime following a criminal trial.\textsuperscript{73} This understanding of banishment led lawyers representing noncitizens subject to exclusion and deportation to argue that expulsion must be treated as a matter of law like the banishment of citizens. This meant that Congress could not provide for deportation by statute except as punishment for a crime. Nor could the Executive order a noncitizen deported, because such an order could issue only from a court as punishment for a criminal conviction.\textsuperscript{74}

In \textit{Fong Yue Ting v. United States}, the Justices rejected this analogy and upheld a deportation law for the first time. Building on their earlier conclusion that noncitizens’ residence in the United States amounted to a mere privilege, the Court concluded that deportation did not count as “banishment” in the legal sense.\textsuperscript{75} This holding gave the President and Congress greater power over deportation by restricting the role of federal courts, just as the earlier vested rights holding had done for exclusion. But this allocation of power to the political branches grew out of relatively conventional nineteenth century thinking about the separation of powers and the scope of judicial authority—not out of the Supreme Court’s wholesale construction of an exceptionalist constitutional order for evaluating immigration policy.

In reading both \textit{Chae Chan Ping} and \textit{Fong Yue Ting}, one can certainly come away with the impression that the Court believed the Constitution’s Fifth Amendment required no “due process” when the government excluded or expelled a noncitizen. The Court suggests this extreme possibility in passing, and its conclusion in \textit{Ekiu v. United States} that the decisions of administrative officials delegated power by Congress to make exclusion decisions amounted to due process of law greatly empowers the political branches and minimizes constitutional review by courts, or at least leaves the availability of a judicial tribunal in the hands of Congress.\textsuperscript{76} But
not long after the Chinese exclusion cases, the Court rejected the notion that the Fifth Amendment did not apply in immigration. In *Yamataya v. Fisher*, the Court held that the Fifth Amendment required the government to provide some measure of process before an immigrant who had entered the United States could be deported. The process need not be as extensive as a trial at common law and could be provided by an administrative tribunal, but according to the Court, “[we have] never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’.” But process nonetheless would be “due” under the Constitution, to protect the immigrant’s interest in continuing to live in the United States.

The Court’s central task in *Chae Chan Ping* was to articulate an affirmative conception of federal power to regulate immigration—a necessary task, given that every immigration case to make it to the Supreme Court prior to *Chae Chan Ping* involved state and local efforts to regulate migration. The case came to the Court during a period of burgeoning national and imperial power. The North’s recent victory in the Civil War eliminated a significant source of sectionalism that previously had tempered federal power. Changes in transportation and communications technology increasingly nationalized the economy and gave rise to demands that the federal government regulate markets more aggressively. New economic and military policies would in short order lead to war and the acquisition of the Philippines, Puerto Rico, and other overseas territories. The conclusion that the federal government possessed broad constitutional authority to exclude noncitizens fit well in this context and was no longer subject to the sorts of doubts held by Madison and Jefferson.
The question of where that power came from remained, since the Constitution did not clearly specify it. A modern eye would easily identify the Commerce Clause or the Foreign Commerce Clause as obvious sources of authority, and the Court’s earlier jurisprudence certainly conceptualized immigration as related to commerce and treated state efforts to regulate it as potential disruptions of federal commercial power. But Justice Field skirted the textual problem in *Chae Chan Ping* by looking beyond the Constitution itself. He turned instead to principles of customary international law, which he believed had long endorsed the notion that every sovereign nation has inherent authority to exclude strangers from its territory. The “power of exclusion of foreigners,” Field concluded, was “an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution.”

This approach neatly resolved any lingering vertical separation of powers question, lodging the power to exclude in the national government rather than the states. But it created a new problem, one related to the allocation of power within the national government. The “government of the United States” was not unitary, and the cases themselves interpret congressional statutes but arise from the statutes’ implementation by administrative officials at the borders. Even as it embodies legislative supremacy, the Constitution distributes powers between the political branches, giving the President the veto power over legislation and the Senate a role in executive appointments and functions such as treaty-making. The Supreme Court’s extra-constitutional account of the federal immigration power left undiscussed whether and how the power might be shared or divided.

In the resulting void, two different visions influenced the courts and shaped the course of immigration policy. On one view, the Executive only had the power to control migration to the
extent Congress delegated it—nothing more, and nothing less. On another view, grounded in part in the history of immigration regulation through treaty, the Executive Branch possessed inherent constitutional authority to exclude or expel noncitizens. The English common law history raised this possibility, and the Court noted approvingly in *Fong Yue Ting* that “[e]minent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.”

80 Decades later, the Court would echo this view, writing that “[t]he right to [exclude aliens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”

81

<1> The Gentleman’s Agreement

Immigration regulation in the twentieth century quickly took on a different form than it had in the nineteenth. Treaties receded as a font of migration regulation. State efforts to regulate the criteria for screening new migrants were finally suppressed by the Supreme Court (though as we will see in chapter 5, state and local involvement in immigration policymaking has never disappeared). Congress, which had gone nearly a century without enacting a single exclusion or deportation law, began enacting significant immigration legislation every few years—a clip that would continue until the start of the Great Depression. Through authorizations and appropriations, Congress also began constructing a powerful new federal bureaucracy to implement and enforce its substantive laws. By and large, immigration policymaking looked much like regulation in other emerging areas of the American administrative state.

Nonetheless, immigration policymaking still looked vastly different than it does today. Because of the foreign affairs implications of immigration policy, international diplomacy continued to be intimately linked to the construction of immigration policy. Today, bilateral
accords play a limited role in U.S. policy and focus on matters such as information sharing and border security. For much of the twentieth century, however, the diplomatic negotiation power continued to supply the President with a powerful tool to shape immigration law.

The Gentlemen’s Agreement that President Theodore Roosevelt brokered with Japan in 1907 and 1908 vividly highlights this possibility. When Roosevelt came to office, immigration from Japan was a relatively new and unregulated phenomenon. The Japanese Empire had forbidden nearly all emigration prior to 1885. After opening its borders, Japan entered into a treaty of commerce and navigation with the United States that assured mutual “liberty to enter, travel, and reside,” securing freedom of movement between the two countries. For a few years, this policy of open immigration held, despite resistance. During the 1890s, there were calls for Congress to exclude Japanese laborers, much as earlier statutes had targeted Chinese immigrants. But the Empire initially staved these calls off, through savvy diplomacy and in large part because most Japanese immigrants were bound not for the United States but for Hawai’i, as contract laborers on sugar plantations.

When the United States annexed Hawai’i as a territory in 1898, a few years after orchestrating the overthrow of the Hawaiian monarchy, the situation changed swiftly. Within a few years, significant numbers of Japanese immigrants who had landed in Hawai’i began moving to the U.S. mainland. As the number of Japanese immigrants rose, they were met with growing hostility and racism, replaying earlier responses to Chinese immigrants.

This hostility reached its peak in turn-of-the-century San Francisco. In 1900, the city’s mayor gave a speech at a rally organized by labor unions calling for total Japanese exclusion. Prominent political parties included ending Japanese immigration in their party platforms, resulting in boycotts of Japanese-run businesses and massive rallies calling for the extension of
Chinese exclusion to Japanese immigrants. Starting in February 1905, a major newspaper, the *San Francisco Chronicle*, ran a series of articles attacking Japanese immigration, including a front-page headline reading, “Japanese Invasion the Problem of the Hour” and warning of the “inundating torrent” of Japanese immigration to come. By May 1905, a Japanese-Korean Exclusion League formed in San Francisco, organized around the fear that an “inferior race” would “destroy our [white] standard of living and, consequently, undermine our civilization.”

Finally, assaults on Japanese residents increased, exemplified by the stoning attack of a Japanese scientist sent to assist San Francisco with earthquake recovery in 1906.

In spring 1905, the San Francisco school board passed a resolution to segregate Japanese schoolchildren. “Our children,” the Board resolved, “should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race.”

The order was not immediately carried out. But after the great earthquake of 1906, which was followed by an increase in anti-Japanese boycotts, vandalism, and attacks, the board finally took its opportunity to implement the policy. On October 11, 1906, the San Francisco school board carried out its earlier resolution and formally ordered principals to send Japanese schoolchildren to a separate “Oriental Public School.” The Union Labor Party, to which many elected officials in San Francisco owed their campaign victories, strongly supported the order.

If the school board’s hope was to provoke a federal response, as some historians have suggested, it succeeded. Secretary of State Elihu Root soon learned of the policy via an anxious telegram from the U.S. Ambassador in Tokyo, who expressed concern about the impassioned press coverage of the policy in Japan. Japan’s ambassador to the U.S. also requested a meeting with the State Department to express his great displeasure.
Roosevelt and his administration saw San Francisco’s ordinance as a serious threat to the country’s relationship with a growing military power across the Pacific. Roosevelt himself supported restrictions on labor immigration. And like many at the time, he had expressed admiration for the idea of preserving America as “a heritage for the white people” in the face of growing immigration from Asia and Southern Europe. So he had no objection, in principle, to restricting labor immigration from Japan. But he opposed any legislation that singled out Japanese immigrants in the fashion of the earlier Chinese Exclusion Act, in order “to avoid giving offense to any one nation.” He also strongly opposed the Board of Education’s segregation order, which he called a “wicked absurdity” sure to provoke Japan. Japan viewed the ordinance as a clear violation of the nations’ bilateral treaty of commerce and navigation, a view Roosevelt and his Secretary of State Elihu Root initially shared. But Roosevelt’s opposition to the order, and his more general commitment to protect Japanese residents on the west coast—indeed, Roosevelt at one point threatened to use “the armed forces of the country to protect the Japanese if they were molested in their person or property”—was likely driven less by legal considerations and more by a desire to preserve American relations with a rising international power.

Root met with the Japanese ambassador on October 25, 1906, and a day later Roosevelt dispatched his Secretary of Commerce and Labor, Victor Metcalf—a California native and former congressman—to San Francisco to investigate the segregation order and attempt to negotiate its withdrawal. Metcalf had no luck persuading the Board. At the same time, however, he and the administration considered the possibility of suing the Board for violating the 1894 treaty with Japan. The treaty included a most-favored-nation clause stating that “in whatever relates to rights of residence or travel . . . the citizens or subjects of each Contracting
Part shall enjoy . . . the same privileges, liberties, and rights . . . [as] native citizens or subjects, or citizens or subjects of the most favored nation.”

While there could be no doubt that this language provided some protection to Japanese residents, the administration debated whether the treaty language prohibited San Francisco from segregating Japanese schoolchildren. Metcalf worried initially that the litigation might flounder because the treaty made no mention of education. Secretary of State Root eventually reassured Roosevelt on this point. But Roosevelt remained concerned that courts would side with the city. Courts might be reluctant to read the treaty to cover education because of the strong norm in favor of local control over schooling. Even if the treaty were read to require equal treatment in schooling, the Supreme Court had recently, in *Plessy v. Ferguson*, held that segregated schooling could still be “equal” in the eyes of the law. The President did eventually direct the U.S. District Attorney for San Francisco, Robert Devlin, to file a test case. But they likely intended the suit primarily as a way to apply political pressure to the school board and signal Roosevelt’s support for the rights of Japanese residents.

While the litigation strategy was shaping up, Roosevelt concluded that San Francisco was likely to abandon its policy if Japanese immigration to the west coast were brought to a halt. Yet the President had already condemned congressional proposals for a Japanese exclusion bill, threatening to veto any such legislation. Like many Presidents before him, he preferred to negotiate a treaty with Japan than to turn to exclusionary legislation targeting Japanese immigrants.

A treaty offered several political advantages. First, it allowed the President to avoid having to secure the approval of Congress as a whole of his preferred resolution. Second, if a treaty included the explicit protection of educational rights, it would give the President
undeniable legal authority to suppress San Francisco’s obnoxious order, a treaty being the “supreme law of the land” under the Constitution. Third, a treaty might leave the United States “less dependent on the good will of Japan” to take unilateral measures to stop emigrants bound for the United States, because the treaty’s terms would commit Japan to such efforts.107

In early January 1907, Root proposed a treaty of reciprocal exclusion, under which laborers from each country would be excluded from the other. But Japan rejected the proposal as one-sided, giving the United States what it wanted while offering nothing in return; few, if any, American laborers sought entry into Japan. Finding a basis for reciprocity posed a significant challenge. On January 31, 1907, the administration offered up a most-favored-nation clause that dealt specifically with schooling, but Japanese officials countered that they believed these rights were already protected under the 1894 treaty.108 They proposed instead treaty terms that would give Japanese noncitizens already living in the United States the right to naturalize and become U.S. citizens—a right denied to Japanese immigrants under then-existing naturalization laws that permitted only Caucasians and persons of African descent to naturalize.109

Roosevelt had already advocated forcefully for the extension of naturalization rights to Japanese residents in his annual address to Congress the previous month. His proposal may have been made “chiefly for Japanese consumption.”110 But regardless of his intentions, Roosevelt knew that his proposal would go nowhere in Congress. As Root told Japanese Foreign Minister Hayashi Tadasu at the end of January, it would be “wholly useless” for the administration to accede to a treaty on the terms proposed, because Congress would never pass a statute permitting naturalization.

