

# UNDOCUMENTED MIGRANTS AS NEW (AND PEACEFUL) AMERICAN REVOLUTIONARIES

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*This essay situates undocumented migrants in the history of the American revolutionary period. The lawbreaking of both groups produced constructive legal and social change. For example, the masses of American revolutionaries and many of their leading men fought to rid the colonies of hereditary aristocracy. Colonists had come to cherish the proto-meritocracy that had bloomed on colonial shores and rankled at local evidence of aristocratic privilege, like the Crown's grant of landed estates to absentee English aristocrats.*

*Today's equivalent hereditary aristocracy is the citizenry of wealthy democracies like the United States. Hereditary citizens use immigration restrictions to reserve the wealth and privilege of rich-world citizenship for themselves and invited guests. The undocumented peacefully challenge this status quo by migrating and remaining in the United States without permission, securing citizenship for their American-born children, and protesting that "no one is illegal." In these ways the undocumented seize some of the aristocratic privileges of American citizenship and fight for others. For this and other reasons, the undocumented are contemporary heirs to the revolutionary moment—the true tea partiers of the twenty-first century.*

## INTRODUCTION

Good things can come from illegal acts—like the founding of the oldest extant constitutional democracy. Knowing this, the United States tolerates a level of disorder and illegality that our technologies of

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governance could eradicate, if we loosed them.<sup>1</sup> Our tradition condones and sometimes validates law-breaking in exchange for the promise that our legal regime can obtain a degree of legitimacy which strict adherence to and enforcement of the positive law cannot provide.<sup>2</sup> This tradition of constructive illegality draws on colonial and English antecedents, but took a recognizably American shape in the Revolutionary period. In this essay I trace the contours of constructive illegality in the revolutionary period and locate the actions and advocacy of undocumented immigrants in that tradition.<sup>3</sup>

By drawing analogies to some of the prominent reasons why American revolutionaries took up arms—like, eliminating hereditary aristocracy and reformulating the relationship between sovereign and subject—I argue that undocumented people are modern, non-violent, American revolutionaries, helping to test concepts of legitimate state authority and global social justice. “Illegal” migration is consistent with our legal tradition, not opposed to it.

The great, or at least most obvious normative tensions, embedded

1. See generally Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23 (2009) (discussing how a lack of administrative state autonomy creates inefficiencies and distortions in immigration enforcement strategy).

2. See, e.g., David C. Williams, *The Constitutional Right to “Conservative” Revolution*, 32 HARV. C.R.-C.L. L. REV. 413, 429–32 (1997) (describing how the actions of American revolutionaries were both “ultra vires”—illegal—and arguably constitutional). A contemporary example of constructive illegality is the often illegal actions of Silicon Valley startups like Uber, Lyft, and AirBNB. Breaking laws to change them is an explicit part of their business strategies. Arguably, American localities relative tolerance for this approach, allows for a more efficient and informed negotiation between the localities and these new services. The concrete evidence of the benefits of these services for users creates a constituency that can negotiate its interests against the established interests of pre-existing stakeholders, like cab owners and hotels. Had these startups first asked for permission, they would likely not have been able to make headway against the interests of established stakeholders.

3. I am not writing a history, at least not one that makes a historical claim to be the “best” account of what happened in the past, or that corrects one or another historiographical error. My purpose is to place undocumented migration in conversation with a lauded historical instance of mass lawbreaking to illustrate how the law-breaking of the undocumented might be similarly viewed as a constructive part of our legal and political tradition. See also Victor C. Romero, *Our Illegal Founders*, 16 HARV. LATINO L. REV. 147 (2013) (analogizing illegal border crossing practices and broken treaties with Native Americans to the trespasses of the undocumented). By making this specific historical analogy, I also aim to push against the tendency to locate the legal possibility of unconstrained peaceful migration in the domain of international human rights. This local approach to building cosmopolitan infrastructure emerges from my prior work. I have argued elsewhere that building the cosmopolitan ethic that will be required to significantly liberalize migration will necessarily be a very local endeavor. See Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 87–93 (2013) (describing how attention to creating institutions that can persuade individual citizens to let go of their fears of migrants is a predicate to further liberalization of migration).

in our constitutional tradition at the outset have been resolved. People of African descent, once slaves, are citizens, not property; women are voters and workers, not means of propagating the body politic; gay men and women can love openly and have their relationships validated by the state on the same terms as heterosexuals; the New Deal and the Great Society lent more substance to the formal equality the Constitution always guaranteed and that various civil rights movements have realized.<sup>4</sup>

