



Legal Origins of the European Border Regime: Internalizing the Chinese Exclusion Act

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Abstract

The current European border regime is characterized by racialized exclusion. I argue that this is the result of a process of internalization of norms whose legal origins can be traced back to the US exclusion era best known for the 1882 Chinese Exclusion Act. After a short introduction, I proceed in four steps. First, I describe the origin of racially motivated exclusion laws targeting Chinese and other Asian immigrants, particularly in the USA. Second, I discuss their legal perpetuation through the concomitant development of the plenary power doctrine in American and British case law. Third, I examine the transfer of the exclusion doctrine per se into contemporary international and European law and its alleged cleansing of racist bias. Fourth, I describe how these historical developments inform current legal and political decisions shaping the European border regime. The aim is to expose more clearly the contradictions between anti-discriminatory norms, such as the ones enshrined in the European Convention on Human Rights, and openly discriminatory legal and political practices regulating unwanted immigration. Arguably, these practices result from an internalization of racialized exclusion since the Chinese exclusion era.

Keywords Migration · Racism · European Union · Internalization of borders · Asian exclusion · Knowledge transfer

Introduction

The current European border regime is characterized by the violent and racialized exclusion of unwanted immigrants. One of the main causes for this is the almost unchecked right of states to control immigration, a constitutive element of national sovereignty. Often conflated with an alleged need to defend national security, this right took the form of a plenary power doctrine in the USA and as a (royal) prerogative of the state in Europe. Today, migration scholars identify it as the exclusion doctrine.

The legal origins of this doctrine can be traced back to the Chinese exclusion era in the late nineteenth century, best known for its most far-reaching law, the US 1882 Chinese Exclusion Act. Similar laws were enacted in settler states

and colonies around the globe, particularly in Australia and British Columbia. Case law from the exclusion era is not only still considered “good law” (Saito 2003: p. 20) in the USA, it has also permeated European and international law (Spijkerboer 2021). Courts use it as legitimate precedent to sustain that the exclusion doctrine is a “well-established principle of international law” (Kmak 2024: p. 77). But the racialized context in which it emerged and the explicitly racist content of the exclusion cases have been neglected by most judges and lawmakers. The incorporation of this cleansed legal knowledge into contemporary law suggests that we are facing not just a transfer but an internalization of racialized exclusion over space and time. This internalization informs current legal and political decisions shaping the European border and deportation regime (De Genova & Peutz 2010), a process that has received little scholarly attention. My analysis addresses this void by situating it in the politico-legal dimension of the internalization of borders, as conceptually outlined by Volker Heins (2024) in his introduction to this Forum. It builds on my work on Chinese migration and dynamics of exclusion in the Americas (Manke 2020 and 2021) and takes a transatlantic look at the production and transfer of knowledge since the exclusion era.

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The Origin of Chinese Exclusion Laws

The nineteenth century was an era in which two dynamics became intertwined across the Americas and beyond. On the one hand, the transition from forced to free labor, fueled by the abolition of slavery, led to an unprecedented increase in free transcontinental migration, including a significant increase in East and South Asian migration to settler colonialist states in the Americas, Australia, and southern Africa. On the other hand, the emerging nation-states began to invent their national identities, which included defining citizenship and belonging to these nations. David FitzGerald and David Cook-Martín (2014) have shown how the rise of both liberal and populist democracies in the Americas was intimately (but not necessarily causally) linked to an expansion of racially selective policies of migration control. By connecting these two dynamics, I have suggested that free immigration to the Americas of people marked as non-white was immediately controlled and contested with racialized exclusion and violence.¹ This particularly targeted Chinese migrants, who constituted the largest group of free non-European migrants arriving in the Americas during the nineteenth century, and the largest immigrant group in the American West (Manke 2020: p. 89).

Violence and discrimination against Chinese immigrants started during the gold rushes in parts of Canada, Australia, and the USA, quickly resulting in exclusionary laws and regulations. The early dissemination of exclusion has been analyzed by Mae Ngai as the “Chinese question” (2021); it was addressed by politicians and judges in their respective countries across the Americas and the Pacific Rim. This became especially significant because it set a precedent for Western migration regimes. The development of “[...] techniques designed to control Asians became the template for practical workings of general immigration laws in the white settler nations, and ultimately around the world” (McKeown 2008: p. 13).² In the USA, pressure on Chinese immigrants was mounting since the 1850s in California and other states of the American West. Increasingly restrictive regulations became implemented at the local, state, and federal level. The first federal law to exclude migrants in the Americas on a racial basis was the Page Act of 1875, which specifically targeted Chinese women.³ It effectively ended “an era

of unrestricted immigration” (Al-kharsan & Shahshahani 2023: p. 133) and would serve as a test balloon for the 1882 Chinese Exclusion Act.⁴

The Chinese Exclusion Act internalized local dynamics of exclusion at the Western border on the national level, albeit hesitantly. Initially, this law was designed to function more as a spectacle of exclusion than as a law effectively preventing unwanted immigration on a large scale. As De Genova has shown, exclusionary policies often work through the enactment of a border spectacle aimed at appeasing anti-immigrant politicians and publics (2013). In this sense, the 1882 law, first dubbed the Chinese Restriction Act by the press, only restricted certain classes of Chinese immigrants from entering the USA. It did not have the function of migration control but to show that Congress was addressing the concerns of Western exclusionists. Lew-Williams explains this clearly: “Tempered by Republican fears of violating America’s treaties with China, the Restriction Act was deliberately narrow in scope. Congress did not design [it] to ‘exclude’ Chinese migrants from America; many members even questioned whether they had the legal prerogative to do so against China’s wishes” (2018: p. 51). It was not until widespread violence, including mass killings of Chinese, increased the pressure on federal lawmakers in the 1880s (Goodman 2020: p. 13), eventually leading to the tightening of the law in 1888. It is not by chance that all the Chinese exclusion cases were heard after that year. Violence committed against Chinese immigrants as racialized others in the American West had led to an internalization of the logic of exclusion in Congress.

