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Weep the People

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INTRODUCTION

Citizenship is famously described as Janus-faced, after the god of beginnings and ends, who presided over every entrance and exit in ancient Rome.¹ He was depicted with two faces and known as “the god who looked both ways.”² The idea of citizenship is similarly Janus-faced—it promises the belonging necessary to the claim of “We the People,” and simultaneously threatens to exclude those who fall outside the borders of belonging. We see citizenship’s two-faced or divided nature in the very title of this symposium. While the first half of the title, “We the People,” rhetorically suggests that citizenship might guarantee universal inclusivity, the second half of the title, “Citizenship, Race and Equality,” warns that “We the People” is an unfulfilled promise, with race, in particular, threatening the equality associated with the idea of citizenship.

I. CITIZENSHIP’S TWO FACES

One way to understand citizenship’s duality is to comprehend it as a division that reflects one’s “analytical starting point,”³ to use the words of Linda Bosniak. Is citizenship viewed “from an internal or endogenous perspective” where citizenship describes the relations among “presumed members of an already existing society?”⁴ If so, citizenship stands “for the inclusion and incorporation of ‘everyone.’”⁵ Alternatively, can citizenship be viewed from an external perspective which attends to “the community’s boundaries” by examining how citizenship is “rationed” and constituted in the first instance?⁶ Bosniak suggests that, with the exception of immigration scholars, most scholars tend to ignore the boundary questions of citizenship.⁷

This divided view of citizenship presents an image that is “hard on the outside and soft on the inside: whereas citizenship embodies a universalist ethic within the community, it is exclusionary at the community’s edges.”⁸ For immigration scholars, this hard outside and soft inside is echoed by the split between immigration law and alienage law. Immigration law governs admission, exclusion, and deportation, and relies upon plenary power to reduce constitutionally guaranteed individual rights, whereas alienage law governs the

1. *Janus*, WIKIPEDIA, <https://simple.wikipedia.org/wiki/Janus> (last visited Apr. 15, 2024); Donald J. Wasson, *Janus*, WORLD HIST. ENCYCLOPEDIA (Feb. 6, 2015), <https://www.worldhistory.org/Janus>.

2. Wasson, *supra* note 1.

3. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 1 (2006).

4. *Id.* at 1–2.

5. *Id.* at 2.

6. *Id.*

7. *Id.*

8. *Id.* at 99.

everyday life of noncitizens who are territorially present.⁹ But, as Bosniak points out, the idea that citizenship has a hard-shelled exterior, but a welcoming interior is belied by the way the hard border can be softened through policies like humanitarian parole, or by the way the soft inside can be hardened through the threat of deportation.¹⁰ The result is that the immigrant carries the border with her as she enters inside.¹¹

Bosniak's focus is the immigrant or would-be immigrant experiencing citizenship's exclusions. Yet citizenship's boundary-making and the experience of citizenship's exclusions is not limited to those we would conventionally label as immigrants. One articulation of this is Kunal Parker's historical study of the rendering of insiders as foreign, which he charts through "a host of politico-legal strategies that the national, state, and local governments have deployed over the long span of American history vis-à-vis portions of the domestic population."¹² He refers here to a range of practices and communities. These include the designation of Native Americans as aliens for purposes of exclusion rather than in recognition of their claims to sovereignty; the subjection of free Blacks to an extensive regime of territorial borders and their formal designation as aliens by some Southern courts; the push for repatriation of freed Blacks, barriers to voting they faced, and their experiences of both formal and de facto segregation.¹³ Parker also refers to the marital expatriation of United States citizen women, the use of state and local poor laws to manage the movement

9. This is the split between *Chae Chan Ping*, *Ekiu* and *Fong Yue Ting*, versus *Yick Wo*. *Chae Chan Ping* and *Nishimura Ekiu* concerned exclusion and *Fong Yue Ting* concerned deportation; *Yick Wo* concerned the rights of territorially present non-citizens to be free from discrimination that was held to violate the Fourteenth Amendment's equal protection clause. Compare *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (*The Chinese Exclusion Case*) (holding that Chinese immigrant laborers can be barred from entering the United States under the Chinese Exclusion Act), *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (holding that denying a Japanese citizen entry to the United States, despite her marriage to an American citizen, did not violate the Due Process Clause), *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that Congress had an absolute right to deport a non-naturalized Chinese long-term resident), with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially neutral ordinance violated the Equal Protection Clause by discriminating against laundry operators of Chinese descent). This juridically salient split between immigration law and alienage law can be criticized as logically flawed. See generally Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2009) (noting that every legal rule concerning either selection of immigrants or regulation of immigrants in fact concerns both). Even while alienage law provides more protections for noncitizens than immigration law, it can be characterized as an "unfinished revolution." See Alison Brownell Tirres, *The Unfinished Revolution for Immigrant Civil Rights*, 25 J. CONST. L. 846, 846–54 (2023) (showing how the movement for the civil rights of noncitizens has been shaped by the Court's "valorization of citizenship," by "thorny questions" about the constitutional lines between citizens and aliens and economic versus political rights, and by the "shape, structure and timing" of the legal movement).

10. See BOSNIAK, *supra* note 3, at 4.

11. *Id.*; see Keith Aoki & Robert Chang, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1397 (1997).

12. KUNAL PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 4–5 (2015).

13. *Id.* at 81–115.

and residence of poor Americans within the country, and the treatment of Asian Americans and Latinx Americans as alien.¹⁴

Parker's historical work demonstrates how the idea of citizenship creates boundaries and ultimately draws a line between citizen and alien. Importantly, this shows us that groups not conventionally understood as foreigners have also been rendered alien, even when they are territorial insiders. Yet it is possible that drawing the line this way insufficiently underscores other dynamics that have shaped the exclusions of citizenship.

Citizenship has also pushed out those considered degraded or unfit for citizenship, where the rationale for exclusion may not be completely captured through the designation of a group as foreign or alien. Justice Taney's decision in *Dred Scott v. Sandford* exemplifies this, through the assertion that Blacks, whether enslaved or free, could not be citizens of the United States, which was expressed as follows:

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. . . . The question before us is, whether the class of persons described . . . are constituent members of their sovereignty? . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.¹⁵

In Devon Carbado's reading of the case, the clearest manifestation that "[p]eople of African ancestry" in the opinion are "not, strictly speaking, foreigners" lies in Justice Taney's articulation, which contrasts Blacks with the Court's vision of Native Americans.¹⁶ Native Americans are treated as foreigners not living under our government, while Blacks are neither recognized as citizens nor foreigners. Instead, they are positioned as "living under our government" as a subordinate political class, and an inferior class of human beings overall.¹⁷

Citizenship has also been shaped by gender, in aligning with an unquestioned public/private dichotomy which relegates women to the private or domestic sphere while reserving the public domain of citizenship for men. This division not only dictated the appropriate realms for gendered action, but also assigned putatively immutable characteristics to each gendered realm: dependency, sentiment, and passivity, versus autonomy, rationality, and self-

14. See *id.* at 118–20.

15. 60 U.S. (19 How.) 393, 404–05 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

16. Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 643 (2005).

