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Simultaneity and Solidarity in the Time of Permanent War

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> The war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war.
>
> —Michel Foucault, *Society Must Be Defended*

In their defense of the Muslim travel ban, lawyers for the Trump administration invoked the plenary power doctrine to justify its legality: "The Order was well under the president's authority under Congress' delegation, particularly in an area like immigration, in which the admission to the United States of foreign aliens is subject to plenary control by the political branches."[1] By invoking this doctrine, the lawyers drew on the powers inherent in sovereignty, whereby the political branches of government had "plenary"— that is, "exclusive" or "unlimited or absolute"—power to secure the nation, protect its borders, and regulate entry without need for judicial review.[2] This reference to plenary power in support of Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," highlights what seems to be a foundational contradiction of the powers inherent in U.S. sovereignty: namely, that such exceptional or "extraconstitutional" measures in the name of national security are routinely exercised in the quotidian domain of immigration, conceived as threats to the racial cultural order of the nation-state.[3] Such a point is made explicit in Executive Order 13769: "In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes towards it and its founding principles. . . . In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress

Americans of any race, gender, or sexual orientation."[4] Setting aside the irony of this order's racist exclusionary tactics to fight "acts of bigotry and hatred," the implicit racialization of "foreign terrorists" and the invocation of plenary power to defend the Muslim ban draws on the legal precedent set by the 1889 case of *Chae Chan Ping v. United States* (also known as the *Chinese Exclusion Case*), which codified racialized exclusion when it barred resident Chae Chan Ping from returning to the United States on the basis of national sovereignty and security.[5]

Though plenary power is described as an "obscure" immigration doctrine in mainstream media, the domain of plenary power is broad, and it operates openly, "hidden in plain sight."[6] Four days before the travel ban, on January 24, 2017, Trump issued a series of executive orders, this time resuming the construction of the Keystone XL Pipeline and the Dakota Access Pipeline. In the shadow cast by the media attention on the travel ban, the Army Corp of Engineers razed the encampments of the Water Protectors and activists, overriding the 1851 and 1868 Laramie Treaties that affirmed Indigenous sovereignty over this territory. Though these orders do not mention plenary power, plenary power has long shaped federal Indian policy, dating to the nineteenth century. Codified in the constitutional era, congressional plenary power has been invoked to undermine and overrule Indigenous sovereignty as well as justify the colonization of territories.[7] In their civil suit against the U.S. Army Corp of Engineers, for example, Robert Flying Hawk and the Yankton Sioux Tribe challenge the limits of plenary power over Indigenous sovereignty, highlighting the extent to which plenary power's unlimited federal power over tribes remains an object of Indigenous resistance.[8]

Despite the imbalance of media attention, the simultaneity of these two sets of executive orders index the centrality of the plenary power doctrine to an extractive settler security state forged in the crisis of permanent war. Characterized as "constitutionally exceptional," plenary power is to be invoked when the security and sovereignty of the nation are under threat.[9] In the "War on Terror," September 11 is cast as inaugurating a state of exception that justifies indefinite detention, extraordinary rendition, and the suspension of constitutional rights; unsurprisingly, Executive Order 13769 opens with reference to this event.[10] However, the extraconstitutional status of "enemy combatants" in Guantánamo Bay recalls that of Japanese Americans during WWII, who were labeled as "enemy aliens" and interned in the name of national security.[11] Though these are wartime examples, there is a genealogy to plenary power and the U.S. state of exception that exceeds these

events. As Natsu Saito Taylor argues, if we consider them in relation to areas in which plenary powers are primarily and routinely exercised—immigration, Indian affairs, and U.S. territories—it becomes apparent that there is a regularity in the exercise of plenary power and that the objects of this routine exceptionality are Indigenous peoples, immigrants, colonized peoples, and people of color.[12] The permanent war that is supposedly "underneath" and masked by civility, as described by Foucault in the opening epigraph, is a painfully obvious state of open and perpetual war for those whose elimination, exclusion, and rightlessness are a structural feature of U.S. sovereignty. For people targeted by these policies, these are not historical anomalies. Rather, this nineteenth- and early twentieth-century doctrine that emerged in the "Indian, alien, and territory cases," as Sarah Cleveland argues, "continues to be the controlling constitutional authority in all three areas."[13] Since the plenary power doctrine is the controlling constitutional authority in which the judiciary defers to the political branches, and the technologies of perpetual war become normalized as "necessities of the state" and operationalized by bureaucratic officials, immigration officers, and the police.[14]

"War," Foucault writes, "is the motor behind institutions and order."[15] It organizes and consolidates the matrix of power and domination that lies beneath peace, civility, and wealth. This war that underlies social organization is a race war in perpetuity, animated by the ongoing threats to white settler security posed by racial others: "We have to defend society against all the biological threats posed by the other race, the subrace, the counterrace that we are, despite ourselves, bringing into existence."[16] The circumstances of this permanent race war is illustrated by how these two simultaneous executive orders discursively "bookend" what seems to be a war without beginning or end. Within settler colonial history, the figure of the "Indian," as Jodi A. Byrd argues, "is the original enemy combatant," the original stateless enemy that threatens the territorial coherence of the settler nation.[17] In the context of the "War on Terror," the "Indian" as a signifier of terrorism, according to Keith Feldman, reconstructs and positions certain parts of the globe "at the frontier of the U.S. homeland."[18] The mapping of the Indian Wars onto the military operations in the Middle East links the "War on Terror" as part of an ongoing settler imperial project dependent on oil and territory. Just as the "Indian" is the prototypical figure for barbaric threats to the foundations of civilization and the resources of settler society, the mechanisms of border security and enforcement rely on a racialized concept of "terrorist" that derives its legal prototype from the threat Chinese "aliens" posed to white property and nationhood in the late nineteenth century. Indeed, as

this article demonstrates, it is the conjoining of these two figures that organizes and gives form to the constant state of exception that underwrites perpetual war.[19] The construction of American Indians and Asians as "terrorists" or "enemy combatants" (to use these terms descriptively but anachronistically) reflects their structural and constitutive relation to the settler security state as well as to each other. In examining the emergence and application of the plenary power doctrine, this article explores how the securing of white settler property was codified through the conjoining of American Indian dispossession and Chinese exclusion, and how shifting and blurred definitions of who was "native" and who was "alien" helped to constitute property as white in the name of national security.

In response to the *Critical Ethnic Studies Journal*'s call for papers on solidarities of nonalignment, this article argues for the importance of plenary power doctrine as an object of comparative ethnic studies critique. As mentioned earlier, the *Chinese Exclusion Case* was an influential plenary power case, and it has been a seminal case in U.S. immigration history. In the context of American Indian legal history, *Lone Wolf v. Hitchcock* (1903), which abrogated tribal treaties and led to arguably "the most massive uncompensated taking of property in United States history," is often cited as the "supreme articulation of unfettered plenary power."[20] These cases, together with the constellation of early twentieth-century cases known as the Insular Cases, which grants congressional plenary power over the "unincorporated" territories of the Philippines, Puerto Rico, Hawaii, and Guam, lay the foundations for plenary power.[21] Despite being a "foundation of immigration law," "a cornerstone of U.S. law as it is applied to American Indian nations," and the prevailing legal justification for U.S. colonization, plenary power doctrine remains underexamined in comparative and critical ethnic studies and in the growing body of scholarship that tracks the intersections of race, migration, and coloniality.[22] However, rather than make solidarity the condition for or the telos of organizing and critique, I focus on how plenary power consolidates the racial regime of settler colonialism by considering solidarity in temporal terms—as an effect and function of simultaneity. In unmooring solidarity from identity formations, an idealization of community, or shared struggles, solidarity in terms of simultaneity is necessarily a provisional analytic that organizes the imbricated projects of white settler imperialism within a momentary synchronous temporal frame. The history of American Indian colonization and dispossession and Asian immigration and exclusion are reframed from independent and separate historical formations to nonequivalent but overlapping, conjoined, and synchronous

processes. Simultaneity also temporalizes racial capitalism's technology of "antirelationality," which Ruth Gilmore Wilson argues, "is the state-sanctioned and/or extra-legal production and exploitation of group-differentiated vulnerabilities to premature death, *in distinct yet densely interconnected political geographies*."[23] Elaborating on Wilson's argument, Jodi Melamed notes that this "discreteness" is capitalism's "particular feat": "to accomplish differentiation as dense networks and nodes of social separateness."[24] Solidarity in terms of simultaneity makes visible the rhetoric of divergent temporality that underwrites plenary power under settler colonial and racial capitalism.

