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Colorblind Nationalism and the Limits of Liberalism

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COLORBLIND NATIONALISM AND THE LIMITS OF CITIZENSHIP

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Policymakers and lawyers posit formal citizenship as the key to inclusion. Rather than presume that formal citizenship will necessarily promote equality, this Article examines the relationship between citizenship, racial equality, and nationalism. It asks: What role does formal citizenship play in excluding noncitizens and Asian, Latinx, and Muslim citizens racialized as foreigners? What effects does it have on the meaning of being American as a non-White citizen? The Article argues that commitments to colorblind equality and democratic self-governance of the nation stand in contradiction to aspirations to protect all persons within the nation. Consequently, individual rights designed to remedy racial inequality will not level citizenship inequalities. The institutional aspects of citizenship require reforms to the structural aspects of citizenship inequality as well—especially political inequality. This new approach requires rethinking the relationship between citizenship and the nation and how noncitizens can be involved in politics.

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INTRODUCTION

Citizenship has contradictory impulses: it can foster inclusion, and perpetuate exclusion, of noncitizens. The U.S. Constitution defines rights and privileges broadly for "citizens," and courts have recognized the word to refer to an enlarging number of racial minorities and vulnerable groups.[1] Noncitizens can be assured national membership and legal equality once they formally naturalize. In *Pursuing Citizenship in the Enforcement Era*, I find that the acquisition of formal citizenship is necessary for full inclusion in society and that formal status is especially

[1] *See generally* U.S. CONST. amend. XIV, § 1.

important in times of intensive immigration enforcement when governments view national boundaries as a source of protection against foreign threats—the essence of nationalism.[2] The global pandemic is one of many examples of the U.S. government excluding foreigners for the sake of protecting the health of U.S. citizens, who were given greater liberties to travel and access to health services such as testing and vaccination.[3]

Yet formal citizenship—meaning the possession of official legal status as a U.S. citizen, either through birth or naturalization—is insufficient to ensure membership in a nation.[4] Those on either side of the dividing line of citizenship face challenges with belonging: lawful permanent residents with a pathway to citizenship, naturalized citizens who have traversed the path, and birthright citizens who do not require a path under law and yet still feel they do not belong to their immigrant families. The exclusion falls especially on Asian American, Latinx, and Muslim immigrants, as well as citizens who are racialized as foreigners, regardless of their actual citizenship status.[5] The process of racialization is often disguised as race-neutral—thus, colorblind—despite the racial overtones intertwined with national protection. By virtue of being non-White,[6] these minority groups are limited to partial membership in the United States. Those with partial citizenship lack the substantive components of citizenship, meaning the social, cultural, economic, and political belonging thought to accompany the rights and benefits of

2 *See* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

3 Ming Hsu Chen, *Pursuing Citizenship During COVID-19*, 93 U. COLO. L. REV. 489 (2022).

4 The U.S. Constitution's Citizenship Clause reads "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. The statutory definition of citizen of the United States is one who owes permanent allegiance to the United States and is a national of the United States, as compared with an immigrant or an alien. *See* 8 U.S.C. § 1101(a)(3), (15), (21)–(22) (defining alien, immigrant, and national, respectively).

5 I use the term "racialized foreigner" throughout this Article to refer to immigrants and naturalized citizens who are perceived as foreign, by virtue of racial formation, despite having formal U.S. citizenship via naturalization or birthright. The term is similar to "racial other" and "others of color" to refer to "peoples who are identified as racial or ethnic Others but not primarily as African American or indigenous to lands now incorporated into the United States," such as Latino, Caribbean, Asian, or Asian Pacific Americans, as well as others deemed "ineligib[le] [for] citizenship" in early naturalization laws. NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 111, 116 (2020).

6 Throughout this Article, I capitalize the racial categories Asian, Latinx, Muslim, Black, and White. Although some style guides do not capitalize White, I capitalize it when used as a racial category to keep with an emerging convention to destabilize Whiteness as a normative standard for all racial groups.

formal citizenship.[7] The distinction between formal and substantive citizenship is particularly pertinent for naturalized citizens who may have an array of national origins prior to naturalizing.

The combination of colorblindness and nationalism combine to produce an exclusionary form of citizenship. The first component, the concept of "nationalism," refers to support for the interests, attitudes, or actions of one's own nation.[8] Classic nationalism refers to a liberal conception of the nation that is sovereign and bounded. It asserts the importance of national borders to protect the nation's interests and to facilitate social closure and self-governance.[9] The term can be used without reference to White supremacy over other ethnic groups. Yet the articulation of liberal national interests can sometimes downgrade the interests of other nations as nationalism seeks to guard against foreign threats to national security, public health, and national identity.[10]

A resurgent form of populist nationalism exhibits an aversion to a non-White minority or multicultural national identity. It pointedly commingles national identity with a dominant racial identity and subordinate racial minority identities, as is the case with White

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7 The nonlegal components of citizenship have been variously defined by sociologists of immigrant integration to include social, economic, and political indicia, *see generally* NAT'L ACADS. OF SCIS., ENG'G & MED., THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY (Mary C. Waters & Marisa Gerstein Pineau eds., 2015), and by theorists to include membership status or belonging in a community. *See, e.g.*, Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 450–51 (2000). Critical race theorists sometimes refer to diminished status or class as evidence of the "second-class citizenship" of racial minorities and especially Black Americans. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). In a classic essay, T.H. Marshall refers to "citizenship" as granting access to political, civil, and social rights in a state that provides for "social" citizenship, or "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society." T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 10–11 (1950).

8 *See* Nenad Miscevic, *Nationalism*, STANFORD ENCYC. OF PHIL. (Sept. 2, 2020), https://plato.stanford.edu/entries/nationalism [https://perma.cc/6473-PDNE]. The classic nationalism as employed in this Article is distinct from political and social movements that have advocated for the liberation and self-determination of ethnic or racial groups, such as Black nationalism or Chicano nationalism. *See, e.g.*, TOMMIE SHELBY, WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY 24 (2005); JAMES LANCE TAYLOR, BLACK NATIONALISM IN THE UNITED STATES: FROM MALCOLM X TO BARACK OBAMA (2011); Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205 (2001).

9 ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 21–22 (1992); *see* Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460 (2021) (distinguishing white protectionism from white nationalism). *See generally* Rogers Brubaker, *Ethnicity, Race, and Nationalism*, 35 ANN. REV. SOCIO. 21 (2009); sources cited *infra* notes 60, 261.

10 A general dictionary definition emphasizes that this articulation of interests can come "to the exclusion or detriment of the interests of other nations." *Nationalism*, OXFORD ENG. DICTIONARY (2022).

nationalism.[11] For example, President Donald J. Trump built a national identity based on populist White nationalism. At the start of his presidency, President Trump sought to "Make America Great Again" by surrounding himself with restrictionist government officials, sympathizing with White supremacist groups, and enacting policies such as the Muslim travel ban.[12] Once the pandemic hit, President Trump seized on COVID-19 to revive dormant justifications for exclusionary policies against Chinese immigrants, whom he blamed for the "China virus," and to close the southern border to Central American and Haitian asylum seekers whom he considered racially inferior.[13] His rhetoric suggested that non-White citizens of Chinese, Central American, and Haitian descent did not fit the national identity of the United States.

This Article adopts the classical meaning of nationalism as support for a nation's interests. While its critiques can be extended to the overtly racist and populist version of nationalism premised on racial hierarchy, White nationalism is not the primary concern. Its focus is on pro-national, race-neutral justifications for exclusionary policies that mask racial bias behind pretext and good faith justifications that are nevertheless vulnerable to misuse. In this classic form, liberal nationalism presumes that universal values such as individual liberty, fairness, equality, and self-governance stand at the core of the U.S. national identity. These beliefs animate civil rights statutes and equal protection doctrine; their universality is said to transcend differences of race, gender,

11 See Bart Bonikowski & Paul DiMaggio, *Varieties of American Popular Nationalism*, 81 AM. SOCIO. REV. 949 (2016), which points out that U.S. scholarly discourse around nationalism is scant and, when it arises, it takes an uncritical view of ethnonationalism. As an example, increasing attention is paid to White nationalism, which is an ideology grounded in the specific "belief that national identity should be built around white [ethno-racial identity], and that white people should therefore maintain both a demographic majority and dominance of the nation's culture and public life." Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019) (quoting Amanda Taub, *'White Nationalism,' Explained*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/22/world/americas/white-nationalism-explained.html (last visited Jan. 11, 2023)). The term "white nationalism" is sometimes used interchangeably with "white supremacy" or "white separatism," which have specific ties to Nazism, Social Darwinism, and Eugenics. *See id.* at 197 n.1.

12 Stephen Miller and Steve Bannon were key advisers who counseled immigration restrictionism. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Feb. 21, 2020), https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession [https://perma.cc/L9QJ-JBU7]; Joshua Green, *Does Stephen Miller Speak for Trump? Or Vice Versa?*, BLOOMBERG (Mar. 1, 2017, 4:47 PM), https://www.bloomberg.com/news/features/2017-02-28/does-stephen-miller-speak-for-trump-or-vice-versa [https://perma.cc/AL33-B55Q]; Zack Beauchamp, *Steve Bannon, the Trump Adviser Who Helped Craft the "Muslim Ban," Explained*, VOX (Jan. 29, 2017, 5:06 PM), https://www.vox.com/world/2017/1/29/14431332/steve-bannon-muslim-refugee-ban-explained [https://perma.cc/HZY7-PAFS].

13 *See infra* notes 63–65 and accompanying discussion.

and religion.[14] Taken at face value, colorblindness refers to the government's preference for facially neutral policies in a nod to the universal value of equality. The word is used in Martin Luther King's "I Have a Dream" speech and the rallying cries of the civil rights movement.

Notwithstanding the liberal faith, critical race theorists warn that the language of universality can erase enduring racial injustices. Kimberlé Crenshaw points out that the erasure appears in the emergence of colorblindness as a purported means of advancing equality, and in the merger of colorblindness with "post-racialism" following the election of Barack Obama as the first Black U.S. president.[15] But the erasure of racial differences to support colorblind equality has sometimes limited the prospects of using race as a lever of inclusion and has instead repudiated race-based remedies or opposed Critical Race Theory (CRT). It can be contorted into a vision of equality that sees the consideration of race as an unnecessary and unproductive part of legal analysis.[16] When used in this way, race neutrality can become pernicious: it preserves White supremacy because "[c]olorblindness does not do away with color, but rather reinforces whiteness as the unmarked norm against which difference is measured" and operates as a "one-way street."[17] Othering racial minorities limits the prospects for substantive belonging and heightens the exclusionary potential of citizenship.

This Article argues that the reality of "colorblind nationalism" limits formal citizenship as an antidote for inequality. The prior discussion reveals how the two component terms are vulnerable to misuse. Nationalism is common to immigration law, but it can be misused in citizenship law, the laws governing the integration of immigrants already residing in the United States and subject to constitutional and civil rights protections by virtue of their personhood. Given the susceptibility of

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14 *See generally* Kok-Chor Tan, *Liberal Equality: What, Where, and Why*, *in* THE OXFORD HANDBOOK OF AMERICAN PHILOSOPHY 515 (Cheryl Misak ed., 2008).

15 Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1310–15 (2011).

16 *See* Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz, *Introduction*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 1, 14 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019) [hereinafter SEEING RACE AGAIN] (defining colorblindness as "racial nonrecognition" that "transforms race into a matter of skin color and then demands formal symmetry as the embodiment of equal treatment under the law"); *see also* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 26 (3d ed. 2010) (describing "abstract liberalism" as one of four "central frames" of colorblind racism). Bonilla-Silva says this form of colorblindness uses liberal ideas such as equal opportunity and economic liberalism to emphasize choice and individualism over forced social mandates and groupedness. *Id.* at 28.

17 George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, *in* SEEING RACE AGAIN, *supra* note 16, at 23, 23–24.

promoting national identity to populism, colorblind nationalism can fuel the government's use of nationalism as a facially neutral justification for racially exclusionary policies. So doing, colorblind nationalism operates to reify the necessity of border control by employing supposedly race-neutral justifications for harsh immigration policies. The faulty importation of immigration law into citizenship law then bleeds into equality law by mistakenly importing the federal government's broad powers over immigration to justify unequal treatment of racial minorities who are U.S. citizens. This racially disparate treatment transfers the Othering of immigrants onto Asian American, Latinx, and Muslim American citizens who are nevertheless perceived as foreigners—even after they naturalize and even if they are birthright citizens born on U.S. soil. This erroneous treatment is easily missed because its facially neutral tenor can be confused with colorblindness, which itself has strayed from its egalitarian roots. Colorblind nationalism makes inequality hard to defeat in a post-racial era of equality laws.

The innovation of colorblind nationalism is to bring together two scholarly critiques to show the cumulative harm of overreliance on formal citizenship as an antidote to inequality and why existing doctrines will not cure these harms. Immigration scholars, who base formal citizenship on national sovereignty, presume that protecting immigrants requires extending access to formal citizenship through naturalization, adjustment of status, or relief from removal.[18] They must listen to critical race theorists who have pointed out the need to critically examine the institutional bias—intentional, pretextual, and classically liberal justifications vulnerable to misuse—within the federal government's power over its citizens, and to recognize the process of racial formation embedded in citizenship law rather than relying on the myth of colorblindness, race neutrality, and post-racialism.

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[18] Some exceptions include critical immigration scholars who call out the dangers of overemphasizing the federal government; they argue that these taken-for-granted premises render citizenship inequalities inevitable. Often these critics argue in favor of open borders, subnational identities, supranational identities, or rights grounded in personhood or territoriality rather than nationhood. *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POLITICS 251 (1987) (open borders); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015) (subnational identities); ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES (2020) (same); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008) (supranational identities); YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994) (same); Bosniak, *supra* note 7 (rights grounded in personhood or territoriality rather than nationhood).

Racial justice and civil rights scholars presume that racial inequality falls short of constitutional ideals.[19] But they also believe that extending the rights associated with formal citizenship will enhance the substantive belonging of disadvantaged groups; this was the animating belief behind the eradication of slavery, the adoption of the Fourteenth Amendment's Equal Protection and Citizenship Clauses, and the subsequent adoption of civil rights and voting rights legislation to enhance equality for disadvantaged groups.[20] These scholars must listen to critical immigration scholars who recognize the limits of formal citizenship for furthering substantive equality and believe that institutional bias is inherent and inextricable. They favor a more radical reimagining of the structural relationship between citizenship, nation, and equality that decenters the nation in favor of alternate sites of belonging and noninstitutional means for delivering the status and benefits of membership. What the two critiques have in common is that they recognize that promoting formal citizenship does not always help equality; it can hinder it.

This Article is distinctive by going a step further: it suggests that sometimes, seeking more formal citizenship is the problem, rather than the solution. Promoting equality for "racialized foreigners" such as Asian, Latinx, and Muslim Americans, who are perceived as immigrants despite their legal status as citizens, requires reimagining the relationship between race, citizenship, and nation. Existing legal frameworks produce inequality and existing remedies perpetuate those differences.

Part I presents research on the relationship between citizenship and nationalism. It pulls apart the strands of formal and substantive citizenship and shows how they produce inequality. It then connects these theories to colorblindness and CRT. Part II uses case studies to trace the heightening of citizenship insecurity and how expansions of immigration enforcement fueled by a national protection narrative led to a resurgence of racial inequalities. It focuses on official justifications that operate as pretextual denials of racism, as well as classical, liberal, race-neutral constructs such as national security or public health, that produce racially disparate effects even without overt racism. The lingering effects for racialized foreigners problematizes the "benefits" of holding formal citizenship. Part III describes the individual harms and structural

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19 Critical race theorists have been pointing to the insufficiency of formal citizenship for Black Americans since the founding of the nation, the reconstruction of the U.S. Constitution after a Civil War, and the legislative reforms to civil rights and voting rights laws after the Civil Rights Era. *See generally* SEEING RACE AGAIN, *supra* note 16.

20 These CRT scholars point out the need for race-conscious remedies, such as the Voting Rights Act or affirmative action, and supplemental policies that advance social, economic, and cultural rights. *See, e.g., id.*

obstacles presented by colorblind nationalism given the inability of traditional equality laws to redress inequalities of racialized foreigners. It explains why conventional liberal strategies against racism and inequality will not work: in essence, nationalist conceptions of American borders and national identity place citizenship restrictions under a different set of norms than the usual liberal legal commitments. Part IV draws out the policy implications in lieu of these doctrinal limitations and ongoing racialization. The prescriptions seek to reform the structures that support inequality by seeing race and cultivating membership in other sites of belonging. The Conclusion offers ways to further equality in a new relationship between race, citizenship, and nation.

I. CITIZENSHIP, INEQUALITY, AND NATION

A. *Citizenship Inequality*

Immigration law is premised on the sovereignty and self-determination of nations and the federal government's plenary power over immigrants' rights. These taken-for-granted concepts sound in classic liberal nationalism.[21] The nationalist logic used to explain differences in the equality of some groups versus others is not always expressly race-based; the idea is that citizenship inequality is inevitable—that is the "difference that alienage makes."[22] Bosniak explains that:

> [A]lienage [is] a hybrid legal status category that lies at the nexus of two legal and moral worlds. On the one hand, it lies within the world of borders, sovereignty and national community membership. . . .
>
> Yet alienage . . . also lies in the world of social relationships among territorially present persons. In th[e] world [of alienage], government power to impose disabilities on people based on their status is substantially constrained[due to] [f]ormal commitments to norms of equal treatment and to the elimination of caste-like status . . . .[23]

There can be a tone of resignation in the nationalist diagnosis of inequality between citizens and noncitizens. But there can also be an optimistic belief in the nationalist prescription: once formal citizenship is obtained, substantive equality will soon follow.

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21 JUSTIN DESAUTELS-STEIN, THE RIGHT TO EXCLUDE: A CRITICAL RACE APPROACH TO SOVEREIGNTY, BORDERS, AND INTERNATIONAL LAW (forthcoming 2023).

22 LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 38–39 (2006).

23 *Id.* at 38.

The problem is that substantive equality remains elusive, even after formal citizenship is obtained. Until 1952, immigration and naturalization laws expressly discriminated against noncitizens on the basis of race.[24] At first expressly and then implicitly, certain immigrants were classified as ineligible for citizenship on the basis of their cultural traits and a reflexive acceptance of their differences as "naturalized" differences—this is the irony of the term "naturalization" to explain the transformation of an immigrant from being an outsider to an insider in the eyes of the law. In this way, as Ian Haney López explains, immigration and citizenships laws constructed social categories of immigrants—particularly non-White immigrants—in a manner that reinforced their inequality.[25]

In *Pursuing Citizenship in the Enforcement Era*, I interviewed over 100 immigrants from varying racial and legal backgrounds about their experiences seeking naturalized citizenship and found that citizenship is especially consequential during periods of intense immigration enforcement when the nation is defending its borders against foreign threats.[26] Contrary to the formal law of citizenship, I found that the immigrants' integration defies legal binaries. The formal legal dimensions of their belonging include multiple legal statuses, ranging from naturalized citizenship to permanent residence to temporary visas to undocumented presence. The substantive dimensions of belonging include immigrants' economic, social, and political engagement. Contrary to studies suggesting a positive relationship between formal and substantive citizenship—typically, having citizenship fosters substantive equality, whereas lacking citizenship constrains it—I found that formal and substantive citizenship related to each other in complicated ways. Formal citizenship conditioned the substantive experiences of immigrants.[27] Enforcement amplified insecurity along the citizenship spectrum, even for those with formal citizenship.

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24 *Cf.* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. ch. 12).

25 IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006).

26 *See* CHEN, *supra* note 2, at 13, 133–38. The study I designed drew on interviews with over 100 immigrants in seven legal statuses. They were chosen and classified by degrees of formal and substantive citizenship. For example, a Canadian green card holder from Canada with education and technical skills would be formally and substantively high (+,+), while an undocumented immigrant with dark skin and without family ties or strong skills would be low (-,-). *See id.*

27 *Id.* at 5–6, 74–80, 95. Immigration scholars and advocates invested in integrating immigrants sometimes caution against the valorization of citizenship. Some scholars argue that state and local governments can substantially fill gaps in integration. *See, e.g.*, Markowitz, *supra* note 18. Some scholars argue that the unintended effects of promoting citizenship are to devalue those who lack it. *See, e.g.*, Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257 (2017);

Legal status remained important: immigrants' experiences varied along a spectrum of legal protection. Not surprisingly, those who lacked formal legal status felt the most acute lack of belonging. Undocumented immigrants with the temporary protections of Deferred Action for Childhood Arrivals (DACA), mostly of Latin descent, described their forestalled sense of future as a result of the limited nature of their legal protection, which does not provide a pathway to citizenship, and the fluctuations of the policy with changing political conditions.[28] International students on temporary visas also described their lack of investment in campus life, their social isolation, and their uncertainties about their career options, despite entering with legal status and economic and educational privilege. These mostly Chinese, Arab, and South Asian international students expressed ambivalence about living in the United States due to the temporariness of their sojourn and the lack of a path to formal citizenship.[29]

But green card holders, or permanent residents, who have a path to citizenship were not spared the effects of uncertain belonging. White Canadian immigrants felt they were "invisible immigrants" and faced few challenges to belonging and little motivation to naturalize.[30] In contrast, Latinx green card holders said they felt they needed to flex formal citizenship to defend against anti-immigrant hostility, defying the conventional wisdom that institutional efforts to welcome immigrants manifest in higher naturalization rates.[31] Refugees from Asian and

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Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 141 (2013); *see also* KATHRYN ABRAMS, OPEN HAND, CLOSED FIST: PRACTICES OF UNDOCUMENTED ORGANIZING IN A HOSTILE STATE (2022).

