

# Law As Temporality: Colonial Politics and Indian Settlers

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On December 17, 1919, *Young India*, a weekly English-language periodical published in Ahmedabad, India and inaugurated and edited by Mohandas K. Gandhi, printed a fastidious and pointed critique of British imperialism. Entitled *Indians Abroad* and written by Gandhi, the essay was both a condemnation of the cruelty and neglect that confronted British Indians who traveled and settled outside the subcontinent and an affirmation of their many contributions to the British Empire, including their forced labor.<sup>1</sup> Gandhi's focus was not the white settlement colonies of Australia, New Zealand, or Canada where restrictive immigration policies barring the entry of British-Indian subjects had garnered significant attention and commentary throughout India and the Indian diaspora.<sup>2</sup> Rather, his essay was motivated by a similar and growing discontent in Fiji, and

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1. 19 MAHATMA GANDHI, *Indians Abroad*, in THE COLLECTED WORKS OF MAHATMA GANDHI 185, 185–87 (4th rev. ed. 2000).

2. Prohibitions on British Indian migration had generated considerable criticism amongst British Indians in India, Canada, Australia, and especially South Africa. For a discussion of these prohibitions in the settler colonies see MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY 186–87 (2008). See generally ROBERT A. HUTTENBACK, RACISM AND EMPIRE: WHITE SETTLERS AND COLORED IMMIGRANTS IN THE BRITISH SELF-GOVERNING COLONIES 1830–1910 (1976).

East and South Africa, its effects equally manifest in proposals to legally restrict and prohibit Indian migration and settlement. In settler colonies, Indians were perceived as threats to white labor and thus to white futures. In Kenya, Gandhi noted, quoting a telegram he received from Nairobi, Europeans alleged that “Africans morally deteriorate through Indian contact but advance under Christian Western civilization.”<sup>3</sup> These assertions, his correspondent explained, were issued by local European associations and were aimed at fortifying Indian exclusion. Responding to these objections and rendering them grossly inaccurate, Gandhi reminded his readers that the Indian “penetrated East Africa when there was no European there and affected for the better [the] manners and customs of the [African] people.”<sup>4</sup> “Those who prate about the Christian civilization,” he admonished, “ignore the teaching of history” and “know nothing of the manner in which the *Indian settler* has raised the native of Africa.”<sup>5</sup>

In Gandhi’s account, the sojourn and settlement of British Indians in East and South Africa stood in stark contrast to the questionable objectives and destructive effects of European expansion, including territorial appropriation and racial-colonial violence. Unlike Europeans, Indians did not “force their customs upon the Africans.”<sup>6</sup> “[N]or did they take the brandy bottle in the one hand and the gun in the other . . .”<sup>7</sup> They “did not go to East Africa with the intention of ‘civilizing’ the barbarians,” he maintained.<sup>8</sup> Rather, Indians sought permission to enter Africa, traded with “the natives of the soil,” and left “traces of their civilization” therein.<sup>9</sup> Drawing a clear and infallible distinction between the interests and intentions of Indian traders and those of British and European colonists, particularly their opposing ethical positions, Gandhi described both to be “settlers,” albeit on different terms. In East Africa, he insisted, the European could not possibly claim to be a “pioneer settler.” The Indian was the “pioneer.” The economic development of the region, he urged, was the result of Indian labor. British Indians “worked in the midst of grave danger to health,” cultivated and developed the land, and contributed immeasurably to the prosperity of Britain’s empire.<sup>10</sup>

Less than a century after Gandhi identified British Indians to be settlers and pioneers, the Asian settler has reentered the historical record for markedly different reasons and in a distinctly (post)colonial political terrain.<sup>11</sup> In *Indians*

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3. 19 GANDHI, *supra* note 1, at 186.

4. *Id.*

5. *Id.* (emphasis added).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 187.

11. Bonita Lawrence & Enakshi Dua, *Decolonizing AntiRacism*, 32 SOC. JUST. 120, 134–35 (2005). For a response to Lawrence and Dua see Nandita Sharma & Cynthia Wright, *Decolonizing Resistance, Challenging Colonial States*, 35 SOC. JUST. 120, 120–21 (2008). Much of this resurgent and renewed interest in Asian settlers has focused not on British Indians, but on Chinese and Japanese

*Abroad*, Gandhi's characterization of British Indians as settlers offered one way to emphasize the material significance of Indian labor and its vital role in building the British Empire. At the same time, his essay invited a resounding call for Indian nationalism and a potent anticolonial critique. Contemporary accounts of the Asian settler, by contrast, have been motivated by divergent political and economic stakes which carry significantly different effects. As activists and scholars in the current global context emphasize the urgent need to recognize indigenous sovereignties, to decolonize existing relations between indigenous peoples and settler states, and to pursue indigenous/nonindigenous reconciliation; as observers and commentators aim to make sense of changing geopolitics, particularly the rise of India and China and their growing involvement in resource development and trade in Africa; and as legal, social, and cultural historians chart the entangled genealogies of colonialism, the Asian settler has entered colonial history and postcolonial politics in unprecedented and also troubling ways.<sup>12</sup>

In some instances, engagements with the Asian settler question have been highly productive, gesturing to the significance of Chinese, Japanese, and Indian migration in shaping colonial politics across continental divides; emphasizing the conjoined histories of indigenous peoples and non-European migrants in settler societies; and highlighting the structural links between distinct and seemingly incommensurable colonial projects, including indigenous dispossession, slavery, indenture, and "free" migration.<sup>13</sup> Other accounts have been framed in surprisingly ahistorical terms. To claim that Asians are settlers comparable to or the same as Europeans, as some have done, glosses over the uneven, asymmetrical, and coercive conditions of colonial, juridical, and racial power that drew Gandhi's attention and reproach in *Indians Abroad* and through which he

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migrants. Ann Curthoys, *An Uneasy Conversation: The Multicultural and the Indigenous*, in RACE, COLOUR AND IDENTITY IN AUSTRALIA AND NEW ZEALAND 21, 23–34 (John Docker & Gerhard Fischer eds., 2000); see also ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAI'I *passim* (Candace Fujikane & Jonathan Y. Okamura eds., 2008) [hereinafter ASIAN SETTLER COLONIALISM].

12. On India and Africa, see ANTOINETTE BURTON, BROWN OVER BLACK: RACE AND THE POLITICS OF POSTCOLONIAL CITATION 1–20 (2012). For an important essay that raises questions on the geopolitical rise of China and of settlers and natives in Africa, see Grant Farred, *The Unsettler*, 107 S. ATLANTIC Q. 791, 791–95 (2008). For a recent discussion of reconciliation between indigenous peoples and immigrants of color in Canada, see CULTIVATING CANADA: RECONCILIATION THROUGH THE LENS OF CULTURAL DIVERSITY (Ashok Mathur et al. eds., 2011) [hereinafter CULTIVATING CANADA]. For discussions of indigenous and black sovereignty, see George Elliot Clarke, "Indigenous Blacks": An Irreconcilable Identity?, in CULTIVATING CANADA, *supra*, at 397, 399–404.

13. See Lisa Lowe, *The Intimacies of Four Continents*, in HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY 191, 191–208 (Ann Laura Stoler ed., 2006); RENISA MAWANI, COLONIAL PROXIMITIES: CROSSRACIAL ENCOUNTERS AND JURIDICAL TRUTHS IN BRITISH COLUMBIA, 1871–1921 (2009). Neither Lowe nor I discuss the Asian settler directly. However, each of us is interested in the role of the Chinese migrant in histories of European colonialization in the Caribbean and Canada respectively.

contrasted the European and the British Indian as settlers on divergent ethico-political and economic grounds.<sup>14</sup>

This Article situates the Asian settler debate within one historical context of settler colonialism. Beginning with Gandhi's provocations that British Indians were settlers and pioneers, I place his anticolonial critique within a much longer and flourishing discourse on Indian settlers in early twentieth-century South Africa. During this period, as is now well known, British Indians in Natal, the Cape Colony, Transvaal, and Orange Free State, inspired by and often under the leadership of Gandhi, struggled against racially restrictive and coercive legislation, including mandatory registration, poll taxes, disenfranchisement, segregation ordinances, and proposed laws barring their entry and facilitating their deportation.<sup>15</sup> In resisting the violence of anti-Indian legislation and the conditions of impermanence these laws generated, "free" British Indians often made claims as settlers, to emphasize the historical contributions of their labor, their indispensability, and their futurity in South Africa. In so doing, they sought to distinguish themselves from other racially inscribed and enumerated populations including Indian indentures, Asiatic migrants, and, most notably, native Africans. The juridical taxonomies in circulation—"native," "European," "Asiatic," and "colored"—were manifestations of a wider regime of racial-colonial power aimed at constituting, dividing, and governing South Africa's heterogeneous populace.<sup>16</sup> Crucially, as I suggest below, these juridical-racial taxonomies were also *temporal divisions* that fomented legal subjectivities ascribed with unequal degrees of worth and value, disparate rights to the land, and with distinct claims to the imperial polity.<sup>17</sup> Each of these racial designations implied specific durations in and of time

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14. In Hawai'i, see Candace Fujikane, *Introduction to ASIAN SETTLER COLONIALISM*, *supra* note 11, at 1, 4. In the Canadian context, see Lawrence & Dua, *supra* note 11, at 120, 134–35.

15. There is now a vibrant literature on Indian exclusion in South Africa. One of the earliest and most cited remains Robert A. Huttenback, *Indians in South Africa: 1860–1914: The British Imperial Philosophy on Trial*, 81 ENG. HIST. REV. 273, 273–91 (1966).

16. Informed by the work of Foucault, I conceptualize race as a regime of power that cannot be reduced to ideology, corporeality, or exclusion alone. Race is not simply imposed on institutional structures that govern social life (including law), but is deeply rooted in the generativity of power/knowledge that informs the emergence and development of these institutional structures and their various effects, including violence and coercion. It is through the production of racial regimes of power that subjection and subjectification are made possible, occurring and unfolding as mutable and mobile forces, responding to various social relations and occurrences, and assuming different manifestations and meanings. These materializations are not always identifiable as "racial," especially if race is narrowly conceived as corporeality, ideology, and/or exclusion. For a useful critique of race as ideology and corporeality that informs my thinking here, see Barnor Hesse, *Im/Plausible Deniability: Racism's Conceptual Double Bind*, 10 SOC. IDENTITIES 9, 11–12 (2004), and Barnor Hesse, *Racialized Modernity: An Analytics of White Mythologies*, 30 ETHNIC & RACIAL STUD. 643, 645 (2007) [hereinafter Hesse, *Racialized Modernity*]. See also DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE 2–4 (2007). Here, da Silva explores how the racial has prefigured the production of philosophical, scientific, and humanistic thought.