With prospects for a formal treaty looking bleak, the Roosevelt administration decided to pursue an informal agreement, an approach Hayashi had agreed to earlier.111 This path allowed
Roosevelt to skirt the Constitution’s requirement that two-thirds of Senators consent to any treaty. It also helped diplomatically: a less formal and public agreement alleviated some concerns in Japan about publicly agreeing to nonreciprocal exclusion. The deal Roosevelt ultimately brokered had three interlocking parts: Japan would agree not to issue passports for laborers bound for the U.S. mainland, permitting travel only to outlying possessions like Hawaii; Congress would pass legislation authorizing the President to prohibit the movement of Japanese immigrants from Hawai’i to the U.S. mainland; and the school board, which Roosevelt invited to Washington D.C. to broker a deal, would rescind its segregation order once that legislation passed.\textsuperscript{112}

The promise of legislation required the help of Congressman Henry Cabot Lodge, a close friend and supporter of Roosevelt’s. Lodge agreed to Root’s suggestion that he insert a provision into an immigration bill then being negotiated by a conference committee.\textsuperscript{113} Root drafted language, neutral on its face, clearly designed to block the movement of Japanese laborers:

\begin{quote}
[W]henever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone.\textsuperscript{114}
\end{quote}

Members of Congress, primarily Democrats, immediately attacked the measure, complaining that it gave the President too much power. Many of these critics also favored excluding Japanese immigrants, but they chafed at the broad delegation of authority in the
proposed bill and supported segregationist measures like the San Francisco policy targeted by Roosevelt. Representative Joseph Goulden of New York opposed the provision “as a matter of principle” because it was “an encroachment on the prerogatives of the legislative branch.” Representative John Burnett of Alabama declared that he did “not believe there is a Member in this House on [the Democratic side] . . . who will say that Japanese cooly laborers ought to be brought in, but we do not believe . . . that the President ought to be able to hold a big stick over a sovereign State and that we should engraft such a law as this on an immigration bill.”

Representative Williams expressed his opposition to “mixed schools” and advocated “separation of the races.” Southern Democrats especially emphasized the implication of the legislation for state autonomy. Senator Tillman of South Carolina lamented that, “it is not a right thing to do for the President to call in question the right of a State to regulate its own schools in its own way.”

Despite this opposition, the bill emerged from the legislative conference committee, and the administration managed to secure its final passage. The San Francisco school board, satisfied by the amendment, signed a written agreement with Roosevelt agreeing to rescind its segregation order once the legislation passed. Roosevelt agreed to drop the lawsuit that the administration had filed against the board. And Hayashi, the Japanese Foreign Minister, provided verbal assurances that Japan would not issue passports to laborers bound for the U.S. mainland. President Roosevelt signed the bill into law on February 20, 1907, and a few weeks later San Francisco repealed its ordinance as applied to Japanese students. The following day, the President exercised his power under the new Act to issue an Executive Order requiring that Japanese immigrant laborers who had received passports to Hawaii (or Mexico or Canada) “be refused permission to enter the continental territory of the United States.”
With this legal backdrop in place, the United States and Japan began implementing their “Gentlemen’s Agreement,” hashing out the details over the subsequent months in a series of telegrams, cables, and other communications.\textsuperscript{123} Actually stopping the arrival of Japanese laborers initially proved complicated. Those who landed first in Mexico were often able to enter over the U.S. land borders, which were then largely unsecured. Moreover, the agreement exempted some Japanese citizens, including farmers and those in transit, and U.S. officials became concerned that Japan did not have adequate emigration procedures to prevent abuse of these exceptions. But within a year these impediments were overcome and Japanese immigration to the U.S. mainland slowed to a trickle.\textsuperscript{124} In 1907, 30,842 immigrants had arrived from Japan. A year later, half that number entered, and by 1909, a mere 3,275 Japanese came to the United States.\textsuperscript{125}

The emergence of the Gentleman’s Agreement thus highlights the vitality of presidential immigration law at the turn of the twentieth century. As the nation transitioned toward ever-more centralized control over immigration law, and as Congress asserted more comprehensive statutory control over the subject, President Roosevelt used his diplomatic authority to pursue his preferred immigration policy while suppressing both local efforts in California and political clamoring in Congress aimed at much harsher, more complete exclusionary policies against Japanese immigrants.\textsuperscript{126} Roosevelt found a way to prevent local efforts to limit the rights and privileges of Japanese immigrants, despite the fact that it was far from clear that the federal government had authority to legally override San Francisco’s ordinance.\textsuperscript{127} He found a way to negotiate an agreement dramatically restricting immigration, while avoiding the treaty-making process that could have inflamed relations with Japan and given the Senate a far greater say in the ultimate bargain. And Roosevelt got Congress to cooperate in his objectives by delegating
him authority necessary to implement the agreement—giving the President unilateral control over who could travel to the mainland from outlying territories.

<1>The Bracero Program

Deep into the twentieth century, Presidents continued to engage in bi-lateral negotiations to advance their immigration agenda. During World War II, this mode of making policy produced the largest guest worker program in American history. The Bracero farm labor program initiated by President Franklin Delano Roosevelt through an agreement with Mexico arguably had more lasting effects on immigration policy than any single other government program of the twentieth century. Not only did the program deepen the already significant dependency of the United States on Mexican workers, it also contributed to the expansion of the immigration enforcement bureaucracy and helped fuel the rise of illegal immigration—phenomena we explore in more detail in chapters 3 and 4. For our purposes here, the evolution of the Bracero program through diplomatic channels highlights the centrality of the powers of the presidency to immigration policy, even in an era of comprehensive congressional regulation. Presidents Roosevelt and Truman set the legislative agenda in a way that underscores the importance of inter-branch tensions and congressional accommodation of executive policy preferences to the shape of modern immigration law.

The Roosevelt administration negotiated the Bracero program with Mexico not long after the United States entered World War II. The flow of workers from Mexico had long been a controversial issue in U.S. immigration policy. For many decades in the late nineteenth and early twentieth centuries, immigration flowed relatively freely across the southern border, creating an integrated labor market. As a matter of law, the head taxes imposed on arriving immigrants from other countries did not apply to Mexicans. As a matter of practice, the United States made no
serious effort to patrol the border or inspect all immigrants crossing land borders. But in 1917, the regulatory tide began to turn. Congress passed legislation making excludable all immigrants, including those from Mexico, who were illiterate in their own language. It simultaneously eliminated the head tax exemption for Mexican migrants. Soon thereafter, Congress created the border patrol and began appropriating significant sums of money for enforcement along the southern border.

Predictably, farmers and ranchers in the Southwest opposed these changes, as they relied heavily on Mexican workers. Local officials initially accommodated the needs of these employers, sometimes turning a blind eye to violations of the contract labor laws and also allowing workers who could not pay the head tax to enter the country anyway. On a few occasions in the early 1920s, federal officials went even further, setting up small programs to admit these otherwise inadmissible noncitizens under a provision of the 1917 immigration act known as the Ninth Proviso. That provision “Provided Further, That the Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions . . . to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission.” While the drafters of the proviso appear to have meant for it to give officials discretion to admit immigrants in emergency situations—when an arriving immigrant required immediate medical treatment, for example—executive officials deployed it more broadly to help manage the flow of farm labor from Mexico.

Fast forward to the onset of World War II. The entry of the United States into the war after the attack on Pearl Harbor triggered the “Manpower Crisis of 1942.” A variety of factors, including the draft and labor demand in wartime industries, significantly depleted the domestic
For growers in the American south and southwest, who had been unsuccessfully pressuring the federal government for years to admit temporary agricultural workers from Mexico, the war provided a political opportunity. They re-doubled their lobbying efforts, and by April 1942 Roosevelt’s War Manpower Commission, joined by representatives from the Departments of State, Labor, Agriculture, and Justice, formed a committee to study the possibility. Within a month, this interagency committee had drawn up plans for the first installment of Mexican guest laborers.

In July 1942, the U.S. Secretary of Agriculture, Claude Wickard, presented the labor importation plan to Mexico’s Foreign Minister, [NAME] Padilla. Less than two weeks later the countries signed a bilateral agreement laying out the details of the plan. The agreement enabled the country to maintain agricultural production levels during the wartime shortage while promoting a bilateral immigration policy that advanced relations with Mexico in the spirit of the United States’ Good Neighbor Policy—a double boon for the wartime President Roosevelt. To implement it, Roosevelt initially directed half a million dollars from the “President’s Emergency Fund” to the Department of Agriculture’s Farm Security Administration, which assumed management of the program. On September 29, 1942, the first installment of Bracero workers arrived in the United States.

Roosevelt established the program without first seeking consent from Congress or initiating any public debate. The program operated for its first seven months simply as a bilateral accord with no express statutory foundation. The President likely believed that he had considerable constitutional authority to craft immigration policy in the midst of a massive war effort. His administration also may have thought that the Ninth Proviso of the 1917 Immigration Act provided statutory authority for the program. The President eventually turned to Congress,
however, seeking legal authorization and a sixty-five-million dollar appropriation to the Department of Agriculture to administer and expand the program. Some in Congress were opposed to the President’s request: a number feared that the President’s Bracero Program would result in foreigners taking the jobs of young men who went off to fight; others worried that it would result in the exploitation of the guest workers. Despite this opposition, however, Congress officially blessed the Bracero Program on April 29, 1943, in a Joint Resolution, known as Public Law 45, appropriating $26 million for the program.\textsuperscript{139}

Congress saw the program as a wartime measure. The Joint Resolution exempted migrant workers “desiring to perform agricultural labor in the United States” from several provisions of existing immigration law, including head tax and contract labor provisions—but only “during continuation of hostilities in the present war.”\textsuperscript{140} Its appropriation of funds was even more brief, making money available for six months, through the end of 1943. Subsequent appropriations legislation created a series of extensions, up through the middle of 1947. A few months before the program’s expiration, Congress, at the urging of several farmers’ and growers’ organizations and over opposition from labor unions, passed legislation providing that the “farm labor supply program . . . may be continued up to and including December 31, 1947, and thereafter shall be liquidated within thirty days.”\textsuperscript{141} In the waning months of 1947, the House Committee on Agriculture introduced additional legislation to give the Department of Agriculture and the INS authority to admit foreign contract labor through administrative means, even in the absence of a congressionally sanctioned program, but Congress failed to act on the bill.\textsuperscript{142}

One might expect that the Bracero program came to an end as 1947 drew to a close, given the expiration of the original statutory authorization, as well as Congress’s explicit termination of the program. In fact, the admission of temporary workers stopped for only a short time. On
February 21, 1948, the State Department arranged a new accord with Mexico and labor
importation resumed.143 No statute authorized this new accord, nor did Congress soon thereafter
ratify the President’s actions, as it had done in 1942. Instead the Bracero program operated from
1948 until 1951 without any express statutory sanction, and in apparent direct contravention of
the statutory command that the program be “liquidated.” During this period, executive officials
managed the movement of labor into the United States administratively, sometimes in
controversial ways. In 1948, for example, hundreds of workers clamored for entry at the border
after the Mexican government decided to permit U.S. growers to recruit two thousand workers
from border towns, and the INS opened the border for a weekend.144

In 1951, Congress did finally pass legislation to re-authorize the Bracero program.145 But
as we saw with the Gentleman’s Agreement, Congress’s involvement was mostly perfunctory.
President Harry Truman spearheaded the revision and extension of the program. A year earlier,
he had established a Commission on Migratory Labor to investigate complaints about the effects
of the Bracero program on domestic wages, as well as about the high levels of illegal
immigration that accompanied the program. While those concerns eventually contributed to the
program’s demise, Congress nonetheless reauthorized the program at the President’s request,
with very little discussion and virtually no opposition. Just fifteen minutes after President
Truman signed Public Law 78, U.S. negotiators met with Mexican officials to arrange yet
another bilateral agreement pursuant to the terms of the new statute. The resulting Migrant Labor
Agreement of 1951, along with Public Law 78, set the official parameters for the Bracero
Program until Congress terminated it in 1964,146 in the wake of the late President John F.
Kennedy’s excoriation of the program in the midst of the civil rights revolution and in response
to the labor abuses exposed by Edward R. Murrow’s *Harvest of Shame* documentary.
The Bracero episode shares many similarities with the earlier Gentlemen’s Agreement. Between the two eras, Congress had erected an elaborate statutory and regulatory structure in the intervening years. And still, in the Bracero period, a bi-lateral arrangement negotiated by the President’s administration continued to play a large role in setting the terms of immigration policy. As was true for the first President Roosevelt, the policymaking process Franklin Roosevelt initiated affected the shape of the ultimate policy. The bilateral agreements that FDR and Truman negotiated directly with Mexico accommodated the interests of the Mexican government far more than the enabling legislation passed by Congress in 1943 and 1951, which more clearly prioritized the protection of U.S. interests. For example, whereas the accords included wage protections for the guest workers, requiring their wages to be the same as those paid to domestic agricultural laborers for similar work, the statutes emphasized the interests of American workers by ensuring domestic workers had the opportunity to obtain work for the same wages as those to be paid to foreign workers. Perhaps more important, in 1948, the ability of the administration to direct the program through a bi-lateral agreement with Mexico literally meant the difference between the program’s existence and termination.