28 *See* CHEN, *supra* note 2, at 74–80, 95. As of this writing, litigation is ongoing, but the current timeline for DACA includes enactment in 2012, an injunction on expansion in 2014, rescission in 2017, invalidation of the rescission in 2020, restoration and legal challenge to the restoration in 2021, and publication of a federal regulation in 2022. For a summary of key developments and ones to come, see generally *DACA Litigation Information and Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 3, 2022), https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions [https://perma.cc/UG2S-F69T].

29 During interviews, international students and H-1B high-skilled workers on temporary visas (frequently Asians and Canadians) showed ambivalence toward coming to the United States and/or becoming formal citizens, even though they had a formal pathway to citizenship and possessed economic privilege. *See* CHEN, *supra* note 2, at 70 ("[S]ome high-skilled workers with green cards from well-developed economies (e.g., China . . . and Canada) said they had *less* interest in pursuing US citizenship because their home countries also supplied good jobs."); *id.* at 72, 90–91.

30 *See id.* at 61. For Canadians, dual nationality laws require no such choice and yet the reluctance remains. *See id.* at 73 (relaying how two interviewees were "more proud to be Canadian and more reluctant to become American" because of American "nationalistic backlash").

31 In the book, I call this defensive naturalization, or the phenomenon of lawful permanent residents seeking to naturalize in response to a hostile political climate and intensive immigration enforcement, as opposed to the privileges and benefits of U.S. citizenship. *Id.* at 65–66.

African countries who became naturalized citizens expressed appreciation for their U.S. citizenship, but many said they would "always be a refugee, never an American." So, their newfound legal status as a formal citizen was largely symbolic when it came to belonging, similar to other people of color.[32]

These instances where formal and substantive citizenship diverge are especially interesting because they challenge the assumption of formal citizenship as the great equalizer. The noncitizens from my book had some measure of insider status, but their experience is of being a legal outsider. The exclusion they feel underscores the key finding of liminality or citizenship insecurity for all noncitizens. But other studies show that the feelings of being an outsider extend to naturalized citizens who continue to feel like perpetual foreigners, second-class, or semi-citizens even after they become legal insiders.[33] Rather than the expected result of more belonging for insiders and less for outsiders, the paradoxical experiences of exclusion despite their legal status reveal the discriminatory impacts of citizenship for insiders. To illustrate the limits of formal citizenship, this Article contrasts the effects of nationalist discourse for native-born Americans and naturalized citizens of color—two groups who ought to be formally equal.

There are two related claims in this Article. First, immigrant exceptionalism, touted as a neutral explanation for excluding immigrants, is an unsatisfactory explanation for enduring inequalities between immigrants and citizens. Equality norms aspire to provide legal equality for immigrants' and minorities' fundamental rights of due process, equal protection, freedom of speech, and freedom of religion. Yet rigorous requirements for proof of discriminatory purpose and deference to state discrimination toward noncitizens leads to inequality.[34]

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32 Although the sample of interviews for *Pursuing Citizenship in the Enforcement Era* did not include naturalized citizens, other empirical studies have shown broken associations between naturalization and belonging. A study of fourteen Western democracies shows that whether citizenship furthers immigrants' feeling of belonging depends on the public attitudes of the host country to naturalized citizenship. Kristina Bakkær Simonsen, *Does Citizenship Always Further Immigrants' Feeling of Belonging to the Host Nation? A Study of Policies and Public Attitudes in 14 Western Democracies*, COMPAR. MIGRATION STUD., 2017, at 1. The cross-country comparison includes the United States, but it does not differentiate by national origin *within* countries. *Id.* at 5–6. Within the United States, most studies on the impact of heightened immigration enforcement focus on immigrants. *See, e.g.*, CHEN, *supra* note 2, at 67–81; Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 37 (2018) (discussing the interrelationship of status and race). However, a few encompass the second generation—presumably U.S.-born citizens as opposed to naturalized citizens. *See, e.g.*, TOMÁS R. JIMÉNEZ, REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY (2009).

33 *See infra* note 43 and accompanying text.

34 This is not inconsistent with current law, even if it is normatively unsatisfying. *See infra* Part III.

Antidiscrimination statutes insufficiently theorize national origin and make immigration exceptions, too. Second, the exceptional treatment is unjustified under the terms of existing law because there should be no legal difference among naturalized and U.S.-born citizens. The Constitution does not provide separate tiers of citizenship for naturalized and U.S.-born citizens, but the federal government and American society sometimes do on the basis of race or national origin.[35]

B. *Citizenship Inequality and Colorblindness*

The paradox of feeling like an outsider after obtaining naturalized citizenship fits into scholarly literature that highlights inequalities among racial minorities, who are legal insiders even if they feel like social or economic outsiders. Critical race theorists have "thoroughly deconstructed and interrogated" race, emphasizing the elusive nature of the Constitution's promise of equal protection of the laws for formerly enslaved people and Black people who had been granted citizenship.[36] Their central message was that "formal citizenship, without more, could not ensure equal treatment or belonging for Blacks within American society."[37] The resulting inequalities, often economic, constitute "second-class citizenship" for racial minorities.[38]

What makes this second-class status of racial minorities unfair is that liberalism promises legal equality notwithstanding racial differences. In its classic form, liberal nationalism presumes equality is a universal value at the core of America's national identity; this belief that race should not matter animates civil rights statutes and equal protection doctrine.[39] However, sociologists have shown that race continues to make a difference.[40] Critical theorists warn that the language of universality and formal equality can erase racial injustice.[41] The evolution of the term "colorblindness" illustrates this problematic erasure. While benign colorblindness refers to the government's preference for facially neutral policies after a history of racial inequality, the erasure of racial differences

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35 U.S. CONST. amend. XIV, § 1; *see infra* Part II.

36 Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2494, 2503 (2007).

37 *Id.* at 2503.

38 *Id.* at 2495.

39 *See supra* note 8; Tan, *supra* note 14.

40 *See, e.g.*, JIMÉNEZ, *supra* note 32, at 16–18; Asad L. Asad, *Latinos' Deportation Fears by Citizenship and Legal Status, 2007 to 2018*, 117 PROC. NAT'L ACAD. SCIS. 8836 (2020).

41 These can be seen in conservative efforts to repudiate race-based remedies in the 1980s and the racial response and backlash to post-racialism and CRT in the 2010s–2020s. *See supra* note 16.

can undermine race-based remedies—such as affirmative action or voting rights—that have contributed to racial progress.

The focus of many critical race theorists is the Black experience with second-class citizenship. The contribution of this Article is to elaborate on the mechanism undergirding second-class citizenship for minority groups who are racialized as foreigners. Many core CRT concepts extend to Asian, Latinx, and Muslim Americans. These groups contain significant foreign-born subpopulations or are seen to be foreign, such that their life experiences consequently blend citizenship inequality and racial inequality.[42] Outsider jurisprudence from Asian American and Latinx scholars has extended the CRT critique to the distinctive function of foreignness and the plenary power doctrine to perpetuate racial inequality. Robert Chang, among other Asian Americans, describes Asian Americans as being racialized as "perpetual foreigners."[43] Latinx scholars, such as Cecilia Menjívar, explain how Latinx persons have been racialized as "illegal aliens."[44] Critical race theorists studying the racialization of Muslims make similar contributions in their analyses of the "Arab

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42 *Cf.* Asad, *supra* note 40 (noting Latino U.S. citizens fear deportation for loved ones and communities, even if they are not themselves subject to deportation); Tomás R. Jiménez, *Mexican Immigrant Replenishment and the Continuing Significance of Ethnicity and Race*, 113 AM. J. SOCIOLOGY 1527 (2008) (noting continuing salience of race across multiple generations of Mexican immigration and integration).

43 Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1397 (1997). The perpetual foreigner stereotype is rooted in the idea that Asian Americans do not belong in the United States and, as a result of their unassimilability, keep with them their ancestral homelands no matter how long they (or their families) have lived in the United States. *See* JIMÉNEZ, *supra* note 32, at 7; Frank H. Wu, *Where Are You Really From? Asian Americans and the Perpetual Foreigner Syndrome*, 6 C.R.J. 14 (2002). *See generally* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

44 CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES (Cecilia Menjívar & Daniel Kanstroom eds., 2014). The construct of "illegality" suggests a violation of immigration laws, implying the foreignness of the transgressor. The term "alien" goes even further to underscore the degree of foreignness; it implies that the immigrant is so foreign as to be a different species, not merely a subordinate race. For this reason, lawmakers in progressive states and some Biden officials have proposed to strike the term "alien" from usage in immigration law. Press Release, Governor Newsom Signs Suite of Legislation to Support California's Immigrant Communities and Remove Outdated Term "Alien" from State Codes (Sept. 24, 2021), https://www.gov.ca.gov/2021/09/24/governor-newsom-signs-suite-of-legislation-to-support-californias-immigrant-communities-and-remove-outdated-term-alien-from-state-codes [https://perma.cc/3WQU-ZPS3]; Maria Sacchetti, *ICE, CBP to Stop Using 'Illegal Alien' and 'Assimilation' Under New Biden Administration Order*, WASH. POST (Apr. 19, 2021, 9:14 AM), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html (last visited Jan. 8, 2023).

terrorist."[45] These processes of Othering position these racialized foreigner groups in a manner distinct from anti-Blackness by bringing in a dimension of foreignness that is disparate from cultural valorization and racial hierarchy.[46] Asian, Latinx, and Muslim naturalized citizens—legal citizens who do not culturally belong—demote to second-class citizens. Their path contrasts with the White immigrants who naturalize and elevate to first-class citizens. The discrepancy might even carry over to the next generation, with first-generation immigrants giving birth to U.S.-born children who are legally U.S. citizens but devolve to second-class citizens.

The same way colorblindness seizes on the myth of "post-racialism," nationalism hides behind concededly legitimate rationales for border control, such as public health, national security, and democratic governance. Embracing colorblind nationalism does not necessarily mean xenophobia, or expressing animus against immigrants as foreigners.[47] However, race and immigration status can be conflated in a way that masks the xenophobic effects of such rhetoric. For example, Natsu Saito says that xenophobia "sanction[s] the use of raw power against racialized Others in ways not otherwise considered acceptable," even as it uses racialization to galvanize national responses.[48] A dichotomy of foreignness versus Americanness explains why the logic used to justify discrimination against racialized foreigners is distinct from the challenges for other minorities. On one side are overseas foreigners, who are the farthest removed from formal U.S. citizenship and cultural belonging. They are seen as inevitably unequal because of a "nationally bounded concept of citizenship" that assumes nations possess the sovereign right to exclude noncitizens and to make self-determinations

45 Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002). *See generally* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM (2022); KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018); *Muslims in America: Immigrants and Those Born in U.S. See Life Differently in Many Ways*, PEW RSCH. CTR. (Apr. 14, 2018), https://www.pewresearch.org/religion/2018/04/14/muslims-in-america-immigrants-and-those-born-in-u-s-see-life-differently-in-many-ways [https://perma.cc/V82Q-483W] ("Most U.S. Muslim adults (58%) hail from other parts of the globe. . . .").

46 *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105 (1999); Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 637 (2005).

47 Xenophobia can be distinguished from allegiance to "this" national identity and its interests, as opposed to other nations and their interests, because of its conflation with racism. Natsu Taylor Saito, *Why Xenophobia?*, 31 BERKELEY LA RAZA L.J. 1 (2021); *see also* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2d ed. 2021); Bonikowski & DiMaggio, *supra* note 11 (distinguishing civic and ethnocultural nationalism in the United States).

48 Saito, *supra* note 47, at 14.

about membership.[49] Kevin Johnson makes a similar point in *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*: "By barring admission of the outsider group . . . , society rationalizes the disparate treatment of the domestic racial minority group in question . . . ."[50] Johnson provides several examples of this transference, in which feelings toward the immigrant refocus on racialized citizens: the Chinese exclusion following the Reconstruction Amendments ending slavery, the racial stigma of Japanese internment, "Operation Wetback" following the *Brown v. Board of Education* decision outlawing school segregation, and the Haitian interdiction following the Los Angeles Police Department's killing of Rodney King.[51]

According to the formalist account, immigrants should cross to the other side when they acquire formal citizenship. At that point, they are legally equal and no longer the concern of immigration law scholars. But the lived reality of colorblind nationalism is that some immigrants, despite attaining legal citizenship, do not reach the threshold of full citizenship; instead, they get caught and cannot become full citizens. Figure 1 illustrates this foiled pathway more concretely. U.S.-born White people are first-class citizens and function as a baseline. White immigrants follow the idealized path of naturalization and are promoted to first-class citizens. Asian, Latinx, and Muslim immigrants can naturalize to become legal citizens, but they remain socially excluded as second-class citizens. Because the children born in the United States to Asian, Latinx, and Muslim immigrants are racialized as foreigners, they are also rendered second-class citizens despite their legal status.[52]

Consequently, racialized foreigners encounter two harms: (1) they are Othered because they are erroneously perceived as foreign, despite possessing legal citizenship, and (2) they are unable to counter racial inequality because the Othering of actual foreigners is rationalized under the law. The dynamics of these racialized experiences of citizenship slip through the cracks of scholarly attention. With a few notable exceptions, racialized foreigners elude immigration law scholars because of their legal status. Racialized foreigners also evade the focus of most CRT scholars since they fall outside the familiar Black/White paradigm of domestic U.S. race relations that gave rise to antidiscrimination laws.

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49 *See* Gordon & Lenhardt, *supra* note 36, at 2549–50. Linda Bosniak asks why there is no such thing as "Critical Immigration Scholarship." *Id.* at 2498 n.12. Her writing and those of others on post-national, transnational, subnational, and performative citizenship might fit this bill. *See generally supra* notes 7, 18.

50 Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1153 (1998).

51 *Id.* at 1154–55.

52 *See infra* Figure 1.

Asian American jurisprudence helpfully explains some of the departures from the Black/White race paradigm for Asian Americans. Many focus on the totalizing trope of foreignness and argue that Asian Americans can be perceived as foreigners long after they obtain citizenship.[53] Claire Jean Kim describes how this trope of Asian Americans as "perpetual foreigners" impacts their racial positioning vis-a-vis Black and White Americans.[54] In terms of cultural valorization and racial hierarchy, Asian Americans rank higher than Black Americans but lower than White Americans, resulting in conceptions of Asian Americans as model minorities.[55] But in terms of belonging as an insider or outsider to U.S. society, Asian Americans remain outsiders by dint of their inescapable foreignness. These two dynamics combine to form the process of racial triangulation. Devon Carbado reinforces this observation with his personal narrative as a Black immigrant whose legal status and social position befuddled police during a traffic stop due to the phenomenon of racial naturalization.[56] Colorblind nationalism innovates on these conceptual models by differentiating racial naturalization for Asian American, Latinx, and Muslim persons; Figure 1 illustrates how their pathways deviate from the idealized path of upward mobility for White immigrants. This divergence suggests a social disparity in the supposed legal equality of all U.S.-born and naturalized citizens.

C. *Colorblind Nationalism*

My argument brings together the CRT critique of colorblindness with critical immigration scholars' critiques of nationalism. Liberal interpretations of colorblind equality can merge foreignness[57] with the

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53 Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1 (1994).

54 Kim, *supra* note 46.

55 See *infra* Figure 1 for a comparison of colorblind nationalism with Kim's model of racial positioning and *infra* Figure 2 for a display of racial triangulation between Whites, Asian Americans, and Blacks.

56 *See* Carbado, *supra* note 46, at 635–37 (analogizing the perception of Black immigrants as Black Americans during traffic stops).

57 *See supra* note 43. *See generally* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233 (1997); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003). Leti Volpp explores the role of gender and "foreignness" in citizenship law. Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 73–74, 78 (2001).

biases of sovereignty,[58] democratic self-governance,[59] and social closure[60] to reinforce inequality. In short, the heightening inequality of racialized foreigners is produced by misplaced rationales of nationalism and national protection that migrate across the border into the daily life of Asian, Latinx, and Muslim American communities. This transmogrification of nationalism is particularly pernicious because it is facially neutral and sounds legitimate in liberal discourse. The evasion is problematic when applied to noncitizens; it becomes more problematic when applied to naturalized and U.S.-born citizens who are racialized foreigners because it socially or politically justifies otherwise unconstitutional racism and xenophobia.

One example of the transmogrified nationalism is the racialization of Muslims and Muslim Americans as terrorists following September 11, 2001.[61] Here, putatively "colorblind" rationales for tightening entry into the United States—such as national security—fuel nationalistic conceptions of who belongs and who poses a threat to the state. A neutral purpose for exclusion attaches to Muslims, who were racialized beyond their religious identity, and Muslim Americans, who were perceived as no different despite their legal identity. Both were surveilled by the government to gather information about Muslim terrorists presumed to be in their proximity. Muslims and Muslim Americans were racialized under the pretense of neutral constructs of national protection without adequate recognition of the racial harm. Because immigration restrictions are shrouded in nationalist conceptions of American borders and cultural identity, they operate under a different, and more pernicious, set of norms than the usual liberal democracy.

In contrast, President Trump made no secret of his racist and xenophobic motivations for excluding immigrants from the United States. However, some of the Trump administration's most harmful policies were enacted in the name of national security and national protection. President Trump's first executive order (in January 2017) excluded entry from Muslim-majority countries on the basis of national security using emergency provisions typically invoked in wartime situations.[62] To many, this travel ban was reminiscent of Chinese

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58 See, for example, DESAUTELS-STEIN, *supra* note 21, and other international law theorists like E. Tendayi Achiume, *infra* note 119.

59 *See, e.g.*, SARAH SONG, IMMIGRATION AND DEMOCRACY (2019); PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

60 *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); BRUBAKER, *supra* note 9 (viewing citizenship as an "instrument of social closure," particularly when patriotism dovetails national boundaries); *infra* note 261.

61 *See generally* Volpp, *supra* note 45.

62 *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

exclusion policies and Japanese Americans internment during World War II. One of his last executive orders, the closure of borders and the implementation of travel restrictions for China and other countries, also deployed emergency powers and a vague notion of national security—guarding public safety during the COVID-19 global pandemic.[63] What was distinctive about President Trump's Muslim travel ban and the China travel ban was not that they excluded racialized foreigners on the basis of race—the United States has a long history of racial exclusion in immigration law—but that they invoked racist tropes using the pretext of nationalism. The vulnerability of using national security as a neutral, pro-nationalism justification for excluding immigrants grew apparent when exclusionary policies expanded to other countries[64] as COVID-19 continued to mutate and spread.[65] For two years, the Biden

63 *See* Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020) ("In December 2019, a novel (new) coronavirus known as SARS-CoV-2 ('the virus') was first detected in Wuhan, Hubei Province, People's Republic of China, causing outbreaks of the coronavirus disease COVID-19 that has now spread globally. The Secretary of Health and Human Services (HHS) declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19. I have taken sweeping action to control the spread of the virus in the United States, including by suspending entry of foreign nationals seeking entry who had been physically present within the prior 14 days in certain jurisdictions where COVID-19 outbreaks have occurred, including the People's Republic of China, the Islamic Republic of Iran, and the Schengen Area of Europe."). Months before President Trump declared a national emergency on March 13, 2020, he publicly blamed China for letting loose the virus and its subsequent variants that would spread around the world. For months leading up to his public recognition of the coronavirus pandemic, President Trump referred to the coronavirus in tweets as the "Chinese Virus" and the "Kung Flu," *see, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 18, 2020, 7:12 AM), https://twitter.com/realDonaldTrump/status/1240234698053431305?s=20 [https://perma.cc/C9M3-DPE9], in contradiction to the World Health Organization's naming guidance that seeks to avoid stigmatization of individuals by using Greek symbols for variants rather than nations of origin. *See generally* WORLD HEALTH ORG., WORLD HEALTH ORGANIZATION BEST PRACTICES FOR THE NAMING OF NEW HUMAN INFECTIOUS DISEASES (2015). When confronted at a press conference about his use of the label "Chinese Virus," President Trump insisted that this name was not racist because "[the virus] comes from China." ABC News, *'Chinese Virus' Not Racist: Trump*, YOUTUBE (Mar. 18, 2020), https://www.youtube.com/watch?v=E2CYqiJI2pE [https://perma.cc/6MHE-UBEB].

64 In addition to relying on Section 212(f) of the Immigration and Nationality Act powers for the Muslim travel ban, President Trump drew on the powers available to executive officers such as the Secretary of the Department of Homeland Security (DHS), the Commissioner of Customs and Border Protection (CBP), and the Surgeon General (or CDC Director, if delegating authority). Both the Secretary of DHS and Commissioner of CBP are allowed to take whatever action may be necessary to respond to a "national emergency . . . or to a specific threat to human life or national interests," such as temporarily closing customs offices or ports of entry. 19 U.S.C. § 1318(b)(1) (Secretary of the Treasury); *id.* § 1318(b)(2) (Commissioner of CBP). Section 362 of the Public Health Service Act allows the Surgeon General, "in the interest of the public health," to prohibit "the introduction of persons or property" from countries where they determine there is "any communicable disease" and a "serious danger of the introduction of such disease into the United States." Public Health Service Act, ch. 373, § 362, 58 Stat. 704 (1944) (codified at 42 U.S.C. § 265).