The starkest remaining contradiction in the United States and other wealthy democracies is between alien and citizen, outsider and insider. Unlike nearly all other laws in such democracies, the laws that enforce this distinction between citizen and “alien” are made without any formal input from the aliens who must follow them.<sup>5</sup> The movement of the undocumented into the U.S. and their rights advocacy on behalf of themselves and other noncitizens are exposing and helping to overcome peaceful noncitizens’ unjust and undemocratic exclusion from our borders.<sup>6</sup>

#### I. THE AMERICAN TRADITION OF CONSTRUCTIVE ILLEGALITY

The American revolutionaries were lawbreakers; they committed a series of treasonous legal breaches backed by force.<sup>7</sup> There were violent precursors too. Colonists expressed their objection to the Stamp Act of 1765—a statute duly enacted by Parliament—by rioting (it worked, Parliament repealed the act).<sup>8</sup> Colonists damaged valuable private

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4. This is not to diminish the contemporary legacy of these tensions in people’s lived experiences, or the way we have backslid or stalled on racial and economic justice, for instance. The point is rather to emphasize the progress, formal and substantive, that has been made, and what those shifts owe to law-breaking and our tolerance for it. From there, we can come to see how illegal migration might be similarly constructive and similar grounded in our traditions of legal and political contestation.

5. See Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37, 38 (2008) (arguing that democratic states must democratically justify border control laws to noncitizens as well as citizens).

6. For an extended defense of the constructive quality of undocumented migrants, see Daniel I. Morales, *“Illegal” Migration is Speech*, IND. L.J. (forthcoming 2017), draft available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2656567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656567) [hereinafter *Illegal Migration*].

7. See Robert M. S. McDonald, *Thomas Jefferson’s Changing Reputation as Author of the Declaration of Independence: The First Fifty Years*, 19 J. OF THE EARLY REPUBLIC 169 (1999) (calling the Declaration of Independence “treasonous”); see also Williams, *supra* note 2, at 443 (listing the potential moments where the actions of the American revolutionaries became illegal).

8. GARY B. NASH, *THE UNKNOWN AMERICAN REVOLUTION: THE UNRULY BIRTH OF DEMOCRACY AND THE STRUGGLE TO CREATE AMERICA* 46–48 (Penguin Books 2005) (describing the riots over the Stamp Act).

property to protest the Tea Act of 1773.<sup>9</sup> In the aftermath, when the Crown tried to impose order through the imposition of legally authorized force, it faced locally organized militias.<sup>10</sup> From there, the tide of revolution began to crest. The Declaration, then the Articles, the Constitution (in violation of the Articles),<sup>11</sup> and the Bill of Rights: the first government to declare itself to rule by virtue of the People's blessing—not God's, or the King's.<sup>12</sup>

The Revolutionary War was both illegal<sup>13</sup> and constructive: out of the illegal break with England came the first government to try and make certain enlightenment values real.<sup>14</sup>

The revolution's constructive illegality had precedents in pre-revolutionary colonial practices: riots were viewed, for instance, as a way for common men to register their dissatisfaction with laws, rulers, or policies. The illegality of revolution was justified as a means to protect important achievements in social justice—like the elimination of hereditary aristocracy, and as a way of countering the injustice of the unchecked and unlimited power of the crown in the colonies. The revolution was also motivated by a conviction that idealistic theories—like a government by, for and of the people—could be implemented in the real world.

9. See JOHN W. SHY, *TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION* 401 (Princeton Univ. Press 1965); *id.* at 90 (noting that in the Boston Tea Party protestors destroyed £10,000 worth of tea).

10. LYNN HUNT, THOMAS R. MARTIN, BARBARA H. ROSENWEIN, R. PO-CHIA HSIA, BONNIE G. SMITH, *THE MAKING OF THE WEST: PEOPLES AND CULTURES: 1320–1830* 718 (2001).

11. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989) (“Almost all modern lawyers recognize that, in proposing a new Constitution in the name of We the People, the Philadelphia Convention was acting illegally under the terms established by America's first formal constitution—the Articles of Confederation solemnly ratified by all thirteen states only a few years before.”).

12. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 189 (Vintage Press 1992) (noting the sovereign power of the people under the U.S. Constitution); *id.* at 719 (“The Constitution's preamble insisted explicitly, for the first time in history, that government derived its power solely from the people and did not depend on divine right or aristocracy.”).

13. The Colonists understood their break with England as justified and legal because their treatment by parliament and the Crown was inconsistent with English constitutional principles. The English obviously had a different view on the legality of the colonists' actions. See Williams, *supra* note 2, at 442–43. The relationship between the undocumented and the United States can be characterized in a similar way. Undocumented people have plainly broken laws, but as Political theorist Arash Abizadeh has argued such laws are null, since aliens have no vote or voice in the formation of these laws, which makes existing border laws fundamentally inconsistent with democracy. See generally Abizadeh, *supra* note 5. Which label sticks, in both cases, is ultimately a function of who has the practical power to enforce its view of what the law is.