In considering the historical–political mechanisms that result in simultaneous but nonequivalent and even divergent effects of plenary power, I argue that plenary power is a particular technique of the racial regime of settler imperialism founded on a constant state of emergency. The codification of plenary power, conjoined through Indian affairs and immigration, highlights the extent to which the formation of U.S. settler state sovereignty is predicated on the permanent external "threat" posed by Indigenous peoples and people of color. While the domain of plenary power is international rather than domestic, as I will show, it is the instrumentalization of the shifting boundaries between the domestic and international that gives plenary power its urgency and broad territorial reach. This piece is part of a broader argument that examines plenary power in relation to the colonization of unincorporated territories acquired as a result of the Spanish–American War. But given the limitations of space, I am unable to develop that here. I hope it suffices to say for the moment that it is the rhetoric of exceptionality that runs through these different cases.[25] Plenary power not only relies on the rhetorical construction of exceptionalism and thus, at times, "extraconstitutional" measures to counter the extraordinary threat that such terrorism demands. Rather, such exceptionalism is a structural and constitutive feature of the powers inherent in U.S. sovereignty. And despite the different temporalities that, in turn, define the "threats" posed by Indians and immigrants, they simultaneously structure the nation as founded on the crisis of permanent war that justifies the suspension of juridical review and necessitates a "constitution-free zone."[26]

SIMULTANEOUS YET DIVERGENT TEMPORALITIES

The codification of plenary power in the nineteenth and early twentieth centuries was a period of accelerated Native dispossession and vitriolic anti-Chinese sentiment. As legal scholar Bethany Berger argues, "The end of the

1, 1880, will be $342,210,867, not including the circulation of the National gold banks, which will amount to $1 426,120. United States currency outstanding at this date—old demand notes, $61,255, legal tender notes of all issues, $346,-651,017; one year notes of 1863, $47,525; two years coupons of 1863, $23,350, compound interest notes, $250,480. fractional currency of all issues, $15,631,315, total, $362,708,591.

The Chinese Question

WASHINGTON, February 28.—Representative Wright, chairman of the Select Committee to Inquire into the Causes of the Depression of Labor, read to-day a long report upon the Chinese question. It will be reported to the House on March 10th. The report recommends the modification of the Burlingame treaty, and the adoption of a joint resolution limiting Chinese immigration to fifteen persons in any one vessel. Testimony is quoted regarding the demoralizing character of the Chinese population and the detrimental effect of Chinese labor on the industrial interests of the white workingmen on the Pacific coast and the community in general. The necessity for immediate action on the part of Congress is strongly urged.

Commissioner of Indian Affairs

WASHINGTON, February 28.—Rowland E. Trowbridge, of Michigan, has been confirmed as Commissioner of Indan Affairs.

Indian Affairs

WASHINGTON, February 28.—The Senate Committee on Indian Affairs, at a long special meeting to-day, agreed to report for passage the original bill designed to cover the entire range of the Indian question by the enactment of various new provisions, based upon the general principle that the United States should, in a great measure, abandon the policy of treating the Indians as children and place them as speedily as possible upon the footing of citizens. The main features of the plan outlined by the Committee are:

1. The permanent localization of the Indians by allotting homesteads to them in severalty, with the provision that the lands so alloted shall be absolutely inalienable during the period of twenty five years.

2. Extension over Indians of the general civil and criminal laws of the United States, or of the respective States and Territories within whose borders they are located.

3. Continuation of a certain degree of assistance to them by the Government in the line of progress toward civilization, until they become self-sustaining

Figure 1. News clipping: proximity in print of Indian removal and Chinese exclusion. From *Wheeling Register,* West Virginia, March 1, 1880, p. 1.

nineteenth century and beginning of the twentieth were one of the most coercive and racist periods in Indian law," in which Native peoples were forcibly assimilated and stripped of their land and sovereignty.[27] This was simultaneously the period of Asian exclusion, a period described as one of the most xenophobic and restrictive in its immigration policies, paving the way for the construction of the "illegal alien" and the apparatuses instituted to regulate it.[28] Comparisons and conflations between Chinese and American Indians were common in nineteenth-century discourse and often centered on the idea that Indigenous peoples of the Americas were Asians who crossed over the Bering Straits between what is now Russia and Alaska.[29] However, despite the relative isolation of the historiography of American Indian dispossession from that of Chinese exclusion, a cursory review of newspaper reports of state- and national-court and legislative proceedings reveal how debates over Indian removal and Asian exclusion were often reported on the same page, occupying the same discursive space that informs the imagined community of the U.S. settler nation (see Figure 1).[30]

Moreover, these reports also highlight the extent to which the "Indian Question" and the "Chinese Question" were concomitantly debated on the House floor and often by the same people.[31] Contrary to how we have subsequently understood and narrated the histories of removal, dispossession, and exclusion, for readers of nineteenth-century news, the "proximity in newsprint" of the "Indian Question" and the "Chinese Question" (also alternatively described as the "Indian Problem" and the "Chinese Problem") was a constant "reminder of their symbolic and literal relationships" and their characterization as concurrent obstacles to white settler sovereignty.[32]

Despite the spatial connections implied by their proximity and their representation within the same discursive spaces, these respective "questions" are often characterized in divergent temporalities with respect to the telos of nation. Native dispossession and the closing of the western frontier often reduces American Indians to figures of the past, whereas the construction of the Chinese as unassimilable heathens anticipates an Oriental invasion that will erase Western civilization. This tension between the spatial proximity of the "Indian Question" and the "Chinese Question" and the divergent temporality they are ascribed as inhabiting is encapsulated in the cover of an 1879 issue of *Harper's Weekly* by the political cartoonist Thomas Nash (see Figure 2).

A commentary about the cyclical nature of xenophobia generally and about white attitudes to Chinese immigrants specifically, this image frames its critique by relying on a visual analogy between the Indian and the