17. *Id.* at 644.

possession.¹⁸ The gendered boundary between public and private spheres correlated with two different kinds of claims to social resources: one based on market labor, and the other based on family ties.¹⁹ In the male sphere, contractual relations of exchange flourished. Such relations existed between individuals who were presupposed to be free, independent, and in control of their objects of exchange.²⁰ This “possessive individualism” correlated with the idea of self-ownership.²¹ Nancy Fraser and Linda Gordon observed that coverture, like slavery, rationalized the subjugation of those who could not claim their labor power as their own, and separated the universe into those who were free citizens, and those who were not.²² Coverture substituted “married women’s obligations to their husbands for obligations to the state.”²³ This meant that diminished obligations of citizenship, such as the responsibility of military service, came with diminished rights of citizenship, such as the right to vote.²⁴

Note that these histories, of gender and race, both relate to questions of work. These histories were also always intersectional. As one example, the first Married Women’s Property Act that passed in the United States was enacted in Mississippi in 1839, and sought to erode the disabilities associated with coverture, primarily by securing the ownership rights of women slaveholders over enslaved Black persons.²⁵ We see here how a step toward full citizenship for some women relied on the denial of personhood and citizenship for others.²⁶

Judith Shklar famously identified the essential role played by the right to earn, along with the right to vote, as foundational to American citizenship, as both a matter of dignity and public respect: “A good citizen is an earner, because independence is the indelibly necessary quality of genuine, democratic citizenship.”²⁷ Thus, eligibility for paid work outside the home was an explicit criterion for citizenship. In contrast, the degraded and enslaved were relegated to the exterior of citizenship, as were the citizen’s dependents, whose field of action was confined to the domestic sphere of the intimate family. In that sphere, resources were to flow through blood and sentiment, unlinked to any public circuit of exchange. Care work was perceived to be a product of “charity,” rather

18. Leti Volpp, *Feminist, Sexual, and Queer Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP 153, 156 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink eds., 2017).

19. See generally Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States?*, 22 SOCIALIST REV. 45 (1992) (“[T]he dominant understanding of civil citizenship remains strongly inflected by notions of ‘contract’ and ‘independence,’ while social provision has been constructed to connote ‘charity’ and ‘dependence.’”).

20. *Id.* at 52.

21. *Id.*

22. *Id.* at 54–55.

23. LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 11 (1998).

24. *Id.* at 236–37.

25. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VIEWS OF CITIZENSHIP IN U.S. HISTORY 233 (1997).

26. Volpp, *supra* note 18, at 154.

27. JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 92–93 (1991).

than of contract.²⁸ Otherwise articulated, the public sphere was characterized as the realm of rights and the pursuit of self-interest, while the private sphere was perceived as the realm of needs, bonds, and selflessness of family.²⁹

Other scholars, including Jennifer Gordon and Robin Lenhardt, have argued that work is an important pathway to citizenship for all.³⁰ But, how should we think about the right to earn as a foundation of American citizenship in relation to the Immigration Reform and Control Act (IRCA), which created a federal scheme of unlawful employment? IRCA has meant that undocumented students ineligible for DACA (as well as other noncitizens lacking work authorization) cannot lawfully be employed by persons or entities covered by IRCA. Recently the attempt to create Opportunity for All in the University of California system, recognizing that IRCA makes no mention of States as persons or entities and may not bind them, and suggesting therefore that undocumented students could be employed by the UC system, was frustrated.³¹ How should we think about noncitizens who need to work to live, who seek formal legal citizenship status? Their work may be viewed simultaneously as unlawful while also functioning as labor that, in theory, creates the deservingness of citizenship. Moreover, how should we think about noncitizens who engage in protest and other acts of citizenship in an effort to shape their fate? I will return to these questions.

II. DISCOURSES OF CITIZENSHIP

I want to pause here to consider precisely what we mean by citizenship. As is already apparent, the term “citizenship” references a wide array of ideas. I have found Bosniak’s analytical work separating discussions about citizenship into four distinct discourses to be helpful.³² First, citizenship as formal legal status refers to who can legally possess the status of citizen, as acquired through birth or naturalization.³³ Second, “citizenship as rights” signifies the rights necessary to achieve full and equal membership in society.³⁴ This rights-centered conception, along with the idea of citizenship as legal status, tracks the Roman model of citizenship, which saw citizenship as an entitlement connected

28. Fraser & Gordon, *supra* note 19, at 59.

29. WENDY BROWN, *STATES OF INJURY* 161 (1995).

30. See generally Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008) (researching the relationship between work and citizenship by focusing on African American and Latino immigrant low-wage workers); see also Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1886 (2000) (encouraging a remake in law and culture to build a society where everyone, including women, can participate meaningfully in life-sustaining work).

31. Ahilan Arulanathan described the Opportunity For All campaign during the RICE symposium. Ahilan Arulanathan, Panel Discussion: Limits on Citizenship from Schools to the Workplace at the U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024). See Mikhail Zinshteyn, *UC Rejects Proposal to Allow Campuses to Hire Undocumented Students*, CALMATTERS (Jan. 26, 2024), <https://calmatters.org/education/higher-education/2024/01/undocumented-students-2>.

32. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 455 (2000).

33. *Id.* at 448.

34. *Id.* at 463–64.

to legal standing.³⁵ Third, in contrast to the idea of citizenship as “merely a status held under the authority of a state,”³⁶ is the Greek conception of active citizenship which is linked to ideas of self-governance.³⁷ Bosniak calls this “citizenship as political activity”; this discourse identifies political engagement in the community as the basis for citizenship.³⁸ And fourth, “citizenship-as-identity” or solidarity alludes to people’s affective and collective experience of themselves.³⁹

I have worked with Bosniak’s distillation of citizenship into different discourses in order to examine how race has produced inequality in the access to or enjoyment of each of these dimensions of citizenship. I have also been interested to think through how these dimensions of citizenship relate to one another.⁴⁰ I address both questions, below.

Formal legal status recognizes one’s membership or belonging within a political community, which is typically assumed to be that of the nation-state. This citizenship is secured at birth through *jus soli*, citizenship through birth in the territory or *jus sanguinis*, citizenship through descent,⁴¹ or is acquired later in life through naturalization. In the United States, historical restrictions on naturalization were significant. Initially, in 1790, naturalization was limited to free white persons.⁴² This changed with the Naturalization Act of 1870, which extended the possibility of naturalization to persons of African nativity or descent.⁴³ Shortly thereafter, the Chinese Exclusion Act of 1882 stated that no federal or state court shall admit Chinese to citizenship.⁴⁴ These restrictions on naturalization led to fifty-two published cases of noncitizens attempting to show they met the racial prerequisite to become citizens.⁴⁵ All sought to be declared white for purposes of naturalization with the exception of one man who had an

35. Linda Bosniak, *Citizenship*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 183, 185 (Mark Tushnet & Peter Cane eds., 2012).

36. Engin F. Isin & Bryan S. Turner, *Citizenship Studies: An Introduction*, in HANDBOOK OF CITIZENSHIP STUDIES 1, 2 (Engin F. Isin & Bryan S. Turner eds., 2002).

37. Bosniak, *supra* note 32, at 470. On Greek versus Roman conceptions of citizenship, see BARBARA VON RÜTTE, THE HUMAN RIGHT TO CITIZENSHIP: SITUATING THE RIGHT TO CITIZENSHIP WITHIN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW 18–20 (2022).