65 Proclamation No. 10315, 86 Fed. Reg. 68385 (Nov. 26, 2021).

administration, aided by Congress and courts, maintained the closure of the U.S.-Mexico border to Central American and Haitian asylum seekers under the authority of an emergency delegation of responsibilities from the Department of Homeland Security to the Center for Disease Control (CDC) public health officials.[66] Over time, the pro-nationalism motivation softened and was replaced with facially neutral language about public safety and preventing the spread of disease. The public health justifications lent these travel restrictions the sheen of a colorblind response to contagion despite their expedient usage to restrict immigration.[67] Title 42 has been used to close borders and expel hundreds of thousands of Haitian and Mexican migrants under the pretext of a "public health threat." Skeptics present evidence that Title 42 was strategically used as a tool to stymie migration, regardless of any real public health threat, given the increased availability of nonexclusionary measures to control the virus, such as testing and vaccination.[68] The racial implications of the policy have become clear over time: Ukrainian migrants fleeing the Russian invasion, who are largely White, were the only group to be granted an exemption to Title 42 expulsions until

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66 Under what is now Title 42, federal officials have had the authority to prohibit "the introduction of persons and property" into the United States in order to stem the spread of communicable disease since 1893. Act of February 15, 1893, ch. 114, § 7, 27 Stat. 449, 452. Title 42 remained intact in the face of resignations of high-level government officials, critique from immigration advocates, skepticism from public health experts, and litigation arguing that it misused the quarantine provision as an exclusionary immigration policy to accomplish what prior policies could not. For helpful background information, see generally P.J.E.S. v. Wolf, 502 F. Supp. 3d 492 (D.D.C. 2020).

67 The Associated Press reported that, according to former Vice President Pence aide Olivia Troye, who coordinated the White House coronavirus task force (and who resigned in protest), the idea to use the § 265 authority to close down the borders was hatched by immigration advisor Stephen Miller. Only subsequently did CDC Director Robert Redfield invoke § 265 to block Canadian and Mexican travelers and to keep the provision in place indefinitely (with evidence of political pressure from Vice President Mike Pence). Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae [https://perma.cc/9KRE-4G5E]. *See generally* Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, 62 WM. & MARY L. REV. 1067, 1118–19, 1119 n.251 (2021).

68 Leonardo Castañeda & Katie Hoeppner, *Five Things to Know About the Title 42 Immigrant Expulsion Policy*, ACLU (Mar. 22, 2022), https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-title-42-immigrant-expulsion-policy [https://perma.cc/J6V6-A3TT] (noting that Trump administration advisor Stephen Miller had proposed using the policy to expel migrants far before the pandemic began, and that the administration pushed the continued use of Title 42 despite top CDC experts arguing that there was "no valid public health reason" to continue using the policy).

immigration advocates pushed the Biden administration to reexamine the policy as a whole.[69]

The waxing and waning of racism within the national protection justifications for border policies shifted to the domestic arena as public health evolved into economic protectionism. In the spring and summer of 2020, President Trump issued a ban on nearly all immigrant workers and their families, including a large number of skilled workers from China and India.[70] In a late night tweet, he made a sweeping declaration that, in order to "protect the jobs of our GREAT American Citizens, [he would] be signing an Executive Order to temporarily suspend immigration into the United States!"[71] A few days later, he issued a Proclamation titled "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,"[72] which was subsequently extended to temporary workers.[73] President Trump justified the emergency restriction on the pretext of economic protection: he said it was "a time when we need to prioritize Americans and the existing immigrant population" over newcomers, even though he had been threatening a complete shutdown of the immigration system for

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69 Dan Friedman, *The Plight of Ukrainian Refugees Highlights the Problem of Title 42*, HIAS (Mar. 24, 2022), https://www.hias.org/blog/plight-ukrainian-refugees-highlights-problem-title-42 [https://perma.cc/Y2LF-CMQ8].

70 *See* Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020). China and India are the top countries petitioning for H-1B visas. U.S. DEP'T OF HOMELAND SEC. & U.S. CITIZENSHIP & IMMIGR. SERVS., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2021 ANNUAL REPORT TO CONGRESS 8–9, 27, 33 (2022). I am one of several Asian American scholars to analogize the China ban to Chinese exclusion—indeed, I distinctly remember wondering aloud if it should be considered Muslim ban 4.0 or Chinese exclusion 2.0 at the time it was issued.

71 Betsy Klein, Priscilla Alvarez & Kevin Liptak, *Trump Claims He Will Temporarily Suspend Immigration into US Due to Coronavirus Fears*, CNN (Apr. 21, 2020, 10:15 AM), https://www.cnn.com/2020/04/20/politics/donald-trump-immigration-halt-coronavirus/index.html [https://perma.cc/8ZUC-PZM6].

72 The original Proclamation 10014 applies to immigrants and lawful permanent residents. Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020). Proclamation 10052 applies to nonimmigrants. Proclamation No. 10052, 85 Fed. Reg. 38263 (June 22, 2020). The ban applying to green card holders was rescinded by President Joe Biden, and the nonimmigrant ban was permitted to expire. *See* Proclamation No. 10149, 86 Fed. Reg. 11847 (Feb. 24, 2021).

73 Proclamation No. 10052, 85 Fed. Reg. 38263 (June 22, 2020). The orders banning immigrant and nonimmigrant workers disproportionately affected would-be immigrants from Asia, Africa, Central America, and Eastern Europe. Despite President Trump's insistence that he issued the order to protect Americans and the existing immigrant population, leaked reports showed that Trump administration advisor Stephen Miller admitted that protecting American jobs was a pretext for the longer-term goal of reducing immigration. Nick Miroff & Josh Dawsey, *Stephen Miller Has Long-Term Vision for Trump's 'Temporary' Immigration Order, According to Private Call with Supporters*, WASH. POST (Apr. 24, 2020, 2:23 PM), https://www.washingtonpost.com/immigration/stephen-miller-audio-immigration-coronavirus/2020/04/24/8eaf59ba-8631-11ea-9728-c74380d9d410_story.html (last visited Jan. 12, 2023).

months.[74] For the remainder of 2020 and 2021, President Trump issued visa restrictions that excluded Chinese international students and researchers for reasons ranging from preservation of the economy to protection against espionage.[75] The country-specific program names were overtly xenophobic. The justifications were protectionist and likely pretextual. The government expressed concern about academic espionage since nearly a quarter of foreign efforts to obtain sensitive information are routed through academic institutions; however, of the seventy-seven cases investigated under the China Initiative, only a quarter charged under the Initiative were convicted.[76] The China Initiative remained intact for another year, despite pressure from twenty Asian American advocacy groups, the Congressional Asian Pacific American Caucus, and independent investigations of the China Initiative's disparate impacts.[77] Eventually, the Biden administration

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74 Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020). In this limited instance, judicial deference has limits: a federal court partly struck the economic ban to discourage foreign labor competition because the stated economic concerns strayed too far from the original purposes of national security, in violation of the Administrative Procedure Act (APA)'s arbitrary and capricious clause, although it left other portions of the worker ban intact. *See* Nat'l Ass'n of Mfrs. v. U.S. Dep't of Homeland Sec., 491 F. Supp. 3d 549 (N.D. Cal. 2020).

75 Initially, President Trump issued executive orders to address espionage threats posed by Chinese-owned mobile applications TikTok and WeChat, stating that mobile applications developed and owned by Chinese companies "threaten the national security, foreign policy, and economy of the United States" because the Chinese Communist Party uses the apps to keep "tabs on Chinese citizens [visiting the United States]" and also obtain "access to Americans' personal and proprietary information." Exec. Order No. 13943, 85 Fed. Reg. 48641 (Aug. 6, 2020). WeChat denounced the order, claiming that the ban "singles out people of Chinese and Chinese American ancestry and subjects them and people who communicate with them to disparate treatment on the basis of race, ethnicity, nationality, national origin, and alienage." Kari Paul, *Trump's Bid to Ban TikTok and WeChat: Where Are We Now?*, GUARDIAN (Sept. 29, 2020, 8:54 AM), https://www.theguardian.com/technology/2020/sep/29/trump-tiktok-wechat-china-us-explainer [https://perma.cc/9T3L-DNFE]. Federal courts enjoined both the order against TikTok and the one against WeChat, and President Biden asked for an abeyance of legal proceedings while the administration investigated whether the apps truly posed a national security threat. President Biden later revoked this ban. Exec. Order No. 14034, 86 Fed. Reg. 31423 (June 9, 2021).

76 Eileen Guo, Jess Aloe & Karen Hao, *The US Crackdown on Chinese Economic Espionage Is a Mess. We Have the Data to Show It*, MIT TECH. REV. (Dec. 2, 2021), https://www.technologyreview.com/2021/12/02/1040656/china-initative-us-justice-department [https://perma.cc/5JKE-D3JX]. *See generally* Erin N. Grubbs, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C. J.L. & TECH. 235 (2019).

77 *See* Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 145–46 (2021); Jodi Xu Klein, *Biden Urged to Pause and Review China Initiative for Racial Profiling*, S. CHINA MORNING POST (Aug. 20, 2021, 2:00 PM), https://www.scmp.com/news/china/article/3145713/biden-urged-pause-and-review-china-initiative-racial-profiling?module=perpetual_scroll_0&pgtype=article&campaign=3145713 (last visited Jan. 9, 2023). Representative Judy Chu, Chair of the Congressional Asian Pacific American Caucus, criticized a hearing on the initiative for

changed the name, procedures, and penalties for "research integrity" violations. While real economic competition from China existed, the U.S. government's framing of its regulation of scientific research as tackling a single, rogue country exploited the enduring tension between innovation and ownership in the global marketplace.[78] This policymaking episode suggests an administration capitalizing on foreign conflict in order to pursue a demonstrably discriminatory domestic policy without reproach. Good-faith government appeals to public health and national security can be colorblind and protective of American safety. But facially race-neutral narratives can nevertheless marginalize immigrants and naturalized and U.S.-born citizens who are perceived as foreigners.

The legal justifications for these policy expansions are likely to be accepted under the status quo. Pro-nationalism policies offer facially neutral explanations that seem colorblind, even if those explanations are intertwined with racial discrimination. In reality, race may be salient even if it can be shown that there is some evidentiary basis for travel bans initiated due to national security, or that there is some scientific basis for border closures initiated due to public health, or that there is global economic competition that necessitates curtailing foreign labor to

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making "dangerous generalizations that would paint all Chinese students and scholars as spies for China." Elizabeth Redden, *Chinese Students: Security Threat or Stereotype Threat?*, INSIDE HIGHER ED (June 7, 2018), https://www.insidehighered.com/news/2018/06/07/lawmakers-discuss-national-security-concerns-and-chinese-students [https://perma.cc/WQE7-M55Y].

78 Margaret Lewis claims that the U.S. government's use of "China" as shorthand for investigations anthropomorphizes the country into a condemned form: "However, it is framing that threat in a problematic way. It is constructing a criminal justice initiative under the umbrella of 'China' and criminalizing that concept in a way that is in tension with foundational principles of the United States' criminal justice system." Lewis, *supra* note 77, at 148. As an example, FBI Director Wray stated in February 2020:

> Confronting this threat effectively does not mean we shouldn't do business with the Chinese. It does not mean we shouldn't host Chinese visitors. It does not mean we shouldn't welcome Chinese students or coexist with China on the world stage. But it does mean that when China violates our criminal laws and international norms, we are not going to tolerate it, much less enable it.

Id. at 149 (quoting Christopher Wray, Dir., Fed. Bureau of Investigation, The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States (July 7, 2020), https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states [https://perma.cc/57CK-FJBD]). For Gideon Lewis-Kraus's description of a clash between scientists who view themselves as participating in collaborative projects to learn and innovate and governments that consider themselves responsible for policing the ownership interests attached to these discoveries, see Gideon Lewis-Kraus, *Have Chinese Spies Infiltrated American Campuses?*, NEW YORKER (Mar. 14, 2022), https://www.newyorker.com/magazine/2022/03/21/have-chinese-spies-infiltrated-american-campuses [https://perma.cc/823F-RQ3X].

ameliorate the hardship of American workers.[79] But to the extent that government discrimination is purposeful or pretextual, it is trumped by public interest. To the extent that government classifications lead to racially disparate impacts, it is rationalized as distinct from the kind of harm the law is meant to correct. Nationalism is used to procedurally and substantively justify these exclusionary policies. Minimally, the analysis would be more complicated: under the Constitution, race-based distinctions would be scrutinized for racial animus, and facially neutral justifications would be examined for pretext. Under antidiscrimination laws, burdens would need to shift. However, the particularity of the nation as a justification for exclusionary policies allows government officials to obfuscate the impact on racial minorities who are racialized as foreigners, whether they are actually or merely perceived to be foreign.[80]

The next Part traces the process of rationalizing the inequitable treatment of racialized foreigners who are legally U.S. citizens. It begins by explaining the history of racialized barriers to citizenship. It then turns to the undermining of citizenship for naturalized citizens struggling to hold on to their legal status in the face of denaturalization or repatriation threats. It then discusses incursions on basic rights during the internment of Japanese Americans, absent evidence of disloyalty, and the refusal to recognize the birth certificates of Mexican Americans living in the borderlands, absent evidence of fraud. It ends with the suspicion toward children of immigrants who are uncontrovertibly birthright citizens.

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79 *See generally* Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PA. L. REV. 313 (2021) (discussing preexisting racism against Black, Native, and Latinx persons and analogizing to H1N1 and the Spanish Flu). As Goodwin and Chemerinsky point out, it has long been the case that "xenophobia and racism shape political discourse and public understanding about disease, origins, and infection." *Id.* at 315. *See generally* Leisy J. Abrego, *Relational Legal Consciousness of U.S. Citizenship: Privilege, Responsibility, Guilt, and Love in Latino Mixed-Status Families*, 53 L. & SOC'Y REV. 641, 641 (2019) ("[D]espite normative conceptions of citizenship as a universally equal status, citizenship intersects with key social markers to determine the contours and inequalities of substantive citizenship."); Tiffany Joseph & Tanya Golash-Boza, *Double Consciousness in the 21st Century: Du Boisian Theory and the Problem of Racialized Legal Status*, SOC. SCIS., Sept. 16, 2021, at 1 ("The intersection of race, ethnicity, and legal status or 'racialized legal status' represents a new variation of Du Bois' 'color line' . . . .").

80 Elizabeth Goitein notes that, "with respect to one subset of emergency powers—those relating to immigration—[President Trump] has indeed taken full advantage of COVID-19 to deliver on longstanding promises to dramatically reduce the flow of lawful immigrants into the United States." Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SEC. L. & POL'Y 27, 28 (2020); *id.* at 36 & n.38. In comparison, Goitein documents President Trump's failure or delay in employing his emergency powers under the Public Health Service Act; the Federal Food, Drug, and Cosmetic Act; the Stafford Act; the Social Security Act; the National Emergencies Act; and the Defense Production Act. *Id.* at 47–48.

II. CASE STUDIES OF CITIZENSHIP INEQUALITY

This Part shows how the facially neutral, pro-nationalism narratives for discrimination against noncitizens do not stop at the border. Rather, they extend to racialized foreigners living inside the United States who naturalize or who are born to U.S. citizens. The case studies show the federal government justifying citizenship restrictions that create barriers to equality for certain U.S. citizens—namely Asian, Latinx, and Muslim Americans—and evading reproach. For the naturalized citizens, these practices and policies form a "second wall" in a system of double selection that first chooses immigrants for entry and then chooses them again for green cards and citizenship.[81] For the U.S.-born children of immigrants and naturalized citizens, they constitute a "third wall" that stymies their substantive equality. The federal government initially justifies these restrictions through by-now-familiar explanations like guaranteeing national security, preserving public health, or preventing fraud. These practices and policies subsequently distort the colorblind, pro-nationalism justifications to defend policies that deny the substantive equality of non-White U.S. citizens.

A. *History of Racialized Barriers to Citizenship*

Federal immigration and citizenship laws historically contained overt race restrictions. For example, the 1790 naturalization law was restricted to "white person[s]."[82] The Reconstruction Congress chose to maintain the word "white" and add "aliens of African nativity and . . . persons of African descent," rather than striking the word "white," to preclude Asians immigrants from naturalizing.[83] Senator William Stewart, who debated the amendment, said:

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81 Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549 (2019). The bureaucratic barriers to naturalizing have also been called the "invisible border wall." Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71 (2021).

82 Naturalization Act of 1790, ch. 3, 1 Stat. 103 ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof . . . .").

83 KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 124 (2015) (quoting Act of July 14, 1870, Pub. L. No. 41-254, 16 Stat. 254).

> I do not propose to hand over our institutions to any foreigners [i.e., the Chinese] who have no sympathy with us, who do not profess to make this country their home, who do not propose to subscribe to republican institutions, who cling to paganism and to despotism, and who are bound by contracts which make them slaves.[84]

Because the 1870 naturalization law did not explicitly prohibit Chinese immigrants from naturalizing, several Chinese immigrants seeking naturalization argued that "white" should be interpreted to include them. In 1878, a California court rejected this claim on the ground that a White person was of the Caucasian race and a Chinese person was of the "Mongolian race."[85] Fifty-two racial prerequisite cases tested the bounds of "whiteness" for naturalizing Asian immigrants and other "aliens ineligible for citizenship" based on a legal definition of citizenship that equated citizenship to Whiteness, as recounted in *White by Law*.[86] As Devon Carbado elaborates, "more is going on in the prerequisite cases than race-based denials of citizenship. In these cases, courts naturalize (rather than simply construct) whiteness itself."[87] The prerequisite cases are significant not only because they reveal the racial terms upon which people become White by law; they are also significant because they naturalized Whiteness as the normative American identity and a requirement for citizenship.[88]

Long after the racial prerequisites were abolished, the legacy of racial exclusion remains. This covert reliance on Whiteness as a predicate for full citizenship echoes in modern naturalization processes in the form of disproportionate delays and denials of naturalization applications of immigrants who are racial minorities. The U.S. Citizenship and Immigration Service (USCIS), the agency tasked with providing immigration and naturalized citizenship to noncitizens, has erected barriers to citizenship that demonstrate the subtle logic of colorblind nationalism. Intensified vetting of applicants and requests for evidence on routine matters exacerbate the delay in naturalization, combined with longstanding USCIS backlogs from outdated practices, insufficient staff,

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84 *Id.* (alteration in original) (quoting CONG. GLOBE, 41st Cong., 2d Sess. 5150 (1870)).

85 *In re* Ah Yup, 1 F. Cas. 223, 223–25 (C.C.D. Cal. 1878).

86 *See* LÓPEZ, *supra* note 25, at 99.

87 Carbado, *supra* note 46, at 637.

88 Notably, some judges of this era considered Chinese people inferior not only to White people but also to Black people. Justice Harlan cast a single dissenting vote in *Plessy v. Ferguson*, a decision that upheld the principle "separate is equal" on the basis that the Constitution required colorblindness. Yet he disparaged Chinese Americans in the same opinion: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

and inadequate resources.[89] The results of these policy choices, as well as the inherited structural biases, can be seen in racial disparities in approval rates: while most applications are approved, Latinx applicants are less likely to be approved than White applicants,[90] and Muslim applicants are less likely to be approved than applicants from countries that are not predominantly Muslim within every racial and gender cluster.[91]

B. *Undermining Citizenship for Racialized Foreigners*

The colorblind myth in U.S. law is that once a noncitizen has naturalized, she is on equal footing with other U.S.-born citizens. In reality, history reveals a pattern of facially neutral policies targeting non-White racial minorities and then attaining legal sanction when a government official deems the policy necessary to protect the nation. Three examples illustrate this false presumption: barriers to naturalization and the risk of repatriation for Mexican Americans, internment of Japanese Americans or denaturalization of Muslim Americans on the basis of national security, and contestation of citizenship documents in the U.S. borderlands.

1. Denaturalization of Mexican Americans and Muslims

One place the colorblind myth can be seen is in U.S. naturalization laws, which have historically strongly disfavored the expatriation of U.S.-born citizens. These laws also reserve denaturalization for cases where the naturalized citizen was never eligible for citizenship, as opposed to using it as a revocation for post-naturalization conduct.[92] The revitalization of

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89 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-529, U.S. CITIZENSHIP AND IMMIGRATION SERVICES: ACTIONS NEEDED TO ADDRESS PENDING CASELOAD 14–20 (2021). During the Trump administration, the USCIS expanded the Fraud Detection and National Security Directorate and the Controlled Application Review and Resolution Program in the USCIS, which significantly delayed naturalization for flagged individuals. COLO. STATE ADVISORY COMM., U.S. COMM'N ON C.R., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS (2019).

90 Emily Ryo & Reed Humphrey, *The Importance of Race, Gender, and Religion in Naturalization Adjudication in the United States*, PROC. NAT'L ACAD. SCIS., Feb. 22, 2022, at 1.