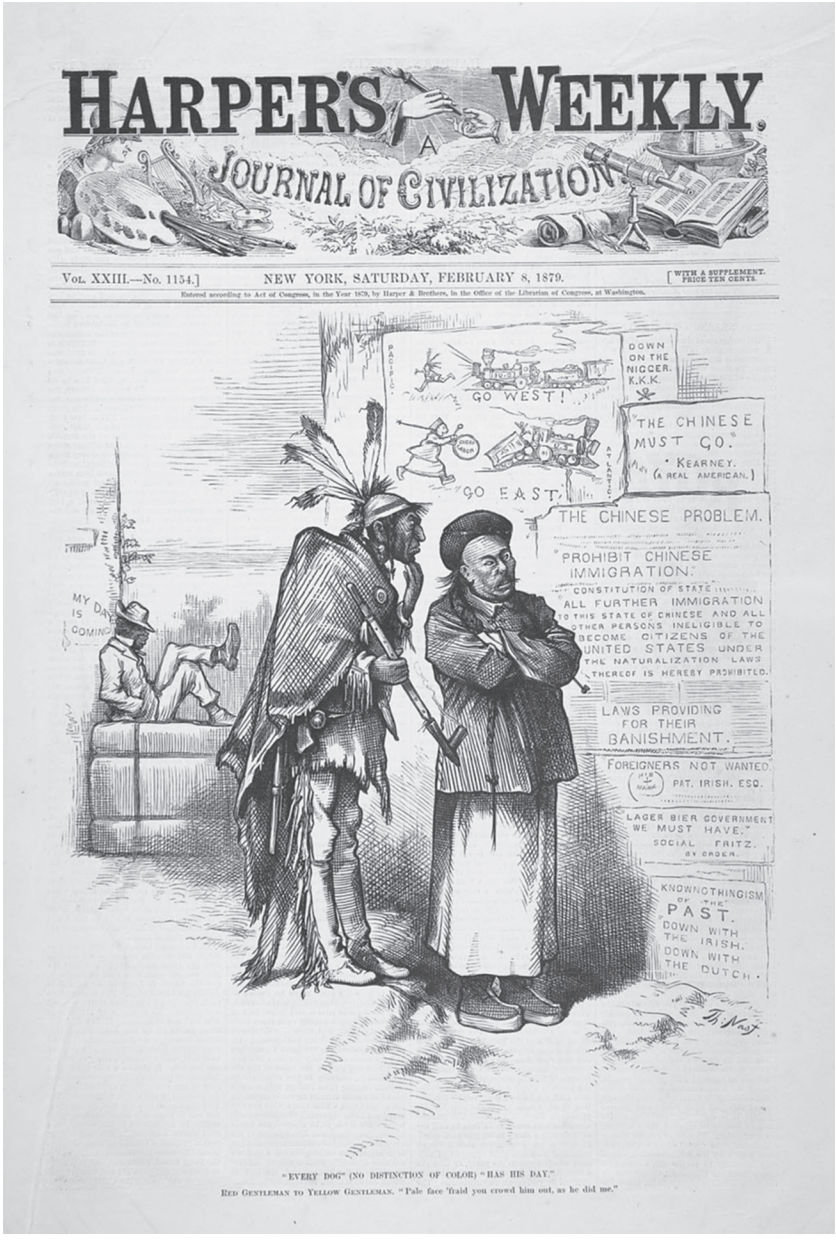

Figure 2. Indian/Chinese Questions: respective figures of the "Indian Question" and the "Chinese Question" occupy the same space to comment on their divergent temporalities. From an 1879 issue of *Harper's Weekly,* by Thomas Nast.

Chinese, placing them in the same representational space to comment on their respective divergent and antithetical relations to the teleology of the nation. Identified by the stereotypes of the Indian headdress and the coolie queue, they also mirror each other through their respective pipes—the Indian with the ceremonial pipe and the Chinese with an opium pipe. A poster on the "Chinese Problem" is in their sightline, and the "Red Gentleman's" comment, "Pale face 'fraid you crowd him out, as he did to me," posits the "Red Gentleman" as a figure of the country's past and the "Yellow Gentleman" as its ominous future. The series of posters on the right archive this antiforeigner history, in which "Every Dog (No Distinction of Color) Has His Day," demonstrating how the previous targets of such racism are now leading the charge against the Chinese. A Black man lies await the background, whose "time is coming," suggesting that after the "Chinese Question" is "answered" the "Negro Question" will need to be addressed and—following the logic of "every dog has his day"—potentially spearheaded by the Chinese.

In situating anti-Chinese racism within this longer history of xenophobia, the image also posits a developmental narrative of the nation that is mapped by the visual homology created between the American Indian and the Chinese immigrant in the image that hangs above the conversing gentlemen. The divergent directions of travel suggest two temporal orders and trajectories of development. The nation's past, marked by the closing of the western frontier and the "vanishing" of American Indians, is captured in the image of the train driving the Indian to the Pacific. The train, as the engine of Manifest Destiny that links the East Coast to the West, is not only iconic of civilization and technological modernity but it is also a stand-in for the nation with the term "U.S." emblazoned on its side. In the bottom half of the image, the train retreats eastward, chased by the Chinese immigrant. Whereas the journey westward suggests the advancement of a modern, industrialized nation, the second image implies that the nation's progress would be undone by unchecked Chinese immigration. This "cautionary tale" figures Indians as part of the nation's primitive past and Chinese immigrants as a future that threatens to return it to its past. Yet this interpretation relies on reading the poster as divided into two images that we read horizontally. If we also view the Indian and the Chinese immigrant and their respective place in the relation to the nation vertically (i.e., synchronically), what it suggests is how the nation's sense of itself temporally—in terms of a developmental narrative of national progress and territorial expansion—depends on the *simultaneous* characterization of American

Indians as existing in the past and Chinese as the future that must be prevented. Facilitating what Mark Rifkin describes as a settler colonial form of "temporal totalization," this simultaneity reinforces the temporality of the nation as both an "a priori political form" in which racism can be remediated in the narrative of progress and also the "only basis for marking the passage of time."[33]

In capturing both the simultaneity and temporal disjuncture of the "Indian Question" and the "Chinese Question," however, this image reflects how U.S. settler sovereignty is unable to acknowledge its consolidation through differentially racialized labor and chattel slavery. References to antiblack racism in the smaller poster atop the long series of posters on the right-hand side equates Black oppression with xenophobia. In situating antiblackness within a history of anti-Chinese racism and previous anti-Irish and anti-Dutch sentiments, this "timeline" erases the Atlantic slave trade, forced migration, and the centrality of slavery to nation building. Thus the emancipated slave, depicted as languidly reclining with his hands in his pockets, can only be represented as a figure of indolence, whose freedom threatens white settler society. For while the phrase "My day is coming" gestures to the cyclical nature of racism and xenophobia, it also hints at the impending social, economic, and racial pressures of the migration of emancipated slaves from the South to the West. By hovering in the background, the African American figure reminds us that the discursive proximities between American Indians and Chinese immigrants are inescapably haunted by the afterlife of slavery and racial capitalism. This exchange between the "Red Gentlemen" and the "Yellow Gentleman," which reduces racism to anxieties about population concerns (i.e., "being crowded out"), territorial coherence, and culture, can only make sense by "bracketing off" racialized labor and the antirelational foundations of racial capitalism. Chinese immigrants can only be imagined as a threat to civilization if their labor and contributions to building the infrastructures of settler colonial modernity are erased. American Indians are reduced to pitiful figures of the past unable to survive because they do not know how to labor and profit from the land, and thus cannot, under a Lockean conception of property, claim ownership. The commodification of African Americans as property and whose labor has been central to the southern economy is replaced by a figure depicted as the antithesis of labor, someone whose idleness will drain the country's resources. The constitution of U.S. settler sovereignty, as this cartoon demonstrates, necessarily displaces and reconfigures racialized labor and property into questions of security and territoriality.

CONJOINING DISPOSSESSION AND EXCLUSION IN PLENARY POWER

The logic of security and permanent war that underwrites plenary power often blurs between the domestic and international. To clarify this point, I first turn to the many variations in the definition of "federal plenary power" and the different assessments of its domain.[34] Sarah Cleveland, in her magisterial "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," argues that plenary power deals with foreign affairs and stems from "the power inherent in sovereignty" to regulate one's borders as an equal among nations, a concept promulgated by the seminal work of Emer de Vattel and his 1758 *The Law of Nations, or the Principles of International Law.* In contrast, Matthew Lindsay suggests that the plenary powers doctrine is less concerned with "inherent sovereignty," but rather is a response to the sense of national peril at the hands of invading immigrants.[35] In the government's dealing with Native peoples, David E. Wilkins notes that the shifting definitions of plenary power often hinge on whether it was "based on a constitutional or extra-constitutional doctrine," reflecting the colonizing contortions that characterizes American Indians as both sovereign nations *and* wards of the state.[36] Despite disagreement on the original articulation of plenary powers, what these debates reveal is the unsettled domain of its reach, a blurring that is reflected in the key cases in which plenary power is most clearly spelled out, notably the *Chinese Exclusion Case* and later *Lone Wolf v. Hitchcock.*

As plenary power cases, the *Chinese Exclusion Case* and *Lone Wolf v. Hitchcock* are landmark cases in immigration law and history and in Indigenous studies and legal history respectively. However, little has been written about how they overlap and conjoin and what this may mean for our understanding of the historical–political intersections of dispossession and exclusion.[37] The fact that the *Lone Wolf v. Hitchcock* ruling, which led to one of the largest land thefts in American Indian history, cites the *Chinese Exclusion Case* is notable and requires exploration. In this section I examine the intersection of these two cases to consider the juridical proximities and temporalities that underwrite the permanent war of plenary power.