38. Bosniak, *supra* note 32, at 470.

39. *Id.* at 479–80.

40. See, e.g., Leti Volpp, “*Obnoxious to Their Very Nature*”: Asian Americans and Constitutional Citizenship, 8 ASIAN L.J. 71, 71–72 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

41. *Jus soli* refers to right of soil, recognizes citizenship based upon location of birth, and is frequently referred to as “birthright citizenship.” *Jus Soli*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jus_soli (last visited June 20, 2024). *Jus sanguinis* refers to right of blood, recognizes citizenship based upon parental citizenship, and is frequently referred to as “citizenship by descent.” *Jus Sanguinis*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jus_sanguinis (last visited June 20, 2024).

42. Gabriel J. Chin, Panel Discussion: Multiracial Democracy and Political Incorporation at U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024).

43. IAN HANEY LÓPEZ, WHITE BY LAW 44 (1996).

44. *Id.* at 37–38.

45. *Id.* at 49.

Indigenous father and a mother who was “half African and half Indian,” who unsuccessfully sought to be declared of African descent or nativity.⁴⁶ The racial restrictions on naturalization intersected with the gendered doctrine of dependent citizenship in complicated ways, which I have examined to better understand how marriage shaped the experience of racialized citizenship.⁴⁷ Only in the middle of the twentieth century did the racial restrictions on naturalization begin to lift, first in 1943 for noncitizens from China, the war-time ally of the United States, and finally in 1952 for noncitizens from Japan when the racial bar was removed altogether.⁴⁸ As Neil Gotanda points out, this pattern demonstrates Derrick Bell’s theory of interest convergence, which asserts that social change for minority communities has only occurred when minority interests align with interests of the majority community.⁴⁹

In terms of racial restrictions on citizenship through birth, we can consider how they have shaped *jus soli* and *jus sanguinis*. The Fourteenth Amendment, which was written in part to reject the *Dred Scott* decision, provides that all 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.⁵⁰ In 1898, the Supreme Court issued its decision in *United States v. Wong Kim Ark* establishing that the Fourteenth Amendment was intended to apply generally and not to be restricted by race.⁵¹ The Court ruled that children born in United States territory with parents who were subjects of the emperor of China were subject to the United States’ jurisdiction, and should be considered United States citizens.⁵² Rachel Rosenbloom, working on a history of birthright citizenship, alerts us to a long history of attempts to deny birthright citizenship between that point and our present, including the attempt to overturn *Wong Kim*

46. *In re Cruz*, 23 F. Supp. 774, 774–75 (E.D.N.Y. 1938).

47. See generally Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (analyzing the intersection and impact amongst gender, race, and bars to citizenship).

48. See Neil Gotanda, *Towards Repeal of Asian Exclusion: The Magnuson Act of 1943, the Act of July 2, 1946, the Presidential Proclamation of July 4, 1946, the Act of August 9, 1946, and the Act of August 1, 1950*, in *ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* 309, 309–10 (Hyung-Chan Kim ed., 1996).

49. *Id.* at 313; see Derrick A. Bell, Jr., Comment, *Brown v. Board and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

50. U.S. CONST. amend. XIV. For an analysis arguing that this clause was intended to encompass the children of unauthorized migrants and therefore must be understood to include children of undocumented immigrants today, see generally Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021) (analyzing laws regulating, suppressing, and ending the African slave trade to argue that the United States had unauthorized migrants and immigration laws coexisting); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing PETER H. SCHUK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY* (Yale Univ. Press 1985)) (examining Peter H. Schuck’s and Rogers M. Smith’s reasoning to argue “[t]here are serious flaws, both logical and historical” in the authors’ conclusions).

51. 169 U.S. 649, 676 (1898).

52. *Id.* at 705. For a discussion of how the government reacted to this decision by creating onerous requirements, see Amanda Frost, “By Accident of Birth”: *The Battle over Birthright Citizenship After United States v. Wong Kim Ark*, 32 YALE J.L. & HUMANS. 38, 63–65 (2021).

Ark as applied to Japanese Americans in the 1940s.⁵³ But, what of *jus sanguinis*—citizenship through descent? *Jus sanguinis* is often considered problematic because it confers citizenship as descent through bloodlines, reproducing ethno-nationalism. However, Kristin Collins points out that in the United States during the era of Chinese exclusion, *jus sanguinis* provided one of the very few routes to entry for those who were or who claimed to be descendants of United States citizens.⁵⁴

Even when a citizen has formal legal status, it is not guaranteed that this status will be recognized by the state. Both Jackie Stevens and Rachel Rosenbloom have written important work showing that the United States has deported many of its own citizens.⁵⁵ While these deportations are called “mistakes or outliers,” Rosenbloom argues that casting these deportations as mistakes assumes the existence of a clear line dividing citizens from noncitizens, while failing to acknowledge the role of immigration procedures in shaping the functional boundaries of citizenship.⁵⁶ She writes that we need to “understand citizenship not just as a status that precedes immigration enforcement but as one that can be produced, at least in a functional sense, by such enforcement.”⁵⁷ This depiction of how citizenship is produced is analogous to the idea that illegal immigration status should not be envisioned as attaching to a person, like an original sin which can only be expiated through self-deportation. Instead, we should reframe being undocumented as a phenomenon produced through the law, which we could understand as the condition of being “illegalized,”⁵⁸ so that undocumented status is both made by and may be unmade by the state.

Moving to the idea of citizenship as rights, being designated a citizen implies receiving state protection for certain rights. Sociologist T.H. Marshall famously described the progression of rights that citizenship protects in Western capitalist democracies as following a particular order: Over the eighteenth, nineteenth, and twentieth centuries respectively, civil rights pertaining to property and protection, political rights of participation, and finally, albeit

53. Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311, 316–29 (2012).

54. Kristin Collins, *Abolishing Jus Sanguinis Citizenship: A Proposal Too Restrained and Too Radical*, in DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 103, 104 (Rainer Bauböck ed., 2018).

55. Jacqueline Stevens, *The Alien Who Is a Citizen*, in CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 217, 226 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017).

56. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1968 (2013).

57. *Id.* at 1969.