The Chinese Exclusion Act was not only “the first comprehensive federal law regulating immigration to the United States” but also an “unabashedly racist” one (Johnson 2022: p. 1469). It marked the beginning of an era of racialized exclusion. The 1882 law aimed at barring Chinese laborers from entering the USA and precluded Chinese residents from becoming naturalized citizens, initially for 10 years. Subsequent amendments and acts further impeded the ability of Chinese to enter the USA and worsened conditions for those already living there. These subsequent developments included a provision that made returning to the USA impossible (1888 Scott Act) and requirements that not only facilitated deportations (by requiring identification certificates) but also increased legal insecurity by denying bail to Chinese in habeas corpus proceedings (1892 Geary Act, which also extended Chinese exclusion for another ten years). In

¹ Manke (2021: pp. 46–50). For a discussion of free vs forced migration during that era also, see McKeown (2004).

² Earlier restrictions of mobility had been imposed against other groups, against people of African descent as early as 1786 (Schoeppner, Michael A. 2021. “Black Migrants and Border Regulation in the Early United States,” *Journal of the Civil War Era* Vol. 11, No. 3 (September 2021), pp. 317–339, here p. 323).

³ *An Act Supplementary to the Acts in Relation to Immigration*, 43rd Congress, sess. II, ch. 141, 1875.

⁴ Formal title: *An act to execute certain treaty stipulations relating to the Chinese*, May 6, 1882; Enrolled Acts and Resolutions of Congress, 1789–1996; General Records of the US Government; Record Group 11; National Archives. <https://catalog.archives.gov/id/5752153>.

1902, the Chinese Exclusion Act became permanent federal law. The control of borders was accompanied by a racialized differentiation between people who were deemed fit or apt to be citizens by the governing elite and those who were not, a process that had started earlier and became codified with the 1790 Naturalization Act, which limited access to citizenship to immigrants who were free “white” people of good character.⁵

In the following decades, this racialized bordering would result in additional laws which extended exclusion to most Asian immigrants and residents, and then to other immigrant groups. This culminated in the Immigration Act of 1924. Also known as the Johnson-Reed Act, this law established the national origins quota system which also targeted people from other regions, including Europe (Ordover 2011).⁶ The Chinese Exclusion Act was not repealed until 1943, and the extremely low quota of 105 Chinese immigrants per year was not eliminated until 1965 (Chin 1996: p. 276).

The Role of Case Law in the Right of States to Control Immigration

Today, the right of states to control the mobility of immigrants and non-nationals is considered an essential component of state sovereignty, as legal scholar Magdalena Kmak has emphasized: “The prerogative of states to control the mobility of foreigners is considered to be a well-established principle of international law” (Kmak 2024: p. 77). This principle is intimately connected to the idea of national security, which impacts how states engage with the mobility of unwanted immigrants. The nexus between defining the nation and defending it against unwanted influences through immigration control has been informed by intersecting markers including race, gender, ethnicity, citizenship, class, status, age, occupation, literacy, property, physical and psychological condition and appearance, sexual and politico-ideological orientation, and religion. The development of some of these normative ascriptions was informed by the development of eugenics in science and by related sociopolitical views of the time,⁷ reaching well into the twentieth

century (Nelson 2024; Olaya 2018: pp. 25–28). So how did the right of states to control immigration become a well-established principle of international law?

USA: From Case Law to the Plenary Power Doctrine

The Constitution does not directly refer to immigration, referring to it indirectly at best by way of “naturalization” (U.S. Const. art.I,§8,cl.4). The doctrine of plenary power over immigration is not contained in the document but developed from case law that implemented Chinese exclusion. Several US Supreme Court cases in the late 1880s and early 1890s, the so-called Chinese exclusion cases, became the foundation of laws that would first apply to Chinese immigrants and later to all foreign nationals willing to immigrate.⁸ In international law, the plenary power doctrine regulating the immigration, residence, and naturalization of aliens became the sovereign right of states to exclude foreigners. It is a doctrine because it “largely immunizes from constitutional scrutiny federal regulations of immigration and naturalization” (Aleinikoff 2002: p. 151). Its best-known version was spelled out by Supreme Court Justice Horace Gray in 1892:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe. (*Nishimura Ekiu v. United States* 142 US 651, at 659 (1892))

Kmak identifies this as the foundational phrase of the plenary power doctrine (2024: p. 77). The origins of this doctrine can be traced back to the Chinese exclusion era, which included the quoted case and other key cases like *Chae Chan Ping v. United States* (1889), as Song (2018: pp. 18–25) and Martin (2015: p. 30) have pointed out. These and subsequent exclusion cases bolstered the state’s power over migrants’ freedom of movement, setting a precedent that keeps being quoted until today, in both the USA and Europe.