14. But see Juan Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 *MICH. L. REV.* 1123 (2012).

All these aspects of constructive illegality, I show below, can be analogized to undocumented migration. By drawing the comparison, I hope to complicate and problematize the characterization of the undocumented as simply “illegal” in a novel way, and to ground undocumented migration and our relative tolerance for the undocumented in an American historical tradition.

*A. Constructive Illegality and the Voice of the Disenfranchised*

Prior to the American Revolution, resistance—burning effigies, vandalism, threatening violence<sup>15</sup>—to the deployment of official power was viewed as a natural and constructive part of colonial life. “[I]n certain circumstances, it was understood, the people would rise up almost as a natural force, much as night follows day, and this phenomenon often contributed to the public welfare.”<sup>16</sup> Where grievances had festered, and officials remained unresponsive or obstinate, there was “a readiness among many Americans to act outside the bounds of law.” But threats and violence were usually a last resort, or a response to the systematic foreclosure of peaceable means to redress grievances.<sup>17</sup> The latter rationale supported tenant-farmer protests in New York’s Hudson River Valley, illustrating the way that tacitly-approved law-breaking was negotiated in the colonial period.

[The valley] had long been controlled by a few wealthy families with enormous landholdings, which were so large that they rivaled the manors of English nobility. Rensselaerswyck Manor totaled [one] million acres, Philipse Manor 200,000 acres . . . [b]y 1710 every acre of some eight hundred square miles of Dutchess County had been patented to a handful of absentee landlords . . . Most of these vast tracts were acquired as virtually free gifts from royal governors, and some were obtained by outright fraud.<sup>18</sup>

Vast landed wealth secured political control of similar scope. “The landlords dominated local government, including, most importantly, control of the courts.”<sup>19</sup> And, by the mid-eighteenth century, the same group of “local oligarchs . . . had a powerful grip on the colony’s legislature. Facing such odds, the grievances of tenants against their

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15. See, e.g., NASH, *supra* note 8, at 44–55.

16. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776 3 (W.W. Norton & Co. 1973).

17. *Id.* at 11.

18. NASH, *supra* note 8, at 79.

19. *Id.* at 80.

landlords had only one realistic channel—going outside the law.”<sup>20</sup> And so they did. “[W]hen the manager of Philipse Manor demanded in 1765 that tenant farmers surrender their long-term leases for new one- to three-year leases[,]”<sup>21</sup> tenant farmer William Prendergast vowed to “relieve the oppressed” and led “angry tenants” “on a rampage to reclaim the farms from which they had been evicted.”<sup>22</sup> In response the “New York Attorney General issued a bench warrant for the arrest of the tenant rioters.”<sup>23</sup> This escalated things. “An even greater number of tenant farmers . . . agreed unanimously to march on [New York City] to ‘do justice and relieve the oppressed’”<sup>24</sup> and perhaps “pull down”—i.e., destroy—the city mansions of the landlords.<sup>25</sup>

But it wasn’t to be. The farmers were met by the local British regiment and retreated. The Governor “ordered Prendergast’s arrest.”<sup>26</sup> A New York City Alderman was dispatched to arrest him, but the alderman (or his constituents) sympathized enough with the Farmers’ plight that he dawdled for a bit to give Prendergast time to escape.<sup>27</sup> Three months later, a British regiment caught up with Prendergast in Poughkeepsie<sup>28</sup> and “hauled” him off to Dutchess County where he was charged with high treason. A jury of landlords tried him in a special court in New York City; Prendergast defended himself, testifying that “he accepted the leadership role [in the uprising] because ‘it was hard’ . . . that poor people ‘were not allowed to have any property’ and were driven from the land where the sweat of their brows had made the land flourish . . . ‘there was no law for poor men’ . . . In such a skewed legal system, going outside the law was justifiable.”<sup>29</sup> A small farmer and witness for the landlords at trial testified “that evicted tenants believed they were entitled to defy the law because”<sup>30</sup> their “equitable title . . . could not be defended in a court of law because they were poor and . . . poor men were always oppressed by the rich.”<sup>31</sup>

The interests of the landlords adjudging the case predictably

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20. *Id.*

21. *Id.* at 83.

22. *Id.*

23. *Id.* at 84.