We can understand the fluidity of legal authority in the Bracero episode in two ways, each of which has important implications for how we think about the President’s control over immigration policy. On the one hand, the legislative impasse that led Congress to refuse to renew the program in 1947 arguably highlights a common historical reality in which Presidents have been more open and internationalist, and Congress more closed and parochial, on matters of immigration policy (as in many other matters). To the extent the breakdown in negotiations over legislation reflected true inter-branch disagreement, it highlighted the power wielded by the President in that moment. Truman then simply ignored Congress’s demand that the program be
terminated and continued on with his preferred policy. On the other hand, members of Congress may have been perfectly happy to turn a blind eye to the President’s actions. As Kitty Calavita has argued, Congress effectively enabled the President to “perpetuate administratively what Congress was for the moment unwilling to legislate,”147 whether because it sought to avoid political accountability for extending the program, or because of the vagaries of legislative deal making.

If the first account accurately describes the political economy of the moment, then the history of the Bracero program suggests that the President has unilateral, perhaps even inherent, authority to conduct immigration policy, at least as a matter of convention. But if the latter explanation makes better sense of Congress’s posture, it prefigures a congressional-executive dynamic we will see in later chapters according to which Congress adopts restrictive legislation with the understanding that the Executive, through enforcement policy and the like, will manage and limit the consequences of that legislation. In either case, the President and his administration play an indispensable role in the construction of our immigration system.

<1>Against Immigration Law Fundamentalism

Until the late nineteenth century, Congress created few rules to govern immigration, other than setting a uniform rule for naturalization. State and local governments acted as de facto regulators through the use of their inspection and taxation powers, particularly in important immigrant destinations such as New York and California. And Presidents facilitated immigration through the negotiation of commercial treaties that ensured reciprocal protections for foreign nationals in the United States and Americans abroad—first with nations in Europe, and later with China during the Gold Rush. Only late in the nineteenth century, in response to growing resentment of Chinese migration on the West Coast and pressure from eastern seaboard states
struggling to manage migration effectively, did Congress finally enact significant legislation, passing the Chinese Exclusion Acts and beginning the American experiment with immigration restriction.

Most scholarly accounts of U.S. immigration law treat this long founding period in a fundamentalist fashion—as the root of immigration law’s constitutionally exceptional (and aberrational) insulation from constitutional scrutiny. But we ultimately aim to show that this view has been overdrawn and distracts attention from just how fluid and uncertain the location and scope of authority to regulate immigration has been. Indeed, what the courts left undecided in this founding period helped enable the late twentieth century transformation of immigration law we explore in chapters 2 through 4.

The transition from a regime of treaty-making to the modern administrative system Congress inaugurated with the Chinese Exclusion Acts and developed over the course of the twentieth century reflects a long arc of institutional development. Many of those officials and lawmakers who participated in the 1798 alien and sedition debates thought that the power to exclude or deport immigrants existed only in the context of war. The importance of national security and diplomacy to the President’s authority never receded entirely, as the negotiation of the Bracero treaties underscores. Today, metaphors of attack and threat help justify strong presidential action. But by the close of the 20th century, foreign affairs and national defense were no longer a necessary condition for broad presidential leadership or power. Instead, the rise of the administrative state and the President’s role in steering an ever-expanding bureaucracy executive power in general rose.

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2 Ibid. at 54. See also Adam Quinn, *US Foreign Policy in Context: National Ideology from the Founders to the Bush Doctrine* 47 (2010).


7 An Act Concerning Aliens, § 1, 1 Stat. 577 (1798).
8 Ibid. (“[I]t shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States…to depart out of the territory.”)

9 Act of June 18, 1798, § 1, 1 Stat. 566 (1798).]

10 Virginia Resolution (Va. 1798); Kentucky Resolution (Ky. 1799).

11 Ibid. The Kentucky Resolution claim that the states “have the unquestionable right to judge” the federal government’s infraction and that “a nullification. . .is the rightful remedy.” The Virginia Resolution is less explicit on the nullification point, but calls on other states to join in calling the Alien and Sedition Acts unconstitutional and to take “necessary and proper measures…in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people.”


13 [Cite Page Act of 1875; Chinese Exclusion Act of 1882].


17 Hirota, *Expelling the Poor*, at [PAGE] n.56; David H. Bennett, *The Party of Fear*, at 135-41 (noting that nativism “flourished more easily” in city settings like Boston, New York, and Philadelphia but was “never as formidable” in the West, including in Wisconsin where influential business interests “who promoted development and wanted rapid population growth announced opposition to any nativist program restricting immigration.”).


19 Kanstroom, *Deportation Nation*, at 63 (describing how the Republican critique of the Alien Friends Act resulted in “an unstable base for future opponents” of deportation laws as “Jeffersonian concerns about highly centralized, discretionary federal power…were linked to states’ rights positions that supported slavery”); see also Mayor, Aldermen, and Commonality of the City of New York v. Miln, 36 U.S. 102, 157 (1837) (Story, J., dissenting) (noting that “[t]he right of congress to pass [New York’s bonding requirements] has been expressly conceded.”).

20 An Act Regulating Passenger Ships and Vessels, § 1, 3 Stat. 488 (1819).


22 See, e.g., Act of Feb. 22, 1847, 9 Stat. 127 (requiring fourteen feet of clear deck space per passenger); Act of May 17, 1848, 9 Stat. 220, subsequently amended by the Act of March 3, 1849, 9 Stat. 399 (regulating ventilation, cooking facilities, food and water supplies, and sanitation).

24 Representative George Rathbun, in reporting from committee the bill that would become the Act of Feb. 22, 1847, explained that “the object of the bill was not to check immigration, but to provide by law that sufficient space should be reserved on board” so that passengers could arrive healthy. Representative Lewis Levin moved to amend the title of the bill to read “A bill to afford additional facilities to the paupers and criminals of Europe to emigrate to the United States”, but the House paid no mind, instead passing the bill quickly. Cong. Globe, 29th Cong., 2d Sess. 304 (1847). The Senate Committee on Commerce similarly believed that the bill would obviate “the evils now resulting from the restriction of passengers to very narrow limits”, although Senator Calhoun asked for a petition from the Irish Emigrant Society of New York to be read to ensure the bill answered their concerns. Ibid. at 446. See also Hutchinson, Legislative History, at 35-36.


26 Ibid. at 43.


29 Hutchinson, Legislative History, at 27.

30 Passenger Cases, 48 U.S. 283 (1849); Neuman, Strangers to the Constitution, at 23-30.

32 I.A. Const. art. I, § 22 (1857). Similar discussions were held at the Wisconsin Constitutional Convention. For example, Representative Beall argued against a provision that would limit non-citizen property rights, noting that it would deprive them of “the most essential privilege” and “operate as a severe check upon immigration.” Wisconsin, Journal of the Convention to Form a Constitution 92 (1848).

33 Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (striking down a California law that allowed state immigration commissioner to require a $500 bond, or a sum of money he thought adequate to compensate for a passenger becoming a public charge).

34 In re Ah Fong, 1 F. Cas. 213, 216-17 (C.C.D. Cal. 1874) (No. 102).

35 U.S. Const., art. II, § 2, cl. 2.


40 Third Annual Message to Congress (Dec. 8, 1863):

I again submit to your consideration the expediency of establishing a system for the encouragement of immigration. Although this source of national wealth and strength is again flowing with greater freedom than for several years before the insurrection
occurred, there is still a great deficiency of laborers in every field of industry, especially in agriculture and in our mines, as well of iron and coal as of the precious metals. While the demand for labor is much increased here, tens of thousands of persons, destitute of remunerative occupation, are thronging our foreign consulates and offering to emigrate to the United States if essential, but very cheap, assistance can be afforded them. It is easy to see that under the sharp discipline of civil war the nation is beginning a new life. This noble effort demands the aid and ought to receive the attention and support of the Government.”

Not long after, Congress enacted “An Act to Encourage Immigration.” See [CITE July 4, 1864 Act].

41 Martin B. Gold, Forbidden Citizens: Chinese Exclusion and the U.S. Congress: A Legislative History 41, 337 (2012). See also Ping Chia Kuo, “Caleb Cushing and the Treaty of Wanghia, 1844”, 5 The Journal of Modern History 34, 34-35 (1933); S. Doc. No. 28-138, at 1-7 (1845) (detailing instructions to commissioner to China including that a “leading object of the mission…[is] to secure the entry of American ships- and cargoes into these ports on terms as favorable as those which are enjoyed by English merchants”).

42 Salyer, Laws Harsh as Tigers, at 7-8.


44 Treaty of Tientsin, China-U.S., Jun. 18, 1858, 12 Stat. 1023.]


Ibid. at art. VI.


Moreover, the resulting treaty agreements constrained Congress even in the courts. See, e.g., Chew Heong v. U.S., 112 U.S. 536, 549 (1884) (“[T]he court ought, if possible, to adopt that [statutory] construction which recognized and saved rights secured by the treaty.”); McClain, *In Search of Equality*, at 165-67.


The abrogation of a treaty with France in 1798 was, Hayes noted in his veto message, the only time during the nation’s first century that Congress had legislated withdrawal from a treaty. Ibid at 5.

Ibid. at 6.

Treaty of Immigration (Angell Treaty), art. I, China-U.S., Nov. 17, 1880, 22 Stat. 826 (“Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it.”).

Ibid. at art. III (“If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of
any other persons, the Government of the United States will exert all its power to devise
measures for their protection and to secure to them the same rights, privileges, immunities, and
exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to
which they are entitled by treaty.

56 President Chester A. Arthur, First Annual Message to Congress (Dec. 6, 1881).
59 Roger Daniels, Asian America: Chinese and Japanese in the United States Since 1850 62-63
(1989); McClain, In Search of Equality, at 173; Mary Coolidge, Chinese Immigration 271
(1909).
60 R. Gregory Nokes, “‘A Most Daring Outrage’: Murders at Chinese Massacre Cove, 1887,”
107 Oregon Historical Quarterly 326, 326-37 (2006); Daniels, Asian America, at 64-65.
Northwest Quarterly, 103, 120-124 (1948); McClain, In Search of Equality, at 173.
62 S. Exec. Doc. 50-273 (1888). For discussion of the political environment surrounding the Scott
Act’s passage, see Gold, Forbidden Citizens, at 237-80; McClain, In Search of Equality, at 191-
93; Salyer, Laws Harsh as Tigers, at 22, 262, n. 123.
63 Passenger Cases, 48 U.S. 283.
64 Miln, 36 U.S. at 142-43.
65 Ibid. at 142.
66 Chy Lung v. Freeman, 92 U.S. 275, 276, 279-80 (1875).
67 Ibid. (“It is hardly possible to conceive a statute more skillfully framed, to place in the hands
of a single [state immigration commissioner] the power to prevent entirely vessels engaged in a
foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.”).

68 See, e.g., Song, Sarah, “Why Does the State Have the Right to Control Immigration?,” Immigration, Emigration, and Migration (Jack Knight, ed.) 3, 5 (2017) (framing Chae Chan Ping as the “first opportunity to address directly the question of the federal government’s power to exclude foreigners” and noting the Court’s main concern was “to establish the federal government’s immigration power under the Constitution”); T. Alexander Aleinikoff et. al., Immigration and Citizenship: Process and Policy 151 (8th ed. 2016) (noting no express grant of immigration power to Congress and the “open borders” of the nineteenth century).


70 Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893).