The conditions for permanent war can be found in the *Chinese Exclusion Case* and its codification of "immigration as invasion."[38] In 1887 Chae Chan Ping, a twelve-year legal resident of the United States, went to China to visit his family. Since the enactment of the 1882 Chinese Exclusion Act prevented new Chinese laborers from entering the country, he obtained a certificate of reentry to prove his resident status as outlined by the act's

provisions. On October 1, 1888—seven days before his return—Congress passed a law that barred all Chinese laborers from entering, nullifying his certificate of reentry. Chae Chan Ping challenged this nullification as unconstitutional on the grounds that it violated both due process and the 1868 Burlingame Treaty, which not only guaranteed immigration between China and the United States but also affirmed the "inherent and inalienable right of a man to change his home and allegiance."[39] The Court ruled against Chae Chan Ping, declaring that "treaties are of no greater legal obligation than an Act of Congress, and are subject to such Acts of Congress may pass for their enforcement, modification, or repeal."[40] The Court's decision against Chae Chan Ping, however, did not address the central point of his appeal—that his constitutional rights to due process as well as his constitutionally protected property rights—had been violated.[41] Instead, the majority opinion, written by Justice Stephen Fields, began with the reassertion of the warmaking power of Congress, laying the groundwork for how it would interpret and support the abrogation of the government's prior treaty with China. He cited the yellow peril rhetoric of the 1878 California Constitutional Convention's characterization of the Chinese immigrants' refusal to assimilate and their increased numbers, which approached "the character of an Oriental invasion."[42] In this series of equivalences between immigration and invasion, the Court deemed assimilation an index of aggression and the immigrant "alien" as fundamentally inassimilable. Moreover, as Matthew J. Lindsay notes, the alien gave "substance to the metaphor of invasion," "enabl[ing] the Supreme Court to transform the immigration power from a species of commercial regulation to a power inherent in sovereignty."[43]

Defending the nation from foreign invaders is a power inherent in sovereignty, and it is in the *Chinese Exclusion Case* that plenary power is most forcefully articulated. As Chief Justice Fields states (citing Chief Justice John Marshall's decision in *The Exchange,* 7 Cranch 116, 11 U.S. 136), "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its territory to that extent is an incident of every independent nation."[44] While asserting a claim that is part of common international law, he goes on to declare that the courts would defer to the political branches of government regarding national security, and that any less would be a constraint on U.S. sovereignty:

> Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an

> investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[45]

In this passage, according to legal theorist Alexander Aleinikoff, is born the *plenary power doctrine.* Congress is here conferred "all the power that a sovereign state may have to regulate the entry of aliens," and it is further stated that "the courts would not subject congressional choices to any limitations on federal power located elsewhere in the Constitution."[46] This judicial deference to Congress with regards to immigration, therefore, renders those who have been designated as "aliens" vulnerable, unprotected by the Constitution. "All exceptions," Justice Fields argues, "must be traced up to the consent of the nation itself," an argument that posits exceptions as outside the domain of the judiciary, an "extraconstitutional" space yet within the territorial boundaries of the nation.

The justification for Chae Chan Ping's exclusion as a security issue effectively codified immigration as a central front of a race war. The equation between immigration and invasion is predicated on racializing the immigrant as a "foreign" threat to the social, moral, and racial order of the United States. As a foreign alien, Chae Chan Ping is no longer an immigrant in need of constitutional protection or able to realize the promise of constitutional freedoms, but rather whose fundamental and inassimilability threatens the constitutional rights and security of those within a white nation. Here I quote Justice Fields at length:

> It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . *If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us to be dangerous to its peace and surety, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which foreigners are subjects.* The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and with the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. (emphasis added)[47]

The essentialization of immigrants as security threats by virtue of their racial difference rationalizes what Hiroshi Motomura calls "immigration exceptionalism," in which immigration matters are cast as "exceptional" to constitutional procedures and due process. As an example of "immigration exceptionalism," Justice Fields states that war is merely an indication of the degree and urgency of the exercise of plenary power and *not* the necessary condition for its exercise.[48] The authority granted to Congress with respect to immigration law is derived from "the same authority" that enables Congress to declare war. But what is most revealing in the above passage is not that war necessitates the exceptional suspension of constitutional protections. Rather, the "mere presence of foreigners of a different race" triggers this "same necessity"—the suspension of rights—even "when war does not exist."

The absence of war does not mean the absence of "aggression and encroachment," and the phrase, "It matters not what form such aggression and encroachment come," requires some comment. If the forms of aggression and encroachment are irrelevant, then any congressional response to perceived aggression and encroachment need not be contained by or tethered to the immediate events at hand. The formlessness that is implied here provides great latitude in the interpretation of what constitutes aggression and encroachment, suggesting that it not the "form" that is open-ended, but the "content." In other words, it matters not who is a foreigner but that the designation of the "foreigner" is performative, potentially triggering the exercise of plenary power and codifying the immigrant's foreignness into "an object of immigration power" as well as a threat to the "nation form."[49] The presence or figure of the foreigner becomes the condition for constitutional exceptionality such that immigration and the threat of crowding "vast hordes" necessitate preemptive measures to secure white territory. Here, plenary power is a normalized feature of immigration regulation such that deportation, the militarization of the border, and the suspension of due process and civil rights are not simply the features of immigration regulation but are, rather, the weapons of immigration regulation as war. If war is sanctioned violence in the name of national security, then these forms of immigration regulation perpetrate state-sanctioned violence on a daily basis; this permanent war, codified by the *Chinese Exclusion Case,* is a quotidian function and feature of inherent sovereignty, and one that terrorizes and primarily targets people of color in the name of white security.

The intersections of security, territory, and property become more visible in the case of *Lone Wolf v. Hitchcock.* In the *Chinese Exclusion Case,* the courts "emphasized the role of the United States' right to exclude as a

means of achieving safety and security within its own property."[50] In *Lone Wolf,* settler colonial expansion and the conversion of Indigenous lands into white property become folded under the exigencies of invasion. The "foreigner" initially defined as extrinsic to U.S. territory becomes, as in the case of *Lone Wolf v. Hitchcock,* untethered to territory, a figure who "threatens" the coherence of U.S. territorial sovereignty from within and without. Just as the *Chinese Exclusion Case* has been seminal in immigration history, *Lone Wolf v. Hitchcock* "enjoys" a similar place in American Indian legal history in its devastation of tribal sovereignty and massive land theft. Coming thirteen years after the *Chinese Exclusion Case, Lone Wolf v. Hitchcock,* in which the court justified the abrogation of treaties with the confederated tribes of Kiowas, Comanches, and Apaches, is "still cited for its principal holding: that Congress has plenary power to abrogate the terms of Indian treaties."[51]

The justification for the breaking of treaties as a necessity of the state, laid out in the *Chinese Exclusion Case,* remerges in *Lone Wolf v. Hitchcock* by casting the confederated tribes as "stateless"–neither full sovereign nations nor citizen-subjects protected by the Constitution—and an implicit "threat" to the territorial coherence of the United States. Lone Wolf, a Kiowa chief, put forth an injunction to stop a bill that would take away land that had been protected under the Medicine Hat Treaty of 1867. In 1889 the government, represented by Commissioner David Jerome, offered each member of the confederated tribes a 160-acre allotment and $2 million for the surplus land after allotment. As the Medicine Hat Treaty stipulated, such transactions needed the consent of three-fourths of the male population. Lone Wolf contended that the agreement signed on October 6, 1892, was based on government fraud and misrepresentation of the terms of the agreement and that the subsequent modified bill, which had passed through both chambers of Congress, did so without tribal consultations. In his appellate brief, Lone Wolf and his lawyers argued that this new bill would violate the terms of their treaty and also would violate the Fifth Amendment, which protected their property rights. Ruling against the appellant, however, the Supreme Court dismissed Lone Wolf's claims over this constitutional breach by blurring the distinctions between "foreign nations" and "wards of the nation," arguing that the confederated tribes were both simultaneously. The court circumvented the question of constitutionality by declaring that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the

government." Moreover, the Court insisted that abrogation of treaties was the domain of Congress, noting that "as with treaties made with foreign nations, *Chinese Exclusion Case,* 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians."[52] In this section of the ruling, the court argued that the abrogation of the treaty was entirely consistent with plenary power—just as it was in the *Chinese Exclusion Case*—and a power inherent in U.S. sovereignty.