24. *Id.*

25. *Id.*

26. *Id.* at 85.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

dictated the guilty verdict, but the sentence rankled the masses: Prendergast “shall be hanged by the neck . . . cut down alive, and his entrails and privy members shall be cut from his body and shall be burned in his sight, and his head shall be cut off, and his body shall be divided into four parts and shall be disposed of at the kings pleasure.”<sup>32</sup> The point, of course, was to send a message to the rabble, but none of the rabble could be persuaded to help execute the sentence. And so, growing aware of “widespread sympathy for Prendergast, [the] Governor reprieved him” and the King, who had the final say, relented too.<sup>33</sup>

While the tenant-farmers did not achieve the redress they sought, their protest was not for nothing either. In the oligarchical political system the tenant-farmers faced, their uprising was the best means available to convey their political position to those in power and renegotiate the social order. Absent such shows of plebian power, the needs of common men had few ways to enter<sup>34</sup> into the calculus of political decision, few ways of being heard at all.<sup>35</sup> In that context, then, the law-breaking of the tenant farmers was an “evil . . . productive of good”<sup>36</sup>: they clearly brought popular feelings . . . to bear on public authority; and, as Thomas Jefferson argued most cogently in 1787, they tended to hold rulers ‘to the true principles of their institutions’ and so provide ‘a medicine necessary for the sound health of government.’<sup>37</sup> This kind of principled law-breaking also steeled the masses called forth to fight in the Revolutionary War.

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32. *Id.*

33. *Id.* at 87.

34. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORD. L. REV.* 2153 (1998) (describing mechanisms, like petitions, which disenfranchised citizens used to seek redress of grievances by political actors).

35. From a modern perspective we might be inclined to see this entire dispute through the private law lens. But, as Gordon Wood has pointed out the public/private distinction is not only anachronistic, the desire to create such a distinction was anti-monarchical and a motivating reason for the Revolutionary War. See WOOD, *supra* note 12, at 252. The dichotomy between public and private simply did not exist under pre-revolutionary colonial rule.

36. See MAIER, *supra* note 16, at 24 (quoting Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) in 11 *THE PAPERS OF THOMAS JEFFERSON JANUARY 1–AUGUST 6, 1787* 93 (Julian Boyd ed.) (1955)).

37. *Id.*

The practice and tacit-approval of law-breaking for the good of the body politic was not isolated to the colonies, but imported from England where the norm was so deeply rooted that its constitutional status could be entertained. “Thus, members of the British House of Lords could seriously argue that ‘rioting is an essential part of our constitution’” and that “[m]obs, a sort of them at least, are constitutional.”<sup>38</sup> Indeed, popular uprisings were “symptoms of a strong and healthy Constitution.”<sup>39</sup> One could not expect the people to manifest “that pacific, timid, obsequious, and servile temper, so predominant in more despotic governments.”<sup>40</sup> If this was true of the English it was all the more true in the American colonies, if only because the freedom white American colonists enjoyed was extraordinary. “[T]he [white] colonists knew they were freer, more equal, more prosperous, and less burdened with cumbersome feudal and monarchical restraints than any other part of mankind in the eighteenth century.”<sup>41</sup> If freedom generally tended to produce a spirit primed to contest authority, then the United States had more of that *esprit* than any other place.

### 1. The Undocumented Are Protesting the Global Social Order

The undocumented occupy a political and social position similar to that of the tenant farmers of the revolutionary period. Though they labor in service of employers, and increase U.S. G.D.P., the undocumented are disempowered in a number of ways.

Not only do noncitizens lack a formal say in the U.S. legal and policy debates that affect them, the undocumented are also disempowered in their countries of origin. They lack the power to force the governments in their native lands to negotiate successfully with the United States to loosen immigration restriction and to improve the living conditions of the undocumented.<sup>42</sup> The governments of the undocumented’s home countries often have their own immigration sovereignty concerns that they wish to protect. Their primary concern is not their citizens, but the flow of remittances to the families of the undocumented that remain in

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38. *Id.*

39. *Id.* at 23.

40. *Id.* (quoting Josiah Quincy Junior in 1770).

41. WOOD, *supra* note 12, at 4.

42. Once inside the United States, laboring and living, the undocumented can contest the disabilities of their status as “illegal.” *See generally* Morales, *Illegal Migration*, *supra* note 6.

their poor countries of birth. The remittance money makes foreign governments more accommodating to U.S. immigration preferences, rather than antagonistic.

These conditions of radical disenfranchisement parallel the disenfranchisement of the tenant farmers, and similarly justify the actions of the undocumented. Prendergast insisted that going outside the law was justifiable where the legal system failed to protect the interests of the poor tenant farmers. The undocumented insist that “no one is illegal”<sup>43</sup> for similar reasons. Moreover, just as the tenant farmers believed that their continuous toil on their tenancies granted them equitable title to the land they worked, so too do the undocumented argue that their labor entitles them to equitable rights to remain in the U.S.,<sup>44</sup> to the “property” of citizenship.

