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## Ownership Without Citizenship: The Creation of Noncitizen Property Rights

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## OWNERSHIP WITHOUT CITIZENSHIP: THE CREATION OF NONCITIZEN PROPERTY RIGHTS

Allison Brownell Tirres\*

*At the nation's founding, the common law of property defined ownership as an incident of citizenship. Noncitizens were unable lawfully to hold, devise, or inherit property. This doctrine eroded during the course of the eighteenth and nineteenth centuries, but few scholars have examined its demise or the concomitant rise of property rights for foreigners. This Article is the first sustained treatment of the creation of property rights for noncitizens in American law. It uncovers two key sources for the rights that emerged during the nineteenth century: federal territorial law, which allowed for alien property ownership and alien suffrage, and state constitutions, a significant number of which included property rights for noncitizens. Iowa, Wisconsin, California, and Michigan led the way, including these rights in their state constitutions prior to the Civil War. Through close examination of congressional debates, records of state constitutional conventions, and other historical texts, this Article places this significant legal reform in a broader historical context. Lawmakers succeeded in untethering notions of citizenship from notions of ownership, creating a more expansive vision of membership in the American polity. Property law was itself a form of immigration law, used not to expel migrants but rather to attract them and eventually, lawmakers hoped, to assimilate them as new Americans. The property reforms discussed here did not, however, result in property rights for all noncitizens; in fact, a majority of states today have some form of property restriction based on alienage. This Article suggests that an answer for the persistence of noncitizen property restrictions in American law lies in the nineteenth century. Reform efforts in this era held the seeds of restrictive policies that would develop later in the twentieth and twenty-first centuries, such as anti-Asian land laws and anti-illegal immigrant housing ordinances. Sources from the nineteenth century reveal that becoming "American" through property ownership was not a fully inclusive process; from the outset it was limited by assumptions about national origin, race and territorial location.*

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## INTRODUCTION

Property law is one of several important areas of law subject to state jurisdiction that can directly influence the lives of noncitizens.<sup>1</sup> Despite recent court decisions upholding federal preemption of state immigration enforcement efforts,<sup>2</sup> states retain significant influence over the membership rights of noncitizens.<sup>3</sup> States and municipalities today can limit noncitizens' access to public benefits, public institutions of higher education, and

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1. For recent scholarship on the intersection of property law and immigration, see Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047 (2011); Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1051–54 (2007); Daniel Eduardo Guzmán, “*There Be No Shelter Here*”: *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL’Y 399 (2010); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Immigration*, 62 VAND. L. REV. 53 (2009); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110 (2011); Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77 (2012); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

2. See *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down portions of Arizona’s omnibus immigration law).

3. On the contours of state power, see Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1559 (2008).

forms of identification like driver's licenses.<sup>4</sup> Some states also limit immigrants' access to employment through state licensing laws.<sup>5</sup> Traditionally, states have also determined the scope of noncitizens' rights to own and lease real estate; at least thirty-six states currently limit property rights in some fashion based on alienage status—that is, on whether a person is a citizen or an alien.<sup>6</sup>

Most recent scholarship—and much recent litigation—has focused on the ways that states and municipalities have used such regulatory powers to limit or restrict the rights of noncitizens, particularly those who are in the country without authorization.<sup>7</sup> This preoccupation with restriction is present in immigration history, as well: most accounts of state and federal immigration law focus on the ways that lawmakers have limited migration and excluded certain migrants.<sup>8</sup> This Article takes up the issue of federal and state power over noncitizens from a different vantage point: that of governmental *expansion* of noncitizens' rights. The expansion of rights is rarely discussed in conversations about contemporary immigration law or in the press, and it is rarely challenged in the courts.<sup>9</sup> Nevertheless, with

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4. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1354–406 (6th ed. 2008) (describing the various state regulations of immigrant membership); Kim Severson, *North Carolina to Give Some Immigrants Driver's Licenses, with a Pink Stripe*, N.Y. TIMES (Mar. 5, 2013), [http://www.nytimes.com/2013/03/06/us/north-carolina-to-give-some-immigrants-drivers-licenses-with-a-pink-stripe.html?\\_r=0](http://www.nytimes.com/2013/03/06/us/north-carolina-to-give-some-immigrants-drivers-licenses-with-a-pink-stripe.html?_r=0) (charting the variation in state policies regarding immigrant driver's licenses).

5. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding an Arizona law that revokes the licenses of businesses found to be employing unauthorized workers).

6. See *Tirres supra* note 1, at Part II.B.

7. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1365 (1999); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1640–42 (1997); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1559 (2008) (“[T]here is a veritable deluge of state and local legislation seeking to regulate non-citizens.”); *Immigration Enforcement-Related Litigation*, NATIONAL IMMIGRATION LAW CENTER, <http://www.nilc.org/litigationie.html> (last visited Oct. 13, 2013); *State and Local Law Enforcement*, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/state-and-local-law-enforcement> (last visited Oct. 13, 2013).

8. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1354 (2009) (“Most histories of immigration law are histories of restriction.”).

9. *But see, e.g.*, PHILIP KRETSEDEMAS, *THE IMMIGRATION CRUCIBLE: TRANSFORMING RACE, NATION, AND THE LIMITS OF THE LAW* 75 (2012) (“[L]ocal immigration laws should not simply be viewed as a strategy that is being used to ‘keep immigrants out’ but as one feature within a broad array of recruitment mechanisms, policies, and social dynamics that are being used to coercively integrate some immigrant populations into U.S. society.”); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 582–89 (2008) (discussing the important role that state and local governments play in integrating lawful immigrants); Rose Cuison Villazor, *“Sanctuary Cities” and Local Citizenship*, 37 FORDHAM URB. L. J.

comprehensive immigration reform still on the drawing board, state legislators and local officials are taking matters into their own hands, and some are doing so in a way that expands noncitizens' rights.<sup>10</sup> To fully understand the contours of both federal and state power vis-à-vis immigrants, we must attend to how and why lawmakers have expanded noncitizens' rights, not just how and why they have restricted them.

This Article demonstrates that both the federal government and the states employed property law as a tool of immigration regulation in the nineteenth century: not just to expel migrants, but also to attract them. It is the first scholarly treatment of this key moment in the expansion of noncitizens' rights in American history.<sup>11</sup> In the mid-nineteenth century, a significant number of state governments adopted provisions in their state constitutions guaranteeing the property rights of noncitizens.<sup>12</sup> In order to do so, state actors had to overcome a long common law tradition of restricting property ownership by citizenship status. Throughout the nineteenth century, courts in most states adhered to the English common law doctrine that prohibited ownership or alienation by noncitizens.<sup>13</sup> These restrictions were commonly referred to as alien property disabilities or alien land laws.<sup>14</sup> State constitutional provisions dramatically altered this common law scheme. Iowa was first: its 1844 constitution stated that “[f]oreigners who are, or who may hereafter become residents of this

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573 (2010) (describing the creation of “sanctuary ordinances” for the inclusion and protection of undocumented migrants).

10. For example, Los Angeles recently joined a number of other municipalities that offer a municipal identification card to all residents, whether citizen or noncitizen, and whether legal or illegal. See Ian Lovett, *IDs for Illegal Immigrants Take a Step in Los Angeles*, N.Y. TIMES, Oct. 16, 2012, at A23; Kathleen Miles, *ID Cards for Undocumented Immigrants in L.A. Approved by Council*, HUFFINGTON POST (Nov. 9, 2012), [http://www.huffingtonpost.com/2012/11/09/id-cards-undocumented-immigrants-la\\_n\\_2102504.html](http://www.huffingtonpost.com/2012/11/09/id-cards-undocumented-immigrants-la_n_2102504.html). For a general discussion of state expansion of benefits, see Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59–65 (2007).

11. Historians and legal scholars have spent little time exploring the history of state constitutional provisions relating to noncitizen property or to state constitution drafting in general in the nineteenth century. Christian Fritz, *More than “Shreds and Patches”*: *California’s First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13, 14 (1989) [hereinafter Fritz, *California’s First Bill of Rights*] (“There has been a remarkable dearth of scholarly writing on nineteenth century constitution-making.”). Those who have attended to state constitutional property law have focused primarily on economic and regulatory issues like the history of eminent domain or civil rights issues like public accommodations law. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008). Those who have discussed these specific noncitizen provisions have done so only in passing. Some have linked them to federal constitutional reforms, such as the passage of the Fourteenth Amendment, but they have not demonstrated any causal connections. See Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 28–29 (1962).

12. See *infra* Part II.C.

13. See Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 157 (1999).

14. See *id.*

State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.”<sup>15</sup> Wisconsin, California, and Michigan followed suit with almost identical language in their antebellum constitutions.<sup>16</sup> Seven more states followed after the Civil War: Florida, West Virginia, Arkansas, Alabama, Colorado, South Dakota, and Wyoming.<sup>17</sup> In this Article, I trace the histories of the four first adopters—Iowa, Wisconsin, California, and Michigan—in order to understand both the causes and the consequences of constitutionalizing property rights for noncitizens.

One of the most significant influences on state constitutional reform was federal territorial law. States’ expansion of noncitizens’ property rights was directly facilitated by federal law. In choosing how to sell public lands and how to create a blueprint for the governance of the western territories, Congress decided to expand the rights of foreigners. The Land Ordinances of 1784 and 1785 jettisoned common law restrictions on alien property ownership; the Northwest Ordinance of 1787 allowed for alien suffrage.<sup>18</sup> These federal policies fostered the development of a land-owning immigrant electorate.<sup>19</sup> In all four of the states that adopted these rights in the antebellum period, residents of foreign birth were active participants in state constitutional conventions.<sup>20</sup> When it came time for residents of Iowa and other states in the West to draft their state constitutions, they had already experienced years of expanded rights for noncitizens.

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15. IOWA CONST. OF 1844, art. II, § 21 (1846). This proposed constitution failed ratification, twice, by the populace. See BENJAMIN SHAMBAUGH, *THE HISTORY OF THE IOWA CONSTITUTIONS* 271, 279 (1902). The same clause was included in the constitution of 1846, which was ratified. *Id.* at 324; see also IOWA CONST. OF 1846, art. II, § 22; JACK STARK, *THE IOWA CONSTITUTION: A REFERENCE GUIDE* (1998).

16. WIS. CONST. art I, § 15 (“No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property.”); CAL. CONST. art. 1, § 17 (“Foreigners who are, or who may hereafter become bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.”); MICH. CONST. art. 18, § 6 (“Aliens who are residents of this state shall enjoy the same rights and privileges in property as citizens of this state.”).

17. FLA. CONST. OF 1868, art. I, § 2; W. VA. CONST. OF 1872, art. II, § 5; ARK. CONST. OF 1874, art. II, § 20; ALA. CONST. OF 1875, art I, § 34; COL. CONST. OF 1876, art. II, § 27; S.D. CONST. OF 1889, art. VI, § 14; WYO. CONST. OF 1890, art. I, § 29. Three states—Pennsylvania, North Carolina, and Vermont—had alien property rights provisions in their eighteenth-century constitutions. All three had repealed this language by the time Iowa introduced its provision. See discussion *infra* part II.A.

18. See *infra* Part II.C.

19. Other scholars have noted the significant ways federal law shaped state and local politics. See, e.g., Peter S. Onuf, *The Expanding Union*, in *DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC* 75 (David Thomas Konig ed., 1995). However, few have discussed the ways that federal influence shaped the place of immigrants in politics in the territories.

20. See discussion *infra* Part II.A.

This investigation of nineteenth-century state constitutional reform builds on recent work that explores the expansive dimension of immigration regulation, and it adds an important—and largely missing—property law perspective.<sup>21</sup> Property ownership had been understood in the English feudal and aristocratic tradition as a privilege belonging to few, not a right belonging to many. But this idea eroded in the fledgling United States, and was put under especially heavy attack in the 1830s and 1840s. Jacksonian democracy<sup>22</sup> and the ideology of “free soil”<sup>23</sup> demanded the extension of property rights to White men and, in some cases, to White married women. State and federal lawmakers applied these same principles to noncitizens’ access to property.<sup>24</sup> In doing so, they eroded the traditional

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21. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1403 (2009) (citing, but not focusing on, the federal government’s “strategic use of property law through homestead acts” in the nineteenth century); see generally HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA (2006); Richard H. Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women’s Property Law*, 2 LAW & HIST. REV. 44–78 (1984); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity and Transparency*, 96 VA. L. REV. 359, 376 (2010); Aziz Rana, *Settler Empire and the Promise of American Freedom* (2007) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University library).

22. Jacksonian democracy is the term commonly used to refer to the political movement in the nineteenth century centered around politician and President Andrew Jackson. Among the issues Jacksonians supported were universal suffrage for White men and territorial expansion. See, e.g., SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 312–89 (2006).

23. Proponents of the ideology of free soil promoted independent small farmers and artisans and opposed slavery and wage labor. See generally CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865* (Thomas A. Green & Hendrick Hartog eds., 2001); ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

24. The nineteenth century witnessed other property law revolutions, particularly with regard to poor White males, married women and former slaves. For example, the century witnessed the end of property qualifications for voting, allowing broader suffrage for White men. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 2, 24 (rev. ed. 2009) (“adult white males who did not own land” were among those excluded from suffrage at the Founding); BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010). During Reconstruction, legislators understood that freed slaves would not be accepted as members of the polity without access to property, and they passed the Civil Rights Act of 1866 in response. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1988). Married Women’s Property Acts represented efforts of legislators to protect the financial health of families, but they also altered the relationship of women to the state, speeding the erosion of coverture and the eventual granting of suffrage. See GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 158–84 (1997) [hereinafter ALEXANDER, *COMMODITY AND PROPRIETY*]; NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440 (1998). Property

common law division between citizens and aliens. It was no longer necessary in these states to be a citizen in order to be an owner.

These constitutional protections only went so far. They effectively ended the power of property to differentiate citizen from noncitizen, but they perpetuated a core distinction between resident and nonresident aliens. This careful line-drawing managed to rid the state of the most objectionable parts of alien land laws, which discriminated against upstanding members of the community (desirable settlers and laborers), while retaining the most politically appealing parts (those aimed at preventing foreign takeover and “absentee landlordism”).

Line-drawing would take a new form in the twentieth century, as states redrafted their land laws to discriminate against those “ineligible to naturaliz[e]”<sup>25</sup> (namely Asian migrants) and those who had roots in communist countries.<sup>26</sup> A full treatment of twentieth-century developments is beyond the scope of this Article, but I believe we can see the seeds of subsequent exclusionary actions within these nineteenth-century constitutional provisions. For example, noncitizens’ property rights were linked in statehood debates with citizens’ desire to divest American Indians of their property claims and to provide a buffer against the in-migration of free Blacks.<sup>27</sup> Race played a leading role in determining which migrants would receive which rights, regardless of their citizenship status. This Article demonstrates that the expansion of noncitizen rights depended upon the restriction of some citizens’ rights; inclusion had a corresponding aspect of exclusion.<sup>28</sup>

A key finding of this Article is that governments regulate migration not just through traditional “immigration law,” which governs entrance into and exit from a jurisdiction, but also through “alienage law,” which

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structured the relationship of these initially nominal members of the polity—poor White males, freed slaves, and women—to full, participatory citizenship. This Article is one of the first to demonstrate the reach of property reform to noncitizens.

25. Chinese Exclusion Act, § 14, 22 Stat. (May 6, 1882) (barring Chinese from naturalization); Immigration Act of 1917 (extending naturalization bar to all Asian immigrants). The Naturalization Act of 1870 limited naturalization to “free white persons and persons of African nativity, or African descent.” For discussion of these naturalization provisions, see IAN HANEY LOPEZ, *WHITE BY LAW* 30–34 (1996).

26. See Tirres, *supra* note 1, at 94–97.

27. On the migration of free Blacks and freed slaves, see EUGENE H. BERWANGER, *THE FRONTIER AGAINST SLAVERY* (2002); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993); Kunal Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75 (2001).

28. On “inclusive exclusion,” see Devon W. Carbado, *Racial Naturalization*, in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 41 (Mary Dudziak & Leti Volpp eds., 2006); see also EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM*, at x (2003) (noting the dependent relationship of slavery to liberty).



dictates migrants' rights while they are within the jurisdiction.<sup>29</sup> Regulation of migrants' rights is more often than not a means of regulating migration itself. This observation undermines the traditional distinction made between "immigration" and "civil rights" law. When it comes to the regulation of noncitizens in the United States, the two are inevitably linked.<sup>30</sup>

Part I of this Article describes the federal treatment of alien property. I argue that the ordinances governing the Northwest Territory, as well as subsequent laws and treaties pertaining to the rest of the West, created a federal policy of alien land rights. This federal policy was an important precondition for the creation of alien property rights in the states in the 1840s.