17. I began developing this argument of race, law, and temporality in an earlier article. Renisa Mawani, *Specters of Indigeneity in British-Indian Migration, 1914*, 46 LAW & SOC'Y REV. 369, 369 (2012). For very useful discussions of time and subjectivity, see JOHANNES FABIAN, TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT 59–60 (2002). For a discussion of race, temporality, and

and thus differing degrees of political sovereignty. British Indians' claims as settlers were asserted against the temporalizing forces of legality and were aimed at placing law's time and its attendant racial inscriptions "out of joint."<sup>18</sup>

Law as temporality presents a set of questions and invites a formulation through which to critically examine the Indian settler as Asian settler question. Although time is crucial to the spectacular and quotidian expressions of law—to its force and legitimacy, and its onto-epistemology—in legal scholarship, law's time has too often been assumed rather than problematized.<sup>19</sup> Insofar as legal historians and legal theorists have discussed law's time explicitly, the temporalities of law have often been restricted to history and context.<sup>20</sup> This Article begins sketching a fuller account of law as temporality by examining how law produces, engages, and inscribes discontinuities between past, present, and future to fortify its own authority, sovereignty, and legitimacy. These processes, I contend, are especially evident in the racial subjection and subjectification of Indian settlers and in their appropriation and deployment of juridico-political identities.

In what follows, I develop these intersecting themes of law, temporality, and colonial-racial subjectivity in two parts. In Part I, I begin to formulate an analytic approach to rethink law as temporality. Here, I contend that law's times cannot be conceived solely in terms of history or historicity. Rather, the temporalities of law demand a critical engagement with law's role in the production and organization of time as past, present, and future; law's imposition of time on colonial-legal subjects; and the tensions and disjunctures between law's time and lived time. Law as temporality, I suggest, opens ways to foreground not only the past and present as significant moments in law's claims to authority and legitimacy, but the future as a juridico-political terrain that forges an equally critical tense of legality.

To be sure, the times of law produce tensions and paradoxes that can most readily be identified in the material conditions of their emergence. Following Gandhi's admonishments of British imperialism and his remarks on its uneven racial and political effects, Part II is situated in early twentieth-century South Africa. Focused on debates in *Indian Opinion*, the Natal newspaper initiated and

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subjectivity, see DA SILVA, *supra* note 16, at 115–51, and ACHILLE MBEMBE, ON THE POSTCOLONY 1–18 (2001).

18. The term "time out of joint" comes from WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5 and is used by Derrida to discuss the role of the specter. JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, & THE NEW INTERNATIONAL 3* (Peggy Kamuf trans., 1994).

19. See, e.g., Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1670 (2010). For important and notable exceptions, see CAROLE J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* 175–210 (1996), or see PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 84–90 (2001).

20. For a useful discussion of the relationship between law, history, and context in American legal history, see Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587, 587–609 (2011). For an important discussion of time and the common law see KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011). For an account of time as duration see Renisa Mawani, *The Times of Law*, LAW & SOC. INQUIRY (forthcoming 2015).

edited by Gandhi, I point to the exigencies and urgencies of settler colonialism, the conditions in which British Indians self-identified as settlers, and the effects of these identifications on prevailing constellations of racial-colonial power. My discussion of the Indian settler in South Africa is not intended to place law in history or context. Rather, my account offers one historical opening through which to consider the *doubling of time*: the tensions between *law's creation of time*, including the legal production of colonial-legal subjectivities, and the challenges posed by British Indians whose claims as settlers were animated by their own *lived times* of colonialism—including migration and indenture—and which animated their claims to belonging. Ultimately, the colonial legalities, temporalities, and politics that I elucidate here, I hope, might open new itineraries for legal history and for an (un)timely politics of solidarity currently occluded by contemporary claims that Asians are settlers.<sup>21</sup>

### I. THE TIMES OF LAW

*All our pasts are . . . futural in orientation.*

—Dipesh Chakrabarty<sup>22</sup>

Over the past two decades, law and legal studies have begun to take space seriously.<sup>23</sup> However, they have not approached time with the same critical rigor. In legal scholarship, time is often assumed to exist as though it were a natural phenomenon, unfolding effortlessly and inconspicuously as the backdrop to social and political life.<sup>24</sup> Even in legal history, where questions of temporality would seem to be of interest and concern, time has only recently been the subject of critical discussion and debate.<sup>25</sup> Often, time is tacitly conceived as a sequential and directional line on which events, subjects, and objects may be plotted and organized in a chronological fashion. For Constantine Fasolt, historians do not often begin their investigations by questioning time. They presuppose it. History,

21. On politics as untimely, see ELIZABETH GROSZ, *IN THE NICK OF TIME: POLITICS, EVOLUTION, AND THE UNTIMELY* (2004). See also DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 74–75 (2000).

22. CHAKRABARTY, *supra* note 21, at 250.

23. There is a large and robust literature on legal geography. For early interventions in the field, see generally NICHOLAS K. BLOMLEY, *LAW SPACE AND THE GEOGRAPHIES OF POWER* 29–31 (1994) and *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* (Nicholas Blomley et al. eds., 2001).

24. Writing about the literature on war, Mary Dudziak argues as follows: “Ideas about the temporality of war are embedded in American legal thought. A conception of time is assumed and not examined, as if time were a natural phenomenon with an essential nature, providing determined shape to human action and thought.” Dudziak, *supra* note 19, at 1670. Although Dudziak is writing of a specific context and a particular body of literature, one can easily expand her critique to encompass law and legal studies, a field in which time is central but not often or fully problematized.

25. There is now a growing concern with temporality in legal history. PARKER, *supra* note 20; Dudziak, *supra* note 19, at 1672; Christopher Tomlins, *Revolutionary Justice in Brecht, Conrad, and Blake*, 21 *LAW & LITERATURE* 185, 187 (2009) [hereinafter Tomlins, *Revolutionary Justice*]; Christopher Tomlins, *The Threepenny Constitution (and the Question of Justice)*, 58 *ALA. L. REV.* 979, 984–86 (2007) [hereinafter Tomlins, *Threepenny Constitution*].

he contends, “shelters us from the experience of time.”<sup>26</sup> It “comforts us with the illusion that subjects can be defined by their historical conditions and that change over time can be explained by historical development.”<sup>27</sup> Although legal historians have demonstrated that law unfolds in time, that it has a history and historicity, few have examined how law appeals to particular conceptions of time, whether linear, chronological, circular, or instrumental. Even fewer have asked how law produces time, how it orders the *nomos* through its own temporalities, aspiring to assimilate and absorb other temporalities in the process. By reducing time to the past and to context, legal historians have conceptualized temporality as a quality that is both vital and intrinsic to history but one that remains exterior and insignificant to law.<sup>28</sup>

Yet, law is fundamentally about time. A cursory glance at legality in all of its heterogeneity and diversity—as statute, precedent, technique, administration, and command—yields numerous examples in which juridical concepts, legal discourses, and legal authority are underwritten by and draw their meanings from the production, specification, and arrangement of time. Civil and criminal statutes—most notably contracts, property, and sentences—are structured and organized along particular temporal coordinates. Law draws its meanings and gains its authorizing force through specifications and limits on time (minimum/maximum sentences or statute of limitations, for example) and through the temporalities it inhabits and brings into being.<sup>29</sup> Although law may seem to operate through a historicist logic evident in its self-referentiality and in its structure of citation and repetition, law is not reducible to a single past. Rather, its pasts are often futural, to paraphrase Dipesh Chakrabarty above. Law’s pasts are teleological in orientation, reflecting both a continuity and a break with what came before, and often refracted through its promises for social betterment and progress in a future that is yet to be realized.

As these few examples suggest, time is integral to the ontology and epistemology of law. It is equally significant to law’s organization of social and political life. The temporal forces of law are vividly materialized in national constitutions. As an act of originary violence, the founding law and social contract that juridically binds the people to the sovereign, the U.S. Constitution, demonstrates the composite and fluctuating relations between past, present, and future.<sup>30</sup> As an inaugural legal imposition, the Constitution divides time into a “before” and “after.” Read and experienced in the present, it connects the polity through a series of absences, through memories and fragments of the past, and in

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26. CONSTANTINE FASOLT, *THE LIMITS OF HISTORY* 231 (2004).

27. *Id.* at 231–32.

28. SAMERA ESMEIR, *JURIDICAL HUMANITY: A COLONIAL HISTORY* 62 (2012).

29. See Emmanuel Melissaris, *The Chronology of the Legal*, 50 *MCGILL L.J.* 839, 846 (2005).

30. On the originary violence of the constitution, see Jacques Derrida, *Force of Law: The “Mystical Foundations of Authority,”* in *ACTS OF RELIGION* 230 (Gil Anidjar ed., 2002). On the constitution and temporality, see Tomlins, *Threepenny Constitution*, *supra* note 25, at 992–93.

promises and proscriptions for an anticipated future that has yet to arrive.<sup>31</sup> As a written text that sets out a national vision, the meanings and purpose of the Constitution are intended to exceed, extend, and outlive its authors. Figured in a moment of discontinuity and interruption, between the past and future of social and political life, the Constitution is not solely a product of or in time. Rather, it produces, condenses, and disjoins time while remaining explicitly teleological. It encourages the people to cultivate and expand their national solidarities by moving beyond the past, overcoming their individual differences, while striving to fulfill a more promising and just future.<sup>32</sup> The Constitution produces its own set of temporal rhythms, effacing other temporalities—reducing “indigenous time” to a time before conquest, the nation, and history, for instance—and arranging the social body in its own visions of a selectively imagined past, present, and future.<sup>33</sup> Through its emphasis on historical progress, its presumed break from the past, and its embrace of futurity, the Constitution vividly reveals law’s production and organization of time.