In the manner of revolution-era riots, undocumented migration facilitates consideration of noncitizens’ interests in the political calculus. Sitting at home, pining for a life in the United States, the undocumented cannot force or persuade the U.S. to change its visa policies and admit them. But when the undocumented break the law and enter the U.S., they not only seize the privileges of rich-world life that the U.S. chose to deny them, they also send a clear message that the American immigration system and the broader political order of which it is a part, do not meet their needs. As a result, the global powers that be must take note and adjust to the eleven million undocumented who contest their exclusion by remaining in the United States, even if only by paying to have the undocumented deported.

Finally, explicit political protests by the undocumented, like the day without an immigrant, recalls the defiance of the tenant farmers in the face of the manor lords’ issuance of a death sentence. Both protests sought to convey the message that their respective societies depend on the labor and cooperation of the disenfranchised—and, in doing so, showcased the power that these groups can wield.<sup>45</sup>

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43. “No One is Illegal” is a movement “[i]nstituted in Montreal in the early 2000s [and] . . . spread to other major cities and began engaging in aggressive campaigns against deportations.” CHRIS DIXON, *ANOTHER POLITICS: TALKING ACROSS TODAY’S TRANSFORMATIVE MOVEMENTS* 49 (Univ. of Cal. Press 2014).

44. See Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 *YALE J.L. & HUMAN.* 110, 135 (2011) (arguing that property law provides analogies relevant to the right of undocumented people to remain in the United States).

45. See generally JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 29–31 (Yale Univ. Press 1987) (theorizing strategies like “foot dragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, [and] sabotage” as “weapons of the weak”: the means by which oppressed people resist power, as well as cultivate

*B. Violence (or Law-Breaking) for Liberation*

The revolutionaries broke their fealty to the British Crown—committed treason—for a purpose that liberated individuals from the social limits of hereditary aristocracy. As Gordon Wood has argued (*contra* the received view that the American revolution was the most conservative in history) the revolution was not *just* a legal and political transformation, but a legal-political transformation in service of radical social change. “[I]f we measure [revolutionary] radicalism by the amount of social change that actually took place—by transformations in the relationships that bound people to each other—then the American Revolution was not conservative at all; on the contrary: it was as radical and as revolutionary as any in history.”<sup>46</sup> It is hard for us to recognize the reorientation because it was “radical . . . in a very special eighteenth-century sense.”<sup>47</sup>

The social distinctions and economic deprivations that we today think of as the consequence of class divisions, business exploitation, or various isms . . . were in the eighteenth century usually thought to be caused by abuses of government. Social honors, social distinctions, perquisites of office, business contacts privileges and monopolies, even excessive property and wealth of various sorts—in fact seemed to flow from connections to government, in the end from connections to monarchical authority.<sup>48</sup>

The central radical achievement of the Revolution was that it “destroyed aristocracy as it had been understood in the Western world for at least two millennia.”<sup>49</sup> That evisceration of feudal privilege and the flattening of the minutely-tiered hierarchy that regulated entitlements to those privileges “brought respectability and even dominance to ordinary people long held in contempt and gave dignity to their menial labor in a manner unprecedented in history.”<sup>50</sup>

In Wood’s telling, the colonial mind was as formed by monarchy as those of Englishman living at the seat of empire; every colonial social stratum shared the co-dependent world-view of their English peers. But the peculiar social and economic opportunities of the colonies, coupled with the relatively thin aristocratic presence in the New World created

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and maintain an oppositional consciousness).

46. WOOD, *supra* note 12, at 5.

47. *Id.*

48. *Id.*

49. *Id.* at 8.

50. *Id.* at 8.

conditions that made aristocratic privilege and the political structure that reinforced it began to seem “less natural, less ordained by God, and more man-made, more arbitrary.”<sup>51</sup>

In the early colonial period the colonists did their best to replicate the old-world:

[They] may not have known much of real kings and courts, but they knew very well the social hierarchy that the subjection and subordination of monarchy necessarily implied. Monarchy presumed what Hume called “a long train of dependence,” a gradation of degrees of freedom and servility that linked everyone from the king at the top down to the bonded laborers and black slaves at the bottom . . . In this traditional world “every Person has his proper Sphere and is of Importance to the whole.” Ideally in such a hierarchy no one was really independent, no one was every alone and unattached.<sup>52</sup>

Everyone had his place. This static order was reinforced geographically as well. Using “warning-out” laws, New England towns “could legally eject ‘strangers’ and have constables convey them from town to town until they were returned to the town where they legally belonged.”<sup>53</sup> Yet this ancient order, incrementally and through a confluence of forces, came undone, so that by the “1760s and 1770s . . . the absence of a traditional European nobility and a sprawling mass of the destitute made everyone [in the colonies] seem much more alike.”<sup>54</sup>

An important part of this phenomenon was the changed social meaning of labor. Labor was traditionally demeaning in aristocratic society, “the consequence of necessity and poverty,”<sup>55</sup> but in the colonies it came to be seen as an important social leveler. Even in South Carolina, the most aristocratic of the colonies, “the distinction between the farmer and a rich planter, the mechanic and the rich merchant” was more “imagination, than reality.”<sup>56</sup> The historical novelty of these relatively equalized circumstances made the colonists feel that this new social organization was very precarious and so whatever aristocratic privilege remained seemed threatening out of all proportion to the actual power the weak colonial gentry could wield.<sup>57</sup>

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51. *Id.* at 145.