91 *Id.* at 5–6. As Emily Ryo says, "We assume all that is in the past, because [our] laws now prohibit those kinds of discrimination. We shouldn't expect to find continued disparities by race, gender, and religion." Leslie Ridgeway, *Data Study Uncovers Inequities in US Citizenship Process*, PHYS.ORG (Feb. 24, 2022) (alteration in original), https://phys.org/news/2022-02-uncovers-inequities-citizenship.html [https://perma.cc/4XVC-DGP5].

92 *See* Afroyim v. Rusk, 387 U.S. 253 (1967) (holding that U.S. citizens may not be deprived of their citizenship involuntarily due to the Citizenship Clause in the U.S. Constitution).

denaturalization policies shows the targeting of disfavored groups. In *The Sovereign Citizen*, Patrick Weil tells the story of denaturalization policies over the course of two centuries, highlighting that upticks tend to target noncitizens who are also racial or religious minorities.[93] He begins with Emma Goldman, a European critic of the government. After many years of heists, the government stripped the prominent anarchist of her citizenship in 1909 and then deported her. In her essay, *A Woman Without a Country*, Goldman wrote that "[t]o have a country implies . . . the possession of a certain guarantee of security, the assurance of having some spot you can call your own and that no one can alienate from you."[94] After being expelled from the United States, she concluded that "[c]itizenship has become bankrupt: it has lost its essential meaning, its one-time guarantee."[95] Denaturalization efforts in the early twentieth century focused on these kinds of political dissidents.[96] They intensified during periods when the United States sought to defend American democracy against the threat of communism.[97]

Over time, race and national origin figured prominently in denaturalization. During the Great Depression, Mexican-American citizens of the United States were forcefully deported without due process under the pretext of repatriation, despite some of these individuals having birthright citizenship.[98] More than a million Mexican-Americans were deported during this time, with an estimated sixty percent having been U.S. citizens.[99] These repatriation policies stated goals of defeating economic competition or illegality, despite the long-standing residence of Mexican-Americans before the U.S. border was redrawn and reinforced and long-standing efforts to recruit cheap immigrant labor.[100] Reminiscent of the period, in 1958 the Supreme Court permitted the U.S. government to strip a naturalized U.S. citizen, Clemente Martinez Perez, of his status.[101] The Government, citing Section 401(e) and (j) of the

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93 *See* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (2013).

94 *Id.* at 2 (quoting EMMA GOLDMAN, A WOMAN WITHOUT A COUNTRY 1–2 (1909)).

95 *Id.* (quoting Goldman, *supra* note 94, at 3).

96 *See id.*

97 *See id.*

98 *See generally* AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 159–74 (2021).

99 *America's Forgotten History of Mexican-American 'Repatriation,'* NPR (Sept. 10, 2015, 1:11 PM), https://www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation [https://perma.cc/GX96-62AK].

100 MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2014).

101 Perez v. Brownell, 356 U.S. 44, 45–46 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

Nationality Act of 1940, denied Perez American citizenship on the ground that he voted in a Mexican political election and remained outside the United States in wartime to avoid military service.[102]

Although the denaturalization provisions stayed on the book, denaturalization remained relatively dormant following World War II and the civil rights movement.[103] This dormancy is ostensibly because of the strong legal protection U.S. citizenship is supposed to bring. In 1967, the U.S. Supreme Court ended what remained of the government's denaturalization campaign in *Afroyim v. Rusk*, "declaring that the Fourteenth Amendment guarantees every American citizen, whether by birth or naturalization, 'a constitutional right to remain a citizen.'"[104] Beys Afroyim was a Polish immigrant and naturalized after migrating to the United States fourteen years earlier. In 1950, Afroyim went to Israel and voted in that country's 1951 governmental election. When he applied for renewal of his U.S. passport ten years later, the State Department informed him that he had forfeited his citizenship "by virtue of [Section] 401(e) of the Nationality Act of 1940 which provides that a United States citizen shall 'lose' his citizenship if he votes 'in a political election in a foreign state.'"[105] In a 5-4 decision, the Supreme Court held that Congress has no general power to revoke American citizenship without consent.[106] Noting the special bond between Americans and their government, the Court held that only citizens themselves may voluntarily relinquish their citizenship.[107] As such, Section 401(e) violated both the Fifth and

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102 *Id.*

103 *See* FROST, *supra* note 98, at 187.

104 *Id.* (quoting *Afroyim*, 387 U.S. at 267). Robertson and Manta highlight how denaturalization was used as a tool during the Red Scare to suppress political disagreement in a harmful and unconstitutional manner. Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 464 (2019).

105 *Afroyim*, 387 U.S. at 254 (quoting Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137, 1168–69). There are two primary ways that an individual may be stripped of their U.S. citizenship. The first, criminal denaturalization, occurs through a criminal conviction under 18 U.S.C. § 1425. A conviction under this section of the law automatically triggers denaturalization. Normally in criminal denaturalization cases, an individual conceals that they were convicted of a previous crime, thereby withholding evidence of material facts that would have resulted in the denial of naturalization. Other similar cases have involved the naturalization applicant withholding membership in a designated foreign terrorist organization or transnational criminal organization, like a gang. With civil denaturalization under Section 340 of the Immigration and Naturalization Act, the naturalized U.S. citizens may be subject to denaturalization proceedings by the United States Attorney General's Office in federal court if one obtains U.S. citizenship illegally through the concealment of a material fact or by willful misrepresentation. 18 U.S.C. § 1451. It is important to note that DHS cannot revoke citizenship administratively but can recommend denaturalization proceedings to other parties in the Department of Justice (DOJ) for action. Additionally, the Attorney General's act of cancelling a certificate of naturalization is not denaturalization.

106 *Afroyim*, 387 U.S. at 257 (overruling *Perez*, 356 U.S. 44).

107 *Id.* at 257, 262.

Fourteenth Amendments. This shifted the legal presumption that U.S. citizens would remain as such, unless they made it very clear they sought to renounce. Since the 1967 *Afroyim* decision, the State has denaturalized fewer than 150 people, most for committing fraud in the naturalization process.[108] The presumption of legal equality among citizens held.

Yet after several decades in dormancy, the Trump administration revisited this presumption for Muslim Americans. The Trump administration expanded the "Operation Janus" program, which sought to denaturalize persons of interest, with "Operation Second Look." While there lacked overt race-based bias in the description of these persons, race was not independent: sometimes, the state flagged persons for flimsy reasons, such as misspelled surnames or translations of foreign names that did not match official documents.[109] Between 1990 and 2017, the DOJ filed an average of 11 cases per year for a total of 305 denaturalization cases,[110] but between 2017 and 2020, the DOJ filed 94 denaturalization cases.[111] In 2008 after a CBP "employee identified 206 [noncitizens] who had received final deportation orders and subsequently used a different biographic identity . . . to obtain an immigration benefit," the DHS initiated Operation Janus,[112] a task force to identify individuals who should have been barred from naturalization. Those individuals came from four Muslim majority countries—two of which were considered "special interest" countries, while the other two shared borders with a special interest country.[113] In 2018, the USCIS launched Operation Second Look, a successor program, to identify suspects of naturalization

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108 Amanda Frost, *Academic Highlight: Weil on Denaturalization and the Supreme Court*, SCOTUSBLOG (June 14, 2017, 2:32 PM), https://www.scotusblog.com/2017/06/academic-highlight-weil-denaturalization-supreme-court [https://perma.cc/366K-G6AE]. *See generally* LAURA BINGHAM & NATASHA ARNPRIESTER, OPEN SOC'Y JUST. INITIATIVE, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES 11 (David Berry & James A. Goldston eds., 2019); WEIL, *supra* note 93, at 197–202.

109 WEIL, *supra* note 93, at 197–202. In *(Un)Civil Denaturalization*, Robertson and Manta begin with the Trump administration's plan to scrutinize the records of 700,000 naturalized citizens and potentially file denaturalization petitions against 1,600 people, through Operation Janus and Operation Second Look. Robertson & Manta, *supra* note 104, at 404, 454.

110 *Fact Sheet on Denaturalization*, NAT'L IMMIGR. F. (Oct. 2, 2018), https://immigrationforum.org/article/fact-sheet-on-denaturalization [https://perma.cc/ZS3D-QTXC].

111 Hamed Aleaziz, *A New Section of US Attorneys Is Being Created to Strip Naturalized Citizenship from Suspected Fraudsters*, BUZZFEED NEWS (Feb. 26, 2020, 3:31 PM), https://www.buzzfeednews.com/article/hamedaleaziz/us-attorneys-strip-naturalization-fraud [https://perma.cc/587Z-9YUM].

112 U.S. DEP'T OF HOMELAND SEC., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS (2016) (footnote omitted).

113 *Id.*

fraud using leads obtained from Operation Janus.[114] The Trump administration even requested over $207 million for fiscal year 2019 in order to investigate American citizens who may be subject to denaturalization,[115] an enormous amount given the scant evidence of widespread immigration fraud.

Operation Second Look ossified within the immigration bureaucracy into a denaturalization task force and then part of the DOJ. President Trump created the Denaturalization Section within the Office of Immigration Litigation in February 2020 with the intent to target "terrorists, war criminals, sex offenders, and other fraudsters who illegally obtained naturalization."[116] While guarding the nation against serious crime falls within public interest, the enforcement efforts targeted several people who committed less serious crimes prior to their naturalization.[117]

In each of these programs, the federal government employed the colorblind language of "special interest" and national security in determining priorities for denaturalization efforts. The countries of origin representing the bulk of denaturalization cases—including Mexico, Haiti, and Nigeria—consisted mostly of disfavored racial minorities.[118] The country list overlapped with nations President Trump publicly maligned throughout his presidency, suggesting pretext or at least strategic use of denaturalization. Facially neutral exclusionary policies, justified on the basis of national security and fraud detection, too easily obfuscate racially discriminatory motives and disparate effects.[119]

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114 Amy Taxin, *US Launches Bid to Find Citizenship Cheaters*, AP NEWS (June 11, 2018), https://apnews.com/article/immigration-north-america-naturalization-us-news-ap-top-news-1da389a535684a5f9d0da74081c242f3 [https://perma.cc/5DZ8-XP3C]; Matthew Hoppock, *Operation Janus and Operation Second Look: Denaturalization of Citizens with Removal Orders* (Mar. 4, 2018), https://www.hoppocklawfirm.com/operation-janus-operation-second-look-denaturalization-citizens-removal-orders [https://perma.cc/37DN-ZGX2].

115 Maryam Saleh, *Trump Administration Is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, INTERCEPT (Apr. 4, 2019, 6:00 AM), https://theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan [https://perma.cc/N5LZ-WEZB].

116 Press Release, Off. of Pub. Affs., U.S. Dep't of Just., The Department of Justice Creates Section Dedicated to Denaturalization Cases (Feb. 26, 2020), https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases [https://perma.cc/K67V-E6HY].

117 Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html (last visited Dec. 20, 2022); *Records Shed New Light on DOJ 'Denaturalization' Section*, AM. OVERSIGHT (Mar. 26, 2021), https://www.americanoversight.org/records-shed-new-light-on-doj-denaturalization-section [https://perma.cc/AP6X-FWLN].

118 BINGHAM & AMPRIESTER, *supra* note 108, at 11.

119 This approach reflects what E. Tendayi Achiume has called "facially race-neutral policies or rhetoric that nonetheless result in racialized exclusion." E. Tendayi Achiume, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 14, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018) [hereinafter Achiume, *Report of the*

Their exclusionary legacy lives on for naturalized citizens, thereby undermining the expected legal equality that accompanies formal citizenship.[120]

Although naturalization fraud occurs, it does not arise at the scale suggested by the denaturalization efforts. Nor does naturalization fraud explain disparities in who is targeted. The disproportionate government response relative to the actual evidence of fraud suggests a desire to sow fear.[121] The denaturalization cases are especially remarkable because they permit citizenship inequality to penetrate beyond the border—where the federal government has its strongest claim to protecting national sovereignty—to let nationalism prevail within the nation. This demonstrates that the colorblind myth is at its height post-naturalization. All citizens bear legally equal rights, and the government supposedly cannot employ noncitizenship-related justifications for differential treatment. Once inside the border, immigrants should hold due process and constitutional protections against deprivations of rights that are higher than for those with no stakes in the United States. Once immigrants naturalize, these rights and protections should equal that of any other U.S. citizen. But there is a double myth in naturalization: that noncitizens become equal to citizens when they naturalize, and that decisions to undo citizenship are based on valid political judgments insulated from judicial review. Instead, citizenship is conditional on beliefs, race, religion, and prior legal status. The Operation Janus and Operation Second Look programs demonstrate that even citizens who complete the lengthy and arduous process of naturalization may be removed from the country due to a distrustful government. The persistence of denaturalization and the prospect for its revival shows that "foreignness" prevails over a myth that naturalized citizenship brings about formal equality.[122]

Special Rapporteur]; *see also* E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2022) [hereinafter Achiume, *Racial Borders*].

120 Under pressure from civil rights advocates and immigration attorneys, President Biden issued an executive order to "review policies and practices regarding denaturalization and passport revocation to ensure that these authorities are not used excessively or inappropriately." Exec. Order No. 14012, 86 Fed. Reg. 8277, 8279 (Feb. 2, 2021).

121 Robertson & Manta, *supra* note 104, at 466–67 ("The problem is not the number of citizens subject to denaturalization proceedings, but rather the arbitrariness of who is targeted—and the political message that is sent by that targeting. . . . That feeling of exclusion creates a chilling effect as individuals fear for their own status.").

122 *See generally* Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html?action=click&module=RelatedLinks&pgtype=Article (last visited Dec. 20, 2022).

2. Internment of Japanese Americans

Perhaps the quintessential example of a discriminatory law gaining legal sanction as racially neutral (or at least justified under the Equal Protection Clause) is the internment of Japanese Americans during World War II. In response to fears unleashed by the Japanese attack on Pearl Harbor in 1942, President Franklin D. Roosevelt issued Executive Order 9066, directing the military to isolate any citizen of Japanese dissent in a sixty-mile extension of the Pacific coast.[123] Invoking the internment order, Fred Korematsu was arrested for evading the internment order.[124] Reviewing the conviction, the Supreme Court ruled in *Korematsu v. United States* that the miliary, in times of war, could exclude and intern persons on the basis of their race.[125] The majority opinion by Justice Black applied strict scrutiny to the order and concluded the high bar was satisfied because "[p]ressing public necessity may sometimes justify the existence of such restrictions."[126] While Justice Black cautioned that "racial antagonism" could not justify the restriction, for Japanese people living in the United States during this period, the association between their race and the perceived risk was paramount.[127] Suspicion toward the Japanese was so acute that forcible relocation and incarceration was deemed necessary to secure the nation, regardless of the race-based impact, and regardless of their citizenship status.[128] It took seventy-five years before the government admitted that its fears were overblown, overturned false convictions of Japanese Americans, and apologized for its wrongdoing.[129] Historian Peter Iron's discovery in the archives showed that government attorneys made false claims against Japanese Americans and also withheld and destroyed evidence favorable to incarcerated citizens.[130] This discovery led to lawsuits challenging the

123 Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

124 Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

125 *Id.*

126 *Id.* at 216.

127 *See id.*

128 *See* T.A. Frail, *The Injustice of Japanese-American Internment Camps Resonates Strongly to This Day*, SMITHSONIAN MAG. (Jan. 2017), https://www.smithsonianmag.com/history/injustice-japanese-americans-internment-camps-resonates-strongly-180961422 [https://perma.cc/VX5C-ZDLE]; Karen Korematsu, *Carrying on* Korematsu: *Reflections on My Father's Legacy*, 9 CALIF. L. REV. ONLINE 95 (2020).

129 Frail, *supra* note 128; Korematsu, *supra* note 128, at 105.

130 The court documents showed that in January 1942, Lieutenant Kenneth Ringle of the Office of Naval Intelligence submitted a report that concluded that "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the

manifest injustice and reversing the criminal convictions of Fred Korematsu, Minori Yasui, and Gordon Hirabayashi in the 1980s.[131] In other words, the government's national security purpose was proved to be pretextual.

Internment represents a particularly stark example of how being foreign-born, or being perceived as foreign, lasts beyond when it should legally matter: Japanese citizens of the United States, whether naturalized or born within the United States to Japanese parents, were presumptively mistrusted without any evidence of political disloyalty. But the Japanese internment is not an isolated example.

The state deployed similar reasoning after the September 11, 2001, terrorist attacks to detain and surveil Muslim Americans.[132] As such, internment set a precedent for racial pretexts and courts relying on facially neutral explanations to permit otherwise impermissible discrimination against racialized foreigners. *Trump v. Hawaii* extended the pretextual reasoning from the *Korematsu* decision, in which the Court upheld a president's executive order barring entry into the United States by making an invidious distinction on the basis of race and national origin.[133] While the order applied to Muslim immigrants, not naturalized citizens, it demonstrates the process of racializing certain groups as foreign, disregarding their actual citizenship status, and then using that

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people . . . [and] that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis." Memorandum from K.D. Ringle, Lieutenant Commander, U.S. Navy, to Chief of Naval Operations (Jan. 26, 1942) (emphasis omitted), http://jerrykang.net/wp-content/blogs.dir/1/files//2010/10/Ex-N.pdf [https://perma.cc/83PH-4DZ9]. The director of the Justice Department's Alien Enemy Control Unit wrote to the Solicitor General expressing concern with the government's arguments in court in light of the Ringle memorandum: "[T]he Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising [General] DeWitt gave him advice directly to the contrary." Memorandum from Edward J. Ennis, Dir., Alien Enemy Control Unit, on Japanese Brief to Solic. Gen. 3 (Apr. 30, 1943), https://catalog.archives.gov/id/296058 [https://perma.cc/A7W3-D7FT]. DOJ Director Ennis encouraged Solicitor General Charles Fahy to reveal the Ringle report to the high court, arguing "that any other course of conduct might approximate the suppression of evidence." *Id.* at 4. The Solicitor General refused. See ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. 2013), for copies of the exhibits to the *coram nobis* petition, as well as other documents related to the *Korematsu*, *Hirabayashi*, and *Yasui* cases. On the companion website to this book, see Jerry Kang, *Coram Nobis Litigation*, JERRYKANG.NET, http://jerrykang.net/racerightsreparation/resources/coram-nobis [https://perma.cc/2J3N-F4K5].

131 Yasui v. United States, 320 U.S. 115 (1943), *vacated*, 772 F.2d 1496, 1498 (9th Cir. 1985); Hirabayashi v. United States, 320 U.S. 81 (1943), *vacated*, 828 F.2d 591 (9th Cir. 1987); *Ex parte* Endo, 323 U.S. 283 (1944).

132 Volpp, *supra* note 45; Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 11–12, 14, 23–24 (2001).

133 *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

false perception to justify disparate treatment.[134] The Court distinguished its opinion in *Trump v. Hawaii* from the overtly race-based *Korematsu* decision by differentiating between discrimination against Japanese Americans "solely and explicitly on the basis of race," and pretextual discrimination based on animus toward a disfavored racial, religious, or national origin minority group.[135] Justice Sotomayor's dissent questions the majority's distinctions, noting the "stark parallels between the reasoning" of the two cases and campaign statements conveying the upcoming president's race-based animus and discriminatory intentions for the travel bans.[136] The convolution of equality laws used to incarcerate U.S. citizens racialized as foreigners circled back to justify exclusion of actual foreigners.

3. Challenging Citizenship of Mexican Americans in Borderlands

Beyond historical examples of discriminatory policies being sanctioned as racially neutral, today, families living in the borderland regions of the United States confront routine skepticism of their citizenship.[137] For example, U.S.-born citizens, mostly Latinx, living in the Rio Grande Valley near the southern border regularly have their birth certificates questioned when crossing the border.[138] Since their families, jobs, schools, friends, and homes are scattered on either side of that line, they cross the border as part of everyday life.[139] These refusals to recognize birthright citizenship cite concerns about poor recordkeeping among midwives or suspicion of "birth attendants" like Trinidad Saldivar, who the government believed had lied about the birth locations of the births

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134 *See generally* Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, 68 L. & CONTEMP. PROBS. 173 (2005).

135 Anil Kalhan, Trump v. Hawaii *and Chief Justice Roberts's* "Korematsu *Overruled" Parlor Trick*, AM. CONST. SOC'Y: EXPERT F. (June 29, 2018) (quoting *Trump*, 138 S. Ct. at 2423), https://www.acslaw.org/expertforum/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick [https://perma.cc/F2LV-CDMM]; *see also* Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688 (2019); Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641 (2019).

136 *Trump*, 138 S. Ct. at 2435–36, 2447 (Sotomayor, J., dissenting). While the discrimination is described as religious animus, the racialization of Muslim Americans renders the logic similar to an overtly race-based distinction.

137 Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 767–68 (2020). This fluid movement grows out of earlier times when there was not an international border between the United States and Mexico, until the Treaty of Guadalupe Hidalgo.