Despite the devastating impact of this decision on tribal rights and sovereignty, it is not entirely clear why the *Chinese Exclusion Case* was cited in *Lone Wolf v. Hitchcock.* The Court defended the abrogation of the Medicine Hat Treaty as a congressional prerogative vis-a-vis other "foreign nations" as in the case with China. As Philip Frickey notes, this justification of the power to abrogate treaties effectively "conjoined the plenary power over Indian affairs with a similarly expansive authority over immigration recognized in the *Chinese Exclusion Case.*"[53]

But "if Congress did indeed have unfettered plenary power over the tribes," as David Wilkins points out, "why did it not simply use it all the time?"[54] Vine Deloria Jr. also notes that the designation of American Indians as "foreign nations" has a tortured and contradictory set of precedents, notably *United States v. Kagama* (1885), which posited American Indians as both "foreign nations" and "wards of the nation," and which the Court also cited.[55] Given these earlier examples and precedents, why reroute the abrogation of treaties with "foreign nations" through citing the *Chinese Exclusion Case,* and what is the significance of justifying this land theft "on the backs of the Chinese"?[56]

Sarah Cleveland argues that these cases are conjoined by the concept of "sovereign necessity," which justified the use of plenary power.[57] In the case of *Lone Wolf,* sovereign necessity cannot be constrained by considerations of the Fifth Amendment and property rights. This conception of sovereign necessity is reflected in the Court's rationale:

> To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.[58]

Here the Court invokes emergency and necessity as the rationale for judicial deference to Congress. But as Deloria points out, Congress had "dilly-dallied"

for eight years before submitting its amended bill, and the "sense of urgency, therefore, is slight."[59] This routing of the appropriation of land through the *Chinese Exclusion Case* performatively renders both the undermining of tribal sovereignty (Native property rights) and U.S. settler colonial expansion as necessities of state security. As the *Chinese Exclusion Case* reveals, it matters not "what form" the aggression and encroachment to settler sovereignty may take. The *Chinese Exclusion Case*'s codification of Chinese laborers as invaders becomes the means by which the racialization of labor and property renders those certain property rights no longer constitutionally protected. As Rose Cuison Villazor persuasively argues, the *Chinese Exclusion Case* forged a connection between property and sovereignty by denying Chan Chae Ping's argument that the exclusion violated his property rights.[60] In conjoining expansive congressional authority over Indian affairs and immigration, *Lone Wolf* codifies territorial expansion and white proprietorial logics as a security issue borne out of settler sovereign necessity.

The theory of necessity, Giorgio Agamben argues, is "none other than a theory of exception. . . . Necessity is not the source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm."[61] But in a case focused on Indigenous property rights and treaty abrogation, what counts as "sovereign necessity"? The argument that underlies sovereign necessity, I would argue, is not the impending threat of invasion but the presence of "foreigners of a different race" in white settler territory, defined as invasion itself. The citation of the *Chinese Exclusion Case,* in this instance, is not merely a reference to "foreign nations" but a means of codifying American Indians as "foreigners of a different race." That is, it serves to racialize Indigenous peoples as alien others who threaten white property ownership from within. Described in *Lone Wolf* as "dependent on the United States. Dependent largely for their daily food. Dependent for their political rights," they are "foreign nations" who have been domesticated. And in "domesticating" what had been primarily the domain of the international, the Court effectively "domesticated" plenary power, expanding the domain of its reach.[62] The Court circumvented both assertions of Indigenous sovereignty and protests of congressional overreach, thus limiting the options for legal challenges to congressional power over tribes.[63]

This conjoining of these two cases in terms of constitutional exceptionality reveals how the management of territorial coherence, expulsion, deportation and dispossession are temporally constitutive of the "inherent sovereignty" of whiteness. While *Lone Wolf v. Hitchcock* connects immigration law and

Indian law by positing both as racialized "foreign nations," the threat these different foreign nations pose are located in antithetical and shifting temporal coordinates. Whereas the invasion of the Chinese immigrants needs to be preemptively mitigated, the legal rationale for the exercise of plenary authority in *Lone Wolf v. Hitchcock* depends on the construction of American Indians as relics of the past, "remnants of a race once powerful, now weak and diminished in numbers."[64] The characterization of this once "powerful now weak" race both resurrects the Indian Wars and the tropes of a nation under siege by rewriting treaty abrogation and expropriation of Native land as a continuation of national security.

In *Deportation Nation* Daniel Kanstroom tracks how the Indian Removal Acts are precursors to Asian exclusion and subsequent policies of deportation. In this historical account, Asian expulsion and deportation are a legacy of the policies of Indian removal. But if we also understand deportation not simply as removal from territory but also as a juridical technique of settler sovereignty, then this technique of permanent war works to racialize subjects as "deportable" into a "constitution-free" zone in the name of national security. The "fiction" of the *Chinese Exclusion Case,* Cleveland notes, is reflected and promulgated by its very name. This decision effectively reframed Chae Chan Ping's case of *deportation* into one of *exclusion* by redefining a legal permanent resident (which he was) into a new applicant whose entry and property rights could be denied.[65] In this context, *Lone Wolf v. Hitchcock*'s citation of *The Chinese Exclusion Case* as a precedent also affirms the efficacy of plenary power to deport racialized subjects regardless of their legal status into "constitution-free zones."[66] The citation of the *Chinese Exclusion Case* thus not only racializes American Indians but also "manufactures" deportability as a possible legal mode of security. In *Yellow Woman and a Beauty of the Spirit,* Leslie Marmon Silko writes of the menacing fear of living in a "border patrol state" and the numerous times she is pulled over by border patrol and forced to show her ID.[67] Despite being Laguna Pueblo, Silko describes being subject to what Rachael Ida Buff calls "deportation terror," a state of perpetual war founded on a sovereign necessity in which constitutional exceptions are normalized to securitize whiteness.[68]

THE COMPULSORY RELATION OF SOVEREIGNTY AND PERMANENT WAR

What the plenary power cases reveal is the extent to which the conjoining of Asian exclusion and American Indian dispossession is central to the racial

regime of U.S. settler sovereignty. State sovereignty, as Giorgio Agamben argues, is inseparable from the state of exception and a "constitution-free zone." Mark Rifkin, in his rethinking of Agamben's theory of sovereignty in relation to American Indians, argues that Native peoples are also figured as exceptions to the state.[69] According to Rifkin, Native peoples are the irresolvable exception to a U.S. sovereignty organized around territorial coherence. Oscillating between independent treaty-making nations and "wards of the nation,"[70] and captured in the oxymoronic phrase "domestic dependent nations,"[71] Native peoples are simultaneously figured as inside and outside the nation-state. Their exceptional status, Rifkin argues, is indicative of "the absence of an appropriate legal framework" to account for Native peoples and it is precisely the creation of the state of exception for Native peoples that performatively founds U.S. sovereignty. Similarly, Patrick Wolfe suggests that American Indian "exceptionalism" preserves and rationalizes the contradictions in the human rights discourse enshrined in the U.S. constitution and the government's systematic denial of American Indian rights. According to Wolfe, "Indian policy instantiates a nulificatory component of US constitutional discourse."[72] In different ways, both Rifkin and Wolfe demonstrate—through the analytic of the exception—how Native peoples exceed and trouble the coherence of a territorial sovereignty rationalized and formalized through the discourse of constitutional rights. Whereas Wolfe describes the practical exception as *corpus nullius,* which effaces Indian subjecthood, Rifkin characterizes as "bare inhabitance" a shift away from the individuation of Agamben's bare life to focus on a politics of collectivity and occupancy to challenge the process of the individuation instrumental to Indigenous dispossession.