52. *Id.* at 19.

53. *Id.* at 20.

54. *Id.* at 171.

55. *Id.*

56. *Id.* at 170.

57. *Id.* at 171.

The point for our purposes is that the revolutionary effort was motivated—at every level of society—in important part by the desire to preserve and to deepen these radical social changes. This was not to say that landed wealthy men did not worry about rule by plebeians. But even these men, who touted a *natural* aristocracy of talent and merit, rankled at unmerited, *hereditary* aristocratic privilege.<sup>58</sup>

### 1. Undocumented Migration Seizes the Unjust Privileges of the Aristocracy of Citizens

If hereditary aristocracy was the social bugbear of the late eighteenth century in America and France, unilateral control of movement across borders—based on hereditary concepts of citizenship<sup>59</sup>—is the twenty-first century analogue. There is a globalized “free trade” economic order that throws capital and goods hither and thither across the globe, but radically restricts the movement of persons across borders, particularly from poor countries to rich ones with higher productivity levels.<sup>60</sup> Access to the privileges of wealth and the productive use and development of one’s labor are granted based on the arbitrary accident of birth.<sup>61</sup> Just as the colonists committed treason to liberate themselves from an aristocratic social order, so do the undocumented—without violence—effectively demand a liberating order that abolishes the hereditary hoarding of citizenship and its privileges for citizens and their invited guests.

Labor plays an important role in upending the citizen aristocracy, just as it did in the revolutionary era. While factions of the citizenry attempt to portray migrant labor as a species of theft, the older,

58. *Id.* at 180.

59. See generally JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (Colum. Univ. Press 2009).

60. The difference in living standards between countries is an order of magnitude greater than the differences within the countries of the developed world. See, e.g., Thomas Nagel, *Ways to Help*, N.Y. TIMES LITERARY SUPPLEMENT (Nov. 18 2015), <http://www.the-tls.co.uk/articles/private/ways-to-help/> (“In real purchasing power – not just money – someone living below the US poverty level, earning \$11,000 a year, is in the top 15 per cent of the world income distribution. Someone earning \$28,000 a year, the median individual income in the US, is in the top 5 per cent. Someone earning \$52,000 or more is in the top 1 per cent. The bottom 20 per cent of the world’s population earns less than \$550 a year in US purchasing power, and lives at an almost unimaginable level of want.”).

61. Moving a poor person from a low-productivity to a high productivity state is the easiest way to engage in economic development. See generally LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON GLOBAL LABOR MOBILITY 33 (Ctr. for Global Dev. 2006). Productivity is in the air—a public good—in high productivity states, and immigrants’ access to that productive “air” generates returns that are orders of magnitude higher than even the most effective economic development strategies. *Id.*

ennobling tradition of labor—birthed in the pre-revolutionary era—continues to have a hold on the public as well. The way in which hard work continues to signal membership in the natural American aristocracy of merit has helped the undocumented ground their claims for membership.<sup>62</sup>

### C. Giving “The People” Power by Making Utopian Theories Real

The American revolutionaries had a utopian streak; they tried to make a pie-in-the-sky theory real. The Revolution and its aftermath radically reconfigured political sovereignty by locating it outside of any political institution and placing it in “the People,”<sup>63</sup> the collective of individuals residing in the colonies. This notion that the collection of individuals to be governed are sovereign came out of “Real Whig” political theory, which, *inter alia*, granted the people themselves the power to engage in a full-scale “revolution, which denied the continued legitimacy of the established government as a whole.”<sup>64</sup>

Significantly, this theory had become for the English a strictly academic pursuit by the late eighteenth century. Prominent Englishmen came to believe that a sovereign people was a practical impossibility. William Blackstone, for example, characterized John Locke’s assertion that “there remains . . . inherent in the people supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them” as just “theory.”<sup>65</sup> “[W]e cannot adopt it, nor argue from it, under any dispensation or government at present actually existing.”<sup>66</sup> “For Blackstone . . . Parliament had, in effect, replaced the people as the repository of sovereignty.”<sup>67</sup>

The colonists rejected this cramped English view of political possibility, seeing no reason why idealistic theory could not become real:

English efforts to distinguish political theory from practice were questioned in America, most notably on the part of some who rose

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62. For a thoughtful discussion of earned membership as the normative foundation for legalization debates, see Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 *YALE J. L. & HUM.* 110 (2011).