58. For the term “illegalized,” see Joel Sati, *Noncitizenship and the Case for Illegalized Persons*, BERKELEY NEWS (Jan. 24, 2017), <https://news.berkeley.edu/2017/01/24/noncitizenship-and-the-case-for-illegalized-persons>. On unmaking illegal immigration status, see Mae Ngai, *Deportation Policy and the Making and Unmaking of Illegal Aliens*, in IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 56, 56–90 (2d ed. 2014).

incompletely, social rights, were secured.⁵⁹ Incorporating women as political subjects forces a revision of this famous trajectory for all the ways that these rights were not and still are not secured.⁶⁰ In many parts of the United States today, the claim to fetal citizenship trumps the citizenship of the pregnant person; in Lauren Berlant's words, the pregnant woman has become "the child to the fetus, becoming more minor and less politically represented."⁶¹ Incorporating Blacks as political subjects forces a revision of this temporal trajectory as well.⁶²

III. CITIZENSHIP STATUS WITHOUT RIGHTS OF CITIZENSHIP

What does it mean to possess citizenship as a matter of formal legal status, but not possess all the rights citizenship is meant to protect, and how might we characterize this phenomenon? Conventionally, this has been characterized as second-class citizenship, a term used to describe the condition for a myriad of groups: those experiencing felony disenfranchisement, residents of the District of Columbia or Puerto Rico, Black people, non-normative sexual subjects, people with disabilities, children, and women. Devon Carbado cautions us from using the term second-class citizen for a number of reasons. The concept assumes that one can move between first- and second-class citizenship, which obscures the fact that these forms of citizenship are co-constitutive.⁶³ Carbado also seeks to redirect our attention to a process he calls "racial naturalization," which produces what he describes as "inclusionary forms of exclusion."⁶⁴ Specifically, Black people in the United States have been included on exclusionary terms. Despite being formally recognized as citizens, they still face racial inequality, as their social intelligibility as Americans remains directly linked to racial subordination.⁶⁵ Carbado argues that Black people have become Americans through, not in spite of, racism.⁶⁶ At the same time, while

59. See generally THOMAS H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS* (1964) (tracking the evolution of rights acquired through citizenship in England during the eighteenth, nineteenth, and twentieth centuries).

60. Fraser & Gordon, *supra* note 19, at 49.

61. Lauren Berlant, *America, "Fat," the Fetus*, in *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY* 83, 85 (1997).

62. For a revision of the temporal trajectory of how civil rights has been historically understood, see generally DYLAN PENNINGROTH, *BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS* (2023).

63. Carbado, *supra* note 16, at 639 n.22.

64. *Id.* at 638.

65. *Id.* at 639.

66. *Id.* at 639, 645. The RICE Symposium lunchtime keynote address by Lisa Holder and Donald K. Tamaki, both members of the Task Force to Study and Develop Reparation Proposals for African Americans convened by the California Legislature, importantly addressed the question of reparations for a long history of ongoing and compounding harms. Lisa Holder & Donald K. Tamaki, Keynote Lunch Panel: Reparations as Remedy for Racial Injustice at U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024); see generally CAL. DEP'T JUST., *THE CALIFORNIA REPARATIONS REPORT* (2023), <https://oag.ca.gov/system/files/media/full-ca-reparations.pdf> (compiling the findings of the Task Force to Study and Develop Reparation Proposals for African Americans).

acknowledging the limitations of the term second-class citizenship, we might decide that the term does usefully capture dimensions of a phenomenon: the United States' "failure to vindicate, fulfill or respect the substantive entitlements of extant citizenship"⁶⁷ for persons who do not enjoy the rights of citizenship that should in theory correlate with their formal legal status.⁶⁸

IV. CITIZENSHIP STATUS WITHOUT POLITICAL ACTIVITY OF CITIZENSHIP

What of possessing citizenship as a formal legal status but being excluded from meaningful political engagement? Political engagement can encompass activities such as voting, donating to campaigns, and running for office, as well as additional activities described below. Arguably, the historical and current racialization of Asian Americans, which suggests that Asians and Asian Americans are indistinguishable, fosters the assumption that Asian Americans maintain an unyielding allegiance to their country of origin. This racialization conceives Asian Americans as subject to corruption and disloyalty, and functions to foreclose their robust political participation.⁶⁹ The idea here is that the political activity of Asian Americans is perceived as conflicting with American interests, which deprives Asian Americans the effective political agency essential for full citizenship. For instance, the campaign finance scandal of the 1990s involving Asian American naturalized citizens who contributed to the re-election campaign of Bill Clinton and the Democratic National Committee was met by a deluge of racist media attention.⁷⁰ We could also consider the idea of Asian Americans holding elected office. Despite the public prominence of Republican Presidential candidates Nikki Haley and Vivek Ramaswamy, or the position of Kamala Harris as Vice President,⁷¹ a recent study calculates that in the year 2021, Asian Americans represented only about 0.9 percent of politicians in office, despite constituting about 6.1 percent of the U.S. population.⁷²

Being elected to represent the people arguably positions one as the ultimate citizen. As President of the United States, one represents the sovereign through one's own body. Sovereign authority is articulated through both the natural body of the head of the state and what is termed the body politic. In the eyes of some, the natural body of the head of state can contradict the ability to represent the body politic. Donald Trump's racist birther conspiracies suggest that "We the

67. Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 THEORETICAL INQUIRIES L. 333, 337 (2007).

68. *Id.*

69. Volpp, *supra* note 40, at 81–82.

70. L. Ling-chi Wang, *Beyond Identity and Racial Politics: Asian Americans and the Campaign Fund-Raising Controversy*, 5 ASIAN L.J. 329, 329–30 (1998).

71. For a related discussion of South Asian American racialization, see generally Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77 (2013).

72. Leann McLaren, *How Do Asian-American Candidates Fare in US Elections?*, POL. SCI. NOW (July 14, 2023), <https://politicalsciencenow.com/how-do-asian-american-candidates-fare-in-us-elections>.

People” cannot be represented by someone whose racial background and parental immigration history, according to Trump, renders that birthright citizen no longer a “natural born citizen.”⁷³ Looking at the reaction to President Barack Obama, we can see the success of Trump’s efforts, as a sizable portion of the American electorate never accepted Obama as a legitimately elected head of state.⁷⁴ The anxiety about President Obama’s putative foreignness and foreign loyalties was expressed through racialized moves which repeatedly reiterated his illegitimacy for office. He was falsely described as Muslim, a narrative intended to delegitimize his citizenship and associate him with terrorism.⁷⁵ When Hillary Clinton was asked by an interviewer in 2008 whether she thought President Obama was a Muslim, she replied “[t]here is nothing to base that on,” adding “as far as I know.”⁷⁶ John McCain, responding in 2008 to a woman expressing fear of President Obama because she thought he was “an Arab,” stated, “[n]o, ma’am, he’s a decent family man,” a formulation suggesting an antagonistic relationship between the terms “Arab” and “decent family man.”⁷⁷ In addition, both anti-Black and forever-foreigner discourses were mobilized against Obama.

Neil Gotanda argues that racializing President Obama as Muslim shifted perceptions of his identity from an “African American body” which “would clearly be American” to one associated with recent immigration, casting him as foreign.⁷⁸ In contrast, Claire Jean Kim asserts that Obama’s Blackness, which carried with it a “trace of unremitting otherness,” made him more susceptible to being racialized as an Arab, Muslim, or suspected terrorist than John Kerry or Jon Edwards, white candidates for president.⁷⁹ Alternatively, in a society founded on anti-Black racism, President Obama’s Blackness was the ultimate problem. However we theorize the relationships between these racial logics, we see them converging to create a regime of truth that persuaded many Americans that President Obama was constitutionally unable to exercise legitimate power. This arguably helped shape the reception of the Obama administration’s

73. On the definition of a natural born citizen, see Gabriel Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 5–14 (2008).

74. Leti Volpp, *Immigrants Outside the Law: President Obama, Discretionary Executive Power, and Regime Change*, 3 CRITICAL ANALYSIS L. 385, 388 (2016).

75. *Id.* at 401.

76. Michelle Ye Hee Lee, *Donald Trump’s Ridiculous Claim That Hillary Clinton Started the Birther Movement*, WASH. POST (May 6, 2016, 3:00 AM EDT), <https://www.washingtonpost.com/news/fact-checker/wp/2016/05/06/donald-trumps-ridiculous-claim-that-hillary-clinton-started-the-birther-movement>.