Scholars at the time were using the term “international law” interchangeably with natural law: the natural right of states to preserve themselves by way of defending their borders against an aggressor. This is how Justice Gray made the nexus between the sovereign right to defend the nation and the “threat” of unwanted immigration. He achieved this by selectively quoting Swiss legal writer Emer de Vattel,

⁵ For similar immigration and naturalization restrictions in the Americas, see FitzGerald and Cook-Martín (2014).

⁶ The Gentlemen’s Agreement of 1907 restricted Japanese immigration to the USA, and the Immigration Act of 1917 (also known as the Literacy Act) created a “barred Asiatic zone” (Ngai 2005: p. 37) which included most of Asia except for Japan and the Philippines. The Immigration Act of 1924, also known as the Johnson-Reed Act or the Asian Exclusion Act, cemented the exclusion of almost all Asians as immigrants, now including the Japanese (Ngai 2005: pp. 21–64).

⁷ Such as the ones of John William Burgess, at the time one of the most influential political scientists in the USA (Lake & Reynolds 2008: 57).

⁸ “ArtI.S8.C18.8.1 Overview of Congress’s Immigration Powers,” in *Constitution Annotated: Analysis and Interpretation of the U.S. Constitution* (online), https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ALDE_00001255/#essay-7.

who had balanced the right to exclude and the right to move in his seminal 1758 treatise on the Law of Nations: “At the time of this judgment, the authority of Vattel proved to be instrumental in justifying a radical breakdown from the time-honoured tradition of free movement. However [...] the famous dictum of the US Supreme Court was based on a biased and selective reading of Vattel. [...] This misreading of Vattel has prevailed until now among US judges” (Chetail 2016: p. 917).⁹

Puzzled by their enduring effect, scholars and journalists (Ma 2024) have revisited these cases. Eunice C. Lee has recently analyzed *Nishimura Ekiu v. U.S.* through a gendered lens, pointing out that violent anti-Asian sentiment and practices informed politics and jurisprudence up to the highest levels. While a key element for Ekiu’s exclusion was the gendered context in which she arrived in San Francisco coming from Japan in 1891 (Lee, 2023: p. 37), the immigration official formally decided to exclude Ekiu on the grounds of suspecting her of becoming a public charge. This speaks to the intersection of immigration status, ethnicity, gender, and class (Johnson 1995: p. 1520). The provision to exclude poor people had been added in the 1882 Immigration Act (Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214) in order to deter “[...] impoverished Britons [...] who came across the border from Canada” (Sauer 2011: p. 215). But federal enforcement on these grounds did not start until the 1891 Immigration Act that extended the mechanisms developed through the exclusion of the Chinese to all sorts of unwanted immigrants.¹⁰

But Ekiu did not simply accept the decision, fighting her way up to the US Supreme Court, which upheld the decision. Justice Gray, who delivered the majority opinion of the Court, identified the immigration of undesired aliens as a threat to national security, thus making immigration eligible to be restricted by the plenary power of the nation, which has the duty to defend and preserve its sovereignty. Natsu Taylor Saito, also referring to this case, noted that the Court “[...] extended the plenary power from substantive to procedural immigration matters, [a]s to [foreigners], the decisions of executive or administrative officers, acting with powers expressly conferred by Congress are due process of law” (2003: p. 16, emphasis added by Saito).

Congress continued to pass laws to further deteriorate the situation of Chinese immigrants by increasingly targeting not just Chinese immigrants but residents, such as the 1892

Geary Act, which required residents to obtain a certificate of residency that had to be backed by the testimony of a “credible white witness.”¹¹ Just months later, in another high-profile case, Justice Gray relied on this new provision to confirm the exclusion of three Chinese long-term residents, affirming this was “constitutional and valid” (*Fong Yue Ting v. United States* (1893) 149 U.S. 698). It is interesting to see how selectively Gray quoted former case law to further bolster and implement the racist views of the white elites of the time, himself included.

One of Gray’s main references was *Chae Chan Ping v. U.S.* (1889) 130 U.S. 581. I will closely analyze the reasoning of Justice Stephen Field in this case because it leads to the very core of how the justification of racist exclusion became applied in federal US law, a justification that resonates with anti-immigrant discourse of the far right today and whose logic would ultimately transition into international law. Field, who dubbed *Chae Chan Ping* “The Chinese Exclusion Case” (Price 2018), painted a menacing picture of a replacement of the population of the American West by undesirable aliens: “[...] the crowded millions of China” who threatened to “overrun” certain western regions like California, “at no distant day [...] unless prompt action was taken to restrict their immigration” (*Chae Chan Ping v. U.S.* 130 U.S. 595). He understood that the State of California had “accordingly petitioned earnestly for protective legislation,” which had been granted through the 1882 Chinese Exclusion Act and subsequent legislation.