For feminist philosopher Elizabeth Grosz, time can only be understood as *doubled*. Time may present an irreversible continuity she writes, yet “the events in time each have a duration of their own, and thus function through discontinuity, realignment . . . [and] rupture.”<sup>34</sup> Drawing primarily from the work of Henri Bergson and placing him in conversation with Darwin and Nietzsche, this doubling of time, Grosz explains, is produced by the tensions and frictions between the persistence of an *overarching time* on the one hand, and time as the duration and temporality of each event, thing, or process, on the other.<sup>35</sup> Grosz conceives of overarching time as cosmological time. However, this doubling, I argue here, is also apparent in the temporalizing force of law, through the coarse and resistant encounters between an unfolding and overarching *telos* and the multiple and unforeseeable temporalities of specific subjects, objects, and events that continually exceed and escape legal order and arrangement, conditions to which law must respond.<sup>36</sup> Law creates time as a discontinuity—through the fitful organization of a past, present, and future that underwrites statute and precedent. Yet, law is constantly confronted by legal events, subjects, and processes each with their own duration and each a potentially disruptive force that does not easily follow or abide by law’s temporal decrees.

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31. Peter Goodrich argues that the constitution is always oriented to the future. PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 172 (1990).

32. Tomlins, *Threepenny Constitution*, *supra* note 25, at 993. Although Tomlins is discussing the U.S. Constitution, this memorializing of the past and reinvention of the future is also vividly evident in Iraq’s new constitution. See Renisa Mawani, *Law’s Archive*, 8 ANN. REV. L. & SOC. SCI. 337, 358–60 (2012).

33. On indigenous time, see Farred, *supra* note 12, at 798.

34. GROSZ, *supra* note 21, at 250.

35. *Id.*

36. For a compelling account of the British common law as underpinned by a time that maintains a discontinuity with itself, see PARKER, *supra* note 20, at 15–16. For a Bergsonian reading of the common law see Mawani, *supra* note 20.



Conceptualizing law as temporality raises a series of important questions. How do law's disjointed movements between past, present, and future, and its responsiveness to its own exteriority produce a doubling of time?<sup>37</sup> On what terms are these temporalities constituted and organized and to what effect? In what ways does law aim to absorb other temporalities into its ever-extending *telos*? How does lived and experiential time escape, exceed, and reconfigure law's temporalizing force? These are difficult questions that I can only begin to address here. To do so, I draw inspiration from two unrelated bodies of scholarship: critiques of Western imperial time and from the insights of Henri Bergson and his recent interlocutors, including Grosz.

Admittedly, each of these literatures offers distinct and seemingly incommensurable interventions and engagements with temporality. In colonial and postcolonial studies, Western time as historical time has been the subject of a growing and sustained critique.<sup>38</sup> Unlike legal historians and legal scholars, critics of colonialism have not approached time as history alone. Rather, many have viewed futurity to be a crucial terminus in the progressive and directional march of history. Colonial futures figured crucially as sites of governance, potential transformation, and, ultimately, annihilation. The future of the colonies was to be distinct from the past, a new time to be captured via observation and prediction and to be refashioned and improved through persuasion, coercion, and brute force. In the work of Bergson, by contrast, the future remains a creative and unpredictable opening that evades calculation and exceeds regulation.<sup>39</sup> It is precisely these tensions between the future as a break from the past in terms of colonial legality and governmentality, and the future as a continuous site of creative opening that persistently escapes legal capture, that is of interest to me here. Despite Britain's efforts to transform and reinvent the futures of its colonial subjects via the force of law, legality, and other violent and coercive modes of "advancement," Bergson's duration offers a useful reminder that colonial futures were often beyond juridical control. Thus, law's production of an "overarching time," to use Grosz's phrase, differed significantly from and existed in tension

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37. On law as responsive, see FITZPATRICK, *supra* note 19, at 84–90.

38. Postcolonial studies have had a long engagement with temporality, as I discuss below. There is now a growing concern with time in settler colonial studies and from a number of different disciplinary approaches. FABIAN, *supra* note 17, at 27–28; ELIZABETH A. POVINELLI, ECONOMIES OF ABANDONMENT: SOCIAL BELONGING AND ENDURANCE IN LATE LIBERALISM 36–37 (2011); John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 44 (1997); Mawani, *supra* note 17, at 369; Elizabeth A. Povinelli, *The Governance of the Prior*, 13 INTERVENTIONS: INT'L J. POSTCOLONIAL STUD. 13, 15–16 (2011); see, e.g., JODI A. BYRD, THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM (2011).

39. Bergson develops his idea of duration in HENRI BERGSON, TIME AND FREE WILL: AN ESSAY ON THE DATA OF IMMEDIATE CONSCIOUSNESS 211–12 (F.L. Pogson trans., 1910). He develops these ideas in terms of evolution in HENRI BERGSON, CREATIVE EVOLUTION 1–7 (Arthur Mitchell trans., 1911) [hereinafter BERGSON, CREATIVE EVOLUTION], and in HENRI BERGSON, THE CREATIVE MIND 153–86 (Mabelle L. Andison trans., 1946) [hereinafter BERGSON, CREATIVE MIND].

with the multiple durations of lived time that it sought to order and even eradicate. This doubling of time, between law's time and the duration of lived time, fractured colonial legalities, opening sites for resistance and subversion, while also producing new intensities of colonial-legal violence, as I discuss more fully in the following section.

In postcolonial studies, scholars have long critiqued time as a Western and secular modernity and as an ontological and organizing impetus of social and political life. As Anne McClintock observes, the field has, from its very inception, oriented itself against the "imperial idea of linear time."<sup>40</sup> Postcolonial historians and literary critics, in particular, have directed their intellectual labors towards decentering Europe from its presumed place as "the sovereign, theoretical subject of all histories" and experiences, including non-European ones.<sup>41</sup> What Dipesh Chakrabarty has famously termed "provincializing Europe" invites a fundamental rethinking of historical time as a multiplicity of *historical times*. One cannot de-center Europe and conceptualize plural histories of power, he contends, without "radically questioning the nature of historical time."<sup>42</sup> The authority of a universal, secular, and singular Western time, he and others insist, has underwritten global histories of capitalism, what counts as politics, as well as prevailing conceptions of the modern political subject. For Chakrabarty, the problem of historical time is not reducible to the past. History has always been entangled with futurity, he maintains. "Imaginations of socially just futures for humans," continue to take "the idea of a single, homogenous, and secular time for granted." Thus, questioning historical time requires a critical investigation into the effects of a singular and chronological time on both the past and the future.<sup>43</sup>

Colonizing time was crucial to Britain's acquisition and control over territory and to its modalities of colonial legality and governance. The imposition of a single, Western, and secular time has a dense and lengthy history of its own, unfolding over centuries, ushered in through the movements and expansion of Christianity via developments in classical physics and through advancements in technology, including the invention of the mechanical clock.<sup>44</sup> By 1884, at the height of British imperialism, Britain distributed its own vision of time across the globe through the invention of Greenwich Mean Time (GMT). The creation and imposition of a global time enabled Britain and its European counterparts to divide the world into twenty-four time zones, standardizing and homogenizing time while beginning the erosion of other temporalities inspired by deities, gods,

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40. Anne McClintock, *The Angel of Progress: Pitfalls of the Term "Post-Colonialism,"* 31 SOC. TEXT 84, 85 (1992).

41. Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?*, 37 REPRESENTATIONS 1, 1 (1992).

42. CHAKRABARTY, *supra* note 21, at 15.

43. *Id.*

44. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1634 (1989); see also ADAM BARROWS, *THE COSMIC TIME OF EMPIRE: MODERN BRITAIN AND WORLD LITERATURE* 1–21 (2011).

and natural forces.<sup>45</sup> The institutionalization of GMT as a global standard time was motivated by Britain's national and imperial ambitions including military, scientific, and industrial advancements, as well as colonial expansion and control.<sup>46</sup> The governance of time became the ultimate expression of Enlightenment rationality, national/imperial authority, and supremacy, while opening new ways for the metropole to rule its colonies from afar and at a distance.<sup>47</sup>

The imposition of a single, Western, secular, and overarching time held significant albeit uneven consequences for colonial subjects and populations. In India, for example, record-keeping practices introduced by the East India Company and expanded by the British crown, instantiated Western time as *the* legitimate temporal register. The use of calendric dates and chronological times in public life introduced new discourses of time while diminishing the significance of Hindu, Muslim, and other chronologies.<sup>48</sup> These processes were expanded and institutionalized from the late nineteenth century onward as British rule restructured time through wage-labor, telegraph and railway timetables, and through new forms of punishment.<sup>49</sup> British time became a critical foundation of British law in India. The daily, bureaucratic, and mundane operations of law and legality, through which Britain sought to maintain its grasp over the uncertainty and indeterminacy of colonial life-worlds, demanded the imposition and regulation of time. Courts sat on particular days and at specific times, legal events and procedures were recorded in letters, reports, and in correspondence following clock and calendric time and sent via telegraph lines that followed their own timetables. The introduction and inauguration of legal schedules, processes, and conventions instituted by the British, to facilitate their rule over India, repeated, reproduced, and reinforced the hegemony of Western chronological time, even if this time was frequently contested, rejected, ignored, and manipulated by the colonial subjects on whom it was imposed.<sup>50</sup>

Conceptions of a homogenous, linear, and secular time were an integral aspect of the common law's ontology in the empire.<sup>51</sup> Representing both a

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45. BARROWS, *supra* note 44, at 50–51.

46. See Peter Galison, *Einstein's Clocks: The Place of Time*, 26 CRITICAL INQUIRY 355, 364–66 (2000).

47. BARROWS, *supra* note 44, at 14.

48. U. Kalpagam, *Temporalities, History and Routines of Rule in Colonial India*, 8 TIME & SOC'Y 141, 143–44 (1999).

49. *Id.* at 142; see also DIPESH CHAKRABARTY, RETHINKING WORKING-CLASS HISTORY: BENGAL 1890–1940, at 96 (1989). Here, Chakrabarty notes that jute mills regularly employed a “Time Babu” who was given the task of checking attendance, keeping registers, preparing wage-books, and assisting in supervision. *Id.*

50. Western forms of temporality had a significant effect on Hindu law. With the reform of India's judicial system in 1864, Bernard Cohn observes, legal decisions in English “transformed ‘Hindu law’ into a form of English case law” complete with “a forest of citations referring to previous judges’ decisions.” BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA 75 (1996). What I am suggesting here is that these changes in Hindu law were contingent on specific formulations of time (Hindu chronology versus Western calendric time).