73 In re Yung Sing Hee, 36 F. 437, 439 (D. Ore. 1888).

74 Modern scholars have sometimes suggested that noncitizens made these argument in an attempt to have the Court declare that they could never, consistent with the Constitution, be deported. [RA: find example?] But this reading of the petitioners’ claim is anachronistic. While everyone agrees today that the Constitution prohibits the United States government from
banishing citizens (though, interestingly, the Supreme Court has never issued a clear ruling to this effect), that was not the view held by lawyers and judges in the 1890s. The banishment argument made by Fong Yue Ting, therefore, was not an argument about the constitutionally permissibility of deportation, full stop.

75 Fong Yue Ting, 149 U.S. at 708-10.

76 Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

77 Kaoru Yamataya v. Fisher, 189 U.S. 86, 100 (1903).


79 Chae Chan Ping, 130 U.S. at 609.

80 Fong Yue Ting, 148 U.S. at 709. The Court also cites the Ortolan treatise on the law of the sea, noting that in France, no “special form” is prescribed for expulsion and that the right of expulsion is “wholly left to the executive power.” Ibid. at 708 (citing 2 Théodore Ortolan, Règles Internationals et Diplomatie de la Mer 297 (4th ed. 1864)).


Governance 64-66 (Alexander Betts, ed. 2011) (discussing the rise of bilateralism in global labor migration).


85 Daniels, Asian America, at 109-11. The number of Japanese immigrating to the continental United States was not recorded prior to 1901, when 5,249 arrived. But the 1900 census recorded only 24,326 Japanese residents in the United States—less than a quarter of the 118,000 Chinese residents). Daniels, The Politics of Prejudice, at 1, Appendix A. These census figures exclude Hawai‘i, where there were an additional 56,000 Japanese residents by 1900. Ringer, We the People, at 685.

86 Ringer, We the People, at 686.


88 “Japanese Invasion the Problem of the Hour,” San Francisco Chronicle, Feb. 23, 1905, at 1; Daniels, Asian America, at 116.

89 Ringer, We the People, at 688; Wollenberg, All Deliberate Speed, at 51.

90 Raymond A. Esthus, Theodore Roosevelt and Japan 132-33 (1966); Wollenberg, All Deliberate Speed, at 53.

91 5070 S.Doc. 147, 59th Congress, 2d. Session, at 3.

92 Esthus, Theodore Roosevelt and Japan, at 133-34; Wollenberg, All Deliberate Speed, at 52-54.

93 Wollenberg, All Deliberate Speed, at 53-54.

Esthus, *Theodore Roosevelt and Japan*, at 128. The segregation policy was not immediately big news beyond San Francisco. However, Japanese in San Francisco organized against the policy and contacted Japanese newspapers, who covered the policy in depth. Wollenberg, *All Deliberate Speed*, at 57. Root’s reply to Wright noted that the issue was so local he didn’t know the policy even existed prior. Esthus, *Theodore Roosevelt and Japan*, at 128.

Ringer, *We the People*, at 691.

Takaki, *Strangers from a Different Shore*, at 201 (noting Roosevelt’s “respect as well as concern for Japan’s military power. Japan had demonstrated ‘feats of heroism’ in the war against Russia in 1905.”); Charles E. Neu, *An Uncertain Friendship: Theodore Roosevelt and Japan, 1906-1909* 46 (1967). Japan had just secured a victory in the Russo-Japanese War, the first such victory by an Eastern nation over a Western military power in modern history. Roosevelt himself had mediated the settlement of the war. Hing, *Making and Remaking Asian America*, at 28. A few weeks after the school board’s segregation order, Roosevelt wrote a letter to a Senator expressing fear that the incident could lead to war. Ringer, *We the People*, at 691-92.
Roosevelt, “National Life and Character,” 2 The Sewanee Review 353, 366 (1894). See also Takaki, Strangers from a Different Shore, at 202 (Roosevelt personally favored restrictions on Japanese immigration and criticized Hawaii for permitting Japanese laborers, when the islands "should be 'filled' with a 'white population' representing 'American civilization.'").

Neu indicates the President first wanted a general immigration bill that excluded laborers but did not single out Japan or other individual nations. Neu, An Uncertain Friendship, at 25; see also 5 Letters of Theodore Roosevelt: The Big Stick, 1905-1907 532 (Elting E. Morison ed., 1952) (Roosevelt wanted to “get to some mutual agreement . . . to keep out the laborers of each country from the other” and “hoped we could do it only in the course of a general immigration restriction bill” to “avoid giving offense to any one nation.”).

Esthus, Theodore Roosevelt and Japan, at 147.

Wollenberg, All Deliberate Speed, at 56; We the People, at 691; Neu, An Uncertain Friendship, at 35. The day after the decision was made to send Metcalf, Metcalf received a memo written by Root at the President’s request. It outlined Roosevelt’s views on the Japanese as a “‘proud, sensitive, warlike’ people who were so ‘ready for war’ that they could take the Philippine Islands, the Hawaiian Islands, and ‘probably the Pacific Coast from the unprepared United States. ‘The subject,’ wrote Root, ‘is not one of some far distant, possible evil, but is an immediate and present danger to be considered and averted now, today.’” Ibid.


Neu, An Uncertain Friendship, at 39-41. Discussed in part in Daniels, The Politics of Prejudice, at 40, 130 n.32 (“separate but equal” precluded any recourse for 25 of the 93 segregated Japanese students, who were American citizens, but the others could have been
protected by treaty provisions); Daniels, *Asian America*, at 123. Wollenberg, *All Deliberate Speed*, at 65 (Root had “doubts about the government’s legal case” as well as concerns that it would drag out the diplomatic dilemma to wait for a court opinion).

105 Wollenberg, *All Deliberate Speed*, at 60, 62-65. The suit was consolidated with a legal challenge filed months earlier by Japanese community leaders.

106 See Neu, *An Uncertain Friendship*, at 53. See also Letter from Theodore Roosevelt to Kermit Roosevelt (Feb. 4, 1907) (“I have to face facts...there is a strong and bitter antipathy to the Japanese on the Pacific slope – the antipathy being primarily due to labor competition, but complicated by genuine race feeling. It is imperative to keep Japanese laborers...out of our Pacific coast territory.”). Bailey, *Theodore Roosevelt and the Japanese-American Crises*, at 123-26.

107 Ibid.


110 Daniels, *The Politics of Prejudice*, at 39; Ringer, *We the People*, at 695 (call for naturalization was “an afterthought” which Roosevelt “he failed to follow through on” in subsequent negotiations with Japan); Takaki, *Strangers from a Different Shore*, at 207.


112 Daniels, *The Politics of Prejudice*, at 42.

113 This legislative procedure maneuver became an issue of contention for at least one Representative, John Williams of Mississippi, who objected to adding the provision for the first
time at conference when it had not formed a part of either prior bill. 59 Cong. Rec. 3217-18 (1907).


115 59 Cong. Rec. 3223-24 (1907). Representative Samuel McCall of Massachusetts shared the view that the provision bestowed “high legislative discretion” on the President and voted against the bill. 59 Cong. Rec. 3226 (1907).

116 59 Cong. Rec. 3217 (1907).

117 59 Cong. Rec. 3222 (1907).

118 59 Cong. Rec. 3030 (1907). The Senator went on, “[w]e ought to have a law regulating [the landing of a certain class of immigrants], and it ought not to be left to the Executive discretion.” 59 Cong. Rec. 3036 (1907). Representative George Burgess of Texas predicted dire long-term consequences: “If we go on and on . . . expanding Presidential and Federal powers, encroaching upon and lessening the responsibilities and the powers of the State governments . . . more and more we shall drift into a servile acquiescence in the will of a dictator; and this tendency will finally convert this real Republic into a despotism in fact under the guise of a republic in name.” 59 Cong. Rec. 3225 (1907). Like Burnett, Burgess may have had mixed motives in opposing the bill, as he also noted his disapproval of the bill’s reliance on labor criteria, rather than racial ones, and emphasized his willingness to vote for exclusion of immigrants who would pose the threat of race-based “intermarr[iage].” 59 Cong. Rec. 3224 (1907).

119 Senate opposition died out quickly, particularly after Roosevelt leveraged the Rivers and Harbors bill to “force certain members into line” and threatened an extra session. The House had greater opposition, but the Republican Congress rallied around the administration. The opposition was “almost solidly” Democratic. Bailey, *Theodore Roosevelt and the Japanese-American Crises*, at 145-49.


122 Exec. Order No. 589 (March 14, 1907).

123 Hing, *Making and Remaking Asian America*, at 207-12, 254 n.67. Daniels, *Asian America*, at 125. It took place over a year and a half of negotiations and six notes in late 1907 and early 1908.
124 See Neu, *An Uncertain Friendship*, at 78.

125 Daniels, *The Politics of Prejudice*, appendix A.

126 However, efforts at Japanese exclusion continued into the 20th century. In 1913, the California legislature passed the Alien Land Law, precluding Japanese immigrants from owning land. Hing, *Making and Remaking Asian America*, at 30. In 1917, Congress established a literacy test and the Asiatic barred zone (excluding all Asian immigrants except the Japanese). The Japanese were exempt under the Gentlemen’s Agreement. Daniels, *The Politics of Prejudice*, at 94. These measures later gave way to the Immigration Act of 1924 which established immigration quotas. The Act included a provision that barred entry for any immigrant “ineligible to citizenship,” thus effectively excluding new Japanese migrants from coming to the United States without any explicit measure. Daniels, *Asian America*, at 150-51.

127 In particular, courts had already upheld state-enforced segregation by this point. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Ward v. Flood, 48 Cal. 36, 52 (Cal. 1874) (California Supreme Court finding that “separation of the races for educational purposes” is not a violation of equal protection). Even if the Treaty of 1894 was interpreted to include a right to education, the Administration would have to argue that the treaty could “override the constitutional powers of a state” to establish and operate schools. Such a judgment would have had even more significant impact in southern states with segregated schools. As one California Congressman noted, if California couldn’t segregate Japanese citizens under the treaty, then southern states would have to integrate black British citizens in their schools. Wollenberg, *All Deliberate Speed*, at 64-65.


$4.5 million to “prevent[] the unlawful entry of aliens into the United States, by the appointment of suitable officers to enforce the laws in relation thereto”); see also Kang, *INS on the Line*, at 45-51.


132 Immigration Act of 1917, § 3.


134 See, e.g., *National Defense Migration: Hearings Before the H. Select Comm. Investigating National Defense Migration*, 77th Cong. 10698 (1942) (statement of Fay W. Howard, Chief, Farm Placement Section, U.S. Employment Service) (observing that “[c]hanging labor market conditions, Selective Service, defense industries, increased production goals, and a host of related factors are working daily to deplete” the supply of agricultural labor); 77 Cong. Rec. 1403-05 (1942) (detailing the reasons for the farm labor shortage); Richard B. Craig, *The Bracero Program: Interest Groups and Foreign Policy* 38-39 (1971); Galarza, *Merchants of Labor*, at 41-45; *Farm Labor Drain Depicted as Crisis*, N.Y. Times (Feb. 24, 1942) (reporting
testimony of Agriculture Department officials that “the country was facing the worst farm labor shortage in its history” due to the draft and industrial demands).


136 Scruggs, Evolution, at 141-45.

137 See Kang, INS on the Line, at 92-93.


140 H.R.J. Res. 96, 78th Cong., Pub. L. No. 78-45, § 5(g), 57 Stat. 73.


142 Calavita, Inside the State, at 25.


144 Calavita, Inside the State, at 29-30.


146 See Calavita, Inside the State, at 46.

147 Ibid. at 25.
Chapter 3

The Rise of the Deportation State

The power to deport is an awesome one. The Supreme Court long ago declared that deportation did not constitute punishment. But the distinction between criminal and civil penalties becomes purely formal in the face of the government’s authority to remove a person from her home, livelihood, and family, forcing her return to a potentially unfamiliar or even dangerous country of origin. The coercive techniques employed to bring deportation to fruition—threats of arrest, raids on the home and workplace, and potentially prolonged detention—heighten the power’s effects on personal liberty, as well as the risks of state abuse.

Today, the President sits atop a massive deportation state, and deportation policy has become a mainstay of immigration politics. As we explore in depth in chapter 4, the power to decide who may stay and who must leave the United States has entrenched the President’s power over immigration. The reach and complexity of this power explain why President Obama could be known simultaneously as the deporter-in-chief among immigrants’ rights advocates and an imperial unilateralist among his detractors for his efforts to shield millions of non-citizens. The rise of deportation as a regulatory regime also explains why President Trump’s call to build a wall on the southern border amounts largely to symbolic politics that distract us from the true measure of his power to control immigration.