His discourse fit right in with the Great Replacement Theory, which became entrenched during that era. A key element of this theory was the assumption of “race suicide” of white people, introduced in 1900 by sociologist Edward Alsworth Ross. In the essay “The Causes of Race Superiority,” Ross singled out Chinese and Japanese labor immigration as being responsible for “the degeneration of Anglo-Saxons in the U.S.” (Bracke & Hernández Aguilar 2024: p. 8). In order to counter the “immigration of unassimilable elements [...], Anglo-Saxons must reproduce a racially superior nation with haste” (ibid., quoted from Weinbaum 2004, pp. 71–72). We also find this nationalist and white supremacist reasoning in Field’s words, who said to a friend in 1882: “You know I belong to the class who repudiate [sic] the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race – the Caucasian race” (Price 2018: p. 12).¹²

⁹ I argue that the selective reading of the Chinese exclusion cases keeps informing current decisions on immigration, also in Europe.

¹⁰ An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor, Public Law 51–551, 26 Stat. 1084, c. 551 (1891). <https://www.govinfo.gov/content/pkg/STATUTE-26/pdf/STATUTE-26-Pg1084-2.pdf>.

¹¹ Geary Act of 1892, Chap. 60; 27 Stat. 25. *An act to prohibit the coming of Chinese persons into the United States*. May 5, 1892. <https://omeka-s.library.illinois.edu/s/ias/media/3724>

¹² Quoted by Price from Paul Kens (1997), *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age*, Lawrence: University Press of Kansas, p. 212.

Field was one of the first federal judges to connect immigration to the question of national security, singling out Chinese migrants at a time of massive free immigration from Europe. In *Chae Chan Ping v. U.S.*, he laid out the obligation to defend the nation as its highest and indisputable duty. He then proceeded to blur the lines between the threat of an enemy nation and the assumed threat of the “vast hordes of its people crowding in upon us” (*Chae Chan Ping v. U.S.* 130 U.S. 606). Finally, he ascribed the discretionary power of defense against any threat to the national government, including the perceived threat of immigration. Price observes that through this argument, the Supreme Court “[...] disavowed any role for the judiciary in reviewing the immigration choices made by Congress. [It] did not locate Congress’s power over immigration in any specific provision of the federal Constitution. Instead, it held that power over immigration was inherent in the existence of any national government and need not be located in the Constitution itself” (Price 2018: p. 12). As we also see today, this aims at putting the executive powers of the President above the Constitution, thus threatening democracy.

Racial fearmongering was not enough to prevent undesired aliens from immigrating. Exclusion had to be reinforced by equating immigration to a potential threat to national security. As each nation had the undisputable right to defend itself against existential threats, Field argued, it also had the right to reject unwanted immigrants and to deport non-citizen residents. The central claim of this plenary power doctrine on immigration — that states have the almost uncontested right to exclude unwanted immigrants — was born.

Anti-Chinese and Other Immigration Laws in the British Empire and Europe

Chinese exclusion was also prevalent in the British Empire. In Australia, Chinese immigration increased with the Gold Rush of 1851 and, similar to California, white settlers violently opposed it. In 1855, the first Chinese Immigration Act was enacted in Victoria, followed by a similar law in New South Wales after a major race riot in 1860–1861.¹³ In 1881, Victoria further limited Chinese immigration. The reasons for this also lay in racial prejudice (Prince 2015: p. 93). Interestingly, the 1881 law was reluctantly declared unlawful by the Victorian Supreme Court in 1888. In *Chung Teong Toy v. Musgrove* (1888), the Supreme Court decided that without a law passed by Parliament it was not legally possible to keep unwanted aliens like Toy from entering the

British colony (Prince 2015, pp. 124–126). Justice Williams, while openly expressing his racist views, was not happy with his decision: “I have come to the conclusion at which I have arrived with great reluctance. [...] we have no legal means of preventing cargoes of alien convicts [...] from landing on and polluting our shores” (*Chung Teong Toy v. Musgrove* (1888) 14 VLR 349). But the decision was appealed 3 years later (*Musgrove v. Toy* (1891) A.C. 272) and ultimately overturned by the Privy Council (which advises the British crown on the exercise of the royal prerogative), thus allowing the Commonwealth to “determine ‘citizenship’ in a practical or ‘inherent’ sense by excluding aliens” (Prince 2015: p. 124) and to cement its right to exclude foreigners.¹⁴ Soon, other groups were targeted in what became termed the “White Australia era” (ibid. p. 14). This was particularly the case with the enactment of the Pacific Island Labourers Act 1901, which banned most Pacific Islanders from entering the Commonwealth of Australia in 1904, a law upheld in the case *Robtelmes v. Brennan* (1906) 4 CLR 395, infamously known for targeting residents by “declaring Australian Islanders to be ‘indisputably alien’ [...], endorsing their forced removal from their homes” (Prince & Lester 2021).