51. Parker develops a rich and nuanced argument regarding the multiple temporalities of the

continuity and break with the past, British law and legality substantiated and legitimized its authority through its promises for the future. Futurity, as Chakrabarty and others have noted, figured prominently in Britain's rule over India. In 1833, Thomas Babington Macaulay made this point in his well-known speech to the House of Commons:

The destinies of our Indian empire are covered with thick darkness. It is difficult to form any conjecture as to the fate reserved for a state which resembles no other in history, and which forms by itself a separate class of political phenomena. The laws which regulate its growth and its decay are still unknown to us. It may be that the public mind of India may expand under our system till it has outgrown that system; that by good government we may educate our subjects into a capacity for better government; that, having become instructed in European knowledge, they may, *in some future age*, demand European institutions.<sup>52</sup>

Jurists and colonists, including Macaulay, who looked beyond Britain to its colonies, assumed that the expansion of British law to colonial jurisdictions and the transformation of indigenous forms of legality that it was believed to facilitate, would bring colonial subjects firmly into the progress and reason of modernity. Britain's "gift of law" to India was underwritten by a historicist and developmentalist logic; assimilating India into an overarching time of British law would bring its ancient civilizations forward, from a dark and anachronistic past into an enlightened present and future, even if the exact terms and effects of law and legality remained in dispute and under negotiation.<sup>53</sup>

Law's creation and imposition of time is also clearly evident in histories of settler colonialism, and in displacements and dislocations that also radically altered other non-Western temporalities. The effects of law's temporalizing force are perhaps most visible in the racial subjection and subjectification of indigenous peoples. In settler colonies, the future was often envisioned not solely through promises of social, political, and moral development and transformation but through annihilation, by relegating colonial subjects, especially indigenous peoples, to the past and to history.<sup>54</sup> Law produced an overarching and chronological time

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British common law in early America. I am not disputing his claims. However, I am suggesting that the common law manifests different temporalities that are interior and exterior and that appear distinct when considered from the vantage point of the British Empire, which is not his concern. See PARKER, *supra* note 20.

52. Thomas B. Macaulay, *A Speech Delivered in the House of Commons on the 10th of July 1833*, in THE MISCELLANEOUS WRITINGS AND SPEECHES OF LORD MACAULAY 551, 572 (1889) (emphasis added).

53. There was of course a long debate on whether the common law as unwritten law would be suitable in India or whether Indians required codified and written laws. See Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 LAW & HIST. REV. 631, 631–33 (2005). On the "gift of law," see PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 107 (1992).

54. Assimilation as annihilation was a key objective in settler societies. The aim was to transform aboriginal peoples so they would cease to be themselves. See, e.g., MAWANI, *supra* note 13, at 29.

through which it sought to capture the lives and experiences of indigenous subjects and life-worlds into a singular temporality. Thus, the European resettlement of indigenous lands, I am suggesting here, generated a set of concerns that were mutually territorial and temporal. Unlike the Indian subcontinent, where British authorities endeavored to bring colonial subjects into modernity, in settler colonies, aboriginal peoples were largely, but not exclusively, confined to history.<sup>55</sup> Although these temporal logics emerged with the settler state, through repetition, re-creation, and reinstantiation, law as temporality has become a governing force through which chronologies and legal subjectivities have been produced through conceptions of Western time that are seemingly natural and naturalizing.<sup>56</sup>

In the Canadian context, for example, John Borrows, an Anishnabe/Ojibway legal scholar, has compellingly argued that legal definitions of “aboriginality” have located indigenous peoples and aboriginal rights firmly in the past. Analyzing the Supreme Court of Canada’s decision in *R. v. Van der Peet*, where Canada’s highest court determined the nature and extent of aboriginal rights under section 35 of the Canadian constitution, Borrows contends that the court defined aboriginality in retrospective terms. Although the court agreed that aboriginal peoples resided in Canada before Europeans arrived, they defined *aboriginal* as “what was, ‘once upon a time,’ central to the survival of a community, not necessarily about what is central, significant and distinctive to these communities today,” Borrows points out.<sup>57</sup> Defining aboriginality through the past and through history, the Supreme Court of Canada determined that aboriginal rights “protect only those customs which have continuity with practices existing before the arrival of Europeans.”<sup>58</sup> For Borrows, the Supreme Court’s decision may have recognized aboriginal rights but in so doing “froze” them in the past, with little prospect or significance for the future.<sup>59</sup>

Critiques of time in colonial and postcolonial studies have highlighted the ontological and epistemological effects as well as the juridico-political stakes of European colonialism. Western conceptions of secular time, as some have argued, were not natural or inevitable forces but were strategies of rule that deferred the production of modern subjects into the future in some instances and locked them in the past in others.<sup>60</sup> These critiques point to the fundamental ways in which European expansion took hold of the world by grasping and rearranging time. Importantly, as others have noted, the *heterotemporalities* that the British aimed to

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55. See DA SILVA, *supra* note 16, at 115–51; see also POVINELLI, *supra* note 38, at 36–37. I have argued elsewhere that indigeneity was also ascribed a nonhistorical temporality. See Mawani, *supra* note 17.

56. Povinelli describes this logic as “the governance of the prior.” See Povinelli, *supra* note 38.

57. Borrows, *supra* note 38, at 43.

58. *Id.* at 44.

59. *Id.* at 45.

60. See *id.* at 44–45; see also CHAKRABARTY, *supra* note 21, at 74.

repress often escaped and defied regulation.<sup>61</sup> Writing of “empty homogenous time” as the time of capital, Partha Chatterjee reminds us that this formulation of time is an abstract time rather than a lived one. It is a time that “[p]eople can only imagine.”<sup>62</sup> Despite Britain’s efforts to impose a chronological and calendric time onto its Indian subjects, Chatterjee contends that lived time under colonialism remained heterogeneous, dense, and uneven.<sup>63</sup> It is here that the philosophy of Henri Bergson and his formulations of duration as lived and experiential time become useful. Notwithstanding Britain’s efforts to mechanize, quantify, and expand temporality through GMT, law and legality, and through various technologies including the mechanical clock and the timetable, the lived time of colonial subjects frequently escaped legal definition and regulation. In *Van der Peet*, indigenous peoples and aboriginal rights may have been relegated to Canada’s past and to its time “before history.” However, indigenous struggles over rights to land and resources continue to persist, are asserted through claims to futurity, and are animated by particular and ongoing lived relations to the land. In short, the dense experiences of lived time may be momentarily displaced but are never fully eclipsed by the imposition of law’s time.

Writing in the late nineteenth and early twentieth century, Henri Bergson was a steadfast critic of the ways in which modern science and philosophy engaged with questions of time. For Bergson, these discussions incorrectly reduced time to mathematical measurement and to spatial configurations. The “terms which designate time,” Bergson writes, “are borrowed from the language of space. When we evoke time, it is space which answers our call.”<sup>64</sup> Physics, he claimed, could not conceive of time on its own terms. It “rests altogether on a substitution of time-length for time-invention.”<sup>65</sup> Responding to what he perceived to be a rigid, mechanistic, and inaccurate formulation of time, Bergson proposed duration, as the “trajectory of a body in motion,” a time that is lived, experienced, concrete, and always changing.<sup>66</sup> We must not accept the movements of time as characterized by science, Bergson urges.<sup>67</sup> We must examine “the flow of time,” as “it is the very flux of the real that we should be trying to follow.”<sup>68</sup>

Duration, for Bergson, is a continuous unfolding in which past, present, and future fundamentally coexist in a heterogeneous simultaneity. As such, duration, as he conceives it, is a force that escapes measurement and one that equally defies the constraints of language. Duration represents a continuous flow in which we pass insensibly from one state to another, “a continuity which is really lived, but

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61. My use of heterotemporalities pluralizes Chakrabarty’s *heterotemporality*. CHAKRABARTY, *supra* note 21, at 239.

62. Partha Chatterjee, *Anderson’s Utopia*, 29 *DIACRITICS* 128, 131 (1999).

63. *Id.*

64. BERGSON, *CREATIVE MIND*, *supra* note 39, at 13.

65. BERGSON, *CREATIVE EVOLUTION*, *supra* note 39, at 342 (emphasis omitted).

66. BERGSON, *CREATIVE MIND*, *supra* note 39, at 2.

67. BERGSON, *CREATIVE MIND*, *supra* note 39, at 342.

68. *Id.*

artificially decomposed for the greater convenience of customary knowledge.”<sup>69</sup> Because duration is doubled as both singular and multiple, “there is no one rhythm,” Bergson claims.<sup>70</sup> Instead, the heterogeneity of duration renders the past, present, and future to be overlapping, interpenetrating, and continuous, preventing these times from being separated, ordered, prioritized, or arranged in succession or linearity. In Bergson’s formulation, the past can never be viewed as the primary or most significant dimension of temporality. Rather, the force of duration can only be experienced in the here and now.<sup>71</sup> Bergson does not privilege the present over the past, however. The dynamic past, which is accessible through memory in the now, has an endless capacity to revive itself in the present and in an unknown and unpredictable future. The past, which is contracted and contained in each moment of the present, may be a precondition but is never the determination of futurity. The future may be animated by the past but it expands the present, remaining a radically discontinuous, uncertain, unpredictable, and creative opening.<sup>72</sup>

Bergson never discussed law. Nor have his many interlocutors.<sup>73</sup> However, his conception of duration as flow opens interesting possibilities for rethinking law as temporality and for developing the idea that time itself is doubled. Given that law is a modality of reasoning, judgment, meaning, and force that operates through language and representation, when read through Bergson, it cannot possibly grasp the lived experiences of duration. In John Borrows’s assessment, for example, law cannot make sense of the complex and discontinuous histories of aboriginal peoples and their relations to the natural world, including land. “Things and events happen at certain moments,” Bergson reminds us.<sup>74</sup> As such, “the judgment which determines the occurrence of the thing or the event can only come after” it has already occurred.<sup>75</sup> Law continually seeks to fix subjects and events in time through judgments, definitions, and impositions that are always retrospective. Life and experience continually exceed legality, shoring up the limits of law but often with violent effect, as *Van der Peet* reminds us. Although law seeks to draw the past and future into the present, the future remains undecided, as a site of novelty, unpredictability, and change. It is precisely this view of the future as uncontainable and unforeseeable that has led Bergson’s interlocutors to view it

69. HENRI BERGSON, *MATTER AND MEMORY* 186 (Nancy Margaret Paul & W. Scott Palmer trans., Zone Books 1988) (1896).

70. *Id.* at 207.