138 *Id.*

139 *See generally* Robert R. Alvarez, Jr., *The Mexican-US Border: The Making of an Anthropology of Borderlands*, 24 ANN. REV. ANTHROPOLOGY 447 (1995).

she assisted.[140] Even if the State refuses to recognize birthright citizenship in good faith to avoid citizenship fraud, subsequent expansion of the efforts suggest pretext. In 2008, the U.S. government mandated additional documentation to prove citizenship for persons born near the southern border outside of a hospital. Up until 2009, to enter the United States from Mexico, an American citizen only needed to show a birth certificate or a U.S. driver's license—this convenience facilitated regular travel back and forth across the border. But after Texas implemented the REAL ID Act, Latinx citizens of the United States must either show passports or an Enhanced Driver's License with biographic and biometric data, causing an increase in passport applications.[141] The selective implementation of these policies by law enforcement directly impacts predominantly Mexican and Indigenous migrants living near the border. The government's suspicion toward those born in the borderlands reflects a racial bias in citizenship law that is refracted through the experiences of racial minorities. U.S. citizens who have been denied passports face outsized scrutiny because of their own race and their physical and relational proximity to the foreign-born. Their experiences in the borderlands demonstrate how U.S. citizens can be racialized as foreigners.

C. *Forever Foreign: Racially Ineligible for American Civic Life*

Government officials have revitalized efforts to contract America's national identity by restricting birthright citizenship for the children of non-White immigrants born on U.S. soil (*jus soli*) and to U.S. citizens living abroad (*jus sanguinis*). Though these arguments have not succeeded in the court of law, the social and political force of the arguments show how slippery the slope is for racializing non-White persons as foreigners.

The Reconstruction Amendments to the U.S. Constitution, eliminating slavery and declaring formal equality for Black persons and other minorities born in the United States regardless of their former legal status, describes formal citizenship. The Equal Protection Clause says that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[142] The provision clarifies that these persons shall enjoy certain protections:

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140 For more factual details from these vignettes, see Robertson & Manta, *supra* note 137, at 768.

141 REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

142 U.S. CONST. amend. XIV, § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[143]

The enactment of the Fourteenth Amendment directly overruled past precedent like *Dred Scott v. Sandford*, a U.S. Supreme Court case denying citizenship to former slaves.[144]

Modern U.S. law since has interpreted the Fourteenth Amendment to extend citizenship to children of immigrant parents born on U.S. soil. In *United States v. Wong Kim Ark*, the federal government showed anti-Chinese animus by arguing that Chinese persons and their U.S.-born kids were unassimilable.[145] Wong Kim Ark's parents were lawful residents who lacked the ability to naturalize due to Chinese exclusion era restrictions and racial prerequisites. Wong's parents were not permitted under Chinese law to renounce their citizenship. While the Court eventually recognized Wong's U.S. citizenship, it struggled to determine whether his parents' allegiance or their Chinese ancestry prevented him, a U.S.-born child, from assimilating into American society.[146] The dissent felt Wong himself must remain subject to the same sovereign as his parents.[147] The doubt seems disingenuous (at worst) and problematic (at best) given that Wong's parents did not naturalize because they could not naturalize under U.S. law at the time. Just as open acknowledgment of the law did not settle the dissent's doubts, the majority's pronouncement that children born on U.S. soil were citizens regardless of their parents' legal status has left doubts about U.S. citizens racialized as foreigners.

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143 *Id.*

144 Dred Scott v. Sandford, 60 U.S. 393 (1857).

145 United States v. Wong Kim Ark, 169 U.S. 649 (1898). Interestingly, the Court at one point seemed to suggest that the core holding—that those born in the United States to foreign parents are nonetheless U.S. citizens—was in part motivated by the implications of a contrary holding for those of European ancestry. The Court said:

> To hold that the fourteenth amendment of the constitution [sic] excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

Id. at 694.

146 *Id.* at 699; *id.* at 731 (Fuller, C.J., dissenting). The word allegiance appears over 100 times across the two opinions.

147 *Id.* at 725. The dissent also emphasized that children born to foreign parents would lack the moral purity that U.S.-citizen parents could provide, warning that "[t]he true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage." *Id.* at 708.

The legal presumption that U.S. birth conveys birthright citizenship became the basis for rulings that recognized the birthright of citizens like John Walker Lindh and Yasar Hamdi during the war on terror. Both Lindh and Hamdi were born in the United States and radicalized overseas before being labelled as enemy combatants. Lindh, who is White and became known as the American Taliban, was born in Washington, D.C., and raised in Marin County, California, before converting to Islam and moving to Afghanistan to fight for the Taliban. Hamdi was born in Louisiana to immigrant parents, grew up in Saudi Arabia, and then attended a Taliban training camp. They were each captured when fighting against the U.S. military in Afghanistan and labeled enemy combatants by the Bush administration in November 2001. Lindh and Hamdi were each initially detained in military custody in Afghanistan and Guantanamo Bay, Cuba, respectively. Lindh was transferred to a U.S. criminal court and went to federal prison before being released.[148] Hamdi was transferred and detained in military jails in Virginia and South Carolina before petitioning the U.S. Supreme Court for habeas corpus. The U.S. Supreme Court granted Hamdi the ability to contest his enemy combatant status.[149] In the *Hamdi* opinion, the Court said, "a state of war is not a blank check for the President when it comes to the rights of the [n]ation's citizens."[150] For both Lindh and Hamdi, the rights of formal citizenship held sway even though Hamdi ultimately renounced his U.S. citizenship and was deported as a foreigner.

Yet ongoing attempts to restrict birthright citizenship for non-White persons born into immigrant families suggest a desire to constrain citizenship not only for immigrants or former immigrants (who have since naturalized), but also for future generations of racialized Americans. A primary example is the ongoing debate over the status of predominantly Latinx undocumented immigrants and their children. Immigrants can enter the United States and then reside without documentation or with lapsed documentation. If they bear children, they

148 *See* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

149 Hamdi v. Rumsfeld, 542 U.S. 507, 509–11 (2004). Hamdi was released and deported to Saudi Arabia after agreeing to renounce his U.S. citizenship and abide by strict travel restrictions that prevented his return to the United States. *See* Abigail D. Lauer, Note, *The Easy Way Out?: The Yaser Hamdi Release and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927, 928 (2006). In a parallel case, Jose Padilla was born a U.S. citizen in New York to Puerto Rican parents, convicted for manslaughter in Chicago, and then converted to radical Islam in the Middle East and held as a material witness for allegedly assisting Al-Qaeda during the September 11, 2001, terrorist attack. Although he was initially held in military tribunal, he was transferred to civilian custody and tried in a U.S. criminal court because of his U.S.-born citizenship. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

150 *Hamdi*, 542 U.S. at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

will have a mixed-status family. This raises a conundrum: U.S.-citizen children are legally and socially American, but their parents are legally outsiders, even while living as insiders.

But is the insider/outsider conundrum based on citizenship or a veiled distinction based on race? The root of the citizenship complaint is that *jus soli* birthright citizenship permits undocumented immigrants to obtain citizenship without the consent of the American people.[151] However, race also plays a part. Members of the U.S. Congress attempted to change the laws of birthright citizenship in the 1980s, precisely during a period when immigrants from Mexico represented the largest share of undocumented migration. The number of undocumented immigrants crested at 390,000 in 2007 and then declined over the next ten years.[152] Members of Congress have nevertheless said they would enact a constitutional amendment or enact new legislation to protect the nation from the proliferation of foreigners. For example, U.S. House Representative Steve King sponsored legislation and proposed constitutional amendments on multiple occasions prior to his ouster from Congress in 2021.[153] President Trump hinted that he would issue an executive order accomplishing the same.[154] The most extreme version of the birtherism critique comes from John Eastman. In a congressional hearing, Eastman claimed that an originalist reading of the Citizenship Clause exhibited the founders' understanding that noncitizens were not subject to the jurisdiction of the United States and were not eligible to pass on citizenship to future generations.[155]

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151 SCHUCK & SMITH, *supra* note 59; LEO R. CHAVEZ, ANCHOR BABIES AND THE CHALLENGE OF BIRTHRIGHT CITIZENSHIP (2017).

152 Jeffrey S. Passel, D'Vera Cohn & John Gramlich, *Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007*, PEW RSCH. CTR. (Nov. 1, 2018), https://www.pewresearch.org/fact-tank/2018/11/01/the-number-of-u-s-born-babies-with-unauthorized-immigrant-parents-has-fallen-since-2007 [https://perma.cc/FRD7-4J2R].

153 Trip Gabriel, Jonathan Martin & Nicholas Fandos, *Steve King Removed from Committee Assignments over White Supremacy Remark*, N.Y. TIMES (Jan. 14, 2019), https://www.nytimes.com/2019/01/14/us/politics/steve-king-white-supremacy.html (last visited Dec. 20, 2022).

154 *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS, https://www.reuters.com/article/us-usa-immigration-trump/trump-says-he-is-seriously-looking-at-ending-birthright-citizenship-idUSKCN1VB21B [https://perma.cc/LVS6-WLHR] (Aug. 21, 2019, 12:43 PM).

155 *Birthright Citizenship: Is It the Right Policy for America?: Hearing Before the Subcomm. on Immigr. & Border Sec. of the Comm. on the Judiciary H.R.*, 114th Cong. 8 (2015) (statement of John C. Eastman, Founding Dir., Claremont Inst. Ctr. for Const. Juris.). Then-professor John Eastman went the furthest of all, claiming that no changes were needed to support the interpretation that birthright citizenship as drafted in the Constitution did not extend to undocumented immigrants because they are not "'subject to the jurisdiction' of the United States." *See* John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020, 8:30 AM), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483

Another part of the complaint is cultural: it claims that the children belong not to the United States but rather to their parents' home country by virtue of their ancestry—earning them the pejorative label "anchor babies."[156] What the cultural complaints fail to acknowledge is that *jus soli* is predicated on the notion that immigrant families can transform from outsiders to insiders. The grant of birthright citizenship is a mechanism in a family's transition irrespective of race, ancestry, or other ascriptive ties. If the Fourteenth Amendment created the legal possibility of birthright citizenship for the children of Black slaves, it remained open for children of Chinese lawful immigrants in *Wong Kim Ark* and, presumably, for the children of Mexican immigrants without status.

But colorblind nationalism seeks to rationalize exclusion as an exercise of the nation's right to sovereignty, a classic feature of liberal nationalism. Advocates for restricting birthright citizenship purport to be acting in the best interests of the nation by ensuring that those who obtain formal citizenship are assimilated into and declare allegiance to the United States. But this colorblind rationale obscures the realities of the victims targeted by such efforts: racial minorities who are portrayed as unwelcome "invaders" on American soil, regardless of their citizenship status. While the proposed changes have not been enacted, these government officials have gleefully fanned the flames of racial discontent and exclusion.

Another front to restrict citizenship has been the restriction of birthright citizenship for the children of lawful nonimmigrants, such as international students or immigrants on tourist visas. Congress and the media have fixated on Chinese immigrants to the United States who arrive on tourist visas, give birth in the United States, and then return to live in their native country. So-called "birth tourists" have been spotlighted in the San Gabriel Valley of California, a suburban enclave with a large number of Asian immigrants.[157] As distinguished from the

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[https://perma.cc/EKP9-BPBZ] (quoting U.S. CONST. amend. XIV, § 1). The argument served as the intellectual edifice for President Trump's claim in a media interview that he had the power to end birthright citizenship without Congress and maybe without even needing to issue an executive order.

156 *See generally* Carly Hayden Foster, *Anchor Babies and Welfare Queens: An Essay on Political Rhetoric, Gendered Racism, and Marginalization*, 5 WOMEN GENDER & FAMS. COLOR 50 (2017) (explaining lawmakers problematic usage of the term "anchor baby" to describe undocumented immigrants' children); Gabe Ignatow & Alexander T. Williams, *New Media and the 'Anchor Baby' Boom*, 17 J. COMPUT.-MEDIATED COMMC'N 60 (2011) (documenting the increased media usage of the derogatory term "anchor baby").

157 *See, e.g.*, Ching-Ching Ni, *'Birthing Tourism' Center in San Gabriel Shut Down*, L.A. TIMES (Mar. 25 2011, 12:00 AM), https://www.latimes.com/archives/la-xpm-2011-mar-25-la-me-birthing-center-20110325-story.html [https://perma.cc/R5FX-7KHU]; Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES (Mar. 28, 2011),

parents of "anchor babies," these noncitizen parents migrate legally. Yet critics believe that they have cheated the immigration system by coming to the United States on a temporary basis and then retaining a permanent possibility of return through their U.S.-born child's enduring claim to legal citizenship. Critics have proposed to reserve birthright citizenship for children of legal permanent residents or U.S. citizens. Their rationale is mixed: there is a colorblind justification that Congress is the political body entrusted with decisions about national boundaries, and there is also a history of anti-Asian xenophobia based on the idea that Chinese are "obnoxious" and "unassimilable." As Asian American legal scholars have noted, the racialization of Asian Americans is premised on these newcomers being "perpetual foreigners" no matter how long they have lived in the United States and no matter their actual legal status.[158]

A related challenge has been the Trump State Department rules limiting travel for pregnant women visiting U.S. territories where their children could attain birthright citizenship. For example, the State Department established "a rebuttable presumption that a B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is traveling for the primary purpose of obtaining U.S. citizenship for the child."[159] Although a showing that specialized medical care is uniquely available in the United States or that the visit is to a dying family member in the United States may rebut this presumption, this limitation creates additional hurdles to birthright citizenship.[160]

These attempts to indefinitely exclude immigrant families from becoming American—like the metics in ancient Greece—show the lower status of the foreign-born in the hierarchy of citizenship and belonging.[161]

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https://www.nytimes.com/2011/03/29/us/29babies.html?hp (last visited Dec. 20, 2022); Fiona Ng, *The Weekend Longread: An In-Depth Look at "Birth Tourism" in L.A.*, L.A. MAG. (Mar. 6, 2015), https://www.lamag.com/citythinkblog/the-born-legacy/2 [https://perma.cc/V2CL-E3C4].

158 *See* Kim, *supra* note 46.

159 Visas: Temporary Visitors for Business or Pleasure, 85 Fed. Reg. 4219, 4220 (Jan. 24, 2020) (codified at 22 C.F.R. § 41.31 (2020)) (outlining the State Department policy governing temporary visas); *see* Off. of the Spokesperson, U.S. Dep't of State, State Department Officials on Changes to U.S. Visa Regulations Regarding Birth Tourism (Jan. 23, 2020), https://2017-2021.state.gov/state-department-officials-on-changes-to-u-s-visa-regulations-regarding-birth-tourism/index.html [https://perma.cc/43GP-4CBA]; *Trump's New Visa Rules Target Pregnant Women Travelling to US to Give Birth*, GUARDIAN (Jan. 23, 2020, 1:31 PM), https://www.theguardian.com/us-news/2020/jan/23/trump-new-visa-rules-target-pregnant-women-travelling-us-birth-tourism [https://perma.cc/VA86-ULMT].

160 The Biden administration so far has not revoked the Trump rule or changed the Foreign Affairs Manual.

161 The metics are discussed in BOSNIAK, *supra* note 22, at 41–49, and CHEN, *supra* note 2, at 111. They were immigrants ineligible to become citizens and whose families also could not become

Of all the limitations on rights, the limited claim to citizenship for their children is especially devastating for families because many immigrate to the United States for the promise of a better future for the next generation. Parts of the effort to end birthright citizenship seem explicitly racist, though the official language of the proposals focuses on liberal nationalism: whether it should be Congress or the president or a more generalized notion of the people who decide the boundaries of the nation.[162]

A third manifestation of birtherism applies to U.S.-born children of noncitizens running for elected office. Barack Obama was born and raised in the United States and identified as Black. His mother was a White woman from Kansas. However, Obama's father was born in Kenya and was still an international student in the United States at the time of his son's birth in Hawaii. When Obama ran for president, he was challenged as being ineligible for office due to his father's citizenship.[163] Critics of Barack Obama additionally demanded to see his birth certificate given unsubstantiated rumors that he had been born in Africa, raised in Indonesia, and was Muslim.[164] The rationale extended beyond a concern for fraud. Some skeptics disbelieved a Black man or Muslim could be eligible for president. Others thought his father, born in a foreign country, was too much of an outsider to raise a son who could lead the United States—even though Obama was largely estranged from his father and was raised by his mother and maternal grandmother, who were White Midwesterners.[165] The birthers' challenge may have a gendered dimension: it supposed that the citizenship of Obama's White U.S.-born mother had been erased by the citizenship of her husband—a position taken in a prior law that required women to reject their U.S. citizenship upon marrying foreigners.[166] Whether the challenge stemmed from race

citizens. The worry is that the immutability of their legal status created an underclass and denied them opportunities to advance in society. *See id.*

162 The historical origins and the contemporary challenges are summarized in CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 166–75 (2021) (describing challenges in the executive branch and Congress, and attempts to circumvent *Wong Kim Ark* in the federal judiciary). In contrast to overtly racist challenges to birthright citizenship, some liberal legal critiques of birthright citizenship situate the decision-making authority with Congress rather than consider it settled under the U.S. Constitution. *See generally* SCHUCK & SMITH, *supra* note 59, at 116–40.

163 FROST, *supra* note 98, at 177–78.

164 *Id.*

165 President Obama's race and foreignness are discussed in FROST, *supra* note 98, at 177–79. His religion is discussed in AZIZ, *supra* note 45, at 159–61.

166 *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 425–31 (2005). Senator Ted Cruz was born in Canada to a U.S.-citizen mother. He went as far as to renounce his Canadian citizenship, yet skeptics question

or gender, note the irony: Obama's election was definitely not post-racial, and his skin color did not assuage his immigrant ancestry. Instead, the notion of him being a Black man summoned anachronistic conceptions of the noncitizen status of former enslaved persons from the days of *Dred Scott* and doubts whether a child of immigrants can assimilate into American life.

In addition, challengers of Kamala Harris objected to her parents both being international students at the time of her birth in California: her mother was a medical student from India, and her father was a graduate student from Jamaica.[167] The discourse surrounding Vice President Harris's status ties back to efforts to limit birthright citizenship to children of lawful nonimmigrants. Once again, race and immigration combined to create doubts about Vice President Harris. Critics maligned her South Asian and Black racial identity, despite her family's affiliation with the American civil rights movement and her embracement of her Black identity.[168] The justification for these challenges seemed to stem not from racial animus but from the assertion that Vice President Harris's foreign-born parents had insufficient ties to the United States to pass on citizenship, or that she was not worthy for public service as a half-Asian, half-Black woman.

The suspicion toward Vice President Harris and President Obama is veiled. The implied grievance is based on the Constitution's "natural born citizen" requirement for presidency that itself reveals mistrust of foreigners. Article II, Section 1 of the Constitution requires that the President of the United States be a "natural born [c]itizen,"[169] one of the

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his eligibility to become a U.S. President given that the Constitution requires he be a "natural born" citizen. Domenico Montanaro, *Is Ted Cruz Allowed to Run Since He Was Born in Canada?*, NPR (Mar. 23, 2015, 11:03 AM), https://www.npr.org/sections/itsallpolitics/2015/03/23/394713013/is-ted-cruz-allowed-to-run-since-he-was-born-in-canada [https://perma.cc/JKB6-LP6F]. Similar questions about Senator John McCain, who was born in the Panama Canal Zone to two American parents, were resolved when Congress passed a private bill declaring him a natural-born U.S. citizen. Recognizing That John Sidney McCain, III, Is a Natural Born Citizen, S. Res. 511, 110th Cong. (2008).

167 Ellen Barry, *How Kamala Harris's Immigrant Parents Found a Home, and Each Other, in a Black Study Group*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/09/13/us/kamala-harris-parents.html (last visited Dec. 20, 2022).

168 *Id.*; Anthea Butler, *Kamala Harris Is Already Facing Sexist and Racist Attacks—and They'll Only Get Worse*, NBC NEWS (Aug. 13, 2020, 3:50 PM), https://www.nbcnews.com/think/opinion/kamala-harris-already-facing-sexist-racist-attacks-it-ll-only-ncna1236620 [https://perma.cc/54FU-RSSU].

169 U.S. CONST. art II, § 1, cl. 5. The "natural born citizen" requirement is said to have emerged due to a letter from John Jay—the first Chief Justice of the U.S. Supreme Court—to George Washington during the drafting of the Constitution, wherein Jay suggested that the "natural born" phrase be included in order "to provide a . . . strong check to the admission of Foreigners into the administration of our national Government." Letter from John Jay to George Washington (July 25,

only legally codified differences between naturalized citizens and citizens by birth.[170]

Two other presidential candidates born outside the United States—John McCain, who was born a U.S. citizen on a U.S. military base in the Panama Canal Zone, and Ted Cruz, who was born a dual citizen in Canada to an American mother and Cuban father—faced scrutiny during their presidential campaigns over their eligibility for office. To quell any doubts, the Senate unanimously issued a resolution regarding McCain's status, stating simply that he met the constitutional requirements for the presidency.[171] Cruz, who is partly Latinx due to his father's heritage, was the subject of various articles and think pieces before former Solicitors General Neal Katyal and Paul Clement laid out a legal analysis arguing for Cruz's eligibility.[172] Still, to quash all doubt, Cruz definitively renounced the Canadian portion of his dual citizenship in 2013.[173]

To be sure, there are multiple intersecting issues raised in these controversies. But the higher legal test of loyalty for politicians with a foreign taint in their bloodline reflects a baseline fear of outsiders that is inapposite with the laws promising equal treatment of "[a]ll persons born or naturalized in the United States."[174] Even more troubling is the inconsistent application of that legal standard to White and non-White citizens. All of the politicians in question claimed birthright citizenship. Yet Cruz and McCain were literally born outside of the territorial United States and overcame presumptions of doubt, whereas Vice President Harris and President Obama were born inside the United States and yet endured years of doubt about their political allegiance.