77. John Bentley, *McCain Booed for Telling Audience to be Respectful of Obama*, CBS NEWS (Oct. 10, 2008, 7:27 PM EDT), <https://www.cbsnews.com/news/mccain-booed-for-telling-audience-to-be-respectful-of-obama/>. For a discussion, see Leti Volpp, *The Boston Bombers*, 82 FORDHAM L. REV. 2209, 2215 (2014).

78. Neil Gotanda, *The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 194 (2011).

79. Claire Jean Kim, *President Obama and the Polymorphous “Other” in U.S. Political Discourse*, 18 ASIAN AM. L.J. 165, 170 (2011).

policies, including DACA and DAPA, programs created to try to assist others who were similarly perceived as existing “outside the law.”⁸⁰

V. CITIZENSHIP STATUS WITHOUT IDENTITY OF CITIZENSHIP

What of possessing citizenship as a matter of formal legal status but not being considered a citizen as a matter of identity? While many scholars approach citizenship as identity as if it were derivative of citizenship’s other dimensions, possessing citizenship in the sense of formal legal status, being guaranteed its corollary rights, and engaging in citizenship activity are insufficient to produce citizenship as identity.⁸¹ American citizenship does not guarantee American identity.⁸² Additionally, falling outside the identity of citizenship reduces feelings of kinship and solidarity that engender membership and belonging in the nation, limiting one’s ability to exercise citizenship as a legal status, rights, or political activity. We can see this in what are now two classic examples. The first is the imprisonment of eighty thousand United States citizens during World War II because these citizens were of Japanese ancestry. The United States government nullified Japanese American citizenship as a matter of practice as well as rhetorically, in describing Japanese American citizens in evacuation orders as “non-aliens of Japanese ancestry,” recasting U.S. citizens as “non-aliens.”⁸³ The second example is the hatred and violence directed at persons who were identified as “Arab, Muslim, and Middle Eastern” after September 11th, 2001, fueled by governmental responses which informed the public that the U.S. government deemed members of these communities responsible for the terrorist attacks.⁸⁴ These individuals were disidentified from U.S. citizenship, and branded as terrorists.⁸⁵ The terms “Muslim,” “terrorist,” and “foreign” now travel in sync in North American English. We could note that Oklahoma City bomber Timothy McVeigh, responsible for murdering 168 people,⁸⁶ must be qualified as a “domestic terrorist,” as though the default meaning of the terrorist is a foreign threat, contrary to the United States’ historical record of Ku Klux Klan activity dating back to the post-Civil War era. We could also observe how in cases of mass violence, the identity of the perpetrator as Muslim or not Muslim routinely shapes whether the person is labeled “the terrorist,” or “the

80. See generally Volpp, *supra* note 74, at 388–89 (analyzing the creation and politics surrounding the DACA and DAPA programs).

81. Volpp, *supra* note 40, at 83; see Bosniak, *supra* note 32, at 479.

82. Carbado, *supra* note 16, at 638.

83. Mae Ngai, *The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases*, in IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 167, 175 (2d ed. 2014) (stating evaluation orders referred to “aliens and non-aliens of Japanese ancestry”). For a discussion of the distinction between “citizen” and “non-alien,” see Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1619 (2005).

84. Volpp, *supra* note 40, at 1575–76.

85. *Id.* at 1576.

86. Edward Tabor Linenthal, *Oklahoma City Bombing*, OKLA. HIST. SOC’Y: THE ENCYC. OF OKLA. HIST. & CULTURE, <https://www.okhistory.org/publications/enc/entry?entry=OK026> (last visited June 23, 2024).

shooter.” And we could acknowledge that “Christian” is presumptively American, while “Muslim” is presumptively foreign.⁸⁷

We could contemplate, to use Ming Hsu Chen’s term, a graduated “spectrum”⁸⁸ of the identity of citizenship. We might envision at one end of this spectrum difference functioning as a relatively benign distinction from the norm, and at the other end, see certain groups labeled as posing an inherent danger, or essential threat, to the nation-state. At this end, these groups are completely cast out from the protective circle of citizenship into unbelonging. At this essential threat level, we could say that citizenship functions as a weapon of oppression.

The idea of weaponizing citizenship is most often discussed in the context of the imposition of citizenship—so that citizenship “begins to be wielded not as a shield that protects the dignity and personhood of its bearer but rather as a sword that states can command to harm or to oppress[.]”⁸⁹ For example, as Mohawk scholar Audra Simpson has described, nation-states have imposed citizenship on Indigenous peoples to absorb them and to deny their sovereignty.⁹⁰ We could think of the Dawes Act, also called the General Allotment Act, which created a system for the destruction of communal reservation lands and the individualized assimilation of Native Americans.⁹¹ Under the Act, parcels between forty and one-hundred-and-sixty acres were allotted to individual Native Americans, and title was held in trust by the federal government for twenty-five years.⁹² At the conclusion of the trust period, after the allottee had established “competency” as a private property holder and as a member of American society, the individual would receive title to the land in fee simple and become naturalized as a United States citizen.⁹³ Competency was correlated with industry, which corresponded with having some modicum of “white blood,” whereas “full-blood” Native Americans were considered legally incompetent.⁹⁴ This allotment process amounted to a divestment of two-thirds

87. Volpp, *supra* note 74, at 402; *see also* KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 6–7, 13 (2018) (“Muslim Americans like myself were presumptive terrorists, not citizens; unassimilable aliens, not Americans . . .”).

88. *See* MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* 127 (2020) (reframing the citizen/alien binary as a spectrum of citizenship).

89. Neha Jain, *Weaponized Citizenship: Should International Law Restrict Oppressive Nationality Attribution?*, *GLOB. CITIZENSHIP OBSERVATORY* (June 30, 2023), <https://globalcit.eu/weaponized-citizenship-should-international-law-restrict-oppressive-nationality-attribution>.

90. Audra Simpson, *Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia*, 25 *WICAZO SA REV.* 107, 114, 116 (2010); AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 16 (2014).

91. Dawes Severalty (General Allotment) Act of 1887, ch. 119, 24 Stat. 388 (repealed 2000).

92. *Id.* § 5.

93. *Id.* § 6. For a discussion, *see* KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* 94–95 (2007).