Chinese exclusion did not directly affect Europe from the mid-nineteenth to the mid-twentieth century, as Europe was marked by a “generally liberal attitude toward freedom of movement” (Torpey 2000: p. 93). The exception were court cases that dealt with their respective colonies. Before 1905, the UK itself had no law including such provisions. Unlike the USA, British governments “were traditionally uncomfortable about making legal distinctions between individuals on basis of nationality, race, or religion” (Bashford & McAdam 2014: p. 317). Still, the logic of racialized exclusion fostered by so-called scientific racism and coded for the first time in national law with Chinese exclusion acts in the colonies led European governments to become “increasingly oriented to making distinctions between their own citizens/subjects and others, a distinction that could be made only on the basis of documents” (Torpey 2000: p. 93). This required laws regulating the mobility of citizens and non-citizens alike. It took the UK until the Alien Act 1905 (5 Edw. 7. c. 13) to enact its own law targeting undesirable immigrants. This law would become “the major antecedent to Britain’s more substantial and enduring legislative moves in the 1960s to restrict entry, regulate borders, and nominate and identify ‘undesirable’ entrants effectively (if not explicitly) on racial grounds” (Bashford & McAdam 2014: p. 311). This early cleansing of the discursive appearance of racial discrimination stood in stark contrast to the legal and political

¹³ *Chinese Immigration Act 1855 (Vic)*. Documenting a Democracy. Australia’s Story (n.d.), <https://www.foundingdocs.gov.au/item-sdid-18.html>.

¹⁴ Until 1986, appeals from State Supreme Courts to the Privy Council were still possible and often used to bypass the High Court of Australia (Gleeson 2008: p. 2).

practice of British colonialism built upon racial inequality, exploitation, and violence against non-white people.

The Dissemination of the Exclusion Doctrine in Contemporary Law

The Dissemination of the Exclusion Doctrine in the Law of Settler Colonial States

In settler colonial states, the exclusion doctrine continued to penetrate and thus inform contemporary law in order to justify the detention and deportation of unwanted immigrants. *Chung Teong Toy v. Musgrove*, *Robtelmes v. Brennan*, and similar cases are still being cited as valid case law in Australia, a fact that some judges have openly called out as an enduring impact of colonialism in contemporary law: “If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination” (*Mabo v. Queensland* [No. 2] (1992) HCA 23). But it seems like this claim fell on deaf ears, as *Ruddock v. Vardalis* (2001) 614 (the *Tampa Case*) illustrates. For the majority opinion of the Federal Court, Justice French “[...] underlined the right of a state to exclude or expel aliens under international law” (Billings 2009: p. 416) by referring to the Australian Chinese exclusion case *Musgrove v. Toy* (1891). Central to this judgment was “the finding that the executive power of the Commonwealth extended beyond the [royal] prerogative and included an inherent power derived from Australia’s status as an independent, sovereign nation” (Stephenson 2021: p. 1022). This would not only provide the constitutional basis for preventing aliens from entering Australia, but also “the deployment of troops for this purpose” (*ibid.*), which had happened.

In the USA, the Cold War brought a gradual abolition of legal exclusion on racialized grounds, following more geopolitical and ideological types of patterns. The Immigration and Nationality Act of 1952 (*McCarran-Walter Act*) maintained the national origins quota system but ended Asian exclusion. In three cases during the 1950 s, the framework of exclusion was used to justify the deportation of long-term non-citizen, non-Asian US residents who were members of the Communist Party. In one of these cases, the exclusion doctrine came very clearly to the fore. In order to substantiate the Court’s argument for the deportation of the four petitioners, the Court cited *Nishimura Ekiu v. United States* (1892) and *Fong Yue Ting v. United States* (1893), in addition to other cases: “So long as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be

permitted to remain within our borders” (*Carlson v. Landon* 342 U.S. 534 (1952)). According to Nolan, this phrase even entailed an expansion of plenary power, because it “couched the power of Congress in the most expansive language used in an opinion until that time” (1975: p. 472).

On the height of McCarthyism, exclusion was no more grounded in racial arguments, but in national security and ideology (Chebel d’Appollonia 2012: p. 51), which had already been inscribed in the Internal Security Act of 1950 (*McCarran Act*). It was not until the Civil Rights era that the legal remnants for excluding Chinese and other immigrants on a racialized basis were finally eliminated by the Immigration and Nationality Act of 1965 (Tichenor 2002: p. 218). Despite the unprecedented increase in immigration from the Global South that followed the 1965 law, the exclusion doctrine would continue to survive in less visible ways. It had been internalized and apparently stripped of its racist content while its concept became applied to other unwanted groups, foremost on ideological grounds.

In the 1980 s, race again started to shape the government’s response to immigration, now intersecting with Cold War ideology. In 1980, over 125,000 Cubans arrived in Miami during the Mariel boatlift, adding to thousands of Haitians fleeing the Duvalier regime. In July 1981, the US Attorney General, “[r]esponding to a perception that America had ‘lost control of [its] borders’ [...] renounced the practice of parole and announced a new policy of detaining undocumented excludable aliens” (Taylor 1995: pp. 1100–1101). As a result, Cubans who were deemed excludable by the Immigration and Naturalization Service (INS) but not accepted back by Cuba and Haitians with pending adjudication of their claims for political asylum could be detained indefinitely. The reasoning for this was developed from cases in the 1950 s which held that because deportation was no punishment, indefinite incarceration pending deportation was no punishment either.¹⁵ A key prerequisite was the judicial construct of the entry fiction which meant that “excludable aliens are ‘treated as if stopped at the border,’ even when they are paroled or confined within the United States” (Taylor 1995: p. 1096, with quote from Kurzban 1994). In practice, this meant the abolishment of the category of the “admitted alien.” The roots of the entry fiction can again be found in case law from the exclusion era (Lee 2023: p. 38).