To understand how the deportation power operates as a significant source of presidential authority, we must first understand the legal and bureaucratic transformations that gave rise to the power in its contemporary form. The story begins in the late nineteenth century, when
Congress effectively launched the government’s legal authority and bureaucratic capacity to extend immigration enforcement from the border into the interior. The rise of federal immigration legislation during this period did not mark some sharp break with the past—a reversal of some earlier, mythical period in which the United States welcomed all comers. Nonetheless, Congress did create a new regulatory machinery for selecting migrants. For the first time since the infamous Alien and Sedition Acts, Congress enacted laws making resident noncitizens deportable. Just as important, Congress began building institutions that would enable the federal government to turn the growing law of deportation into a reality on the ground. This chapter tells the story of this rise of state capacity.

<1>Selecting Immigrants: An Early History

From the earliest days of the Republic, Americans have worked to engineer the composition of the United States. In Aristide Zolberg’s evocative formulation, we are a “nation by design.” The United States has been comprised by violent, coercive, and bureaucratic efforts to eliminate or subjugate the undesirable, as well as to import, recruit, and often exploit those who would build the country and its institutions. Alongside colonization and the slave system, immigration policy has constituted American society and the body politic since the nation’s founding.

But for the first century of American history, the legal tools used to regulate immigration were vastly different than those deployed today. The federal government did not directly regulate the entry of immigrants: there was no elaborate system of visas, admissions rules, and inspections. Nor did it expel immigrants who had taken up residence in the United States. And while states and local governments did, on occasion, use their poor laws and other police powers
to forcibly rid themselves of unwanted residents, most migration regulation operated indirectly to promote or discourage certain forms of migration.

State officials knew that immigrating to America might be less desirable if one could not purchase real property after arriving. Many eastern seaboard states therefore prohibited non-citizens from owning property in fee simple to deter unwanted residents.\textsuperscript{4} States with large ports also imposed head taxes on every arriving immigrant, or forced ship captains to indemnify the state against the risk that immigrants arriving on their vessels would become paupers. While the Supreme Court invalidated state laws that imposed taxes on newcomers as beyond local power, other laws designed to deter poor immigrants were upheld.\textsuperscript{5}

New states being carved from territory west of the Appalachians took the opposite approach. Wanting to induce migrants to settle their territories, they held out the prospect of landowning and voting to recruit migrants.\textsuperscript{6} In a similar vein, the national government often worked to facilitate migration, negotiating treaties that promoted migration by protecting the rights of resident migrants. The series of treaties negotiated with China during the generation that experienced the California Gold Rush and built the transcontinental railroad had just the effect, helping spur labor migration to the West Coast.

Before the civil war, therefore, most state efforts to regulate migration were indirect. And as we explained in the last chapter, pitched political battles over slavery’s expansion effectively foreclosed significant federal immigration legislation. But the political and legal landscape shifted dramatically during reconstruction. In the economic malaise that followed the completion of the transcontinental railroad, California began adopted ever more aggressive measures to try to block immigrants from China. New York, continuing to feel aggrieved at the costs imposed by immigrants who entered America through its gates, took a similar approach. State officials also
ratcheted up the pressure on Congress to do something about the arrival of “undesirable”
immigrants—pressure that only increased when the Supreme signaled, in *Chy Lung v. Freeman*
and *Henderson v. New York*, that it was increasingly likely to strike down state efforts to manage
migration as an unconstitutional interference with Congress’s Article I power to regulate
international commerce.  

Congress responded in 1875 by passing the Page Act, the first federal law in the nation’s
history that made specified types of immigrants “excludable” and formally prohibited their entry
into the United States. On its face, the Page Act singled out two types of migrants: women
“imported for the purposes of prostitution,” and any person serving a felony conviction in his
home country.  As a matter of (not-so-secret) practice, the Act targeted Chinese immigrants—
particularly Chinese women, who were widely believed to be coming to the United States for
“lewd and immoral purposes.”

Just seven years later, Congress more fully embraced the strategy of exclusion in a new
pair of statutes. The 1882 Immigration Act prohibited entry of “any convict, lunatic, idiot, or any
person unable to take care of himself or herself without becoming a public charge.” The
Chinese Exclusion Act suspended the entry of most Chinese immigrants for 10 years, launching
an infamous period of formal racial exclusion in immigration law that would persist for more
than half a century. The law did contain a few exceptions, permitting merchants and others who
were not considered “laborers” to land, and preserving the right of Chinese migrants already
living in the United States to come and go as they pleased. But together with the more general
Immigration Act of 1882, the law announced Congress’s intention to police immigration to the
United States directly and aggressively.
In order to make good on the law’s promise to exclude, Congress needed more than just the public law. It required a regulatory regime. Sifting arriving immigrants into two pools—one permitted to enter the United States, the other containing excludable aliens who could be returned to their home countries—would require the creation of new screening techniques and bureaucratic structures. When a steamer pulled into the port of San Francisco, how was an inspector to determine who was permitted to land? There was no system of visas, stamps, and modern passports; nor were there any records of those who had been admitted prior to the Act’s passage. The exceptions to exclusion contained in the Chinese Exclusion Act meant that prospective immigrants had powerful incentives to misrepresent their occupations or whether they had previously been living in the United States.

Congress laid the foundation for a screening system with rudimentary documentation requirements for admission to the country. All Chinese non-laborers entering the United States were required to present a certificate from the Chinese government on arrival, affirming their exempt status. Customs collectors at each port had formal authority to review these documents, and each relevant customs office contained a Chinese Bureau generally made up of inspectors, an interpreter, and a clerk, though the Treasury Department also sent inspectors to the local offices to conduct routine and special investigations. When migrants denied entry under this new system began filing petitions for writs of habeas corpus to challenge collectors’ decisions, federal courts had their say too. Whereas the collectors tended to apply the law’s requirements strictly under the influence of political and popular opinion, the courts worked to balance the exclusionary tenor of the Act with the country’s obligations under the 1880 amendment to the Burlingame-Seward Treaty, which committed the United States to respecting the rights of Chinese migrants.
Even more significant, Congress began to expand the federal government’s screening and enforcement powers beyond the ports of entry. The 1882 Chinese Exclusion Act provided for the deportation of “any Chinese person found unlawfully in the United States”—in other words, any immigrant who illegally entered the country after the exclusion act went into force. To facilitate the identification of those who had violated the exclusion laws, the 1892 Geary Act added a new requirement that all Chinese laborers in the United States apply for a certificate to prove the lawfulness of their residence. Those whose applications were denied for want of evidence—under rules that barred testimony from Chinese witnesses—would be deemed deportable. No longer would inspection agents be limited to examine arriving passengers and refusing entry at that point. Enforcement could now lawfully take place away from the ports and borders, and could occur weeks, months, or even years after an immigrant’s arrival in the country.

To be clear, this was not the first time that Congress had given the Executive the power to deport resident noncitizens. But Congress’s prior experiment with deportation—the 1798 Alien Friends Act—had turned out to be short-lived. The Act expired after two years without ever having been used, in large part because Jeffersonians, and even some Federalists like James Madison, argued that the federal government lacked the power to deport “alien friends;” deportation, they believed, was permissible only for alien enemies—citizens of a country at war with the United States. But as the nineteenth century drew to a close, the Supreme Court saw the power differently. In *Fong Yue Ting*, a case challenging the Geary Act’s deportation authority, Justice Gray wrote for the Court and treated as obvious the proposition that the government possessed a deportation power: “The power to exclude aliens and the power to expel them 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.”
The Deportation State

The creation and legitimation of the deportation power eventually would transform immigration law. The federal government had established its authority to screen immigrants at two different moments in time for their suitability: at a port-of-entry upon arrival, and at some later date, perhaps years down the road. What began as a highly contested and never before used power by the federal government in the 1880s would become over the course of the twentieth century an ordinary regulatory instrument, viewed by the Supreme Court and Congress as indispensable to the protection and construction of the nation.

The deportation state had modest beginnings, to be sure. The first deportation provisions, embedded in the Chinese Exclusion Acts, formally applied only to those who had entered the country in violation of law. If a Chinese laborer evaded the point-of-entry screening system designed to exclude him, the Act’s deportation provision authorized officials to deport him if they later discovered that he had entered illegally. In other words, deportation was based on pre-entry facts about the person: once lawfully admitted, an immigrant could not be deported under the immigration statute. Other early deportation provisions had a similar structure. In 1888, Congress made deportable any laborer who entered the country in violation of the contract labor laws—though, in contrast to the deportation power in the Chinese Exclusion Acts, this power could be exercised over immigrants only within one year of their entry into the United States. Similarly, the Immigration Act of 1891 provided that “any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to landing therein shall be deemed to have come in violation of law and shall be returned as aforesaid.” Again the power was formally tied directly back to facts and circumstances that existed at the time of entry. Immigrants who became destitute as a result of an accident that occurred after they immigrated
were not, under the terms of this provision, deportable. Instead the provision was designed to sweep up those who should have been excluded when they applied for admission, as “persons likely to become a public charge,” but who had mistakenly been permitted by inspectors to land.\textsuperscript{19}

This limitation on the scope of deportation rules eroded quickly after its inception. In 1907, Congress enacted the first law that clearly provided for the deportation of an immigrant solely on the basis of her post-entry conduct. It amended the immigration code to make deportable any female immigrant who engaged in prostitution, or who was found living in a “house of prostitution,” within three years of entering the United States.\textsuperscript{20} Once Congress began to focus on the lives and behaviors of immigrants already living in the United States, it quickly began adding to its list of “undesirable” conduct that could render an immigrant deportable. Deportable conduct soon included a felony conviction for any “crime involving moral turpitude;” advocating or teaching anarchy and the overthrow by force or violence of the Government of the United States; or even working in a dance hall “habitually frequented” by prostitutes.\textsuperscript{21} Perhaps unsurprisingly, these grounds were remarkably consistent with commonly held stereotype about immigrants, both then and now—that they have a penchant for crime, vice, and other morally undesirable behavior.

At first, many of these grounds of deportation came with a built-in brake: a statute of limitations. A felony conviction for a crime of moral turpitude could only result in deportation if the crime was committed within five years of arrival in the United States.\textsuperscript{22} Working as a prostitute would lead to deportation only for those caught working within three years of entering the country.\textsuperscript{23} The Immigration Act of 1917, enacted over President Wilson’s veto in the midst of World War I and falling real wages for American workers, provided for the deportation within
five years of any alien excludable at the time of entry. These temporal limits on the deportation power protected longer-term residents from the possibility of expulsion. At least one member of the Supreme Court, Justice Oliver Wendell Holmes, thought they might also be constitutionally compelled—that Congress might lack the “power to retain control over aliens” for decades after their admission. These views about the Constitution and conscience were apparently not universally shared, however, as temporal limits on the deportation power turned out to be fleeting. Almost immediately Congress began to chip away at them; by the early 1920s, Congress had removed the time limits from all but a tiny number of deportation grounds.

Perhaps the most important limit to fall by the wayside disappeared in the 1924 Immigration Act, which made deportable “any alien who at any time after entering the United States is found to have been at the time of entry not entitled” to admission. That change meant that any immigrant who slipped into the country by evading or defrauding the inspectors, even an immigrant admitted because of an inspector’s mistake, could now be deported many years or decades after entering. This deportation rule, carried through in the code to the present, is today what renders deportable every immigrant who enters the United States unlawfully.

Over the balance of the twentieth century, Congress steadily added to the list of deportable conduct, usually in response to perceived political emergencies having little to do with immigration policy. In the 1940s and 50s, Congress added grounds related to the “Communist threat” as the Cold War took shape. Dissidents, communists, and other political subversives were suddenly subject to removal based on activity that was otherwise mostly protected by the First Amendment. Fears of terrorism and the war on drugs prompted the addition of new grounds in the 1980s and 90s. The inclusion of drug offenses was perhaps the most consequential of Congress’s moves, given that it coincided with skyrocketing rates of drug
prosecution. Suddenly, almost any minor drug offenses was enough to make an immigrant deportable. Congress at the same time made deportation more categorical by eliminating many avenues of relief from the Code.\textsuperscript{30} Many immigrants thus had no opportunity to present the equities of their particular cases to an administrative tribunal or a judge, or to argue that their otherwise good behavior and ties to the country cut against deportation. By 1996, a lawful permanent resident, even one who had lived in the United States for decades and had a citizen spouse and children, could become categorically deportable under the immigration code if he were convicted in state court of possessing a small quantity of marijuana. Moreover, the Supreme Court repeatedly blessed these expansions, refusing to embrace Justice Holmes’s earlier suggestion that the Constitution might impose some outer limit on the time after arrival that an immigrant could be deported.\textsuperscript{31}

\textless 1\textgreater The Probationary Model of Migration

What justified this turn to and expansion of deportation? Selective immigration regimes seek to distinguish the “right” sort of people from the “wrong” sort to admit to the country and add to the body politic. Today American immigration law no longer selects people formally on the basis of race or ethnicity. Yet exclusivity remains a foundational aspect of American immigration policy. This fact, which makes migration debates so politically and ethically fraught, also raises a central regulatory question: How is the state to ensure that its selection decisions are good ones?