71. SUZANNE GUERLAC, *THINKING IN TIME: AN INTRODUCTION TO HENRI BERGSON* 91 (2006).

72. GROSZ, *supra* note 21, at 184. For Bergson’s discussion of the future as “expanding the present,” refer to BERGSON, *CREATIVE EVOLUTION*, *supra* note 39, at 52.

73. For notable exceptions, see ALEXANDRE LEFEBVRE, *THE IMAGE OF LAW: DELEUZE, BERGSON, SPINOZA* 114–17 (2008); Alexandre Lefebvre, *The Time of Law: Evolution in Holmes and Bergson*, in *DELEUZE AND LAW* 48 (Rosi Braidotti et al. eds., 2009); and Mawani, *supra* note 20.

74. BERGSON, *THE CREATIVE MIND*, *supra* note 39, at 22.

75. *Id.*

as a political terrain of possibility.<sup>76</sup> It is also this view of the future as open and indeterminate that has rendered it an object of colonial law and legality.

Combining critiques of Western imperial time with Bergson's duration, as I have endeavored to begin here, points to a doubling of time through the tensions between law's time and the multiplicity of lived times. To be sure, a linear and homogenous time underwrote legal and political developments in the British Empire. So too did its disorientation. Just as British time was aimed at ordering colonial life through its emphasis on progress and on the conjoined futurity of some colonial subjects (settlers) and the vanishing past of others (indigenous peoples), this temporal continuity was continually challenged by conceptions of lived and experiential times that often defied legal regulation. Law as temporality shaped social and political life, privileging certain tenses that mattered (i.e., futurity), obscuring its own involvement by naturalizing time, and yet remaining continually open to contestation. In early twentieth-century South Africa, as I argue below, histories of colonial-racism manifested in coercive legal developments were crucial to producing the "Indian settler" as a juridical-racial concept and as a temporalized legal subject who made proprietary claims to belonging through colonial futures of settlement.

Thus far, my discussion of law as temporality has remained at the level of abstraction and generalization. The doubling of time, which I have been intimating here, produced tensions, inconsistencies, and excesses that can more clearly be elucidated through the material and political contexts to which it gave shape and in which it was produced. The discussion to follow takes us back to Gandhi and to early twentieth-century South Africa to examine how law generated temporalities through racial subjection and subjectification by inscribing colonial-legal subjects in chronological time. The lived temporalities wrought by colonial and imperial expansion, including forced migration, indenture, diaspora, and exile—conditions that confronted British Indians in South Africa—were often mobilized to negotiate and undermine law's time through the disjointed and discontinuous experiences of a colonial lived time.<sup>77</sup>

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76. GROSZ, *supra* note 21, at 244–61.

77. For a useful discussion of indigeneity and time in a very different context, see Justin B. Richland, *Sovereign Time, Storied Moments: The Temporalities of Law, Tradition, and Ethnography in Hopi Tribal Courts*, 31 POLAR 8 (2008).



## II. INDIAN SETTLERS IN SOUTH AFRICA

[T]here is a close relationship between subjectivity and temporality . . . in some way, one can envisage subjectivity itself as temporality

—Achille Mbembe<sup>78</sup>

Written in 1919, five years following his return to India, Gandhi's assertion that British Indians were settlers and pioneers had a much longer history in South Africa.<sup>79</sup> As a political identity, the term *settler* was widely circulated across colonial contexts, deployed by Europeans as a racial and proprietary claim to civilizational superiority, territorial ownership, and to social and political entitlement and belonging.<sup>80</sup> "Settlers were those who came from the 'north' . . . were generally considered free and were headed tautologically for settler colonies."<sup>81</sup> As a colonial formation, the settler was ontologically white.<sup>82</sup> The term "settler" accrued its racial significance and value through assertions of racial being and belonging that were enacted, symbolically and materially, through coercive and violent relationships of conquest, manifest in the dispossession, subjugation, and eradication of indigenous peoples.<sup>83</sup> Formulated through specific claims to temporality, the settler was thus distinct from the *immigrant*. European assertions of priorness, permanency, and racial supremacy entailed an insistence to social belonging that was contingent on origins that gained their racial and temporal meanings through the putative inferiority and primitiveness of a vanishing indigenous populace.<sup>84</sup> As such, the term settler was already arranged in a hierarchical and competing order of occupancy and in a disjointed temporality.<sup>85</sup> In their demands to be first, European settlers inscribed their pasts into their futures. Indigenous peoples, by contrast, were situated in the past and, as Borrows

78. MBEMBE, *supra* note 17, at 15.

79. Several scholars writing on East and South Africa have described Indians as settlers. Isabel Hofmeyr & Uma Dhupelia-Mesthrie, *South Africa/India: Re-Imagining the Disciplines*, 57 S. AFR. HIST. J. 1, 9 (2007); see, e.g., MARINA CARTER, *SERVANTS, SIRDARS AND SETTLERS: INDIANS IN MAURITIUS, 1834–1874* (1995). In these accounts, however, the term is often used descriptively and is not problematized racially or temporally as I seek to do here.

80. For discussions of a European designation of the term settler, see Mahmood Mamdani, *Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism*, 43 COMP. STUD. SOC'Y & HIST. 651, 657 (2001), or see Sarah Nuttal, *Subjectivities of Whiteness*, in *RETHINKING SETTLER COLONIALISM: HISTORY AND MEMORY IN AUSTRALIA, CANADA, AOTEAROA NEW ZEALAND AND SOUTH AFRICA* 245, 245 (Annie E. Coombes ed., 2006).

81. Hofmeyr & Dhupelia-Mesthrie, *supra* note 79, at 9.

82. *Id.*

83. For a classic discussion of the dialectical relation between the settler and native see FRANTZ FANON, *THE WRETCHED OF THE EARTH* 36 (Constance Farrington trans., 1963); Nuttal, *supra* note 80, at 245.

84. I am drawing here from Povinelli's argument that the "governance of the prior" emerged from settler nationalism and continues as an enduring form of governmentality in late liberalism. See POVINELLI, *supra* note 38, at 36–37; Povinelli, *supra* note 38, at 23–24.

85. POVINELLI, *supra* note 38, at 36.

tells us, subjected to European time and partially effaced through the literal, symbolic, and territorial erasures this retrospection enabled.<sup>86</sup>

From the turn-of-the-century onward, “free” British Indians in South Africa regularly appropriated and assumed a settler identity, albeit on their own terms and to achieve specific effects. Although the settler had a distinct racial ontology and was the alibi and outcome of European conquest, British Indians arrogated and adapted the term to emphasize their own genealogies, contributions, and perpetuity in South Africa; the settler afforded British Indians a powerful rhetorical strategy through which to foreground their investments in the colony’s past and in its future as a British settlement. Given that the term was already freighted with ontological and temporal entanglements that conjoined European and indigenous, British Indian appropriations were consistently locked in a specific constellation of racial-colonial power. Their claims to be settlers, as Gandhi’s essay makes clear, were underscored by their violent pasts and imagined futures in South Africa, their putative ethico-political differences from Europeans, and their presumed political and civilizational superiority over native Africans. The Indian settler, as I argue below, was marked by a double emergence. It was the dual effect of a virulent colonial-racism, most visibly evident in the implementation and institutionalization of racial-judicial prohibitions. It was also the outcome of anticolonial struggles and activism directed against colonial-racism. Evoked as a ruptural figure, the Indian settler challenged some racial and temporal configurations of colonial power and reaffirmed and reinforced others. To fully understand its vexed conditions of production and possibility, and its racial and temporal signification and significance, necessitates a brief detour through South Africa’s long history of Indian migration, restriction, and exclusion.

The legal restrictions and prohibitions directed at Indians in South Africa have a rich and well-documented history.<sup>87</sup> Although Indian migration is often perceived to be a nineteenth-century phenomenon, Indians first arrived as slaves in the Dutch Cape during the mid-seventeenth century, brought by Dutch merchants returning from their travels to India. Large-scale migration from the Indian subcontinent did not begin until two centuries later. Many Indian migrants, including Gujaratis and Parsis from the northwestern and western regions of India, crossed the Indian Ocean to work as traders, hawkers, and professionals. However, the largest numbers of Indians were brought from Madras and Calcutta,

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86. One of the classic postcolonial texts that engages with questions of colonality and temporality is McClintock, *supra* note 40. For a discussion of the temporal order of occupancy, see POVINELLI, *supra* note 38, at 37.

87. This is a voluminous literature. See generally SURENDRA BHANA, *INDENTURED INDIAN EMIGRANTS TO NATAL, 1860–1902: A STUDY BASED ON SHIPS’ LISTS* (1991); UMA DHUPELIA-MESTHRIE, *FROM CANE FIELDS TO FREEDOM: A CHRONICLE OF INDIAN SOUTH AFRICAN LIFE* (2000); ROBERT A. HUTTENBACK, *GANDHI IN SOUTH AFRICA: BRITISH IMPERIALISM AND THE INDIAN QUESTION, 1860–1914* (1971); HUTTENBACK, *supra* note 2; HUGH TINKER, *A NEW SYSTEM OF SLAVERY: THE EXPORT OF INDIAN LABOUR OVERSEAS, 1830–1920* (1974); Huttenback, *supra* note 15, at 273–91.

both located on the eastern coast, and recruited via systems of indenture.<sup>88</sup> Between 1856 and 1859, as Britain began developing its plans to cultivate sugar in Natal, it looked to India as a primary source of cheap and exploitable labor. From 1860 to 1911, estimates suggest that over 150,000 Indian workers were successfully conscripted under programs of indenture.<sup>89</sup> After completing their requisite terms of labor many were encouraged by colonial authorities to renew their contracts or to return home. Yet large numbers remained in South Africa. Between 1902 and 1913, only 32,506 Indians who arrived via indenture returned to India.<sup>90</sup>

Driven by the uneven demands for cheap and exploitable labor and by new opportunities of economic trade and settlement, patterns of Indian migration to South Africa followed discrepant trajectories. Given its reliance on indentured labor, Natal had the longest history of Indian migration and was home to the largest resident British-Indian community. By the late nineteenth century, the numbers of Indians in Natal almost matched those of Europeans. According to the 1893 census, 500,000 Africans, 43,742 whites, and 41,208 Indians resided in Natal.<sup>91</sup> By the late nineteenth century, there was a growing British-Indian populace in the Transvaal as well as smaller communities developing in the Cape Colony and Orange Free State.<sup>92</sup> The settlement of British Indians and the reception and responses it engendered were shaped, influenced, and complicated by the distinct political status of these jurisdictions.<sup>93</sup> Whereas Natal and the Cape were British colonies, the Transvaal and Orange Free State were Afrikaner Republics. In 1910, the four were consolidated as a union under British rule. Despite their historical, political, and jurisdictional differences, their respective governments viewed migration from India to be an urgent problem. Restrictive, coercive, and prohibitive legislation, especially in Natal and the Transvaal, was deemed necessary not to prevent Indian migration altogether but to discourage the permanent settlement of “free” Indians. “Never has a community been engaged in an unequal fight such as our countrymen are in South Africa,” Gandhi wrote in *Indians Abroad*.<sup>94</sup> “Compared to their rivals they are poor. They have no political power and they have been engaged ever since 1880 in protecting the right to exist with self-respect a right which any civilized Government would not deny even to utter strangers.”<sup>95</sup> It is from these conditions of racial exclusion and struggle that the Indian settler emerged. As an effect of racial, colonial, and juridical power, the

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88. Uma Dhupelia-Mesthrie, *The Place of India in South African History: Academic Scholarship, Past, Present, and Future*, 57 S. AFR. HIST. J. 12, 27 (2007).