Part II explores the influence of this federal policy on state governments. It describes the process of transitioning from territory to state and emphasizes the important step of drafting a state constitution. It delves into the debates in the four states that first adopted noncitizen property rights—Iowa, Wisconsin, California, and Michigan—and describes the major themes that emerged. The debates reveal multiple motivations for the legal change that transpired: the desires to protect vested property interests, encourage future migration, promote property law reform, and assimilate immigrants. Importantly, delegates' decision to constitutionalize noncitizen rights was founded upon a particularly "American" vision of property law: one that was modern, open, and inclusive. This system of property, they asserted, would "Americanize" immigrants by showing them what independence really meant.<sup>31</sup>

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29. See, e.g., Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) ("As traditionally understood, 'immigration law' [refers to] the admission and expulsion of aliens, and 'alienage law' embraces other matters relating to their legal status.").

30. See *id.* at 203 (noting that "alienage" rules may effectively function as "immigration" rules, and vice versa); see also Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PENN. L. REV. 341, 343 (2008) (arguing that the traditional distinction between laws that regulate migration and laws that regulate migrant rights is "misguided," since "every rule that imposes duties on noncitizens imposes both selection pressure, potentially influencing noncitizens' decisions about whether to enter or depart the United States, and regulatory pressure, potentially influencing the way in which resident noncitizens live."); Hiroshi Motomura, *Whose Immigration Law? Citizens, Aliens, and the Constitution* 97 COLUM. L. REV. 1567, 1598–99 (1997) (reviewing GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996)). This episode of state constitution-making also usefully highlights lesser-known sources for the constitutional protection of aliens. We usually view the turning point in the constitutional protection of noncitizens as the famous case of *Yick Wo v. Hopkins*, which extended Fourteenth Amendment protections to Chinese immigrants, despite the fact that they were not, and could not at that time become, naturalized citizens. 118 U.S. 356 (1886). What these state constitutional provisions reveal is widespread acceptance, at a moment decades before *Yick Wo*, of fundamental rights for certain noncitizens.

31. See, e.g., JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN, 1847, at 93 (Madison, Wis., W.T., Tenney, Smith & Holt 1848) [hereinafter WIS. CONVENTION OF 1847] (comments of Mr. Sanders).

Constitutionalizing alien property rights was a significant step, since most states still adhered to the common law doctrine that limited property ownership to citizens only. Yet, as this Article explains, it was also a complicated and limited step: lawmakers expanded rights for aliens at the expense of others. Part III contextualizes the state constitutional debates by examining concurrent debates over the migration of free Blacks, the granting of universal suffrage, and the fear of foreign corporate invasion. The choice to expand noncitizen rights was, on its face, an inclusive one. Yet it depended, both rhetorically and politically, on a deliberate exclusion of non-White landowners and non-resident foreigners. This exclusion helps to explain the continued prevalence of restrictive alien land laws in the nineteenth and twentieth centuries, despite these state constitutional advances:

Finally, Part IV discusses the persistence of the link between citizenship and property ownership in American law. It suggests that continued restriction is due in part to an ongoing ambivalence about the place of noncitizens in the American polity. The inclusion of noncitizen property rights in state constitutions is one chapter in a long and as yet unfinished story about the contested relationship between citizenship and ownership.<sup>32</sup>

#### I. NONCITIZEN PROPERTY AND FEDERAL POLICY

Following the American Revolution, alien property rights were understood to be a matter of common law and thus subject to state jurisdiction.<sup>33</sup> In 1790, Congress discussed extending property rights to aliens as

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32. The long, complicated history of alien property ownership is largely reduced in the historical and legal literature to a focus on the infamous anti-Asian alien land laws of the early twentieth century, which prevented noncitizens of Asian heritage from owning or leasing farmland. See, e.g., Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 33 (1947); Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L. Q. 15, 28 (1962). While the anti-Asian land laws are of great importance, they are one chapter in a much longer story. For recent work discussing the relationship of alienage and property in American history, see, e.g., Price, *supra* note 13; Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of New Property*, 26 LAW & HIST. REV. 389 (2008).

33. See, e.g., The Notes of William Patterson, in 4 THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON THE SENATE DEBATES 494 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter The Notes of William Patterson] (noting sentiments expressed during the congressional debates over the first naturalization law that “tenure and protection of property belong to each state” and “the right of holding property belongs to the State”); The Diary of William MacClay, in 4 THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON THE SENATE DEBATES 221 [hereinafter The Diary of William Maclay] (“It therefore strictly speaking rested, with the respective States whether they would repeal the common law with respect to Aliens.”); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 70 (New York, Banks & Brothers 1832) (characterizing rights of property ownership as “civil privileges, conferred upon aliens, by state authority”).

part of the first naturalization law. These proposals failed, not because representatives were hostile to the idea of alien ownership, but because they believed it was the province of the states, not the federal government, to decide to extend such property rights. But deference to the states did not prevent Congress from extending such rights in the federal territories. Vast portions of land in the fledgling republic were not yet organized into states and thus were under federal sovereignty. A majority of states—twenty-seven out of fifty—began as territories during the nineteenth century.<sup>34</sup> By jettisoning such restrictions in the territories, the federal government facilitated immigrant settlement, which in turn contributed to the formation of communities accustomed to expansive rights for noncitizens.

To understand the significance of the extension of noncitizen property rights to the territories, we must first examine the English legal tradition of restricting alien property ownership and its adoption in the states after America gained independence. This section begins with an overview of the English doctrine and its adoption in the states. It then describes the debate over property and naturalization in the first Federal Congress. It concludes with an examination of the creation of alien property rights in the federal territories.

#### A. *Alien Property in English Common Law*

Courts in the fledgling United States adopted various tenets of English common law, including alien property disabilities<sup>35</sup>—that is, restrictions on various property rights based on alienage. The idea of restricting a foreigner’s access to land stemmed from the structure of feudalism itself.<sup>36</sup> Under feudal land tenure, land was directly connected to allegiance.<sup>37</sup> All land was under the control of the monarch, who granted it to individuals only upon assurances of their service to him. Such assurances took various forms, typically either financial or military—as a landholder, you had a duty to provide money, defense, or some other such service to the sovereign.<sup>38</sup> The modern “citizen” did not exist; in a monarchy, all those owing allegiance to the king were his subjects.<sup>39</sup> Holding land was the privilege of subjectship; those who were the subjects of another—say, the king of

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34. See *infra* note 153.

35. Price, *supra* note 13, at 157.

36. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 207–389* (Cambridge Univ. Press 1895) (discussing the structure of land tenure).

37. E.g., NORMAN ALEXANDER, *RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION* 101 (1931) [hereinafter ALEXANDER, *RIGHTS OF ALIENS*] (“[D]uring the feudal era acquisition of property involved the notion of allegiance to the prince.”).

38. JOSEPH SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 598–601 (5th ed. 2010).

39. POLLOCK & MAITLAND, *supra* note 36, at 442.

France—could not legally hold English lands.<sup>40</sup> As an English legal scholar later summarized:

By feudal law every tenant of lands owed fealty to the lord of whom his lands were holden. In England the King is the ultimate feudal lord and owner of all lands, and an alien owing allegiance to a foreign prince was held incapable of taking the oath of fealty which imposed obligations that might be inconsistent with the fidelity due to his own sovereign.<sup>41</sup>

From the feudal era until the late nineteenth century, then, aliens in England could not legally inherit property or leave it to others upon death; if they purchased property, they held it only so long as the King allowed. Alien property disabilities also interacted with married women's property law: a woman who was an alien could be barred from receiving her dower.<sup>42</sup> Owners who attempted to sell, rent, or otherwise convey their property to an alien would lose that property to the crown through forfeiture, since such a transaction would be "contrary to law."<sup>43</sup> As William Blackstone noted in his *Commentaries on the Law of England*, a highly influential eighteenth-century treatise on English law, aliens were "disabled to hold by purchase, except by the King's license."<sup>44</sup> The ability to inherit or devise property was not available to them, since they had no "inheritable blood in them."<sup>45</sup> In this way, Blackstone noted, "they are on a level with bastards."<sup>46</sup>

Alien property disabilities grew out of a time not only of monarchical rule, but also of perpetual allegiance: one could not hold dual or multiple citizenships, and one's allegiance was not a matter of choice.<sup>47</sup> Subjectship was not based on consent; it was based on duty. This notion extended

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40. *Id.* ("An alien cannot hold land in England. If the person to whom land would descend according to the common rules of inheritance, be an alien, it misses him and passes to some remoter kinsman of the dead man. If, on the other hand, an alien obtains land by gift, sale, lease, or the like, the transaction is not a nullity, but the king can seize the land and keep it for himself.")

41. H.S.Q. HENRIQUES, *THE LAW OF ALIENS AND NATURALIZATION INCLUDING THE TEXT OF THE ALIENS ACT, 1905*, at 4 (1906).

42. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 172 (4th ed. London, V. & R. Stevens and G.S. Norton 1853).

43. *Id.* at 351, 358.

44. *Id.* at 328.

45. *Id.*

46. *Id.*

47. See KENT, *supra* note 33, at 43 ("It is the doctrine of the English law, that natural born subjects owe an allegiance, which is intrinsic and perpetual, and which cannot be divested by any act of their own."). On the doctrine of perpetual allegiance in American history, see Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L. J. 1411, 1457–58 (1997).

beyond property law; for example, prior to the seventeenth century, aliens were unable to sue in English courts.<sup>48</sup>

There were exceptions to the rule against alien property ownership, however. Some foreigners were granted the status of denizen, if the sovereign chose to extend it.<sup>49</sup> Denization empowered aliens to hold a life estate in real property; they were then able to devise the property, but only to after-born children.<sup>50</sup> As English legal historians Frederick Pollack and Frederic Maitland explain, “A denizen thus made can hold land, and he can acquire land by gift, sale or the like, but he can not inherit, and a child of his born before the act of denization can not inherit from him.”<sup>51</sup> Alien merchants were granted some exceptions so that they could rent property for their trade.<sup>52</sup>

To be sure, the concerns underlying restrictions on property ownership were not just structural; they were also political. Foremost among these political concerns was fear of foreign invasion. Blackstone admitted that the reasons for alien disabilities were not “strictly feudal,” but were also based on “a principle of national or civil policy.”<sup>53</sup> In other words, “[i]f lands had been suffered to fall into their hands who own no allegiance to the crown, the design of introducing our feuds, the defence of the kingdom, would have been defeated.”<sup>54</sup> According to this view, alien landholding was a threat not only to the land tenure system, which depended on ties of loyalty, but also to the kingdom itself.

In the American colonies, alien disabilities “mirrored those of England”<sup>55</sup> and were sustained in the courts. There were some exceptions; some colonial governments enacted laws to exempt certain aliens at certain times from the operation of the common law rules.<sup>56</sup> Land laws were not always uniformly prosecuted. Some aliens did hold land and passed it on to their heirs, since they were not challenged by competing heirs and governments did not act to dispossess them. This left many Americans confused as to the state of the common law, with some assuming that aliens were able

48. HENRIQUES, *supra* note 41, at 2.

49. BLACKSTONE, *supra* note 42, at 392; *see also* 1 WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER, AND WITH THE LAW OF ENGLAND 726–30 (London, Saunders & Benning, 1838) (“Denization is conferred by letters patent of the king, and is a high and incommunicable branch of the royal prerogative.”).

50. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity and Transparency*, 96 VA. L. REV. 369, 376 (2010); BLACKSTONE, *supra* note 42, at 329.

51. POLLOCK & MAITLAND, *supra* note 36, at 443.

52. *Id.* at 442.

53. BLACKSTONE, *supra* note 42, at 328.

54. *Id.*

55. Price, *supra* note 13, at 158.

56. *Id.*

to hold land.<sup>57</sup> Yet for the most part, the English common law rules regarding alien property were adopted wholesale in the colonies and in the states after independence. Because of this common law tradition, the United States and Great Britain specifically made an exception to the rules governing alien land ownership in the 1794 Jay Treaty, which ensured that British citizens in the fledgling American republic would be able to hold land as natives rather than as aliens.<sup>58</sup>

Common law alien property restrictions continued well into the nineteenth century.<sup>59</sup> The first treatise of American law, James Kent's *Commentaries on American Law*, recited various forms of alien disabilities in property ownership. An alien, wrote Kent, "cannot acquire a title to real property by descent, or created by other mere operation of law."<sup>60</sup> An alien, even in the United States in the 1830s, was "exposed to the danger of being divested of the fee, and of having his lands forfeited to the state."<sup>61</sup> Tellingly, Chief Justice Shaw of Massachusetts stated in an 1834 case that the rule against alien inheritance was "among the first principles of the law of real property."<sup>62</sup>

While alien property disabilities persisted, many other elements of English property law that were imported to the colonies did not survive into the nineteenth century.<sup>63</sup> Tenurial obligations gave way to land held in fee simple, while various forms of related intangible property—like that in offices or common lands—disappeared.<sup>64</sup> The doctrine of primogeni-

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57. See, e.g., 1 ANNALS OF CONG. 1109 (1790) (noting that Rep. Tucker "conceived it the policy of America to enable foreigners to hold lands, in their own right").

58. Treaty of Amity Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, art. 9, reprinted in 2 U.S. DEPT. OF STATE, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 253-54 (Hunter Miller ed. 1931). The treaty stated, in part:

It is agreed, that British Subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands, be and the legal remedies incident thereto, be regarded as Aliens.

*Id.*

59. See, e.g., THE STATE HIST. SOC'Y OF WIS., THE CONVENTION OF 1846 (Milo M. Quaife ed., 1919) [hereinafter WIS. CONVENTION OF 1846] ("By the common law an alien cannot hold his realty.").

60. KENT, *supra* note 33, at 53.

61. *Id.* at 61.

62. Slater v. Nason, 32 Mass. (1 Pick.) 345, 350 (1849).

63. The demise of the land tenure system and feudal obligations is recounted in STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 21 (2011).

64. *Id.* at 12.

ture was replaced by state statutes allowing for the equal distribution of land, and the fee tail was eliminated.<sup>65</sup> Coverture was pushed into near oblivion by married women's property acts. All these practices were judged to be feudal relics, not suited to a modern republic with plentiful lands and an aversion to entrenched aristocracy.<sup>66</sup> Lawyers in the nineteenth century described "a complete revolution"<sup>67</sup> in property law, noting that there had been "almost total change in the system of laws relative to property."<sup>68</sup> As Stuart Banner notes, "[t]he old conceptual structure of land ownership had vanished."<sup>69</sup>

Alien property disabilities were a glaring exception to this trend. They remained in American common law after the Revolution and persisted into the nineteenth century. Indeed, they still exist in many states.<sup>70</sup> The persistence of these disabilities well into the nineteenth and twentieth centuries is all the more striking given that England, from whence the tradition came, granted full property rights to aliens in 1870, overturning all prior common law restrictions.<sup>71</sup> Historian Polly Price argues that xenophobia is at the root of this persistence in American law. These property disabilities "withstood differing social forces that affected other common-law property doctrines" because of an enduring "fear of aliens."<sup>72</sup> Judges resisted alterations in common law practices despite strong economic and social forces pointing towards the expansion of alien land rights.

Some states resisted this xenophobia and began to change the law through statute during this period.<sup>73</sup> Kent noted in 1836 that several states, including Maryland, Kentucky, Ohio, Delaware, New York, and Massachusetts, had passed laws enabling a "natural born subjects" to inherit from

65. *Id.* at 21. On the end of the entail, see Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 394 (2006).

66. See ALEXANDER, *COMMODITY AND PROPRIETY*, *supra* note 24, at 168–70.

67. James Humphreys, *Law of Real Property*, in 1 AMERICAN JURIST 58, 98 (1829).

68. St. George Tucker, *The Editor's Preface* of 1 BLACKSTONE'S COMMENTARIES, at iii, x (1803).

69. BANNER, *supra* note 63, at 6.

70. See Tirres, *supra* note 1, at 97–101; Price, *supra* note 13, at 152–53; NATIONAL ASSOCIATION OF REALTORS, *ALIEN LAND OWNERSHIP GUIDE* (2006).