The Native state of exception, however, is also dependent on the state of permanent war, in which the peculiarization of Natives is defined in terms of a "compulsory relation to territorial boundaries [that] thus threaten[s] the security and coherence of statehood."[73] This compulsory relation to national territorial boundaries can only be externalized as threats to the security of these boundaries. Rifkin argues that Agamben's emphasis on bare life "leave[s] little room for thinking indigeneity, the existence of *peoples* forcibly made domestic whose self-understandings and aspirations cannot be understood in terms of the denial of (or disjunctions within) state citizenship."[74] He argues that the "topos of sovereignty designates less a content that can be replaced (a racist vision of Indian savagery, a Eurocentric resistance to Native customs) than a process of compulsory relation, one predicated on the supposedly unquestionable fact of national territorial boundaries."[75]

While this process of Native compulsory relation is "predicated on the unquestionable fact of national boundaries" and is shaped by relations of "exceptionality," this account does not address the legacy of the *Chinese Exclusion Case* and its relationship to *Lone Wolf v. Hitchcock*. And here I again turn to Agamben to foreground his theorization of sovereignty. While much has been made of the grammatical structure of the *exception* to the coherence of the state, Agamben's theorization of the *example* is also crucial to understanding the compulsory relation of immigrants, racialized as invaders, to the state. According to Agamben, "Both exception and example constitute the two modes by which a set tries to found and maintain its own coherence."[76] Both exception and example are the central modes by which sovereignty is cohered and maintained, and as Agamben notes, these two modes are not distinct but rather blur into each other, deriving their force from their juridical proximations of each other.[77] The exception is unthinkable without the example; the paradigmatic example denotes the limit by which that exceptionality is marked as "exceptional." "In every case," according to Agamben, "exception and example are correlative concepts that are ultimately indistinguishable and that come into play every time the very sense of belonging and commonality of individuals is to be defined."[78] Just as state sovereignty is powered by the constant state of exception, so too is it dependent on a paradigm of otherness through which the territorial anxieties and Indigeneity invoked by the exceptional status of American Indians are managed. If, as both Rifkin and Wolfe formulate, Native peoples are the exception by which U.S. settler state sovereignty depends, then Chinese immigrants are the paradigmatic example of the "foreigner" whose unassimilable difference becomes the means by which the U.S. settler state performatively manages and tries to contain the territorial anxieties posed by the Native state of exception.

Though the exception and the example are crucial for the founding and maintenance of white settler sovereignty, their mechanisms are different. The exception "is an *inclusive exclusion* (which thus serves to include what is excluded)," whereas the example "instead functions as an *exclusive inclusion*."[79] Put differently, the "inclusive exclusion" of Native peoples acknowledges their "inherent sovereignty" while domesticating and undermining that independence through the insistence on the geographic unity of the nation. An exclusive inclusion is premised on the example's paradigmatic status, which necessitates its exclusion from the set of which it is paradigmatic. The example is embodied by Chinese immigrants, whose otherness spatializes the promise of assimilation through their exclusion, affirming the "supposedly unquestionable fact of national territorial boundaries." Thus just as

Native struggles for sovereignty do not work within the framework of state citizenship, these are precisely the governing terms by which Asian immigrants have sought inclusion; that is, their struggles for political intelligibility—centered on domestic inclusion and citizenship—both affirms these values as the telos of immigration and yet is premised upon their exclusion from this polity, this "nation of immigrants," that they, in their radical alien difference, exemplify but cannot belong to.[80] The regulatory technologies of interrogation, documentation, registration, deportation, and surveillance that were developed to enforce Chinese exclusion—the first race- and class-based immigration exclusion law—have become the norm by which Homeland Security manages and polices its national borders.[81] The "immigrant" as a biopolitical and juridical subject is, in other words, constituted through the singularity of the exclusion of Chinese immigrants and also their exemplarity. And by virtue of exemplarity, they must be kept outside of the nation.[82]

But security threats defined as "form without content," to reiterate the words of Chief Justice Fields, are defined in terms of a compulsory relation to the state. That is, "form without content" renders the content of these threats interchangeable, fluid, and even permeable. The shifting racial taxonomies and juridical constructions of "Indian" and "Chinese" as national security threats give form to U.S. state of exception and sovereignty not through their content, but through their compulsory relation to settler sovereignty. In these cases, the discursive forms of the "Indian" and "Chinese" becomes the means by which the settler state attempts to resolve its racial and territorial anxieties. Thus it matters not whether the terrorist is "Indian" or "Chinese," "Native" or "Foreign," "Citizen" or "Immigrant," only that they can potentially and simultaneously be both. And they are simultaneously both by virtue of their compulsory relation to U.S. settler sovereignty and to the formation of a "constitution-free zone" crucial to the securing of white property and territory.

While I began this article by foregrounding the two concurrent executive orders and the rhetoric of national security that justifies this exceptional exercise of government power, this permanent race war is broader than these two examples would suggest. The doctrine of plenary power is a normalized feature of the settler security state such that it operates openly and yet invisibly. Justifications for the extrajudicial killings of African Americans by police officers persistently point to the "security threats" posed by these unarmed civilians. The securitizing of white property, as Cheryl Harris, Cedric Robinson, Ruth Gilmore Wilson, and Jared Sexton, among others, have argued, is inseparable from the laws of racial capitalism and the

commodification and criminalization of Black bodies central to its operations. In light of the recent anti-immigrant policies, increased ICE raids and deportations, the seizure of Indigenous lands for oil pipelines, the abandonment of Puerto Rico after Hurricane Maria, and the militarized policing of African Americans and other communities of color, it is clear that new comparative and intersectional frameworks of analyses are necessary. In positing the plenary powers doctrine as an important object of critical ethnic studies critique, it is my hope that more scholars will examine how plenary power differentially organizes the settler colonial logics of white security, territory, and property.

Plenary power and its consolidation of white settler sovereignty continues to constitute and racialize Indigenous peoples, colonized peoples, immigrants, and people of color as security threats. And it is the construction and presence of racialized threats to white settler society that give rise to the conditions of permanent war. The compulsory relations of American Indians and Asian Americans to U.S. sovereignty legitimates a state of permanent war untethered to geographic and territorial specificity. What is international can be made domestic and vice versa. The conjoined figures of the U.S. settler sovereignty—the "Indian" and the "Chinese"—mediate the tension and oscillation between the territorial boundaries of the nation and its content, between the abstract ideal of the citizen subject and its racialized embodiment, between the inclusive exclusion of American Indians and the inclusive exclusion of Asian immigrants, and between the compulsory relation of American Indian exception and the coercive replacement of the Asian immigrant example. They are conjoined precisely because of their lack of content and their compulsory and structural relation to settler sovereignty. While the effects of plenary power on communities are not commensurate or even, plenary power's agility in racializing conquest and constituting white settler security are dependent on the formlessness of threats to state sovereignty. The object of plenary power—the regulation, removal, and containment of colonized and racialized immigrant subjects—is defended as powers inherent in white settler sovereignty.

Permanent war has been and continues to be the condition of our contemporary moment. In advocating for solidarity in terms of simultaneity, however, I am cautious about making claims regarding what the outcomes and forms of antiracist decolonization and resistance could look like because such a synchronic framing temporarily forecloses examining the progressive possibilities and consequences that a diachronic view enables. But solidarity in simultaneity enables one way of thinking through the mechanism

and techniques that bifurcate and position dispossession and elimination as temporally distinct and thus isolated from the juridical conjoining of exclusion and deportation. Simultaneity is an attempt to bring a moment of this perpetual state violence within view. In the amicus brief submitted by the Fred Korematsu Center for Law and Equality challenging the legality of this travel ban, Robert Chang et al. question the invocation of the plenary power to justify the president's "unreviewable authority."[83] The center is named after Fred Korematsu, who challenged the constitutionality of Japanese American internment during World War II. The Fred Korematsu Center for Law and Equity also joined in the "Memorandum of Amici Curiae" in support of the Standing Rock Sioux challenge to the U.S. Army Corp of Engineers and Dakota Access LLP, reminding us of the connection between detention, deportation, terror, and territorial expansion.[84] As the example of these amicus briefs show, solidarity, therefore, need not be based on identity, collectivity, or even shared experiences. Rather it is an attempt to resist the divergent temporalities that continue to divide and compartmentalize the simultaneous and multiple projects of white settler sovereignty.