1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61 (Max Farrand ed., 1911). A later Supreme Court Justice described the purpose of the clause as intended to "cut[] off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interpose[] a barrier against those corrupt interferences of foreign governments in executive elections." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473, at 333 (1833). This history suggests a concern that foreign governments may surreptitiously interfere with American governance by "planting" a future president. The underlying suspicion seems to echo the concerns lodged against Vice President Harris and President Obama—that they were secretly foreign, or at least harbored foreign allegiances.

170 Perhaps the only other legally cognizable difference is that naturalized citizens can be stripped of their citizenship status via denaturalization, while this process looks somewhat different for "natural born" citizens and is known as renunciation. See *supra* notes 98, 101–111 and accompanying text, for a discussion on denaturalization.

171 S. Res. 511, 110th Cong. (2008).

172 Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen,"* 128 HARV. L. REV. F. 161, 163 (2015).

173 Doreen McCallister, *U.S. Sen. Ted Cruz to Renounce Canadian Citizenship*, NPR (Aug. 20, 2013, 2:21 AM), https://www.npr.org/sections/thetwo-way/2013/08/20/213691860/u-s-sen-ted-cruz-to-renounce-canadian-citizenship [https://perma.cc/9UYD-AN2Y].

174 *See generally* U.S. CONST. amend. XIV, § 1.

These citizenship challenges arise in the face of increased racial diversity, global interdependency, international travel, and overseas residences, resulting in higher numbers of mixed race families. The targeting of second and subsequent generations of these family members is justified with the same elements of overt racism, pretext, and colorblindness. Race, citizenship, and nation blurred in a few ways. Skeptics struggled to accept newcomers remaining in the United States with their families while retaining ties to other countries and questioned the legitimacy of legal citizenship of Americans who fail to adopt the majority culture of White Americans.[175] Some skeptics import assumptions of racial hierarchy and specific beliefs of racial inferiority and antipathy toward those from Asian, Latinx, and Black persons.[176] They are also dubious of the assimilability of immigrants and immigrant parents imparting foreign influences on their children, despite the children's life-long residence in the United States and their automatic acquisition of *jus soli* citizenship. Although these birthright citizenship challenges do not admit overt racism, they reflect a double distancing from racialized foreigners using nationalist beliefs that people of color must be foreigners and American national identity is White.

Most problematically, these attempts to exclude immigrants from citizenship reach beyond the immigrant generation to their U.S.-born children. Not only are immigrants considered culturally distinct and foreign, but they continue to be considered foreign after naturalizing. Their U.S.-born children are seen to be foreign as well. The racialization of perceived foreigners is also present in efforts to suppress racial minority-voter participation.[177] The underlying stereotype of Asian, Latinx, and Muslim Americans as perpetual foreigners extends beyond harms to actual immigrants, who are often legal and political outsiders. The perpetual foreigner stereotype also hurts racial minorities who, despite being legal insiders, are treated as outsiders.[178] Further, their

175 Peter Spiro describes dual nationality and plural citizenship as a perceived threat and calls for a changed view amid a new era of globalism. *See generally* PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP (2016).

176 NACKENOFF & NOVKOV, *supra* note 162, at 167 ("Recent direct assaults on birthright citizenship have identified several targets and have drawn on racially charged imagery."); Foster, *supra* note 156 (describing similarities between using rhetoric of "anchor babies" and "welfare queens" to denigrate Black persons); Mehera Nori, *Asian/American/Alien: Birth Tourism, the Racialization of Asians, and the Identity of the American Citizen*, 27 HASTINGS WOMEN'S L.J. 87 (2016) (situating controversies about birth tourism in conversations about Asian immigrants).

177 *See generally* Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715 (2021).

178 *See* Jennifer M. Chacón, *The Inside-Out Constitution:* Department of Commerce v New York, 2019 SUP. CT. REV. 231, 235 (2019).

children and other co-ethnics feel fear and suffer mistreatment by proxy.[179]

In other words, for certain racial groups: once an immigrant, always an immigrant. This myopic view exposes the myth that immigrants can gain equality through the acquisition of formal citizenship, whether from naturalized or birthright citizenship. Neither can minorities attain equality by adhering to liberal ideals of equal protection and tolerance for diversity or similar American notions of individual rights, duties, and privileges. Rather, there is a resistance to incorporating cultural differences from minorities whose presence challenges a more homogenous national identity; these unwelcome expansions of the boundaries of inclusion stir fears that foreigners will overtake the nation from "real" Americans. Put together, these case studies of citizenship restriction for newcomers squarely confront the United States's vexed relationship between citizenship, equality, and nationalism.

III. CITIZENSHIP INEQUALITY AND THE LIMITS OF LIBERALISM

Making citizenship determinations on the basis of liberal nationalist concerns has both individual and institutional effects. Section III.A bolsters the case studies on how nationalism operates as racially neutral, legally sanctioned inequality by marshalling empirical evidence of divergent integration outcomes by racial group. Section III.B revisits the transformation of pro-nationalist narratives into legally sanctioned inequalities. It analyzes the ways that exclusionary policies that have gained legal sanction blunt the constitutional and civil rights meant to remedy racial inequalities.

A. *Tiered Citizenship for Racialized Foreigners*

Notwithstanding Part II's case studies of inequality, quantitative data shows that differences between immigrants, foreign-born Americans, and native-born Americans in education, wages, occupations, residential integration, and civic engagement narrow over time.[180] Presumably, the increased parity flows from a mixture of improved language ability, resources, opportunities, and enhanced social networks. Another factor leading to increased parity may be a

179 Asad, *supra* note 40, at 8840–41; *see* Johnson, *supra* note 50.

180 NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 7, at 3 ("Overall, the panel found that current immigrants and their descendants are integrating into U.S. society.").

"citizenship premium,"[181] or the idea that integration outcomes improve with acquisition of formal citizenship—when the immigrant naturalizes or the second generation is born into U.S. citizenship. Still, there is empirical evidence that inequality lingers for racial and national origin minorities even after naturalization.[182] This may be attributed to the prominence of race as a factor in social stratification and the intertwining of race with immigration policies that disfavored certain groups for admission and subsequent integration.

Immigration policy focused on European immigrants' settlement of the United States throughout the nineteenth and early twentieth centuries.[183] More than twenty million immigrants arrived between 1880–1920.[184] When European migration slowed during World War I and the Great Depression, national origin quotas functioned to maintain the priority on European immigrants.[185] The Civil Rights Era of the 1950s–1960s brought the end of Asian exclusion and the liberalization of immigration policy in 1965 that dramatically increased migration from Asia, Africa, and Latin America.[186]

The experiences of integration for each wave of immigrants differ in important ways. Sociologists' interpretation of integration and upward social mobility for immigrants and successive generations likely had European immigrants in mind.[187] While integration may not have been

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181 *See, e.g.*, Floris Peters, Maarten Vink & Hans Schmeets, *Anticipating the Citizenship Premium: Before and After Effects of Immigrant Naturalisation on Employment*, 44 J. ETHNIC & MIGRATION STUD. 1051 (2018) (providing empirical evidence on economic integration); Irene Bloemraad, *Does Citizenship Matter?*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 524 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017) (summarizing empirical evidence that citizenship status may increase political and civic participation, carry economic benefits, and improve social integration and cohesion).

182 *See supra* Section II.B.

183 Elijah Alperin & Jeanne Batalova, *European Immigrants in the United States*, MIGRATION POL'Y INST. (Aug. 1, 2018), https://www.migrationpolicy.org/article/european-immigrants-united-states-2016 [https://perma.cc/H8YL-3VRQ].

184 *Id.*

185 The national origin quota system in the 1924 Johnson-Reed Act favored Western and Northern European immigrants to Eastern and Southern European immigrants and completely excluded Asian immigrants. *See* Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

186 The 1965 Hart-Cellar Act initially intended to benefit Southern and Eastern Europeans, even though it also had the effect of diversifying immigration. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996); DAVID M. REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA (1985).

187 Robert E. Park, a sociologist from the University of Chicago, is a leading example. A collection of his essays was published posthumously by his students and suggests a race relations cycle consisting of contact, competition, accommodation, and acculturation. ROBERT EZRA PARK, RACE AND CULTURE (1950); *see also* Stanford M. Lyman, *The Race Relations Cycle of Robert E. Park*,

uniformly easy for all European immigrants, Western and Northern European immigrants blended into the predominantly White American mainstream, and Southern European immigrants were considered White ethnics.[188] Even if considered White ethnics, as opposed to mainstream, the racialization of European immigrants as White eased their integration into American society.[189] That they were always eligible for naturalization as a formal matter also helped.[190]

This whiteness premium may explain the post-World War II acceptance of Eastern European refugees and the recent embrace of Ukrainian migrants. Since the Russian military invasion of Ukraine in 2022, the U.S. government has moved quickly to grant Temporary Protected Status to Ukraine and to soften border restrictions for Ukrainians at the U.S. southern border.[191] Americans have shown warm feelings toward Ukrainian refugees, and individual families have volunteered to privately sponsor Ukrainian refugees, despite lukewarm or even hostile sentiments toward Afghan, Syrian, and Central American asylum seekers.[192]

In contrast, theorists studying non-European migration after 1965 describe a divergent trajectory of immigrant integration. Sociologists Min Zhou and Alejandro Portes laid out their theory of segmented assimilation that posits different potential integration outcomes for successive generations of non-White immigrants: upward assimilation,

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11 PAC. SOCIO. REV. 16, 16–18 (1968) (describing Park's theory of the "inevitable transition from accommodation to assimilation" and the process of overcoming obstacles, often presented by a failure to establish interracial friendships, as "ad hoc soldiers fighting a losing war against ultimately victorious assimilation" (emphasis omitted)).

188 *See generally* DAVID R. ROEDIGER, COLORED WHITE: TRANSCENDING THE RACIAL PAST (2003); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

189 Historians disagree to some extent on whether these European immigrants went through an assimilation process similar or different to post-1965 Asian, African, and Latin American immigrants. *Compare* ROEDIGER, *supra* note 188, *and* IGNATIEV, *supra* note 188, *with* THOMAS A. GUGLIELMO, WHITE ON ARRIVAL: ITALIANS, RACE, COLOR, AND POWER IN CHICAGO, 1890–1945 (2003), *and* Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 AM. J. SOCIOLOGY 327, 364 (2012).

190 Email exchange between Ming Hsu Chen, Author, and Gabriel Jack Chin (Sept. 21, 2022) (on file with *Cardozo Law Review*).

191 Aline Barros, *Immigration Experts Contrast US Support for Ukrainian, Afghan Refugees*, VOA (Mar. 26, 2022, 2:48 AM), https://www.voanews.com/a/immigration-experts-contrast-us-support-for-ukrainian-afghan-refugees/6502093.html [https://perma.cc/YR2G-Y7LL].

192 A poll showed that a majority of American respondents (61%) were willing to welcome Ukrainian refugees, which is greater than that for refugees from Syria (46%), Afghanistan (46%), and El Salvador (40%). *Americans Are More Willing to Welcome Ukrainians Than Others Fleeing Violence*, ECONOMIST (Mar. 25, 2022), https://www.economist.com/graphic-detail/2022/03/25/americans-are-more-willing-to-welcome-ukrainians-than-others-fleeing-violence [https://perma.cc/SHR9-44US]; *Daily Survey: Refugees*, YOUGOV (Mar. 2022), https://s3.documentcloud.org/documents/21408544/refugees-poll-data.pdf [https://perma.cc/KX9P-VVFT].

downward assimilation, or selective acculturation that permits upward mobility while retaining distinctive cultural attributes.[193] They concluded that race significantly determines the trajectory an immigrant group will follow.[194]

Zhou and Portes's findings reflect the racial bias against non-White immigrants present at the founding of the nation and encoded in successive immigration and naturalization laws. Their theory matches mainstream Americans' treatment of non-White minority groups today. The interview data from *Pursuing Citizenship* shows that, whereas Canadian immigrants can operate as "invisible immigrants,"[195] Latinx and Asian immigrants trigger ambivalence or opposition from native-born Americans especially.[196]

Latinx immigrants, like co-ethnic Latinx U.S. citizens, occupy the lower rungs of the socioeconomic ladder. Their racialization as undocumented immigrants is largely defined by presumptions of illegality.[197] In reality, people from a wide range of countries overstay their visas in numbers that equal or exceed migrants who enter without obtaining documents.[198] But the ire that undocumented people from Central America receive suggests a different rationale for their ostracization: non-White immigrants are seen as unwanted intruders, while White immigrants do not receive the same hostility, even if the two groups bear the same immigration status. While mainstream public discourse—and governmental action—disproportionately targets newcomers from the southern border, visa overstays constitute the

193 Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 74 (1993); *see also* Richard Alba & Victor Nee, *Rethinking Assimilation Theory for a New Era of Immigration*, *in* THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER 35 (Marcelo M. Suárez-Orozco, Carola Suárez-Orozco & Desirée Baolian Qin eds., 2005).

194 *See* sources cited *supra* note 193.

195 *See* CHEN, *supra* note 2, at 62–63.

196 Daniel J. Hopkins, *Politicized Places: Explaining Where and When Immigrants Provoke Local Opposition*, 104 AM. POL. SCI. REV. 40 (2010) (showing that rate of change in population growth provokes local opposition).

197 MENJÍVAR & KANSTROOM, *supra* note 44.

198 Krishnadev Calamur, *The Real Illegal Immigration Crisis Isn't on the Southern Border*, ATLANTIC (Apr. 19, 2019), https://www.theatlantic.com/international/archive/2019/04/real-immigration-crisis-people-overstaying-their-visas/587485 [https://perma.cc/R4QU-ZJ96]; Mark Hugo Lopez, Jeffrey S. Passel & D'Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population [https://perma.cc/3EMY-S5H2] ("In recent years, immigrants from countries outside of Mexico and Central America accounted for almost 90% of overstays . . . .").

majority of undocumented immigrants.[199] Though the demographics of the visa overstay population are varied, men arriving from Mexico and Central America via the southern border receive outsize media attention and vitriol.[200] This hateful discourse has endured despite the fact that migration rates among this group have been decreasing for over twenty years.[201] Moreover, the enduring stereotypes of Latinx immigrants shape perceptions of Latinx people living in the United States even after they become naturalized citizens.[202]

The racial dynamics surrounding Asian Americans are complicated. East and South Asian Americans approximate and sometimes exceed the wages and higher education levels of White Americans.[203] Consequently, policymakers and policy entrepreneurs pit Asian Americans against White majorities and Black racial minorities to stoke intergroup division and conflict, including in affirmative action lawsuits.[204] However, Asian Americans have experienced a history of discrimination similar to other

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199 Claire Klobucista, Amelia Cheatham & Diana Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (Aug. 3, 2022, 2:30 PM), https://www.cfr.org/backgrounder/us-immigration-debate-0 [https://perma.cc/2JZP-4GC9].

200 Chris Nichols, *Mostly True: Visa Overstays Account for 'Half' of All People in the Country Illegally*, POLITIFACT (Aug. 24, 2018), https://www.politifact.com/factchecks/2018/aug/24/kevin-mccarthy/mostly-true-visa-overstays-account-half-all-people [https://perma.cc/L5A3-48CM] ("The debate over illegal immigration in America most often centers on the unlawful crossings at the U.S.-Mexico border. President Trump frequently stokes that debate . . . . But Republican House Majority Leader Kevin McCarthy recently claimed there's another factor—visa overstays—that accounts for half of the people in the country illegally."); Joel Rose, *Border Patrol Apprehensions Hit a Record High. But That's Only Part of the Story*, NPR (Oct. 23, 2021, 7:47 AM), https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story [https://perma.cc/9E5K-G6VX].

201 Rose, *supra* note 200.

202 JIMÉNEZ, *supra* note 32.

203 Southeast Asians (e.g., Vietnamese) and Pacific Islanders (e.g., Hawaiians), who are grouped with Asian Americans by the federal government, suffer lower social, economic, and political power. However, their struggles are masked without data disaggregation. Additional complexities flow from some Pacific Islanders being U.S. nationals (e.g., Puerto Ricans, American Samoans), but not U.S. citizens, and South Asian identities being bisected by religion (e.g., Hindu Indians vs. Muslim Pakistanis; Sunni vs. Shiite Arab Americans).

204 Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022). As of this writing, two cases challenging affirmative action in higher education are pending in the Supreme Court. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 20-1199); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 21-707 (2022). At oral argument, Seth Waxman on behalf of Harvard College and Elizabeth Prelogar on behalf of the U.S. government both argued that the university's admissions policies did not discriminate against Asian Americans and that "Asian Americans demonstrably benefit from a holistic admissions policy." These contentions were met with skepticism by Justices Gorsuch, Alito, and Roberts. Transcript of Oral Argument at 1, 41–42, 52–60, 64, 113–14, *Students for Fair Admissions, Inc.*, 142 S. Ct. 895 (No. 20-1199).

racial minorities.[205] The resulting perception of racial threat echoes the case studies from Part II, depicting racialized foreigners as threats to the health and safety of the nation, the American economy, and the national identity.

The global pandemic makes the damage of racializing Asian Americans as foreign threats particularly salient. Following a long history of anti-Asian sentiment, government data shows an eightfold increase in COVID-19-related hate crimes in New York City, with Stop AAPI Hate statistics showing that, nationally, nearly one in five Asian Americans (21.2%) and Pacific Islanders (20.0%) reported that they experienced some kind of hate incident between March 2020 and September 2021.[206] A Pew Research poll on feelings of racial minority groups since the COVID-19 outbreak says that Asian Americans are more likely than any other group to report negative experiences and least likely to feel they

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205 *See supra* Section II.A. Subgroups of Asian Americans, such as Pacific Islanders and Southeast Asians, underperform the pan-ethnic group and white Americans because they are nonwhite poor immigrants; data disaggregation and policies emphasizing ethnic cohesion may enhance their upward mobility and improve their integration outcomes. Jennifer Lee, Karthick Ramakrishnan & Janelle Wong, *Accurately Counting Asian Americans Is a Civil Rights Issue*, 677 ANNALS AM. ACAD. POL. & SOC. SCI. 191, 194 (2018) ("The differences in migration histories manifest in socioeconomic outcomes at the extremes with respect to educational attainment, poverty levels, median household income, and political participation. For example, 72 percent of Asian Indians and 53 percent of Chinese hold a bachelor's degree or higher, yet less than 15 percent of Cambodian, Laotian, and Hmong can claim the same . . . .").

206 ASIAN AM. BAR ASS'N OF N.Y. & PAUL WEISS, A RISING TIDE OF HATE AND VIOLENCE AGAINST ASIAN AMERICANS IN NEW YORK DURING COVID-19: IMPACT, CAUSES, SOLUTIONS (2021) (first citing Press Release, NYPD, NYPD Announces Citywide Crime Statistics for October 2020 (Nov. 2, 2020), https://www.nyc.gov/site/nypd/news/p1102a/nypd-citywide-crime-statistics-october-2020 [https://perma.cc/4WM3-5DL7]; and then citing *Complaints and Arrests Summary, Third Quarter 2020*, NYPD, https://www.nyc.gov/site/vnypd/stats/reports-analysis/hate-crimes.page (last visited Dec. 20, 2022) (scroll down to "2020" under the "Complaints and Arrests Summary Report" section; and then click on "Complaints and Arrests Summary, Third Quarter 2020"); AGGIE J. YELLOW HORSE, RUSSELL JEUNG & RONAE MATRIANO, STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT 2 (2021), https://stopaapihate.org/wp-content/uploads/2021/11/21-SAH-NationalReport2-v2.pdf [https://perma.cc/B5R4-E9TT]. Stop AAPI Hate statistics on hate crime also show an eightfold increase during COVID-19 (3,800 incidents between March 2020–February 2021), with particularly egregious crimes against Asian women and Asian elders. *Id.* Asian Americans report verbal harassment (62.9%) and shunning (16.3%). *Id.* Their businesses have been boycotted and looted. They have been targeted for shootings, stabbings, and other physical attacks. Although not every incident has been determined to be a hate crime, race was a motivating factor in the assault of elderly Asians and Asian women especially, including coordinated attacks in Chinatowns nationwide and a mass shooting at a spa in Atlanta in 2021. *See* Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (Oct. 26, 2021), https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html (last visited Jan. 25, 2023); *8 Dead in Atlanta Spa Shootings, with Fears of Anti-Asian Bias*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth (last visited Jan. 25, 2023).

have heard expressions of support because of their race.[207] Their view is confirmed by others' perceptions of community hostility toward Asian Americans.[208] These studies shed light on why non-White naturalized citizens tend to see "their inclusion within American society as contingent upon the perceptions of other Americans."[209]

Be it in the context of anti-Asian sentiment during the pandemic, or the racialization of Latinx persons as "illegal," the prevalence of such racial bias reflects a hesitance among mainstream America to accept non-White Americans as equal citizens, recalling the "forever foreigner" trope. Asian Americans' and Latinx Americans' racialization as foreigners resembles the subordination of Black Americans relative to White Americans that critical race theorists term "second-class citizenship."[210] However, Black Americans' racialization usually presumes U.S. domestic race relations—shaped by African American slavery and reconstruction—rather than presuming that Black people living in America are foreign.[211] Devon Carbado, a critical race theorist who is himself a Black immigrant from the United Kingdom, describes his personal experience being stopped by police as an example of Blacks being "racially naturalized" into the African American experience rather than being viewed as non-White alongside other immigrants.[212]

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207 Neil G. Ruiz, Juliana Menasce Horowitz & Christine Tamir, *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RSCH. CTR. (July 1, 2020), https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak [https://perma.cc/J7X3-EUBX].