71. The British Naturalization Act of 1870 declared that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject." Naturalization Act, 1870, 33 Vict., ch. 14, § 2 (Eng.). One remaining statutory restriction at this time prevented aliens from owning British ships, but they were otherwise "under no incapacity by common law" to own property. HOWARD WARBURTON ELPHINSTONE & JAMES W. CLARK, *GOODEVE'S MODERN LAW OF PERSONAL PROPERTY* 418 (London, Sweet and Maxwell, Ltd. 1892).

72. Price, *supra* note 13, at 205.

73. See BURGE, *supra* note 49, at 726–30 (summarizing state statutes regarding alien property). Burge, writing in 1838, observes that "[i]n some of the states aliens are not subject to any disabilities, in others, the greatest facility is afforded them, and again, in others, the common law disabilities of aliens are retained." *Id.* at 726.

an alien parent.<sup>74</sup> A few had apparently removed all prohibitions on alien property ownership via statute, while others had done so only for those aliens who took an oath of allegiance and pledged that they would naturalize as soon as possible.<sup>75</sup> Yet when delegates met in the 1840s to draft state constitutions in Iowa, Wisconsin, Michigan, and California, these statutory provisions merited little mention. Instead, delegates spoke most forcefully of a different legal basis for expanding rights: federal law governing the territories.<sup>76</sup> Thus, only by understanding the property scheme created by federal land policy can we understand states' creation of constitutional property rights for noncitizens.

### B. Property and Naturalization

Members of the first Congress were clearly aware that such alien disabilities in property ownership existed in the common law. As Representative Smith of South Carolina noted in 1790, “[B]y the laws of this country, it is generally understood that aliens cannot hold real estate.”<sup>77</sup> Members considered disrupting this scheme by granting property rights before naturalization, as a matter of federal law.<sup>78</sup> Ultimately, federalism concerns won out: representatives decided that only states could determine the property rights of noncitizens within their borders.<sup>79</sup> Members of Congress instead encouraged migration by crafting a federal naturalization policy that would enable aliens to achieve citizenship—and thus land ownership—relatively quickly. And, as the next section will explain, they placed no bars to alien purchase and ownership of *federal* lands.<sup>80</sup>

Naturalization, property, and the national interest were intimately related in the eyes of the founders. The framers of the Constitution believed that immigration was of vital importance to the future of the colonies and, later, of the fledgling republic.<sup>81</sup> This dynamic was aptly summed up by Daniel Defoe in the early eighteenth century: “[T]he more people, the more trade; the more trade, the more money; the more money, the more strength; and the more strength, the greater the nation.”<sup>82</sup> English controls on naturalization were a significant factor leading to rebellion, and the framers clearly expressed their frustration with the King’s onerous naturali-

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74. KENT, *supra* note 33, at 55–56.

75. *Id.* at 68–70.

76. See discussion *infra* Parts II.C, II.D.

77. 1 ANNALS OF CONG. 1068 (1790).

78. See *infra* note 94 and accompanying text.

79. See *infra* notes 108–112 and accompanying text.

80. See *infra* Part II.C.

81. On the relationship between federal policy and migration, see generally, ZOLBERG, *supra* note 21.

82. DANIEL STATT, FOREIGNERS AND ENGLISHMEN: THE CONTROVERSY OVER IMMIGRATION AND POPULATION, 1660–1760, at 49 (1995).



zation laws in the Declaration of Independence. The King, they complained, “has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”<sup>83</sup> Without a steady influx of immigrants, the colonies would have difficulty maintaining a presence and establishing new ground in the New World.

Between the 1783 signing of the Treaty of Peace and the 1788 ratification of the Constitution, the states issued their own naturalization laws. The requirements for naturalization in these laws were remarkably lax.<sup>84</sup> Essentially, states used their naturalization laws as a means of competing for migrants, which led to some frustration and dissatisfaction among lawyers.<sup>85</sup> By the time of the ratification of the Constitution, there was general agreement that the power to craft a law of naturalization should belong to the federal government alone.<sup>86</sup> “Widespread acceptance of the argument for a national standard,” note James Pfander and Theresa Wardon, “made the transfer of naturalization power to the new federal government one of the least controversial features of the new Constitution.”<sup>87</sup> The federal Constitution thus granted Congress the power to draft “an uniform law of Naturalization” for the entire country.<sup>88</sup>

The first federal naturalization law, enacted by Congress in 1790, made citizenship available to “free white persons” who had resided in the United States for two years and in the state where they sought naturalization for one.<sup>89</sup> Applicants also had to demonstrate “good moral character” and pledge to support the Constitution.<sup>90</sup> These were the only requirements.

Noticeably, the naturalization law enacted in 1790 made no mention of alien property rights; however, the issue of land ownership figured prominently in the debates leading to its adoption.<sup>91</sup> Members were united in their assumption that land and migration were intimately related, and

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83. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

84. See ZOLBERG, *supra* note 21, at 79; see also RANA, *supra* note 21, at 5960 (noting the “lax naturalization policies” promoted in the American colonies).

85. Pfander & Wardon, *supra* note 21, at 383.

86. *Id.* at 385.

87. *Id.*

88. U.S. CONST. art. I, § 8, cl. 4.

89. Naturalization Law of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed by Act of January 29, 1975).

90. *Id.*

91. Debates in the House of Representatives during this era were recorded for posterity; the official record of the debates is published in the Annals of Congress. Senate debates were not recorded, since the Senate met in secret during its first six years. Historians therefore rely on unofficial sources, like the diaries and notes of senators themselves, in order to reconstruct the debates. See The Diary of William Maclay, *supra* note 33, at xi–xiii.

they discussed this dynamic repeatedly. Representative Lawrence of New York opined, “The reason of admitting foreigners to the rights of citizenship among us is the encouragement of emigration, as we have a large tract of country to people.”<sup>92</sup> Representative Page of Virginia plainly recognized the relationship between land, naturalization, and migration: every man who takes the oath of allegiance and intends to reside in the United States, he said, “ought to be enabled to purchase and hold lands, or we shall discourage many of the present inhabitants of Europe from becoming inhabitants of the United States.”<sup>93</sup>

Attentive to the relationship between property rights and settlement, some members proposed including clauses in the federal naturalization law that would explicitly ensure such rights.<sup>94</sup> An early version of the act would have allowed aliens to own land after one year of residence and to hold elective office after two years, even before naturalization.<sup>95</sup> What members called the “progressive”<sup>96</sup> granting of rights over time (that is, the piecemeal granting of rights, such as voting and property ownership, prior to naturalization) received support among representatives for a number of different reasons. Members were in general agreement that alien property disabilities were an impediment to the growth of the republic, and some predicted their eventual demise.<sup>97</sup>

Even those who were in favor of strict naturalization requirements seemed sanguine about removing restrictions on property ownership, especially for resident aliens.<sup>98</sup> Representative Seney, for example, preferred

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92. 1 ANNALS OF CONG. 1111 (1790) (comments of Rep. Lawrence).

93. 1 ANNALS OF CONG. 1115 (comments of Rep. Page).

94. See, e.g., The Diary of William Maclay, *supra* note 33, at 214 (citing Maclay’s support for an amendment to “enable Aliens to hold lands in the United States.”).

95. 1 ANNALS OF CONG. 1109 (summarizing bill).

96. On the “progressive” granting of rights, see, e.g., 1 ANNALS OF CONG. 1119 (comments of Rep. Jackson) (“It was observed yesterday . . . that we could not modify or confine our terms of naturalization; that we could not admit an alien to the rights of citizenship progressively. I shall take the liberty of supporting the contrary doctrine . . . that [in England], not only that citizens are made progressively, but that such a mode is absolutely necessary to be pursued in every act of Parliament for the naturalization of foreigners.”); 1 ANNALS OF CONG. 1116 (comments of Rep. Tucker) (“[N]o doubt the Government had a right to make the admission to citizenship progressive.”). This idea of granting rights progressively, prior to naturalization, was similar to the notion of denization—a status in between alien and citizen—in England and in European countries. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 392 (1765); MICHAEL RAPPORT, NATIONALITY AND CITIZENSHIP IN REVOLUTIONARY FRANCE 48 (2000).

97. See, e.g., 1 ANNALS OF CONG. 1110 (comments of Rep. Page) (arguing that distinctions based on alienage were not appropriate in the United States “where a more liberal system ought to prevail.”); 1 ANNALS OF CONG. 1113 (comments of Rep. Hartley) (noting that he had “no objection” to a clause that would “enabl[e] foreigners to acquire and hold lands on a qualified tenure.”).

98. See, e.g., 1 ANNALS OF CONG. 1118 (1790) (comments of Rep. Smith) (approving a clause that would “let foreigners, on easy terms, be admitted to hold lands” but objecting to a

significant residence requirements for political office-holding, but had “no objection to foreigners being admitted to hold property, without any previous residence.”<sup>99</sup> Representative Clymer thought in terms of migration by both people and money. He argued that “it might be good policy to admit foreigners to purchase and hold lands in fee simple, without ever coming to America; it would, perhaps, facilitate the borrowing of money of Europeans, if they could take mortgages, and be secure.”<sup>100</sup> Similarly, Representative Smith of South Carolina argued for a separate clause to be inserted in the naturalization law, one that would ensure land rights but would not make them dependent on the other requirements of naturalization.<sup>101</sup>

The “progressive” granting of property rights prior to naturalization was unobjectionable in part because a few states had already granted property rights to foreigners. The Pennsylvania Constitution of 1776, for example, granted property rights to aliens who had declared their allegiance to the state and allowed them to be elected to state office after two years as “free denizen[s].”<sup>102</sup> Senator Maclay cited Pennsylvania’s law with approval, noting that it had led to the state’s success in attracting migrants.<sup>103</sup> He encouraged fellow members to model the national law on Pennsylvania’s precedent.<sup>104</sup>

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bill with minimal residency requirements for naturalization); 1 ANNALS OF CONG. 1119 (comments of Rep. Stone) (“A foreigner who comes here . . . is desirous of obtaining and holding property. I should have no objection to his doing this, from the first moment he sets foot on shore in America; but it appears to me, that we ought to be cautious how we admit emigrants to the other privileges of citizenship.”).

99. 1 ANNALS OF CONG. 1122 (comments of Rep. Seney); *see also* 1 ANNALS OF CONG. 1109 (comments of Rep. Hartley) (arguing that the “right to purchase and hold lands” did not have to be dependent on a residency requirement but that voting and office-holding, as well as naturalization itself, should).

100. 1 ANNALS OF CONG. 1121 (comments of Rep. Clymer).

101. 1 ANNALS OF CONG. 1118 (comments of Rep. Smith) (“[T]he object of his colleague was nothing more than to let foreigners, on easy terms, be admitted to hold lands; that this object could be better effectuated by introducing a clause to that purpose.”).

102. PENN. CONST. of 1776, § 42. The Constitution stated:

Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year’s residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence.

*Id.*

103. The Diary of William Maclay, *supra* note 33, at 220 (“The fact is the adoption of Strangers has set Pennsylvania far ahead of her Sister States”).

104. *Id.* at 222 (“For our parts we wished the naturalization bill to be in exact conformity as possible to the existing Laws relating to aliens, in Pennsylvania.”); *see also* 1 ANNALS OF CONG. 1121 (comments of Rep. Clymer) (citing Pennsylvania’s law with approval).

However, other legislators were uncomfortable with granting land rights without a clear statement of allegiance; they argued that either naturalization or some other indication that the alien intended to naturalize was necessary.<sup>105</sup> Representative Tucker thus proposed a compromise, stating that he would permit the extension of land rights to recent immigrants, but would make full title contingent on a three-year probationary period.<sup>106</sup> Three years seemed like enough, apparently, to demonstrate allegiance and an intent to remain.<sup>107</sup>

These proposals to guarantee alien property rights in federal law were popular in principle but lost out to a broader, institutional concern. Legislators argued that the federal government was not the proper creator nor guarantor of such rights.<sup>108</sup> Though the naturalization power belonged to the federal government alone, it was the states, not Congress, that should decide matters of property law and suffrage. They argued that rights of property were properly creatures of state common law, not federal statute. Senator Maclay recounted these arguments against federal grants of alien property rights:

[T]he disability of an Alien to hold lands arose from the common law[ ] & was separable from the rights of Naturalization . . . . When an alien therefore was enabled to hold real Estate it was in reality by repealing part of the common law with respect to him not by giving a power but taking away a disability. It therefore strictly speaking rested, with the respective States whether they would repeal the common Law with respect to Aliens touching the point of holding property and being a pure State concern had no Occasion to be made any mention of in the Naturalization Act but must remain to be settled by the different States by Law . . . .<sup>109</sup>

The argument, then, was that rights *could* be granted “progressively”—that is, prior to naturalization—but the appropriate grantor was the states, not

105. See, e.g., 1 ANNALS OF CONGRESS 1120 (1790) (comments of Rep. Huntington).

106. 1 ANNALS OF CONG. 1124 (explaining that Rep. Tucker “would withdraw, and propose to new model the clause, so as to allow aliens to be admitted to so much of the rights of citizenship as to be able to hold lands, upon taking the necessary oaths,” but “with a proviso, that the titles to real estates should not be valid, unless they continued to reside for the term of three years in America”). As part of this proposal, he suggested a three-year residency requirement for voting and standing for office. *Id.*

107. On the role of declarations of intent in immigration and nationality law, see generally MOTOMURA, *supra* note 21.

108. See, e.g., The Notes of William Paterson, *supra* note 33, at 494 (“[T]enure and protection of property belong to each state”); 1 ANNALS OF CONG. 1123 (comments of Rep. Smeney commenting) (“We can go no further than to prescribe the rule by which it can be determined who are, and who are not citizens; but we cannot say they shall be entitled to privileges in the different States.”).

109. The Diary of William Maclay, *supra* note 33, at 221.

the federal government. As Senator Patterson reflected in his record of the proceedings, “We can make a Citizen; we cannot do less.”<sup>110</sup> The final version of the first naturalization law thus made no mention of alien property or political rights, leaving those for the states to decide.<sup>111</sup> Naturalization was a federal matter, but property and suffrage qualifications ultimately belonged in state law.<sup>112</sup>

The debates over the first naturalization law reveal that members of Congress were aware of alien land restrictions and that they sought to limit the effect of common law disabilities on migrants’ willingness to settle. They did so not by guaranteeing these rights as a federal matter, but instead by crafting a relatively short and simple path to naturalization. Once naturalized, of course, foreign-born residents had the same property rights as all other citizens.

Thus the federal government’s control over naturalization did not translate into control over most other alien rights, which remained the province of the states. The situation was strikingly different, however, within those parts of the United States that were not yet fully incorporated into the union: the federal territories. When it came to governing the territories, the federal government had a much more expansive role to play in the realms of property law and alien rights.

### C. Federal Land Policy and the Territories

With independence and the signing of the Treaty of Peace in 1783, the American colonies gained not only their own freedom but also control over vast landholdings to the West.<sup>113</sup> The fledgling state of Virginia ceded control of the Northwest Territory to the federal government in 1784; this is known as the Virginia cession. The ceded territory covered what would later become the states of Indiana, Illinois, Michigan, Wisconsin, and parts of modern-day Ohio and Minnesota.<sup>114</sup> Over the course of the eighteenth and nineteenth centuries, these landholdings would grow. The United States acquired more acreage due to a variety of factors, including cessions

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110. The Notes of William Paterson, *supra* note 33, at 494.

111. See Naturalization Law of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed by Act of January 29, 1975).

112. The regulation of property continues to be primarily the domain of states. See, e.g., ALEXANDER, RIGHTS OF ALIENS, *supra* note 37, at 98 (“[T]he rules and conditions pertaining to the ownership of property are in the main within the jurisdiction of the several states.”); *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 22 (1990) (O’Connor, J., concurring) (acknowledging “state law as the traditional source of . . . real property interests”); *Sei Fujii v. State*, 242 P.2d 617, 626 (Cal. 1952) (“Congress regulates admission to citizenship, not ownership of property.”). The federal government does have presumptive control over intellectual property and over federally-owned property. See Abraham Bell and Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 n.1 (2005).

113. MARK STEIN, HOW THE STATES GOT THEIR SHAPES 1 (2008).

114. *Id.* at 1–2.

by other states in the 1790s, the acquisition of the Southwest Territory in 1790, the Louisiana Purchase in 1803, and the Mexican cession in 1848.<sup>115</sup>

Congress first faced the question of how to settle and govern these landholdings in 1784, with regard to the Virginia cession lands. Early on, Congress determined that these landholdings would eventually be incorporated as states of the new republic after divisions of each particular territory met certain population and governance requirements.<sup>116</sup> However, how to put the land in the hands of settlers was a different, thornier question. Congress decided not to follow the approach common in European countries, where a sovereign would grant land to a wealthy proprietor, who would then divvy it up amongst settlers.<sup>117</sup> Instead, Congress aimed to put land directly in the hands of settlers.