94. *See generally* BRUYNEEL, *supra* note 93, at 94 (“Specifically, the GAA set out a process whereby the ‘allottee’ had established ‘competency’ as a private property holder and a member of American society, the federal government’s role as a trustee ended, ‘the land became taxable and the allottee became a citizen.’”).

of the reservation land base.⁹⁵ In the words of Patrick Wolfe, “democracy’s intolerance of difference has operated through inclusions as much as through exclusion.”⁹⁶ While inclusion can be a valued good, it can also mean assimilation and loss. This is an important history that seems to be occluded by our field’s focus on the negative impact of exclusion from citizenship.⁹⁷

But, we might think about the weaponization of citizenship beyond its imposition for oppressive nationality. I am thinking here of citizenship being weaponized in relation to particular categories of persons identified as extreme dangers, who are positioned as anti-citizens. This list of anti-citizen categories might include the enemy alien, the spy, the terrorist, the criminal alien, and the invading horde.⁹⁸ These anti-citizens threaten to destroy the nation-state through their presence; they are perceived not just as outsiders but as existential threats. The reaction to the anti-citizen is not just exclusion, but quarantine, immobilization in carceral spaces, punishment, and even death. We could conceptualize citizenship’s weaponization in relation to these groups as meaning several things—for those holding formal citizenship status, the enjoyment of citizenship is rendered a nullity, eclipsed by their perceived antithetical identity. The state may try to take away their formal status citizenship, and undo citizenship of those who are naturalized.⁹⁹ As for those without formal citizenship status, their outsider identity renders them such a threat that it calcifies and strengthens both the boundaries of citizenship and the nation-state against them. Those anti-citizens will be kept outside the borders, and if they are inside, will be surveilled by a state that makes it difficult or impossible for them to ever become citizens.

We can think of the idea of citizenship as identity as the dimension of citizenship that correlates with sentiment, feeling, and emotion. When we consider the idea of the nation-state, citizenship as identity correlates with the “nation” part of the hyphenated nation-state construct. Benedict Anderson described the nation as an imagined community formed through bonds of horizontal comradeship—in the United States context, it is a horizontal kinship with millions of people we have never and will never meet.¹⁰⁰ Nationalist sentiments can be produced through xenophobia, tightening bonds of kinship

95. *Id.* at 83; Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1240 (2016).

96. Patrick Wolfe, Reflections Prepared for the Fifth Annual Critical Race Studies Symposium Race and Sovereignty, UCLA School of Law (Apr. 2011) (unpublished manuscript) (on file with author).

97. Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 291 n.10 (2015).

98. Jennifer Chacón and Karen Musalo both spoke to the weaponizing of citizenship, in the context of interior enforcement and refugee protection, respectively, during the University of California College of the Law, San Francisco’s Center for Race, Immigration, Citizenship, and Equality Symposium. Jennifer Chacón & Karen Musalo, Panel Discussion: Racial Citizenship as a Weapon in Crime and National Security at U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024).

99. Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2582–83 (2007).

100. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (2d ed. 2016).

through racial expulsion, as Donald Trump has dramatically shown in recent years. His rhetoric, such as the claim that undocumented immigrants are “poisoning the blood of our country”¹⁰¹ taps in to feelings of vulnerability within “We the People,” suggesting that citizens need to be protected by sealed borders, higher walls, and Donald Trump.

VI. CITIZENSHIP OF NONCITIZENS

On a potentially happier note, can a person who does not have citizenship as a matter of formal legal status still nonetheless enjoy the rights of citizenship, engage in political acts of citizenship, or enjoy citizenship as a matter of identity? The fact that citizenship is divisible into different discourses helps us see that noncitizens, defined through their lack of formal citizenship status, may yet be understood to enjoy certain other forms of citizenship. Noncitizens do enjoy some rights in the United States, given a constitutional framework that protects individuals. Arguably, territorial personhood—the soft inside of the nation-state when insulated from the hard outside of border regulation—may be understood to instantiate the “right to have [some] rights.”¹⁰²

Yet, the rights noncitizens enjoy as persons do not generally extend to political rights. Voting is almost “universally denied to non-citizens in the United States,” and engaging in unlawful voting both constitutes a ground for immigration removal and raises the possibility of criminal charges.¹⁰³ The constitutional right to run for federal elective office and the right not to be discriminatorily denied the vote are also explicitly limited to citizens.¹⁰⁴ Employment considered to concern public functions may also be legally restricted to citizens. But, such limits on the political rights of citizenship for noncitizens were not always the norm. Alien suffrage, which began in the late 1700s and ended in the 1920s, was available to legal residents who had declared their intent to naturalize.¹⁰⁵ This was an era in which racial restrictions on naturalization qualified the franchise and men enjoyed the exclusive right to vote. Declaring an intent to naturalize conferred not only the right to vote. It also created eligibility to participate in the project of settlement of the Western frontier through homesteading, which helps clarify how the expansive treatment of racially eligible noncitizens aided the settler colonial project.¹⁰⁶

101. Michael Gold, *Trump’s Long Fascination with Genes and Bloodlines Gets New Scrutiny*, N.Y. TIMES (Dec. 22, 2023), <https://www.nytimes.com/2023/12/22/us/politics/trump-blood-comments.html>.

102. See BOSNIAK, *supra* note 3, at 117.

103. Daniel Kanstroom, “Alien” Litigation as Polity-Participation: The Positive Power of a “Voteless Class of Litigants”, 21 WM. & MARY BILL RTS. J. 399, 405 (2012).

104. *Id.* at 405–06.

105. On alien suffrage, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–1417 (1993); Ronald Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the US*, 26 NEW POL. SCI. 499, 501–07 (2004).

106. On declaring the intention to naturalize, see HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 8 (2006); Gabriel J. Chin, *A Nation of White*

Political participation is not limited to voting. We could think about the categories of protest and public claim making, which encompass activities such as writing to a government official, signing a petition for a political cause, volunteering for a political candidate, donating money to a campaign or an organization, attending a protest demonstration, participating in voter registration, encouraging others to take political action, and filing litigation.¹⁰⁷ In the words of Kathy Abrams, political engagement by noncitizens can take the form of “performative citizenship” which can transform the polity and the political subjectification of new participants.¹⁰⁸ It can “recursively reconstruct a binary”—the difference between citizens and noncitizens—that had been presumed.¹⁰⁹ For Abrams, performative citizenship can create change by rupturing political conventions or expectations and by reconstituting expectations about “who may participate in politics or how.”¹¹⁰

We might shift from the idea of the “citizen who acts” to the idea of “acts of citizenship.” As expressed by Engin Isin and Greg Nielsen, this shift permits us to think beyond those who are already produced as citizens, and encourages us to focus on, not the “doer,” but the “deed.”¹¹¹ This perspective emboldens us to examine the actions through which subjects view themselves as “those to whom the right to have rights is due,”¹¹² allowing citizenship to be an incipient project. Although the legal status of citizenship is usually regarded as a prerequisite for engaging in political activity, the participation of undocumented immigrants in political affairs suggests an inverse relationship. But, if acts of citizenship were to potentially pave the way for formal legal status—in the form of a pathway to citizenship—this has so far frustratingly and devastatingly not yet borne fruit in the United States.

We can turn to the recent decision by the Regents of the University of California to table the question of “Opportunity for All” as well as the general failure to create a pathway to legalization for undocumented youth, despite years of intense political engagement and acts of citizenship. This failure is all the more striking given that, in addition to these acts of citizenship, undocumented youth may also possess citizenship as a matter of identity, especially in the role of the DREAMer. Hiroshi Motomura coined the term “Americans in waiting” to

Immigrants: State and Federal Racial Preferences for White Noncitizens, 100 B.U. L. REV. 1271, 1279–89 (2020). On homesteading, see K-Sue Park, *Property*, KEYWORDS FOR GENDER & SEXUALITY STUD., <https://keywords.nyupress.org/gender-and-sexuality-studies/essay/property> (last visited June 23, 2024).