Another case in point was the distinction between Cuban and Haitian refugees, with the latter being treated even worse because they were not fleeing Communism (Eckstein 2022: pp. 127–181). The consequence was that

¹⁵ Particularly in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) and *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), which had both targeted Communists (Saito 2003: p. 17).

while Cubans received comparatively privileged treatment, no Haitian refugees nor asylum seekers were accepted by the USA throughout the 1980 s (Audin, 2019: p. 421). On top of that, in the exemplary case *Jean v. Nelson* 472 U.S. 846 (1985), the majority opinion of the US Supreme Court was “[...] sanitized of any description of the discrimination that Haitian refugees suffered or the deadly consequences many would face if forced to return to Haiti [...]” (ibid. p. 425). This cleansing became common practice until today (Johnson 2022: p. 1472).

After the Cold War had ended, nativist policies governing immigration legislation started seeing an even clearer comeback (Jaret 1999: p. 9), this time intertwined with the targeting of real and suspected terrorists. The key elements for this were the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), both enacted in 1996. Together, they dramatically reduced migrants’ rights and privileges granted by Congress, combining to restrict due process and judicial review in immigration cases (Chebel d’Appollonia 2012: p. 54). The targets were overwhelmingly Mexican and other Latin American immigrants. Since the 1980 s, even those born in the USA became marked as “never truly American” (Lee 2021: p. 812). After the terrorist attacks on September 11, 2001, the exclusion doctrine was activated again as “the term ‘national security’ became a code word for a racial and religious campaign targeting Muslim immigrants and Muslim Americans” (Lee 2021: p. 813).

Bush’s anti-Muslim policies were reinforced in Donald Trump’s first term, through the so-called Muslim ban. Enacted as Executive Order No. 13769 entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” the order and its follow-ups were immediately challenged in court and temporarily halted. Ultimately, the Supreme Court took the case and ruled in favor of reinstating it (*Trump v. Hawaii*, No. 17–965, 585 U.S. 667 (2018)). Justice Sonia Sotomayor, dissenting, argued that the Court had failed to protect the principle of religious neutrality enshrined in the Constitution and that an openly discriminatory policy “masquerades behind a façade of national-security concerns” (ibid., Sotomayor, J., dissenting).

The exclusion doctrine thus came full circle: “Not coincidentally in light of the plenary power doctrine’s modern application, the Muslim ban and many of the Trump administration’s other immigration measures are remarkably similar to policy initiatives taken in the era of Chinese exclusion, including mass detention, denial of admission, removals, and more” (Johnson 2022: p. 1476). Most recently, the Trump administration is considering a much more far-reaching travel ban “to address national security risks” (Moodie 2025) which could include as many as 43 countries. The nexus between national security and migration control would

prove crucial to override any suspicion of discrimination or unequal treatment, also in Europe.

The Dissemination of the Exclusion Doctrine in European Law

The situation informing immigration laws and policies in Europe was different from the one in the USA and other settler colonial states. This, we argue, led to a delayed dissemination of the exclusion doctrine. US standards of regulating immigration on racialized grounds, established with Chinese exclusion and expanded to non-Asian immigrants through the 1924 quota system, also had an impact on Europe. The continent “would never return to the relatively open migration systems of the eighteenth and nineteenth centuries. Instead, the twentieth century would be an era of migration restriction, and travel would come to require elaborate documentation” (Hollifield 2022: p. 417).

Modern migration regimes had been an “experimental ground for the separation of persons willing to migrate into wanted and unwanted ones” (Heins & Wolff 2023: p. 29, my translation) since the rise of nation-states. Immigration controls thus became an integral part of racialized structures of managing mobility. Still, after the Second World War, “rights-based immigration policies that constrained the power of the state to manage and control migration” (Lucassen 2022: p. 385) originating in the late 1920 s were revived in Western Europe, as industrialized postwar nations like the UK and Germany came into pressing need of labor immigration to fuel their economic revitalization and to keep rebuilding their war-torn cities. The UK “actively encouraged immigration from Caribbean commonwealth countries (the Windrush generation) to address the severe labor shortages” (Yan 2023: p. 165). The British Nationality Act 1948 (11 & 12 Geo. 6. c. 56) tried to facilitate immigration and settlement in the UK by granting citizenship to all British subjects born in the colonies, thus establishing a *ius sanguinis* across the British Empire. The European Convention on Human Rights (ECHR) signed in 1950 prohibited discrimination based on ethnicity, national origin, and other markers.

But neither these provisions nor the ECHR or laws could stop European countries — particularly former and fading colonial powers — from selecting immigrants based on exactly these markers. Facing decolonization, the UK “adapted its immigration and nationality legislation, making it nearly impossible for immigrants from its former colonies in Africa and Asia to be legally admitted to its territory” (De Vries & Spijkerboer 2021: p. 299).

Migration policy decisions based on this legislation were contested in the early 1980 s, ultimately ending in the landmark case *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985), the first case on immigration brought by the European Commission to the European Court of Human

Rights (ECtHR) (Dembour 2021: p. 21). The applicants claimed that British immigration rules “had a disproportionate impact on people of colour and that the legislative history showed that their purpose had been to ‘lower the number of coloured immigrants’” (De Vries & Spijkerboer 2021: p. 300). The Court acknowledged discrimination on the grounds of sex but not of race or birth, denying a violation of Article 14 of the European Convention on Human Rights (ECHR). This aimed at keeping the door open for selective procedures based on national origin. At the same time, the Court upheld the State prerogative to control migration: “[...] as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory” (*Abdulaziz* §67). The ECtHR thus used the exclusion doctrine while denying its application implied racialized differentiation.