This approach was first formulated as part of the Land Ordinances of 1784 and 1785.<sup>118</sup> These laws created a market for public lands, using the public land survey system developed by Thomas Jefferson. In crafting the Land Ordinances, Congress intentionally sought to exclude certain buyers from the market. The Ordinances discouraged purchase by squatters (those already living on the land), land speculators (those who would purchase vast acres simply to raise prices and resell), and those of modest means by limiting the total acreage one person could purchase, parceling out the acreage in large, discrete sections, and charging a relatively high minimum purchase price.<sup>119</sup>

Congressional disdain for speculators and squatters is a familiar story; less well known is the extent to which federal land policy depended on a specific vision of foreign settlement. Foreigners featured prominently in congressional debates and official correspondence as likely, and desired, purchasers of the federal lands.<sup>120</sup> Lawmakers imagined an influx of White European migrants who would, they thought, contribute to the republic's White, Christian character.<sup>121</sup>

115. *Id.* at 1–10.

116. ZOLBERG, *supra* note 21, at 68.

117. *See id.* at 67 (noting that “the revolutionary generation adamantly rejected [land] grants as a path to aristocratic corruption”).

118. *See generally* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 21–43 (1987); ZOLBERG, *supra* note 21, at 66–69.

119. *See* ONUF, *supra* note 118, at 30 (“The cost of federal lands under the 1785 land ordinance would block out poor, lazy squatters; instead, the territory would attract industrious settlers determined to recoup their investment by developing their property and finding markets for their products.”). But, by 1817, Congress had lowered the required acreage from 160 to 80 in some areas. ZOLBERG, *supra* note 21, at 118.

120. *See, e.g.*, Letter from George Washington to the President of Cong. (Aug. 22, 1785), in THE WRITINGS OF WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 231 (John C. Fitzpatrick ed., 1988) (noting that the West would “more than probably . . . be composed in a great degree of Foreigners”).

121. Of course, not all Europeans were considered desirable. Benjamin Franklin, for example, was “suspicious” of German immigrants in particular. Glenn Weaver, *Benjamin Franklin and*

Cognizant of the connection between granting land rights and inducing immigration, Congress abandoned common law property restrictions on aliens in the market for public lands. The Land Ordinances placed no restrictions on purchase or ownership by noncitizens.<sup>122</sup> As an observer noted in 1909, “In the acts offering the public lands for sale no requirement has been made of citizenship, or even declaration of intentions [to naturalize]. Such lands have been offered on the same terms to all irrespective of their allegiance.”<sup>123</sup> Because the territories were federal property, the state common law restrictions were understood not to apply, at least as long as the territories remained under federal jurisdiction.

This move to jettison alien property disabilities caused some debate. As the first plots of land were sold in the territories in the 1790s, some representatives in Congress expressed concern about foreigners purchasing land in the same way as citizens. Representative Smith of South Carolina, for example, noted that one prospective purchaser, Hannibal Dobbyn, “is avowedly an alien.”<sup>124</sup> Sale to Mr. Dobbyn presented a problem since, as Smith noted, the states adhered to the common law doctrine prohibiting alien ownership of real estate.<sup>125</sup> Smith thought it would be “a solecism in Government to encourage or countenance the holding of land by such a tenure.”<sup>126</sup> Representative Baldwin, however, countered with his own interpretation of the relationship between the federal government and the states:

There has been some difficulty suggested, whether, by the common law, which is adopted in the several States, an alien can hold real estate in this country. If the common law excludes aliens from possessing lands in their own right, be it remembered that we have not adopted the common law, and therefore are free from its restraints.<sup>127</sup>

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*the Pennsylvania Germans*, 14 WM. & MARY Q. 536, 536 (1957). The Alien and Sedition Acts are another example of congressional animus towards even those of White, Christian identity.

122. The Land Ordinances of 1784 and 1785 made no specifications about the identity of the purchaser—unlike land laws that followed in the nineteenth century, such as the Homestead Act. Unfortunately, the legislative history of the Ordinances of 1784 and 1785 is limited due to the lack of records of congressional debate. See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 64 (1968).

123. Samuel MacClintock, *Aliens Under the Federal Laws of the United States*, 4 ILL. L. REV. 27, 27 (1910).

124. 1 ANNALS OF CONG. 1068 (1790).

125. 1 ANNALS OF CONG. 1068.

126. 1 ANNALS OF CONG. 1068.

127. 1 ANNALS OF CONG. 1071.

In other words, Congress was not bound by state common law. Baldwin's perspective carried the day: ultimately, no alienage restrictions were placed on federal public land purchase until the late nineteenth century.<sup>128</sup>

In addition to granting land rights, congressional plans for settlement of the Western territories also included political rights. Such rights were guaranteed both in The Northwest Ordinance of 1787, which laid the groundwork for governance of the territories and their eventual admission to the union, and also in subsequent ordinances and organic acts that governed additional territories in the West.<sup>129</sup> Residents in the territories could form a governing legislature and petition for statehood once the population reached a specific number of "free inhabitants."<sup>130</sup> Congress intentionally used the word "inhabitant" rather than "citizen" here. The Ordinance enabled aliens to count not only towards the requisite population numbers, but also as voters: section nine stated that noncitizens could cast a vote for their representatives as long as they had a freehold interest in fifty acres of land and two years of residence in the district.<sup>131</sup> Office-holding was extended to noncitizens, as well; they were qualified to run for office as long as they had three years of residence in the district and a freehold interest in 200 acres.<sup>132</sup>

The principles of the Northwest Ordinance were eventually extended, via congressional enactments and enabling acts, to all other territories acquired in the nineteenth century, including lands gained through the Louisiana Purchase and the Mexican cession.<sup>133</sup> In combination, the Northwest Ordinance and the land ordinances provided a strong foundation for noncitizen rights—to both property ownership and the vote—in all of the federal territories.<sup>134</sup>

128. See discussion *infra* Part IV.

129. See An Ordinance for the Government of the Territory of the United States, Northwest of the river Ohio (Northwest Ordinance), 1 Stat. 51 (1787); ONUF, *supra* note 118; Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L. J. 1820 (2011) (tracing the significant influence of the Ordinance, and its extension to other territories in later organic acts, on the states that came under its ambit).

130. Northwest Ordinance, 1 Stat. 51, art. 5.

131. Northwest Ordinance, 1 Stat. 51.

132. *Id.*

133. Hegreness, *supra* note 129, at 1830, 1843–54 (“[T]he principles in the [Northwest] Ordinance were incorporated into the organic law of almost all of the territories before the Civil War as well as many of the states formed in the territories.”). Hegreness does not address the dissemination of the alien suffrage clause in the Northwest Ordinance; his focus is instead on what he calls the “core privileges and immunities,” most of which are in the ordinance’s “Articles of Compact.” *Id.* at 1840–43.

134. There were some land laws that specifically applied to particular territories, such as the Donation Land Act of 1850, which applied to the Oregon Territory. 9 Stat. 496 (1850). These territory-specific laws, like the 1785 Land Ordinance, continued to allow for unfettered purchase and ownership by noncitizens. See *id.*



Though various components of territorial law came under fire, particularly the provisions outlawing slavery,<sup>135</sup> expansive land policies remained. Federal preemption laws, which allowed squatters to make legal claims to land, enabled noncitizen claims. The Preemption Acts of the 1830s allowed “any settler or occupant,” regardless of citizenship, to claim lands that he or she had improved.<sup>136</sup> The Preemption Act of 1841 allowed preemptive claims by noncitizens who had filed declarations of intent to naturalize.<sup>137</sup> The declaration of intent could be filed immediately upon arrival in the country; it was the first step towards naturalization, which could be achieved under the Naturalization Act of 1795 after five years of residency.<sup>138</sup> This language of declarant eligibility was also used in the 1850 Donation Land Claim Act, which allowed homesteading in the Oregon Territory.<sup>139</sup> The Homestead Act of 1862, like the Donation Act, granted homesteads not only to citizens but also to those who had declared their intent to become citizens.<sup>140</sup> There was a key limitation, however: title would not vest in the declarant noncitizen until he had naturalized.<sup>141</sup>

The ability of aliens to *purchase* federal land remained free of either naturalization or declaration of intent requirements; as the Attorney Gen-

135. See, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 38–39 (2d ed., 2001).

136. 4 Stat. 420 (1830) (opening the possibility of a preemption claim to “every settler or occupant” in possession of public lands). On the preemption laws, see EVERETT DICK, *THE LURE OF THE LAND* 50–69 (1970); MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS* 161–176 (1990).

137. § 10, 5 Stat. 452, 455 (1841).

138. See Naturalization Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (1795) (repealed by Act of April 14, 1802) (requiring that immigrants file a declaration of intent three years before admission as a naturalized citizen); PRENTISS WEBSTER, *LAW OF NATURALIZATION IN THE UNITED STATES AND IN OTHER COUNTRIES* 54 (Little Brown, 1895) (noting that the declaration could be filed upon arrival or at a later time, but that at least two years must have elapsed between declaration and the application for naturalization); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 *GEO. IMM. L. J.* 479, 509 (1999). Declarations of intent were removed as a requirement of naturalization in 1952. Immigration & Nationality Act of 1952, ch. 477, § 334(f), 66 Stat. 163, 254–55 (1952).

139. Land Donation Act of 1850, ch. 76, § 4, 9 Stat. 496–97 (1850).

140. It provided:

[A]ny person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands . . . .

Homestead Act of 1862, ct. 75, 12 Stat. 392 (1862).

141. *Id.* The Act stated that title could vest after five years of occupation if the homesteader was “at that time a citizen of the United States” and if he or she (for widows could ripen a claim as well) could prove occupation and improvement of the land.

eral wrote in an opinion regarding an 1854 land law, “But what is there in the act to forbid the alien to purchase . . . in open competition with all the world, as he may other public lands? I do not perceive anything.”<sup>142</sup>

Over time, then, the land ordinances and the Northwest Ordinance created a federal policy of alien property and political rights. Aliens’ rights to purchase and possess public lands were at times challenged, but such challenges were largely unsuccessful. Only the 1840s declarant requirement for preemption grants limited the rights initially implemented by these ordinances.<sup>143</sup> Not until 1887 would Congress prohibit alien purchase of public lands, and that prohibition was significantly qualified by an exception allowing noncitizens who had filed declarations of intent to purchase.<sup>144</sup>

Territorial governments did not have to abide by the demands of the ordinances once they became states; with statehood, they gained sovereignty over voting qualifications and procedures within their jurisdiction.<sup>145</sup> Most of the territories received large grants of federal land upon their admission to the Union, and state governments had power to define the property rights relating to these grants of land, as well as those relating to properties that had already been purchased in the state.<sup>146</sup> Newly-admitted states could have decided to abandon alien property rights and alien suffrage. Yet many of these states continued to provide aliens with more expansive rights.<sup>147</sup> Federal law thus set the stage for these immigrant-friendly state policies, both by creating communities accustomed to noncitizen rights and, as we will see in Part II, by encouraging the settlement of aliens themselves, who could then expend political power in territorial legislatures and, ultimately, constitutional conventions. The following sec-

142. 7 U.S. Op. Att’y. Gen. 351, 354 (1855).

143. Daniel Feller notes that land policy remained remarkably constant, even during the era of reform in the 1830s and 1840s. DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 194–95 (1984).

144. Act of March 3, 1887, ch. 340, 24 Stat. 476 (1887); see discussion *infra* note 294.

145. The federal government retained control over public lands in the states that experienced a territorial phase, but the new states were otherwise supposed to be sovereign, “on an equal footing as the original states.” Northwest Ordinance, 1 Stat. 51 (1787); see also ONUF, *supra* note 118, at 67–68.

146. See GATES, *supra* note 122, at 285–318 (surveying grants state-by-state). Some grants of land to the states were restricted for particular purposes, but states could in many cases decide to use the lands differently. The federal government retained control over those federal public lands not granted to the states, in all states except for the original 13 and Texas. *Id.* at 317.

147. A full survey of the position of aliens in all states that experienced territorial government is outside the scope of this article. Others have discussed the prevalence, and continuation, of alien suffrage in former territories. See, e.g., RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES*, 15–25 (noting that Congress repeatedly sanctioned alien suffrage in the territories); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 65 (rev. ed., 2009); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1406–09 (1993).

tion explores the influence of these federal policies on one phenomenon in particular: the adoption of property rights for noncitizens in state constitutions.

## II. CRAFTING CONSTITUTIONAL PROPERTY RIGHTS FOR NONCITIZENS

In the nineteenth century, eleven states added provisions to their state constitutions guaranteeing property rights for noncitizens. All but two—West Virginia and California—were federal territories prior to attaining statehood. Two—Wisconsin and Michigan—were states formed out of the Northwest Territory.<sup>148</sup> Five—Arkansas, Colorado, South Dakota, Wyoming, and Iowa—were entirely or partially products of the 1803 Louisiana Purchase.<sup>149</sup> California was part of the prize of the Mexican cession in 1846.<sup>150</sup> Finally, West Virginia was carved out of the state of Virginia during the Civil War.<sup>151</sup> Thus, before achieving statehood, the majority of those states adopting constitutional property rights for noncitizens were subject to federal land policies. This section focuses on the antebellum adopters of alien land rights: Iowa (1846), Wisconsin (1848), California (1849), and Michigan (1850).<sup>152</sup> These four states were followed by seven others after the Civil War.<sup>153</sup>

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148. STEIN, *supra* note 113, at 2.

149. *Id.* at 2–5.

150. *Id.* at 5–6.

151. *Id.* at 6–7.

152. The convention debates for these four states can be found in the following sources: J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA (D.C., J.T. Towers 1850) [hereinafter CALIFORNIA DEBATES]; WIS. CONVENTION OF 1847, *supra* note 31; REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN (Lansing, R.W. Ingals 1850) [hereinafter MICHIGAN DEBATES]; BENJAMIN FRANKLIN SHAMBAUGH, THE STATE HISTORICAL SOC'Y OF IOWA, FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 (Iowa City, State Historical Soc'y of Iowa 1900) [hereinafter FRAGMENTS OF THE IOWA CONVENTIONS]; WIS. CONVENTION OF 1846, *supra* note 59.

153. Twenty-seven states experienced territorial law in the nineteenth century and also became states in the nineteenth century. See U.S. DEPT. OF COMMERCE, *U.S. Territory and Statehood Status by Decade, 1790–1960*, U.S. CENSUS BUREAU (Feb. 21, 2013), <http://www.census.gov/dataviz/visualizations/048/508.php>. The states that constitutionalized alien property rights in the nineteenth century were in the minority: ten of the adopters had experienced territorial law (all but two, West Virginia and California, were organized territories at some point in the nineteenth century). This does not mean, however, that these other states were not amenable to alien property ownership. Some passed such laws via statute. See KENT, *supra* note 33, at 102, 107, 115. A full explication of these other states' policies is beyond the scope of this article. My exploration here focuses on explaining this moment of constitutionalizing alien property rights. I argue that federal influence was a key factor. The fact that it was not uniformly influential in all states governed by territorial law in the nineteenth century does not mean that it was not influential in those states that did adopt these rights.

There were key similarities among these four states. First, each was sparsely populated; the extant populations were comprised in part by Native Americans, and in California, by Mexican Americans. Three of the four states—Iowa, Wisconsin, and California—had only recently been admitted to the Union. In these states, alien property rights were included in the first state constitutions. Michigan had been admitted as a state in 1837 and included an alien property rights provision in its 1850 constitution.<sup>154</sup> Each of the four state governments were actively concerned with increasing their state's population, both to achieve the requisite numbers for statehood—in the case of Iowa, Wisconsin, and California—and to ensure a prosperous future. Some lawmakers desired migration not only to increase the population and wealth of the state, but also to oust Native American and Mexican American residents. Alien land rights acted then, as they did in the late eighteenth century, as a direct inducement to settlement and, by extension, to Western conquest.<sup>155</sup>

The economic and political pressure to encourage immigration was strong, but it was not the only factor leading to the inclusion of alien property rights in state constitutions. Such provisions were also influenced by the particular legal traditions of the territories, which diverged substantially from that of the Eastern seaboard states. Wisconsin, Michigan, and Iowa each had been governed prior to statehood by federal territorial law, which, as Part I explained, granted noncitizens the same rights of property as citizens. California had been a part of Spain and then Mexico prior to statehood, and Mexican law, like most civil law systems in this era, did not distinguish between citizens and aliens in property ownership.<sup>156</sup> Federal policy and the influence of Mexican law thus set the stage for alien rights in the new states of the West.