107. See Matt A. Barreto & José A Muñoz, *Reexamining the “Politics of In-Between”*: Political Participation Among Mexican Immigrants in the United States, 25 HISPANIC J. BEHAV. SCI. 427, 439–45 (2003); Leti Volpp, *Civility and the Undocumented Alien*, in CIVILITY, LEGALITY, AND JUSTICE IN AMERICA 69, 86 (Austin Sarat ed., 2014); KATHRYN ABRAMS, OPEN HAND, CLOSED FIST: PRACTICES OF UNDOCUMENTED ORGANIZING IN A HOSTILE STATE 168 (2022).

108. ABRAMS, *supra* note 107, at 76.

109. *Id.* at 76–77.

110. *Id.* at 77.

111. ENGIN F. ISIN & GREG M. NIELSEN, ACTS OF CITIZENSHIP 2 (Engin F. Isin & Greg M. Nielsen, eds., 2008).

112. *Id.* at 2.

describe an earlier vision of immigrants who were in transition to becoming citizens—a vision that existed within a broader context of racial restrictions on the eligibility to naturalize.¹¹³ We can think of undocumented youth, and in particular the idea of the DREAMer (a term rejected by many undocumented youth precisely for the splitting of this group from other undocumented people) as an American-in-waiting, waiting now for decades. This American-in-waiting is promised the future horizon of full membership in the American polity after experiencing the shared K-12 educational experience guaranteed through the Supreme Court’s decision in *Plyler v Doe*.¹¹⁴ It is only later, after learning one cannot get a driver’s license or cannot get grants or loans to go to college, that in Roberto Gonzalez’s term, one “learn[s] to be illegal,” realizing new constraints at the precise moment when others that age realize independence.¹¹⁵

Plyler followed the Supreme Court’s decision in *Brown v. Board of Education*, which linked education and citizenship with these words:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.¹¹⁶

The majority in *Plyler* similarly saw “‘the public school as a most vital civic institution for the preservation of a democratic system of government,’ and as the primary vehicle for transmitting ‘the values on which our society rests.’”¹¹⁷ Of course, we could think of public schools today (and of the values on which our society rests) in more depressing terms. Schools are a site for mass shootings, and in Thalia González’s formulation, a space of “discipline, surveillance, and control that constitutes a pathway to carceral systems.”¹¹⁸

In addition to positioning education as a quasi-fundamental right given its foundational role, the *Plyler* majority also depicted undocumented immigrant children as a quasi-suspect class.¹¹⁹ The Court described the children seeking to attend Texas schools as “innocent children,” ascribing guilt for their

113. MOTOMURA, *supra* note 106, at 8–9. On the myriad federal and state programs whose eligibility was conditioned on a declaration of the intention to naturalize, see Chin, *supra* note 106, at 1273.

114. 457 U.S. 202, 230 (1982).

115. Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOCIO. REV. 602, 603, 608, 612–15 (2011).

116. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

117. *Plyler*, 457 U.S. at 221 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) and *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

118. Thalia González, Panel Discussion: Limits on Citizenship from Schools to the Workplace at U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024); see also Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J. L. & EDUC. 281, 282–83 (2012) (“The presence for zero tolerance and punitive discipline policies within schools also have negative effects on the offending student, by increasing the likelihood of future disciplinary problems, and ultimately increasing contact with the juvenile justice system.”).

119. *Plyler*, 457 U.S. at 202–04.

undocumented status to their parents.¹²⁰ I always think of the chilling footnote to Justice Burger's dissenting opinion, where he states, "[s]urely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation."¹²¹

The vision of the DREAMer is of course also that of the graduate in a cap and gown with exemplary human capital. Lawrence Downes, public editor of the New York Times, pointed to these words in President Obama's second inaugural address: "Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity, until bright young students and engineers are enlisted in our workforce rather than expelled from our country."¹²² As Downes notes, this linking by Obama of two groups of immigrants with exemplary human capital, and his suggestion that "[w]e need to legalize them to help our economy," puts forward what Downes called a "cold utilitarian argument for immigration."¹²³

This discussion brings us back to the role of the right to earn as a key foundation of American citizenship. Why has the potential work, as well as actual work, conducted by undocumented students and undocumented immigrants more broadly, not successfully grounded their claim for citizenship? The potential and actual work has supported a claim in the context of advocating for "earned citizenship," which functions as an exchange for past labor. The work is performed to show that in contrast to the idea of "amnesty," the state is not granting immigrants "something for nothing."¹²⁴ Here, acquisition of citizenship mirrors Lockean labor theory, which asserts that a property right arises in part because of labor mixed in with the land.¹²⁵ But, the perception of illegality seems to turn undocumented immigrants from legitimate future owners of the property of United States citizenship into underserving trespassers engaging in a kind of theft.

Conceptualizing undocumented immigrants primarily in relation to their labor, as Shannon Gleeson has shown, allows them to be monetized, where their "use-value" as economic contributors of labor that United States citizens are unwilling to perform is emphasized.¹²⁶ Cristina Beltran also argues that:

The menial and physical labors that immigrants typically perform (farm work, domestic work, construction, food production and processing) are activities

120. *Id.* at 203.

121. *Id.* at 242 n.1 (Burger, J., dissenting).

122. Lawrence Downes, *Turning "Them" into "Us"*, N.Y. TIMES (Jan. 22, 2013, 12:26 PM), <https://archive.nytimes.com/takingnote.blogs.nytimes.com/2013/01/22/turning-them-into-us>.

123. *Id.*

124. On earned citizenship, see Muneer Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. REV. 257, 259, 273–291 (2017); on amnesty, see Linda Bosniak, *Arguing for Amnesty*, 9 LAW, CULTURE & HUMANS. 432, 434–39 (2013).

125. On the relationship between property ownership and citizenship, see generally Alison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013).

126. Shannon Gleeson, *"They Come Here to Work": An Evaluation of the Economic Argument in Favor of Immigrant Rights*, 19 CITIZENSHIP STUD. 400, 407 (2015).

that have become constitutive of undocumented subjectivity. In other words, to be undocumented is to be a subject *made* for arduous labor, a subject whose very existence is understood in terms of his or her willingness to engage in toilsome practices that allow for the maintenance of life itself.¹²⁷

This labor is made valuable for its characteristics of “disposability, deportability, and replaceability”—labor that is “impermanent and interchangeable.”¹²⁸ This complicates the idea of civic status conferred by work. In other words, the particular racialization of members of the Latinx community, says Beltrán, “can undermine[] the relationship between work and civic standing.”¹²⁹

This discussion suggests a limitation in how I have approached Bosniak’s four discourses of citizenship. By focusing on formal legal status, rights, political activity, and identity, the primary orientation is of the citizen in relationship to the state, with insufficient attention given to the relationship of citizenship to the market.¹³⁰ This may be especially an issue when, as we see in Irene Bloemraad’s comparative work on the incorporation of immigrants into Canada versus the United States, immigrants in Canada experience a sense of political citizenship, whereas immigrants in the United States experience a relationship to the United States defined primarily by work and the possibility of economic success.¹³¹

We might also foreground other ways that the market structures citizenship. Scholars have suggested a transition away from the notion that participation in the paid labor force is the essential determinant of citizenship. In 1990, Nikolas Rose observed a shift in the identity and economic role of citizens from producers of work to consumers: “Through consumption we are urged to shape our lives by the use of our purchasing power . . . [t]he image of the citizen as a choosing self entails a new image of the productive subject.”¹³² In the neoliberal context of a declining welfare state, “[f]reedom’ and ‘power’ are thus increasingly (even exclusively) articulated through the market.”¹³³ In this context, the power to consume becomes the cornerstone of citizenship. The

127. Cristina Beltrán, *Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance*, 37 *POL. THEORY* 595, 600 (2009) (emphasis in original).