89. SURENDRA BHANA & JOY B. BRAIN, *SETTING DOWN ROOTS: INDIAN MIGRANTS IN SOUTH AFRICA 1860–1911*, at 15 (1990).

90. Dhupelia-Mesthrie, *supra* note 88, at 27 n.71.

91. LAKE & REYNOLDS, *supra* note 2, at 118.

92. Dhupelia-Mesthrie, *supra* note 88, at 14.

93. Radhika Mongia, *Gender and the Historiography of Gandhian Satyagraha in South Africa*, 18 GENDER & HIST. 130, 132 (2006).

94. 19 GANDHI, *supra* note 1, at 187.

95. *Id.*

settler was a political identity, appropriated from its histories of European conquest, and mobilized by British Indians as a modality of anticolonial critique that drew on the past and reached out to the future as a refusal to be temporary.

There is little doubt that the restrictive and prohibitory legislation passed in Natal and elsewhere in South Africa was aimed at dissuading permanent Indian settlement. In 1880, twenty years after the first indentures arrived—after thousands completed their requisite five-year terms, refused to renew their contracts, and newly claimed residence as “free” Indians—anti-Indian sentiments intensified and were institutionalized through a series of exclusionary and punitive laws and policies. Although Natal remained committed to maintaining its steady supply of indentured labor, authorities strongly discouraged Indian settlement by enacting legislation that placed limits on mobility, and access to housing, marriage, and education. Together, these laws were aimed at socially and politically disenfranchising ex-indentures, colonial-borns, and those newly arrived, curtailing the freedom of “free” Indians and limiting their long-term prospects for permanent settlement. In 1895, to draw one well-known example, all non-indentured adult Indians in Natal were required to pay a three-pound annual tax, an imposition that would later become one target of Gandhi’s *Satyagraha* campaign.<sup>96</sup> The following year, Natal disenfranchised all British Indians, except those already on voter’s lists. Importantly, this particular legislation never cited Indians directly. Rather, it stipulated that “those ‘who (not being of European Origin) are Natives or descendants in the male line of Natives of countries which have not hitherto possessed elective institutions,’ unless exempted by the Governor in Council,” were not permitted to vote in parliamentary elections.<sup>97</sup> As India was ruled by Britain and thus did not enjoy elective institutions of government, the Natal Act was interpreted widely to include British Indians. For the purposes of the Act, migrants from India were defined as “natives,” a conflation that would become the subject of intense criticism and debate among British Indians well into the twentieth century.

Historians and scholars of Indian migration to South Africa have usefully chronicled the emergence of anti-Indian legislation and the legal and political responses it evoked from various constituencies, including Gandhi.<sup>98</sup> Immigration to South Africa, and to settler colonies more generally, has most often been conceptualized in spatial and geographical terms. Many have conceived of anti-Indian laws through territorial containment and exclusion, for example. Writing of immigration restrictions as a global phenomenon in early twentieth-century settlement societies, Marilyn Lake and Henry Reynolds make this point cogently.

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96. Dhupelia-Mesthrie, *supra* note 88, at 22; Huttenback, *supra* note 15, at 279–80.

97. Huttenback, *supra* note 15, at 279.

98. BHANA & BRAIN, *supra* note 89; SURENDRA BHANA & GOOLAM VAHED, *THE MAKING OF A POLITICAL REFORMER: GANDHI IN SOUTH AFRICA, 1893–1914 passim* (2005); Mongia, *supra* note 93; *see, e.g.*, SURENDRA BHANA, *GANDHI’S LEGACY: THE NATAL INDIAN CONGRESS, 1894–1994*, at 1–7 (1997).

Prohibitory legislation aimed at restricting non-European migration, they observe, “became a version of racial segregation on an international scale.”<sup>99</sup> While I am in no way disputing the territorial significance of immigration regulations, what I am suggesting here is that restrictive and prohibitory laws directed at British Indians and other non-European migrants in South Africa and elsewhere might also be read as a *temporalizing* force. Immigration restrictions did not limit Indian migration solely in spatial and territorial terms alone. They also restricted and prohibited migration through the imposition of an overarching time. The fitful times of a vanishing past, a temporary present, and a permanent future, were produced, imposed, and reinforced by legal enactments and taxonomies that ordered colonial subjects—including “natives,” “Indians,” and “Europeans”—in and through time. *Making up People*, I suggest below, was a juridico-political and temporal process that differentiated individuals and demarcated populations as racially distinct and as inhabiting competing and incommensurable times of colonial settlement.<sup>100</sup> The proliferation of anti-Indian laws, it is important to remember, were not directed at indentured laborers who came to South Africa under coercive conditions of contract and with specified times of residence. Rather, prohibitory and restrictive legislation, including the three-pound tax and the ban on voting, was aimed at “free” Indians, inscribing them in a temporary now, foreclosing their demands to legal rights, and limiting their future prospects as permanent residents.

In early twentieth-century South Africa, the temporalities of law were particularly visible in the concerted but unsuccessful efforts to racially taxonomize, order, and govern the region’s heterogeneous populace. Legislation in Natal, the Transvaal, and elsewhere produced a set of political and legal subjects identified as “European,” “native,” “colored,” and “Asiatic,” each with (and without) corresponding rights, duties, and privileges and with different temporal terms of settlement. To be sure, there was much at stake in the social, political, and legal distinctions and differentiations between populations. However, racial-juridical definitions were never clearly determined. Racial classifications in colonial South Africa were often produced and circulated without explicit definition.<sup>101</sup> Even after colonial-racial taxonomies were institutionalized, racial designations were inconsistently deployed and distinctions between populations, including “natives” and “Indians,” were frequently collapsed. Racial inscriptions were highly mutable and were open to lively discussion in courts, amongst government officials in South Africa and London, and in the public domain. After the 1910 union under British rule, racially specific laws increased in number and intensity. As Deborah Posel observes, there was “no general constitutional definition of racial categories,

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99. LAKE & REYNOLDS, *supra* note 2, at 5.

100. “Making up people” comes from Ian Hacking’s essay of the same title. See IAN HACKING, *Making Up People*, in *HISTORICAL ONTOLOGY* 99 (2004).

101. Deborah Posel, *Race as Common Sense: Racial Classification in Twentieth-Century South Africa*, 44 *AFR. STUD. REV.* 87, 89–90, (2001).

which meant that each statute concerned with race produced its own rendition.”<sup>102</sup> This confusion and controversy over racial designations was especially apparent in deliberations over nativeness. “One of the first difficulties presented in connection with the consideration of laws by the recent South African Native Affairs Commission,” wrote one commentator in 1905, “was the varying definitions therein of the term ‘Native.’ So great indeed is the variation that in the same colony [of South Africa] it has several meanings.”<sup>103</sup> At least one of these meanings included British Indians.

Individuals and populations were racially differentiated through physical appearance, descent, civilization, comportment, language, and lifestyle. Juridical-racial distinctions were also informed by temporal designations that did not always map neatly onto racial differentiations and were not as mutable or easily languished. Under the 1896 Natal Act, British Indians and the “natives of Africa” were considered similar on racial terms. Both populations were deemed inferior to Europeans, were thought to be in need of vigilant administration, and were to be excluded from social and political life, albeit in very different ways.<sup>104</sup> Whereas colonial authorities frequently designated Indians and native Africans to be commensurate, though not identical, on the barometer of racial and civilizational inferiority, in other legislation they were registered in distinct and incommensurate temporalities. In 1907, the Transvaal Immigration Restriction Act No. 15 differentiated immigrant and native populations in spatial and temporal terms, even if these distinctions were not defined or elaborated substantively.<sup>105</sup> The Act drew a clear legal and political divide between the “aboriginal races of Africa” and those immigrants who sought entry into the Transvaal.<sup>106</sup> Accordingly, a “prohibited immigrant” included a long list of classes “desiring to enter or entering this Colony.”<sup>107</sup> By defining immigrants via entry and arrival, prohibited persons were explicitly identified as those who came from *elsewhere*. The Transvaal Immigration Restriction Act further emphasized its jurisdiction and constituency by specifying that immigration restrictions were not applicable to “descendants of the aboriginal races of Africa south of the Equator.”<sup>108</sup> As the “natives of Africa” were already territorially present, they could not be considered immigrants. Under the Act, immigration restrictions could only be extended to indigenous peoples if they came under the six prohibited classes: criminals; prostitutes; “lunatic[s]”; those afflicted with leprosy or “infectious or contagious disease”; undesirables;

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102. *Id.* at 90.

103. *What Is a Native?*, RHODESIA HERALD, Mar. 30, 1905, at 5. For an account of the “native question” in this Commission and others, see ADAM ASHFORTH, *THE POLITICS OF OFFICIAL DISCOURSE IN TWENTIETH-CENTURY SOUTH AFRICA* (John D. Hargreaves et al. eds., 1990).

104. For a similar discussion on indigenous peoples and Chinese migrants in British Columbia, see MAWANI, *supra* note 13.

105. *Transvaal Immigration Restriction Bill*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), July 13, 1907, at 260.