208 In an experimental study about factors triggering racial discomfort, researchers found that priming survey respondents to think about the pandemic caused them to be less tolerant toward Asians, South Asians, and Latinos and to label members of these minority groups as "extremely culturally incompatible." These findings indicate that the pandemic may be heightening a generalized antiforeigner sentiment for Asians and Latinos. However, the negative views could be reduced for Latinos through prior social contact; the same was not found true for Asians. Yao Lu, Neeraj Kaushal, Xiaoning Huang & S. Michael Gaddis, *Priming COVID-19 Salience Increases Prejudice and Discriminatory Intent Against Asians and Hispanics*, PROC. NAT'L ACAD. SCIS., Aug. 30, 2021, at 1.

209 Katherine Sorrell, Simranjit Khalsa, Elaine Howard Ecklund & Michael O. Emerson, *Immigrant Identities and the Shaping of a Racialized American Self*, SOCIUS: SOCIO. RSCH. DYNAMIC WORLD, June 14, 2019, at 5.

210 MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2014); Yuching Julia Cheng, *Bridging Immigration Research and Racial Formation Theory to Examine Contemporary Immigrant Identities*, 8 SOCIO. COMPASS 745 (2014); Gordon & Lenhardt, *supra* note 36, at 2495 (remarking on abandonment of Black residents of New Orleans following Hurricane Katrina and stating that "American society is divided by deeply entrenched lines of race and class that, over time, have erected a second-class citizenship").

211 Carbado, *supra* note 46; *see infra* Figure 3.

212 Carbado, *supra* note 46, at 649–52. For more on Black immigrant incorporation, see José Itzigsohn, Silvia Giorguli & Obed Vazquez, *Immigrant Incorporation and Racial Identity: Racial*

B. *Colorblindness Undermines Rights-Based Remedies*

These distorted beliefs toward racialized foreigners manifest themselves in both individual beliefs and institutional policies. Rights-based challenges to such exclusionary policies have failed. This is the predictable result of years of policies that have narrowed the constitutional and statutory remedies for racial discrimination.[213]

Moreover, inconsistent enforcement of the constitutional rights of noncitizens exacerbates discrimination against racialized foreigners. The Fourteenth Amendment's Equal Protection Clause says that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[214] Its obligations apply to states through the Due Process Clause. Along with the other Reconstruction Amendments, the Equal Protection Clause prescribes constitutional protection for Black Americans who were formerly enslaved, and it extends birthright citizenship to the children of Chinese and Mexican immigrants. The Supreme Court affirmed in *Yick Wo v. Hopkins* that equal protection applies to all persons, including noncitizen Chinese laborers in San Francisco.[215] The Court also invoked the Equal Protection Clause against state alienage discrimination in *Graham v. Richardson*, saying that state discrimination in public benefits on the basis of citizenship merits strict scrutiny because the inability to vote makes noncitizens the paradigmatic "discrete and

Self-Identification Among Dominican Immigrants, 28 ETHNIC & RACIAL STUD. 50 (2005); Mary C. Waters, *Ethnic and Racial Identities of Second-Generation Black Immigrants in New York City*, 28 INT'L MIGRATION REV. 795 (1994); Bernadette Ludwig, *"Wiping the Refugee Dust from My Feet": Advantages and Burdens of Refugee Status and the Refugee Label*, 54 INT'L MIGRATION 5 (2016); Bernadette Ludwig & Holly Reed, *"When You Are Here, You Have High Blood Pressure": Liberian Refugees' Health and Access to Healthcare in Staten Island, NY*, 12 INT'L J. MIGRATION, HEALTH & SOC. CARE 26 (2016).

213 Beyond the well-established critiques of the Equal Protection Clause requiring direct evidence of discriminatory purpose and not merely disparate impact, *see, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); McCleskey v. Kemp, 481 U.S. 279 (1987), constitutional provisions on citizenship reveal a history of exclusion. Federal laws initially qualified citizenship by racial prerequisites. African Americans did not gain citizenship until the Reconstruction Amendments implemented between 1865 and 1870. Chinese Americans did not gain citizenship until the repeal of the Chinese Exclusion Act in 1943. *See supra* Section II.A.

214 U.S. CONST. amend. XIV, § 1.

215 Yick Wo v. Hopkins, 118 U.S. 356 (1886). Some readings of *Yick Wo* are less complementary. According to Kevin Johnson in *A Magic Mirror, Yick Wo* requires proof that "the state actor intentionally used alienage as a proxy for race." Johnson, *supra* note 50, at 1119 n.43 (emphasis omitted). He also says that "[t]hough often cited for the proposition that a facially neutral law enforced in a racially discriminatory manner violates the Constitution, the decision . . . [can be read as] an early foray by the Supreme Court in invalidating economic regulation, which reached its high-water mark during the *Lochner* era." *Id.* at 1124 (footnote omitted).

insular" minority.[216] *Plyler v. Doe* used a robust form of rational review to strike a state law denying free public education to undocumented immigrant children.[217] However, the Court has not consistently applied equal protection to noncitizens, especially when the federal government is involved, perhaps because of a mistaken importation of plenary power analysis into their equal protection jurisprudence.[218]

The same faulty thinking transfers immigrant exclusion to naturalized and U.S.-born citizens. As Gerald Rosberg points out, U.S. citizens who share the race or national origin of excluded groups suffer similar damage: "a [racial or national origin] classification would . . . require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens

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216 Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). Contrary to the *Graham* majority, Justice Rehnquist dissented in *Nyquist v. Mauclet*, suggesting that immigrants should not be considered a suspect classification because alienage is not immutable: a permanent resident can become a naturalized citizen, if she qualifies. 432 U.S. 1, 17–21 (1977) (Rehnquist, J., dissenting) (disagreeing that alienage is a suspect classification and critiquing the *Graham* Court's reliance on *Carolene Products*'s characterization of aliens as "discrete and insular"). While true that status can change, Justice Rehnquist's analysis overlooks the history of exclusion and evidence of ongoing discrimination. It also overlooks the impossibility or impracticability of obtaining a green card with a path to citizenship for immigrants in oversubscribed countries (e.g., Mexico, China, and India have some of the longest wait times) or the economic and other factors that contribute to unauthorized migration for poor, unskilled, or unaffiliated migrants who lack the necessary qualifications for an immigration system built around families, jobs, and political persecution. *But cf.* Mathews v. Diaz, 426 U.S. 67, 78–80 (1976) (permitting discrimination against permanent residents in federal law providing Medicare, presumably on preemption grounds).

217 In *Plyler v. Doe*, the Supreme Court applied rational review to strike a state law denying free public education to K–12 students who were children of undocumented immigrants. 457 U.S. 202 (1982). However, the application of rational review was more rigorous than in typical cases. *See id.*

218 *Graham* is part of a series of "political function cases" upholding state discrimination in public affairs under rational review. In my opinion, the reasoning in these cases is tautological: the very thing that makes noncitizens a "discrete and insular minority" is their lack of access to the political process; yet, in response to this exclusion, the government function doctrine doubles down with its further exclusion of noncitizens from roles that could enhance their public participation. The Court never specifies why noncitizens cannot participate in political functions or why they should be outsiders to issues arising in their communities, such as schools, utilities, welfare benefits, and labor protections. Rather, the Court seems to rest on the logical fallacy that the denial of the right to vote necessarily begets the denial of other political rights to noncitizens. For more analysis of the political function cases, see generally Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013); Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563 (2017); Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231 (2021); Allison Brownell Tirres, The Civil Rights of Immigrants and the Lost Promise of the 1970s (Jan. 19, 2022) (unpublished manuscript), https://wwws.law.northwestern.edu/research-faculty/events/colloquium/legal-history/documents/tirres_civil-rights-of-immigrants_abfnu-draft.pdf [https://perma.cc/K7S8-C865].

of the same race or national origin who are stigmatized by the classification."[219]

Jennifer Chacón in *The Inside-Out Constitution* characterizes the federal government's faulty equation of immigrants entitled to political representation with immigrants who are legally "outsiders" to the nation as "problems of an equal protection doctrine that does not protect."[220] Linda Bosniak describes the friction of alienage that resides in the "separate spheres" of political and legal membership given that immigrants who are territorially present in a nation are entitled to be treated equally in some respects, and yet they are treated unequally in other respects due to their legal status. She says that true equality requires that "no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good."[221] Her diagnosis also fits the naturalized and U.S.-born citizens who are in close proximity to immigrants—such as U.S.-citizen family members and communities—because Latinx people perceived as social outsiders face the same fate of discrimination, even if they are not themselves subject to immigration enforcement.[222]

The narrowing of equal protection protections for racial minorities of any citizenship vintage compounds the problem of erroneously carving out exceptions to equality norms for racial minorities who are perceived as foreign despite being U.S. citizens. Geoffrey Heeren describes the application of the Equal Protection Clause when fundamental rights are involved as anemic.[223] Prohibitions of national origin discrimination provide thin protection for racialized foreigners given the dilution of equal protection in the racial context.[224] The prevailing logic of anticlassification makes discriminatory purpose harder to prove because policy motivations may not be explicitly race-based. A status-based classification based on national protection will sound facially neutral and

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219 Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (1977).

220 Chacón, *supra* note 178, at 233–35, 246.

221 BOSNIAK, *supra* note 22, at 42–43 (quoting MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 19 (1984)) (analyzing Walzer's contributions to membership theory).

222 Asad, *supra* note 40; Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 L. & SOC'Y REV. 133, 167 (2020); Asad L. Asad & Matthew Clair, *Racialized Legal Status as a Social Determinant of Health*, 199 SOC. SCI. & MED. 19 (2018). For more on the concept of linked fate, see MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994).

223 *See* Heeren, *supra* note 218, at 409.

224 Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

nonpretextual.[225] Discrimination can be easily missed if evidence of disparate impact—say, against racial minorities who are stereotyped as foreigners—is not considered unlawful.[226]

The national protection justification echoes themes of sovereignty, self-governance, and liberalism from U.S. immigration law and international law.[227] Yet the justifications are wrongly displaced into U.S. constitutional law[228] and antidiscrimination law.[229] As E. Tendayi Achiume, UCLA Law Professor and United Nations Special Rapporteur on Contemporary Forms of Racism, has explained, "foreignness [is] the status of being an actual or perceived outsider to a given political community."[230] While foreignness is intertwined with race and racism, its false equation of racial difference with nationality provides a facially neutral explanation for exclusionary policies. This type of neutrality fits comfortably with contemporary edicts of "colorblindness" and "post-racialism" as the realization of equality law, but with the unwitting

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225 This can be seen in *Trump v. Hawaii*, where the Court did not recognize the Muslim travel ban as a suspect classification because the underlying claim was viewed as freedom of religion rather than race or national origin discrimination. 138 S. Ct. 2392 (2018).

226 *Cf.* Washington v. Davis, 426 U.S. 229, 246 (1976). Justice Sotomayor highlighted the discriminatory impact of immigration-based classifications on racial groups with dense foreign-born populations in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1916–18 (2020) (Sotomayor, J., concurring in part and dissenting in part), and *Trump v. Hawaii*, 138 S. Ct. at 2433–48 (Sotomayor, J., dissenting), among other places.

227 DESAUTELS-STEIN, *supra* note 21, at 228. Desautels-Stein describes the Supreme Court's plenary power doctrine set forth in the foundational Chinese Exclusion Act case, *Chae Chan Ping*, as an illustration of this logic. *Id.* at 179–181 ("[D]ifferences of race . . . [made the Chinese] strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration . . . great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.'" (quoting Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889))).

228 Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991) (describing racial categories as "formal" classifications, or "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin"). Gotanda concluded that "color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended, and irrational prejudice." *Id.* at 46.

229 Crenshaw, *supra* note 15, at 1307–15; *see also* Kimberlé Williams Crenshaw, *How Colorblindness Flourished in the Age of Obama*, *in* SEEING RACE AGAIN, *supra* note 16, at 128, 128–33, 143–45; Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593–97 (2009).

230 E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT'L L. 323, 331 (2014). Xenophobic harm is cognizable on the basis of race, nationality, national origin, color, or descent. What distinguishes it is the status of foreignness. *Id.* See generally REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE (2021), on the false dichotomy between refugees in international human rights instruments, such as the United Nations High Commissioner for Refugees, and economic migrants in U.S. immigration law.

consequence of making it harder to remedy continuing racial disparities. Nationalism becomes the ultimate pretext for racism.

Civil rights statutes have shown more promise than constitutional law for racialized foreigners, but they remain flawed vehicles. The Civil Rights Act of 1964 prohibits national origin discrimination, but the meaning of national origin is ill-defined in the statute.[231] Agency interpretations explain that it entails "treating people . . . unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not)."[232] Courts have used the term to guard against animus toward either citizens or noncitizens on the basis of language, religion, or culture by using analogies to protected classifications such as race.[233] These analogies are often imperfect because they require accommodation of cultural differences rather than the same treatment. For example, under Title VI, an immigrant with limited English-speaking abilities has a right to equal educational opportunity, but she does not necessarily benefit from being taught in the same instructional methods as a native English speaker.[234] The nonnative English speaker may require specialized language instruction or accommodations similar to those found in second generation antidiscrimination laws such as the Americans with Disabilities Act.[235] Title VII prohibits citizenship discrimination toward someone who is actually, or who is perceived to be, foreign—perhaps due to language proficiency or accent—if the distinction is being used for the purpose of national origin discrimination. Notwithstanding this prohibition against

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231 *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

232 *National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/national-origin-discrimination [https://perma.cc/3XBN-JAKZ]. Title VII does not prohibit citizenship discrimination per se, but "citizenship discrimination [that] has the purpose or effect of discriminating on the basis of national origin" does violate Title VII. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-19, FACT SHEET: NATIONAL ORIGIN DISCRIMINATION (1997).

233 *See generally* Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 332–34 (2012) (critiquing the Court's interpretation of "national origin" discrimination under Title VII); Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291 (2014).

234 *See* 42 U.S.C. §§ 2000d, 2000d-4a; Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964, 33 Fed. Reg. 4955 (Mar. 23, 1968). *Lau v. Nichols*, 414 U.S. 563 (1974), affirmed that Title VI prohibits the denial of educational opportunities on the basis of language, though subsequent case law clarified that the choice of curricular method for non-English speakers, e.g., dual immersion, bilingual instruction, or intensive instruction in English as a second language, is up to the school. *See, e.g.*, Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

235 *See* Karen M. Tani, *After 504: Training the Citizen-Enforcers of Disability Rights*, 42 DISABILITY STUD. Q. (forthcoming 2023) (on file with author) (describing Section 504 as "the disability analog to Title VI" of the Civil Rights Act of 1964).

national origin discrimination, the same statute permits employers to make citizenship status and characteristics associated with the perception of foreignness—such as English fluency—job requirements, if they are a business necessity.[236]

In summary, constitutional and statutory rights designed to combat inequality do not protect racialized foreigners from discrimination. Structural considerations compound the challenges. Many immigration scholars have criticized the plenary power doctrine as curtailing constitutional norms owed to noncitizens.[237] This Article makes a sharper critique of excessive deference to the political branches when considering the rights of racialized foreigners. The need for a singular figurehead to represent a nation in foreign affairs is not duplicated when dealing with U.S. citizens. Their education, employment, and public health are traditionally reserved to states and localities, not the federal government.[238]

Nationalist justifications for exclusion are problematic. Colorblind nationalist justifications are even more problematic because they falsely represent nationalism as facially neutral and race blind. As the purportedly neutral policies gain legal sanction, they evade hard-fought legal protections designed to smoke out racism and, indeed, can undo them. Exclusionary practices that equality laws previously made sanctionable become *un*sanctionable.

IV. RETHINKING POLITICS FOR CITIZENSHIP EQUALITY

How can a liberal democracy cure the problem of colorblind nationalism toward naturalized and U.S.-born citizens? This Article has suggested that access to formal citizenship is necessary, but not sufficient, for equality. This Part will tackle the limits of formal citizenship imposed by colorblind nationalism. It will first address colorblindness and the false perception that setting aside race renders citizenship inequality acceptable for racialized foreigners. It will next address nationalism and the false conception that legal status is dichotomous, rather than a

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236 *See supra* note 232.

237 *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (calling it an "obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power"); Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

238 This conflation of plenary power with state prerogative in preemption analysis that has permitted state discrimination in places like Arizona is touched on in Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

multifaceted identity intertwined with a process of racial formation. It then considers alternate ways to foster belonging in communities.

A. *Seeing Race and Citizenship Inequality*

A first step toward remedying inequality is recognizing that colorblindness and nationalism are not incontrovertible precepts in a liberal democratic nation. Colorblind nationalism can obscure inequality[239] and make it difficult to counter.[240] Scholars should instead take a skeptical posture toward exclusionary policies that are presumed to serve national interests, even when facially neutral. Federal policies related to national security and public safety should be recognized as inherently suspect because they are built on histories of racial inequality and exclusion for non-White immigrants and their families.[241] Unwitting acceptance of executive branch discretion over citizenship eligibility can mask inequality unfairly visited on noncitizens and minorities who are racialized as foreigners.[242] Reflexive deference over political questions misses the intertwined nature of racial and political inequality.[243]

Second, scholars should notice how the goals of Whiteness can stand in for colorblind neutrality. Colorblindness intersects with the protection of a singular cultural identity.[244] Scholars should embrace legal doctrines that expose and rectify harm toward non-White immigrants and U.S.

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239 Critical race theorists refer to this unseeing of race as "racial nonrecognition." Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz, *Introduction*, *in* SEEING RACE AGAIN, *supra* note 16, at 1, 14 (noting Crenshaw, Mari Matsuda, Neil Gotanda, Charles Lawrence, Cheryl Harris, and Gary Peller as skeptics of colorblindness). These critics of a "color-blind policy alliance" have long contended that colorblindness ignores racialized identities, frustrates antidiscrimination efforts, and perpetuates White advantages. *See, e.g.*, MARK GOLUB, IS RACIAL EQUALITY UNCONSTITUTIONAL? 6–7 (2018); DESMOND S. KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA 13–14 (2011); BONILLA-SILVA, *supra* note 16.

240 *See generally supra* notes 233–34. "Countering colorblindness" is the name of an interdisciplinary project of the Stanford University Center for the Comparative Study of Race and Ethnicity that resulted in the edited volume of *Seeing Race Again*.

241 *See supra* Sections I.C, II.A. *See generally* Tani, *supra* note 235.

242 *See supra* Sections I.C, II.A, III.B.

243 *See* Mathews v. Diaz, 426 U.S. 67, 78–80 (1976). The purpose of the political question doctrine is conventionally understood to be a separation of powers concern, as explained in *Baker v. Carr*, 369 U.S. 186 (1962). The consequence is that political questions can be superficially dismissed for lack of jurisdiction. Other readings of the political question doctrine would enable courts to retain authority to decide substantive matters, such as whether a voter suppression law is discriminatory or whether equality principles have been misapplied to aliens and naturalized citizens. *See generally* Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681 (2021).

244 Lipsitz, *supra* note 17, at 23–25.

citizens. Seeing racial inequality would resist formalist readings of sovereignty in national security law that blunt due process. It would maintain affirmative action policies that rectify past harms against Black and Latinx school children and promote diversity in higher education admissions and employment as consistent with the Equal Protection Clause.[245] It would maintain the Voting Rights Act's statutory prohibitions of minority vote dilution that have allowed for the creation of Latinx influence districts where the minority group has a meaningful chance of winning an election to avoid cracking the group into multiple districts that each contain a small number of minorities. It would similarly maintain district lines that preserve ethnic enclaves or consolidate interracial coalitions among communities with shared interests that can lead to political influence.[246]

B. *Migrating Along the Citizenship Spectrum*

A next step is moving away from binary categories of national membership and toward multi-layered conceptions of membership.

My prior work has described a spectrum that runs from U.S. citizen to permanent resident to foreigner.[247] This Article extends that spectrum, recognizing that U.S. citizens who are racialized as foreigners continue to be excluded from the polity, even after they obtain legal status. It shows that official justifications for noncitizen exclusion are stretched and then displaced onto racial minorities who are perceived as social outsiders and racialized as foreign, even though they are legally citizens.[248] Legal status,

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245 The U.S. Supreme Court is reviewing the use of race in higher education admissions in its 2023 term. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022); *supra* note 204.

246 *See generally* Guy-Uriel Charles, *Creating an Inclusive Political Order*, 11 REGUL. REV. 1 (2022). The U.S. Supreme Court has been deferential to states in their redistricting plans, even when they dilute racial minorities' electoral power in violation of the Voting Rights Act. *See, e.g.*, Robinson v. Ardoin, Nos. 22-211, 22-214, 2022 WL 2012389 (M.D. La. June 6, 2022); Ardoin v. Robinson, 142 S. Ct. 2892 (2022) (application for stay granted in Louisiana); Singleton v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022); Merrill v. Milligan, 142 S. Ct. 879 (2022) (application for stay granted in Alabama). As of this writing, *Merrill* is pending in the Supreme Court. Oral arguments included a spirited dialogue involving Justice Jackson postulating about the framers' intentions for the Equal Protection Clause to be race-conscious, as opposed to race-neutral, and Justice Kagan discussing the curtailment of the Voting Rights Act based on that reasoning. Transcript of Oral Argument at 13–15, 41–44, 57–59, Merrill v. Milligan, No. 21-1086 (Oct. 4, 2022).