128. *Id.* at 613.

129. *Id.* at 616.

130. Alison Brownell Tirres addressed different relationships between economic rights and citizenship, particularly in the context of property and employment at the University of California College of the Law, San Francisco Law Journal RICE Symposium. Alison Brownell Tirres, Panel Discussion: Multiracial Democracy and Political Incorporation at U.C. L.J. - RICE Symposium: We the People: Citizenship, Race, and Equality (Feb. 2, 2024).

131. See generally IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006) (analyzing how Canada and the United States encourage immigrants to become citizens).

132. NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* 102–03 (Routledge, 1st ed. 1990).

133. David Bell & Jon Binnie, *Authenticating Queer Space: Citizenship, Urbanism and Governance*, 41 *URB. STUD.* 1807, 1809 (2004).

choosing self is a self-regulating self, who can “go shopping” as a patriotic affirmation of citizenship, as President George W. Bush urged Americans to do after the terrorist attacks on September 11th.¹³⁴

VII. BEYOND “WEEP THE PEOPLE”

Given all these issues with citizenship, what is to be done? This contribution is titled not “We the People,” but “Weep the People,” to center the failed promises and weaponization of United States citizenship. Yet, is there an alternative? Membership in a political community is necessary to ward off the horror of not having a state to guarantee the right to have rights, and typically that political community has been understood to be the nation-state.¹³⁵ But given the violence of the nation-state and the violence of nation-state borders, what might it mean to abolish citizenship? I will only gesture in a few directions.

We might head in the direction of supranational citizenship or world citizenship. For world citizenship, I am thinking about Garry Davis’ World Citizenship passport.¹³⁶ Davis, a bomber pilot in World War II, renounced his United States citizenship in 1948 and began traveling only on a World Citizenship passport (and was subject to routine detention).¹³⁷ Today, millions of World Citizenship passports, citizen cards, ID’s and birth certificates have been issued.¹³⁸ We might turn to the idea of open borders articulated early on by Joe Carens¹³⁹ and by Kevin Johnson¹⁴⁰ or to the distinct project of “no borders”—articulated recently by Harsha Walia as “the freedom to stay and the freedom to move.”¹⁴¹

Or we could try to make the citizenship of one’s locality, where one resides, more meaningful. City identification cards and the New York is Home Act are concrete examples of this impetus.¹⁴² Jackie Stevens suggests replacing

134. On consumer citizenship, see Inderpal Grewal, *TRANSNATIONAL AMERICA: FEMINISMS, DIASPORAS, NEOLIBERALISMS* 217–19 (Inderpal Grewal, Caren Kaplan & Robyn Wiegman eds., 2005). On the inverse relationship of welfare use and citizenship, see AIHWA ONG, *BUDDHA IS HIDING: REFUGEES, CITIZENSHIP, THE NEW AMERICA* 1–21 (2003).

135. On the “right to have rights,” see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296–97 (New York, Meridian Books, Inc., 2d ed. 1976) (1958).

136. See *Our History*, WORLD CITIZEN GOV’T, <https://worldcitizengov.org/our-history> (last visited June 23, 2024).

137. *Id.*

138. *Id.*

139. See generally Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. POL.* 251 (1987) (“borders should generally be open and . . . people should normally be free to leave their country of origin and settle in another”).

140. See generally Kevin Johnson, *Open Borders?*, 51 *UCLA L. REV.* 193 (2003) (applying the Fawlsian, the Nozickian, and the utilitarian approaches to political theory to argue the need to open borders).

141. HARSHA WALIA, *BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* 3 (Haymarket Books 2021).

142. Els de Grauw, *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, 42 *POL. & SOC’Y* 309, 310–11 (2014); Rose Cuisson Villazor, *State Citizenship Strengthens What It Means to Be a Citizen*, *N.Y. TIMES* (Nov. 17, 2014, 2:59 PM),

citizenship with membership based on residence in the context of a world with open borders.¹⁴³ Ayelet Shachar, explicitly not calling for open borders (and still supporting nation-state citizenship), proposes to shift to “*jus nexi*”—a right of connection—as a principle of distribution of that citizenship.¹⁴⁴ Steven Sacco recommends recognizing what he calls “*jus locus*”—membership by location—“wherever you go, there you belong.”¹⁴⁵

I am also thinking of the recent passing on January 8th of 2024, of Leon Wildes, John Lennon’s attorney.¹⁴⁶ At a press conference in 1973, two years after Lennon released the song “Imagine,”—“imagine there’s no countries, it isn’t hard to do”—Lennon and Yoko Ono announced the creation of a conceptual country they called Nutopia.¹⁴⁷ In announcing Nutopia, Lennon and Ono read the following message:

Citizenship of the country can be obtained by declaration of your awareness of NUTOPIA. NUTOPIA has no land, no boundaries, no passports, only people. NUTOPIA has no laws other than cosmic. All people of NUTOPIA are ambassadors of the country. As two ambassadors of NUTOPIA, we ask for diplomatic immunity and recognition in the United Nations of our country and its people.¹⁴⁸

Nutopia links in its name the “new,” and the idea of “utopia,” and the now discredited term “nut.” Yet, as always, even in or especially in times of anxiety and despair, we need to imagine, to dream, in new ways. Perhaps, Nutopia can help us conjure a future beyond “Weep the People.”

<https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-strengthens-what-it-means-to-be-a-citizen>; Peter Markowitz, *State Citizenship Is a National Solution to Immigration Reform*, N.Y. TIMES (Aug. 18, 2015, 4:04 PM); <https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-is-a-national-solutin-to-immigration-reform>; Peter Spiro, *State Citizenship Has Roots in American History*, N.Y. TIMES (Jan. 30, 2017, 12:59 PM), <https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-has-roots-in-american-history>.

143. JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS 12–14 (2011).

144. AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 166–68 (2009).

145. Steven Sacco, *Abolishing Citizenship: Resolving the Irreconcilability Between “Soil” and “Blood” Political Membership and Anti-racist Democracy*, 36 GEO. IMMIGR. L.J. 693, 733–34 (2022).

146. Adam Nossiter, *Leon Wildes, 90, Immigration Lawyer Who Defended John Lennon, Dies*, N.Y. TIMES, (Apr. 5, 2024), <https://www.nytimes.com/2024/01/13/us/leon-wildes-dead.html>.

147. See *Nutopia*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Nutopia> (last visited Apr. 14, 2024).

148. For a video of the press conference and an image of the statement announcing the birth of Nutopia, see Yoko Ono Lennon, *The Birth Of Nutopia, 2 April 1973*, JOHN LENNON, <https://www.johnlennon.com/news/the-birth-of-nutopia-1-april-1973-%F0%9F%8F%B3%EF%B8%8F> (last visited Apr. 14, 2024).