106. *Id.*

107. *Id.*

108. *Id.*

and/or those deemed dangerous to the “peace, order, and good government” of the colony.<sup>109</sup> By intimating the “aboriginal races of [southern] Africa” to be a population that was *already there*,<sup>110</sup> the Act designated indigenous peoples to be temporally and spatially distinct from immigrants. “Here” and “there” were not solely geographical designations but also temporal ones. Native Africans residing south of the equator were tacitly regarded as the original inhabitants of the land and thus could not be restricted entry or deported. However, they could be made foreign under exceptional circumstances of moral and/or physical corruption.<sup>111</sup> Indian migrants, by contrast, were legally regarded as temporary sojourners who could be prohibited from entering South Africa and compelled to leave even after their arrival.

As in discussions of immigration, space has figured centrally in debates over indigeneity and European resettlement in settler contexts. Indigenous sovereignty movements have gained traction through claims to the soil. Immigrants, by contrast, have long been conceived as those who arrived from a distinct place of origin and thus have a place of return.<sup>112</sup> The “native,” “settler,” and “Asiatic,” critics have observed, have always been mapped in spatial terms, legally dividing and segregating settler contexts in efforts to prevent interracial intimacies and encounters.<sup>113</sup> These racial taxonomies, as I suggest here, were also juridico-political differentiations in time that generated conflicts and antinomies that demand further attention. Natives and European settlers each made competing claims as the prior inhabitants with disparate and uneven access to firstness. However, migrants were thought to arrive much later. Given these temporal demarcations, many British Indians recognized that they could not easily make demands for inclusion through claims to the past and to history.

In efforts to secure a future in South Africa, British Indians might have made strategic appropriations as indigenous/native subjects; a population that migrated from elsewhere, labored on the land, enjoyed a long history of settlement in the region, and now saw themselves to be indigenous to the settlement colony. In some instances, colonial subjects residing elsewhere in the British Empire made

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109. *Id.*

110. *Id.*

111. For an interesting discussion of how African-Americans became foreigners in Massachusetts, see Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75, 75–124.

112. Sharma & Wright, *supra* note 11, at 126. This is one of the main arguments animating the Asian settler debates. See Lawrence & Dua, *supra* note 14, at 121–22. The conversation that Lawrence and Dua set up is one between indigenous and migrant; the former from the soil (Canada) and the latter from elsewhere.

113. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 185–205* (1993); MAWANI, *supra* note 13; RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY *passim* (Sherene H. Razack ed., 2002); Achille Mbembe, *Aesthetics of Superfluity*, 16 PUB. CULTURE 373, 384 (2004).

claims to inclusion precisely on such grounds.<sup>114</sup> In South Africa, by contrast, Indians vehemently expressed their differences from native Africans in political, legal, and racial terms. Gandhi's newspaper, *Indian Opinion*, was a vibrant forum for such debate, a site where "free" Indians—mostly business owners, politicians, and professionals—along with political figures in India and the diaspora voiced their views on political matters, particularly Indian exclusion. The result was a lively "diasporic public" in which contributors publicized and criticized legislative changes in South and East Africa and condemned the treatment of Indians in South Africa, Canada, Australia, and New Zealand.<sup>115</sup> Many used this forum to publicly question, rebuke, and undo the racial taxonomies and temporal designations imposed on British Indians. They frequently challenged the temporalizing forces of law through duration, through their lived times of indenture, migration, and settlement.

To be sure, British Indians were astutely aware of the temporalities that underwrote their exclusion in South Africa. Attending a meeting in Johannesburg where Indians were responding to the Asiatic Convention and denouncing proposals for Indian segregation, Dr. Williamson Godfrey—an associate of Gandhi—admonished the ongoing legal and political efforts to identify Asiatics with indigenous Africans. Very often, "the term 'colored person' is applied to mean natives and Asiatics in the popular language," he lamented.<sup>116</sup> However,

[T]he history of the Colony shows that a sharp distinction has ever been drawn between the two. We have nothing in common. There are different laws regulating the connection of the natives with the other races living in Africa. . . . There is, for instance, a separate native tax. . . . The laws in which the distinction has been carefully observed are too numerous to mention. The latest is the Chinese Ordinance. This ordinance, recognising the distinction between the two races, provides for the Chinese labour on a totally different footing from the natives, for instance, *the latter are invited to stay in the country, whereas the former, as soon as they have finished their indentures, are to leave the country.*<sup>117</sup>

To facilitate the ongoing and permanent residence of native Africans, Godfrey continued, colonial authorities set aside "huge reserves of land."<sup>118</sup> Yet, "there is no such thing" for Chinese and Indians, he observed.<sup>119</sup> Although British Indians were well aware that native Africans were subjected to an intensifying racial-colonial legality aimed at securing their territorial dispossession and

114. Early black settlers in what is now Halifax, for example, did make claims as indigenous to the land. As an example, see Clarke, *supra* note 12, at 399–404.

115. Isabel Hofmeyr uses the term *diasporic public* to describe the *Modern Review*. Isabel Hofmeyr, *The Idea of "Africa" in Indian Nationalism: Reporting the Diaspora in The Modern Review 1907–1929*, 57 S. AFR. HIST. J. 60, 72 (2007). The same could certainly be said for the *Indian Opinion*.

116. *A Great Indian Meeting at Johannesburg*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), Nov. 19, 1904, at 2.

117. *Id.* (emphasis added).

118. *Id.*

119. *Id.*



segregation, they equally recognized that native populations were situated in a very different temporality and thus had distinct claims to belonging. Unlike British Indians, native Africans were rendered to be from the past and from the soil, a population with which the British were forced to contend, a population that held claims to prior occupation, and a population that required alternative means of containment, removal, and erasure.

By the early twentieth century, distinctions between Indians and Africans generated considerable attention in the British Indian imagination. In 1906 for instance, *Indian Opinion* reprinted an article, *What is a Native?*<sup>120</sup> Originally published in the *East London Daily News*, a newspaper that furnished the Cape Colony, the article pointedly questioned the racial-legal meanings of the term *native*, particularly its political implications for Indians and other non-British Asiatics:

There has been a good deal of controversy as to the proper definition of the word native, and the question has, we see, been raised in the House of Commons [London], where Mr. Winston Churchill recently, in reply to an enquiry, said he believed the meaning attached to the word in South Africa was a native of any country other than a European country. Considering that Mr. Churchill has been out in this country [South Africa], and knows something about it, it is extraordinary that he should make such a blunder. We venture to say that the great majority of Colonists attach no such meaning to the word. To them a native is one of the aboriginal inhabitants of South Africa. *Who ever speaks of Indians, Chinese or Japanese as natives?*<sup>121</sup>

British Indians claimed that native Africans, as the prior occupants, had a long history in South Africa and were indigenous to the land. As such, their own claims to inclusion mobilized the native African as a racially and temporally distinct figure. While some agreed that migrants from India arrived much later to lands that were already inhabited by native Africans, others viewed themselves to be much further ahead in their civilizational and political development. In their claims to be settlers, British Indians emphasized their long histories in South Africa, their futural investments in the development of the land through their forced labor, their business and professional acumen, and especially their racial superiority over the “aboriginal races of Africa.”

The Indian settler emerged from the material conditions of racial coercion, hostility, and violence that underwrote European/white superiority and settlement. British-Indian claims as settlers opened a modality of anticolonial critique through which migrants from India rejected their impermanence, a temporality that was produced and facilitated through juridical taxonomies and through restrictive and prohibitory legislation. Their demands to be recognized as

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120. *What Is a Native?*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), Sept. 1, 1906, at 618.

121. *Id.* (emphasis added).

settlers—with a past and a future in the colony—were temporal assertions of a lived time against the imposition of law’s time. In another 1919 essay, this one published in *Indian Opinion*, Gandhi foregrounded the duration of British Indians by emphasizing their long histories of indenture and settlement, and their politico-economic contributions through their claims to the future:

Indians have settled in South Africa for over 50 years; they are not known to have lowered the standard of living. . . . [T]he first Indian settlers were imported by the Europeans of South Africa[.] . . . I refer to the introduction of indentured Indians. I said in 1894, as I repeat now, that it was a criminal blunder on the part of the greedy Europeans of Natal to have imported indentured labour from India at miserably low wages when they had 400,000 stalwart Zulus in their midst who would gladly have worked if the employers had not wanted to make enormous profits. Can South Africa with any right on its side starve the descendants of the original settlers and their brethren out of existence?<sup>122</sup>

Here, Gandhi identified all Indians to be the descendants and brethren of the original settlers who were brought by Europeans to labor in the region and who now claimed legal and political entitlements to permanently reside. This was a common argument. In the early twentieth century, many British Indians insisted that their efforts to cultivate the land as indentured laborers in the past afforded them some permanency in the present and future. “Before 1859,” Mr. Madanjit explained, “Natal was on the brink of bankruptcy. There were no tea or sugar estates, and her hotels and private houses could not find reliable cooks and waiters.”<sup>123</sup> “The Kaffirs,” a pejorative term used to describe indigenous people, “could not be induced to work for any length of time.”<sup>124</sup> Thus, “Indian labour is the fulcrum of the prosperity of Natal.”<sup>125</sup> Recall to be a settler was not to be from the past alone. It was also a claim to futurity. “Colonial-borns,” Gandhi urged, *were the future*.<sup>126</sup> They “were the *permanent* Indian settlers of South Africa.”<sup>127</sup> The country “was their birth-place and home.”<sup>128</sup> It was their responsibility to “nurse the [Indian] settlement” and to “live down the prejudice which . . . still existed in South Africa,” all in the interests of cultivating a better future.<sup>129</sup>

British-Indian demands for permanent settlement, as I have argued above, were intended to challenge the temporalizing force of law. Their claims to belonging gained rhetorical traction through their assertions as both the past and

122. M.K. Gandhi, *How South Africa Was Won: Not by Europeans Only*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), Oct. 24, 1919, at 221.

123. *Other Speeches on the British Indian Grievances*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), Feb. 18, 1905 (Special Congress Supplement), at 1.

124. *Id.*

125. *Id.*

126. *Mr. Gandhi and the Colonial-Borns*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), Sept. 9, 1914, at 258.