247 *See generally* CHEN, *supra* note 2.

248 Psychological theory describes "displacement" as "[a] defense mechanism in which a drive or feeling is shifted upon a substitute object, one that is psychologically more available. For example, aggressive impulses may be displaced, as in 'scapegoating'" of a weak group that is not the actual "source[] of frustration but [is] safer to attack." Johnson, *supra* note 50, at 1155 (first alteration in

unlike race, is not immutable: immigrants can change from foreigner to naturalized citizen, and they can give birth to a second generation of U.S.-citizen children. The social reality and the legal category do not operate in sync.

The blurring of immigrant and citizen for naturalized citizens reinforces racial hierarchies where Asian, Latinx, and Muslim American racial minorities are subordinate to White Americans.[249] The aforementioned internment of Japanese Americans illustrates government discrimination toward racialized U.S. citizens.[250] So does the State Department's high standard for proving that immigrant soldiers from communist China do not maintain a "foreign nexus" that disqualifies them from naturalized citizenship, law enforcement's demand to see birth certificates for Latinx persons living in the borderlands, and state voter identification laws that present obstacles for persons who change their foreign-sounding names when they naturalize.[251] And so does the USCIS's denaturalization of individuals from specified countries of interest that are all Muslim-majority and the ineligibility of naturalized citizens for presidency under the Constitution's "natural born citizen" requirement.[252]

C. *Decentering Citizenship and Alternatives to National Belonging*

Beyond seeing racial inequalities, this Article seeks to find ways to eradicate them. This requires decentering citizenship as the sole source of national belonging and facilitating alternatives.[253]

This Article has shown that sovereignty, national security, and plenary power have been imported into the treatment of immigrants and racial minorities in the United States. Political branches of the federal government must recognize non-White immigrants and naturalized citizens as members of the political community when defining their boundaries. The judiciary must take responsibility for protecting their constitutional rights rather than declining to review all cases involving political questions and executive enforcement discretion. The executive

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original) (quoting DAVID KRECH, RICHARD S. CRUTCHFIELD & NORMAN LIVSON, ELEMENTS OF PSYCHOLOGY 768 (2d ed. 1969)).

249 *Id.* at 1153–57.

250 *See supra* text accompanying notes 123–31.

251 *See supra* text accompanying notes 109–17.

252 *See supra* note 169 and accompanying text.

253 JOHN CLARKE, KATHLEEN COLL, EVELINA DAGNINO & CATHERINE NEVEU, DISPUTING CITIZENSHIP 57–104 (2014). After a forceful call to destabilize citizenship as it is conventionally known—membership in a nation state—the authors seek to "pluralize" sites of belonging and recognize the act of reinventing an imagined community as the crux of citizenship. *Id.*

order that interned Japanese American citizens and immigrants for their race and national origin was upheld in *Korematsu*, due to broad deference to the President's executive order.[254] The U.S. Supreme Court upheld the INS's exclusion of a Japanese permanent resident from naturalized citizenship on the basis of his race because he was "clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side."[255] A few months later, the Court found Bhagat Singh Thind, a South Asian immigrant who was scientifically classified as Caucasian, to be non-White because he would not be seen that way by the "common man."[256] Accordingly, the Court found him ineligible for citizenship. While the two decisions may seem contradictory, they are consistent in their exclusion of individuals racialized to be foreigners on the basis of their race.

Courts have also acquiesced to racial discrimination in politics under the political question doctrine, which entrusts certain matters to the democratic branches of government. For example, courts have become increasingly deferential in the face of apparent gerrymandering ever since *Rucho v. Common Cause* held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[257] This hands-off approach may be extended to electoral practices that violate Section 2 of the Voting Rights Act to prevent minority vote dilution.[258] The question of who gets to decide how the polity is constituted was initially raised by Republicans in North Carolina who wanted to restore a voting map drawn by the state legislature and rejected as a partisan gerrymander by the state supreme court. "The question presented here," their emergency application to the court said, "goes to the very core of this nation's democratic republic: what entity has the constitutional authority to set the rules of the road for federal elections . . . ."[259] The Court declined to intervene at the time but has since agreed to hear *Harper v. Hall*, which will test the independent state legislature theory that reads the U.S. Constitution's Elections Clause to give the state legislature sole responsibility among state institutions for

254 Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

255 Ozawa v. United States, 260 U.S. 178, 198 (1922).

256 United States v. Thind, 261 U.S. 204, 214–15 (1923). The *Thind* decision led to the denaturalization of about fifty Asian-Indian Americans who had previously applied for and received naturalized citizenship.

257 139 S. Ct. 2484, 2506–07 (2019). While racial gerrymandering is prohibited under voting rights laws, partisan gerrymandering is permitted. *See id.* at 2497. However, there is a strong relationship between partisanship and race that makes the two difficult to separate.

258 *See* Transcript of Oral Argument, *supra* note 246.

259 Emergency Application for Stay Pending Petition for Writ of Certiorari at 24, Moore v. Harper, 142 S. Ct. 2901 (2022) (No. 21-1271).

drawing legislative districts such that state courts have no role to play.[260] The repercussions could be broad, insulating from judicial review state laws impinging on voter rights by requiring strict documentary proof of identification or citizenship at the polls, purging ballots from voters whose surnames do not precisely match, or limiting ballot access and language translation services.

For all of its pitfalls, democratic engagement with the government is not wholly incompatible with belonging.[261] Formal citizenship remains necessary for safety and inclusion, even if some non-White persons may fear that interacting with the federal government can lead to enforcement action against oneself or one's immigrant family. The benefits of federal involvement primarily flow from the legal benefits that accompany citizenship and the difficulty of belonging with the lingering specter of removal. They secondarily flow from opportunities for social and political attachment, such as political participation, electoral representation, payment of taxes and provision of public benefits, military service, civilian service such as AmeriCorps and the Civilian Conservation Corps, and even material support in the manner of the G.I. Bill.[262] These opportunities are meaningful and invigorate communities and individuals alike.[263] But compared to more local inclusion efforts, they exist at a far remove from the daily lives of most people. As such, federal citizenship is not sufficient to ensure inclusion.

Decentering national citizenship would clear space for alternate sources of belonging, attachment, and integration that can boost a person's subjective well-being and objective position in the United States. State and local governments can play a practical role in expanding

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260 *See* Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom. Moore*, 142 S. Ct. 2901. *See generally* U.S. CONST. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof. . . ."). As of this writing, a decision is pending in the Supreme Court for *Moore*.

261 Rogers Brubaker points out that nationhood can be understood as a political claim and can "develop more robust forms of citizenship, provide support for redistributive social policies, foster the integration of immigrants, and even serve as a check on the development of an aggressively unilateralist foreign policy." This is because nationhood is an imagined community, not always coextensive with national boundaries. Rogers Brubaker, *In the Name of the Nation: Reflections on Nationalism and Patriotism*, 8 CITIZENSHIP STUD. 115, 115–16 (2004). More critical perspectives are contained in a collection of essays edited by Nancy Foner and Patrick Simon. *See generally* FEAR, ANXIETY, AND NATIONAL IDENTITY: IMMIGRATION AND BELONGING IN NORTH AMERICA AND WESTERN EUROPE (Nancy Foner & Patrick Simon eds., 2015).

262 *See* SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 129–31 (2007).

263 These ideas can be grouped together as a type of *jus meritum*, or citizenship for service, and are described in detail in Cara Wong & Grace Cho, Jus Meritum: *Citizenship for Service*, *in* TRANSFORMING POLITICS, TRANSFORMING AMERICA: THE POLITICAL AND CIVIC INCORPORATION OF IMMIGRANTS IN THE UNITED STATES 71 (Taeku Lee, S. Karthick Ramakrishnan & Ricardo Ramírez eds., 2006), METTLER, *supra* note 262, and Chen, *supra* note 3.

political and social engagement with an emphasis on economic and social inclusion. The reason is historical and doctrinal. Historically, Americans were foremost members of states and territories.[264] The federal government's primacy over immigration regulations did not begin until the late 1800s.[265] The federal government's role in the regulation of racial equality enlarged during the same era with the passage of the Reconstruction Amendments and then the Civil Rights Era. But after years of congressional gridlock, progressive states have once again stepped up to fill in gaps in civil rights and immigrants' rights. Some states provide extensive language translation to enhance access to public benefits or extend worker protections without regard to legal status.[266] These states may guard against racial profiling by health insurance companies or the police or require priority for underrepresented groups.[267]

The states that have taken this protective role have formed a patchwork rather than a uniform tapestry. Other states have discriminated against racialized foreigners by passing English-only laws for public schools and government operations[268] or enacting racial privacy laws that prevent the collection of data about racial identification in order to downplay ethnocultural differences.[269] Several state laws prohibit the consideration of race as a factor in hiring for public employment and admissions to public universities.[270] Other state laws permit racially discriminatory election laws. Most of these prohibitions would be impermissible under federal civil rights laws. For every

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264 Markowitz, *supra* note 18; *see* Takeshi Akiba, The Evolution of State and Federal Citizenship in the United States (2010) (Ph.D. dissertation, University of California, Berkeley), https://escholarship.org/uc/item/3tf8b9d5 [https://perma.cc/38RQ-YRD5]; *see also* Anna O. Law, *The Historical Amnesia of Contemporary Immigration Federalism Debates*, 47 POLITY 302 (2015).

265 *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1886–93 (1993).

266 *See, e.g.*, *Language Assistance*, CA.GOV: DEP'T OF MANAGED HEALTH CARE, https://www.dmhc.ca.gov/healthcareincalifornia/yourhealthcarerights/languageassistance.aspx [https://perma.cc/K5HX-R2H7].

267 *See, e.g.*, *Racial and Identity Profiling Act (RIPA)*, CA.GOV: POST, https://post.ca.gov/Racial-and-Identity-Profiling-Act [https://perma.cc/DW3S-Y9AL].

268 *See, e.g.*, *Proposition 227: English Language in Public Schools*, CAL. LEGIS. ANALYST'S OFF. (June 1998), https://lao.ca.gov/ballot/1998/227_06_1998.htm [https://perma.cc/9EDG-E7HL] (repealed by California Proposition 58 in 2016).

269 *See, e.g.*, Neal Conan, *Proposition 54: Racial Privacy Initiative*, NPR (Sept. 22, 2003, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=1439184 [https://perma.cc/33JA-MDZ8].

270 *See, e.g.*, *Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities*, CAL. LEGIS. ANALYST'S OFF. (Nov. 1996), https://lao.ca.gov/ballot/1996/prop209_11_1996.html [https://perma.cc/TS94-4DME] (upheld by California Proposition 16 in 2020); MICH. CONST. art. I, § 26.

California or New York, there is an Arizona or Texas seeking to disadvantage immigrants and racial minorities.

Yet, doctrinally, it makes sense that states would be the central players in matters of social welfare, which include education, public health, and many aspects of employment. States traditionally regulate social welfare and operate under a presumption of police powers. School districts have an important role to play in the incorporation of immigrant children in their classrooms, and state constitutions have enshrined a fundamental right to education that does not exist at the federal level.[271] States have also been entrusted with important decisions about workplace conditions and police powers[272]—e.g., Arizona state legislation mandating employer verification of an immigrant worker's eligibility to work and numerous states' workers' compensation laws.[273] State legislation has been the fulcrum for inclusion with driver licenses, in-state tuition for public universities, voter registration, and health care.[274]

Even more opportunities exist at the local level because cities are where communities are built.[275] Public schools can administer COVID-19 testing, and county public health departments can focus outreach on vaccines toward Black and Latinx communities severely impacted by the coronavirus.[276] Community groups can provide multilingual promotional materials, transportation to polls, and technical assistance with election registration to accommodate poor, minority, and disabled

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271 *See* MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 25, 47 (2009).

272 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491–92, 498–501 (1977); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999).

273 "Alabama, Arizona, and Tennessee require that most or all employers use E-Verify," while Colorado, Georgia, Florida, Michigan, Minnesota, and Pennsylvania require E-Verify for public employers and/or public contractors. MICHAEL A. RODRÍGUEZ, MARIA-ELENA YOUNG & STEVEN P. WALLACE, GLOB. HEALTH INST., CREATING CONDITIONS TO SUPPORT HEALTHY PEOPLE: STATE POLICIES THAT AFFECT THE HEALTH OF UNDOCUMENTED IMMIGRANTS AND THEIR FAMILIES 10 (2015).

274 *Id.* at 8–10. *See generally* COLBERN & RAMAKRISHNAN, *supra* note 18; Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2111, 2133–36 (2013).

275 Some political theorists see this kind of localized civic engagement as the basis for belonging. Politics were the essence of citizenship in the Athenian polis, a unit comparable to the modern city. Sarah Song says "collective self-determination" justifies state power over immigration and immigrants. Rather than accepting "the nation" as the basic unit of politics, she posits "a people" engaged in collective self-governance and says binding collective decisions must be accountable to a political process that represents those who are subject to such decisions. SONG, *supra* note 59, at 53.

276 *See generally* Olatunde C.A. Johnson & Kristen Underhill, *Vaccination Equity by Design*, 131 YALE L.J.F. 53 (2021).

voters.[277] San Francisco and other major cities grant municipal identity cards.[278] As of this writing, noncitizen voting exists in fifteen cities across four states, most prevalently in Maryland.[279] What explains these unlikely inclusions of marginalized groups? Local communities can be responsive to immigrant and racial minority communities by developing trust and accommodating distinctive needs when administering services. This willingness of cities to welcome marginalized groups expands the conception of community to include those who may be otherwise excluded.

Decentering citizenship as the sole form of national membership can ameliorate some of the problems posed by colorblind nationalism because it creates openings for alternate sites of belonging. Integration into local communities provides what granting formal citizenship often cannot: social inclusion, opportunities for economic advancement and security, and commitments to multiculturalism in the places that value them. Creating spaces—even a patchwork of spaces—that embrace racial and cultural differences provides membership for immigrants who diverge from the dominant cultural markers of American society. Thwarting nationalist justifications for legally sanctionable exclusion clears the way for racial belonging.

CONCLUSION

Immigrants are not the same as citizens under the law. But legal commitments to equality for immigrants who become citizens are at odds with racial hierarchies. Instead of being racialized as forever foreigners, persons who were once outsiders should be permitted to join America's enduring quest for equality and belonging.

Policy solutions emphasizing formal citizenship as the key to unlocking formal equality too easily miss that belonging requires more. The goal is not merely turning noncitizens into citizens, even though naturalization is an important steppingstone to integration. The goal is to build a more equal nation for those who reside in the United States,

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277 These were some of the best practices recommended to increase ballot access for vulnerable populations during the pandemic. Wendy R. Weiser, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CTR. FOR JUST. (Mar. 16, 2020), https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus [https://perma.cc/6TR7-CDUE].

278 *See Immigrant Voting Rights: Research on Immigrant Voting Laws and Campaigns in the United States*, IMMIGR. VOTING RTS., https://www.immigrantvotingrights.com [https://perma.cc/W6U3-4DHF].

279 *Id. See generally* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

regardless of prior citizenship status or race. There must be a unified vision of race and citizenship equality to combat colorblind nationalism. This unified vision would reconceptualize national identity, nation-building, and national interests in a way that recognizes the myriad contributions and challenges of immigrants and naturalized citizens. Doctrinally, this would require a reinvigoration of constitutional and other civil rights and a reconfiguration of the balance of federal, state, and local power. Culturally, it would require restoring the American identity as a nation with the potential to include—and be transformed by—newcomers and the cultural diversity they bring into communities.

Even if there are continuities with the broader quest for racial equality, the quest entails distinct challenges for non-White immigrants and naturalized citizens. Because the federal government is the gatekeeper for formal citizenship, courts give the government more leeway to discriminate against permanent residents than they would for discrimination against racial minorities. Whereas institutional racism is unconstitutional in the post-civil rights and post-racial era, nationalism is legally permissible due to cramped definitions of national interest. Government discrimination violates federal civil rights laws, but protection of the American people from economic and public health threats is legally sanctioned. Whereas arbitrary and capricious policymaking violates procedural norms, executive enforcement discretion in national security is legally justified. The legal distinctions are stretched to the breaking point when applied to naturalized citizens who are only considered foreign due to racialized misconceptions about their ability to belong.

Citizenship is necessarily a boundary drawing exercise. But between borders, inclusion should extend to all persons, regardless of race or prior immigration status. Racism and nationalism were embedded in the settlement and founding of the United States. Race and nation continue to vex belonging when immigration fuels the growth of non-White communities consisting of immigrants and naturalized and U.S.-born citizens. Without making conscious efforts to scrutinize colorblindness and nationalism, colorblind nationalism will perpetuate inequality.

APPENDIX

Figure 1. Racialized Paths to Citizenship

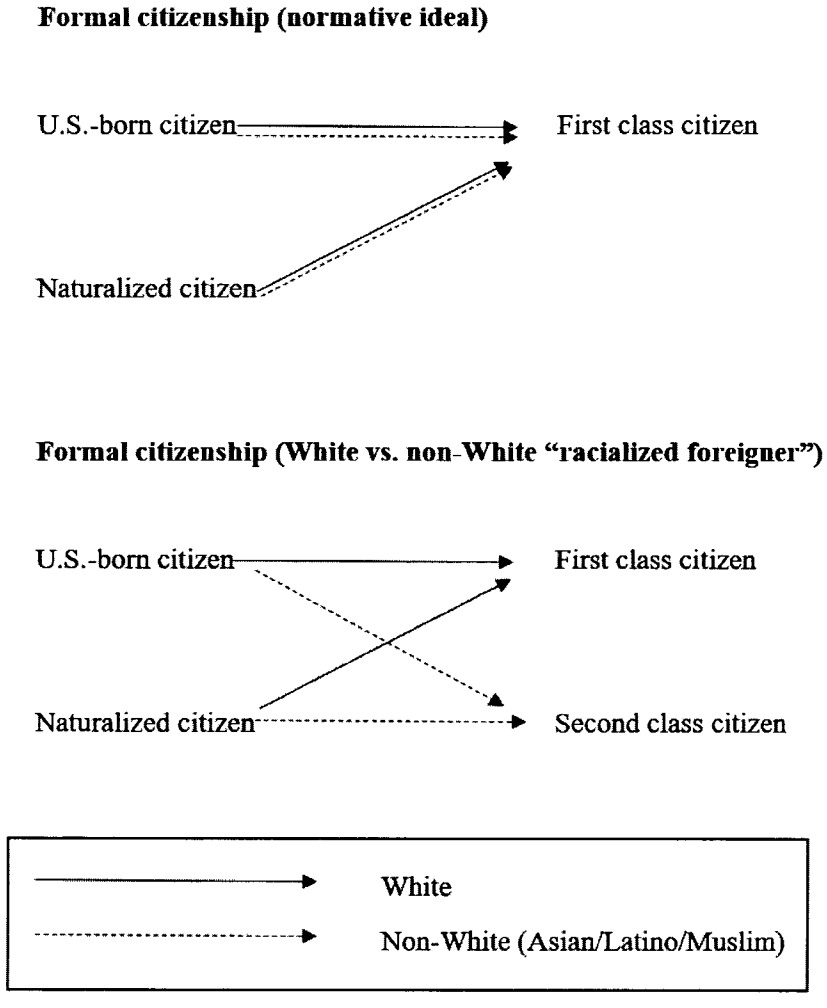
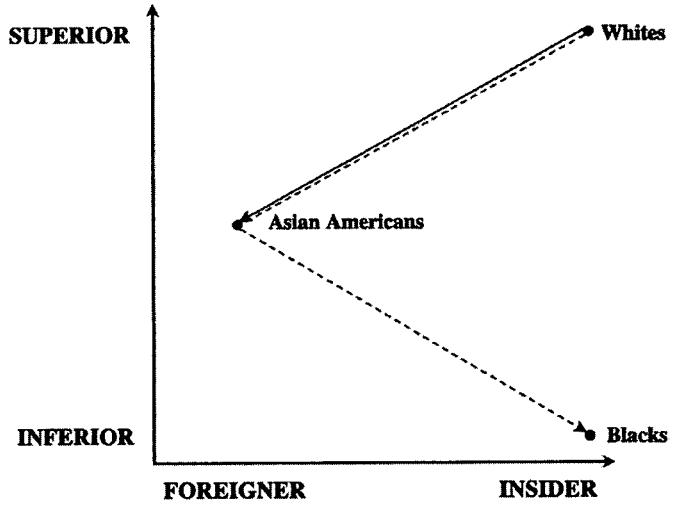
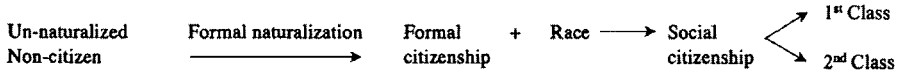


Figure 2. Racial Triangulation[280]



280 Kim, *supra* note 46, at 108.

Figure 3. Racial Naturalization[281]



281 Carbado, *supra* note 46, at 641.