If states had perfect information about prospective migrants and could see into the future, selecting immigrants would be straightforward. Like an omniscient employer who sifts through a thick stack of job applicants and invariably identifies the most talented prospective employee, a state with perfect information would quickly single out the migrants it wanted and turn the others
away. Because the state would never be uncertain or make mistakes, all of the screening apparatus could operate on the front-end of the system, when immigrants first sought admission to the country. And any immigrant selected through this ex ante system could immediately be awarded permanent residency and the promise of an indefinite stay.

But, of course, states are not all-knowing. Even the most generous immigration state will, therefore, often want a second bite at the apple: a chance at some point after the immigrant enters the country to decide that the immigrant should not be permitted to remain in the country. The deportation power provides just this opportunity. It functions as an ex post complement to the mechanism of ex ante exclusion, liberating the state from having to make screening judgments solely on the basis of information it has at the moment a migrant arrives. If unfavorable information about the migrant develops after she has already entered—facts that lead officials to believe the immigrant should not be permitted to remain—the power to deport authorizes government officials to act on that information. Using deportation as a tool to screen migrants thus effectively puts arriving migrants on a form of probation, making their presence in the country contingent to some degree or another.

For the state, a central advantage of the deportation power is that it facilitates the gathering of greater amounts of information about the migrant. An immigration inspector might not have known at the time of arrival that the immigrant was a member of class prohibited by statute from entering the United States and taking up residence. Perhaps the immigrant lied to the inspectors, faking a family relationship or misrepresenting her occupation. Or, more straightforwardly, the immigrant might have evaded the inspectors all together. This is what was alleged to have happened in the case of *Yamataya v. Fisher*, a famous early deportation case to reach the Supreme Court.\(^{32}\) Kaoru Yamataya, a sixteen-year-old girl who landed in Seattle from
Japan, found herself in deportation proceedings just four days after her arrival. The government contended that she was excludable as a pauper and, therefore, deportable as well. According to Thomas Fisher, the duly appointed “immigrant and Chinese inspector,” she had “surreptitiously, clandestinely, unlawfully and without any authority come into the United States of America,” thus evading controls at the border and necessitating after-the-fact authority to judge her fitness to be in the country.

When Congress first authorized deportation during the early days of Chinese exclusion, ex post screening was designed to detect those who had evaded inspection or been untruthful during the initial inspection process. Deportation was used, in other words, to uncover information that existed at the time of entry but was concealed from the government. But even if an immigrant enters lawfully, the government might still want to continue gathering information about her. Congress realized this quite quickly, broadening deportation to authorize expulsion on the basis of an immigrant’s post-entry conduct. Immigrants who were deemed desirable when they were admitted were, under these new rules, rendered deportable for things they did after arriving in the United States. As the grounds of deportation grew ever more extensive and baroque, and as statutes of limitation on deportability fell by the wayside, our immigration screening system became increasingly probationary—providing more and more legal routes for the government to rescind an immigrant’s right to reside in the United States.

Rules that make migrants deportable for post-entry conduct also put pressure on migrants to live their lives in particular ways. They function, as immigration scholar Daniel Kanstroom has noted, as tools of “social control.” The law that makes deportable those convicted of drug crimes deportable does more than just operate as a screening device, allowing the government to remove those connected to the drug trade. It also creates powerful incentives for non-citizens to
avoid conduct that might make them deportable, or even association with people and groups that might raise the suspicion of immigration authorities. When these rules parallel criminal law, their significance lies in the fact that they impose an additional penalty on immigrants—sometimes one that is far, far harsher than the penalty that would ever be imposed by criminal law. Often, however, deportation rules hold immigrants to higher standards than we impose on citizens. Being addicted to drugs, for example, is not itself a crime. But “any alien who is . . . a drug abuser or addict is deportable.”

Beyond revisiting the admission of a particular immigrant, deportation empowers the government to expel whole groups of immigrants in response to changed economic, social, or political circumstances—effectively changing its mind, after the fact, about what sorts of migrants should be residing in the state. If the state’s labor market collapses, for example, the government could order out large numbers of workers present on probationary statuses. Or if the political environment changes, as it did dramatically during the ascendancy of the Chinese exclusion era, the government can respond by trying to force out previously admitted groups.

This is part of what explains a number of early battles over the Chinese Exclusion laws. Though the federal government was always ambivalent about accepting large numbers of immigrants from China, the political climate in the 1860s made possible the treaties that facilitated Chinese migration and protected the Chinese who had come to live in the United States. But as the size of the immigrant community in California grew, and as economic development slowed and a depression began to take shape, anti-Chinese sentiment in the state and around the country gathered political steam. Initially this led Congress to pass legislation banning new Chinese migrants from coming. But as we have seen, by the 1880s, many state and national politicians demanded not just the end of migration from China, but also the removal of
those who had already settled in the United States. Congress responded to these demands in legislation like the Geary Act, which required all resident Chinese immigrants prove the lawfulness of their residence or be deported. The stringent standards of proof in the Act were designed to do more than simply suss out those who had evaded the port-of-entry inspection system. They were also created in the hopes that the law would force out large numbers of lawfully settled Chinese migrants.36

From the state’s perspective, therefore, three powerful benefits cut in favor of broad deportation authority: information, control, and flexibility. But to enumerate the benefits of the probationary model is also to bring into view the costs it imposes on both migrant and even the state itself. During the probationary period, which can extend through a lifetime, an immigrant’s right of residence remains uncertain. Will he be permitted to live his life in the country where he has developed ties to workplaces, families, and communities? Or will the state ultimately decide to force his return to his country of origin, or another place altogether? For the migrants themselves, and for their families and the broader communities in which they are embedded, this insecurity can impose serious economic, psychological, and civic costs.

Even for a purely selfish state with no concern for the rights and interests of immigrants, the uncertainty created by a probationary regime can be costly. States frequently benefit when new immigrants put down roots and invest in their new places of residence, by learning the local language, making friends, starting families, and so on. Many of the investments that states would like migrants to make are country-specific; the migrant will lose all, or most, of the investments they have made if later forced to leave. Deportation can break up families, pull apart social networks, and destroy much of the value of having learned a new language. The greater the prospects of deportation, the less likely migrants will be to make country-specific investments.
Moreover, insecurity of status can influence migrants even as they are formulating plans to migrate. Some migrants may simply forgo moving to the U.S. altogether, if the risk that things won’t work out seems particularly high. And where a prospective immigrant has more than one destination state in mind—an increasingly common occurrence given that migration has been at historic highs for the last three decades—she may choose his destination on the basis of which nation offers her greater security.

These clear vices of a probationary system mean that nearly all states—certainly all democratic ones—place limits on the probationary character of immigration. will create strictly contingent immigration regimes. In the United States, some of these limits are constitutional. The Supreme Court long ago required that resident noncitizens be provided with due process before being subject to deportation. But these procedural protections have never matured into substantive due process rights; since the days of Fong Yue Ting, the Court has repeatedly rejected claims that long-term residence gives rise in immigrants to a vested constitutional right against deportation itself. So far as constitutional law is concerned, therefore, the government remains free today to deport nearly life-long residents of the United States over quite trivial matters. Protection is a matter of congressional legislation. Today, the status of lawful permanent residency provides some security of residence, creating a strong statutory presumption in many contexts of the immigrant’s right to remain. But in a world with elaborate and indefinite deportation grounds, even the status of lawful permanent resident begins to take on a probationary character.

Our deportation rules present the most vivid examples of the tools of probation. But there are many other features of America’s immigration regime have this same probationary character. Though they are not denominated as deportation rules, they too make migrants’ right to reside in
the country contingent, and thus empower the state to re-visit its initial admissions decisions at a later date. Our contemporary system of labor migration offers one such example. Labor migration patterns historically have taken many forms, with some migrants moving permanently to the United States, others coming for a time and then leaving, and still others coming on a periodic, cyclical, or seasonal basis. Labor migration rules, as such, hardly existed prior to the close of the nineteenth century. Beginning with the Chinese Exclusion Acts, however, Congress began to formally regulate access to the domestic labor market.

For nearly a century, the immigration system has formally divide labor migration into two categories—one temporary, the other permanent. Under the landmark 1952 Immigration and Naturalization Act, for example, permanent labor migrants received green cards that provided a right to live indefinitely in the United States and to work in most any occupation. Temporary labor migrants, on the other hand, received visas that gave them a right to live only for a fixed term in the country, usually for just a few years. (These temporary visas were also often tied to a particular employer and so prohibited migrants from accessing the larger labor market while in the United States.) The law regarded these tracks as parallel, rather than serial, and precluded most temporary workers from becoming permanent residents. The temporary visa rules even often required migrants to prove that they had no intent to permanently abandon their residence abroad, as a way of weeding out migrants whose real desire was to obtain permanent residence.

Over time, this two-track model has morphed into a largely probationary one. Today, the overwhelming majority of labor migrants granted green cards are currently working in the United States on putatively temporary visas. Their path to permanent residency is a probationary one. Under the H-1B program for high-skilled migrants, for example, firms Silicon Valley and elsewhere to hire software engineers and other technology workers on three-year visas that can
be renewed just once. Those firms later often offer to sponsor the most successful employees for green cards—a fact many migrants are themselves counting on. The H-1B statute has even been revised to reflect the reality of this probationary approach, eliminating old rules that required applicants for the temporary visa to prove they had no desire to remain permanently.

This probationary approach to immigrant screening has been adopted even in the rules governing marriage-based immigration. Because of a 1986 law designed to unearth fraud, the very core of our permanent immigration regime—sponsorship by U.S. citizens of their spouses—has become contingent.⁢³⁹ Today, a newly married couple seeking a green card for one of the spouses initially receive only a conditional green card, which expires after two years. Only at the end of that two-year period can the couple petition (generally jointly) to have the conditional status lifted and the visa converted to a traditional, permanent green card. When the couple does petition at the close of the two-year period, the government uses the petition as an opportunity to screen the couple’s marriage a second time. Couples are required to provide proof about where during the two years they resided and worked, along with any other information they have documenting their life together. This documentation, if it suggests the absence of a joint life, might spark further investigation into whether the couple’s marriage is a sham entered into only for immigration purposes.⁢⁴⁰ If the agency concludes that it is indeed a fraudulent marriage, the noncitizen spouse will be ordered deported.

These marriage and labor migration rules may not look exactly like traditional grounds of deportation. But they operate in a similar fashion, rendering probationary an immigrant’s initial right to reside in the United States. And they provide the state with the many of the same benefits: supplying additional information that those charged with screening immigrants more information that can be used to perfect admissions decisions; expanding the state’s control over
the immigrant population and those with whom immigrants associate; and increasing the state’s flexibility to respond to changing labor market conditions, the interests of employers or other powerful interest groups, and so on. These features are baked into the formal structure of these legal rules. As we will see in the next chapter, however, perhaps the most pervasively probationary aspect of modern immigration law emerges not from the de jure structure of the immigration code but from the de facto structure of how immigration law has come to be enforced on the ground. Before explaining that structure, we must first grasp the enforcement bureaucracy that undergirds it.

<1>The Bureaucracy of Expulsion

The rise of the deportation state began with the creation and expansion of the formal legal rules and authorities to remove noncitizens from the country. Just as crucial to its development, however, has been the construction of the government’s implementation capacity—the building of a federal bureaucracy of exclusion and expulsion. Over many decades Congress built this bureaucracy into the full-bore law enforcement apparatus we know today. The emergence of this enforcement capacity was accompanied by a gradual expansion of officials’ discretionary power. These officials, in turn, consistently have been criticized as incompetent and unprofessional on the one hand, and showered with resources by Congress on the other, making enforcement policy both hotly contested and central to immigration policy.