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NOTES

1. Ariane de Vogue, "The Legal Arguments around Trump's Travel Challenges," CNN, February 4, 2017, https://www.cnn.com/2017/02/04/politics/donald-trump-travel-ban-legal-challenges/index.html. This order was blocked and was superseded by Executive Order 13780 on March 6, 2017. It should be noted that in this second iteration, the lawyers for the administration did not refer to plenary power.

2. David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas, 1997), 26. The distinction between "political" is key here, as Wilkins elsewhere has pointed out. Regarding "political" issues, the courts have been differential to Congress and the executive branch of government.

3. Hiroshi Motomura, "Federalism, International Human Rights, and Immigration Exceptionalism," *University of Colorado Law Review* 70, no. 4 (1999): 1361–94; Sarah Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and

the Nineteenth Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81, no. 1 (November 2002): 1–284.

4. According to Executive Order 13769: "In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles . . . In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation." https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/.

5. See, for example, Garrett Epps, "The Ghost of Chae Chan Ping," *Atlantic,* January 20, 2018, https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/; Doug Tsuruoka, "Dark Shadows of Chinese Exclusion Act in Muslim Ban," *Asia Times,* March 15, 2017; https://www.asiatimes.com/2017/03/article/dark-shadows-chinese-exclusion-act-trumps-muslim-ban/; Kat Chow, "A Chinese Exclusion Act Turns 135, Experts Point to Parallels Today," *NPR: Code Switch,* May 5, 2017, https://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban.

6. Shikha Dalmia, "The Obscure Doctrine That Could Save Trump's Travel Ban," *Week,* April 6, 2017, http://theweek.com/articles/688615/obscure-doctrine-that-could-save-trumps-travel-ban. For an account of the expansive reach of plenary power exercised in "plain sight," see Susan Bibler Coutin, Justin Richland, and Véronique Fortin's "Routine Exceptionality: The Plenary Power Doctrine, Immigration, and the Indigenous under U.S. Law," *UC Irvine Law Review* 4, no. 97 (2014): 97–120.

7. As Cleveland in "Powers Inherent in Sovereignty" explains, plenary power deals with immigration, Indian affairs and insular possession—territories acquired as a result of the Spanish–American War. Though it is beyond the scope of this article, the role of plenary power in the Insular Cases is crucial for examining the intersection of Asian migration and settler colonialism within an imperial circuitry.

8. According to the suit, "Because the Tribe, as a signatory of the 1851 Treaty, does not consent to construction and operation of the Pipeline, which would traverse its treaty territory, construction and operation of pipeline would constitute a violation of the 1851 Treaty. While the boundaries of the tribe's possessory interest in the treaty territory have been diminished by Congress pursuant to its 'plenary powers,' such alleged powers in fact violate Article VI of the United States Constitution which declares treaties to be the supreme law of the land" (13–14). See Yankton Sioux Tribe v. US Army Corp of Engineers, civil case no. 16-1796, filed September 8, 2016.

9. See Cleveland, "Powers Inherent in Sovereignty," 11; In "Immigration as Invasion," Matthew J. Lindsay explores how "constitutional exceptionalism of the immigration power within American public law" is tied to questions of state security. See "Immigration as Invasion: Sovereignty, Security and the Origins of the Federal Immigration Power," *Harvard Civil Rights–Civil Liberties Law Review* 45, no. 1 (Winter 2010): 4. See also José Jorge Mendoza, "Neither a State of Nature nor a State of Exception: Law, Sovereignty and Immigration." *Radical Philosophy Review* 14, no. 2 (2011): 187–95.

10. Giorgio Agamben, *State of Exception,* trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

11. Fred I. Lee, "The Japanese Internment and the Racial State of Exception," *Theory and Event* 10, no. 1 (2007), doi: 10.1353/tae.2007.0043.

12. See Natsu Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (Boulder: University of Colorado, 2007).

13. Cleveland, "Powers Inherent in Sovereignty," 12.

14. See Christopher Tomlins, "Necessities of State: Police, Sovereignty, and the Constitution," *Journal of Policy History* 20, no. 1 (2008): 47–63.

15. Michel Foucault, *Society Must be Defended: Lectures at the Collège de France, 1975–1976,* trans. David Macey (New York: Picador), 50.

16. Foucault, 61–62.

17. Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011), xviii.

18. Keith P. Feldman, "Empire's Verticality: The Af-Pack Frontier, Visual Culture, and Racialization from Above," in *Critical Ethnic Studies: A Reader,* ed. Critical Ethnic Studies Editorial Collective (Durham, N.C.: Duke University Press, 2016): 386.

19. According to Philip Frickey's analysis of plenary power and the citation of the *Chinese Exclusion Case* in *Lone Wolf v. Hitchcock,* the "court *conjoined* the plenary power over Indian affairs with a similarly expansive authority over immigration recognized in the *Chinese Exclusion Case*." "Domesticating Federal Indian Law," *Minnesota Law Review* 81, no. 32 (1996): 36, emphasis added.

20. Joseph William Singer, "Lone Wolf, or How to Take Property by Calling It a Mere Change in the Form of Investment," *Tulsa Law Review* 38, no. 1 (2002): 39. See also David Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001), 110.

21. There is disagreement about which cases fall under this category of Insular Cases, and the range of cases that are considered Insular Cases span from 1901 to 1979. For example, Cleveland describes Insular Cases as "a term which refers to a series of decisions between 1901–1905." See Cleveland, "Powers Inherent in Sovereignty," 212. Efrén Rivera-Ramos offers a broader framework in "The Legal Construction of American Colonialism: The Insular Cases (1901–1922), *Revista Jurídica de la Universidad de Puerto Rico* 65, no. 2 (1996): 225–328, as does Bartholomew H. Sparrow in *The Insular Cases and the Emergence of American Empire* (Lawrence: University of Kansas, 2006); and Gerald L. Neuman and Tomiko Brown-Nagin, eds., *Reconsidering the Insular Cases: The Past and Future of the American Empire* (Cambridge, Mass.: Harvard University Press, 2015). See also Christina Duffy Burnett, "Untied States: American Expansion and Territorial Deannexation," *University of Chicago Law Review* 72, no. 3 (Summer 2005): n. 2.

22. Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State,* 5. There is, however, a small but growing body of work that examines plenary power and comparative ethnic studies, notably in the context of plenary power in relation to its territorial possessions. This includes Isaac Punzalan Allen's *American Tropics: Articulating Filipino America* (Minneapolis: University of Minnesota Press, 2006); Andrew Hebard, *The Poetics of Sovereignty in American*

Literature, 1885–1910 (Cambridge: Cambridge University Press, 2013); Taylor, *Chinese Exclusion*.

23. Ruth Wilson Gilmore, "Race and Globalization," in *Geographies of Global Change: Remapping the World,* ed. R. J. Johnston, Peter J. Taylor, and Michael J. Watts (New York: Wiley-Blackwell, 2002), 261, emphasis in original.

24. Jodi Melamed, "Racial Capitalism," *Critical Ethnic Studies* 1, no. 1 (2015): 78.

25. Marie Lo, "Plenary Power and the Exceptionality of Igorots: Settler Imperialism and the Lewis and Clark Exposition," *Amerasia* 43, no. 2 (2017): 98–121.

26. Cleveland, "Powers Inherent in Sovereignty," 12–13.

27. Bethany R. Berger, "Red: Racism and the American Indian," *UCLA Law Review* 59 (2009): 595.

28. See Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2003); Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003); Bill Ong Hing, *Making and Remaking Asian America through Immigration Policy* (Stanford, Calif.: Stanford University Press, 1993).

29. From Henry Schoolcraft's six-volume *Historical and Statistical Information Respecting the History, Condition, and Prospect of Indian Tribes of the United States,* which included anthropological comparisons between different tribes and Chinese and Hindus, often speculating on the Asian origins of Native Americans. See also Juliana Hu-Pegues for how the Bering Straits idea indexed particular gendered racial formations, "Rethinking Relations: Interracial Intimacies of Asian Men and Native Women in Alaskan Canneries," *Interventions* 15.1 (spring 2013): 55–56.

30. See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1983); Cari M. Carpenter and K. Hyoejin Yoon, "Rethinking Alternative Contact in Native American and Chinese Encounters: Juxtaposition in Nineteenth-Century US Newspapers." *College Literature* 41, no. 1 (2014): 7–42.