63. See David C. Williams, *Civic Constitutionalism, the Second Amendment, and the Right of Revolution*, 79 *IND. L.J.* 379, 380–81 (2004).

64. MAIER, *supra* note 16, at 28.

65. *Id.* at 46.

66. *Id.*

67. *Id.*

to prominence in America’s revolutionary movement . . . . When Josiah Quincy, Jr. Came across Blackstone’s statement, he asked in the margin ‘whether a conclusion can be just in theory, that will not bear adoption in practice.’ John Adams too was dumfounded when he encountered an assertion that ‘revolution principles’ were ‘noble and True’ but ‘the application of them to particular cases is wild and utopian.’ ‘How they can be in general true, and not applicable to particular cases, I cannot comprehend.’<sup>68</sup>

And this American variant of “Real Whig”<sup>69</sup> political theory traveled up and down the colonial seaboard, informing discussions esoteric and plebian, “provid[ing] a strong unifying element”<sup>70</sup> for the diverse colonial people.

Thus, the belief that the noble and true should be made real—even if deeply impractical—bound colonists together to fight for independence. Our tradition of constructive illegality, then, contemplates throwing off the constraints of the practical and the poverty of the possible, in pursuit of the true and the right.

#### 1. “Illegal” Migration Helps to Realize Ideal Theory

Just as Real Whig political theory seemed hopelessly idealistic to the English, Cosmopolitan political theory—which imagines a world of unrestricted migration for those with peaceful intentions<sup>71</sup>—is often viewed as unserious, impossible and utopian. Yet the actions of the undocumented themselves, have helped to test the viability of such theories in the United States.

Cosmopolitanism, in essence, calls for each individual migrant to choose for herself which political community she wishes to belong to, rather than be bound to her country of birth.<sup>72</sup> By migrating without permission, the undocumented are testing the viability of a cosmopolitan form of political organization—where the state does not directly control who (with peaceful intentions) resides within its boundaries or even whose progeny becomes a part of the citizenry.<sup>73</sup> While this challenge to territorial sovereignty has lead portions of the

68. *Id.* at 47.

69. *Id.* at 27.

70. *Id.*

71. *See, e.g.,* STEVENS, *supra* note 59.

72. For discussion, *see* Morales, *Illegal Migration*, *supra* note 6, at 83–85 (discussing cosmopolitan political theory); *see also* STEVENS, *supra* note 59, at 28–37 (arguing that liberal political theory requires free movement of persons and analogizing restrictions on movement to slavery).

73. *Id.*

citizenry to frame the undocumented as a dire threat to the viability of the United States, another cohort has accepted that the legal violation of the undocumented is not and should not be a barrier to their inclusion as members or the inclusion of their progeny.<sup>74</sup> This acceptance of the undocumented reflects a cosmopolitan ethos, one that is being nurtured and given legal force inside the boundaries of sanctuary cities.

This achievement, convincing a cohort of the citizenry that membership norms ought to be more elastic and less legalistic, is quite significant, given the strength of mainstream commitments on the left and the right to full national control over who is permitted to immigrate.

#### *D. Power Without Limit is Unlawful*

The Real Whig political theory was also a *legal* theory grounded in the English constitutional precedent of the Glorious Revolution. And while the legal arguments for the constructive law-breaking of the revolution were numerous and complex, their gravamen was the unrestrained character of the power that the empire could deploy against the colonists. The colonists were not represented in Parliament and Parliament's authority to legislate was theoretically infinite. This infinite coercive power over the colonists went unchecked.

The central fear of the colonists<sup>75</sup>—and, indeed, all Englishmen—in the eighteenth century was the exercise of power without limit. The notion that legitimate power is exercised and recognized through power's conformance with legal limits “was older than the Magna Carta.”<sup>76</sup> “The colonists . . . complained that Parliament would be their ‘sovereign’ without giving them any check, any ‘participation in the deliberation, or the will.’ leaving them only the obligation to obey what was commanded. ‘The colonists [said] that this sovereign . . . is an

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74. See Jeffrey M. Jones, *65% Favor Path to Citizenship for Illegal Immigrants*, GALLUP (Aug. 12, 2015), <http://www.gallup.com/poll/184577/favor-path-citizenship-illegal-immigrants.aspx>.

75. In his magisterial four volume treatise on the American revolution, legal historian John Philip Reid insists on the centrality of the concept of arbitrariness to the eighteenth century English and colonial legal mind. See JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE*, 136–37 (Univ. of Wis. Press. 1992).