This section begins by describing the transition from territory to state and the important role of state constitutions in this process. It then uses the state constitutional convention debates to flesh out the causes and consequences of constitutionalizing alien property rights. In short, state delegates transformed immigrant-friendly practices into constitutional law. In doing so, they asserted and reinforced a particularly American conception of property, pursuing widespread, democratic land ownership. This was in direct contrast to the aristocratic and feudal traditions of the English common law, of which alien property disabilities were an important part.

#### A. *From Territory to State: The Process of Creating Constitutions*

The Northwest Ordinance laid out an orderly procedure for eventual self-government of the lands covered by the act. Once a population

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154. See MICH. CONST. OF 1850, art. 18, § 12.

155. See sources cited *supra* note 152.

156. See BURGE, *supra* note 49, at 697–98, 704 (noting the absence of alien property disabilities in the civil law codes of Spain and France).

reached five thousand male inhabitants, the residents could elect a territorial legislature.<sup>157</sup> This was the first step in territorial organization. Upon reaching a population of sixty thousand free inhabitants, they could seek an Enabling Act from Congress, allowing the territory to convene a constitutional convention.<sup>158</sup> The process was similar for lands gained through the Louisiana Purchase, and Congress passed additional organic acts that extended the Northwest Ordinance principles to territories acquired later on.<sup>159</sup>

Michigan, Iowa, and Wisconsin all shared a common territorial area. Both Wisconsin and Iowa had been a part of the Michigan Territory, which split off from the Illinois Territory when Illinois became a state in 1818. The Michigan Territory was a combination of lands gained through the Virginia cession and the Louisiana Purchase. When Michigan became a state in 1837, the remaining Michigan Territory lands were transferred to the Wisconsin Territory.<sup>160</sup> Iowa, then a part of the Wisconsin Territory, was organized as a separate territory in 1838. The southeastern portion of the Iowa Territory was admitted as the state of Iowa in 1846, and Wisconsin followed in 1848.

Territorial organization, which started with the election of a territorial legislature, provided a strong incentive for settlement. The population of the Midwest grew rapidly in the 1830s and 1840s. The Wisconsin Territory grew from an estimated three thousand persons in 1830 to more than one hundred fifty-five thousand in 1846.<sup>161</sup> The Iowa Territory grew from a population of approximately twenty three thousand in 1838 to more than eighty thousand by 1846.<sup>162</sup> Michigan had a population of more than two hundred thousand in 1840; this number would quadruple by 1860.<sup>163</sup>

California followed a different path than the other three antebellum adopters. In California, it was not territorial organization but gold that caused an exponential jump in population and settlement.<sup>164</sup> In 1846—at

157. Northwest Ordinance, § 14, 1 Stat. 51 (1787).

158. *Id.*

159. See Hegreiness, *supra* note 129, at 1845–54.

160. Act of Aug. 6, 1846, ch. 89, 9 Stat. L. 56; Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 WIS. L. REV. 648, 654 n.23 (1949).

161. Brown, *supra* note 160, at 648–49.

162. Leonidas Goodwin, *The American Occupation of Iowa, 1833 to 1860*, 17 IOWA J. HIST. & POL. 83, 89 (1919).

163. 2 HENRY M. UTLEY AND BYRON M. CUTCHEON, MICHIGAN AS A PROVINCE, TERRITORY AND STATE, THE TWENTY-SIXTH MEMBER OF THE FEDERAL UNION 337 (1906); MICHIGAN NONPROFIT ASSOCIATION & COUNCIL OF MICHIGAN FOUNDATIONS, MICHIGAN IN BRIEF 2–3 (2002), available at <http://www.michiganinbrief.org/edition07/Chapter1/Chapter1.htm> (last modified Apr. 1, 2002).

164. H.W. BRANDS, THE AGE OF GOLD: THE CALIFORNIA GOLD RUSH AND THE NEW AMERICAN DREAM 23–24 (2003) (noting that the California gold rush “triggered the most astonishing mass movement of peoples since the Crusades”).

the conclusion of the U.S.-Mexico War—Mexico ceded California, as well as all or most of present-day Arizona, Utah, Nevada, Colorado, New Mexico, and Wyoming.<sup>165</sup> Unlike the Midwestern states, California did not go through a period of territorial governance. It was under military control until it was admitted as a state in 1850, and state leaders held a constitutional convention and ratified their constitution without the permission of Congress.<sup>166</sup> The state was thus never organized as a territory; it skipped from the status of unorganized territory directly to statehood. Although California differed from the other states mentioned in this respect, it had a similar relation to federal land law: the land ordinances that governed federal public lands still applied in California, just as they did in the other Western states (with the exception of Texas, which retained sovereignty over its public lands upon its admission as a state in 1845).<sup>167</sup> California, though, was also supposed to abide by the treaty provisions established in 1848, which guaranteed the property rights of Mexican landholders.<sup>168</sup>

When constitutional convention delegates met in these states in the 1840s and 1850s, they followed the requirements laid out in the federal ordinances and treaties. They also had a sense of power and choice. As legal scholar Christian Fritz shows, Western convention delegates in the nineteenth century drew upon compilations of state constitutions, legal treatises, and other materials as they drafted their own constitutions.<sup>169</sup> In many ways, these fledgling state constitutions were not much different from previous late eighteenth- and early nineteenth-century state constitutions. They contained discrete sections: preamble and boundaries; a bill of rights; and separate sections on legislative, judicial, and executive func-

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165. LAURA E. DAVIS, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 4 (2008).

166. See DAVID ALAN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890*, at 23–31, 101–38 (1992).

167. GATES, *supra* note 122, at 303 (noting that Congress admitted California with an express provision that “there should be no interference with the [federal] primary disposal of the public lands”).

168. Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., arts. XIII–IX, Feb. 2, 1848, 5 U.S.T. 217 [hereinafter Treaty of Guadalupe Hidalgo].

169. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations On State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L. J. 945, 975–83 (1994) [hereinafter Fritz, *The American Constitutional Tradition Revisited*] (“Virtually all state conventions were influenced by earlier constitutions, constitutional experience, practice, and interpretations.”); see also GORDON M. BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING, 1850–1912*, at 12 (1987) (“The tradition [in the Rocky Mountain states] was one of borrowed provision and periodic innovation reflective of contemporary concerns.”).

tions.<sup>170</sup> They generally addressed the same core topics. Delegates engaged in “extensive borrowing,” Fritz writes, in both form and substance.<sup>171</sup>

Yet the constitutions they developed were not purely derivative. Delegates “still discussed and wrestled with constitutional ideas”; they compared constitutions with an eye towards deciding what made the most sense for their particular place and population.<sup>172</sup> They differed quite significantly in the range of additional topics covered. As Fritz and other scholars have shown, delegates in the mid- to late-nineteenth century began a trend of constitutional legislation, meaning they were comfortable incorporating regulations into their constitutions that might earlier have been considered inappropriate.<sup>173</sup> They embraced a far greater level of specificity and detail, for better or worse. They also began to grant more expansive rights than those granted by the federal Constitution (a trend that continues today).<sup>174</sup> These trends set the stage for careful attention to and vigorous debate of property rights. Delegates felt empowered to consider such rights outside of traditional common law restraints.

### B. *Of State Power and Alien Rights*

Questions about the proper extent of alien civil rights featured prominently in constitutional conventions in the states that emerged from the Western territories. The rights of property and of suffrage were the two primary concerns, and they were often interwoven.<sup>175</sup> Delegate W.H. Clark gave a stirring defense of alien suffrage in the Wisconsin debates of 1846: foreigners left the “ties of friendship, of kindred, and of home,” and “came to America, paid their money into the treasury of the United States, and became tenants of a large portion of the public domain, and have therefore a common interest with and an attachment to the community

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170. See Fritz, *California's First Bill of Rights*, *supra* note 11, at 31 (describing the general contours of mid-nineteenth century constitutions).

171. Fritz, *The American Constitutional Tradition Revisited*, *supra* note 169, at 981.

172. *Id.* See also Fritz, *California's First Bill of Rights*, *supra* note 11, at 15 (“[T]he nineteenth century state constitutional conventions produced constitutions that reflected both continuities with eighteenth century American constitutionalism and the concerns of the age in which they were created.”).

173. See generally Fritz, *California's First Bill of Rights*, *supra* note 11.

174. See Kermit Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 388–89 (Paul Finkelman & Stephen E. Gottlieb eds., 2009); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 97 (1998) (“[S]tate constitution-makers . . . came to view constitution making as a progressive enterprise, requiring the constant readjustment of past practices and institutional arrangements in light of changes in circumstance and political thought.”); *CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS*, at xiii–xiv (G. Alan Tarr, ed., 1996).

175. See discussion *infra* Part III.B, at 149–51.

and consequently the right of suffrage.”<sup>176</sup> Land rights—first guaranteed by federal land policy—ripened into political rights, in Clark’s view and those of other supporters of alien suffrage.

But in order to grant political and property rights to noncitizens, delegates had to agree it was within their power to do so. State convention delegates understood that Congress retained the power to govern naturalization, but some were uncertain about whether that naturalization power controlled or restrained the states in their treatment of noncitizens.<sup>177</sup> Delegate J.A. Barber of Wisconsin argued, for example, that in choosing to grant suffrage to foreigners “we are exercising a power of naturalization we do not possess, and violating the Constitution of the United States.”<sup>178</sup> During the Iowa debates, one delegate argued that granting suffrage to noncitizens would be a violation of the federal Constitution, “admitting persons to privileges of citizenship, who had never renounced their allegiance to a foreign power.”<sup>179</sup>

However, those arguing that states had the power to grant noncitizens more extensive rights were more persuasive. Delegates pointed out that states had long regulated immigrants in various ways. Naturalization, they conceded, was a federal prerogative, but the regulation of alien rights prior to naturalization was left to the states.<sup>180</sup> Granting civic and political rights to foreigners was not a violation of federal government power over naturalization, according to Wisconsin delegate George Ryan, but instead “the simple and unquestionable exercise of a sovereign power which the states have never surrendered, and which almost every state has in one way or another continually exercised: the sovereign power of denization.”<sup>181</sup> Barber agreed that aliens in the territory of Wisconsin were akin to “denizens,” defined by Blackstone as “a person not a native or a naturalized citizen or subject, but occupying a middle space.”<sup>182</sup> Barber noted that foreigners in the Wisconsin Territory could “inherit, hold, and transmit real estate,” hallmarks of denizenship.<sup>183</sup>

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176. WIS. CONVENTION OF 1846, *supra* note 59, at 277 (internal quotation marks omitted). Clark based his argument for a membership based on community ties on Jefferson’s drafting of the Virginia constitution, which extended the vote to “[a]ll men who have sufficient evidence of a common interest in, and attachment to, the community . . . .” *Id.* at 276–77.

177. *Id.* at 275 (“Sentiments have been strongly entertained by many men . . . that to confer the elective franchise upon the foreigner before he becomes a citizen of the United States is in conflict with the naturalization laws thereof.”).

178. *Id.* at 236.

179. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 45.

180. Not until the 1870s did Congress begin to assert its plenary power over immigration. Even after this, states retained the power to set rules regarding the rights of aliens in their midst, as long as those rules did not infringe upon the federal government’s enforcement of its ever-expanding immigration regulation efforts.

181. WIS. CONVENTION OF 1846, *supra* note 59, at 254.

182. *Id.* at 236.

183. *Id.*



Delegates found support for their arguments in favor of state power over alien rights in other states' laws. Two other states, North Carolina and Pennsylvania, had granted full property rights to noncitizens in their 1776 constitutions.<sup>184</sup> There were state statutes that permitted aliens to own property, either in fee simple or with less onerous disabilities.<sup>185</sup> Other states and localities permitted aliens to vote.<sup>186</sup> Wisconsin delegate Ryan mentioned these statutory provisions in passing, when arguing for the power of states to grant voting rights to noncitizens.<sup>187</sup> He argued that, based both on prior statutes and constitutional provisions, granting alien suffrage was “no new thing, no unsanctioned thing, no unusual thing, no unauthorized thing. It is the simple exercise, in one form, of a power which almost all the states appear to exercise in some form.”<sup>188</sup>

Some delegates considered legislation a more appropriate place than a state constitution to deal with land rights, but this was a minority view.<sup>189</sup> As one delegate argued, “[c]ircumstances might occur which would render a modification of these rights necessary, and the legislature could then restrict them.”<sup>190</sup> Placing such rights in the constitution prohibited the legislature and courts from rescinding them at a later date.

Some delegates argued that not only *could* they extend property rights to noncitizens, they *had* to do so because of federal precedent in the territories, or, in the case of California, because of the treaty guarantees.<sup>191</sup> As the next two sections explain, these arguments proceeded from both retrospective and prospective points of view. In other words, delegates wanted to promote future immigration to the state via land rights, but they also wanted to protect the ownership rights of those residents who had

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184. PENN. CONST. OF 1776, § 42 (“Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate.”); N.C. CONST. OF 1776, § 40, reprinted in *THE AMERICAN’S GUIDE* 190 (Hogan & Thompson, 1835) (“That every foreigner who comes to settle in this state, having first taken an oath of allegiance to the same, may purchase, or, by other just means, acquire, hold, and transfer land, or other real estate, and after one year’s residence be deemed a free citizen.”). Pennsylvania jettisoned this provision in 1790, although it included a clause guaranteeing “[t]hat all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of . . . acquiring, possessing, and protecting property.” PENN. CONST. OF 1790, art. 9, § 1, reprinted in *THE AMERICAN’S GUIDE* 135 (Hogan & Thompson, 1835). North Carolina removed the provision guaranteeing alien land rights in 1868. See N.C. CONST. OF 1868.

185. See KENT, *supra* note 33, at 55–56.

186. See KEYSSAR, *supra* note 24, at 27–28.

187. See WIS. CONVENTION OF 1846, *supra* note 59, at 259–60.

188. *Id.* at 261.

189. See, e.g., WIS. CONVENTION OF 1847, *supra* note 31, at 94, 95 (noting that these were “mere legislative details, having no appropriate place in the constitution”).

190. *Id.* at 126.

191. See *infra* notes 205, 206 and accompanying text, Part II.C.

purchased property during the territorial period and were not yet naturalized citizens.

### C. Protecting Property

By rejecting strictures on voting and property-holding in federal territorial law, Congress facilitated the growth of an enfranchised, propertied immigrant population in the West. The presence of land-owning, enfranchised noncitizens within the territories influenced the constitutional debates in those states that adopted immigrant-friendly provisions. Conventions in each state included delegates of foreign birth.<sup>192</sup> Native-born delegates were aware and tried to be responsive to their immigrant constituents.<sup>193</sup> This turned the conversation into one about protecting vested interests in property, rather than one focused solely on attracting prospective migrants.

The first provision protecting alien property rights to be successfully introduced in a nineteenth-century constitution was the outcome of a motion by a German-born naturalized citizen and delegate to the Iowa constitutional convention of 1844 named Henry M. Salmon.<sup>194</sup> Salmon had arrived via steamboat up the Missouri River in Fort Madison, Iowa, with his wife on August 6, 1836—less than ten years prior to the constitutional convention.<sup>195</sup> He opened the territory's first drug store, called the "Good Samaritan," shortly thereafter.<sup>196</sup> Salmon introduced the provision grant-

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192. The California Convention of 48 delegates included seven native *Californios*, born in the region before American occupation, and five delegates born in Europe. JOHNSON, *supra* note 166, at 104–05. The Wisconsin Convention of 1846 included thirteen foreign-born delegates and at least eight first-generation immigrants, out of 124 total delegates. WIS. CONVENTION OF 1846, *supra* note 59, at 756–800. The Michigan delegation of one hundred included eight foreign-born delegates. MICHIGAN DEBATES, *supra* note 152, at v–vi. The Iowa Convention of 1844 included only three foreign-born delegates, out of a total of seventy-two, but two of these were particularly influential in the debates: German-born delegate Henry Salmon introduced the provision guaranteeing noncitizen property ownership, and Irish-born delegate Michael O'Brien introduced the provision supporting alien suffrage. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 408–10.