The precursors of the immigration enforcement bureaucracy date back to the early nineteenth century, in the offices of customs collectors and other (mostly state) officials who enforced state and federal passenger acts that regulated transatlantic travel. But Congress began to build a federal enforcement apparatus in earnest in the late nineteenth century, when it first displaced state-level officials from the frontlines. Prior to that point the federal government
relied on state officials to enforce the earliest federal immigration laws. Administrative officials in New York and Massachusetts, for example, entered into contracts with the Secretary of the Treasury to administer the exclusion grounds of the Act of 1882, exercising authority to turn away “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge,” as required by federal law. But with the Immigration Act of 1891, Congress created the office of “superintendent of immigration” within the Treasury Department and transferred all of the duties and powers previously conferred on “state commissioners, boards, or officers acting under contract with the Secretary of Treasury” to newly created “inspection officers of the United States.” These inspection officers were charged with examining all immigrants arriving by water and deciding whether they should be permitted to land—decisions reviewable only by the superintendent and the Treasury Secretary himself, not by federal courts.

Though immigration enforcement was now federalized, it remained weak. Immigration enforcement during this early period was focused at ports of entry. Little attention was paid to the United States’ northern and southern land borders, over which significant informal economic exchange and work occurred. Officials of the new Bureau of Immigration, created in 1903 when Congress transferred immigration authority from the Treasury to the new Department of Labor and Commerce, often facilitated this flow, turning a blind eye to Mexicans coming north for work and discouraging inspectors from searching farms and ranches for unauthorized workers. As a result, the government deported only a few hundred immigrants each year at the turn of the twentieth century. A decade later this number had risen to a few thousand—relatively trivial numbers given that nearly one million immigrants arrived in the United States each year at this time. Indeed, the regime was such that one legal commentator of the era noted that deportation
“has always been regarded . . . as a complementary function to the exclusion process, never as a matter of much independent importance.”

Yet as immigration law became more restrictive, sharpening the distinction between legal and illegal immigration as World War I wound down and generally increased demands on immigration officials, the Bureau came under harsh scrutiny for its lax and incomplete control of movement across the southern border. Calls to create a mobile force to patrol the border mounted, and Congress through an appropriation created the Border Patrol in 1924. In so doing, it granted the Secretary of Labor $4.5 million to “prevent[] the unlawful entry of aliens into the United States, by the appointment of suitable officers to enforce the laws in relation thereto.”

The agency initially consisted of a 472 employees. Congress steadily increased its size through appropriations, and by 1930 its ranks had swelled by 50 percent. The personnel themselves initially came from the civil service register of railway postal clerks. But when their lack of qualifications quickly became apparent, the Department began recruiting cowboys, ranchers, and former members of the military. These new recruits only served to exacerbate the force’s low status and reputation as rag-tag and poorly disciplined bunch—a reputation helped along when an internal government investigation uncovered abusive tactics by border patrol officials, including physical and verbal abuse of Mexican immigrants, quick turns to force, and reliance on questionable informants.

The creation and funding of the border patrol certainly reflected a commitment to building an enforcement apparatus. But the realization of the deportation power depended on the government’s capacity to reach far into the interior. The Border Patrol built a bit of this capacity on the back of legislative ambiguity. The Patrol’s existence and legal authority was laid out only in a couple of appropriations bills. One gave border patrolmen the power to arrest without a
warrant anyone seen attempting to enter the United States unlawfully, as well as to “board and search for aliens,” without a warrant, “any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle, in which he believes aliens are being brought into the United States.” Agency officials interpreted this warrantless search and arrest power as authorizing the border patrol to operate well within the interior. In testimony before the House Committee on Immigration and Naturalization in 1930, Commissioner General of Immigration Harry E. Hull offered that “[t]he distance a patrolman is supposed to pursue is . . . flexible. It has to be so.”

Still, when the economic anxieties of the early depression years made migrants a national scapegoat for stealing American jobs, there was still relatively modest federal capacity to implement policy proposals that included banning all immigration and mass deportation. In 1929, Hoover’s Secretary of Labor launched a national-scale deportation effort, and in 1931 he sent Bureau officials on a “nine-moth, cross-country search for deportable immigrants.” But officials relied heavily on voluntary returns and assistance from state and local officials—both because of chronic understaffing and underfunding, and because immigration officials balked at cumbersome federal deportation procedures, which included investigations, a hearing, and supervisory transactions within the immigration bureaucracy itself. Indeed, even as deportation reached an all-time high during the Depression, state and local officials, not the federal government, did the deporting.

This began to change slowly with the establishment in 1933 of the Immigration and Naturalization Service. Created by President Roosevelt through an Executive Order, the INS replaced the old Immigration Bureau and created a new bureaucratic home for all border and interior enforcement operations. While the initial focus of the INS remained on policing legal
and illegal traffic across the southern border, both internal executive branch reforms and congressional legislation refined and expanded the powers of the INS throughout the 1930s and 40s. In the early 1930s, there were some efforts to reform enforcement practices and professionalize the immigration enforcement bureaucracy. For instance, one of the first moves of the Commissioner General of the newly minted INS was to prohibit the detention of immigrants without arrest warrants—even where congressional statutes granted warrantless arrest authority. Over time, however, most adjustments expanded the scope of official discretion over whether and how to enforce the law. In the 1940 Alien Registration Act, for example, Congress delegated to the Attorney General discretion to suspend the deportation of noncitizens who fit certain criteria—though a subsequent DOJ study of the power’s use revealed that it was mostly European immigrants who received the favorable exercise of discretion. The arrest power of INS and Border Patrol agents, which had been reigned in by administrators, also began expanding. The INS’s central office delegated to lower-level field agents the power to issue arrest warrants in all cases, rather than just in emergencies. Congress in 1946 gave the INS agents authority to conduct warrantless arrests of “any alien who is in the United States in violation of [immigration law] and is likely to escape before a warrant can be obtained for his arrest”—a dramatic expansion over previous rules that permitted the warrantless arrest only of those caught in the act of entering the country illegally. Confirming the INS’s arrival as a full-fledged law enforcement agency, President Roosevelt transferred the agency from the Department of Labor to the Department of Justice.

The operation of the Bracero farm labor program in the 1940s provided confirmation of the agency’s growing enforcement capacity and considerable discretion to shape immigration policy. As we explained in Chapter 1, the bi-lateral Bracero agreement, negotiated by President
Roosevelt with Mexico, provided for the temporary admission of large numbers of guest workers. Managing the flow of workers under the program, as well as policing contract violators and illegal workers who entered without contracts altogether, were enormous tasks. The INS took on these roles reluctantly during the war years, concerned about its capacity. But by the late 1940s, inattention from other agencies made the INS the de facto custodian of the program.\textsuperscript{57}

INS enforcement initially proved spotty. From 1942 to 1952, an estimated 818,545 workers entered on contracts. But many more entered illegally: during this period the INA apprehended approximately 2.4 million illegal aliens, the vast majority of who were would be workers who had crossed the southern border illegally.\textsuperscript{58} Growers, particularly in the state of Texas that had been excluded from the formal Bracero program, pressured officials to turn a blind to illegal workers, and the INS even adopted a policy of legalizing unauthorized workers through adjustment strategies.\textsuperscript{59} Nonetheless, the rapid year-over-year rise in deportations, documented in Figure 1 below, was not just evidence of fecklessness; it was also a testament to the agency’s growing capability to identify, apprehend, and remove those who attempted to enter in violation of immigration law.

By the early 1950s, public disquiet with the Bracero program, along with heightened concern over illegal immigration, created pressure for more aggressive enforcement practices. President Truman’s Commission on Migratory Labor, having been charged with investigating the extent of illegal immigration in the United States, declared that the volume amounted to “virtually an invasion,” and concluded that the “wetback traffic” had had negative impacts on wages, labor competition, public health, and the welfare of the migrants themselves.\textsuperscript{60} The Commission proposed a series of reforms that would expand INS authority to enter places of employment to investigate potential illegal work and add to the law offenses for harboring,
concealing, and transporting unauthorized immigrants. Congress responded by criminalizing harboring and further expanding the INS’s search power. But the most significant response came from the INS itself, which launched an initiative it labeled “Operation Wetback.” The INS set up roadblocks, boarded trains, and designated neighborhoods for inspection, in search of unauthorized immigrants. It created Special Mobile Force units to conduct roundups in California, New Mexico, Texas, and Arizona, which eventually made their way into major metropolitan areas such as Los Angeles, San Francisco, and Chicago. (With the help of Congress, the mobile units were later made permanent additions to interior enforcement.) The initiative resulted in the apprehension and expulsion of over a million immigrants, definitively establishing the INS as an interior enforcement agency, as well as a force at the border.

Following Operation Wetback’s surge, enforcement levels mostly returned to the status quo ante: large numbers of temporary workers continued to enter under the Bracero Program, and the INS went back to doing much less about illegal immigration that operated around the margins of the program. But this all changed when the Bracero Program was terminated in 1964. Rates of unauthorized immigration immediately began to climb, as many agricultural workers who had previously entered legally under the Bracero Program continued to come without legal permission. The INS did not respond immediately: apprehensions and expulsions barely rose in the first few years following the end of the Bracero program. But before long enforcement levels began to rise dramatically. As Figure 1 reveals, they quite quickly reached high levels that have persisted nearly to our present moment.
The Mature System

Rising levels of illegal immigration partly explains the dramatic growth in apprehensions during the early 1970s. With more migrants attempting to cross, there were simply more to apprehend. But the dramatic spike and decline in deportations during the Bracero era do not simply mirror changing rates of illegal immigration. They also reflect ever-shifting politics surrounding the issue of illegal immigration. Political forces were a central reason why, even as deportation grew into a more important social and political phenomenon in the post-War decades, INS expulsions in most years ran far below their Operation Wetback peak.

When enforcement activity against accelerated in the 1970s, therefore, politics were surely part of the story. But the 1970s growth in expulsions also reflects the fact that the enforcement bureaucracy had matured to a point where it could more readily respond to increases in illegal immigration. Three decades earlier, a similar influx of immigrants would have been met by the meager response of a much smaller, less organized agency. To be sure, many in Congress continued to lament what they saw as under-enforcement by the INS: Congressional hearings in 1974, for example, focused on “whether operational and managerial weaknesses on the part of the INS might be responsible for the tremendous growth in illegal alien presence in the United States.” A House report from the same period cited the usual culprits of underfunding and internal corruption as sources of the day’s enforcement crisis. In hindsight, however, the data reveal a robust and growing law enforcement agency during this period. By 1977, just a few years after these congressional complaints, the Service apprehended and expelled over a million deportable noncitizens—the highest number since the year of Operation Wetback. And it would continue to deport extremely large numbers of border crosses in subsequent years, reaching a peak of nearly 2 million in the late 1990s.
This pattern continued in subsequent decades, with enforcement capacity growing ever larger. In the 1990s, the size and scope of the Service underwent dramatic expansion; this growth continued, unabated, through successive presidential administrations. Shortly after assuming office in 1993, President Clinton announced his intention to enhance immigration enforcement at the border, including by offering support for a proposal to hire 600 more Border Patrol agents.68 Later than year, Border Patrol in El Paso launched “Operation Blockade” (later re-named “Operation Hold-the-Line”), which involved the aggressive, constant deployment of agents along a 20-mile stretch of the El Paso border.69 The effort succeeded in decreasing the number of attempted illegal border crossings in the area, and the INS incorporated the strategy into a new policy, introduced in 1994, termed “prevention through deterrence.”70 The new policy was implemented through a series of similar “operations” at some of the busiest U.S. entry points along the Southwest Border: Operation Gatekeeper in San Diego, in 1994; Operation Safeguard, in Nogales in 1995; Operation Rio Grande, in Southeast Texas, in 1997.71 During this period, both the INS budget and the number of Border Patrol agents in the Southwest skyrocketed: between FY 1993 and FY 1999, the former increased nearly threefold, while the latter more than doubled.72

Contributing to this development was the 1996 enactment of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), one of the most consequential pieces of federal immigration legislation Congress has passed. The law helped propel Clinton’s efforts to beef up border enforcement; it called for hiring 1,000 new border patrol agents every year, seeking by 2001 a total force of 10,000 agents.73 The statute promoted the construction of additional fencing along the border. In addition to pouring more resources into enforcement, the Act took steps to make deportation easier and less expensive for federal immigration authorities.
IIRIRA expanded the grounds of deportability, narrowed the avenues of relief from removal, restricted access to federal court review of deportation orders.\textsuperscript{74} It also created a new streamlined process for deporting noncitizens. The new “expedited removal” procedure permitted noncitizens arriving at ports of entry without required documents (or with false or fraudulent documents) to be summarily deported, without access to an immigration judge or any judicial process. The statute also authorized the Attorney General to expand the use of this summary procedure beyond ports of entry.\textsuperscript{75} In 2002 and 2004, such expansions took place, and today expedited removal applies to all noncitizens apprehended within 100 miles of the U.S. borders—unless the noncitizen can prove to the satisfaction of the immigration agent that she has lived in the United States continuously for at least two years.\textsuperscript{76}

Clinton-era growth in the enforcement bureaucracy continued unabated during the Bush Administration, but with a renewed national security emphasis in the aftermath of September 11, 2001. In the wake of the terrorist attacks, the combination of those new national security imperatives and persistent criticism of the INS prompted Congress to abolish the agency and re-allocate most of its functions to the newly created Department of Homeland Security. The Act creating the new department replaced INS with new immigration and border enforcement agencies housed within DHS—primarily U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). In short order the budget increases for these new agencies, as well as for the department as a whole, dwarfed the increases the INS had received during the 1990s. In FY 2002, federal funding for immigration enforcement was $6.2 billion; by FY 2006 funding had doubled, and reached a peak of nearly $20 billion in FY 2009.\textsuperscript{77} And just as border patrol personnel increases went hand in hand with budget increases in the 1990s, so too did border staffing surge along with the budget in the 2000s: at the start of that decade, Border
Patrol had 9,212 staff, but by 2010 that number had grown to 20,558. During these years, the federal government continued to pursue efforts to physically build up border: in 2005, for instance, DHS introduced the Secure Border Initiative, which envisioned (among other things) expanding fencing at the southwest border, integrating advanced technological systems with the physical infrastructure, and increasing border staffing. The following year, Congress passed the Secure Fence Act, which sought construction of 700 miles of additional fencing, as well as surveillance, along that border.