76. See *id.* at 6.

absolute sovereign, an arbitrary lord, and that their obedience and subjection, without the interposition of their own free will, is . . . absolute slavery.”<sup>77</sup>

Ben Franklin, for example, objected to Parliament’s emerging legal supremacy by arguing “that such doctrine is incompatible with every idea in a civil constitution; . . . for this supreme authority, having no rule or law to direct its operations, or limit its power, must necessarily become arbitrary and absolute.”<sup>78</sup>

During the run-up to the Revolution, the unchecked authority of parliament on colonial government manifested itself in numerous ways that helped to justify treason against the crown. For example, the Townshend Acts, which taxed glass, paper, paints, and teas, grated not just because it was a tax imposed on colonists in which they had had no say, but also because the revenues were to be used to consolidate parliament’s power in the colonies “by making local judicial and executive officials dependent on the Crown for their salaries.”<sup>79</sup>

Tying the judiciary and the executive to the crown in this way threatened to cut the colonial assemblies out of power, since the assemblies would lack anyone on their payroll to execute or uphold their commands. By taking these civil functionaries out of colonial control Parliament was eliminating a check on power that the colonies had previously enjoyed.<sup>80</sup>

This abiding fear of unchecked power is the strongest political tradition to emerge from the revolutionary period since it profoundly influenced the architecture of the Constitution. In turn, continued constitutional practice over the centuries has ensured that fear of unchecked governmental power remains a vibrant part of the American political tradition.

77. *Id.* at 139 (citing JOHN LIND, REMARKS ON THE PRINCIPAL ACTS OF THE THIRTEENTH PARLIAMENT OF GREAT BRITAIN: VOL. I CONTAINING REMARKS ON THE ACTS RELATING TO THE COLONIES WITH A PLAN OF RECONCILIATION (1775)).

78. *Id.* at 135.

79. See REID, *supra* note 75, at 286.

80. *Id.* at 287. The Townshend Act salary provision reflected the then emerging doctrine of Parliamentary supremacy which “threatened to end colonial autonomy or to codify permanent colonial legislative subordination”: “[B]y raising revenue for the support of the civil government you destroy the utility of the Assemblies . . . . The men whose deliberations heretofore had an influence on every matter relating to the liberty and happiness of themselves and their constituents will now find their deliberations of no more consequence than those of constables . . . . Their influence will hardly be permitted to extend so high, as the keeping of roads in repair, as that business may more properly be executed by those who receive the public cash.” *Id.*

### 1. The Undocumented Challenge the Power Without Limit of Immigration Law

Noncitizens in the United States live under the yoke of unchecked power every day. Immigration law is notoriously under-regulated by constitutional checks on legislative and executive power. Moreover, noncitizens cannot vote, and so enjoy no direct political voice in crafting the rules which they are obligated to follow. The undocumented are the most vulnerable to the immigration regime's use of unchecked power, given the way that their very presence in the United States is framed as an affront to sovereignty—the backbone, or so the citizenry is told, of social order and the foundation of democratic possibility.<sup>81</sup>

Yet, the undocumented person standing at the border, staring down the “cimmigration complex”<sup>82</sup> that has sprung up at colossal expense in an effort to prevent him from joining the U.S. political community, has had no say—no voice or vote—in forming the immigration law that she is supposed to comply with. The grossly undemocratic—utterly unchecked—quality of the law that excludes the undocumented and regulates the lives of noncitizens places then in a similarly antagonistic position to legal authority as the colonists at the moment of revolution.

### CONCLUSION

The revolutionary era was a period of radical political, social, and legal ferment. Its aftermath established a new form of government that spread throughout Europe and eventually the world.

Today we have reached a moment where there is a global consensus that the democratic nation-state, an eighteenth century political structure (complete with various important innovations) represents the apogee of human political evolution. This has to be wrong. American democracy, and the countries that have adopted and adapted it to their governments, carried forward an even older view of territorial sovereignty, one where the sovereign—now, the citizenry—have unfettered authority to decide which peaceful persons come in and out of their borders. The inadequacy of this system in our globalized world is readily apparent.<sup>83</sup> The rich democracies move from immigration

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81. Other scholars have imagined alternatives to this. *See, e.g.*, STEVENS, *supra* note 59.

82. Mary Fan, *The Cimmigration Complex*, 92 N.C. L. REV. 75 (2014).

83. The wealth of the rich world is grotesque when seen through a global lens. *See* Nagel, *supra* note 60.

crisis to immigration crisis without appreciating that their model of sovereignty is inadequate to the contemporary landscape: democracy must evolve.

I hope that the historical comparisons drawn in this essay helped to illustrate how this needed, peaceful—if disordered—evolution is both desirable and possible, and how it is being furthered by undocumented migrants. The status quo, as undocumented migration shows, is not meeting the needs of the global community of human beings.