193. See, e.g., WIS. CONVENTION OF 1847, *supra* note 31, at 172 (comments of Mr. Lakin) ("We hear members of this convention threatening to vote down the constitution, unless we make provision for the foreign vote. They say that their constituents are principally foreigners, and that they are all-powerful."). Lakin opposed alien suffrage but noted that "[a] large portion of those whom I have the honor, in part, to represent, are foreigners—English, Irish, German, and others, from various parts of the world." *Id.*

194. THE HISTORY OF LEE COUNTY, IOWA 392 (Chicago, Western Historical Co. 1879).

195. *Id.*

196. *Id.* at 292. Salmon ran this business until he died in 1873; his son, J.F. Salmon, then took it over. Records indicate that Salmon was a well-respected member of the community. His home was one of three used for township elections in 1842 and he served as chairman of the county board of supervisors in the 1860s. He was a charter member and officer of the Concordia Lodge in 1861. *Id.* at 392, 547, 564, 597, 611. One contemporary reminisced that Salmon "had a monopoly of selling whisky for the thirsty and the traveling men"; this reputation likely contributed to his general popularity. *Id.* at 666.

ing property rights to noncitizens on the seventh day of the Iowa constitutional convention, when the delegates were discussing a draft of the Bill of Rights. Salmon proposed adding a clause stating that “[f]oreigners who are residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native citizens of the United States.”<sup>197</sup> The proposition was “unanimously agreed to.”<sup>198</sup>

There are many fascinating questions about this episode, the answers to which have likely been lost to history. Why did Salmon introduce the provision? Had he experienced difficulties in acquiring and transferring property? Were there others in Lee County who had encouraged him to propose such a provision? Was he influenced by extant provisions? And why did the delegates vote in favor of the clause? Such unanimity was not present in the states to follow; in Wisconsin and California there were at least some expressions of doubt or concern about alien land rights, and the votes were not unanimous.<sup>199</sup> While we cannot know with certainty the answers to these questions, we can make some general observations drawn from the regional history and other parts of the debates that help explain this important constitutional event. Salmon may not have suffered alien property disabilities, given the federal law in force in the territory. However, he was likely sensitive to land rights given the history of land tenure in Germany. As historian Mark Wyman notes, many Irish and German migrants had struggled in their home countries with finding and holding onto land. Farmers in those countries “had been forced onto smaller and smaller landholdings that by the 1840s were being taken away by wealthy landlords.”<sup>200</sup> Land was central to the decision of many emigrants to leave their home countries, so it is not surprising that land rights were a concern upon their arrival in the United States.

Salmon’s amendment resonated beyond Iowa’s boundaries. The committee to draft a Bill of Rights for the California Convention looked to two other states’ constitutions for guidance: New York’s and Iowa’s.<sup>201</sup> California’s property provision, along with twelve other provisions, was lifted directly from the Iowa constitution, according to the chair of the Bill of Rights committee.<sup>202</sup> California delegates did try to make some changes; a suggestion to include the word “permanent” before the word

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197. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 41. Salmon himself was not on the committee to draft the bill of rights, but instead on the State Boundaries committee. *Id.* at 9.

198. *Id.* at 41.

199. See CALIFORNIA DEBATES, *supra* note 152, at 43; WIS. CONVENTION OF 1847, *supra* note 31, at 127.

200. MARK WYMAN, IMMIGRANTS IN THE VALLEY: IRISH, GERMANS, AND AMERICANS IN THE UPPER MISSISSIPPI COUNTRY, 1830–1860, at 70–71 (1984).

201. CALIFORNIA DEBATES, *supra* note 152, at 31.

202. *Id.* (noting that “the first eight sections [of the draft Bill of Rights] . . . were from the Constitution of New York; all the others were from the Constitution of Iowa”).

“resident” was rejected, but one to include “bona fide” before “resident” succeeded.<sup>203</sup> Two delegates tried to eviscerate the provision; one sought to replace the word resident with the word “citizen,” which would have undermined the entire premise, and another proposed to strike the provision all together. However, this suggestion was overruled in a vote of twenty-five to eleven.<sup>204</sup> California thereafter adopted the Iowa clause almost verbatim, adding the minor requirement that noncitizens be “bona fide” residents of the state.<sup>205</sup>

The California debates also leave unanswered questions, since there was little recorded discussion of the provision besides the various amendments to change the wording.<sup>206</sup> There was no clear contribution here from a delegate of foreign birth, as there was in Iowa, but we do know that a fair portion of the overall delegation in California were either of foreign birth or had been born in Alta California while it was still a part of Mexico. Of the forty-eight delegates, seven were native *Californios*—those who had been born in California prior to American occupation—and five had been born in Europe.<sup>207</sup> The remainder hailed from states in the East. The committee that first introduced the draft Bill of Rights was comprised of twenty delegates, five of whom were native *Californios*.<sup>208</sup> The significant number of delegates of Mexican and European birth may have influenced the ultimate adoption of the foreign property rights provision.

Another, perhaps concurrent, explanation for the adoption of this provision is California’s treaty obligation. Protection of noncitizen property was a treaty requirement after the U.S.-Mexico War. Articles VIII and IX of the Treaty of Guadalupe Hidalgo protected property holdings of Mexican citizens within the new territory.<sup>209</sup> Delegates of Mexican de-

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203. *Id.* at 43.

204. *Id.*

205. *Compare id. with* FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 41.

206. The provision was likely discussed in committee, but committee debates were not included in the official record.

207. JOHNSON, *supra* note 166, at 104–05. European delegates had emigrated from five different countries: Spain, Scotland, Switzerland, Ireland, and France. *Id.*

208. *See* CALIFORNIA DEBATES, *supra* note 152.

209. *See* Treaty of Guadalupe Hidalgo, *supra* note 168. Article VIII states, in part:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax, or charge whatever. . . . In the said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties [sic] equally ample as if the same belonged to citizens of the United States.

scent, along with others, reminded the convention of these treaty requirements with regard to suffrage;<sup>210</sup> it is not unrealistic to think that they did so with regard to property rights as well.

Wisconsin's two conventions were also both comprised of fair numbers of foreign-born delegates.<sup>211</sup> In 1848, the successful provision—and the first to depart in wording from Iowa's precedent—was introduced by Morritz Schoeffler, a delegate from Milwaukee County.<sup>212</sup> Schoeffler was born in Germany in 1813 and traveled to the U.S. in 1842. He arrived in Wisconsin in 1844.<sup>213</sup> A prominent member of the Milwaukee community, Schoeffler published the first German-language paper in the state and served as school commissioner and register of deeds.<sup>214</sup> As an immigrant and a delegate from a heavily-immigrant county, Schoeffler was committed to protecting the rights of noncitizens. In addition to promoting alien property rights, he also argued forcefully for the continuation of alien suffrage.<sup>215</sup> His provision—introduced as an amendment to the committee report—passed by a vote of 43 to 18.<sup>216</sup>

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*Id.* Article IX states:

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

*Id.*

210. See, e.g., CALIFORNIA DEBATES, *supra* note 152, at 63.

211. See sources cited *supra* note 192.

212. WIS. CONVENTION OF 1847, *supra* note 31, at 127. Schoeffler's provision, later adopted, stated that "[n]o distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property." *Id.* Delegates preferred this wording to an alternate version, introduced by the committee, which would have restricted rights to those who had declared their intent to naturalize. See *id.* This version also allowed that "property of foreigners who may die within three years after their arrival in this state, or in the United States, and without such declaration of intention, shall not escheat to the state or United States." *Id.* Schoeffler's amendment was a significant simplification since it removed escheat proceedings for all resident foreigners.

213. Schoeffler, Moritz, in CLIFFORD NEAL SMITH, EARLY-NINETEENTH CENTURY GERMAN SETTLERS IN OHIO (MAINLY CINCINNATI AND OTHER ENVIRONS), KENTUCKY AND OTHER STATES 37 (1984).

214. Moritz Schoeffler, 1813–1875, WISCONSINHISTORY.ORG, [http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term\\_id=2597&term\\_type\\_id=1&term\\_type\\_text=people&letter=S](http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term_id=2597&term_type_id=1&term_type_text=people&letter=S) (last visited Nov. 12, 2013).

215. See, e.g., WIS. CONVENTION OF 1847, *supra* note 31, at 93, 190.

216. *Id.* at 127.

As in California, there was little direct discussion of alien property rights in the debates surrounding Michigan's constitution of 1850. The convention to revise the 1835 constitution consisted of one hundred delegates, eight of whom were born outside the United States: one each from England, Ireland, and Scotland, and five from Canada.<sup>217</sup> The vast majority were born in New York or one of the New England states. We have no direct evidence that these foreign-born delegates had a direct impact on the adoption of the constitutional provision; there was no specific vote on this clause in particular. It is interesting to note, however, that all eight of the foreign-born delegates hailed from countries with British legal traditions, and that three of the delegates were lawyers.<sup>218</sup> We can surmise that these British-born migrants were aware of English land policies and the American alternatives. Thus foreign-born delegates may have had an influence on the provision adopted in Michigan as well.

While delegates were certainly interested in attracting new immigrants to their state, the property provisions were also the product of a desire to protect vested interests in property. As Wisconsin delegate George Gale remarked, to refrain from offering such protection in the constitution would be an "extreme injustice," since "[t]he organic act and the present laws of Wisconsin, had held out the inducement to foreigners to possess, enjoy, and transmit real estate . . . ."<sup>219</sup> Another delegate, Mr. Judd, noted that "[f]oreigners are, and will continue to be daily buying and selling lands," and that he had "personally witnessed forty such transfers within the six months past." Judd continued, "If now, it was to be declared that only those who had already become citizens, should hold their lands, the effect would be to rip up, nullify, and destroy all contracts of this kind." If foreigners who had relied on the prospect of land ownership when deciding to move to the state were unfairly barred by the imposition of the common law, the effect, Judd argued, "would be in the highest degree disastrous . . . ."<sup>220</sup>

Delegates also made clear that failing to include property rights in the constitution—or restricting them by citizenship—would not just affect future migrants, but would also work an injustice on current noncitizen residents. Here, delegates used territorial law to argue on moral as well as legal grounds. A proposed limitation on such rights, as several delegates noted, was not "in accordance with the laws of the United States."<sup>221</sup> Another delegate noted that such a limitation would be "opposed to the ordinance and laws of congress."<sup>222</sup> A provision guaranteeing property rights

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217. MICHIGAN DEBATES, *supra* note 152, at v–vi.

218. *Id.*

219. WIS. CONVENTION OF 1847, *supra* note 31, at 94.

220. *Id.* at 95.

221. *Id.* at 93.

222. *Id.* at 94.

to resident aliens, on the other hand, “was just what the laws of the United States conferred upon them.”<sup>223</sup> Delegates thus argued that ensuring alien property rights was a necessary and just continuation of extant practices, required either under federal land law or, in the case of California, the treaty signed with Mexico.

The presence of an active and enfranchised alien population was thus one of the most important preconditions for the passage of these immigrant-friendly constitutional provisions. Salmon, Schoeffler and other foreign-born delegates—including both noncitizens and naturalized citizens—ensured that their own property rights, as well as the property rights of their noncitizen constituents, would be protected. And in doing so, they also set the stage for active recruitment of immigrants in the future.

#### D. *Attracting Migrants, Redefining Membership*

The pragmatic, instrumental goal of constitutionalizing alien land rights was attracting migrants. Convention debates evidence an appreciation for the role of migration in both the past and the future of the polity. As one Wisconsin delegate (dramatically) phrased it: “Wisconsin owes all to emigration—foreign emigration—even to her very existence today as a civilized state. And shall we resist our destiny, or foster it?”<sup>224</sup>

Western governments competed actively for European migrants immediately after achieving statehood by creating state commissions to recruit immigrants. Commissioners opened offices in New York and traveled throughout Europe advertising their states. Wisconsin was the first to create a state-run “commission of emigration,” but it was followed shortly thereafter by many others—Michigan, Iowa, and Arkansas among them.<sup>225</sup> States published manuals for migrants in multiple languages, touting the advantages of their particular climates, resources, and land laws.<sup>226</sup> Migrants themselves published manuals of advice to other emigrants, giving advice and weighing the strengths and weaknesses of the various western states.<sup>227</sup> State constitutional provisions that removed noncitizen property

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223. *Id.* at 107.

224. WIS. CONVENTION OF 1846, *supra* note 59, at 264.

225. Theodore C. Blegen, *The Competition of the Northwestern States for Immigrants*, 3 WIS. MAG. OF HIST. 3, 4 (1919); Beverly Watkins, *Efforts to Encourage Immigration to Arkansas, 1865–1874*, 38 ARK. HIST. QUAR. 32, 37–61 (1979).

226. Blegen, *supra* note 225, at 4, 13–18 (noting that states in the Midwest “carried on comprehensive and ingenious campaigns” to attract migrants, including the publication of state pamphlets).

227. *See, e.g.*, CARL DE HAAS, HINTS FOR IMMIGRANTS (Julius Bädecker Verlag et al. eds., 1848); SAMUEL FREEMAN, THE EMIGRANT’S HANDBOOK AND GUIDE TO THE STATE OF WISCONSIN (1851); MARK WYMAN, IMMIGRANTS IN THE VALLEY: IRISH, GERMANS AND AMERICANS IN THE UPPER MISSISSIPPI COUNTRY, 1830–1860, at 71 (1984) (“By 1840 several thousand Irish and Germans had gone to America. Many of them wrote travel books for the home market, and all formed a new base or haven for the next traveler.”).

disabilities were one additional measure to attract settlers, for they signaled to migrants the desirability and inclusivity of the state. Property law became a new tool in the state competition over immigrants.

Some commentators at the time interpreted these provisions as merely instrumental measures. The *Chicago Daily Tribune*, in an article critical of Iowa's constitutional provision, opined in 1886 that "[t]he laws granting special privileges to aliens were adopted in the Western States . . . when the population was sparse, land plenty, and everybody [was] anxious to adopt any measure that would 'bring money into the country.'"<sup>228</sup>

To reduce the constitutional property provisions to utilitarian interest alone, however, missed their broader significance. Some delegates conceived of the extension of property rights to noncitizens as an expression of a more inclusive ideology of membership in the American polity. In their estimation, one did not have to be a citizen to have a place in the community. Foreigners, even those who had not officially declared their allegiance to the United States, could contribute economically and politically to the polity. Extending property rights to foreigners was thus a recognition of their belonging. Sometimes delegates made both instrumental and ideological arguments in a single breath: delegate Beall remarked in the 1847 Wisconsin debates that a proposed section limiting property rights to naturalized citizens "would be depriving foreigners of the most essential privilege that freemen could enjoy, and," he hastened to add, would "operate as a severe check upon immigration."<sup>229</sup>

Delegates agreed, for the most part, on the need to attract migrants to the state, but they were not always in agreement on the proper means of doing so. A vocal minority in Wisconsin preferred to keep property rights restricted to those who had declared an intent to naturalize. The delegate who drafted this provision was himself an immigrant. James De Noon Reymert migrated to the United States from Norway in 1842. He arrived in Wisconsin in 1844, just three years before the second constitutional convention to which he was elected delegate. Reymert published the first Norwegian newspaper in the country and was an active proponent of emigration from Europe.<sup>230</sup> His proposed provision limiting property rights to those who had declared their intent to naturalize was not rooted in a nativist impulse. Instead, according to the debates, Reymert had protectionist concerns. A fellow member of Reymert's committee described his rationale this way: migrants "have every inducement held out to them to come here—but none whatever to become citizens."<sup>231</sup> Their proposal was de-

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228. *Alien Landlordism in Iowa*, CHI. DAILY TRIB., Feb. 13, 1886, at 4.