The Obama Administration continued some of the trends of its predecessor administrations, but departed from them in other ways. Though the budget for DHS did not witness the same steep and uninterrupted growth during Obama’s presidency, the agency’s funding by the end of Obama Administration still markedly outpaced the funding allocated when President Bush left office. DHS’s total budget authority for FY 2009 hovered close to $52.8 billion (itself an eleven percent increase from the previous year); by FY 2017, that number approached $66 billion. During the same time period, the budgets for CBP and ICE rose, respectively, from $11.25 billion to almost $13.5 billion and from $5.97 billion to $6.1 million, although the number of Border Patrol agents actually decreased, from 20,119 to 19,347. Today, the annual immigration enforcement budget dwarfs the budgets of all other federal law enforcement agencies combined. Moreover, the enforcement capacity reflected in those numbers has been augmented by a number of programs we discuss later in the book that capitalize on the resources of state and local law enforcement agencies to vastly increase ICE’s capacity to identify and apprehend potentially deportable noncitizens.

The upshot is that the government’s capacity to deport large numbers of noncitizens—especially from the nation’s interior—has never been greater. Deportation statistics drive home
home this fact. For decades, deportations pursuant to removal orders—which are much more likely to represent interior enforcement efforts—generally ran well below 20,000 per year. As Figure 2 shows, this was true as late as the early 1990s, when President Clinton took office. But over the past few decades these removal numbers have skyrocketed.

[INSERT FIGURE 3.2 HERE]

But over the last few decades the number of these formal removals has skyrocketed. The dramatic shift began in the mid-1990s, before which removals pursuant to a deportation order had never exceeded 50,000 per year. Climbing swiftly from President Clinton’s second term steadily straight up and into Barak Obama’s presidency, they peaked in 2012 at more than 400,000.

To be sure, the growth in removals pursuant to formal deportation orders charted in Figure 2 overstates somewhat the growth in interior enforcement. This is because the government has begun in recent years to issue formal orders more frequently when it apprehends noncitizens at or near the border—partly because expedited removal made it easier to issue such orders, and partly out of a desire to increase the consequences for noncitizens of attempting to enter unlawfully. (Previously, noncitizens apprehended at the border were typically removed without formal process and much less frequently issued deportation orders.) Nonetheless, it is possible to correct for this potential bias in recent years, as changes government data retention and reporting have made it possible to disaggregate border and interior enforcement figures. Examining those numbers highlights astonishing growth in interior removal efforts. As recently as 2003, fewer than 40,000 noncitizens were removed from the interior of the United States. By 2011, that number was nearly 200,000—a more than five-fold increase in less than a decade.90 These numbers drive home the enormous capacity that has been built over the last century.
Conclusion

The U.S. immigration regime, like all other systems that receive large numbers of immigrants, has long consisted of a mix of ex ante and ex post screening techniques to determine who within the vast pool of prospective immigrants should be allowed in and ultimately offered full citizenship status. The deepening of its probationary character over time, along with the emergence of a formidable bureaucracy designed to enforce the terms of that probation, created the preconditions for our modern immigration system. But creating these formal screening rules, and erecting these bureaucratic structures, did not alone produce the structure of immigration lawmaking we witness today. As important has been the rise of discretion to decide how to wield the power of deportation—a phenomenon reflected in the dramatic shifts in proactive enforcement efforts highlighted in this chapter. We now turn to an analysis of how executive branch officials have organized this enormously important discretion and thus consolidated power over immigration in the hands of the President.

1 Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).

7 Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of City of New York, 92 U.S. 259 (1875).


13 Lucy E. Salyer, Laws Harsh as Tigers, Chinese Immigrants and the Shaping of Modern Immigration Law 38-40 (1995). The rigorous system of questioning that arose as the result of the Chinese Exclusion Acts helped produce the phenomenon of the “paper sons,” wherein many Chinese who sought to enter illegally arrived well coached to make the case that they were the children of resident Chinese immigrants. Ironically, many of those who had the right to enter failed to prepare—perhaps on the assumption that the legitimacy of their claim to entry was enough—and were excluded. Salyer, Laws Harsh as Tigers, at 61-62.

14 Id., at 18-19.

15 Geary Act, Pub. L. No. 52-60, §§ 2, 3, 6, 27 Stat. 25, 25-26 (1892). Section 3 of the Act provided that “[a]ny Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United
States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.”


17 Fong Yue Ting, 149 U.S. 698 (1893).


19 Act of March 3, 1891, ch. 551, 26 Stat. 1084, 1084 (“any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to landing.”)


25 Keller v. United States, 213 U.S. 138 (1909) (Holmes, J., dissenting) (“For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. . . . If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show
that she was in the business when she arrived. But how far back such an inference shall reach is a
question of degree, like most of the questions of life. And, while a period of three years seems to
be long, I am not prepared to say, against the judgment of Congress, that it is too long.”).

period for “aliens who are members of the anarchistic and similar classes”); Act of May 26,

27 Act of May 26, 1924, Pub. L. No. 68-139, § 14, 43 Stat. 153, 162; Today this rule is reflected
in INA § 237(a)(1) and § 212(a)(6)(A)(i).

28 Alien Registration Act, Pub. L. No. 76-670, sec. 23(b), § 2, 54 Stat. 670, 673 (1940); Act of
L. No. 81-831, sec 22, § 1, 64 Stat. 987, 1006. See also Harisiades v. Shaughnessy, 342 U.S. 580
(1952).

4470, made a conviction for any “aggravated felony” a ground of removal. Subsequent
§ 101(a)(43), 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of
1994, Pub. L. 103-416, sec. 222, § 101(a)(43), 109 Stat. 4305, 4320-22; Antiterrorism and
Effective Death Penalty Act of 1996, Pub. L. 104-132, sec. 440(e), § 101(a)(43), 110 Stat. 1214,
1277-78; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-
208, sec. 321, § 101(a)(43), 110 Stat. 3009-627. For a summary of these developments, see Alina
Das, The immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in
Immigration Law, 86 N.Y.U. L. Rev. 1669 (2011); Kanstroom, Deportation Nation, at 227-228.

304 (a), § 240(A), 110 Stat. 3009-594 and sec. 304(b), § 242 (c), 110 Stat. 3009-597.


33 Transcript of Record at 4, Return to writ of Habeas Corpus, Kaoru Yamataya v. Thomas M. Fisher, 189 U.S. 86 (1903) (No. 171). This language is often attributed to the Supreme Court because the Court repeated this allegation, nearly verbatim, in its disposition of the case. Yamataya, 189 U.S. at 87.

34 Kanstroom, *Deportation Nation*, at 4-6.

35 INA § 237(a)(2)(B)(ii). For another example, contrast the Department of Justice’s current policy not to prosecute minor drug crimes with the Department of Homeland Security’s aggressive policy of deporting noncitizens for minor drug offenses. Or consider the mid-twentieth century rules that arguably authorized the deportation of immigrants for engaging in speech and conduct that otherwise would have been protected by the First Amendment. Cf. Bridges v. Wixon, 326 U.S. 135 (1945) (overturning deportation order of petitioner for affiliation with Communist party on ground of an unfair hearing but not addressing the constitutionality of deportation rules permitting removal for constitutionally protected activity) with 326 U.S. at 157 (Murphy, J., concurring) (“Seldom in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and is guaranteed to him by the Constitution.”).

36 Geary Act, Pub. L. No. 52-60, 27 Stat. 25, 25 (1892); Fong Yue Ting, 149 U.S. 698 (1893). The story of Chae Chan Ping embodies this sort of change of heart. Congress’s decision to revoke the re-entry certificates it had earlier authorized may have been motivated in part by concerns about fraud—by the worry that first-time immigrants would present counterfeit
certificates in order to gain entry to the country. But almost certainly the principal motivation was a desire to refuse re-entry to resident immigrants who wanted to travel to China, as a way of ridding the country of any who decided to leave briefly. Chae Chan Ping v. U.S., 130 U.S. 581 (1889).


38 See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Fong Yue Ting v. United States, 149 U.S. 698 (1893).


40 Moreover, because it will be more costly for two people in a sham marriage to keep up the appearance that they are living together, working in the same city, and so forth, the ex post screening rule is what economists call incentive compatible: it promotes self-selection, discouraging those contemplating a sham marriage more than couples in a legitimate relationship.


1925 U.S. Department of Labor Annual Report Commissioner General of Immigration to Secretary of Labor, 14; Immigration Border Patrol: Committee on Immigration and Naturalization House of Representatives, 71st Cong., 2nd Session (1930), 31-32 (noting that border patrol employed 747 in 1930).


Immigration Border Patrol: Committee on Immigration and Naturalization House of Representatives, 71st Cong., 2nd Session (1930), 7 (statement of Henry E. Hull, Comm’r General of Immigration). Though it was clear the patrol’s authority did not extend to arresting resident aliens domiciled in their homes, the agency eventually developed a strategy of luring suspected unauthorized immigrants from their homes and arresting them for still being in “travel status.” Kang, The INS on the Line, at 61.

Kang, The INS on the Line, at 63-64.

Id., at 64-65; Ngai, Impossible Subjects, at 72.


Kang, The INS on the Line, at 81-82, 86.

who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens . . . ”.

57 Kang, *The INS on the Line*, at 97, 103.


60 President’s Commission on Migratory Labor in American Agriculture at 69, 78-85 (1951).


65 H.R. Rep. No. 93-1623, at 2 (1974). In Chapter 4, we discuss in more detail the connection between the end of the Bracero Program and the rise of unauthorized migration.

66 *Id.*

67 Immigration & Naturalization Service, 1977 Annual Report, 14 (1977). In the coming years, the figures of deported noncitizens followed the same trend: 1,003,886 deported aliens for the fiscal year 1978 and 1,076,418 for the fiscal year 1979. Immigration & Naturalization Service,


*Id.* at 95; Andreas at 94.

Andreas at 90.

Illegal Immigration Reform and Immigrant Responsibility Act, § 101; Andreas at 90.


INA § 235(b)(1)(A)(i), (iii).


Formidable Machinery at 16-17.

*Id.* at 18.


Kavanagh Memo, Additional Data re: DHS Budget Allocations, available on Google Drive.
82 FY 2018 Budget-in-Brief at 1, available at

83 Kavanagh Memo, Additional Data re: DHS Budget Allocations.

84 FY 2018 Budget-in-Brief at 28.

85 Kavanagh Memo, Additional Data re: DHS Budget Allocations. Note that the FY 2009 number was itself significantly higher than in the surrounding years: funding for the previous fiscal year was $5.05 billion, and funding dropped in FY 2010 to $5.74 billion.

86 FY 2018 Budget-in-Brief at 36.


90 See Marc Rosenblum, Understanding the Potential Impact of Executive Action on Immigration Enforcement (Migration Policy Institute, July 2015); Marc Rosenblum and Kristen McCabe, Deportation and Discretion: Reviewing the Record and Options for Change (Migration Policy Institute, October 2014). MPI’s analysis is based on data obtained through Freedom of Information Act litigation by the New York Times. Recent reports issued by Immigration and Customs Enforcement confirm this trend-line, though these government reports do not disaggregate border and interior removals prior to 2007. Department of Homeland Security, ICE Enforcement and Removal Operations Report, Fiscal Year 2015.
DHS Removals and Returns by Year
Fiscal Year 1927–2016

Removals
Returns