31. One example is the front page of the Friday, January 25, 1878, issue of the *Boston Daily Globe,* which features "Washington News" and describes the legislative proceedings that involve both the "Chinese Question" and the "Indian Question." What is also important to note is that these written records of legislative proceedings are circulated in local newspapers.

32. As Benedict Anderson describes, the juxtaposition of articles in newspapers may be linked by a "calendrical coincidence" organized under the date of the daily newspaper's publication in service of the "onward clocking of homogenous empty time" of the imagined nation. In "Rethinking Alternative Contact," Carpenter and Yoon explore how the Chinese and American Indians "shared" space on the newspaper page as an analog to their shared space in the American nineteenth century (8).

33. Mark Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham, N.C.: Duke University Press, 2017), 59.

34. See David Wilkins's "The U.S. Supreme Court's Explication of 'Federal Plenary Power': An Analysis of Case Law Affecting Tribal Sovereignty, 1886–1914," *American Indian Quarterly* 18, no. 3 (1994): 349–68.

35. Lindsay, "Immigration as Invasion."

36. Wilkins, "'Federal Plenary Power,'" 349.

37. Currently, such comparative work is mainly done in the area of constitutional law, as reflected in the works of Alexander Aleinikoff, Bethany R. Berger, Sarah Cleveland, and Natsu Taylor Saito.

38. Lindsey, "Immigration as Invasion."

39. See Article V of the Burlingame Treaty.

40. Chae Chan Ping v. United States 130 U.S. 581 (1889) at 600.

41. Rose Cuison Villazor, "*Chae Chan Ping v. United States*: Immigration as Property," *Oklahoma Law Review* 68, no. 137 (2015): 137–64.

42. *Chae Chan Ping* at 595.

43. Matthew J. Lindsay, "Immigration, Sovereignty, and the Constitution of Foreignness," *Connecticut Law Review* 45, no. 3 (2013): 749.

44. *Chae Chan Ping* at 604.

45. *Chae Chan Ping* at 604.

46. Aleinikoff, T. Alexander, *Semblances of Sovereignty: The Constitution, the State and American Citizenship* (Cambridge, Mass.: Harvard University Press, 2002), 16.

47. *Chae Chan Ping* at 606.

48. As Lindsay in "Immigration, Sovereignty," has argued, "The association between immigration regulation and national security remains essential to justifying a power unmoored from the Constitution and shielded from judicial scrutiny" (749). The legal construction of the foreigner as a threat normalizes the notion that immigration is always a potential invasion, which in turn, normalizes the constitutionally exceptional circumstances in which plenary power is to be invoked.

49. According to Lindsay in "Immigration as Invasion," "The immigration power was thus redefined in relation to its *objects,* as immigrants' foreignness itself came to dictate the source, locus, and scope of Congress's regulatory authority" (8). Hoang Gia Phan argues that race and nation are here conflated and that the figure of the Asiatic becomes the bearer of the conflation between race and nation such that individual migrations can be perceived as national aggression. See "'A Race So Different': Chinese Exclusion, *The Slaughterhouse Cases* and *Plessy v. Ferguson,*" *Labor History* 45, no. 2 (2004): 133–63.

50. Villazor, "*Chae Chan Ping,*" 150.

51. Ann Laquer Estin, "Lone Wolf v. Hitchcock: The Long Shadow," in *The Aggressions of Civilization: Federal Indian Policy since the 1880s,* ed. Sandra L. Caldwalader and Vine Deloria Jr. (Philadelphia: Temple University Press, 1984), 216–17.

52. Lone Wolf v. Hitchcock, 187 U.S. 553 at 383.

53. Frickey, "Domesticating Federal Indian Law," 35.

54. Wilkins, "'Federal Plenary Power,'" 351.

55. Vine Deloria Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review* 31 (1989): 221–22.

56. Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass.: Harvard University Press, 2007), 95.

57. Cleveland, "Powers Inherent in Sovereignty," 72.

58. *Lone Wolf* at 564.

59. Deloria, "Justice and Humanity," 222.

60. Villazor, "*Chae Chan Ping,*" 137–64.

61. Agamben, *States of Exception,* 25.

62. United States v. Kagama 11 U.S. 375 (1886).

63. Frickey, "Domesticating Federal Indian Law," 31–95.

64. *Lone Wolf* at 383.

65. Cleveland, "Powers Inherent in Sovereignty," 132–39. In addition to preventing entry at the border, the *Chinese Exclusion Case* effectively argued that immigrants were not subject to constitutional protections. In *Fong Yue Ting v. United States* (1893), the courts ruled that deportation could take place within U.S. borders, effectively incorporating the "constitution-free" zone outside of national borders to within it.

66. "Constitution-free zone" described by Cleveland regarding Guantánamo Bay in "Powers Inherent in Sovereignty," 12.

67. Leslie Marmon Silko, *Yellow Woman and Beauty of the Spirit: Essays on Native American Life Today* (New York: Simon & Schuster, 1996), 15.

68. See Rachel Ida Buff, "The Deportation Terror," *American Quarterly* 60, no. 3 (2008): 523–51.

69. Mark Rifkin, "Indigenizing Agamben: Rethinking Sovereignty in Light of the 'Peculiar' Status of Native Peoples," *Cultural Critique* 73 (2009): 88–124.

70. The phrase "Wards of the Nation" is codified in the 1886 *United States v. Kagama*.

71. Chief Justice John Marshall's term, which appeared in the 1831 *Cherokee Nation v. Georgia.*

72. Patrick Wolfe, "*Corpus Nullius*: The Exception of Indians and other Aliens in US Constitutional Discourse," *Postcolonial Studies* 10, no. 2 (2007): 129.

73. Rifkin, "Indigenizing Agamben," 105.

74. Rifkin, 94–95, emphasis in original.

75. Rifkin, 105.

76. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* trans. Daniel Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998), 21.

77. In using the word "proximate" I am invoking Renisa Mawani's groundbreaking work on how aboriginals and Chinese were juridically defined in relation to each other within the British and Canadian colonial system. See *Colonial Proximities: Crossracial Encounters and Juridical Truths* (Vancouver: University of British Columbia Press, 2007). Here I also deviate slightly from José Jorge Mendoza's argument that in immigrant cases, noncitizens who have been abandoned by the U.S. government live in a state of exception. See "Neither a State of Nature nor a State of Exception," *Radical Philosophy Review* 14, no. 2 (2011): 191.

78. Agamben *Homo Sacer,* 22.

79. Agamben, 21, emphasis added.

80. As Donna Gabaccia explains, the phrase, "nation of immigrants" was a highly contested term in the nineteenth century, arguing that it was the debates and racialized exclusion of Chinese and other newer immigrants from southern and eastern Europe as well as newly emancipated slaves that "midwifed" this phrase, the "nation of immigrants." Though the negative connotations of the word "immigrant" were

initially associated with Chinese immigrants and southern and eastern European immigrants, eventually, its negativity came primarily from its association with the Chinese. See Donna Gabaccia, "Nation of Immigrants: Do Words Matter?" *Pluralist* 5, no. 3 (2010): 18–19.

81. See Lee, *At America's Gates.*

82. As Agamben scholar Leland de La Durantaye explains, "The paradigm is a singular case that is isolated from the context to which it belongs only to the extent that by exhibiting its singularity it renders a new group of phenomena intelligible whose homogeneity the paradigm itself constitutes." See *Giorgio Agamben: A Critical Introduction* (Stanford, Calif.: Stanford University Press, 2009): 224–25.

83. Fred T. Korematsu Center for Law and Equality and Attorneys for Amicus Curiae, "Brief of the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color, as Amici Curae in Support of Plaintiffs," February 2, 2017, 2, https://digitalcommons.law.seattleu.edu/korematsu_center/34/.

84. Fred T. Korematsu Center for Law and Equality, "Memorandum of Amici Curiae, National Congress of American Indians, et al, in Support of Plaintiff Standing Rock Sioux Tribe's Motion for Partial Summary Judgement," February 22, 2017, 85, http://digitalcommons.law.seattleu.edu/korematsu_center/85.