229. WIS. CONVENTION OF 1847, *supra* note 31, at 92.

230. DICTIONARY OF WISCONSIN HISTORY, <http://www.wisconsinhistory.org> (search "James DeNoon Reymert").

231. WIS. CONVENTION OF 1847, *supra* note 31, at 93 (comments of Mr. Sanders).



signed, he noted, “especially for their own benefit—to make them renounce their allegiance to the country from which they came, and to take the oath of allegiance to our own government. In a word, to Americanize them, and make them citizens.”<sup>232</sup> Requiring a declaration of intent first was “an act of charity,” argued another delegate, one that would rightly “compel foreigners to become citizens.”<sup>233</sup>

The proposal to limit property rights to those who had declared their intent to remain in the state thus struck off a more nuanced conversation about how best to attract migrants: was it better to reserve full property rights to declaring immigrants and thereby encourage all immigrants to naturalize as soon as possible? Or was it preferable to grant land rights to all immigrants regardless of their intent to naturalize? This was a reprise of the debates in Congress over the 1790 Naturalization Act. Some favored restricting land rights in order to encourage naturalization, while others favored expanding land rights in order to encourage settlement. Both camps assumed the desired outcome was the eventual full incorporation of these migrants into the American polity. Those opposed to Reymert’s provision limiting property rights to declarant noncitizens stressed the legal havoc it might wreak on both current and prospective noncitizen landholders. One delegate appealed directly to Reymert’s constituents: “Was [Reymert] willing,” Mr. Gale asked, “that if a Norwegian should come with a numerous family and invest his all in a quarter section of land, and should then die, that that land should revert to the state of Wisconsin, and his children thrown upon the world, without a dollar to assist them . . . ?”<sup>234</sup>

In the end, none of the first four adopters of constitutional property rights for noncitizens made property rights dependent on the filing of a declaration of intent to naturalize. Delegates in these states opted for a more expansive view of membership. Immigrants did not have to be naturalized citizens, or to declare their intent to naturalize, in order to contribute economically and to participate politically. The move to constitutionalize noncitizen property rights thus grew out of an instrumental need for settlers as well as a more expansive view of foreign membership in the polity.

#### E. *Modernizing Property Law*

Arguments for the extension of property rights to noncitizens were accompanied by assertions of a specifically “American” vision of property law, one that was rooted in equality rather than “monarchy, aristocracy, or monopoly.”<sup>235</sup> Delegates who were in favor of noncitizen property rights focused on the ways these provisions would be in line with, as one delegate

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232. *Id.*

233. *Id.* at 95 (comments of Mr. Doran).

234. *Id.* at 94 (comments of Mr. Gale).

235. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 331.

called it, “the liberal and enlightened policy of the age.”<sup>236</sup> A Wisconsin delegate and Irish immigrant, Daniel Harkin, asked and answered his own rhetorical question: “*Ques.* What constitutes the keystone in the arch of our liberty? *Ans.* The right of soil vested in the occupant.”<sup>237</sup> What made the U.S. different from Europe, Harkin argued, was both its republican political system and its distinctive property law: “[H]ere . . . we have no kings, no counts, no ecclesiastical dominion; the poor man is not humbled by paying feudal service to a lord, nor harassed by tithes or game laws. No, sir, they are the owners of the soil they till.”<sup>238</sup> Harkin, then, was one of many who made the connection between liberty, property, and state progress.

Delegates envisioned themselves getting rid of feudal relics, including the alien land laws.<sup>239</sup> A textual analysis of these constitutions reveals a common anti-feudal theme. For example, Wisconsin’s Constitution of 1848 included a section, immediately preceding the alien property clause, stating that “all lands within the state are declared to be allodial, and feudal tenures are prohibited.”<sup>240</sup> This statement was followed by a provision outlawing imprisonment for debt, which delegates considered a particularly distasteful relic of the feudal system. Similarly, Michigan’s Constitution of 1850 included a provision, also immediately preceding the alien land clause, outlawing long-term in-kind agricultural leases, which were perceived as creating a feudal obligation.<sup>241</sup>

In public opinion and legal treatises alike, these changes often took the form of continued critiques of England and the “Old World.” Delegates staked their claims on uniquely “American” notions of property and liberty.<sup>242</sup> A Chicago paper, for example, criticized the lack of alien rights

236. JOURNAL OF THE WIS. CONVENTION, *supra* note 189, at 93.

237. THE CONVENTION OF 1864, *supra* note 59, at 250. Harkin was born in Ireland in 1799 and was one of the early settlers of Kenosha County. *Id.* at 775.

238. *Id.* at 249.

239. See JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE (1998) (noting that this “rather anachronistic aversion to feudalism . . . appeared in several state constitutions of the vintage of Iowa’s”).

240. WIS. CONST. OF 1848 art. 1, § 14. Most antebellum conventions were a mix of lawyers and farmers. At times, the legal terminology was aggravating to those not as schooled in the law; as one reporter remarked during the Wisconsin debates of 1846: “[A]fter the explanation . . . that the word ‘allodial’ meant ‘my own’ and that if a man possessing an estate died without heirs, his estate did ‘escheat’ to the state—after that explanation—I came to the conclusion that my land is my own unless I get cheated out of it, and if I died without heirs it will go to the attorney general.” WIS. CONVENTION OF 1846, *supra* note 59, at 518.

241. MICH. CONST. OF 1850, art. 18 §, 12 (“No lease or grant hereafter of agricultural land for a longer period than twelve years, reserving any rent or service of any kind, shall be valid.”); see also WIS. CONST. OF 1848 art. 1 §, 14 (also prohibiting long-term in-kind agricultural leases).

242. See, e.g., MICH. DEBATES, *supra* note 152, at 642 (comparing the “inalienable rights” of “American citizens” with the “feudal despotism” of England); WIS. CONVENTION OF 1846, *supra* note 59, at 631 (declaring the doctrine of coverture to be “a remnant of the feudal system,

in England and drew parallels between the treatment of aliens and citizens there. “It is true that England treats the majority of her own subjects, through her laws of primogeniture and entail, almost as harshly as aliens,” the article asserted; English property laws were “a disgrace in a country claiming to be civilized” and would “drive[] England to a new revolution.”<sup>243</sup>

In these states, residents were catching the wave of property reform instigated during the Revolution; feudal relics, they hoped, would no longer bind the rights of property holders. This attitude comports well with the philosophy of Jacksonian democracy, which privileged the expansive rights of White men (and sometimes women), regardless of their place of birth. As historian David Alen Johnson writes, “Central to antebellum America’s rhetoric of popular democracy was a correlation between liberty and individual freedom in a market economy.”<sup>244</sup>

Property, in this view, had the power to both attract and educate immigrants. Delegates placed faith in the power of property to Americanize oppressed peoples from the “Old World.” Property ownership itself would be a key first lesson. This was an argument noted in congressional debates over the 1852 Homestead Act: “As soon as he finds himself in possession of a home of his own, and occupying a position that makes him a free man . . . he will and must feel proud of American citizenship. He becomes identified with us in hopes, in interest, in feeling.”<sup>245</sup>

The vision that emerged from the debates on noncitizen property laws emphasized both the liberative power of property—that is, property’s power to free White men from tyranny and oppression—and its essential role in economic development. Here were both proprietary and commodity views of property, to use Gregory Alexander’s terms.<sup>246</sup> Granting noncitizens property rights would lead to a better, more democratic society, while also abandoning strictures that would prevent the easy market alienability of property.

The effort to include alien property rights in antebellum constitutions comprised both a rejection of feudalism and an embrace of a different stance towards property, one that saw widespread property ownership, free of state interference or dependence, as essential to the democratic project.

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which ought to be abolished, and the sooner the better”); *id.* at 277 (contrasting the “tyranny” and “aristocracy” of England and Europe with “America . . . the land where the ‘blessings of government, like the dews of heaven, descend alike upon the rich and the poor’”).

243. *Rights of Aliens in England*, CHI. TRIB., Jan. 29, 1868, at 2. Ironically, it was England, not the United States, that abandoned all strictures on alien property rights, just two years after this article was published, in the Naturalization Act of 1870. See discussion *supra* Part II.D.

244. JOHNSON, *supra* note 166, at 121.

245. CONG. GLOBE, 36th Cong., 1st Sess. 1672 (1860) (comments of Rep. Cyrus L. Dunham of Indiana).

246. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 24, at 1–2 (defining the “commodity” and “propriety” views of property).

Yet this was a limited liberative vision. As the following Part explains, the goal was not to attract any and all settlers, but rather a particular kind of settler, namely White Europeans.

### III. PROPERTY RIGHTS AND THE POLITICS OF EXCLUSION

The vision of widespread, democratic property ownership did not extend to certain potential landowners in these fledgling states, namely free Blacks and Native Americans. The extension of property rights was contingent upon certain assumptions about the origin, race, and location of the property owners. These assumptions become clear when we look to concurrent constitutional convention debates over Black migration, universal suffrage, and the influence of foreign corporations.

Examining concurrent debates also helps illuminate the relationship between property, citizenship, and race. The separation of civil rights from citizenship cut both ways: it enabled some foreigners to enjoy certain rights without attaining formal citizenship, while at the same time enabling denial of the rights of others. In this way, the choice to disconnect rights from citizenship—that is, to make rights of property and suffrage not dependent on citizenship status—was both inclusive and exclusive, benefitting foreigners and harming citizens of color.<sup>247</sup>

This section first describes delegates' efforts in the states that adopted noncitizen property rights to prohibit or discourage the migration of Blacks. It then explores the role of race in the debates about the relationship between property and suffrage. Finally, it describes the explicit limitations within the constitutional provisions (which granted rights to "resident" aliens only) and the underlying fear of foreign corporate influence. The racialized assumptions in the debates and the specific legal exclusions of the constitutional provisions help explain the persistence of alien land restrictions in the twentieth century, which will be the subject of Part IV.

#### A. *Black Migration*

The urge to attract European migrants had an undercurrent: the fear of some delegates that immigrant-friendly policies would attract free Blacks. Delegates in Iowa, California, and Michigan considered provisions that would have outlawed the migration of free Blacks to those states. They were in good company: territories throughout the West passed, or considered passing, restrictive "Black laws" during the antebellum era.<sup>248</sup> During the California convention, delegates introduced and debated a provision that would have "prohibit[ed] free persons of color from immigrating to

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247. African Americans were, in Mae Ngai's terminology, "alien citizens," treated as outsiders despite their formal right of territorial membership. See Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521 (2007).

248. See generally BERWANGER, *supra* note 27.

and settling in this state.”<sup>249</sup> The proposal failed, but not because of lack of popular support; rather, delegates feared that Congress would not grant statehood if such a provision were in the state constitution.<sup>250</sup> California delegates did succeed in limiting suffrage to “white males,” with the express intent of preventing persons of color—Blacks and Indians—from voting.<sup>251</sup>

During the Iowa convention of 1844, a provision that would have obligated the state legislature “to pass laws to exclude from the state blacks and mulattoes” failed by only three votes.<sup>252</sup> Proponents of the measure argued that Iowa would be “overrun” by the “broken-down negroes of Missouri,” a neighboring slave state. Representative Baily remarked that his constituents “did not want negroes swarming among them.”<sup>253</sup> The provision failed, as it did in California, because of fears that Congress would not approve a constitution containing such a clause. Those voting against the exclusionary provision could rest assured, said one delegate, that the legislature “would undoubtedly take measures to that effect” after Iowa became a state.<sup>254</sup> The territorial legislature of Iowa had already done so in 1838, when it passed a law that required free Blacks to post bond upon their entrance to the state and to possess a “certificate of freedom.”<sup>255</sup> The new state legislature would do so in 1851, after the constitution’s adoption.<sup>256</sup> Delegates kept such language out of the constitution out of concerns for attaining statehood, but knew that their own state—as well as many others in the West—had already prohibited movement via statutory law.<sup>257</sup>

Delegates viewed the extension of civil rights to free Blacks as a dangerous inducement to their migration. In Michigan, for example, Representative Britain argued that extending civic privileges like suffrage would cause Michigan to be “overwhelmed with colored persons from the

249. CALIFORNIA DEBATES, *supra* note 152, at 48.

250. *See id.* at 337–38; *see also* JOHNSON, *supra* note 166, at 129.

251. CALIFORNIA DEBATES, *supra* note 152, at 341 (recording the successful amendment “inserting the word ‘white’ before ‘males’ and striking out the words ‘Indians, Africans, and descendants of Africans’”).

252. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 156.

253. *Id.* at 155.

254. *Id.* at 156.

255. BERWANGER, *supra* note 27, at 32.

256. *Id.* at 43.

257. Ohio, Indiana, and Illinois all considered prohibitions on the migration of free Blacks in their constitutional conventions earlier in the century. All three eventually adopted statutory restrictions on movement in the 1830s. Restrictions throughout the region in this era extended both to movement (requiring free Blacks to have certificates of freedom and post bond upon entrance to the state), as well as to civil rights (excluding Blacks from the franchise, militia service, and courtrooms). *See* BERWANGER, *supra* note 27, at 30–51. On Ohio, *see* Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373, 382–89 (2004).

south,” and that delegates should take up a policy generally to “discourage the settlement of colored people in our State.”<sup>258</sup> Delegate Leach, who was in favor of Black suffrage, parodied the concern for migration: “Thousands there are who raise their hands in holy horror at the thought that it will fill our state with negroes. ‘We shall be flooded with them,’ says the objector. ‘They will come upon us in swarms, like locusts of Egypt, until the land will be darkened.’”<sup>259</sup> (Leach then proceeded to provide population statistics for those states with race-neutral suffrage, demonstrating no such “flood” had ever occurred.)<sup>260</sup>

No constitutional provisions were introduced in these four states that explicitly or directly limited Black citizen landholding. However, one provision recommended by a delegate in the Wisconsin Convention of 1846 may have been calculated to achieve this end. The provision would have limited land rights to those who were eligible to become citizens.<sup>261</sup> The naturalization law at that time allowed only free White persons to naturalize, and there were ongoing debates about whether freed slaves were legal citizens,<sup>262</sup> though *Dred Scott v. Sanford* temporarily settled this debate.<sup>263</sup> Such a provision, if it had been adopted, would have limited land ownership by race.<sup>264</sup>

The extension of land rights to noncitizens was portrayed by some as an important bulwark against the encroachment of “uncivilized” persons in the state. The specter of “amalgamation” appeared repeatedly, as those opposed to Black migration into the state painted a picture of interracial marriage and social intermingling.<sup>265</sup> An influx of foreigners, on the other hand, did not worry the delegates in this way; as one argued, “the foreigners will eventually be with us one people, and we should grant them the privileges asked.”<sup>266</sup> Michigan Representative Britain’s support for civil rights for foreigners and disdain for extending similar rights to Blacks was premised on the same conclusion: “Encourage them, and they will come

258. MICHIGAN DEBATES, *supra* note 152, at 294–95.

259. *Id.* at 288–89.

260. *Id.*

261. See WIS. CONVENTION OF 1846, *supra* note 58, at 213.

262. See, e.g., CALIFORNIA DEBATES, *supra* note 152, at 331 (comments of Mr. McCarver) (“It has been contended by my friend here (Mr. Norton), that negroes are citizens; that a resident is a citizen, and consequently entitled to all the rights and privileges here enjoyed by citizens of the States generally. Now, we all know how this matter stands there; we are well aware that negroes are not regarded as citizens.”).

263. See *Dred Scott v. Sanford*, 60 U.S. 393, 427 (1856).

264. It was, as it turns out, a foreshadowing of the anti-Asian land laws, which prohibited those “ineligible for naturalization”—at that time, a category that included all those of Asian nationality—from leasing or owning property. See Tirres, *supra* note 1, at 94–96, 101–07.

265. See, e.g., WIS. CONVENTION OF 1846, *supra* note 59, at 214 (arguing that “[i]t was not right to mingle together two races whom God had declared could not mingle”).

266. MICHIGAN DEBATES, *supra* note 152, at 492; see also WIS. CONVENTION OF 1846, *supra* note 59, at 235 (noting with favor the “amalgamation” of “different national elements”).

amongst us.”<sup>267</sup> Encouraging foreign migration would not only boost the state’s settled population, it would also leave less room for unwanted Black migrants. In this sense, property reforms were, in legal scholar Kunal Parker’s words, “making blacks foreigners” while simultaneously making foreigners American.<sup>268</sup>

### B. Property and Suffrage

Granting property rights for foreigners in state constitutions signaled widespread acceptance of the disassociation of civil rights and citizenship: one did not have to be a citizen to have rights of ownership.<sup>269</sup> In convention debates, delegates repeatedly expounded a vision involving gradations of membership, which would allow the extension of rights to aliens. This perspective on citizenship—that it was separate from rights—was essentially inclusive, since it opened up rights of landholding to foreigners, enabling them to participate in the economic development of the country and to establish a foothold in their communities. This theme of inclusiveness would reappear in a different form decades later, when the Supreme Court ruled in *Yick Wo v. Hopkins* that the Fourteenth Amendment applies to noncitizens.<sup>270</sup> As Justice Matthews stated in that case, “[the] provisions [of the Fourteenth Amendment] are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws.”<sup>271</sup>

One of the arguments that delegates had to rebut when seeking to constitutionalize noncitizen property rights was that land rights and suffrage were necessarily connected. Owning property, paying taxes, and voting had been tied together in the republican imagination since the Revolutionary era. Delegates in Wisconsin had to be convinced that separating land ownership and taxation from voting was acceptable. Some argued for delaying taxation until suffrage was granted; Representative Leach argued during the 1850 Michigan debates that “as long as you deny the right of voting to a whole class [of foreigners], you should exempt their property [from taxation].”<sup>272</sup> Most disagreed with Leach, arguing that it was possible to disassociate property ownership and voting rights. This dis-

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267. MICHIGAN DEBATES, *supra* note 152, at 256.