The reasoning in this case demonstrates that the “principle of sovereign control over the movement of foreigners [...] became a dominant principle of international law limited only by certain exceptions as regulated in international refugee or human rights law” (Kmak 2024: p. 77). Karin de Vries and Thomas Spijkerboer explain how this process involved a cleansing of the doctrine’s racialized origins by arguing that, while relying on case law from the Chinese exclusion era, *Abdulaziz* and related cases do not refer to the context in which they evolved, thus obscuring the racist origins of this doctrine. *Abdulaziz*, they argue, effectively “incorporated the doctrine of sovereign control over migration, as developed by the US Supreme Court in the late 19th century, into the ECHR” (De Vries & Spijkerboer 2021: p. 300) — a clear case of its internalization into European case law. However, there exists a difference in the conception of the limits of the right of States to control immigration between the EU and the USA. While US law gives almost unchecked (i.e., plenary) power to Congress in immigration matters, the ECtHR did recognize certain limitations of the right of States to control immigration in *Abdulaziz*, which are grounded in international refugee and human rights law (inscribed in the ECHR), as well as in international treaty obligations.

The Internalization of Racialized Exclusion and Current Repercussions

The racialized roots of the exclusion doctrine may not have been acknowledged by the ECtHR, but the Court still accepts case law from the Chinese exclusion era as valid while denying that decisions taken on the grounds of this precedent are racist. This also holds true for UN policy guidelines reflecting this legal practice, which serves as evidence that the doctrine has been internalized not only in US law, but also in international and European law. In contrast to the USA and

British colonies, racist exclusion laws were not immediately internalized in the UK. Decolonization brought about a shift in external borders and granted (former) colonial subjects the right to immigrate to and stay in the UK.

During the first decades of the Cold War, it became apparent that the UK internalized two types of exclusion, and both arguably stemmed from Chinese exclusion: Its own logic developed in the colonies entangled with the doctrine of national sovereignty and security. US and British colonial case law informed these two strands, but exclusion of immigrants on (openly) racist grounds arguably remained constrained due to the experiences of totalitarianism and two World Wars, and the subsequent commitment to human rights. As discussed, *Abdulaziz* (1985) marked a turning point, as it exposed the internalization of racialized exclusion in contemporary British law and national policy.

The same year as *Abdulaziz* justified the exclusion of unwanted immigration to the EU while denying racialized reasons for this decision, the establishment of free movement in parts of the European Union was initiated by the Schengen agreement. This and subsequent agreements eliminated internal border controls in the Schengen area and facilitated mobility in the EU while hardening its external borders, effectively creating a “continental border regime” (Hess & Kasperek 2017: p. 50). The internal consolidation of Europeanization and the contraction of Europe’s colonial borders brought about a racialized differentiation towards the unwanted, external “other,” a process not only accompanied by a hardening of external borders but also by an expansion, and thus externalization, of racialized and violent bordering practices through the enlargement of the EU. These violent bordering practices, in turn, became partly legitimized by European jurisprudence, supported by international, Western-made standards of exclusion.

A highly telling example of this is a 2006 United Nations’ Memorandum entitled “Expulsion of aliens,” which cements a State’s “inherent nature of the right of expulsion” of undesired aliens by arguing it being “well established as a matter of international law.”¹⁶ It does this by quoting the case of *Moustaquim v. Belgium* (1991), which in turn refers to the 1985 case *Abdulaziz*. To further substantiate this claim, the Memorandum goes to great lengths to create a paper trail of case law that supports its argument, including references to both US and British case law deeply embedded in the era of racialized exclusion of Asian immigrants (UN 2006: §185, notes 375+376; §531, note 1264, passim). While it also dedicates a large chapter to the principle of non-discrimination,

¹⁶ *Expulsion of aliens*. Memorandum by the Secretariat, 10 July 2006, A/CN.4/565, §185, UN General Assembly International Law Commission, https://legal.un.org/ilc/documentation/english/a_cn4_565.pdf.

the Memorandum obscures the racialized arguments explicitly contained in the Chinese exclusion cases. Consequently, the Memorandum represents a stunning example of internalization of the doctrine of sovereign control over migration while clearly trying to sanitize it from its racist context.

Although the practice of violent EU bordering saw a brief break in the *Mare Nostrum* maritime operation initiated by Italy (2013–2014), “*Mare Nostrum* is not an exception to sovereignty, but a particular, temporally defined exemplar of the humanitarian facet of military-humanitarian sovereignty” (Albahari 2015: p. 112), as Maurizio Albahari sharply observes. In fact, *Mare Nostrum* was quickly replaced with *Operation Triton* carried out by Frontex, which “reprioritised secure borders over the lives of humans” (Hess & Kasperek 2017: p. 60). The supposed threat of irregular immigration thus justifies the urgency of defending national security and reaffirms an almost unchecked sovereignty of the state. Not coincidentally, the increased securitization of EU borders since 2015 was flanked by ECtHR decisions that reinforced state sovereignty. In 2016, the Court cut back on the prohibition of collective expulsion in *Khlaifia and Others v. Italy* (GC) (Günther 2016).