127. *Id.*

128. *Id.*

129. *Id.*

future of South Africa. Given the racial and onto-epistemological entanglements between settler and native, the aspirations of British Indians to be recognized as settlers were advanced through their self-acclaimed racial superiority over native Africans. Writing of mid-twentieth-century South Africa, Antoinette Burton argues that a “self-consciously racialized Indian settler identity” that developed in the 1940s was “dependent—in economic, political and imaginative terms—on the literal and figurative work of the indigenous African.”<sup>130</sup> As the British-Indian appropriation of the settler suggests, the significance of native Africans in the making of an Indian identity has a much longer colonial history. To facilitate their own assertions of racial superiority and their related demands for permanent political and legal inclusion in South Africa, British Indians regularly identified and emphasized their putative civilizational differences with native Africans.<sup>131</sup> Indians, some observers claimed, enjoyed freedoms in India that were not yet afforded to the natives of South Africa: “We have perfect freedom of trade, of locomotion, of ownership of landed property, (indeed even the franchise such as it is), not so the natives of South Africa.”<sup>132</sup> Others alleged that any legal and political comparisons drawn between Indians and native South Africans were made solely for the purposes of racial degradation. As one observer reported, Lord Curzon denounced the ways “in which Indians [in South Africa] are classed with barbarous races.”<sup>133</sup> Similarly, the Colored People’s Vigilance Committee insisted that “Indian settlers are not ‘natives,’” they “are civilised men, who ought not to be confounded with raw Kaffirs.”<sup>134</sup>

British-Indian demands to futurity through the idioms of settlement in South Africa, I am suggesting here, were intended as challenges to the temporalizing force of law. Importantly, their claims to belonging gained traction not only through duration or lived time but also through assertions of racial superiority over indigenous inhabitants. How are we to make sense of the racially freighted temporal claims of Indian settlers without reverting to facile explanations of Indian racism and without equating Indians with European colonists? As I have argued elsewhere, British-Indian claims as British subjects—as imperial citizens and as settlers—were the productive effects of a dynamic and mobile racial regime of power.<sup>135</sup> European conquest and expansion generated new racial knowledges, including juridical-political processes that instituted, established, and calcified colonial-racial differentiations between Europeans and non-Europeans. The settler

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130. Antoinette Burton, “*Every Secret Thing*”? *Racial Politics in Anusuyah R. Singh’s Behold the Earth Mourns*, 46 J. COMMONWEALTH LITERATURE 63, 63 (2011); see also BURTON, *supra* note 12.

131. BURTON, *supra* note 12.

132. *A Great Indian Meeting at Johannesburg*, *supra* note 1176.

133. *Lord Curzon on the Indians in South Africa*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), May 20, 1905, at 313–14.

134. *The Position of the Indians*, INDIAN OPINION (Phoenix, KwaZulu-Natal, South Africa), May 12, 1906, at 299.

135. See Mawani, *supra* note 17, at 380. For a superb discussion of imperial citizenship, Gandhi, and South Africa, see SUKANYA BANERJEE, *BECOMING IMPERIAL CITIZENS: INDIANS IN THE LATE-VICTORIAN EMPIRE* (2010).

was one outcome. These colonial distinctions were established in ontological terms via language, history, culture, disposition, religion, phenotype, and climate.<sup>136</sup> Importantly, British Indians were not situated beyond or outside racial-colonial power. They were its constitutive effects. As Foucault reminds us, there is a double meaning to the term *subject*. The subject may be “subject to someone else by control and dependence.”<sup>137</sup> However, he is also “tied to his own identity by a conscience or self-knowledge.”<sup>138</sup> Both instances, Foucault elaborates, “suggest a form of power which subjugates and makes subject to.”<sup>139</sup> Subjection and subjectivity, I am claiming here, are inscribed in and work through competing racial temporalities.

Racial power as white/European superiority worked on the body as coercion, violence, and force, as the enactment of colonial laws and through the subjection and subjectification of Africans and British Indians, as my discussion of South Africa makes clear. However, racial power also worked *through* subjects, through the production of desires, choices, and actions. Explaining the settler’s emergence solely through Indian racism tells us little of racial subjection and subjectification as entangled products of racial, colonial, and juridical power. Indian claims as settlers were not merely demands to be European. Remember, in *Indians Abroad*, Gandhi drew a clear and immutable distinction between the ethical priorities and objectives of British Indians and European colonists. Thus, British-Indian assertions and appropriations of the term settler were temporal and racial claims to imperial subjecthood; they were demands for inclusion in the imperial polity to enjoy equal rights as British subjects through their pasts and their futures in South Africa as they were condensed in the now. Focusing on the generativity of race—as a regime of power that underwrote the colonial context in South Africa—foregrounds the Indian settler as a racial and temporal effect, a refusal of law’s time through the experiences of lived time that was produced through long and violent histories of colonial-racism. The temporal demands of the Indian settler were made possible through the antinomies of colonial politics and through the figurative and literal erasure of the African native as inhabiting a vanishing time of priorness. The constituent relations between subjectivity and temporality and the ontological entanglements between European and native, as evidenced in the term settler, reveal the asymmetries of colonial power that underwrote British-Indian claims to belonging.

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136. See Hesse, *Racialized Modernity*, *supra* note 16, at 656.

137. Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 781 (1982).

138. *Id.*

139. *Id.*

## CONCLUSION

*[T]he settler is a figure of contradiction rather than uninterrupted colonial hegemony. Some of the critical aporetic difficulties, those gaps, silences, ambivalences that so indelibly mark the colonial project, are resonantly evident in the settler.*

—Grant Farred<sup>140</sup>

What is to be gained conceptually and politically by critically examining the temporalities of law as teleological, yet fitful, as changing and responsive, as a process of doubling that continually unfolds onto and into itself? How might these abstract formulations on the ephemerality of law's time be relevant to and resonate with the historical and ongoing politics of settler colonialism, the conditions that marked the emergence of the Indian settler in South Africa and its renewed counterpart, the Asian settler in Hawai'i, Canada and Australia? Conceptualizing law as temporality, through a wider and more dynamic view of past, present, and future, as I have suggested above, illuminates law's claims to authority, legitimacy, and universality. It highlights law's becoming: its expansive reach, its ubiquity, and in the case of South Africa and other settler colonies, its effects on the colonial-racial constitution and organization of social and political life. Conceptualizing law as temporality queries the ways in which law produces time, orders the *nomos*, and gains its authority through variegated and discontinuous temporal arrangements. While retaining the past as a critical element in law's time, law as temporality moves beyond history and historicity and invites an exploration into law's own deployment of time as a means of capturing and obscuring, albeit not always successfully, the densities of lived time. Law condenses past, present, and future, its *telos* produces an overarching unity in and as its *nomos*, a configuration in which the future is central as both a critical opening of newness and as a time to be appropriated and absorbed. One way through which law maintains its sovereignty and authority is by ordering the world temporally, erasing other temporalities through its overarching time, while remaining responsive to those temporalities that do not neatly map onto and cannot easily be incorporated into its own movements. The presumed timelessness of law masks a heterogeneity of lived temporalities that law aspires to assimilate and obfuscate but which also actively challenge and refuse law's temporal claims, as the case of Indian settlers makes clear. Until law's time is sufficiently problematized, the temporalities that continue to organize and animate racial-colonial distributions of power will remain eclipsed and unremarked.

In early twentieth-century South Africa, a critical exploration of law's time reveals the racial divisions and antinomies produced by colonial legalities, the fraught and fractious racial and anticolonial politics these divisions generated, and their ongoing effects as modalities of racial-colonial governance. Attending to law as temporality points to the dense, knotted, and shifting entanglements of settler

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140. Farred, *supra* note 12, at 796–97.

colonialism and to the existence of competing and overlapping temporalities. These antagonisms are not unique or specific to South Africa alone, as evidenced by indigenous struggles over land and sovereignty, changing state concerns over migration, and shifting geopolitics that have led to fears regarding the ascendancy of China and India and its effects. In the midst of a projected “Asian century,” where Asia is considered the *new future*, the enduring, mutable, and lived forms of coloniality continue to demand historical analysis and critical scrutiny.<sup>141</sup>

Charges of Asian settlers that have emerged of late must be situated within these historical, contemporary, and futural times as a way to consider the animating forces, logics, and modalities of violence that underpin its ascendancy on the global political scene. The Indian settler, as I have argued here, cannot be separated from the violence and coercion of its emergence. As an effect of racial-colonial power in early twentieth-century South Africa, the Indian settler vividly demonstrates the doubling of time: the ways that law produced colonial subjects as inhabiting specific temporalities (as past, present, and future) and how colonial subjects contested these temporalizations through their own fractured and dislocated conceptions of lived time. British Indians rejected the impermanence imposed on them through legal restrictions and taxonomies, and in so doing initiated their own conceptions of time that trafficked in particular formulations of race. Their claims as settlers endeavored to challenge some configurations of colonial-racial power but only by reinforcing, repeating, and reifying others. British-Indian attempts to challenge law’s time, particularly its imposing force, only reinscribed efforts by the colonial state to relegate native Africans to the past and to history.

To look historically at the Indian settler question is not to absolve British Indians for their role in settler colonialism. Nor is it to initiate a comparison of colonial pain and suffering. Rather, my investigation, I hope, opens other ways of examining the enduring effects of racial-colonial regimes of power, particularly the deep entanglements of settler colonial violence and coercion that have resurfaced in (post)colonial politics, often in divisive ways. Approaching law as a temporal force in colonial politics foregrounds the racial divisions and antinomies produced through colonialism while suggesting that the racial is not solely a spatial force but also a temporal one that operates as an equally powerful set of governing practices. A critical examination of law’s temporalizing command, its divisions and dislocations might open possibilities for an (un)timely politics of solidarity that is currently strained through claims of Asians as settlers. The *settler* as Grant Farred reminds us, is a figure of contradiction produced by the silences and ambivalences “that so indelibly mark the colonial project.”<sup>142</sup> It is these silences and

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141. While the nineteenth century was defined as the “British century,” and the twentieth century as the American one, the twenty-first century has been identified as the “Asian century.” These changing geopolitics are vital to the debates over colonial settlement but have received little critical attention. On the Asian century, see ASIA 2050: REALIZING THE ASIAN CENTURY (2011).

142. Farred, *supra* note 12, at 797.

ambivalences, often marked and masked by the imposition of law's time that demands our critical attention; as a way of problematizing the endurance of settler colonial politics in all its mutabilities. Following Bergson, it is a means of imagining futures as creative openings of ceaseless change that are always something other than what they appear to be today.