268. Parker, *supra* note 27, at 81.

269. The converse was true as well in the nineteenth century: that those who were citizens did not have to have civil rights. See *Bradwell v. State*, 83 U.S. 130 (1872) (ruling that a married woman, though a citizen, could be prevented from admission to the state bar based on gender); see also *Minor v. Happersett*, 88 U.S. 162, 177 (1874) (holding that “the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage” and upholding Missouri’s law limiting suffrage to males).

270. 118 U.S. 356 (1886).

271. *Id.* at 369.

272. MICHIGAN DEBATES, *supra* note 152, at 851.

association was in accord with retreats from property qualifications for the vote generally.<sup>273</sup>

Proponents of alien suffrage argued that voting itself should be separate from citizenship. As Representative Ryan insisted in the Wisconsin debates of 1846, “suffrage is not citizenship, nor citizenship suffrage.”<sup>274</sup> Some commentators saw a unifying principle in extending the right to vote to all “inhabitants,” whether foreign-born or Black. Others preferred to grant the vote discriminately, to those who merited the right. “In regard to negro suffrage, I am in favor of withholding the elective franchise from the colored man for the same reason I would confer it upon the foreign population,” stated W.H. Clark in the Wisconsin debates.<sup>275</sup> To Clark, the franchise should be given only to those who were capable of feeling a strong and lasting attachment to the country. Those of the “African race” were unable to do so, he argued, whereas migrants—even relatively recent ones—had demonstrated appropriate attachment. Wisconsin supported such a bifurcation in the Constitution of 1846, which restricted voting rights to “white citizens” and “white persons, not citizens of the United States,” who had declared their intent to apply for naturalization and had taken an oath of allegiance.<sup>276</sup> Notably, the Wisconsin Constitution of 1847, which was ratified by the people, removed the racial restriction; it provided suffrage for all male citizens and for White male foreigners who had declared an intent to naturalize. The debates reveal that the abolitionist vote may have played a large role. In fact, some blamed the failure of the ratification of the 1846 Constitution on abolitionists who refused to vote for a document that did not provide race-neutral suffrage.<sup>277</sup> In Wisconsin, then, anti-slavery sentiment benefitted both foreigners and Blacks.

Arguments about suffrage were inextricably linked with arguments about property. In California, for example, delegates argued against suffrage for free Blacks or Indians on the basis of their inability to support themselves. Free Blacks, according to the convention’s president, were a threat because they “have never been freemen; [they] have never been

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273. Delegates expressed disdain for property qualifications. See, e.g., WIS. CONVENTION OF 1846, *supra* note 59, at 245 (comments of Rep. Burchard) (“[A] property qualification is an old and exploded doctrine.”).

274. *Id.* at 259. This argument would also appear in cases dealing with woman suffrage. See, e.g., *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that the Fourteenth Amendment does not guarantee the right of suffrage as one of the “privileges and immunities” of a citizen).

275. WIS. CONVENTION OF 1846, *supra* note 59, at 278.

276. WIS. CONST. OF 1846, art. 8, sec. 1. This section also extended the franchise to “all civilized persons of the Indian blood, not members of any tribe of Indians.” Wisconsin delegates refused to decide the question of Black suffrage in the convention, instead sponsoring a popular referendum on the issue. The extension of suffrage to Blacks failed by a vote of 15, 415 to 7,664. Brown, *supra* note 160, at 687.

277. WIS. CONVENTION OF 1847, *supra* note 31, at 25–26; BROWN, *supra* note 160, at 92–93.



accustomed to provide for themselves.”<sup>278</sup> A similar line of reasoning was put forward regarding Indian suffrage. As historian David Alan Johnson summarizes, in the view of some California delegates, “‘Wild Indians and Africans were, by reason of race, dependent beings and, as such, open to manipulation by designing (White) men who by controlling their livelihood controlled their votes.’”<sup>279</sup> Under this racial logic, those who were territorial outsiders—who still owed allegiance to a different country or sovereign—could have a greater claim to the right to vote than those who were born and raised on American soil. There was to be no “Americanization” through property ownership for these citizens, such as that delegates envisioned for the European serf.

### C. Residence and Fear of Corporate Influence

Race was a key factor in the debates over the adoption of property rights for foreigners, but it was not the only category of exclusion. The four early-adopter states each extended property rights to noncitizens, but each extension included a key limitation: property rights were granted to *resident* aliens only. Three of the early adopters—Iowa, California, and Michigan—limited property rights to aliens who were state residents, specifically. There was little discussion of the inclusion of the word “resident,” but the discussion that did take place indicates a concern for the actions of foreign land speculators and wealthy aristocrats, who would purchase land from afar without necessarily making an effort to improve or settle it. As one Wisconsin delegate remarked, “What guarantee have we, that the grandees of Europe would not come in and monopolize our very best lands. That they would not actually crowd our own hard-working and industrious citizens from the market.” He argued that given this possibility of foreign monopoly, the state “had the right to require the residence and service of the owners of our soil, as a return to the protection extended to their property.”<sup>280</sup>

Animosity towards corporations, both foreign and native, was widespread during this period.<sup>281</sup> An Iowa delegate proposed a separate section in the Bill of Rights that would have prohibited foreign corporations from holding land within the state without the express permission of the legislature.<sup>282</sup> This failed to pass, but such sentiments reappeared a few decades

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278. MADISON, *supra* note 152, at 138.

279. JOHNSON, *supra* note 166, at 126.

280. WIS. CONVENTION OF 1847, *supra* note 31, at 93.

281. On the Grange movement, see generally D. SVEN NORDIN, *RICH HARVEST: A HISTORY OF THE GRANGE, 1867–1900* (1974). On the expression of corporate animosity in state constitutions, see, e.g., G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, in *CONSTITUTIONAL POLITICS IN THE STATES* 3, 15 (G. Alan Tarr ed., 1996) (describing state constitutional efforts to limit corporate power in the late-nineteenth century).

282. FRAGMENTS OF THE IOWA CONVENTIONS, *supra* note 152, at 159.

later, when the Grange and other agrarian movements directly targeted foreign corporate landholding.<sup>283</sup>

At least one delegate spoke in favor of extending rights to all foreign purchasers, whether residents or not, on the basis of fairness and efficiency in the distribution of property. Whether buying from afar, through a land agent, or within the state, the title obtained at the land office “was as good a one as any native born citizen could get, and the state had no right to interfere with such a *bona fide* purchaser.” To restrict property rights to resident aliens only, this delegate argued, would not be “dealing in good faith” with foreign purchasers. These arguments failed to carry the day; a motion by another delegate to strike the word “resident” from the provision was voted down.<sup>284</sup>

The debates and the surrounding political context reveal clearly the impetus for limiting property rights to resident aliens: fear of foreign influence, particularly foreign corporate influence. The residence requirement had a particular purpose: to ensure that noncitizen property rights furthered the economic welfare of the state. Property rights were granted to noncitizens as part of a scheme of Americanization of foreigners. This scheme would be undermined if those who were not planning to establish themselves in the state were allowed to purchase and sell land. By retaining the connection between residence and property rights, these states kept the door open for a continuing controversy over foreign ownership rights, one that would play out in new ways in the twentieth century.

#### IV. THE PERSISTENCE OF A DIFFERENCE

The antebellum constitutional provisions in Iowa, Wisconsin, California, and Michigan influenced other states after the Civil War. Between 1868 and 1890, seven states added clauses guaranteeing resident alien property rights to their constitutions.<sup>285</sup> It appeared to be the start of a long-term trend; the delegates in Iowa and the states that followed likely thought they were engaging in a long-overdue modernization of property law, one of many to take place in the nineteenth century.<sup>286</sup>

Yet instead of widespread constitutionalization of alien property rights, the trend essentially ended and in some cases reversed in the twentieth century—even in those states that already had expanded property rights on the books. Only one state, New Mexico, adopted a new constitutional provision guaranteeing alien property rights in the twentieth cen-

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283. See, e.g., Roger V. Clements, *British-Controlled Enterprise in the West between 1870 and 1900, and Some Agrarian Reactions*, 27 *AGRICULTURAL HIST.* 132, 139–41 (1953).

284. WIS. CONSTITUTIONAL CONVENTION, *supra* note 152, at 127.

285. See *supra* note 17 and accompanying text.

286. See, e.g., BANNER, *supra* note 65, at 4–22.

tury, and it passed an amendment limiting such rights a decade later.<sup>287</sup> Of the thirteen states that adopted constitutional provisions extending property rights to noncitizens in the eighteenth and nineteenth centuries, six later repealed them or passed directly conflicting statutes. Four states—Washington, South Carolina, Oklahoma, and Florida—created constitutional provisions barring property ownership by resident and non-resident foreigners or by those ineligible for naturalization.<sup>288</sup> The common law restrictions persisted in many states.<sup>289</sup> Today, the majority of states—thirty-six to be exact—have some form of alien property restriction on the books.<sup>290</sup> The variability is striking, but the overall landscape is one of continuing (if under-enforced) restriction, rather than an expansion of property rights.

Why did restrictive property provisions persist, rather than die out all together like primogeniture, coverture, and the fee tail? The answer lies, in part, in the constitutional provisions themselves.<sup>291</sup> They were adopted with certain assumptions in mind: that the beneficiaries were of a certain origin (European), a certain race (White), and a certain location (within

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287. N.M. CONST. OF 1910 art. II, § 22. The original section stated: “[N]o distinction shall ever be made by law between resident aliens and citizens, in regard to the ownership or descent of property.” *Id.* This section was amended in a special election on September 20, 1921. The 1921 amendment stated:

Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico.

N.M. CONST. OF 1910 art. II, § 22 (amended 1921). This section remained in the constitution until 2006, when it was repealed all together. See Kevin Johnson, *New Mexico's Alien Land Law Repealed*, IMMIGRATIONPROF BLOG (Nov. 8, 2006), [http://lawprofessors.typepad.com/immigration/2006/11/new\\_mexicos\\_ali.html](http://lawprofessors.typepad.com/immigration/2006/11/new_mexicos_ali.html) (noting the role of law students and advocacy groups in pushing for repeal); see also NEW MEXICO LEGISLATIVE COUNCIL SERVICE, *PIECEMEAL AMENDMENT OF THE CONSTITUTION OF NEW MEXICO, 1911–2010* (2011) (discussing the New Mexico constitution and the amendment of section 22); CHUCK SMITH, *THE NEW MEXICO STATE CONSTITUTION: A REFERENCE GUIDE* 16 (1996).

288. FLA. CONST. art. I, § 2 (stating, in part, that “ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law”); S. C. CONST. art. III, § 35 (“It shall be the duty of the General Assembly to enact laws limiting the number of acres of land which any alien or any corporation controlled by aliens may own within this State.”); OKLA. CONST. art. XXII, § 1 (stating, in part “[n]o alien or person who is not a citizen of the United States, shall acquire title to or own land in this state”); WASH. CONST. art. II, § 33 (repealed 1966) (“The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state.”).

289. See POLLOCK & MAITLAND, *supra* note 36; KENT, *supra* note 33, at 40–73.

290. Tirres, *supra* note 1, at Part II.A.

291. General suspicion of foreigners certainly has also played a role; as Polly Price notes, “‘fear’ of aliens” has “withstood differing social forces that affected other common-law property doctrines.” Price, *supra* note 32, at 205.

the territory). A restriction based on residence was explicitly included in the provisions and the racialized nature of the rights granted was apparent within the context of their passage. Yet each of these assumptions about the identity of the property holder was challenged by new waves of migrants from diverse parts of the world and by technological advances that enabled land ownership from afar.

In the latter half of the nineteenth century and throughout the twentieth, alien property disabilities proved resilient. Such restrictions served new social functions, including protecting small domestic farmers against foreign corporate takeover.<sup>292</sup> In Iowa, for example, legislators proposed and passed an amendment in 1886 that prohibited non-resident aliens from holding property. The law was intended to prevent the scourge of “alien landlordism,” which, according to an article in the *Chicago Tribune*, “has proved a drain on the country and retarded its progress”; the article further describes alien landlordism as “a political danger as well as an economic evil.”<sup>293</sup> Given the Iowa constitution’s limitation of property rights to resident aliens, this statute would seem to be redundant. It was clearly a political move, a way to broadcast anti-foreign and anti-corporate sentiment.

Federal land law changed, as well. In 1887, due to anti-corporate pressure, Congress passed a law prohibiting the purchase of land by aliens who had not declared their intent to naturalize.<sup>294</sup> The declarant provision had been a part of preemption acts since the Homestead Act of 1862, but, as we have seen, it had never applied to lands obtained through direct purchase from the federal government. It was no coincidence that this law was passed just a few years after Congress declared all Chinese immigrants ineligible for naturalization.<sup>295</sup> The new federal land law effectively barred Chinese immigrants from purchasing federal public land, since they were no longer eligible to naturalize.

In the early twentieth century, alien land laws continued as a legal mode of race discrimination and took various anti-Asian forms. The expansive property rights granted by California’s 1850 constitution were directly contradicted by statutes passed in the early twentieth century barring aliens “ineligible for naturalization” from owning or leasing property.<sup>296</sup> During the Cold War, alien land laws became a political tool, used to punish those with connections to communist countries. States adopted “Iron Curtain Statutes” that barred persons from these countries from inheriting property in the United States.<sup>297</sup> In recent years, alien property

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292. McGovney, *supra* note 32, at 33.

293. *Alien Landlordism in Iowa*, CHI. DAILY TRIB., Feb. 13, 1886, at 4.

294. 24 Stat. 476 (1887).

295. 22 Stat. 58 (1882). This category was later expanded to include all those from Asian countries with the Act of 1917 (creating the “Asiatic barred zone”). 39 Stat. 874 (1917).

296. See Villazor, *supra* note 1.

297. Tirres, *supra* note 1, at 96–97, 107–09; William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643, 646–47 (1985).

restrictions have emerged in ordinances prohibiting undocumented immigrants from renting—or, in some cases, occupying—housing.<sup>298</sup>

As this discussion reveals, the “unheard of liberality” of the federal land laws only went so far.<sup>299</sup> Federal territorial policy contributed to a more expansive view of alien rights in states that were governed by territorial law in the nineteenth century. The state constitutional provisions discussed here are a prime example of this legacy. But these state constitutional provisions were, it turns out, not the beginning of a uniform trend. These antebellum state constitutional provisions may have been rooted in a vision of liberative property rights, but their limitations enabled backtracking and recalcitrance.

### CONCLUSION

Important works in immigration law and history have examined the ways state governments restricted immigration prior to the federal government’s restriction of immigration in the 1880s.<sup>300</sup> Far less attention has been paid to the ways states encouraged, aided, and abetted immigration during the nineteenth century.<sup>301</sup> This article has demonstrated that property law was a key mechanism for regulating immigration at both the federal and state levels. It has also revealed one central precondition to pro-immigrant state constitutional reform: the establishment of alien voting and property rights in these states under federal territorial law. Congress constrained itself when crafting the first naturalization law in 1790, refusing to extend rights to noncitizens. Yet, by granting aliens rights in the territories, the federal government established a precedent, and a distinct legal culture, that helped make the constitutionalization of alien rights possible. Immigrants themselves were a critical part of the process of property reform: they participated alongside citizens in creating state constitutions. The end result of these efforts was an expansion of the fundamental rights of certain noncitizens in these states. These expanded rights, while significant in overturning the common law prohibition on alien property ownership, contained exclusionary elements that would reappear in new guises in the decades to follow.

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298. See, e.g., HAZLETON, PENN., ORDINANCES ch. 18 § 2(C) (2006) (cited in full in *Lozano v. City of Hazleton*, 620 F.3d 170 (2010)). For a discussion of the anti-illegal immigrant ordinances in four different jurisdictions, see Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009); Tirres, *supra* note 1, part II.B.

299. MacClintock, *supra* note 123, at 44 (“[T]he public lands were disposed of to settlers upon terms of unheard of liberality, and . . . in this policy no discrimination was made against those who desired to build their homes and live here, and yet who had not ceased to be subjects of foreign sovereigns.”).

300. See, e.g., Neuman, *supra* note 27.

301. But see sources cited *supra* note 21.