Collective expulsion, also known as illegal pushbacks, became practically legalized in the case *N.D. and N.T. v. Spain* (2020). Here, the Grand Chamber decided that “expedited expulsions” or pushbacks by Spanish authorities at the border of Melilla to Morocco did not violate the prohibition of collective expulsions of Art. 4 Protocol 4 ECHR. In order to substantiate its case, the Court first established a track record of case law dating back to *Hirsi Jamaa and Others* (2012) which in turn referred to *Abdulaziz*. The Court then selectively quoted pertinent documents in order to further tip the already uneven balance towards state sovereignty. The first document quoted by the ECtHR was the *Twenty Guidelines on Forced Return* adopted by the Committee of Ministers of the Council of Europe on May 4, 2005 (Council of Europe 2005). The Court considered the “relevant parts of this document” as the ones referring to the state’s right to “control the entry and residence of aliens on their territory” and that, “[...] in exercising this right, member states may find it necessary to forcibly return illegal residents within their territory” (*N.D. and N.T.*).

Interestingly, the *Twenty Guidelines* actually offer a more balanced perspective on the relationship between the rights of migrants and the rights of states than the selection by the Court might suggest. The introduction to the guidelines includes two other reminders omitted in the judgment that precede the ones quoted by the judges. The first one reminded EU member states of Article 1 ECHR, which asks them to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention” and Article 2 of Protocol No. 4 to the Convention, which reminds them “that everyone shall have the right to

freedom of movement” (Council of Europe 2005). Furthermore, the Court omitted a concern formulated in the *Twenty Guidelines*, namely the “risk of violations of fundamental rights and freedoms which may arise in the context of forced return” (ibid.). It becomes obvious that in *N.D. and N.T.* the ECtHR did not consider as relevant to its judgment three paragraphs that seem to sandwich the sovereign power of the state in provisions which aim at restraining this power by stressing the rights of migrants and their protection.

The ECtHR made it even harder to identify pushbacks as illegal by erasing evidence through non-admittance, disregards, and other methods (Alpes & Baranowska 2024). Other cases show that the ECtHR has almost completely sided with and empowered the state vs. the migrant. In *M.N. and Others v. Belgium* (2020), the ECtHR argued that if it accepted the applicants’ arguments — a Syrian family trying to stay in Belgium — the doctrine of migration control would become nil: “the well-established principle of international law to the effect that a State is under no general obligation to admit aliens to its territory would become meaningless, and would give way to an unlimited obligation on the States Parties to authorise entry to their territory to individuals who were at risk of treatment in breach of Article 3 [ECHR] anywhere in the world” (*M.N. and Others v. Belgium* §89). Marie-Bénédicte Dembour, an expert on migrant case law of the ECtHR, recently confirmed that the Court “generally privileges state sovereignty over migrants’ rights” (2021: p. 19).

Conclusions

For over 60 years, the UK had been implementing immigration and nationalization laws that effectively discriminated against non-white immigrants, residents, and their descendants. In 2017, this would lead to the wrongful detention, deportation, and death of British citizens, mostly from the West Indies, a series of events that came to be known as the Windrush scandal. Only after years of pressure from the press and the public, the British government eventually unsealed documents that showed it had wrongly deprived these people of their citizenship rights. Still, the scandal triggered a discussion about systemic injustices and racism against non-white immigrants and citizens built upon “the central idea of sovereignty that stems from Britain’s colonial past” (Yan 2023: 172).

Less than a week into Trump’s second term, Republican US Senator Lindsey Graham said he believed there was a “‘good chance’ the Supreme Court will side with President Trump on the issue of birthright citizenship. [...] ‘I introduced legislation to end birthright citizenship years ago’” (Irwin 2025). Donald Trump is currently trying to erase the constitutional right of birthright citizenship confirmed for the first time for descendants of Chinese in the landmark case *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

This shows us that both liberal and far-right governments have internalized the exclusion of unwanted immigrants, a logic which does not stop at the border but permeates society. Although great pains have been taken by courts to strip the exclusion doctrine — enshrined in the power of the state to control immigration — from its racialized origins, current court cases and legal documents show that the application of this doctrine is indeed very much racialized. This, in turn, leads to the selective and unequal treatment of immigrants.

This paper aimed at highlighting the process of internalization of the exclusion doctrine from the Chinese Exclusion Act to today over space and time. On a metalevel, one might identify certain elements that might contribute to explaining why this internalization comes to the fore in Europe's violent border regime today. There are parallels between the process of consolidation of the EU and the violent hardening of its external borders since the late 1990s and the USA experienced about 100 years ago. After the USA completed its continental expansion, nationalism and nativism defined who would belong to the young nation and who would not. This entailed the rise of the plenary power doctrine on the back of unwanted Asian immigrants.

In Europe, internal consolidation since 1985 implied not only the hardening of external borders but also the incorporation of already existing, systematic othering of unwanted aliens into the fabric of the European Border Regime. As this article has shown, consolidation resulted from an internalization of the exclusion doctrine established by the Chinese Exclusion Act and similar laws of that era, marking a central characteristic of Western democracies and the transnational migration regimes they establish.

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